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PRISON REFORM TRUST

# Creating a sentencing commission for England and Wales:

## an opportunity to address the prisons crisis

Mike Hough and Jessica Jacobson

The work of the Prison Reform Trust aims to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing parliament, government and officials towards reform.

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# Foreword

This thoughtful report has its origins in two earlier pieces of work by the same research team, published by the Prison Reform Trust. *The Decision to Imprison*, launched in 2003 was concerned with the factors that have led sentencers to rely increasingly on custodial sentences since 1991. *Mitigation: the role of personal factors in sentencing* was published in 2007. It drew attention to the importance of mitigating factors, and personal mitigation in particular, in many sentencing decisions.

In January 2008 the government announced its decision to establish a working group under Lord Justice Gage to examine the advantages, disadvantages and feasibility of a structured sentencing framework and permanent sentencing commission. This followed a recommendation from Lord Carter, who had been asked in 2007 by the then Lord Chancellor to consider options for improving the balance between the supply of, and demand for, prison places.

The established partnership between the Institute for Criminal Policy Research, Kings College London and the Prison Reform Trust was well placed, with the support of the Esmée Fairbairn Foundation, to conduct an independent study within the same demanding timescale faced by the working group. This review is free of the constraints inevitably imposed by the terms of reference for Lord Gage's review. It provides an authoritative, evidence based examination of the various models of sentencing commissions that exist around the world. It recommends a model that makes sense in our constitutional framework.

The authors have been careful to steer away from measures that might restrict judicial independence and towards an approach that would lead to greater consistency in sentencing, better assessment of the resource implications of policy proposals and clearer information for the public.

Whatever the machinery in place, the conclusion from *The Decision to Imprison* remains apposite:

> *However, none of these interventions is likely to meet with much success unless there is clear political will to stop the uncontrolled growth in prison numbers, and visible, consistent, political leadership in stressing the need to do so.*

Lord Hurd of Westwell
June 2008

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Mike Hough
Jessica Jacobson

July 2008

# Summary

The Carter review of the use of imprisonment, published in December 2007, proposed that a permanent sentencing commission be set up in England and Wales. The creation of a commission was seen as a means of improving the transparency, predictability and consistency of sentencing, and thus bringing the demand for imprisonment and the supply of prison places into closer alignment.

This report presents the findings of a review of the policy options relating to a sentencing commission. The main conclusion is that a commission with a broad range of functions should be established in England and Wales in order to address the problems of prison over-use, sentencing disparity and the excessive politicisation of sentencing practice and policy. However the report does not advocate the use of US-style sentencing grids, which would excessively constrain judicial discretion.

## Key points

### The prisons crisis

- The prison population has grown in an uncontrolled way for almost two decades.
- There is also extensive sentencing disparity.
- Any effective response to these problems needs to take into account all the factors that are driving up the prison population and leading to disparity.
- The quality of media coverage of law and order issues, public opinion about crime and punishment, and the associated penal populism which characterises political debate all need to be factored into any strategy for containing the prison population.
- Simply constraining sentencers' discretion, without addressing the underlying pressures for tougher sentencing, is a not a viable, long-term solution to the prisons crisis.
- A long-term solution needs to have both political and technical dimensions to it.

### How can a sentencing commission address the prisons crisis?

- A sentencing commission can serve three main functions: providing guidance to sentencers; gathering and providing information and statistics for monitoring, planning and policy development; and community engagement – to inform and to consult with the public.

- Most US commissions combine the first two functions but not the third. Some Australian commissions focus on the third but not the first two. The only jurisdiction currently planning a commission that performs all three functions is New Zealand.

- A sentencing commission for England and Wales that discharged all three functions would help to address the current prison capacity crisis. In performing its three functions, a commission would pursue two overarching and interlinked objectives:
  - Achieving greater consistency and stability in sentencing practice, thereby preventing any further upward drift in sentencing severity;
  - Reducing the politicisation of sentencing policy and practice, by acting as an institutional buffer between the political process and penal practice.

## Function 1: providing guidance for sentencers

- Guidance for sentencers in England and Wales is currently provided by the Sentencing Guidelines Council (SGC), which works in conjunction with the Sentencing Advisory Panel (SAP).

- The existing SGC guidelines are quite loosely structured, and adherence to the guidelines is not strictly enforced. Sentencers are required by statute to 'have regard to' the guidelines in passing sentence. We simply have no idea whether this requirement means that most sentences fall within the relevant guideline.

- A more structured and mandatory guidelines system (based on the sentencing grids used in some states of the USA) would rapidly yield greater predictability and uniformity in sentencing practice.

- However, there would be many disadvantages to a highly structured and mandatory guidelines system: most offender-related factors would be excluded from sentencing decisions; it would lead to unwarranted uniformity even if it reduced unwarranted disparity; it would be likely to stimulate plea-bargaining. It would also prove unpalatable to sentencers and other criminal justice professionals in this jurisdiction.

- A better reform option would be to retain the model of loosely structured guidance developed by the SGC, but to make the guidance more mandatory by restricting the statutory grounds for imposing a sentence outside the guidelines.

- The existing SGC guidelines should thus be the foundation for a comprehensive set of sentencing commission guidance. Consistency, simplicity and clarity in the format and presentation of the guidance should be ensured.

- Once the set of guidelines has been established, periodic adjustments could be made in response to prison capacity and other resource constraints, although this would pose practical problems and would not be easily reconciled with principles of consistency in justice.

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## Function 2: research and monitoring

- Currently there is no monitoring of levels of judicial compliance with the SGC guidelines. The sentencing commission should undertake this task, either on a routine basis or through periodic surveys.

- For effective monitoring of sentencing practice to be carried out, sentencers must record how their sentencing decisions map on to the guidance.

- The sentencing commission should carry out impact assessments of proposed reforms to sentencing policy.

- The commission should also undertake and co-ordinate research into other aspects of sentencing, including attitudes of the public and of sentencers to the guidelines.

- Through its research and monitoring exercises, the commission should contribute to Ministry of Justice projections of demand for prison places and other correctional resources.

- The Ministry of Justice should continue to have primary responsibility for the collection and analysis of national statistics on sentencing outcomes.

## Function 3: community engagement

- The general public are systematically misinformed about sentencing practices. They believe that the courts are much more lenient than they in fact are. Inaccurate media representations of sentencing feed into the public misconceptions.

- A sentencing commission that was a source of authoritative, trusted and accessible information about sentencing could help to correct public misconceptions, and create a more constructive climate of public and political debate about penal issues.

- The sentencing commission should thus develop and implement a comprehensive public information and education strategy, targeting all sectors of the general population and the mass media.

- The commission should not, however, stray into areas which properly fall to the government and to Parliament. Decisions about the overall severity of

our penal system are political ones, and a commission should not aim to displace political leadership in this regard – or to compensate for a lack of such leadership.

- A public information role was never part of the formal remit of the SAP and SGC. However, sentencing commissions in other jurisdictions, including Australia, have undertaken work of this kind.

- The community engagement function of the sentencing commission would also encompass public consultation on specific sentencing guidance, as is currently carried out by the SAP and SGC.

## What should a sentencing commission look like?

- The existing SAP-SGC structure is complex and unwieldy and takes considerable time to produce definitive guidelines; there are thus clear advantages to replacing this with a single sentencing commission that can provide a swifter and more flexible response to issues that arise.

- Ideally, the commission should comprise three elements:

    - Full-time and part-time members
    - A secretariat, including support staff, researchers and a research director
    - A small external advisory group.

- Determining the membership of the commission is likely to be a challenging task. In particular, establishing the appropriate level of judicial representation in the membership may be critical to its success.

- The best solution to the question of membership would be to have a senior judge as chair of the commission, and to include a number of judges in the commission's membership, but with a majority of the members being from other criminal justice professions and (to a limited extent) from outside the criminal justice system.

- While the commission's membership should reflect a wide range of interests, its total size should probably be smaller than the SAP and SGC in aggregate (currently, the two bodies have 28 members between them). A membership in the range of 15 individuals would be appropriate.

Guidelines produced by the commission should be submitted to Parliament where they would pass into law, in the absence of a negative resolution.

## Key Recommendations

1. A well-resourced, unitary sentencing commission should be set up to replace the SAP and SGC.
2. The commission should have a wide range of functions – principally the provision of sentencing guidance, research and monitoring, and community engagement.
3. The sentencing guidance produced by the commission should be based on the existing SGC guidance and should thus permit sentencers to give due weight to offender-related factors in passing sentence. Parliament should consider restricting the scope for departure from the guidance.
4. The commission should monitor compliance with the guidelines, contribute to government forecasts of prison population trends, assess the impact of proposed reforms to sentencing policy, and conduct original research.
5. Community engagement should be seen as a core function of the commission; this would entail both informing and educating the public about sentencing, and undertaking public consultation.
6. The commission should aim to be an authoritative and trusted source of non-partisan information and guidance on sentencing practice and policy.

A commission of the kind we envisage would offer sentencers clearer and simpler guidance that would structure – rather than fetter – their discretion in much the same way as the existing SGC guidelines. It would serve as a source of expertise to assist with prison projections and sentencing reform. It would help to achieve more sensible and better-thought-out sentencing reform in the future. It would provide sentencers with relief from some of the political and media pressures. If politicians so wished, it could help them find a way of withdrawing from the – highly unproductive – political competition to offer the electorate the toughest solutions to crime. For their part, the public should welcome greater transparency and consistency in sentencing practice, and better information about sentencing.

We think it essential that the design of any sentencing commission is informed first and foremost by principles of justice. The Ministry of Justice's desire for predictability of prison numbers is understandable, but this should not be the main consideration that shapes any commission's structure and function.[1]

1. A point made persuasively by Ashworth (2008a)

# 1 Introduction

In June 2006 Lord Carter was asked by the government to consider ways of achieving a better balance between the supply of prison places and the demand for them. His report was published in December 2007. The recommendation that received most attention focussed on increasing supply, through the provision of 6,500 new prison places, some of which would be provided by 'Titan' prisons. Less attention was given to his proposals for containing demand for prison cells:

> *A structured sentencing framework and permanent Sentencing Commission should be developed, with judicial leadership, to improve the transparency, predictability and consistency of sentencing and the criminal justice system.*
> (Carter, 2007)

The government accepted Lord Carter's recommendation to establish a Sentencing Commission Working Group to examine the pros and cons, and at the time of writing the Working Group had issued a consultation document on the options (Sentencing Commission Working Group, 2008).

Establishing a sentencing commission could prove a very significant development. It could – intentionally or accidentally – impose important changes on the way that justice is achieved in this country. Properly implemented, a commission could serve as a mechanism for helping to insulate the judiciary from the – largely malign – pressures that come from media and political debate about law and order. On the other hand, if poorly thought through and inadequately implemented, a commission could further erode public confidence in sentencing in particular and the criminal justice system in general.

The government set itself very rapid timescales, which have been subject to much critical comment (eg Ashworth, 2008a; Zander, 2008a, 2008b). In the light of this, it seemed to us and to our collaborators at the Prison Reform Trust, that there would be value in mounting a policy review of the issues independently of the Working Group. We should stress that the Working Group is itself independent of the government. It is led by a senior judge appointed by the Lord Chief Justice; and its sixteen members were also appointed in their own right. However, it has terms of reference that in our view are narrow. This is not surprising, as the Group was established in response to a report whose analysis of the pressures on the prison population was also narrow. In our view, the Group's terms of reference do not permit it to examine the full range of options that are open to the government.

We were fortunate to secure funding from the Esmée Fairbairn Foundation for a rapid policy review of the issues, and this report presents our findings. It aims to contribute to the current debate about the future of sentencing reform in England and Wales, and to provide some international context for the government as it addresses the question of whether or not to establish a sentencing commission. Our main conclusion is that the establishment of a sentencing commission with a broad range of functions would help to address the problems of prison over-use, sentencing disparity and the excessive politicisation of sentencing policy

and practice. In the event that the government ultimately decides to create a sentencing commission, we hope that this report will be useful in suggesting the possible form and functions that such a body might assume.

Chapter 2 presents an analysis of the problems which a sentencing commission could help solve. Chapter 3 summarises the evolution of judicial guidance in this country, and considers the main functions that a sentencing commission could serve:

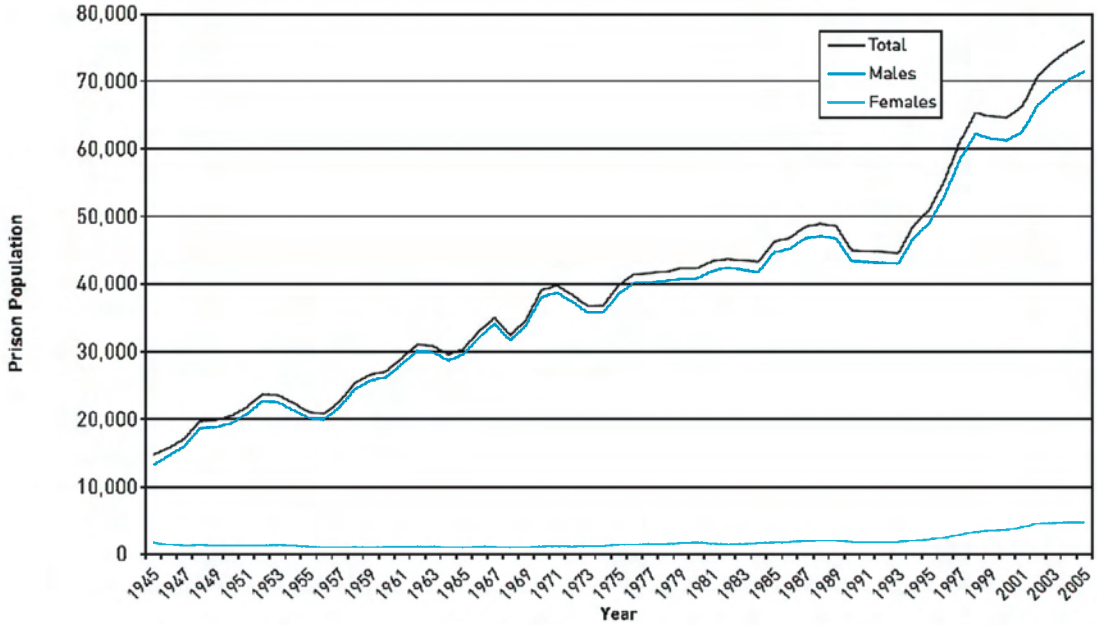
- providing guidance for sentencers
- providing information and statistics for planning and policy development
- promoting community understanding and engagement.

Chapters 4, 5 and 6 consider in more detail the policy options relating to each of these three functions respectively. Chapter 7 considers the various options relating to structure and composition of a commission. Chapter 8 summarises our recommendations.

# 2 The problems of prison overuse and sentencing disparity

As can be seen in Figure 2.1, the prison population in England and Wales has risen over most of the post-war period. For much of this time, the growth reflected rising crime rates, and increasing court workloads. Since the mid 1990s, however, patterns have been distinctively different. The numbers of offenders sentenced by the courts have been broadly static.[2] Crime has fallen steeply yet the prison population has almost doubled since 1992, rising more steeply than at any time since 1945. Expenditure on prisons is drawing resources from other parts of the criminal justice system, and creating strain throughout the system.

***Figure 2.1 Growth in the average prison population 1945 to 2005***




*Source: Securing the future: Proposals for the efficient and sustainable use of custody in England and Wales Carter (2007)*

We have obviously made a value judgement in characterising these trends as representing an overuse of custodial sentences. It is not the purpose of this report to argue the case for this position. There are many who welcome the increasing severity of the penal process, and this report will be of only marginal interest to this group. A sentencing commission could in principle be designed with a view to ensuring that sentencers

2. Numbers sentenced for all offences stood at 1,425,000 in 1993, 1,385,000 in 1997 and 1,421,000 in 2006. Numbers sentenced for the (more serious) indictable offences stood at 307,000 in 1993, 319,000 in 1997 and 307,000 in 2006 (RDS NOMS, 2005, 2007).

'toughened up'. However, the position taken here, as in the 2007 Carter Report and (implicitly) by the Sentencing Commission Working Group (2008) is that a commission could provide a means of stabilising the prison population. Those who wish to examine the arguments for parsimony in the use of prison sentences are directed to von Hirsch et al., (1999), Bottoms et al. (2004) for reviews and to Spelman (2005) for a cost benefit analysis from the US.

The immediate causes of the growth in the prison population can be stated very simply: since 1992 the sentencing process has become tougher in all respects.[3] Sentencers are more likely to pass custodial sentences, and when they do, sentences are likely to be longer.[4] The Parole Board has become more reluctant to release prisoners on licence. Today, offenders are more likely to be recalled to prison following a breach of licence conditions, and are more likely to be sent to prison for breach of a community order. In short, decision-makers have become more risk-averse, and tougher in their decisions.

These patterns have not been consistent over the entire period. From 1992 to 2002, for example, the use of custodial sentences increased; between 2002 and 2006 it fell back by 13%. However this recent trend has been offset by the recent surge in numbers of recalls and in custodial sentences following breach proceedings. Trends in sentence length are hard to calculate following the introduction of new indeterminate sentences in 1995 but it is almost certain that in the crown court average sentence length has increased, taking into account usage of the new indeterminate sentence of imprisonment for public protection (IPP). Recent trends in the length of prison sentences passed in magistrates' courts appear stable over the last five years.

The factors explaining these processes are more complex, and more contentious. We have explored them in previous research (see Hough, Jacobson and Millie, 2003). On the one hand, sentencers and other penal decision-makers have responded to statutory changes, including the introduction of:

- higher maximum sentences for certain offences including causing death by dangerous driving, carrying a knife, and offences relating to child pornography[5]
- mandatory minimum sentences for serious violent, drug and burglary offences
- extended tariffs for life sentence prisoners
- indeterminate sentence for public protection and extended sentences.

While these changes affect only a minority of offences, the changes inevitably have a 'spill-over' effect upon similar offences, at least if sentencers aim to observe broad principles of proportionality. Leaving aside these statutory requirements, however, the climate of media and public opinion about law and order has almost certainly made penal decision-makers more risk-averse. Tabloid newspapers in particular have attempted to influence sentencers. One of the clearest examples of this was a campaign by the *Sun* in June 2006 demanding an end to soft sentencing, in which individual judges were 'named and shamed' for supposed excessive lenience. Box 2.1 contains a selection of newspaper headlines illustrating the media pressure on courts.

3. There have been some changes in the mix of offences coming before the courts: in 2005 there were fewer burglaries and more cases of violence coming before the courts, for example. But the impact of this may not have been large, as the imprisonment rate for the two categories is similar.
4. Straightforward comparisons of sentence length show no change for magistrates' courts since 1995 but a 20% increase in Crown Court sentence lengths. But these comparisons mask the real trend, because the lowering of the custody threshold means that the average gravity of cases attracting imprisonment has fallen.
5. Raising the maximum sentence for an offence is Parliament's way of signaling the need for tougher penalties for that offence – even if the maximum is rarely, if ever, actually used.

**Box 2.1: Selection of newspaper headlines**

**Soft judges, derisory jail sentences and the subversion of justice**
*Mail on Sunday*, 12 May 2005

**Soft life and crimes of the lenient judges**
*The Sunday Times*, 8 January 2006

**Judges on Trial: we demand end to soft sentences**
*Sun*, 12 June 2006

**Judges face more complaints over 'lenient' sentences**
*Independent*, 12 June 2006

**Axe killer wife escapes jail**
*Daily Mail*, 22 August 2006

**When will our judges return to planet Earth?**
*Daily Mail*, 9 October 2006

**Shocking figures show judges are jailing fewer criminals**
*Daily Mail*, 28 February 2007

**Top judge: Let killers out of jail**
*Sun*, 10 March 2007

**Roll-call of the 'lenient' judges**
*Telegraph*, 23 June 2007

**Top cop gunning for 'soft' judges**
*Sun*, 26 March 2008

**Fury at killer's 14 month sentence**
*Sun*, 14 June 2008

The general public is misinformed about key features of crime and punishment. Majorities believe that crime rates have risen and even larger majorities of the public believe that sentences are too lenient (although there is ample research evidence that the public become less punitive in their views when asked about specific cases and sentencing options). The public substantially underestimates the proportion of convicted offenders who get sent to prison. One can argue about whether the media have created these misperceptions, or responded to them, or compounded them. Whatever the case, the end-result is a climate of debate about law and order that traps politicians into a difficult 'prisoner's dilemma'[6] (cf Lacey, 2008).

The origins of this process are now well-documented (e.g., Ashworth and Hough, 1996; Roberts et al., 2003; Ryan, 2003; Tonry, 2004; Pratt, 2006). In 1992 the Labour Party started to mount a credible challenge to Tory credentials as the party of law and order[7], making it impossible for the latter to continue with their policy of 'penal parsimony'. As Labour became 'tough on crime' the Conservatives in turn discovered that 'prison works'. Penal parsimony turned into penal greed, as the main parties competed to 'out-tough' each other.[8] A rational outcome – which many politicians will privately accept as the most desirable one – would be for the main political parties to establish a tri-lateral agreement to treat 'law and order' as off-limits in electioneering. This would entail self-denying ordinances against promising tough crack-downs on crime and on attacking the opposition for being soft on crime. However, other things being equal, politicians are unlikely to enter into such an agreement. Breaking trust and betraying such an agreement may yield a decisive electoral advantage. It is likely that politicians will remain locked in a counterproductive battle to 'out-tough' each other. Hence the key to solving the problem of prison overcrowding is, first and foremost, to find a political solution to this intrinsically political problem: politicians need help in finding a constructive resolution to their particular 'prisoner's dilemma'.

## Sentencing disparity

However, the solution to the problem has technical as well as political dimensions. The prisons problem can be thought of as a problem of sentencing disparity over time, given the – largely unintended and certainly uncontrolled - upward drift in sentencing severity, especially in the decade from 1992. There are also considerable geographic disparities in sentencing, and disparities between individual sentencers. Controlling these disparities is in part a technical issue, and is generally seen as one of the primary aims of sentence guidance.

It is tempting to think that controlling sentencing disparity is simply a question of ensuring that similar cases get treated in the same way in different courts and at different times. However, sentencing disparity can take two forms: first, where similar cases attract dissimilar treatment and, second, where dissimilar cases get similar

6. There are several variants of the prisoner's dilemma in game theory. Typically, two participants are required to play the roles of suspects under interrogation for armed bank robbery. They face the choice of betraying the other or staying silent. If both stay silent, they face a six month sentence for possession of firearms. If each betrays the other, they both face five years in prison. If only one betrays the other, he goes free and his co-conspirator gets ten years. The dilemma illustrates problems of trust in competitive situations: mutual distrust results in mutual betrayal, and thus in sub-optimal outcomes for both participants.
7. Pratt (2006) offers another metaphor that also seems particularly apt: he characterized Tony Blair as 'the sorcerer's apprentice' in initiating this challenge.
8. At the same time it should be noted that throughout the period both the main parties continued to invest in, and advocate the use of, community penalties.

treatment. Rigid systems of guidance can ensure that the first type of disparity is controlled, so that the same cases get treated in the same way[9]. But if these systems are insensitive to subtle differences, they may also result in the second type of disparity – or unwarranted uniformity – where cases that are dissimilar on important dimensions get the same penalty. In other words, systems of guidance which do not allow the courts to take account of all the relevant features of cases can simultaneously contain and extend disparity. It is essential to avoid systems of control that have the appearance of yielding consistency but actually force sentencers to impose similar sentences in dissimilar cases.

The key to successful systems of guidance (or control) is to identify the full range of relevant factors that sentencers should consider in passing sentence, and to ensure that these factors can be accommodated. It is a matter of choice – and let us for the time-being ignore whose choice it is – to decide which factors are considered relevant.

Most jurisdictions adhere to some extent to the 'just deserts' sentencing principle that a court is required to pass a sentence that is commensurate with the seriousness of the offence. However there are important differences between jurisdictions on what constitutes seriousness. The narrowest form of desert-based sentencing would aim to make the punishment fit the crime – where the crime is defined solely in terms of harm done. Lex talionis – an eye for an eye – represents a form of retributivist sentencing in which no account is taken of variations in the offender's culpability: seriousness is equated with harm done.

In practice, common law jurisdictions all accommodate offender culpability to some degree. England and Wales actually now defines offence seriousness in statute as a combination of offender culpability and harm. Section 143(1) of the 2003 Criminal Justice Act states that:

> *In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.*

However, there is considerable variation in the culpability factors that jurisdictions take into account at sentencing. All systems take account of previous offending to some extent although the precise way in which they do so varies.[10] This judicial recognition of the significance of previous history reflects our intuitive sense that people who persistently break the law deserve tougher treatment than those who commit offences through 'a moment of madness'.

Some jurisdictions – including England and Wales – take a broad view of offender culpability and also take into account offender-related factors that are not necessarily or strictly linked to culpability. Hence in England and Wales factors such as the circumstances that triggered the offence, the offender's reaction to the offence, the degree of remorse shown, steps taken to make reparation, and the impact of

9. The US sentencing guideline systems which employ a two dimensional grid are a good example of this approach
10. There are two extreme options. One is to take no account whatsoever of previous criminal history, and the other is to treat each and every previous conviction as increasing the offender's level of culpability. Most jurisdictions give defendant with 'previous good character' some sort of discount but there are wide variations in the number and type of convictions that can be acquired before an offender has completely squandered his or her good character (see Roberts, 2008a).

imprisonment on the offender's employment prospects and family, can all play a part in sentencing decisions[11] (see Jacobson and Hough, 2007). As we shall see, those US jurisdictions that employ sentencing grids implicitly place less weight on offender-related factors other than criminal history, by providing sentencers with limited room for manoeuvre within the ranges specified within each cell of the grid. This marks them apart from sentencing in Britain.[12]

Any system of sentencing guidance designed to contain sentencing disparity will involve decisions about the range of factors that have to be considered by sentencers. These are important decisions that need to be debated and made explicit. How the courts define offence seriousness, and which kinds of offender factors they take into account, are questions that reach to the heart of justice.

11. A significant discount is also given for a guilty plea, but this is treated as a separate issue to culpability. It is seen as a pragmatic incentive to save the court's time and money. In reality, a guilty plea and remorse cannot readily be disentangled.
12. However, following the Supreme Court's ruling in US v. Booker (2005), both federal and states systems acquired more flexibility to take account of offender factors, when they moved from mandatory to voluntary guidelines.

# 3 How can a sentencing commission address the problems?

This chapter examines how a sentencing commission might address the problems of prison overuse and sentencing disparity. The first section provides a brief account of the development of the current system of sentencing guidance in England and Wales. The second section takes stock of our present system. The third section describes the range of sentencing commissions in other jurisdictions and summarises the three key functions that a commission could serve in England and Wales.

## The development of sentencing guidance in England and Wales

There is a long history of policy attempts to keep demand for prison places in balance with supply. Throughout the 1980s the Conservative administration was concerned to curtail the use of imprisonment — first for young offenders and then for adults. The culmination of this set of policies was the Criminal Justice Act 1991, which:

- stressed that custody was a sentence of last resort
- encouraged the use of community penalties
- discouraged sentencing on the offender's previous convictions.[13]

Section 95 of the 1991 Act also gave the Home Secretary powers to 'publish such information as he considers expedient for the purpose of enabling persons engaged in the administration of justice to become aware of the financial implications of their decisions'. In other words, the Home Secretary acquired powers to alert sentencers to the cost of resources they consumed and – by implication – to encourage them to adjust their sentencing to take account of cost. As we have seen, however, the philosophy of penal parsimony that had served the Conservative party well in the 1980s did not survive for long after the 1991 Act.

The Crime and Disorder Act 1998 gave the Court of Appeal Criminal Division (CACD) formal powers[14] to formulate and issue guideline judgements which took account of:

- the need to promote consistency in sentencing
- current sentencing practice
- the cost-effectiveness of different sentences
- and the need to promote public confidence in the criminal justice system.

13. The intention behind some very opaque drafting was to ensure that sentencers followed the (then well established) practice of 'progressive loss of mitigation for good character' where offenders with previous good character, or one or two previous convictions, received a discount, but thereafter there was no 'recidivist premium' (see Ashworth, 2005; Roberts, 2008a).

14. Though this was a practice that the CACD had already initiated

It also established the Sentencing Advisory Panel, whose task it was to advise the CACD, either proactively or reactively. This Act was thus an important step towards the establishment of structures and procedures designed to improve sentencing consistency and (potentially, at least) to inject a degree of cost-consciousness into judicial decision-making.

The 2003 Criminal Justice Act set up the Sentencing Guidelines Council (SGC). As with the CACD legislation, SGC guidelines were required to take into account consistency, current practice, cost-effectiveness and public confidence. The Sentencing Advisory Panel was left in place, but was required to provide advice to the SGC rather than to the CACD. The legislation imposed a light duty on sentencers to 'have regard to' SGC guidance (S 172) and to state reasons for deviating from SGC guidance when it does so (S 174(2)a).

The 2003 Criminal Justice Act also placed two other considerations on a statutory footing. As discussed in the previous chapter, Section 143(1) renders explicit the important sentencing principle of proportionality between offence seriousness and severity of punishment by defining offence seriousness as the aggregate of offender culpability and harm done.

Secondly, the Act imposed a duty on sentencers to treat each previous conviction as an aggravating factor in all cases where this was reasonable. A common-sense reading of the subsection is that Parliament wished to see a linear relationship between sentence severity and the number of previous convictions:

> *S 143(2) In considering the seriousness of an offence ('the current offence') committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated.*

If sentencers had paid any serious attention to this section – or had construed its meaning in a common-sense way – it would have had a highly inflationary effect on the prison population. In practice, the section is more honoured in the breach than the observance. It appears that once an offender has re-offended two or three times (and thus lost the discount for 'previous good character'), the volume of previous convictions is relatively unimportant (see Sentencing Commission Working Group, 2008, pp. 64-66). The Working Group has pragmatically interpreted S143(2) as affording wide discretion in considering the relevance of previous convictions when passing sentence, given that 'sentencers are free to judge the specific weight to be applied to each previous conviction'.[15] The SGC has also steered clear of explicit guidance. This sub-section has some implications for any highly structured system of guidance that specifies the weight accorded to previous convictions.

15. It seems unlikely that Parliament would have intentionally enacted this sub-section in this form, had it been clear at the time that it would be interpreted as providing no significant guidance to sentencers. We suspect that in reality the requirement simply managed to escape close scrutiny in its passage through Parliament.

## Sentencing guidance in England and Wales

As matters now stand in England and Wales, the principal source of sentencing guidance is the SGC, although the CACD and the Judicial Studies Board are also both significant - the latter through its training function. The SGC has produced definitive guidance on most of the main offences tried in the Crown Court, and the revised version of the Magistrates' Courts Sentencing Guidelines will come into effect in August 2008. What started in 2004 as an incomplete patchwork of guidelines on selected offences for the Crown Court is now beginning to take shape as a near-comprehensive system of guidance.

This guidance is organised broadly around the concept of proportionality, where punishment is proportional to the harm committed and the offender's level of culpability. The guidance usually takes the form of splitting the offence into bands of different gravity, and setting out starting points and ranges for each band. The gravity bands are sometimes defined in terms of harm done, and sometimes in terms of culpability, and sometimes a mixture of the two. The guideline also provides guidance with respect to the kinds of aggravating and mitigating factors that need to be taken into account. The guidance is only loosely presumptive, in that deviation from the proposed range is permitted, provided that reasons are stated. As described by Martin Wasik, who was chair of the SAP from 1999 to 2007, the SGC guidelines 'to date have been issued primarily to inform sentencers, and to guide them through the decision-making process', with the objective being 'uniformity of approach' rather than 'uniformity of outcome' (2008: 259).

Box 3.1 sets out the SGC's definitive guidance for the offence of robbery. The guidance is for adult offenders, and is based upon the case of a first-time offender pleading not guilty.[16] Judges are required to identify the seriousness of the offence in question, and then, weighing up all the aggravating and mitigating circumstances, decide where within the range for that gravity band the penalty should fall. If the offender has pleaded guilty, a discount should then be made to take account of this. If there are reasons for passing a sentence that falls outside the range indicated, these should be stated in open court.

The guidelines produced by the SGC represent a considerable achievement, given that the body has been in existence for less than four years. However, the existing arrangements for developing guidelines have some notable weaknesses. First, reflecting the way in which it has developed, the system is complex, and protracted in its lengthy processes for consulting with Parliament and the wider public. Secondly the complexity of the system, coupled with its piecemeal approach of dealing with offence groups – and occasionally individual offence categories – in isolation, has resulted in inconsistencies between guidelines both in substantive terms, and in terms of process and format.

16. In practice most offenders appearing at the Crown Court for this offence will have significant criminal histories, and this will increase the severity of their sentence from the starting point. On the other hand, those who plead guilty at the earliest possible stage will also get a discount of up to a third, drawing the sentence back down again.

***Box 3.1 Illustration of SGC Guidance***

**Street robbery or 'mugging'**
**Robberies of small businesses**
**Less sophisticated commercial robberies**

**Robbery is a serious offence for the purposes of sections 225 and 227 Criminal Justice Act 2003**

Maximum Penalty: **Life imprisonment**

**ADULT OFFENDERS**

| Type/nature of activity | Starting point | Sentencing Range |
|---|---|---|
| The offence includes the threat or use of minimal force and removal of property. | 12 months custody | Up to 3 years custody |
| A weapon is produced and used to threaten, and/or force is used which results in injury to the victim. | 4 years custody | 2-7 years custody |
| The victim is caused serious physical injury by the use of significant force and/or use of a weapon. | 8 years custody | 7-12 years custody |

| Additional aggravating factors | Additional mitigating factors |
|---|---|
| 1. More than one offender involved.<br>2. Being the ringleader of a group of offenders.<br>3. Restraint, detention or additional degradation, of the victim.<br>4. Offence was pre-planned.<br>5. Wearing a disguise.<br>6. Offence committed at night.<br>7. Vulnerable victim targeted.<br>8. Targeting of large sums of money or valuable goods.<br>9. Possession of a weapon that was not used. | 1. Unplanned/opportunistic.<br>2. Peripheral involvement.<br>3. Voluntary return of property taken.<br>4. Clear evidence of remorse.<br>5. Ready co-operation with the police. |

*Souce: http://www.sentencing-guidelines.gov.uk/docs/robbery-guidelines.pdf*

A third – and critical – problem is that there is currently no way of knowing whether a new guideline, properly implemented, represents a shift up or down tariff in relation to existing practice. Even if there was political will to use the current guideline system as a means for controlling judicial demand for prison places, there is not enough information available to know precisely what impact any given set of detailed guidance would actually achieve if fully implemented. Related to this, a fourth problem is that levels of compliance

with the guidelines are not monitored. In previous research (Hough et al., 2003) experienced judges suggested to us that guideline judgements tend to pull lenient sentencers up to the norm, but fail to draw tough sentencers down to this norm. In other words, guideline systems designed to compress the range of variation around average practice may actually turn out to have an inflationary effect. On the other hand, it is quite possible that the decline since 2004 in the custody rate of crown court sentencing could be, in part at least, a response to the growing body of SGC guidelines. We simply do not have the information that would allow us to make a judgement about this.[17]

Finally, the two bodies lack institutional presence and public visibility. If their function is defined in fairly narrow terms – as the provision of sentencing guidance – this may not be a significant problem. However, the more that they are required to engage in public debate, the more important it is that they should be able to command authority and public trust.

## Sentencing commissions in the United States

The United States has the longest and the broadest experience of sentencing commissions. Over the years, 22 states have established commissions in some shape or form, and 19 are currently in existence. The federal US Sentencing Commission was set up in 1984. The US systems have in common the aim of containing sentencing disparity, and many, including the US Sentencing Commission, were originally envisaged as systems for restricting courts from sentencing in a more severe direction.

A sentencing grid of the sort used in the United States typically contains two dimensions, representing what are taken – in those jurisdictions – to be the two most important determinants of sentence severity: crime seriousness and the offender's criminal history. Appendix A presents the sentencing grid used in the state of Minnesota, one of the first jurisdictions to adopt this kind of sentencing structure. Grids exist in various forms across the US, and have been proposed in at least one other jurisdiction (Western Australia). Although popular in the United States, they were rejected as a model in New Zealand (2002), Canada (1987), and South Africa (2000) for varying reasons.[18]

Some of the US systems are presumptive in nature – sentencers are required to follow the guideline range or explain why they have deviated. Others are voluntary, existing simply to provide guidance rather than control.[19]

US sentencing guidelines are usually sensitive to prison capacity, with adjustments made to sentence ranges in response to prison overcrowding. States that have adopted this approach to their sentencing guidelines – which of course represent a minority of states in the US – have largely been successful in avoiding prison overcrowding, and without recourse to 'one-off' remedial strategies such as amnesties or introducing ad hoc changes to the early release system. Minnesota is generally recognized to be amongst the most successful, whilst the federal system has been widely criticized, not least by the Supreme Court, which ruled that its mandatory requirements were unconstitutional.[20]

17. The proportionate decline in the use of custody by magistrates' courts has been much greater – 18% between 2002 and 2006 – and this cannot be a function of SGC guidance, of course.
18. The most common reason would appear to be that the guidelines are too restrictive and the architecture of the grid too rigid. New Zealand also decided that culpability was a more important structuring dimension than criminal history.
19. See Ostrom et al. (2008) for a comparative assessment of three states.
20. US v. Booker (2005). Both prior to the Booker ruling and, subsequently, other Supreme Court decisions found that many state systems were also unconstitutional, and some states had to make their mandatory systems advisory.

Despite the original intention of insulating sentencing from politics, the Commission was captive to political pressures, and issued highly punitive guidance. In the words of Gertner (2008: 103), 'For other jurisdictions seeking to implement sentencing reform through a sentencing commission, it is a cautionary tale.'

## Guidelines authorities in other jurisdictions

Commissions and councils in other countries have tended to have a rather different mix of functions. Commissions in Australia are involved in the production of guidance for sentencers, but their role in this respect is typically advisory – to the Court of Appeal – rather than prescriptive. Like the US systems, they have an explicit role in the provision of research and statistics both to assess the demand for prison places, and to improve understanding of the sentencing process. In contrast to the US systems, they also place emphasis on consultation with the wider public, in order to incorporate community views into the sentencing process, and on informing the public about sentencing. New Zealand 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 (see Young, 2008a). The remit of its Sentencing Council stretches from the provision of guidance to community engagement, with a view to improving public confidence in sentencing. Appendix B summarises its statutory functions.

In most western European jurisdictions, sentencing practice is guided by their respective penal codes rather than by sentencing councils or commissions, and the extent of discretion permitted to sentencers varies from country to country.[21] In Germany, the federal penal code contains general sentencing provisions and sets out broad sentencing ranges for each offence type. The sentencing ranges in the penal code allow sentencers wide discretion, and there appear to be substantial geographic disparities in sentencing practice.

In the Netherlands, the penal code places few limits on sentencing. The code sets out a wide range of penalties that can be imposed, but does not specify the type and severity of sentence for individual offences. There is a statutory minimum custodial term of one day for all crimes, irrespective of seriousness, and a statutory maximum of 15 years (which can be extended to 20 years in murder cases), although sentences can exceed the maximum if specified aggravating factors are present. Although there is wide inconsistency in sentencing practice, the fact that prosecutors are required to propose a sentence in each case, and in doing so are largely bound by sentencing directives issued by the prosecution service, has had the effect of reducing disparity with respect to some offence types.

Finland's criminal code sets out the minimum and maximum sentence that can be imposed for any offence, and a series of mitigating and aggravating factors to which the sentencer must give consideration. In exceptional circumstances, the courts can sentence below the prescribed minimum for any offence. Judges are required to pay particular attention to 'uniformity of sentencing practice', and a model of 'normal punishments' - based partly on sentencing statistics - has been developed to structure sentencing decisions.

21. The material presented here on western European jurisdictions is drawn from a paper produced by the Sentencing Commission for Scotland (2006a).

## The functions and aims of a sentencing commission in England and Wales

We have seen that sentencing commissions can take a range of forms, and perform a range of different functions:

- they can provide guidance to sentencers
- they can gather and provide information and statistics for monitoring compliance with sentencing guidance, planning and policy development
- they can fulfil a community engagement function – informing and consulting with the public and engaging in public debate on penal issues.

It is our view that the establishment of a sentencing commission in England and Wales to carry out all three of the above broad functions would be the most effective means of addressing the current prisons crisis. In performing these functions, the commission would pursue two overarching objectives:

1. To achieve greater consistency and stability in sentencing practice, and thereby prevent any further upward drift in sentencing severity.

2. To reduce the politicisation of sentencing policy and practice.

Achieving the first of these objectives will depend, in large part, on achieving the second. Stability in sentencing practice is unlikely to be achieved unless the temperature of political and public debate about sentencing is reduced, thus relieving pressure on the courts. A sentencing commission can contribute to this process by containing the penal greed of the wider political culture. Wright has observed that: '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.' (2005, p. 1010).

Various commentators have drawn the analogy between fiscal and penal policy (e.g., Pettit, 2001; Lacey, 2008), and suggested that penal policy requires the equivalent of a Monetary Policy Committee. In other words, just as economic experts now make decisions about interest rates and the money supply independently of the political process, so too might a sentencing commission serve as an institutional buffer between the political process and penal practice.

The next three chapters of this report discuss, in turn, the three main functions that a sentencing commission in England and Wales could perform: that is, the production of sentencing guidelines; research and monitoring; and community engagement.

# 4 Providing guidance for sentencers

This chapter considers the kind of sentencing guidance which should be produced by a sentencing commission in England and Wales. First, however, we discuss the two basic dimensions of all forms of sentencing guidance, and approaches to developing guidance that have been adopted in the United States and elsewhere.

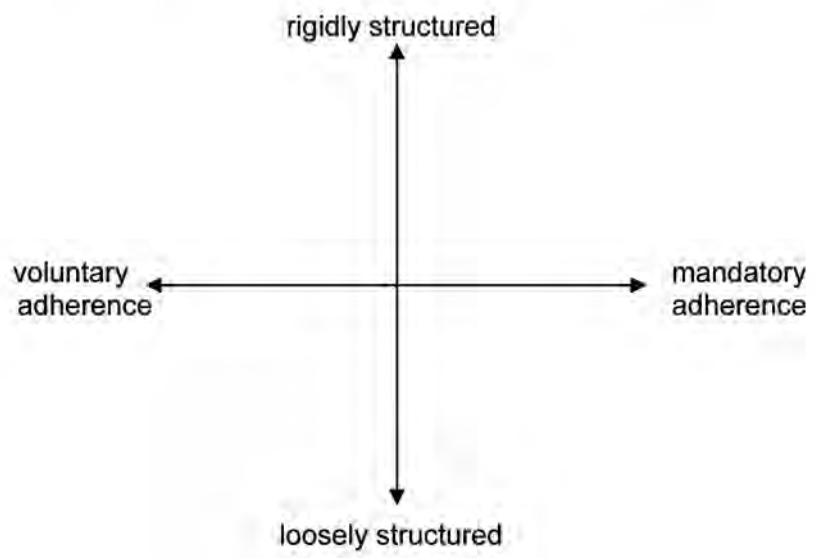
## The two dimensions of sentencing guidance

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 the degree of constraint imposed on courts, sentencers must 'have regard to' SGC guidance and must state reasons for deviating from SGC guidance when they do 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.

19. In the words of Thomas, the 'primary decision' to be made by the sentencer is over 'which of the two conflicting objectives [of sentencing] will be pursued' – namely, the objective of retribution and general deterrence, which necessitates correlating sentence severity to the seriousness of the offence, or the objective of meeting the offender's needs, in which case the sentence is shaped by the court's understanding of those needs (1970: 4).

**Figure 4.1: Dimensions of sentencing guidance**




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. 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 provide.[22]

The New Zealand approach serves as a model for what we envisage. The legislation provides that a Court must impose a sentence that is consistent with any sentencing guidelines that are relevant to the offender's case, unless the Court is satisfied that it would be contrary to the interests of justice to do so. The New Zealand guidelines are roughly based on the view that there should be adherence to the guidelines in around 80% of cases (Young, 2008b).

## Presumptively-binding sentencing grids

The advantages of a sentencing guidelines system which is both highly presumptive and structured are clear. This kind of system makes the sentencing process transparent. The guidelines enable the parties at a sentencing hearing (or indeed any member of the

22. 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.

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.[23]

However, presumptive sentencing grids also have number of serious disadvantages. First, depending on the number of levels of seriousness (or degree of structure), crimes of quite variable seriousness can be assigned a common seriousness level. This means that 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 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.

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'. Sixth, presumptive, or grid-style guidelines are typically unpopular with judges trained in the common law tradition that permits considerable judicial discretion at sentencing.[24]

Finally, a grid along the US lines formalises – 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 Consultation paper (see pp. 64-66) suggests to us that the courts are still operating broadly according to the principle of progressive loss of mitigation for good character. According to this, having

23. 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).
24. Judicial opposition to sentencing guideline grids was a major factor in the rejection of such arrangements in the Canadian context; see Report of the Canadian Sentencing Commission (1987).

'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 history.[25]

***To summarise our views on presumptive grids, they have many significant deficiencies. 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 either to criminal justice professionals (including and especially sentencers) or to the public in this country. In short, despite their ability to achieve specific policy goals rapidly, sentencing grids have more disadvantages than advantages for a jurisdiction like England and Wales.***

## Alternative approaches to guidance[26]

If formal two-dimensional presumptive sentencing grids are not the answer, what other options exist? 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 sentencing 'are almost as numerous as the jurisdictions adopting them' (Frase, 2005a, p.1191; see also Frase, 2000).[27] 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 (see Ostrom et al., 2008).

### Voluntary guidelines

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.[28]

One example of a successful advisory system can be found in Delaware. The Delaware Sentencing Accountability Commission was established in 1983. In this state all offences are classified into categories of severity rather than in 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

25. 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 the offender's record'.
26. In this report we do not review or discuss computerised 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 Sentencing Commission for Scotland which concluded that the system created in Scotland 'does not have anything other than the most marginal of impacts on the imposition of sentence' (2006b:37).
27. A good overview of state sentencing guidelines schemes can be found in Kauder, et al.(1997). See also the National Association of State Sentencing Commissions (list of associations available at www.ussc.gov/states/nascaddr.htm).
28. 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).

guidelines are as high as, or higher than, those associated with binding presumptive guidelines, with a compliance rate of 90% (Hunt and Connelly, 2008). Ostrom et al. (2008) also report fairly good levels of compliance in Virginia, another state with a voluntary system.

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.[29] This observation may carry a lesson for England and Wales, which could not be described as having a single judicial culture.[30]

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 package[31] 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.[32] Nevertheless, the scheme is worth noting as an alternative to the numerical grids used across the United States.[33]

***In summary, voluntary grid guidelines can under some circumstances achieve high levels of compliance, but insofar as they do, they encounter 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***

29. 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 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.
30. SGC data on the relative use of custody as a sanction suggest wide variations between different Crown Court centres across the country.
31. It is described by the Chair of the Missouri Sentencing Advisory Commission as a 'discretionary, information-based system' (see Wolff, 2006).
32. 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).
33. 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:
    - summaries of recent Court of Appeal judgments;
    - summaries of recent empirical sentencing patterns;
    - lists of relevant mitigating and aggravating factors

***dispositions[34] 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.***

## A guidelines system for England and Wales

If a sentencing commission is established, it should retain the SGC model of guidelines. Consider the SGC's guidelines for robbery, summarised in Chapter 3. 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 includes a commentary. The degree of guidance is significant, yet courts retain a significant degree of discretion to sentence outside the guideline range.

There are a number of advantages to using the existing SGC guidelines as the basis of the guidance promulgated by a new sentencing commission. First, the degree of specificity of the existing guidelines is appropriate, given that it is loose enough to permit considerable judicial discretion in the passing of sentence[36] (and the avoidance of unwarranted uniformity), but detailed enough to structure and inform sentencing decisions in a meaningful way. Secondly, the existing guidelines have been developed through an exhaustive process of consultation, and in the absence of any evidence to the contrary, we would assume that their content is broadly acceptable to the judiciary and the wider public. Thirdly, and from a more pragmatic standpoint, it would be difficult to justify the resources that would have to be invested in any thoroughgoing revision of the guidelines, especially given that they were all recently devised.

However, although there may be little reason to alter the basic content and degree of structure of the existing SGC guidelines, there is a case to be made for making the guidelines more presumptive. The statutory requirement for the courts to impose a sentence while 'having regard to' the Council's guidelines is in no way comparable to the 'presumptiveness' of many guideline schemes operating across the United States. It may well be that over time, case law in England and Wales establishes a legal definition of 'having regard to' the guidelines that actually imposes significant constraints on our sentencers. Nevertheless, we would contend that in the interest of increasing consistency and stability in sentencing practice, Parliament should consider imposing tighter restrictions on departure from the guidelines. Provided the loose structure of the guidelines was maintained, limiting the scope for departure would not have the effect of overly curtailing judicial discretion, or producing unwarranted uniformity.

If the SGC model of guidelines is retained, there would be clear advantages to reviewing their format and presentation, if not their content. The piecemeal manner in which the

34 .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 unnecessarily complicated to courts in this country.

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

36. This point is amply illustrated by the robbery guideline. 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).

guidelines have been produced has resulted in marked inconsistencies in their format; and these inconsistencies, together with the high level of detail of many of the guideline commentaries, may reduce their accessibility to sentencers. We anticipate that sentencers would welcome a clearer, simpler and more coherent set of guidelines, and that this in itself would contribute to higher rates of compliance.

***In our view, the best way to proceed in England and Wales is for a sentencing commission to produce guidelines similar, in terms of both content and structure, to those that have been devised to date by the SAP-SGC. The existing definitive guidelines could, in other words, provide the foundation for a comprehensive set of commission guidance – although greater consistency, clarity and simplicity in presentation would bring benefits. We also believe that Parliament should consider imposing tighter restrictions on departure from the 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 consultation 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.*
>
> (Sentencing Commission 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-stepped 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 Committee[37] raises issues of both principle and 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 it contains geographic disparity. Pragmatic decisions to adjust the sentencing tariff to fit the Treasury pocket may appear unprincipled – and may 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 light of the fact that there has

37. 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).

been unplanned and uncontrolled upward drift in sentencing over much of the last fifteen years.[38] 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. Inevitably, such a task would be complicated by the increasing use of indeterminate sentences, such as the sentence of imprisonment for public protection (IPP).

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 currently no information about the degree of judicial compliance with SGC guidelines. Because of the lack of information on sentencing practice in general, 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 guidance and sentencing practice into close alignment; periodic recalibration of the tariff could then follow. 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 binding force 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 sufficient discretion to take into account all relevant factors when passing sentence (cf Ashworth, 2008a).

***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 associated with rapidly setting up a system with sufficient predictability to enable periodic recalibration of the tariff; and any system that had such predictability would undermine the individualised approach to sentencing long favoured by the courts in England and Wales.***

38. 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.

# 5 Information for monitoring, planning and policy deployment

Most sentencing commissions are tasked with collecting, analysing or publishing statistical information. Chapter 3 identified as a significant weakness in the current system in England and Wales that there is no information about the levels of judicial compliance with SGC guidance and no way of knowing what impact any given guideline has on prison capacity. Chapter 4 discussed how limited knowledge about the system's operation rules out any form of recalibration of tariffs, in the event that this should be judged necessary. This chapter considers how research and monitoring functions might be discharged by a sentencing commission.

## Sentencing statistics

Compared with many jurisdictions, England and Wales has relatively comprehensive sentencing statistics. The annual Ministry of Justice publication Sentencing Statistics England and Wales[39] provides a great deal of information about sentencing patterns, broken down in some detail by age, sex, court of sentence and offence. However, it remains very difficult to derive from the statistics a good sense of what the 'going rate' is for any given offence type. The problem is that the sentence will vary according to many factors including, for example:

- the physical and psychological harm done to any victim
- the value of any property acquired through the offence
- the immediate circumstances of the offence
- the offender's previous relevant criminal history
- the offender's age
- the offender's role in the offence
- the court of sentence
- the offender's plea in court.

Some of this information is available to the Ministry of Justice, and some of it can be presented in tables of sentencing statistics, but it is impossible to get statistics about the 'going rate' for an offender with a particular profile where most or all of the above factors are specified.

39. www.justice.gov.uk/docs/sentencing-stats2006.pdf

There are two dimensions to the problem. First, most of the offence categories are broad and encompass a wide range of actions of varying and unmeasured severity. Secondly, the factors taken into account by sentencers in individual cases cannot be readily identified, since sentencers' remarks are not routinely transcribed and collated moreover, the variability and range of factors that can potentially be taken into account makes their quantification difficult. At present, the best guide to the going rate for any given offence is probably SGC guidance for offences sentenced in the Crown Court and the Magistrates' Courts Sentencing Guidelines; it would be highly desirable for the Ministry of Justice to produce more fine-grained sentencing statistics.

***In our view, ownership of these sentencing statistics would need to remain with the Ministry of Justice, both because the Secretary of State is accountable to Parliament for penal policy and because the practical and resource issues in administering the statistical series are considerable. However, a commission would need open – and timely – access to the statistics.***

## Compliance with the guidelines

The SGC guidelines indicate what sentence an offender ought to expect, but provide no insight as to whether that sentence is actually passed. What is needed – by the SGC, by politicians and their officials, and by others with an interest in penal issues – is some indication of the degree of judicial compliance with the guidelines. In our view, it is unacceptable to have a system of judicial guidance that has no mechanism whatsoever for monitoring its impact.

There is only one sure route to securing this information within the current sentencing framework. Sentencers need to record, for the principal offence under sentence, how their sentence maps onto the guidance. Minimally, there needs to be a record made of:

- the judge's assessment of the severity band of the offence
- what premium, if any, was added for prior criminal history
- what discount, if any, the offender received for entering a guilty plea
- whether, taking these three factors into account, the sentence fell within the relevant SGC sentencing range
- if the sentence did not fall within the sentencing range, the reasons for this 'departure' from the guideline.

This record could be made only by the sentencing judge, or by someone making a note of his or her sentencing comments. It cannot be constructed or extrapolated from administrative records.[40] This is because it includes subjective judgements which only the sentencer can disclose. It would not take long to complete. It would allow statistics to be generated of the extent of judicial compliance with guidelines. It would identify guidelines which secure high levels of compliance and those that do not. Where compliance was low, this might indicate either a need to adjust the guidance or to adjust sentencing practice. The ultimate aim should be to bring guidance and practice into alignment by a process of mutual accommodation.

40. And in any case, as discussed above, attempts in 2005/06 to secure baseline data from administrative records on sentencing practice in 2002 proved unworkable.

We recognise that designing and putting in place the necessary recording processes is far from straightforward. There are particular problems, first, in identifying the principal offence when offenders are sentenced for several offences and, secondly, in describing how the sentence is apportioned between the principal conviction, any secondary convictions and any offences taken into consideration (TICs). The 'totality principle' – that the aggregate sentence for a group of similar offences should remain within the overall range for the offence type in question – properly entails that sentences for secondary offences cannot simply be calculated in isolation and then summed. However, this creates difficulties for anyone wishing to track the degree of correspondence between guidelines and practice.

***The proposal to monitor compliance is likely to be opposed by many sentencers, either as an unwelcome bureaucratic burden, or as a needless ploy to constrain their discretion. It would need to be piloted, to minimise its unacceptability. Decisions then need to be made as to whether compliance is best measured by ad hoc research surveys, or through routinised data collection processes. If the latter, it is a technical decision whether such a data collection exercise should eventually be integrated into that for collating sentencing statistics. However, responsibility for gathering, analysing and publishing these should fall to the commission rather than the Ministry of Justice.***

## Assessing the impact of new penal policies

Most US commissions have some responsibility for assessing the impact of changes in sentencing policy and of the introduction of new sentences. This can play an important part in the development of penal policy and is a function that should be shouldered by a commission. Historically, central government has been very poor at assessing the costs of changes to the penal process. For example, the under-costing of 'Custody Plus' meant that money was spent in preparation and training before the sentence was shelved in 2005. The Home Office projections for prison places required by sentences of imprisonment for public protection (IPPs) were woeful underestimates, and no proper financial provision was made for programmes for IPP prisoners. Projections of the take-up of suspended sentence orders fell far short of reality. The reason is simple: government spending departments have an interest in getting their ministers' proposals through the Treasury, and systematically under-cost proposals. Over-costed government projects are almost unheard of.

For sentencing policy the solution is to place this function of 'impact assessment' with a sentencing commission. The task involves a mix of informed judgement and statistical modelling. For example, assessing the impact of IPPs required modelling, to assess the size of the pool of eligible offenders, and judgement, to assess judges' take-up rates.

***It would make more sense to place these tasks with an independent body that understood sentencing than with a government department with a vested interest in a low costing. To take this on, a commission would require staff with both statistical expertise and penological knowledge.***

## Projecting the overall demand for prison places

Much of the discussion about sentencing guidelines has focused on the need to contain the rising prison population. The Working Group placed particular importance on the need to make accurate middle-term projections of the need for prison places, enabling government to keep supply and demand in balance. Aligning supply and demand for correctional resources other than prison places has also been seen as an important goal. We believe that a sentencing commission should, through its research and monitoring exercises, contribute to the task of undertaking prison population projections. However, we doubt that a commission should take on central responsibility for this, as it requires competence that runs far beyond sentencing expertise.

Projections of the prison population require assumptions to be made about:

- crime trends
- clear-up rates
- prosecution and conviction rates
- remand trends
- sentencing trends
- parole and license recall rates (and length of time prisoners are held on recall)
- breach rates
- arrangements for home detention curfew and early release
- transfers of foreign national prisoners.

The existing prison projections prepared by Ministry of Justice statisticians incorporate assumptions about most of these trends, and draw on several models in so doing.[41] Pre-court factors including crime trends and conviction rates probably contribute only marginally to the projections, and the major predictor variables appear at present to be related to sentencing. This reflects the fact that court workloads have been very largely static over the last fifteen years – despite steep increases in crime in the early 1990s, and steep falls since the mid 1990s. Our prediction is that pre-trial factors will probably become much more salient in these projections over the next ten or twenty years – largely because we appear to be entering a phase of global economic and social instability which is likely to trigger rises in crime. Whatever the case, it does not make sense to place responsibility for such projections with a sentencing commission when many factors other than sentencing practice drive the demand for prison places.

The fact that sentencing has been amongst the more significant drivers over the last 15 years does not mean that it will continue to be so. Indeed, the safest prediction is that as sentencing guidance becomes more institutionalised within the judiciary, sentencing trends will become more stable – and all the more so if a sentencing commission is created with an explicit remit of producing comprehensive guidance and reducing disparities in sentencing practice. If so, sentencing variables will reduce in importance in the prison projections.

41. See, for example, http://www.justice.gov.uk/docs/stats-prison-pop-aug07.pdf

***A sentencing commission should play its part in work on prison projections, and in particular should provide advice on the assumptions to be made about sentencing trends. However, other predictor variables are likely to become more salient in future projections. It does not make sense to require a sentencing commission to take overall responsibility for prison projections, even if changes in sentencing practice have proved to be amongst the most salient contributors to the growth of the prison population over the last 15 years.***

## Wider research

Since the establishment of the SAP and SGC, there has been no attempt to canvass sentencers with respect to the utility and impact of the guidance published to date. It would make sense for a commission to conduct original research and periodically survey the opinions of the judiciary. The commission should also have the capacity to co-ordinate or commission research into other aspects of the sentencing process. In this respect, it would take over some of the research functions of the Ministry of Justice with respect to sentencing. The commission might also have the capacity to consider broader reforms to the sentencing process such as a systematic review of the maximum penalty structure.

42. The statutory maxima in most common law jurisdictions are out of date, lack a close correspondence to the offences for which they may be imposed and for these reasons there have been repeated calls in many countries for a comprehensive revision.

# 6 Community engagement

Chapter 3 discussed how politicians have locked themselves into a counterproductive competition of offering ever-tougher criminal policies to the electorate. Part of the dynamic behind this process is that a large majority of the population has very jaundiced views about sentencers and sentencing. Most people think that sentencers are too soft, that judges and magistrates are out of touch, that the courts are unlikely to use prison for serious crimes such as burglary, robbery, rape and causing death by dangerous driving. These beliefs are all contestable, and the public's estimates about the use of custody are simply wrong. Moreover, a large body of research on attitudes to sentencing has established that the public frequently favour more lenient sentencing options when they are provided with information about specific cases, the costs of custody, and alternatives to custody.[43] Hence media representations of a public demanding ever harsher punishment are overly simplistic.

The obvious thing to do is to try to correct public misperceptions about sentencing. However, politicians are reluctant to do so, and this is probably for two reasons. First, it is politically risky to tell the electorate that they have 'got it wrong', and it is especially risky to do so when the opposition will seize upon this as an example of complacency and lack of political will to tackle crime. Secondly, politicians probably judge – accurately – that they and their civil servants command insufficient credibility with the public to be able to persuade them about the realities of current sentencing practice. After all, they would be competing with the mass media, many sections of which, as we have seen, are committed to attacks on the judiciary.

The spiral of penal populism has proved an intractable problem. However, we think that a sentencing commission provided with sufficient powers and resources might form part of the solution. The question to ask is whether it would be possible for government to construct an independent sentencing institution that could engage with the public more constructively than politicians and government – or indeed than the senior judiciary. A body that could evolve into the principal source of trusted information about sentencing could be of great value in helping to create a more constructive climate of public debate on penal issues. We think that in examining the possible functions of a sentencing commission, the Ministry of Justice should have given its Working Group terms of reference that were sufficiently broad to allow them to consider this community engagement role.

This proposal carries obvious risks. As we discussed in Chapter 3, the US Sentencing Commission was originally set up with the intention that it should insulate sentencing from politics. In the event, the body was subject to political influence, and served to make penal politics in that jurisdiction even more 'prison-centric'. It is also possible that an outward facing commission could be dismissed as an 'arms length' spin-doctoring institution. To have credibility and authority, a commission would have to recognise and

43. For research illustrations of this phenomenon the reader is directed to Hough and Roberts (1998) and Roberts and Hough (2005).

address problems when these are real. However the recent history of penal politics in Britain is in large part a sorry tale of ignorance, misinformation and prejudice, and the need for some sort of effective counterbalancing body strikes us as clear.

Clearly there would need to be a proper demarcation between issues that fall to the commission, and those that should fall to the legislature. Judgements about the overall framework of punishment within the criminal law are essentially political ones that should fall neither to the judiciary nor to those involved in the administration of justice. Such judgements include decisions about the appropriate severity of the system, as distinct from those about the appropriate punishment for specific cases. Such political decisions need to be made democratically by the government of the day which should in turn be accountable to Parliament. A commission should never aim to be a substitute for these political processes. But there remains an important role for a trusted institution that can explain to the public, to the media and to other interested parties how and why the system as it is at any given time actually operates.

## Community engagement functions

Perhaps the most important community engagement function would be to inform and educate the public about sentencing. The SAP and SGC have avoided any public information function. Their 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.[44] Assigning a public opinion 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, a commission has a significant role to play.

There are many possible approaches to this task, and the detail needs fleshing out by communications experts rather than criminologists. There needs to be a process of audience segmentation, to identify key audiences, which would then require tailored and targeted intervention. Key audiences include:

- teenagers
- young adults
- parents
- the elderly
- victims of crime and victims' groups
- police and other CJS staff who work with the public
- offenders.

The challenge is to find approaches that enable significant proportions of the population to be reached without inordinate costs. New communications media, and in particular new uses of the internet, may prove critically important here. In terms of direct contact, one possibility would be to facilitate a number of public meetings (see Box 6.1).

44. This is particularly true of the Victoria Sentencing Council. 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).

The community engagement role could also encompass work with the media, to the extent that this is feasible. This might entail not only the regular provision of user-friendly statistics and other research findings to appropriate media outlets, but also the development of both formal and informal media networks, and the hosting of public events, including debates and electronically-based forums, in conjunction with media organisations. The inclusion of a media representative, such as a newspaper editor, in the commission's membership, might also be a means of forging productive links with the media. Clearly, the effectiveness of any work with the media would depend in large part on the commission being viewed as an authoritative source of information about sentencing.

**Box 6.1: Community engagement through public meetings**

The idea here is that the sentencing commission would co-ordinate a series of public 'town halls' on the subject of sentencing. These would consist of public meetings where judges and magistrates would make presentations to and interact with members of the public. The meetings could follow a 'Question Time' model. This kind of judicial 'outreach' is far more common in other jurisdictions such as the United States.[45] The efficacy of such initiatives is unclear as they have not been evaluated formally. It is clear however, that one of the problems confronting the sentencing process in England and Wales is the widespread public perception that sentencers (both judges and magistrates) are out of touch with the community. One existing initiative that aims to correct this perception – and from which lessons could be drawn for any sentencing commission work of this kind – is the Local Crime: Community Sentence project.[46] This project is jointly delivered by magistrates and probation officers, and primarily involves presentations to community groups about sentencing and the use of community sentences.

Meaningful community engagement is a two-way process that would require a commission to listen to members of the public as well as to inform and educate. 'Listening' requires complex skills in the context of penal policy, because it is important to differentiate between opinions grounded in misinformation, and those that reflect considered judgment (see the discussion in Green, 2006). We think that there is a need for three forms of consultation:

- traditional formal consultation
- outreach consultation
- consultation through research.

45. For a description of some of these programs, see Hough and Roberts (2004).
46. See http://www.magistrates-association.org.uk/mic_public/lccs.htm

Public consultation on the specific guidelines produced by the commission would be an important element of this work, and could take any or all of the above forms. Both the SAP and SGC are currently required to consult on the advice and guidelines they produce; any consultation undertaken by the commission could deploy those methods that have been effectively used by the SAP and SGC and could draw, as appropriate, on their findings to date. The creation of a single sentencing guidelines body would, however, considerably simplify the consultation process. Nevertheless, public consultation on sentencing guidelines is likely to remain a challenging task; traditionally there has been a low level of response from the general public to consultation papers issued by the SAP, and it can be assumed that a sentencing commission would face similar difficulties in accessing the views of the public. One (albeit somewhat costly) solution to this problem is to commission research – ideally incorporating both quantitative and qualitative dimensions - into the public's views on proposed sentencing guidelines.[47]

47. For an example of a study of this kind commissioned by the SAP, see Hough et al. (2008) and Roberts et al. (2008) on public attitudes to the sentencing of offences involving death by driving.

# 7 What should a sentencing commission look like?

A sceptic may regard the creation of a third statutory sentencing 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 significant body of work that has been conducted to date. The new body would replace the SGC and SAP, 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 main 'products' of the new sentencing commission would be guidelines closely related to those produced by the SGC. Various organisational issues would have to be addressed in the creation of a sentencing commission, many of which could have profound implications for the new body's credibility and authority in the eyes of the public, its acceptability to the judiciary, and its capacity to serve as a buffer between the political process and penal practice. It is beyond the scope of this paper to discuss the organisational issues in detail, but some of the key considerations with respect to the commission's status and composition are outlined below.

## Legislative overview of sentencing guidelines

One of the thorniest problems confronting a guidelines system is determining the level of legislative oversight.[48] It would be unreasonable to expect Parliament to accord a sentencing commission the liberty 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 sentencing commission 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, in the absence of 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.

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

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 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.

## Composition of the sentencing commission

After reviewing arrangements in a number of other jurisdictions, we have concluded that the commission should comprise three elements: (i) the members, some of whom would be part-time and others full-time; the latter would include the chair; (ii) a secretariat composed of full-time administrative and researcher staff, along with a research director who could also serve as a commission member; and (iii) a small external advisory group.

### Commission leadership and membership

The membership of any sentencing commission is critical 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 sitting judge, and the commission should include members of the judiciary as well as experienced magistrates. However, the majority of members of the commission should come from other criminal justice professions, or indeed from outside the criminal justice system. There is considerable variation both in terms of size and the nature of membership in other jurisdictions; no single model has been followed. In our view, the commission should adopt a 'big tent' approach to membership, and 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 members include:

- members of the judiciary (including a senior judge as chair)
- members of the Magistrates' Association
- representative of the Defence Bar
- director of Public Prosecutions
- two senior academics, one serving as the commission's research director
- representative of victims' advocacy group
- parliamentarians representing the principal political parties (in order to protect the commission from political pressure)
- media representative, for example a national newspaper editor.

### Relationship with Court of Appeal Criminal Division

A specific question to be taken into account in the determination of the commission's membership is that of the relationship between it and the CACD. Under the current SAP-SGC arrangements, the Court of Appeal has continued to issue guideline judgments when a rapid response is required to a particular sentencing issue (for example, following the implementation of new sentencing provisions). The judicial leadership of the SGC has ensured that this organisation and the CACD have been able to work in tandem.

If a sentencing commission is established, the need for CACD guidance would be reduced, since the new body should have the capacity to develop guidelines more quickly and flexibly than the unwieldy SAP-SGC structure can allow. An advantage of this would be that sentencers would, in time, have a simpler and more unified set of guidance on which to draw (the avoidance of duplication of effort by the CACD and the sentencing guidelines body would be another benefit). Nevertheless, a constructive working relationship between the CACD and sentencing commission would be desirable, and would be rendered more likely by judicial membership – and leadership – of the commission.

### Contribution to judicial training

To date, the SGC and SAP have had limited input into judicial education, although representatives of both bodies have contributed to Judicial Studies Board events and continuation courses (Wasik, 2008), and the SAP-SGC secretariat is involved in the current training of magistrates on their new sentencing guidelines. Sentencing commissions in other jurisdictions tend to be actively engaged in judicial training, and in our view this is an appropriate role for a sentencing commission in England and Wales. More specifically, the commission could contribute to both the design and delivery of training on the sentencing guidelines, which should be built into the national judicial education curriculum.

### Commission resources

The sentencing commission would assume some of the research and policy review functions of the Ministry of Justice, along with a community engagement role. This should be reflected in its mandate and resource allocation. In 2006/07 the total budget of the SAP-SGC was approximately £1million. The sentencing commission that we envisage would require a significantly larger budget in order to achieve its objectives.

# 8 Conclusions

It is clear that a number of commentators, and possibly a significant number of sentencers, would prefer to see the current SAP-SGC structure maintained. Some may be actively opposed to the creation of a replacement body, particularly one with expanded powers and responsibilities. It is essential, therefore, that sentencers be consulted closely regarding the creation of the sentencing commission, to ensure the maximum degree of support from the outset. For example, it is important to ensure that the judiciary and the legal community do not see the creation of a sentencing commission as an additional encroachment on judicial discretion in sentencing; and that they appreciate that a commission can reduce the political pressures on sentencers, and contribute to the development of reasoned and informed sentencing policy.

We see the government proposals for a commission as an opportunity that may not present itself again for some time to come. It is clear to most knowledgeable commentators – including politicians themselves – that something has gone wrong with our sentencing policy over the last fifteen years. The problem is complex, but at its heart it is a political problem, in that politicians have trapped themselves in a counterproductive competition to demonstrate to the electorate – or to the media – how much tougher they are on crime than the competition. Establishing a sentencing commission could prove a first step in helping politicians find a way out of this trap.

We conclude with the following summary points:

1. There is a clear need to revamp the statutory agencies responsible for providing guidance to sentencers in England and Wales. The bicameral SAP-SGC structure is complex and unwieldy; placed in an international context, it is anomalous, as many jurisdictions have created or recommended the creation of a single sentencing commission.

2. We recommend the creation of a well-resourced, unitary sentencing commission for England and Wales to replace the SAP-SGC structure. This should have a wider remit than the existing bodies: in addition to providing sentencing guidance, it should have a research and monitoring function, and should undertake community engagement. A sentencing commission would thereby promote stability and consistency in sentencing practice, and reduce the politicisation of sentencing policy and practice.

3. The existing definitive guidelines produced by the SGC should provide the foundation for those issued by the sentencing commission, although the sentencing commission guidance should be simpler, clearer and more consistent in its format and presentation. Parliament should consider

introducing tighter restrictions on departure from the guidance than is currently imposed by the statutory direction to sentencers to 'have regard to' the SGC guidelines.

4. The research and monitoring role of the commission would encompass a number of specific tasks, including monitoring compliance with the guidelines and their impact on sentencing practice; contributing to government forecasts of prison population trends; assessing the impact of proposed reforms to sentencing policy; and conducting original research into views of sentencers and public attitudes to sentencing.

5. Community engagement should be a central function of the commission. It should participate in a range of activities aimed at informing and educating the public about sentencing; and it should consult the public as widely as possible to ensure an appropriate degree of congruence between public opinion and sentencing policy and practice.

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# Appendix A:

## The Minnesota Sentencing Grid

Presumptive Sentence Lengths in Months

Italicised 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 |
| *Murder, 2nd Degree (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] |
| *Murder, 3rd Degree* *Murder, 2nd Degree (unintentional murder)* | X | 150 *128-180* | 165 *141-198* | 180 *153-216* | 195 *166-234* | 210 *179-252* | 225 *192-270* | 240 *204-288* |
| *Assault, 1st Degree* *Controlled Substance Crime, 1st Degree* | IX | 86 *74-103* | 98 *84-117* | 110 *94-132* | 122 *104-146* | 134 *114-160* | 146 *125-175* | 158 *135-189* |
| *Aggravated Robbery, 1st Degree* *Controlled Substance Crime, 2nd Degree* | VIII | 48 *41-57* | 58 *50-69* | 68 *58-81* | 78 *67-93* | 88 *75-105* | 98 *84-117* | 108 *92-129* |
| *Felony DWI* | VII | 36 | 42 | 48 | 54 *46-64* | 60 *51-72* | 66 *57-79* | 72 *62-86* |
| *Assault, 2nd Degree* *Felon in Possession of a Firearm* | VI | 21 | 27 | 33 | 39 *34-46* | 45 *39-54* | 51 *44-61* | 57 *49-68* |
| *Residential Burglary* *Simple Robbery* | V | 18 | 23 | 28 | 33 *29-39* | 38 *33-45* | 43 *37-51* | 48 *41-57* |
| *Nonresidential Burglary* | IV | 12[1] | 15 | 18 | 21 | 24 *21-28* | 27 *23-32* | 30 *26-36* |
| *Theft Crimes (Over $2,500)* | III | 12[1] | 13 | 15 | 17 | 19 *17-22* | 21 *18-25* | 23 *20-27* |
| *Theft Crimes ($2,500 or less)* *Check Forgery ($200-$2,500)* | II | 12[1] | 12[1] | 13 | 15 | 17 | 19 | 21 *18-25* |
| *Sale of Simulated Controlled Substance* | I | 12[1] | 12[1] | 12[1] | 13 | 15 | 17 | 19 *17-22* |

Effective August 1, 2006

# Appendix B:

## 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 (available at www.lawcom.govt.nz)*

The Carter review of the use of imprisonment, published in December 2007, proposed that a permanent sentencing commission be set up in England and Wales. The creation of a commission was seen as a way of improving the transparency, predictability and consistency of sentencing, and thus bringing the demand for imprisonment and the supply of prison places into closer alignment. This report presents the findings of an independent review of the policy options relating to a sentencing commission.

The main conclusion of this review is that a commission with a broad range of functions should be established in England and Wales in order to address the problems of prison over-use, sentencing disparity and the politicisation of sentencing practice and policy. The authors do not advocate the use of US-style sentencing grids, which would excessively constrain judicial discretion.

The report calls for a sentencing commission that would offer sentencers clearer and simpler guidance that would structure – rather than fetter – their discretion. It would serve as a source of expertise to assist with prison projections and sentencing reform. The commission would also provide sentencers with relief from some of the political and media pressures associated with sentencing. It could, potentially, help politicians to withdraw from the - highly unproductive - competition to offer the electorate ever tougher responses to crime. And, to the public, the commission would offer extensive and accurate information about sentencing, as well as the promise of more consistent sentencing practice.

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