Chapter 3

Sentencing Guidelines Outside the United States

Handbook on Corrections and Sentencing

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Most readers of this Handbook will be familiar with the sentencing guidelines currently functioning across the United States. These have been operating for 40 years now, following their introduction in Minnesota in 1979 (Frase, in press; 2005; Kauder & Ostrom, 2008). Far fewer readers, however, will be aware of the guidelines found in other jurisdictions. The purpose of this chapter is to introduce these alternative schemes and to make some limited comparisons across legal boundaries.

The US guidelines were created as a response to concerns about disparity at sentencing (Frankel, 1973). Prior to the creation of guidelines courts had exercised wide discretion at sentencing, with very few restrictions on that discretion and little guidance as to how to exercise discretion at sentencing. The inevitable consequence of this state of affairs was some degree of unwarranted sentencing disparity (see discussion in Spohn, 2002, Chapter 4). Yet disparity or discrimination at sentencing is not an exclusively American problem, and guidelines are not a uniquely American solution. Other countries facing this common challenge have responded with different kinds of guidelines. Most US states have a formal sentencing guidelines scheme to assist judges at sentencing. The best-known guidelines model involves a two-dimensional sentencing grid – much like a mileage chart which shows the distance between two cities. Under a sentencing grid, the two dimensions are crime seriousness and criminal history. In order to determine the sentence that should be

imposed, a court selects the appropriate level of seriousness, and the appropriate criminal history category. Where the crime seriousness row and the criminal history column intersect, there is a grid cell containing a relatively narrow range of sentence length. Sentencing grids of this kind are found in a number of states including Minnesota (e.g., Minnesota Sentencing Guidelines Commission, 2018; Frase, 2005; 2009) and are used in the federal district courts in the US.

Structuring judicial discretion at sentencing is one of the most significant challenges for a legislature. If they prescribe specific sentences – such as mandatory terms of custody – courts are prevented from doing justice by reflecting the individual circumstances of specific offenders. For example, legislating a mandatory sentence of imprisonment of a specified length for all convictions of robbery means that offenders of different levels of culpability who have committed offences involving differing levels of harm will receive the same sentence – a clear injustice, as it violates the key principle of proportionality at sentencing. This principle requires that the severity of punishments be proportionate to the seriousness of the crime and the culpability of the offender. In many countries the principle has been codified (see Roberts & Baker, 2008). For example, in 1996 as part of a sentencing reform law, the Canadian Parliament legislated the following provision in that country's Criminal Code: 'A sentence must be proportionate to the seriousness of the crime and the offender's degree of responsibility' (s. 718.1; see Roberts, and Cole, 1999). If legislatures leave the courts to regulate themselves at sentencing, outcomes may be too variable, leading to sentencing disparity (see Palys & Divorksi, 1986). In short, there is a fine balance between offering too much and too little structure.

Chapter Overview

All common law jurisdictions confront the challenge of guiding courts in the critical stage of sentencing, and disparity is an inevitable consequence of wide discretion across all systems. Many countries have risen to this challenge and created sentencing guidelines. This chapter reviews these guidelines schemes in the following way. Part I provides some general commentary on common law sentencing, followed by introductory comments about sentencing guidelines and sentencing commissions. Part II discusses schemes of sentencing guidance which do not include specific sentence length recommendations or ranges of sentence length. Such schemes are found in many Scandinavian countries as well as Israel. Part III focuses on the jurisdiction outside the US with the most well-developed guidelines: England and Wales. The English and Welsh sentencing guidelines have been evolving for the past 20 years (Ashworth & Roberts, 2013a; Roberts & Ashworth, 2016) and represent the principal alternative to the grid-based approach found in several US jurisdictions. This section summarises the research into the effects of the guidelines on sentencing practices. Part IV briefly summarises developments in other parts of the world. We exclude Australia from our survey of foreign jurisdictions because it is the subject of a separate chapter in this handbook (see Freiberg and Flynn, Chapter 12). Part V draws some limited conclusions about the future of sentencing guidelines around the world.

I. Sentencing in Common Law Countries

Sentencing in common law jurisdictions has traditionally been grounded in wide judicial discretion and a resistance to structuring of the decision-making process. A combination of significant stock placed in the experience of the sentencing judge and a lack of concern as to the existence or extent of disparity in sentencing made for a sentencing landscape which paid little regard to consistency at sentencing. Emphasis was typically placed on the

need to reflect the individualities of each case and therefore recourse to general common law principles at sentencing was, for a considerable period of time, as far advanced as matters became. This inevitably produced subjective interpretation and application of the proper approach to sentencing, which would result in disparities.

While there was likely to be intra-judge consistency, with judges sentencing (within the law but) according to their own penal philosophies, inter-judge consistency was unlikely. For instance, in the 1830s in England, the Criminal Law Commissioners sought to bring a sense of order to the discretionary sentencing practices which they considered to be leading to arbitrary sentencing (Radzinowicz & Hood, 1979).

Concerns regarding disparity led to corrective measures. In England and Wales, this led to the creation of a criminal appeal court and a right to apply for leave to appeal in the early 20th century. The court had the ability to review sentencing decisions and thereby provide some 'light touch' guidance and structure by way of appellate review. There was increasing interest in the wide discretion afforded to sentencing judges in common law jurisdictions and greater involvement from appellate courts in the structuring of that discretion by the issuing of guideline judgments (Pattenden, 1996). Greater political interest and involvement followed. This led to legislation providing increasing levels of structure and constraint placed on judicial discretion, alongside calls for the creation of guidelines bodies. The claims for guidelines bodies were, in some jurisdictions, resisted by reference to the 'need' for wide judicial discretion to do justice to difference, yet the direction of travel was towards more constrained judicial freedom at sentencing. That is not to say judicial involvement must be limited, but merely that structured discretionary decisions limit the scope of the range of penalties which may be imposed in a particular case.

While there are distinct differences between the approaches to sentence, the role of the prosecutor and what is required of a sentencing judge in common law jurisdictions, there are

overwhelming similarities. Most common law jurisdictions operate a sentencing system based around the principle of proportionality: Canada, England, USA, Australia and other countries. This requires the advocates for the prosecution and defence to address matters of offence seriousness at the sentencing hearing. The role of the attorneys differs from jurisdiction to jurisdiction, however. For instance, in Australia, a prosecutor may not make a submission as to sentencing ranges (*Barbaro v The Queen* [2014] HCA 2). In England and Wales and Canada, prosecutors play a more active role, making submissions on relevant factors and setting out the court's sentencing powers (Roberts, 2012b). In England, this represents a shift from a more traditional view that the prosecution had no role at sentencing. England and Wales has traditionally been an outlier in this regard. Although prosecutors in Canada, the US and Australia make robust submissions at sentencing, this has typically not been the case in England. English prosecutors normally identified the most important aggravating factors for the court but stopped short of making specific recommendations as to the appropriate sentence to impose. As noted, that is now changing as a result of the English sentencing guidelines (discussed below).

The story of sentencing in common law jurisdictions therefore appears to be one of increasing restraint placed on the discretion afforded to sentencing judges in the pursuit of consistency. From a position of limited structure provided by a combination of sparse statutory provisions and appellate oversight, towards an interest in the practice of sentencing and the desirability of greater consistency, there has been a seismic shift in the sentencing landscape in common law jurisdictions over the past 150 years.

Sentencing Structures: Commissions and Councils

Assuming a legislature has been convinced of the need for greater structure at sentencing how do countries go about creating a sentencing guidelines scheme? The first step in any move towards structuring judicial discretion involves the creation of an independent

authority to develop and issue sentencing guidelines. The most common approach to this is the creation of such an authority as a statutory body. It is this step which, as is discussed below, can stall the move towards a guidelines system, in circumstances where the legislature does not enact the required legislation. All US guidelines schemes emerge from a sentencing commission, such as the Minnesota Sentencing Guidelines Commission or the US Sentencing Commission at the federal level. In other countries these bodies are usually called 'Sentencing Councils', and there is significant variation in their structures and functions. The Sentencing Council of England and Wales is headed by the Lord Chief Justice and is tasked with devising and disseminating guidelines as well as a range of other functions (see Roberts, 2012a).

By contrast, sentencing councils in Australia such as the Sentencing Advisory Council in New South Wales are, as the name implies, purely advisory in nature. These councils do not issue sentencing guidelines per se, but rather provide advice and conduct research upon a wide range of sentencing matters. All sentencing councils and panels are involved in public legal education of one kind or another. This may mean publishing reports to help the public understand the sentencing process better, or it may mean releasing comprehensive sentencing statistics. For example, some guidelines authorities publish periodic Sentencing Bulletins which summarise sentencing trends for specific offences (see http://sentencingcouncil.vic.gov.au/page/about-us/council). The public typically rely on news media accounts of sentencing decisions, and these generally focus on unusual or exceptionally lenient sentences – those which are newsworthy in some respect (Roberts & Hough, 2005). Often media reporting of sentencing decisions is inaccurate or misleading; non-immediate custodial sentences are described as the offender having "walked free from court" or having been "let off" and errors are made in relation to the period of time to be spent in custody, and the period of time spent on licence subject to recall to custody.

Overwhelmingly in England and Wales, for example, the media reporting suggests that sentencing judges are too lenient. It is important therefore for a guidelines authority to dispel public misperceptions of sentencing.

Guideline Structures

If appropriately constructed, and not subject to political interference, sentencing guidelines represent the best way of constraining prison populations and achieving principled sentencing (see Stemen & Rengifo, 2011; von Hirsch, Ashworth & Roberts, 2009), but the question remains: what form of guidelines is appropriate for any given jurisdiction? The guidelines movement remains strong across the US, but despite its high profile, the model employed in states such as Minnesota has not proven a popular penal export.

Canada was the first country to reject this approach to structured sentencing. In 1984, the Canada created a term-limited Sentencing Commission which visited several American states (including Minnesota and Pennsylvania) and concluded that two-dimensional grids held no promise for sentencing in Canada (see Canadian Sentencing Commission, 1987). A generation later the Sentencing Commission Working Group in England and Wales visited the home of numerical guidelines and drew the same conclusion. Western Australia considered adopting a two-dimensional sentencing grid in 1999, but also ultimately abandoned the idea. The grid-based approach has therefore found no support in foreign jurisdictions.

The proliferation of two-dimensional sentencing grids across the US since the 1970s may paradoxically have undermined the appeal of all presumptively binding guidelines. Sentencing guidelines of any kind are often regarded by judges as harbingers of grids and as being antithetical to sentencing as a "human process" (see Hogarth, 1971). Calls for the introduction of any kind of sentencing guidelines system are perceived as an attempt to move

towards the ultimate goal of a grid and a reduction in judicial discretion. Indeed, opposition in Canada (and England and Wales) to sentencing guideline schemes of all stripes was fuelled by predictions that any move towards structuring judicial discretion would culminate in the imposition of a rigid two-dimensional grid. In England and Wales, despite considerable judicial and professional resistance to the concept of guidance derived from a source other than the Court of Appeal, guidelines have slowly emerged over the past 15 years. Definitive guidelines now exist for most high frequency offences and enjoy widespread support from practitioners, politicians and the public.

II. Sentencing in Other Jurisdictions: Guidance by "Words alone"

When most people think about sentencing guidelines, formal structures usually come to mind, involving guideline sheets or grids, sentencing tables and manuals and so forth. However, guidance does not have to be numerical in nature, providing a specific range of sentence for each crime. A number of Scandinavian countries have developed what may be termed "guidance by words" (see also Ashworth (2009) for discussion of techniques to reduce disparity through increased guidance). This approach to structured sentencing involves the legislature placing relatively detailed guidance in a sentencing law. For example, the Swedish Penal Code identifies proportionality as the primary rationale for sentencing and requires courts to assess the seriousness of the crime in order to determine sentence. A number of mitigating and aggravating factors are also specified in the Swedish sentencing law, in order to guide judges in the determination of sentence. Finally, the law also contains guidance for courts with respect to the choices they should make between different sentencing options (for further information, see von Hirsch & Jareborg, 2009).

In theory, an advantage of the "guidance by words" approach is that it leaves courts with considerable flexibility to determine an appropriate and proportionate sentence, thereby

doing justice to difference. On the other hand, this may result in much greater disparity than would be the case in a jurisdiction such as Minnesota where judges have to follow detailed and prescriptive sentencing guidelines. As is discussed in more detail below, the resolution of that issue rather depends on one's conception of "consistency."

The best example of sentencing guidance by words alone can be found in the state of Israel. In 2012 the Israeli Parliament (Knesset) approved a sentencing law. This law adopted parts of a Bill which provide for "guidance by words" but without establishing the guidelines authority which would have been empowered to develop and issue guidelines scheme involving "starting point sentences" (see Gazal-Ayal & Kannai, 2010: Roberts & Gazal-Ayal, 2013). Under the legislation, courts are required to devise their own proportionate sentence range for the case being sentenced, and to provide reasons if they impose a sentence outside this range. This novel approach is very different from the US grids. For example, in Minnesota, the grid will determine the sentence length range on the basis of the offense level and the offender's criminal history score. This range has therefore been decided, *a priori*, by the Minnesota Sentencing Guidelines Commission. Courts in Israel determine their own proportionate range.

The consequence of this approach is likely that consistency across sentences by the same judge is likely to be high but sentencing between judges or courts will be less consistent, as each judge will presumably devise his or her own proportionate range. This said, the Sentencing Law in Israel provides a great deal more guidance than any other sentencing statute, including direction about mitigating and aggravating factors; sentencing procedure; reasons for a court to impose a sentence outside the proportionate sentence range and much else besides. Unfortunately, to date there has been no published evaluation of the new law, so it is unclear whether sentencing in Israel has become more consistent or principled since the reform was introduced.

II. Sentencing Guidelines in England and Wales

The English guidelines have been operating for almost 20 years now. Although most publications trace the origins of sentencing guidelines to the proposals made by Judge Frankel in 1972, in fact a number of writers in Victorian England first proposed creation of sentencing commission and guidelines (see Roberts and Ashworth, 2016). These proposals were never actually adopted by the United Kingdom Parliament, and it was not until years after the US guidelines had been operating that a sentencing commission with authority to issue guidelines was created. The evolution of the English sentencing guidelines has been documented in earlier publications (e.g., Ashworth, 2015; Roberts & Ashworth 2016). However, a brief summary may help to contextualise the discussion.

Until 1998, English courts enjoyed widespread discretion at sentencing, guided only by limited appellate review. Guideline judgments from the Court of Appeal were rare and only expressly acknowledged in the 1970s (Pattenden, 1996, p. 271); this state of affairs changed with the creation of the Sentencing Advisory Panel in 1998. Created to provide advice to the Court of Appeal, this statutory body was subsequently joined by a second statutory body, the Sentencing Guidelines Council (SGC). The SGC issued the first formal guidelines in 2004. Both bodies remained in existence until 2010 when they were replaced by the Sentencing Council of England and Wales (SCEW).

Structure and Functions of the Sentencing Council of England and Wales

The English judiciary has historically opposed the imposition of more structured sentencing. Why then, did the English judiciary ultimately come to accept the creation of definitive sentencing guidelines? The explanation lies in the origins of the Council and the nature of its guidelines. Members of the judiciary constitute a majority of the Council's 14 members yet representatives of key stakeholders are also included. There are no members of the general

public on the SCEW, and the perspective of victims is represented not by an individual crime victim (as is the case in several Australian Sentencing Councils) but rather a professional working in a victim-related organization. Finally, the SCEW is apolitical in the sense that no members are appointed to represent political parties or to provide "political experience and connections" (Frase, 1993a, p. 369). The US Commissions are undoubtedly more political in nature than their European counterparts.

The English Council was created in close conjunction with the senior judiciary. The Lord Chief Justice serves as President and a senior Court of Appeal (Criminal Division) judge sits as the Chair. The influence of the judiciary can also be found in the nature of the enabling statute which created the Council and which specifies the kinds of guidelines the Council should be developing. This significant degree of judicial engagement was critical to ensuring acceptance by sentencers. Judicial dominance of the Council has been questioned by some scholars, but the English guidelines would not have emerged if Parliament had created a Council modelled on the Minnesota Commission. An additional benefit of the judicial majority is that it in practice it confers more independence upon the Council and provides confidence to sentencers in the courts that the guidelines developed are developed by those who understand the task of a sentencing judge and are not designed to undermine or restrict judicial discretion. Judicial membership additionally adds to the development of the methodology employed by the guidelines, ensuring that the theoretically rigorous process is also practically workable.

The Minnesota governor makes appointments to the MSGC and while the UK Lord Chancellor and Secretary of State for Justice, also an elected politician, appoints members to the English Council, decisions are taken in conjunction with the Lord Chief Justice. To date, neither the government nor Parliament has intruded into the Council's activities save for requiring the Council to produce guidelines on sentencing when the offender has multiple

convictions and on the reduction in sentence for a guilty plea. The judicial majority may explain this uncharacteristic reticence on the part of legislators. By contrast, the Minnesota Commission appears to have been under almost constant political pressure since its creation. This pressure has resulted in an escalation in sentence severity over time. Frase noted in 1991 "the pressure for increased sentence severity and legislative control" (p. 732). The English Council has been spared this pressure, and the guidelines have not been amended in response to any external political influences. The judicial dominance comes with a cost, however. One consequence of this judicial presence will be seen in the more discretionary nature of the English guidelines (discussed later in the essay).

Descriptive or Prescriptive Guidelines?

An important policy decision for any legislature contemplating creating a sentencing council to develop guidelines concerns its role in the sentencing environment. Guidelines can be descriptive in nature, simply reproducing current judicial practice, or prescriptive, with a mandate to change current practice. von Hirsch (1987) argued that "The enabling statute [of any commission] should make clear that the commission's role is a *policy-making* one" (p. 62, emphasis in original). The Minnesota guidelines are much closer to the prescriptive model (Frase, 1993; Tonry, 1987). As the MSGC noted, "In developing guidelines we have been informed by, but not bound to, current practice" (Minnesota Sentencing Guidelines Commission, 1980, p. 30).

A related question is whether the guidelines should be sensitive to prison capacity. Most US guidelines are sensitive to the prison population, and therefore have the potential to prevent serious overcrowding. Chapter 23 of the Minnesota Laws 1978, ch. 244 et sec. directs the Commission to "take into substantial consideration current sentencing and release practices and correctional resources, including but not limited to the capacities of local and state correctional facilities." The Minnesota Commission noted that it interpreted its enabling

legislation, “to mean that the guidelines should produce prison populations which do not exceed the current capacity of state correctional institutions” (1980, p. 2). US academics share the opinion firmly expressed by Frase that “an assumption of limited prison capacity is an essential component of guidelines development” (1991, p. 734).

Unlike Minnesota, the English Council is not required to consider the size of the prison population. For this reason, the English guidelines are founded upon judicial practice prevailing at the time and designed simply to promote a more consistent approach to current sentencing. This approach has been criticised by a number of UK scholars, who have argued that the Council should address the high (relative to other western European nations) prison population in England and Wales by amending its guidelines (e.g., Allen, 2016).

Even if the Council wished to change sentencing trends, in contrast to Minnesota, there are practical impediments to reducing the use of custody, or the size of the prison estate. The principled objection is that the Council has no legal authority to engineer changes in the volume or duration of custodial sentences. The practical objection is that it is hard to see how the Council could go about the task, even if it had the authority. The Minnesota Commission can lower the volume of prison admissions very expeditiously by reducing the grid sentence ranges. For example, it could reduce sentence lengths by 10% across the entire grid. This step would result in a reduction in the sentence lengths, (and ultimately a smaller prison population) without disturbing ordinal proportionality – all offences would be affected to the same proportionate degree. The English Council has sought to make a small alteration to sentencing levels in one case – drug mules. It considered that current levels (prior to the guideline being issued) were too high and ought to be reduced (Sentencing Council, 2012, p. 6). This was expressly consulted upon and endorsed by consultees. The change was introduced to correct a tendency towards disproportionate sentencing, rather than to achieve a reduction in the volume of admissions to custody.

The US Sentencing Commissions (including the federal Commission) can achieve expeditious reductions in the prison population (see Adelman, 2013). However, if the English Council wished, for example, to promote a greater use of noncustodial sentences for, say, drug offenders, this would require launching a professional and public consultation and then ultimately issuing an amended guideline. The typical duration for creation, consultation and release of a guideline is approximately 12 months. Moreover, if sentences for drug offenders changed it would also be necessary to review all other offence specific guidelines to ensure that proportionality between offences was not undermined. This limitation is one of the drawbacks of an offence-specific approach to issuing guidelines and represents one of the advantages of the US approach, where all offences are assigned to a single grid, or a small number of grids.

Consistency of Outcome versus Consistency of Approach

The US and English guidelines have adopted different conceptions of consistency. Should a guidelines scheme prioritise, or exclusively pursue, consistency of approach – a conception of consistency concerned with process over substance whereby the desire is to influence sentencers' behaviour so as to achieve greater likeness between the methodological approach to the discretionary sentencing decision – or consistency of outcome – a conception of consistency more concerned with substance so as to achieve a greater likeness between the sentences imposed in similar cases. An increase in the consistency of sentencing outcomes as an aim of a guideline scheme places more emphasis upon the sentence imposed for the offence; it appeals more obviously to our innate sense of justice and may tend towards a more prescriptive guideline scheme as outcomes are more measurable than adherence to process. By contrast, a guideline scheme which aims to achieve more consistency in the approach to the determination of sentence favours a more nuanced sense of justice grounded in procedural fairness. It would however, be wrong to view the two conceptions as antithetical; on the

contrary, they will frequently go hand-in-hand: a more consistent process is, *a priori*, more likely to lead to a more consistent outcome, than an unregulated process, and a restriction to bring about more consistent outcomes will likely be enforced by the same methodology across different cases.

Whether a preference for consistency of outcome ought to result in more prescriptive guidelines with narrower ranges and greater limitation on departures, or looser guidelines requiring more subjective assessment on the part of the sentencer is up for debate. It is clear, however, that whichever way one construes the concept of consistency, a desired result – direct or latent – will be more consistent outcomes.

Minnesota guidelines (and indeed all US presumptive schemes) emerged in response to recognition that disparity was the inevitable consequence of highly discretionary sentencing. Judge Frankel's seminal volume inspired the creation of the Minnesota Sentencing Guidelines Commission (see Frase, 2005). Disparity was the problem, guidelines the remedy. In light of this, it is unsurprising that the Minnesota guidelines assumed the form of a relatively restrictive grid which would ensure predictable and consistent outcomes. More recently, a number of authors have questioned this emphasis on reducing disparities, linking such a goal to the high use of imprisonment. For example, Berkow (2012) wrote that "the [guidelines] movement's reaction against the prior regime often placed too much emphasis on uniformity and not enough on individualization" (p. 1620) while Stith (2000) and others have drawn a similar conclusion about the federal guidelines.

The grid-based approach has also been criticised by European scholars such as Wandall (2004) who concluded that the Danish, more discretionary model was "preferable" (p. 42). There was no such recent trigger for the English guidelines, with predictable consequences for their structure. Although research in this country also documented a lack of consistency, there was far less pressure to achieve greater uniformity. To date, no study has

directly compared levels of disparity in the two jurisdictions. Empirical research on sentencing variation in England and Wales suggests that disparity may be less striking in this jurisdiction (e.g., Pina-Sanchez & Grech, 2018). This more relaxed approach to the problem of disparity is reflected in the more flexible format of the English guidelines.

Development of Guidelines: Concurrent or Consecutive?

Unlike the US Commissions, the English Council issues its guidelines incrementally, offence by offence. The incremental approach confers benefits but also creates challenges. The more protracted approach is a consequence of the decision to issue offence-specific guidelines. Guidelines are more easily and expeditiously developed if all offences are assigned to a single grid. Constructing a separate guideline with different sentence recommendations, starting point sentences and mitigating and aggravating factors takes much longer. The Council could well have taken several years to develop all of its offence-specific guidelines in preparation for a mass release. Instead, it chose to identify key offences and to issue guidelines one by one. By 2020, a full decade after its creation, the Council will have issued guidelines for all principal offence categories. In short, the English guidelines have taken much longer than those in Minnesota to cover all offences, though this is primarily due to the consultation and drafting process. Other Councils have taken even longer. The Scottish Sentencing Council began in 2016 and is also issuing its guidelines sequentially. In 2018, the Scottish Council had completed a consultation exercise on its first guideline but had not yet issued a guideline.

Structure of English Guidelines: Offence Specific vs a Single Grid

The principal structural difference between the regimes in Minnesota and England/Wales is that the Minnesota guidelines use 3 grids to accommodate all offenses, whereas the English guidelines provide guidance in separate (and individualised) guidelines

for different categories of offending. Despite some structural variation reflecting the nature of the offence, all the offence-specific guidelines contain a number of common elements. Broadly speaking, they require courts to follow a step-by-step methodology when determining sentence.

The first two steps of all the English guidelines are the most important as they begin the process of providing guidance and have the greatest impact upon the eventual sentence. The Minnesota guidelines reflect a modified just deserts rationale, although the enabling statute articulates no single rationale (see Minnesota Sentencing Guidelines Commission, 2018). The English guidelines incorporate two primary dimensions, harm and culpability, the principal components of a proportional sentence. It is noteworthy that the guidelines developed in other jurisdictions have adopted the harm-culpability combination rather than the US crime seriousness-criminal history alternative. These include South Korea (Park, 2010), New Zealand (Young, 2013) and China (Chen, 2010; Roberts & Wei, 2016).

Guideline Example: Street Robbery

The street robbery sentencing guideline contains nine separate steps for courts to follow (Appendix A contains an extract from the guideline). At Step 1, in assessing the seriousness of the offence, the court must assign the offender to one of three levels of culpability (high, medium and lesser) and the case to one of three levels of harm (1, 2 and 3). Consistency at this crucial first step of the guidelines methodology is encouraged by requiring all courts to apply a common set of factors to determine which category of harm and culpability is appropriate. The list of factors at Step 1 which determine category sentence range is exclusive; courts may consider other factors only later, at Step 2. The exclusive nature of this list is one of the most restrictive elements of the English guidelines and ensures

that the primary determinant of the sentence – the initial assessment of culpability and harm – is approached in as consistent a way as possible.

Step 2 uses these two dimensions to create a matrix which contains starting point sentences and sentence ranges. For example, if the court assigns the case to lesser culpability and intermediate harm, the guideline provides a starting point sentence of two years and range of 1-4 years. Step 2 also provides a non-exhaustive list of mitigating and aggravating factors to be considered by the court (along with any other factors proposed by advocates) in order to determine a provisional sentence within the range. Thereafter, the court works through a series of additional steps, including awarding credit for any assistance to the police or prosecution or for entering a guilty plea. These two considerations are external to considerations of harm or culpability and for this reason they are considered at a separate step.

The guideline thus creates categories of factors: those of primary relevance (located at Step 1); those of more limited relevance (Step 2) and those relevant to the sentencing decision but unrelated to harm or culpability (state assistance; plea, found at Steps 3 and 4). The guidelines note that the Step One factors "comprise the principal factual elements of the offence" (see Sentencing Council, 2011, p. 4). In all, this guideline contains nine steps, with steps 5 to 9 concerning other relevant considerations, such as totality, the assessment of dangerousness and whether an offender should be subject to a sentence for public protection and a reduction for time spent on remand.

Box 3.1 summarises the operation of the robbery sentencing guideline, using a specific case.

Box 3. 1 Example of Applying the Street Robbery Guideline

An offender aged 30, wearing a hooded sweater and a scarf covering half of his face, approaches a lone male walking in a poorly lit alley way at night in darkness. He stops the man and reveals a knife stored in the waist band of his trousers. He instructs the man to hand over his mobile telephone and wallet. He then leaves the scene. The victim was scared but otherwise unscathed. The offender has no previous convictions and has shown some remorse and insight into his offending.

In applying the guideline, the court must first assess culpability. The offence appears to fit into Category B, Medium Culpability, by reference to 'Production of a weapon other than a bladed article or firearm or imitation firearm to threaten violence' or 'Threat of violence by any weapon (but which is not produced)'. The court must then assess Harm. It appears to fit into Category 3, 'No/minimal physical or psychological harm caused to the victim'. That produces a category range of 1-4 years' custody and a starting point of 2 years' custody. The court must then assess the aggravating and mitigating factors. There appear to be three aggravating factors present: the timing of the offence (at night after dark), the location of the offence (a poorly lit alley way) and the offender has attempted to conceal their identity (by the use of a hooded sweater and face-covering). This warrants an increase from the starting point, perhaps in the region of 6-9 months. There appears to be on mitigating factor present: good character. That warrants a reduction in sentence, perhaps in the region of 6 months. That produces a sentence in the region of 27-30 months. The court must then consider steps 3-9, dealing with, inter alia, any reduction for a guilty plea and assistance to the prosecution.

The advent of the English guideline has significantly affected sentencing practices at the trial court level. As a direct result of the increased certainty introduced by the guidelines,

advocates are able to provide more detailed and concrete advice to defendants prior to entering a plea. At sentencing hearings, submissions now revolve around the interpretation of the guideline rather than discussion of appellate decisions which are said to inform the approach to sentence. There are probably no fewer appeals against sentence as the guidelines have merely changed the nature of the appeal (House of Commons Justice Select Committee, 2018).

Greater guidance, more onerous requirements

Compared to the Minnesota grid, the English guidelines provide guidance on a wider range of issues. This can be demonstrated by considering a typical case of robbery in which the offender has no prior convictions and has pleaded guilty to the offense. Under the Minnesota guidelines a court must impose a sentence of imprisonment between 41 and 57 months or find "substantial and compelling circumstances" to justify a downward or upward departure. Judicial decision-making therefore focuses on whether such circumstances exist, and most of the time the sentence falls within the recommended range.

By contrast, an English court would first apply the robbery guideline, proceeding through the nine steps enumerated above. At Step 1 the court considers an exhaustive list of factors needed to assign the case to high, medium or lesser culpability, and one of three levels of harm. This determination produces a starting point sentence as a point of departure and a sentence range (at Step 2). The judge then takes all other relevant mitigating and aggravating factors into account to arrive at a provisional sentence. This sentence would then be modified to reflect other considerations such as plea (found in steps 3 through 9 of the guideline).

The offence-specific robbery guideline is not the only guidance that the court will have to follow. Since the guideline sentence ranges encompass both custodial and

noncustodial dispositions, the court will need to consult the separate guideline on the use of the principal sanctions.

If the defendant has pleaded guilty, the court will also have to apply the guideline regulating plea-based sentence reductions. Unlike other common law jurisdictions, including the US, courts follow a clear guideline when determining the level of reduction that a defendant should receive if he or she enters a guilty plea. The level of reduction in all other countries is left to the individual court to determine. However, in England and Wales there is a guideline which contains clear recommendations. If the defendant enters his or her plea at the first opportunity to do so, the savings in terms of case preparation and court time are greatest. Victims and witnesses are best off if they know early in the proceedings that their testimony will not be needed (because the defendant has decided to plead guilty). For this reason, the guideline recommends the greatest reduction – one third off the sentence – to defendants who enter their plea early. If they choose to wait, and perhaps plead guilty only on the day of trial, the savings are minimal and accordingly the recommended reduction is modest – only 10% off the sentence (See Appendix B for an extract from the guideline). Having a guideline of this kind makes the consequences of pleading guilty far more predictable, and attorneys are better able to advise their clients about the anticipated benefits of entering a plea. Research has shown that the courts in England generally follow the recommendations of the guideline (Roberts and Bradford, 2015).

Finally, there is an additional relevant guideline addressing factors affecting seriousness.[1] As with other Commissions and Councils,[2] the English Council also publishes a

[1] All the English Council's guidelines are available on the Council's website (see https://www.sentencingcouncil.org.uk/).

[2] Particularly the Sentencing Councils in Australia (see for example https://www.sentencingcouncil.vic.gov.au/)

range of statistical and analytic information relevant to sentencing in general and with respect to specific offenses. It is unclear how often this material is accessed by sentencers or whether it affects judicial decision-making.

The custody threshold is another example of the deeper judicial processing required by the English guidelines. Under the Minnesota guidelines the offender can know in advance of sentencing whether he is in the custody zone of the grid, based upon his offense of conviction and criminal history score. The offender can arrive at the sentencing hearing knowing their fate is largely determined by the decisions of the Minnesota Commission. The dispositional departure statistics suggest that in most cases, this *a priori* classification will accurately predict whether he is incarcerated. In 2016, mitigated dispositional departures occurred in approximately one third of cases (MSGC, 2017, p. 27) and aggravated dispositional departures were extremely rare. As the Commission notes in a recent data release, the aggravated dispositional departure rate is very low (MSGC, 2017, p. 25). Judicial reflection is required only to determine whether there are substantial and compelling circumstances to justify overturning the presumptive disposition.

In applying the English guideline, courts must consider whether an offence ought to be mitigated or aggravated to the extent that the sentence ought to cross the custody threshold in one direction or another. It is noteworthy that the statutory duty to "follow" the English guidelines requires only that the sentencer imposes a sentence between the bottom of the lowest category range and the top of the highest category range. Using the street robbery example relied upon above, this would require a sentence between a high-level community penalty (a sentence lasting up to three years served in the community consisting of requirements which must be complied with) to an immediate custodial sentence of 12 years.

The English guidelines are therefore more demanding of judges, less prescriptive, and less restrictive than their Minnesota equivalent. Does the former lead to a more reasoned

sentencing decision? It is unclear what kind of critical test could be devised to establish the superiority of one model. Perhaps the best we can say is that sentencing involves a more in-depth judicial processing of all relevant variables, albeit at the cost of greater variability in outcomes. The sentence ranges for many offences encompass custodial and noncustodial options and many offence ranges span the custody threshold. For example, the category 3 sentence range for unlawful wounding (maximum penalty of 5 years) runs from a low-level community order to 51 weeks custody.[3] A court must therefore grapple with the question of whether the custodial threshold has been passed in a high volume of cases. In resolving this issue, the court will be assisted by submissions from the advocates; compared to offenders in Minnesota, advocates representing offenders sentenced under the English guidelines have more to play for in terms of mitigating the effects of prior offending.

Compliance Requirement

A key question about any guidelines scheme is the degree of constraint that is imposed upon courts. In Minnesota, and several other US states, the guidelines are presumptively binding. This means that the defendant is presumed to receive a sentence within the sentence length range recommended by the grid (if the offense falls with the custodial zone). A court may impose a sentence above or below the range, but in order to do so it must find "substantial and compelling reasons" to justify this "departure" sentence (see MSGC, 2018). This requirement ensures that courts apply the guideline recommendations in most cases and allows attorneys and defendants to have a clear idea of the sentence that will likely be imposed. Some states operate guidelines that are purely advisory in nature; the court is not compelled to follow any specific recommendation. In England, courts are also required

[3] https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf, p. 8.

by law to "follow any relevant guideline" at sentencing. But comparisons of the two sets of guidelines (Minnesota; England and Wales) makes it clear that the English guidelines allow more discretion within the guideline. In addition, as with Minnesota, a court in England can impose a different sentence if it finds that it would be "contrary to the interests of justice" to follow the guideline.

Research on the Impact of the English Guidelines

Since the English guidelines have been existence for a much shorter period than those found in Minnesota, Pennsylvania or other States, there is far less research into their effectiveness. Nevertheless, a number of studies have demonstrated positive impacts in terms of consistency. Academic analyses published to date suggest a positive impact on consistency across courts and the application of the offence-specific guidelines. Pina-Sanchez and Linacre (2013) demonstrated that for a number of high-volume offences, the sentencing factors provided in the guideline were being applied in a consistent way across courts. Pina-Sanchez (2015) evaluated the impact of the new assault guideline on variability in sentencing, conducting a pre-post analysis using the Council's dataset and concluded that "consistency improved in all the offences studied after the new guideline came into force" (p. 87). Irwin-Rogers and Perry (2015) focused on sentencing for domestic burglary and found that "the courts were sentencing in a manner that was consistent with the domestic burglary guideline" (p. 210). These studies (see also essays in Roberts, 2015), while limited in scope, suggest the English guidelines have had a positive effect on promoting consistency. More research is clearly needed, however.

The introduction of guidelines may have contributed to improving public confidence in sentencing. One empirical exploration of public opinion suggested that greater public awareness of the guidelines may promote public confidence in sentencing and possibly

mitigate criticism of sentencers. Members of the public in the UK were strongly supportive of the concept of guidelines. Over 90% of a representative sample of the public endorsed the view that guidelines were definitely or probably a good idea (Roberts et al. 2012). In addition, respondents in the same survey who had been informed of the guidelines were less likely to rate specific sentences as being too lenient than were people who reacted to the same cases without having been made aware of the guidelines (Roberts et al. 2012).

III. Guidelines in Other Jurisdictions

Progress towards developing sentencing guidelines in other counties has been slower. However, as of 2018, a number of other countries have created guidelines for courts at sentencing. The Sentencing Commission for Scotland recommended creation of an Advisory Panel on Sentencing to assist with the introduction of sentencing guidelines, and a Scottish Sentencing Council now exists (see Hutton & Tata, 2010). The Scottish Council has yet to issue its first guideline, but it is likely to follow the offence-specific rather than the grid-based approach to guidance. South Korea launched a guidelines scheme over a decade ago (see Park, 2009). The Korean guidelines are issued by the Supreme Court. Although they are modelled loosely on the English format and are offence-specific in nature (Sentencing Commission of the Supreme Court of Korea, 2014), the Korean guidelines are less detailed and allow greater discretion for courts. For most offences they prescribe a standard sentencing range, applicable in most cases, as well as a mitigated and an aggravated sentence range. An example illustrates. The standard sentencing range for a robbery conviction is from two to four years, while the mitigated range is 18 months to 3 years and the aggravated range is three years to six years (Supreme Court of Korea, 2014, p. 76). Unlike the English guidelines, the Korean guidelines do not contain a series of steps to follow.

None of the existing foreign guidelines have been subject to systematic research, so no conclusions may be drawn about their relative effectiveness in reducing disparity of outcome or achieving other goals usually set for guideline structures.

Aside from the countries that have implemented formal sentencing guidelines, a number of others have expressed an intention to do so or have created prototypes. The Law Commission of New Zealand developed a comprehensive and principled set of guidelines but the legislature in that jurisdiction has yet to enact the necessary legislation to permit implementation (see Young & Browning, 2008). The New Zealand scheme involved a comprehensive guideline for each offence; the guideline contained categories of crime seriousness, each with an associated range of sentence. A sentencing court would match the case appearing for sentencing to the guideline category using information in the guideline. The system was more flexible than the US based schemes. The New Zealand guidelines also included "generic" advice – guidelines which apply to more than a single offence. For example, the guidelines provide guidance on considering the impact of the crime upon the victim and also the way in which courts should approach the sentencing of multiple crimes on the same occasion. This adopts a similar approach to that taken by the English Council, which has issued a number of overarching guidelines on topics such as totality of sentence, assessing seriousness, domestic abuse as a factor in other offences, and the imposition of custodial and community sentences. In 2017, the government of the Australian state of Victoria announced it would introduce legislation to establish a sentencing guidelines council. This body would be granted the powers to issue sentencing guidelines for courts in that state (Sentencing Advisory Council, 2018).

Other jurisdictions – including Western Australia and Northern Ireland -- have explored the use of guidelines for sentencers, but so far have not actually adopted a formal scheme. Following recommendations from a Sentencing Working Group in 2010, Northern

Ireland held a consultation on the possible options for a form of sentencing guidelines (Criminal Policy Unit, 2010), but unlike Scotland, no Council has been created.

Several jurisdictions (including New South Wales and the state of Victoria in Australia) have created advisory bodies which disseminate information about sentencing but which do not issue guidelines (see Freiberg, this volume; and more generally, Freiberg & Gelb, 2008). Finally, other countries – Canada, South Africa, Ireland, and India for example – have resisted all appeals for greater structure at sentencing (e.g., O'Malley, Terblanche, 2003; Roberts, Azmeh &Tripathi, 2011). Although scholars and practitioners in those countries have long advocated creation of some kind of guidelines scheme, legislatures in these countries have so far rejected calls to introduce sentencing guidelines. The consequence is that judges in these jurisdictions continue to impose sentence much as they have for decades, with the only guidance coming from the appellate courts. This approach to sentencing may be termed "judicial self-regulation" (see Ashworth, 2009). The limitation of this approach is that higher courts hear only a small proportion of cases on appeal, which means that the opportunities for guidance are limited. When a court of appeal does hear a sentence appeal it does not always give general guidance, other than by way of general comment as to the level of sentence imposed when dismissing or allowing the appeal.

IV. Conclusions

What have we learned about the experience with guidelines outside the United States? A number of lessons can be drawn. First, the Scandinavian model suggests that numerical guidelines are not necessarily the only model to follow. It is possible to offer guidance to courts without prescribing specific sentencing ranges in terms of numbers of months or years. Whether the "guidance by words" approach is sufficient to achieve adequate levels of consistency is debatable, however. Most sentencing scholars appear to agree that some form

of guidelines is necessary in order to achieve an acceptable degree of consistency in sentencing.

Second, the English guidelines demonstrate that there is a middle ground lying between the relatively tight sentencing guidelines grids found across the United States and the looser systems of "guidance by words" found in countries like Sweden and Finland (see von Hirsch et al., 2009, Chapter 6). The English guidelines offer a system which is numerical (in the sense that it contains specific sentence recommendations), prescriptive, and yet quite flexible in application. Both systems (the US and the English) represent an improvement upon the highly discretionary sentencing arrangements found in countries like Canada, South Africa, and India.

Third, judicial acceptance of greater structure (and reduced discretion) is more likely when the judiciary are heavily implicated in the development and evolution of the guidelines. The statutory bodies responsible for the guidelines in England and Wales have generally been dominated by the judiciary. The Canadian Sentencing Commission proposals failed, in part because judges perceived the guideline scheme to be a bureaucratic scheme created by academics. Similarly, in the Australian states, judicial resistance to the introduction of guidelines has been an obstacle to adoption of a guidelines scheme.

Fourth, there may be an advantage to the gradual evolution of the guidelines. The English guidelines have been criticized for being slow to cover all offenses. The English guidelines for specific offences have been issued serially over the years rather than in one step as was the case in the United States. In retrospect, this potential weakness of the guidelines may paradoxically have ensured their survival and development. More structured sentencing, by way of guidance, has evolved very slowly, beginning with the first guideline judgments from the Court of Appeal (Criminal Division) in the mid-1970s (Pattenden, 1996).

These increased in frequency over the following decades and eventually led to the creation of the Sentencing Advisory Panel in 1998, which provided guidance to the Court of Appeal (Criminal Division). From these modest origins in 1999 (see Ashworth & Wasik, 2010) came a true guidelines model in 2003 providing increased structure. This incremental development allowed the creation of the much more comprehensive and detailed guidelines which have been issued since 2011 (Ashworth & Roberts, 2016). Judges who are traditionally resistant to any attempts to curb their discretion may be more likely to accept guidance when it comes in this format.

The ultimate question, however, is the following: Are the guidelines proposed or implemented in other countries better or worse, more or less effective than those developed across the United States? Does the experience in other countries carry any lessons for US guideline commissions? Unfortunately, the absence of truly comparative research makes it impossible to resolve the issue one way or another. In addition, the non-US based guidelines including those in operating in England have yet to be comprehensively evaluated. At the very least, however, the experience in that country demonstrates that is possible to introduce detailed and prescriptive sentencing guidelines even in a common law jurisdiction which, in the 1980s and 1990s, was committed to the traditional model of privileging judicial discretion (see Ashworth, 2015).

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Appendix A:

Example of Offence-Specific Sentencing Guideline Outside the US:

Sentencing Robbery in England and Wales

STEP ONE
Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:	
A – High culpability	• Use of a weapon to inflict violence • Production of a bladed article or firearm or imitation firearm to threaten violence • Use of very significant force in the commission of the offence • Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity
B – Medium culpability	• Production of a weapon other than a bladed article or firearm or imitation firearm to threaten violence • Threat of violence by any weapon (but which is not produced) • Other cases where characteristics for categories A or C are not present
C – Lesser culpability	• Involved through coercion, intimidation or exploitation • Threat or use of minimal force • Mental disability or learning disability where linked to the commission of the offence

Harm The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.	
Category 1	• Serious physical and/or psychological harm caused to the victim • Serious detrimental effect on the business
Category 2	• Other cases where characteristics for categories 1 or 3 are not present
Category 3	• No/minimal physical or psychological harm caused to the victim • No/minimal detrimental effect on the business

STEP TWO
Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Consecutive sentences for multiple offences may be appropriate – please refer to the *Offences Taken into Consideration and Totality* guideline.

	Culpability		
Harm	**A**	**B**	**C**
Category 1	**Starting point** 8 years' custody	**Starting point** 5 years' custody	**Starting point** 4 years' custody
	Category range 7 – 12 years' custody	**Category range** 4 – 8 years' custody	**Category range** 3 – 6 years' custody
Category 2	**Starting point** 5 years' custody	**Starting point** 4 years' custody	**Starting point** 2 years' custody
	Category range 4 – 8 years' custody	**Category range** 3 – 6 years' custody	**Category range** 1 – 4 years' custody
Category 3	**Starting point** 4 years' custody	**Starting point** 2 years' custody	**Starting point** 1 year's custody
	Category range 3 – 6 years' custody	**Category range** 1 – 4 years' custody	**Category range** High level community order – 3 years' custody

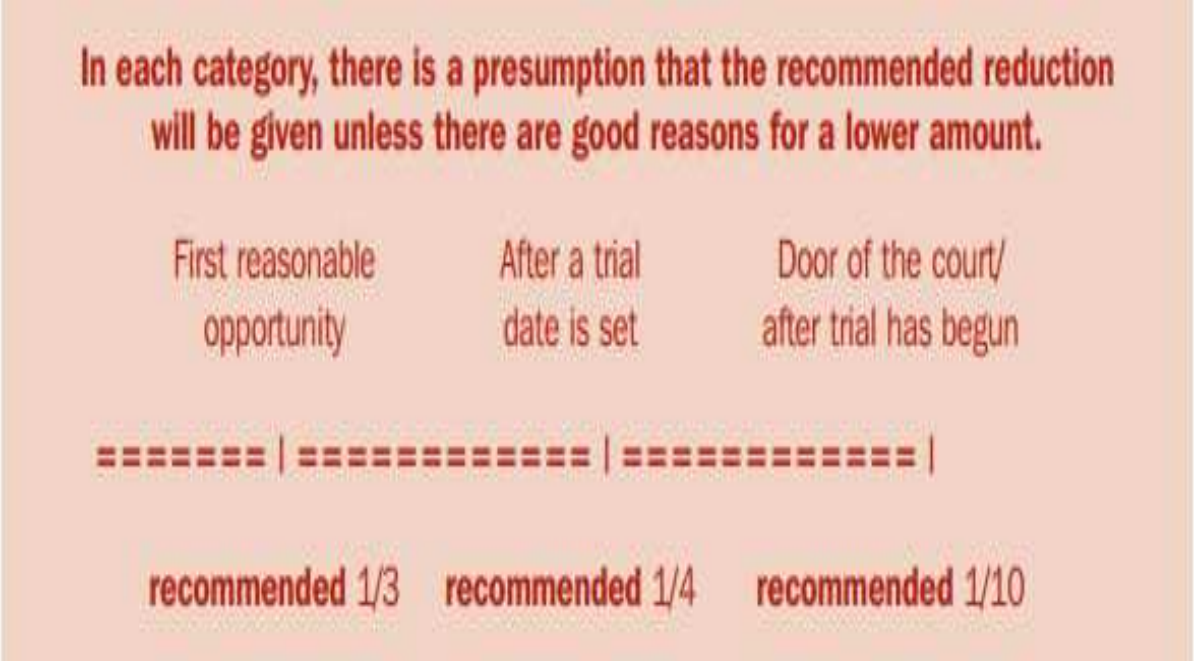
The table on the next page contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Source: Sentencing Council of England and Wales

Appendix B

Example of a 'Generic' Sentencing Guideline, applicable to all crimes

(Extract from Plea-based Sentence Reduction Guideline, England and Wales)



Source: Sentencing Council of England and Wales