

**A SENTENCING COMMISSION FOR
ENGLAND AND WALES:**

**Evidence to the Sentencing Commission
Working Group**

**Professor Mike Hough
Dr Jessica Jacobson**

Institute for Criminal Policy Research, King's College London

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Overview of paper

This paper is submitted as evidence to the Sentencing Commission Working Group. It is a truncated version of a report on sentencing commissions that will shortly be published by the Prison Reform Trust¹. It examines the case for the creation of a permanent sentencing commission for England and Wales. If created, we assume that such a commission would replace or incorporate the Sentencing Advisory Panel (SAP) and the Sentencing Guidelines Council (SGC). Our paper includes a review of some of the sentencing commissions and guidelines structures in existence in other common law jurisdictions. Since sentencing commissions have been in existence for 30 years,² and now exist in many countries, there is a rich literature upon which we have drawn. As well, we have consulted with key informants in the field to sound out views with respect to the issues examined and proposals advanced.

Our paper consists of several parts. We start with answers to the questions posed by the Working Group (2008) report. Where appropriate, our answers refer to the relevant pages of the full report. Thereafter, Part I describes the problems – as we see them – confronting the sentencing process, to which a sentencing commission is a potential solution. Part II reviews the current structure for providing guidance to sentencers in this jurisdiction and considers the extent to which the status quo meets our current requirements. We conclude that a pressing need exists for an overhaul of the existing arrangements, and that the way forward lies in the creation of a new sentencing commission. The status quo – while a significant improvement on arrangements prior to the creation of the SAP – is not sufficient to respond to current priorities, most notably controlling the rising prison population.

Part III outlines a number of possible alternative guideline models, including the two dimensional sentencing grid used in a number of American states and at the federal level in that country. We conclude that the *nature* of the guidance currently produced by the SGC means that the SGC approach is the most appropriate model for England and

¹ We are grateful to the Esmée Fairbairn Foundation for supporting the research upon which this submission draws, and to the Prison Reform Trust for their invaluable help and advice.

² The first sentencing commission was created in the state of Minnesota in 1978.

Wales, although the arrangements suffer from a number of deficiencies. Part IV describes a specific sentencing commission prototype for consideration in the event that such a commission is created by the Government.

Throughout the paper we attempt to draw lessons for England and Wales from the experience in other jurisdictions, particularly those that have created, or are currently creating, sentencing structures of the kind being discussed here. In this sense the report is partly descriptive and partly prescriptive. The objective of our document is to contribute to the current debate about the future of sentencing reform in this jurisdiction, and to provide some international context for the Government, on the one hand, as it contemplates the report of the Sentencing Commission Working Group and, on the other hand, for Parliament, as it considers any legislation that is put forward by the Government. If a decision is taken to create a sentencing commission, we hope that this report will be useful in suggesting the nature and functions that such a body would assume. If, alternatively, current arrangements are deemed adequate, we hope that this report will spark some ideas for improving the work of the SAP and SGC.

Responses to Working Group questions

Q1 Do you agree that this chapter identifies the main aspects of our current system that make it hard to predict the sentenced population? If not, please identify other broad factors.

No. The real drivers of the prisons problem are political, and the real solutions need to be political.

Q2 Do you agree that paragraph 2.28 above correctly identifies the broad changes which would be necessary to improve the situation? If not, please identify any other changes that may be necessary

No. See pages 16 and 17.

Q3 Is it desirable to create a defined scale of offence seriousness in England and Wales?

We are agnostic. It is certainly not central to solving the problems you identify. There may be some benefit, but there are also risks (see page 14) and we prefer the existing SGC approach.

Q4 What would be the advantages, disadvantages of creating such a scale?

See Q3

Q5 If desirable, how would such a scale be constructed?

See Q3.

Q6 Should more detailed guidance to sentencers on the application of section 143(2) of the Criminal Justice Act 2003?

Yes. But it would make more sense to dispense with this provision and revert to the doctrine of 'progressive loss of mitigation'.

Q7 If yes what form should this guidance take?

Make it clear that a linear relationship between weight of record and severity of penalty is undesirable.

Q8 Does the model set out at Annex I provide a possible way forward?

See Q6 & 7.

Q9 In the light of this should any proposals for a reformed sentencing framework for England and Wales apply to the sentencing of those under 18 years of age?

We have not considered in depth the question of guidance for youth courts, but in principle the adult system that we favour could be extended to youth justice – provided that it allowed rather more scope for individualized justice.

Q10 Are the requirements of Section 174(2) CJA 2003 sufficient for a structured sentencing framework?

We favour a more explicit obligation on sentencers to take account of guidance, by stressing the exceptional nature of cases where departure is justified.

Q11 Would positive endorsement by the legislature, of itself, create a stronger and more presumptive framework?

Yes, in that it would make it easier and more legitimate for the Court of Appeal to strike down judgments that had departed from the guidelines.

Q12 Do you think that a more clearly presumptive system should be adopted in England & Wales?

Yes, the system should be nudged more in the direction of presumptiveness.

Q13 Do you favour the adoption of an enhanced departure provision as outlined above?

Yes. The formulation of ‘unjust in all the circumstances’ is attractive.

Q14 Do you think that an independent body as described above should be established?

A sentencing commission should be established, building on the strengths of the SAP and the SGC. It should be better resourced. It should have broader functions that Chapter 5 of the consultation document indicates.

Q15 Should a Commission's role include assessing the impact on correctional resources of new policy proposals?

Yes, definitely, where sentencing is relevant. Government departments have a very poor track record because they have a vested interest in costing cheaply in order to get Treasury backing for their proposals.

Q16 Should the Commission additionally be required to comment on trends which might affect correctional capacity or similar issues?

It would overburden a commission to require it to speak authoritatively about, eg, crime trends, policing and prosecution practice. But it should be free to comment.

Q17 Do you think that the Commission might usefully be the same body as would be responsible for structured sentencing (assuming the existence of both bodies)?

The commission should incorporate the SGC and SAP.

Q18 What do you consider should be the process for agreeing a sentencing framework?

Our proposals do not involve the immediate creation of a comprehensive sentencing framework, in the sense of a single sentencing grid. The framework we envisage is a near-comprehensive compendium of guidelines covering sets of offences and other themes.

Q19 What role, if any, should Parliament play in agreeing a sentencing framework?

Parliament must obviously establish a commission, and give it powers to develop appropriate guidelines, developing on the SAP/SGC model. This incremental approach is not dissimilar to the present arrangements, but guidance should get parliamentary approval by negative resolution.

Q20 What do you consider to be the process for amending such a sentencing framework?

As Q19.

Q21 How frequently should reviews of the framework take place?

As necessary

Q22 Would a model based on reducing sentencing maxima provide a feasible mechanism for aligning supply and demand?

Attempts to align supply and demand should be made only when sentencing practicing and the guidelines have already been drawn into alignment. The obvious way to recalibrate demand would be to adjust starting points and ranges.

Q23 Who should sit on a Sentencing Commission should one be established?

See page 27

Q24 Who should chair a Sentencing Commission?

A senior judge, with support from a non-judicial deputy.

Q25 How should members of a Sentencing Commission be appointed?

Ex officio and by appointment

1. The case for change

As Ashworth (2008, p.122) has argued, the approach in England and Wales to creating sentencing guidelines is, by comparison with most others, a system that is complex (with its two bodies, the Panel and the Council) and slow (with its requirements for two tiers of public consultation and its piecemeal offence-by-offence approach).

Does England and Wales need to create a Sentencing Commission (hereafter SC)? The Australian Law Reform Commission recently warned that, "In general it is undesirable to propose the establishment of new government agencies unless there is a compelling case to do so" (2005, p. 400). This is particularly true when two statutory bodies already exist, as is the case in England and Wales. The justification for creating a new statutory body to develop and distribute sentencing guidelines is to be found in the inadequacy of current arrangements. But this case has to be made to the Ministry of Justice, and indeed to Parliament. The basic question is whether current arrangements are adequate to address the existing problems. The most fundamental need is to reduce unwarranted disparity over place and time – and this includes the upward drift in sentencing severity over the last fifteen years. Five main issues need addressing.

1. *The rising prison population.* One of the most well-known problems with the sentencing process in England and Wales is the rising prison population. The number of prisoners has been rising steadily since the mid 1990s, and is currently close to maximum capacity. The reasons for this increase are complex and have been explored elsewhere (see Hough, Jacobson and Millie, 2003). However, it is clear that changes in sentencing practice are primarily responsible, compounded by subsequent executive decisions; the numbers of remand prisoners and the proportion of accused detained on remand are relatively modest compared to most other western jurisdictions.³ The vast majority of prisoners are serving a sentence of imprisonment rather than awaiting trial; reducing the number of remand prisoners or the amount of time that remand

³ Recent statistics reveal that remand prisoners account for 16% of the total prisoner population. Remand prisoners account for a much higher percentage of the total prison population in continental European jurisdictions. For example, in Italy over half the prison population are pre-trial detainees, while in Belgium the statistic is 44% (Walmsley, 2007).

prisoners spend on remand will have only a very modest impact on the size of the prison population. It is also far from clear whether the creation of the SAP in 1998 and the SGC in 2003 have exercised any brake on the expansion of the prison estate. If they have, this effect has been substantially overshadowed by the raising of tariffs for grave offences, the creation of other mandatory sentences and the introduction of indeterminate sentences. Recently, however, there has been some sign of judicial restraint in the use of custody⁴. However in aggregate sentence length is continuing to rise, and this is a significant driver of the rise in the prison population. Other factors include recalls of offenders on license and breach proceedings for those serving community penalties and suspended sentence orders.

2. *Concerns over disparity of treatment:* The impact of the SGC guidelines has yet to be determined. Unlike in the U.S.,⁵ no impact analysis has been conducted, or, to the best of our knowledge is being planned.⁶ No new evidence has been adduced to demonstrate that sentencing disparity is a greater problem in England and Wales than other jurisdictions.⁷ However, existing research suggests that legal cultures vary considerably across the country, resulting in variability with respect to the use of custody. Yet it is surprising – and anomalous – that a guideline system was put in place without any explicit link to promoting uniformity, or without any evaluation mechanism or plan to evaluate its impact.

⁴ The number of custodial sentences passed in both the Crown Court and magistrates' courts has fallen since 2003. The fall has been largest in the magistrates' courts.

⁵ Most state sentencing commissions conduct impact analyses of their guidelines at periodic intervals. For example, a major review of the federal sentencing guidelines was published in 2004 (see United States Sentencing Commission, 2004). The Minnesota Sentencing Guidelines Commission has also conducted a significant amount of evaluation research into the effect of its guidelines.

⁶ The Home Office (as it then was) funded a sentencing project in 2005 designed to establish sentencing practice as it stood at that time, and preliminary work was mounted by the Cambridge Institute of Criminology. To the best of our knowledge, this project has been subsequently been mothballed.

⁷ It is significant that in its 2006 report, the Sentencing Commission for Scotland appeared to acknowledge the existence of inconsistency in that jurisdiction. The Commission noted that "it is not surprising if there is a measure of inconsistency in sentencing" (p. 3) and "we are persuaded that there is a significant body of anecdotal evidence that inconsistency in sentencing actually occurs" (p. 3). It would be surprising if the level of consistency was very different in England and Wales.

3. *The under-utilization of community penalties:* Academic commentators, politicians and senior members of the judiciary have for years advocated greater use of community penalties. Yet these penalties remain in the shadow of the prison in terms of their profile as a sanction. Our conclusion is that neither judicial or Ministerial exhortations nor legislative interventions will be sufficient to ensure greater use of these sanctions. What is needed is a more directive sentencing framework, accompanied by mechanism for monitoring compliance with guidelines.

4. *Public and media pressure on sentencers and politicians:* it has been clear since the British Crime Survey began asking questions about sentencing that most members of the public believe that courts should be harsher – but that they are misinformed about key features of sentencing (see Hough and Roberts, 1998; Roberts and Hough, 2005, for reviews). In addition, the tabloid media have for years attempted to influence sentencers directly through ‘name and shame’ campaigns,⁸ or indirectly through media pressure on politicians. A sentencing commission could offer both politicians and judiciary some protection against these forces.

5. *Absence of an independent advisory group:* Government sentencing policy develops in the absence of any independent advice, either with regard to the impact of proposed reforms on the prison population, or indeed the way in which specific reforms will promote or impede important sentencing objectives. Neither the SGC nor the SAP provides general advice of this kind, but a sentencing commission would be expected to do so. A commission would also be able to conduct original research and propose additional reforms – as is the case in a number of other jurisdictions. Such activities are not part of the mandate of the SGC or the SAP in England and Wales.

⁸ See for example, the self-styled Sun newspaper Campaign “Judges on Trial” launched in July 2006 and discussion in Hough and Allen (2008).

2 The *status quo* regarding sentencing guidance

Sentencers in England and Wales currently receive guidance from the Sentencing Guidelines Council, which produces definitive guidelines in conjunction with the Sentencing Advisory Panel, and the Court of Appeal (Criminal Division) (hereafter CACD). The bicameral structure of the SAP-SGC is unique; all other jurisdictions with a sentencing advisory body have a single organization. In addition to the SAP-SGC, the Court of Appeal periodically issues guidelines for specific offences or categories of offence.⁹ Is this arrangement optimal? We think not, and would identify the following problems with the status quo:

- There has been continued upward drift in sentencing severity
- The custodial threshold has proved labile over time, suggesting that discretion might be more structured in relation to the decision whether or not to impose custody;¹⁰
- There is an inability *swiftly* to affect sentencing practices (unlike a sentencing grid where offences and presumptive sentence ranges can be changed expeditiously - see discussion below);
- Definitive guidelines only emerge after a slow, iterative process involving multiple consultations, first on the Panel's advice and subsequently on a guideline proposal from the Council;
- The piecemeal, offence-by-offence approach to producing guidelines has resulted in marked inconsistencies in their format. The individual guidelines are also lengthy and complex, rendering them difficult to use by sentencers who are simultaneously drawing on other sources of guidance (e.g. from the CACD).
- There is a potential inconsistency in the content of the guidelines: guidance on one set of offences will have consequence for other offences yet this is not fully considered;

⁹ For example *Richardson*

¹⁰ In a recent speech the Lord Chief Justice noted that: "The seriousness of the offence determines whether it crosses what is known as 'the custody threshold'..but... in practice there is quite a wide borderline area where it is open to the court to choose between sending the offender to prison or dealing with him in some other way" (2007, p.12). We would argue that one of the goals of a sentencing guideline system would be to reduce the degree of discretion exercised by courts with respect to the custodial decision.

- There is currently no mechanism to measure or evaluate the impact and utility of the current guidelines;
- The bicameral structure of the SAP-SGC is unwieldy and requires the participation of a large number of individuals;
- Both bodies (SAP/ and SGC) lack public visibility and any degree of public engagement;¹¹
- The SGC has an insufficiently broad mandate: e.g. it has no public education role and is not engaged in judicial education programs.

Conclusion

While constituting a significant improvement on earlier arrangements, the current system of guidance could be significantly developed and improved. The dual agency approach is anomalous and out of step with guidelines authorities in other common law jurisdictions (e.g. United States, New Zealand, and the Australian states of New South Wales and Victoria¹²). After establishing two statutory bodies, it is important that Parliament in this next phase of reform creates a more appropriate authority for providing guidance and responding to current priorities. Any new organization will need to be able to respond to the five policy issues identified in Part I of this paper. The SAP-SGC combination was simply not designed to perform this task. These comments should not be taken as criticism of the SGC or the SAP. These bodies have diligently and successfully fulfilled their statutory duties. The problem lies with their respective mandates and the overall structure of the sentencing framework, particularly the degree to which their guidelines are followed and their relationship to prison capacity.

¹¹ The SAP has commissioned three significant public opinion research studies to inform its deliberations. This research will help to improve the degree of 'fit' between sentencing guidelines and community views. However, it will do little to promote public confidence that sentencing practices have some link to public opinion.

¹² The only jurisdiction which seems to have rejected creation of a sentencing commission is Scotland. In its 2006 report, the Scottish Sentencing Commission recommended creation of a single sentencing advisory body modeled on the Sentencing Advisory Panel of England and Wales. The Commission described the two-tier structure (SAP-SGC) as "complicated and bureaucratic" (Sentencing Commission for Scotland, 2006, Annex C, p. 1). It must be said however that the problems confronting the sentencing process are more pressing in England and Wales.

3 Alternative Guidelines Models

This section considers what kind of sentencing framework would be most appropriate in the context of the jurisdiction of England and Wales. The bulk of the chapter is given over to comparisons of the various options that have been tried:

- the presumptively binding grids used in some US states
- the voluntary guidance systems used elsewhere
- the existing approach used in England and Wales.

It is helpful to introduce this discussion with an analysis of the two key dimensions of sentencing guidance.

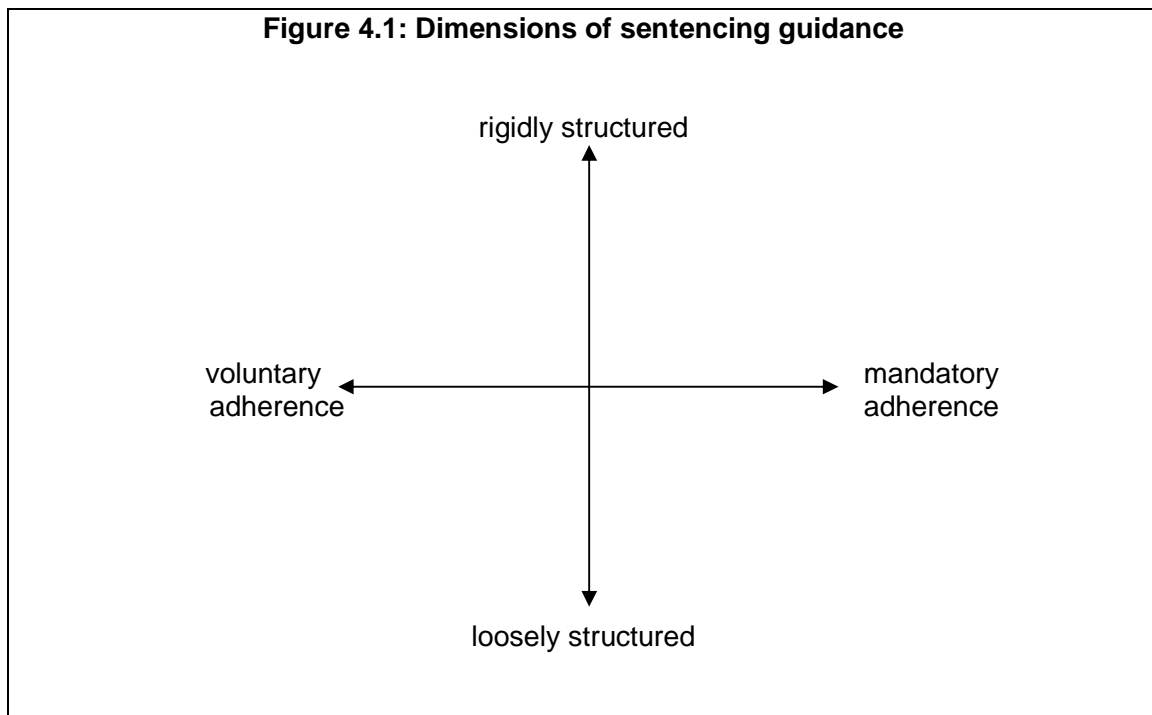
The two dimensions of sentencing guidance

Existing sentencing guideline systems can be characterized in terms of the degree to which they are *structured* (that is, the level of detail with which offences and key variables are categorised) and the degree to which adherence to the guidelines is *mandatory*. In other words, all guideline systems can be located on a two-dimensional matrix, as depicted in Figure 4.1, with the one dimension ranging from loose to rigid structure, and the other dimension from voluntary to mandatory adherence.

Structure is not logically linked to ‘presumptiveness’. Highly structured systems can be voluntary, and loosely structured ones can be mandatory. Despite this, many commentators assume that structure implies constraint, and that grid systems necessarily limit judicial discretion. It is important to maintain the distinction between the degree of structure in a system, and the degree to which compliance is mandatory.

We would characterise the current system in England and Wales as falling into the bottom left-hand quadrant of Figure 4.1. In terms of structure, offence severity is illustrated rather than enumerated, and for each level of severity there is a wide range of permissible penalties. In terms of presumptiveness, sentencers must “have regard to” SGC guidance and must state reasons for deviating from SGC guidance when it does

so. Of course, the degree of coercion in any system of guidance is not to be found simply in statute but also in case law. It is case law that will establish – over time – precisely how much freedom sentencers in England and Wales have to disregard SGC guidelines. Sentences that fall above and below the appropriate range may provide grounds for defence and prosecution appeals respectively.



The presumptive US systems clearly fall into the top right-hand quadrant of Figure 4.1: Minnesota’s system, for example, has a high degree of structure, in that gradations of offence seriousness and of criminal history are tightly specified, and sentence ranges are narrow (see Appendix A). It is also quite presumptive: although sentencers may depart from the guidelines, they need to cite “substantial and compelling circumstances”. Some of the voluntary systems retain the sort of structure associated with grids, whilst others do not.

The important point to make here is that decisions about the degree of structure and presumptiveness are analytically separate. The SGC could be amended to have more

structure, or it could be amended to be more presumptive. As will emerge, we favour making the current system somewhat more presumptive, without seeing a need to increase the degree of specificity or granularity that a more structured system would provide¹³.

Presumptively-binding sentencing grids

The advantages of a highly presumptive and structured guidelines system are clear. Such a system makes the sentencing process transparent. The guidelines enable the parties at a sentencing hearing (or indeed any member of the public) to see the range of sentence that will normally be imposed for a specified offence and an offender with a particular criminal history. In addition, this level of clarity results in greater overall predictability of sentencing outcomes in aggregate. Projections of sentencing patterns are likely to be more accurate and this permits the guidelines authority to be able to predict and – where they have the mandate – to control the prison population. Finally, by providing a structured guidelines environment that encompasses all (or most) offences, the guidelines authority is able to ensure that legislative or guidelines amendments result in a single step-change in sentencing practice.¹⁴

Presumptive sentencing grids also have number of disadvantages. First, if seriousness is judged solely on the basis of offence severity and criminal history, cases of quite variable seriousness can be assigned to the same cell within the grid. If other offender-related variables are ignored, a degree of proportionality is inevitably lost. In the pursuit of reducing *unwarranted disparity*, these systems can generate the opposite problem, namely *unwarranted uniformity*. This arises when unlike cases are treated alike. In

¹³ Structured guidance is not *synonymous* with grid systems of course, in that any system of guidance can be laid out in grid format. However, the more specific and structured a system, the more it lends itself to presentation in grid format.

¹⁴ For example, after the introduction of the sentencing guidelines in the state of Minnesota, two important policy goals were rapidly achieved: first, racial differences between black and white defendants were reduced, and second, the nature of the custodial population was transformed. Prior to the creation of the guidelines, property offenders accounted for a high proportion of custodial admissions. After the guidelines were introduced violent offenders accounted for a higher proportion of admissions, reflecting the state legislature's desire to punish violent offenders more harshly. Indeed, race, gender and class biases were largely eliminated as sources of disparity of outcome following the introduction of guidelines (see discussion in Frase (2005b)).

particular, the US grids allow little scope for sentencers to take account of culpability factors that relate to the offender's circumstances, in a way that is now required in this jurisdiction by the 2003 Criminal Justice Act's definition of seriousness.

Secondly (and linked to the first problem), sentencing grids tend to project a mechanical image of the sentencing decision. Many people, not just judges, see the determination of sentence as a 'human process', one in which the specific characteristics of the individual offender must be considered. Third, it is sometimes suggested that detailed sentencing manuals may discourage courts from considering cases in sufficient detail; they may simply choose a sentence within the guideline range. Fourth, by making the outcomes of conviction specific, numerical grids encourage and facilitate plea bargaining. By specifying the offence to which the offender is prepared to plead guilty, defence counsel can, in effect, specify the sentence that the offender is prepared to accept without contesting guilt.

Fifth, and linked to this, sentencing grids may encourage dishonesty in sentencing, in that judges can 'work back' from the sentence that they think is fair to an assessment of the appropriate 'facts of the case'. Sixthly, presumptive, or grid-style guidelines are typically unpopular with judges trained in the common law tradition that permits considerable judicial discretion at sentencing.¹⁵

Finally, a grid along the US lines formalizes – and may promote to an excessive degree – the role of previous convictions. All jurisdictions place heavy emphasis on the seriousness of the crime as the principal sentencing factor, but there is less consensus about the role of previous convictions (Roberts, 2008a). In some US jurisdictions, an offender's previous convictions can carry more weight than the offence of conviction (Roberts, 1997). Although the Criminal Justice Act 2003 requires courts to consider each previous conviction as an aggravating circumstance (if it can be reasonably so treated), previous convictions do not currently occupy the same central role in sentencing in England and Wales. Indeed the evidence presented in the Working Group's discussion paper (on pages 64-66) suggests to us that the courts are still operating broadly

¹⁵ Judicial opposition to sentencing guideline grids was a major factor explaining the rejection of such arrangements in the Canadian context; see Report of the Canadian Sentencing Commission (1987).

according to the principle of progressive loss of mitigation for good character. According to this, having 'good character' mitigates, and this good character can be squandered over the course of two or three court appearances. Once lost, however, the courts take little account of the precise length and severity of criminal history¹⁶.

To summarise our views on presumptive grids, their deficiencies outweigh their benefits. They exclude important considerations about offender culpability and other offender-related factors. They are likely to lead to unwarranted uniformity even if they reduce unwarranted disparity. They are likely to stimulate plea-bargaining and lead to dishonest sentencing. We conclude that any form of sentencing guidelines grid is unlikely to prove acceptable to criminal justice professionals (including and especially sentencers) or to the public in this country. Despite their ability to achieve specific policy goals rapidly, sentencing grids have more disadvantages than advantages for a jurisdiction like England and Wales.

Other sentencing guidelines models¹⁷: voluntary guidelines

If formal two-dimensional presumptive sentencing grids are not the answer, what other options exist?¹⁸ Although many people associate grid structures with the United States, in fact guideline schemes across that jurisdiction can take many other forms. One of the leading guidelines experts in the U.S. has written that the approaches to structuring

¹⁶ Identifying the precise relationship is hard. In the period in which criminal careers develop, offences sometimes become more serious; and as offenders move towards desistance they may also engage in less serious offending. This means that a simple correlation between sentence severity and criminal history cannot be taken as evidence that sentencers 'sentence on record'.

¹⁷ In this report we do not review or discuss computerized sentencing information systems. Several such schemes have been piloted in various jurisdictions such as Canada. The most recent is to be found in Scotland. We are of the view that such schemes have only limited utility as a tool to guide sentencers or structure discretion. In this opinion we concur with that of the Scottish Sentencing Commission which concluded that the system created in Scotland "does not have anything other than the most marginal of impacts on the imposition of sentences" (p. 37).

¹⁸ Virginia is one of the only five states in which jury sentencing takes place in non-capital felony cases. After recording a conviction, juries recommend a sentence. The court may reduce this recommended sentence if it is in excess of the guideline range, but may not increase the sentence proposed by a jury. Consistent with a policy of keeping jurors ignorant of penalty information, the jury does not have the guidelines when they make their sentence recommendation. We do not discuss this as an option for reforming sentencing in England and Wales.

sentencing “are almost as numerous as the jurisdictions adopting them” (Frase, 2005, p. 3; see also Frase, 2000).¹⁹ A critical variable in the US is the level of constraint imposed upon sentencers. Some guidelines are presumptive in nature – with some scope for departure – while others are merely advisory. Research on US guidelines suggests that, as would be expected, voluntary guidelines generally have less impact on sentencing practice than presumptive schemes (e.g., Tonry, 1996). However, the research literature has yet to reach a definitive answer regarding the relative merits of the two systems.²⁰

One example of a successful advisory system can be found in Delaware. The Delaware Sentencing Accountability Commission was established in 1983. Rather than a grid, in this state all offences are classified into categories of severity rather than placed on a grid. There are five possible sentence levels, ranging from custody (the most severe) to ‘administrative supervision’ (the least severe). Courts may impose a sentence outside the range provided by the guidelines although reasons must be provided. Surprisingly, no appellate review exists with respect to the guidelines. Despite their voluntary nature, compliance rates with the guidelines are as high, or higher than, those associated with binding presumptive guidelines, with a compliance rate of 90% (Hunt and Connelly, 2008).

Hunt and Connelly (2008) suggest that voluntary systems have the necessary flexibility to avoid the problem of unwarranted uniformity to which presumptive grid systems are prone. In addition, these authors argue that advisory guidelines generate less judicial resistance – and their compliance data from Delaware suggest that binding guidelines are not necessary to achieve high levels of compliance. Finally, they conclude that advisory, rather than presumptive guidelines may be most appropriate in jurisdictions that have a homogenous judicial culture.²¹ This observation may carry a lesson for England and Wales, which could not be described as having a single judicial culture.²²

¹⁹ A good overview of state sentencing guidelines schemes can be found in Kauder, Ostrom, Peterson and Rottman (1997). See also the National Association of State Sentencing Commissions (list of associations available at www.ussc.gov/states/nascaddr.htm).

²⁰ Indeed, Hunt and Connelly argue that “the paucity of reliable scientific evidence regarding the performance of all sentencing systems [constitutes] a major obstacle to informed choice” (2008; p. 13).

²¹ Frase (2005b) writes that “Delaware is a very small state, with substantial informal “peer” pressure on judges to conform to the guidelines. This pressure may ensure compliance without a

One area in which presumptively binding guideline schemes appear to have an advantage concerns resource management, or management of the prison estate. Reitz (2005) among several other authorities has argued that presumptive regimes have had more success in managing prison populations than voluntary guideline schemes. But the latter are not totally ineffective in addressing this issue, as the experience in Missouri has demonstrated. In that state, judges enjoy wide discretion at sentencing, without appellate review so long as the sentence is within the statutory limit. However, judges are provided with sentencing recommendations as well as a range of other information to guide their decision-making. Preliminary data on the impact of this advisory package²³ has suggested a decrease in the prison population (Wolff, 2006).

Prototype dispositions

In 1987, the Canadian Sentencing Commission published its final report, recommending the creation of a permanent sentencing commission. It proposed a novel guidelines scheme, one that may be considered a hybrid approach to structuring discretion (Canadian Sentencing Commission, 1987). In the event, neither the recommended commission nor the guideline scheme was actually adopted.²⁴ Nevertheless, the scheme is worth noting as an alternative to the numerical grids used across the United States.

Under the Commission's scheme, each offence would carry one of four presumptive dispositions – two custodial presumptions and two community presumptions (Canadian Sentencing Commission, 1987, p. 311). If the presumption was in favour of custody, the guideline would contain a sentence length range. In addition, the guideline would provide sentencers with a great deal of additional information including the following:

legal requirement to comply". However, we are of the view that the size and diversity of England and Wales argues in favour of a presumptive rather than an advisory guidelines scheme.

²² The data on the relative use of custody as a sanction suggest wide variations between different Crown Court centres across the country.

²³ It is described by the Chair of the Missouri Sentencing Advisory Commission as a "discretionary, information-based system" (see Wolff, 2006).

²⁴ In 1996, the Canadian parliament approved a sentencing reform bill which, *inter alia*, codified the purposes and principles of sentencing and introduced a number of other statutory reforms to the sentencing framework (see Roberts and Cole, 1999).

- summaries of recent Court of Appeal judgments
- summaries of recent empirical sentencing patterns
- lists of relevant mitigating and aggravating factors.

Courts would be obliged to impose a sentence within the guideline range or to provide written reasons why it was appropriate to sentence outside the range.

In summary, voluntary grid guidelines can under some circumstances achieve high levels of compliance but, insofar as they do, they risk encountering the same problems of presumptive grids, in narrowing the range of relevant factors taken into account by sentencers. The Canadian proposal has some of the advantages of a sentencing grid, yet fewer of the disadvantages. However, it offers little or nothing beyond the guidelines issued by the SGC. In addition, we doubt that the presumptive dispositions²⁵ would be well-received by sentencers in England and Wales. We think that the degree of compulsion reflected in the SGC guidelines is the minimum desirable, and that there is scope for making the guidelines more presumptive.

The status quo in England and Wales

There is a strong argument in favour of following the model of the SAP-SGC – albeit with a new authority. Consider the SGC’s guidelines for robbery. The offence is stratified into three sub-categories, with examples of the kinds of conduct which are typical of each.

The guideline provides starting points and sentence ranges applicable to each level, and provides a non-exhaustive list of mitigating and aggravating factors. The guidance also

²⁵ For example, there are two presumptive custodial dispositions. The most serious offences would be classified as ‘Presumptive In’, meaning that the offender is presumed to receive a custodial sentence unless the court believes there are compelling reasons to depart. Less serious offences for which custody is still a likely option carry a ‘Qualified In’ presumption. This means that the offender is to be incarcerated unless both of the following conditions are met: the offence is not serious AND the offender has no relevant record. This classification is more sophisticated than the US-style IN-OUT guidance regarding the use of custody, but would probably appear unduly foreign or unnecessarily complicated to courts in this country.

includes a commentary. The degree of guidance is significant, yet courts still retain a significant degree of discretion to sentence outside the guideline range.²⁶

There are two notable features to the current structure: (i) the guidelines are quite broad and loosely structured, allowing for considerable discretion; (ii) the degree of compulsion to comply with the guidelines is very mild.²⁷ The robbery guideline illustrates the first point. The least serious form of the offence “includes the threat or use of minimal force and removal of property”; it carries a sentence range from a very short prison sentence to three years in custody. This is a very broad range of sentence for an offence description which implies a relatively narrow spectrum of conduct (i.e. the use or threat of minimal force). Put another way, few sentences would be likely fall outside this wide range, although a high rate of compliance with the guideline would surely not constitute evidence of consistency in sentencing.

One solution to this is to introduce more structure – or more specificity – into the guidance. Instead of three categories of robbery, for example, one might subdivide the bands into those that involve only threat, and those that involve force. Alternatively one might introduce some form of comprehensive offence severity scale, as proposed by the Working Group (2008:10), which might sub-divide highly heterogeneous offence categories such as robbery. The main risk here is that the greater degree of structure exacerbates the problem of unwarranted uniformity.

As for point (ii), the requirement to impose a sentence while having regard to the Council’s guidelines is in no way comparable to the presumptive guideline schemes operating across the United States. It may well be that over time, case law establishes a legal definition of ‘having regard to’ the guidelines that actually imposes significant constraints on our sentencers. In our view, however, there is a case for Parliament to

²⁶ We do not discuss the Magistrates’ Court Sentencing Guidelines here. However, these constitute a more structured model of sentencing guidance. The guidelines provided magistrates with a clear methodology to apply when determining sentence, as well as guidance regarding the nature of disposition that should be imposed.

²⁷ In the absence of any statistics showing the proportion of sentences falling within the Council’s guidelines (for those offences for which a definitive guideline has been issued) we can only speculate on the degree to which courts are complying with guidelines issued to date. We see this absence of “compliance” data as symptomatic of the problems associated with the sentencing framework at the present time.

impose tighter requirements on sentencers to comply with the guidance, whilst retaining a loosely structured system that protects against the risks of unwarranted uniformity.

In our view, the best way to proceed in England and Wales is for a sentencing commission to produce guidelines similar in nature to those that have been devised to date by the SAP-SGC. The definitive guidelines already produced by the SGC provide much of the foundation for a comprehensive set of guidelines. The guidelines produced by the SGC are the most appropriate form of guidance for sentencers in the context of England and Wales; what needs changing is the infrastructure or the service delivery model that creates these guidelines.

An adjustable system of sentencing guidance?

A key issue for any guidance system is whether it should be designed to be responsive to prison capacity. The sentence starting points or ranges can be adjusted in some systems to keep the demand for prison places in balance with the supply. The Sentencing Commission Working Group was guarded about this issue. Its discussion paper focused discussion on how to design a system that yields predictability of demand, leaving aside any serious discussion of the desirability of adjusting the guidance so as to balance supply and demand:

If a planning system can be devised (noting that this is not the case today) that can predict the total impact of current sentencing practice, new sentencing guidelines and legislative changes as well as other drivers of the system, then it would make it possible for Parliament if it so chose to determine how best to reconcile long term prison and probation capacity with criminal justice policy.
(Working Group, 2008:2)

The Working Group was clear that any system of guidelines should not be seen as a “short term adjustment tool to dampen current demand”. In so saying it effectively side-stepping the question whether such a system might serve as a *long-term* adjustment tool.

The prospect of a commission fulfilling the penal equivalent of the Bank of England's Monetary Policy Committee²⁸ raises issues both of principle and of practicality. The issues of principle relate to the containment of sentencing disparity, which has served as one of the central rationales for sentencing commissions. Given this overarching purpose, it may seem odd to design a system with an inbuilt capacity to vary sentencing severity over time – and thus create temporal disparity – at the same time that contains geographic disparity. Pragmatic decisions to adjust the sentencing tariff to fit the Treasury pocket may appear unprincipled – and may, incidentally, carry a significant political price-tag.

On the other hand it strikes us as equally odd to say that resource considerations must *never* enter into decisions about penal policy – especially in the light of the fact that there has been unplanned and uncontrolled upward drift in sentencing over much of the last fifteen years²⁹. Whatever the political costs in doing so, we think it justifiable for Parliament to review periodically, in the light of affordability and other issues, whether the upper and lower ends of the sentencing tariff are anchored in the right places.

However, there are practical problems in actually achieving the sort of recalibration of the tariff that such a review might imply. We have laboured the point that there is no information about the degree of judicial compliance with SGC guidelines. We cannot even say for certain whether specific guidelines would be inflationary or deflationary in their impact if they were given 100% compliance. Obviously the SGC and SAP are as well placed as any to make assessments about current practice and to reach judgements about preferred practice. But these judgments are not formed against a backdrop of firm statistical evidence about the operation of the system.

One route to achieving the predictability that is required for this sort of recalibration is to monitor judicial practice and its concordance with SGC guidelines. This would involve an incremental – and thus slow – process of monitoring and iterative adjustment to bring

²⁸ The MPC was established to insulate policy decisions about the money supply – and thus demand for credit – from short term political considerations (and to insulate politicians from the consequences of these decisions).

²⁹ Most people can come to terms with the fact that in other areas of social policy, such as health and social care, investment decisions have to take account of affordability – even when the outcomes affect the length and quality of people's lives.

guidance and sentencing practice into close alignment. This would provide the necessary predictiveness that would then allow for periodic recalibration. Precisely how the relevant body of statistical evidence might be accumulated and used more widely is discussed in the next chapter. Whatever the detail of so doing, this strikes us as the best way forward.

The alternative – which may seem more attractive to the Ministry of Justice – is to introduce an entirely new form of guidance with enough structure and presumptiveness to achieve predictability at one fell swoop. In our view this is a risky strategy which would privilege the Ministry of Justice’s desire for predictability over and above considerations of justice that require sentencers to take into account all relevant factors.

In summary, setting up a guidelines system that is designed to be responsive to prison capacity may appear to conflict with principles of consistency in sentencing, but it makes no sense to place penal policy beyond the processes of democratic review or for such reviews to be blind to resource considerations. However, there are significant practical problems in rapidly setting up a system with sufficient predictability to enable periodic recalibration of the tariff; and any system that had such predictability would sit uncomfortably with principles of sentencing that require full consideration of the offender’s circumstances.

4 A Sentencing Commission for England and Wales: Purpose, Mandate, Structure

Sentencing commissions have added value to criminal sentencing by acting as intermediaries. They sit between the legislature and the sentencing judge, midway between the drafters of general rules and the actors who apply the rules in particular cases. (Wright, 2005, p. 1010.)

There are a number of advantages of a Sentencing Commission including:

- The promise of less inconsistency in sentencing, building on the work of the SAP and SGC;
- The promise of a more coherent overall sentencing policy – statutory amendments to sentencing provisions, new dispositions, indeed, all sentencing related legislation would be reviewed by the Commission;
- Preventing, or limiting the extent to which sentencing policy and practice is politicized.

The importance of protecting the sentencing process from politicization cannot be over-estimated. Guidelines need to be developed by an expert body, with a broad perspective which includes all legitimate considerations and close co-operation with the judiciary.

Purpose

- to devise, implement and monitor a sentencing guideline system;
- to advise the government and Parliament with respect to sentencing reform proposals, and specifically the impact of proposals on the prison population;
- to consider broader reforms to the sentencing process such as systematic review of the maximum penalty structure;³⁰
- to conduct research into current sentencing practices;
- to participate in public and judicial education initiatives.

³⁰ The statutory maxima in most common law jurisdictions are out of date, and for the most part lack any correspondence to the seriousness of offences for which they may be imposed and for these reasons there have been repeated calls in many countries for a comprehensive revision. In the event that an SC is created with a sufficiently broad mandate, revising the statutory maxima should be on of its priorities.

Mandate and Specific Functions

The critical issue for any legislature contemplating the mandate and functions of a sentencing commission is the breadth of activities of the agency. A range of potential models can be found around the world (see Freiberg and Gelb, 2008, for the most recent developments, and von Hirsch, Knapp and Tonry, 1987, for further information from an earlier period in the evolution of sentencing guidelines). At one extreme is the Sentencing Advisory Council in the Australian state of Victoria. This council was established as an independent statutory authority in 2003. Unlike the US sentencing commissions, the Victoria Sentencing Advisory Council does not develop guidelines. Rather, its principal activities include:

- to provide statistical information on current sentencing practices to members of the judiciary and other parties;
- to conduct and disseminate research on sentencing matters;
- to evaluate public opinion towards sentencing in the state;
- to consult parties with a stake in sentencing process, including the public; and to advise the Attorney General on sentencing matters.

In other words, the Victoria council is purely advisory, and has no guidelines development capacity (see Freiberg (2008) for further information).

At the other extreme, the US Sentencing Commission was created to develop binding sentencing guidelines and was also provided with the resources to conduct a great deal of research into the functioning of those guidelines. In our view, only a robust commission, with a mandate to devise and monitor binding guidelines will be effective in addressing the problems confronting the sentencing process in this jurisdiction.

Appendix D summarizes the statutory functions of the Sentencing Council in New Zealand. This is the latest country to create a sentencing commission and since it draws upon the experience in many other jurisdictions, it provides a useful model.

1. Development of the guidelines

In the first instance, the SC would be charged with developing guidance for all high frequency offences – which would involve revising or consolidating SGC guidance where this exists. This represents a compromise between the offence-by-offence approach taken by the SGC – although the number of definitive guidelines is extending across the terrain – and the comprehensive approach followed in the U.S.. The guidelines would be proposed to and reviewed by Parliament (see below). Guidelines for low frequency offences might eventually follow.

While the US sentencing guidelines are generally comprehensive in nature, this practice is not universal. Although they have yet to be published, it appears that the guidelines being developed in New Zealand will deal with each offence category which “routinely comes before the court and results in significant numbers of prison sentences” (Young, 2008, p. 186).³¹ In developing its guidelines the Commission should build upon the existing work of the SGC with the important additional element that the package of guidelines will be accompanied by prison population forecasts (see below).

Finally, we have noted (see above) that the guideline format followed by the SGC is the most appropriate model for this jurisdiction. However, to date no evaluation of the guidelines has been conducted. It would seem prudent, therefore, before adopting this approach for all high frequency offences, for the sentencing commission to conduct some such research canvassing sentencers’ views. This kind of exercise would provide some harder evidence to sustain our (and presumably the SGC’s) conclusion that their definitive guideline format provides the right level of guidance and in the most appropriate way.

Constraining the Prison Population

The problem of an increasing prison population has clearly sparked the current debate about reforming the sentencing structure of England and Wales. Without the current crisis, it is unlikely that the Carter report would have been written, or the Sentencing

³¹ The Scottish Sentencing Commission also took this position, recommending that a future body “give priority to guidelines on those offences that normally, or at least frequently, result in the imposition of a sentence of detention” (p. 8).

Commission Working Group created. The position of the judiciary seems clear: judges determine sentence without consideration of correctional resources, for which the government is responsible. However, it has been observed that judges are practical people, and some courts may have an eye to the prison population problem when contemplating the imposition of custody. Moreover, there is evidence from other jurisdictions that when judges perceive a problem with the administration of a particular sanction, they are less likely to resort to the disposition. It is possible therefore that the relationship between sentencing practice and prison capacity is bi-directional in nature. Courts can create a crisis by imposing more and longer terms of custody,³² and at some point evidence of over-populated prisons changes sentencing practices. Either way, remedial steps need to be taken.

Judges cannot be expected to impose a term of custody unless they are secure in the knowledge that space is available for the prisoner to discharge the term under the appropriate conditions. Moreover, courts need to know that the prison sentence will be served under the terms of the court, and that it will not be curtailed, or the location of the sentence changed, as a result of executive or administrative intervention to respond to an overcrowded institution. As the Carter report noted, the use of emergency measures, particularly those affecting early release “inevitably affect confidence and the integrity of sentences and the criminal justice system as a whole” (2007, p. 2).

It is impossible to review the voluminous literature on the relative effectiveness of different strategies to constrain or reduce prison populations. However, our reading of the literature is that of all the mechanisms that have been proposed or implemented, creating a sentencing commission with the power to devise and monitor guidelines is the most effective approach. In a recent review of the experience in the United States, Barkow and O’Neill (2005) concluded that “sentencing commissions act to curb growth rates of incarceration and correctional expenditures” (p. 2009).

³² This appears to be the principal reason for the current record numbers of prisoners in England and Wales; see Hough et al. (2003).

Legislative Overview of Sentencing Guidelines

One of the thorniest problems confronting a guidelines system is determining the level of legislative oversight.³³ It would be unreasonable to expect Parliament to accord a sentencing commission unfettered freedom to develop and promulgate sentencing guidelines independent of parliamentary approval. Total independence is therefore unrealistic; as in all such matters Parliament remains sovereign. On the other hand, requiring Parliament to review, debate and likely amend the offence-specific guidelines would be time-consuming and would defeat the whole purpose of external expertise. As with many issues explored in this report, the answer lies in the middle.

The SC should devise a comprehensive set of guidelines, consulting widely, as has been the case with the definitive guidelines from the SGC. These guidelines should then be submitted to Parliament where they would pass into law, absent a negative resolution supported by some threshold number of members. This procedure was proposed by the Canadian Sentencing Commission (1987) and has also been adopted in New Zealand. In New Zealand, it is proposed that the Council's guidelines be tabled in Parliament, reviewed by an appropriate Parliamentary committee, and will come into force within 30 sitting days unless opposed by negative resolution. In our view a similar arrangement should be adopted in England and Wales. Any subsequent amendments to the guidelines would be subject to the same degree of Parliamentary scrutiny. There are therefore two other ways in which Parliament would have input into the proposed guidelines. First, they would be reviewed by a standing committee (the House of Commons Justice Committee) as is currently the case (although now the committee would be required to review the entire set of guidelines). Second, we feel that it would be prudent for the sentencing commission to include a sitting member of Parliament, and presumably a member of the Justice Committee, in its membership.

2. Monitoring the guidelines

This is a vital function of the SC. Although the SAP has been in existence for a decade and the SGC for half that time, no information is available on the impact of these bodies

³³ Ashworth (2008) notes that in its 2002 White Paper, the Government cited the need to allow greater parliamentary input into the development as a justification for creating the SGC.

on sentencing practices. The Home Office launched a large-scale study of sentencing practices in 2005. As noted, the study appears to have been suspended. However, even if resuscitated, it will not yield information for years, as the first phase was simply to establish baseline levels of sentencing for a variety of offences. Nor has there been any attempt to canvass sentencers with respect to the utility and impact of the guidance published to date. An SC would conduct original research and periodically survey the opinions of the judiciary.

Compliance Rates and Impact Analyses

One of the most important issues in any guideline schemes is the compliance rate. From the perspective of consistency or accuracy of prison projections, it is important to know the extent to which a guideline system is followed. At present, it is unclear whether sentencers in England and Wales are following the SGC guidelines - despite a statutory obligation to sentence within the guidelines or give reasons for imposing a different sentence or a sentence outside the range. Section 172 (1) (a) of the Criminal Justice Act 2003 states that, "Every court must, in sentencing an offender, have regard to any guidelines which are relevant to the offender's case". (Section 171(2) specifies the definitive guidelines issued by the Council.) This provision creates a relatively mild compulsion on courts to sentence within the guidelines range. Moreover, little is known about the degree to which courts impose a sentence within the guidelines, and as noted, guidelines still apply to only a proportion – albeit a growing proportion – of all offences. If compliance is relatively low,³⁴ this would imply a lack of judicial confidence in guideline arrangements. One of the first tasks therefore of a sentencing commission would be to determine the compliance rate and then to consider remedial options in the event that the rate was deemed low. At the very least, the language of section 171 (1) (a) should be the subject of some research and consultation.

The necessity to measure the impact of sentencing guidelines on sentencing practices has long been recognized in the United States. Over 20 years ago Kay Knapp, the

³⁴ As noted, across the US, compliance rates are generally in excess of 80%, whether the guidelines are mandatory or advisory in nature. Rates of this magnitude may not be appropriate in England and Wales where there is a stronger tradition of, and adherence to, the exercise of discretion at sentencing.

research director at the time of the Minnesota Sentencing Guidelines Commission, wrote, “After the guidelines are adopted, their effects on sentencing practice need to be assessed” (1987, p. 113). Even if guidelines largely reflect current practice, their effect needs to be measured; it is reasonable to expect sentencing practices to become somewhat more uniform – otherwise why are guidelines introduced at all? But the SGC guidelines do not simply institutionalize current practice. In constructing a definitive guideline the Council draws upon a number of sources, including feedback on the Panel’s advice; empirical public opinion research conducted for the Panel and so forth. For this reason, it is reasonable to expect sentencing practices to change to some unknown degree as a definitive guideline is absorbed by the courts. As noted, however, to date no impact analysis has been conducted. We regard the task of filling this gap as one of the primary goals of the sentencing commission.

3. Participation in judicial training

Neither the SGC nor the SAP is apparently involved in judicial education regarding sentencing and sentencing guidelines. In our view this is a serious oversight. It is unclear how much training in this specific area is offered by the Judicial Studies Board. Sentencing commissions in other jurisdictions are actively engaged in judicial training. Sentencing guidelines training should be built into the national judicial education curriculum.

4. Monitoring prison capacity

Much of the discussion about sentencing guidelines has focused on the need to constrain the rising prison population. A critical function of the SC should be to monitor prison capacity, make projections about future correctional requirements and to respond to overcrowding if and when it arises. Responses may include adjusting sentence lengths or increasing the proportion of non-custodial dispositions.

5. Conducting original sentencing research

The SC should have the capacity to initiate, co-ordinate or commission research into the functioning of the sentencing process and into public attitudes about sentencing. In this respect it would take over some of the research functions of the Ministry of Justice with respect to sentencing.

6. Promote public understanding of sentencing

Both capacity and mandate mean that the SAP and SGC have to date declined to engage in much public legal education.³⁵ Their joint website contains little information of general interest and their activities do not include any community outreach. This approach is understandable in light of their respective mandates, but we believe it to be misguided. Other sentencing commissions have embraced this function.³⁶ Assigning a public education function to the sentencing commission is not going to eliminate public and media criticism of current sentencing practices or cynicism towards sentencers. However, within the context of a broader strategy, the SC has a significant role to play. One possibility would be to facilitate a number of public meetings, along the lines of the Magistrates' Association *Local Crime Community Sentence* programme

Sentencing Commission Resources

Since the SC will assume many of the sentencing-related functions of the Ministry of Justice, this should be reflected in its mandate and resource allocation. In 2006/07 the total budget of the SGC-SAP was approximately £1million. The sentencing commission that we envisage would require a significantly larger budget in order to achieve its objectives.

³⁵ From our perspective it is disappointing that judging from its consultation document the Sentencing Commission Working Group appears to see little merit in engaging in some form of broader initiative involving the public (see Sentencing Commission Working Group, 2008).

³⁶ This is particularly true of the Sentencing Advisory Council in Victoria. The US sentencing commissions and the Canadian Sentencing Commission generally overlook the public engagement function, but this is largely because they were created in the 1970s and 1980s when there was little interest in incorporating public views. That is clearly no longer the case (see Freiberg and Gelb, 2008; Roberts, 2008b, for discussion of this trend).

Structure of the Sentencing Commission

After reviewing arrangements in a number of other jurisdictions, we have concluded that the commission should comprise four elements: (i) a full-time Chair, who would be a senior judge seconded full-time to the commission; (ii) a mix of full-time and part-time members; (iii) a secretariat (composed of a full-time Chief Executive, a part-time Research Director and Communications Director, support staff and researchers; and (iv) a small external advisory group.

Commission Membership

Membership of any sentencing commission is crucial to its success. The most important question concerns the extent to which the judiciary is represented. Two extremes may be noted: a commission with a small, token presence of judges, or a commission in which members of the judiciary predominate. In our view a middle approach is to be preferred: the Chair of the Commission should be a senior sitting judge, and the commission should include members of the judiciary as well as experienced magistrates. However, a large minority – or possibly a small majority – of members should be drawn from other criminal justice professions and from outside the criminal justice system. Appendix B provides some examples of commission membership from the United States while Appendix C contains examples from other common law jurisdictions. As can be seen, there is considerable variation both in terms of size and the nature of membership. No single model has been followed. Since it is one of the oldest and most researched commissions, it is worth noting the membership of the Minnesota Sentencing Guidelines Commission. The Minnesota Commission comprises 11 members, as follows:

- the Chief Justice of the Minnesota Supreme Court or a designee
- a Judge from the Minnesota Court of Appeals
- a District Court Judge
- a Public Defender
- a County Attorney
- the Commissioner of Corrections or a designee

- a Peace Officer
- a Probation or Parole Officer
- 3 members of the public one of whom must be a felony crime victim.

In our view, the SC should adopt a “big tent” approach to membership which should include and reflect a range of interests. It might be useful to make a distinction between full and part-time members. Full time members would be heavily engaged in the development of guidelines, part-timers would serve more of a representative role. In addition, the use of ex-officio members should be considered. In total however, the commission would be smaller than the current 28 members who jointly comprise the SGC and SAP.

Possible membership:

Chaired by a senior member of the judiciary

Members of the judiciary

Members of the magistrates association

Representative of the Defence Bar

Director of Public Prosecutions

Two academics, one serving as the SC research director (part time)

Senior members of the press

Member of public

Member of victims’ advocacy group

Parliamentarians representing the principal political parties (in order to protect the SC from political pressure)

Sentencing Commission “Products”

Guidelines for all high frequency offences

Statistical reports of current sentencing trends

Public information material

Sentencing Information website

Periodic public “consultation/ education” sessions

As for the Commission's Secretariat, the SC would need a research staff capable of conducting or commissioning all necessary research.

Relationship between Sentencing Commission and existing bodies

A sceptic may regard the creation of a third statutory body within a decade as evidence of failure on the part of the government. In addition, questions may be asked about the fiscal prudence of starting a new agency while the work of the SGC and the SAP is still in its relatively early stages. In fact, there is no reason why a commission could not efficiently build upon the work that has been completed to date. The SGC and SAP would be replaced by the new body, but it would make sense for some members of the existing bodies to become members of the new organization. In addition the Secretariat would be expanded in scope and responsibility, not replaced. And, as noted, the "products" of the new sentencing commission would be definitive guidelines of the kind currently produced by the SGC.

Finally, it is clear that a number of commentators, and possibly a significant number of sentencers, would either prefer to see the status quo maintained, or would be actively opposed to the creation of a replacement body, particularly one with expanded powers and responsibilities. It is vital, therefore, that sentencers be consulted closely in the creation of the sentencing commission, to ensure the maximum degree of support from the outset. For example, it is clearly important to ensure that the judiciary and the legal community do not see the creation of a sentencing commission as an additional encroachment on the exercise of judicial discretion at sentencing.³⁷

³⁷ See recent commentaries by Zander (2008) and Ormerod (2008).

5 Conclusion

We conclude with the following summary points:

1. In our view, there is a clear need to revamp the statutory agencies responsible for providing guidance to sentencers in England and Wales; placed in an international context the SAP-SGC structure is anomalous, as many jurisdictions have created or recommended the creation of a single sentencing commission.
2. While the definitive guidelines issued by the SGC are appropriate to the sentencing environment in this jurisdiction, the structures in which the guidelines are developed are insufficient to the task of promoting consistency and ensuring that the prison population is under control.
3. A better alternative to the SAP-SGC structure – and one that has been adopted in a diversity of other jurisdictions – is a well-resourced unitary sentencing commission.
4. This commission would be charged with devising definitive sentencing guidelines for all high frequency offences, particularly those that currently result in a term of custody in 50% or more cases.
5. These guidelines may need to introduce a greater degree of constraint upon courts than at present; this will depend on the results of research into current levels of compliance with the existing guidelines.

The commission would also be required to fulfil a number of other tasks related to the sentencing process, including but not limited to the following: monitoring the impact of the guidelines on sentencing practices; providing the government with general forecasts of prison population trends, as well as forecasts about the impact of specific reform proposals; participating in judicial and public education initiatives in the area of sentencing; conducting original research into sentencing and public attitudes to sentencing.

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Appendix A

IV. SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. Offenders with non-imprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVEL OF CONVICTION OFFENSE (Common offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree</i> (intentional murder; drive-by-shootings)	XI	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 ²	426 363-480 ²
<i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree</i> (unintentional murder)	X	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Assault, 1st Degree</i> <i>Controlled Substance Crime,</i> <i>1st Degree</i>	IX	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
<i>Aggravated Robbery, 1st Degree</i> <i>Controlled Substance Crime,</i> <i>2nd Degree</i>	VII I	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI</i>	VII	36	42	48	54 46-64	60 51-72	66 57-79	72 62-86
<i>Assault, 2nd Degree</i> <i>Felon in Possession of a Firearm</i>	VI	21	27	33	39 34-46	45 39-54	51 44-61	57 49-68
<i>Residential Burglary</i> <i>Simple Robbery</i>	V	18	23	28	33 29-39	38 33-45	43 37-51	48 41-57
<i>Nonresidential Burglary</i>	IV	12 ¹	15	18	21	24 21-28	27 23-32	30 26-36
<i>Theft Crimes (Over \$2,500)</i>	III	12 ¹	13	15	17	19 17-22	21 18-25	23 20-27
<i>Theft Crimes (\$2,500 or less)</i> <i>Check Forgery (\$200-\$2,500)</i>	II	12 ¹	12 ¹	13	15	17	19	21 18-25
<i>Sale of Simulated</i> <i>Controlled Substance</i>	I	12 ¹	12 ¹	12 ¹	13	15	17	19 17-22

Presumptive commitment to state imprisonment. First Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence. See section [II.E. Mandatory Sentences](#) for policy regarding those sentences controlled by law.

Presumptive stayed sentence; at the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in this section of the grid always carry a presumptive commitment to state prison. See sections [II.C. Presumptive Sentence](#) and [II.E. Mandatory Sentences](#).

¹ One year and one day

² M.S. § 244.09 requires the Sentencing Guidelines to provide a range of 15% downward and 20% upward from the presumptive sentence. However, because the statutory maximum sentence for these offenses is no more than 40 years, the range is capped at that number.

Effective August 1, 2006

Appendix B

Representative Examples of Membership of U.S. Sentencing Commissions

State	<i>Oregon</i>	<i>Delaware</i>	<i>Michigan</i>	<i>Ohio</i>
Number of Members	6	11	19	31
Membership	Director of Department of Corrections; 1 sheriff; Chair of Parole Board; 1 Attorney; 1 Community; Corrections Director	4 judges; the state Attorney General; the public defender; the commissioner of corrections; 4 members at large "with knowledge of state sentencing practices"	4 state senators; 4 state representatives; 2 judges; 1 prosecutor; 1 defence counsel; 1 law enforcement representative; 1 department of corrections representative; 1 community sentencing advocate; 1 crime victim; 1 department of management and budget representative; 2 members of the general public	Chief Justice of State Supreme Court; 10 judges; Superintendent of state highway patrol; Director of Rehabilitation; 1 sheriff; 3 prosecutors; 1 municipal or township peace officer; 1 peace officer with juvenile justice experience; 1 crime victim; 1 defence counsel; 1 juvenile defence counsel; Director of Youth Services; 1 member of Ohio Bar; 1 county commissioner; 1 mayor or municipal representative; 2 state senators; 2 state representatives

Appendix C

Representative Examples of Membership of Sentencing Commissions in other common law jurisdictions

Jurisdiction	<i>South Africa (proposed)</i>	<i>New South Wales</i>	<i>Victoria Sentencing Advisory Council</i>
Number of members	8	13	11
Membership	2 judges; 2 magistrates Director of Public Prosecutions; Representative of Department of Correctional Services; Sentencing expert; Director of Council (Source: Terblanche, 2008)	1 retired judge; 1 law enforcement professional; 3 sentencing experts including one defence and one prosecutor; One Aboriginal justice expert; One correctional services expert; One juvenile justice expert; Representative of the AG; Homicide victim support member; Victim advocacy group; 1 other to be appointed	1 senior academic; two people with experience in community issues affecting courts; one experienced defence lawyer; on experienced prosecutor; one member of crime victim support or advocacy group; other members with experience in the criminal justice system.

Appendix D

Statutory Purposes and Functions of the New Zealand Sentencing Council

Purposes

- promote consistency in sentencing practice between different courts and judges;
- ensure transparency in sentencing policy;
- promote consistency and transparency in Parole Board Practice;
- foster the development of sentencing and parole policy, informed by a breadth of experience and expertise;
- facilitate effective management of penal resources;
- inform politicians and policy makers about sentencing and parole practice and reform options;
- inform the general public about sentencing and parole policies and decision-making, and thereby promote public confidence in the criminal justice system.

Functions

- draft sentencing guidelines;
- draft parole guidelines;
- assess and take account of the cost-effectiveness of the guidelines;
- provide advice on sentencing and parole issues that relate to the development and use of guidelines, either at the request of the Minister of Justice, or on its own initiative;
- collate and provide information about the extent of compliance with the guidelines for sentencing judges and the Parole Board;
- publish and make accessible information about sentencing and parole to the general public.

Source: Law Commission of New Zealand (www.lawcom.govt.nz)