

# **SENTENCING COMMISSION WORKING GROUP**

SENTENCING GUIDELINES IN ENGLAND  
AND WALES: AN EVOLUTIONARY APPROACH

July 2008

## Foreword by the Chair of the Working Group

### **The Rt Hon Lord Justice Gage**

In December 2007 the Lord Chancellor and Lord Chief Justice asked me to chair a Working Group to examine the advantages, disadvantages and feasibility of a structured sentencing framework and permanent sentencing commission. We were asked to examine detailed proposals through consultation for a possible Sentencing Commission for England and Wales including:

- the membership of a Sentencing Commission;
- the possible formulation of a set of indicative ranges for a structured sentencing framework for the Crown Court, and subsequently Magistrates' Courts, including the role of Government and Parliament in assigning the prison population and other penal resource limits;
- the effect of a set of indicative ranges on current judicial decision making;
- the mechanism for presenting the set of indicative changes to Parliament for legislative endorsement;
- an appropriate process for dealing with departures from the ranges;
- the remit and process for a Sentencing Commission's on-going functions to monitor and report on the impacts on the prison population and penal resources of all national policy proposals and system changes;
- the process for making revisions to the set of indicative ranges;
- the necessary preliminary data from current sentencing practice.

We were asked to report to the Lord Chancellor and Lord Chief Justice by summer 2008.

We have spent a challenging six months pursuing our research and as I present our findings I express my thanks to my colleagues on the Working Group: Brian Barker, Guy Beringer, Paul Cavadino, George Howarth, Ken Jones, Peter Lewis, Rachel Lipscomb, David Meredith, Christopher Murray, Martin Narey, David Omand, Christopher Pitchford, Nicholas Purnell, Julian Roberts, Christine Stewart, and, until 19 March, Martin Thomas. I am also grateful to our adviser Professor Kevin Reitz of the University of Minnesota Law School. I want to thank the Secretariat, both policy advisers and analysts, whose contribution has been invaluable. Above all, thanks must go to all those who gave of their time to talk and write to us, and everyone who responded to our consultation.

The Working Group believes that this report reflects a practical way forward based on an evolutionary approach, building on past success, and we commend its conclusions to the Lord Chancellor and Lord Chief Justice.



LORD JUSTICE GAGE

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**CHAPTER 1****Introduction**

- 1.1 For many years the prison population has been rising. However, in recent years it has risen more rapidly. Between June 1995 and June 2007 the increase was 60% or more than 30,000 places. By November 2007 the prison population stood at a record level of 81,500. We address the causes and significance of this rise in Chapter 2. In June 2007 Lord Carter of Coles was asked by the Prime Minister, the Chancellor of the Exchequer and the Lord Chancellor and Secretary of State for Justice, to consider options for improving the balance between the supply of prison places and the demand for them. Lord Carter was asked to make recommendations on how this balance could be achieved. In his Report entitled “Securing the Future” dated December 2007, Lord Carter proposed both a major new building programme to increase prison capacity to a net 96,000 places by 2014 and recommended that longer term measures be found to try to avoid continuous and expensive prison building, prison overcrowding and new measures to release offenders from prison early.
- 1.2 In his Report, Lord Carter identified as a possible approach the use of a US style structured sentencing framework and Sentencing Commission. Lord Carter recommended that a Working Group be set up to examine the advantages, disadvantages and feasibility of a structured sentencing framework and permanent Sentencing Commission and to lead and inform debate on these issues. In accordance with this recommendation the Working Group was established in January 2008 by the Lord Chancellor and the Lord Chief Justice. Lord Justice Gage was appointed Chair of the Working Group with terms of reference and membership as set out in Annex A to this report. What follows is the report of the Working Group setting out its findings and its recommendations which we submit to the Lord Chancellor and the Lord Chief Justice.
- 1.3 We point out at the outset that the question of whether or not the overall sentencing framework should be tied to financial resources is a political issue. How Parliament’s intentions on criminal justice policy should be kept consistent with the capacity of the prison and probation services to deal with sentenced offenders is pre-eminently a political matter. Our task has been solely to advise on the advantages, disadvantages and feasibility of mechanisms for achieving this purpose if Parliament decides it should be accomplished.
- 1.4 The phrase “sentencing framework” can be used in two ways. The first sense refers to the provisions relating to sentences in statute e.g. in the sentencing provisions of the Criminal Justice Act 2003. The second sense refers to a guidelines framework, either a US style grid system or narrative guidance to sentencers, such as issued by the Sentencing Guidelines Council (SGC). This report discusses the second sense. Our terms of reference do not embrace a review of sentencing policy, whether in order to identify a means of reducing or controlling the prison population, or to analyse cost-benefit effectiveness in sentencing. Such a review may be desirable but our consideration of current sentencing policy in England and Wales has been limited to its relevance to our terms of reference. We note that in June 2001 the Halliday report, ‘Making Punishments Work’ travelled that ground. We have therefore placed suggestions on other aspects of sentencing provided by respondents to our consultation for the Government to consider at Annex D.

- 1.5 In carrying out our task and arriving at our conclusions we have endeavoured to explore sentencing frameworks that exist in other jurisdictions, and to stimulate debate in our jurisdiction on the merits or otherwise of a sentencing framework and a Sentencing Commission or Council. To this end the Chair and members of the Secretariat visited Minnesota and North Carolina to examine the sentencing frameworks and Commissions which exist in those two states in the USA. We have also endeavoured to research sentencing frameworks in other jurisdictions as well as receiving help and information from those familiar with the Sentencing Council about to be set up in New Zealand. In our jurisdiction we have visited ten of the larger Crown Court centres with a view to explaining the issues involved. We have held two half-day conferences to explain the issues: one for experienced criminal circuit judges and one for other interested parties. We have conducted a survey of sentencing for four groups of offences at ten Crown Court centres carried out over a period of four weeks. We refer to this survey later in this Report. The Chair has spoken at meetings of the Council of the Magistrates' Association and of the Criminal Justice Alliance. We have held meetings with members and staff of the SGC and Sentencing Advisory Panel (SAP), with Professor Andrew Ashworth (Chair of the SAP) in his personal capacity, and with Justice Young and Warren Young, respectively Chair and architect of the New Zealand Sentencing Council.
- 1.6 Our Consultation Paper has received a large number of responses from groups and individuals interested in the criminal justice system. We are publishing a summary of these responses with this Report. The meetings which we have described and the responses to the Consultation Paper have helped to inform us and assisted us in reaching the conclusions expressed in this Report.
- 1.7 Many respondents have expressed the view that the subject of our enquiries and deliberations is too important and too complex to be given proper consideration in the time available to us. To this we reply we believe the conclusions we have reached have not been adversely affected by the short time in which we have been required to carry out our work.

**CHAPTER 2**

# The Causes of the Increased Prison Population

- 2.1 Lord Carter in Chapter 1 of his Report sets out his view of some of the causes of the increased prison population. We in turn in our Consultation Paper briefly set out our view of some, but not all, of the causes of the increase in the prison population. Lord Carter took a period of ten years between 1996/1997 to 2006/7 as demonstrating that increase. Unless otherwise stated, the statistics we now quote also take a ten year span. Where possible we also quote the latest available statistics.
- 2.2 We start by repeating and expanding the factors set out in paragraph 2.1 of our Consultation Paper. They are:
- (1) demographics;
  - (2) crime patterns;
  - (3) police activity (including Offenders Brought to Justice);
  - (4) court processes (such as the “Criminal Justice: Simple, Speedy Summary” initiative);
  - (5) re-offending including breaches of supervision, licence recall, suspended sentences and community orders;
  - (6) a more stringent approach to parole;
  - (7) the number of foreign national prisoners including those detained post release date pending deportation;
  - (8) legislative changes;
  - (9) sentencing practice.
- 2.3 We comment on some of these factors. Evidence suggests that some types of crime have become more prevalent. We understand that the Crown Prosecution Service has noticed increased seriousness in the mix of offences which come to them. There is also evidence that there has been an increase in violent offences<sup>1</sup> and a substantial increase in the number of violent offences being committed by young females.<sup>2</sup>
- 2.4 The use of suspended sentences has increased since the introduction of new suspended sentence orders in the Criminal Justice Act 2003. Breaches of suspended sentence orders, community orders, licence conditions and supervision orders have increased substantially. We received some evidence from the National Association of Probation Officers that the reduction of probation officers’ discretion to breach an offender has increased the number of offenders, subject to supervision, being breached. The number of people in prison for breaches of all court orders has increased from approximately 260 in June 1997 to 1,300 in April 2008.
- 2.5 There are increasing numbers of foreign national prisoners detained and as a result some of these prisoners continue to be held in prison post their release dates under immigration powers pending deportation. There were approximately 11,370 foreign national prisoners in March 2008, an increase of 270 from 11,100 in June 2007. The number of non-criminal prisoners including those pending deportation has increased by 18% from the same time last year to stand at approximately 1,670 on 13th June 2008.<sup>3</sup>

1 Total number of offenders sentenced for violence against the person has risen from 30,093 in 1996 to 41,905 in 2006. Note these figures include all violence against the person offences from the most serious murder, grievous bodily harm with intent down to the less serious common assault.

2 For offences of violence against the person involving young females the rate of offences resulting in disposals for 2006-07 is 150% higher than in 2003-04. Source YJB annual workload data 2006-07.

3 Provisional prison population data.

- 2.6 Legislative changes have had an effect on the length of sentences. In our Consultation Paper at Annex K we set out some of the major legislative changes since 1993. With the addition of the Criminal Justice and Immigration Act 2008 the same list appears at Annex B to this report. It is very difficult to work out with precision the effect of legislation on the prison population. Those members of the Working Group who have experience of sentencing are confident that certain legislative provisions have had a considerable effect on the prison population by increasing the length of sentence for some offences. For example, Schedule 21 of the Criminal Justice Act 2003 has increased the appropriate starting points in relation to mandatory terms of life imprisonment. These starting points have not only increased the minimum terms for mandatory life sentences but have, they believe, also had some knock-on effect on the length of determinate sentences passed for violent offences.<sup>4</sup> The Sexual Offences Act 2003 and the increase of the maximum penalty for death by dangerous driving from 10 to 14 years have also had an effect on sentence lengths.<sup>5</sup>
- 2.7 The Parole Board is more risk averse than hitherto. This has resulted in a decrease in the rate of release of offenders on parole. The rate of release on parole decreased from 21.6% in 2004/05 to 14% in 2007/08 for lifer releases and 52% in 2004/05 to 36% in 2007/08 for discretionary conditional releases.<sup>6</sup>
- 2.8 This is of some significance since the introduction of sentences of imprisonment for public protection (IPPs) in the Criminal Justice Act 2003. IPPs have substantially increased the number of offenders serving indeterminate sentences. The growth of IPPs is as follows: since such sentences became available in April 2005 the number of prisoners sentenced to IPPs has grown from 700 in 2005/06 to 1,650 in 2007/08.<sup>7</sup> On 1 January 2008 there were 3,850 prisoners serving IPP sentences of which 535 were being held post their tariff expiry date. The IPP provisions have been amended by the Criminal Justice & Immigration Act 2008 to limit the application of IPP to more serious offenders. The number of prisoners received in custody in 2007-08 for mandatory and other life sentences are, 360 and 160, respectively.
- 2.9 Custody rates in the Magistrates' Courts and the Crown Court and sentence lengths in the Crown Court have increased over the last ten years. This may be partly the result of political and media rhetoric. Whilst it may appear that sentence lengths in recent years have stabilised, when IPPs are factored in sentence lengths have continued to increase. The average custodial sentence length for adults sentenced for indictable offences in the Crown Court, when IPPs are factored in, reached an all time high of 27.1 months in 2007 rising from 26.2 months in 2005 when IPPs were introduced.<sup>8</sup> When breaches of suspended sentences are factored in custody rates have increased in recent years. The effective custody rate (immediate custody and breach of suspended custody) for adults sentenced at the Crown Court for 2005 (when suspended sentence orders were introduced) was 59% rising to 61% in 2007. The equivalent Magistrates' Courts effective custody rate has risen from 4% in 2005 rising to 5% in 2007.<sup>9</sup>

4 See for example *Ford* [2006] 1 CAR (S) 204.

5 See *A-G Ref no 104 of 2004 (Garvey)* [2005] 1 CAR (S) 666 and *Richardson* [2007] 2 CAR (S) 211.

6 Provisional parole release data for 2007/08.

7 Prison receptions data.

8 The average determinate custodial sentence length is calculated for all determinate custodial sentences excluding all indeterminate sentences such as life sentences and indeterminate sentences for public protection (IPPs). The significantly growing number of IPPs following the introduction of the sentence in 2005 therefore has affected this calculation. Offenders receiving an IPP who prior to 2005 would have received a long custodial sentence are no longer included in the average determinate custodial sentence lengths published post 2005 (e.g., the average determinate custodial sentence length without taking account of the IPP effect was 25.9 months in 2005 as opposed to 24.4 months in 2007). Therefore, in order to provide a like with like comparison when examining average sentence lengths the average tariff for IPPs have been included this calculation using provisional 2007 sentencing data and provisional IPP tariff data (average IPP tariff of 30 months in 2005 and 41 months in 2007).

9 The effective custody rate has been calculated with the assessed steady state breach rate for suspended sentence orders of 30%-35% (the rate used for these calculations is 35%).

- 2.10 The increased length of sentences has a “lagging” effect. This means that prisoners serving longer terms than before increase the numbers in prison at any given time.
- 2.11 We make the following points arising out of these facts. First, any framework, whether structured in a grid form as in other jurisdictions or through guidelines provided by the SGC, cannot have any effect on those factors which are outside the scope of the guidelines.
- 2.12 Secondly, it is possible that predicting the future effect on the prison population of sentencing alone may be made easier by guidelines. The more restricted and presumptive the guidelines, the better the projections. If the sentence range for a particular offence is very narrow and the departure test is very stringent, it will be possible to predict the impact of sentencing on the prison population with greater accuracy.
- 2.13 However, the factors outside the scope of the guidelines, referred to above, will make projections uncertain. We conclude that in England and Wales it will never be possible to produce anything other than a broad projection of the future prison population and so far as sentences alone are concerned, the uncertainties in the projections will be directly related to the degree of discretion in the guidelines. However, as discussed later in this report, we think there are changes which could be made and which may make projecting the prison population less difficult and sentencing both more transparent and consistent.

**CHAPTER 3**

## Our Approach

- 3.1 There is universal agreement that as a matter of principle and practice individual sentencers should not be required to have regard to resources at the time they sentence in individual cases. In saying this we recognise that the Court of Appeal Criminal Division (CACD) has said that sentencers when considering the length and use of custody should properly bear in mind that the prison regime is likely to be more punitive as a result of prison overcrowding.<sup>10</sup>
- 3.2 We recognise the importance of maintaining judicial independence and discretion as exercised in the interests of justice. This is fundamental to the administration of justice in England and Wales.
- 3.3 We believe that the increase in the prison population is undesirable for a number of reasons. Although prison protects the public from the possibility of further offending during the sentence, overcrowded prisons are less effective at rehabilitation, and other disposals such as community orders may be more cost effective. We provide more detail on this in Annex D. We are conscious it takes time to build a prison and to train prison and probation staff. Within the resources voted by Parliament, therefore, correctional capacity is not a variable which can be assumed to be adjustable rapidly or continuously in relation to changing sentencing practice or other factors affecting demand for correctional capacity. It is also the case that both custodial and non-custodial disposals must be considered together because of the relationship between them.
- 3.4 Save for home detention curfew (HDC) and other early release schemes, we have discerned no single mechanism within our system of justice that would even out peaks and troughs in supply and demand for correctional capacity. Further the use of early release schemes has the potential to bring the criminal justice system into disrepute. It follows that the answer to such problems must be to maintain a sufficient margin of capacity in the system. We recognise to do this effectively requires a greater degree of predictability than exists at present.
- 3.5 In order to explain our approach we have organised our thinking around four concepts. They are transparency, predictability, consistency and compatibility. We have considered each proposal in the light of these concepts subject to an overarching commitment to achieve justice in an individual case.
- 3.6 Transparency: that is, the ability of Parliament, the public and sentencers to have an understanding, through the existence of clear and comprehensive sentencing guidelines for offences or classes of offence, of how offenders may expect to be sentenced under existing legislation, together with an appreciation of the aggravating and mitigating factors that may be taken into account through judicial discretion.
- 3.7 Predictability: that is, the ability of those administering the criminal justice system to foresee with an acceptable degree of accuracy the total impact on the prison population and community sentences of current sentencing practice, new sentencing guidelines and legislative changes as well as the other factors in the system.
- 3.8 Consistency: that is, the assurance that Parliament's intentions through criminal justice legislation will be delivered through the consistent application of sentencing guidelines across England and Wales whilst providing for appropriate judicial discretion.

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<sup>10</sup> *R v Seed & Stark* [2007] EWCA Crim 254 (CACD).

- 3.9 Compatibility: that is, compatibility between the supply and demand for correctional capacity, in other words the confidence that there is long term compatibility between Parliament’s intentions, expressed through its criminal justice legislation and the availability of sufficient correctional capacity.
- 3.10 There are important relationships between these concepts and the principles we have set out. For example, predictability and consistency could in theory be improved by having mandatory rather than presumptive guidelines. Greater transparency might be obtained by insisting on a rigid formula for taking previous convictions into account. Consistency could in theory be improved by a US-style sentencing framework determined by capacity. Views may differ outside the Working Group as to whether such ideas should be explored further. But the Working Group is agreed that such major changes, even if Parliament were to consider them desirable, cannot be introduced into our criminal justice system without compromising our overarching commitment to justice.
- 3.11 In reaching our conclusions on feasibility, advantages and disadvantages of the various factors which we have considered, we have taken these four principles as our guide subject to our overarching commitment to justice. We have also been impressed by those respondents, judicial and academic, who have counselled an evolutionary approach. This accords with our own views. We reject any attempt to construct a grid-like framework for which a lengthy exercise would be needed to gather data and to complete a major codification exercise before such a scheme could start. We recognise the best approach is to build organically on existing expertise within the SGC<sup>11</sup> and enhancing its role rather than attempting to set up a separate Sentencing Commission. The path which the Working Group favours is one along which the criminal justice system in England and Wales has already taken the first steps through the work of the SGC. We describe a number of important improvements which might be made. The incremental approach towards the objectives of transparency and consistency seems to us to have the advantage of utilising and building on experience. We consider that further detailed research into the impact of existing guidelines by data collection and interpretation is required, building on the Crown Court survey we have undertaken.

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11 Hereafter we refer to the proposed enhanced body as the “SGC”.

**CHAPTER 4****Sentencing in England and Wales and Other Jurisdictions****Sentencing in England & Wales**

- 4.1 Before any change to sentencing practice in the criminal justice system is undertaken it seems to us essential to understand our present system. In March 2005 the then Vice President of the CACD, Lord Justice Rose said<sup>12</sup>:

*“Sentencing is a complex and difficult exercise. It can never be a rigid, mechanistic or scientific process. Consistency of approach by sentencers is essential to maintain public confidence. But perfect consistency in outcome is impossible to achieve because of the infinite variety of circumstances with which, even in relation to one kind of offence, the courts are presented.*

*In choosing a fair and just sentence in a particular case, judges and magistrates, within the parameters established by Parliament, must have regard to the gravity of the offence, its impact on the victim, the circumstances of the offender and the wider public interest. In relation to all these matters they must exercise judgement and discretion.”*

- 4.2 We regard this statement as an authoritative and accurate description of and rationale for current sentencing practice in England and Wales. The emphasis is on passing a sentence which is tailored to the individual facts of the case taking account of the culpability of the offender, the effect on the victim and the individual circumstances of the offender.
- 4.3 As we pointed out in our Consultation Paper, historically the relationship between the judiciary and Parliament in respect of sentencing was that Parliament set the parameters, namely the maximum and, in some cases, the minimum sentences and the judiciary decided on the individual sentence in each case. Within those parameters the discretion of the judiciary in sentencing was unfettered. It was Parliament’s responsibility to provide the necessary resources to give effect to the sentences passed by the judiciary.
- 4.4 A number of judicial consultees have expressed the view that this is a constitutional principle that should be upheld. It is suggested that sentencing guideline frameworks are unconstitutional and an unjustified interference with judicial discretion. In our view this purist principle has been changed by the setting up of first the SAP and subsequently the SGC. These bodies have injected into the sentencing process, hitherto thought to be the preserve solely of the judiciary, sentencing guidelines which have been constructed with lay input and subjected to wide consultation. However, we agree with the suggestion in some responses that for guidelines to be placed before Parliament for approval would be a fundamental departure from the accepted relationship between the judiciary and the legislature. We return to a consideration of this issue in Chapter 8.
- 4.5 The SAP was created by the Crime and Disorder Act 1998. Originally it was created to give advice to the CACD in the promulgation of sentencing guidelines. It is a body with a diverse membership whose power when set up included obtaining and considering views of “other persons and bodies” and “formulating its own views” before communicating those views to the CACD (and now the SGC).

<sup>12</sup> In his Foreword to the Case Compendium of Guideline Judgments.

- 4.6 The Criminal Justice Act 2003 established the SGC. Its duties involve framing guidelines in respect of which it must have regard to:
- (1) the need to promote consistency in sentencing;
  - (2) sentences imposed by courts in England and Wales for offences to which the guidelines relate;
  - (3) the cost of different sentences and their relative effectiveness in preventing re-offending;
  - (4) the need to promote public confidence in the criminal justice system;
  - (5) the views communicated to it by the SAP.
- 4.7 The Chair of the SGC is the Lord Chief Justice and its members consist of judicial and non judicial members. The non-judicial members are eligible for appointment by virtue of their experience in specified areas of criminal justice.
- 4.8 Since its creation the SGC has issued guidelines for a number of offences by groups as well as providing generic sentencing principles, over-arching principles for groups of offences and a definitive guideline for the discount for guilty pleas. By their nature guidelines are designed to structure judicial discretion, promote consistency of approach and thereby reduce sentencing disparity. The responses to the consultation have acknowledged the achievements of the SGC and SAP towards these goals.
- 4.9 In addition, the SGC has produced a case compendium that collects together the various CACD guideline judgments. This body of work provides detailed and comprehensive guidance on a large volume of offences as well as over-arching principles. However, the guidelines provided by these judgments are steadily being replaced by definitive guidelines issued by the SGC. The SAP in its response to our consultation makes it clear that in the next year the SGC expect to have issued definitive guidelines for all the high volume, high custody offences.
- 4.10 Before a definitive guideline is issued, the SGC will have received the advice of the SAP, which will in turn have collected the views of various bodies following a consultation process and thorough research. The SGC also consults Parliament and Ministers (together with other specified statutory consultees) but the final guideline is the responsibility of the SGC.
- 4.11 In developing levels of seriousness for each offence the SAP and the SGC seek to assess offence seriousness relative to groups of offences. Many of the offences are divided into different levels of seriousness within the offence itself, thus recognising that there may be a wide range of seriousness in respect of the offence. It is clear that in setting the levels of seriousness within each offence the SAP and the SGC have regard to levels of seriousness in other guidelines. Furthermore, it is recognised in the drafting of guidelines that aggravating features may or may not be common to different groups of offences. Cross-checks are made for consistency between the guidelines as each new guideline is prepared.
- 4.12 The SGC has not constructed a comprehensive ranking of seriousness of offences such as appears in the frameworks adopted in certain states in the USA. We discuss the reasons for this later in this Report.<sup>13</sup> The SGC has also not attempted to provide guidance on the weighting to be attributed to previous criminal convictions that forms an important feature of the frameworks in the USA. Again, we discuss this matter later in our Report.

- 4.13 The SGC has attempted to obtain data enabling it to monitor the effect of its guidelines. The SAP in its response to our consultation points to the abandonment of an important research project due to the unavailability of reliable data necessary for the research project to be completed.<sup>14</sup> Data currently available is not sufficient to allow the SGC to predict the effect of a draft guideline on the prison population or other correctional resources. In our view, the absence of a system for more precise measurement of resource requirements is an obvious inhibitor to effective planning for management of the sentenced population.
- 4.14 In England and Wales judges and magistrates are under a statutory duty to have regard to sentencing guidelines when sentencing an offender<sup>15</sup> and when passing a sentence of a different kind or outside the range in the guideline to give reasons<sup>16</sup> for doing so. At present no information is collected in respect of the number of departures from guidelines nor the reasons for the departure. In our view this represents another defect in the present system.
- 4.15 The right of an offender to appeal and the right of the Attorney-General and Solicitor-General to apply for leave to refer sentences to the CACD which they regard as unduly lenient helps in maintaining consistency in sentencing.
- 4.16 Finally, we draw attention to the role and the work of the Judicial Studies Board (JSB) in the field of sentencing. When inaugurated in the 1970s the emphasis in judicial training was upon consistency of outcome by bare comparison of one sentence (or judicial view of the correct sentence) with another. In recent years training in this area has concentrated on consistency of approach and transparency, through public explanation in sentencing remarks, of the process of sentencing. Case studies now require the application of guidelines, whether from the SGC or from the CACD and, by their application, accurate identification of aggravating and mitigating features of the offence, together with the relevant circumstances of the offender. The JSB believes that the application of these training objectives should and does lead to greater consistency in outcome. We agree. It preserves, through consistency of approach and transparency of process, the identification of the just sentence.
- 4.17 Since 1991, Magistrates' Courts have used a comprehensive set of guidelines to promote a consistent structured approach to sentencing. This has now culminated in a definitive guideline from the SGC to be implemented in August 2008, covering the majority of offences by volume dealt with in Magistrates Courts in England and Wales.
- 4.18 Training has already begun for district judges, some 30,000 magistrates and 3,000 legal advisers. We recommend strongly that no further changes be made to this guideline until proper monitoring of its effect has taken place or until such time as there is clear evidence of lack of compliance by sentencers.

## **Minnesota and North Carolina**

- 4.19 In his Report, Lord Carter specifically referred to structured sentencing in Minnesota and North Carolina. As Professor Wasik has pointed out<sup>17</sup>, Minnesota is generally regarded as the best example of such frameworks. For these reasons the Working Group studied these two structured sentencing frameworks more closely than any others. In our Consultation Paper we stated our conclusion that the specific design of these frameworks was overly formulaic and mechanistic. A number of respondents appear to have overlooked this conclusion. We now give in more detail our reasons for reaching this view.

<sup>14</sup> "A Study of Sentences and their Outcomes" Cambridge University.

<sup>15</sup> s.172 of Criminal Justice Act 2003.

<sup>16</sup> s.174(2) of Criminal Justice Act 2003.

<sup>17</sup> Professor Martin Wasik 'Sentencing Guidelines in England and Wales – State of the Art'. CLR 2008, Issue 4.

- 4.20 It cannot be emphasized too strongly that the sentencing frameworks adopted in Minnesota and North Carolina were intended to improve a quite different sentencing environment from that currently experienced in England and Wales. In those states sentences served bore little relationship to sentences passed. It was felt that indefinite sentences left the real decision as to when a prisoner should be released to the Parole Board with the consequent lack of certainty as to the actual length of the sentence at the date it was passed by the judge. There were also considerable inconsistencies in sentencing in different parts of the two states. The sentencing frameworks were primarily designed to eradicate these two problems. In addition, it was felt that sentencing frameworks would make predictions of the future prison population more accurate, therefore providing a greater opportunity to manage correctional resources. Copies of the frameworks or guides for these two states can be found annexed to the Consultation Paper.
- 4.21 US style sentencing grids work by using two axes. The offence for which the offender is to be sentenced will fall into one of the vertical categories of seriousness (11 such categories in Minnesota and 10 in North Carolina). The range of sentence for the offence will be defined by the number and type of previous convictions represented by the horizontal axis at the top of the grid. The box where the seriousness of the offence and the number of points for criminal conviction intercept will decide the range of sentence. The ranges within each box are comparatively narrow. A judge may depart from this range only if there is some substantial and compelling reason for doing so. The commentary to the Minnesota Guidelines, published by the Minnesota Sentencing Commission makes clear that “the purposes of the sentencing guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity”.<sup>18</sup>
- 4.22 We set out a summary of the advantages and disadvantages of these two frameworks in the Consultation Paper. We draw particular attention to the culture of plea-bargaining in both states. The majority of criminal proceedings in the USA are disposed of by plea-bargaining. In Minnesota and in North Carolina the rate is 95% and over. This enables a prosecutor to have a very considerable influence on the sentence and for both the prosecution and the defence to agree the severity level by negotiation.
- 4.23 Together with a large number of respondents and some commentators<sup>19</sup>, we regard these two sentencing frameworks as far too restrictive of judicial discretion to be acceptable. The vertical scale of seriousness, as constructed in these frameworks, forces offences which vary widely in seriousness across a very large range of criminality into narrow bands. The horizontal axis puts too much weight on previous convictions in the sentencing process and has a disproportionate effect in comparison with other factors such as aggravating and mitigating factors. In addition there are restrictions on the use of some mitigating factors and a necessity for a jury to determine all aggravating factors.
- 4.24 In short, in our opinion, these frameworks cannot sensibly be transported to our jurisdiction.
- 4.25 We must also mention the role of the Sentencing Commission in each state. The Sentencing Commission is responsible for promulgating the guidelines. In performing this function it carries out much the same role as the SGC by providing guidance to sentencers but its guidelines are also designed to assist in the management and control of correctional resources. It monitors the effect of the guidelines and must provide predictions for their effect on correctional resources. It also has a duty to inform the legislature of the effect on the prison population of any proposed new legislation. In each case the guidelines promulgated by the Commission are placed before the legislature for approval. In Minnesota the guidelines have statutory force unless vetoed. In North Carolina they have no force until approved by the legislature.

18 “Certainty in sentencing cannot be obtained if departure rates are high. Prison populations will exceed capacity if departures increase imprisonment rates significantly above past practice.” Source: Minnesota Sentencing Guidelines and Commentary p.30 para 11.D.03 Revised edition August 2007.

19 See for example Professor Martin Wasik’s article cited in footnote 17 above.

4.26 Whilst Minnesota has experienced a considerable increase in its prison population, unlike other states that increase has not resulted in prison overcrowding because, with more accurate prediction, it has been able to plan and manage the criminal justice system better. For the years 2000 to 2006, one-year-ahead prison population forecasts have on average been 2% off realised population.<sup>20</sup> This error rate is relatively small compared to the observed growth of the prison population which has averaged 6.6% per annum over the same period. The Commission stated that the main areas of uncertainty in their prison population forecasts are related to changes in crime rates and charging practices in the state, and not variations in sentencing. Indeed the Commission argued that using a structured sentencing approach can reduce the uncertainties surrounding sentencing variation that would otherwise diminish the accuracy of their prison population projections.

### **New Zealand**

4.27 We have paid particular attention to the Sentencing Council in New Zealand. It is described in detail in an article by Warren Young and Claire Browning entitled “New Zealand’s Sentencing Council” (CLR issue 4, 2008). We summarise the main features of the framework and the Sentencing Council which were established by the Sentencing Council Act 2007. The Sentencing Council comprises five judicial and five non-judicial members supported by a secretariat. It is chaired by a judge who has a casting vote. The Working Group has had the opportunity of meeting the first Chair, Justice Young, and Warren Young.

4.28 In setting up the Sentencing Council, those responsible for designing it have drawn much from the example and experience of the SGC. Guidelines are being drawn for the majority of offences before the Council formally starts work. Guidelines were framed with bands of offence seriousness and the majority cater for offenders with previous criminal histories. They are presumptive guidelines; that is to say they must be followed unless the court is satisfied that it would not be in the interests of justice to do so. We are told that their aim is to achieve an adherence to the guidelines in 80% of cases. The opinion of the Council is that departures at a rate greater than 20% would demonstrate that the guideline ranges were too narrow to capture an adequate range of circumstances, while departures at a rate significantly lower than 20% would demonstrate that sentence ranges were too broad to be effective.

4.29 One of the key objectives in setting up the New Zealand Sentencing Council was to enable considerations of cost effectiveness to be taken into account in determining sentence severity levels. This aspect is factored into the New Zealand guidelines by:

- (1) requiring the Council when developing draft guidelines to assess and take account of the costs and overall benefits of the guidelines;
- (2) when a draft guideline or group of guidelines is published for the purpose of public consultation the Council is required to provide a statement of their likely effect on the prison population;
- (3) there is a requirement for a similar statement to accompany final guidelines which are presented to Parliament.

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20 This 2% figure is based on the monthly absolute percentage error rate for each annual forecast for the first 12 months of the forecast period. It does not represent the accuracy of the forecasts beyond the one year point.

- 4.30 As is apparent from the above under the New Zealand legislation, Parliament is given the role of agreeing a sentencing framework. The structure of Parliament's role is as follows:
- (1) Parliament may only consider guidelines that are presented to it by the Sentencing Council.
  - (2) Parliament is not required to approve guidelines presented to it. Guidelines will automatically come into force unless they are disallowed by negative resolution within a specified period.
  - (3) Parliament may only disallow the guidelines in whole but not in part.
- 4.31 We should emphasize that the work of the Sentencing Council is at an early stage and its effects are not yet known. In addition, it possesses a substantial understanding of past practice represented by being able, because of the comparatively small size of its jurisdiction, to analyse all relevant sentencing transcripts during the past four years. This is a considerable advantage over our jurisdiction.
- 4.32 Many respondents suggest that we should research sentencing guidelines in Europe and other parts of the world. While we have done so, our principal focus has been on common law jurisdictions which more closely share our experience and thus provide a more suitable comparison.

**CHAPTER 5****Data Collection**

- 5.1 At the start of its work the Working Group was struck by the lack of information and difficulty of obtaining information on a reliable basis about sentencing practice. Although the Ministry of Justice collects a large volume of statistics it is not possible to obtain data about departures from the guidelines and the constituent factors which make up the judge's sentence. This lack of data makes it impossible for either the Ministry of Justice or the SGC to predict the effect of existing guidelines and current sentencing practice for offences, not as yet the subject of definitive guidelines. As we note in Chapter 4 we regard this as a substantial deficiency. A recurring theme of many of the responses to the Consultation Paper was the need for relevant data to be collected.
- 5.2 By reason of this lack of data and in accordance with our Terms of Reference we instituted a four-week survey at 10 Crown Court centres seeking information about sentencing practice which we considered necessary in order better to understand sentencing practice. We return to this survey below.
- 5.3 We have no doubt that there is an overwhelming need for the collection of a range of details of current sentencing practice. We equally have no doubt that the SGC should be put in a position to obtain the necessary details of sentencing practice so as the better to aid them to prepare guidelines and explain to the legislature and the public at large the impact on correctional resources, of their guidelines.
- 5.4 As our own survey demonstrated, the collection of meaningful data is not an easy task. Our survey required the judge to fill in a form which contained 10 pages of questions. The form was supplied electronically and in hard copy. It required the judge to answer a range of questions. The time taken to complete the form was estimated at the outset to be ten to fifteen minutes. By the end of the period most judges, using existing IT, completed this form within approximately ten minutes although some took longer. As was to be expected, some judges were more adept at using the electronic version of the form than their colleagues. Others completed the survey form in hard copy. The latter required the Secretariat to transpose the information onto the data base. The process of sentencing defendants was made more time-consuming by the need to fill in the questionnaire with the result that some judges said they were unable to deal with as many cases in any one day as before. Ideally the form needed to be completed immediately after the sentence had been passed. If our form was universally used in England and Wales we believe it would be necessary to consider the additional burden on judges and any consequent effect on the operation of the courts.
- 5.5 Consideration must be given to ameliorating this burden in particular by providing appropriate staff support to provide the necessary assistance to the judge. We recognise that this may be an expensive exercise. It is, however, one that is routinely carried out in courts in the USA by judges with the assistance of court officials. The nature and detail of subsequent schemes to collect data, in our view, warrants further research and should be left to the SGC in conjunction with the Government and the judiciary to explore. We would hope that experience would lead to a simpler and easier system of collecting data than that used in our pilot survey.
- 5.6 Having explained the difficulties involved in collecting data, we need to express how important it is. From advice given to us by our statisticians, from discussions with the SGC and from the opinions expressed by a large number of respondents, we are satisfied that the collection of relevant data is a key factor in understanding sentencing practice and in the process of prediction. We believe that this process should be started without delay. Without relevant data much of our recommendations made in later chapters will either be very difficult to carry out or will be of little value.

5.7 We have concluded that the frameworks which exist in the USA are too formulaic and restrictive of judicial discretion to be transferred to England and Wales (See Chapter 4). By contrast, our guidelines structure the judge’s approach to sentencing leaving an area of discretion in respect of the individual sentence. The flexibility in our guidelines is provided, not so much by the width of the ranges, but by advice upon the application of aggravating and mitigating factors. Aggravating factors, including relevant previous convictions, are capable of elevating a sentence out of the range for that level of seriousness to the next level of seriousness.<sup>21</sup> In this way a sentence may be imposed outside the guideline range for the initial level of seriousness identified by the sentencer yet remain compliant with the guidelines. It follows that consideration of whether the sentence imposed is justified in the light of the guidance provided by the SGC is not determined by whether the sentence falls within the seriousness range for the basic offence, but by whether the sentencer has correctly identified the aggravating and mitigating features of the offence. However, for statistical purposes it is important to understand the distribution of sentences within and outside of the range specified in the SGC guideline for each level of offence seriousness.

5.8 Accordingly, in order to understand judicial sentencing practice the analyst must obtain details, not just of the sentence level adopted by the judge, but also the reasons for selecting that level, namely whether the level of the basic offence was elevated or reduced to reflect relevant aggravating and mitigating factors. It will be of crucial importance to capture those instances where “guidelines indicate that a sentence of a particular kind or within a particular range would normally be appropriate for the offence and the sentence is of a different kind or is outside that range”<sup>22</sup>. This information, together with detailed data in respect of the distribution of sentences within sentence levels, will help the analyst to assess the trends. In order to predict accurately future demand for correctional resources the pre-requisites are:

- (1) an understanding of the historical trends in the factors in the criminal justice system (identified above in Chapter 2);
- (2) a clear picture of current sentencing practice;
- (3) a comprehensive set of sentencing guidelines covering the main criminal offences and;
- (4) compliance with guidelines.

At Annex E we set out some suggested methods for improving predictability of the demand for correctional resources. It will be for the SGC in consultation with the Government and the judiciary to consider and develop these proposals.

5.9 However, we must point out that even with their prescriptive frameworks neither Minnesota nor North Carolina’s predictions are free from error. The evidence available to the Working Group is that the one-year-ahead error rate for predictions was 2% in Minnesota and 0.6% in North Carolina over the periods 2000 to 2006 for Minnesota and 2002 to 2006 for North Carolina.

21 See e.g. SGC Guideline on Assault and other offences against the person, page 10, paragraph 4, “The particular circumstances may, however, make it appropriate that the provisional sentence falls outside the range” and, paragraph 5, “Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the provisional sentence beyond the range given particularly where there are significant other aggravating factors present.”

22 Section 174(2)(a) Criminal Justice Act 2003.

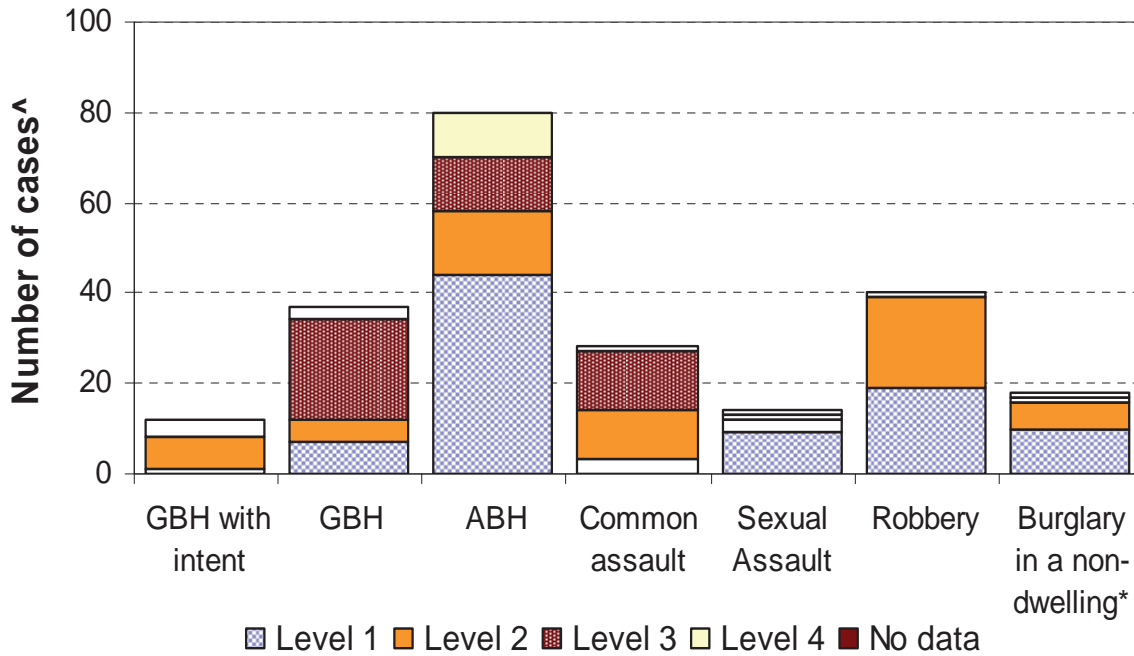
- 5.10 The ability to make accurate predictions of the prison population depends upon a combination of the strictness of the departure standard and the thoroughness of data collection. Thus, a prescriptive framework such as those adopted in Minnesota and North Carolina is likely to provide a more accurate prediction than the guidelines system in England and Wales. In order to improve predictability in England and Wales it is essential that studies are made to identify the data upon which accurate predictions will rely. It is only by knowing why offenders are in prison for specific offences with specific aggravating and mitigating features that analysts will be able to advise how the prison population would change by the introduction of new sentencing provisions intended to affect a limited number of them.

### **The Crown Court Sentencing Survey**

- 5.11 The Working Group commissioned a one month data collection exercise in ten Crown Courts centres in England and Wales from 30 April 2008 to 30 May 2008 with the co-operation of the judiciary and the SGC. The exercise was conducted to understand how Crown Court judges use and apply sentencing guidance from the SGC and the CACD.
- 5.12 In summary, the survey presents a snap-shot of sentencing practice. While it was not intended to be nationally representative, the exercise has provided a better understanding of how judges and recorders in the ten survey courts applied various factors when sentencing offenders for the four offence groups covered. It demonstrated that this type of data collection exercise is possible and can be seen as a pilot for how such information might be collected more widely.
- 5.13 The Addendum to this report presents in more detail the findings of the survey with reference to how one might implement a national survey of a similar type. Conclusions on sentencing on a national scale cannot be drawn from these results due to the size and limited nature of the sample. However, analysis of the data collected has provided new insights into:
- (1) the use and application of aggravating and mitigating factors and personal mitigation;
  - (2) how sentencers use previous convictions to aggravate sentences;
  - (3) the way sentencers use suspended sentence orders;
  - (4) what factors are most commonly associated with sentences imposed that are outside the guideline ranges for the levels of offence seriousness described in the guideline;
  - (5) differences in how sentencers interpret circumstances under which they impose sentences that are outside the guideline ranges for the levels of offence seriousness described in the guideline.

### **Applying Lessons Learnt from the Survey**

- 5.14 The Working Group believes that it is essential to develop a picture of current sentencing practice in order to establish a clear set of data for assessing the impact of guidelines, and to act as a reference point for framing or revising guidelines. To establish this, the Working Group recommends that the SGC conducts a sentencing survey on a national basis to understand the factors that influence sentencing practice. The information that would be required is similar to that collected in the Crown Court Sentencing Survey, with appropriate adaptations for the Magistrates' Court. Figure A below provides a simple illustration of the general utility of data collection of this nature. This figure reveals the allocation of cases to specific guidelines levels of seriousness. All that current knowledge can tell us is the type of sentence and average sentence length passed for any type of offence, e.g. robbery. But this information generates little or no predicative power without knowing the reasons for decisions and the relative frequency with which courts assign cases to different levels of seriousness within the SGC guideline. It should be noted that this figure represents a small number of courts at a specific moment in time. If these data were available on an annual or periodic basis we believe predictability would be enhanced.

**Figure A:** Seriousness level by offence type

^ This analysis is based on 229 survey returns for the listed offences.

\* Burglary in a dwelling offences are not included because no SGC guideline exists for this offence.

5.15 Following this national survey the SGC would be able to assess what was required of ongoing data collection. In order to aid transparency, the Working Group therefore recommends that this regular data collection should as a minimum include critical information required for monitoring sentencing practice, the application of guidelines, the overall distribution of sentences and predictability.

**CHAPTER 6**

## Enhancing the SGC

- 6.1 In Chapter 3 of this Report we state that the Working Group has concluded that it is better to build on the expertise that exists within the SGC rather than attempt to set up a commission. Our proposals provide for an enhanced SGC building on and not wasting the existing expertise within the SAP and SGC. We note that a considerable body of respondents, particularly judicial respondents, are vehemently opposed to setting up a US style Sentencing Commission.
- 6.2 We are unanimous in our view that the SGC should be provided with the ability to collect the data referred to in Chapter 5. This will require a team dedicated to the task, the appropriate owner of which is the SGC. This would help it to assess the effect of its guidelines on correctional resources, that is to reach an informed conclusion on the impact in terms of prison places and non-custodial orders which a guideline might be expected to produce. Once it has completed the exercise of providing guidelines for all the major offences the SGC will be able to provide a prediction of the effect in terms of capacity required in respect of sentencing. As time passes the SGC's analysts will doubtless become more adept at making such predictions.
- 6.3 Similarly, before a new guideline is promulgated it should be possible for the SGC to provide a prediction of its effect in terms of correctional resources.
- 6.4 We see this capability as a very considerable advance on the current position. In our opinion, which is supported by the vast majority of respondents, judicial, academic and others, it would greatly enhance the ability of the SGC to formulate new guidelines and, if necessary, revise existing guidelines. It would also be an important tool for Government in planning and managing the correctional resources.
- 6.5 We recommend that the SGC is provided with the necessary capacity, to which we refer below, to carry out this process and provide this information. We recommend that it be placed under a duty to estimate the effect of its guidelines in terms of prison population and other correctional resources; and that these estimates are kept under review and furnished either in its Annual Report or, at least, at regular intervals.
- 6.6 The Working Group is satisfied that there is another considerable advantage to be gained by providing the SGC with this capability. Although we have rejected the idea of establishing a Sentencing Commission, such as exists in some states in the USA, we see much to be gained from the requirement which places on the Commission in those states a duty to assess the impact in terms of correctional resources of proposed new legislation. Accordingly we recommend that the Secretary of State, when introducing a Bill into Parliament that is likely to have an effect on the demand for correctional resources, or when proposing a significant policy initiative, should invite the SGC to carry out an assessment of the impact of the proposals on correctional resources and should publish that assessment. In our view, if adopted in England and Wales, this would have the beneficial effect of enabling Parliament and the wider public to know the impact of proposed sentencing legislation and other major policy initiatives. Amongst respondents there is a considerable body of support for this proposal which we believe would assuage concern about the proliferation of legislation by promoting informed debate on legislative proposals.

- 6.7 Judged by the principles of transparency, predictability, consistency and compatibility set out in Chapter 3, these two proposals would provide greater transparency to the formulation of the guidelines and would considerably enhance the ability to predict the effect of them. We believe they would also enhance compatibility in that Government would be better informed for planning purposes on the effect of the guidelines and of future legislation.
- 6.8 We recommend that the duties explained above are enacted as statutory duties. We regard each as complementary to the other and of equal importance.
- 6.9 Associated with the above proposals, we have discussed whether in complying with a duty to provide predictions of the effect of the guidelines the SGC ought also to provide an overview that identifies and includes the other factors which influence the prison population and draw the Government's attention to any significant developments. These factors include:
- (1) Recalls and breaches of orders
  - (2) Re-offending patterns
  - (3) Parole release rate
  - (4) Home Detention Curfew and other early release mechanisms
  - (5) Remand
  - (6) Number of offenders brought to justice and sentenced
  - (7) Changes in case mix before the courts
  - (8) Changes in police policy and activity
  - (9) Changes in prosecution policy
  - (10) Changes in court process
  - (11) Changes in crime patterns
  - (12) Demographic change
  - (13) Foreign national prisoners detained post release pending deportation
- 6.10 We wish to emphasize that these are factors which should not influence the framing or revising of guidelines nor should the SGC have any responsibility for policy in relation to these factors. What we have considered is whether the SGC, in undertaking its functions should identify and have regard to the statistics relating to these other factors and be able to alert the Government to the likely effect of these factors on trends in the prison population.
- 6.11 The Working Group is of the opinion that there would be an advantage in a single body - the SGC - being able to assess the likely impact of all these factors in order to provide authoritative advice on the need for future prison places and other correctional resources. Although the information on the other factors included in the composite prediction would have to be supplied to the SGC by the Government, it is thought that in the interests of transparency and compatibility it would be advantageous for the SGC, as an independent body, to advise on the impact of these factors.
- 6.12 The Working Group is clear that if our recommendations are adopted, the SGC and SAP will in future need to have a different shape. We are all agreed on the following proposals. First, we are agreed that it is undesirable for the SAP and SGC to remain as two distinct bodies. We recognise the value of the input to the guidelines of both bodies as they are at present constituted. From our discussions with the SAP, the SGC and information and opinions given to us by Professor Andrew Ashworth (the current Chair of the SAP but acting in his personal capacity) we conclude that it is cumbersome and unnecessary for the two bodies to remain separate. In particular, it seems to us unnecessary for each body to carry out separate consultations in the process of producing guidelines. Whilst recognising that at present the two consultation processes involve different groups of consultees, we think it would be an advantage and would speed up the process of producing guidelines if one body carried out all functions.

- 6.13 For these reasons we favour the combining of the SGC of the SAP into one statutory body.
- 6.14 We have no doubt that the significant contribution of criminal justice professionals and lay members to the SAP is extremely important and will be key features of the enhanced SGC.
- 6.15 In our opinion, the enhanced SGC will require a substantial increase in staff and expertise which will include skilled analysts and researchers. Its workload will be increased and we recognise that the cost of the enhanced SGC will almost certainly be greater than the combined present cost of the SAP and SGC.
- 6.16 In our view, it will not be possible for the Chair of the SGC to be the Lord Chief Justice. We envisage that the work-load will be such, at least initially, that the Chair should be either full-time or at least require his or her attention for two to three days a week. This requirement effectively rules out the Lord Chief Justice from being Chair. The Working Group has considered how the Chair is appointed and whether the Chair should always be a senior member of the judiciary. The Working Group recommends that the Chair should be appointed by agreement between the Lord Chief Justice and Lord Chancellor. The Working Group is agreed that the first Chair must be a member of the senior judiciary to ensure the confidence of the judiciary and because its first task will be to complete a comprehensive set of guidelines.
- 6.17 If our approach is followed then the Lord Chancellor and the Lord Chief Justice will need to consider membership of the enhanced SGC. In the time available to us we do not think it possible to make further recommendations. Specifically, the involvement of the Lord Chief Justice in the revised body will need to be considered when the details of the membership of the new body are being determined.

**CHAPTER 7****Improvements to sentencing guidelines**

- 7.1 In the Consultation Paper we sought views on the following specific issues relating to the guidelines. They were:
- (1) the development of an offence severity scale;
  - (2) the approach to previous convictions;
  - (3) the test for departure from the guidelines.
- 7.2 Although we have not specifically consulted on them, the following additional issues have been raised since we published the Consultation Paper. They are the treatment of aggravating and mitigating factors and totality principle. In this chapter we deal with each of these issues. Since we have rejected the prospect of establishing a structured sentencing framework of the sort employed in some states in the USA we can deal with all but (3) above reasonably briefly.

**The development of an offence severity scale**

- 7.3 We are satisfied that to endeavour to place all current offences into a comprehensive severity scale in our jurisdiction would be at best extremely difficult and at worst end up in a scale which would be so prescriptive as to reduce the judge's discretion to an unacceptable extent. Unlike those states in the USA which we have observed and researched we do not have a codified criminal law. Many of our offences cover a wide breadth of seriousness. One of the best examples of this is the offence of involuntary manslaughter. This can cover at one end of the scale a single punch killing and towards the other end a killing following a violent, unprovoked and sustained attack by more than one offender.<sup>23</sup>
- 7.4 In the responses to the Consultation Paper respondents cite a number of other examples which require the offence to be broken up into several different levels of seriousness.
- 7.5 We have been informed by the SGC that within a year it will have completed definitive guidelines for all the high volume, high custody offences. In the course of producing them each guideline will be cross-referenced with existing guidelines to ensure that severity levels bear an appropriate relationship with existing guidelines.
- 7.6 We note that when preparing its guidelines the New Zealand Sentencing Council did not provide a hierarchy of seriousness. They have taken the view that relativities can best be established by bands of seriousness for each broad offence type. We regard this approach as sensible.
- 7.7 In our view the SGC should produce definitive guidelines for all major offences as soon as possible. Once they have been completed this work the SGC will be able to assess all its guidelines relative to each other. It may be able to produce a document which in simple terms sets out the broad bands of sentence levels for all offences for which there are definitive guidelines. We recognise the difficulties of attempting to produce such a document but nevertheless urge the SGC to endeavour to do so. In any event, it seems to us that consultation on such a document when completed would give the guidelines added authority.

<sup>23</sup> *Gratton* [2001] 2 CAR (S) 36: a single punch to victim after he saw him kissing his girlfriend, caused victim and chair on which he was sitting to tilt back, struck his head on a rock. Sentence, 9 months. *Sargeant & Blenheim* [2006] EWCA Crim 1746 killing by three young offenders of victim during the course of a happy slapping incident of violent, unprovoked and sustained attacks on the victim and others in the late evening. Sentence, 12 years for each offender.

**Previous convictions, aggravating and mitigating factors and totality**

- 7.8 In the Consultation Paper we made it quite clear that we regarded the mechanistic approach to previous criminal convictions in the grids in Minnesota and North Carolina as inimical to our criminal justice system. We did, however, ask consultees if they thought further guidance was required on the treatment of previous convictions in the sentencing process. A suggested model was set out in Annex I of the Consultation Paper.
- 7.9 A significant body of respondents have suggested that further guidance would be helpful. None thought the model in Annex I was appropriate, although some thought it might usefully be explored further. Many experienced judges expressed the view that there was no need for further guidance on this issue as it is well understood by them that the relevance of previous convictions depends upon the facts of the offence for which the offender is to be sentenced, the facts underlying the previous convictions, the date when they were committed relative to the offence for which the offender is being sentenced and the possibility of previous convictions displaying a pattern of offending. Some respondents said that they would value further guidance. We recognise the value of this argument. We understand that the SAP is actively considering providing some further guidance with a view to enhancing consistency. In the circumstances, we recommend that the SGC considers this issue and gives such further narrative guidance as it thinks appropriate.
- 7.10 We add the Working Group is clear that such further guidance should not attempt to quantify the weight given to previous convictions in the sentencing process. To do this would, in our opinion, elevate previous convictions to a status in the sentencing process which is disproportionate to the other factors which may aggravate the offence. It would also introduce the element in the structured sentencing frameworks in the USA which we find objectionable and would, we believe, be likely to increase sentence lengths.
- 7.11 Finally on this issue, whilst further guidance may assist transparency and consistency in the sentencing process, a number of members of the Working Group are sceptical as to whether it will assist predictability.
- 7.12 Although not strictly within its terms of reference the Working Group did in the course of its investigations consider the development of a system to provide submissions from the prosecution and defence on aggravating and mitigating factors before sentence. One member of the Working Group argued that this will assist the sentencing judge to identify any relevant factors for the purposes of the sentencing exercise. The Working Group did not form any conclusions in relation to this issue but believe that it might merit further consideration particularly in the Crown Court.
- 7.13 During the course of discussions with Professor Andrew Ashworth and Justice Young and Warren Young from New Zealand, we explored the treatment of aggravating and mitigating factors and the totality principle. There is at present in the SGC guidelines some guidance on aggravating and mitigating factors. As the response from the senior judges points out, this guidance appears in the guideline on “Overarching Principles Seriousness” which identifies 22 factors indicating higher culpability. We understand that the SAP is in the process of looking again at this issue and also at the totality principle. There is no guidance given, at present, on totality. In the circumstances we are content to encourage the SGC to complete this process. Again, it might assist transparency and consistency and possibly improve predictability. However, as with the treatment of previous convictions, in our opinion, no attempt should be made to quantify the weight to be given as this will vary from case to case. The guidance should be in narrative form.

## The departure test

- 7.14 We have referred in Chapter 4 to the departure test in England and Wales in Minnesota and in New Zealand. These three tests represent the spectrum of departure tests considered by us. The most prescriptive is the substantial and compelling reason for departure required by the Minnesota framework. The least prescriptive is the current test in our jurisdiction provided by s.172 and s.174(2) of the Criminal Justice Act 2003, namely the duty on the sentencer to have regard to the guidelines and to give reasons for departing from them.”

Minnesota	<p><b>Sentencing Reform Act 1981</b></p> <p>The sentencing judge must find, and record, substantial and compelling reasons why the presumptive guidelines sentence would be too high or too low in a given case.</p>
New Zealand	<p><b>Sentencing Act 2002</b></p> <p>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.</p>
England and Wales	<p><b>Criminal Justice Act 2003</b></p> <p>In sentencing an offender, every court must have regard to any guidelines which are relevant to the offender’s case, and</p> <p>Where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence and the sentence is of a different kind, or is outside that range, state the court’s reasons for deciding on a sentence of a different kind or outside that range.</p>

- 7.15 In New Zealand the sentencer must impose a sentence that is consistent with relevant guidelines but may depart from them if it is in the interest of justice to do so.
- 7.16 We note that New Zealand rejected the Minnesota test and the Working Group is satisfied that it is far too restrictive of the judge’s discretion for it to be adopted in our jurisdiction.
- 7.17 Both the Working Group and respondents are divided on which of the remaining two is the appropriate test for departure.
- 7.18 The majority view is that the application of guidelines should be sufficiently robust to provide the necessary consistency, transparency and predictability. This argues for a presumption that the guidelines have to be applied. It is recognised that judicial discretion needs to be preserved in order to avoid any injustice which might arise from the rigid application of guidelines without any regard to their consequences. For this reason the majority of the Working Group favours a greater degree of presumption, similar to that in the New Zealand Sentencing Act 2002. We have formulated this in a proposed amendment to s.172 and s.174(2) of the Criminal Justice Act 2003 (see Annex C). This formulation is similar to that used in a number of other statutory provisions and is one with which courts are familiar. It would require the sentencer to apply the guidelines of the SGC unless they were of the opinion that it was in the interests of justice not to do so.

- 7.19 The minority believes that the test should remain as it is in the Criminal Justice Act 2003. First, the minority argues that the current test is more likely to provide a just sentence. Any more restrictive test would inhibit the judge's ability to sentence an offender to what he or she believes is just for the specific facts of the case without increasing predictability.<sup>24</sup>
- 7.20 Secondly, the minority believes that the SGC guidelines should be given more time to bed down before any change to the departure test is made, something which many respondents have urged as of great importance generally as a reason for no change being made to the current guidelines. The minority regards it as important to discover first whether the departure rate is unacceptably high before introducing a more robust test and points also to the fact that any upward departure is likely to be scrutinised on appeal.
- 7.21 The Working Group regards it as essential that whatever test is chosen the use and application of guidelines is carefully monitored by the SGC.

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<sup>24</sup> Lord Woolf in the inaugural Radzinowicz Lecture at Cambridge University in May 2005 said "Consistency is important and that is why the judge has to find the right pigeon hole ... but the judge must, when the circumstances in the judge's opinion justify this, be prepared to impose the unconventional sentence if this is what the case requires"; and the Halliday Report "Making punishments work" July 2001 "Consistency in sentencing should be a continuing goal, but measured by consistency of approach ... recognizing that disparate outcomes in superficially similar cases are frequently justifiable and necessary."

**CHAPTER 8**

# Aligning Supply and Demand for Correctional Resources in the Long Term

- 8.1 In this chapter we discuss aligning the supply and demand for correctional resources in the long term. We start by pointing out that the Carter Report and our Terms of Reference have caused us to focus on the prison population but it is important not to lose sight of that element in the correctional resources which provides for non-custodial sentences. It remains a fact that it is still cheaper to provide for non-custodial sentences than prison places. In Annex D we refer to a number of potential alternative methods of reducing the prison population which have been suggested by respondents. Having made the point that non-custodial sentences are cheaper than custodial sentences, we consider how guidelines might take account of the correctional resources as a whole.
- 8.2 The issue for us is whether it is possible to harmonise demand and supply with regard to the sentenced population through guidelines. We reiterate that the question of whether to attempt to achieve alignment is pre-eminently an issue for Parliament. We shall make no recommendations but confine our Report to a discussion of the advantages and disadvantages of the alternative options.

**Agreed Principles**

- 8.3 The Working Group believes that guidelines must be based on the need to do justice in the individual case. Absent considerations of policy, which are not for us, this principle must not be undermined by resource constraints. However, it is important for there to be better alignment of the supply of resources for correctional services and the demands placed upon them. Poor alignment of supply and demand will produce either the need to take the sort of emergency measures that we have seen recently to relieve the pressure on the system, namely early release and overcrowding or the waste that would result from the provision of unnecessary capacity. Early release is one of the least attractive ways to bring the system into equilibrium. It prevents the sentence handed down being carried out, undermining the integrity of the court's decision. The difficult question is how equilibrium can best be achieved, recognising that sentencing guidelines are an important factor but only one factor that affects demand for correctional resources. Before outlining our approach in any detail we wish to make some general observations.

**Practical Issues**

- 8.4 First, it is not possible for guidelines to control the prison population, as the prison population will depend on a number of factors the most important being the number of offenders brought to justice and the profile of the crimes they commit. Any increase in the number of offenders will inevitably lead to an increase in demand for correctional resources. Similarly, an increase in the seriousness of the offences committed will inevitably lead to more severe sentences.
- 8.5 Secondly, predicting the prison population and other correctional resources does not simply depend on guidelines and the rate of departure from them. It also depends upon proper analysis of past sentencing practice and trends. Guidelines, do, however, add to the confidence that the analyst may have that past practice will be replicated in the future.
- 8.6 Thirdly, in England and Wales, we are unlikely to achieve a level of predictability attained in Minnesota and North Carolina. This is primarily because our guidelines must provide a larger measure of discretion, and cannot apply factors such as previous convictions in the mechanistic and rigid way adopted in those states. In addition we have a greater number of indefinite sentences, one of a number of differences between us and these states.

- 8.7 Fourthly, there are real practical problems with attempting to use sentencing guidelines to control the prison population and bring it within a capacity envelope. This could be attempted in one of two ways. Either the Government could say to the SGC ‘we have x prison places and y capacity for community penalties. Please produce a framework of guidelines which requires fewer prison places.’ Alternatively, it might occur at any subsequent point when, say, the SGC provides its regular assessment to Parliament and this indicates that, for example in future demand will exceed supply. In that scenario the Government would ask the SGC to recalibrate the framework to fall within available resources.
- 8.8 In these circumstances the SGC would have the following options:
- (1) adjusting all offence ranges in equal proportions according to some mathematical formula which simply lowered the overall level and might be argued to be inherently ‘fair’;
  - (2) taking some offences out of custodial scope altogether;
  - (3) adjusting selected offence ranges.
- 8.9 All of these approaches would in practice be problematic. First, we do not yet have the data to know whether any of these approaches would work, nor will we have that data for some time to come. No jurisdiction with a sentencing framework has shown it is capable of using that framework to control demand, and some of those who responded to the consultation raised real concerns as to whether it would be practicable. Secondly, choosing which ones to propose and which to exclude would require the exercise of judgement amounting to a policy decision, as recalibration options are almost limitless and may be used in combination with each other. Furthermore there may be unintended consequences which result in a different outcome. Creating a system and investing some hope in it with this lack of certainty is highly unattractive.
- 8.10 It may be that in the future, solutions can be found to these problems, however, we agree that currently in the absence of sufficient baseline data on sentencing practice it is not practicable to impose a duty on the SGC to draw up the framework designed to fit within current and reasonably foreseeable capacity. Even if the practical problems could be overcome there are still issues of principle and these will be for Parliament to consider.
- 8.11 However a minority consider that if and when such data is available such a requirement should be placed on the SGC. While accepting that complete predictability may never be attainable they believe that this need not rule out a requirement to design guidelines with the aim of fitting within capacity in the light of known current trends affecting the size of the correctional population.

### **Moving Forward**

- 8.12 We turn now to consider other ways by which it may be possible to provide better alignment of the supply and demand for correctional resources without the need for them to come within a capacity envelope.
- 8.13 We are all agreed, as indicated in Chapter 6, that the SGC should have a duty to publish at regular intervals predictions of the impact of its guidelines on correctional resources and also the impact of legislative and policy proposals on correctional resources. In addition, it is our view that Parliament should express its intention with regard to the long-term capacity available for correctional services at regular intervals. These twin obligations would ensure that there was a better understanding of the likely demand for and supply of correctional resources which would allow for more rational planning and would allow for informed debate on future options.

- 8.14 In our view this would represent a considerable step forward from the present position in which neither the SGC nor Government is able to predict the requirements for correctional resources in other than very broad terms which has been one of the causes of the present crisis.
- 8.15 We have gone on to consider whether a further step could be taken, namely whether a duty should be placed on the SGC to have regard to Parliament's intentions on capacity alongside the matters to which it must have regard. Such a duty would oblige the SGC to have regard to this new factor, alongside the others to which it already must have regard. The Working Group is divided as to the advantages and disadvantages of this proposal.
- 8.16 Those in favour of placing a duty on the SGC believe it would help to encourage a better alignment between the totality of sentencing guidelines and available resources. It would not constitute the pre-eminent duty, which placing a requirement to come within capacity would. It would therefore not be open to the objection that it could lead to unjust guidelines. It would recognise the reality that the SGC may need to have regard in some circumstances to the pressure on capacity or availability of particular disposals and the desirability of ensuring that the effectiveness of sentences is not damaged by guidelines which have no regard to the resources available to deliver them. However it also would recognise that it for the SGC to decide when and if such considerations are appropriate and relevant. Moreover, as we recommend that the SGC should comment on the resource implications of new legislation, placing a duty on them to have regard to available resources would create an appropriate balance between Parliament and the SGC.
- 8.17 However, there are disadvantages to this approach. Those who do not favour imposing this duty on the SGC believe that to do so would inevitably lead the SGC to have to consider matters of policy relating to resources, which are the province of Parliament. For instance, in the event that supply and demand appeared in danger of being out of balance, the SGC might have to consider ways in which the guidelines could be drawn up to take this into account. This would give rise to the difficulties which we have outlined in paragraphs 8.7 to 8.9. They believe that leaving Government and Parliament to choose how to address this imbalance better fits the appropriate relationship between Government, Parliament, the SGC and the judiciary.
- 8.18 In addition, these members of the Working Group believe it would be better for a new system of data collection to be introduced before any such step is taken. This would enable informed decisions to be made as to the necessity or otherwise of imposing a duty to have regard to resources.
- 8.19 The majority of the Working Group believes that the disadvantages of placing a duty on the SGC to have regard to resources outweigh the advantages. Accordingly, in its view no such duty should be placed on the SGC. The minority favours the opposite conclusion and thinks it important for such a statutory duty to be imposed.

**Placing the Guidelines before Parliament**

- 8.20 The Working Group has considered whether guidelines should be placed before Parliament for approval. This issue can be regarded as separate from resources issues. In New Zealand, for example, the guidelines are to go before Parliament but there is no duty to have regard to resources in framing them. In New Zealand Warren Young from the Law Commission argues “if its goal of changing the law and order debate is to be achieved there must be political ownership of the guidelines that result from the Council’s work.”<sup>25</sup>
- 8.21 Leaving aside resources there is a separate issue as to whether the guidelines should go before Parliament. A minority of the Working Group support such a course and believe that the guidelines should be placed before Parliament to be accepted or rejected in their entirety. They take the view that enhancing Parliamentary scrutiny and participation in the guidelines process would give the guidelines greater democratic legitimacy, this might be particularly desirable if there was a more stringent departure test and a stronger requirement to follow the guidelines.
- 8.22 Furthermore, such a system may lead to stability over time. It would reduce the risk that sentences would increase in response to political criticism of individual decisions and would help to control the impact of media firestorms. Parliament might be encouraged to take responsibility for the guidelines in the knowledge of the price tag attached to them.
- 8.23 A majority of the Working Group, however, together with most sentencers, as well as some other bodies, do not favour a system for Parliamentary approval. They regard it as a significant and unwarranted change in the relationship between Government and Parliament on the one hand and the judiciary on the other. They believe that seeking Parliamentary approval would inevitably result in the politicisation of the guidelines.
- 8.24 They also believe that there would be real practical difficulties in devising a workable system that coped with potential problems such as a stalemate between the SGC and the Lord Chancellor on the content of guidelines to be placed before Parliament. Some respondents characterised this alternative as imposing by the back door financial constraints on a judge’s sentencing powers.
- 8.25 However, a process by which Parliament approved the guidelines, could be used as an indirect method of allowing Parliament to form a view as to the costs of the guidelines. If draft guidelines were estimated by the SGC to have an impact on the prison population that the Government regarded as unacceptable it could make that clear to the SGC in its response to the draft guidelines. If the guidelines were still put to Parliament in their original form it would be open to Parliament to vote against them.
- 8.26 At present draft guidelines prepared by the SGC are considered by the Justice Select Committee of the House of Commons as part of the consultation process. If it is decided that the guidelines should not go to Parliament for approval consideration might be given to enhancing Parliament’s existing role in scrutinising draft guidelines.

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25 Warren Young: ‘New Zealand’s Sentencing Council’ Crim. L.R. 287.

## Chapter 9

# Findings, Conclusions and Recommendations

- 9.1 In this final chapter we summarise our main findings and conclusions and set out our recommendations.
- 9.2 The Working Group finds that there have been several separate causes of the increase in the prison population in recent years, some of which are not related to the sentencing process and cannot be affected in any way by sentencing guidelines.
- 9.3 The Working Group finds that structured sentencing frameworks on the US grid model increase consistency and predictability of sentences but at the cost of an inflexibility that makes them unsuitable and unacceptable in England and Wales. The Working Group **recommends** that the process of introducing guidelines through the SGC be retained and the introduction of a US style grid be rejected
- 9.4 The Working Group finds that effective planning for correctional resources requires significantly better short, medium and longer term prediction of outcomes than currently is possible in England and Wales.
- 9.5 The Working Group finds that current data collection in England and Wales in respect of sentencing is inadequate and that it is impossible to predict the effect of sentencing guidelines or to predict the requirement for future correctional resources. It concludes that a more comprehensive system of data collection in respect of sentencing in the Crown Court and the Magistrates' Court is required. It **recommends** that such a system is devised and put into effect as soon as possible. This task is urgent, considerable and needs appropriate funding. It also **recommends** that the SGC conducts a national survey of current sentencing practice.
- 9.6 The Working Group concludes that the SGC is best positioned to devise, commission and take ownership of an expert system of data collection and, by that means, to provide Government and the public with reliable assessments of the likely impact of its guidelines. It **recommends** that the SGC publish such assessments at regular intervals.
- 9.7 The Working Group concludes that the SAP and SGC would work more efficiently and speedily if the two bodies were combined whilst preserving the essence of their existing constituent representation and advisory functions. The Working Group describes this single body as an enhanced SGC. It concludes that in order properly to perform its new functions the SGC will need greater resources in staff and expertise. It **recommends** that such resources are provided and that it be provided with statutory authority to undertake its enhanced responsibilities.
- 9.8 The Working Group **recommends** that the Secretary of State, when introducing a Bill into Parliament and when proposing a significant policy initiative, which affects correctional resources, consults the SGC and invites it to carry out and publish its assessment of the proposals on correctional resources.
- 9.9 The Working Group concludes and **recommends** that the SGC should be provided with information by the Government in respect of factors, other than sentencing, which affect the prison population, so that it can provide at regular intervals a comprehensive overview of the effects of all factors on future correctional resources.

- 9.10 The Working Group concludes that the workload of the Chair of the enhanced SGC will be such as to require a substantial commitment of time. Therefore, it will not be possible for the Lord Chief Justice to remain as Chair. It concludes that in the first instance the Chair should be a member of the senior judiciary, in order to maintain the confidence of the judiciary as a whole in the guidelines. It **recommends** that the Chair be appointed jointly by the Lord Chief Justice and the Lord Chancellor.
- 9.11 The Working Group **recommends** that the SGC produces as soon as possible definitive guidelines for all major high-volume offences. It **recommends** that the SGC gives further narrative guidance on the treatment of previous convictions and aggravating and mitigating factors and gives some guidance on the totality principle.
- 9.12 A majority of the Working Group **recommends** that the test for departures from the guidelines be made more robust by providing that the court may only pass a sentence outwith the guidelines if it is of the opinion that it is in the interests of justice to do so. A minority of the Working Group **recommends** that there should be no amendment to the statutory tests contained in the Criminal Justice Act 2003.
- 9.13 The Working Group **recommends** that the SGC monitor the application of the guidelines.
- 9.14 The Working Group, whilst concluding that the guidelines must be based on the need to do justice in individual cases, recognises that it is important for there to be better alignment of the supply of correctional services and the demand for them. It concludes that at present it is impractical to place a duty on the SGC to design guidelines to fit within current and reasonably foreseeable capacity. But, it **recommends** that Parliament should express its intentions with regard to correctional resources at regular intervals. It concludes that this obligation together with the SGC's publication of its assessment of the effect of guidelines on correctional resources will allow for more rational planning.
- 9.15 A minority of the Working Group believes that it would be advantageous for a duty to be placed on the SGC to have regard to Parliament's intentions on resources, together with other matters to which it must have regard, when formulating its guidelines. It **recommends** that such a statutory duty be placed on the SGC.
- 9.16 A majority of the Working Group is of the opinion that it would be inappropriate to place such a duty on the SGC and makes **no** such recommendation.
- 9.17 A minority of the Working Group believes that it would be advantageous for guidelines to be placed before Parliament for approval and would **recommend** that such a system for doing so be established.
- 9.18 A majority of the Working Group believes that the advantages of placing guidelines before Parliament for approval would be outweighed by the disadvantages. It therefore makes **no** such recommendation.

**Annex A**

# Sentencing Commission Working Group

## Terms of Reference

A working group will be established to examine the advantages, disadvantages and feasibility of a structured sentencing framework and permanent sentencing commission.

The working group will be chaired by a senior member of the judiciary, to be appointed by the Lord Chief Justice in consultation with the Lord Chancellor, and it will have a membership of approximately 12 people consisting of those with experience in criminal justice issues including prison, probation and policing.

The Circuit and District bench and the lay magistracy should be represented on the working group by persons nominated by the Lord Chief Justice in consultation with the Lord Chancellor. There would also be members with expertise in data and financial management systems including how to produce effective and timely management information.

Members would be appointed in their own right and not as representatives of the professions or organisations from which they may come and the working group will have a staff led by an executive director and a team with analytical, research and legal skills. The group should also draw upon expert advice and experience from other jurisdictions.

The working group will examine detailed proposals through consultation for a possible Sentencing Commission for England and Wales including:

- the membership of a Sentencing Commission;
- the possible formulation of a set of indicative ranges for a structured sentencing framework for the Crown Court, and subsequently Magistrates' Courts, including the role of government and parliament in assigning the prison population and other penal resource limits;
- the effect of a set of indicative ranges on current judicial decision making;
- the mechanism for presenting the set of indicative changes to Parliament for legislative endorsement;
- an appropriate process for dealing with departures from the ranges;
- the remit and process for a Sentencing Commission's on-going functions to monitor and report on the impacts on the prison population and penal resources of all national policy proposals and system changes; and
- the process for making revisions to the set of indicative ranges.

The working group will also assess what preliminary data from current sentencing practice would be needed if a Sentencing Commission were to be established. This will include:

- analysis of data currently available by offence and criminal history and determining future data and information needs and collection methods;
- collecting the required data and information from a statistically significant sample of Crown Courts;
- ranking all either way and indictable offences into approximately 10 offence groups;
- producing a first iteration of a set of indicative ranges for each offence group based on the data and information of current sentencing practice and following discussion on the format and breadth of the range;
- developing a model that can translate the effect of the indicative ranges on the prison population and other correctional resources; and
- identifying options for an eventual Sentencing Commission to consider how the first iteration of a set of indicative ranges could be altered to come with a resource envelope as and when set down by government and endorsed by Parliament.

The working group will report to the Lord Chancellor and Lord Chief Justice by summer 2008.

**Annex B****Legislation Since 1993**

The following lists some of the major legislative changes to the sentencing framework and the more significant legislation on new offences.

**1993**

Criminal Justice Act 1993  
Asylum and Immigration Appeals Act 1993  
Sexual Offences Act 1993

**1994**

Criminal Justice and Public Order Act 1994  
Police and Magistrates' Courts Act 1994  
Drug Trafficking Act 1994  
Firearms (Amendment) Act 1994

**1995**

Criminal Appeal Act 1995  
Prisoners (Return to Custody) Act 1995  
Proceeds of Crime Act 1995

**1996**

Asylum and Immigration Act 1996  
Offensive Weapons Act 1996  
Police Act 1996  
Sexual Offences (Conspiracy and Incitement) Act 1996  
Theft (Amendment) Act 1996

**1997**

Crime (Sentences) Act 1997  
Firearms (Amendment) Act (No.s 1&2) 1997  
Knives Act 1997  
Protection from Harassment Act 1997  
Sex Offenders Act 1997

**1998**

Crime and Disorder Act 1998  
Magistrates' Courts (Procedure) Act 1998  
Criminal Justice (Terrorism and Conspiracy) Act 1998  
Human Rights Act 1998

**1999**

Youth Justice and Criminal Evidence Act 1999  
Football (Offences and Disorder) Act 1999  
Immigration and Asylum Act 1999

**2000**

Criminal Justice and Court Services Act 2000  
Powers of Criminal Courts (Sentencing) Act 2000

**Football Disorder Act 2000**

Regulation of Investigatory Powers Act 2000  
Sexual Offences (Amendment) Act 2000  
The Terrorism Act 2000

**2001**

Criminal Justice and Police Act 2001  
Anti-terrorism, Crime and Security Act 2001  
Social Security Fraud Act 2001  
Vehicles (Crime) Act 2001

**2002**

Nationality, Immigration and Asylum Act 2002  
Proceeds of Crime Act 2002

**2003**

Criminal Justice Act 2003  
Anti-social Behaviour Act 2003  
Sexual Offences Act 2003

**2004**

Domestic Violence, Crime and Victims Act 2004

**2005**

Drugs Act 2005  
Prevention of Terrorism Act 2005  
Serious Organised Crime and Police Act 2005

**2006**

Fraud Act 2006  
Police and Justice Act 2006  
Racial and Religious Hatred Act 2006  
Road Safety Act 2006  
Terrorism Act 2006  
Violent Crime Reduction Act 2006

**2007**

Offender Management Act 2007  
Serious Crime Act 2007  
UK Borders Act 2007

**2008**

Criminal Justice and Immigration Act 2008

**Annex C****Suggested Revisions to the Departure Test****Current Wording, Criminal Justice Act 2003**

172 Duty of court to have regard to sentencing guidelines

(1) Every court must—

- (a) in sentencing an offender, have regard to any guidelines which are relevant to the offender's case, and
- (b) in exercising any other function relating to the sentencing of offenders, have regard to any guidelines which are relevant to the exercise of the function.

(2) In subsection (1) “guidelines” means sentencing guidelines issued by the Council under section 170(9) as definitive guidelines, as revised by subsequent guidelines so issued.

174 Duty to give reasons for, and explain effect of, sentence

(1) Subject to subsections (3) and (4), any court passing sentence on an offender—

- (a) must state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed, and
- (b) must explain to the offender in ordinary language—
  - (i) the effect of the sentence,
  - (ii) where the offender is required to comply with any order of the court forming part of the sentence, the effects of non-compliance with the order,
  - (iii) any power of the court, on the application of the offender or any other person, to vary or review any order of the court forming part of the sentence, and
  - (iv) where the sentence consists of or includes a fine, the effects of failure to pay the fine.

(2) In complying with subsection (1)(a), the court must—

- (a) where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence and the sentence is of a different kind, or is outside that range, state the court's reasons for deciding on a sentence of a different kind or outside that range,

**The Working Group's Suggested Revision**

172 Duty of court to apply sentencing guidelines

(1) Every court must—

- (a) in sentencing an offender, apply any guidelines which are relevant to the offender's case unless it is of the opinion that it would be contrary to the interests of justice to do so, and
- (b) in exercising any other function relating to the sentencing of offenders, apply any guidelines which are relevant to the exercise of the function unless it is of the opinion that it would be contrary to the interests of justice to do so.

(2) In subsection (1) “guidelines” means sentencing guidelines issued by the Council under section 170(9) as definitive guidelines, as revised by subsequent guidelines so issued.

174 Duty to give reasons for, and explain effect of, sentence

- (1) Subject to subsections (3) and (4), any court passing sentence on an offender—
- (a) must state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed, and
  - (b) must indicate how any relevant sentencing guideline has been applied, and
  - (c) must explain to the offender in ordinary language—
    - (i) the effect of the sentence,
    - (ii) where the offender is required to comply with any order of the court forming part of the sentence, the effects of non-compliance with the order,
    - (iii) any power of the court, on the application of the offender or any other person, to vary or review any order of the court forming part of the sentence, and
    - (iv) where the sentence consists of or includes a fine, the effects of failure to pay the fine.
- (2) In complying with subsections (1)(a) and (1)(b), the court must—
- (a) where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence and the sentence is of a different kind, or is outside that range, state the court's reasons for deciding on a sentence of a different kind or outside that range,

**Annex D**

## Additional Proposals Contained in Responses to the Consultation

1. In addition to responding to the issues raised directly in the Working Group's Consultation Paper, a number of those who sent in their comments raised other ideas and proposals for addressing some of the problems currently facing the correctional services, related to our work but not technically within our Terms of Reference. We believe that it would be regrettable if this aspect of the response to the Consultation was lost, and so we have decided to record those suggestions here.
2. A number of responses advocated either a reduction in the amount of new legislation, or a complete moratorium. Some suggested reviewing the whole approach to sentencing, while others limited their proposed review to past legislation, such as the Criminal Justice Act 2003, with a view to repealing those aspects that may have increased the prison population. Conversely, some recommended some new legislation, specifically to reduce maximum sentences.
3. Others preferred methods of reducing the demand on correctional services, in particular on prisons. Some questioned whether all of those currently in prison really ought to be there, either in terms of their own good or of the benefit to society. They called for a review of the use of prison, when it was appropriate and for whom. Some drew particular attention to foreign national prisoners and those awaiting trial, who they felt ought not to be in prison.
4. Many who responded took the view that there are too many people in prison. Some proposed that the number of indeterminate and discretionary life sentences be reduced. Others focused on community sentences. These are an important part of any sentencing framework. Many respondents welcome extended options for community penalties made available under the Criminal Justice Act 2003. Responses recognised there is continuing public disquiet about the effectiveness of community sentences in reducing re-offending. They urge the Government to give further support to raising public confidence in community sentences. They also argued there should be more investment in community penalties and the Probation Service which administers them, to make these penalties more effective and increase public confidence in them, so that they are more used.
5. It was also suggested that Probation Officers be given more discretion, for example regarding recall to prison for breaches, which some felt was not always appropriate as many breaches were essentially technical rather than substantial.
6. Regarding those for whom prison is appropriate, there was support for sentences tailored more individually to the offender with a greater focus on health, reform and rehabilitation in order to reduce re-offending and therefore the long-term demand on the correctional services. Some argued in favour of better funding for prison courses so that more prisoners become eligible for parole, and more support, both financial and political, for the Parole Board and its activities.
7. Many respondents considered better provision for those with mental health needs a particularly pressing desideratum.
8. Some responses discussed the role of the different partners in the criminal justice system. They argued that the training and efficiency of all of partners, such as police, prosecutors and other advocates, was very important and if improved would have a beneficial effect.

9. Some suggested a specific role for these groups, for example ensuring prosecutors point out relevant guidelines to a case to help, although not to direct, the sentencer. Other aspects of training, for example to magistrates on the use of bail, beyond the exemptions in the 1976 Act, were also raised.
10. The Working Group does not comment on or recommend any of these proposals. However it draws them to the attention of the Lord Chancellor and Lord Chief Justice and registers its thanks to those who made them.

## Annex E

# Improving Predictability of Demand for Correctional Resources

1. This provides an assessment of how some improvements to the predictability of demand for correctional resources may be achieved through improvements to the concepts/definitions used in sentencing guidelines and further data collection.
2. In order for analysts to use sentencing guidelines as a framework for 'predicting' future sentencing practice we are advised the following would need to be established:
  - (a) A mechanism which helps to ensure that in the majority of cases sentencing guidelines will be applied by sentencers (New Zealand set the expected rate of compliance by sentencers at 80%). This is the key factor that minimises prediction risks.
  - (b) A mechanism to ensure that legislation (both existing and new) is clearly referenced to the guidelines framework.
  - (c) A clear reference between guidelines and current practice with a clear understanding of whether new guidelines intend to maintain or change current practice.
  - (d) A comprehensive set of guidelines with clear relativities in place covering all of the major offence groups.
  - (e) A clear (and shared) understanding of the rules for departure including a definition of what constitutes a departure, of guideline starting points.
  - (f) Guidance on previous convictions and the application of other aggravating and mitigating factors (including personal mitigation).
  - (g) Clear identification in sentencing remarks of the reasons for guideline departures.
  - (h) Active monitoring and publication of statistics relating to the use and application of sentencing guidelines.

### How this might work in practice

- 3 **Applying the guidelines:** The following is required:
  - (a) a clear definition/guidance on the 'application' of guidelines;
  - (b) a clear departure test;
  - (c) a clear explanation from sentencers relevant sentencing guidelines have been applied;
  - (d) a clear record of the reasons for departure;
  - (e) proper recording of sentencing remarks (including reasons for departure).
- 4 **Developing a 'baseline':** To develop a robust picture of current sentencing practice to act as a reference point for designing guidelines, a snapshot survey needs to be conducted on a national basis to understand factors that currently influence sentencing practice. The data that needs to be captured in this baseline survey is very similar to that collected in the Crown Court Survey.
- 5 The process of setting up the baseline would involve the following:
  - (a) Data will have to be collected over 3 months (a quarter) to encapsulate average behaviour that could be extrapolated over the year.

- (b) All courts will need to participate in the baseline data survey to build a true national and regional picture of current sentencing practice.
- (c) All Courts<sup>26</sup> and judges will need to participate in the baseline survey.
- (d) The vast majority of the forms need to be completed electronically rather than manually to make the survey manageable and reduce data quality errors.
- (e) The baseline survey and any subsequent data collection needs to include a defendant identifier and a court identifier that corresponds to those recorded on existing data systems so that linkages can be made for further analysis.
- (f) The baseline survey needs to take account of any changes to the guideline departure test. In addition, it ought not to be carried out during a period of major legislative or process change in order to ensure a 'steady state' is captured.

6. **Establishing analytical definitions, standards and tests:** Agreement between sentencers, those who frame sentencing guidelines and data analysts with a view to drawing up common definitions and rules for statistical purposes. An assessment of ongoing data collection should be made after the baseline survey has been completed. As a minimum this should encapsulate the information required for monitoring sentencing practice, the application of guidelines and the overall distribution of sentencing decisions.
7. **Monitoring:** Sentencing data should be assessed at regular intervals to evaluate any significant shifts in patterns and trends. If significant shifts are seen a new baseline may need to be established. Regular feedback on sentencing practice and departure statistics should be provided to individual courts as part of a process of dialogue and informed debate on sentencing practice. The collection of regular monitoring data will with time generate a 'time series' of trends which will enable an investigation of long-term trends in sentencing practice which may aid long term projections of demand for correctional resources.

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26 All Crown Courts and Magistrates' Courts if both are covered by the guidelines framework and just all Crown Courts if the comprehensive guidelines framework is applicable only to the Crown Court.





