Assessing Approaches to Sentencing Data Collection and Analysis

FINAL REPORT

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Chapter 1: Introduction to the Report

1.1 Background

The Judicial Council was established on 17th December 2019 pursuant to the Judicial Council Act 2019. The Council is an independent body whose members are judges in Ireland and constitute a separate and independent branch of Government. Section 7 of the Judicial Council Act 2019 sets out the functions of the Judicial Council. As part of its statutory functions, the Council is required to adopt and publish in such manner as it considers appropriate sentencing guidelines. As set out in s. 23(2), the Sentencing Guidelines and Information Committee (hereinafter the SGIC) of the Judicial Council is required to:

> *"(a) prepare and submit to the Board for its review draft sentencing guidelines,*
>
> *(b) prepare and submit to the Board for its review draft amendments to sentencing guidelines adopted by the Council,*
>
> *(c) monitor the operation of sentencing guidelines,*
>
> *(d) collate, in such manner as it considers appropriate, information on sentences imposed by the courts,*
>
> *(e) disseminate that information from time to time to judges and persons other than judges."*

Section 23(4) authorises the Committee to undertake tasks such as collating information on decisions of the courts relating to sentencing and conducting research on court sentencing practice.

The statutory aims of the SGIC are important but also onerous. Indeed, in some ways, the SGIC has a more ambitious mission statement than similar bodies in other jurisdictions. Being a relatively new body, the SGIC also faces additional challenges compared to more established comparable bodies in other jurisdictions.

To assist with the discharge of its functions, the SGIC commissioned us as the independent academic research team to assess the methodological approaches to sentencing data collection and analysis in Ireland, as well as to evaluate the utility of methodologies employed in other jurisdictions. This document is the final report submitted by the academic research team us. It brings together various lessons from experiences around the world and makes several recommendations to the SGIC.

The substance of the report is divided into four chapters. This chapter (Chapter 1) outlines the purpose of this report and provides a short overview of the key findings. Chapter 2 explores the data available to the SGIC in Ireland and its limitations. Chapter 3 provides a review and analysis of data collection methodologies adopted in several jurisdictions where a body equivalent to the SGIC has been established. Chapter 4 synthesises the material from Chapters 2 and 3 to draw conclusions and make recommendations on the steps to be taken to promote high-quality sentencing data that will enable the fulfilment of the SGIC's statutory purposes.

1.2 Summary of Chapter Findings

1.2.1 Data Needs in Ireland

Chapter 2 sets out what is known about sentencing practices in Ireland. It identifies several significant gaps in the data that threaten to prevent the SGIC from fulfilling its statutory aims.

The chapter scrutinises the primary sources of sentencing data available in Ireland: statistical data derived from administrative datasets, research by the former Judicial Researchers' Office, academic research, and the Irish Sentencing Information System. Additionally, we conducted a small number of semi-structured interviews with individuals who have particular knowledge and experience in using and interpreting sentencing data in Ireland.

1.2.1.1 Key Findings About Irish Sentencing Data

- *Quality of Data about Sentencing Practices.* Data relevant to sentencing is available in Ireland, but it is not sufficiently detailed or comprehensive enough to provide an accurate portrait of current sentencing practices.

- *Data on the District Court*. There are particularly acute information deficits with regard to the sentencing practices in the District Court, which hears the overwhelming majority of cases.

- *Administrative Data*. Criminal justice agencies collect data as part of fulfilling their functions, and it is from this administrative data that official statistics are derived. Yet, while undoubtedly useful for some purposes, the available official statistical data are inadequate for the specific purpose of providing a meaningful or accurate picture of judicial sentencing practices. The kind of reliable, comprehensive, and up-to-date data needed to identify (for example) sentencing patterns for particular offences is absent.

- *Prison Service Data*. Of the different agencies collecting administrative data for the discharge of their functions, the statistical data included in the Prison Service annual reports comes closest to providing information that is relatively helpful for understanding sentencing practices involving custody. In making this observation, however, it should be remembered that custodial sentences are only a small fraction of all sentences passed. Yet, even those data, for the most part, lack the degree of specificity needed to draw definitive conclusions about current custodial sentencing practice.

    - For instance, the Prison Service's data show the total number of persons sentenced to imprisonment in 2020, categorised by offence type and length of the prison sentence. However, from the perspective of providing information about

sentencing practices, there are three problems. Firstly, the offence categories used are so broad that it is not clear which kinds of conduct might be included within them. Secondly, the figures themselves reveal nothing about the nature or circumstances of the offences or about any offender-related variables, such as the pleas entered or previous convictions. Thirdly, there is the significant problem that multi-conviction cases appear to be poorly represented in the data.

- *Improving Administrative Data*. Administrative data held by different agencies are fragmented and often incommensurable. This impedes insight into how cases progress through the criminal justice system. For understandable reasons, agencies use their own case-counting, recording, and categorisation rules and procedures. These inter-agency differences mean that combining the data gathered by different agencies would be a long term ambition. At least for the foreseeable future, linking administrative datasets in any comprehensive and systematic way is unlikely to provide the desired insights into real-world sentencing practices.

    - Existing data collection, for example, in the Prison Service, could and should be developed further to include the additional information and level of detail about case characteristics.

- *Undertaking Routine Research*. The former Judicial Research Office (JRO) (now the Research Support Office) conducted occasional analyses of sentencing practices that could be used to assist judges in fulfilling their functions. It may be helpful if a synergy develops between the research offices of the Courts Service and the Judicial Council so that they can share relevant information and data. However, that would be a matter of discussion between the Service and the Council. Regardless, in any event, the SGIC itself will require a research office to collect and analyse data to enable the Committee to fulfil statutory its functions.

- *Using Court Guidance to Inform Data Collection*. Consideration in this report is also given to the development of court guidance. While sentencing guidance should inform first-instance sentencing practices, empirical data about first-instance sentencing is still required. However, guidance can be a valuable resource for the design of data collection methodologies in Ireland.

- *In-Depth Research Studies*. The report considers ad-hoc research studies. The strength of such research is that it tends to prioritise depth. By examining a particular question, research provides a level of detail and explanation that official administrative data, for example, simply cannot. In this way, ad-hoc research is an invaluable supplement to other sources of data.

- *Learning from the Irish Sentencing Information System.* In moving forward, we recommend that the SGIC reflects upon Ireland's own Sentencing Information System (ISIS). The ISIS project contended with many of the limitations of sentencing data currently at issue. Even if the resources to revitalise ISIS are not forthcoming, the project still offers substantial insights into how meaningful sentencing data could be collected in the Irish context.

1.2.2 Sentencing Data in Other Jurisdictions

Chapter 3 provides a review and analysis of a range of data collection methodologies adopted in three broadly comparable countries 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 (particularly New South Wales and Victoria).

1.2.2.1 The USA

- At a federal level, the USA has comparatively high-quality data compiled by the United States Sentencing Commission (USSC). These data include individual offender data files with 100,000 variables. The USSC data files of sentencing information are publicly available, which means that they 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 (many even 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 improving sentencing decision-making and sentencing policy.

1.2.2.2 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/overarching 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 offences commonly encountered by the courts.

- 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 for 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 a 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 in 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; their ability to assess issues and the likelihood of compliance with new guidelines; their resources to forecast the likely impact of policy changes to sentencing; and their ability to engage with and understand public perceptions about sentencing

- 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 Sentencing Council 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). The structure of the CCSS may help to inform the SGIC if it seeks to adopt a survey or census method for data collection.

- CCSS completion rates varied but overall completion 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 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 to promote awareness of sentencing.[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 Council 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.

1.2.2.3 Scotland

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

- The main sources of data on criminal justice 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 practice is limited. However, various empirical research studies and literature reviews have been commissioned by the 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 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 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 sentencing information in the world - combining numerical data patterns and narrative information.*
- *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 Courts 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 without 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.*

1.2.3 Chapter 4: Conclusions and Recommendations for Ireland

Chapter 4 draws conclusions and provides recommendations for the SGIC. It finds that in light of the multiple statutory functions allocated to the SGIC, reliable data will be needed to ascertain current practice, develop guidelines, monitor the effects of guidelines, and revise guidelines as appropriate. It is clear that the current data are inadequate to achieve these functions.

Precisely how data collection is to be approached is a matter for the consideration of the SGIC. The decision as to how to proceed will involve various factors, many of which cannot be ascertained at the time of writing. However, we note that the limited available data places the SGIC at a distinct disadvantage compared, for example, to England and Wales and certain jurisdictions of the United States. Therefore, the SGIC will have to expend proportionally more resources than some of its counterparts to fulfil its functions.

1.2.3.1 Key Recommendations

We strongly recommend that:

1. The SGIC should openly recognise that current data about sentencing in Ireland are profoundly limited and inadequate for its purposes. The scale of this challenge can only be remedied by a systematic, concerted effort, underpinned by significant and sustained investment.
2. The SGIC should, as part of developing its strategic objectives, prioritise the creation of a strategy to tackle the challenges we outline in recording, collating, and representing data. This strategy should make the District Court a high priority.
3. The SGIC should recognise the need for both depth and breadth in sentencing data. It should work towards establishing a database through a new data collection exercise. In doing so, it may seek to combine administrative data from various criminal justice agencies. The breadth of the database should be complemented by the depth

of individual research studies commissioned to examine important issues.

4. The SGIC should consider the need for appropriately qualified personnel to record data in a manner that balances the virtues of consistency in recording practices with familiarity of the case.
5. The SGIC should carefully consider the methodological challenges of representing sentences when persons are convicted of more than one offence in the same case (multi-conviction cases).
6. The SGIC should demonstrate its commitment to open and constructive dialogue, not least to assist in the development of its future research priorities and strategic objectives. We suggest that the SGIC should also draw on academic expertise for comment and constructive assistance, as well as having a role in anonymised peer review of SGIC research reports.
7. Crucially, to facilitate these recommendations and to provide the SGIC with the necessary research capacity, we recommend in the strongest terms that a Research Unit be established and properly resourced to operate under the aegis of the Judicial Council.

Chapter 2: Data in Ireland

2.1 Introduction

This chapter provides a survey of existing sentencing data in Ireland, drawing mainly on published reports of the various criminal justice agencies. We draw attention to the limitations of this data, but also to the potential for developing innovative collection and analytical practices to render the data more practically useful for sentencing purposes. We shall deal with this matter further in our final chapter, especially in light of the practices and experiences of the other jurisdictions (the subject of Chapter 3).

In this chapter, we also note the very impressive body of appellate case law, mainly from the Court of Appeal, on a wide range of sentencing issues, including some important guideline judgments. When drawing up this chapter, we consulted with some leading criminal justice scholars within Ireland to get their perspective on the utility of the currently available data. These consultations proved to be very helpful.

2.1.1 The Importance of Sentencing Data

Whether to improve public understanding of sentencing or to develop and assess policy, reliable, comprehensive and up-to-date information about sentencing is essential. The creation of effective and meaningful official sentencing norms (such as guidelines), whether by statute, case law, or other body such as a commission depends on and must be informed by systematic and reliable knowledge about sentencing practices in real cases. While individual practitioners, judges, and lawyers build up a personal sense of 'normal' practices, inevitably, this can only be a partial view of national reality. Without reliable empirical data, there is the ever-present danger of creating norms that are semi-detached from the reality of differing and varying practices on the ground. The development of reliable, comprehensive and up-to-date information about what is happening (including, for example, how official norms

play out in real cases) affords a greater chance of sentencing policies and practices being effective and helps to contribute overall to a more genuinely consistent and just approach. This point, to understand practices so as to improve them, is well made in a lecture:

> *"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 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." (Hon. Mr Justice Peter Charleton and Lisa Scott)."*[2]

Understanding sentencing practices in Ireland poses several challenges. Sentencing in Ireland is discretionary.[3] When sentencing, judges are subject to relatively few constraints, and there is little in the way of formal guidance compared to some other jurisdictions. However, judicial discretion is controlled, in the first instance, by the statutory maximum sentence attaching to the offence of conviction and, in the case of the District Court, by the general jurisdictional limit to which that court's sentencing powers are subject. Sentencing judges must also have regard to the general sentencing principles, established and endorsed by the superior courts. Foremost among these is the principle of proportionality which enjoys a constitutional status in Ireland. Further, there is a growing number of formal and informal guideline judgments from the Court of Appeal and Supreme Court to which regard must be had and that provide valuable guidance for the sentencing of the offences to which they relate.[4]

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[2] 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), 22.

[3] Niamh Maguire, 'Consistency in Sentencing', *Judicial Studies Institute Journal* 2 (2010): 14–54; D Healy and I O'Donnell, 'Crime, Consequences and Court Reports', *Irish Criminal Law Journal* 20, no. 1 (2010): 2–7.

[4] John Edwards, 'Sentencing Methodology - Towards Improved Reasoning In Sentencing Title', *Irish Judicial Studies Journal* 3 (2019): 41.

While flexibility in sentencing is important in Ireland, concerns over disparity and inconsistency [5] have been longstanding and never entirely assuaged. Importantly, in the 1990s, the Law Reform Commission noted that "intuitively, the existence of inconsistency here is a certainty."[6] Even today, sentencing data in Ireland remains limited, making it difficult to find out the answers even to relatively simple questions about Irish sentencing practices.

While other jurisdictions have created Sentencing Councils (some long-established) and other similar bodies, Ireland has only recently followed suit as the Judicial Council Act 2019 established the basis for the Sentencing Guidelines and Information Committee (SGIC). Ireland's new foray into this area is perhaps emblematic of the limited sentencing data reform seen in the country.[7]

All jurisdictions that move to develop meaningful sentencing guidelines require sufficiently detailed sentencing statistics. While court guidance can be used to inform the creation of normative guidelines (see Chapter 3), monitoring the impact of guidelines on trial court (i.e. first-instance)[8] sentencing practices require additional data. Where existing data is insufficient, jurisdictions will need to improve this otherwise the impact of guidelines will be unknowable.[9]

However, it should be noted that guideline creating bodies have not *necessarily* improved sentencing data in and of themselves. For example, the Sentencing Guidelines Council (SGC) of England and Wales did not greatly improve sentencing data. This resulted in limitations that the subsequent Sentencing

[5] In a nutshell, genuine consistency in sentencing means treating similar cases similarly; inconsistency or disparity means treating similar cases differently (for example on the basis of which individual judge is passing sentence).

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

[7] The Irish Sentencing Information System is a notable exception (see Section 0).

[8] Throughout this report we refer to sentencing by 'trial courts' as meaning 'first-instance' sentencing to differentiate it from appellate court sentencing practices. By 'trial courts' we mean all sentencing at first instance, regardless of whether or not a case went to a contested trial or was sentenced (as is the case in the overwhelming majority) following a guilty plea.

[9] Chapter 4 will detail recommendations concerning how data can be enhanced.

Council had to address.[10] Thus, while it is possible guidelines can be created in the absence of data, this can be problematic.

In fulfilling its functions, the SGIC can, amongst other things, collect data on sentencing. In this regard, the novelty of the SGIC places Ireland in an interesting position. Ireland may have been later than some other jurisdictions such as England and Wales in moving to introduce sentencing guidelines, but it now has the advantage of being able to learn from the experiences of jurisdictions that have adopted guidelines or are in the process of doing so.[11]

2.1.2 Sentencing Data Sources in Ireland

In Ireland, there are three main sources of data on sentencing practice: administrative data from criminal justice organisations, which is used to produce criminal justice statistics; data that was collected by the former Judicial Research Office (JRO); and data stemming from research that has been carried out in Ireland. While these are the main sources of data available to officials, two other notable resources are the Irish Sentencing Information System (ISIS) and court guidance.

Regarding ISIS, Ireland pioneered an innovative sentencing information system (with the somewhat unfortunate acronym). While ISIS has not been maintained, meaning much of its data is now out of date, the project tackled many of the challenges (specifically in the Irish context) that this report highlights as relevant to the SGIC. As such, the methodological considerations underpinning ISIS are still relevant – regardless of whether it is desired to revitalise ISIS.

Concerning court guidance, one might also note various guidelines that have been issued by the senior appeal courts in Ireland. Guidance of this nature provides valuable insight into a range of issues that arise at sentencing, as well as being obviously valuable to trial judges. Indeed, guidance might be described as providing an interpretative legal context in that while it is not empirical data

[10] See Chapter 3.

[11] Maguire, 'Consistency in Sentencing', 16.

about practice in trial courts, it can aid our understanding of statistics pertaining to practice. This chapter, therefore, examines court guidance.

2.2 Criminal Justice Statistics

In this section, we provide a review of statistical information that is now publicly available. The available information is provided by different criminal justice agencies, except for recorded crime statistics which are produced by the Central Statistics Office (CSO), though these, in turn, are furnished by the Garda Síochána. Two exemplar extracts are provided in Appendix A: one from the Courts Service and one from the Prison Service.[12]

Criminal justice agencies necessarily collect administrative data as part of fulfilling their functions, and it is from this administrative data that statistics are derived. Yet, as will be apparent from the remainder of this chapter, our general conclusion is that the available statistical data, while undoubtedly useful for some purposes, are inadequate for the specific purpose of identifying judicial sentencing practices with sufficient precision. They do fulfil this role to some limited extent by, for example, broadly indicating the frequency with which the criminal courts deploy various sentencing options (on which there is some information in the Courts Service's annual reports). However, the kinds of data needed to identify sentencing patterns for particular offences are lacking.

The statistical data included in the Prison Service's annual reports comes closest to answering this need, but even that, for the most part, lacks the degree of specificity required to draw accurate conclusions about sentencing practice. Our observations on the limitations of the data in the various reports considered here should not, of course, be interpreted as a criticism of the agencies that produced them. The production of such annual reports is an exercise in public accountability. Their predominant purpose is to describe the performance of the relevant agencies during the year under review, to account for the funding provided to them, etc. We are viewing them through a sentencing lens, and our

[12] 'Courts Service Annual Report 2020', 28 July 2021; 'Annual Report 2020: Creating A Better Environment', 2020.

sole concern is to assess the usefulness of the data they provide for sentencing purposes and for the development of guidelines.

2.2.1 Statistics on Recorded Crime

At first sight, recorded crime data may not seem particularly germane to an analysis of sentencing practice. Yet, reliable information about the incidence and prevalence of particular kinds of offending, and about changing patterns of offending, is essential for making projections about the extent and nature of the future workloads of the various criminal courts. Obviously, only a certain percentage of recorded crimes will result in prosecutions, and only a certain percentage of that again will result in conviction and sentence. However, at the level of policymaking, regard must always be had to the capacity of the criminal justice system, and of the various institutions within that system, to cope with present and projected demands.

For instance, figures published in June 2021 by the CSO show a sharp fall in the recorded incidence of certain offences during the year to March 2021. Recorded burglaries declined by 45% and thefts by 31%. This, in all probability, was due to the profound effects of COVID-19 and may therefore be a temporary phenomenon. Still, it illustrates the utility of having such information, given the likely impact of such occasional fluctuations in the volume of cases (in respect of certain offences at least) that will come up for sentence.

2.2.1.1 General Analyses Published by the CSO

The CSO also publishes analyses of re-offending rates periodically. For instance, it has recently published a valuable report on Prison Re-Offending Statistics 2011-2018. This report provides re-offending estimates of individuals released from prison in 2015 (3-year re-offending) as well as estimates for those released in 2018 (1-year re-offending). It records, for example, that 6 out of 10 individuals released from prison in 2015 re-offended within three years of release. The CSO has also produced Probation Re-Offending Statistics. However, it is beyond the scope of the present report to consider these analyses in any detail beyond pointing to their clear relevance for the purpose of sentencing policymaking.

Going forward, there may well be opportunities for the Sentencing Guidelines and Information Committee to work collaboratively with the CSO in terms of exploring possibilities for further research, especially on matters that have a bearing on sentencing practice. Sentencers and agencies developing guidelines need to have an accurate idea of the relative re-offending rates of different offences.

2.2.1.2 Office of the Director of Public Prosecutions

The Director of Public Prosecutions (DPP) has published an annual report since 1999, the most recent, at the time of writing, being for 2019. As might be expected, this report is concerned with the work of the DPP's office for the year under review. It includes a good deal of detailed statistical information on the outcomes of cases prosecuted on indictment in the various criminal courts.

However, no information is provided on sentencing, apart from a brief statistical summary of applications for review of sentences on the grounds of undue leniency. But, beyond indicating the number of applications that were successful and the refused, the report reveals nothing further about the nature or level of the sentences involved or the categories of offence for which they were imposed.

2.2.1.3 The Courts Service

The Courts Service was established by statute in 1998, and it has produced an annual report since 2000. This report, unlike the others mentioned so far, does provide some statistical information on sentencing, but of a very general nature for the most part. The format in which this information is presented has varied somewhat over the years, so we shall concentrate here on the Annual Report for 2020.

The Annual Report for 2020 includes reasonably detailed statistics on the outcome of cases prosecuted in the various criminal courts, including the nature of the penalties imposed or orders made. However, it merely sets out the total number of such penalties or orders for broad categories of offences. Thus, in 2020, more than 15,000 drug offences were dealt with summarily in the District Court. Of these, about 2,500 resulted in a fine, 403 in imprisonment, 504 in a suspended sentence, and (rather unhelpfully for the present purpose) more than 4,300 in "other" disposal. A similar pattern is followed in respect of convictions in the Circuit Court. Again, the offence categories are very broad, e.g., "Road Traffic", "Drugs", "Sexual", "Larceny/Fraud/Robbery" and "Assault."[13]

The raw data on sentencing outcomes in the District and Circuit Courts, the two key criminal courts in terms of case volume, is of little practical use for present purposes, beyond indicating in broad terms the relative use of the various sentencing options. No information is given on the level of fines or the length of prison terms. Additionally, the offence categories, as already noted, are broad in any event. Indeed, the generally limited data pertaining to the District Court is of particular note given the high proportion of offences it deals with.[14]

Somewhat more detailed information is provided on sentences imposed in the Central Criminal Court. It is clearly more viable to gather this information given the limited number of offences (primarily murder, rape and aggravated sexual

[13] It is surprising to see a reference to "larceny" 20 years after the enactment of the Criminal Justice (Theft and Fraud Offences) Act 2001.

[14] Of 225,776 offences resolved in 2020, 194,796 were in the District Court. See the 'Courts Service Annual Report 2020', 39.

assault) within the exclusive jurisdiction of this court. The number of cases with which it has to deal, at least when compared with the District and Circuit Courts, is relatively low.

The 2020 Report sets out both the nature of the penalties provided for the offences that resulted in convictions in the Central Criminal Court and the lengths of the prison sentences imposed. Obviously, all murder convictions resulted in life sentences. But it is useful to know that in respect of rape, no fully suspended sentence was imposed, although there were 50 partly suspended sentences as well as 114 unsuspended sentences of imprisonment. Of the prison sentences imposed (including partly suspended sentences), 22 were for terms of 2 to 5 years, 30 for terms of 5 to 10 years and 114 for more than 10 years. This is reasonably helpful though, of course, no information is provided about the circumstances of the cases, the pleas entered, the offenders' previous records and other relevant factors. The next category for which such information is given (in the Central Criminal Court) is simply "Sexual Offences". This probably consists mainly of sexual assaults, but it is still too broad to enable any useful conclusions about sentencing practices to be drawn from it.

2.2.1.4 The Probation Service

The Probation Service is a key agency within the criminal justice system. It discharges a range of important functions, which include the preparation of court reports, the supervision of offenders within the community and providing various services for prisoners in custody. The Irish Probation Service produces an annual report with much useful information but, again, not of a kind that permits reliable conclusions to be drawn about judicial sentencing practices.

Some of the global statistics in this report indicate the extent of the contribution made by the Probation Service to the criminal justice process. In 2020, for instance, it dealt with more than 15,500 offenders in the community and completed more than 9,000 probation reports. The 2020 Report also includes general information on the number of court orders which required supervision of some kind by the Probation Service: e.g. 1,698 community service orders and

more than 1,300 fully or partially suspended sentences with supervision.[15] There is also a great deal of other information but, unfortunately for present purposes, scarcely any on the offences or categories of offenders in respect of which the various kinds of orders were made. There is one table entitled "Offence Breakdown of all Referrals and Orders made 2020", but this is largely uninformative.[16] It merely indicates the percentage of orders (probation supervision and community service orders) made in respect of different offences. For example, 20.9% of probation orders were for drug offences, 21.2% for theft and so forth.

2.2.1.5 The Prison Service

The annual report of the Irish Prison Service is by far the most useful of all the reports considered here in terms of indicating sentencing patterns.[17] The statistical data in this report may be divided into two broad categories. First, there is a good deal of general data on matters such as the overall number of committals for the year under review, the age profile of prisoners, the ethnic origin of the offender, the population of the different prison establishments, patterns over time in the average daily population and so forth. These statistics represent a good point of departure for a more comprehensive portrait of current sentencing practices.

Secondly, and most relevant for our present purposes, there is a snapshot of the prison population on a given date, usually towards the end of the year. In the 2020 report, two appendices are of particular value. Appendix II sets out the length of the sentence being served by those in custody under sentence on 30 November 2020, categorised by offence type.[18] Appendix V shows the total number of persons sentenced to imprisonment in 2020, categorised by offence

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[15] "Probation Service Annual Report 2020," July 29, 2021, http://www.justice.ie/en/JELR/Pages/IPS-Annual-Report-2020, 54.

[16] "Probation Service Annual Report 2020," July 29, 2021, http://www.justice.ie/en/JELR/Pages/IPS-Annual-Report-2020, 64.

[17] "Irish Prison Service: Annual Report 2020,"July 20, 2021, https://www.irishprisons.ie/wp-content/uploads/documents_pdf/IPS-Annual-Report-web-FINAL.pdf.

[18] "Irish Prison Service: Annual Report 2020,"July 20, 2021, https://www.irishprisons.ie/wp-content/uploads/documents_pdf/IPS-Annual-Report-web-FINAL.pdf, 59.

type and length of sentence.[19] This information is potentially of considerable value in identifying sentencing patterns. However, it is limited in two ways.

The first limitation is that some of the offence categories are very broad, and it is not even clear which kinds of conduct might be included within them. For example, it is helpful and practically useful to know that in 2020, 261 persons were committed for "Burglary and related offences" and the lengths of sentences imposed. The same applies to "Robbery, extortion and hijacking offences", as it is highly probable that most of those in this category (the number being 60 in 2020) were convicted of robbery. However, other categories, e.g. "Sexual Offences" are so broad that one cannot draw any useful conclusions. The same applies to the penultimate category, "Offences against Government, Justice Procedures and Organisation of Crime", for which there were 552 committals in 2020. It is by no means clear what kind of conduct is encompassed under this general heading.

The second limitation which, admittedly, is common to most statistical data, is that the figures themselves reveal nothing about the nature or circumstances of the offences or about any offender-related variables, such as the pleas entered or previous convictions. As will be seen in the subsequent chapter, these variables are incorporated in most foreign sentencing databases – recognition of their importance. The 2020 Prison Service Report shows that there were 716 committals for "Theft and related offences." Rather predictably, most of those (510 or 71%) were for terms of 12 months or less. It is safe to assume, therefore, that most of the thefts involved were fairly minor in nature, but the apparently high rate of imprisonment may be explained by the previous record of the offenders. Many, for example, may have been recidivist shoplifters. As it happens, the next category in both Appendices is entitled "Fraud, deception and related offences." There could well be some overlap, in terms of conduct, between this and "Theft and related offences."

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[19] "Irish Prison Service: Annual Report 2020,"July 20, 2021, https://www.irishprisons.ie/wp-content/uploads/documents_pdf/IPS-Annual-Report-web-FINAL.pdf, 62.

Finally, there is, of course, the "principal offence" phenomenon which is discussed below. Many of those committed to prison or serving sentences of imprisonment will have been convicted of more than one offence. This may well have influenced the sentence, though that would not be apparent from the statistics themselves.

2.2.2 The Fragmented Character of Administrative Data

As mentioned at the beginning of this chapter, each of the relevant agencies collects and publishes data that reflects its own particular functions and responsibilities, as is entirely understandable. However, this means that, when considered cumulatively and assessed in terms of their utility for deriving reliable conclusions about criminal justice decision-making, including sentencing, the available data are highly fragmented. It is difficult, if not impossible, to engage in "follow-through" by tracing, even within fairly broad parameters, the progress of cases from the point of initial reporting or detection to final disposition.

For example, "the computer systems of police, courts, prisons and probation stand alone and are not configured to share details of offences or offenders."[20] This is one reason different sources of data cannot presently be joined up to provide better insights. Beyond computer systems, there are also distinct elements in how each agency records and classifies events. For instance, the offence categories in the Courts Service Reports are different from those in the Prisons Reports, and those in the Probation Report are different again.

It would seem to be a good start if all the agencies could agree on a uniform categorisation of offences. Projects such as the Irish Crime Classification System (ICCS) have attempted to create a more integrative system.[21] It might also be

[20] Ian O'Donnell, Eric P Baumer, and Nicola Hughes, 'Recidivism in the Republic of Ireland', *Criminology & Criminal Justice* 8, no. 2 (2008): 124.

[21] The ICCS was the result engagement between the Central Statistics Office and An Garda Síochána. It was assisted by advice from the Advisory Group on Crime Statistics.

noted more generally that the Department of Justice has a data and research strategy that, while light on substantive details, indicates some focus on research and data.[22] However, for the time being, the fragmented character of administrative data limits the insights that are possible.

2.2.2.1 Case-Counting Rules

If/when Ireland moves towards a more cohesive system of data collection and reporting across various institutions, coding and classification issues will likely need to be addressed. The aforementioned variations in offence categories may prove to be one issue. Another key issue to consider that has implications for administrative data is case-counting rules.

Different case-counting rules can present rather different portrayals of criminal justice matters:

> *"Over time, different ways of classifying crime incidents (or offences) have been used in the various organisations involved in the criminal justice area. For instance, a robbery offence involving four offenders may be classified as a single event by the Gardai. It may, however, result in four separate referrals to the Director of Public Prosecutions. Thus, what may be classified as one event by one organisation may be classified as more than one event (or unit) by another."*[23]

Even in this report counting issues must be considered. For instance, the IPRT study noted below[24] counts individual defendants rather than offences. This complicates comparisons between official figures on offences and the research (given that a single defendant may be charged with more than one offence). However, recording and representing cases involving multiple charges and convictions (common in the District Court) is a particular challenge in all justice systems (one that, as discussed below, ISIS attempted to address).

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[22] 'Data & Research Strategy 2018-2020: Supporting Delivery of "A Safe, Fair and Inclusive Ireland"', June 2018. (Note that the report itself is dated 2018-2020 but the online material uses the dates of 2018-2021).

[23] 'Irish Crime Classification System (ICCS)', 17 April 2008, para. 1.2.

[24] Aaron Hunter, Claire; Hamilton, and Rick Lines, 'Research Brief: Sentencing in the District Courts, 2003', 2005.

One approach adopted when there are multiple offences, is to record what is known as the "principal offence:"

> *"A 'Principal Offence Rule' means that where more than one offence is committed at the same time by the same perpetrator(s), only the most serious offence is recorded. For example, where it appears that a homicide and robbery have been committed simultaneously, under a principal offence rule, only the most serious offence - the homicide - would be recorded in crime statistics."*[25]

In recording the principal offence only, a single offence is selected – often the most serious offence or the one that attracts the longest sentence.[26] However, the principal offence approach to recording sentences can mean that the record poorly reflects the actual case that was sentenced by a judge. As a consequence, when sentencing statistics are created and published using a principal offence approach, the portrait of sentencing is distorted. The less severe offences will be under-reported.

Additionally, we emphasise the fact that a court can make multiple orders when disposing of a single offence. As the Courts Service's Annual Report notes, "there can be more than one order made in respect of an offence. For example, in respect of a road traffic offence, a person may receive a fine, an imprisonment and a disqualification." [27] These various disposals also pose challenges for recording and representing cases in official data and the less serious disposals may be underreported. Moreover, there are also important questions to be addressed concerning headline sentences and effective sentences[28] and how this ought to be addressed in terms of data collection.

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[25] 'Crime and Criminal Justice Statistics - Methodological Guide for Users', May 2017, 33–34. See also 'Crime and Criminal Justice (Crim): Reference Metadata in Euro SDMX Metadata Structure (ESMS)', 19 July 2021.

[26] The most serious offence would usually attract the longest sentence but there may be exceptions (e.g. when considering the previous record of the offender or when different offences are of relatively similar seriousness are sentenced).

[27] 'Courts Service Annual Report 2020', 86.

[28] On headline sentences, see Section 2.6.2.2.

2.2.3 The Quality of Administrative Data for Sentencing

We have already touched on some of the limitations of administrative data in terms of sentencing. However, it is worth elaborating further to show that there is relatively little that might provide meaningful insights into sentencing practices.

One limitation is that the offence categories in the statistical tables are often broad or ill-defined. To take one example, the tables in the Annual Prison Service Reports have one category for "Sexual Offences"[29] which can obviously cover a wide range of conduct, and another for "Offences against Government, Justice Procedures and Organisation of Crime." It is far from clear what kind of conduct is included under this heading. Many other examples could be given.

There are further limitations to administrative data. Notably, the recorded crime data produced by the CSO are generally presented as "Under Reservation", which means that they do not meet the standards required of official statistics published by the CSO:

> *"These statistics are categorised as Under Reservation. This categorisation indicates that the quality of these statistics do not meet the standards required of official statistics published by the CSO."*[30]

These issues are profound. For example, at present, there is an ongoing review by An Garda Síochána (AGS) into the recording of homicide incidents and whether these are accurate. While some discrepancies due to different recording conventions might be expected, this example is nonetheless striking and provides a further hindrance to ambitions that administrative data, as it currently stands, can provide meaningful insight into sentencing. This is obviously a matter of some concern.

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[29] See Figure 2 in Appendix A.

[30] For more information see the CSO FAQ page: https://www.cso.ie/en/methods/crime/statisticsunderreservationfaqs/

2.2.3.1 The Utility of Existing Sentencing Data for Sentencing Purposes

There are matters of concern with various official administrative data. As well as the fragmented nature and sometimes questionable quality of administrative data, it can also be ambiguous and quite difficult to follow at times.

However, for present purposes, it may be noted that some broad offending patterns may still be deduced from the data that can be of some value for planning purposes. For example, the CSO presents recorded crime data under 15 broad headings, (e.g., "Homicide and related offences", "Sexual Offences," "Dangerous and Negligent Acts"). Initially, these may not seem very helpful, but supplementary tables provide greater detail. Thus, "Sexual Offences" has sub-headings for rape, defilement of a child, sexual offences against mentally impaired persons, aggravated sexual assault, sexual assault, and other sexual offences.

Yet, while some general planning may be possible, it is currently the exception rather than the norm for current administrative data to provide useful (or even remotely useful) insight into patterns of sentencing practice. Below an example of how statistical data has been used is provided, along with two complications to consider in terms of the meaningfulness of statistical data to sentencing practice.

2.2.3.2 Use of statistical data in Sentence Appeals

The Court of Appeal and Supreme Court have been receptive to submissions including statistical data on existing sentencing practice, provided they are satisfied as to its reliability. For instance, in *People (DPP) v Casey and Casey* [2018] IECA 121; [2018] 2 I.R. 337, the DPP's submissions to the Court of Appeal included data drawn from the Irish Prison Service Annual Reports on committals to prison for "burglary and related offences" for the years 2013 to 2016. This set out the number of committals by sentence length. Thus, for example, 21.5% of committals were for two to five years, 3.6% for five to ten years, and 0.54% for more than ten years. Obviously, the presentation of this data had to be heavily qualified as there was no indication as to the circumstances of the offences or the offenders, the pleas entered or other decisive factors. This still permitted

some broad conclusions to be drawn about existing sentencing patterns for burglary.

Likewise, in *People (DPP) v Sarsfield* [2019] IECA 260, a leading authority on the sentencing for s. 15A drug dealing offences, the Court of Appeal was presented with data on existing sentencing practice for that offence. On this occasion, the data was drawn, not from official reports, but from an analysis undertaken by counsel for the DPP of 104 sentence appeals in s.15A cases decided by the Court of Appeal and its predecessor, the Court of Criminal Appeal. The Court recorded this information in its judgment and clearly found it of some assistance.

2.2.3.3 Headline Sentences and Ultimate Sentences

When recording and using research data based on decided cases in order to identify sentencing practice for particular offences, it is important to identify if the sentences recorded in respect of those cases were the sentences ultimately imposed or the headline sentences (which would, of course, in most cases be further adjusted to reflect offender circumstances). Older data may not record headline sentences as it is only in relatively recent times, mainly at the prompting of the Court of Appeal, that the identification of headline sentences has become more or less standard practice. Yet when dealing with data based on ultimate sentences, it must be recalled that they reflect any mitigating factors connected with the offender's personal circumstances which must be taken into account under the second limb of the proportionality principle.

In so far as the objective is to compile information that will be useful for future sentencing, it is likely that substantial focus will be upon the "headline" sentence (though there may also be interest in other aspects of sentencing). As set out in a paper by O'Malley for the State Solicitors Seminar,[31] it is now all but mandatory for courts to begin by identifying headline sentences in all cases. Court of Appeal judgments are now very useful for identifying headline sentences that have been deemed appropriate or inappropriate, as the case may

[31] Thomas O'Malley, 'Sentencing Methodology And Sentencing Guidelines: Recent Developments', 2021.

be, for certain kinds of offences. However, to draw conclusions solely from the sentences ultimately imposed could be quite misleading.

Indeed, a recurring observation made in the preceding paragraphs is that, even where some relevant statistics are provided (as in the Prison Reports), they do not reveal anything about the nature and circumstances of the offences, the pleas entered or the legally relevant characteristics of the offenders. Granted, statistics in general, no matter how detailed, cannot readily convey this kind of information in any detail. One must generally look to other sources, such as analyses of trial (or first-instance) court or appeal court sentencing decisions, for more qualitative information of this nature. However, the statistics themselves could be rendered more useful for this purpose if the offence categories were narrowed so that the nature of the criminal conduct reflected in each of them was reasonably patent, even allowing for the inevitable difficulty posed by the "principal offence" method of counting.

2.2.3.4 Sentencing of Children

Worth special note, the sentencing of children (persons under the age of 18 years) is apt to be forgotten in discussions about sentencing practice. Yet, a significant number of children appear before the criminal courts each year. Most are dealt with in the Children Court (the District Court), but within the past few years, an increasing number of children have been convicted of serious offences, including murder, attempted murder and rape, and have therefore been sentenced in the higher criminal trial courts. The Annual Report of the Courts Service for 2020 has a section devoted to "Juvenile Crime" and shows that in that year, 3,236 orders were made in respect of children in the District Court, including 182 detention orders.

Once more, the general terms in which the data are presented render it difficult to draw any conclusions about sentencing practice. The relatively low number of detention orders presumably reflects the statutory requirement (Children Act 2001, s.96) that detention must always be a sanction of last resort. Children sentenced to detention are held at the Oberstown Campus. Oberstown produces an annual report, but this includes very little statistical information. In 2020, 122 children were held in Oberstown (119 male; 3 female), with 55 in

detention and 67 on remand. The average daily population was 36 (24 in detention, 12 on remand). In light of the very small numbers involved, it should be possible to obtain information about the offences for which children were detained and the terms of judicially imposed detention, categorised by the offence in a format similar to that in the Prisons Report.

2.2.4 Conclusions on Administrative Data

Currently, administrative data is unlikely to offer the desired insights into real-world sentencing practices. Perhaps in the future, it will be possible to link existing datasets in ways that are not currently possible. However, this is likely to be a long term and difficult project that will require different agencies to record and share more information according to common standards.

It might also be noted that there exists administrative data that are collected by criminal justice organisations but not routinely published (e.g. the Prisoner Records Information System (PRIS). These systems may contain data that can be analysed in ways the published data cannot. The authors of this report have not had sight of this data and are consequently limited in what we know about it.

Precisely what insights this data may (if scrutinised) yield are unknown in the absence of fuller details concerning what variables are recorded, how they are recorded, etc. Presently, these details are not public and knowledge of them seemingly only resides within the respective institutions. We do note that this data has occasionally been used in academic and other research. From this other research and the reporting of the variables, we offer some cautious speculation on what insights this data might provide (see Section 2.4.1). However, it must be stressed that our speculation of what insights may be possible is severely constrained. Indeed, an obvious recommendation would be for a much more rigorous examination of this existing data to gather basic information such as the variables recorded.

Even if it is possible to make better use of *existing* administrative data, this is unlikely to be a panacea to the data gap regarding sentencing. Beyond what are possibly inherent limitations of the current unpublished administrative data,

using it in new ways will likely raise technical challenges (e.g. data flows between organisations) and possibly legal matters to consider (e.g. GDPR). Yet, before these challenges can begin to be addressed, more background on the data held (metadata) is needed.

To summarise, while a fair amount of data relevant to sentencing is available in Ireland, it is not currently sufficiently detailed or comprehensive to provide an accurate portrait of current sentencing practices. Existing data collection, particularly in the Prison Service, could and should be developed further to include the additional variables and level of detail about case characteristics.

2.3 The Former Judicial Research Office

Until 2020, the Judicial Research Office (JRO) conducted occasional analyses of sentencing practices that can be used to assist judges in fulfilling their functions.[32] The JRO has now been replaced by the Research Support Office within the new Legal Research and Library Service. However, given the new status of the Research Support Office, it is worth noting the data generated by its predecessor and how it operated.[33] Certainly, it seems that the JRO has played a role in furnishing courts with information useful for guideline judgments.[34] For example, in *Mahon*, the court noted one development in data facilitating guidance was that "sentencing research has been conducted on several major offences by the Judicial Researchers' Office" (judicial guidance is discussed further below).[35] The JRO also provided information relevant to certain (typically more serious) offences.[36]

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[32] Eoin Guilfoyle and Ian D Marder, 'Using Data to Design and Monitor Sentencing Guidelines: The Case of Ireland', *Common Law World Review*, 2020, 1473779520975193; Edwards, 'Sentencing Methodology - Towards Improved Reasoning In Sentencing Title'. See also, Ruadhan Cormaic, 'Using Complex Data to Answer a Simple Query: How Do Judges Decide on Sentences?', *The Irish Times*, 4 June 2013.

[34] Edwards, 'Sentencing Methodology - Towards Improved Reasoning In Sentencing Title', 46.

[35] *People (DPP) v Mahon* [2019] IESC 24 para 36

[36] Lisa Scott, 'DEVELOPMENTS IN IRISH SENTENCING', *Irish Judicial Studies Journal* 1 (2017): 4.

Moving forward, it is not yet clear how the Research Support Office will differ from the JRO. Given that the Judicial Council now exists as a separate entity with its own staff, it should not be assumed that Research Support Office staff will be able to devote substantial time and resources in the future to the collection of data that may be seen as the concern of the Council. The SGIC may seek cooperation and it may be helpful if a synergy develops between the research offices of the Courts Service and the Judicial Council so that they can share relevant information and data. However, that would be a matter of discussion between the Service and the Council. In any event, the SGIC will almost certainly need its own research office to collect and analyse data and thereby enable the Committee and the Judicial Council to fulfil their statutory functions (see Chapter 4).

2.4 Research

As Ireland is a relatively small jurisdiction, there is a smaller body of research than is generated in larger jurisdictions. However, though the quantity is limited, there has been some empirical research published on Irish sentencing.[37] Given the paucity of official sentencing data in Ireland, one goal of research and scholarship has been to set out the many data gaps and to scope out where the

[37] To take just a few indicative examples, there is work relevant to various aspects of sentencing, including the effect of pre-sanction reports on sentencing (Maguire, Niamh, and Nicola Carr. "Individualising justice: pre-sentence reports in the Irish criminal justice system." (2017)); disparities in sentencing (Brandon, Avril Margaret, and Michael O'Connell. "Same crime: different punishment? Investigating sentencing disparities between Irish and non-Irish nationals in the Irish criminal justice system." The British Journal of Criminology 58, no. 5 (2018): 1127-1146); links between sentencing and recidivism (O'Donnell, Ian, Eric P. Baumer, and Nicola Hughes. "Recidivism in the Republic of Ireland." Criminology & Criminal Justice 8, no. 2 (May 2008): 123–46. https://doi.org/10.1177/1748895808088991); gender (Lyons, A., and P. Hunt. "The effects of gender on sentencing: A case study of the Dublin Metropolitan Area District Court." Whose law and order (1983)); socio-economic depravation (Bacik, Ivana, A. Kelly, M. O'Connell, and H. Sinclair. "Crime and Poverty in Dublin: an analysis of the association between community deprivation, District Court appearance and sentence severity." Irish Criminal Law Journal 7, no. 2 (1997): 104-133); prison populations (O'Donnell, Ian. "Ireland's shrinking prison population." Irish Criminal Law Journal 27, no. 3 (2017): 70-77); CSAM offences (O'Donnell, I. and Milner, C., 2012. Child pornography: Crime, computers and society. Willan.); and various works on sentencing law and policy (e.g. Campbell, Liz. "Reconstituting sentencing policy in the Republic of Ireland." N. Ir. Legal Q. 59 (2008): 291). Readers should note, however, that this is an indicative non-exhaustive list.

"dragons be" in our knowledge and understanding.[38] In charting the limitations to existing data (such as the notable knowledge gap pertaining to the District Court),[39] research can also provide valuable snapshots of practice. The strength of research is that it can prioritise depth. By examining a particular question, research provide a degree of detail and explanation that administrative data, for example, cannot. In this way, research can be seen as an invaluable supplement to more comprehensive but less in-depth data. This approach may be particularly important in examining the effects of reforms, or the realities of sentencing practices in areas that are subject to particular public or media concerns.

Research in Ireland has drawn on several methods such as utilising official data from criminal justice organisations, court observations, interviews, and analyses of newspaper reports. Each of these methods has strengths and limitations in terms of the data they provide and the demands they place on researchers' resources.

2.4.1 Research Using Official Administrative Data

Using official data (unless it is publicly available) and relying on interviews requires researchers to gain access to courts, databases, etc. For various reasons, this can be challenging: GDPR concerns, concerns over resources, low prioritisation of research in the face of time demands on practitioners, etc.

One source of data that research could theoretically use is DAR – the system for recording audio in courts. Audio recordings could provide a promising source of data on a particular case, though extracting this would be time-intensive (albeit less so than court observations). Indeed, the JRO appears to have made use of DAR. However, for other researchers, access to DAR is governed by statutory

[38] Claire Hamilton, 'Sentencing in the District Court:" Here Be Dragons"', *Irish Criminal Law Journal* 15, no. 3 (2005): 9–15.

[39] Healy and O'Donnell, 'Crime, Consequences and Court Reports'.

provisions and conditions that appear to create difficulties in terms of utilising this as a resource.

Difficulties related to conducting empirical research with the cooperation of criminal justice organisations could also limit the potential for research to help close the knowledge gap in Ireland. However, where access is obtained, some interesting results can emerge. For example, research into recidivism (a likely consideration of many judges when determining a sentence) has been enabled through the use of official (but not publicly available) data - such as that held by the prison service:

> *"In 2000, however, the Irish Prison Service began to phase in a new computer system, known as the Prisoner Records Information System (PRIS), which centralized in electronic format a large amount of information including the reason for custody (remand or sentence), principal offence committed, recent criminal history, amount of time served under sentence, sex, age, address, marital status, education level, employment status and nationality. The data collected for our research mark the first time that researchers were granted access to PRIS."*[40]

For the purposes of this report, it seems that there is not a comprehensive list of the variables contained in systems such as PRIS (and their counterparts in other criminal justice agencies – notably the Courts Service) in the public domain. For example, it would appear from the limited details we have from the above research that PRIS is potentially a good resource for examining the predictors of custodial sentence lengths but not for determining what predicts a custodial sentence in the first place (the "custodial threshold"). However, at present, we lack a sufficient basis to speculate further here.

2.4.2 Court Observations

Court observations of public proceedings do not require the same degree of formal access permissions. Yet, court observations are time-consuming, and

[40] O'Donnell, Baumer, and Hughes, 'Recidivism in the Republic of Ireland', 127.

without the provision of basic documentation about the cases, these too pose challenges for researchers and have limitations. Indeed, when court observations were used for ISIS data collection, access to court documents was available:

> *"In addition to their attendance at the sentencing hearings, the relevant case files in the Circuit Court Office are available to the researchers in cases where this has been necessary to fill any gaps in the information available from the oral evidence tendered before the Court."*[41]

However, the costs of court observation mean that they are confined to covering a small sample of cases as it is unfeasible to utilise this data gathering method on a large scale. As noted, DAR may offer a less resource-intensive way to gather similar data on cases, but access to this has proved challenging.

2.4.3 Newspaper Reports

In the absence of alternatives, newspaper reports can offer the only source of information in many instances. While research has used such reports, it ought to be stressed that, while newspapers may be all that is available, they are far from an ideal source of sentencing data and no substitute for reliable, comprehensive, and up-to-date information from official sources.

Newspaper and media reports have a number of drawbacks. The media report upon only a very small selection of cases, even of those involving serious offences. Often, the decision to report and the amount of attention they devote to a case will depend on whether, for example, one of the parties is a well-known person or there is some strong human interest element to the case.

Media bias (in terms of being unrepresentative) can have significant consequences for public confidence in sentencing - leading to misperceptions of sentencing and sentencing trends. Moreover, most newspapers do not report as many cases now as they did in the past. Therefore, there can be no guarantee

[41] Brian Conroy and Paul Gunning, 'The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool', *Judicial Studies Institute Journal* 1 (2009): 39.

that sentences imposed in cases reported in the media are typical or characteristic of the sentences imposed for the offence in question more generally.

Healy and O'Donnell have noted the possible utility of newspapers, with the caveat being this is in light of the dearth of other data:

> *"There is very little information available about what goes on in Irish courtrooms, especially at District Court level. In the absence of official data, newspaper reports of criminal cases offer a largely untapped resource, containing information about offences, trials and outcomes, including remarks made by defendants, victims, judges, solicitors and Gardaí. But the data is unlikely to be representative and is likely to be of limited detail. Thus, all methods have their limitations and in practice a combination of methods may be necessary."*[42]

Again, it should be stressed that this is not a source of data upon which it is desirable to rely. The extent of reliance on newspapers may be better understood as reflecting the paucity of other available data (notably official statistical data). It may also serve to highlight the need for more official data as, in the absence of official data, the public (and others) may draw on problematic sources leading to misperceptions of sentencing and sentencing trends – with potentially dire consequences for public confidence.

2.4.4 Examples of Research

A few examples of research help to illustrate what use has been made of the data sources noted above. Starting with court observations, research in Ireland has been carried out by academics and organisations. For instance, in 2003, the Irish Penal Reform Trust (IPRT) conducted research in the District Court using court observations.[43] In total, the cases of 356 individual defendants were observed. This sample (though relatively small compared to the vast number of

[42] Healy and O'Donnell, 'Crime, Consequences and Court Reports', 2.

[43] Hunter, Hamilton, and Lines, 'Research Brief: Sentencing in the District Courts, 2003'.

District Court cases) nonetheless provides a rare glimpse into sentencing in the lower courts.[44] There is also work that examines the District Court and matters such as how deprivation may be linked to sentencing.[45]

Looking at official administrative data, research has used prison data to search for racial disparities in sentencing.[46] There have also been some commentaries by the IPRT on other official data, such as imprisonment rates. However, the limited detail provided by administrative data remains an issue. To work around this, some research has used a combination of sources whereby administrative data, newspapers, unpublished official data, and interviews are all combined.[47] Yet, even so, there remain problematic gaps that could be better filled more comprehensive data.

2.4.5 The Limitations of Research

From the above, it can be seen that there are substantial impediments to research in Ireland. Perhaps the biggest impediment is the lack of reliable, comprehensive and up-to-date official data. The lack of such official data has meant that problematic sources (in that they are not ideally suited) such as newspapers are relied on at times. In other instances, the lack of official data has also meant that ad-hoc data requests have been used. Indeed, the IPRT noted the importance of good working relationships with criminal justice organisations is beneficial here. However, it would still be preferable, for several reasons, if more data were routinely published.

If some of these impediments could be resolved (e.g. a formal application process for criminal justice research combined with a receptive attitude to

[44] The study utilised a principal offence method of classification and is therefore limited in terms of depicting multiple offences.

[45] Ivana Bacik et al., 'Crime and Poverty in Dublin: An Analysis of the Association between Community Deprivation, District Court Appearance and Sentence Severity', *Irish Criminal Law Journal* 7, no. 2 (1997): 104–33.

[46] Avril Margaret Brandon and Michael O'Connell, 'Same Crime: Different Punishment? Investigating Sentencing Disparities between Irish and Non-Irish Nationals in the Irish Criminal Justice System', *The British Journal of Criminology* 58, no. 5 (2018): 1127–46.

[47] Ian O'Donnell and Claire Milner, *Child Pornography: Crime, Computers and Society* (Willan, 2012), col. 4.

research or a more comprehensive publication of official data), then Ireland may be better able to capitalise on its existing expertise to generate new insights into sentencing. The ability of organisations to respond to requests by organisations such as the IPRT may suggest there is potential for a thorough and structured approach to collecting and publishing data.

2.5 Irish Sentencing Information System

As noted above, the fact that there are substantial limitations to sentencing data in Ireland has long been recognised.[48] However, it seems that there has rarely been sufficient impetus to take action to correct the knowledge deficit. The main exception to this, prior to the newly formed SGIC, was the Irish Sentencing Information System.

The ISIS project was a pilot that involved researchers observing cases in court. The focus of ISIS was mainly on the Circuit Court in Dublin. The researchers would record the details of a case on a standardised template, and this would be added to the database.[49] An effort was also made to record data on District Court cases. However, this was impractical given the setup at the time. Interestingly, data from the ISIS project was publicly available and accessible online.[50]

Although no longer actively maintained, the Irish Sentencing Information System is still worth discussion as it may, in principle, represent one way forward. Several points are worth noting. Firstly, in some small way, the work of ISIS lived on in the work of the JRO (now replaced by the Research Support Office), which updated some of the figures that were accessible through the ISIS website.[51] This, perhaps, speaks to the continuing utility of the types of data

[48] 'Consultation Paper on Sentencing'.

[49] For examples of the recorded data, see Conroy and Gunning, 'The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool', 42–51.

[50] At the time of writing, the site (http://irishsentencing.ie) appears inoperable. However, it can be accessed using archive tools.

[51] Edwards, 'Sentencing Methodology - Towards Improved Reasoning In Sentencing Title', 46.

available on the ISIS website. Moreover, the utility of ISIS appears to have been recognised by the courts themselves:

> *"General guidance is to be obtained from a number of sources. In the recent Martin Tansey lecture published in the Irish Probation Journal, Mr Justice Peter Charleton has provided some valuable and stimulating insight into the question of sentencing, particularly the question of consistency of sentencing. He points out, that there is a significant degree of information now available through the ISIS Project (Irish Sentencing Information System Project) in relation to different types of offences and when available it should be brought to the attention of the sentencing judge. As has been observed, this is slow and painstaking work, but immensely valuable. This information, especially where it is synthesised in a lucid and accessible way is an essential step in understanding what range of sentence is being applied in respect of some offences, and identifying or allowing developments in the approach to sentencing for particular offences."*[52]

In the past, there was a link between the work of the JRO and ISIS. Indeed, it seems that (at one point) it was envisaged that ISIS would take the work of the JRO further to enhance understanding of sentencing and facilitate the creation of guidance.[53]

As will be discussed below, there have been numerous judicial decisions on sentencing since this lecture. However, despite the praise, ISIS has not played its envisaged role, and it is effectively mothballed. Moreover, ISIS was of limited use in collecting sentencing data in the District Court and its comparatively vast number of cases.

Additionally, ISIS data recording was, in general, a labour-intensive process. This means that the sustainability of an ISIS type system, in the absence of sufficient funding, would be problematic. Theoretically, there is the possibility that, in the

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[52] *DPP v O'Bryne* [2013] IECCA 93.

[53] Charleton and Scott, 'Throw Away the Key: Public and Judicial Approaches to Sentencing-Towards Reconciliation The Martin Tansey Memorial Lecture', 2013, 21–22.

future, the sentencing judge or court staff could complete a standard template to collect sentencing information at a reduced cost (perhaps a revised version of the ISIS template).[54] However, as it operated, the costs of ISIS had a determinantal effect on its longevity.

2.5.1 The Suspension of ISIS

The mothballing of ISIS was largely related to resource issues, which were exacerbated by the financial crises of the time. In this way, it is perhaps unfortunate ISIS has languished given the hurdles it was able to overcome. However, the idea behind it remains useful. Presently, in terms of data collection methodologies, the ISIS project considered many of the issues identified in this chapter and how they might be addressed in the Irish context. As the practical guide to ISIS notes:

> *"The pilot system now in place does not simply imitate one of the various sentencing schemes created abroad, but rather aims to take what is considered to be the best aspects of each and combine these with modifications to suit the Irish legal landscape."*[55]

For example, how to record multiple convictions is a serious challenge for those deliberating sentencing data collection methodologies. Yet, this is one challenge ISIS addressed:

> *"For the sake of clarity, it was decided that separate matters should be dealt with in separate entries on the database. Accordingly, where two accuseds are being sentenced on the same bill of indictment, two separate entries are made on the database. Similarly, where an accused is being sentenced under multiple bills of indictment, separate entries are made in respect of each bill, but not in respect of each count on the bill. However, to ensure that anyone reading the data is made aware of the full picture considered by the sentencing judge, the fact that the accused was*

[54] There is also the possibility of something similar to the Court Sentencing Servery (CCSS) previously used in England and Wales (discussed in Chapter 3 and Chapter 4).

[55] Conroy and Gunning, 'The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool', 38.

sentenced on another bill of indictment on the same date or that another accused was sentenced on the same bill is noted on the database entry, and an electronic link to the relevant entry or entries is provided."[56]

Consequently, whether or not a commitment is made to funding something like ISIS in the future, the conceptual framework behind how ISIS collected data is worth considering.

2.6 Appeal Court Guidance

When drafting their guidelines, sentencing commissions and councils around the world have tended to begin by first reviewing the existing appellate jurisprudence relating to the offence for which a guideline is being drafted. Thus, recent appellate sentencing judgments may be taken to provide a point of departure for the drafting of guideline sentence ranges for categories of seriousness. If the proposed guidelines include 'starting point' sentences, then appellate decisions also provide a particularly useful steer for the guidelines authority. In addition, appellate judgments normally highlight or enumerate the most important aggravating and mitigating factors relevant to the offence in question. This then typically forms the basis of the lists of sentencing factors contained in the guidelines issued for consultation.

Appellate judgments thus provide a normative framework for guideline construction and the guideline is then crafted to promote the approach to sentencing already affirmed by the Court of Appeal. However, it is vital first to note that, by their nature, appellate judgments cannot yield systematic and reliable knowledge about the patterns of first-instance sentencing practices. If such knowledge is made available, the impact of appellate judgements (or other rule-like norms such as guidelines) will be greatly enhanced in two ways.

Firstly, it will become possible to know, in a systematic and reliable way, how first-instance sentence practices are patterned in different kinds of cases – and

[56] Conroy and Gunning, 'The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool', 40–41.

thus pinpoint areas that may benefit from reform or clarification. Secondly, only the availability of high-quality systematic data can allow a proper assessment of how such norms (or reforms more generally) play out in practice.

Thus, both to determine current sentencing practice and to monitor the operation of guidelines, it is essential to have high-quality information about the patterns of sentencing in different cases. Having made this key point, we now consider how the development of appellate court jurisprudence can inform the structuring of the collection of such data. The following sections elaborate on these points in the Irish context.

2.6.1 Developments in Ireland: Appellate Jurisprudence

From an empirical and analytical perspective, a new sentencing landscape is now taking shape, one that has the potential to produce a body of knowledge from which useful normative principles, including indicative headline sentences for a wide range of offences, can be derived. This has implications for the conduct of future research on the sentencing of serious offences in that it may provide interpretative context for empirical data.

Historically in Ireland, the courts were hesitant to specify indicative sentencing tariffs, starting points or sentence ranges, with the court refusing to do so in *People (DPP) v Tiernan.*[57] The concerns of the court in *Tiernan* related to the need for individualised sentencing and poor data on sentencing practice. Consequently, the courts focused on descriptive guidance and the principles of sentencing. Indeed, as O'Malley notes:

> *"This remained the orthodoxy for the next quarter of a century although, during that period, both the Supreme Court and the former Court of Criminal Appeal produced a substantial body of case law on general sentencing principles with a special emphasis on proportionality. They did not offer any guidance in the form of tariffs, starting points or sentence*

[57] [1988] IR 250 (SC).

> *ranges for particular offences, although indications of appropriate sentence levels for certain offences might be inferred from some of their judgments."*[58]

In 2014 there was a "quiet revolution."[59] The former Court of Criminal Appeal issued guideline judgments and noted that a "broad level of consistency" is desirable and that:

> *"It is part of the function of this Court, as a Court of Appeal, to attempt to establish not only the broad legal principles by reference to which any sentencing exercise should be conducted but also to give, where possible, some guidance as to the broad range of sentences which should be imposed, all else being equal, across the spectrum of severity applicable to an offence under consideration."*[60]

This revolution has been significant. It has now become standard practice for the Court of Appeal to indicate the appropriate headline sentences in individual cases, whether by approving or varying those identified by trial (i.e. first-instance) courts and specifying a headline sentence where the trial court failed to do so. For the period 2005 to 2013, the average annual number of Court of Criminal Appeal judgments on the Courts Service website was 30. By contrast, the number of judgments (both civil and criminal) posted by the Court of Appeal from its establishment in 2014 to the end of August 2021 ran to 2,550, an average of 320 a year. It is safe to assume that at least half of these, and perhaps more, are criminal cases – though it would be preferable that the split was quantified on the website.

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[58] O'Malley, "Sentencing: A Modern Introduction." Forthcoming.

[59] O'Malley, "A quiet revolution occurred this month: sentencing guidelines were introduced." (2014) https://www.irishtimes.com/news/crime-and-law/a-quiet-revolution-occurred-this-month-sentencing-guidelines-were-introduced-1.1741707. See also Scott, 'DEVELOPMENTS IN IRISH SENTENCING'.

[60] *People (DPP) v Ryan* [2014] 2 I.L.R.M. 98. Para 1.2.

2.6.2 Establishing Knowledge about Existing Sentencing Practice

Under the terms of the Judicial Council Act 2019 (s. 91(3)), the SGIC, in preparing or amending draft guidelines, must have regard to a number of factors, including "sentences that are imposed by the courts." Even in the absence of such a provision, the collection of data on existing practice would be necessary in any event if the guidelines are to reflect and/or shape that practice, at least to some appreciable degree. The Committee will doubtless have to consider strategies for collecting data on trial (i.e. first-instance) court sentencing practice. Such an exercise will also be necessary in the long run by virtue of s.23(2) of the 2019 Act, which requires the SGIC to "monitor the operation of sentencing guidelines." It bears mentioning that bodies charged with developing guidelines in other jurisdictions have undertaken extensive research on existing practice. For instance, the United States Sentencing Commission analysed more than 10,000 past cases when it was drafting the original federal guidelines between 1985 and 1987.[61] The English Sentencing Council now also routinely undertakes detailed analyses of existing practices when developing new guidelines or amending existing ones. However, it must also be noted that relevant data, at least in statistical form, are more readily available in those jurisdictions and elsewhere than they are here.

Appeal court judgments cannot, of course, provide comprehensive and reliable data about trial (i.e. first-instance) court sentencing practice. While the appellate courts offer normative guidance, examining the *ought* of sentencing is a distinct (albeit complementary) endeavour from presenting a complete picture of what *is* happening in the daily reality of first-instance sentencing across the country. As such, without ready access to systematic information about the empirical reality of sentencing practices on the ground, guidelines are limited to engaging with sentencing at the level of the ought and, specifically, cases that are appealed. Moreover, to examine compliance with official

[61] Stephen Breyer, "The Federal Sentencing Guidelines and the Key Compromises on which They Rest" (1988) 17 *Hofstra Law Review* 1 at 7. The author, now a Justice of United States Supreme Court, was a member of the original Sentencing Commission.

guidance, one needs systematic data on cases and the patterns of sentences imposed in different kinds of cases.

No more than a fraction of the sentences imposed at first instance by trial courts are appealed. In fact, it is rare for a sentence involving anything other than immediate custody to be appealed. An even more fundamental consideration is that District Court sentences (and sentences imposed by the Circuit Court on appeal from the District Court) cannot be appealed to the Court of Appeal. However, the sheer volume of Court of Appeal sentencing judgments now so readily available can usefully be mined for various kinds of thinking about normative sentencing principles and headline sentences. For instance, it appears (though we say this very tentatively) that a significant proportion of sentences imposed for serious sexual offences are appealed to the Court of Appeal, whether by way of defence appeals or undue leniency applications, and it may be possible to derive some useful information from those.

2.6.2.1 General Sentencing Principles

The SGIC's remit is not confined to preparing offence-specific guidelines. Guidelines may also relate to "sentencing generally."[62] The Committee may therefore decide to develop guidelines on matters such as the general procedure to be followed when selecting a sentence (similar perhaps to the recent guideline produced by the Scottish Sentencing Council),[63] and on other general matters such as the reduction for a guilty plea, the use of concurrent and consecutive prison sentences, and the relevance of previous convictions.

Here, the existing jurisprudence of the Court of Appeal and, indeed, of the Supreme Court will be tremendously useful not least, for example, in informing the structure of future data collection and empirical research into first-instance sentencing practices. For example, in relation to the sentence decision-making

[62] Judicial Council Act 2019, s. 91(1).

[63] Scottish Sentencing Council, *The Sentencing Process: Sentencing Guideline* (effective from 22 September 2021). For an in-depth analysis of this Scottish guideline and its utility in an Irish context, See also Tom O'Malley, *A New Scottish Sentencing Guideline – The Sentencing Process* (5 October 2021) sentencingcrimeandjustice.wordpress.com

process, Court of Appeal case law on the desirability of first specifying a headline sentence in every case will be most valuable.[64]

2.6.2.2 Headline Sentences

The identification of appropriate headline sentences is critical to the development of a coherent and principled sentencing system. As just noted, the Court of Appeal, since its establishment, has frequently reiterated the importance of specifying in each case the appropriate headline sentence based on the objective gravity of the offence, before adjustments are made for offender-related factors which, for this purpose, include matters such as a guilty plea and co-operation with law enforcement authorities. The Court has stopped short of holding that failure to specify a headline sentence will, in itself, amount to an error of principle but it has left trial courts in no doubt that the two-step approach to sentence selection is the best and most desirable practice. It is reasonable to infer from more recent judgments of the Court that, by and large, trial judges sentencing at first-instance may now be adopting this practice.

General guidance on headline sentences, like that offered in formal guideline judgments such as *People (DPP) v Casey and Casey,*[65] is, of course, authoritative. But useful information about appropriate headline sentences can be derived from other judgments as well. After all, most of the Court's judgments record the headline sentence specified by the trial judge for the offence of conviction. In some cases, that headline sentence is approved; in others, it is varied. In either event, the headline sentences ultimately approved by the Court of Appeal provide significant guidance for trial courts sentencing at first instance on the appropriate starting points for many offences. Needless to say, only a very small proportion of the Court's judgments include formal, or even informal, guidelines. In all the others, the approved headline sentence is specific to the facts of the case under appeal. However, in many instances, trial judges will be

[64] Leading cases on this topic include: *People (DPP) v Flynn (Davin)* [2015] IECA 290; *People (DPP) v Molloy (Raymond)* [2018] IECA 37; and *People (DPP) v Joyce* [2021] IECA 124.
[65] [2018] IECA 121; [2018] 2 I.R. 337.

able to extrapolate from those what the appropriate headline sentences should be in cognate, though probably not identical, cases.

This body of case law should also be of great value to the SGIC when it embarks on the preparation of offence-specific guidelines. At present, we do not know what form those guidelines are likely to take. But if, for example, the Committee were to opt for a structure somewhat similar to that of the English and Welsh sentencing guidelines, it would begin by identifying levels of seriousness for the relevant offence and then, perhaps, indicate appropriate sentence ranges and/or starting points for the identified categories. Court of Appeal case law on headline sentences would obviously be of great value for this purpose, though it can be supplemented with any up-to-date information that becomes available on existing trial court practice.

2.6.3 Court Of Appeal Sentencing Judgments

The Court of Appeal has made available to us a spreadsheet of 830 of its sentencing judgments, delivered between November 2014 (when the Court first began hearing cases) and August 2021.[66] This is an extraordinarily useful resource and one that is clearly crucial for the future work of the SGIC. The database includes guideline judgments, both formal and informal in the sense identified by the Court in *People (DPP) v O'Sullivan* [2020] IECA 331, as well as hundreds of others that elucidate and develop general principles of sentencing, including the approach to be adopted when sentencing individual offences. Many of the cases included in the database are also of great value in indicating appropriate headline sentences, a topic to which we shall return below.

This spreadsheet can contribute to the accomplishment of tasks that may be undertaken by the SGIC. First, it should indirectly assist, though admittedly to a limited extent, in identifying current sentencing practice by showing what sentences the appeal courts dispense. Secondly, it provides an extensive body of modern, authoritative case law on general sentencing principles. Thirdly, it is

[66] This can be accessed from the SGIC's website: https://judicialcouncil.ie/assets/uploads/Court%20of%20Appeal%20Sentences.xlsx

most useful for the purpose of identifying appropriate headline sentences for particular offences.

We offer one final observation about the sentencing judgments spreadsheet compiled by the Court of Appeal. It is very conveniently presented in spreadsheet format, which permits the inclusion of additional information in respect of the individual cases. While it is of great value as it stands, it would probably be even more useful to judges, practitioners, scholars and others if it included an indication of the principal subject matter of each case, e.g., “robbery”, “residential burglary”, “discount for guilty plea”, etc.

2.7 Conclusions on Data in Ireland

This chapter has outlined the main sources of data currently available in Ireland. In doing so, it has drawn attention to the limitations that hinder insights into sentencing practices. The report also discussed developments in senior appeal court guidance, which is now far more abundant. This guidance is a valuable resource in itself in terms of elucidating norms and providing direction. It can also serve a complementary role when seeking to improve data on sentencing practices in trial courts.

Over time, there has been some modest progress concerning the data on trial court sentencing practices. Where progress has occurred, for example with ISIS, it has typically been the result of judicial initiatives. However, despite some progress, sentencing data in Ireland still has profound limitations. These limitations include the lack of a large scale, offence specific database, or an annual release of key sentencing indicators, as is the case in some other jurisdictions. The limited data is problematic because it is only when reliable information is available that useful guidelines (that are likely to be respected by trial courts) can be drawn up. For example, guidelines for certain offences, such as defilement and other forms of child sexual abuse, cannot realistically be

drawn up without a thorough examination of the many variables that occur in such cases – as was effectively recognised by the Court of Appeal in *McD*.[67]

Better sentencing information would also appear necessary to support efforts to bolster public confidence. As noted here, in the absence of official data, newspapers have played a distinct role as a source of information that is concerning. In various jurisdictions, there are over 50 years of research showing newspaper reports of sentencing can be hugely problematic in terms of the selection of cases, presentation of cases, etc. That research shows that biased media coverage is largely responsible for the huge public misperceptions of sentencing and sentencing trends.

Unfortunately, such are the issues with sentencing data that presently:

> *"The penal policy arena in Ireland is characterised by a collection of lacks… The extent to which the criminal justice system operates in the absence of informed comment, research and critical scrutiny is striking. Often, the good quality information that is required to allow a sensible discussion simply does not exist. Substantial data deficits remain at every level and progress linking systems from the different agencies is slow. There are still far too many simple questions that cannot be answered. For example, what is the average sentence for a first-time burglar (or robber or shoplifter or car thief or violent offender)?"*[68]

As is clear from earlier sections of this chapter, information on sentencing practices in all Irish courts has limits, but these are particularly acute in the District Court. Of course, the sheer volume and range of offences with which the District Court must deal will render it difficult to devise a system for the regular collection of detailed sentencing data. According to the Courts Service Annual Report for 2020, the Court dealt with about 154,000 summary offences and

[67] [2021] IECA 31. For the contributions research can make, see also O'Donnell and Milner, *Child Pornography: Crime, Computers and Society*.

[68] Ian O'Donnell, 'Penal Policy in Ireland: The Malign Effect of Sustained Neglect', *Studies: An Irish Quarterly Review* 102, no. 407 (2013): 315 and 319.

41,000 indictable offences that year. A further 21,538 orders were made sending persons forward for trial in respect of various indictable offences.[69]

As well as a significant caseload, the District Court also has significant sentencing powers: it may impose up to two years' imprisonment in certain circumstances. A rational and coherent sentencing system is, therefore, just as important in the District Court as in the other trial courts. However, there are relatively infrequent opportunities for the Court of Appeal and Supreme Court to issue sentencing guidance on the cases and issues commonly encountered in the District Court. Thus, quite understandably, court issued guidance has tended not to focus on the District Court. For these reasons, the Sentencing Guidelines and Information Committee may wish to address information gaps at the level of the District Court sentencing in particular.

We have suggested (and will explain in our third chapter) that many of these issues are not unique to Ireland. For example, in Scotland and in England and Wales, data on the lower courts are also (in their own ways) not without serious limitations. The relevant Sentencing Councils have not been entirely successful in addressing this (see Chapter 3). This could, however, suggest grounds for optimism in the case of Ireland. The SGIC's decision, as one of its first priorities, to take a hard look at the quality of sentencing data in Ireland and around the world means that it can learn from the successes and failures of other jurisdictions. Moreover, in moving forward, the SGIC may also wish to reflect upon Ireland's own Sentencing Information System (ISIS). The ISIS project contended with many of the limitations of sentencing data identified here. Even if the resources to revitalise ISIS in its previous form are not forthcoming, the project nevertheless offers substantial insights into how meaningful sentencing data could be collected in the Irish context.

[69] As the chapter explains, when considering the global figure of 194,796 offences dealt with by the Court itself that year, it must be recalled that this figure refers to orders made, and more than one order may be made in respect of a single offence. However, even with this qualification, the District Court clearly has an enormous criminal case workload. This is further borne out by another statistic in the report, namely that in 2020 the Court had 382,455 incoming cases involving 226,081 defendants.

Chapter 3: Data in the USA, England and Wales, and Scotland

3.1 Introduction

This chapter focuses on the United States, England and Wales, and Scotland. It provides an analysis of their sentencing data and assesses the operation of institutions that are equivalent to the Sentencing Guidelines and Information Committee. Numerous terms, in different countries and at different times, have been used to refer to such institutions: commissions, committees, advisory councils, guidelines councils, etc. [70] Here, for simplicity we use the internationally recognised term 'sentencing council' to signify the various independent[71] bodies assessing and developing sentencing policy (whether or not through guidelines), and/or engaging with the public.

Focusing on these jurisdictions provides a broad range of experiences from which to elucidate key lessons for sentencing councils, which the SGIC may draw on. The USA and England and Wales have long had sentencing councils. They possess significant experience in the design, implementation, and evaluation of guidelines and the use of sentencing data. Therefore, it is prudent to examine these jurisdictions. Scotland is comparatively inexperienced. Its council is in the process of designing its first offence specific guideline. Consequently, the Scottish Sentencing Council (SSC) has not fully designed an offence specific guideline. Nor has the SSC gained any experience implementing or evaluating offence specific guidelines: though it has designed and implemented three generic/overarching guidelines. [72] However, Scotland does have extensive

[70] See, for example, Arie Freiberg and Karen Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* (Willan, 2014).

[71] Or at least at arms-length from government.

[72] 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: <

historical experience in researching, developing, and implementing the delivery of reliable, comprehensive, and up-to-date sentencing data. This experience is worth learning from.

The remainder of this chapter is structured as follows. Section 3.2 covers the USA and reflects on the importance of statistical data as a building block for action. Section 3.3 focuses on England and Wales and highlights key lessons learned from that jurisdiction's history with guidelines. Section 3.4 concerns Scotland and its position early in the process of creating guidelines and its experience with a sentencing information system. Section 3.5 provides concluding thoughts.

3.2 Approaches to Sentencing Data & Analysis in the USA

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.[73] 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

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/.

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

sentence and called for reforms designed to curb discretion, reduce disparity and discrimination, and achieve proportionality and parsimony in sentencing.[74]

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 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.[75]

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."[76] 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.

Below, 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

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[74] 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).

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

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

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.

3.2.1 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).[77] The SRA created the U.S. Sentencing Commission (USSC), which was authorized to 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*[78] that the SRA, the USSC, and the guidelines were constitutional. In 2005 the Supreme Court ruled in *United States v. Booker*[79] that the guidelines were advisory, not mandatory. However, judges must still consult the guidelines before imposing sentences.

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[77] 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, see 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.

[78] 488 U.S. 361 (1989).

[79] 543 U.S. 200 (2005).

3.2.1.1 Sources of Data on Federal Sentencing

The main source of data on federal sentencing is 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."[80] To meet this mandate, the Commission, through its Office of Research and Data, publishes an annual *Sourcebook of Federal Sentencing Statistics,*[81] 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 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

[80] 28 U.S.C. § 995(a)(12)(A).

[81] 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

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[82] and are archived at the Inter-university Consortium for Political and Social Research at the University of Michigan.[83] 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.[84] 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, 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.

3.2.1.2 Quality of Data on Federal Sentencing

The individual offender datafiles compiled by the USSC for each fiscal year are 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,

[82] www.ussc.gov.

[83] www.icpsr.umich.edu.

[84] www.ida.ussc.gov.

and the offender's sentence. The recent USSC datafiles include more than 100,000 variables.[85]

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 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,[86] charge reduction, or other types of plea bargains. In addition, the USSC does not release the name of the judge who imposed the sentence,[87] 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." [88] The lack of judge-specific sentencing data means that it is impossible to determine whether different judges (or judges with certain

[85] The USSC variable codebook for cases involving individual offenders can be found here: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/Individual_Codebook_FY99_FY14.pdf.

[86] 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.

[87] 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 . . ."

[88] 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.

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.[89]

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 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:

> *"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."*[90]

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[89] 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.

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

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 instructions provided by the USSC to determine a single offence level for cases with multiple counts of conviction.[91]

3.2.1.3 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.[92] 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.

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[91] 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.

[92] 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.

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

3.2.2 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.[93] 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).

[93] 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.

3.2.2.1 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.[94] 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.[95]

Sentencing guidelines currently are in effect in 17 states, the District of Columbia, and, as noted above, the U.S. federal system.[96] 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. In those other states which have considered and rejected sentencing guidelines, have a sentencing commission without a mandate to develop guidelines, and just one state (Florida) had guidelines but then repealed them.[97]

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

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

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

[96] 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.

[97] Florida enacted sentencing guidelines in 1983, significantly revised them in 1994 and repealed them in 1998, replacing them with the Criminal Punishment Code. Repeal of the guidelines was motivated by concerns that offenders were serving only a third of the pronounced sentence and that the offender's criminal history did not adequately guide the determination of the sentence. For further details, see Sentencing Guidelines Resource Center (https://sentencing.umn.edu).

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. [98] 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 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."[99] By contrast, in Oregon, a departure will be upheld as long as it is warranted by "substantial and

[98] In the Minnesota Standard Guidelines Grid, 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.

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

compelling reasons."[100] 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."[101] Although all state guidelines attempt to make sentencing more uniform and 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 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

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

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

prior record.[102] Even among states with sentencing guidelines, in other words, there is no typical 'American approach.'

3.2.2.2 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.[103] 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 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.[104] 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

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[102] 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.

[103] 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.

[104] 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).

Commission.[105] However, there can be issues with the 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.

Data on sentencing in the state courts are available from the Sentencing Project,[106] the National Center for State Courts,[107] Measures for Justice,[108] and the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota Law School.[109] 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.

[105] 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.

[106] www.sentencingproject.org.

[107] www.ncsc.org.

[108] www.measuresforjustice.org.

[109] www.sentencing.umn.edu.

3.2.3 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 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 (many also 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.

In sum, the experiences from the USA make it 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."[110] 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.

3.3 Sentencing Statistics and Guidelines in England and Wales

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.[111] As of 2020, the Sentencing Council had issued guidelines for most common offences.[112] 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 (discussed 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.

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

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

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

3.3.1 Empirical Research on Sentencing

Although empirical studies have been conducted in England and Wales for many decades now,[113] over the decade 1995 to 2005 only a handful of major empirical studies on sentencing were published.[114] Most of this research related to the Magistrates' Courts.[115] 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.

3.3.1.1 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.

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[113] 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* (Commission for Racial Equality, 1992).

[114] 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 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.

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

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 information 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 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.[116] 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 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.[117]

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

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

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

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.[118] Most of its research is conducted 'in house' by a small team of full-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).

3.3.2 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.[119] The *Prison Reform Trust* publishes periodic reports (called the Bromley Briefings)[120] 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.[121] These three sources all contribute to the collective understanding of current sentencing practices. Although there is no direct evidence of impact on the

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[118] '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.

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

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

[121] 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.

guidelines themselves, reports by bodies like these are frequently cited by legislators (such as the House of Commons Justice Select Committee).

3.3.2.1 Ministry of Justice (MoJ)

There are two key MoJ databases: (1) Sentencing data found in the *Criminal court statistics* collection [122] and (2) the *Criminal Justice statistics quarterly* collection. [123] 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.[124] The *Criminal court statistics* collection covers the period of July to September 2014 until January to March 2021.[125] 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.[126] Overview tables contain more in-depth information on sentencing, remand and court proceedings - as can be seen in Appendix B.

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

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

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

[124] 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.

[125] 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

[126] 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.

sentenced to immediate custody or a fine according to their age, sex, ethnicity, 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.[127]

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.[128]

3.3.2.1.1 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.[129] 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.[130] As with sentencing statistics in most 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

[127] 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).

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

[129] 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.

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

result in a 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.[131]

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.[132]

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[131] 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.

[132] See, as noted in Chapter 2, 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 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."

3.3.2.2 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.

3.3.2.2.1 Research Capacity of the Council

The research function is essential to any sentencing 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 issues 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, 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.[133] 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."[134] 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.[135] 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."[136]

In our next chapter (which focuses on recommendations), we will further consider the implications of the experience in England and Wales for Ireland. However, at this juncture, it should be noted that the SGIC appears to have less pre-existing data available to it than the Sentencing Council of England and Wales. Differences such as this, between the Sentencing Council and the SGIC, may, depending on resources made available, impact the speed and scale at which the SGIC is able to fulfil its functions.

3.3.2.2.2 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

[133] 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.

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

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

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

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."[137] The survey was used by the Sentencing Council to devise and revise its guidelines. Since the release of data to the public domain, [138] researchers have examined CCSS data to address specific questions.[139]

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 of the survey which we discuss later). We now offer an illustration (relating to the relationship between plea and sentencing) of the

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

[138] 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.

[139] 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-Sánchez, '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).

contribution that such a database can make to our understanding of sentencing practices.[140]

3.3.2.2.3 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 pleaded to a criminal charge (guilty/not guilty) affects the sentence they will receive if they are convicted. Defendants who pleaded guilty receive 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.[141] 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 pleaded not guilty may involve more serious crimes. Or cases in which the defendant pleaded not guilty, may be more serious because they may tend to result in more convictions in each case compared to guilty plea cases.[142] 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

[140] 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."

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

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

– 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.[143] 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 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 conducted similar analyses on the CCSS data to document the effect of previous convictions on sentencing outcomes.[144] The CCSS survey analysis showed 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.

[143] 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.

[144] Roberts and Pina-Sánchez, 'Paying for the Past: The Role of Previous Convictions at Sentencing in the Crown Court'.

3.3.2.2.4 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 response rates are variable. The response rate was in excess of 90% in some Crown Court locations; elsewhere it was significantly lower.[145] 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[146] which contains all Crown Court sentences. These comparisons suggest that relatively robust conclusions may be drawn from data collected by the survey. If the response rate were to have declined, however, non-response would have become 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 the 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. [147] 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

[145] See Sentencing Council 2013, Chart 1.11.

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

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

methodologies such as observational studies, qualitative research involving defendants and legal practitioners, or academic research.[148]

Fourth, 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.

Fifth, the most important limitation of the Crown Court sentencing survey, 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.

The Sentencing Council discontinued the CCSS in 2015. Instead of an ongoing, census exercise, the Council now conducts one-off, bespoke data collections in both the Magistrates' Courts and the Crown Court. The Council justified the decision to replace the CCSS with periodic data collections on the grounds of efficiency. In addition, the Council 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.

[148] Hood and Cordovil, *A Question of Judgement: Race and Sentencing*.

3.3.2.2.5 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.[149]

3.3.2.2.6 Research on Ethnic Differences in Sentencing

The Council has published analyses examining racial differences for a limited number of drug offences. This research has contributed along with other reports by the Ministry of Justice to our understanding of the issue in England and Wales.[150] 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 publishes a biennial report "*Statistics on Race and*

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

[150] 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.

the Criminal Justice System."[151] 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.[152]

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 differences tend to affect the conclusions which can be drawn. The most recent Ministry report [153] 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.[154]

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[151] 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

[152] "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.

[153] 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.

[154] 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).

However, research published by the Sentencing Council in 2019[155] 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.[156]

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 offender was a caregiver. These (and other) offender-related variables are not currently captured by court statistics.[157]

3.3.3 Informing Guidelines

There is a clear link between the improvement of sentencing data and the development of the Council's functions and its guidelines. Although the Council 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 Council's functions. It draws heavily on sentencing data in determining the starting point sentences and sentence

[155] '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/.

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

[157] 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.'

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.

3.3.3.1 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 we are aware, neither the Ministry nor the Council have plans to improve the scope or accessibility of current sentencing statistics.

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 discussed in Section 3.4) 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 on 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.[158] 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 that in 2013. The Council has been criticised for failing to do more to facilitate research into sentencing practices and the guidelines.[159]

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[160], 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.

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[158] 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.

[159] 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.

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

Leading academics have expressed the view that the Sentencing Council should play a more significant role in developing and distributing sentencing statistics.[161] The Coroners and Justice Act 2009 (which established the Council) assigned it powers to promote awareness of sentencing and "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 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."[162] Although it contains other elements, the main component is a Sentencing Information System, which preceded that in Scotland (see 3.4.3 for a discussion of the Scottish system and also the Irish Sentencing Information System discussed in Chapter 2). 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

[161] 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.

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

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.

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).[163] 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 C).

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

[163] 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.

history data.[164] This may also serve to reduce the undue variability of sentences – in this case at the federal level – if judges consult the data when deciding on a sentence.

3.3.4 Conclusion: Sentencing Data in England and Wales

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 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.

3.3.4.1 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*

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

passage of the Coroners and Justice Act 2009 which replaced the Sentencing Guidelines Council[165] with a new guidelines' authority, the Sentencing Council. This statute also changed the compliance 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*

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

to limit the burden on courts, by some form of sampling procedure, over time, or by the offence.[166]

- *For around five years to 2015, England and Wales was particularly well-served with respect to information about sentencing. Ministry of Justice 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.*[167] *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.*

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[166] 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.

[167] These are necessary but not sufficient sources and they must be supplemented with qualitative data, surveys of practitioners and other stakeholders, and independent academic scrutiny.

- *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 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. Second, 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 cost effectiveness of different sentences in preventing re-offending. The Council has taken only limited steps in publishing information on these matters to date.[168] 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.

[168] The Council has commissioned a literature review on the effectiveness of sentencing that is due to be published in 2022 and will address reoffending.

3.4 Assessing Sentencing Data in Scotland

The Scottish Sentencing Council (the SSC) was established in October 2015. A consequence of the (relative) youth of the SSC is that it has far fewer guidelines than, for example, England and Wales. To date, the SSC has only designed and implemented three generic/overarching guidelines on matters such as the principles and purposes of sentencing.[169] The SSC has not released any offence specific guidelines. The first offence specific guideline is expected in 2022 at the earliest and the design process, as far as we know, is still underway. At the time of writing this report, the SSC has not announced how it plans to structure offence specific guidelines (e.g. whether there will be starting points as in England and Wales). Therefore, Scotland is comparatively inexperienced in using sentencing data to design, implement, and evaluate guidelines. However, Scotland's experience can provide useful lessons. The SGIC may learn from how the young SSC operates. The SGIC may also learn from Scotland's past work on a sentencing information system.

Section 3.4.1 examines the criminal justice data in Scotland most relevant to understanding sentencing and Section 3.4.2 covers its main limitations. However, this is just an overview and the landscape of data relevant to sentencing in Scotland is complex.[170] Section 3.4.3 details Scotland's substantial experience researching, developing, piloting, and implementing a Sentencing Information System (SIS). Even though the SIS has not, for reasons we will cover, been kept up to date by the Courts Service and so is no longer in judicial use, the experience in the SIS project as a whole offers valuable lessons: notably for

[169] At the time of writing, 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 and evaluation of this 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/

[170] See Appendix D.

those who are interested in collecting and representing high-quality information about sentencing practice – both at appellate and trial (first instance) levels.

3.4.1 Scottish Data: Overview

The information most relevant to criminal justice is published by the Scottish Government, which receives information from other institutions' databases. Notably, the *Criminal Proceedings in Scotland* publications[171] and reconviction publications[172] have interesting data drawn from the Criminal Case History System for Scotland (CHS). Likewise, the *Recorded Crime in Scotland* publications[173] are somewhat helpful and these "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."[174]

While much of the data used in Scottish Government publications comes from the police, data are 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) and are used in different government criminal justice publications. The fragmentary nature of the information is commented on below.

Beyond the Scottish Government publications, there are a few other sources worth highlighting. Notably, Scotland has a body of case law that can be used to identify principles and normative trends. However, case law is not discussed in this chapter for two reasons. Firstly, many of the points in Chapter 2 remain relevant. Appeal judgments are unable to provide comprehensive data about patterns of sentencing in trial (or first instance) courts - especially given the small sample of cases that are appealed. Secondly, while there is case law on general sentencing principles (from which some appropriate sentence levels can

[171] Available online: https://www.gov.scot/collections/criminal-proceedings-in-scotland/.

[172] Available online: https://www.gov.scot/publications/reconviction-rates-scotland-2018-19-offender-cohort/pages/35/.

[173] Available online: https://www.gov.scot/collections/recorded-crime-in-scotland/.

[174] 'Recorded Crime in Scotland, 2020-2021', Scottish Government, 28 September 2021, para. 7.1, https://www.gov.scot/publications/recorded-crime-scotland-2020-2021.

be inferred), there is no substantial guidance in the form of tariffs, starting points, or sentence ranges for particular offences and according to different aggravating and mitigating features.

Finally, sources of information worth highlighting are publications by criminal justice institutions (the Scottish Prison Service, the Scottish Courts and Tribunal Service, and the Crown Office and Procurator Fiscal Service), various research works, and practitioner resources/guides. We note these sources below to clarify their limitations with regard to sentencing.

3.4.1.1 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, and the types of offences committed by those sentenced to imprisonment can give a very general overview of the sentencing landscape and issues therein.[175]

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 for sentencing is available through Scottish Government publications rather than SPS directly.[176]

3.4.1.2 Scottish Courts and Tribunals Service (SCTS)

The Scottish Courts and Tribunal Service (SCTS) provide some official statistics that can be accessed online.[177] The Management Information Analysis Team (SCTS) provide monthly information derived from the Criminal Operations digital case management system (COPII).[178] There are also quarterly and annual

[175] Some issues noted include the increasing age of the prison population.

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

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

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

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

However, more importantly, while there is some information on pleas, this information does not include sentences and all bulletins have the proviso that:

> *"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."*[179]

Thus, SCTS's publicly available data is unhelpful with regard to understanding sentencing. Again, the only somewhat useful insights from SCTS data will be through Scottish Government publications that utilise this information.

3.4.1.3 Crown Office and Procurator Fiscal Service (COPFS)

The Scottish prosecution service (COPFS) provide various figures, and these are available online.[180] However, these are of limited help for understanding sentencing. 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 in the past and contain no information on court disposals.

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.[181] The main point to note

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[179] 'SCTS Official Published Statistics'. The latest bulletin can be accessed at: https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/criminal-court-statistics/2021-2022/scts-quarterly-criminal-court-statistics---bulletin-q3-2021-22.pdf?sfvrsn=8a39ce60_2.

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

[181] '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.

here is that the live nature of COPFS's database is reported to make extracting information for statistical purposes more difficult.

3.4.1.4 Empirical Research on Sentencing

While there is some well-known research on Scottish criminal justice,[182] as a smaller jurisdiction of comparable size to Ireland, Scotland has seen less empirical research than England and Wales or (especially) the USA on sentencing. However, there have been various academic studies of sentencing.[183]

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

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

[183] 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 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).

"underlying patterns" of sentencing.[184] There have also been evaluations that shed light on sentencing practices of the time.[185] Nonetheless, significant gaps in knowledge of Scottish sentencing remain that cannot be filled by the existing body of research.

Research is, occasionally commissioned by UK and transnational 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.[186] 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 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.

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[184] 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.

[185] 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'.

[186] 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. Additionally, the SSC spent £162,296 on 'research' in 2019-2020. 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 following guilty pleas.

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.

3.4.1.5 Legal Practice Sources

Legal practice sources focus on the legal and procedural aspects of criminal cases. Practice sources in Scotland include a number of works by Scottish judges.[187] 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, several of these sources are dated and cannot take into account more recent important developments such as the presumption against short custodial sentences. More fundamentally, none of these sources offers enough breadth to provide a substitute for detailed official figures. By their nature, these sources only cover a small number of cases, which are often atypical. Therefore, while those seeking to understand sentencing in Scotland ought to have regard to practice sources, they are not able to provide data about the typical patterns of sentencing in different case scenarios.

3.4.2 Limitations of Official Data

Since Government publications are the main resource relevant to understanding sentencing, their limitations are worth further scrutiny. The first and most obvious issue is that few official publications have a specific focus on sentencing.[188] A second problem is that multiple convictions are poorly reflected in the data. Little more needs to be said about these limitations given what has been discussed already in Chapter 2. However, two limitations worth noting

[187] For example, one now dated work is Nigel Morrison, *Sentencing Practice* (W. Green, 2000).

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

further are the fragmentary character of official data and the distinction official data draws between crimes and offences.

3.4.2.1 Fragmentary Character of Official Data

Rather than provide a cohesive picture, official data in Scotland tends to offer a fragmented perspective of sentencing. In part, the lack of a cohesive picture is a consequence of information coming from different databases that cannot be linked due to different case counting rules and different ways of classifying offences:

> *"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 identify distinct individuals (be it as witnesses, victims or accused) across the whole sheriff court system."*[189]

Matters are not helped by the fact that various sources of data in Scotland are operational databases that are not intended to facilitate data extraction and sharing for statistical purposes. COPFS's database has been noted above as one example, but the same is true of others such as the CHS (which underpins many criminal justice publications), and COPII (used by SCTS).

The net effect of this fragmentation is that there are serious limitations in the ability to understand sentencing. 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 measure the main charge in a case,[190] this means that COPFS figures are not directly comparable. Similarly, the fragmentation of data means there is little ability to enable plea

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

[190] Additionally, the Scottish Government's statistics on criminal proceedings report on the convictions and sentencing of accused persons. This is different from the recorded crime statistics, which count crimes and offences at the time that they came to the attention of Police Scotland.

status (a legal factor with potentially significant implications for sentencing)[191] to be linked to final sentence outcomes. This inability means that the impact of key policies such as 'sentence discounting' (changing a sentence depending on whether or not the person had pleaded guilty or not guilty) cannot be adequately measured by official data.[192] Other important features that may influence sentencing are also difficult to factor into analyses based on official data.

Even the Scottish Government, the main publisher of data relevant to sentencing, is not immune to these difficulties. Moreover, when data is shared between a criminal justice institution and the Government, not all fields are necessarily shared from their databases. For example, the Scottish Government does not receive all fields from the data held on the police CHS. Accordingly, reports based on the CHS have limitations where either the variable is not held on the CHS or not shared with the Scottish Government.[193] Indeed, *Criminal Proceedings* data lack key variables such as the conditions attached to community sentences and, therefore, say little about these potentially diverse sentences.[194]

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[191] 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*.*

[192] 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.

[193] 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/.

[194] For partial insight, yet another publication with general aggregate data is the best available. See 'Criminal Justice Social Work Statistics: 2020 - 2021' (Scottish Government, 31 January 2022), https://www.gov.scot/publications/criminal-justice-social-work-statistics-scotland-2020-21/documents/.

Consequently, in terms of sentencing, fragmentation is one reason why Scotland has less information available than England Wales. Initiatives have been undertaken in Scotland to improve data sharing, but further work is needed.[195] However, progress may be made as Justice Analytical Services (JAS) has key research priorities relevant to sentencing: undertaking international comparisons of sentencing lengths across key jurisdictions; monitoring the 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.[196] Additionally, the Scottish Sentencing Council may also come to play a role in addressing the gaps in the data.

3.4.2.2 The Distinction between 'Crimes' and 'Offences'

In Scotland, there is no legal distinction between 'crimes' and 'offences.' Neither is such a distinction widely made in policy or academic literature. However, data published by the Scottish Government makes such a distinction – with 'crimes' typically being considered more serious than offences. This distinction, for the purposes of Scottish Government publications, is an abstraction with little 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.[197] 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).

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

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

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

A limitation of the crimes/offences distinction is that, as the format is so old, it is unclear as to the exact 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. 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 be problematic. More generally, some of the classifications of conduct as a crime or offence appear to be peculiar.[198]

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

In sum, none of the sources of information above (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. Official data may be the best available but even this has serious limitations. These limitations prompted the senior Scottish judiciary to create and pilot a database (initially for the High Court) that would provide users with quick and easy access to comprehensive and high-quality information. We discuss this next.

3.4.3 Scottish Sentencing Information System (SIS)

Although Scotland has much less experience with guidelines than England and Wales, or the USA, it has considerable experience in 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

[198] 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 some 'crimes.' Conversely, some seemingly less serious transgressions of the criminal law (e.g. 'shoplifting') are categorised in the more serious grouping of "crimes."

conducted to research, develop, and implement a Sentencing Information System (SIS) for the High Court of Justiciary.[199] 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.[200]

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. They were simply encouraged to consult the SIS: for example, 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."[201]

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[199] 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).

[200] 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;

[201] 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.

However, it was not until the 1980s when information technology became widespread that sentencing databases were pioneered in Canada in British Columbia;[202] Doob in various Canadian provinces;[203] and then the Judicial Commission in New South Wales.[204]

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

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[202] John Hogarth (1988) *Sentencing Database System: User's Guide*, Vancouver, (University of British Columbia).
[203] Anthony Doob and Park, N. (1987) 'Computerised Sentencing Information for Judges: An Aid to the Sentencing Process' *Criminal Law Quarterly* vol. 30 p. 54.
[204] 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

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.[205] (See Chapter 2 for an overview of ISIS). 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'[206] approach.

[205] Notably, ISIS data was publicly available while the SIS data (even if from public records) was not.

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

3.4.3.1 Developing a More Meaningful Case Taxonomy

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:

> *"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."*[207]

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" [208] is selected (often not by the court) 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.

Where there is more than one conviction, a main, or principal, conviction is usually selected by a body with the administrative responsibility, not by the court. Although in many cases this may be thought by the 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 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,

[207] Cyrus Tata and Neil Hutton, '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.

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

concurrently (or in some combination of the two), or, in cumulo (covering all offences in a single sentence). This can make it difficult 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 (in particular) 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:

> *"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."*[209]

3.4.3.2 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 a "pilot" project.

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 the university team.

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

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. As a direct consequence, it was not maintained by the Courts Service. Since the project was fully handed over from the university to the Courts Service, the Courts Service declined to implement the recommended data-entry training or data quality control regime. Over time, therefore, the judicial clerks who were supposed to input data about new cases felt no need to do so with the predicted 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."[210]

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.[211] By contrast, the Scottish SIS atrophied because of a change in senior judicial personnel who appeared to harbour an altogether more suspicious stance toward 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.

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. This confirmed the warning that earlier prototype studies suggested: without formal

[210] 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.
[211] See Chapter 2 for further details.

authority, the voluntary pursuit of consistency by consulting information is unlikely, in itself, to succeed.[212]

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 closely resembling an SIS) will come to be seen as a necessity.

3.4.4 Conclusion: Scottish Sentencing Data

Overall, there is currently 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."[213] Consequently, official data is "a 'jigsaw puzzle' with missing pieces."[214]

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:

> *"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*

[212] Anthony Doob, 'Evaluation of a Computerised Sentencing Aid' (Strasbourg: Council of Europe: Select committee of experts on sentencing, European committee on crime problems, 1990), 2–5.

[213] 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.

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

very clear perception amongst both practitioners and the public in general that sentencing in this country is inconsistent."[215]

There are parallels here to the findings of the Law Reform Commission in Ireland that could only *intuit* "the existence of inconsistency."[216] 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. However, 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 the SIS to judges (that consulting it was not mandatory) was also its key weakness. Without formal endorsement from the Court of Criminal Appeal or linking it to judicial guidelines, and with a change in judicial leadership, the SIS was left to wither. This confirmed the warning that earlier prototype studies suggested.[217] Without formal authority, the voluntary pursuit of consistency by consulting information is unlikely, in itself, to succeed. However, 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 the kind of reliable, comprehensive, and up-to-date data needed to identify, for example, sentencing patterns.

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

[216] 'Consultation Paper on Sentencing', para. 2.32.

[217] Doob, 'Evaluation of a Computerised Sentencing Aid', 2–5.

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 cross this gap.

3.5 Final Conclusions on the USA, England and Wales, and Scotland

This chapter has examined the principal data collection methodologies of the USA, England and Wales, and Scotland. These are jurisdictions whose experiences offer useful lessons for Ireland to draw upon. Several key lessons can be identified. For example, Ireland has begun experimentation with survey/census methods of data collection in courts. Such ventures may be fruitfully informed by the English and Welsh experience with the CCSS. Indeed, our next and final chapter turns to bringing together the various lessons identified in Chapters 2 and 3 to draw conclusions and recommendations for the SGIC.

3.5.1 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. Indeed, while generic or normative guidelines (of the kind not requiring the data noted in this report) may appease early demands for outputs, alone (in the longer term) they may not be sufficient to fulfil all the functions of a sentencing council. Therefore, an overarching guideline on principles and purposes of sentencing, for example,

could be a worth pursuing while the data needed for offence specific guidelines and guideline monitoring are gathered.

3.5.2 Lessons Concerning Data and Research

The experiences of the USA and England and Wales demonstrate that a sentencing council (or similar body) with a suitable research function can achieve things that a Court of Criminal Appeal is unable to do. For example, appellate courts are limited in their ability to research current practices in depth; conduct systematic consultations; assess issues concerning 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, which considers the specific duties of the council and the existing sentencing data available to it. Indeed, though the Council in England and Wales may be better served by its existing data on sentencing than some other jurisdictions, its ability to fulfil its wider functions in, for example, 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 a 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 for the monitoring of their implementation and impact.

3.5.3 Lessons Concerning Public Confidence

Sentencing policy and practice are 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,[218] 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.

[218] Freiberg and Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy*; Marsh et al., 'Public Knowledge of and Confidence in the Criminal Justice System and Sentencing–A Report for the Sentencing Council'; 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*.

Chapter 4: Conclusions and Recommendations

4.1 Introduction

This final chapter brings together the lessons from these analyses and contains our recommendations with respect to data collection for the purposes of establishing an accurate and meaningful picture of sentencing patterns, and for devising (and later amending) sentencing guidelines. We do not assume a specific model of guideline, as the scope and form of any guidelines remains to be determined. Rather we consider data collection in a broader way that would support different guideline structures.

The recommendations contained in this report are based on the simple premise that good guidelines depend on good data. The same, of course, holds true for providing information on current sentencing practice, whether for purely descriptive purposes or for monitoring compliance with adopted guidelines.

Our second chapter assessed the quality of data about patterns of sentencing currently available in Ireland. It concluded that, despite some progress, sentencing data in Ireland still have profound limitations. These limitations include the lack of a large scale, offence-specific database, or an annual release of key sentencing indicators, as is the case in some other jurisdictions.

As outlined in our second chapter, the annual reports of the Courts Service and the Irish Prison Service are the most useful sources of information now available on existing sentencing patterns. This information may well be adequate for the institutional purposes of the agencies in question, but it is wholly inadequate for the tasks which the SGIC is statutorily required to undertake.

By way of illustration, the annual reports of the Prison Service provide information on the lengths of sentences being served by those currently in custody for various offences and categories of offences. Yet, the practical utility of this information is severely limited because of three factors. First, some of the

offence categories are very broad (e.g., “dangerous or negligent acts” or “theft and related offences”) and therefore provide no information on the specific conduct in respect of which the sentences are being served. Secondly, and naturally, these statistics relate solely to prison sentences, whereas non-custodial sentences would have been imposed for many offences within the various categories. Indeed, it may well be that some of the custodial sentences recorded include activated suspended sentences. Thirdly, each of the relevant agencies collects and publishes data that reflect their own particular functions and responsibilities. However, this means that the available data are highly fragmented. It is difficult, if not impossible, to engage in ‘follow-through’ by tracing, even within fairly broad parameters, the progress of cases from the point of initial reporting or detection to final disposition.

The annual reports of the Courts Service are somewhat more informative about the range of sentences imposed in the various courts. Essentially, however, they do no more than describe the spread of penalties imposed for various categories of offences. The information provided in respect of the Central Criminal Court is somewhat more specific in that it indicates terms of imprisonment, expressed in ranges such as 2 to 5 years, imposed for homicide and sexual offences. Again, unfortunately, information of this nature is of very limited value for guideline creation purposes. For instance, within the category of “rape”, it is not clear how many of the cases involved multiple offences as opposed to single incidents of rape. As to the next category, “sexual offences”, there is no indication as to the precise offences or the conduct coming under this heading. Overall, therefore, while the Courts Service statistics permit certain conclusions to be drawn about the extent to which the various sentencing options are used for certain offences or, more commonly, broad categories of offences, they are of little assistance for the purpose of identifying the sentences imposed for different variants of all the offences, or even the more commonly prosecuted ones, coming before the criminal courts.

By contrast, in England and Wales (discussed in Section 3.2) reasonably good quality sentencing data is provided by the Ministry of Justice and, nowadays, by the Sentencing Council. As noted there, the statistical information published by the Ministry of Justice has certain limitations but was considered adequate by

the Sentencing Guidelines Council when first established under the Criminal Justice Act 2003.

Likewise, in the United States (discussed in Section 3.2), relatively high-quality data on sentencing practice are available in many jurisdictions where guidelines have been introduced. Sentencing commissions and similar bodies have been responsible for generating much of this data, and they have been given the necessary resources to do so. As the USA's experience illustrates, reliable and comprehensive statistical information is essential before a guideline-setting body can even embark on the development of guidelines. For instance, the original United States Sentencing Commission (which developed the federal guidelines during the period October 1985 to April 1987) largely adhered to past sentencing practice when creating offence categories and determining sentence length. For this purpose, it analysed 10,000 federal sentencing cases drawn from existing databases.[219] Without having access to such data, it could scarcely have produced a comprehensive set of guidelines within such a short period of time, least of all guidelines that largely reflected existing practice.

In Scotland (discussed in Section 3.4) the main source of data available 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 better than that in Ireland but limited in some important respects. However, various empirical research studies and literature reviews have been commissioned, which help to provide a fuller picture of sentencing in Scotland. Additionally, Scotland has considerable past experience in seeking to research, design, implement and maintain an information system to provide instant access to meaningful 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, which produced with and for the judiciary high-quality data about sentencing. Changes in judicial leadership

[219] Stephen Breyer, 'The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest', *Hofstra L. Rev.* 17 (1988): 1. (The author, now a Justice of the United States Supreme Court, was then a federal Appeals Court Judge and a member of the original United States Sentencing Commission).

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 Courts Service.

4.2 Evidence-Based Policymaking

The importance of evidence-based policymaking which, in turn, requires high-quality data, is increasingly recognised in Ireland as well. For instance, in early March 2022, the Criminal Justice Strategy Committee, which was established in 2015, published its Sectoral Strategy for 2022-2024. The core objective of this Strategy is to create a more "joined-up" criminal justice system and, for this purpose, it identifies five strategic pillars, including one entitled "Data as Driver." One of the more specific objectives under this heading is to "support a data culture to ensure an evidence-based approach to policymaking." It also aims to use research, analysis and data to identify new and emerging trends. The Strategy Committee consists of representatives from all the key criminal justice agencies, including the Courts Service but not the Judicial Council (and it may not be appropriate for the Council to be involved).[220] However, the significance of the newly published Strategy in the present context is its recognition of the necessity for good data and data sharing for policymaking purposes. It would nonetheless have been preferable if the Strategy had more explicitly recognised the limitations of existing criminal justice data and the need to review the present systems of data collection and analysis.

[220] The signatories to the new Strategy are the Secretary-General of the Department of Justice, the CEO of the Courts Service, the Director General of the Irish Prison Service, the Director of the Probation Service, the Garda Commissioner, the CEO of the Legal Aid Board, the Director of Public Prosecutions, and the Director General of Forensic Services Ireland.

4.3 Sentencing Data and the Statutory Functions of the SGIC

In formulating our recommendations in this report, we have had regard first and foremost to the statutory functions of the SGIC as specified in the Judicial Council Act 2019. As set out in s. 23(2), the Committee's primary functions are to:

> *"(a) prepare and submit to the Board for its review draft sentencing guidelines,*
>
> *(b) prepare and submit to the Board for its review draft amendments to sentencing guidelines adopted by the Council,*
>
> *(c) monitor the operation of sentencing guidelines,*
>
> *(d) collate, in such manner as it considers appropriate, information on sentences imposed by the courts,*
>
> *(e) disseminate that information from time to time to judges and persons other than judges."*

Section 23(4) authorises the Committee to undertake related tasks such as collating information on decisions of the courts and conducting research on court sentencing practice.

Further, s. 91 of the 2019 Act describes the nature of the sentencing guidelines the SGIC may develop and the matters it must take into account when drafting new guidelines or proposing amendments to existing ones. For present purposes, the most significant of these matters is the "sentences that are imposed by the courts" (s. 91(3)(a)).

In light of the multiple functions thus allocated to the SGIC, reliable data will be needed for descriptive purposes, normative guideline creation, and compliance purposes. These will now be considered in turn because each requires its own

kind of data, although it is possible that a single database could provide a viable information source for fulfilling most of the SGIC's core functions.

4.3.1 The Descriptive Function

The 2019 Act places considerable emphasis on the collection, collation and dissemination of information on existing sentencing practice. This is one of the express functions conferred on the SGIC by s. 23 and it is also implied by s. 91 which requires that account be taken of existing practice when drafting and amending sentencing guidelines. Therefore, it follows that an effective system must be put in place for collecting, analysing and disseminating reliable and reasonably comprehensive data on current sentencing practice. The nature and extent of the information to be thus obtained is, to a considerable extent, within the discretion of the SGIC itself. Section 23(2)(d) provides that the Committee shall collate "in such manner as it considers appropriate" information on sentences imposed by the courts. Obviously, the extent to which the SGIC can fulfil this function will be determined in large measure by the resources available to it.

Further, and partly perhaps for a resource-based reason, the SGIC *may* decide to concentrate *at first* on collecting data on sentences imposed for serious offences or certain kinds of commonly prosecuted serious offences, as opposed to collecting data on all sentences imposed in all criminal courts. However, this is a matter for the SGIC itself to decide. In any case, the challenge will be to devise a system for the routine collection of reliable data on existing practice.

The experience of the former Irish Sentencing Information System demonstrates what can be achieved in this regard. But it also bears testament to the degree of policy commitment, and the sustained resourcing needed to collect and analyse information on existing practice, and to disseminate that information through a user-friendly database that is accessible to all. Researchers, mainly junior barristers, were employed to attend court in person and collect the relevant information, which was later analysed and made publicly available. Limited resources meant that only a small number of courts, mainly in Dublin and a few other large urban areas, could be covered over the duration of the project.

If the SGIC is to fulfil its information collection role adequately, it will have to extend its reach to all criminal courts, or perhaps to certain levels of court in the first instance. Either way, information must be collected on a state-wide basis. While one option would be to have researchers in each court collecting data, on an ongoing basis this could prove too cumbersome or impracticable.

A simpler option would be for each relevant court to collect information in respect of each sentence it imposed (or, as the case may be, the sentences imposed for those offences selected by the SGIC for this purpose).

Obviously, resources will need to be considered in thinking through how much information courts will be able to provide, but the SGIC must identify the essential information needed in respect of the offence(s), the offender(s) and the sentence(s) imposed in each case. The SGIC will obviously need to consider further the precise nature of the information required and the format in which it should be furnished by the relevant sentencing courts. This underscores the need for a professionally staffed information unit under the aegis of the SGIC/Judicial Council, as recommended later in this Report (see Section 4.5.6).

4.3.2 The Normative Guideline Function

Under this heading, we consider the nature of the data needed for the development of sentencing guidelines to guide the courts as to how they *ought* to approach sentencing. As already noted, the SGIC is required, under s. 91 of the 2019 Act, to take account of existing sentencing practice, among other matters, when fulfilling this function. Therefore, the information collected through a system of the kind indicated under the previous heading will be crucial for formulating guidelines, together with such limited information as may be gleaned from administrative data contained in reports of the Prison Service, the Courts Service and other publicly available sources.

The precise nature of the data needed for guideline creation obviously depends on the nature and format of the guidelines it is proposed to draft. Drawing on the experience in other jurisdictions, notably the United States and England and Wales, it is possible to identify two broad approaches to guideline creation. The

first of these, as reflected in the United States federal system, Minnesota and various other states, involves drafting a comprehensive set of guidelines covering all offences or, more commonly, all serious offences known to the law of the jurisdiction in question.[221]

The grid-centred systems favoured in these US jurisdictions clearly facilitate this comprehensive approach. Weightings can be attributed to different manifestations of each offence (e.g., the value of property stolen in theft offences and the type and amount of illegal drugs in drug offences) and to various offender-related factors such as a guilty plea, co-operation with law enforcement authorities and previous criminal record. Sentencing then becomes largely an exercise in calculation, as a trial court's task, once it has established the offence score and criminal history score, is to identify the appropriate starting point or range which is typically at the intersection of the offence axis and the criminal history axis on a grid. Guideline systems of this nature vary in the extent to which courts are permitted to depart from the recommended sentence or range of sentences. Further, it should be noted that American numerical grid guideline systems often impose a very heavy premium for previous convictions. The sentence prescribed for an offender with the highest criminal history score may be many times higher than that for a first-time offender.[222] This is one reason, and perhaps the main one, why American-style numerical grid guidelines have found no imitators elsewhere. In fact, they were expressly rejected in Canada, England and Wales, and Scotland largely for this reason.[223]

The second approach is incremental in nature. It entails the gradual development of offence-specific guidelines as well as more "generic" guidelines dealing with matters such as the assessment of offence gravity and discounts for

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[221] For a detailed analysis of the Minnesota guidelines (often regarded as the most successful American guidelines) and the English guidelines, and the contrasts between them, see Julian V Roberts, 'The Evolution of Sentencing Guidelines in Minnesota and England and Wales', *Crime and Justice* 48, no. 1 (2019): 187–253. In Michael Tonry (ed), *American Sentencing: What Happens and Why?* (Chicago: University of Chicago Press, 2019).

[222] Julian V. Roberts and Richard S. Frase, *Paying for the Past: The Case Against Prior Record Sentence Enhancements* (Oxford University Press, 2019), https://doi.org/10.1093/oso/9780190254001.001.0001.

[223] See for example, the Sentencing Commission Working Group and Great Britain, *Sentencing Guidelines in England and Wales: An Evolutionary Approach* (Sentencing Commission Working Group, 2008).

guilty pleas that are potentially applicable to all offences. This is the approach adopted in England and Wales, and it seems to be the planned approach in Scotland as well.[224] The English guidelines are more narrative than numerical, at least when contrasted with the grid-centred systems favoured in the United States. The English offence specific guidelines indicate appropriate starting points and sentence ranges, but they also include descriptive accounts of the factors that should increase or reduce offence gravity as well as those that may be relevant in determining the ultimate sentence. The generic guidelines assume a predominantly narrative structure.

We shall assume for present purposes that the guidelines ultimately formulated by the SGIC will be closer, in structural terms at least, to the English than to the American guidelines. However, even if we are wrong about this – and the SGIC may, of course, opt for an entirely different model – it makes little difference for present purposes because the data needs are likely to be much the same in any event. We can nonetheless safely proceed on the assumption that offence-specific guidelines formulated by the SGIC will be expressed in sentence ranges, with or without recommended starting points. We make this assumption for two reasons. First, s. 91(2) of the 2019 Act provides:

> *"A range of sentences may be specified in sentencing guidelines that it is appropriate for a court to consider before imposing sentence on an offender in the proceedings before it."*

Secondly, the Court of Appeal and the Supreme Court have already delivered several guideline judgments, some formal in the sense specified in *People (DPP) v O'Sullivan (Ian)* [2020] IECA 331, and others more informal but still decidedly useful. The approach adopted by both courts has been, broadly speaking, to identify three or more sentence ranges for the relevant offence. Where an offence carries a maximum sentence of life imprisonment, the Court of Appeal has generally adopted a notional maximum of 15 years for guideline purposes,

[224] For a concise but comprehensive account of the English guidelines, see Ashworth and Kelly, *Sentencing and Criminal Justice*; Andrew Ashworth and Julian V Roberts, *Sentencing Guidelines: Exploring the English Model* (OUP Oxford, 2013). The English Sentencing Council has a useful website where all its guidelines and other information about its work can be found: www.sentencingcouncil.org.uk.

while accepting that a longer sentence may sometimes be warranted. To cite just a few examples, sentence ranges of this nature have been indicated for residential burglary (*People (DPP) v Casey and Casey* [2018] 2 I.R. 337), robbery (*People (DPP) v Byrne (Leon)* [2018] IECA 120), manslaughter (*People (DPP) v Mahon* [2019] 2 I.R. 337) and rape (*People (DPP) v F.E.* [2019] IESC 85 and [2020] IESC 5).

Of course, sentence ranges are generally intended to guide the selection of *headline* sentences. As the Court of Appeal has clarified on numerous occasions, the headline sentence is determined by the gravity of the offence, taking account of the harm caused or risked and the offender's moral culpability. It is sometimes referred to as the pre-mitigation sentence. A court must then have regard to the personal circumstances of the offender under the second limb of the proportionality principle as it applies in Ireland, and those circumstances are usually mitigating. Typically, therefore, the ultimate sentence will be lower than the headline sentence on account of personal mitigation including, for this purpose, some reduction for a guilty plea where that applies. Aggravating factors are more likely to be relevant when assessing offence gravity under the first limb of the proportionality principle.

The identification of mitigating and aggravating factors is therefore highly relevant for both assessing offence gravity and establishing the level of deserved personal mitigation. Some such factors are common to all offences, e.g., a guilty plea or co-operation with law enforcement authorities. Others are particular to certain offences or categories of offences. For instance, in a case of a manslaughter or assault offence, it is accepted that bringing a firearm or offensive weapon to the scene of the crime and using it is an aggravating factor, as is an unlawful intrusion into the victim's dwelling in the case of a sexual offence. Offence-specific guidelines should therefore include a list (even if non-exhaustive) of aggravating and mitigating factors to be considered under both limbs of the proportionality principle.

The SGIC is also empowered to develop what may be termed generic guidelines, namely guidelines that are applicable to sentencing generally (s. 91(1) of the 2019 Act). These might include, for example, a guideline on reductions for a

guilty plea which, in turn, would require consideration of the underlying rationale for granting such reduction and the levels of reduction that should be granted.[225] (Under the Criminal Justice Act 1999 (s. 29), a court must ordinarily have regard to the stage at which the plea was entered when determining the discount, if any, to be granted).

Bearing all these considerations in mind, it is clear that the structuring (categorisation and classification) of data collection and analysis of measurable sentencing patterns can be usefully informed by the careful and sustained analysis of case law. This will help to identify the jurisprudence of the appeal courts, including, for example, the factors that do (or should) influence appellate assessments of offence gravity and the adjustments to be made in respect of circumstances personal to the offender. It is the kind of task that can be allocated to legal researchers who would be charged with analysing existing case law, primarily from Ireland but usefully from other jurisdictions as well, with a view to identifying aggravating and mitigating factors relevant to sentencing generally or to particular offences.

The offence specific guidelines drawn up by the English Sentencing Council should also be useful for this purpose as they include lists of factors increasing or reducing culpability as well as those relevant to the determination of the ultimate sentence. As for numerical data, it is best collected under the kind of system suggested under the previous heading of the 'descriptive function.'

4.3.3 The Compliance Function

Under s. 23(2) of the 2019 Act, the SGIC is required to monitor the operation of sentencing guidelines. It is impossible at present to be prescriptive with respect to the data necessary to fulfil that function. In the fulness of time, the Committee will have to decide how best it can discharge this function, and it will have a variety of strategies available to it for this purpose. One possibility, however, is to combine this function with the information gathering function

[225] For an analysis of these issues in the context of the English Guideline on discounts for guilty pleas, see Gormley et al., 'Sentence Reductions for Guilty Pleas: A Review of Policy, Practice and Research'.

described above in Section 4.3.1. If the Committee is routinely being furnished with good quality information on sentences imposed by the courts, it will eventually be in a position to identify the extent to which any guideline formally adopted by the Judicial Council is being applied. This in turn underscores the importance of establishing a robust and effective system for collecting, collating, and analysing information on current sentence practice. Having such a system in place should enable the SGIC to discharge several of its functions, notably the provision of information on the sentences being imposed by the courts and also monitoring the application of guidelines once they are adopted.

The SGIC will doubtless need to engage periodically with sentencing judges (including appeal court judges) to identify any problems or issues they may have with Council guidelines, once these are adopted. Guidelines are far more likely to gain acceptance when they are responsive to the concerns of those judges who must implement them. The Judicial Council Act 2019 clearly envisages that existing guidelines may be amended from time to time, and as the need arises. An effective synergy between the guideline-setting body and those responsible for guideline application is critical for the gradual elaboration of just and workable guidelines. Guidelines are far more likely to gain acceptance when they reflect the collective wisdom of judges who have extensive experience in sentencing, and who become aware, before most others, of emerging patterns of offending and novel issues connected with the personal circumstances of offenders.[226] For the same reason, judges and, indeed, others closely involved in the administration of justice are in the best position to alert a guideline-setting body to problems with existing guidelines and to factors that may necessitate some adjustment or amendment

[226] Daniel J. Freed, 'Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers Symposium: Punishment', *Yale Law Journal* 101, no. 8 (1992 1991): 1687. ("A sense of justice is essential to one's participation in a system for allocating criminal penalties. When the penalty structure offends those charged with the daily administration of the criminal law, tension arises between the judge's duty to follow the written law and the judge's oath to administer justice").

4.4 The Challenge of Data Collection and Management in Ireland

The SGIC is starting out at a clear disadvantage compared to similar bodies established elsewhere to the extent that it cannot draw on any existing source of reliable and comprehensive data on current sentence practice. Therefore, the SGIC faces the unavoidable challenge of devising a system for the systematic collection and analysis of data for the immediate purposes of developing guidelines and presenting information on current sentencing practice. Similar data will later be needed for monitoring compliance with guidelines. However, while this may be a challenge in the sense of requiring the establishment of a data collection and management system and finding the necessary resources to do so, it also provides the SGIC with a unique opportunity to develop a database specially designed to meet its own information requirements.

A potential pitfall that a body akin to SGIC should avoid is having to defend poor quality data. On grounds of short-term expediency and cost, it could be tempting for a new body like the SGIC to pronounce the data adequate so as to produce work from it. As criticism of the data grows, such a body may be caught in a dilemma of its making when trying to disassociate itself from the very data it has relied upon.

Viewed in this light, the disadvantage of being unable to draw on existing data may in truth be seen as an advantage because it furnishes an opportunity – and a need – to create a bespoke system to generate the kind of detailed and reliable information, of both a quantitative and qualitative nature, that is essential for the development of good sentencing guidelines.

In fact, data of this quality are unlikely to be available from existing sources in any event, as existing data will probably have been compiled for some purpose other than facilitating the creation of sentencing guidelines. As noted earlier, the former English Sentencing Guidelines Council was able to draw on reasonable quality statistical information published by the Ministry for Justice,

but even that information had certain gaps and limitations that had to be addressed through later research conducted by the present Sentencing Council.

The SGIC, by contrast, will be able to determine from the outset the kind of information it needs for its specific purposes and how to go about collecting it. This, admittedly, will take some time but it is an exercise that will pay off in the long term because of the quality of information that can be provided on existing sentencing practice, and the quality of the guidelines that are formulated on the basis of that information.

We **strongly recommend**, therefore, that SGIC should openly recognise that current data are profoundly limited and inadequate for its tasks and that this can only be remedied by a systematic, concerted, and properly resourced effort.

As discussed further below in Section 4.4.3, the collection and analysis of sentencing data call for considerable expertise in empirical research methodologies. Initially, however, certain policy decisions must be taken regarding the nature of the data required in both the short and long terms, the range of offences in respect of which current sentencing information will be sought and the courts that will be surveyed. For offences tried on indictment in the Circuit Court, Central Criminal Court and Special Criminal Court, it should be possible to design a data collection form to be completed under the supervision of the trial judge or court registrar (as deemed appropriate) providing essential information on the offence(s), the offender(s), and sentence(s) imposed in each case.

4.4.1 Multi-Conviction Cases

As our second and third chapters explained, a recurring problem encountered in many jurisdictions where sentencing data are collected is that many offenders will have been convicted of more than one offence. A particularly significant problem with such official data 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"[227] is selected (often not by the court) 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.

Persons convicted of multiple offences may therefore have been sentenced to concurrent, consecutive or partly concurrent terms of imprisonment, or some offences may have been taken into consideration. The most common strategy by official bodies for addressing this problem is to adopt a "principal offence" approach. In effect, this means that where there is more than one conviction, a main, or principal, conviction is usually selected by a body with the administrative responsibility, not by the court. As our third chapter explains, although in many cases this may be thought by the 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 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 to know what the court perceives to be the principal conviction.

However, a data collection form of the kind suggested can still be designed to include information on the sentence imposed for each offence where the number of offences of conviction is relatively small, and a separate sentence has been imposed in respect of each. This information may still be useful. The situation obviously becomes more complicated when an offender has been convicted of a large number of offences, as may happen in cases of fraud or serial child sexual abuse. A complimentary 'whole offence approach' was created by the Scottish Sentencing Information System (SIS), which sought

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

specifically to overcome the shortcomings of a principal offence approach. Data were collected and represented in the SIS according to both approaches, allowing users greater flexibility.[228] However, it should be noted that this required a significant research effort to design, test and revise a whole offence taxonomy to capture the course of conduct in multi-conviction cases.

We **strongly recommend, therefore,** that the SGIC considers very carefully the methodological challenges presented by multi-conviction cases. As a way first to understand the scope and nature of the challenge, the SGIC should, we suggest, consider conducting a small scoping study to examine in small samples the incidence and character of multi-conviction cases in the different levels of criminal courts. Having done so, if a principal offence approach is adopted careful thought should be given as to how and by whom such offences are recorded against the sentence.

Careful consideration must be given to the skillsets needed for the collection and management of sentencing data. Legal skills are necessary for identifying the precise matters on which data is needed, and for analysing case law in order to identify relevant sentencing factors, as outlined above. However, the critically important tasks of designing data collection systems, collating and analysing data as it is collected, and presenting it in a manner that will facilitate the discharge of the SGIC's various statutory functions call for a different kind of expertise. Those who possess this expertise are more likely to have a background in a discipline, possibly within the social sciences, that will have equipped them with a thorough knowledge of empirical research methodologies as well as experience in actually conducting empirical research. Again, it should be stressed that both legal and empirical skills are needed. This combination can be achieved through the recruitment of a small team of researchers with the required diversity of expertise who can work together to deliver high-quality statistical data and legal analysis as required by the SGIC.

We **strongly recommend**, therefore, that the SGIC should demonstrate its commitment to open and constructive dialogue, not least so as to consult and

[228] See Chapter 3.

so assist in the development of its future research priorities. We suggest that SGIC should also draw on academic expertise for comment and constructive assistance, as well as having a role in anonymised peer review of SGIC research reports.

4.4.2 Academic Research

The availability of good quality sentencing data will also facilitate academic research, which can be of great practical value and which can draw attention to fundamental problems or issues that may not be immediately apparent to those engaged in the day-to-day administration of the criminal law.

Our third chapter explains experiences from other countries (such as England and Wales) where a body akin to the SGIC has not engaged with the academic community as closely as critics suggest it could. In relation to the situation in England and Wales, we observed that an open and cooperative relationship between the Council and independent researchers enables a fuller and wider public understanding of sentencing; and informs the development of policy and practice and the ability to plan sentencing and wider policy. 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.[229] 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 that in 2013. The Council has been criticised for failing to do more to facilitate research into sentencing practices and the guidelines.

As we note in our third chapter, bodies such as sentencing councils, (which are more or less equivalent to SGIC), can benefit greatly from expert academic assessment and collaboration, as a report commissioned by the English and

[229] The Council very occasionally commissions and publishes research reports co-authored with academics. For example, Isaac, Pina-Sánchez, and Montane, 'The Impact of Three Guidelines on Consistency in Sentencing'.

Welsh Sentencing Council to review its work identified.[230] It is crucially important, therefore, that a council should be open to evaluation (including critical evaluation) by members of the academic community and others. The long-term development of sentencing policy can only suffer unless scholars working in the area feel included in the overall enterprise. Every effort should therefore be made to encourage and recognise scholarly endeavour in all aspects of sentencing.

Therefore, we **strongly recommend** that the SGIC demonstrates that it is committed to maintaining an active, open and constructive approach to engaging with academic scholars.

Fortunately, the number of well-qualified scholars in Irish universities and elsewhere who are working in the areas of criminology and criminal justice has increased very significantly in recent years. Hopefully, some of these will, on their own initiative, engage in empirical and analytical sentencing research based on accessible statistical data and appeal court jurisprudence of which there is now an abundance, as already noted. They might also be commissioned from time to time by the SGIC to undertake research on specific issues in which they have expertise. Again, the better the available data, the more useful and enlightening the results of such research are likely to be.

4.4.3 Research Capacity of the SGIC

In our third chapter we observed that the research function is essential to any sentencing 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

[230] See: Anthony Bottoms, 'The Sentencing Council in 2017: A Report on Research to Advise on How the Sentencing Council Can Best Exercise Its Statutory Functions' (Sentencing Council of England and Wales, February 2018), https://www.sentencingcouncil.org.uk/wp-content/uploads/SCReport.FINAL-Version-for-Publication-April-2018.pdf.. See also for example: 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

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 sentencing; engage with and understand public perceptions about and knowledge of sentencing and examine ways of correcting any misperceptions; etc.

To meet the challenges of data collection and management, systems must be put in place to ensure that all this information is accurately and effectively collected, collated, and analysed. This will require that the SGIC have sufficient research capacity and certain kinds of professional expertise.

To provide the SGIC with the necessary research capacity, we **strongly recommend** that a Research Unit (or similar office) should be established and operate under the aegis of the Judicial Council, though the precise arrangements would clearly be a matter for the Council itself. The Unit should consist of full-time research officers tasked with the collection, analysis and presentation of sentencing data as required by the SGIC. For the reasons outlined earlier in this report, those officers should include persons with expertise in social science research methods as well as others with expertise in criminal law and sentencing. The number of such officers will naturally depend on the extent of the work being undertaken by the SGIC, but we estimate that at least three would be required at the outset to set in train the processes needed to design and implement an effective data collection system. It is important to the development of sentencing policy, and indeed to the reputation of the SGIC, that such a Research Unit maintains a close and constructive dialogue with external parties, such as academic researchers.

As a potential comparator, the budget of the English Sentencing Council for 2020-2021 amounted to £1.390 million of which £1.271 was devoted to staff costs. The Council was supported by an office with 18 members of staff.[231] Obviously, Ireland is a much smaller jurisdiction, which means that there are

[231] Sentencing Council Annual Report 2020/21, at www.sentencingcouncil.org.uk. The staff include empirical researchers; legal researchers, policy personnel and media officials.

significant differences in scale. Yet, it should also be stressed that the English and Welsh Council has the advantage of better sentencing data and the SGIC has more work to do in this area.[232] However, the Sentencing Council has been criticised for failing to do more to facilitate research into sentencing practices and the guidelines.[233] Although the Council in England and Wales may be better served by its existing data on sentencing than some other jurisdictions, as Chapter 3 notes, its ability to fulfil its wider functions in, for example, promoting public awareness appears to have been frustrated by resource pressures. In our third chapter, we also noted: "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."

Irrespective of the size of the jurisdiction or pre-existing data, high-quality information systems and credible, effective guidelines depend crucially on relevant and well-targeted research conducted to a high professional standard. Thus, the need for a dedicated research unit, which will require significant and sustained investment given the scale of challenges it faces in addressing Ireland's data needs

[232] For an overview, see the Sentencing Council website: https://www.sentencingcouncil.org.uk/research-and-resources/criminal-justice-statistics/

[233] See Section 4.4.2

4.5 Recommendations

The foregoing analysis provides insight into a number of matters to which we suggest the SGIC have regard. In this part of the report, we draw on this analysis to consolidate our key recommendations for the SGIC.

Given the limitations of sentencing data in Ireland, the SGIC will need to devise an adequate strategy to address the lack of sentencing data that currently threatens the fulfilment of the statutory function outlined above. To accomplish this, the SGIC must, in the first instance, be candid about the limitations of existing data, and be clear about the measures necessary to improve sentencing policy-making and practice. This, in turn, will further the interests of justice and assist judges, lawyers and other criminal justice personnel in the discharge of their functions. Below we set out a non-exhaustive list of considerations relevant for these purposes. At the end of this section we sum-up by providing a list of our seven strong recommendations.

4.5.1 Clarify Data Limitations and the Need for Improvement

Sentencing data come from various sources and often serve purposes other than those related to guideline creation and monitoring. As a result, while existing data may satisfy a range of functions for criminal justice agencies, they generally fail to offer sufficient insight into sentencing. Experience from elsewhere suggests that it is valuable for a new guideline creating body to be open about the limitations of existing sentencing data.

Openness about data limitations is important when identifying what efforts and resources will be needed to remedy data deficits and why this is vital for a new guideline creating body to fulfil its functions. Relatedly, if data limitations are not set out, then externally this can be perceived as an endorsement by a new guideline creating body that existing data are adequate for it to function. Such an eventuality poses reputational risks when, even if years later, inevitably the need for more data than is available becomes apparent. In this situation, a

guideline creating body may find itself facing challenges and criticisms concerning data that it has been (or has been perceived to be) claiming as adequate fails to offer a sufficient evidence base. In Chapter 3 we analyse how the expectations placed upon guideline bodies to have reliable data appear to have increased.

For Ireland, a first step is to recognise openly that there is a real problem with data. Of course, sentencing data in all jurisdictions of which we are aware have limitations. However, some jurisdictions have poorer sentencing data than others and some guideline creating bodies have greater statutory obligations. Ireland, compared to England and Wales and some United States jurisdictions, is at some disadvantage presently.

We **strongly recommend**, therefore, that the SGIC openly recognise that current data about sentencing are profoundly limited and inadequate for its tasks and that the scale of this challenge can only be remedied by a systematic, concerted effort, which demands significant and sustained investment.

4.5.2 Evaluate the Data Necessary to Fulfil the Statutory Functions

The SGIC will seek to make use of legal data (e.g. case law[234]), qualitative data (e.g. interviews, court observations, etc), and quantitative data (e.g. statistics). The SGIC will need to consider in more detail what specific data are critical to its functions. The SGIC will then need to develop processes to gather these data. In doing so, breadth and depth should be regarded as complementary in providing a comprehensive view of sentencing.

While the uses of different types of data may overlap,[235] legal analysis will help to elucidate key normative principles (e.g. what factors should aggravate or

[234] As noted in Chapter 2, reported cases are only a minority of all cases and therefore they are not necessarily reflective of typical cases.

[235] For example, data may be extracted from case law for qualitative or quantitative analysis.

mitigate sentences, sentence ranges used in reported cases, etc).[236] While such analysis cannot, in itself, comprehensively describe sentencing patterns, it can and should help to inform what sorts of information is recorded and how it is analysed and represented.

We **strongly recommend** that the SGIC operates a twin strategy seeking breadth and depth of data. Statistical databases can provide breadth and the ability to monitor real-world sentence trends over time with a consistent methodology.[237] Such a larger scale data collection exercise using more or less the same methodology enables comparisons to be made over time and so can inform planning for the future. Bespoke individual research (whether qualitative, quantitative, or mixed methods) can provide more granularity concerning real-world sentencing.[238]

A strategic plan should be formulated to ensure that the collection, collation, and analysis of these different types of data work in tandem to meet the needs of the SGIC in the medium to long term. Such a plan may involve setting out key research priorities (e.g. specific guidelines) that the SGIC will focus on. For example, to follow the Scottish example, a strategy could call for a general guideline first (such as on the principles and normative purposes of sentencing) and then, later, an offence-specific guideline. Having a clear plan would enable the SGIC to logically plan data collection. In this hypothetical, the generic guideline selected could largely draw on legal analysis[239] and serve to test the guideline creation process. Simultaneously, the SGIC could work to gather the empirical data on current sentencing practices for the offence-specific guideline.

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[236] See the table of cases included as part of Jay Gormley et al., 'Assessing Methodological Approaches to Sentencing Data and Analysis. Report 1: Ireland' (Sentencing Guidelines & Information Committee of the Judicial Council (Ireland), 20 January 2022), https://judicialcouncil.ie/assets/uploads/1st%20Interim%20Report.pdf. Available online: https://judicialcouncil.ie/assets/uploads/Court%20of%20Appeal%20Sentences.xlsx

[237] The use made of the MoJ data in England and Wales and the USSC data in the USA offers some insight into these uses cases.

[238] We note the SGIC is currently undertaking such research

[239] Case law is readily accessible to the SGIC and may be adequate for this guideline. However, it should be noted that some general guidelines (e.g. concerning reductions following a guilty plea) should also draw data about court practices.

4.5.3 Plan how Data is to be Disseminated

Consideration should be given to which data will be disseminated and how this will be done. As noted in Chapter 2, there are several benefits to having accessible and up to date sentencing statistics. First, without these data, news media sources cannot place emerging sentences in a statistical context; thus, high profile sentences may be taken as representative of more general trends with risks to public confidence. 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 policymakers or politicians, as well as being able to inform planning for future needs.

To achieve these benefits, we **recommend** that the SGIC should determine what data can be made accessible to the public and in what form. In this regard, we note that while England and Wales publish a range of data (e.g. in the form of pivot tables), it is often not easily accessed or understood by the public. Therefore, while as much data as is feasible should be publicly available, the SGIC should also consider providing more accessible reports or summaries that analyse the statistical data. In the alternate, it could facilitate dissemination of these trends by others such as academics and stakeholder groups.

4.5.4 Establish a Method to Collect Data in the District Court

Collecting data on District Court sentencing practice will pose distinct challenges. The importance of this court, which is, of course, a court founded on the Constitution, within the criminal justice system cannot be overstated. Even a cursory examination of the statistical tables in the annual reports of the Courts Service reveals the sheer range of the District Court's jurisdiction and its heavy workload. One significant feature of this Court in the context of developing sentencing guidance is that it has extensive jurisdiction over indictable as well as summary offences. In fact, it may deal with most indictable offences, apart from a small number of particularly serious ones, where the defendant pleaded

guilty.[240] Further, it may impose a prison sentence of up to 12 months in respect of any one offence and up to two years for a combination of offences.[241]

In 2020, the District Court "resolved" about 195,000 offences (154,000 summary offences and 41,000 indictable offences).[242] It is assumed that "resolved" in this context means having dealt with an offence in a final manner (and this may include "strike out" which seems to have occurred in respect of more than 52, 000 summary offences and almost 10,000 indictable offences dealt with summarily). The number of defendants is generally much lower than the number of offences, as many defendants face more than one charge.[243] Of the 154,000 summary offences, 70 per cent consisted of road traffic offences. Drug and theft-related offences accounted for 80 per cent of the 41.000 indictable offences dealt with summarily. The fine was the most prevalent sanction imposed, accounting for the penalty in respect of 31,000 summary offences and about 4,500 indictable offences. However, imprisonment/detention was imposed in respect of almost 7,000 offences (summary and indictable combined), which is quite a significant number.

It is beyond the scope of this report to offer detailed recommendations on how the SGIC might go about collecting data on District Court sentencing practice. The kind and specificity of data needed will obviously depend on the nature of the sentencing guidelines that may be drawn up for the District Court. Many offence-specific guidelines, once adopted, for indictable offences will presumably apply (or could potentially apply) to the District Court as well as to the higher criminal courts. As already noted, drug and property offences account for 80 per cent of indictable offences disposed of summarily in the District Court. It is reasonable to assume that offences in these categories will eventually be the subject of offence-specific guidelines. As for summary offences, the SGIC might, for example, decide to concentrate on a limited number of offences such as assault or dangerous driving. Alternatively, it might decide to address the

[240] Criminal Procedure Act 1967, s. 13 (as amended).

[241] Criminal Justice Act 1984, s. 12, amending the Criminal Justice Act 1951, s. 5.

[242] The figures mentioned here are drawn from the Annual Report of the Courts Service 2020, p. 87.

[243] This is reflected in another statistic in the Annual Report for 2020. In that year, the number of incoming offences in the District Court was 382,455 but involving only 226,081 defendants.

more general question of custody thresholds and attempt to devise some guidance on the use of custodial penalties for summary offences, including the relevance of previous convictions when deciding if a custodial penalty is appropriate.[244] We note that the SGIC plans to undertake a survey of District Court Judges. This is to be welcomed as it should yield valuable information on the matters that are of most concern to those Judges in exercising their sentencing powers.

Therefore, we **strongly recommend** that a plan to tackle the specific challenges in recording, collating, and representing data from the District Courts is made a high priority.

4.5.5 Establish a Sentencing Database

While we do not recommend a particular means of data collection, we do see a need for some sort of sentencing database in Ireland. All other western jurisdictions operate such a database, albeit with varying degrees of coverage and depth. The form this database should take is for the SGIC to determine in concert with key stakeholders such as the Courts Service. This process will probably present a number of pragmatic challenges which the SGIC will be required to manage.

In establishing a sentencing database, the SGIC will need to consider what variables are essential as a bare minimum. We have provided some comments on this above and as our analysis of the United States Sentencing Commission (USSC) data shows, there are many relevant variables to understand sentences and compliance with guidelines.[245]

While the USSC may be the gold standard for a sentencing database, should such a comprehensive approach be determined by the SGIC to be impractical within

[244] The Law Reform Commission's *report* may be of some use for this purpose: 'Report on Penalties for Minor Offences' (The Law Reform Commission, February 2003), https://publications.lawreform.ie/Portal/External/en-GB/RecordView/Index/33436.

[245] The USSC collects data on the percentages of sentences that are within range, above range, and below ranges (for each type of offense).

given resource constraints, it may be necessary to limit the range of variables. While not as comprehensive as the USSC data, the statistical data available in England and Wales offer another example of a practice that has served the English and Welsh Council when supplemented with bespoke research. Likewise, the SIS and ISIS demonstrate what data it is possible to collect (the latter specifically in the Irish context).

The creation of a sentencing database could, in principle, include links to existing databases from criminal justice organisations (some of which are noted above). However, this is unlikely to prove fruitful in the medium or longer term. As our third chapter observed, administrative data held by different agencies is fragmented and often incommensurable. This impedes insight into how cases progress through the criminal justice system. For understandable reasons, each agency uses its own case-counting, recording and categorisation rules and practices. These fundamental problems mean that combining the datasets of multiple agencies is a long term ambition and one which is dependent on the different agencies agreeing and operationalising common standards of definition and recording practices. At least for the foreseeable future, 'joining up' administrative datasets in any comprehensive and systematic way is likely to be impractical and fail to provide the desired insights into real-world sentencing practices.

Given that linking criminal justice agencies' data is unlikely to be achievable nor provide the necessary information in the short or medium term, we **strongly recommend** that the SGIC looks towards establishing a database through a new data collection exercise. Amongst other things, this will entail the development of a detailed data collection protocol to accompany a data collection instrument. Below we note, in broad terms, two options for how data may be collected for a sentencing database. These options are for illustrative purposes and are not recommendations.

4.5.5.1 Option 1: A Sentencing Information System

One candidate would be a sentencing information system like Irish Sentencing Information System (ISIS) or the Sentencing Information System (SIS) in Scotland. An advantage of such judicially led information systems is that they

enable a high degree of control of how and what data are collected. However, as noted in Chapter 2 and Chapter 3, these systems tend to be vulnerable to the winds of political and judicial change.

Despite producing valuable data that would serve the SGIC well, neither of these information systems were not sustained. In the case of ISIS, this was attributed to resource reasons. In the case of the SIS in Scotland, the problem was not a lack of resources but a failure to institutionalise the SIS, which left it vulnerable to changes in judicial leadership. Therefore, if something akin to ISIS or SIS was established in Ireland it would require commitment, a clear institutional home and sustained funding.

There are various ways such a system could be optimised, and it would be for the SGIC to determine the balance to be struck. For example, an information system could focus on a sample of cases rather than all cases (e.g. snapshots of specific offences or time periods). We recommend that this should be done in concert with a strategy for commissioning short-life research studies on specific issues (see above Section 4.4.2).

Such a system, if implemented, would complement legal analyses that can also aid guideline development through identifying principles and mitigating and aggravating factors, etc. However, as above, special consideration would need to be given to the District Courts and whether this method (even if suitable in the Circuit Courts in some fashion) can be appropriately optimised for the District Courts where court time is limited, and caseloads are high.[246]

4.5.5.2 Option 2: A Sentencing Survey or Census

The second option would be to implement a sentencing survey or census, akin to the Crown Court Sentencing Survey (CCSS) which ran in England and Wales (discussed in Chapter 3). The CCSS, according to some sentencing experts,

[246] Sampling techniques could be one methodological consideration given the volume of cases.

collected and shared some of the best sentencing data worldwide, and various analyses of it have been informative.[247]

A survey or census method requires a form to be completed by a sentencing judge (or by someone under their supervision). To illustrate, Section 4.5.5.3 will discuss a survey template being trialled in the Central Criminal Court (shown in Appendix E). We have also added the CCSS form used for drug offences in Appendix F as an example. From this, it should be possible to ascertain how long each form would take to complete and the level of detail it would offer.

However, as with ISIS, the CCSS was discontinued due to the resources it required – in particular judicial workload. Therefore, a streamlined approach to the survey method may also be required. Again, there are various ways such a system could be optimised, and it would be for the SGIC to determine the balance to be struck. For example, the survey may be time-limited to address the current data gap or focused on a sample of offences (a snapshot approach), etc.

Moreover, a key question with regard to a survey or census method would be whether it could be applied in the District Court where data and time are both limited. Indeed, in England and Wales, the method was not used in the Magistrates Courts and even in the Crown Court the resource constraints were problematic. Therefore, even *if* considered viable for the District Court, special considerations may need to be given (see Section 4.5.4).

4.5.5.2.1 Who Should Record Data?

A further question that the SGIC will have to address is how to record data and who should record it. Data needs to be recorded in a consistent way according to agreed standards, which can be overseen and checked.

There appear to be at least four options as to who could record case data. First, data could be recorded by researchers accountable to the SGIC (similar to that

[247] Pina-Sánchez and Linacre, 'Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey'; Eoin Guilfoyle and Ian D Marder, 'Using Data to Design and Monitor Sentencing Guidelines: The Case of Ireland', *Common Law World Review*, 2020, 1473779520975193.

in ISIS) who attend different courts (or use digital court recordings (DAR) where available), though this may prove to be cumbersome and impracticable on anything other than an occasional basis (e.g. for quality control checks).

A second option would be for judges to do this themselves (as in the CCSS or the Central Criminal Court Template below). While this has the advantage of data recording being 'close' to the case, without clear data recording rules it may also be open to inconsistency in recording practices, as well as risking judicial resistance to the perceived burden of completing the necessary forms.

A third option is for an administrative body (as in the USSC) to record data; while its practices may be relatively consistent, they may be more removed from the case.

A fourth option, (envisaged but not properly carried out by the Courts Service in the implementation of the Scottish SIS), is for court clerks to enter the data. This could be done in the higher Irish courts by Judicial Assistants, who may be relatively close to the case but also be easier to subject to monitoring and training to avoid inconsistent approaches to recording.

We **strongly recommend** that the SGIC carefully considers the need for the appropriately qualified personnel to record data which balances the virtues of consistency with 'proximity' to the case. So as to assure the quality of the data entered, such personnel should be subject to training in data entry and the rules of recording cases, as well as regular monitoring that data are being entered correctly and consistently.

4.5.5.3 The Central Criminal Court Template

In April 2022 the SGIC brought to our attention a template for collecting information on sentencing practice in the Central Criminal Court. We understand that the template (Appendix E) was created by the Central Criminal Court (CCC). This appears to be based on a 'census' approach (akin in that sense to the Crown Court Sentencing Survey which ran in England and Wales – see Chapter 3).

We recommend, that if the committee chooses to adopt a census approach that it should consider the template used for the Crown Court Sentencing Survey

(CCSS) in England and Wales (Appendix F). Of course, the content of the SSCC template would have to be adapted to render it suitable for use in Ireland. For instance, some of the sentencing options in England and Wales are not available in Ireland. However, it may be worth studying the CCSS as the general sentencing principles are largely similar in both jurisdictions, as are the data needed for the purposes of creating guidelines and monitoring their implementation, once adopted. Further, the CCSS has a proven capability for permitting comprehensive information on sentencing practice to be collected.

More particularly, in respect of the CCC template, we offer the following brief comments.

- The CCC template forwarded to us deals with a sentence imposed for manslaughter, and the information is presented in a combination of narrative and note form. It has been anonymised and we have assumed that the original included a brief statement at the beginning setting out the circumstances of the offence and, possibly, the circumstances of the offender, (which was removed for confidentiality reasons).

- It bears noting in this context that, in terms of information collection, manslaughter sentencing is usually relatively straightforward to the extent that there will typically be one offence, one offender and one victim, and the offence is likely to have been fairly recent. However, other types of cases may involve additional complexities. With sexual offences, for example, there may be a multiplicity of different offences, often committed over a significant period of time, perhaps against more than one victim (see 4.4.1 on multi-conviction cases). Occasionally, there may be more than one offender. If there is to be a single template for collecting information on the sentencing of all offences dealt with on indictment, it needs to be sufficiently comprehensive to capture information on all the relevant variables. Therefore, a further vitally important issue (which may or may not be addressed by the CCC) is the need to record and properly represent data about cases where there is more than one conviction.

- As the Court of Appeal has repeatedly stated, comparator cases presented to it are often of very limited use, unless there is a definite factual similarity between them and the case at hand and, also, unless certain key information about each comparator case is available, (e.g., did the defendant plead guilty, did he or she have relevant previous convictions and so forth). The same consideration applies when past sentencing practice is being examined or analysed for any purpose, including the information functions which the SGIC is obliged to discharge. Any form or template to collect information on sentences imposed by the courts should therefore be designed to elicit all the data necessary to draw reliable conclusions about sentencing practice for the relevant offences.

- Further, while a certain amount of narrative data of the kind included in the template on manslaughter sentencing is certainly desirable and, indeed, necessary, it is equally important to have certain key data set out in tabulated form so as to be amenable to calculation and analysis. For example, the Scottish Sentencing Information System (see Chapter 3) provided a systematic way of collecting information using an electronic data entry form (with information as to how data should be recorded). This could be supplemented with an option for the sentencing judge to add further narrative remarks if s/he wished (though in practice this typically repeated the systematic information already recorded).

- Such a systematic approach is also vital if information is to be recorded in a consistent way, rather than simply depending on who is recording it. What is needed (in addition to any narrative information) is a menu component or, at least, a facility for entering certain key information in a systematic way. Thus, for example, the form should have a section where it can be indicated if the offender pleaded guilty, the extent of previous convictions (these can be grouped into bands for ease), whether or not these convictions are cognate/relevant (e.g. prior sexual offences in a sexual offence case), as well as categorical information about age (which

can be in bands), and other offender characteristics. In doing so it is vitally important to ensure that recording practices are consistent. For example, what may count as cognate/relevant previous convictions needs to be explicated so that the recording of these categories does not simply depend on the person recording the information. Likewise what may count as (mitigating) or (aggravating) features of a case needs to be recorded in a consistent way. It is necessary therefore for those responsible for overseeing data recording to devise explicit recording rules or guidance as to how information should be recorded. We suggest that the SGIC should consult academics and key stakeholders on the content of such recording rules/guidance.

4.5.6 Establish a Research Unit

Many of our recommendations entail significant consideration, work, and management on the part of the SGIC. Given the level of work required to collect, collate, and analyse sentencing data, our strongest recommendation, therefore, is that a Research Unit should be established to support the work of the SGIC.

4.6 Final Conclusions: The Next Steps for Sentencing Data in Ireland

We **strongly recommend:**

1. The SGIC should openly recognise that current data about sentencing in Ireland are inadequate for its tasks and that the scale of this challenge can only be remedied by a systematic, concerted effort, underpinned by significant and sustained investment.

2. That a plan to tackle the specific challenges in recording, collating, and representing data from the District Court be made a high priority.

3. The SGIC should aim for depth and breadth in data. Given that combining data from different criminal justice agencies so as to provide an in-depth picture of sentencing patterns is likely to be a long-term aspiration,[248] the SGIC should look towards establishing a database through a new data collection exercise. The breadth of the database should be complemented by the depth of individual research studies commissioned to examine specific important issues.

4. The SGIC should consider carefully the need for appropriately qualified personnel to record data, in a way that balances the virtues of consistency in recording practices with proximity to the case. Quality

[248] While combining criminal justice agencies data to any significant extent appears to be impractical in the short- or medium-term, it *may* be possible to incorporate some agencies' data into a new database. However, the feasibility of this would require detailed examination by the SGIC and the relevant agencies.

assurance and standardisation will be necessary to ensure that the data recorded does not vary based on who is recording it.

5. The SGIC should consider very carefully the methodological challenges presented by persons convicted of more than one offence in the same case (multi-conviction cases).

6. The SGIC should demonstrate its commitment to open and constructive dialogue, not least to assist in the development of its future research priorities. We suggest that SGIC should also draw on academic expertise for comment and constructive assistance, as well as having a role in anonymised peer review of SGIC research reports.

7. Crucially, to enable all of the above and to provide the SGIC with the necessary research capacity, we recommend in the strongest terms that a Research Unit (or similarly named office) be established and properly resourced, and that it should operate under the aegis of the Judicial Council, though the precise arrangements would clearly be a matter for the Council itself.

In addition to our recommendations, three principal conclusions may be drawn from this report. First, existing data on current sentencing practice are clearly insufficient. Rather than seeking for short term expediency to minimise the profound limitations of available data, it should be regarded as an opportunity to openly acknowledge the problem and begin the task of addressing the scale of the challenge. Second, high-quality statistical data (informed and assisted by a detailed legal analysis of existing appeal court jurisprudence), will be indispensable if the SGIC is to discharge its statutory functions effectively. This should apply both breadth and depth. Third, systems must be put in place to ensure that all this data and information is accurately and effectively collected, collated and analysed, and this, in turn, calls for specific kinds of professional expertise.

Precisely how the SGIC should proceed is a matter for it to carefully consider in consultation with key stakeholders, as well as wider public consultation. The recommendations above should guide this process. The analysis of data

collection methods noted in Chapters 2-3 can also assist the SGIC if tailored to the contemporary Irish context. For example, in the USA, the Federal court system managed to establish comprehensive statistical data to a degree that proved impractical for England and Wales. England and Wales, for a period, devised an innovative census survey method but this too posed challenges in terms of sustainability. For a time, Ireland and Scotland implemented sentencing information systems that could have fulfilled much of the needs above. However, in Scotland, a failure to institutionalise and in Ireland a sense that it was too expensive led to their abandonment. Therefore, the SGIC must consider not just how, in theory, sentencing data may be improved, but how the data may be improved given pragmatic considerations.

In conclusion, we reiterate a point made at the outset of this chapter: good guidelines depend on good data, and the latter need to be established before the former can be created and implemented. The next step for the SGIC is to determine how it will achieve this by consulting with stakeholders and establishing a suitable data collection and management strategy.

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Appendix A: Extract from Court and Prison Services Reports

Criminal Business: District Court	Incoming		Resolved: offences: orders made		
Categories	**Offences**	**Defendants**	**Summary**	**Indictable dealt with summarily**	**Sent forward for trial***
Road traffic	214,056	134,350	107,838	573	221
Drugs	38,635	22,750	1,313	15,143	2,750
Sexual	3,411	618	29	111	3,470
Larceny/fraud/robbery	35,354	14,553	4	17,555	6,013
Public order/assault	48,823	26,084	24,185	1,981	2,585
Other	42,176	27,726	20,595	5,469	6,499
Total	**382,455**	**226,081**	**153,964**	**40,832**	**21,538**

** Note: There is usually only one order made when an offence is being sent forward for trial*

Summary Offences: Outcomes: Orders Made: District Court													
	Dis	**S/O**	**TIC**	**Fine**	**Bond**	**Disq**	**C/S**	**Prob**	**Imp***	**Susp**	**Other**	**Fixed**	**Total**
Road traffic	2,384	39,145	11,984	21,308	34	7,405	245	508	1,025	1,037	13,706	9,057	**107,838**
Drugs	46	204	107	367	3	330	5	48	38	29	136	0	**1,313**
Sexual	1	2	1	8	1			2	8	4	2	0	**29**
Larceny/ fraud/ robbery	0	2	0	0	0	0	0	1		0	1	0	**4**
Public order/ assault	701	6,056	5,023	4,286	290	2	194	2,042	1,131	710	3,750	0	**24,185**
Other	724	7,051	2,797	5,034	85	232	73	1,075	747	527	2,250	0	**20,595**
Total	**3,856**	**52,460**	**19,912**	**31,003**	**413**	**7,969**	**517**	**3,676**	**2,949**	**2,307**	**19,845**	**9,057**	**153,964**

Figure 1 (extract from Courts Service Annual Report 2020)

Offence	<3 Mths	3 to <6 Mths	6 to <12 Mths	1 to <2 Yrs	2 to <3 Yrs	3 to <5 Yrs	5 to <10 Yrs	10+ Yrs	Life	Total
GP01 Homicide Offences	0	0	0	2	3	10	36	10	348	**409**
GP02 Sexual Offences	0	1	5	23	19	71	170	128	10	**427**
GP03 Attempts/Threat to Murder, Assaults, Harassments and Related Offences	4	18	40	75	98	149	88	19	2	**493**
GP04 Dangerous or Negligent Acts	0	0	12	11	14	14	16	1	0	**68**
GP05 Kidnapping and Related Offences	0	0	0	2	5	11	24	13	0	**55**
GP06 Robbery, Extortion and Hijacking Offences	0	0	3	10	15	37	25	1	0	**91**
GP07 Burglary and Related Offences	0	4	20	49	48	101	77	15	0	**314**
GP08 Theft and Related Offences	5	40	54	86	69	134	83	12	0	**483**

Figure 2 (extract from IPS Annual Report 20

Appendix B: 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 C: 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

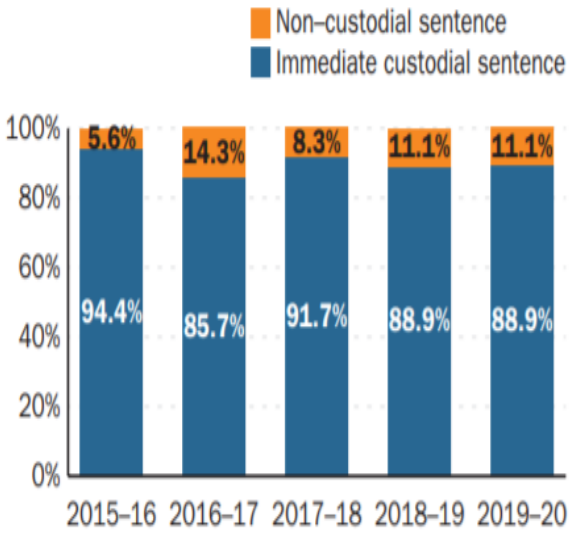
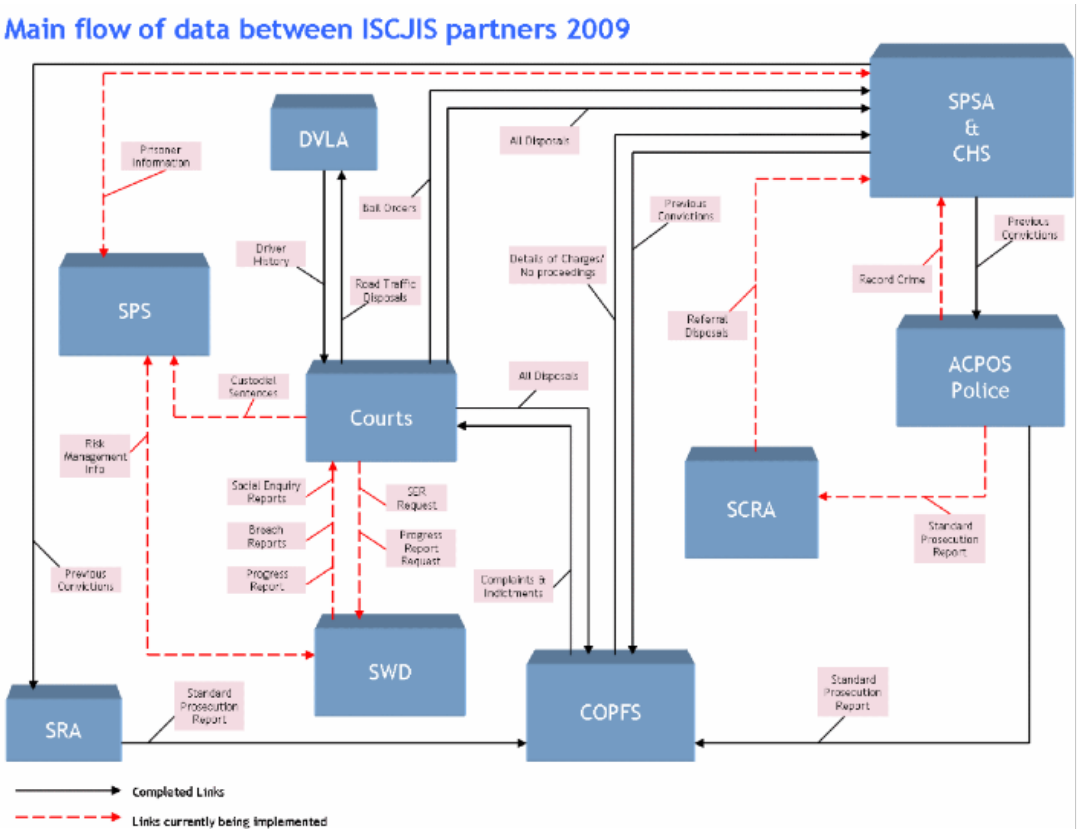


Table 1 shows the principal sentence imposed for sexual penetration of a child under 12 from 2015–16 to 2019–20.[8] The *principal sentence* is the most serious sentence imposed for the charge that is the principal offence.[9] The availability of different sentence types has changed over time. Most notably, 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

Appendix D: Data Flows Between Scottish Criminal Justice Organisations[249]



[249] 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>

Appendix E: Sample CCC Form

DPP v. xx

Manslaughter – Unlawful Killing– Headline Sentence 7 Years' Imprisonment – 5 Years' Imprisonment Imposed, Final Year Suspended

Facts

Information from judge in a single descriptive paragraph setting out the background and events deleted.

At trial, the defendant entered a not guilty plea to a charge of murder and offered a plea to manslaughter. The jury found him guilty of manslaughter.

Aggravating Factors	**Mitigating Factors**
• Level of aggression	• Guilty plea was offered to the offence he was convicted of. • Co-operation with An Garda Síochána. • Genuine remorse for his actions. • Good work history. • A number of character references were furnished to the Court.
Sentencing	
Manslaughter Offence • The headline sentence was 7 years' imprisonment. • Following mitigation, a sentence of 5 years' imprisonment was imposed with the final year suspended for a period of 5 years on the basis that the defendant must comply with the requirements of the Probation Service upon his release, as well as any medical regimen imposed, including the taking of medication.	
Appeal	
None	

Appendix F: Sample CCSS Form

Crown Court Sentencing Survey

OFFICIAL WHEN COMPLETE

Drug Offences

[PRINCIPAL OFFENCE ONLY]

Form Details

Form ID	
Issued	

Please refer to guidance on completing this form overleaf

COMPLETE FOR THE PRINCIPAL OFFENCE ONLY

Part A: To be completed by the sentencing Judge/Recorder or Court Clerk

PLEASE COMPLETE IN CAPITALS

Case Details

Sentence date	Day / Month / Year
CREST case ID	

Offender Details – Individual

Offender name	*Surname*
	Forename
Offender DOB	Day / Month / Year
Offender gender	☐ Male ☐ Female

Offender Details – Company

Company name	

If you have any queries when completing this form or on the Crown Court Sentencing Survey in general, you can contact the Office of the Sentencing Council at research@sentencingcouncil.gsi.gov.uk or 020 7071 5793

Part B: To be completed by the sentencing Judge/Recorder for the PRINCIPAL OFFENCE ONLY

SEE NOTES OVERLEAF

1a. Type of offence *FOR BREACHES, SEE NOTES OVERLEAF*

- ☐ Single offence
- ☐ Multiple offences - *ANSWER FOR THE PRINCIPAL OFFENCE ONLY*

- ☐ Possession
- ☐ Supplying
- ☐ Possession with intent to supply
- ☐ Conspiracy to supply
- ☐ Other (please specify in box below)
- ☐ Bringing in/taking out controlled drug
- ☐ Production/being concerned in production/cultivation
- ☐ Permitting premises to be used

1b. Drug/Class of drug associated with the offence

- ☐ Cocaine
- ☐ Heroin
- ☐ Other Class A
- ☐ Cannabis or Cannabis resin
- ☐ Other Class B
- ☐ Class C

2. Sentence outcome (for the PRINCIPAL OFFENCE ONLY)
SEE NOTES OVERLEAF, TICK ALL THAT APPLY

(a) Custodial Sentence

- ☐ Determinate — Length
- ☐ Extended — Custodial Term — Extension Period
- ☐ Life — Minimum Term
- ☐ Hospital Order

(b) Suspended Sentence Order or Community Order

- ☐ SSO — Length — Suspension Period
- ☐ Community Order — Length

Requirements of Suspended Sentence Order or Community Order
TICK ALL ADULT REQUIREMENTS GIVEN OR NEAREST YRO EQUIVALENT

- ☐ Supervision — Length
- ☐ Unpaid work — Length
- ☐ Curfew — Period
- ☐ Activity — Time to Complete
- ☐ Prohibited activity
- ☐ Exclusion
- ☐ Residence
- ☐ Foreign travel prohibition
- ☐ Attendance centre
- ☐ Programme(s) (please specify in box below)
- ☐ Mental health treatment
- ☐ Drug rehabilitation
- ☐ Alcohol treatment
- ☐ Alcohol abstinence and monitoring (pilot scheme)

(c) Other outcome

- ☐ Fine — Amount £
- ☐ Conditional discharge
- ☐ Absolute discharge

RECORD COMPENSATION, CONFISCATION & COSTS IN SECTION 6

3. Definitive guideline - Step 1

- ☐ No existing guideline

For the offence of 'permitting premises to be used' or 'possession'

- ☐ Category 1 – most serious
- ☐ Category 2
- ☐ Category 3 – least serious

For all other drug offences

(a) Culpability (role of offender)

- ☐ Leading role
- ☐ Significant role
- ☐ Lesser role

(b) Harm (quantity)

- ☐ Category 1 – most serious
- ☐ Category 2
- ☐ Category 3
- ☐ Category 4 – least serious

Where harm is identified as 'Category 3', complete if appropriate:

- ☐ Street Dealer
- ☐ Prison Employee
- ☐ Basis of quantity

4. Definitive guideline - Step 2

(a) Factors increasing seriousness

Statutory aggravating factors

- ☐ Previous relevant convictions: ☐ 1-3 ☐ 4-9 ☐ 10+
- ☐ Permitted under 18 year old to deliver etc.
- ☐ Offence committed on bail
- ☐ 18 years or over supplies in the vicinity of school etc.

Other aggravating factors

- ☐ Sophisticated nature of concealment/attempts to avoid detection
- ☐ Attempt to conceal/dispose of evidence
- ☐ Exposure of others to more than usual danger
- ☐ Presence of weapon
- ☐ High purity or high potential yield
- ☐ Failure to comply with current court orders
- ☐ On licence
- ☐ Targeting premises of vulnerable people
- ☐ On-going/large scale evidenced by specialist equipment
- ☐ Presence of others, especially children and/or non-users
- ☐ Use of premises with unlawful access to utility supply
- ☐ Level of profit element
- ☐ Premises adapted to facilitate drug activity
- ☐ Location of premises
- ☐ Length of time premises used
- ☐ Charged as importation of very small amount
- ☐ Nature of likely supply
- ☐ Possession of drug in school/licensed premises
- ☐ Possession of drug in prison
- ☐ Volume of activity permitted
- ☐ Established evidence of community impact
- ☐ Other factors (please specify in box below)

(b) Factors reducing seriousness or reflecting personal mitigation

- ☐ Lack of sophistication as to nature of concealment
- ☐ Involvement due to pressure/intimidation/coercion
- ☐ Mistaken belief regarding type of drug
- ☐ Isolated incident
- ☐ Low purity
- ☐ No previous relevant convictions
- ☐ Offender's vulnerability exploited
- ☐ Remorse
- ☐ Good character/exemplary conduct
- ☐ Determination/demonstration to address addiction/behaviour
- ☐ Serious medical conditions
- ☐ Age/lack of maturity affecting responsibility
- ☐ Mental disorder/learning disability
- ☐ Sole/primary carer for dependent relatives
- ☐ Offender addicted to same drug
- ☐ Offender using cannabis to help diagnosed medical condition
- ☐ Other factors (please specify in box below)

5. Indication of guilt/guilty plea

Was guilt indicated at police station?
☐ Yes ☐ No ☐ Don't know

Was a guilty plea entered for the principal offence?
☐ Yes ☐ No

Where was guilty plea indicated in the court process?

- ☐ At magistrates' court
- ☐ At preliminary hearing
- ☐ Between preliminary hearing and PCMH
- ☐ At PCMH
- ☐ After PCMH/prior to day of trial
- ☐ At/after day of trial

Was the guilty plea entered at the first reasonable opportunity?
☐ Yes ☐ No

Approximately what reduction for guilty plea was given? %
SEE NOTES OVERLEAF

6. Additional factors

Were any of the following other factors present or stated to have influenced the sentence imposed?
DO NOT INCLUDE ANYTHING THAT IS COVERED ELSEWHERE ON THIS FORM

- ☐ Totality principle
- ☐ Consecutive sentence
- ☐ Concurrent sentence
- ☐ Multiple defendants
- ☐ Ancillary Order
- ☐ Compensation Order
- ☐ Confiscation Order
- ☐ Costs
- ☐ Serving another sentence
- ☐ Other factors that you stated and are relevant to the sentencing decision, for example S.116 Return to Custody (please specify in box below)

RELATIONSHIP OF FORM TO SENTENCING REMARKS

The form is designed to record the basis upon which the Judge/ Recorder approached the task of passing sentence; fundamental to the principles of open justice, it is important that nothing is included on the form which is not reflected in the sentencing remarks. Judges may therefore find it helpful to complete the form and use it as a checklist when passing sentence. The majority of the information for Part A will be contained in or on the front of the case file.

- You should complete only **ONE** form for the **principal offence** where more than one offence appears on a single indictment in a sentenced case (including committal for sentence cases). However, if on a single sentencing occasion you have more than one indictment for unrelated cases, complete a form for the principal offence on each indictment.
- If an offender is being sentenced for more than one offence, the principal offence will be the offence which attracts the **highest** sentence.
- If there is more than one offence attracting the highest sentence, the principal offence should be the one for which the highest maximum penalty exists.
- If the offences have the same maximum penalty you are asked to (randomly) select one as the principal offence.
- If there are **multiple offenders** in a case a form must be completed for the principal offence for **each offender**.

Breaches: You do not need to complete a separate form for breach proceedings unless the breach attracts a sentence in its own right, e.g. breach of Protective Order or ASBO. In which case use the 'Other Offences' form (light brown).

OFFENCE FORMS AVAILABLE

Arson & Criminal Damage (violet)
Assault & Public Order (blue)
Burglary (green)
Driving Offences (dark brown)
Drug Offences (maroon)
Offences Causing Death (red)
Robbery & Assault with Intent to Rob (orange)
Sexual Offences (turquoise)
Indecent Photographs of Children (light turquoise)
Theft, Dishonesty, Fraud (purple)
Other Offences (light brown)

DRUG OFFENCES

GUIDANCE ON COMPLETION

Section 1: Type of offence

Tick the two relevant boxes to reflect (a) the **principal offence** for which the offender is being sentenced and (b) the drug associated with the principal offence. If the principal offence is not listed please tick *'Other'* and specify the offence, but please confirm that there is not another offence form that would be more appropriate.

Section 2: Sentence outcome

Tick the relevant box to reflect the sentence/s imposed. In all cases where a length, term, extension period etc. is given, please ensure that the measurement is also included e.g. hours, days, weeks, years. If a programme requirement was given, please specify what the specific accredited programmes were. If you impose a curfew, specify the length of the curfew only, do not provide the time of day for which the curfew is in force. If you have imposed an Ancillary Order, Compensation or Confiscation Order this should be recorded under Section 6 'Additional factors'. Please record the actual sentence imposed without taking into account the period credited for remand time.

Section 3: Guideline Step 1 - Factors indicating greater or lesser harm and higher or lower culpability

For this you will need the latest sentencing guideline where available. If the offence is not yet covered by a sentencing guideline (e.g. 'conspiracy to supply') then tick the box *'No existing guideline'*. For the offences of 'permitting premises to be used' and 'possession', please tick the relevant category box depending on the level of harm and culpability. For other offences, each guideline presents a table with levels of culpability demonstrated by the offender's role and categories of harm. Associated with each combination of role and category there is a starting point and sentencing range. Tick one box relating to the offender's role and one box for the category of harm. Where harm is identified as *'Category 3'*, please also indicate the basis for the offence being at this level if appropriate.

Section 4: Guideline Step 2 - Factors increasing and reducing seriousness or reflecting personal mitigation

Tick all the relevant factors for step 2 that you stated you took into account in reaching the sentence imposed. Any additional factors (not listed) should be inserted under '*Other factors'* and specified. 'Previous convictions' is now a guideline step 2 factor. If you tick this box please also indicate the number of previous convictions you took into account. Tick the box *'1-3'* for 'few', *'4-9'* for 'many' and *'10+'* for 'substantial'.

Section 5: Indication of guilt/guilty plea

Tick the relevant box to reflect whether there was an indication of guilt at the police station and if a guilty plea was entered for the principal offence. If a guilty plea was entered, tick the relevant box to indicate; at which proceedings it was entered and whether it was entered at the first reasonable opportunity. Write the percentage reduction that was in mind for the guilty plea only, and ignore any other discounts applied. Where a percentage reduction is not appropriate given the nature of the sentence/s imposed, please write in *'Full credit'* or *'Not applicable'*. If a guilty plea was not entered, only answer the first two questions in this section.

Section 6: Additional factors

A number of other factors may have been present in the case or have influenced the final sentence imposed, if so tick all of the boxes that apply to those stated in your sentencing remarks. You should use this section to record compensation and confiscation orders and any costs imposed. Any additional factors (which have not been specified or could not be included elsewhere on the form) that you stated and which you think were relevant should be inserted under *'Other factors'*. This may include, among others, S.116 Return to Custody.

If you have any queries when completing this form or on the Crown Court Sentencing Survey in general, you can contact the Office of the Sentencing Council at research@sentencingcouncil.gsi.gov.uk **or 020 7071 5793**.

Authors of this Report

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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 levels. 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*.

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Professor Julian Roberts, PhD is Professor of Criminology at the University of Oxford. One of 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 scholars in the field of research into 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.

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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*.

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Dr Jay Gormley, is a 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, Community Justice Scotland, and the Sentencing Council of England and Wales. 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 summer 2022