

1

The Origins and Nature of the Sentencing Guidelines in England and Wales

Andrew Ashworth and Julian V Roberts

For most of the twentieth century, courts in England and Wales enjoyed wide discretion when determining sentence, restricted only by broad statutory limits—a small number of minimum sentences, high maximum penalties—and guided only by appellate review.¹ Indeed, these arrangements characterized sentencing in all other common law jurisdictions except the United States. In recent years, many legislatures across the common law world have attempted to structure judicial discretion at sentencing—or have expressed a desire to do so. These developments reflect recognition that greater consistency at sentencing is desirable or even necessary—both in order to ensure fairness of outcome and greater accuracy in prison population projections. The first of these objectives—reducing unwarranted disparity—derives its force from the research on sentencing practices which has been accumulating for over a century now.² However, while consistency of approach remains an important goal, the development of sentencing guidelines is also motivated by the need to achieve greater accuracy in projections of the number of prisoners.³

Sentencing guidelines offer a means to achieve the objectives of greater consistency and hence predictability. A diverse collection of jurisdictions—including

¹ A formal system of appellate review began with the creation of the Court of Criminal Appeal in 1907, on which see L Radzinowicz and R Hood, *A History of English Criminal Law: Volume 5, The Emergence of Penal Policy* (1985) pp 758–70. Nineteenth-century sentencing law was characterized by a mixture of mandatory sentences, minimum sentences, and discretionary common law sentencing, on which see DA Thomas, *The Penal Equation* (1978).

² Early studies into sentencing disparity include F Gaudet, G Harris, and C St John, ‘Individual Differences in the Sentencing Tendencies of Judges’ (1932) *International Journal of Criminal Law, Criminology and Political Science*, 23: 811–18; see also F Gaudet, ‘Individual Differences in the Sentencing Tendencies of Judges’ (1938) *Archives of Psychology*, no 230. Empirical research has since been conducted in all jurisdictions. Until new data arrive from the Sentencing Council’s Crown Court sentencing survey, the most recent research focusing on sentencing variation in England and Wales can be found in Mason et al (2007). In addition, limited information about sentencing variation across local justice areas may be found in the annual sentencing statistics published by the Ministry of Justice.

³ In England and Wales the report by Lord Carter, *Securing the Future: Proposals for the efficient and sustainable use of custody in England and Wales* (2007) is perhaps the most significant example of this desire to more accurately project the size and hence costs of the prison estate.

2 *The Origins and Nature of the Sentencing Guidelines in England and Wales*

Belgium, New Zealand, Western Australia, Israel, South Korea, and South Africa⁴—have floated proposals for guidelines, yet only the United States and England and Wales have to date adopted a formal guideline scheme which prescribes sentence ranges for specific crimes as well as guidance on generic issues such as sentencing offenders convicted of multiple offences. Judicial opposition is often the reason why reforms restricting discretion have failed to take hold in many other countries. Some members of the judiciary fail to see merit in a scheme which creates presumptively binding sentence ranges; appellate review appears to offer all that is necessary in the way of guidance for trial courts.

The sentencing guidelines found across the United States have for many decades represented the only formal schemes in operation. The most well-known and well-documented guidelines structure is the two dimensional sentencing grid found in several states (including Minnesota and Oregon) and also at the federal level. Crime seriousness and criminal history constitute the two dimensions and each cell of the grid contains a range of sentence length.⁵ In states where the guidelines are presumptively binding, courts must sentence within the guidelines ranges, or find ‘substantial and compelling’ reasons to depart therefrom.⁶ Sentencing guidelines have been evolving across the US for 40 years now. In light of the length of time they have been in existence, it is not surprising that almost all the scholarship on guidelines has focused on the US schemes.

Although the US guideline systems vary in their approaches, some being significantly more restraining than others,⁷ there is a perception around the world that sentence ranges are too narrow and the compliance requirement too restrictive; perhaps for this reason the US schemes have proven unpopular in other countries. In 2008, the Sentencing Commission Working Group (SCWG) headed by Lord Justice Gage evaluated the utility of Minnesota-style grids for England and Wales. Ultimately, the SCWG concluded that such schemes held little attraction for sentencing in England, being ‘far too restrictive of judicial discretion to be acceptable’.⁸ Instead, the SCWG recommended a series of reforms to the existing guidelines arrangements, including creation of the Sentencing Council (see below).

⁴ Of these countries only New Zealand has developed a complete guidelines scheme, although it remains to be implemented: see W Young and C Browning, ‘New Zealand’s Sentencing Council’ [2008] Crim LR 287–98. South Korea created a sentencing commission in 2011 which is now devising a system of guidance: see H Park, ‘The Basic Features of the First Korean Sentencing Guidelines’ (2010) *Federal Sentencing Reporter*, 22: 262–71. In all other common law jurisdictions such as India and Canada, calls for more structured sentencing have fallen on deaf parliamentary ears.

⁵ See R Frase, ‘Sentencing Guidelines in Minnesota, 1978–2003’ in M Tonry (ed) *Crime and Justice* (2005); R Frase, ‘Sentencing Policy under the Minnesota Sentencing Guidelines’ in A von Hirsch, A Ashworth, and JV Roberts (eds) *Principled Sentencing: Readings on Theory and Policy* (2009).

⁶ Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary*. Revised, August 2011.

⁷ See Reitz, this volume.

⁸ Sentencing Commission Working Group, *Sentencing Guidelines in England and Wales: An Evolutionary Approach* (2008) p 13. The Canadian Sentencing Commission also rejected the grid-based approach when it conducted the same comparative exercise in devising sentencing guidelines for Canada in 1986: see Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987).

A. Origins of the English Sentencing Guideline System

There was much debate about the need for a firmer sentencing structure in the second half of the nineteenth century, with some people pressing for codification of the criminal law as a first step,⁹ others for a Royal Commission to establish sentence levels.¹⁰ Those initiatives foundered, evidence of sentencing disparities accumulated, and the only significant step was the Alverstone Memorandum of 1901. Lord Alverstone, the Lord Chief Justice, and a committee of Queen's Bench judges met and drew up a 'Memorandum of Normal Punishments', establishing sentence levels for various permutations of six categories of offence.¹¹

That memorandum was never updated, and the next significant step in the development of sentencing guidance came three-quarters of a century later, in the form of judicial experimentation with guideline judgments. The pioneer was Lawton LJ, who in two Court of Appeal judgments on sexual offences in the mid-1970s decided to move beyond the particular offence and to propose sentence levels for different varieties of the offence.¹² This form of guidance was taken over by the then Lord Chief Justice, Lord Lane CJ, who began to deliver guideline judgments as a way of fostering consistency, the first two dealing with sentencing for drug offences and causing death by dangerous driving.¹³ This development established consistency as a goal, but the Court of Appeal was limited in what it could achieve in this respect: the Lord Chief Justice had no staff to assist him in preparing the ground for such judgments, and so during the 1980s and 1990s guideline judgments were relatively infrequent.

The first call for the creation of a Sentencing Council in England came in 1982,¹⁴ and the argument was based on recognition that generating sentencing guidelines is a public policy function. It was contended not only that the introduction of a sentencing guideline machinery would be an aid to consistency across a wider range of offences than the Court of Appeal had the resources or expertise to deal with, but also that it should incorporate a far wider range of perspectives on sentencing. The proposal recognized that judges have considerable knowledge about sentencing, but argued that others also have important experience to bring to the process, notably prison governors, probation officers, police, prosecutors and defence lawyers, as well as academics and sentencers from the lower courts.

Scholarly interest in sentencing guidelines began to develop, and a conference at the University of Manchester in 1985, involving academics from both sides of the Atlantic, was a catalyst.¹⁵ The proposal for a Sentencing Council to develop

⁹ Radzinowicz and Hood, above note 1, ch 22.

¹⁰ Radzinowicz and Hood, above note 1, p 754.

¹¹ Radzinowicz and Hood, above note 1, pp 755–58.

¹² *R v Willis* (1974) 60 Cr App R 146; *R v Taylor, Roberts and Simons* (1977) 64 Cr App R 182.

¹³ These were the first two guideline judgments given by a Lord Chief Justice: see *R v Aramah* (1982) 4 Cr App R (S) 407, and *R v Boswell* (1984) 6 Cr App R (S) 257.

¹⁴ A Ashworth, 'Reducing the Prison Population in the 1980s: The Need for Sentencing Reform', in *A Prison System for the Eighties and Beyond* (1983).

¹⁵ K Pease and M Wasik (eds) *Sentencing Reform: Guidance or Guidelines?* (1987).

guidelines also remained alive in public discussion: a Conservative think tank published a blueprint for a Sentencing Council in 1989,¹⁶ and in the same year JUSTICE produced the report of a committee on sentencing which recommended the appointment of a Sentencing Commission.¹⁷

Attempts were made to persuade the government of the time to include the proposal in the draft legislation that became the Criminal Justice Act 1991, but the government thought that (given its new framework for sentencing) the existing machinery was sufficient. Thus it expressed the hope ‘that the Court of Appeal will give further guidance, building on the legislative framework’, and concluded that there was ‘no need for a Sentencing Council to develop sentencing policies or guidance’.¹⁸ The Labour opposition argued in favour of the creation of a Sentencing Council,¹⁹ but the government spokesmen regarded this as unnecessary, adding that England and Wales might end up like Minnesota, with a grid which has 43 offences and 6 criminal history categories.²⁰

The arguments did not go away, however. The ‘legislative framework’ which the 1991 Act was intended to establish drifted into oblivion, and it was not long before the Penal Affairs Consortium—an alliance of penal reform groups—issued its paper on ‘The Case for a Sentencing Council’.²¹ The Labour Party, in opposition, then argued for greater use of sentencing guidelines, but in its ‘shadow’ White Paper published in 1996 it proposed that the Court of Appeal be explicitly given a proactive role in the creation of guidelines.²² The very next year the Labour Party came into government, and the Home Secretary, Jack Straw, wasted no time in putting forward proposals for sentencing guidelines. However, those proposals were linked to the creation of a Sentencing Council, as advocated in the paper from the Penal Affairs Consortium.²³

Without more ado—no consultation paper, for instance—two sections in the wide-ranging Crime and Disorder Act 1998 created the Sentencing Advisory Panel to provide advice to the Court of Appeal.²⁴ The arrangement whereby the Panel provided ‘advice’ (ie draft guidelines and supporting text) to the Court of Appeal, which then had the power (but not the duty) to implement the draft guidelines, was examined by the Home Office Sentencing Review in 2001. This review was critical of the involvement of the Court of Appeal, not least because it had to wait until a suitable appeal case arose before it could attach new guidelines to its

¹⁶ A Ashworth, *Custody Reconsidered: Clarity and Consistency in Sentencing* (1989).

¹⁷ JUSTICE, *Sentencing—A Way Ahead* (1989).

¹⁸ Home Office, *Crime, Justice and Protecting the Public* (1990) paras 2.17 and 2.20.

¹⁹ House of Commons, 20 November 1990, vol 181, col 155.

²⁰ That was Minister of State John Patten, mixing up the Minnesota guidelines with the US federal guidelines; House of Commons, 20 November 1990, vol 181, col 232.

²¹ Penal Affairs Consortium, *The Case for a Sentencing Council* (1995).

²² Labour Party, *Honesty, Consistency and Progression in Sentencing* (1996) paras 60–1.

²³ Penal Affairs Consortium (1995) above note 21.

²⁴ For further information on the evolution of the guidelines, see A Ashworth, *Sentencing and Criminal Justice* (2010); A Ashworth and M Wasik, ‘Ten Years of the Sentencing Advisory Panel’ in Sentencing Guidelines Council and Sentencing Advisory Panel, *Annual Report* (2010). Available at <sentencingcouncil.judiciary.gov.uk>.

judgment.²⁵ Ultimately, the Review proposed three alternative ways in which the guideline system could be developed, and the government chose in 2003 to create the Sentencing Guidelines Council, a body which had the authority to issue guidelines after receiving advice from the Sentencing Advisory Panel. This change accelerated the development of definitive sentencing guidelines.

In 2007 the then government became particularly concerned about the rapid expansion of prisoner numbers in England and Wales, and commissioned a report from Lord Carter. Among other recommendations Lord Carter proposed that a working group be set up to examine the advantages, disadvantages, and feasibility of a structured sentencing framework.²⁶ It was the report of the Sentencing Commission Working Group that made the recommendations on which the current English guideline structure is based.²⁷ With the enactment of the Coroners and Justice Act 2009, sentencing in this jurisdiction entered a new era. The Act introduced a number of important changes to the sentencing environment and the development of guidelines.²⁸ First, it amended the duty of a court to comply with the guidelines. Under the previous regime the statute stated that courts ‘must have regard’ to any relevant guidelines. Section 125 of the new Act states that:

- (1) Every court—
 - (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and
 - (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function, unless the court is satisfied that it would be contrary to the interests of justice to do so.

Second, the two previous statutory bodies were replaced by a single authority, the *Sentencing Council of England and Wales*, which retains a judicial majority among its 14 members. Before being replaced by the Sentencing Council in 2010, the Sentencing Guidelines Council (SGC) had issued definitive guidelines for a range of offences. These guidelines remain in force until such time as the Sentencing Council revises and reissues them. The new Council has started issuing its own guidelines—which are the focus of the present volume. These guidelines assume a rather different structure than the SGC Guidelines. The first new guideline—which came into effect in June 2011—relates to the assault offences.²⁹ Since then the Council has issued definitive guidelines for other offences including burglary; drug offences; and offences involving dangerous dogs.

²⁵ Home Office Sentencing Review, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (2001).

²⁶ Carter (2007) above note 3.

²⁷ Sentencing Commission Working Group (2008) above note 8.

²⁸ JV Roberts, ‘Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales’ (2011) *British Journal of Criminology*, 51: 997–1013.

²⁹ See <<http://sentencingcouncil.org.uk>>.

B. Structure of the English Guidelines

Whereas sentencing guideline systems in the US have been created at a single stroke, introducing an integrated set of guidelines, the English approach has been to proceed piecemeal by creating guidelines for particular offences or groups of offence. Moreover, the structure of the offence-specific guidelines in England and Wales is unique, and readers may find a brief summary of their format helpful at this point. The assault guideline structure contains a series of nine³⁰ steps, of which the first two are the most critical. For the purposes of illustration we discuss the definitive guideline for assault occasioning actual bodily harm (ABH). As with many offences for which a definitive guideline has been issued, ABH has been stratified into three categories of seriousness. The guideline provides a range of sentence and starting point sentence for each category.

Step One of the guidelines methodology requires a court to match the case to one of the three categories of seriousness. The three categories reflect gradations in harm and culpability, with the most serious category (1) requiring a court to find the case to involve greater harm *and* enhanced culpability. Category 2 is appropriate if either greater harm *or* higher culpability is present. Category 3 applies to cases of lesser harm *and* a lower level of culpability.

Step One: Determining the Offence Category

Step One of the guidelines supplies an *exhaustive* list of factors courts should use to determine which of the three categories is most appropriate for the particular sentencing exercise. These factors constitute what the guideline describes as the ‘principal factual elements’ of the offence, and their primordial status is reflected in the fact that determination of the category range is the step which will have greatest influence on severity of sentence.³¹

The Step One factors include statutory aggravating factors (eg hate motivation) as well as other important circumstances affecting the level of harm created by the crime—such as deliberate targeting of a vulnerable victim. Lower culpability factors include: a subordinate role of the offender; a greater degree of provocation; and a lack of premeditation. The exhaustive nature of the Step One list of factors means that courts are restricted to considering only factors on the list when identifying which category is appropriate, although as will be seen factors other than those found in the guideline may be considered at the next step.

³⁰ The Drug Offences guideline has only eight steps since one of the assault guideline steps (step five) relates to the dangerousness provisions of the Criminal Justice Act 2003 which have no relevance to the sentencing of drug offences.

³¹ This is clear from examining the respective sentence ranges. Eg the lowest level of seriousness (Category 3) carries a non-custodial sentence range of a fine to a high level community order, whereas the highest category range runs from one to three years of custody.

Step Two: Shaping the Provisional Sentence

Step Two requires a court to ‘fine tune’ the calibration of harm and culpability by reference to lists of factors which relate to crime seriousness, culpability, or personal mitigation.³² In the words of the guideline, these circumstances provide ‘the context of the offence and the offender’—as opposed to Step One factors which constitute the ‘principal elements of the offence’. Step Two constitutes a change from the previous (SGC) guidelines which required a court to consider aggravating factors—and to revise the sentence upward if appropriate—and then to consider mitigating factors and personal mitigation in a separate step.

Under the New Zealand guidelines, once a court has selected a particular category, the sentence must remain within the range associated with that specific category. In contrast the new English guidelines allow some discretion to move out of the category range. Thus if the court is confronted at Step Two with a case in which multiple aggravating or mitigating factors exist, it may move away from the starting point to reflect this multiplicity of aggravators or mitigators. This movement may result in a provisional sentence from a higher or lower category range. Preliminary research with magistrates at least suggests that this occurs only rarely; this is comforting, as frequent movement out of a category range would undermine the integrity of the guidelines.

Having determined the relevant category at Step One, at Step Two a court will move towards the final disposal using the range of sentence and starting point sentence associated with the category. The Sentencing Council’s new format changes the definition of the starting point. The previous SGC guidelines defined the starting point in terms of a first offender who is convicted following a trial. Practitioners and scholars³³ have observed that this definition reflects a highly atypical offender profile, as few offenders appear for sentencing following a contested trial and with no criminal antecedents.³⁴ The starting point for the assault offences guideline—and all subsequent guidelines—applies to all offenders, irrespective of plea or previous convictions.

The aggravating factors identified at Step Two include: committing the offence while on bail or licence, while under the influence of drugs, or through an abuse of trust. The guideline factors which indicate a lower level of seriousness include: an absence of prior convictions and the fact that the crime was an isolated incident.

³² For further discussion, see Young and King, this volume, and Young and Browning (2008) above note 4; JV Roberts, *Sentencing Guidelines in England and Wales: Exploring the Views and Experiences of Magistrates* (2012).

³³ See, eg, I Edwards, ‘Draft Sentencing Guidelines for Assaults’ (2010) *Criminal Law and Justice Weekly*, 174. In addition, most respondents to the Sentencing Council’s consultation exercise agreed with the shift from the first time, not guilty plea profile to the more general model proposed and adopted by the Council.

³⁴ In 2009, only approximately one in ten (12 per cent) of offenders pleaded not guilty, and only 10 per cent of offenders appeared for sentencing without any prior convictions; the overlapping population is obviously much smaller than 10 per cent; see Ministry of Justice, *Sentencing Statistics: England and Wales 2009* (2010). Available at <<http://www.justice.gov.uk>>.

Several factors are identified under the heading 'personal mitigation', including remorse, the fact that the offender was a sole or primary carer, and good character and/or exemplary conduct. As noted, the list of factors at Step Two is, unlike the list provided at Step One, non-exhaustive. A court may therefore consider other factors not contained in the list provided by the guideline and then reflect these additional circumstances in the sentence imposed.

Incorporating Disposal Thresholds

An important feature of the new format guideline is that it incorporates consideration of the statutory thresholds for custody and community disposals.³⁵ Thus, for example, the guideline advises that when sentencing Category 3 offences, the court should consider whether the community threshold has been passed. For Category 2 offences the court should consider (i) whether the custodial threshold has been passed; (ii) if it has been met whether a custodial sentence is unavoidable; and finally, (iii) whether the sentence of imprisonment should be suspended. These directions provide courts with a salutary reminder of the need to consider the hierarchy of sanctions and the statutory criteria which must be fulfilled before specific disposals are imposed.³⁶ (Appendix A contains Steps One and Two, extracted from the definitive guideline for assault occasioning actual bodily harm.)

Additional Guideline Steps

Having selected a provisional sentence within the appropriate category range, a court proceeds to shape this sentence by working through the remaining steps of the guideline. After Step Two the guidelines methodology prescribes seven further steps for courts to follow, which may be briefly summarized.

Step Three directs courts to take into account provisions in the Serious Organized Crime and Police Act 2005³⁷ permitting a court to reduce sentence in cases where the offender has provided (or offered to provide) assistance to the prosecution or police. Any potential reduction here is independent of the reduction for the guilty plea (see below), although the utilitarian justification is the same in both cases.

Step Four invokes the reduction for a guilty plea. Section 144 of the Criminal Justice Act 2003 requires a court to take into account the stage at which a guilty plea was entered as well as the circumstances in which this indication was given. The SGC issued a revised definitive guideline on sentence reductions for a guilty plea in 2007. This guideline remains in effect until the Sentencing Council issues a

³⁵ Criminal Justice Act 2003, ss 152(2), 148(1). See Ashworth (2010) above note 24, p 396, for discussion of this issue.

³⁶ Under the previous guideline, the statutory thresholds were cited by cross-reference to the generic guideline on overarching seriousness.

³⁷ See ss 73, 74.

new guideline, as it is required to by section 120(3)(a) of the Coroners and Justice Act 2009.

Step Five requires courts to consider whether, having regard to the criteria contained in Chapter 5 of the Criminal Justice Act 2003, it would be appropriate to impose an extended sentence.

Step Six invokes the totality principle which is relevant when the court is sentencing an offender for more than a single offence, or where the offender is currently serving a sentence. This principle requires courts to ensure that the total sentence is just and proportionate to the offending behaviour, through application of the totality principle. In 2012, the Sentencing Council issued a guideline regarding the application of this principle.³⁸

Step Seven reminds sentencers that they should consider making a compensation order and or any other ancillary orders.

Step Eight invokes section 174 of the Criminal Justice Act 2003 (CJA) which imposes a duty on courts to give reasons and to explain, for the benefit of the offender and others, the effect of the sentence. (The Legal Aid, Sentencing and Punishment of Offenders Act 2012 revises the CJA provisions and requires courts to state 'in ordinary language and in general terms the court's reasons for sentence'.)

The final step, Step Nine, directs sentencers to take into consideration any remand time served in relation to the final sentence. Courts should consider whether to give credit for time spent on remand or on bail, in accordance with sections 240 and 240A of the CJA.

Summary of Guidelines Methodology

The English guidelines promote consistency by requiring sentencers to follow the step-by-step methodology laid down in each offence-specific guideline. The rationale is that if all courts follow the same methodical approach to considering characteristics of the offence and the offender, greater consistency and fairness will ensue. Additional guidance is also to be found in a number of generic guidelines such as the definitive guideline regarding the determination of offence seriousness, and, as noted, totality or reductions for a guilty plea.³⁹ The English approach therefore contrasts with the US schemes which adopt a simpler methodology: once a court has established the offender's criminal history score, and the seriousness level of the offence of conviction, consistency in the US is achieved by restricting courts to a range of sentence length which is determined primarily by two factors, crime seriousness and criminal history.

³⁸ See Sentencing Council, *Totality* (2012).

³⁹ All guidelines including those issued by the SGC can be found at the Sentencing Council website: <<http://sentencingcouncil.judiciary.gov.uk/>>.

C. Research into Sentencing Guidelines

Despite the steady accretion of offence-specific and generic guidelines over the past decade, the English experience has attracted little attention from scholars, either in terms of normative critiques or empirical enquiries.⁴⁰ One explanation for the lack of empirical research may be the episodic, cumulative evolution of the English guidelines. The SGC periodically issued its guidelines, each preceded by a professional consultation period. In contrast, the US guidelines were introduced for all offences in one fell swoop; when this occurred it naturally generated more interest and subsequently research. Moreover, the introduction of a comprehensive scheme permitted evaluations of the guidelines in a way that was impossible when guidelines are issued seriatim as has been the case in England and Wales.⁴¹

A second explanation for the paucity of empirical research on the guidelines concerns the quality of available sentencing statistics which would be used for the purposes of research. Neither the Sentencing Advisory Panel nor the SGC had a statutory duty to monitor the guidelines as they were issued—or indeed the necessary research resources to discharge such a duty. As one of the contributors argues in a subsequent chapter of the present volume, a bespoke sentencing database is a necessary prerequisite for any functioning guidelines scheme, particularly one based on numerical guidelines. The SGC was co-sponsor of a major piece of empirical research into sentencing practice in 2007, but the research foundered⁴² and was ultimately abandoned. Happily, when Parliament created the Sentencing Council in 2010, it required the Council to monitor the use of its guidelines. Section 128 of the Coroners and Justice Act 2009 states that:

The Council must—

- (a) monitor the operation and effect of its sentencing guidelines; and
 - (b) consider what conclusions can be drawn from the information obtained by virtue of paragraph (a).
- (2) The Council must, in particular, discharge its duty under subsection (1)(a) with a view to drawing conclusions about—
- (a) the frequency with which, and extent to which, courts depart from sentencing guidelines;

⁴⁰ A number of publications have addressed the evolution of the guidelines (see, eg, M Wasik, 'Going Round in Circles? Reflections on Fifty Years of Change in Sentencing' [2004] Crim LR, 253–65; A Ashworth, 'The Sentencing Guideline System in England and Wales' (2006) *South African Journal of Criminal Justice*, 19: 1–23; A Lovegrove, 'The Sentencing Council, The Public's Sense of Justice, and Personal Mitigation' [2010] Crim LR 906; J Cooper, 'The Sentencing Guidelines Council—A Practical Perspective' [2008] Crim LR, 4: 277–86; but only a few empirical studies have appeared (see, eg, J Raine and E Dunstan, 'How Well Do Sentencing Guidelines Work? Equity, Proportionality and Consistency in the Determination of Fine Levels in the Magistrates' Courts of England and Wales' (2009) *The Howard Journal*, 48: 13–36; JV Roberts, M Hough, and A Ashworth, 'Personal Mitigation, Public Opinion and Sentencing Guidelines in England and Wales' [2011] Crim LR, 7: 524–30; JV Roberts, 'Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application' [2008] Crim LR 264–76).

⁴¹ The periodic introduction of an offence-specific guideline also complicates the task of evaluating its impact on sentencing practices, as other variables will change at the same time.

⁴² M Dhami and K Souza, *Sentencing and its Outcomes Project. Part One: Pilot Study Report* (2009).

The Council has interpreted this provision to mean that it must monitor compliance with its own guidelines, rather than those issued by previous statutory authorities.⁴³ The Council was also provided with sufficient research resources to develop and administer a sentencing database. In 2010, the Council inaugurated its database drawing upon data derived directly from sentencers—a first⁴⁴ for this or any other jurisdiction.⁴⁵ Data from the first full year of the Crown Court Sentencing Survey (CCSS) were released in May 2012,⁴⁶ and are discussed in subsequent chapters of this book.

D. Purpose and Scope of the Volume

The current collection of essays contributes to a research tradition in relation to the English guidelines. The focus of contributors is primarily upon the new format guidelines issued by the Sentencing Council; however, many issues discussed here are also relevant to the guidelines issued by the previous statutory authority (SGC). The SGC's guidelines remain in effect until such time as they are reviewed and ultimately reissued in the new format by the Sentencing Council.

E. Conclusion

It is too early to answer all the questions arising from the use of the guidelines. Nevertheless, this volume addresses a number of important issues and the essays offer a range of conclusions and insights with respect to the guidelines. Although the principal focus is upon the English guidelines, the essays contain lessons for other jurisdictions, several of which are contemplating the introduction of guideline schemes. As noted, New Zealand has created but not implemented a guidelines scheme. In Israel a scheme employing 'starting point' sentences has been proposed but not yet implemented,⁴⁷ to date the Knesset has approved only a Sentencing Act which structures judicial discretion without actually creating a guidelines scheme.⁴⁸ If and when these governments implement formal sentencing guidelines, the experience in England and Wales may well be of interest.

⁴³ See Sentencing Council (2012) Annual Report.

⁴⁴ The SCWG conducted a very limited survey along these lines. See Sentencing Commission Working Group, *Crown Court Sentencing Survey* (2008): it served as the prototype for the Crown Court survey now conducted by the Sentencing Council.

⁴⁵ The alternative to statistics derived from sentencers is a database drawing upon data recorded for administrative purposes. Examples of this latter approach include the Sentencing Statistics collected and published annually by the Ministry of Justice in England and Wales: Ministry of Justice (2010) above note 34, and the Canadian Centre for Justice Statistics, *Adult Criminal Court Survey* 2012). Both databases capture aggregate sentencing trends which cannot answer detailed questions about sentencing policies and sentencing.

⁴⁶ See Sentencing Council (2012) above note 43.

⁴⁷ See O Gazal-Ayal and R Kannai, 'Determination of Starting Sentences in Israel—System and Application' (2010) *Federal Sentencing Reporter*, 22: 232–42.

⁴⁸ The new Israeli sentencing law requires courts to determine a 'Proportionate Sentence Range' for the case appearing for sentencing and then move towards establishing a sentence within that range.