

## SENTENCING GUIDELINES AROUND THE WORLD

### Introduction

1. This paper provides a summary of sentencing practices in jurisdictions around the world and has been prepared to assist the Sentencing Commission for Scotland in its consideration of the question of how to improve consistency in sentencing. The jurisdictions covered in the paper are those in Western Europe, where penal codes predominate, the Commonwealth Countries, where narrative sentencing guidelines systems have been developed and a number of American states, where a mixture of numerical grid and narrative guideline systems exist.

2. Sentencing frameworks can be regarded as lying along a continuum that ranges from, at one extreme, highly prescriptive systems that afford individual sentencers very little discretion in sentencing individual cases to, at the other extreme, systems that impose very few constraints on sentencers' decision making and allow them to exercise wide discretion in sentencing individual cases. The sentencing systems examined in this paper cover a very wide spectrum, ranging from the highly prescriptive system in place at federal level in the United States of America, to the almost entirely discretionary system in place in Scotland. All of the other systems examined lie somewhere between these two extremes. The paper begins by examining those systems at the more prescriptive end of the spectrum, which are predominantly the determinate sentencing and guideline systems in operation in the United States and the mandatory sentencing regimes operating in parts of Australia. The review then moves through systems that afford increasing degrees of discretion, including a look at a number of Western European jurisdictions that predominantly operate Penal or Criminal Codes. The paper concludes with a review of sentencing in Scotland where sentencers have very wide discretion. In total 26 sentencing systems are examined.

3. By June 2003 22 American States had implemented sentencing guideline systems (and one had repealed a system in 1997 that had been in place for 14 years). Annex A identifies these systems and provides brief details. The table shows that the various guideline systems have not been developed with a uniform approach – there is a fairly even split between presumptive and voluntary systems, some cover only felonies while others cover both felonies and misdemeanours, some allow extensive appellate review while other systems allow none, some systems provide guidelines only in relation to the use of imprisonment, while others cover imprisonment and intermediate sanctions, and some systems use numerical sentencing grids while others are based on narrative guidance. Experience in America has demonstrated that sentencing commissions can be effective instruments of policy implementation, both where policies are punitive and seek to make sentencing harsher and where they seek to adopt a more lenient approach and constrain prison growth.

4. Only a limited selection of state sentencing guideline regimes has been described in this paper. The selection of states is intended to cover a variety of characteristics, as identified in the grid overleaf and covers both long and recently established guideline systems. For comparison purposes, the systems in place in two American states where sentencing guidelines systems do not operate are also summarised. These are Florida, which had guidelines for 20 years before repealing them in 1996, and California, which has never had guidelines but has a particularly punitive determinate sentencing system.

	Presumptive	Voluntary	Felonies only	Felonies and Misdemeanours	Prison only	Prison and intermediate sanctions	Numerical Grid	Narrative Guidelines	Sentence Score
Minnesota	x		x		x		x		
Pennsylvania	x			x		x	x		
Ohio	x			x		x		x	
Delaware		x		x		x		x	
Virginia		x	x		x				x
District of Columbia (Washington D.C.)		x	x		x		x		
Alaska		x	x		x			x	

5. In the context of this review of sentencing systems, Scotland appears to occupy an almost unique position in having neither a penal/criminal code nor a formal, operational system for the provision of comprehensive sentencing guidance. Scotland proved to be one of the most difficult jurisdictions on which to obtain detailed sentencing information.

## UNITED STATES FEDERAL SENTENCING GUIDELINES<sup>1</sup>

6. The United States Sentencing Commission (USSC), an independent agency in the Judicial Branch of the federal government, was created through enactment of the 1985 Sentencing Reform Act. The Commission, based in Washington, D.C., is comprised of seven members, all of whom are selected and appointed by the President with the advice and consent of the Senate, and no more than three of whom can be practicing judges. The Commission was established in order to develop a national sentencing policy for the federal courts. It develops and revises guidelines for federal district court judges to consider in sentencing offenders convicted of federal crimes. These sentencing guidelines structure the courts' sentencing discretion to help ensure that similar offenders who commit similar offences receive similar sentences. The Commission monitors and evaluates the use of the guidelines; conducts research and education programmes on guideline application and sentencing matters generally, and recommends improvements in federal sentencing practices. The guidelines that the Commission develops and revises are always subject to final approval by Congress, which reserves the right to 'modify or disapprove' any of the Commission's recommendations.

7. The purposes of sentencing in the federal courts of America are set out in the United States Code as being:

- “(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” (28 U.S.C. § 991(b)(1)).

8. The primary aims of the Sentencing Commission were specified in the Sentencing Reform Act as being to:

- “..establish sentencing policies and practices for the Federal criminal justice system that—(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of Title 18, United States Code.
- (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.” (28 U.S.C. § 991(b)(1)(B))

9. The Act contains many detailed instructions to the Commission, a number of which encouraged it, or in some cases required it, to increase sentence severity. The Act includes directives to the Commission to ensure that 'the guidelines reflect the fact that in many cases current sentences do not accurately reflect the seriousness of the offence', to consider 'the community view of the gravity of the offence' and 'the public concern generated by the

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<sup>1</sup> Hofer, P.J.; Loeffler, C.; Blackwell, K. and Valentino, P (2004) - FIFTEEN YEARS OF GUIDELINES SENTENCING: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform. U.S. Sentencing Commission [http://www.ussc.gov/15\\_year/chap1.pdf](http://www.ussc.gov/15_year/chap1.pdf)

offence' and to use the prison terms then typically served for various types of crime as a 'starting-point' for sentence ranges. The Act requires judges to sentence within the prescribed guideline range unless 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described' This had the effect of making the guidelines presumptive rather than voluntary. The Act also provides an automatic right of appeal in cases where the judge sentences outside the guidelines – the defendant has an automatic right of appeal if the judge departs upwards (i.e. sentences above the top of the guideline range), while the government has an automatic right of appeal if the judge departs downwards. Either party can appeal against sentence on the basis of a misapplication of the guidelines.

10. In 2003 Congress ruled that the standards for appellate review of departures from sentencing ranges had resulted in an unacceptably high downward departure rate, particularly in cases of sex offences against children. For these cases the subsequent PROTECT Act of 2003 eliminated judicial departures from the prescribed sentence range for all reasons except those specifically authorised in the Guidelines Manual. The Act also directed the Sentencing Commission to revise the guidelines and policy statements in order to substantially reduce the incidence of downward departures. It did this by narrowing the circumstances under which departure is authorised. The Act also introduced a requirement for the courts to provide sentencing and departure information to the Commission and, on their request, to the Department of Justice and Congress.

11. Following its establishment in 1985 the Sentencing Commission developed an extensive federal sentencing *Guidelines Manual* that was published in 1987. The *Manual* sets out the rules that determine the presumptive guideline range in every case and contains policy statements, background commentary, and application notes to assist courts in applying the guidelines as intended. The manual is revised annually, and all versions can be found on the Commission's website (see [www.ussc.gov](http://www.ussc.gov)). The basic structure of the guidelines has remained constant.

12. The Commission based the guidelines on many considerations, including distinctions made in the criminal statutes, the United States Parole Commission's guidelines, public commentary and a statistical analysis of pre-guidelines sentencing practices. The Commission analysed detailed data from over 10,000 reports of offenders sentenced in 1985 and additional data from approximately 100,000 more federal convictions. The analysis determined the average prison term likely to be served for each generic type of crime. These averages were used to establish 'base offence levels' for each crime, which were directly linked to a recommended imprisonment range. Aggravating and mitigating factors that significantly correlated with increases or decreases in sentences were also identified statistically, along with each factor's importance and were used to adjust the base offence level for each type of crime upward or downward. The Commission used a wide variety of information to assess crime seriousness, including survey data on public perceptions of the gravity of different offences, analysis of the economic impacts of various crimes, and medical and psychological data on the harm caused by offences such as drug trafficking, sexual assaults and pollution.

13. The vast majority of the sentencing guidelines, particularly those in Chapters Two and Three of the *Manual*, are intended to ensure that the severity of punishment is proportional to the seriousness of the crime. In developing Guidelines that met the purposes of sentencing as

set out in the U.S. Code, the Commission took the view that proportionate punishment can control crime through a deterrent effect. Hence, guidelines were developed that increased terms of imprisonment for offenders who were at greater risk of recidivism. To minimise conflict with the other purposes of punishment, the Commission chose to predict risk using only the offender's criminal history. Chapter Four of the *Guidelines Manual* provides rules for assigning each offender to one of six criminal history categories which, along with the offence level, determines the range of imprisonment and sentencing options available to the judge. The offender's 'criminal history score' is based on the frequency, seriousness, and recency of prior criminal convictions, and whether the offender was under criminal justice supervision at the time of the current offence.

14. In order to meet the aims of increasing consistency of sentencing while retaining proportionality, the Sentencing Commission developed a Sentencing Table with 43 offence levels and six criminal history categories with overlapping ranges of imprisonment. In devising the Table, the Commission was guided by 'the 25% rule' set out in the Sentencing Reform Act, which required that the maximum of each recommended sentencing range exceed the minimum of the range by no more than six months or 25 percent of the minimum range, whichever is greater. This rule results in guidelines that assign offenders to relatively narrow ranges of recommended prison terms. Offences at level 43 result in life imprisonment.

15. Judges must impose a sentence within the guideline range unless a reason for departure is identified and recorded. For offenders convicted of less serious offences who do not have a lengthy criminal history, Chapter Five, of the *Manual* provides sentencing options other than imprisonment, including fines, restitution, forfeitures and probation. The Sentencing Table is divided into four zones, A to D. Offenders in all zones *may* receive a sentence of imprisonment, but offenders in Zone D, (which most of the Sentencing Table falls in to) *must* receive a term of imprisonment equal to at least the minimum of the guideline range. In Zones A to C judges have the option of imposing alternative sentences, depending on the particular zone in which the defendant falls.

16. Research into the impact of 15 years of guideline sentencing has demonstrated that the guidelines have made a substantial contribution to sentences for federal offences becoming more severe. Between 1987 and 2002 the proportion of probation sentences declined (the use of simple probation fell by two thirds), use of restrictive alternatives such as home confinement increased and the use of imprisonment for lengthier periods of time increased dramatically. By 2002 86% of all federal offenders received sentences of imprisonment, an increase of approximately 20% over pre-guideline years. The abolition of parole, the introduction of mandatory minimum penalties, changes in the types of offenders sentenced in federal courts and the introduction of sentencing guidelines have all contributed to federal offenders sentenced in 2002 spending almost twice as long in prison as offenders sentenced in 1984 (average sentences have increased from just under 25 months to almost 50 months).

17. In June 2004, the U.S. Supreme Court decided a case that has led to profound consequences for the federal sentencing guidelines system (*Blakely v. Washington*, 124 S.Ct. 2531 (2004)). The court invalidated a sentence imposed under the Washington State sentencing guidelines because it violated the defendant's rights under the Sixth Amendment to the United States Constitution. The trial judge had departed from the standard sentencing range, set out by the legislature in the state's sentencing statutes, based on an aggravating factor that had not been admitted by the defendant as part of his guilty plea nor proven to a

jury beyond a reasonable doubt. Although the majority opinion made clear that the court was not passing judgment on the constitutionality of the federal sentencing guidelines, which were not before the court, some of the dissenting justices and numerous commentators argued that the decision raised questions about the constitutionality of the federal guidelines or the procedures used to enhance sentences under them. Two subsequent cases, *United States v. Booker* (375 F.3d 508 (7th Cir. 2004)) and *United States v. Fanfan* (2004 U.S. Dist. LEXIS 18593), furthered the arguments and resulted in a Supreme Court ruling in January 2005 that federal judges are no longer bound by mandatory sentencing guidelines but need only consult them in sentencing federal offenders. This compromise position, which arose from the five justices in both *Booker* and *Fanfan* being equally divided, is intended to ‘avoid excessive sentencing disparities while maintaining flexibility sufficient to individualise sentences where necessary.’<sup>2</sup> The precise practical impact of the Supreme Court’s ruling on the federal sentencing guidelines system is still emerging.

### CALIFORNIA<sup>3</sup>

18. A system of determinate sentencing was originally introduced in California in 1977 and has subsequently been amended a number of times, primarily to increase sentence severity. A multiple-choice approach to sentencing is followed under which each offence carries three potential punishments (which may all be imprisonment of periods of three different lengths, e.g. the current provision concerning first degree burglary specifies that the sentencing options for the offence are ‘imprisonment in the state prison for two, four or six years). In ‘normal’ cases the trial judge is required by statute (Pen. Code § 1170(b)) to impose the middle or ‘presumptive’ sentence laid out for each crime. The judge may select the mitigated or aggravated term only when there are specific circumstances to justify doing so and provided the judge is able to record adequate reasons for doing so. While the approach adopted in California has led to state-wide uniformity in sentencing as there is a high degree of compliance with the law, it has also led the prison population to expand very rapidly. Legal commentators have suggested that the 2004 Supreme Court judgement in the case of *Blakely* has significant implications for California’s system of determinate sentencing and particularly for the provisions governing upward departures.<sup>4</sup>

19. In 1994 California introduced one of the most punitive sentencing statutes in state history. The law became known as ‘three-strikes and you’re out’ because of its provision requiring 25 years to life prison terms for offenders convicted of any felony who have two previous convictions for ‘serious’ or ‘violent’ felonies. The three-strike’s law promised to reduce violent crime by imprisoning repeat violent offenders for life. The severe nature of the law was intended to maximize the criminal justice system’s deterrent and selective incapacitation effect. Three strikes law includes non-violent burglary to be counted as a strike for sentence enhancement purposes. Other felonies, such as receiving stolen property, motor vehicle theft, or possession of marijuana, count as third strikes, resulting in offenders receiving sentences of 25 years to life. The three strikes law has had a significant impact on

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<sup>2</sup> Justice Stephen G. Breyer, quoted in Lane, C. Sentencing Standards no Longer Mandatory. Federal Judges may Deviate, Judge Rules. Washington Post January 13, 2005.

<http://www.washingtonpost.com/wp-dyn/articles/A3336-2005Jan12.html>

<sup>3</sup> Primary sources: Reitz, K. R. (2001) – The Disassemble and Reassembly of U.S. Sentencing Practices. In Tonry, M. and Frase, R. S. (Eds.) – Sentencing and Sanctions in Western Countries. Oxford University Press.

<sup>4</sup> O’Connell, J. B. (2004) – Amazing Stories: *Blakely v Washington* and California Determinate Sentences. At <http://www.fdap.org/news-6-25-04.html>

incarceration practices in California and by 2001 had resulted in around 40,000 three strike sentences. Research evidence suggests that the law has not been effective in reducing crime rates and both its deterrent and incapacitation effects have been extremely limited.<sup>5</sup> One reason suggested for this is that prosecutors are unwilling to charge arrestees with a third-strike offence because the penalties that would result are such an extreme departure from both prior practice and their own sense of justice.

## **WESTERN AUSTRALIA AND NORTHERN TERRITORY<sup>6</sup>**

20. Mandatory sentencing laws were enacted in Western Australia (WA) in November 1996, through amendments to the *Criminal Code (WA) 1913*, for juvenile and adult offenders. The laws require that when convicted for the third time or more for a home burglary, adult and juvenile offenders must be sentenced to a minimum of 12 months imprisonment or detention. This is regardless of the gravity of the offence. Justifications for the legislation were the high burglary rate, and the traumatic impact of burglaries on victims. The law, which applies to any person over the age of 10 years, was intended to reduce the incidence of domestic burglary. However, research and monitoring have revealed that the laws have had no impact on burglary rates, little impact on adult and persistent juvenile property offenders who tend to receive sentences in excess of 12 months anyway, but a profound impact on younger, less persistent offenders, particularly from Aboriginal communities.

21. Mandatory sentencing laws were enacted in the Northern Territory (NT) in 1997 through amendments to the *Sentencing Act (NT) 1995* and the *Juvenile Justice Act (NT) 1993*. The Act provided that offenders over the age of 18 found guilty of certain property offences would be subject to a mandatory minimum term of imprisonment of 14 days for a first offence, 90 days for a second property offence and one year for a third offence. The *Sentencing Act* was amended in 1999 to allow alternative sentences to be imposed in 'exceptional circumstances'. The *Juvenile Justice Act* provided that young people aged 15 to 18 who were convicted of certain property offences and who had one or more previous convictions for such offences committed after 8 March 1997 must be detained for a minimum of 28 days. Additional punitive orders could be imposed in addition to this mandatory period.

22. The offences subject to mandatory sentences included stealing (other than from a shop), criminal damage, receiving stolen property, unlawful entry of a building, unlawful use of a motor vehicle (including as a passenger) robbery, and assault with intent to steal. The introduction of mandatory sentences was justified on the basis that they would:

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<sup>5</sup> Zimring, F., Hawkins, G. and Kamin, S. (2001) – Punishment and Democracy – Three Strikes and You're Out in California. Oxford University Press.

<sup>6</sup> Primary sources: Australian Human Rights and Equal Opportunities Commission (2000) - Mandatory Sentencing laws in the Northern Territory and Western Australia. At [http://www.hreoc.gov.au/pdf/social\\_justice/submissions\\_un\\_hr\\_committee/5\\_mandatory\\_sentencing.pdf](http://www.hreoc.gov.au/pdf/social_justice/submissions_un_hr_committee/5_mandatory_sentencing.pdf)  
Morgan, N.; Blagg, H. and Williams, V. (2001) – Mandatory Sentencing in Western Australia & the Impact on Aboriginal Youth. Aboriginal Justice Council. At <http://www.dia.wa.gov.au/Publications/files/Mandatory%20Sentencing%20in%20Western%20Australia%20the%20Impact%20on%20Aboriginal%20Youth.pdf>

The Australia Law Reform Commission, a statutory body that conducts inquiries into areas of law reform at the request of the Attorney General, is currently conducting an inquiry into the laws and practices governing the sentencing of federal offenders.

- send a clear and strong message to offenders that those offences would not be treated lightly;
- force sentencers to adopt a tougher policy on sentencing property offenders;
- deal with community concerns that penalties imposed are too light; and
- encourage law enforcement agencies that their efforts in apprehending villains are not wasted.

23. Further amendments to the Juvenile Justice Act enabled diversion in respect of second offences in some circumstances and the court could order that the offender attend some form of diversionary programme. However, a third offence continued to carry the mandatory 28 days imprisonment. Further amendments to the Sentencing Act provided that courts were not required to impose a mandatory sentence where there were 'exceptional circumstances'. Mandatory sentences were also extended to some violent offences and all adult sex offences.

24. Mandatory sentences in both WA and NT have been heavily criticised in both the legal and academic literature as being arbitrary, discriminatory, not proportionate to the severity of the crime and in breach of a number of principles established in the International Covenant on Civil and Political Rights, the United Nations Convention on the Rights of the Child and the Human Rights Committee. In both states the mandatory sentences were introduced with no meaningful consultation or discussion with the judiciary, the legal profession, other interested parties or the general public. The Australian Law Reform Commission reported in 1997 that it viewed the mandatory sentencing regimes as contrary to established sentencing norms and international law and it recommended that federal legislation be introduced to override such legislation if it was not repealed. It advocated instead the introduction of national standards for the sentencing of young people. In 1999 a private members bill (Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999) was introduced to the Australian Senate (the upper house of the Federal Parliament). The bill sought to override mandatory sentencing laws in relation to juvenile offenders. It was passed by the upper house but was not supported by the federal government which controls the lower house of Parliament. The bill was not considered by the lower house and consequently has not been introduced. However, in 2001 the NT government fulfilled a key election promise and repealed most of the Territory's mandatory sentencing legislation - Juvenile Justice Amendment Act (No.2) 2001 (NT) repealed mandatory sentencing for juvenile offenders, while the Sentencing Amendment Act (No. 3) 2001 (NT) repealed mandatory sentencing for property offences for adults. As such, WA is now the only Australian state that retains mandatory sentencing laws for property offenders.

## **FLORIDA<sup>7</sup>**

25. Florida introduced sentencing guidelines in 1983 and abolished them in 1998 replacing them with the Florida Criminal Punishment Code. The sentencing guidelines required sentencers to calculate a score according to the severity of the offence and the offender's criminal history. The total score determined the sanction and a range of length of sanction when state prison was applicable. There were three categories of sanction based upon total scores:

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<sup>7</sup> Primary sources: Florida Department of Corrections (1999) – Florida's Criminal Punishment Code: A Descriptive Assessment. A Report to the Florida Legislature Detailing Florida's Criminal Punishment Code. See [http://www.dc.state.fl.us/pub/sg\\_annual/9899/intro.html](http://www.dc.state.fl.us/pub/sg_annual/9899/intro.html)

- a non-state prison sanction when the total score is 40 points or less.
- discretionary prison or non-state prison sanction when the total score is between 41 and 52 points.
- a state prison sanction when the total score exceeds 52 points.

26. The length of prison sentence was determined by subtracting 28 from the total sentence points to derive the total prison months. The court had discretion to increase or decrease the sanction by 25% which provided a relatively narrow range for the imposition of a guideline sentence. The sentencing guidelines were perceived by prosecutors and law enforcement officials as being too lenient and by judges as being too restrictive on their discretion and hence, were never widely accepted.

27. The Criminal Punishment Code became effective for offences committed on or after October 1, 1998. (The sentencing guidelines remain in effect for offences committed prior to this date.) The Code contains features of both structured and unstructured sentencing policies. However, it allows for greater upward discretion in sentencing, provides for increased penalties and lowers mandatory prison thresholds. Under the sentencing guidelines, the upward discretion was 25% above the state prison months determined by the calculation. Under the Code, the maximum sentence for any felony offence is determined by the statutory maximums as provided in §775.082.

Felony Degree	Years in Prison
Life Felony	Up to Life
1st	Up to 30
2nd	Up to 15
3rd	Up to 5

28. As a result, all felony offenders can potentially receive a prison sentence, whereas under the guidelines many were excluded from such a possibility. The maximums laid down in 775.082 also provide for far greater sentence lengths than were permissible under the guidelines. The determination of when a prison sentence is mandatory has also changed - the basic structure of the points determination system remains the same but the point thresholds for sentence calculations have undergone significant revisions:

- If total points are equal to or less than 44, the lowest permissible sentence is a non-state prison sanction (however state prison up to the statutory maximum can be imposed).
- If total points exceed 44, the minimum sentence is established by taking the total point value, subtracting 28 and decreasing the remaining value by 25%. The end result value is the lowest permissible prison sentence in months. This means that only those offenders scoring 44 points or less may receive a non-state prison sanction under the code, all others must receive a state prison sanction. (Under the guidelines the threshold for mandatory imprisonment was 52 points.)

29. The Criminal Punishment Code is now Florida's primary sentencing policy. It is distinct in that it has features of both structured and unstructured sentencing policies. From a

structured sentencing perspective, the Code requires a uniform evaluation of relevant factors present at sentencing, such as the severity of the offence, prior criminal record and victim injury. It also identifies the lowest permissible sentence that the court must impose in any sentencing decision. From an unstructured sentencing perspective the Code allows wide upward discretion in sentencing, provides for increased penalties, and lowers mandatory prison thresholds. Some commentators have suggested that the new Code combines the least desirable elements of both structured and unstructured sentencing systems.<sup>8</sup>

## MINNESOTA<sup>9</sup>

30. Minnesota was the first state to introduce sentencing guidelines. The Minnesota Sentencing Guidelines Commission is a permanent, policy making body created by legislation in 1978. Its original guidelines came into effect in 1980 and apply to crimes committed on or after 1 May 1980. The Commission consists of 11 members - one justice from the Supreme Court, one judge from the Court of Appeals, one district court judge, a prosecuting attorney, a defence attorney, a law enforcement representative, a probation officer, the Commissioner of Corrections, and three citizen representatives, one of whom must be a crime victim. Primary responsibility for criminal justice policy resides at state level in the U.S. and the Minnesota legislature determined that its criminal justice system should promote uniform and proportional sentences for convicted felons and ensure that sentencing decisions are not influenced by factors such as race, gender, or the exercise of constitutional rights by the defendant. The guidelines are regarded as providing a model of rational and consistent sentencing standards for felony offenders. The Commission collects and analyzes information on actual sentencing practices, as compared to the sentences recommended by the guidelines and the guidelines are modified on an annual basis, in response to legislative changes, case law, problems identified by the monitoring system, and issues raised by various groups.

31. The specific aims of the sentencing guidelines system are identified as being:

1. **To Assure Public Safety:** Violent offenders who pose a danger to the community are more likely to be incarcerated, and for longer periods of time.
2. **To Promote Uniformity in Sentencing:** Offenders who are convicted of similar crimes and who have similar criminal records will be similarly sentenced.
3. **To Promote Proportionality in Sentencing:** The guidelines support a "just deserts" philosophy by recommending to the sentencing judge a proportionally more severe sentence based first, on the severity of the conviction offence and second, on the offender's criminal history.
4. **To Provide Truth and Certainty in Sentencing:** The period of time to be served in prison is pronounced by the judge at sentencing and that time is fixed. Those sentenced to imprisonment serve at least two-thirds of their sentence in prison.
5. **To Coordinate Sentencing Practices with Correctional Resources:** To assure available resources, the guidelines recommend who should be imprisoned and for how

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<sup>8</sup> Griset, P.L. (1999) – Criminal Sentencing in Florida: Determinate Sentencing's Hollow Shell. Crime and Delinquency, Vol. 35 (3) pg. 316-333.

<sup>9</sup> Primary sources: Minnesota Sentencing Guidelines Commission website.

[http://www.msgc.state.mn.us/what\\_is\\_the\\_sentencing\\_guidelines\\_commission.htm](http://www.msgc.state.mn.us/what_is_the_sentencing_guidelines_commission.htm)

Knapp, K. (2004) – Sentencing Guidelines – Minnesota. Presentation to the Sentencing Guidelines Council. July 2004. See [http://www.sentencing-guidelines.gov.uk/docs/meeting4\\_presentations.pdf](http://www.sentencing-guidelines.gov.uk/docs/meeting4_presentations.pdf)

long. The need for prison resources is therefore more predictable and the Legislature can fund accordingly.

32. The Minnesota system is a numerical grid-based system that operates on the same principles as the federal sentencing grid, although it was developed in a different way. The Minnesota system was developed through a process of Commission members individually ranking felony offences in terms of seriousness on the basis of a ‘typical offence’. The Commission then debated the ranking of offences, with reference to how harm and culpability should be weighted for a particular offence, until a consensus was reached. In the case of some offences, such as assault, the category had to be sub-divided to allow different types of assault to be ranked separately. Offences were only sub-divided where objective factors could be identified easily (e.g. the age of the victim). The term “typical case” was not defined and examples of a typical case are not given in the guidelines. Ultimately it is for the judge, aided by the adversarial process, to determine whether a particular case is typical or not. Each offence is categorised according to its seriousness and offenders are assigned a criminal history score ranging from zero to ‘six or more’. In developing the guidelines the Commission ranked felony offences into twelve severity levels but subsequent amendments have reduced the number to 10. (First degree murder is excluded from the guidelines as it carries a mandatory life sentence.) The offender’s criminal history score is determined by consideration of four measures – prior felony sentences, prior misdemeanour sentences, prior serious juvenile record and ‘custody status’ (i.e. whether the offender was under supervision when the current offence was committed).

33. Sentences are recommended based first on the seriousness of the offence (represented on the vertical axis of the grid) and then on the offender’s criminal history (represented on the horizontal axis). The grid provides a narrow sentence range and a presumptive sentence that the judge is expected to impose unless there are justifiable reasons for departing from it, which the court must record in writing. Presumptive sentences are based on ‘typical cases’ and while departure is permitted (and even acknowledged to contribute to proportionality when used appropriately), ‘substantial and compelling’ circumstances must exist before the judge can justify departure. Any departure from the presumptive sentence can be appealed by either the prosecution or the defence. Although the guidelines deal only with felony offences in some instances (less serious offences committed by offenders without an extensive prior record) the guidelines recommend a ‘stayed sentence’. This is where either, the pronouncement of a sentence of imprisonment is delayed until some later date, providing that the offender complies with conditions pronounced by the court, in which case the case is discharged; or, the execution of a pronounced prison sentence is delayed to a future date, providing that the offender complies with conditions pronounced by the court, in which case the sentence is discharged. When a sentence is stayed the offender is placed on probation for a period determined by the judge, up to the statutory maximum permitted. Other penalties such as a fine, restitution or house arrest can also be imposed on the offender.

34. Implementation of the sentencing guidelines (together with other changes in sentencing policy such as the introduction of mandatory minimum sentences, and changes in the distribution of cases) have resulted in a significant increase in the average length of imprisonment in Minnesota. In 1987 felony offenders served an average of 36.3 months, by 1999 this had increased to 47.9 months. It is frequently argued that determinate sentencing systems such as those created by the use of sentencing guidelines can reduce proportionality and increase sentence disparity by not allowing the particular circumstances of individual cases to be taken sufficiently into account. However, experience from Minnesota shows that

while sentencers are able to depart from the presumptive sentence, in the majority of cases they do not. In 1999 75% of felony offenders received the sentence recommended by the sentencing guidelines. In 15.5% of cases the judge made a downward departure, in 7.4% of cases there was an upward departure and in the remaining 1.7% there were mixed departures. However, in 43% of the upward departures and 60% of downward departures, the court indicated that a plea agreement between prosecutors and defence attorneys was involved. Of the 25% of cases in which the judge departed from the presumptive sentence, fewer than 2% resulted in an appeal against sentence.

## **PENNSYLVANIA<sup>10</sup>**

35. The Pennsylvania Commission on Sentencing is an agency of the General Assembly, created in 1978 for the primary purpose of creating a consistent and rational state-wide sentencing policy to promote fairer and more uniform sentencing practices. Its original guidelines came into effect in 1982 and its current guidelines, which came into effect in 1997, apply to all offences committed on or after 25 April 1988. The Commission consists of eleven members - four judges, two state senators, two members of the House of Representatives, a district attorney, a defence attorney, and a professor of law or criminologist. The legislation required the Commission to adopt sentencing guidelines that would be "...considered by the sentencing court in determining the appropriate sentence for defendants who plead guilty or who are found guilty of, felonies and misdemeanors" (42 Pa.C.S. §2154). The guidelines, which are reviewed annually, are intended to promote sentencing equity and fairness by providing every judge with a common reference point for sentencing similar offenders convicted of similar crimes. The Commission was given the primary duty of developing sentencing guidelines that would (42 Pa.C.S. §2154):

- (1) Specify the range of sentences applicable to crimes of a given degree of gravity.
- (2) Specify a range of sentences of increased severity for defendants previously convicted of or adjudicated delinquent for one or more misdemeanor or felony offenses committed prior to the current offense.
- (3) Specify a range of sentences of increased severity for defendants who possessed a deadly weapon during the commission of the current conviction offense.
- (4) Prescribe variations from the range of sentences applicable on account of aggravating or mitigating circumstances.

36. The Pennsylvania Commission was given a wide range of powers and responsibilities in addition to promulgating sentencing guidelines. In particular the Commission was empowered to:

- establish a research and development program;
- collate information on Commonwealth of Pennsylvania sentencing practices;
- serve in a consulting capacity to state courts;
- collect and disseminate information regarding the sentences actually imposed and the effectiveness of sentences;
- make recommendations to the General Assembly concerning modification or enactment of sentencing and correctional statutes to ensure an effective, humane and rational sentencing policy; and

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<sup>10</sup> Primary source: Pennsylvania Commission on Sentencing website. <http://pcs.la.psu.edu/>

- systematically monitor compliance with the guidelines and with mandatory sentencing laws.

37. The Commission’s original 1982 guidelines were completely revised in the early 1990s following a comprehensive, multi-method assessment of their use and impact. A number of factors influenced the development of the revised guidelines. First, research conducted by the Commission found that, in comparison to other states with guidelines, Pennsylvania’s guidelines were more lenient for violent offenders and harsher for non-violent offenders. Second, prison overcrowding, which was primarily caused by the increased imprisonment of non-violent offenders, emerged as a serious problem, straining the state budget. Third, there was growing support for drug treatment as a sentencing option for certain non-violent offenders. In addition, the State legislature passed Intermediate Punishment legislation in 1990 to provide judges with an alternative sentencing option that was intended to divert people from imprisonment into community based programs, such as electronic monitoring and drug treatment. The revised guidelines focused on recommending harsher sentences for violent offenders and Intermediate Punishment alternatives for less serious offenders. The guidelines were further revised in 1997 to provide even harsher sentences for violent offenders and to expand the recommendations for Restrictive Intermediate Punishment to include a wider range of offenders.<sup>11</sup>

38. Section 303.15 of the sentencing guidelines assigns an ‘offence gravity score’ (OGS) from one to 15 to every statutorily defined felony and misdemeanour (with the exception of first and second degree murder that are punishable by mandatory life sentences). Offenders are assigned a Prior Record Score (PRS) which is based on the number and seriousness of prior convictions. The guidelines provide a three-part recommendation that the court must consider when imposing a minimum sentence – the standard range that takes into account the seriousness of the conviction offence and the offender’s PRS, an aggravated sentence recommendation and a mitigated sentence recommendation. In addition to the specific recommendations based on the combination of the OGS and PRS, the 1997 guidelines contain five levels of penalties:

- Level 1 County supervision; non-confinement
- Level 2 County supervision; Restorative Sanction\*/Restrictive Intermediate Punishment\*\*/County jail options
- Level 3 County sentence in a county facility; Restrictive Intermediate Punishment option following a Drug & Alcohol assessment
- Level 4 State sentence in a county facility; Restrictive Intermediate Punishment option following a Drug & Alcohol assessment
- Level 5 State sentence in a state facility

\* Fines, restitution and probation are all restorative sanctions.

\*\* Restrictive Intermediate Punishments are various community based sanctions such as electronic monitoring and drug treatment programmes that provide strict supervision of the offender.

39. If the court determines that the guideline recommendations are inappropriate based on the facts of the case, the court may depart from the recommendation, upwards or downwards, as long as it provides a reason on the record for such a sentence and reports that reason to the

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<sup>11</sup> Kempinen, C.A. (2003) – Impact of the 1994 and 1997 Revisions to Pennsylvania’s Sentencing Guidelines. Pennsylvania Commission on Sentencing Research Bulletin Volume 3 No. 2

Sentencing Commission. The reasons should not include aspects of the case that are already incorporated into the guidelines. Departures from the guidelines can be further divided into three types:

- dispositional departures - when the guidelines recommend a period of imprisonment but a community sentence is imposed.
- durational departures - when a sentence of imprisonment is recommended and imposed, but the length of imprisonment is either greater than or less than that recommended by the guidelines.
- procedural departures - when a guideline procedure is ignored, such as ordering intermediate punishment for a Level 3 offender without a drug and alcohol evaluation.

40. The sentencing guidelines contain two enhancement provisions: deadly weapon enhancement and youth/school enhancement. The legislation requires that the guidelines "(S)pecify a range of sentences of increased severity for defendants who possessed a deadly weapon during the commission of the current conviction offense," (42 Pa. C.S. §2154(a)(3)). The enhancement provides increases in the guideline recommendations proportional to the severity of the conviction offense. The 1997 edition of the guidelines differentiates between deadly weapons that were possessed and those that were used during the commission of an offense. The youth/school enhancement provides increases in the guideline recommendations whenever an offender either distributes a controlled substance to a minor or commits certain drug offences within 1000 feet of a school. This enhancement was initially developed as an alternative to mandatory sentencing provisions. A two-step process for the application of enhancements has been developed. Firstly the court must make a determination as to whether the elements of the enhancement are present (i.e. possession or use of a deadly weapon during the commission of the offence; or distribution of a controlled substance within 1000 feet of a school or to a minor). If the court determines the elements to be present it must consider the enhanced guideline sentence recommendations. The second step in the process is the imposition of the sentence. As with any guideline sentence recommendation, the court is free to sentence in the mitigated, standard, or aggravated range of the enhanced recommendations or to depart above or below these enhanced guidelines (204 Pa. Code §303.9).

41. The Commission's enabling legislation grants both the prosecutor and the defence attorney the right to appeal the discretionary aspects of a sentence. The Superior Court is instructed to vacate a sentence when the lower court failed to consider the guidelines, applied guidelines erroneously, departed from the guidelines and imposed an unreasonable sentence, or sentenced within the guidelines and imposed a clearly unreasonable sentence.

42. Pennsylvania's comprehensive Sentencing Guidelines Software system requires judges to enter information on any case they are dealing with and the system identifies the recommended mitigated, standard and aggravated sentences for the conviction offence. The system also contains a pro-forma for completion and electronic submission to the Sentencing Commission. For a presentation of the software system see:

<http://pcs.la.psu.edu/> Information Technology and Software, SGS Web Demo.

## WASHINGTON, D.C.<sup>12</sup>

43. The District of Columbia (DC) Truth in Sentencing Commission (TIS) was established in 1997 in order to make recommendations to the Council of the District of Columbia for amendments to the District of Columbia Code with respect to the sentences to be imposed for felonies committed on or after 5 August, 2000. The DC Council subsequently created the Advisory Commission on Sentencing to make recommendations that would:

- Ensure that, for all felonies, the sentence imposed on an offender reflects the seriousness of the offence and the offender's criminal history; provides for just punishment; affords adequate deterrence to any offender; provides the offender with needed educational or vocational training, medical care and other correctional treatment;
- Provide for the use of intermediate sanctions in appropriate cases;
- Conduct an annual review of sentencing data, policies, and practices in the District of Columbia;
- Make such other recommendations appropriate to enhance the fairness and effectiveness of criminal sentencing policies and practices in the District of Columbia.

44. The Commission, now known as the District of Columbia Sentencing Commission, comprises 13 voting and four non-voting members. In 2000 it recommended to the DC Council that a sentencing guidelines system should not be implemented for several reasons:

- there was no compelling evidence of a need for one;
- the move from a system of indeterminate sentencing with extensive parole to a system of determinate truth in sentencing, implemented by legislation that came into effect at the beginning of 2000, had not yet become apparent; and
- the Commission had not been afforded the time that would be necessary for the careful development of a guidelines system.

45. Instead of sentencing guidelines the Commission recommended extensive training of the judiciary and other criminal justice practitioners on the move to determinate sentencing and monitoring of before and after sentencing data for tangible evidence of disparities in sentencing. In response to the Commission's recommendations the DC Council passed the *Sentencing Reform Amendment Act 2000* and this directed the Commission to include in its 2003 report 'a comprehensive structured sentencing system, or explain why such a system is not recommended'. In its 2003 report the Commission recommended the implementation of 'a structured sentencing system that provides ranges of available sentences based primarily on the severity of the offence and the prior criminal record of the offender, but one that also permits judges to apply other sentencing factors in arriving at the appropriate sentence within the applicable range'. The Commission aimed to achieve a framework that will promote fairness and uniformity in sentencing and, at the same time, preserve enough flexibility and discretion to achieve justice in individual cases. It developed two grids, a Master Grid that covers all offences with the exception of drug offences and a separate Drug Grid. Two axes are used - one to plot offences by seriousness and one to plot degrees of criminal history

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<sup>12</sup> Primary sources: Report of the District of Columbia Advisory Commission on Sentencing, April 2000. See <http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/acs.2000SentenceRecommendations.pdf&acsNav=33150> 2003 Annual Report of the District of Columbia Advisory Commission on Sentencing, November 2003. See [http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/Chapter\\_III.pdf](http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/Chapter_III.pdf)

(ranked from 0 to 6+). The Commission regarded this approach as encouraging proportionality in sentencing because it places a given crime and criminal history in relation to other combinations of crimes and criminal histories.

46. The Commission ranked offences into nine groups according to seriousness, collected data on eight years of past sentencing practices, and weighted the relative importance of prior criminal convictions to develop the ranges for each sentence on the grid. Additional factors can be taken into account in determining where a particular offender should be sentenced within a given range; and unusual factors can be taken into account in determining whether a particular offender should be sentenced entirely out with the range. Each cell on the sentencing grid contains information on the offender's eligibility for a suspended sentence and probation, in addition to information on the appropriate length of any prison sentence imposed. Each cell contains the recommended sentencing range for a prison sentence. For the most serious offences and those offenders with the most significant criminal histories, prison is the only option and, unless the judge finds sufficient reason to apply one of the departure principles, the prison sentence must fall within the guideline range. For a number of offence and criminal history combinations the cells on the grids indicate that the judge may impose a prison sentence within the designated range and suspend part of that sentence, requiring the offender to serve a brief period of imprisonment followed by probation for up to five years. If probation is later revoked, the offender must serve the remaining portion of the prison sentence that was suspended. In a number of cases the cells indicate that the judge may impose a prison sentence within the designated range, or may impose a prison sentence and suspend all or part of the sentence and place the offender on probation.<sup>13</sup> The practice manual also contains detailed guidance on 'extraordinary' cases that might justify departure from the recommended sentence range, aggravating and mitigating factors, consecutive and concurrent sentences and sentencing of probation violations.

47. The Commission recommended that the sentencing guideline system should be implemented on a pilot basis for a period of around two years in order to:

- give judges and lawyers an opportunity to test whether offences are ranked correctly according to severity;
- establish whether the guideline ranges and alternatives to prison sentences, where permitted, are consistent with the principles of fairness and community safety; and,
- determine whether the other rules the Commission has proposed are fair and adequate.

48. The pilot sentencing guidelines, which are voluntary, although 'the Commission expects a high degree of compliance', came into effect in June 2004 and apply to any offences committed on or after 14 June 2004. The Commission will monitor their use, impact and compliance and report to the DC Council on an annual basis. The detailed guidance on the system issued to judges states that the Commission's goal in developing the guidelines 'was to create a sentencing system that would reduce disparity and increase the likelihood that similarly situated offenders would be treated similarly' and that 'the guidelines should give judges, practitioners, defendants, crime victims, and the community at large a better understanding of the likely consequences of criminal behaviour and greater

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<sup>13</sup> A detailed account of the development of the sentencing grid can be found at: [http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/Chapter\\_III.pdf](http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/Chapter_III.pdf) pages 4 to 20.

confidence that sentences will be predictable and consistent.’<sup>14</sup> In order to assist in the evaluation of the guidelines the Commission requires judges to acknowledge that they have followed the guidelines, to identify the departure principle they relied upon to sentence ‘outside the box,’ or to state why they did not use the guidelines.

## VIRGINIA<sup>15</sup>

49. In 1995 the Commonwealth of Virginia abolished parole for felony offenders and implemented truth in sentencing. At the same time the Virginia Criminal Sentencing Commission was established under *Section 17.1-803* of the *Code of Virginia* to implement and oversee sentencing guidelines compatible with the state’s new punishment system for felons. The Commission comprises 17 members – the Chairman of the Commission is appointed by the Chief Justice of the Supreme Court of Virginia, must not be an active member of the judiciary and must be confirmed by the General Assembly; the Chief Justice also appoints six judges or justices; five members of the Commission are appointed by the General Assembly; four individuals are appointed by the State Governor, at least one of whom must be a victim of crime or a representative of a victim’s organisation; the final member is the Attorney General, who serves by virtue of his office.

50. The Commission develops and administers guidelines to provide Virginia’s judiciary with sentencing recommendations in felony cases. The guidelines were developed on the basis of past sentencing practice – around 120,000 cases were analysed for all significant factors that influenced the decision on whether to impose custody or not and the guidelines were based on those factors that the judiciary deemed to be appropriate to the sentencing decision. The guidelines cover all felony offences, which are divided into 14 offence groups according to seriousness. In developing the guidelines the Commission rejected the numerical grid approach as being too simplistic and opted instead for offence-specific guidelines. The guidelines provided a recommended sentence range for each felony and sentencers are required to use the sentencing guidelines worksheet to arrive at a ‘score’ for each case they consider. This allows the individual characteristics of each case to be taken into account. The score is then converted into a guideline recommended sentence range. (See <http://www.vcsc.state.va.us/worksheets.htm> for copies of the worksheets for each of the 14 categories of felonies.)

51. Judicial compliance with the truth-in-sentencing guidelines is voluntary although the process is not, in that the judge must consider the guidelines and must complete a sentencing guidelines worksheet. A judge may depart from the guideline recommendation and sentence an offender to a punishment either more or less severe than called for by the guidelines. In cases in which the judge departs from the guideline recommendation, he or she is required by § 19.2-298.01 of the *Code of Virginia* to provide a written reason for the departure on the guidelines worksheet. The guidelines are revised annually and at each revision the Commission takes into account the departure reasons given by judges. In this way, the

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<sup>14</sup> The District of Columbia Sentencing Commission (2004) – Practice Manual. The Superior Court of the District of Columbia Voluntary Sentencing Guidelines for Pleas and Verdicts Entered on or After June 14, 2004. At: <http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/chapter1.pdf>

<sup>15</sup> Primary sources: Kern, R. (2004) – Sentencing Guidelines, Virginia. Presentation to the Sentencing Guidelines Council July 2004. See [http://www.sentencing-guidelines.gov.uk/docs/meeting4\\_presentations.pdf](http://www.sentencing-guidelines.gov.uk/docs/meeting4_presentations.pdf) Virginia Criminal Sentencing Commission – 2004 Annual Report. See <http://www.vcsc.state.va.us/2004FULLAnnualReport.pdf>

judiciary feel that they are having input into the refinement of the guidelines and are more willing to accept them. Data published by the Commission show that in 2004 sentencers complied with the guidelines in 80.7% of cases. Judicial acceptance of the guidelines is regarded as being crucial in ensuring the success of the truth-in-sentencing reforms. The compliance rate exceeds that in many other states with mandatory guidelines systems and the ongoing success of voluntary guidelines is believed to reflect the confidence of the judiciary in these benchmarks.

52. In addition to considering the guideline recommendation, in any case where the judge decides the offender has crossed the custody threshold a risk assessment must be carried out. This is intended to ensure that those who do not pose a risk to public safety are diverted to a community disposal, while prison is reserved for those serious felons who do threaten public safety. The risk assessment is based on criminological research and includes factors such as age, prior record, sex and employment status. Research has shown that the recidivism rate for the offenders recommended for diversion on the basis of the risk assessment was 12%, compared to 38% for those offenders not recommended for diversion. A risk assessment was also developed specifically for sex offenders to assess the risk of re-offending and the likelihood of the offender responding to treatment interventions. According to the risk assessment score, the guideline sentencing range for sex offences can be inflated by 50%, 100% or 300%. Where the offender's score is minimal, the sentencing range should not be adjusted.

53. Virginia's voluntary sentencing guidelines are regarded as having significantly reduced sentencing disparities across the Commonwealth. Research has shown that prior to the adoption of the sentencing guidelines, approximately half of the variation in judicial sentences could be explained by factors unrelated to the nature of the crime or the felon's prior criminal record – factors such as the identity of the judge, locality and the offender's race. Under the sentencing guidelines system a significantly larger proportion of the variation is attributable to differences between crimes and criminals.

## OHIO<sup>16</sup>

54. The Ohio Criminal Sentencing Commission was created by statute (Ohio Revised Code §§181.21 - 26) in 1991 primarily to:

- Study Ohio's criminal laws, sentencing patterns, and juvenile offender dispositions;
- Recommend comprehensive plans to the General Assembly that encourage public safety, proportionality, uniformity, certainty, judicial discretion, deterrence, fairness, simplification, more sentencing options, victims' rights, and other reasonable goals;
- Review correctional resources and recommend cost-effective proposals;
- Monitor the changes and periodically report on their impact to the General Assembly; and

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<sup>16</sup> Primary sources: Supreme Court of Ohio website at

[http://www.sconet.state.oh.us/sentencing\\_commission/overview.asp](http://www.sconet.state.oh.us/sentencing_commission/overview.asp)

Berman, D. A. (2005) – *Big Blakely/Booker* Case From Ohio. Sentencing Law and Policy. At [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2005/02/big\\_emblakelyem.html](http://sentencing.typepad.com/sentencing_law_and_policy/2005/02/big_emblakelyem.html)

Ohio Criminal Sentencing Commission (2002) – Felony Sentencing Quick Reference Guide. At [http://www.sconet.state.oh.us/Sentencing\\_Commission/publications/FelonyQuickRef03.pdf](http://www.sconet.state.oh.us/Sentencing_Commission/publications/FelonyQuickRef03.pdf)

- Review related bills introduced in the General Assembly and study sentencing and dispositions in other states.

55. The Chief Justice of the Supreme Court of Ohio chairs the 31 member Commission. One appellate judge, three municipal or county judges, three juvenile court judges, and three other common pleas judges are appointed by the Chief Justice. A county, juvenile, and municipal prosecutor, two defence attorneys, a Bar Association representative, a sheriff; two police chiefs, a victim of crime, a county commissioner and a mayor are appointed by the State Governor. Four members of the General Assembly serve on the Commission, one from each caucus and the law also appoints the State Public Defender, Director of Rehabilitation and Correction, Director of Youth Services, and Superintendent of the Highway Patrol to the Commission.

56. The Commission has developed narrative sentencing plans for:

- felony offences, based on ‘truth in sentencing’, five felony levels, a continuum of sanctions and comprehensive victims’ rights;
- adults convicted of misdemeanours - this sentencing plan states that the judge has discretion to determine the most effective way to achieve the purposes and principles of sentencing. Unless a sanction is required or precluded, the judge may impose any lawful sanction or combination of sanctions; and,
- juveniles, which introduced ‘blended sentences’ where the most serious juvenile offenders receive both a juvenile and an adult sentence, with the adult sentence suspended to encourage the young person’s rehabilitation.

57. The guidelines for felony offences identify the purposes and principles of sentencing, with which the sentencer must comply, as being:

**Overriding Purposes:** Punish the offender and protect the public from future crime by the offender and others.

**Principles:** Always consider the need for incapacitation, deterrence, rehabilitation, and restitution.

- Sentence should be commensurate with, and not demeaning to, the seriousness of offender's conduct and its impact on the victim and consistent with sentences for similar crimes by similar offenders.
- Do not sentence based on the offender's race, ethnicity, gender, or religion.

58. The Ohio Revised Code § 2929.14 provides that:

‘(B) Except [under certain specified circumstances] the court shall impose the shortest prison term authorized for the offense ... unless (1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term [and/or] (2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except [under certain specified circumstances], the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense ... only upon offenders who committed the worst forms of the offense [or] upon offenders who pose the greatest likelihood of committing future crimes....’.

59. The judge must give reasons for imposing the longest term and the offender has a right of appeal.

60. Ohio's sentencing guidelines scheme does not permit a sentencing court to deviate from a prescribed range of sentences for any felony. The statutory range of imprisonment is set by the General Assembly for each felony level. The statutory range for a first-degree felony is three to ten years. The sentencing court has discretion to impose the longest sentence within that range as long as it makes the factual finding that the defendant is an offender who has committed the 'worst form' of the offence or poses the greatest likelihood of recidivism. The guidelines identify a list of factors that make the offence more or less serious and that make recidivism more or less likely and sentencers are required to weigh these in every case where they are present. The guidelines identify those cases where imprisonment is mandatory and those where there is a presumption in favour of imprisonment. For cases in which imprisonment is optional, the sentencer is required to bear in mind that 'the sentence must not impose an unnecessary burden on State or local resources'. A sentencing table is provided for cases that do not attract mandatory prison sentences. For felonies at each of five levels the table identifies the general sentencing guideline, the range of prison terms, the maximum fine, enhancements for repeat violent offenders and whether post release control is required. (For a copy of the felony sentencing table see [http://www.sconet.state.oh.us/Sentencing\\_Commission/publications/FelonyQuickTable03.pdf](http://www.sconet.state.oh.us/Sentencing_Commission/publications/FelonyQuickTable03.pdf))

## **DELAWARE**<sup>17</sup>

61. The Delaware Sentencing Accountability Commission (SENTAC) was established by statute in 1987 in order to "establish a system which emphasises accountability of the offender to the criminal justice system and accountability of the criminal justice system to the public." The Commission comprises 11 members, five of whom are judges with the remainder being criminal justice practitioners. A number of Supreme Court rulings (e.g. *Mayes v State*, 604 A.2d 839, 845 (Del. 1992); *Siple v State* 701 A.2d 79 (Del. 1997)) have determined that Delaware sentencing guidelines are voluntary and non-binding, although sentencing judges are required to state their reasons for sentencing out with the guidelines. Because they are voluntary, the guidelines are generally not subject to appeal. The Guidelines, which are revised annually, are published in the form of a Benchbook and are designed to ensure certainty and consistency of punishment commensurate with the seriousness of the offence and with due regard for resource availability and cost. The overall sentencing philosophy of the Delaware General Assembly and SENTAC is that offenders should be sentenced to the least restrictive and most cost-effective sanction possible given the severity of the offence, the criminal history of the offender and the focus, which is, first and foremost, to protect the public's safety. Other goals in order of priority, and as set out in Statute (64 Del. Laws, c. 402 § 1), include:

- (1) Incapacitation of the violence-prone offender;
- (2) restoration of the victim as nearly as possible to the victim's pre-offence status, and,
- (3) rehabilitation of the offender.

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<sup>17</sup> Delaware Sentencing Accountability Commission website: <http://www.state.de.us/cjc/sentac.htm>  
Delaware Sentencing Accountability Commission Benchbook 2005.  
At <http://www.state.de.us/cjc/PDF/BB.Final.2005.pdf>

62. The Benchbook is designed to assist sentencing judges, prosecutors and defence attorneys in the formulation of sentences that are consistent with SENTAC's goals of sentencing reform. Every offence, with the exception of most road traffic violations, is classified into one of seven classes, A to G, and categorised according to whether it is violent or non-violent in nature. The Benchbook identifies recommended sentencing ranges and statutory maxima for every offence by class and category. For example, the Benchbook specifies that Class B felonies in the violent category attract a presumptive sentence of two to five years, of which the first two years must be served at supervision level V. The specific crimes that fall within the class and category are listed. The recommended sentencing range for each crime classification is intended to apply to 'typical' offences i.e. does not take aggravating and mitigating factors into account. However, recommended sentencing ranges are also provided for cases in which mitigating or aggravating factors exist - the presumptive sentencing range for a first conviction generally represents 25% of the statutory maximum; while serious aggravating factors can increase the penalty up to 100% of the statutory maximum. The Benchbook contains a list of aggravating and mitigating circumstances that can justify departure from the guideline sentencing range but the lists are not definitive and the sentencing judge can take other factors into account. Prior criminal history, excessive cruelty and commission of the offence while under control of the Department of Corrections must always be taken into account as aggravating factors.

63. In formulating its sentencing guidelines in 1987 SENTAC identified five levels of supervision of offenders. These are:

- **Level I Unsupervised:** Fine or Administrative Supervision, i.e. criminal record checks, checks to determine compliance with programme completion, certification of payment of financial obligations, etc.
- **Level II Field supervision:** one to 50 hours of supervision per month. This may be accomplished by office visits or field visits and/or the imposition of special conditions such as payment of a fine.
- **Level III Intensive supervision:** No less than one hour per day and no more than 56 hours per week. Offenders sentenced at this level are supervised by officers carrying limited caseloads to allow sufficient time for full follow up. This level may include sentencing options such as community service, payment of a fine, day reporting, curfews, etc.
- **Level IV Quasi-Incarceration or Partial Confinement:** Offender is placed under house arrest with electronic monitoring, a halfway house, a restitution centre, a residential treatment facility, and/or a re-entry program. As a result, supervision should amount to approximately 9 or more hours daily.
- **Level V Incarceration or Full Confinement** Commitment to the Department of Correction for a period of incarceration with or without the imposition of a fine as provided by law.

64. The presumptive sentences specify the supervision level as well as the length of sentence, for example, the guidelines identify the presumptive sentence for a Class E violent felony as being 0-18 months at Level V. Statute requires that all sentences that impose a period of imprisonment of one or more years at Level V, require that the court must include as part of its sentence a six-month "Reintegration Period" at Custodial Supervision Level IV (quasi-incarceration), III or II (Title 11, §4204).

65. Delaware's sentencing guidelines are predominantly narrative in nature and the Benchbook, which is updated annually, currently runs to 147 pages. In addition to the offence ranges for each offence class, it provides detailed information on aggravating and mitigating factors, exceptional sentences, sentencing of breaches of probation and legislative updates.

## **ALASKA<sup>18</sup>**

66. Alaska first established a sentencing commission in 1968 in response to concerns about the need for sentencing reform and the implications of a Supreme Court decision that the Court did not have jurisdiction to review criminal sentences for an abuse of discretion. The Commission recommended that the state legislature should enact a statute giving the Alaska Supreme Court jurisdiction to review sentences in serious criminal cases, and this was enacted in 1969. The new law gave both the defendant and the State the right to appeal a sentence to the Supreme Court. However, where the State appealed, the court had no power to increase the sentence, it could only approve or disapprove it. The court first exercised its new duty in the case of *State v Chaney* in 1970 and in a written opinion concluded that the primary goal of the legislation (Alaska Statutes §12.55.120) 'was to implement Alaska's constitutional mandate that penal administration shall be based on the principle of reformation and upon the need for protecting the public.' The court then translated this principle into concrete standards to which the sentencing judge should refer when choosing a sentence. These standards, known as the Chaney factors, are:

- Rehabilitation of the offender into a non-criminal member of society
- Isolation of the offender from society to prevent criminal conduct during the period of confinement
- Deterrence of the offender himself after release from confinement or other penological treatment
- Deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender
- Reaffirmation of societal norms for the purpose of maintaining respect for those norms.

67. In the companion case of *Nicholas v State* the court stressed that sentencing should remain flexible in order to take into account the facts of each crime, as well as the record and character of each offender. The court refused to rank the Chaney factors in order of importance, preferring instead to let the trial court 'determine the priority and relationship of the objectives in any particular case.'

68. Research on all sentence appeals heard by the Supreme Court in the first five years (1970-1975) revealed that the court had interfered very little in the sentencing function. However, it did exercise its appellate review authority to develop and articulate sentencing criteria to guide trial judges. For example, in cases involving serious crimes against people,

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<sup>18</sup> Primary Sources: Alaska Judicial Council (1991) – Appellate Sentence Review in Alaska. See

<http://www.ajc.state.ak.us/Reports/sentframe.htm>

Alaska Judicial Council (1998) – A Guide to Alaska's Criminal Justice System. See

<http://www.ajc.state.ak.us/reports/cjguideframe.htm>

Sentencing Commission News, October 1995, Issue 2. National Association of Sentencing Commissions. See

<http://www.ussc.gov/states/statnews.htm>

the court ruled that the nature of the offence should predominate over most mitigating factors, leaving judges free to place great emphasis on the Chaney factors of protecting society and reaffirming societal norms. In cases involving drug offenders the court developed four categories of offences and directed that the maximum terms of imprisonment should ordinarily be reserved for the worst offenders. The court further suggested that factors such as the personal history and age of the offender should play a larger role in the sentencing of drug cases than in violent cases. The court also issued guideline judgements for cases involving property crimes and robbery.

69. Research by the Alaska Judicial Council showed that disparities in sentencing continued to exist despite the system of appellate sentence review. In 1978 the Criminal Code of Alaska was substantially rewritten and a system of presumptive sentencing was adopted in order to eliminate ‘unjustified disparity in sentences imposed on defendants convicted of similar offences – disparity which is not related to legally relevant sentencing criteria.’ The presumptive sentencing scheme came into effect at the start of 1980. In the meantime the Supreme Court concluded in 1979 that the number of appeals being filed was such that the court’s workload had exceeded its capacity to decide cases in a reasoned and timely manner. In response the Alaska Legislature established, with effect from August 1980, a three-judge court of appeals with mandatory jurisdiction in criminal and quasi-criminal matters, including sentencing appeals. The Supreme Court retained discretionary jurisdiction to review final decisions of the court of appeals. From the outset the new court of appeals was responsible for interpreting a virtually new criminal code and sentencing scheme.

70. Alaska’s presumptive sentencing statutes do not specify presumptive terms for all offences or combinations of offences. Those that are specified are set out in the table below.

<b>Offence</b>	<b>First Felony Conviction</b>	<b>Second Felony Conviction</b>	<b>Third Felony Conviction</b>	<b>Maximum Fine</b>
Murder	20-99 years			\$75,000
Other unclassified felonies	5-99 years			\$75,000
Unclassified sexual offences	4-30 years presumptive 8	7.5-30 years presumptive 15	12.5-30 years presumptive 25	\$75,000
Class A felonies	2.5-20 years presumptive 5/7	5-20 years presumptive 10	7.5-20 years presumptive 15	\$50,000
Class B felonies	0-10 years	0-10 years presumptive 4	0-10 years presumptive 6	\$50,000
Class C felonies	0-5 years	0-5 years presumptive 2	0-5 years presumptive 4	\$50,000
Class A misdemeanours	0-1 year			\$5,000
Class B misdemeanours	0-90 days			\$1,000
Violations	No imprisonment			\$300

71. The table shows the general range of sentences set by the Alaska Legislature for various crimes. It shows the minimum, maximum, and presumptive length of imprisonment for different classes of crimes. A presumptive sentence is the sentence that applies if the crime is regarded as being as serious as the ‘typical’ crime of this type, and the offender’s criminal history is typical for this type of offender. There are, however, a number of exceptions to these general presumptive sentences. In some cases, longer sentences apply to offenders who knowingly commit crimes against police or correctional officers. For some Class A felonies, a longer presumptive term applies if the offender possessed a firearm, used a dangerous instrument, or caused serious physical injury. Under some circumstances a

three-judge panel may sentence outside the presumptive ranges. Some offences have mandatory minimum sentences that may not be reduced. For cases in which presumptive sentencing applies, the court of appeals has developed an important body of case law prescribing the extent to which presumptive terms may be adjusted when statutory aggravators are found. The court's most important rulings in these areas relate to:

- (1) first felony offenders convicted of class B felonies,
- (2) first felony offenders convicted of aggravated class A felonies,
- (3) first felony offenders convicted of aggravated cases of sexual assault in the first degree and sexual abuse of a minor in the first degree,
- (4) offenders convicted of the unclassified felony of murder in the second degree, and
- (5) offenders convicted of two or more offences before the judgment on either has been entered (offenders subject to consecutive sentencing).

72. For cases in which presumptive sentencing does not apply, the court of appeals has created a series of 'benchmark' or typical sentences, based primarily on the court's interpretation of the principles implicit in the presumptive sentencing scheme. The purpose of the benchmark is to 'focus the attention of the trial court and the parties on individual cases and ensure that typical cases would receive a typical sentence and that those defendants receiving atypical sentences would be sentenced on the basis of objective aggravating factors, not factors idiosyncratic to a specific judge.' The Alaska Court of Appeals has articulated benchmarks for:

- (1) first felony offenders sentenced for class B felonies,
- (2) aggravated class A felonies,
- (3) serious sexual offences,
- (4) second degree murder, and
- (5) consecutively-imposed sentences.

73. Alaska's court of criminal appeals is regarded as having had a profound impact on sentencing policy since its creation in 1980. The Chaney factors identified by the Supreme Court are applied to every sentencing decision and were incorporated into statute in the revision of the Criminal Code. The court's decision to determine the justice of non-presumptive sentences by referring to the presumptive sentencing structure has had a significant impact on sentencing practice and sentencers now have a substantial body of case law to inform their sentencing decisions. In 1990 a new Sentencing Commission was established in Alaska to evaluate the effect of sentencing laws and practices on the criminal justice system and to make recommendations for improving sentencing practices. The Commission completed its work in 1993 and did not recommend in favour of establishing an alternative approach to developing sentencing guidelines, favouring instead increased judicial training and improved availability of information.

## NEW SOUTH WALES<sup>19</sup>

74. The New South Wales (NSW) Sentencing Council is a statutory body established under Part 8B of the *Crimes (Sentencing Procedure) Act 1999*. It was the first system of its kind in Australia and became operational on 1 February 2003. The Council comprises ten members drawn from specified fields who are appointed for a fixed term of no more than three years, but who can be re-appointed. Section 100I of the *Crimes (Sentencing Procedure) Act 1999* provides that:

- One is to be a retired judicial officer, and
- One is to have expertise or experience in law enforcement, and
- Three are to have expertise or experience in criminal law or sentencing (of whom one is to have expertise or experience in the area of prosecution and one is to have expertise or experience in the area of defense), and
- One is to be a person who has expertise or experience in the area of Aboriginal justice matters, and
- Four are to be persons representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime.

75. The Council's functions are also prescribed by statute and are:

- To advise and consult with the Attorney General in relation to offences suitable for standard non-parole periods and their proposed length;
- To advise and consult with the Minister in relation to offences suitable for guideline judgements and the submissions to be made by the Minister on an application for a guideline judgement;
- To monitor and to report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgements; and,
- At the request of the Minister, to prepare research papers or reports on particular subjects in connection with sentencing.

76. The Council may give advice to the Minister either at the request of the Minister or without any such request. It is permitted by statute to consult with, and may receive and consider information and advice from, the Judicial Commission of New South Wales and the Bureau of Crime Statistics and Research of the Attorney General's Department. In receiving advice from the Council it is a matter for the Attorney General to decide whether and to what extent he/she will adopt, accept and implement the advice. One of the Council's first tasks was to focus on the issue of real or perceived inconsistency in Local Court sentencing and to make recommendations about how best to ensure consistency in sentencing. The considerations were restricted to Local Courts because it was felt that in the higher courts guideline judgements and standard minimum sentencing (see below) have been effective

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<sup>19</sup> Primary sources: Debus, B. (2003) – The NSW Sentencing Council – its Role and Functions. *Judicial Officers' Bulletin* 15 (6).

Abadee, A. R. (2003) – The New South Wales Sentencing Council. *Local Courts Annual Conference 2003*.

Marien, M. (2003) – Standard Non-Parole Sentencing and Guideline Judgements: Where to From Here? [http://www.lawlink.nsw.gov.au/lawlink/clrd/ll\\_clrd.nsf/pages/CLRD\\_standard\\_sentencing](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_standard_sentencing)

Schmatt, E. (2001) – The Sentencing Information System of the Judicial Commission of New South Wales. At [http://www.judcom.nsw.gov.au/about\\_the\\_commission/baltimore\\_speech.php](http://www.judcom.nsw.gov.au/about_the_commission/baltimore_speech.php)

Sentencing systems in all of the Australian territories were explored. Guidelines are a very recent development in Australia and the territories not described in this paper do not have sentencing guidelines systems in place.

mechanisms for satisfying the need for increased consistency. The Council has also been requested by the Attorney General to consider and research the question of whether “attempt” and “accessorial” offences should be included in the standard non-parole sentencing scheme and to prepare a report on the subject of abolishing prison sentences of six months or less.

77. At the same time as the NSW Sentencing Council was established the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* introduced standard non-parole periods (i.e. standard minimum sentences) for a number of serious offences when they are dealt with on indictment. The offences in question are:

- murder;
- conspiracy to murder;
- attempted murder;
- wounding etc with intent to do bodily harm or resist arrest;
- certain assault offences involving injury to police officers;
- certain sexual offences, including sexual intercourse with a child under ten years old;
- certain robbery and break and enter offences;
- car-jacking;
- certain offences involving commercial quantities of prohibited drugs;
- certain offences involving unauthorised possession or use of firearms; and
- intentionally causing a bushfire.

78. The offence of murder is divided into two categories comprising murder where the victim was a public official (e.g. police officer, emergency services worker etc.), exercising public or community functions; and the offence arose because of the victim’s occupation, and “murder — in other cases”.

79. A “standard non-parole period” is defined by the Act as “the non-parole period for an offence in the middle range of objective seriousness” for offences of that category. It provides a reference point or “benchmark” for sentencing. The non-parole periods were set taking into account the seriousness of the offence, the maximum penalty for the offence, current sentencing trends for the offence (as shown by sentencing statistics routinely collected by the Judicial Commission of New South Wales) and community expectations of an appropriate sentence. The sentencer may impose a non-parole period that is longer or shorter than that specified as the standard non-parole period but only for the reasons (aggravating and mitigating factors) specified in s21A of the 2002 Act. The court must make a record of its reasons for increasing or reducing the standard non-parole period and must identify in the record of its reasons each factor that it took into account. Standard non-parole periods were introduced by the Government, not as mandatory sentences, but to ‘provide further guidance and structure to judicial discretion’ and are aimed primarily at promoting consistency and transparency in sentencing and promoting public understanding of the sentencing process.

80. Section 37 of the *Crime (Sentencing Procedure) Act 1999* provides that the Court of Criminal Appeal may give guideline judgements, on its own motion in any proceedings considered appropriate by the Court, or on the application of the Attorney General. In both instances the Attorney General has an opportunity to make submissions with respect to the framing of the proposed guidelines. In debating the 2002 Amendment Bill the Attorney General indicated that the guideline judgements already promulgated by the Court in respect

of offences of ‘armed robbery’, ‘dangerous driving causing death or grievous bodily harm’ and ‘break, enter and steal’, should continue to be used by the courts when sentencing for these offences as they are an “*extremely useful tool in achieving consistency in sentencing and in taking into account community expectations as to the appropriate penalty to be imposed.*” He emphasised the Government’s view that guideline judgements should continue to play an important role with respect to offences that are not part of the standard non-parole scheme.

81. Commentators have suggested that the distinction between what offences might be deemed suitable for standard non-parole periods (and their proposed length) and what offences might be deemed suitable for guideline judgements is not necessarily a clear one. The inclusion of any offence within the table of those subject to standard non-parole periods does not necessarily exclude it from being subject to a guideline judgement. However, in NSW the Court of Criminal Appeal has the power to decline to give a guideline judgement if it considers it inappropriate to do so. While the Sentencing Council is required to make decisions on which offences are suitable for standard non-parole periods and which might be suitable for guideline judgements, neither the Attorney General nor the Court is obliged to follow their advice.

82. Prior to the creation of the Sentencing Council in 2003, sentencing in NSW was not entirely unfettered. In 1986, in response to public concerns about unjustified disparity in sentencing, the NSW government established a Judicial Commission whose primary responsibilities are: education and training of judges and magistrates; establishing guidelines for sentencing; and establishing a Conduct Division to deal with complaints against judicial officers and investigate allegations made against them. At this time the government specifically rejected the idea of a ‘prescriptive’ sentencing council, taking the view that the establishment of the Judicial Commission (with access to improved statistics) was preferable to a sentencing council since it would ‘be a valuable servant, rather than a master determining sentences in individual cases’. A major function of the Commission is assisting courts to achieve consistency in approach in the sentencing of offenders. It’s objectives in this area are to reduce unjustified disparities in sentences imposed by the courts, to improve sentencing efficiency generally, and to reduce the number of appeals against sentences, thereby freeing up resources which can be redeployed to reduce court delays. The Commission’s strategies for achieving sentencing consistency are:

- providing judicial officers with access to the Sentencing Information System (SIS), a computerised sentencing database developed by the Commission;
- undertaking and disseminating original research and statistical analysis on aspects of sentencing and other topics of assistance to sentencers.

83. The SIS, a computerised, state-wide sentencing database developed by the Judicial Commission became operational in 1993. The system contains a number of databases:

- a penalty statistics database, which gives information on sentences passed by the courts for offences categorised by case characteristics (i.e. age, prior criminal record, plea, and liberty status);
- a judgements database containing full text sentencing decisions from the Court of Criminal Appeal and criminal cases decided by the High Court of Australia. Information from this module may be retrieved either by selecting from a judgment-year alphabetic list of case names or by undertaking a word search;

- a case summary database containing brief case facts and sentencing outcomes of decisions of the Court of Criminal Appeal. This module makes it possible to quickly locate all cases relating to a particular offence and, from the summary, move to the full text of the judgment;
- a Sentencing Principles and Practice database containing concise, specially prepared, commentary on sentencing principles, and key passages from judgments that distil the main points of the judge's sentencing rationale. This database provides a convenient method of identifying the leading cases on sentencing so that the full text of the judgments can be called up.
- a database of local sentencing facilities and programmes available to the courts for the referral of offenders;
- sentencing law database, which includes the available sanctions for each offence and any legislative restrictions on sentence; and
- an advance notes database which contains summaries of the main submissions of counsel and a précis of the legal principles or rulings arising from the decision in cases decided by the Court of Criminal Appeal and the High Court of Australia. The advance notes are prepared by the Office of the Director of Public Prosecutions and provided to the Commission for inclusion in the SIS.

84. The statistical data base comprises data collected by the NSW Judicial Commission on sentences passed by the courts in the previous two years (although where the number of cases is small, older data are retained on the system). It indicates, in the form of tables and graphs, an overall distribution of sentences per offence (selected according to one or more case characteristics), and more detailed information about the use of a particular sentence (e.g. amounts of fines, terms of imprisonment).

## IRELAND<sup>20</sup>

85. In the main, sentencing in Ireland is at the discretion of the judiciary, subject to the maximum penalties laid down in statute by the Oireachtas (the Legislature of Ireland). Over time the Superior Courts have developed a substantial body of case law setting out general principles of sentencing. For example, case law has established the principles that:

- a sentence should be proportionate to the gravity of the offence and the personal circumstances of the offender (*The People (D.P.P.) v M, 1994*).
- Save in exceptional circumstances a person convicted of Rape should receive an immediate and substantial custodial sentence (*The People (D.P.P.) v Tiernan, 1989*); and,
- A guilty plea should ordinarily attract a reduction in sentence (*The People (D.P.P.) v G, 1994*). This principle is also supported by statute – the *Criminal Justice Act, 1999* provides that a Court shall, if it considers it appropriate, take into account the stage at

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<sup>20</sup> Primary sources: Address by the Minister for Justice, Equality and Law Reform at the First Edward O'Donnell McDevitt Annual Symposium: 'Sentencing in Ireland' Feb. 2004 Department of Justice, Equality and Law Reform at <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ5XUD5V-en>  
The Law Reform Commission Ireland (1996) – Report on Sentencing. At [http://www.lawreform.ie/publications/data/lrc90/lrc\\_90.html](http://www.lawreform.ie/publications/data/lrc90/lrc_90.html)  
The Working Group on the Jurisdiction of the Courts (2003) – The Criminal Jurisdiction of the Courts. At <http://www.courts.ie/WGJC.nsf/LookupPageLink/reports?OpenDocument>

which the person indicated an intention to plead guilty and the circumstances in which the indication was given. The Act also provides, however, that a court is not precluded from passing the maximum sentence prescribed by law if the court is satisfied that there are exceptional circumstances.

86. Since 2004 all written judgements of the Court of Criminal Appeal have been available on-line in a judgements database provided by the Courts Service (see <http://www.courts.ie/judgments.nsf/HomePage?OpenForm&Start=10&Seq=2> ).

87. Other sentencing principles established by statute are that:

- any sentences for offences committed while on bail must be ordered to run consecutively to each other or to any previous sentence, provided that where the sentences are imposed by the District Court the aggregate term of imprisonment must not exceed two years (*Criminal Justice Act, 1984*).
- Where a court imposes consecutive sentences for an offence committed while on bail it may consider the fact that the offence was committed while on bail as an aggravating factor justifying the imposition of a greater sentence than might otherwise have been imposed (*Bail Act, 1997*).

88. There are, however, two types of offence for which mandatory sentences are specified in statute. In the case of murder the *Criminal Justice Act, 1990* provides that a person convicted of treason or murder shall be sentenced to imprisonment for life. Where a person is convicted of treason or of what formerly would have been capital murder, the Act obliges a court to specify imprisonment for a period of not less than 40 years as the minimum period to be served. In all other cases of murder the offender must serve a minimum of seven years before their case can be referred to the Parole Board. Section 4 of the Act provides for a mandatory term of 20 years imprisonment for attempts to commit certain murders. At the beginning of 2004 Ireland's Minister for Justice, Equality and Law Reform, who retains the final decision on the point of release of life sentence prisoners, indicated the introduction of 'a general policy that at least 12 to 15 years must now pass before an adult convicted of murder, whatever the circumstances, can contemplate any prospect of release on licence', together with 'a general policy that in the case of murder committed in the course of or in the context of violent criminality - such as robbery, gangland activity or drug crime - no consideration of release on licence will be given until 15 to 20 years has elapsed.'<sup>21</sup>

89. In the case of commercial drug trafficking (i.e. possession of drugs for the purposes of sale or supply), Part II of the *Criminal Justice Act, 1999* introduced a mandatory minimum sentence of 10 years imprisonment, up to a maximum of life, in cases where the value of the drugs is €12,700 or more. However, the Act also provides that a court should not apply the mandatory minimum sentence where it is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make it unjust in all the circumstances to impose the minimum sentence of 10 years. Factors that the court may take into account include whether the person pleaded guilty, the stage at which the intention to plead guilty was indicated and the circumstances surrounding the indication, and whether the accused materially assisted in the investigation of the offence.

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<sup>21</sup> McDowell, M. (2004) – Sentencing in Ireland. First Edward O'Donnell McDevitt Annual Symposium, 28 February 2004. At <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ5XUD5V-en>

Evidence suggests that in practice departure from the mandatory minimum sentence is common.

90. In 1996 Ireland's Law Reform Commission unanimously recommended against the introduction of statutory sentencing guidelines. Instead it recommended by a majority that non-statutory guidelines should be introduced to link the severity of the sentence to the seriousness of the offending behaviour. The Commission recommended that the legislature set out, by way of statute, a clear statement that the sentence to be imposed on an offender be determined by reference to the "just deserts" principle of retribution, whereby the severity of the sentence should be measured in proportion to the seriousness of the offending behaviour and seriousness should be measured by reference to the harm caused or risked by the offender in committing the offence and the culpability of the offender. It also recommended that the sentencer should *not* have regard to the deterrence of the offender or others from committing further crime, to the incapacitation of the offender from committing further crime or, where a sentence of imprisonment is warranted, to the rehabilitation of the offender when determining the severity of the sentence to be imposed. A minority of Commissioners, however, dissented from the recommendation that the Government introduce non-statutory guidelines as they considered that, while there was room for further identification and refinement of the criteria by which judicial discretion should be exercised, the task should continue to be the responsibility of the judiciary itself. The Commission considered the existing set of maximum penalties and recommended that the legislature undertake a review of them and rescale the levels in accordance with modern perspectives on offence seriousness and in accordance with the view that custodial sentences should be regarded as sanctions of the last resort. They recommended that the set of maximum penalties should be diminished to between six and eight levels. The Commission also recommended that the existing minimum and mandatory sentences of imprisonment for indictable offences be should be abolished and recommended against the introduction of mandatory or minimum sentences of imprisonment for summary offences.

91. The Working Group on the Jurisdiction of the Courts was set up in 2002 with a remit to examine the existing jurisdiction of the courts of Ireland and make recommendations on any changes desirable in the fair, expeditious and economic administration of justice. While the Commission felt that they were not able to examine the issue of sentencing in sufficient depth to make concrete recommendations, they did find that there was a need for some system of objective guidance for sentencing judges at all levels and in their report discussed the option of creating a statutory body charged with providing statutory guidelines. The Group acknowledged that if such a body were to take the more prescriptive approach adopted in the US it could encroach upon judicial discretion to the point where sentencing discretion is effectively transferred from the judge to the prosecutor, with the charge predetermining the sentence. However, they also recognised that such an approach could facilitate greater flexibility, establishing norms from which, having regard to the circumstances, a trial judge could depart. As an alternative the Group proposed that there should be more effective dissemination of decisions which are regarded as being authoritative in nature, particularly decisions of the Court of Criminal Appeal. It felt that the wider dissemination of these benchmark cases would both assist trial judges and enable the public to understand more clearly the principles behind sentencing decisions. The Group also proposed that in order to achieve consistency a 'cadre of judges should be dedicated to hearing appeals in the Court of Criminal Appeals' for a period of at least two years. The court, composed of one group of three judges drawn from the cadre, should sit for extended periods of two to three successive weeks to hear listed appeals.

92. Because of the complexity of the issue the Working Group concluded that the entire issue of sentencing should be subject to further independent study. Although the Working Group's report was broadly welcomed by the Minister for Justice, Equality and Law Reform on its publication in July 2003, it is not clear what progress has been made in accepting and/or implementing its recommendations.

## VICTORIA<sup>22</sup>

93. In 2000 the government of the state of Victoria commissioned a review of a number of aspects of the state's sentencing laws. This was in response to public concern about a number of sentencing issues, in particular the perceived leniency of sentences in individual cases, disparity between sentences and sentencers and the gap between statutory maximum penalties and the actual sentences imposed by the courts. The report recognised the need for a body which would allow properly informed public opinion to be taken into account in the sentencing process and disseminate more up-to-date and accurate sentencing data to assist judges in their role and promote consistency in sentencing outcomes. The review recommended a number of improvements to the sentencing system including the establishment of a Sentencing Advisory Council and the introduction of guideline judgments. The state established an independent Sentencing Advisory Council in 2004 under the *Sentencing (Amendment) Act 2003*, which amended the *Sentencing Act 1991*. The Council became operational on 1 July 2004 and its functions, as specified by Section 108C of the *Sentencing Act 1991*, are to:

- provide statistical information on sentencing, including information on current sentencing practices;
- conduct research and disseminate information on sentencing matters;
- gauge public opinion on sentencing;
- consult on sentencing matters;
- advise the Attorney-General on sentencing issues; and
- provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

94. The Council is an advisory body rather than a review body and it cannot, therefore, review sentencing outcomes in individual cases. It comprises 12 members who represent a range of perspectives. Under the terms of the *Sentencing Act 1991*, Council members must be appointed to represent 6 profile areas as follows:

- One senior academic;
- Two people with broad experience in community issues affecting the courts;
- One highly experienced defence lawyer;
- One highly experienced prosecution lawyer;
- One member of a victim of crime support or advocacy group;
- People with experience in the operation of the criminal justice system.

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<sup>22</sup> Primary sources: State of Victoria Sentencing Advisory Council website. At <http://www.sentencingcouncil.vic.gov.au/CA256F82000D281D/HomePage?ReadForm&1=Home~&2=~&3=~>

95. In addition to establishing the Council the Victorian Government also amended the *Sentencing Act 1991* to enable the Court of Appeal to issue guideline judgements. These set out, for the guidance of the courts in sentencing offenders:

- the criteria that might be applied in choosing between sentencing options;
- the weight to be given to the various purposes of sentencing;
- the criteria by which a court may determine the gravity of an offence or which may be used to reduce the sentence for an offence;
- the weighting to be given to relevant criteria;
- any other matter consistent with the Sentencing Act 1991.

96. The Court of Appeal is the only court in Victoria with a statutory power to give a guideline judgment and these may be made after an application from a party to the appeal, or by the court on its own initiative. One of the functions of the Council under the *Sentencing Act 1991* is to state in writing to the Court of Appeal its views about the giving or review of a guideline judgment. If the Court of Appeal decides to give or review a guideline judgment, it is required by legislation to notify the Council and to set a timeframe within which the Council should respond with any written views. In practice, the Council might prepare a draft of the proposed guideline judgment (incorporating relevant statistical information and research material) and consult on it with the community and other interested organisations. The Council can then take into consideration any issues raised in this consultation, and refine the guideline if necessary, before presenting back its written views to the Court of Appeal. In this way, the Council can provide a means for informed community opinion to be incorporated into the sentencing process. There is no *requirement* for the Court of Appeal to give a guideline judgement and under the legislation any decision to give a guideline judgment must be a unanimous decision of the judges hearing the appeal.

97. As of the end of February 2005 no guideline judgements had been given by the Court of Appeal. However, in August 2004 the Attorney-General asked the Sentencing Advisory Council to investigate how suspended sentences are currently being used in Victoria and whether their operation can be improved in any way. The Council has launched a preliminary information paper on suspended sentences.

## CANADA<sup>23</sup>

98. In the late 1970s the Supreme Court of Canada ruled that it was appropriate for criminal appellate courts to lay down guidelines relating to the starting point for sentences for particular offences and in some instances this was how sentencing parameters in Canada

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<sup>23</sup> A review of sentencing in each of the Canadian provinces and states did not reveal the existence of any sentencing guidelines systems distinct from the provisions operational at federal level.

Primary sources: Gabor, T. and Crutcher, N. (2002) – Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities and Justice System Expenditures. Department of Justice, Research and Statistics Division. At <http://canada.justice.gc.ca/en/ps/rs/rep/rr02-1a-e.pdf>

Youth Criminal Justice Act (2002 c.1) Department of Justice, Canada. At <http://laws.justice.gc.ca/en/Y-1.5/index.html>

Mapleleafweb – The Youth Criminal Justice Act: New legislation attempts to meet the needs of society and the young offender. At <http://www.mapleleafweb.com/features/crime/youth-act/youth-criminal-justice-act.html>

Department of Justice Canada (2003) – Fact Sheet Conditional Sentences. At [http://canada.justice.gc.ca/en/ps/voc/cond\\_sent.html](http://canada.justice.gc.ca/en/ps/voc/cond_sent.html)

evolved. However, in the mid-1980's the Canadian Government embarked on a comprehensive 10 point programme of reform of the administration of justice. In its contribution to the 'Directions for Reform' programme the Canadian Sentencing Commission argued that the appeal courts are not adequately structured to make policy on sentencing since "They are structured to respond to individual cases that are brought before them rather than to create a comprehensive integrated policy for all criminal offences." The Commission accepted that 'the appeal process can most probably ensure a measure of consistency in the sentences given for some serious offences' but took the view that this is not the same as having an overall policy framework on sentencing.<sup>24</sup> In 1996 Chapter 22 of the Statutes of Canada (formerly Bill C-41 (Sentencing Reform)) became law and established a clear set of purposes and principles of sentencing, amending the sentencing provisions of the *Criminal Code*. The first principle of sentencing is stated to be that sentences must be proportionate to the seriousness of the offence and the degree of responsibility of the offender. Other principles are that an offender should not be deprived of liberty, if less restrictive sanctions are appropriate; and that alternatives to incarceration should be used where appropriate. These statements are intended to act as a reference for sentencing decisions and a touchstone against which potential sentencing law amendments should be examined.

99. Chapter 22 of the Statutes of Canada also introduced a new sentence – the conditional sentence. This is a sentence of imprisonment that can be served in the community and was introduced in order to reduce the number of admissions to custody. Conditional sentences can only be imposed on offenders sentenced to less than two years in prison and the offender must comply with a number of compulsory and optional conditions. If the conditions are breached the offender is returned to court and, if the breach is proved, may be required to serve the remainder of the sentence in prison. The Supreme Court of Canada has ruled that conditional sentences should generally include punitive conditions that restrict an offender's liberty, such as house arrest. The Court has also said that a conditional sentence is a punishment intended to promote a sense of responsibility in the offender and that has the objectives of rehabilitation and reparation to the victim and the community.

100. In addition to appellate court guidelines Canada also operates a system of Minimum Mandatory Penalties (MMPs) laid down in the 2001 *Criminal Code* for a total of 28 types of offences, 20 of which relate to firearms offences. The offences and their MMPs are set out in the table at Annex B. MMPs for firearms offences were first introduced in 1977 and were amended in 1995 and again in 2001.

101. Although Canada does not have a formal system of sentencing guidelines, the recent *Youth Criminal Justice Act 2002* (YCJA), which came into effect in April 2003, goes a long way towards putting sentencing guidelines into law. Section 38(1) of the Act specifies that:

'The purpose of sentencing .... is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.'

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<sup>24</sup> Canadian Sentencing Commission (1987) – Sentencing Reform: A Canadian Approach. Canadian Government Publishing Centre: Ottawa. Cited in Ministry of Justice (1997) – Sentencing Policy and Guidance: A Discussion Paper. Ministry of Justice, New Zealand. At: [http://www.justice.govt.nz/pubs/reports/1997/sentence\\_guide/chapter\\_12.html](http://www.justice.govt.nz/pubs/reports/1997/sentence_guide/chapter_12.html)

102. Section 38(2) sets out eight principles that should govern the sentencing of juveniles, while Section 42 specifies the range of sentences that can be imposed on juveniles. In the case of murder the Act specifies the maximum sentence that can be imposed – for first degree murder, 10 years, comprising a maximum of six years in custody, followed by a period of conditional supervision in the community; for second degree murder, seven years comprised of a maximum of four years in custody followed by conditional supervision in the community. However, the Act also gives authority to the youth court to sentence young people as adults in certain cases and reduces the age at which this can happen in cases of murder, attempted murder, manslaughter and aggravated sexual assault from 16 years to 14 years (although individual provinces can raise the age to 15 or 16 years). No youth sentence, with the exception of those for murder and prohibition orders, can continue in force for a period of more than two years, or three years in the case of offences for which the punishment set down in the *Criminal Code* is imprisonment for life. When imposing a sentence the youth court is required to state its reasons for the sentence in the court record and on request to provide a copy of these reasons to the young person, the young person's counsel, a parent, the prosecutor, the provincial director and, in the case of custodial sentences, the review board. With regard to the firearms offences for which MMPs are set out in the *Criminal Code*, a young person convicted of any of these will be subject to a mandatory prohibition order of not less than two years duration, in addition to whatever youth sentence is imposed.

## **FINLAND<sup>25</sup>**

103. Finland's court system comprises three levels – the lower courts, the courts of appeal and the Supreme Court. There are two kinds of lower courts – the town courts where cases are heard by three judges, all of whom are professionally qualified, and circuit courts where cases are heard by one professionally qualified judge and five to seven lay judges. Decisions in these courts are made by the professional judge unless he is overruled by the unanimous vote of the lay judges. The courts of appeal hear appeals from the lower courts and cases are generally heard by three professional judges. The Supreme Court of Finland hears cases involving appeals of decisions of appellate courts where serious errors are alleged to have occurred or where important precedents might be involved. Cases are heard by five-judge panels. The Supreme Court is regarded as being an important source of guidance on sentencing and it has pronounced its views on issues concerning the choice between different sentencing options in different situations. It has, however, been reluctant to issue concrete guidance on the level of penalties.

104. Chapter 6 of Finland's Criminal Code sets out in some detail the principles of sentencing and the penal ideology underpinning the statutory provisions. Proportionality, predictability and equality are the central principles of sentencing, with 'proportionality between the seriousness of the crime and the severity of the sanctions' being identified as the leading principle. The Code specifies a 'ladder' of five different types of sanctions that can be imposed on convicted offenders:

- Sentence waiver

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<sup>25</sup> Primary sources: Lappi-Seppala, T. (2001) Sentencing and Punishment in Finland. In Tonry, M. and Frase, R.S. (Eds.) – Sentencing and Sanctions in Western Countries. Oxford University Press. Jurist Legal Intelligence – Finland. Constitution, Government and Legislation. At <http://jurist.law.pitt.edu/world/finland.htm>

- Fine
- Conditional imprisonment/juvenile penalty
- Conditional imprisonment with a fine, and
- Unconditional imprisonment/community service

105. As the blameworthiness of the offence and the culpability of the offender (including previous convictions) increase, the severity of the sentence will increase. Chapter Six of the Criminal Code sets out both the range of sentences and the minimum and maximum sentences that can be imposed for any offence. It also sets out a series of mitigating and aggravating circumstances that the sentencer must give consideration to. Mitigating factors can be divided into two subgroups – grounds that justify the imposition of a less harsh type of penalty, and grounds that justify imposing a lower sentence within a particular type. The lists of mitigating factors are open-ended, allowing sentencers to take other factors into account. However, the list of aggravating criteria is intended to be exhaustive and the sentencer does not have scope to take into consideration any factors that are not on the list. Chapter Six of the Code contains a clear statement against aggravation of punishment for the purposes of general deterrence. The courts have a general right to sentence below the prescribed minimum for any offence where exceptional circumstances exist. Taken together the provisions of Chapter Six of the Criminal Code place a strong emphasis on preventing overly harsh and unjustified sentences but are much less restrictive in influencing the courts' ability to impose sentences that are less severe than the offender's acts appear to deserve.

106. Sentencing decision must be made on both the amount of punishment and the type of punishment to be imposed. Only in the most serious cases is unconditional imprisonment the only sentencing option. In all other cases decisions must be made between fines and imprisonment, conditional and unconditional imprisonment and unconditional imprisonment and community service. Community service can only be used in cases where the seriousness of the offence and the culpability of the offender lead to a decision that unconditional imprisonment is the appropriate sentence. Section 3 of the *Community Service Act* provides that community service should be imposed instead of unconditional imprisonment unless there are strong reasons why this should not be the case.

107. In addition to the fairly detailed guidance set down in the Criminal Code, two legal principles operate that, while not laid down in statute, are deemed to be part of Finland's customary law. The principle of *ultima ratio* requires that the use of criminal law be restricted to the smallest justifiable minimum. Sentencing decisions should begin by considering the least punitive level of punishment. In borderline cases the principle of *in dubio mitius* applies - this principle requires the judge to select the least restrictive sentencing option.

108. Chapter Six of Finland's Criminal Code requires judges to pay particular attention to 'uniformity of sentencing practice'. Unless special reasons exist the sentence for any offence should be the sentence that is imposed most frequently in similar cases, referred to as 'normal punishment'. Sentencers are required to give reasons when they deviate from the range of normal punishments. In order to structure the decision making process and give the courts a firm starting point for their decisions (and thus reduce disparity in sentencing), Finland's Sentencing Act contains a model, the 'notion of normal punishments', for structuring sentencing decisions. In order to use this model, sentencing judges require to have access to three types of information:

- Statistical information about the penalties that are most often used in typical cases of the type being considered.
- Descriptive information about typical cases.
- Information on the aggravating and mitigating circumstances that should be taken into consideration when the case at hand is compared with the ‘normal’ offence.

109. Information of the first two types is available from annual court statistics and a number of studies of the most common types of offences. Information of the third type is provided partly in legislation, partly by higher court decisions and partly by legal doctrine. The model provides the judge with a practical starting point on which to base the sentencing decision. The ranges of normal punishments provide a concrete basis for comparisons and assist the decision making process by anchoring the scale of crimes to the scale of punishments. The model does not, however, unduly constrain the sentencer in the decision making process and the specific circumstances of the case can still determine the individual sentence.

## THE NETHERLANDS<sup>26</sup>

110. The Dutch Penal Code, 1983 sets out a wide range of sentences that can be imposed, including fines, imprisonment, detention and task penalties<sup>27</sup>, but it does not impose any limits on the courts in their choice of type and severity of sanctions in individual cases. The statutory minimum sentence of imprisonment is one day and this applies to all crimes irrespective of the general level of seriousness. The statutory maximum prison term is 15 years, which can be extended to 20 years in murder cases. Life sentences can be imposed for murder and certain manslaughter cases but they are rare and can be substituted with a fixed sentence of up to 20 years. In practice where life sentences are imposed they are always converted to a specified period of time by way of a pardon. The Code of Criminal Procedure provides that fines should be given precedence over custodial sanctions and requires the judge to give an explanation when a custodial sentence is imposed. Fines can be imposed for any offence, including murder but tend to be used for infractions and less serious, non-violent crimes.

111. The Penal Code provides restrictive rules on aggravating factors. There are three general circumstances that can lead to the imposition of a more severe sentence – recidivism, concurrent offences and commission of an offence in the capacity of a civil servant. Where any of these circumstances exists the court may increase the statutory maximum sentence by one third. Special aggravating circumstances are specified for a number of offences and may result in a more severe sentence. The Code contains one general mitigating circumstance – tender age, which results in the application of juvenile law which carries lighter sentencing

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<sup>26</sup> Primary sources: Aronowitz, A.A. (1993) – The Netherlands. World Factbook of Criminal Justice. At <http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjnet.txt>

Tak, P.J. (2001) – Sentencing and Punishment in the Netherlands. In Tonry, M. and Frase, R.S. (Eds.) – Sentencing and Sanctions in Western Countries. Oxford University Press.

Tak, P.J.P. (2003) – The Dutch Criminal Justice System. Organization and Operation. 2<sup>nd</sup> Edition. The Hague:WODC [http://www.ministerievanjustitie.nl:8080/b\\_organ/wodc/publications/ob205\\_08.pdf](http://www.ministerievanjustitie.nl:8080/b_organ/wodc/publications/ob205_08.pdf)

<sup>27</sup> Task penalties were introduced in 2001 as a replacement for Community Service Orders. They are a distinct sanction that is considered to be a restriction of a person’s liberty that is less severe than the custodial sentence, and more severe than a fine. A task penalty can consist of a work order, a training order, or a combination of both orders. A task penalty cannot exceed a total of 480 hours, of which the work order can be a maximum of 240 hours. The task penalty must be completed within twelve months of sentence.

options. The Code also contains special mitigating circumstances relating to specific offences.

112. The Code of Criminal Procedure provides that consecutive prison sentences cannot be imposed. Where an accused is convicted of multiple offences the court may impose a concurrent sentence, the maximum term of which may be one-third higher than the statutory maximum penalty for one offence. The Code of Criminal Procedure also requires sentencers to state the reasons why a particular sentence was imposed and in the case of custodial sentences, the judge must explain both why custody was chosen and why the particular length of sentence was merited.

113. A four tier criminal court system operates in the Netherlands, comprised of:

- Cantonal courts – court of first instance that tries cases involving infractions (less serious, non-violent crime). Cases heard by a single judge.
- District Court – also a court of first instance. Cases in which the penalty cannot exceed six months imprisonment are heard by a single judge. More serious cases in which the penalty can exceed six months are heard by a panel of three judges. District courts also serve as courts of appeal for cases from the Cantonal Courts and can retry cases in full.
- Courts of Appeal – five courts which hear appeals against decisions of the District Courts. The Courts of Appeal can retry cases in full.
- Supreme Court – does not retry cases but hears appellate court cases in which the law has been wrongly applied and cases in which there has been a violation of due process. The Supreme Court also oversees sentencing but review is restricted to whether adequate reasons were provided to justify the sentence according to the statutory requirements of the Code of Criminal Procedure.

114. Commentators (see Tak, 2001) have suggested that sentence disparity is a serious problem in the Netherlands. A range of proposals have been put forward to reduce disparity in sentencing without unduly constraining the judges' discretionary power. Ideas considered have been the establishment of special sentencing courts, the development of an electronic data-bank on sentences (i.e. a sentencing information system) and the introduction of sentencing checklists or guidelines. However, none of these proposals has been regarded as offering an effective solution to the problem. For some offences statistics show that there is less disparity in sentencing. This is regarded as being due to directives issued by the Prosecution Service on prosecutors' sentencing proposals - Dutch prosecutors are required to propose a sentence in their closing speech to the court. Directives are issued by the Board of Prosecutors General, which has responsibility for oversight of the prosecution service, and individual prosecutors at local level are bound by the directives. The courts are not bound by the directives and do not have to give reasons when they disregard the prosecutor's recommendation. However, in practice the directives for some types of offences, which are developed in line with the sentencing policies of the courts, have had a harmonising effect as the courts appear to regard the sentence requested by the prosecutor as providing a guideline on sentencing. This has not been true of all directives – those for many types of crime have had little impact on sentence disparity because they allow a wide range between the minimum and maximum sentences that can be requested, because there are anomalies between directives and because, in some cases, they leave room for individual prosecutors to deviate from them without giving reasons.

115. Prosecution sentence guidelines first began to be issued, on an ad hoc basis, in the 1970s. In the late 1990s a project was initiated to develop a comprehensive set of national prosecution guidelines and since 1999 more than 35 new national guidelines for sentencing have been formulated, with the express intention of producing greater equality in sentencing. The expectation is that uniform requests by the prosecution service, based on the national guidelines for sentencing, will lead to more uniform sentences by the courts. The structure of these so-called *Polaris*-guidelines is very clear and is based on the 'Frame for prosecutorial sentencing guidelines' published by the Board of Prosecutors General (*Stcr.* 2001, 28). For each crime a number of sentencing points is set, e.g., bicycle theft 10 points; burglary 60 points; shoplifting 4 points; bodily harm 7 points; open or overt use of violence 15 points; import or export of hard drugs 30 points; burglary in a factory 42 points. Points can be added or deducted according to special circumstances e.g., the use of a weapon or physical injury to the victim lead to extra points. An attempt to commit a crime leads to a reduction of points. Recidivism results in half the total number of points being added, while multiple recidivism doubles the points. Once the total number of points has been calculated they are converted into a sentence. However, not all the points count fully for the sentence as this would result in serious cases attracting unduly severe sentences. A conversion method has been developed whereby the first 180 points in any case each count as one sentencing point. Points between 181 and 540 each count as half a sentencing point, and any points above 541 each count as a quarter of a point. Every point may lead to a fine of €22, or to one day of imprisonment, or to two hours of task penalty. In any case that attracts fewer than 30 points, the public prosecutor can avoid a public trial and impose a fine or task penalty. In cases attracting between 30 and 60 points, the prosecutor can only request a task penalty. In cases attracting more than 60 points the case will be tried on indictment and the public prosecutor can request a task penalty (for cases attracting between 61 and 120 points) or a prison sentence (in cases attracting more than 120 points). Individual public prosecutors are permitted to deviate from these guidelines, but must give an explicit reason for doing so. This allows reviews to take place in all nineteen regional prosecution services. Where a prosecutor deviates widely from the national policy, a discussion must take place between the chief public prosecutor and the individual prosecutor.

116. Since 2001 the judiciary in Holland have also had access to the CST (Consistent Sentencing) database. This is an electronic database that contains information on sentences passed in previous cases. The system uses type of offence, criminal history and age as the basic criteria for identifying like cases. Earlier incarnations of the system were not regarded as being particularly useful as they were felt to contain insufficient information on the reasons why previous sentences had been imposed and were difficult to use and maintain.<sup>28</sup>

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<sup>28</sup> Lodder, A.R.; Oskamp, A. and van den Hoogen, R. (2004) - IT SUPPORT OF THE JUDICIARY, chapter 6, pages 99-110. TMC Asser Press. <http://pubs.cli.vu/pub161.php>

## NEW ZEALAND<sup>29</sup>

117. The sentencing guidelines system in place in New Zealand is based on case law rather than specifically developed guideline judgements. A synthesis of pre-existing first instance sentences is used to inform the sentencing decision in current cases. The decision is also informed by the provisions of the *Sentencing and Parole Reform Act 2002* which changed the law in areas such as the types of sentences available to be imposed and the length of custodial sentences that can be imposed. Section 7(1) of the Act sets out nine distinct purposes of sentencing and Section 8 sets out nine principles of sentencing. The Act also sets out the aggravating and mitigating factors that the court ‘may’ take into account in sentencing the offender and specifies that the Court may take into account any offer, agreement, response, or measure taken by the offender to make amends. Sections 11 to 14 of the Act specify the types of sentences that the court can impose as reparation, fines, community-based sentences (supervision or community work) and imprisonment. The Act emphasises that reparation and fines should be the preferred sentencing options in every case. Section 11 provides that where a court is lawfully entitled to impose a sentence of reparation it must do so unless there are specific reasons for not doing. Where the court does not impose a sentence of reparation it must give reasons for not doing so. Section 12 provides that where a court is lawfully entitled to impose a fine in addition to or instead of any other sentence, the court must consider a fine as the appropriate sentence for the particular offence unless there are specific reasons why a fine would not be appropriate. Section 16 of the Act provides that no court can impose a sentence of imprisonment on an offender under the age of 17 years unless he or she has been convicted of a purely indictable offence.

118. Part 2 of the Act sets out the minimum periods of imprisonment that offenders must serve in cases where they are convicted of murder or qualifying sexual and violent offences. Section 79 provides that a person convicted of a qualifying sexual or violent offence must be sentenced to preventive detention to protect the community from a significant and ongoing risk to the safety of its members. Where a court sentences an offender to preventive detention, it must also order that the offender serve a minimum period of imprisonment, which in no case can be less than five years. Section 91 provides that an offender who is convicted of murder must be sentenced to life imprisonment unless, given the circumstances of the offence and the offender, a sentence of life imprisonment would be manifestly unjust. If a court does not impose a sentence of life imprisonment it must give written reasons for not doing so. Where an offender convicted of murder is sentenced to life imprisonment the court may order that the offender serve a minimum period of imprisonment of more than 10 years if it is satisfied that the circumstances of the offence are sufficiently serious to justify doing so. The court may consider imposing a minimum period of imprisonment of at least 17 years if:

- a) the murder was committed in an attempt to subvert the course of justice, particularly to avoid detection, prosecution, or conviction for other offending; or

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<sup>29</sup> The sentencing system in operation in New Zealand is based on both top-down and bottom-up approaches. The routine provision of synthesised sentencing case law constitutes a bottom-up approach, but at the same time a number of minimum sentences are specified in statute.

Primary sources: The Howard League for Penal Reform, New Zealand, Factsheet 32 – Parole. At [http://www.howardleague.co.nz/factsheets/factsheet\\_32.html](http://www.howardleague.co.nz/factsheets/factsheet_32.html)

Sentencing and Parole Reform Bill: Part 1: Sentencing Purposes and Principles, and provisions of general application. At [http://www.courts.govt.nz/pubs/reports/2001/sentence\\_reform/part\\_1.html](http://www.courts.govt.nz/pubs/reports/2001/sentence_reform/part_1.html)

- b) the murder involved an unusual level of premeditation, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or
- c) the murder involved the unlawful entry into a dwelling place, or was committed in the course of another serious offence, or demonstrated extreme brutality, depravity, or callousness; or
- d) the victim is a member of the police or a prison officer acting in the course of his or her duty, or is particularly vulnerable; or
- e) there was more than 1 victim; or
- f) in any other exceptional circumstances.

119. The *Sentencing and Parole Reform Act 2002* came about as a result of a citizen-led referendum on the criminal justice system which had been the subject of widespread public concern and confusion.

120. Criminal Justice practitioners in New Zealand also have access to The Sentencing Tracker – a searchable database of over 2,500 sentencing decisions that is updated weekly on-line or monthly on CD. Judgements are summarised, with key sentencing information arranged for easy searching. Access to the system is by subscription and purchasers can choose to subscribe only to the case summaries, or to the full-text judgments.

## ENGLAND AND WALES<sup>30</sup>

### Sentencing Advisory Panel

121. The Sentencing Advisory Panel (hereafter referred to as ‘the Panel’) is an independent body, established under the Crime and Disorder Act 1998, with the overall objective of promoting consistency in sentencing. It started work in July 1999 and provided advice to the Court of Appeal, as at that time it was the Court’s responsibility to issue sentencing guidelines. The Criminal Justice Act 2003 established a Sentencing Guidelines Council (hereafter referred to as ‘the Council’) to take over responsibility for issuing sentencing guidelines from the Court of Appeal. Since March 2004, in accordance with the terms of the Criminal Justice Act 2003, the Panel has been required to provide its advice to the Council. The remit of the Panel and the Council allows them to consider sentencing for particular offences or groups of offences as well as any other issue that relates to sentencing, including general principles, sentences themselves and decisions on mode of trial.

122. The process by which the Panel develops sentencing guidelines is as follows:

**Step 1:** The Council decides to consider a particular topic for a guideline. The Council may have decided on the topic themselves or it may have been suggested by the Sentencing Advisory Panel or the Home Secretary.

**Step 2:** The Council commissions the Panel to provide advice on the topic.

**Step 3:** The Panel consults widely with the 28 ‘statutory consultees’ designated by the Council and with other bodies and individuals with a particular interest in the issue, judges, academics and the general public as part of their research process.

**Step 4:** The Panel submits its advice to the Council.

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<sup>30</sup> Primary sources: Sentencing Advisory Panel and Sentencing Guidelines Council website. At <http://www.sentencing-guidelines.gov.uk/index.html>

**Step 5:** The Council forms a preliminary view on the advice and issues a draft guideline to the Home Secretary, Parliament and any other party the Council sees fit. The draft guideline is published on the Council's website.

**Step 6:** The Council allows up to two months to receive comments on the draft guideline. The Council may amend the draft in accordance with any comments received, if it regards amendment to be appropriate, and then issues a definitive final guideline which is binding on all courts in England and Wales.

**Step 7:** The Council then keeps the guidelines under review so that they can be amended and developed as required.

123. To date the Panel has produced advice for consideration by the Council, and prior to that the Court of Appeal, on the following:

Environmental Offences	Rape
Offensive Weapons	Offences involving child pornography
Importation and Possession of Opium	Causing death by dangerous driving
Racially Aggravated Offences	Alcohol and tobacco smuggling
Handling Stolen Goods	Robbery
Extended Sentences	Reduction in sentence for a guilty plea
Minimum terms in murder cases	New sentences: Criminal Justice Act 2003
Domestic Burglary	Overarching Principles: Seriousness

### **Sentencing Guidelines Council**

124. The Sentencing Guidelines Council is an independent body that issues guidelines for use by the courts in England and Wales on sentencing issues, having taken over responsibility for this in 2004 from the Court of Appeal and the Magistrates' Association. The Council must consult the Sentencing Advisory Panel before issuing new or amended guidelines. The Panel can propose that the Council issue a new guideline and the Home Secretary can ask the Council to consider developing a guideline on a particular topic. The Council aims to:

- Give authoritative guidance on sentencing.
- Give a strong lead on the approach to allocation and sentencing issues based on a principled approach which commands general support.
- Enable sentencers to make decisions on sentencing that are supported by information on effectiveness of sentences and on the most effective use of resources.

125. The sentencing guidelines issued by the Council are not, of course, the only guidelines available to sentencers in England and Wales. They also have access to:

- Court of Appeal Guidelines – sentencing guidelines were formerly issued by the Court of Appeal and cover a wide range of issues.
- Magistrates' Courts' Sentencing Guidelines – guidelines for magistrates that are published by the Magistrates' Association. The most recent edition of these was implemented on 1 January 2004.
- Practice Directions – these support court rules and aim to achieve uniformity in practice. They also set out what the court expects of those involved in court practice and what they can expect of the court.

## GERMANY<sup>31</sup>

126. Criminal law in Germany is set out in its federal Penal and Criminal Procedure Codes. Justice is administered regionally by Germany's 16 states but they must all administer the same laws. Evidence suggests that there is wide variation between the states in their punitiveness. Paragraph 46 of the Penal Code sets out the general provisions for sentencing with the broad range of authorised sentences for each offence type set out in other sections of the code. As the sentencing ranges are broad, a wide degree of judicial discretion exists. For the most part the Penal Code specifies maximum penalties, however, paragraph 38 specifies that the minimum fixed term of imprisonment is one month while paragraph 47 provides that imprisonment of less than six months should only be imposed in extraordinary circumstances. This section also requires the courts to give specific reasons in writing for imposing short-term prison sentences. Paragraph 56 of section 3 requires that sentences of between six and 12 months must be suspended unless the offender poses a substantial risk of re-offending or exceptionally strong public interest demands immediate imprisonment. The court must provide strong written justification for not suspending a sentence of imprisonment of less than one year. Murder carries a mandatory life sentence but the Federal Court of Appeals has allowed lesser sentences to be imposed in cases where the maximum penalty would have been disproportionate in view of the individual circumstances of the case. Fines are imposed as daily rates up to a maximum of 360 days, with the daily amount fixed by the judge in accordance with the offender's income. The only other sentence available to the courts in Germany is the suspended execution of a punishment.

127. Germany's Code of Criminal Procedure allows the public prosecutor to have a direct influence on sentencing decisions. In misdemeanour cases the prosecutor can require the suspect to make restitution to the victim or to make a payment to charity or to the state in return for dropping criminal charges. The prosecutor also makes a sentencing recommendation at the end of trials or suggests a specific sentence to the court in a written procedure.

128. Sentencing decisions are subject to appeal at the request of either the defence or the prosecution. Appeal courts require, in the trial court's written judgement, a detailed explanation of the reasons for the sentence imposed and appeal courts sometimes cite insufficient detail of the judgement as a ground for upholding appeals against sentence. The Penal Code specifies that the offender's blameworthiness should be the primary consideration in determining sentence and the Federal Court of Appeals has ruled that the sentencing judge must not impose a penalty that is so severe that he himself does not regard it as proportionate to guilt (7 BGHSt 28 at 32 [1954]).

129. Commentators on the German Criminal Justice System have suggested that the sentencing theory articulated in the Penal Code is not reflected in the day-to-day practice of the courts. In the absence of clear guidance from the legislature the courts adopt a pragmatic approach and base their sentencing decisions on facts that are easy to establish, such as the circumstances of the offence, the damage caused and the offender's prior record, rather than on considerations of the offender's individual blameworthiness and his specific preventive needs. The standards and conventions that guide the court in determining the appropriate

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<sup>31</sup> Primary sources: Nestler, C. (2004) – Sentencing in Germany At

<http://wings.buffalo.edu/law/bclc/bcl/articles/7/1/nestler.pdf>

Weigend, T (2001) – Sentencing and Punishment in Germany. In Tonry, M. and Frase, R.S. (Eds.) – Sentencing and Sanctions in Western Countries. Oxford University Press.

sentence for any offence differ from state to state and this is felt to result in some inequality in sentences (see Weigend, 2001).

## **SWEDEN<sup>32</sup>**

130. The Penal Code defines all crimes in Sweden but makes no distinction between crimes and infractions. The Code contains two chapters concerned with the principles of sentencing and also specifies the sanctions that are available to the courts. These are: fines, imprisonment, conditional sentence which may contain an element of community service, probation, protection and surrender for special care. The Penal Code defines the sanctions that the court may impose on convicted offenders as ‘punishments’ and ‘other consequences’. The term ‘punishments’ refers to fines and imprisonment. ‘Other consequences’ are primarily conditional sentences, probation or special treatment. Minimum and maximum terms of imprisonment are prescribed by statute and range from 14 days to 10 years. Sentences of up to 16 years can be imposed for a number of more serious crimes. Life sentences can be imposed but in practice are usually converted to a specific length of imprisonment of between 14 and 16 years. The Penal Code contains a general principle that imprisonment should be avoided wherever possible.

131. The Swedish Court system comprises three tiers – the District Courts, the courts of Appeal and the Supreme Court. The District Courts are the courts of first instance in practically every case tried. Cases relating to petty offences are heard by a single legally qualified judge while all other cases are heard by a panel of one legally qualified judge and three lay judges. The Courts of Appeal hear appeals against decisions of the District Courts. In general any party in cases tried in the District Courts can lodge an appeal against a decision of that court in the Court of Appeal. The Supreme Court of Sweden is the third and final instance in all criminal cases already examined by one of the six regional Courts of Appeal. Before a case can be considered by the Supreme Court leave to appeal must be granted and almost without exception, this only happens if a grave procedural error occurred in the course of proceedings in the court of first instance or if the case is of interest as a precedent. The purpose of the provision requiring parties to be granted leave to appeal is to restrict the flow of cases to the Supreme Court so that the court can devote its time to its primary task of acting as the court of precedent. Supreme Court cases therefore play a significant role in guiding the sentences of the lower courts.

## **DENMARK<sup>33</sup>**

132. Denmark’s Criminal Code sets out the penalties available for each type of crime and the upper range of the penalty that can be imposed. The ranges are broad and include fines and imprisonment. Sentences of imprisonment are separated into ‘lenient prison’ (seven to 30 days) and ‘prison’ (one month to 16 years or life) The maximum sentence is life imprisonment but most offenders sentenced to life are given a conditional royal pardon after

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<sup>32</sup> Primary Sources: The National Courts Administration of Sweden: Information leaflets. See <http://www.dom.se/>

<sup>33</sup> Primary Source: Ravn, L. (1993) – Denmark. World Factbook of Criminal Justice. At <http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbciden.txt>  
Wandall, R.H. (2003) – Denmark: Harder Punishments – A Consequent Crime Policy. Sentencing Observer. At <http://www.law.strath.ac.uk/csr/content/ObserverPDFs/Issue2.pdf>

12 to 14 years. Article 56.1 of the Criminal Code provides that imprisonment should only be used if necessary and sentencers otherwise have considerable discretion in deciding whether or not to imprison and offender.

133. The Criminal Code specifies that the penalty for a typical offence should be within the lower half of the range of penalties for the crime – allowing scope for non-typical cases to be sentenced more or less harshly as the specific circumstances of the case require. However, in 2002 the Danish legislature passed ‘Amendment to the Penal Act no. 380 Harder Punishments – a Consequent Crime Policy’ which increased the maximum penalties for a range of serious sexual and violent offences by 20-200%. The primary purpose of this change was to bring about a general increase in the sentencing levels of the courts for these offences categories and to bring the maximum penalties to a level reflecting society’s views of these crimes. The passing of the Amendment, on the basis of these stated aims significantly changed the framework governing sentencing decision-making in Denmark.

### **ITALY<sup>34</sup>**

134. A new Code of Penal Procedure implemented in 1988 shifted Italy’s criminal justice system from an inquisitorial system to an adversarial system. The Code defines the behaviours that are criminal and specifies the minimum and maximum penalties. The Constitution specifies that penalties must tend to the rehabilitation of the offender. The Penal Code specifies two classes of offences:

- delitti – serious offences, and
- contravvenzione – less serious offences.

Delitti are punishable by sentences of imprisonment ranging from 15 days to 24 years (or up to 30 years in certain exceptional cases). Contravvenzione are punishable by sentences of 15 days up to three years. Both are also punishable by fines.

135. Accused persons can request a ‘short trial’ in which the case is decided at a preliminary hearing on the basis of evidence gathered in the preliminary investigation. If found guilty the accused is entitled to a reduction of one third of the penalty provided for the crime. This reduction applies to all crimes except those incurring a life sentence.

136. The Court of Appeal hears appeals from the Pretura – the court of first instance that can hear cases carrying a penalty of up to four years imprisonment. The Court of Assizes of Appeal hears appeals against decisions of the Court of Azzise – which has jurisdiction over cases where the offence carries a penalty of up to 24 years or life imprisonment.

### **FRANCE<sup>35</sup>**

137. A new Penal Code entered into force in France in 1994 that sought to update the previous Penal Code of 1810. The new Penal Code comprises four books and Part 1, the

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<sup>34</sup> Primary source: Marongiu, P. and Biddau, M (1993) – Italy. World Factbook of Criminal Justice. At <http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjita.txt>

<sup>35</sup> Primary sources: Miquel, I. (2002) – French Criminal Justice System. At <http://www.iap.nl.com/regconference/reg1.html>  
Clavier, S.M. (1997) – Perspectives on French Criminal Law. At <http://userwww.sfsu.edu/~sclavier/research/frenchpenalsystem.pdf>

*Partie Generale* sets out most of the rules on sentencing. Article 111-1 of the code specifies a tripartite division of offences based on their seriousness: crimes, misdemeanours and violations. The code also sets out the range of penalties for each type of offence – crimes can incur a sentence of imprisonment of five years up to life (including penal servitude for life, criminal detention for life and banishment), misdemeanours are punishable with imprisonment of between 2 months and five years or a fine in excess of €1,500, and violations can be punished with a fine of no more than €1,500, imprisonment of no more than two months and/or confiscation of certain seized objects. France’s trial courts also follow a tripartite structure:

- the Police Court, which hears cases relating to petty offences that are liable for fines, non-custodial sentences or sentences of up to one year imprisonment. Cases are tried by a single judge.
- The Criminal Court hears cases related to more serious offences that are liable to imprisonment of up to 10 years. Cases heard in this court are generally tried by a panel of three judges, although occasionally they may be heard by a single judge.
- The Court of Assizes tries the most serious offences that are liable to imprisonment of more than 10 years or life imprisonment. Cases are heard by a panel of three judges and a jury of nine citizens. Prior to 2001 verdicts of the Assize Court could not be appealed. Now, however, appeals can be heard by a new sitting of the Assize Court composed of three judges and a jury of 12 citizens.

138. The Criminal Division of the Court of Appeal hears appeals against decisions of the Police Court and the Criminal Court and is composed of a panel of three or five judges. The highest court in the French judicial system is the Court of Cassation. Convicted persons can submit a petition to the *Cour de Cassation* that seeks to have the judgement of the lower court annulled on the basis that it failed to follow the rules of law. If the *Cour de Cassation* annuls a judgement of the Police Court it transfers the case to a court of the same order for retrial. Where a judgement of the Criminal Court or the Court of Assize is annulled by the *Cour de Cassation*, the case must be transferred back to the lower court for re-trial by a different panel of judges. The *Cour de Cassation* may also review judgements on the ground of inconsistency of judgement and may annul the entire judgement or just parts of the decision.<sup>36</sup>

## SENTENCING IN SCOTLAND

139. Sentencers in Scotland have extremely wide discretion in the sentencing process. There is no penal code defining crimes and specifying minimum and maximum penalties, (with three exceptions<sup>37</sup>) there is no system of sentencing guidelines and no substantial body of

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<sup>36</sup> In addition to the western European jurisdictions summarised here other western European jurisdictions examined that do not appear to contain noticeably different sentencing systems are Spain, Malta, Belgium and Norway.

<sup>37</sup> Mandatory minimum sentences exist for three types of offences in Scotland:

- A mandatory sentence of life imprisonment for murder (Murder (Abolition of Death Penalty) Act 1965;
- minimum sentences of three years for offenders aged 16 to 20 years and five years for those aged over 20 years convicted on indictment of illegal possession or distribution of prohibited firearms (Criminal Justice Act 2003 s.287); and,
- minimum sentences of seven years imprisonment for offenders aged 18 years or more convicted in the High Court of a Class A drug trafficking offence where the person has previously been convicted in

appeal court ‘guideline’ judgements. Statutory power to issue ‘guideline’ judgements was conferred on the High Court by the Criminal Procedure (Scotland) Act 1995. Section 118(7) of the Act provides that:

‘(7) In disposing of an appeal under section 106 (1)(b) to (f) or 108 of this Act the High Court may, ..... pronounce an opinion on the sentence or other disposal or order which is appropriate in any other case.’

140. A handful of guideline judgements have been issued since 1995, most notably Ogilvie v HM Advocate 2002 JC 74, (which addresses the appropriate level of sentences for offences of downloading and possession of indecent images of a child), Ansari v HM Advocate 2003 JC 105, (which deals with the imposition of discretionary life sentences) and Du Plooy v HM Advocate 2003 SLT 1237, (dealing with sentence discounts for a guilty plea).

141. In the absence of a system of comprehensive sentencing guidelines, sentencers in Scotland base their sentencing practice on their professional experience of court practice, intuition and training provided by the Judicial Studies Committee. Recent research by Tombs (2004)<sup>38</sup> reveals that just over 42% of sentencers studied (17 out of 40) felt that they adopted a structured approach to sentencing. The decision making processes that they described tended to involve first considering the indictment or charge to look at all the features of the offence including aggravating and mitigating factors, then looking at previous convictions, then, in cases where the accused pled guilty, considering the point at which the guilty plea was entered, then looking at any reports submitted and finally considering the plea in mitigation. Thirty percent of sentencers regarded that their sentencing practice was based primarily on experience and intuition but that structure played a limited part; 27% reported basing their practice only on experience and intuition. The sentencers interviewed also said that they keep up to date with Appeal Court judgements through Green’s Weekly Digest, Scottish Courts website, Scottish Criminal Case Reports, Scots Law Times and Sheriff Nigel Morrison’s text book on sentencing.

142. Unlike other jurisdictions such as Canada and Australia, comprehensive data (including statistics and narrative information) on sentencing is not routinely collected in Scotland. The Scottish Executive publishes information on sentencing profiles in the sheriff and district courts on an annual basis<sup>39</sup>. However, the information is very broad brush and it is not possible to determine from the data whether sentencing practice is consistent or inconsistent between sentencers, courts or even sheriffdoms. An electronic Sentencing Information System (SIS) for use in the High Court was developed in the latter half of the 1990s with the aim of ‘providing sentencers with quick and easy access to past decisions of the High Court’. The system became fully operational and available to all Judges in 2002. It contains information on all sentences passed in the High Court since 1989 and data can be searched according to offence and offender characteristics. The system also has capacity for narrative

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any court irrespective of age, of two other Class A drug trafficking offences, unless there are specific circumstances relating to the offences or the offender which would make that sentence unjust (Criminal Procedure (Scotland) Act 1995 s.205B).

The law also prescribes mandatory minimum sentences of disqualification from driving following conviction for a number of road traffic offences.

<sup>38</sup> Tombs, J. (2004) – A Unique Punishment: Sentencing and the Prison Population in Scotland. Scottish Consortium on Crime and Criminal Justice.

<sup>39</sup> Scottish Executive (2004) – Costs, Sentencing Profiles and the Scottish Criminal Justice System, 2002. Astron.

information on sentencing decisions to be added by Judges. No research has been carried out on the operation or impact of the SIS but anecdotal information suggests that it is not widely used by the Judiciary and has fallen largely into abeyance.

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**May 2005**

**American Sentencing Guidelines Systems as of June 2003\***

<b>Jurisdiction</b>	<b>Effective Date</b>	<b>Features</b>
Minnesota	May 1980	Presumptive guidelines for felonies; moderate appellate review; parole abolished; no guidelines for intermediate sanctions
Pennsylvania	July 1982	Presumptive guidelines for felonies and misdemeanours; minimal appellate review; parole retained; guidelines incorporate intermediate sanctions
Maryland	July 1983	Voluntary guidelines for felonies; no appellate review; parole retained; no guidelines for intermediate sanctions; legislature created permanent sentencing commission in 1998
Florida	October 1983	Guidelines repealed in 1997 and replaced with statutory presumptions for minimum sentences for felonies; appellate review for mitigated departures; parole abolished; no guidelines re: intermediate sanctions; sentencing commission abolished effective 1998
Washington	July 1984	Presumptive guidelines for felonies; moderate appellate review; parole abolished; no guidelines for intermediate sanctions; juvenile guidelines in use
Delaware	October 1987	Voluntary guidelines for felonies and misdemeanours; no appellate review; parole abolished in 1990; guidelines incorporate intermediate sanctions
Federal Courts	November 1987	Presumptive guidelines for felonies and misdemeanours; intensive appellate review; parole abolished; no guidelines for intermediate sanctions
Oregon	November 1989	Presumptive guidelines for felonies; moderate appellate review; parole abolished; guidelines incorporate intermediate sanctions
Tennessee	November 1989	Presumptive guidelines for felonies; moderate appellate review; parole retained; no guidelines for intermediate sanctions; sentencing commission abolished effective 1995
Ohio	February 1991	Presumptive narrative guidelines (no grid) for felonies (1996) and misdemeanours (2004); limited appellate review; parole abolished and replaced with judicial release mechanism; structured sentencing for juveniles introduced in 2002.
Kansas	July 1993	Presumptive guidelines for felonies; moderate appellate review; parole abolished; no guidelines for intermediate sanctions
North Carolina	October 1994	Presumptive guidelines for felonies and misdemeanours; minimal appellate review; parole abolished; guidelines incorporate intermediate sanctions; dispositional grid for juvenile offenders became effective July 1999
Arkansas	January 1994	Voluntary guidelines for felonies; no appellate review; parole retained; guidelines incorporate intermediate sanctions; preliminary discussion of guidelines for juvenile cases

Virginia	January 1995	Voluntary guidelines for felonies; no appellate review; parole abolished; no guidelines for intermediate sanctions; study of juvenile sentencing underway
Missouri	March 1997	Voluntary guidelines for felonies; no appellate review; parole retained; guidelines incorporate intermediate sanctions
Utah	October 1998	Voluntary guidelines for felonies and selected misdemeanours (sex offences); no appellate review; parole retained; no guidelines for intermediate sanctions; voluntary juvenile guidelines in use
Michigan	January 1999	Presumptive guidelines for felonies; appellate review authorised; parole restricted; guidelines incorporate intermediate sanctions
Oklahoma	July 1999	Presumptive guidelines for felonies; appellate review contemplated; parole to be limited; guidelines incorporate intermediate sanctions
Alabama	May 2000	Voluntary guidelines for felonies; no appellate review; guidelines incorporate intermediate sanctions; parole to be abolished from 2006
Washington, D.C.	1997	Voluntary guidelines for felonies, incorporate intermediate sanctions
Alaska	Early 1980s	Judicially-created “benchmark” guidelines for felonies; moderate appellate review; parole abolished for most felonies (retained for about one-third of all felonies); benchmarks do not address intermediate sanctions; no active sentencing commission
Massachusetts	1994	Presumptive guidelines for felonies and misdemeanours; appellate review permitted; guidelines incorporate intermediate sanctions; parole to be retained
Wisconsin	2002	Voluntary guidelines for felonies; no appellate review; parole eliminated; guidelines do not incorporate intermediate sanctions
Iowa	Disbanded	Legislative commission established in 1998 to study sentencing reform Commission reported in 2000 – final report not available. Guidelines system not introduced
South Carolina	1989	Voluntary guidelines (implemented in 1998) for felonies and misdemeanours with potential sentence of one year or more; no appellate review; parole abolished for all felonies; guidelines incorporate intermediate sanctions.

\* Based on Reitz, K. R. American Sentencing Guidelines Systems as of June 1999. At <http://www.ussc.gov/states/asgs.pdf>

**Mandatory Minimum Penalties in Force in Canada**

<b>Offence</b>	<b>Minimum</b>	<b>Maximum</b>
Driving while impaired	14 days*	summary procedure 6 months solemn procedure 5 years
Failure or refusal to provide a breath sample	14 days*	summary procedure 6 months solemn procedure 5 years
Betting, pool-selling, bookmaking	14 days*	2 years
Placing bets on behalf of others	14 days*	2 years
High Treason	Life minimum parole eligibility set at 25 years	Life
First degree murder	Life minimum parole eligibility set at 25 years	Life
Second degree murder	Life minimum parole eligibility set at 10 years	Life
Living off avails of child prostitution	5 years	14 years
Using a firearm during commission of an offence	1 year^	14 years
Using an imitation firearm during offence	1 year^	14 years
Criminal negligence causing death – firearm	4 years	Life
Manslaughter – firearm	4 Years	Life
Attempted murder – firearm	4 Years	Life
Causing bodily harm with intent – firearm	4 years	14 years
Sexual assault – firearm	4 years	14 years
Aggravated sexual assault – firearm	4 years	14 years
Kidnapping – firearm	4 years	Life
Hostage taking - firearm	4 years	Life
Robbery – firearm	4 years	Life
Extortion – firearm	4 years	Life
Possession of firearm knowing it is unauthorised	1 year◇	10 years
Possession of weapon/device/ammunition knowing its possession is unauthorised	1 year◇	10 years
Possession of prohibited/restricted firearm with ammunition	1 year⊗	10 years
Possession of firearm obtained by commission of an offence	1 year⊗	10 years
Weapons trafficking	1 year	10 years
Possession for purpose of weapons trafficking	1 year	10 years
Making weapon into automatic fire	1 year⊗	10 years
Importing/exporting firearm/ prohibited weapon/restricted weapon/prohibited device or prohibited ammunition	1 year	10 years

\* These sentences are for second conviction of these offences. First convictions attract no minimum sentence, subsequent convictions attract mandatory minimum penalties of 90 days.

^ This sentence is for first conviction. Subsequent convictions attract a minimum sentence of 3 years. In addition the sentence for this offence must be served consecutively to any sentence imposed for conviction of any other offences arising from the same incident.

◇ This sentence is for first conviction. Subsequent convictions attract a mandatory minimum penalty of two years less a day.

⊗ Sentence restricted to offences tried on indictment.