ASSESSING METHODOLOGICAL APPROACHES TO SENTENCING DATA & ANALYSIS

REPORT 2: USA, ENGLAND AND WALES, AND SCOTLAND

SUBMITTED TO SGIC 9 FEB 2022

Dr Jay Gormley (Centre for Law, Crime & Justice, Law School, University of Strathclyde, Scotland),

Mr Tom O'Malley SC (Member of the Inner Bar of Ireland and Associate Professor of Law, NUI Galway).

Professor Julian Roberts (Centre for Criminological Research, Law Faculty, University of Oxford, England),

Prof Cassia Spohn (School of Criminology & Criminal Justice, University of Arizona State University, USA),

Prof Cyrus Tata (Centre for Law, Crime & Justice, Law School, University of Strathclyde, Scotland.

Table of Contents

Key Points Summary

- To assist with the discharge of its functions, the Sentencing Guidelines and Information Committee of the Judicial Council of Ireland commissioned independent academic research to "assess the methodological approaches to sentencing data collection and analysis in Ireland, as well as evaluation of the utility of methodologies employed in other jurisdictions."

- This document is the second of three interim reports submitted by the international academic team commissioned by the Sentencing Guidelines and Information Committee (SGIC) to assess methodological issues in sentencing data and analysis.

- The first report surveyed existing sources of criminal justice data in Ireland and explored the kinds of statistical information necessary to support guideline construction and guideline monitoring.

- This second report provides a review and analysis of the range of data methodologies adopted in three broadly comparable countries and jurisdictions where a body equivalent to the SGIC has been established. It assesses the strengths and weaknesses of sentencing data in the USA, England and Wales, and Scotland. Additionally, it notes developments in some Australian states (most notably New South Wales).

- The third report will provide recommendations on the methodological framework which can be employed to ensure sentencing data of the highest quality.

- The final (fourth) report will combine the findings of the three interim reports.

The USA

- At a federal level, the USA has comparatively high-quality data compiled by the United States Sentencing Commission (USSC). This data includes individual offender data files with 100,000 variables, though some important variables are not available.
    - USSC data files of sentencing information are widely available, accessible to the general public which, in turn, means that they also facilitate academic research.
- At the state level, legislatures concerned about the fairness, proportionality and financial costs of punishment are increasingly using sentencing and correctional data to inform deliberations and to craft sentencing policies that provide appropriate punishment while ensuring public safety.
    - Half of the states and the District of Columbia have established sentencing commissions to analyse sentencing data and monitor the implementation of sentencing policies.
    - At the state level, most agencies produce public reports and publish some data. However, most do not make datafiles as freely available as the USSC.
- The availability and quality of data on sentencing practices, outcomes, and trends in the United States have improved dramatically since Minnesota became the first state to enact sentencing guidelines in 1980. The USSC and sentencing commissions in guideline states have been tasked with collecting, managing, and analysing sentencing data; preparing annual reports on overall sentence outcomes; preparing reports on specialized sentencing topics; and (in some jurisdictions) making sentencing data available to researchers and practitioners.

- The most comprehensive data are the individual offender datafiles compiled by the USSC: which include detailed information on offenders, cases, and sentences for all offenders sentenced in each fiscal year.

- Data available on sentencing in states with sentencing guidelines are more variable. Although most state sentencing commissions prepare annual reports on sentencing practices and patterns and many have interactive data portals that allow researchers to create customized reports, most do not make raw data available on their websites or through their statistical agencies. Those who want to use the state sentencing data for research generally must submit a data request to the sentencing commission. This does not preclude researchers and practitioners from obtaining and analysing the data, but it is a hurdle that those using the federal data do not confront.

- The USA experience demonstrates that accurate and reliable data are essential to sentencing decision-making and to developing sound sentencing policy.

England and Wales

- England and Wales has created a statutory body called the Sentencing Council (SC), which has issued a range of offence-specific and 'generic' guidelines. The jurisdiction has significant experience in devising, implementing, and monitoring guidelines. The first guideline was issued by a previous statutory body in 2004, and guidelines now exist for most common offences.

- While England and Wales did not initially seek to improve sentencing data when the first guideline body was established, over time demands for data have increased. This is partly driven by the need of the Sentencing Council to draft and monitor the impacts of guidelines.

- The experience in England and Wales suggests that to create (and update) guidelines, it will be necessary to collect some data directly from sentencers and that administrative statistics alone will be insufficient. The challenge for sentencing guidelines authority is to devise a data collection procedure that is sufficiently robust yet not overly burdensome on judicial officers.

- Although sentencing data in England and Wales is relatively good compared to other jurisdictions, its accessibility to generalist readers has declined in recent years.

- The experience of England and Wales suggests that a sentencing council (or similar body) without sufficient capacity to conduct and/or commission research will be limited in its ability to devise guidelines that are respected by and meaningful to those who are responsible for their implementation in practice. Indeed, one of the most important lessons from the Sentencing Council's experience is that a guidelines authority needs to have a specialised and adequately resourced research team. Moreover, this team should include both legal and social science expertise. Without a substantial research function, a Council may offer little substantive advantage over a Court of Criminal Appeal, which may also create guidelines. A sentencing council (or similar body) with a substantial research function can achieve things that a Court of Criminal Appeal is unable to do. For example, appellate courts are limited in various ways: including their ability to research current practices in depth; ability to assess the issues in and the likelihood of compliance with new guidelines; resources to forecast the likely impact of policy changes to and on sentencing; scope to engage with and understand public perceptions about and knowledge of sentencing and examine ways of correcting any misperceptions; etc.

- A survey of Crown Court sentencers was carried out from 2011 to 2015. The Crown Court Sentencing Survey (CCSS) was, in effect, a census rather than a sample of Crown Court sentencing decisions. The survey was used by the SC to inform the drafting and revision of its guidelines. It also

enabled a more in-depth examination of the reality of sentencing patterns, including consideration of specific and important questions (such as the impact of "race" in decision-making).

- CCSS completion rates varied but overall was around 60%. It was discontinued in 2015 in part because sentencers found it onerous. Instead of an ongoing census of all decisions, the Council now conducts one-off, bespoke data collections at both Magistrates' and Crown Court levels.

- The inception of guidelines and the creation of the Sentencing Council have combined to improve the quality and accessibility of sentencing statistics. The Sentencing Council of England and Wales has a statutory duty to publish statistics on sentencing patterns from the Magistrates' and Crown courts in local justice areas across the country. The Council has published information about sentencing patterns in its resource assessments, but since the demise of the CCSS, it has not taken on the task of providing a comprehensive portrait of sentencing trends at both levels of court, which has implications for policy planning, etc. Instead, the Council's research activities and publications focus on issues of direct relevance to its guidelines.

- The legislation establishing the Council assigns it powers (though not a duty) to: promote awareness of sentencing of offenders by court including, in particular, "the sentences imposed by courts".[1] One way of promoting public and professional awareness of the sentences imposed by the courts is by publishing sentencing statistics in an accessible format. Sentencing commissions and councils in other jurisdictions include this activity as part of their mandate. The SC has so far made only a modest contribution to promoting public awareness of sentencing, though critics have argued that it has the capacity to develop its contribution.

[1] Coroners and Justice Act 2009, s129.

Scotland

- The Scottish Sentencing Council (SSC) was established in 2015. Although it has begun with some general guidelines (e.g. about the sentencing process and the sentencing of young people), it has not, as yet, issued offence-specific guidelines. However, this is expected to change from 2022 onwards and so it will have to consider how it will monitor the impacts of its guidelines.

- The main source of data available in Scotland are publications from the Scottish Government, which are derived from data collected from different criminal justice agencies.

- Currently, the ability of the available data to represent sentencing patterns is limited. However, various empirical research studies and literature reviews have been commissioned by SSC (and other bodies), which help to provide a fuller picture of sentencing in Scotland.

- Scotland has considerable experience in researching and developing the provision of reliable, comprehensive, and up-to-date sentencing data. Over a period of around a decade (1993 to the mid-2000s), a project was conducted to research, develop, and implement a Sentencing Information System (SIS) for the High Court of Justiciary. It was initiated by the senior judiciary and was carried out in collaboration with an academic research team from the University of Strathclyde.

    - The SIS aimed to enable High Court judges (and the Court of Criminal Appeal) to pursue consistency in sentencing by seeing how a sentence, or potential sentence, would compare to other sentences (passed at first instance or changed on appeal) in reasonably similar cases. The SIS aimed to provide users with quick and easy access to the patterns of sentencing in similar cases. The SIS was seen as an alternative way to pursue consistency in sentencing without recourse to guidelines (or mandatory minima) – most especially of the more intrusive kind government ministers were proposing.

- Consulting the SIS was a voluntary choice for judges and there was no question that it would ever tell the judicial sentencer what 'the correct' sentence would be. Rather, judges were encouraged to consult the SIS to check whether the sentence they had in mind would be broadly in line with the typical range for similar cases.

- Having assessed the feasibility of using existing administrative data sources, it was concluded that administrative data was not capable of providing meaningful sentencing data of the kind needed to represent existing sentencing patterns sufficiently accurately or meaningfully. Therefore, the SIS created its own taxonomy and means of collecting data (initially from court archives) and then contemporaneously. In that way, and in close consultation with its judicial users, the SIS reflected the ways in which judges thought about sentencing and the sort of information they would need. As such it was not constrained by the recording practices of different agencies and contained some of the most in-depth and detailed information from the perspective sentencing not only in Scotland but in the world - combining both numerical data patterns.

- The SIS was flexible and it enabled the user to view information according to different criteria and see how the patterns changed. It also included textual information recorded by the judge to highlight information that she or he thought to be especially important and not otherwise captured by data collection.

- The SIS contained comprehensive and detailed information on all sentences passed over 15 years (some 15,000 cases), including appeal decisions. Information was initially collected by the research team from court/trial papers, but then information began to be recorded contemporaneously by judicial clerks, according to a template, with judges being able to add narrative information.

- Although it was suggested that, if carefully presented, the SIS data could be of value to policy-makers, practitioners, the judiciary, and wider public audiences, no decision was taken by the senior

judiciary to make the SIS publicly available on the grounds that it was still a ‘pilot’ project.

- Changes in judicial leadership combined with a lack of an institutional home and institutional authority meant that after the SIS was fully implemented it was not maintained by the court service.

- A critical limitation of the SIS was that it was not properly institutionalised. A key virtue of the SIS for the senior judiciary was that consulting it was not mandatory. However, while the SIS’s voluntary nature garnered favour, it also lacked the explicit authority needed to ensure that judges would consult it, and in particular to ensure that judicial court clerks were properly trained and supported to continue to input new data according to the required standards.

- As had been found previously in Canada, without formal endorsement from, for example, the Court of Criminal Appeal, or linking it to judicial guidelines, the SIS was left vulnerable to changes in judicial leadership. Therefore, without formal authority the voluntary pursuit of consistency by consulting information is much less likely, by itself, to achieve and sustain improvements in sentencing data.

Part 1: Interim Report 2: Introduction

This interim report examines sentencing data in the United States, England and Wales, and Scotland. It provides a review and analysis of methodologies adopted in these jurisdictions, which have bodies equivalent to the Sentencing Guidelines and Information Committee. Such bodies come under different names in different jurisdictions at different times. For the sake of simplicity, throughout this report, we have referred to such bodies using the internationally recognised term 'sentencing council' to cover the range of different terms used to signify broadly similar purposes.[2] This report includes a brief assessment of the advantages and deficiencies of sentencing data in each jurisdiction.

The USA and England and Wales have long-standing guideline systems and significant collective experiences with data concerning the operation of these guidelines. Scotland, Ireland's near neighbour and with a similar population size, is currently less experienced and is in the process of creating its first offence specific guideline. As such, while there are generic guidelines,[3] the Scottish Sentencing Council (SSC) has not yet been required to monitor or evaluate the implementation of an offence specific guideline. Therefore, while guideline developments in Scotland are noted, the Scottish experience (so far) is relatively limited. However, Scotland does have fairly extensive experience of researching, developing, and implementing the delivery of reliable, comprehensive, and up-

[2] For the purposes of this report, the term 'council' is intended to include various terms used in different countries and at different times (e.g. commission, committee, advisory council, guidelines council etc). In other words, we use the term 'sentencing council' to signify the various forms and approaches of different publicly funded bodies concerned with assessing and developing sentencing policy (whether or not by way of guidelines), and/or engagement with the public and which are independent, or at least at arms-length, from government. See, for example, Arie Freiberg and Karen Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* (Willan, 2014).

[3] For a detailed analysis of the Scottish guidance, and its relevance to Irish sentencing policy, see O'Malley, Tom. "A New Scottish Sentencing Guideline – The Sentencing Process." 5/10/21. <https://sentencingcrimeandjustice.wordpress.com/2021/10/05/a-new-scottish-sentencing-guideline-the-sentencing-process/>. Scotland currently has three generic guidelines: one on the principles and purposes of sentencing, one for sentencing young persons, and one on the sentencing process. These are available on the SSC website: < https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/approved-guidelines/>.

to-date sentencing data. That experience, combined with the experience of guidelines in other jurisdictions discussed in this report, may be instructive.

The remainder of this interim review is structured as follows. Part 2 covers the USA and reflects on the importance of statistical data as a building block for action. Part 3 focuses on England and Wales and highlights key lessons learned from that jurisdiction's history with guidelines. Part 4 concerns Scotland and its position early in the process of creating guidelines. Part 5 provides concluding thoughts.

In these three parts, we cover a range of methodologies. One key point is that these jurisdictions differ greatly in size, resource allocations, etc. In our third report, we will bring forward recommendations for Ireland based on the lessons which can be learned from the study of these different jurisdictions.

Part 2: Assessing Approaches to Sentencing Data & Analysis in the USA

2.1 Introduction

The USA is a federal system and as such sentencing, sentencing policy, and sentencing data collection are carried out by both the federal (national) government and by the individual states. In the United States, concerns about disparity, discrimination, and unfairness in sentencing led to a reform movement that began in the mid-1970s and continued throughout the remainder of the 20th century.[4] The initial focus of reform efforts was the indeterminate sentence, in which the judge imposed a minimum and maximum sentence, and the parole board determined the date of release. Both liberal and conservative reformers challenged the principles underlying the indeterminate sentence and called for reforms designed to curb discretion, reduce disparity and discrimination, and achieve proportionality and parsimony in sentencing.[5]

After a few initial missteps, in which jurisdictions attempted to eliminate discretion altogether through flat-time sentencing, states and the federal government adopted structured sentencing proposals designed to control the discretion of sentencing judges. A number of states adopted determinate sentencing policies that offered judges a limited number of sentencing options and that included enhancements for use of a weapon, a prior criminal record, or infliction of serious injury. Other states and the federal government adopted sentence guidelines that incorporated crime seriousness and criminal history into a sentencing grid that judges were to use in determining the appropriate sentence. Other reforms enacted at both the federal and state level included

[4] Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice, 1950-1990* (Oxford University Press on Demand, 1993).

[5] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (LSU Press, 1969); Marvin E Frankel, *Criminal Sentences: Law without Order* (New York: Hill and Wang, 1972).

mandatory minimum penalties for certain types of offences (especially drug and weapons offences), "three-strikes-and-you're-out" laws that mandated long prison sentences for repeat offenders, and truth-in-sentencing statutes that required offenders to serve a larger portion of the sentence before being released.[6]

This process of experimentation and reform revolutionized sentencing in the United States. A half-century ago, every state and the federal government had an indeterminate sentencing system and "the word 'sentencing' generally signified a slightly mysterious process which involved individualized decisions that judges were uniquely qualified to make."[7] The situation in the United States today is much more complex. Sentencing policies and practices vary enormously on a number of dimensions, and there is no longer anything that can be described as the American approach.

In this report, we discuss the sources of data on sentencing in the United States District Courts (which are the trial courts of the federal court system) and in the state courts. We focus on the quality of the available data, the limitations of the data, and the ways in which data are used by policymakers and researchers.

2.1 Sentencing in the U.S. District Courts

The U.S. District Courts operate under the federal sentencing guidelines, which were enacted as a result of the Sentencing Reform Act of 1984 (SRA).[8] The SRA created the U.S. Sentencing Commission (USSC), which was authorized to

[6] Cassia Spohn, *How Do Judges Decide?: The Search for Fairness and Justice in Punishment* (SAGE Publications Inc, 2009).

[7] Michael H Tonry, *Sentencing Matters* (Oxford University Press, 1997).

[8] 18 U.S.C. §§ 3551-3626 and 28 U.S.C. §§ 991-998. For a detailed discussion of the history of the federal sentencing guidelines, see Kate Stith and Jose A Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press, 1998). For a comprehensive analysis of American sentencing guidelines, Richard S Frase, 'Sentencing Guidelines in American Courts: A Forty-Year Retrospective', *Federal Sentencing Reporter* 32, no. 2 (2019): 109–23. For a comparison of guidelines in Minnesota and England and Wales, see Julian V Roberts, 'The Evolution of Sentencing Guidelines in Minnesota and England and Wales', *Crime and Justice* 48, no. 1 (2019): 187–253.

develop and implement presumptive sentencing guidelines designed to achieve honesty, uniformity, and proportionality in sentencing. The SRA also abolished release on parole, stated that departures from the guidelines would be permitted only with written justification, and provided for appellate review of sentences to determine if the guidelines were correctly applied or if a departure was reasonable.

The federal sentencing guidelines promulgated by the USSC went into effect in 1987. In 1989 the U.S. Supreme Court ruled in *Mistretta v. United States*[9] that the SRA, the USSC, and the guidelines were constitutional. In 2005 the Supreme Court ruled in *United States v. Booker*[10] that the guidelines were advisory, not mandatory. However, judges must still consult the guidelines before imposing sentences.

2.1.1 Sources of Data on Federal Sentencing

The main source of data on federal sentencing are the datafiles compiled by the United States Sentencing Commission (USSC). The USSC is mandated to serve as a "clearinghouse and information center for the collection, preparation, and dissemination of information on federal sentencing practices."[11] To meet this mandate, the Commission, through its Office of Research and Data, publishes an annual *Sourcebook of Federal Sentencing Statistics,* [12] as well as periodic research reports on topics such as mandatory minimum sentencing, sentencing of career offenders, child pornography offences, and sentences for economic crimes. In addition, the Commission has compiled fiscal year datafiles on sentencing outcomes since shortly after the federal guidelines went into effect. The available datasets include individual offender datafiles (i.e., detailed de-identified data on all individual offenders sentenced each fiscal year), organizational datafiles (i.e., data on sentences imposed in cases involving

[9] 488 U.S. 361 (1989).

[10] 543 U.S. 200 (2005).

[11] 28 U.S.C. § 995(a)(12)(A).

[12] The 2020 *Sourcebook* can be found here: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf

organizational offenders), special collection datafiles (e.g., criminal history of federal offenders, economic crime offence types, enhanced penalties for federal drug-trafficking offenders), and report datafiles (i.e., datafiles used in reports to Congress, such as reports on mandatory minimum penalties and child pornography cases).

Data on federal sentencing are provided to the USSC by the chief judge of each District Court, who is required by statute to send various documents to the USSC within 30 days after the entry of judgment in a criminal case. These documents, which themselves are not publicly available, include the following: the judgement and commitment order, a written statement of reasons for the sentence imposed, any plea agreement, the indictment or other charging document, the presentence report, and any other information the Commission finds appropriate. Of particular importance is the judgment and commitment order, which contains detailed information about the type and length of the offender's sentence.

The USSC's Office of Research and Data receives the documents from each District Court, enters the data from these documents into a comprehensive database, and creates annual datafiles of sentencing information. The USSC individual offender datafiles for each fiscal year (i.e., the Monitoring of Federal Criminal Sentences datafiles) are available (since 2012) through the Commission's website[13] and are archived at the Inter-university Consortium for Political and Social Research at the University of Michigan.[14] They also are available from the Federal Justice Statistics Resource Center (FJSRC) at the Urban Institute. These datafiles are available to researchers, who can download the data in various formats (i.e., SAS. SPSS, R, ASCII). In the fiscal year 2012, the Office of Research and Data developed, and the USSC implemented an interactive data analysis website.[15] Through this website, users can view all of the data reported by the Commission in its annual *Sourcebook of Federal Sentencing Statistic*s and can tailor all of these analyses by year, judicial district,

[13] www.ussc.gov.

[14] www.icpsr.umich.edu.

[15] www.ida.ussc.gov.

and judicial circuit. Users can request reports that summarize information on the demographic characteristics of offenders (i.e., race, gender, age, citizenship, education), the crime type, the primary guideline under which offenders were sentenced, the drug type (for drug offenders), and the offenders' criminal histories. The website also includes a video tutorial for using the interactive data analysis tool.

2.1.2 Quality of Data on Federal Sentencing

The individual offender datafiles compiled by the USSC for each fiscal year are of extremely high-quality. Although there is missing data on some variables (e.g., the type of defence counsel and the offender's marital status), most variables have little or no missing data. Moreover, the data include very detailed information about the demographic characteristics of the offender, the offence (s) for which the offender was convicted, case processing characteristics, and the offender's sentence. The recent USSC datafiles include more than 100,000 variables.[16]

Another strength of the federal sentencing data is its accessibility. As noted above, the individual offender datafiles (and some of the special datafiles) are available to researchers either through the Commission's website or ICPSR. The Monitoring of Federal Criminal Sentences datafiles are not restricted, can easily be downloaded, and are accompanied by a detailed codebook. Researchers can analyse the downloaded data with statistical analysis software (e.g., SAS, STATA, SPSS, R). The detailed data can be used to produce descriptive reports of federal sentencing outcomes, sophisticated multivariate analyses designed to identify disparity and discrimination in sentence outcomes, and multi-level analyses designed to illustrate how outcomes differ by district and/or circuit. The data

[16] The USSC variable codebook for cases involving individual offenders can be found here: https://www.pdffiller.com/jsfiller-desk18/?requestHash=3e8d6d18ac753e3db1e0041ed3b5b97e2763373c8b439b55bee8c9a50607248d&projectId=821108633&loader=tips#0d77a15b7c2f8414c9ed5b9b72801353

are available over time, which allows researchers to conduct longitudinal analyses of sentencing outcomes and the factors that predict these outcomes.

The federal sentencing data also have a number of weaknesses. There is no information on the original charges in the indictment or the terms of the plea agreement; thus, it is impossible to use the USSC data to analyse count dismissal,[17] charge reduction, or other types of plea bargains. In addition, the USSC does not release the name of the judge who imposed the sentence,[18] which has been described as "one of the most frustrating aspects of the study of federal sentencing [and one that has] significantly impeded scholarly evaluation." [19] The lack of judge-specific sentencing data means that it is impossible to determine whether different judges (or judges with certain characteristics) tend to impose more or less lenient sentences in otherwise similar cases, nor whether some judges (or judges with certain characteristics) sentence Black or Hispanic offenders differently than White offenders in otherwise similar cases.[20]

Another weakness (although it also might be seen as a strength) of the federal sentencing database is its complexity. As noted above, the USSC data include

---

[17] Defendants may be charged with multiple counts of a single offense (e.g., drug trafficking) and during plea bargaining may negotiate for dismissal of some of these counts.

[18] This was memorialized in a letter dated June 22, 1988, between L. Ralph Mecham, Director of the Administrative Office of the United States Courts, and Judge William W. Wilkins, Jr. Chairman of the USSC. According to the letter, the USSC agreed to maintain the confidentiality of the data and that "no information that will identify an individual defendant or other person identified in the sentencing information will be disclosed to persons or entities outside of the Commission . . ."

[19] Max M Schanzenbach and Emerson H Tiller, 'Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform', *The University of Chicago Law Review* 75, no. 2 (2008): 715–60.

[20] To address this issue, a group of researchers from a variety of disciplines and several different academic institutions, developed JUSTFAIR (Judicial System Transparency through Federal Archive Inferred Records), a publicly available and free database of federal criminal sentencing decisions from 2001-2018 that links information about defendants and their demographic characteristics with information about their crimes, their sentences, and the identity of the sentencing judge. See, Maria-Veronica Ciocanel and others, 'JUSTFAIR: Judicial System Transparency through Federal Archive Inferred Records' (2020) 15 Plos one e0241381. Data on federal sentencing also are available from the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, which is in the process of compiling judge-specific sentencing data. For information on TRAC see https://trac.syr.edu

over 100,000 variables, including multiple variables measuring the type and length of the sentence, the offender's criminal history, whether there were upward or downward departures, whether mandatory minimum sentences were imposed, and the guideline provisions that were applied. Using these datafiles requires (at the very minimum) a basic understanding of the federal sentencing process and facility with statistics and data management. Although the complexity of the data means that many practitioners and policymakers will be unable to use the datafiles for their own purposes, the Commission's annual *Sourcebook of Federal Criminal Justice Statistics* provides detailed (and accessible) descriptive data on the federal sentencing process. As one commentator noted:[21]

> *"The sourcebook is a rich source of information of many aspects of federal sentencing including average sentences by offense, use of guideline adjustments, frequency of out-of-range sentences, demographic characteristics for individuals sentenced and number of appeals initiated. In general, it serves as an excellent starting point for those interested in federal sentencing."*

One complication of sentencing in the U.S. District Courts is that many offenders have multiple counts of conviction; court officials thus must consider each count in determining the offender's final offence level (which, in combination with the offender's criminal history score, determines the presumptive sentencing range). To address this issue, the USSC developed a set of "grouping rules" that are to be applied in determining a single offence level for a defendant with multiple counts of conviction. These rules require a determination of whether the multiple counts are closely related (and thus represent composite harm) or are separate and distinct from one another (and thus represent separate harms). Court officials then use a "grouping decision tree" and step-by-step

[21] Charlies Loeffler, 'An Overview of US Sentencing Commission Data', *Federal Sentencing Reporter* 16, no. 1 (2003): 15.

instructions provided by the USSC to determine a single offence level for cases with multiple counts of conviction.[22]

2.1.3 Federal Sentencing Data: Research and Practice

The availability of comprehensive data on all offenders sentenced each year in the U.S. District Courts has resulted in a large and growing body of research on the federal sentencing process.[23] Social scientists have used the data to address issues such as compliance with the guidelines, unwarranted disparity in sentencing outcomes, intra- and inter-jurisdictional variations in sentencing, the imposition of trial penalties, the application of mandatory minimum penalties, the use of downward and upward departures, and trends in sentencing drug offenders. Legal scholars have assessed the fairness and transparency of the principles that guide the federal sentencing process and have analysed various guideline provisions and proposals for modifying the guidelines. As noted above, the USSC's Office of Research and Data uses the annual data to assess various aspects of the federal sentencing process; the research conducted by the office is used to inform decisions regarding proposed amendments to the guidelines and to evaluate the intended and unintended effects of the guidelines.

An important forum for research and scholarship on the federal sentencing process is the *Federal Sentencing Reporter (FSR),* an academic journal that was launched in 1988 is published five times annually. The *FSR* is the only journal that focuses on sentencing law, sentencing policy, and sentencing reform. In addition to scholarly research, the journal includes articles written by judges, prosecutors, defence attorneys, probation officers and members of sentencing commissions.

The importance of accurate and reliable data on sentencing processes and outcomes is unequivocal. Without such data, we cannot determine what is

[22] The USSC provides step-by-step instructions on "Grouping Multiple Counts of Conviction" in a eLearning module that can be found here: https://www.ussc.gov/education/training-resources/grouping-multiple-counts-conviction.

[23] A search of the ASU online library using the keywords "federal sentencing" resulted in more than 7,000 articles published in social science journals and law reviews since 1990.

working effectively (and what is not), identify areas in need of modification, and evaluate the impact of changes to policy and practice.

2.2 Sentencing in the State Courts of the USA

Each of the 50 states in the United States has its own court system, laws, penal codes, and rules of criminal procedure established by the state legislature. As of 2015, 33 states had a primarily indeterminate sentencing system and 17 had a primarily determinate sentencing system. Half of the states (both those with indeterminate and determinate sentencing) had structured sentencing provisions designed to provide guidance to judges regarding the type and length of the sentence and to increase consistency of sentencing for similar offenders convicted of similar crimes.[24] Moreover, all states have enacted mandatory minimum sentencing statutes that require a minimum sentence for individuals convicted of certain types of offences (typically, drug offences, weapon offenses, and aggravated DUI) or for certain types of individuals (i.e., career offenders).

2.2.1 State Sentencing Guidelines

In 1993 the American Bar Association (ABA) endorsed sentencing guidelines; it recommended that all jurisdictions create permanent sentencing commissions charged with drafting presumptive sentencing provisions that apply to both prison and non-prison sanctions and are tied to prison capacities.[25] Echoing this, in 2017 the American Law Institute gave final approval to a revision of the Model Penal Code that recommended sentencing guidelines created by a sentencing commission tasked with, among other things, conducting research, maintaining data on sentencing, and regularly assessing the impact of guideline provisions.[26]

---

[24] Alison Lawrence, 'Making Sense of Sentencing: State Systems and Policies' (National Conference of State Legislatures Washington, DC, 2015), https://www.ncsl.org/documents/cj/sentencing.pdf.

[25] American Bar Association, Standards for Criminal Justice—Sentencing Alternatives and Procedures.

[26] 'Model Penal Code: Sentencing, Proposed Final Draft' (American Law Institute, 2017), https://www.ali.org/publications/show/sentencing/.

Sentencing guidelines currently are in effect in 17 states, the District of Columbia, and, as noted above, the U.S. federal system.[27] In some of the 17 states with guideline sentencing, the guidelines have been substantially weakened (i.e., by making them voluntary rather than presumptive) or the sentencing commission has been abolished. Other states considered and rejected sentencing guidelines, have a sentencing commission without a mandate to develop guidelines, or had guidelines but then repealed them.

The guidelines systems adopted by the states have a number of common features. Like the federal sentencing guidelines, state guidelines base the presumptive sentence primarily on the severity of the offence and the seriousness of the offender's prior criminal record. Typically, these two factors are arrayed on a two-dimensional grid; their intersection determines whether the offender should be sentenced to prison and, if so, for how long. Although some states have a single grid that covers all offences, others use multiple grids that provide sentencing ranges for different types of offenders. For example, Minnesota has a sex offender grid, a drug offender grid, and a grid for all other offences.[28] States with presumptive sentencing guidelines, as opposed to voluntary or advisory guidelines, also require judges to follow them or provide justifications for failing to do so. In most jurisdictions, judges are allowed to depart from the guidelines and impose harsher or more lenient sentences if there are specified aggravating or mitigating circumstances. Some states also list factors that should not be used to increase or decrease the presumptive

[27] See Richard S Frase, 'Sentencing Guidelines in American Courts: A Forty-Year Retrospective', *Federal Sentencing Reporter* 32, no. 2 (2019): 109–23. According to Frase, these jurisdictions all meet the following criteria: (1) judges are given recommended sentences for most felonies (and sometimes misdemeanours); (2) those sentences apply to typical cases of that type: and (3) the guidelines were developed by a legislatively created sentencing commission.

[28] The Minnesota Standard Guidelines Grid is shown in the Appendix. The dark line separates offense/criminal history combinations that are probationable (below the line) from those that are not (above the line). As shown on the grid, the guidelines require prison sentences for all offenders convicted of murder or aggravated robbery. The length of the term depends upon the offender's criminal history. The guideline range for aggravated robbery is 41 to 57 months if the offender's criminal history score is 0, 50 to 69 months if the criminal history score is 1, and 92 to 129 months if the criminal history score is 6 or more. Offenders convicted of less serious crimes may receive a non-incarceration sentence, again depending upon the criminal history score. Offenders convicted of residential burglary or simple robbery could either be placed on probation or sentenced to prison if their criminal history scores are 2 or less; if their criminal history scores are greater than 2, prison sentences would be required.

sentence. For example, the Minnesota guidelines state that the offender's race, gender, and employment status are not legitimate grounds for departure. In North Carolina, on the other hand, judges are allowed to consider the fact that the offender has a positive employment history or is gainfully employed.

In most states, a departure from the guidelines can be appealed to state appellate courts by either party. If, for example, the judge sentences the defendant to probation when the guidelines call for prison, the prosecuting attorney can appeal. If the judge imposes 60 months when the guidelines call for 36, the defendant can appeal. However, the standards used by appellate courts to review sentences vary widely. In Minnesota, for example, the appellate court is authorized to determine "whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact."[29] By contrast, in Oregon, a departure will be upheld as long as it is warranted by "substantial and compelling reasons."[30] If the appellate court rules that the sentence departure is unwarranted, the sentence will be overturned and the offender will be resentenced.

These similarities notwithstanding, state guidelines differ on a number of dimensions. Arguably, the most important difference concerns the purpose or goals of the reform. As the Bureau of Justice Assistance stated, "states create sentencing commissions for many reasons... The most frequently cited reasons are to increase sentencing fairness, to reduce unwarranted disparity, to establish truth in sentencing, to reduce or control prison crowding, and to establish standards for appellate review of sentences."[31] Although all state guidelines attempt to make sentencing more uniform and to eliminate unwarranted disparities, the other goals are not universally accepted. Using the guidelines to gain control over rapidly growing prison populations, for example, is a relatively recent development. Minnesota, the first state to incorporate this

[29] Laws of Minnesota 1978 CA. 723 § 244,11

[30] Oregon Criminal Justice Council, 1989 Oregon Sentencing Guidelines Manual.

[31] 'National Assessment of Structured Sentencing' (U.S. Department of Justice, Bureau of Justice Assistance, n.d.), 31, https://www.ojp.gov/pdffiles/strsent.pdf.

goal into the guidelines, stated that the prison population should never exceed 95 percent of available capacity. Pennsylvania, on the other hand, initially did not link sentencing decisions to correctional resources; by the time they did, prisons and jails were operating at 150 percent of capacity.

State guidelines systems differ on other dimensions as well. Some guidelines are designed primarily to achieve just deserts, whereas others incorporate utilitarian as well as retributive rationales. Most guidelines cover felony crimes only, but a few, such as those adopted in Pennsylvania, also apply to misdemeanours. Some apply only to the decision to incarcerate or not and the length of incarceration, whereas others also regulate the length and conditions of non-prison sentences. Most guidelines states abolished discretionary release on parole, but a few states have retained it. The procedures for determining offence seriousness and prior record vary widely, as do the presumptive sentences associated with various combinations of offence seriousness and prior record.[32] Even among states with sentencing guidelines, in other words, there is no typical "American approach."

2.2.2 Data on State Court Sentencing

Legislatures concerned about the fairness, proportionality and financial costs of punishment are increasingly using sentencing and correctional data to inform deliberations and to craft sentencing policies that provide appropriate punishment while ensuring public safety.[33] Half of the states and the District of Columbia have established sentencing commissions to analyse sentencing data and monitor the implementation of sentencing policies. Many of these commissions engage in research, conduct cost-benefit analyses of legislative proposals, and make policy recommendations. State sentencing commissions provide publicly available data on their websites, including annual reports of

[32] For a comparison of sentencing policies and outcomes in Minnesota, John H Kramer, Robin L Lubitz, and Cynthia A Kempinen, 'Sentencing Guidelines: A Quantitative Comparison of Sentencing Policies in Minnesota, Pennsylvania, and Washington', *Justice Quarterly* 6, no. 4 (1989): 565–87.

[33] Alison Lawrence, 'Data Analysis Is Driving Justice Reforms', *State Legislatures Magazine*, 31 July 2020, https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-data-analysis-is-driving-justice-reforms-magazine2020.aspx.

sentences imposed and sentencing trends and reports focused on specific issues (e.g., sentences for drug trafficking, imposition of mandatory minimum sentences); several also provide online dashboards and online databases.[34] Courts and correctional agencies also are responsible for collecting case outcome and sentencing data.

Although there are variations, typically the state sentencing commission is responsible for collecting, cleaning, and analysing sentencing data. As an example, courts in the state of Minnesota submit their data using the Electronic Worksheet System (EWS). Court staff create a worksheet for each sentenced offender and submit the worksheet to the Minnesota Sentencing Guidelines Commission.[35] However, there can be issues of accuracy and data quality control in data recording. Similarly, court officials in Pennsylvania submit sentencing information to the Pennsylvania Commission on Sentencing through SGS Web, which is an online application that is integrated with the court case management system managed by the Administrative Office of Pennsylvania Courts that contains defendant and case information.

Some sentencing commissions provide sentencing datafiles that researchers and practitioners can download and use to analyse sentencing outcomes. In some states (e.g., Virginia), the datafiles can be downloaded directly from the Commission's website. For example, the Virginia Criminal Sentencing Commission provides Excel files with data on offenders sentenced in fiscal years 2018-2020. Other commissions (e.g., those in Kansas, Pennsylvania, and Washington) have established procedures for requesting access to raw datafiles.

---

[34] For example, the Pennsylvania Commission on Sentencing (PCS)website (www.pcs.la.psu.edu) has an interactive data portal that allows users to create reports and graphics summarizing sentences imposed by year, county, and type of offense (an example can be found here: https://pcsdata.psu.edu/SASPortal/main.do. The PCS also allows users to request custom reports and raw datafiles. The Virginia Criminal Sentencing Commission also has an interactive dashboard that can be used to filter data and create customized reports (http://www.vcsc.virginia.gov/datadashboard.html).

[35] A guide to using the Minnesota Electronic Worksheet System can be found here: https://mn.gov/sentencing-guidelines/assets/Updated%20Training%20Manual_tcm30-31611.pdf.

Data on sentencing in the state courts are available from the Sentencing Project,[36] the National Center for State Courts,[37] Measures for Justice,[38] and the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota Law School.[39] With the exception of the Robina Institute, each of these organizations has an interactive data tool that allows policymakers and researchers to customize reports by jurisdiction (state or county) and (to a lesser degree) by offender and case characteristics.

2.3 Conclusion: Sentencing Data in Federal and State Courts in the USA

The availability and quality of data on sentencing practices, outcomes, and trends in the United States have improved dramatically since Minnesota became the first state to enact sentencing guidelines in 1980. The USSC and sentencing commissions in guideline states have been tasked with collecting, managing, and analysing sentencing data; preparing annual reports on overall sentence outcomes; preparing reports on specialized sentencing topics; and (in some jurisdictions) making sentencing data available to researchers and practitioners.

The most comprehensive data are the individual offender datafiles compiled by the USSC, which include detailed information on offenders, cases and sentences for all offenders sentenced in each fiscal year. Researchers have used these datafiles, which can be downloaded from the USSC's website or from ICPSR, to analyse and assess federal sentencing outcomes for different types of offences, in different jurisdictions, and across time. The datafiles are limited by the fact that they do not include information on the original charges filed in the case or the identity of the sentencing judge, and by their complexity, which limits their utility for practitioners. Coupled with reports prepared by the USSC, including the annual *Sourcebook of Federal Criminal Justice Statistics*, research carried out

[36] www.sentencingproject.org.

[37] www.ncsc.org.

[38] www.measuresforjustice.org.

[39] www.sentencing.umn.edu.

using these datafiles provides a wealth of information on the federal sentencing process.

Data available on sentencing in states with sentencing guidelines are more variable. Although most state sentencing commissions prepare annual reports on sentencing practices and patterns and many have interactive data portals that allow researchers to create customized reports, most do not make raw data available on their websites or through their statistical agencies. Those who want to use the state sentencing data for research generally must submit a data request to the sentencing commission. This does not preclude researchers and practitioners from obtaining and analysing the data, but it is a hurdle that those using the federal data do not confront.

It is clear that accurate and reliable data are a valuable - indeed, an essential - tool for sentencing decision making and for developing sound sentencing policy. Sentencing data are "a building block for action" and can be used "to move the system forward." [40] The availability of solid sentencing data allows those concerned with the development of sentencing policy to determine whether sentences are proportional, consistent, and fair and to identify sentencing policies and practices that contribute to unwarranted disparity.

[40] Steven L Chanenson and Douglas A Berman, 'Deciphering Data', *Federal Sentencing Reporter* 33, no. 4 (2021): 217–20.

Part 3: Sentencing Statistics and Guidelines in England and Wales

3.1 Introduction

England and Wales is one of the few jurisdictions outside the US which operates a formal system of guidance for courts. Sentencing guidelines, both offence-specific and general in application, first emerged in 2004.[41] As of 2020, the Sentencing Council had issued guidelines for most common offences.[42] The introduction of the guidelines and the creation of the Sentencing Council accelerated improvements to existing statistics. In addition, the Sentencing Council itself created a new (albeit temporary) database containing Crown Court sentencing statistics derived directly from individual Crown Court sentencers (see below). This database made an important, albeit time-limited, contribution to understanding sentencing practices and trends. It has since been replaced by time-limited, focused data collections in both Crown and Magistrates' Courts.

3.1.1 Empirical Research on Sentencing: Background

Although empirical studies have been conducted in England and Wales for many decades now[43], over the decade 1995 to 2005 only a handful of major empirical studies of sentencing were published.[44] Most of this research related to the

[41] Non-statutory guidelines were available to the magistrates' courts before 2004.

[42] Since 2011 the Council has produced 27 sets of guidelines encompassing 145 separate guidelines that cover 227 offences and eight overarching issues.

[43] Roger Hood, *Sentencing in Magistrates' Courts: A Study in Variations of Policy* (Stevens, 1962); Roger Hood, Kenneth W Elliott, and Eryl Shirley, *Sentencing the Motoring Offender: A Study of Magistrates' Views and Practices* (Heinemann London, 1972); Roger G Hood and Graça Cordovil, *A Question of Judgement: Race and Sentencing: Summary of a Report for the Commission for Racial Equality'Race and Sentencing: A Study in the Crown Court'* (Commission for Racial Equality, 1992).

[44] Roger Tarling, 'Sentencing Practice in Magistrates' Courts Revisited', *The Howard Journal of Criminal Justice* 45, no. 1 (2006): 29–41, https://doi.org/10.1111/j.1468-2311.2006.00402.x; Thomas Mason et al., 'Local Variation in Sentencing in England and Wales', *Ministry of Justice, London*, 2007; Claire Flood-Page, Alan Mackie, and G Britain, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in*

lower (magistrates') courts.[45] Matters have improved over the past 20 years, in part as a consequence of the introduction of guidelines and the creation of the Sentencing Council.

3.1.2 Fit between Data Available Pre-Guidelines and the Guidelines

If they are to be informed and effective, guidelines (such as those operating in England and Wales) that provide starting point sentences and sentence ranges require an accurate source of data on current sentencing practice. Most of the Ministry of Justice data (see below) were available when the first guidelines were issued. The Ministry data were deemed sufficient for the purposes of the first guidelines. The sentencing guidelines authority which issued these early guidelines, therefore, did not need to create a new database or greatly improve the data available in 2004. The need for better sentencing data became apparent first in the Coroners and Justice Act 2009, and when the new Sentencing Council began to issue its own guidelines. This Act placed a number of duties on the Council with respect to publishing more detailed sentencing statistics.

The Coroners and Justice Act 2009 specified the nature of the guidelines, the structure of the Council, as well as the specific duties of the Council and the courts. These all affect the nature of the sentencing statistics required. Regarding the courts, the statutory compliance requirement changed: when sentencing an offender, the new Act requires courts to 'follow' any relevant guideline, rather than simply 'have regard to' the guidelines. In addition, when the Sentencing Council issued its first 'new format' guideline in 2011 (for assault offences), it revised the earlier model and issued a range of new guidelines. The guidelines provide courts with lists of the key aggravating and mitigating factors

---

the Mid-1990's (Home Office London, 1998); Mike Hough, Jessica Jacobson, and Andrew Millie, 'The Decision to Imprison: Sentencing and the Prison Population', 2003.

[45] A Keith Bottomley and Ken Pease, *Crime and Punishment: Interpreting the Data* (Open University Press Milton Keynes, 1986).

at sentencing. Under the new format, the first two steps are critical. Step 1 determines the category range and starting point, and Step 2 requires a court to move above and below the starting point to reflect additional mitigating and aggravating factors – those insufficiently central to be placed at Step One.[46] As a result, the Council needed to understand the effect of different sentencing factors in order to locate them at Step 1 or Step 2. Finally, the Council began to develop 'generic' guidelines applicable across all cases to supplement the offence-specific guidance.

For all these (among other) reasons, the sentencing statistics available in 2011 were insufficient. Since the Council had a research capacity that significantly exceeded that of its predecessor body (the Sentencing Guidelines Council), it was able to address the gaps in several ways. The principal way was to develop its own bespoke sentencing database (described below). But the research team of the Council also took other steps, including the creation of a pool of judicial officers and practitioners who volunteer to 'road test' draft guidelines. The Council's research team also conducts original research and commissioned external research on key topics such as sentence reductions.[47]

Relative to its statutory duties and functions in a relatively large jurisdiction, the Sentencing Council of England and Wales has only a small research budget. The Council's annual report does not provide a specific expenditure for research, although some idea of the magnitude of research funding may be gleaned from the overall budget. In 2020-21, the total expenditure of the Council was approximately 1.3 million pounds, and the non-staff portion of this was £119,000.[48] Most of its research is conducted 'in house' by a small team of full-

[46] Julian V Roberts and Anne Rafferty, 'Sentencing Guidelines in England and Wales: Exploring the New Format', *Criminal Law Review*, no. 9 (2011).

[47] All research outputs are available on the Sentencing Council website: https://www.sentencingcouncil.org.uk/research-and-resources/publications?s&cat=research-report.

[48] 'Annual Report 2020/21' (Sentencing Council of England and Wales, 21 June 2021), 44, https://www.sentencingcouncil.org.uk/wp-content/uploads/6.7421_SC_Annual_Report_2020_21_WEB.pdf.

time analysts who are assisted by one or two interns. In addition, the Council has recently begun to issue research tenders for small projects (under £20,000).

3.2 Main Data Sources

Currently, the principal sources of sentencing data in this jurisdiction are from the Ministry of Justice (MoJ) and the Sentencing Council (SC) of England and Wales. The MoJ collects and publishes quarterly (and periodic) sentencing statistics while the SC is responsible for periodic releases of data collected on an ad hoc basis. A member of the MoJ attends all Council meetings and the Ministry analytic team appear to work closely with the research branch of the Council.

Three additional sources of information about current sentencing practice should be noted. The *Sentencing Academy* conducts and commissions empirical research on aspects of sentencing such as the sentencing of ethnic minorities and the effectiveness of sanctions.[49] The *Prison Reform Trust* publishes periodic reports (called the Bromley Briefings)[50] which provide detailed analysis of prison statistics, while the *Institute for Criminal Policy Research* (ICPR) regularly releases data-based examinations of aspects of sentencing practice.[51] These three sources all contribute to the collective understanding of current sentencing practices. Although there is no direct evidence of impact on the guidelines themselves, reports by bodies like these are frequently cited by legislators (such as the House of Commons Justice Select Committee).

3.2.1 Ministry of Justice (MoJ)

[49] See https://sentencingacademy.org.uk/.

[50] 'Bromley Briefings Prison Factfile: Winter 2022' (Prison Reform Trust, 2022), http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Winter%202022%20Factfile.pdf.

[51] For example, Jessica Jacobson, Gillian Hunter, and Amy Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy*, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press, 2015), https://www.icpr.org.uk/theme/courts-court-users-and-judicial-process/inside-crown-court.

There are two key MoJ databases: (1) Sentencing data found in the *Criminal court statistics* collection [52] and the *Criminal Justice statistics quarterly* collection. [53] The *Criminal court statistics* generate quarterly reports summarising the latest statistics and other case characteristics for both the magistrates' courts and the Crown Court. These quarterly reports contain information on trial efficiency, guilty pleas, average hearing time, and many other variables.[54] The *Criminal court statistics* collection covers the period of July to September 2014 until January to March 2021.[55] The *Criminal Justice statistics quarterly* collection is also comprised of quarterly reports that summarise the latest sentencing data including the number of individuals dealt with by the criminal justice system; court prosecutions and convictions; out of court disposals; remand and sentencing convictions and offender criminal histories.[56] Overview tables contain more in-depth information on sentencing, remand and court proceedings - as can be seen in Appendix A.

The annual reports (published in December) contain more detailed information such as sentencing outcomes by offence and out of court disposals. The Sentencing Data Tool, for example, provides the volumes of defendants sentenced to immediate custody or a fine according to their age, sex, ethnicity,

---

[52] https://www.gov.uk/government/collections/criminal-court-statistics

[53] https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly

[54] The reports can be downloaded in the form of Excel Spreadsheets and include: Magistrates' and Crown Court timeliness tools; Magistrates' and Crown Court cases received, disposed and outstanding tool; Crown Court outstanding case duration tool; Crown Court average waiting and hearing time tool, Language interpreter and translation tool and Crown Court plea tool. These Excel Spreadsheets include user-friendly 'Pivot' tables which allow users to select the statistics of interest. In the Crown Court plea tool, for example, users can select quarterly data, data for a specific offence, or for triable either way or indictable cases and for specific regions.

[55] Previous versions can be accessed here: https://www.gov.uk/government/collections/court-statistics-quarterly, https://www.gov.uk/government/collections/judicial-and-court-statistics, https://www.gov.uk/government/collections/statistics-on-the-use-of-language-services-in-courts-and-tribunals

[56] The data can be downloaded in Excel Spreadsheets and include: First Time Entrants' Pivot tables; ad hoc tables which contain information on the number of out of court disposals, defendants proceeded against, offenders convicted, and the total number of defendants sentenced.

plea, or offence type, using the pivot table. Data available in the *Criminal Justice statistics quarterly* collection is available from September 2012 up to March 2021.[57]

For users willing to invest the time, the MoJ statistics provide information on most key variables associated with the sentencing decision. Textbooks such as Ashworth and Kelly's (2021) 'Sentencing and Criminal Justice' contain summary tables based upon the Ministry data, so reaching a wider body of scholars and practitioners.[58]

3.2.2 Data Limitations on Ministry Sentencing Statistics

The Ministry of Justice sentencing data are relatively comprehensive and have been available for many years, thereby permitting trend analyses. However, the MoJ data also have their limitations and gaps.[59] For example, no information on guilty pleas is available in the Magistrates' Court data tool, although such information is available in relation to the Crown Court. Additionally, the latest versions of the data are missing offender previous convictions, this is due to the COVID-19 pandemic. In addition, no information is available on deferred sentences, a sentence imposed (until recently) in thousands of cases each year.[60] As with sentencing statistics in all jurisdictions, the MoJ statistics do not distinguish multiple from single conviction cases. When an offender is sentenced for more than one crime, the case enters the database according to the most severe sentence rule. Most jurisdictions employ a 'most serious offence' or 'most severe sentence' rule to record and present sentencing data. These rules may have the advantage of simplifying the presentation of data but result in a

[57] Archived data can also be found on the National Archive Research, Development and Statistics website: (https://webarchive.nationalarchives.gov.uk/ukgwa/20110218135833/http://rds.homeoffice.gov.uk/rds/index.html).

[58] Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (Bloomsbury Publishing, 2021).

[59] For further discussion of the 'pitfalls and possibilities' of using official court statistics, see Mandeep Dhami and Ian Belton, 'Using Court Records for Sentencing Research: Pitfalls and Possibilities', in *Exploring Sentencing Practice in England and Wales* (Springer, 2015), 18–34.

[60] Julian V. Roberts, 'Deferred Sentencing: A Fresh Look at an Old Concept', *Criminal Law Review, in Press*, 2022, 202.

loss of very significant information about less severe sanctions when only the most severe sentence is recorded. This practice also means that sentences passed in multi-conviction cases can appear to be of similar seriousness to single-conviction cases – which may often not be the reality.

Data are also less comprehensive for non-custodial sanctions. Although the statistics provide a detailed breakdown of the principal sanctions, no information is available on key components of those sanctions. For example, the number and nature of conditions imposed as part of a community order or suspended sentence order are unavailable.

Finally, while the MoJ data are more comprehensive than those found in most other jurisdictions, they are rather inaccessible to wider readers looking to gain a good understanding of current sentencing trends. This accessibility of MoJ data has deteriorated in recent decades. Until 2004, the databases referred to were used in user-friendly reports which summarised, for the general reader, key trends in sentencing.[61]

There are a number of benefits to having accessible and up to date sentencing statistics. First, news media sources can place emerging sentences in a statistical context. Without this context, high profile sentences may be taken as representative of more general trends. Second, the existence of accessible statistics facilitates public and professional understanding of sentencing. Third, research is able to address key questions about current practice when these are posed by policy-makers or politicians. Accessible sentencing data promote transparency of judicial practice and accountability, and ultimately enable improvements in policy and practice.[62]

---

[61] Four editions of this publication appeared, the first in 1991 and the last in 2002. The reports were widely distributed and cited by researchers and policy makers.

[62] See, as noted in Report 1, Peter Charleton and Lisa Scott, 'Throw Away the Key: Public and Judicial Approaches to Sentencing-Towards Reconciliation The Martin Tansey Memorial Lecture' (The Martin Tansey Memorial Lecture, 2013), 1–22. "We as a nation are entitled to demand the best from our judges. From our perspective, self-analysis carries a higher chance of improvement than being informed by mere opinion... From the

3.2.3 The Sentencing Council

As noted earlier, when the Council began its work, it became apparent that existing sentencing statistics would be insufficient if the Council was to discharge its range of statutory duties. To assist in developing new guidelines, amending existing ones, and monitoring the effects of its guidelines the Council set up a Crown Court sentencing survey. This was intended to provide data relevant to several aspects of the Council's work, including and especially the key function of monitoring levels of compliance.

3.2.3.1 Research Capacity of the Council

The research function is central, indeed essential to any guidelines council. Other than having a different composition, a council without significant research capacity would be in danger of offering little significant difference in purpose from a court of criminal appeal producing guidelines. A Council (or similar body) with a substantial research function can achieve things that a Court of Criminal Appeal is unable to do. For example, the English and Welsh Council can research current practices in depth; assess the issues in and the likelihood of compliance with new guidelines; forecast the likely impact of policy changes to and on sentencing, engage with and understand public perceptions about and knowledge of sentencing and examine ways of correcting any misperceptions etc. The SC research team has been instrumental in enabling the Council to conduct the research necessary to support its ongoing series of guidelines. It is a dedicated unit that has benefitted from the continuity of having the same research director since 2011. In addition, the team is multi-disciplinary. The different disciplines are important because the development of the guidelines draws upon more than simply sentencing statistics (e.g., distributions of sanctions, sentence lengths etc).

The Council also conducts qualitative and quantitative analyses of public opinion; focus groups with practitioners and judges; and conducts (or,

---

perspective of an ordinary judge, the right attitude is to do one's best to gather the materials and do the studies that will make sentencing in serious crime more predictable and more consistent."

occasionally, commissions) research and research reviews of specialised topics. For example, in 2019 the SC published a review of public knowledge of sentencing, including the guidelines (Marsh et al., 2019). The purpose of this research was to inform the Council about the gaps in public knowledge so as to assist in its efforts to promote greater awareness. The Council is not obliged by statute to promote public awareness of sentencing practices. Rather, the statute specifies that the Council "may promote awareness."[63] Perhaps for this reason the Council has yet to take more active steps to promote greater public awareness of sentencing trends.

All of this work feeds into the development and monitoring of guidelines to some degree, albeit not in every guideline.[64] Finally, at least one member of the Council has research expertise. The enabling statute enumerates the kinds of expertise necessary for an appointment, and these include an individual with experience in "academic study or research relating to criminal law or criminology."[65]

3.2.3.2 The Crown Court Sentencing Survey

A survey of Crown Court sentencing was carried out from 2011 to 2015. The Crown Court Sentencing Survey (CCSS) was used by the SC to inform the drafting and revision of its guidelines. Sentencers were asked to complete a return for each sentenced case: the survey, therefore, constituted a *census* rather than a *sample* of sentencing decisions in the Crown Court. In the CCSS return, individual judicial sentencers noted the most important elements of the offence and required the sentencer to indicate the factors taken into account at sentencing. One sentencing expert noted that the CCSS "contains much useful information and is certainly an improvement upon the data which was available in the early days of producing guidelines."[66] The survey was used by the Sentencing Council

[63] Section 129 of the Coroners and Justice Act 2009.

[64] All research reports are available on the Sentencing Council website.

[65] S 41(f) of Schedule 15, Coroners and Justice Act 2009.

[66] M Wasik, 'Editorial: The Crown Court Sentencing Survey', *Criminal Law Review* 569 (2012): 571.

to devise and revise its guidelines. Since the release of data to the public domain,[67] researchers have examined CCSS data to address specific questions.[68]

The CCSS offered a unique insight into sentencing practices and went far beyond merely documenting the extent to which courts comply with the Council's guidelines. Information derived from the sentencer permits a much more accurate calibration of the influence of various factors upon sentence outcomes (subject to the limitations on the survey which we discuss later). We now offer an illustration (relating to the relationship between plea and sentencing) of the contribution that such a database can make to our understanding of sentencing practices.[69]

3.2.3.3 Sentencing and the Effect of a Guilty Plea

In England and Wales, as well as many other countries, it is often said that how and when a defendant pleads to a criminal charge (guilty/not guilty) affects the sentence they will receive if they are convicted. Defendants who plead receive

---

[67] In 2013, the Council made the first full year of data available to external researchers, and several additional years are now available on the Council's website.

[68] For example, see Julian V Roberts, 'Complying with Sentencing Guidelines: Latest Findings from the Crown Court Sentencing Survey', in *Sentencing Guidelines* (Oxford: Oxford University Press, 2013), https://doi.org/10.1093/acprof:oso/9780199684571.003.0007; H Maslen and J V Roberts, 'Remorse and Sentencing: An Analysis of Sentencing Guidelines and Sentencing Practice', *Sentencing Guidelines: Exploring the English Model*, 2013, 122–49; Jose Pina-Sánchez and Robin Linacre, 'Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey', *British Journal of Criminology* 53, no. 6 (2013): 1118–38; Hannah Maslen, *Remorse, Penal Theory and Sentencing* (Bloomsbury Publishing, 2015); Julian V Roberts and Jose Pina Sanchez, 'Paying for the Past: The Role of Previous Convictions at Sentencing in the Crown Court', in *Exploring Sentencing Practice in England and Wales* (Springer, 2015), 154–72; Jose Pina-Sánchez, Ian Brunton-Smith, and Guangquan Li, 'Mind the Step: A More Insightful and Robust Analysis of the Sentencing Process in England and Wales under the New Sentencing Guidelines', *Criminology & Criminal Justice*, 9 November 2018, 174889581881189, https://doi.org/10.1177/1748895818811891. For a collection of essays exploring sentencing practice in England and Wales, see Julian Roberts, *Exploring Sentencing Practice in England and Wales* (Springer, 2015).

[69] The CCSS was also capable of contributing to the effectiveness of the guidelines. The survey form captured all the elements of the guideline including all the guideline factors. In completing the form, sentencers therefore had to proceed through the guideline, and each return would increase familiarity with the guidelines. The requirement to complete the form may have been as effective a force for compliance with the guidelines as the statutory duty to "follow any relevant guideline".

a reduced sentence, with the levels of reductions specified in the Council's definitive guideline. An important practical question is the following: to what extent do courts follow the definitive guidelines in terms of the magnitude of reductions awarded and the factors affecting these reductions? The MoJ statistics provide aggregate sentence length differentials between convictions following a contested trial and those following a guilty plea. These data appear to suggest that the plea-based discount is higher than might be expected in light of the current guideline. Thus, in 2011, the average sentence length in the Crown Court was more than twice as long for offenders convicted after trial compared to those pleading guilty (50 months compared to 22 months) - implying an average 56% reduction.[70] However, such uncorrected comparisons of sentence lengths imposed in convictions following a contested trial versus a guilty plea overestimate the true levels of reductions. For example, cases in which the defendant pled not guilty may involve more serious crimes. Or, cases in which the defendant pled not guilty, may be more serious because they may tend to result in more convictions in each case compared to guilty plea cases.[71] For this reason, what is needed is a database such as the CCSS which permits research to control for the independent effect of all legally-relevant case factors – such as the defendant's plea and the reduction specifically awarded for a guilty plea.

Drawing on the CCSS, Roberts and Bradford were able to provide a more accurate calibration of both the magnitude of reductions awarded and the correspondence between the decisions of the courts and the reductions recommended by the guideline.[72] They found that reductions were more modest than suggested by court-based statistics. The research also documented the degree of 'fit' between the reductions prescribed by the definitive guideline

[70] Ministry of Justice, 2012, Table A5.25.

[71] Where a defendant pleads guilty there may also have been a withdrawal of and/or reduction of charges offered in return for the guilty plea.

[72] Julian V Roberts and Ben Bradford, 'Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends', *Journal of Empirical Legal Studies* 12, no. 2 (2015): 187–210.

and the reductions actually awarded in practice. Courts generally followed the levels of reduction in the guideline.

The CCSS also permits multivariate analyses, which control for factors correlated with plea but may also affect sentence outcomes. Roberts and Pina-Sanchez (2015) conducted similar analyses on the CCSS data to document the effect of previous convictions on sentencing outcomes. The CCSS survey found that courts disregard a large number of prior convictions for the purposes of sentencing, on the grounds the prior crimes were too old, too trivial, or insufficiently related to the current crime. This finding could not have been made using the MoJ data, where each prior conviction is recorded.

3.2.3.4 Limitations of the CCSS

All databases have their limitations, and the Crown Court sentencing survey is no exception. We note five important limitations.

First, the CCSS was operational for only a few years (2011-2015) and cannot, therefore, be used to explore historical trends – for these, there is no substitute for the annual Ministry data.

Second, the survey captured most but by no means all sentencing decisions. Some court centres proved reluctant to complete the forms, with the result that responses rates are variable. The response rate was in excess of 90% in some Crown Court locations; elsewhere it was significantly lower.[73] In the final year of the survey, the Council reported a completion rate across all Crown Court locations of 60%. Missing data represent a potential threat to the validity of any survey. Sentencing Council researchers have addressed the non-response issue by comparing CCSS records to the Ministry of Justice CREST database[74] which contains all Crown Court sentences. These comparisons suggest that relatively robust conclusions may be drawn from data collected by the survey. If the current response rate were to decline, however, non-response would become

[73] See Sentencing Council 2013, Chart 1.11.

[74] This is the case management system used by Crown Courts to track case progression through the system.

an important threat to validity. If the sentencers with low response rates were different from those completing all returns, the CCSS would suffer from bias.

Third, the CCSS records the factors taken into account by Crown Court sentencers, but not necessarily *all* the factors affecting sentence. The form that sentencers are asked to complete lists all the *guideline* factors and provides respondents with the opportunity to note any other factors taken into account. [75] Other factors which are not captured by the form may have influenced the sentence imposed and the survey cannot detect the influence of extra-legal factors on the sentencing outcome – racial or ethnic status for example. This kind of information must be collected by alternative methodologies such as observational studies, qualitative research involving defendants and legal practitioners, or academic research.[76]

Fourth, the most important limitation on the Crown Court sentencing survey, however, is that it collected data (by definition) in the Crown Court only. Since the vast majority of sentences (over 90%) are imposed in the Magistrates' Courts, this constitutes an important limitation on our knowledge of sentencing trends.

Fifth, a sentencing database needs to accommodate cases involving multiple counts. A significant minority of defendants appearing for sentence have been convicted of multiple crimes. This complicates the sentencing exercise as well as the collection of sentencing statistics. The database needs to include a 'multiple conviction' identifier, and a way of identifying the number and nature of the various crimes. The CCSS contained a variable that permitted the court to flag a multiple conviction case but lacked the detail to identify the convictions beyond the most serious or the principal offence.

The Sentencing Council discontinued the CCSS in 2015. Instead of an ongoing, census exercise, the Council now conducts one-off, bespoke data collections in

[75] These free response options have never been analysed.

[76] Hood and Cordovil, *A Question of Judgement: Race and Sentencing: Summary of a Report for the Commission for Racial Equality'Race and Sentencing: A Study in the Crown Court'*.

both the Magistrates' Courts and the Crown Court. SC justified the decision to replace the CCSS with periodic data collections on the grounds of efficiency. In addition, SC wished to reduce the burden on sentencers who had to complete a return for every sentencing decision. The experience with the CCSS suggests that a census approach is excessively burdensome, although it may be necessary for the first few years.

Nonetheless, the depth of data (as provided by the CCSS for example) has enabled the CCSS to examine long-standing questions and claims. We illustrate this point by looking briefly at a recent analysis of the relationship between "race" and sentencing.

3.2.3.5 Race/Ethnicity and Sentencing

One measure of the utility of sentencing statistics is the degree to which they can provide answers to key policy questions such as whether sentences vary according to the race or ethnicity of the defendant. All sentencing guidelines authorities should be concerned about the potential for guidelines to have different impacts on ethnic minorities or other profiles of an offender. The Sentencing Council of England and Wales provides interpretive directions to courts in its guidelines to ensure that sentencers are aware that for certain offences disparities may be an issue. For example, the Council notes that when sentencing for drugs and firearms offences, sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Other ethnicity offenders receive an immediate custodial sentence than White and Asian.[77]

3.2.3.6 Research on Ethnic Differences at Sentencing

The SC has published analyses examining racial differences for a limited number of drug offences. This research has contributed along with other reports by the

[77] For discussion see Julian Roberts and Andrew Ashworth, 'Sentencing Guidance, the Sentencing Council, and Black & Ethnic Minority Offenders. London: Sentencing Academy.' (Sentencing Academy, 2022).

Ministry of Justice to our understanding of the issue in England and Wales.[78] Policy-makers and guidelines authorities in England and Wales now have good data relating to the sentencing of ethnic minorities. These data are a result of collaboration between the Ministry and the Council. They illustrate the co-operation necessary between the MoJ and the Council's research teams.

First, under Section 95 of the Criminal Justice Act 1991, the Ministry of Justice has a duty to publish statistics documenting any differences between groups of offenders at all stages of the criminal justice system, including sentencing. In response, the Government's publishes a biennial report "*Statistics on Race and the Criminal Justice System*."[79] However, the statistics presented in the section 95 reports are uncorrected for a range of legally-relevant case characteristics which may explain different custody rates or sentence lengths. For example, if visible minority offenders have more extensive criminal histories, or are less likely to plead guilty, this may help account, at least to some extent, for differential rates of custodial sentencing. Comparisons of rates uncorrected for such variables can therefore be misleading. In recognition of this limitation, the section 95 reports caution against drawing direct inferences of discrimination.[80]

Second, in addition to these reports, several 'one off' studies employ additional statistical analyses to control for case characteristics that influence sentencing outcomes, and which may contribute to the differences between groups documented in the section 95 reports. These studies have used different data sources, time periods, and ethnic classifications, and so inevitably these

---

[78] For a review, see Julian Roberts and Jonathan Bild, 'Ethnicity and Custodial Sentencing: A Review of the Trends, 2009-2019' (Sentencing Academy, June 2021), 2009–19, https://sentencingacademy.org.uk/wp-content/uploads/2021/06/Ethnicity-and-Custodial-Sentencing-1.pdf.

[79] The most recent report was published in 2019 using data from 2018 [Statistics on Race and the Criminal Justice System 2018: A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991]. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849200/statistics-on-race-and-the-cjs-2018.pdf

[80] "No causative links can be drawn from these summary statistics…Differences observed may indicate areas worthy of further investigation, but should not be taken as evidence of bias or as direct effects of ethnicity", ibid, p. 2.

differences tend to affect the conclusions which can be drawn. The most recent Ministry report [81] used a different methodology to identify whether disproportionality existed at various stages of the criminal justice system, including sentencing. The aim was to identify the points in the criminal justice system where there appeared to be racial/ethnic disparities. That analysis replicated similar analyses published in the US and was recommended by the Lammy Review.[82]

However, research published by the Sentencing Council in 2019[83] overcame some of the limitations of the MoJ studies. The Council drew upon its *Crown Court Sentencing Survey* (CCSS) having extracted an ethnicity marker from MoJ databases. As noted earlier, there are two advantages of this unique data source over the court data. First, the data are provided directly by each individual sentencer, and not simply coded by a researcher or administrator. When the data are coded by the actual sentencer, they are more likely to reflect the way that different variables affected the sentence. For example, with respect to prior offending, administrative staff will simply enter all previous convictions, even those insufficiently recent or relevant to affect sentencing. A sentencer completing a data return will include only those which that individual sentence thought especially relevant at sentencing.[84]

Second, the CCSS captures information that is unavailable from the court files, but which may have had an important influence on the sentence imposed. These include factors reflecting personal mitigation, such as remorse and whether the

---

[81] Noah Uhrig, *Black, Asian and Minority Ethnic Disproportionality in the Criminal Justice System in England and Wales*, 2016, http://www.justice.gov.uk/publications/research-and-analysis/moj.

[82] David Lammy, 'The Lammy Review an Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System' (UK Government, 8 September 2017).

[83] 'Investigating the Association between an Offender's Sex and Ethnicity and the Sentence Imposed at the Crown Court for Drug Offences' (Sentencing Council of England and Wales, 15 January 2020), https://www.sentencingcouncil.org.uk/publications/item/investigating-the-association-between-an-offenders-sex-and-ethnicity-and-the-sentence-imposed-at-the-crown-court-for-drug-offences/.

[84] See Julian V Roberts and Jose Pina-Sanchez, 'Previous Convictions at Sentencing: Exploring Empirical Trends in the Crown Court', *Criminal Law Review* 8 (2014): 575–88.

offender was a caregiver. These (and other) offender-related variables are not currently captured by court statistics.[85]

3.3 Informing Guidelines

There is a clear link between the improvement of sentencing data and the development of the SC's functions and its guidelines. Although the SC and other bodies are free to improve sentencing data, experience in England and Wales suggests that significant improvements have only been made as a consequence of the development of the SC's functions. The SC draws heavily on sentencing data in determining the starting point sentences and sentence ranges provided in its offence-specific guidelines. Even though the Council has by now issued guidelines for most common offences, it continues to amend and revise existing guidelines in response to developments in the case law and statutory sentencing provisions. There is, therefore, an ongoing need for a comprehensive and accurate sentencing database. Sentencing statistics are also used by the SC to project the impact of its guidelines on the need for prison spaces, one of its critical statutory functions.

More widely, however, there is little evidence that official (e.g. parliamentary) reports make use of this data. This lack of engagement with the statistics may reflect the fact that, as noted, they are relatively inaccessible to wider audiences beyond SC and the government.

3.3.1 Attempts to Improve Data

Both the inception of guidelines and the creation of the Sentencing Council have led to improvement in the quality and accessibility of sentencing statistics. The Crown Court Sentencing Survey was the most significant development. As noted, the Council now conducts periodic data collections in the Crown and Magistrates' courts to assist in developing and revising its guidelines. As far as

[85] These factors include many aspects of the offence as well as the offender's personal circumstances. For example, whether the offender was of 'good character'.

we are aware, neither the Ministry or the Council have plans to improve the scope or accessibility of current sentencing statistics.

3.3.1.1 Relationship between the Sentencing Council and Independent Research

External, independent research will always be a useful source of information to assist a sentencing council or guidelines authority, or indeed policy-makers and politicians responsible for devising and implementing sentencing policy. For example, academic research can provide a disinterested perspective in evaluating the extent to which sentencing guidelines have achieved their objectives. The Scottish Council (see later sections of this paper) has developed good working relationships with academic researchers and has issued a number of research tenders. The English Sentencing Council also works with academic researchers, albeit on a more sporadic basis.

An open and cooperative relationship between SC and independent researchers enables a fuller and wider public understanding of sentencing; informs the development of policy and practice and the ability to plan sentencing and wider policy. As noted, the Sentencing Council has its own research unit which collects data to support guideline construction and revision. This unit periodically publishes data reports or analyses of current practice to support consultations of any new guidelines. Almost all the Council's research activities address its own data needs. From time to time the Council commissions external work from academic or commercial research companies, but these are relatively rare. The Council encourages researchers to use its databases (principally the CCSS), but there is little ongoing collaboration between Council and academics.[86] The principal outward-facing research activity is a half-day seminar on sentencing research co-hosted with a university. The last was held in 2018, which followed

[86] The Council very occasionally commissions and publishes research reports co-authored with academics. For example, Amber Isaac, Jose Pina-Sánchez, and Albert Montane, 'The Impact of Three Guidelines on Consistency in Sentencing' (Sentencing Council of England and Wales, 2021), https://www.sentencingcouncil.org.uk/wp-content/uploads/The-impact-of-three-guidelines-on-consistency-in-sentencing.pdf.

that in 2013. The Council has been criticised for failing to do more to facilitate research into sentencing practices and the guidelines.[87]

The Sentencing Council of England and Wales has a statutory duty under section 129(1) of the *Coroners and Justice Act 2009* to publish statistics on sentencing patterns from the Magistrates' and Crown courts in local justice areas across the country. The Council has published information about sentencing patterns in its resource assessments[88], but it has not taken on the task of providing a comprehensive portrait of sentencing trends at both levels of court. Instead, the Council's research activities and publications focus on issues of direct relevance to its guidelines. These include the extent to which courts depart from the Council's guidelines, the likely impact of proposed new guidelines on prison places, and information on the use of mitigating and aggravating factors. This is information is helpful yet fails to fulfil the essential need of providing an annual comprehensive portrait of sentencing in the Magistrates' courts and the Crown court.

Leading academics have expressed the view that the Sentencing Council should play a more significant role in developing and distributing sentencing statistics.[89] The Coroners and Justice Act 2009 (which established the Council) assigned it powers to: promote awareness of sentencing of offenders by court, including, in particular "the sentences imposed by courts."

An obvious way of promoting public and professional awareness of the sentences imposed by the courts is by publishing sentencing statistics in an

---

[87] Anthony E Bottoms and John David McClean, *Defendants in the Criminal Process (Routledge Revivals)* (Routledge, 2013); Rob Allen, 'The Sentencing Council and Criminal Justice: Leading Role or Bit Part Player?' (Transform Justice, December 2020), https://www.transformjustice.org.uk/wp-content/uploads/2020/12/TJ_November_2020_IA_3.pdf.

[88] See http://sentencingcouncil.judiciary.gov.uk/.

[89] Anthony Bottoms, 'The Sentencing Council in 2017: A Report on Research to Advise on How the Sentencing Council Can Best Exercise Its Statutory Functions', 2018, 23, https://www.sentencingcouncil.org.uk/wp-content/uploads/SCReport.FINAL-Version-for-Publication-April-2018.pdf.

accessible format. Sentencing councils in other jurisdictions include this activity as part of their mandate.

The Judicial Commission of New South Wales regularly publishes reports on sentencing issues in a readable form. It also runs a Judicial Information Research System (JIRS). JIRS is an online database "for judicial officers, the courts, the legal profession and government agencies that play a role in the justice system."[90] Although it contains other elements, the main component is a Sentencing Information System, which preceded that in Scotland (see Part 3 of this report and the Irish Sentencing Information System).[91] The JIRS is available to wider users on application and payment of a substantial subscription fee.

The Sentencing Advisory Council (SAC) in the neighbouring Australian state of Victoria has been particularly active in seeking to provide accessible information about sentencing to wider audiences, as well as the judiciary. The SAC of Victoria states that its "mission is to bridge the gap between the community, the courts and government by informing, educating, and advising on sentencing issues." As such it represents a somewhat different model from other sentencing councils where guidelines tend to be more central to their work than dissemination of information and engagement with the public. The composition of the SAC in Victoria also differs noticeably from other councils elsewhere. In contrast to other councils which tend to be led by judges, the Directors of the SAC in Victoria are drawn from across criminal justice and chaired by an academic. This composition is intended to reflect its emphasis on informing and advising policy and public engagement with the public, rather than concentrating on the drafting and revision of guidelines.

---

[90] 'Judicial Information Research System (JIRS)', Judicial Commission of New South Wales, n.d., https://www.judcom.nsw.gov.au/judicial-information-research-system-jirs/.

[91] Jay Gormley et al., 'Assessing Methodological Approaches to Sentencing Data and Analysis. Report 1: Ireland' (Sentencing Guidelines and Information Committee, 20 January 2022), https://judicialcouncil.ie/assets/uploads/1st%20Interim%20Report.pdf.

The Sentencing Advisory Council in Victoria is a model of good practice with respect to the dissemination of sentencing statistics. Since its creation in 2004, the SAC has published many Sentencing Bulletins. These documents provide regular snapshots of current sentencing practices for an offence or offence category (e.g., Sentencing Advisory Council, 2022).[92] They are widely used by the news media, official organisations; advocacy groups and have also been cited by sentencers in their sentencing decisions. (An extract from a snapshot is provided in Appendix B).

The fact that these bulletins are read and cited by the courts is noteworthy. It suggests that sentencing statistics may also help to promote consistency in sentencing. Knowing about the distribution of sentences imposed for any given offence will mean that judges in that jurisdiction have a common context in which to determine the sentence. Indeed, some sentencing guidelines systems provide a summary of current sentencing practices along with the proposed guideline recommendation, for this very reason. Providing information about the distribution of sentences actually imposed may be a particularly useful practice in Victoria since Victoria does not currently operate sentencing guidelines.

The US Sentencing Commission recently released a tool to provide "average" sentencing data based on the primary guideline, final offence level, and criminal history data.[93] This may also serve to reduce the undue variability of sentences

[92] For example, see 'Sentencing Snapshot 266: Sentencing Trends for Causing Injury Recklessly, 2016-17 to 2020-21' (Sentencing Advisory Council, n.d.), https://www.sentencingcouncil.vic.gov.au/sites/default/files/2021-12/Snapshot_266_Causing_Injury_Recklessly.pdf. There is no equivalent publication in England and Wales, although the Sentencing Council publishes a sentencing practice bulletin as part of its consultation exercise prior to issuing a guideline and the Sentencing Academy publishes bulletins highlighting key trends.

[93] https://jsin.ussc.gov/analytics/saw.dll?Dashboard; https://www.ussc.gov/guidelines/judiciary-sentencing-information

– in this case at the federal level – if judges consult the data when deciding on a sentence.

3.4 Conclusions

The Sentencing Council in England and Wales appears to have significantly improved the quality of its statistical information to discharge one of its *primary* statutory duties: to develop guidelines. In order to achieve an acceptable level of information about sentencing practice the Council has worked with the MoJ and also developed its own bespoke data collection activities. Guideline ranges and starting points draw upon Ministry statistics; focused data collections conducted by Council researchers in both levels of court; and occasional reports by external researchers commissioned by the Council. Without its substantial research capacity, the Council would have been unable to develop its guidelines as they draw upon current sentencing practice to establish proportionate starting points and sentence ranges. Beyond the guidelines function, the Council has been less successful in deploying sentencing data to promote wider public awareness and understanding of sentencing, and to inform the development and planning of sentencing and criminal justice policy.

3.4.1 Lessons from the Experience in England and Wales

We draw the following lessons from the experience in this jurisdiction:

- The relatively comprehensive sentencing statistics available prior to 2003 were thought at that time to be sufficient for the creation of the early guidelines issued by the Sentencing Guidelines Council (beginning in 2004). However, the guidelines environment changed significantly with the passage of the Coroners and Justice Act 2009 which replaced the Sentencing Guidelines Council[94] with a new guidelines' authority, the Sentencing Council. This statute also changed the compliance

[94] A second advisory body (the Sentencing Advisory Panel) was also abolished.

requirement for courts in England and Wales and provided a detailed specification for the new council and its guidelines.

- The experience in England and Wales suggests that in order to create (and update) guidelines, it is necessary to collect some data directly from sentencers and/or sentencing courts. Administrative statistics alone will be insufficient. The challenge for a sentencing guidelines authority is to devise a data collection procedure that is sufficiently robust yet not perceived by judicial officers as too burdensome.

- The Sentencing Council launched a new-format guideline which set the template for all future offence-specific guidelines. In addition, it began to develop a range of other, "generic" guidelines applicable across cases. Finally, the Council had to discharge a statutory duty to monitor the impact of its guidelines and to estimate the effect of its guidelines upon the need for prison places. For a number of reasons, the Council required more (and better) sentencing statistics in order to discharge its various duties.

- The primary research initiative of the SC was the creation of the CCSS. Sentencing statistics derived directly from the sentencer provide a more accurate portrait of the factors which affect sentencing than data coded by administrators from court records. This said, busy sentencers are unlikely to welcome the additional task of completing a form for every sentencing decision. If a court-derived database is created, it is important to limit the burden on courts, by some form of sampling procedure, over time, or by the offence.[95]

- For around five years to 2015, England and Wales was particularly well-served with respect to information about sentencing. Ministry of Justice

[95] Courts could be asked to complete a form for every fifth sentencing decision, or to complete a form only for certain categories of case such as convictions resulting in a term of immediate imprisonment. These strategies were considered but rejected by the Sentencing Council when it took the decision to terminate the CCSS.

data provided a comprehensive and historical portrait of aggregate sentencing trends, including the use of different disposals and information about the quantum of punishment (sentence lengths, duration of probation, etc). These data were supplemented by the Crown Court Sentencing Survey (CCSS) which permitted insight into the factors influencing sentencing decisions. Both approaches proved to be necessary to achieve a complete picture of sentencing.[96] It appears that the Ministry and the Council work well together in generating statistics on sentencing. A good example of this close cooperation can be found in the publication examining sentencing outcomes for different ethnicities. This research drew upon databases in the Ministry and the Council.

- The creation of a guideline scheme requires research support and an adequate sentencing database. This is necessary to devise starting point sentences and sentence ranges (in the event that these are provided in the guidelines), as well as to inform the monitoring of the implementation and effects of guidelines.

- One likely benefit of guidelines – and the improvement in sentencing statistics – is an increase of empirical research examining the realities of sentencing practices. As a direct result of the Crown Court Sentencing Survey, the volume and sophistication of sentencing research increased significantly after 2011.

- Perhaps the most important lesson from the SC experience is that a guidelines authority needs to have a specialised and adequately resourced research team. Moreover, this team should include both legal and sociological expertise. This was the case for the Sentencing Council, and evidence of the success of its research team can be found in the civil service award the team received four years after its creation. Members of

[96] These are necessary but not sufficient sources. It is also necessary to supplement these sources with qualitative data, surveys of practitioners and other stakeholders, and independent academic scrutiny.

the Council's research team have also published peer-review articles on sentencing, thereby contributing to the scholarship in the field.

However, there are some important limitations to the Council's activities to date with respect to promoting awareness of sentencing.

First, one means of promoting greater public awareness would be to issue annual, or periodic sentencing statistics by local area. In this way, the public can have a clear idea of sentencing patterns in their area, the way that they currently have local crime statistics. Section 129 (1(a) of the Coroners and Justice Act requires the Council to publish "information regarding sentencing practice" of courts in local areas. The Council has yet to fulfil this duty, citing resource and data limitations as the explanation.

In addition, the Coroners and Justice Act 2009 states that the Council "may promote awareness" of several aspects of sentencing including the sentences imposed by courts and the costs effectiveness of different sentences in preventing re-offending. The Council has taken only limited steps in publishing information on these matters to date. Resource limitations may help explain the Council's modest efforts to date. The lesson to be drawn from the experience in England and Wales is therefore that the resource capacity should correspond to the duties and functions ascribed to a sentencing council.

Part 4: Assessing Sentencing Data in Scotland

4.1 Introduction

Scotland's sentencing council (the SSC) was established in October 2015. One consequence of the (relative) novelty of the SSC Scotland has far fewer guidelines than, for example, England and Wales where there is a longer established guideline system. To date, the SSC has issued some general guidelines on matters such as the principles and purposes of sentencing.[97] However, the SSC has not released any offence specific guidance. The first offence specific guideline is expected in 2022 at the earliest. At the time of writing this report[98], the SSC has not yet announced how it plans to structure this guidance (e.g. whether there will be starting points as in England and Wales). Consequently, Scotland has not yet had the same experience of using data on sentencing practice for the purposes of guideline creation and monitoring.

This part will briefly note the publicly available data in Scotland that might be used to understand sentencing practice. Of course, Scotland also has a body of case law that can be used to identify principles and some normative trends. However, case law is not the focus here for two reasons. Firstly, many of the points in Report 1 are remain relevant. Appeal court judgments cannot, of course, provide comprehensive and reliable data about trial (i.e. first-instance)

[97] At the time of writing (January 2022), Scotland currently has three generic guidelines: one on the principles and purposes of sentencing, one for sentencing young persons, and one on the sentencing process. These are available on the SSC website: < https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/approved-guidelines/>. For a detailed analysis of the Scottish guidance, and its relevance to Irish sentencing policy, see O'Malley, Tom. "A New Scottish Sentencing Guideline – The Sentencing Process." 5/10/21. <https://sentencingcrimeandjustice.wordpress.com/2021/10/05/a-new-scottish-sentencing-guideline-the-sentencing-process/>.

[98] January 2022.

court sentencing practice. Additionally, while there is a substantial body of case law on general sentencing principles, there is not substantial guidance in the form of tariffs, starting points, or sentence ranges for particular offences (although indications of appropriate sentence levels for certain offences might be inferred from some judgments). Secondly, such case law, while a relevant consideration to the creation of normative guidelines, cannot provide data about the patterns of sentencing at first instance (trial courts) - especially given the small sample of cases that are appealed.

4.2 Main Official Data Sources

In Scotland, the main sources of official data are collated and produced by the Scottish Government but derived from data collected by individual criminal justice agencies. Some criminal justice institutions also publish data, and this will be briefly noted to assess their utility with regard to understanding sentencing.

Much of the Scottish Government's data about sentencing is derived from data held by Police Scotland (e.g. some fields from the Criminal History System and police operational databases). However, data is also produced by other agencies, (e.g. the Scottish Prison Service, the Scottish Courts and Tribunal Service, local authority Criminal Justice Social Work departments, etc) which are used in government criminal justice publications. Moreover, initiatives have been undertaken in Scotland to improve data sharing between agencies.[99]

However, understanding the landscape of data relevant to sentencing in Scotland is still challenging. Information management within the Scottish Government is complex and various recommendations for improvement have

[99] See the Integration of Scottish Criminal Justice Information Systems (ISCJIS) and Co-ordinating IT and Management Information (CIMI) projects.

been made.[100] Data sharing in the context of criminal justice systems is extremely complex.[101]

4.2.1 Scottish Government Publications: Overview

In terms of published data in Scotland, the *Criminal Proceedings and Reconvictions* statistics are drawn from data from the Criminal Case History System for Scotland (CHS). Other publications use different data sources. For instance, *Police Recorded Crime* data comes from Police Scotland's Scottish Operational and Management Information System:

> *National Statistics on total recorded crime are based on data which Police Scotland extract from their data repository (called the Source for Evidence Based Policing (SEBP)) and submit to the Scottish Government.*

Moreover, prisons data, as may be expected, comes from the Scottish Prison Service's systems. However, even where data is shared between databases, not all fields are necessarily shared. For example, the Scottish Government only receive a limited range of fields from the data held on the police Criminal History System (CHS).[102]

---

[100] 'A Review of Information Management in the Scottish Government' (Scottish Government, 5 January 2021), https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2021/06/review-of-corporate-information-management/documents/review-of-information-management-in-the-scottish-government/review-of-information-management-in-the-scottish-government/govscot%3Adocument/SG%2Breview%2Bof%2Bcorporate%2Binformation%2Bmanagement%2Bpublished%2BJune%2B2021.pdf.'A Review of Information Management in the Scottish Government' (Scottish Government 2021) <https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2021/06/review-of-corporate-information-management/documents/review-of-information-management-in-the-scottish-government/review-of-information-management-in-the-scottish-government/govscot%3Adocument/SG%2Breview%2Bof%2Bcorporate%2Binformation%2Bmanagement%2Bpublished%2BJune%2B2021.pdf>.

[101] Compounding the challenge of understanding criminal justice and sentencing data, only a small number of Scottish Government officials have access to all the data used for criminal justice publications. Therefore, there is very limited capacity to create and update data-flow guides (see for example Appendix C).

[102] See 'Integration of Scottish Criminal Justice Information Systems (ISCJIS): Data Sharing Manual' (Scottish Government, 26 February 2020), https://www.gov.scot/publications/integration-of-scottish-criminal-justice-information-data-sharing-manual/.

In terms of sentencing data specifically, Scotland has less information available than England Wales. For present purposes, notable here is data on criminal proceedings and data on prison populations. This can be accessed online, and reference can be had to Justice Analytical Services (JAS) for most matters. Key JAS research priorities include undertaking international comparisons of sentencing lengths across key jurisdictions, monitoring the introduction of a presumption against custodial sentences under 12 months, in-depth investigation of the use of community payback orders (CPOs) in Scotland and designing research on the use of remand.[103]

4.2.2 Scottish Prison Service (SPS)

The Scottish Prison Service (SPS) possesses data that can provide some insights into the custodial population. For example, information on the daily prison populations, the pre-trial remand populations, the types of offences in prisons can give a very general overview of the penal landscape.[104]

SPS also conducts some research (such as annual prisoner surveys and staff surveys) and publishes reports. These can be accessed online but are of little relevance to sentencing. Indeed, as noted earlier, the most relevant SPS data to sentencing is available through Scottish Government publications rather than SPS directly.[105]

4.2.3 Scottish Courts and Tribunals Service (SCTS)

The Scottish Courts and Tribunal Service (SCTS) provide some official statistics that can be accessed online.[106] The Management Information Analysis Team (SCTS) provide monthly information derived from the Criminal Operations digital case management system (COPII).[107] There are also quarterly and annual

[103] 'Justice Analytical Programme 2019-20', 24 June 2019.

[104] Some other matters noted include the (increasing) average age of the prison population.

[105] 'Publications', Scottish Prison Service, accessed 20 October 2021, https://www.sps.gov.uk/Corporate/Publications/Publications.aspx.

[106] 'SCTS Official Published Statistics', Scottish Courts and Tribunals Service, accessed 19 October 2021, https://www.scotcourts.gov.uk/official-statistics.

[107] 'Digital Strategy – 2018-2023', 22 June 2018, 7.

publications. The publicly available information is aggregate. As such, it is of limited use in terms of facilitating detailed analyses in general.

However, more importantly, while there is some information on pleas, this information does not include sentences:

> *The statistics in this bulletin do not have information relating to accused persons in terms of what they were charged with or their resulting conviction or sentence as there are already well-established National Statistics on these aspects of criminal justice.*

Thus, SCTS's *publicly available data* does is not helpful here. Again, the only somewhat useful insights from SCTS data will be through Scottish Government publications that utilise SCTS data.

4.2.4 Crown Office and Procurator Fiscal Service (COPFS)

The Scottish prosecution service (COPFS) provides various figures, and these are available online. [108] However, these are of limited direct relevance in understanding sentencing patterns.

Of what little data COPFS publishes, this has decreased in recent years as responsibility for information on court disposals is now left to the Management Information Analysis Team at the Scottish Courts and Tribunals Service (SCTS) – who in turn (as noted above) largely leave it to the Scottish Government's national statistics. As such, COPFS case processing statistics are even more spartan than previously and contain no information on court disposals. An example table from one of COPFS's reports is provided to illustrate the limitations of what is in the public domain.

[108] See https://www.copfs.gov.uk/publications/statistics

In terms of understanding COPFS data, there could be more detail concerning precisely what data is held and in what form (metadata). However, COPFS has clarified some aspects of its database infrastructure.[109] The main point to note here is that the live nature of COPFS's database is reported to make extracting information for statistical purposes more difficult.

Statistics on Case Processing April to June 2021

Reports Received (1)	**Number**
Criminal Reports	39,199
Death Reports	4,061
Total Reports Received	43,260

Non-Court Disposals (2)	**Number**
No Action	3,745
Warning Letters	1,588
Conditional Offers of Fixed Penalties Paid	3,111
Fiscal Fines Paid/Accepted	2,960
Compensation Orders Accepted	166
Combined Fiscal Fines/Compensation Orders Accepted	971
Other Non-Court disposals	3,713
Total Non-Court Disposals (3)	16,254

No Further Action	**Number**
Total No Further Action (4)	4,990

[109] 'Freedom of Information: COPFS Case Management System (R010137)', COPFS, 2015, https://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/1055-copfs-case-management-system-r010137.

4.3 Limitations of Official Data

There are at four limitations to official government data publications in terms of understanding sentencing patterns. The first and most obvious limitation is that few official publications have a specific focus on sentencing and the information relevant to sentencing.[110] A second limitation is that multiple convictions are poorly reflected in the data. Little more needs to be said about these limitations given what has been noted already in Report 1[111] and Part 3 of this report. The third limitation is the fragmentary character of official data and the fourth is the abstractions used in publications. These latter issues are discussed below.

4.3.1 Fragmentary Character of Official Data

Rather than provide an overall, cohesive picture, the official data in Scotland tends to be fragmented. Different criminal justice organisations share data, but this can be partial. For example, Scottish Government publications use data from the CHS but not all fields within the CHS are shared. Difficulties include different case counting rules, different ways of classifying offences, issues extracting data or otherwise making it useful, etc. For example, COPFS publish charge-level statistics in publications such as *Hate Crime in Scotland and Domestic Abuse Charges reported to COPFS*. As *Criminal Proceedings* statistics only measure the main charge in a case, this then means that COPFS figures are not directly comparable and can appear higher. Indeed, it has been noted that:[112]

> *Each of the main criminal justice bodies measures activity differently. Police Scotland count standard prosecution reports (SPRs), COPFS count the number of cases and accused people, and SCS [now SCTS] count numbers of cases and accused appearances. There is no consistent way to*

[110] One recent focus pertains to interest in the "presumption against short sentences." However, even here, the level of information available and relevant to sentencing is limited.

[111] Jay Gormley et al., 'Report on Methodological Approaches to Sentencing Data Collection and Analysis: Report 1 (Ireland)' (Sentencing Guidelines and Information Committee, 20 January 2022), https://judicialcouncil.ie/assets/uploads/1st%20Interim%20Report.pdf.

[112] 'Efficiency of Prosecuting Criminal Cases through the Sheriff Courts ', September 2015, para. 15.

identify distinct individuals (be it as witnesses, victims or accused) across the whole sheriff court system.

This fragmentation has serious implications for our ability to understand patterns of sentencing practice. . For example, little data is available that enables plea status (a legal factor with potentially significant implications for sentencing)[113] to be linked to final sentence outcomes. This means that the impact of key policies such as "sentence discounting" (changing a sentence depending on whether or not the person had pled guilty or not guilty) cannot be measured by official data.[114] Other important features that may influence sentencing are also difficult to factor into analyses based on official data. For example, the *Criminal Proceedings* data misses key variables such as the conditions attached to community sentences in Scotland and, therefore, says little about these potentially diverse sentences.

Moreover, various sources of data in Scotland are from operational databases. COPFS data has been noted as one example, but the same is true of other data sources. For example, the CHS (which underpins many criminal justice publications) is not designed for statistical purposes.

4.3.2 Official Data: The Distinction between "Crimes" and "Offences"

[113] See Section 196 of the Criminal Procedure (Scotland) Act 1995. This provision has been discussed in a series of cases such as *Du Plooy v HMA* 2005 1 JC 1*, Spence v HMA* [2007] HCJAC 64*,* and *Gemmell v HMA* 2012 JC 223*.*

[114] For an analysis of *some* of the challenges to understanding the operation of plea bargaining, see Jay Gormley, 'The Inefficiency of Plea Bargaining', *Journal of Law and Society*, forthcoming in Summer issue 2022. See also, Jay Gormley and Cyrus Tata, 'Remorse and Sentencing in a World of Plea Bargaining', in *Remorse and Criminal Justice: Multi-Disciplinary Perspectives*, ed. Steven Tudor, Richard Weisman, and Kate Rossmanith (London and New York: Routledge, 2022), 40–66, https://doi.org/10.4324/9780429001062; Jay Gormley, Rachel McPherson, and Cyrus Tata, 'Sentence Discounting: Sentencing and Plea Decision-Making Literature Review' (Scottish Sentencing Council, December 2020); Jay Gormley et al., 'Sentence Reductions for Guilty Pleas: A Review of Policy, Practice and Research', *Sentencing Academy*, 2020; Jay M Gormley and Cyrus Tata, 'To Plead? Or Not to Plead? "Guilty" Is the Question. Re-Thinking Plea Decision-Making in Anglo-American Countries', in *Handbook on Sentencing Policies and Practices in the 21st Century*, ed. Cassia Spohn and Pauline Katherine Brennan (New York: Routledge, 2019), 208–34.

In Scots law, there is no legal distinction between “crimes” and “offences”, neither is it widely made in policy or academic literature. However, data published by the Scottish Government makes such a distinction in its publications – “crimes” being considered more serious. This distinction is primarily for the purposes of these Scottish Government publications, and it is an abstraction with no relevance to real-world criminal proceedings.

The separation of “crime” and “offence” statistics is a long-running practice that has been in place since the 1920s. Indeed, Scottish statistics have been presented in the statistical bulletin in largely the same format since 1983.[115] While the publicly-available data is simplified, internally, the Scottish Government uses a more detailed classification system with about 500 codes for crimes/offences. The list of crimes and offences is published online and adjusted in response to changes in the law (e.g. when new offences are created).

A limitation of the crimes/offences distinction is that, as the format is so old, it is unclear as to the basis on which these categories were initially devised. Certainly, there is no legal distinction between crimes and offences in Scots law.

There are also limitations to how this format ranks seriousness. Firstly, the practice of classifying offence severity without considering the broader context of the offence and offender (e.g. harms caused to victims, mitigating and aggravating factors, etc) can problematic. More generally, to the extent that one might venture to generalise, some of the classifications of conduct as a crime or offence appear to be peculiar.[116]

Despite these limits, the simplified format may provide more straightforward descriptive statistics. Unfortunately, the cost of this format is that it limits detail by abstracting the reported data from the raw data upon which it is based. This

[115] Some changes have occurred. For example, in 2004 the Scottish Crime Recording Standard (SCRS) was introduced.

[116] For example, although conduct classified as "crimes" should be more serious, there are some "offences" (e.g. driving or in charge of motor vehicle while unfit through drink or drugs) that have more severe punishments associated with them than “crimes.” Conversely, some seemingly less serious transgressions of the criminal law (e.g. “shoplifting”) is categorised in the more serious grouping of “crimes.”

is particularly problematic given that the focus of the data is seldom upon sentencing, and the insights available on sentencing practice are limited.

4.4 Empirical Research on Sentencing

While there is some well-known research on Scottish criminal justice,[117] as a smaller jurisdiction of comparable size to Ireland, Scotland has seen less empirical research than England and Wales or (espically) the USA on sentencing decisions. However, there have been various academic studies of sentencing. [118]

[117] For example, Doreen McBarnet (1981) *Conviction* (Martin Robertson) Pat Carlen, *Magistrates' Justice* (M. Robertson, 1976).

[118] The following provides non-exhaustive indicative examples. Easily the largest empirical study of sentencing was for The Sentencing Information System in Scotland, which researched and developed for the High Court judiciary in Scotland created a database of over 15,000 sentenced cases (including subject to appeal) from 1989 to the mid 2000s. See Cyrus Tata, *Sentencing: A Social Process Re-Thinking Research and Policy* (Springer International Publishing 2020) ch 6 <http://link.springer.com/10.1007/978-3-030-01060-7> accessed 29 April 2020. On the ways in which judges conceptualise of sentencing including multi-conviction cases, see Cyrus Tata, 'Conceptions and Representations of the Sentencing Decision Process' (1997) 24 Journal of Law and Society 395; Cyrus Tata, 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' (2007) 16 Social & Legal Studies 425. On the making of 'custody threshold' decisions, see for example: Andrew Millie, Jacqueline Tombs and Mike Hough, 'Borderline Sentencing: A Comparison of Sentencers' Decision Making in England and Wales, and Scotland' (2007) 7 Criminology & Criminal Justice 243. On questions of consistency in sentencing, see for example Cyrus Tata and Neil Hutton, 'What' rules' in Sentencing? Consistency and Disparity in the Absence of "rules'' (1998) 26 International journal of the sociology of law 339. On the role and influence of mitigation and pre-sentence reports see for example Cyrus Tata and others, 'Assisting and Advising the Sentencing Decision Process: The Pursuit of "Quality" in Pre-Sentence Reports' (2008) 48 The British Journal of Criminology 835. On recent work examining public perceptions of sentencing practices, see: Carolyn Black and others, *Public Perceptions of Sentencing: National Survey Report* (Scottish Sentencing Council 2019); Hannah Biggs and others, 'Public Perceptions of Sentencing Sexual Offences in Scotland: Qualitative Research Exploring Sexual Offences' (Scottish Sentencing Council 2021) <https://www.scottishsentencingcouncil.org.uk/media/2122/public-perceptions-of-sentencing-qualatative-research-of-sexual-offences-final-july-2021.pdf>. On the roles of judicial attitudes and self-identity in sentencing see Fiona Jamieson, 'Judicial Independence: The Master Narrative in Sentencing Practice' [2019] Criminology and Criminal Justice. On the influence of nature and timing of plea, see for example Graeme Brown*, Criminal Sentencing as Practical Wisdom* (SAGE Publications Sage UK: London, England 2018); Jay Gormley, 'The Nature and Extent of Sentence Discounting (PhD Thesis)' (University of Strathclyde 2018). On the role of remorse and guilty pleas, see: Gormley and Tata (n 80).

As well as empirical studies dedicated to sentencing, some research has shed valuable, indirect light on sentencing when examining a related topic. For example, research studying the impact of changes to legal aid payment structures on case outcomes (including sentencing) has yielded an analysis of "underlying patterns" of sentencing.[119] There have also been evaluations that shed some light on practices of the time.[120] Nonetheless, significant gaps in knowledge of Scottish sentencing remain.

Research is, occasionally commissioned by UK research funding councils, larger charities, the Scottish Government, and other organisations (e.g. Community Justice Scotland). Recently, however, the Scottish Sentencing Council (SSC) has begun to commission some new empirical research into public perceptions of sentencing practices.[121] The SSC has a statutory duty to promote greater awareness and understanding of sentencing. By researching public knowledge about sentencing as well as what sentences members of the public would like to see passed in different kinds of case scenarios, it is, in principle, possible to reveal that the public is systematically misinformed about the reality of sentencing, believing sentencing to be far more lenient than it in fact is. With data, it would be possible to show fairly conclusively that the typical patterns of sentencing are not, in fact, out of line with what the general public would prefer. However, in doing so the SSC (like other councils) faces a significant obstacle. While it can commission research to show what members of the public suppose

[119] Tamara Goriely et al., 'The Public Defence Solicitors' office in Edinburgh: An Independent Evaluation', *Edinburgh: Scottish Executive*, 2001; Cyrus. Tata and Frank Stephen (2006) '"Swings and Roundabouts": Do Changes to the Structure of Legal Aid Remuneration Make a Real Difference to Criminal Case Management and Case Outcomes?' *Criminal Law Review* 722-741; C. Tata (2007) 'In the Interests of Commerce or Clients? Supply, Demand, 'Ethical Indeterminacy' in Criminal Defence Work' *Journal of Law & Society* 38: 489-519; Paul Bradshaw et al., 'Evaluation of the Reforms to Summary Criminal Legal Assistance and Disclosure', 2012.

[120] Goriely et al., 'The Public Defence Solicitors' office in Edinburgh: An Independent Evaluation'; Bradshaw et al., 'Evaluation of the Reforms to Summary Criminal Legal Assistance and Disclosure'.

[121] Black et al., *Public Perceptions of Sentencing: National Survey Report*; Hannah Biggs et al., 'Public Perceptions of Sentencing Sexual Offences in Scotland: Qualitative Research Exploring Sexual Offences', 2021. The SSC spent £162,296 on 'research' in 2019-2020.[121] This, however, included consultations and literature reviews, so cannot be directly compared for example with the spend by Council in England and Wales. In the future, the SSC is expected to carry out data gathering on matters such as sentence adjustments for guilty pleas.

normally happens and what members of the public would like to see happen, the quality of available official data means that SSC is restricted in how well it can describe the normal patterns of sentencing for the same sorts of case scenarios.

Presently, the key point is that the existing body of research is limited in terms of the insights it can provide concerning contemporary sentencing practices. Indeed, sentencing practices have seldom been a research focus in Scotland, and current research is unable to supplement the deficiencies in official data.

4.5 Legal Practice Sources

Legal practice sources focus on the normative and procedural aspects of court work. The authors intended for them to be a practitioner's guide. Practice sources in Scotland include a number of works by Scottish judges such as Morrison (2000), Stewart (1997), and Nicholson (1992). There are also a limited number of other sources such as “Sentencing Statements” (available online), Green’s Weekly Digest, and Scottish Criminal Case Reports.

Inevitably, these practice sources are not comprehensive. Additionally, many of these sources are dated and cannot take account of more recent important developments such as the presumption against short custodial sentences. More fundamentally, none of these sources offers enough granularity or breadth to provide a substitute for detailed official figures. By their nature, these sources only cover a small number of cases that are often appellate cases and somewhat atypical. Therefore, while those seeking to understand sentencing in Scotland ought to have regard to practice sources, they are not able (and indeed not intended to) provide data about the typical patterns of sentencing in different case scenarios.

As such, none of the main sources of information (official data; occasional short-life research studies of specific issues; or legal practice sources) can provide a rich and meaningful depiction of typical sentencing practices in Scotland. For this reason, the senior Scottish judiciary sought to create a database (initially for

the High Court) that would provide users with quick and easy access to comprehensive and high-quality information about patterns of sentencing according to different case scenarios and variables. The following section outlines the origins, aims, and experience of this project.

4.6 Scottish Sentencing Information System (SIS)

Although Scotland has much less experience of guidelines than England and Wales, or the USA, it has considerable experience of researching issues in developing the provision of reliable, comprehensive and up-to-date sentencing data. Over the period of around a decade (1993 to the mid-2000s), a project was conducted to research, develop, and implement a Sentencing Information System (SIS) for the High Court of Justiciary[122]. It was initiated by the senior judiciary and was carried out in collaboration with an academic research team from the University of Strathclyde.

The aim of the SIS was to enable High Court judges (and the Court of Criminal Appeal) to pursue consistency in sentencing by seeing how a potential sentence a judge might have in mind, would compare in relation to other sentences (passed at first instance and, where relevant, changed on appeal) in reasonably similar cases.

The SIS aimed to provide users with quick and easy access to the patterns of sentencing in similar cases. The SIS was seen as an alternative way to pursue consistency in sentencing without recourse to guidelines (or mandatory minima) – most especially of the more intrusive kind government ministers were proposing.[123]

[122] The High Court of Justiciary is Scotland's highest first instance criminal court. Senior judges of the court may also sit in appeal cases. As a separate criminal jurisdiction, the UK Supreme Court has no jurisdiction in criminal cases, (though its rulings on constitutional matters may have a very important bearing on criminal matters).

[123] Cyrus Tata (2020) *Sentencing a Social Process- Rethinking Research & Policy* (Palgrave Springer) chapter 6; Neil Hutton and Cyrus Tata, 'A Sentencing Exception? Changing Sentencing Policy in Scotland', *Federal Sentencing Reporter* 22, no. 4 (28 October 2010): 272–78, https://doi.org/10.1525/fsr.2010.22.4.272;

Consulting the SIS was a voluntary choice for judges and, unlike an artificial intelligence approach, there was no question that it would ever tell the judicial sentencer what 'the correct' sentence would be. Rather judges were still free to pass the sentence they thought appropriate, but simply encouraged to consult the SIS to check whether the sentence they had in mind would be broadly in line with the typical range for similar cases.

The idea of encouraging sentencing judges to pursue consistency in sentencing by accessing systematic data about patterns of sentencing in similar (including appeal) cases is not new. More than four decades earlier, Morris (in 1953) proposed sentencing judges be given information about sentences imposed so that they could "see clearly where they stand in relation to their brethren."[124] However, it was not until the 1980s when information technology became widespread that sentencing databases were pioneered in Canada in British Columbia;[125] Doob in various Canadian provinces;[126] and then the Judicial Commission in New South Wales.[127]

Having assessed the feasibility of using existing official administrative data sources, it was concluded that administrative data was not capable of providing meaningful sentencing data of the kind needed to represent existing sentencing patterns sufficiently accurately or meaningfully. (See earlier in this part). Therefore, the SIS created its own taxonomy and means of collecting data (initially from court archives) and then contemporaneously. In that way, and in close consultation with its judicial users, the SIS reflected the ways in which judges thought about sentencing and the sort of information they would need.

---

[124] As quoted by Richard S. Frase, 'Sentencing Principles in Theory and Practice', *Crime and Justice* 22 (1 January 1997): 366, https://doi.org/10.1086/449266.

[125] John Hogarth (1988) *Sentencing Database System: User's Guide*, Vancouver, (University of British Columbia).

[126] Anthony Doob and Park, N. (1987) 'Computerised Sentencing Information for Judges: An Aid to the Sentencing Process' *Criminal Law Quarterly* vol. 30 p. 54.

[127] Ivan Potas (2005) The Sentencing Information System *Australian Law Reform Commission - Reform Journal* 86: 17-23; Cyrus Tata (2000) 'Resolute Ambivalence: Why Judiciaries Do Not Institutionalize Their Decision Support Systems' *International Review of Law, Computers & Technology* 14(3): 297-317

As such, the Scottish SIS was unique as a database in not being constrained by the recording practices of administrative agencies. As such the Scottish SIS contained some of the most in-depth and detailed information from the perspective of sentencing not only in Scotland but in the world.

The SIS contained comprehensive and detailed information on all sentences passed over a 15 year period (some 15,000 cases), including appeal decisions. Information was initially collected by the research team from court/trial papers, but then information began to be recorded contemporaneously by judicial clerks, according to a template, with judges being able to add narrative information.

The SIS was flexible: it enabled the user to view information according to different criteria and see how the patterns changed. As well as providing data about the patterns of sentencing according to different case criteria, the SIS also included textual information recorded by the judge to highlight information that she or he thought to be especially important and not otherwise captured by data collection.

The Scottish Sentencing Information System (SIS) inspired the Irish Sentencing Information System (ISIS) – although the two systems differed, and ISIS did not simply replicate the SIS.[128] (See Report 1 for an overview of ISIS).[129] However, in some key respects, the two projects were also quite different. For one thing, the Irish project made an early decision that its data would be made publicly available – contrasting with Scotland's 'resolutely ambivalent'[130] approach.

4.6.1 Developing a More Meaningful Case Taxonomy

[128] Notably, ISIS data was publicly available while the SIS data (even if from public records) was not. This difference is perhaps emblematic of the different judicial attitudes in Scotland at the time.

[129] Gormley et al., 'Report on Methodological Approaches to Sentencing Data Collection and Analysis: Report 1 (Ireland)', 1.

[130] Cyrus Tata (2000) 'Resolute Ambivalence: Why Judiciaries Do Not Institutionalize Their Decision Support Systems' *International Review of Law, Computers & Technology* 14(3): 297-317

A unique feature of the Scottish SIS (compared to other databases) is that it sought to overcome key problems with official administrative data by creating its own taxonomy which was tested and revised to reflect the ways in which judges tend to approach the sentencing of different cases: [131]

> *The structure and classifications that the system uses to store and retrieve this information were designed specifically for the information system with the aim of providing a resource that would be useful to sentencers and it was the sentencers themselves who made the important decisions about how case similarity would be operationalised.*

4.6.1.1 Representing Multi- and Single-Conviction Cases

A particularly significant problem with official data across the world (and which we have already mentioned in earlier parts) is its inability to record and represent cases with more than one conviction adequately and meaningfully from the perspective of sentencing. Typically the "principal offence" [132] is selected (often not by the court but by an administrative agency) and recorded and other information (which may also be an offence) is then added in if possible. In other words, data recording tends to conceive all cases as single-conviction cases and then adjust where it can. The representation of sentencing practices by official data tends to make relatively little distinction between single and multi-conviction cases. How should the effective sentence in a multi-conviction case be represented? Where there is more than one conviction, a main, or principal, conviction is usually selected by an official administrative body (e.g. criminal records office), not by the court. Although in many cases this may be thought by the administrative body to be a self-evident decision, it may often be less apparent, where, for instance, there is more than one conviction that might appear to be of similar gravity. Those selecting the conviction against which the total effective sentence is to be recorded may select the conviction

[131] Cyrus Tata, 'Beyond the Technology of Quick Fixes. Will the Judiciary Act to Protect Itself and Short Up Judicial Independence? Recent Experience from Scotland', *Federal Sentencing Reporter* 16, no. 1 (21 October 2003): 68, https://doi.org/10.1525/fsr.2003.16.1.67.

[132] Other phrases are used in different jurisdictions to convey a similar idea.

which receives the most severe penalty. However, this raises its own difficulties. For example, multiple-conviction cases may attract different sentences. Sentences may be passed consecutively, concurrently (or in some combination of the two), or, in cumulo (covering all offences in a single sentence). This can make it difficult for an administrative data body to know what the court perceives to be the principal conviction.

The consequence of this complex problem is that the different gravity of different cases may not be clearly reflected in the representations made by official data about sentencing practices. Furthermore, the comparison between sentences passed for cases that may or may not have involved more than one similarly serious conviction is questionable. The SIS sought to overcome this problem by offering users a second way of exploring the data. A 'whole offence approach' to the recording and representation of sentencing data was developed with the judiciary to reflect especially multiple convictions cases where there was 'a course of conduct'. This whole offence approach was complementary to 'the principal conviction approach' so as to capture the inter-relationship between offences:[133]

> *This approach is less fragmented than the Principal Conviction Approach and reflects the holistic way in which judges, (in common with other skilled discretionary decision-makers), often conceive and make sense of the narrative or "course of conduct" of the offending behaviour.*

4.6.2 Maintenance and Lack of an Institutional Home

Although it was suggested that if carefully presented the SIS data could be of value to policy, practitioner, judicial, and public audiences, no decision was taken by the senior judiciary to make the SIS publicly available on the grounds that it was still a "pilot" project.

[133] Tata, 'Beyond the Technology of Quick Fixes. Will the Judiciary Act to Protect Itself and Short Up Judicial Independence? Recent Experience from Scotland', 69.

Unlike the SIS (part of the Judicial Information Research System) run by the Judicial Commission of New South Wales, the SIS in Scotland had no institutional home. As such it had no core funding and was essentially a collaboration between the senior judiciary and a university team.

Predictably, therefore, changes in judicial leadership combined with a lack of an institutional home and institutional authority left the SIS vulnerable. This, in a context where the political threat of more intrusive guidelines was perceived to have waned, meant that after the SIS was fully implemented it was not championed by the new head of the court of criminal appeal and so as a direct consequence it was not maintained by the court service. As the project was fully handed over from the university to the court service, the court service declined to implement the recommended training or quality control regime. Over time, the judicial clerks who were supposed to input data about new cases felt no need to do so with the predictable consequence that because the SIS was not kept up to date it was consulted less by judges. As Hutton and Tata comment, when a changed government signalled less interest in sentencing then the judiciary had less interest in the SIS: "in the absence of immediate political pressure on the judiciary, the SIS has been allowed to atrophy."[134]

The predictable neglect of the Scottish SIS differs from the Irish SIS whose suspension is widely reported to have been due to a lack of funding.[135] By contrast, the Scottish SIS atrophied because of a change in senior judicial personnel who appeared to harbour an altogether more suspicious stance to the SIS. In a context where the judicially-perceived threat of political intrusion had receded, this meant that the lack of an institutional home, the failure to implement the recommended training and quality-control of data input on new cases by court clerks and a refusal to allow non-judicial users access to the data combined to ensure that the SIS withered away.

---

[134] Neil Hutton and Cyrus Tata, 'A Sentencing Exception? Changing Sentencing Policy in Scotland', *Federal Sentencing Reporter* 22, no. 4 (28 October 2010): 275, https://doi.org/10.1525/fsr.2010.22.4.272.

[135] See Jay Gormley et al report 1; also any pubs from Tom which point to this suspension due to lack of funds.

The key appeal of an SIS to judges that consulting was not mandatory was also its key weakness. Without formal endorsement from the Court of Criminal Appeal or linking it to judicial guidelines, the SIS was left to wither away. This confirmed the warning that earlier prototype studies suggested: without formal authority, the voluntary pursuit of consistency by consulting information is unlikely, in itself, to succeed.[136]

Arguably, today the situation is somewhat different in Scotland, and the idea of official guidelines has become more normalised. Indeed, it seems likely, even inevitable, that with the advent of guidelines in Scotland reliable, comprehensive, and up-to-date sentencing data (whether or not in the form of something resembling an SIS) will come to be seen as a necessity.

4.7 Conclusions on Scottish Sentencing Data

Overall, there is limited sentencing data in Scotland. The main sources of relevance to sentencing are publications by the Scottish Government derived from data collected by different agencies. The fragmentation of this data poses a challenge to producing a 'joined up' analysis of sentencing and criminal justice. While some official data exists, it could be dramatically improved with regard to sentencing. However, as with official data in England and Wales, "innovation in presentation or analysis" has been rare, and the focus has been on maintaining "comparability of what is being measured year to year."[137] Consequently, official data is "a 'jigsaw puzzle' with missing pieces."[138]

To emphasise these limits, it is worth noting that even the Scottish Sentencing Commission could not find reliable data upon which to base its conclusions:

---

[136] Doob, A (1990) "Evaluation of a Computerised Sentencing Aid, " Select Committee of Experts on Sentencing, pp. 2 –5 (European Committee on Crime Problems, Council of Europe

[137] Mike Maguire and Susan McVie, 'Crime Data and Criminal Statistics: A Critical Reflection', in *The Oxford Handbook of Criminology*, 6th ed. (Oxford: Oxford University Press, 2017), 165 and 171, https://doi.org/10.1093/he/9780198719441.003.0008.

[138] Maguire and McVie, 'Crime Data and Criminal Statistics: A Critical Reflection', 183.

> *Whilst there may be limited empirical research evidence available that indicates that sentencing in Scotland lacks consistency and shows the extent and prevalence of such inconsistency, we are persuaded that there is a significant body of anecdotal evidence which demonstrates that inconsistency in sentencing actually occurs. Whatever the actual degree of inconsistency in sentencing in Scotland, we are satisfied that there is a very clear perception amongst both practitioners and the public in general that sentencing in this country is inconsistent.*[139]

There are parallels here to the findings of the Law Reform Commission in Ireland that could only *intuit* the "the existence of inconsistency."[140] In general, it might be fairly commented that it is undesirable that a commission must proceed based on such limited evidence. Arguably, there should be better data to enable evidence-based decisions.

The Scottish SIS overcame the limitations of official data about sentencing by designing and collecting its own data set for judicial users. This addressed some of the challenges seen in official data by devising its own taxonomy.

A change of senior judicial leadership led to the neglect of the SIS. In a context where the judicially-perceived threat of political intrusion had receded, this meant that the lack of an institutional home, the failure to implement the recommended training and quality-control of data input on new cases by court clerks and a refusal to allow non-judicial users access to the data combined to ensure that the SIS withered away.

The key appeal of an SIS to judges that consulting was not mandatory was also its key weakness. Without formal endorsement from the Court of Criminal Appeal or linking it to judicial guidelines, the SIS was left to wither away. This confirmed the warning that earlier prototype studies suggested[141]: without formal authority, the voluntary pursuit of consistency by consulting information

[139] The Sentencing Commission for Scotland (2006), para 1.9.

[140] 'Consultation Paper on Sentencing' (Dublin, March 1993), para. 2.32.

is unlikely, in itself, to succeedHowever, now in a context where the Scottish senior judiciary has embraced guidelines with a sentencing council, it seems likely that as new guidelines are planned, their impact monitored, etc there is likely to be increased demand for high-quality data.

In Scotland, some efforts to improve publicly-available data are underway, but sentencing data has not been a key focus. Perhaps things will change in the future, given that the Scottish Government's Justice Analytical Services has some sentencing issues in its research plan and the SSC is moving towards issuing offence specific guidelines and, presently, has some data collection in its research plan too.[142] However, there are likely still changes ahead for Scotland.

In sum, while there is public data in Scotland, there is a dearth of available information (both qualitative and quantitative) on actual sentencing practices in Scottish first instance courts. Some high-level statistics have been noted above, but there are significant gaps in Scotland's knowledge and understanding of sentencing in real cases. It remains to be seen how the SSC will address this gap.

[142] The research plan is due to be updated shortly.

Part 5: Report Conclusion

This report has examined the key data relied on in the USA, England and Wales, and Scotland and the lessons that have been learned. While all three jurisdictions offer useful insights, in terms of utilising data on actual sentencing practices, Scotland is in a different position. As Scotland is still looking to devise its first offence specific guideline, experientially, the jurisdiction still has lessons of its own to learn about the relationship between guidelines and data. However, Scotland has considerable experience of seeking to research, design, implement and maintain an information system to provide instant access to meaningful sentencing data. By contrast, the USA and England and Wales have much more of a history to draw on with guidelines and data considerations.

5.1 Lessons Concerning Initial Steps

One key lesson that may be taken from Scotland is how new sentencing councils might begin with issuing guidelines. In particular, the SGIC may wish to consider the Scottish practice of first issuing generic guidelines that are less dependent on data about sentencing practices.

However, it would also seem that once a guideline body is created, it will after a period be expected to deliver offence specific guidelines. The Scottish Sentencing Council is now experiencing this expectation to some degree and its progress has drawn political attention.[143] Indeed, while generic or normative guidelines (of the kind not requiring the data noted in this report) may appease early demands for outputs, they may not in-and-of-themselves be seen as sufficient to fulfil all the functions of a sentencing council in the long-term.

This could be a useful endeavour to pursue while the data needed for offence specific guidelines and guideline monitoring is gathered. .

[143] The SC is working towards first offence specific guideline pencilled in for 2022.

5.2 Lessons Concerning Data and Research

The experiences of the USA and England and Wales demonstrates that a sentencing council (or similar body) with a substantial research function can achieve things that a Court of Criminal Appeal is unable to do. For example, appellate courts are necessarily limited in their ability to research current practices in depth; conduct systematic consultations; assess the issues in and the likelihood of compliance with new guidelines; forecast the likely impact of policy changes to and on sentencing; engage with and understand public perceptions about and knowledge of sentencing and examine ways of correcting any misperceptions; etc.

Conversely, a guideline issuing body without sufficient capacity to conduct and/or commission research will be limited in its ability to devise guidelines that are respected by practitioners and meaningful in practice. Indeed, one of the most important lessons from the English and Welsh Sentencing Council's experience is that a guidelines authority needs to have a specialised and adequately resourced research team. Moreover, this team should include both legal and social science expertise. Without a substantial research function, a sentencing council is in danger of approximating and duplicating the work of a court of criminal appeal, which may also create guidelines.

That said, a sentencing council cannot fulfil its duties, without adequate resourcing. Indeed, the ability of the Sentencing Council in England and Wales to fulfil its wider functions in promoting public awareness appears to have been frustrated by resource pressures.

The experiences of the USA and England and Wales also show that expectations for sentencing data have increased over time. What may once have been considered sufficient is no longer acceptable and data has had to be improved. While Ireland's SGIC is new, it is embarking on its work at a time when the standard of data (in terms of extent and quality) is higher than may have been expected when comparable bodies elsewhere were first established.

Improvements to sentencing data can be made by arranging for various administrative bodies to collect the relevant information and also through the direct efforts of a sentencing council. Experience suggests, however, that to achieve this there needs to be formal and institutional requirements to do so. While Scotland created a high-quality information system, the lack of an institutional home made it vulnerable to changes in judicial leadership, with the result that those responsible for recording and maintaining the information system lost motivation. Legislation in England and Wales, by contrast, created the new Sentencing Council with a wider set of duties and this saw a step-change improvement in the quality of sentencing data.

In improving data in order to create (and update) guidelines, it seems beneficial to collect some data directly from sentencers and/or sentencing courts. Administrative statistics alone derived from agencies collecting it for different purposes are most unlikely to be sufficient. The challenge is to devise reliable, comprehensive, and up-to-date sentencing data collection procedure that is sufficiently meaningful, though without being perceived by judges and officials as being too burdensome.

To inform not only judicial sentencers, but policy-makers, parliamentarians, wider civil society groups, and the public, sentencing data should be made available in an accessible form. This is vital not only for the creation of guidelines but also the monitoring of their implementation and impact.

5.3 Lessons Concerning Public Confidence

Sentencing policy and practice is of central importance not only to the administration of justice, but also to public confidence in the administration of justice, and so more broadly, trust in state institutions: including the judiciary. In many English-speaking countries, responses to generalised public opinion surveys tend to indicate relatively low levels of public confidence in criminal justice, especially sentencing. In these surveys, people tend to report that they feel sentencing is too lenient and that the courts are ‘out of touch.’ However, in recent years an interesting body of research has been emerging in a number of

countries that uncovers important findings. It shows that when research studies explore public attitudes in-depth, a more complex picture emerges. First, the sense of leniency is linked to misperceptions and incorrect or a lack of knowledge. People tend to imagine that sentencing is far more lenient than it actually is. Second, when people are given the responsibility of mock-sentencing an anonymised case, people's responses tend to be much closer to those of actual sentencing practices than they had expected as well as being more nuanced than 'top-of-the-head' opinion poll surveys appear to suggest. Third, it seems that the gravest and the least typical crimes tend to figure prominently when people are asked to say whether or not sentencing should be more punitive.

All of this has substantial policy implications. An obvious remedy for this serious gap between public perception and reality is for sentencing councils (or other bodies) to engage with the public with a view to improving public knowledge (as well as understanding the sources of misperception and legitimate concerns). While these (and other findings) are well established in other comparable countries,[144] the absence of reliable, comprehensive, and up-to-date sentencing data (for example in Ireland) obstructs the ability to draw such conclusions, or indeed to carry out work to improve public knowledge.

5.4 Summary

This report has examined the principal data collection methodologies of other jurisdictions whose experience may offer useful lessons for Ireland to draw

[144] Freiberg and Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy*; Nicola Marsh et al., 'Public Knowledge of and Confidence in the Criminal Justice System and Sentencing–A Report for the Sentencing Council', *London: Sentencing Council*, 2019, https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf; Neil Hutton, 'Beyond Populist Punitiveness?', *Punishment & Society* 7, no. 3 (2005): 243–58; Julian V Roberts, Mike Hough, and JM Hough, *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (Routledge, 2002); 'Scottish Crime and Justice Survey 2019/20' (Scottish Government, 16 March 2021), https://www.gov.scot/publications/scottish-crime-justice-survey-2019-20-main-findings/; Black et al., *Public Perceptions of Sentencing: National Survey Report*.

upon. These lessons will be used to inform our next report which will make recommendations for the SGIC.

Appendix A: Example of Ministry of Justice Sentencing Statistics

annual_quarterly	Quarterly
offence_group	00: All offences
case_type_desc	0. All for trial
region	England and Wales

Sum of value	Column Labels											
	2014				2015				2016			
Row Labels	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4
1. Plea counts												
01. Total number of defendants dealt with in trial	25,294	24,674	26,117	26,087	27,412	26,333	25,117	25,694	25,721	24,568	22,725	21,098
02. Guilty plea: total	16,544	16,000	16,572	16,401	17,433	16,788	15,549	16,262	16,482	15,400	13,848	12,875
02a. Guilty plea: Prior to trial	11,984	11,712	11,869	11,527	12,399	11,687	10,664	11,179	11,675	10,353	9,014	8,322
02b. Guilty plea: Cracked trial	4,053	3,852	4,216	4,397	4,535	4,613	4,414	4,664	4,315	4,500	4,337	4,089
02c. Guilty plea: Unknown	507	436	487	477	499	488	471	419	492	547	497	464
03. Not guilty	4,243	4,505	4,908	4,969	5,211	5,026	5,136	5,133	4,871	5,150	4,834	4,697
04. Dropped	2,323	2,255	2,417	2,415	2,478	2,397	2,420	2,385	2,408	2,357	2,270	2,116
05. No plea	2,184	1,914	2,220	2,302	2,290	2,122	2,012	1,914	1,960	1,661	1,773	1,410
2. Plea rates												
0: Guilty plea rate (%)	72%	70%	69%	69%	69%	69%	67%	68%	69%	67%	66%	65%
1: Guilty plea	65%	65%	63%	63%	64%	64%	62%	63%	64%	63%	61%	61%
2: Not guilty	17%	18%	19%	19%	19%	19%	20%	20%	19%	21%	21%	22%
3: Dropped	9%	9%	9%	9%	9%	9%	10%	9%	9%	10%	10%	10%
4: No plea	9%	8%	9%	9%	8%	8%	8%	7%	8%	7%	8%	7%

Courts	Magistrates Court
Type of Offender	All
Offence Type	All
Offence Group	All
Offence	All
Sex	All
Ethnicity	All
Age Range	All
Age Group	All
Detailed Sentence	All
Plea at Crown Court	All
Custodial Sentence Length	All
Fine Amount	All

Sum of Count	Column Labels										
Row Labels	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
01: Immediate Custody	48,904	49,507	47,361	44,542	43,935	43,087	43,502	42,070	37,732	33,440	25,845
02: Suspended Sentence	26,191	26,584	24,667	27,455	30,058	32,754	34,022	32,488	26,076	22,340	18,933
03: Community Sentence	170,083	160,418	136,556	114,968	101,900	104,513	96,101	90,108	85,536	80,935	55,817
04: Fine	891,420	854,776	821,618	797,822	851,513	889,890	911,342	903,300	928,516	925,633	616,645
05: Absolute Discharge	8,766	8,092	7,456	6,969	5,712	8,890	4,646	5,131	4,034	4,366	1,853
06: Conditional Discharge	87,350	83,830	78,106	74,605	70,834	64,400	54,064	46,797	39,922	36,452	24,836
07: Compensation	7,807	6,702	7,090	9,283	6,191	5,208	4,713	4,894	4,962	4,550	3,479
08: Otherwise Dealt With	22,875	20,666	16,389	15,359	19,257	10,995	10,462	9,968	8,488	8,675	5,775
Grand Total	**1,263,396**	**1,210,575**	**1,139,243**	**1,091,003**	**1,129,400**	**1,159,737**	**1,158,852**	**1,134,756**	**1,135,266**	**1,116,391**	**753,183**

Appendix B: Extract from a Data 'Snapshot'

Sentence types and trends

Figure 2 shows the proportion of people who received a custodial or non-custodial sentence for the principal offence of sexual penetration of a child under 12.

A custodial sentence involves at least some element of immediate imprisonment or detention.[7] The rate of custodial sentences was lowest in 2016–17 (85.7%) and highest in 2015–16 (94.4%). Over the five-year period, 90.6% of people were given a custodial sentence.

Figure 2: The percentage of people who received a custodial sentence and non-custodial sentence for sexual penetration of a child under 12 by financial year

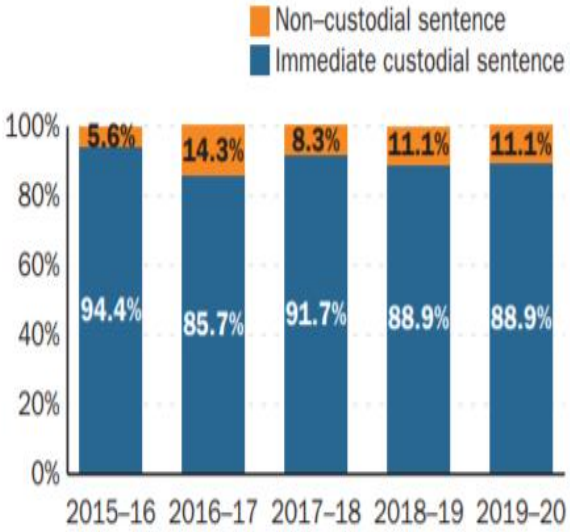


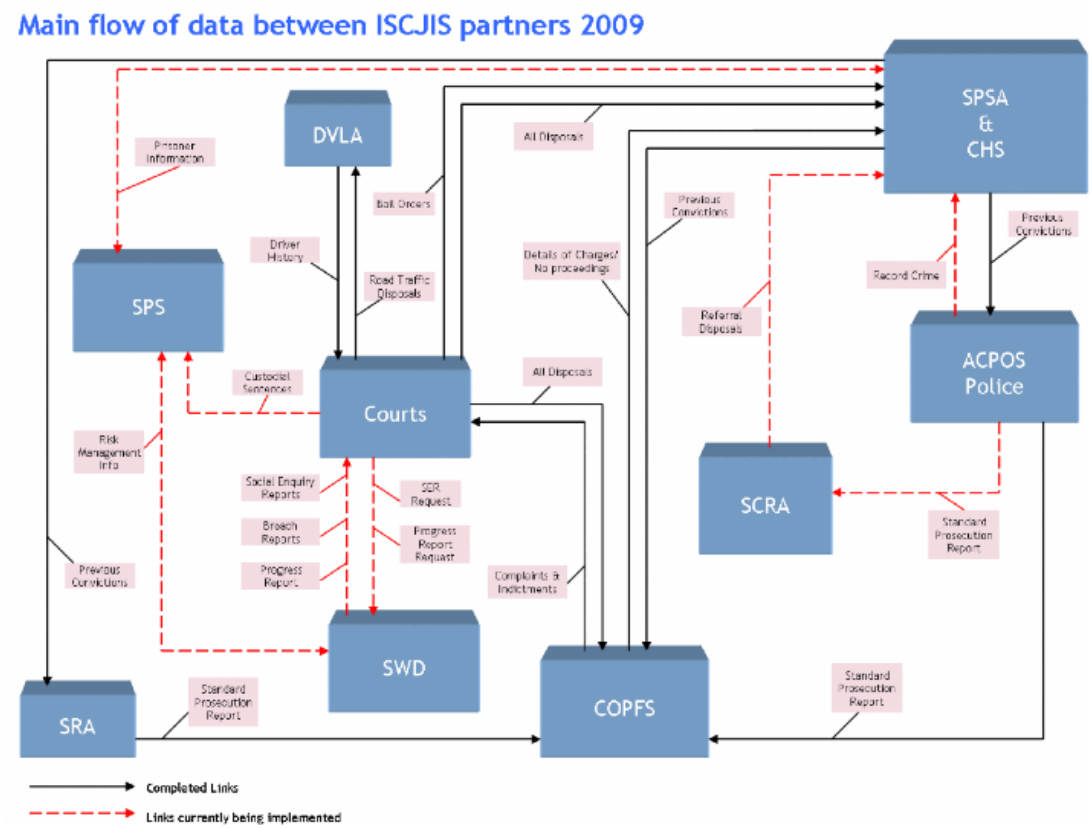
Table 1 shows the principal sentence imposed for sexual penetration of a child under 12 from 2015–16 to 2019–20.[8] The *principal sentence* is the most serious sentence imposed for the charge that is the principal offence.[9] The availability of different sentence types has changed over time. Most notably, wholly and partially suspended sentences have now been abolished.[10] Changes to community correction orders may have also influenced the sentencing trends over the five years covered by this Snapshot.[11]

Over the five-year period, most people sentenced for sexual penetration of a child under 12 received a principal sentence of imprisonment (87.5% or 56 of 64 people). The rate of imprisonment sentences was highest in 2015–16 (94.4%) and lowest in 2016–17 (71.4%). All offenders whose offence attracted standard sentence classification received a sentence of imprisonment.

Source: Sentencing Advisory Council (2021) Sentencing Advisory Council, Victoria, Australia

10/10

Appendix C: Data Flows Between Scottish Criminal Justice Organisations[145]



[145] Scottish Government, "Main flow of data between ISCJIS partners 2009." <https://www.webarchive.org.uk/wayback/archive/20150218221752mp_/http://www.gov.scot/Resource/Doc/254431/0097170.pdf>

References

'A Review of Information Management in the Scottish Government'. Scottish Government, 5 January 2021. https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2021/06/review-of-corporate-information-management/documents/review-of-information-management-in-the-scottish-government/review-of-information-management-in-the-scottish-government/govscot%3Adocument/SG%2Breview%2Bof%2Bcorporate%2Binformation%2Bmanagement%2Bpublished%2BJune%2B2021.pdf.

Allen, Rob. 'The Sentencing Council and Criminal Justice: Leading Role or Bit Part Player?' Transform Justice, December 2020. https://www.transformjustice.org.uk/wp-content/uploads/2020/12/TJ_November_2020_IA_3.pdf.

'Annual Report 2020/21'. Sentencing Council of England and Wales, 21 June 2021. https://www.sentencingcouncil.org.uk/wp-content/uploads/6.7421_SC_Annual_Report_2020_21_WEB.pdf.

Ashworth, Andrew, and Rory Kelly. *Sentencing and Criminal Justice*. Bloomsbury Publishing, 2021.

Biggs, Hannah, Susan Reid, Kaushi Attygalle, Konstantina Vosnaki, Rachel McPherson, and Cyrus Tata. 'Public Perceptions of Sentencing Sexual Offences in Scotland: Qualitative Research Exploring Sexual Offences'. Scottish Sentencing Council, 2021. https://www.scottishsentencingcouncil.org.uk/media/2122/public-perceptions-of-sentencing-qualatative-research-of-sexual-offences-final-july-2021.pdf.

———. 'Public Perceptions of Sentencing Sexual Offences in Scotland: Qualitative Research Exploring Sexual Offences', 2021.

Black, Carolyn, Rachel Warren, Rachel Ormston, and Cyrus Tata. *Public Perceptions of Sentencing: National Survey Report*. Scottish Sentencing Council, 2019.

Bottomley, A Keith, and Ken Pease. *Crime and Punishment: Interpreting the Data*. Open University Press Milton Keynes, 1986.

Bottoms, Anthony. 'The Sentencing Council in 2017: A Report on Research to Advise on How the Sentencing Council Can Best Exercise Its Statutory Functions', 2018. https://www.sentencingcouncil.org.uk/wp-

content/uploads/SCReport.FINAL-Version-for-Publication-April-2018.pdf.

Bottoms, Anthony E, and John David McClean. *Defendants in the Criminal Process (Routledge Revivals)*. Routledge, 2013.

Bradshaw, Paul, Clare Sharp, Pete Duff, Cyrus Tata, Monica Barry, Mary Munro, and Paul McCrone. 'Evaluation of the Reforms to Summary Criminal Legal Assistance and Disclosure', 2012.

'Bromley Briefings Prison Factfile: Winter 2022'. Prison Reform Trust, 2022. http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Winter%202022%20Factfile.pdf.

Brown, Graeme. *Criminal Sentencing as Practical Wisdom*. SAGE Publications Sage UK: London, England, 2018.

Carlen, Pat. *Magistrates' Justice*. M. Robertson, 1976.

Chanenson, Steven L, and Douglas A Berman. 'Deciphering Data'. *Federal Sentencing Reporter* 33, no. 4 (2021): 217–20.

Charleton, Peter, and Lisa Scott. 'Throw Away the Key: Public and Judicial Approaches to Sentencing-Towards Reconciliation The Martin Tansey Memorial Lecture', 1–22. The Martin Tansey Memorial Lecture, 2013.

'Consultation Paper on Sentencing'. Dublin, March 1993.

Davis, Kenneth Culp. *Discretionary Justice: A Preliminary Inquiry*. LSU Press, 1969.

Dhami, Mandeep, and Ian Belton. 'Using Court Records for Sentencing Research: Pitfalls and Possibilities'. In *Exploring Sentencing Practice in England and Wales*, 18–34. Springer, 2015.

'Digital Strategy – 2018-2023', 22 June 2018.

'Efficiency of Prosecuting Criminal Cases through the Sheriff Courts ', September 2015.

Flood-Page, Claire, Alan Mackie, and G Britain. *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the Mid-1990's*. Home Office London, 1998.

Frankel, Marvin E. *Criminal Sentences: Law without Order*. New York: Hill and Wang, 1972.

Frase, Richard S. 'Sentencing Guidelines in American Courts: A Forty-Year Retrospective'. *Federal Sentencing Reporter* 32, no. 2 (2019): 109–23.

Frase, Richard S. 'Sentencing Principles in Theory and Practice'. *Crime and Justice* 22 (1 January 1997): 363–433. https://doi.org/10.1086/449266.

COPFS. 'Freedom of Information: COPFS Case Management System (R010137)', 2015. https://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/1055-copfs-case-management-system-r010137.

Freiberg, Arie, and Karen Gelb. *Penal Populism, Sentencing Councils and Sentencing Policy*. Willan, 2014.

Goriely, Tamara, P Duff, A Henry, M Knapp, P McCrone, and C Tata. 'THE PUBLIC DEFENCE SOLICITORS'OFFICE IN EDINBURGH: AN INDEPENDENT EVALUATION'. *Edinburgh: Scottish Executive*, 2001.

Gormley, Jay. 'The Inefficiency of Plea Bargaining'. *Journal of Law and Society*, forthcoming in Summer issue 2022.

———. 'The Nature and Extent of Sentence Discounting (PhD Thesis)'. University of Strathclyde, 2018.

Gormley, Jay M, and Cyrus Tata. 'To Plead? Or Not to Plead? "Guilty" Is the Question. Re-Thinking Plea Decision-Making in Anglo-American Countries'. In *Handbook on Sentencing Policies and Practices in the 21st Century*, edited by Cassia Spohn and Pauline Katherine Brennan, 208–34. New York: Routledge, 2019.

Gormley, Jay, Rachel McPherson, and Cyrus Tata. 'Sentence Discounting: Sentencing and Plea Decision-Making Literature Review'. Scottish Sentencing Council, December 2020. https://www.scottishsentencingcouncil.org.uk/media/2076/20201216-sentence-discounting-lit-review.pdf.

Gormley, Jay, Thomas O'Malley, Julian Roberts, and Cassia Spohn. 'Assessing Methodological Approaches to Sentencing Data and Analysis. Report 1: Ireland'. Sentencing Guidelines and Information Committee, 20 January 2022. https://judicialcouncil.ie/assets/uploads/1st%20Interim%20Report.pdf.

Gormley, Jay, Thomas O'Malley, Julian Roberts, Cassia Spohn, and Cyrus Tata. 'Report on Methodological Approaches to Sentencing Data Collection and Analysis: Report 1 (Ireland)'. Sentencing Guidelines and Information Committee, 20 January 2022. https://judicialcouncil.ie/assets/uploads/1st%20Interim%20Report.pdf.

Gormley, Jay, Julian V Roberts, Jonathan Bild, and Lyndon Harris. 'Sentence Reductions for Guilty Pleas: A Review of Policy, Practice and Research'. *Sentencing Academy*, 2020.

Gormley, Jay, and Cyrus Tata. 'Remorse and Sentencing in a World of Plea Bargaining'. In *Remorse and Criminal Justice: Multi-Disciplinary Perspectives*, edited by Steven Tudor, Richard Weisman, and Kate Rossmanith, 40–66. London and New York: Routledge, 2022. https://doi.org/10.4324/9780429001062.

Hood, Roger. *Sentencing in Magistrates' Courts: A Study in Variations of Policy*. Stevens, 1962.

Hood, Roger, Kenneth W Elliott, and Eryl Shirley. *Sentencing the Motoring Offender: A Study of Magistrates' Views and Practices*. Heinemann London, 1972.

Hood, Roger G, and Graça Cordovil. *A Question of Judgement: Race and Sentencing*. Commission for Racial Equality, 1992.

Hough, Mike, Jessica Jacobson, and Andrew Millie. 'The Decision to Imprison: Sentencing and the Prison Population', 2003.

Hutton, Neil. 'Beyond Populist Punitiveness?' *Punishment & Society* 7, no. 3 (2005): 243–58.

Hutton, Neil, and Cyrus Tata. 'A Sentencing Exception? Changing Sentencing Policy in Scotland'. *Federal Sentencing Reporter* 22, no. 4 (28 October 2010): 272–78. https://doi.org/10.1525/fsr.2010.22.4.272.

'Integration of Scottish Criminal Justice Information Systems (ISCJIS): Data Sharing Manual'. Scottish Government, 26 February 2020. https://www.gov.scot/publications/integration-of-scottish-criminal-justice-information-data-sharing-manual/.

'Investigating the Association between an Offender's Sex and Ethnicity and the Sentence Imposed at the Crown Court for Drug Offences'. Sentencing Council of England and Wales, 15 January 2020. https://www.sentencingcouncil.org.uk/publications/item/investigating-the-association-between-an-offenders-sex-and-ethnicity-and-the-sentence-imposed-at-the-crown-court-for-drug-offences/.

Isaac, Amber, Jose Pina-Sánchez, and Albert Montane. 'The Impact of Three Guidelines on Consistency in Sentencing'. Sentencing Council of England and Wales, 2021. https://www.sentencingcouncil.org.uk/wp-content/uploads/The-impact-of-three-guidelines-on-consistency-in-sentencing.pdf.

Jacobson, Jessica, Gillian Hunter, and Amy Kirby. *Inside Crown Court: Personal Experiences and Questions of Legitimacy*. *Inside Crown Court: Personal Experiences and Questions of Legitimacy*. Policy Press, 2015. https://www.icpr.org.uk/theme/courts-court-users-and-judicial-process/inside-crown-court.

Jamieson, Fiona. 'Judicial Independence: The Master Narrative in Sentencing Practice'. *Criminology and Criminal Justice*, 2019. https://doi.org/10.1177/1748895819842940.

Judicial Commission of New South Wales. 'Judicial Information Research System (JIRS)', n.d. https://www.judcom.nsw.gov.au/judicial-information-research-system-jirs/.

'Justice Analytical Programme 2019-20', 24 June 2019.

Kramer, John H, Robin L Lubitz, and Cynthia A Kempinen. 'Sentencing Guidelines: A Quantitative Comparison of Sentencing Policies in Minnesota, Pennsylvania, and Washington'. *Justice Quarterly* 6, no. 4 (1989): 565–87.

Lammy, David. 'The Lammy Review An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System'. UK Government, 8 September 2017.

Lawrence, Alison. 'Data Analysis Is Driving Justice Reforms'. *State Legislatures Magazine*, 31 July 2020. https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-data-analysis-is-driving-justice-reforms-magazine2020.aspx.

———. 'Making Sense of Sentencing: State Systems and Policies'. National Conference of State Legislatures Washington, DC, 2015. https://www.ncsl.org/documents/cj/sentencing.pdf.

Loeffler, Charlies. 'An Overview of US Sentencing Commission Data'. *Federal Sentencing Reporter* 16, no. 1 (2003): 14–17.

Maguire, Mike, and Susan McVie. 'Crime Data and Criminal Statistics: A Critical Reflection'. In *The Oxford Handbook of Criminology*, 6th ed. Oxford: Oxford University Press, 2017. https://doi.org/10.1093/he/9780198719441.003.0008.

Marsh, Nicola, Emma McKay, Clara Pelly, and Simon Cereda. 'Public Knowledge of and Confidence in the Criminal Justice System and Sentencing–A Report for the Sentencing Council'. *London: Sentencing Council*, 2019. https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf.

Maslen, H, and J V Roberts. 'Remorse and Sentencing: An Analysis of Sentencing Guidelines and Sentencing Practice'. *Sentencing Guidelines: Exploring the English Model*, 2013, 122–49.

Maslen, Hannah. *Remorse, Penal Theory and Sentencing*. Bloomsbury Publishing, 2015.

Mason, Thomas, Nisha de Silva, Nalini Sharma, David Brown, and Gemma Harper. 'Local Variation in Sentencing in England and Wales'. *Ministry of Justice, London*, 2007.

Millie, Andrew, Jacqueline Tombs, and Mike Hough. 'Borderline Sentencing: A Comparison of Sentencers' Decision Making in England and Wales, and Scotland'. *Criminology & Criminal Justice* 7, no. 3 (1 August 2007): 243–67. https://doi.org/10.1177/1748895807078866.

'Model Penal Code: Sentencing, Proposed Final Draft'. American Law Institute, 2017. https://www.ali.org/publications/show/sentencing/.

‘National Assessment of Structured Sentencing’. U.S. Department of Justice, Bureau of Justice Assistance, n.d. https://www.ojp.gov/pdffiles/strsent.pdf.

Pina-Sánchez, Jose, Ian Brunton-Smith, and Guangquan Li. ‘Mind the Step: A More Insightful and Robust Analysis of the Sentencing Process in England and Wales under the New Sentencing Guidelines’. *Criminology & Criminal Justice*, 9 November 2018, 174889581881189. https://doi.org/10.1177/1748895818811891.

Pina-Sánchez, Jose, and Robin Linacre. ‘Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey’. *British Journal of Criminology* 53, no. 6 (2013): 1118–38.

Scottish Prison Service. ‘Publications’. Accessed 20 October 2021. https://www.sps.gov.uk/Corporate/Publications/Publications.aspx.

Roberts, Julian. *Exploring Sentencing Practice in England and Wales*. Springer, 2015.

Roberts, Julian, and Andrew Ashworth. ‘Sentencing Guidance, the Sentencing Council, and Black & Ethnic Minority Offenders. London: Sentencing Academy.’ Sentencing Academy, 2022.

Roberts, Julian, and Jonathan Bild. ‘Ethnicity and Custodial Sentencing: A Review of the Trends, 2009-2019’. Sentencing Academy, June 2021. https://sentencingacademy.org.uk/wp-content/uploads/2021/06/Ethnicity-and-Custodial-Sentencing-1.pdf.

Roberts, Julian V. ‘Complying with Sentencing Guidelines: Latest Findings from the Crown Court Sentencing Survey’. In *Sentencing Guidelines*. Oxford: Oxford University Press, 2013. https://doi.org/10.1093/acprof:oso/9780199684571.003.0007.

Roberts, Julian V. ‘Deferred Sentencing: A Fresh Look at an Old Concept’. *Criminal Law Review, in Press*, 2022.

Roberts, Julian V, and Ben Bradford. ‘Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends’. *Journal of Empirical Legal Studies* 12, no. 2 (2015): 187–210.

Roberts, Julian V, Mike Hough, and JM Hough. *Changing Attitudes to Punishment: Public Opinion, Crime and Justice*. Routledge, 2002.

Roberts, Julian V, and Jose Pina-Sanchez. ‘Previous Convictions at Sentencing: Exploring Empirical Trends in the Crown Court’. *Criminal Law Review* 8 (2014): 575–88.

Roberts, Julian V, and Anne Rafferty. ‘Sentencing Guidelines in England and Wales: Exploring the New Format’. *Criminal Law Review*, no. 9 (2011).

Roberts, Julian V, and Jose Pina Sanchez. 'Paying for the Past: The Role of Previous Convictions at Sentencing in the Crown Court'. In *Exploring Sentencing Practice in England and Wales*, 154–72. Springer, 2015.

Schanzenbach, Max M, and Emerson H Tiller. 'Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform'. *The University of Chicago Law Review* 75, no. 2 (2008): 715–60.

'Scottish Crime and Justice Survey 2019/20'. Scottish Government, 16 March 2021. https://www.gov.scot/publications/scottish-crime-justice-survey-2019-20-main-findings/.

Scottish Courts and Tribunals Service. 'SCTS Official Published Statistics'. Accessed 19 October 2021. https://www.scotcourts.gov.uk/official-statistics.

'Sentencing Snapshot 266: Sentencing Trends for Causing Injury Recklessly, 2016-17 to 2020-21'. Sentencing Advisory Council, n.d. https://www.sentencingcouncil.vic.gov.au/sites/default/files/2021-12/Snapshot_266_Causing_Injury_Recklessly.pdf.

Spohn, Cassia. *How Do Judges Decide?: The Search for Fairness and Justice in Punishment*. SAGE Publications Inc, 2009.

Stith, Kate, and Jose A Cabranes. *Fear of Judging: Sentencing Guidelines in the Federal Courts*. University of Chicago Press, 1998.

Tarling, Roger. 'Sentencing Practice in Magistrates' Courts Revisited'. *The Howard Journal of Criminal Justice* 45, no. 1 (2006): 29–41. https://doi.org/10.1111/j.1468-2311.2006.00402.x.

Tata, Cyrus. 'Beyond the Technology of Quick Fixes. Will the Judiciary Act to Protect Itself and Short Up Judicial Independence? Recent Experience from Scotland'. *Federal Sentencing Reporter* 16, no. 1 (21 October 2003): 67–75. https://doi.org/10.1525/fsr.2003.16.1.67.

———. 'Conceptions and Representations of the Sentencing Decision Process'. *Journal of Law and Society* 24, no. 3 (1997): 395–420.

———. *Sentencing: A Social Process Re-Thinking Research and Policy*. Cham: Springer International Publishing, 2020. https://doi.org/10.1007/978-3-030-01060-7.

———. 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process'. *Social & Legal Studies* 16, no. 3 (2007): 425–47.

Tata, Cyrus, Nicola Burns, Simon Halliday, Neil Hutton, and Fergus McNeill. 'Assisting and Advising the Sentencing Decision Process: The Pursuit of "Quality" in Pre-Sentence Reports'. *The British Journal of Criminology* 48, no. 6 (2008): 835–55.

Tata, Cyrus, and Neil Hutton. 'What "rules" in Sentencing? Consistency and Disparity in the Absence of "Rules"'. *International Journal of the Sociology of Law* 26, no. 3 (1998): 339–64.

Tonry, Michael H. *Sentencing Matters*. Oxford University Press, 1997.

Uhrig, Noah. *Black, Asian and Minority Ethnic Disproportionality in the Criminal Justice System in England and Wales*, 2016. http://www.justice.gov.uk/publications/research-and-analysis/moj.

Walker, Samuel. *Taming the System: The Control of Discretion in Criminal Justice, 1950-1990*. Oxford University Press on Demand, 1993.

Wasik, M. 'Editorial: The Crown Court Sentencing Survey'. *Criminal Law Review* 569 (2012).

Authors of this Interim Report

This research is led by the Centre for Law, Crime & Justice, University of Strathclyde in collaboration with an international team of experts.

Professor Cyrus Tata, PhD is Professor of Law and Criminal Justice at the University of Strathclyde, Scotland. He has over 25 years of experience conducting empirical research studies, funded by governmental bodies and research councils – both in Scotland and abroad. These include: assessments of approaches to collecting and representing sentencing data (including for a Sentencing Information for the High Court in Scotland); the role of pre-sentence reports; public perceptions of sentencing; the impact of legal aid reforms on case outcomes; plea decision-making and negotiation; and the role of emotion (including remorse). His recent book is entitled *Sentencing: A Social Process – Rethinking Research & Policy* (Springer).
https://www.strath.ac.uk/staff/tatacyrusprof/

Tom O'Malley, LLM is Tom O'Malley is a Member of the Inner Bar of Ireland and Associate Professor of Law, NUI Galway. A recent member of the Irish Law Reform Commission, he is also a practising Barrister. Acknowledged as Ireland's most eminent sentencing scholar, he is frequently invited to speak to judicial, policy and practice audiences in Ireland and abroad and he has served on numerous committees and working groups at national and international level. Tom is the author of numerous works on sentencing in Ireland often drawing on comparison with other jurisdictions. He is currently working on a new book on *Sentencing Guidelines*.
https://www.nuigalway.ie/our-research/people/law/tomomalley/

Professor Julian Roberts, PhD is Professor of Criminology at the University of Oxford. One the world's leading sentencing scholars, Julian was a Member of

the Sentencing Council of England & Wales (2008-18). He was Chair of the Council's Research subgroup which designed and administered all the Council's data collection. Prof Roberts is one the world's foremost scholar in the field of research into of public opinion, attitudes, confidence about sentencing and punishment. His seminal work in that field has influenced reforms around the world and informed the creation and development of sentencing council-like bodies. Most recently, his comparative work was recognised internationally when he was awarded the *American Society of Criminology 2021 Sellin-Glueck Award* for scholarship that considers Criminal Justice Internationally and Comparatively.

https://www.law.ox.ac.uk/people/julian-roberts

Professor Cassia Spohn, PhD is Foundation Professor and Regents Professor in the School of Criminology and Criminal Justice at Arizona State University. The author of numerous books and articles including on sentencing data, guidelines, race and ethnicity, gender and sexual offences, Prof Spohn is one of the world's most renowned sentencing experts in the USA. She is a Fellow of the *Academy of Criminal Justice*, and *the American Society of Criminology* and *ASC's Division on Corrections and Sentencing* presented Prof Spohn with its *Lifetime Achievement Award*.
https://publicservice.asu.edu/content/cassia-spohn

Dr Jay Gormley, is post-doctoral researcher at the Centre for Law, Crime & Justice, University of Strathclyde. Specialising in criminal justice and sentencing, he has worked with several guideline-creating bodies and critical policy influencers in various jurisdictions, including the Scottish Sentencing Council, the Sentencing Academy, and Community Justice Scotland. His most recent publication (with Cyrus Tata) is 'Sentencing and Remorse in a World of Plea Bargaining' in *Remorse & Criminal Justice* (eds S Tudor et al, 2022 Routledge); and his article 'The Inefficiency of Plea Bargaining' will appear in the *Journal of Law & Society* in spring 2022.