

Sentencers' Views on Sentencing

This report addresses the question of how sentencers in Scotland view the sentencing process. This question is considered in preparation for possible workshops with the Scottish judiciary in which sentencing practices and trends would be discussed. It is hoped that workshop discussion will build on what we already know from this prior research and address some of the questions raised as a result of this analysis. In order to examine existing knowledge on this topic, relevant texts were examined, including academic journal articles, evaluations of policy changes and government-led consultations, via academic databases and the Scottish Government publication archive. Texts were restricted to those published from 2004 onwards in order to balance the aim of including a broad range of relevant information with ensuring that the views reported reflect, as far as possible, those of the current judiciary.

The first and largest section of the report examines the principles underlying sentencing practices – the norms which influence how sentencers do, or perceive they should, carry out sentencing duties. As will be shown throughout this section, these principles influence both how sentencing is carried out and their attitudes towards proposed or implemented policy changes. The second section looks at sentencers' perceptions as to what changes (if any) are needed to improve sentencing practice in line with these principles. Finally, sentencers' views on Scotland's rising prison population were examined.

The final section uses the review to consider possible explanations for the increase in the Scottish prison population in recent decades, which cannot be explained solely through reference to crime rates. No single explanation appears entirely satisfactory and many further questions are raised about sentencing practices and sentencers' views which require further research to address. The workshops would provide a forum in which to begin addressing these questions.

1. Sentencing Practice and Principles

1.1 Overall sentencing approach: intuition vs. structure

- Variation exists with regard to the role of structure and intuition which sentencers report in their sentencing practice.
- However, the vast majority felt that intuition and/or experiential knowledge played at least some role in the decision-making process.

Given policy and political sensitivity to sentencing practice, surprisingly little research has engaged with the decision-making processes of sentencers themselves. Just one study has examined the *overall* approach adopted by sentencers in Scotland (Tombs 2004, see also Millie, Tombs and Hough 2007). Following in-depth interviews with 40 sentencers (34 sheriffs, 1 stipendiary magistrate and 5 members of the senior judiciary), Tombs finds that most perceived sentencing as a process

containing at least some element of structure, though this was emphasised by some more than others. Nearly half (17/40) of those interviewed reported following a fairly systematic process, beginning by considering the nature of the offence committed and then other factors such as the offender and their circumstances, the impact on the victim and the public interest. Just over a quarter of sentencers also described a more limited role for structure in their decision-making. Sentencers explained that they took guidance from a variety of places, including weekly digests of law reports, textbooks on sentencing law and the “Bench Book.” Two also stated that they made use of the English Magistrate’s Association guidance.

However, alongside descriptions of a systematic approach and the use of these standardised sources, most interviewees described a role for intuition in the sentencing process. Most sentencers (23/40) emphasised this intuitive dimension over a more structured approach, with a significant minority within this group (11) describing sentencing as an entirely intuitive process. These sentencers talked about the importance of experience in allowing them to get a “feel” for a case. A few sentencers explained they would like to take a more structured approach but felt they were limited by a lack of time given the high volume of cases they had to deal with. Given this finding, it would be interesting to analyse whether senior judiciary are more or less likely to allow for intuition in their decision making. Tombs does not comment on this issue (and of course any observation might be limited by the small number of senior judiciary recruited). However, the citations given would suggest that both sheriffs and more senior sentencers adopt a range of sentencing approaches.

1.2 Prison as a “last resort” where all else has “failed”

- Sentencers perceive prison as a “last resort,” only imposed when there is “no choice.”
- Categorisation of the offender as redeemable or not were key to deciding if this point had been reached.
- Custodial sentences are often chosen when community options are perceived to have failed or sometimes because no appropriate alternative option is available.

A key finding of Tombs’ (2004) study was that sentencers perceived prison as a sentence of “last resort.” The majority perceived a real qualitative difference between a custodial sentence and other disposals, although a few envisaged electronic tagging as equivalent to a short prison sentence (Tombs 2004, Millie, Tombs and Hough 2007). Those interviewed were well aware that prison was often ineffective as a deterrent or for rehabilitative purposes. Sentencers therefore stated that they only issued a custodial sentence when they felt that they had “no choice.” These views are reflected in a recent survey of 72 Scottish sheriffs, conducted as part of an on-going evaluation of community sentence reforms (Anderson et al. 2015). In relation to the introduction of the statutory presumption against short sentences, the majority of sheriffs reported that the legislation had not impacted on their sentencing practice since they had always used prison only as a “last resort.”

Tombs’ work explores how it is that sentencers arrive at the position where they see “no choice” but to impose a custodial sentence (Tombs 2004, Millie, Tombs and

Hough 2007, Tombs and Jagger 2006, see also Lightowler and Hare 2009). Her discussions with sentencers suggest that the seriousness of the offence (whilst significant) is not the only key factor in deciding between custodial or non-custodial sentences. In relation to “borderline” cases, Tombs finds that a categorisation of the offender as “redeemable” or “irredeemable” underlines this decision. Ultimately, sentencers were deciding whether there was still “hope” for the offender. In making such assessments, sentencers took into account any previous offences, their response to any prior non-custodial sentences, family responsibilities and support, employment or training prospects and the offender’s perceived attitude, including their willingness to address their behaviour and any root causes.

It should be emphasised that, in sentencers’ eyes, they are not choosing custodial sentences *over* community sentences. Instead they are issued because either 1) community sentence(s) have been tried and, in their view, “failed” since the person has either continued to offend or not complied with the sentence, or 2) sometimes because sentencers do not believe an appropriate community sentence is available. In relation to this latter situation, Tombs (see Lightowler and Hare 2009) is critical of the assumption that community sentences therefore need to be “toughened up.” On the basis of her research, she states that, although in some cases sentencers opt for a custodial sentences because they perceive no appropriately demanding community sentence is available, it was also the case that community sentences could be seen as “*too demanding*” for particular offenders. This was particularly the case for female offenders, especially those with substance abuse issues (Carlen and Tombs 2006). Some sentencers perceived that the “chaotic lifestyles” of these women limited their ability to engage with demanding DTTO programmes and that issuing such disposals would only “set [offenders] up to fail.” Such findings are reflected in the findings of a recent evaluation of the DTTO II programme in Scotland (Wilson 2015, unpublished). In a survey of JPs (n=20) and sheriffs (n=6), respondents stated that if this less demanding disposal was not available, then either custodial sentences might increase or less appropriate community sentences (including the harsher DTTO) might be used instead. Some respondents stated that this was likely to impact particularly negatively on younger and/or female offenders for whom a DTTO could even be detrimental.

1.3 The value of custody

- Sentencers perceived custodial sentences as useful in some circumstances and a necessary back-up to the credibility of the courts.
- There is some evidence that longer sentences may be preferred to shorter ones because of their perceived potential to rehabilitate.

Despite repeated statements that prison was a “last resort,” there is evidence that some sentencers think custodial sentences have a particular value in some cases. In various interviews, sentencers have depicted custodial sentences as useful in a variety of ways - as a “short sharp shock,” for example where compliance or progress is poor in relation to a DTTO (Brown et al. 2006), for young offenders (Millie, Tombs and Hough 2007), to remove offenders (albeit temporarily) from chaotic lifestyles and drug use, as a brief respite to the public and as a straightforward punishment for wrongdoing (Tombs 2004). In addition, sentencers took the view that

custodial sentences were necessary in order to back-up community sentences and ensure the credibility of the courts (Carlen and Tombs 2006).

There is also some limited evidence that, whilst recognising the limited rehabilitative value of short sentences, sentencers perceive longer sentences as potentially rehabilitative for some offenders. Carlen and Tombs (2006), who are deeply sceptical of the claims of in-custody programmes to rehabilitate, raise concerns about sentencers up-tariffing for female offenders. Drawing again on Tombs (2004) work with Scottish sentencers, they suggest that given a desire for sentences to “work,” reports that sentences less than 6 months have little rehabilitative value and a perceived lack of suitable community options for women, some sentencers use longer custodial sentences than they might otherwise choose with the intention of enabling women to benefit from these in-prison programmes.

1.4 Interpretation and use of pre-sentencing reports

- Sentencers do make use of pre-sentencing reports in their decision-making processes.
- However, there may be ideological and practical barriers to up-take of sentencing recommendations.

In making sentencing decisions, sentencers describe taking account of (clearly distinguished from being ‘influenced by’) the views of key stakeholders and professionals. As part of the more systematic approach described by some of Tombs’ participants, commissioning and reading Social Enquiry Reports (SERs) was a key stage in the sentencing process. In a four year qualitative study, Cyrus Tata et al. (2008) analysed the production and use of pre-sentence reports in Scotland. As part of this study, 26 sheriffs were interviewed and 5 focus groups conducted with sheriffs throughout the country. He found that sheriffs usually read these reports after other information about the case. At this point, they may have already formed a view about what ‘type’ of case or offender they were dealing with. Reports might then have to compete with this established view and, since sheriffs would usually read the report’s conclusions first, if the recommendations were perceived as “unrealistic” in relation to their perception of the offence or offender, the credibility of the whole report could be undermined and recommendations were less likely to be followed. Although recent changes to pre-sentencing reports (now Criminal Justice Social Work Reports) are generally being viewed positively, a recent survey of sheriffs found that such reports were still viewed negatively by a few due to perceptions that they were unreliable and biased towards the perspective of the offender (Anderson et al. 2015). Tata’s earlier study (2008) suggests that, ironically, this perception of bias may result from the particular style of writing which social workers adopt in an attempt to actually appear objective. He finds that report writers tended not to spell out contradictions or inconsistencies in the words of offenders. Instead, they allowed sheriffs to “read between the lines” rather than include their own judgements. However, when interviewed, sheriffs sometimes took such omissions of evidence that social workers simply believed without challenge the views of offenders and were likely to see such reports and report-writers as unreliable and even gullible.

Whilst the above suggests ideological barriers may limit sentencers’ ability to take account of social workers’ recommendations, there is also evidence of material

barriers to their take-up. Interview evidence would suggest that sheriffs are limited in their ability to fully take account of social workers' recommendations (via pre-sentence reports) due to lack of time and resources, within and without of the court system. Presumably influenced by time pressures, Tata's (2008) judicial interviewees reported skim reading the initial sections of the SERs (relating to personal and social circumstances of the offender) and honing in on what they considered to be the most relevant sections, those relating to individual responsibility and choice regarding the offender's behaviour and the social worker's recommendations of appropriate disposals. The busy case load and time pressures on sheriffs are reflected in their comments on new Criminal Justice Social Work Reports (CJSWRs), collated as part of the evaluation of the Community Payback Order and Presumption Against Short Sentences . Although, as previously stated, the survey of 72 sheriffs found that the newly standardised reports were generally viewed favourably, some negative views related to perceived repetition or inclusion of perceived irrelevant information.

1.5 Judicial independence

- A frequently arising theme in sentencers' views was the importance of "judicial independence."
- The need for independence was frequently cited to object to suggested policy changes
- "Independence" is often vaguely referred to but, when unpicked, seems to consist of various concerns including independence from standardisation, politicians, other professionals, the media, public and victims.

One of the most consistent themes which arises in interviews and surveys of the judiciary is a strong belief in sentencers' "independence". A commitment to judicial independence has been referenced by sentencers in relation to concerns about proposed and actual policy and practice changes in recent years. These include proposals for a sentencing council and sentencing guidelines (see consultation responses in Scottish Government 2009), public consultation with regard to sentencing guidelines (ibid.), the creation of a sentencing information system (SIS) (see Tata and Hutton 2010) and the inclusion of sentence recommendations in SERs (Tata 2008, Anderson et al. 2015).

However, it is interesting to note that this list includes concerns about judicial independence in relation to quite different groups of people. So, "judicial independence" might refer to independence from politicians, other professionals, public and/or media influence, victims and victim-interest groups and, to a lesser extent, independence from other members of the judiciary.

Each case is unique

In many cases, the concern for judicial independence seems to be closely linked to a belief in the uniqueness of each case and therefore a resistance to standardising sentencing. Respect for judicial discretion, and the ability of sentencers to respond to the *particular* circumstances of each case, was commonly raised as an objection to such measures (Lightowler and Hare 2009). The Sentencing Commission (2006), in fact, acknowledge the likelihood for such concerns in their proposals for sentencing

guidelines. Responses to a later consultation on the proposed sentencing council (Scottish Government 2009) would seem to fulfil this prediction. Both the sheriffs' association and an individual JP respondent were concerned about the suggestion that sentencers would need to provide reasons where they departed from sentencing guidelines. An earlier consultation on summary justice reform, seeking views on clarifying appropriate reductions for early guilty pleas, drew responses from several sheriffs who felt they should retain their discretion to offer reduced sentences for guilty pleas up to, and including, the day of trial, in order to protect vulnerable witnesses from being called to give evidence (Scottish Executive 2005).

Distance from politics and practicalities

In other cases, the principle of judicial independence seems to be premised on a belief that, for justice to be delivered, sentencers need, at least to some extent, to be free of political and/or practical concerns with regard to the consequences of their decision. This can be illustrated via sentencers' (the sheriffs' association and several individual JPs) responses to the consultation on sentencing guidelines (Scottish Government 2009). Consultation responses consistently emphasised the need for separation of the judiciary from government and some sentencers objected to the appointment of a Scottish Government observer to the council, as well as the proposed ministerial input on guideline topics and council membership, on this basis. The sheriffs' association were also critical of the proposals for a council, believing that they are actually premised on a desire to reduce the prison population rather than the stated concern with consistency. The association argues that sheriffs should not have to consider the impact on overall prison populations of their disposals, whether in terms of cost, capacity, or ideological implications. It is interesting to note that, in contrast, cost and capacity implications do limit the use of non-custodial disposals – something which sentencers are often aware of (see section 2); where suitable community options are not available (either in that area or because of capacity), sentencing options are constrained. Whilst such a lack of resources is criticised by sentencers, it does not seem to raise the same concerns about “independence” as any suggestion of limiting prison sentences. This would seem to suggest that the option of custody (perhaps because it is a long-standing sentencing option) is seen as a particular *right* of the courts, with community options (though valued) not viewed in quite the same way.

Professional boundary setting

In some cases, the concern for judicial independence can be related to a maintenance of professional boundaries, particularly in relation to social workers and, less often, police and prosecutors. This view is reflected in the way that some sentencers perceive the recommendations of social workers via pre-sentencing reports. Both academic work and a recent government-commissioned evaluation found that, although others were happy to be “steered”, some sheriffs considered it inappropriate for social workers to suggest a disposal for a particular case (Tata 2008, Anderson et al. 2015). Tata (2008) attributes this response to a desire to maintain professional boundaries between the judiciary and other professions and retain “ownership” of legal expertise. There is perhaps also evidence of the converse - that sheriffs also *disown* responsibility for non-legal matters. Tombs' (2004) interviewees commonly commented that the problem of rising prison

populations needed to be addressed outside of court, using social means to prevent people from ending up in the situation where “no option” was left but a custodial sentence.

The objections of some JPs to increased alternatives to prosecution can also be understood in relation to the desire to maintain professional boundaries. In response to a consultation on summary justice reforms (Scottish Government 2005) and in the later evaluation of these reforms (Richards et al. 2011), which included increased powers for prosecutors to impose higher fines, many JPs were concerned that, in such cases, prosecutors would become both “judge and jury.” They contrasted their role, in which they would hear and consider the context to offences, with the role of prosecutors, in which access to such information was limited. JPs considered that this could lead to the use of unjust disposals.

Independence from the public and media

In relation to the need for independence from the public and media coverage, Tombs’ study (2004) found varied and nuanced views among sentencers. Several perceived public opinion as already embedded within the law. They stated that they therefore had a duty to follow the law but that media reporting was irrelevant to their sentencing. The majority of Tombs’ interviewees did however state that it was important to take account of local public concerns which might lead them to use exemplary sentences as deterrents, on occasion. This view is reflected in the vast majority of judicial respondents (predominantly JPs but also the sheriff’s association) to a consultation on lay justice reforms; proposals to abolish lay justice were strongly opposed by sentencers, in part because of the value placed on links between sentencers and local communities and the importance of local knowledge to inform sentencing (Scottish Executive 2005). Tombs’ participants also highlighted a distinction between those public views that they should and shouldn’t take account of. Some stated that they should take account of “reasonable” but not “hysterical” public views in their sentencing. Similarly, concerns were raised by the sheriffs’ association and an individual JP via the sentencing council consultation that public consultation on proposed guidelines might lead to inappropriate levels of influence either from special interest groups or from those dissatisfied with the criminal justice system (Scottish Government 2009). Interestingly, some sentencers distinguished between being “informed by” and being “influenced by” public opinion – though what distinguishes these two processes and how sentencers can maintain the former and resist the latter was not addressed. In Tombs’ study (2004), several sentencers explained that it was important for them to be aware of, and anticipate, public opinion with regard to their sentencing decisions but that they were not influenced by it.

The influence of victims

A similarly nuanced approach is evidenced in relation to victims’ views and experiences. Sentencers considered that they should also be aware of the views of victims but not allow themselves to be “influenced” by them (Tombs 2004). Similarly, interviews with 11 sheriffs and 2 high court judges, conducted as part of evaluation

of a pilot victim statement scheme (Leverick, Chalmers and Duff 2007), evidenced ambivalent views. On the one hand, a number of sentencers reported that the information in these reports could be useful with regard to sentencing, in addition to what was previously available. However, they were generally against victim impact statements being read out in court and were concerned about victims being allowed any comment or direct influence on the sentencing process.

1.6 The need for independence vs. the desire for consistency

- There seems to be less objection to pressures on judicial independence where these pressures are seen to emanate from *within* the judiciary.
- However, sheriffs are generally unconvinced about the existence of sentencing inconsistency, and the necessity of addressing this through new measures.
- JPs were more positive about efforts to promote consistency via increased communication between sentencers.

Sentencers seem to be less concerned about protecting their independence from other members of the judiciary. This is reflected in their greater willingness to accept the introduction of a sentencing council if it has a majority of judicial members and remains led by a senior judge (Scottish Government 2009). Some concerns regarding judicial independence were also alleviated to some extent if it was clear that the High Court retained overall responsibility for sentencing and were the sole means through which draft guidelines could be approved (*ibid.*). A willingness to learn from one another's sentencing practices was also reflected in interviews with JPs, conducted as part of an evaluation on lay justice reforms (McCoard et al. 2010); JPs were highly positive about newly introduced training opportunities where they were able to discuss sentencing in example cases. JPs commented that such opportunities helped to promote sentencing consistency.

However, there is little evidence that sheriffs are concerned about sentencing consistency and/or the need to promote it. Whilst there is some implicit acknowledgement (Tata 2008) and anecdotal evidence (Sentencing Commission 2006) of variation in sentencing practice, consultation responses from sheriffs tended to highlight that the existence of inconsistency was unproven and, where it is acknowledged, it is not necessarily seen as problematic or cause for reform. For example, sheriffs interviewed by Tata (2008) explained that it was appropriate for social workers to take account of sentencers' particular "foibles" in order to provide pre-sentence reports which were realistic in that context. Many believed this already happened in practice although the social workers themselves reported that they were often unable or unwilling to adapt their reports in this way. The sheriffs' association response to the sentencing council consultations argues that the appeals process is sufficient to ensure any inconsistency between sentencers does not result in injustice (Scottish Government 2009).

1.7 Meeting the needs of offenders

- A key reported or implicit aim in sentencers' decision-making was to meet the needs of offenders.
- Flexibility in terms of the range of disposals available to them was valued in order to achieve this.
- Sentencers could be quite creative in the way sentences were used in order to meet perceived needs.

The idea that sentences should meet the needs of offenders was another common theme in the views of sentencers. Meeting the needs of offenders was often associated with a desire for a range of sentencing options which could be used flexibly by the judiciary, including community options and the option for court reviews. This was particularly evidenced in survey responses for the DTTO II evaluation where many respondents were highly positive about the introduction of this new disposal as a means of flexibly meeting offenders' needs and ultimately reducing reoffending and crime (Wilson, 2015 unpublished)). Where court reviews of disposals have been introduced (e.g. with DTTO (II)s and the drug and youth court pilots), sentencers have been overwhelmingly positive about the process. They considered that reviews were helpful as a means to both hold offenders to account and encourage/praise them for progress made (McIvor et al. 2006, Brown et al. 2006, Wilson 2015 (unpublished), Anderson et al. 2015). In contrast, prior to the introduction of increased sentencing powers for JPs in 2007, many JPs felt that the sentencing options available to them (notably fines) might actually make the situation worse (McCoard et al. 2011).

When analysed as a whole, research with sentencers evidences creativity in the way that available disposals are combined in order to issue and monitor a sentence which sentencers believe is appropriate and will meet the needs of the offender. For example, an evaluation of the youth court pilots in two Scottish locations found that sheriffs, lamenting their loss of power to review probation orders and faced with sentencing offenders on multiple charges, would issue a probation order for one offence and a deferred sentence for another. They then subsequently commissioned a Social Enquiry Report (SER) at the second sentencing process as a means of assessing their response to probation (McIvor et al. 2006). Deferred sentences and also increased/decreased drug testing were used similarly by sheriffs in the drug court pilots as means of imposing sanctions for or rewarding progress (Brown et al. 2006).

2. What changes (if any) are needed to improve sentencing

- New CPOs generally viewed positively but criticisms made of lack of resources and speed of breach proceedings.
- Some criticism of lack of judicial options for dealing with non-compliance.
- Some evidence that sentencers felt that a better-informed public (via the media and/or education) might lessen the potential influence on some sentencers' decisions.

In the most recent research, sentencers were generally positive about the new community sentences (CPOs with range of requirements available) and the ability of criminal justice social work to deliver and monitor these (Anderson et al. 2015).

Although most sentencers perceived little difference with delivery of previous community sentencing options, a significant minority saw the CPOs as an improvement and no respondent perceived them as worse than previous disposal options. Similarly positive views were expressed in relation to DTTO and DTTO IIs (Wilson 2015 unpublished). CPOs, DTTOs and DTTO IIs were valued as examples of disposals which could meet the needs of offenders. However there was some suggestion that these disposals could be improved upon in order that they might be suitable for a wider range of offenders. For example, respondents to the DTTO II survey suggested that an alcohol-focussed version of the disposal might helpfully be made available (Wilson 2015, unpublished).

However, the most common concern raised in relation to non-custodial sentences and bail were that procedures for monitoring compliance and instigating breach were slow or lenient (Anderson et al. 2015) and that there existed a lack of options for dealing with non-compliance (Tombs 2004). A previous evaluation of the drug court pilots found that sentencers supported greater availability of sanctions in the case of poor progress or non-compliance (Brown et al. 2006). Similarly, an impact study of bail reforms found that sentencers supported increased penalties for breach which they believed would be a deterrent to non-compliance (Orr et al. 2012). In addition, sheriffs and JPs voiced frustration during the summary justice evaluations about their limited options in the case of fine non-payment (Bradshaw et al. 2011). There is some evidence that sentencers would like greater powers to impose breach themselves rather than relying on social workers to do this. Such views were reported by a few respondents to the recent DTTO II survey (Wilson 2015 unpublished) and sheriffs interviewed as part of the drug court pilot evaluations (McIvor et al. 2006).

In the CPO evaluation (Anderson et al. 2015), as well as previous studies (Tombs 2004), sentencers commented on a lack of resources to deliver sentences in the community and there was some suggestion that this impacted on sentencing decision-making. For example, in the CPO evaluation, sheriffs reported reasons for not using particular requirements included social workers not recommending them (this could be linked to a lack of availability or the difficulty of providing medical assessments within court timeframes) or a lack of suitable programmes, particularly for young, female or sex offenders (Anderson et al. 2015). However, in Tombs' study, though sentencers commented on a lack of availability of some community programmes, they all stated that, in this case they would defer sentencing rather than impose custody.

There was also some evidence that sentencers felt change in public/media attitudes could improve sentencing practice in Scotland. Many respondents to the CPO evaluation expressed doubts about the seriousness with which offenders and the wider public viewed community disposals (Anderson et al. 2015). Although it was rarely admitted that punitive attitudes from the public and/or media criticism of "soft" sentences impacted on their decision-making process, some sentencers expressed the view that such attitudes may affect the decision-making of less experienced sentencers (Tombs 2004). The need for public education about the purpose of sentencing generally, and community sentences in particular, was also raised by two respondents to the sentencing council consultation (Scottish Government 2009). Many participants in Tombs' study (2004) also expressed the view that the media

needed to be more responsible and accurate in the way which they reported sentencing decisions.

3. Sentencers' views on rising prison populations

- Majority aware of increasingly harsh sentencing and impact on prison population
- Explanations offered included increased serious offences and repeat offending, stricter monitoring of community sentences and rise in breach proceedings, a punitive political/social climate, delays in cases being heard, the tendency to prosecute for multiple offences and factors out-with the criminal justice system.

In recent years, the rise of UK (including Scottish) prison populations, despite falling crime, has attracted attention from criminologists (Tombs 2004, Millie, Tombs and Hough 2007, Tata 2008, Tombs and Jagger 2006, Lightowler and Hare 2009). A recent, not yet published, analysis by the Scottish Government (Conlong on-going) uses statistical modelling to show that, although the rising prison population in Scotland can partly be explained through reference to the balance of crime types which are falling and rising, the most significant drivers of the prison population are increased clear-up rates and increased conviction rates, particularly for serious violent crime. Increased severity of sentencing is also an important factor for certain crime types, e.g. handling an offensive weapon – custodial sentences are being used more frequently, and tend to be longer.

Just one previous study has asked sentencers to comment on their perceived reasons for the increase in the prison population (Tombs 2004). Sentencers' responses via evaluations of various policies also give us some insight into their views on this question. Of Tombs' participants, the vast majority of those interviewed (including all five senior judges) thought that the prison population had increased as a result of increased severity of sentences. Only five sheriffs and the stipendiary magistrate interviewed did not think sentences had become more severe and were puzzled by rising numbers in custody.

In Tombs' (2004) study, various explanations were offered by sentencers as to why sentencing had become more severe. Some linked the increase to a rise in more serious crimes and/or increased repeat offending. Others made a connection with a punitive social and political climate. For example, some commented on an increase in maximum sentences for certain offences, such as death by dangerous driving and some talked of a public pressure to punish offenders, particularly reflected in media commentary on "soft" sentences. On this latter point, several commented that less experienced sentencers might more likely be influenced by this kind of pressure.

In some cases, sentencers perceived that the use and monitoring of community sentences may have contributed to rising prison populations. Five sheriffs in Tombs' study suggested that the introduction of national standards for more rigorous monitoring of community sentences had led to an increase in breach proceedings and consequently custodial sentences. Sentencers also expressed concern that the use of multiple requirements could make community sentences, or bail conditions, difficult to abide by, potentially setting up the offender to fail and resulting in custodial

sentences for relatively minor crimes (Carlen and Tombs 2006, Orr et al. 2012). It should be noted that those who made these comments suggested that they were very careful about imposing multiple requirements for exactly this reason but considered that others may not be.

Sentencers have commented that time and resource constraints can impact on the use of custodial sentences. Specifically, sentencers suggested that where there are delays in cases coming to court, sometimes offenders would have committed further offences in the intervening time making a custodial sentence more difficult to avoid (Tombs 2004). The implication seems to be that if the original case had been heard more promptly, a community sentence might have been imposed, carried out and discouraged any subsequent offending (perhaps through deterrent or rehabilitation).

On a related note (though perhaps more linked to police/crown office policy than lack of resources), a few participants in Tombs' (2004) study considered that the tendency to prosecute for multiple offences, in relation to a single incident, might also be driving up the prison population.

Sentencers in Tombs' study also frequently commented that answers to the rising prison population should be looked for outside the criminal justice system. They suggested that social measures were necessary in order to prevent individuals getting to the point where they were appearing in court where the sentencer had no option but to serve a custodial sentence.

Conclusions and implications

As this review demonstrates, whilst there is much we can learn from previous research with sentencers, much is still unknown with regard to how sentencers make decisions in the context of changing policy and practice in the criminal justice system. Building knowledge in this area is key to ensuring that the new sentencing council meets the needs of all in the criminal justice system, including sentencers, offenders and other stakeholders. As well as suggesting the need for further research on sentence decision-making, sentencers' views raise a number of questions with regard to sentencing practice:

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- Should a broader range of community sentences be widely available that are more suitable for women, young people and chaotic offenders?
- How can non-compliance with community sentences be reduced without the use of custody and how should non-compliance be dealt with?
- Should more accurate information about crime, reoffending and sentencing be available to the public, the media and criminal justice professionals?
- Should sentencers have more discretion in sentencing?
- What are the distinct roles of the judiciary, government and social work in terms of:

- Developing the right balance of sentencing options.
- Ensuring sheriffs have access to training.
- Reducing delays in court processes.
- Increasing compliance with community sentences.
- Making sure that community sentences can effectively address offender needs without 'setting offenders up to fail'.
- Ensuring that the public, the media and criminal justice professionals receive accurate information about sentencing and crime in general.

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