

# **A Review of Consistency in Sentencing**

**Sarah Poppleton, Elaine Wedlock, Amber Isaac and Emma Marshall**

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# 1. Summary

The Sentencing Council for England and Wales was set up in 2010 as an independent non-departmental public body of the Ministry of Justice. The statutory functions of the Council are set out in the Coroners and Justice Act 2009<sup>1</sup> and include developing sentencing guidelines and monitoring their use and promoting awareness amongst the public. The statute also states that the Council should have regard to a number of issues when developing guidelines, which includes the need to promote consistency and to monitor the effect of guidelines in promoting this.

The aim of this work is to outline the different ways in which consistency in sentencing can be defined and measured, how the Council has chosen to address the issue and to collate the best available evidence on measuring consistency in sentencing. Any studies measuring the impacts of sentencing guidelines on consistency in England and Wales since the Sentencing Council came into operation in 2010 are outlined.

There is no universally accepted definition of consistency in sentencing, though it is widely understood as the concept that offenders with similar characteristics, who commit similar offences, in similar circumstances would be expected to receive similar sentencing outcomes.

The Sentencing Council promotes consistency in approach. Guidelines encourage a consistent approach by guiding sentencers through structured, step by step decision making, while still allowing judicial discretion around the final sentence. This allows for a consistent approach to sentencing, but some variation in outcomes for offences that on the face of it appear to be very similar.

The Council undertakes research with sentencers to understand and explore how they use the guideline in practice, both during the development of guidelines and then after implementation. Draft guidelines are issued for public consultation whereby any potential impacts on consistency can also be highlighted and addressed through revisions to the draft.

Studies of consistency in sentencing since the Sentencing Council came into operation in 2010 have shown mixed results, with some showing increases in the levels of consistency when the relevant guidelines came into force, and others showing no change over time, and where improvements in consistency have been found, these have been small. This includes findings from studies conducted by Pina-Sánchez and Linacre (2014) looking at the assault guideline, and Isaac, Pina-Sánchez and Varela Montane (2021) in relation to guidelines for theft from a shop or stall, domestic burglary and supply/ possession with intent to supply a controlled drug. Other studies conducted in this area include those by Pina-Sánchez and Linacre, 2013; Pina-Sánchez, Lightowlers and Roberts, 2017; and Pina-Sánchez and Grech, 2018.

There are important limitations on the data available at present (either lack of data or a lack of sufficient variables within the data to control for all relevant factors or the inability to randomly allocate cases between judges). It is therefore not always possible to draw

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<sup>1</sup> Coroners and Justice Act 2009. Available at: <https://www.legislation.gov.uk/ukpga/2009/25/part/4> Accessed 14.08.2020

conclusions about consistency from studies. The methodology employed in the review also means that not every study on consistency will have been included.

In terms of the studies from England and Wales which have been reviewed here and have looked at whether or not sentencing consistency has increased following the implementation of guidelines, these have found only small gains. This is in the context of the fact that where we have evidence, some of this indicates that sentencing already seems to be relatively consistent.

This means that there may only be narrow room for improvement, particularly in common offences and/ or ones where there is already a guideline. Guidelines are also intended to impose consistency of approach and encourage individualised sentencing decisions within the steps of the guidelines. For this reason, complete consistency would not be expected and it may be harder to detect changes in the level of consistency.

The Sentencing Council continues to work on its statutory duty to promote consistency in sentencing. It does this through its research work, both while guidelines are in development and then after they have been implemented.

The Council is also currently considering its future priorities and the way it discharges its statutory duties as part of considering the responses to the 2020 consultation *What Next for the Sentencing Council?* This will include considering the ways in which consistency can be monitored and measured over time and any improvements to data sources that will facilitate further work in this area.

## 2. Introduction

The Sentencing Council for England and Wales was set up in 2010 as an independent non-departmental public body of the Ministry of Justice, created to ensure transparency and consistency in sentencing while maintaining and promoting the independence of the judiciary. It is currently chaired by Lord Justice Holroyde, who is supported by seven judicial members and six non-judicial members.<sup>2</sup>

The Council's statutory obligations are set out in the Coroners and Justice Act 2009.<sup>3</sup> Its primary function is to issue guidelines on sentencing, which the courts must follow unless it is in the interests of justice not to do so. Other responsibilities include monitoring use of the guidelines, assessing the impact of guidelines on sentencing practice, promoting awareness among the public about sentencing and publishing information about sentencing practice in magistrates' courts and the Crown Court.

Section 120(11)(a-f) of the Act states that when exercising the function of preparing guidelines, the Council should have regard to a number of issues. These include the impact of sentencing on victims and the cost of different sentences and their relative effectiveness in preventing re-offending. It also includes the need to promote consistency when preparing guidelines. Section 128(2)(c) states that the Council should monitor the effect of guidelines on the promotion of consistency in sentencing.

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<sup>2</sup> The Council has previously been chaired by Sir Brian Leveson and Lord Justice Treacy.

<sup>3</sup> <https://www.legislation.gov.uk/ukpga/2009/25/part/4/chapter/1>

In relation to consistency, when developing guidelines, the Council undertakes research with sentencers to understand and explore how they would use the guideline in practice. If inconsistencies are found in the way sentencers interpret aspects of a draft guideline or the guideline appears to be leading to inconsistency in decision making, guidelines are revised, and improvements are made to ensure this is minimised.

During this development stage, draft guidelines are issued for public consultation whereby any potential impacts on consistency can also be highlighted and addressed through revisions to the draft. Following their publication, the Council continues to monitor and assess how guidelines are used in practice along with assessing any unintended impacts on sentencing severity.

The digitisation of guidelines has enabled the Council to include expanded explanations of factors in guidelines which are accessed through links in the digital guidelines. These explanations may help to improve consistency in how factors are interpreted and applied. The expanded explanations were added in October 2019, after the period when the data used for many of the studies mentioned in this paper were collected. Therefore, any effects of the expanded explanations on consistency have not been accounted for in this study.

## 2.1 Background to consistency as a concept

While there is no universally accepted definition of consistency in sentencing, the general concept is clear: similar offenders who commit similar offences in similar circumstances would be expected to receive similar sentencing outcomes.

The Sentencing Council promotes consistency of **approach**. As explained by Sir Brian Leveson, the first Chair of the Sentencing Council, in a BBC radio interview at the time of launching the first Sentencing Council guideline: *"For judges, the aim is to increase the consistency of approach to sentencing so that offenders receive the same approach whether they're being sentenced in Bristol, Birmingham, Bolton or Basildon."* (BBC 2011)<sup>4</sup>.

Guidelines encourage a consistent approach by guiding sentencers through structured, step by step decision making, while still allowing judicial discretion around the final sentence. This allows for a consistent approach to sentencing, but some variation in outcomes for offences that on the face of it appear to be very similar.

This is necessary because no two offences are ever exactly the same in terms of the circumstances of the offence and offender. To take account of this, sentencing guidelines incorporate a range of aggravating and mitigating factors relating to the offence and the offender for the sentencer to consider in their decision making. This means that variation in sentencing outcomes is appropriate and is to be expected.

In practical terms, this will mean that where guidelines for an offence exist, all cases are considered in accordance with the step by step process set out. At step one, sentencers are required to consider the offender's level of culpability and the harm caused, based on an exhaustive list of factors.<sup>5</sup> At step two, they will then decide on a starting point sentence

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<sup>4</sup> BBC News (March 2011). *Judge pledges more consistency in assault sentencing*. Available at <https://www.bbc.co.uk/news/uk-12681250> Accessed 05/06/2020

<sup>5</sup> Assessing the culpability and harm caused by the offence at step 1 applies to the majority of guidelines, though there are exceptions, for example in the case of manslaughter where there is no differentiated harm category; or in sentencing

from within a table of ranges appropriate to the level of culpability and harm. They are then required to consider additional aggravating and mitigating factors, that may increase or decrease the sentence, prompted by a non-exhaustive list of additional factors.

This report examines how the Sentencing Council meets its statutory obligation to promote consistency in sentencing and discusses its focus on consistency of approach to sentencing. Literature is reviewed to identify how consistency in sentencing can be measured and studied. Studies on consistency in sentencing in England and Wales since the implementation of Sentencing Council guidelines in 2010 are also reviewed to ascertain, where possible, the impact of the guidelines on consistency.

## 3. Methodology

### 3.1 Research questions

The following specific research questions are addressed:

- How does the Sentencing Council for England and Wales define consistency in sentencing, and how does the Sentencing Council meet its statutory obligation to have regard to promoting consistency in sentencing?
- What is consistency in sentencing and how is it discussed in academic literature?
- How is consistency in sentencing studied?
- What evidence is there on the impact of sentencing guidelines on consistency in sentencing in England and Wales since the Sentencing Council came into effect in 2010?

In addition to collating literature on consistency in sentencing outlined in this report, analysts from the Sentencing Council worked with academics from the University of Leeds to conduct analysis on consistency of sentencing for three Sentencing Council guidelines and develop a methodology to assess consistency of sentencing (Isaac, Pina-Sánchez and Varela Montane, 2021). The results of this study are summarised below but also outlined in more detail in a report accompanying this evidence review.<sup>6</sup>

### 3.2 Reviewing academic literature

This review presents available academic evidence on consistency in sentencing. Evidence is presented on how consistency in sentencing is conceptualised and the methods for measuring consistency in sentencing are reviewed. Evidence on the effectiveness of sentencing guidelines in achieving consistency in sentencing in England and Wales since the Sentencing Council came into effect in 2010 is also presented.

Searches for literature relating to consistency in sentencing were carried out with support from the Royal Courts of Justice library using the eLIS online library and the Ministry of

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environmental offences, where the court considers compensation and confiscation at steps 1 and 2 and culpability and harm is considered at step 3.

<sup>6</sup> This report can be viewed here: <https://www.sentencingcouncil.org.uk/publications/item/investigating-the-sentencing-councils-impact-in-three-key-areas>



Justice Library using the EBSCO database. Search terms included ‘sentencing’, ‘consistency’ and ‘disparity’.

International methodological literature relating to defining consistency in sentencing along with how it is studied and measured was collated. Literature was included from as far back as 1977 to demonstrate the methodological developments in the understanding of these issues for consistency in sentencing.

Searches for literature relating to the impact of Sentencing Council guidelines on consistency in sentencing in England and Wales were limited to those from 2010 to the present date and those carried out in England and Wales. Only rigorous (and therefore valid<sup>7</sup>) and replicable UK studies were used to examine the impact of Sentencing Council guidelines on sentencing consistency in England and Wales.

### 3.3 Limitations of the studies

The studies included in this paper each have a number of limitations, which sometimes impede the conclusions that can be drawn from them. Many of these limitations relate to the data or other sources of evidence drawn upon. For example, where data have been taken from the Crown Court Sentencing Survey (CCSS) or other similar datasets, the factors included in the data are not exhaustive, and it is likely that other factors (not captured in the data) have been taken into account by sentencers when deciding the appropriate sentence. This sometimes includes additional details related to factors that *are* present in the data: for example, the CCSS datasets include data on the presence and number of previous convictions, but not the nature of these convictions, and while the data on some of the more serious drug offences include information on the level of culpability (the role of the offender), the data do not capture the individual elements of culpability that appear in the guidelines. Similarly, not all aspects of the sentencing *process* are included in the datasets: for example, important information on the sentence starting point used by the sentencer, or the offence categorisation, have usually not been available, and this has led analysts to focus on the final sentence instead.

In addition, the methods utilised in the studies have sometimes not been able to take account of all of the factors that *are* in the data, for example, because of the nature of the data (factors being structured in a different way to that required for a method to be valid), or because volumes have been too low for a particular factor.

For other types of evidence, including transcripts of judges’ sentencing remarks and similar, some assumptions have been required about the meaning of the contents of the transcripts studied. If a sentencer mentioned a factor or used a particular word or phrase in their sentencing remarks then it may have been taken to mean that the sentencer took this into account when sentencing, when this may not have been the case. Similarly, a factor not being mentioned may have been assumed not to have been taken into account, when this is also not necessarily the case.

If complete and robust data on the approach to sentencing are not available and not all factors taken into account by sentencers can be analysed, then any analysis of

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<sup>7</sup> In this context, we are defining validity as whether or not a study is strong enough in its research design to allow us to be confident in its conclusions. We have excluded studies with a weak research design or medium validity i.e. we might be able to be confident in its conclusions, but it is unclear.

consistency of approach will inevitably be limited, at least to some extent. For some of the studies where the limitations were not considerable, they have simply been noted, whereas for others, the limitations were considerable enough that conclusions have been severely constrained or could not be drawn at all. This paper has touched on some of the limitations alongside the relevant studies, but the original studies should be read in full for users to gain a comprehensive understanding of the issues and how they have affected the findings.

## 4. Concepts of consistency in sentencing

As discussed above, the Sentencing Council has a statutory duty to promote consistency in sentencing. Concepts of consistency in sentencing identified in the literature include consistency of approach, consistency in outcome and uniformity in sentencing. These concepts are outlined below and reasons for the Sentencing Council's focus on promoting consistency in approach to sentencing are discussed.

### 4.1 Consistency of approach and consistency in outcome

Consistency of approach in sentencing can be defined as applying a consistent method to the sentencing process, whereas consistency in outcome focuses on the result of the sentencing process. Consistency of approach takes into consideration differences in offences and offenders and allows for judicial discretion which should lead to more consistent (although not identical) outcomes.

Consistency of approach in the use of Sentencing Council guidelines means that sentencers all work through the same step by step approach as set out in the guidelines. This supports sentencers in coming to a similar starting point and sentencing category range in similar cases. Sentencers then determine the appropriate final sentence according to the specific attributes of the offence and the offender by applying aggravating and mitigating factors and other relevant factors (for example, guilty plea reductions and the application of the principle of totality when sentencing for multiple offences).

A myriad of combinations of circumstances of the offence (including effect on the victim) and offender mean that we would not expect identical outcomes from similar cases, but by following the guideline, sentencers take a consistent approach in how they come to their final sentence. This consistency in approach means that where there are similar cases, sentencing outcomes should be similar but not necessarily the same. If cases with similar characteristics were to have exactly the same outcome, this would not account for nuanced sentencing which takes all the factors of the offender and the offence into consideration. It is this nuanced but consistent method which promotes a clear and fair approach to sentencing.

In his review of how the Sentencing Council can best exercise its statutory functions, Professor Sir Anthony Bottoms (2017) supports the Council's stance on promoting consistency in approach as this promotes a more nuanced approach tailored to individual circumstances.

*To take a simple non-legal example, the mother of a friend (let us call her 'Gim'), recalls that her father aimed to be scrupulously fair in the way that he treated his three much-loved daughters. Gim was the eldest of the three and found herself*

*required at age five still to wear a bib at mealtimes, because although she was no longer spilling food, her younger sisters were, and her father believed in equal treatment. It is striking that Gim, now in her ninth decade, still remembers this incident. This is because she felt unjustly treated, since a relevant difference between her and her sisters had not been taken into account. She had been treated equally with her sisters, but her different needs had not been considered, so she had not been accorded equal concern and respect.* (Bottoms, 2017, p.13)

Bottoms (2017, p.13) goes on to say: *'In the sentencing context, the implication is that, if individual differences are of any relevance to the final sentence (as the Council, surely rightly, believes that they sometimes are) then defendants who have committed identical offences should sometimes not receive equal sentences.'*

## 4.2 Consistency versus uniformity

In defining consistency in terms of having a consistent approach to sentencing, outcomes are expected to be *similar*, and not *the same*. This is because no two offenders and sets of circumstances will ever be exactly the same, given the wide number and array of factors. Shapland (1981, as cited in Bargaric and Pathinayake, 2013) highlighted 229 factors, with Douglas (1980, as cited in Bargaric and Pathinayake, 2013) suggesting that there were 292 factors taken into account when sentencing.

If similar offenders committing offences in similar circumstances received *the same* outcome, the result would be uniformity of sentencing rather than consistency (Pina-Sánchez and Linacre, 2016).

In the academic literature in the UK, uniformity of sentencing is seen as undesirable because it means *ostensibly* similar (but subtly *dissimilar*) offences may receive the same sentence (Pina-Sánchez and Linacre, 2014 and 2016). As Pina-Sánchez and Linacre (2014 p.12) note, *"uniformity implies a lack of nuance in sentencing decisions, which results in dissimilar offences being treated alike, hence causing a deterioration in both proportionality and consistency."*

By contrast in the US literature, the terms consistency and uniformity are sometimes used inter-changeably in the context of studies of sentencing (e.g. Anderson and Spohn, 2010; Mason and Bjerk, 2013). This may be because in the US there appears to be a stronger notion of a right or 'proscribed' sentence, as promulgated by the relatively prescriptive US sentencing guidelines.

In the context of sentencing in England and Wales such a uniform approach to sentencing is not desirable. It would also not comply with statutory requirements, for example: to have regard to the purposes of sentencing ([section 57 of the Sentencing Code](#)); assess seriousness with regard to the offender's culpability and the harm caused, intended to be caused or might foreseeably have been caused ([section 63 of the Sentencing Code](#)); and the duty to enquire into an offender's circumstances before imposing a financial penalty ([section 124 of the Sentencing Code](#)).

The aim of the Council, therefore, is to promote a tailored approach to sentencing which follows a consistent and transparent approach and allows for consideration of the aggravating and mitigating circumstances of the offence and the offender and judicial discretion in coming to the final sentence.

## 5. Approaches and methods to studying consistency in sentencing

A review of literature on consistency in sentencing indicates there are a number of ways in which it has been studied and measured. This section examines the broad approaches that have been used to study consistency, in particular: controlling for case characteristics in statistical modelling of outcomes; randomisation in natural experiments; and qualitative simulations. It also discusses another feature of some studies: accounting for whether consistency varies over time, particularly whether consistency changes after the introduction of a guideline.

Specific methods of consistency used within studies are then considered. The relative merits of the following four measures of consistency are discussed: convergence of sentencing outcomes; consistency of approach; and predictability of sentencing outcomes and unwarranted disparities in outcomes.

As demonstrated below, the issue of studying consistency in sentencing is complex and is dependent not only on the approach taken, but also on the available data.

### 5.1 Broad approaches to studying consistency

#### **Controlling for case characteristics in statistical modelling of outcomes: comparing like with like**

Sentencing consistency can be studied in terms of variability in sentencing across judges, across courts, across districts, at a given point in time and across a period of time. Leading on from the huge number of factors that affect sentencing (highlighted above) the main threat to the validity of studies in this area is the difficulty of controlling for all the possible relevant factors that should legitimately be taken into account (sometimes called 'legal' factors in the literature) across cases in order to ascertain whether there is still some variability in consistency which is not accounted for by these factors. These relevant 'legal' factors include aggravating and mitigating factors along with other elements that will affect the final sentence such as reduction of sentence for a guilty plea and taking into account previous convictions etc.<sup>8</sup>

Without controlling for such relevant factors, it is possible that the amount of variability or disparity may be over-estimated. Also, some variability may be due to legitimate differences between cases and so not controlling for relevant factors could lead to under-

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<sup>8</sup> A differentiation is made in the literature between relevant 'legal' factors and other factors (also known as 'non-legal' or extra-legal factors in academic literature). The former are those factors which legitimately (or as a matter of principled judgement) should be taken into consideration when sentencing a given offence, and include factors such as aggravating and mitigating factors as well as adjustment of sentence for guilty plea and consideration of previous convictions. 'Non-legal' factors are sources of variability arising from the sentencing context that should not, as a matter of principled judgement, have a bearing on the case (Pina-Sánchez and Grech, 2018). These may include sentencers' responses to superficial characteristics of an offender, as well as time of day, weight of caseload and organisation of the court (Pina-Sánchez and Grech, 2018; Reid and MacAlister, 2018).

estimating consistency. This has been termed the problem of ‘omitted relevant variables’ (Pina-Sánchez and Linacre, 2013; Cole, 1997).

To ensure that cases are compared ‘like with like’, cases could be compared within one offence type (e.g. assault), and between offenders with similar offending histories (e.g. the same number of previous convictions). However, this is only the start: within a group of assault cases committed by offenders with no previous convictions there are likely to be many other differences that will legitimately affect the sentencing of a case: the offender’s culpability based on factors such as whether a weapon was used or the degree of planning involved; the harm caused; their age or level of maturity and so forth.

The best studies will therefore statistically control for (i.e. hold constant) as many as possible of these relevant factors, so that any remaining variability or disparity can confidently be attributed to other ‘non-legal’ factors. Few sentencing datasets afford the opportunity to incorporate enough of these relevant factors but in the UK, Crown Court Sentencing Survey data<sup>9</sup> does contain some of these factors and has been used by academics in high quality studies to examine consistency (e.g. Pina-Sánchez and Linacre, 2014; Pina-Sánchez and Grech, 2018, Isaac, Pina-Sánchez and Varela Montane, 2021). More recent survey data released by the Council – for example on theft from a shop or stall – also contains some of these relevant variables.

It should be noted that while such studies can minimise the risk that any inconsistency detected is actually a result of legal differences in case characteristics, they can never fully rule out the possibility that factors that have not been measured could explain or help explain the effects.

### **Randomisation in natural experiments**

In the US, there is another answer to the problem of the general inability to compare cases ‘like with like’. Many US districts assign cases to judges randomly so each judge should get a varied, unbiased mix of cases. Randomisation is the basis of many experimental methods in science and social science (e.g. clinical trials and randomised control trials) because across a random sample the differences in cases should even themselves out, such that any remaining differences in the dataset should be due to the factor being studied (e.g. the identity of the sentencing judge).

High quality studies from the US have been able to take advantage of this natural experimental context to examine consistency (e.g. Anderson and Spohn, 2010; Anderson, Kling and Stith, 1999; Scott, 2010). However this does not apply to the sentencing context in England and Wales as cases are not randomly allocated to sentencers.

### **Qualitative simulations**

Some studies use simulations to study consistency in sentencing by setting case scenarios and observing sentencing practice when all sentencers are working with the same case and supporting information.

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<sup>9</sup> During the period 1 October 2010 to 31 March 2015, the Sentencing Council conducted a data collection exercise called the Crown Court Sentencing Survey (CCSS). The CCSS recorded details on the factors taken into account by the judge when determining the appropriate sentence for an offender (such as harm and culpability factors, and aggravating and mitigating factors), and the final sentence given. For further information see <http://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/>.

No dataset holds information on the multitude of different details about the offence and the offender that could impact on sentencing. As a result, statistical analysis can never show with certainty if a disparity is attributable to variability in judges or variability in cases. In simulations, however, cases are held constant through the presentation of identical scenarios. Sentencing is then observed and the reasoning behind decision making explored in further detail. Simulation exercises can also gather the sentencing practice of multiple judges on the same case with the same background information (e.g. Austin and Williams, 1977; Palys and Divorski, 1986; Davies and Tyrer, 2003).

Researchers have also used simulations to test for consistency when developing sentencing guidelines. Raine and Dunstan (2009), used simulated scenarios and offenders' financial circumstances in 'laboratory like conditions' to test three approaches to sentencing guidelines for imposition of fines in workshops with 90 magistrates and 23 district judges. Significant variations in sentencing outcomes were found and the simulation methodology allowed researchers to observe and monitor sentencers' deliberations, giving insight into any inconsistencies in sentencing approach. In this way, simulation is used to develop consistency in approach to sentencing and results from this simulation were fed into the development of revised guidelines on imposing fines by the Sentencing Guidelines Council in 2008.<sup>10</sup>

## 5.2 Studies over time

While some studies look at consistency across judges, courts or districts at a single point in time, the most useful approach for the purposes of the Sentencing Council is to examine consistency over time, posing the question: do sentencing guidelines result in greater consistency of approach and/or outcome when they are introduced? These studies examine sentencing before and after (or 'pre' and 'post') guideline implementation and look for changes which might indicate greater consistency of outcome, approach or both. These studies use statistical methods to minimise the possibility that changes are due to differences in case mix, rather than differences resulting from the implementation of guidelines.

## 5.3 More specific methods of studying consistency

Some of the different ways of studying consistency of sentencing which are most commonly used in the literature are outlined below.

### Convergence of sentencing outcomes

In the USA, federal sentencing guidelines were introduced under the Sentencing Reform Act of 1984 with the aim of ensuring "*reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders*" (US Sentencing Guidelines Manual, 1987, cited in Scott, 2010, p.8). These guidelines are relatively prescriptive in nature.

Leading on from this aim of '*reasonable uniformity*', US studies generally assume that guidelines will result in a convergence of outcomes at the aggregate level (Anderson, Kling

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<sup>10</sup> The Sentencing Guidelines Council was the predecessor of the Sentencing Council. Sentencers were required to 'have regard' to Sentencing Guidelines Council guidelines. The Coroners and Justice Act 2009 then set out that the court 'must follow' any relevant sentencing guidelines, unless it would be contrary to the interests of justice to do so.

and Stith, 1999; Anderson and Spohn, 2010; US Sentencing Commission, 2004 and 2019). Given the aim of greater uniformity and the highly prescriptive nature of sentencing guidelines in the USA, it seems reasonable to expect this kind of consistency of outcome there.

By contrast, other authors have pointed out a potential tension between sentencing consistency and sensitive, individualised sentencing that accounts for all of the many factors that are relevant to a case (Ulmer, Light and Kramer, 2011). Indeed, there is a view that sentencing is inherently inconsistent because of its complexity, so that the pursuit of consistency in outcome is futile (Bargaric and Pathinayake, 2013; Cole, 1997).

The nuanced approach to sentencing and focus on consistency of approach means that the convergence of outcomes method is not applicable in the context of sentencing in England and Wales. Sentencing Council guidelines provide a step by step framework which focuses sentencers' attention on various exhaustive harm and culpability factors, leading to the sentence starting point and range. In principle, this could minimise the variation in sentences. However, each Sentencing Council guideline contains around 50 factors (Roberts, Pina-Sánchez and Marder, 2018), around nine sentencing starting points within wider sentencing ranges, and a non-exhaustive list of aggravating and mitigating factors (at step two). Therefore, while the sentencing approach may be consistent, outcomes are likely to be highly individualised. Sentencing Council guidelines could legitimately result in numerous possible sentences within which overall consistency of outcome might be difficult to detect. Guidelines might even increase the variability of outcomes if it encourages more factors to be taken into account than sentencing without a guideline (Marder and Pina-Sánchez, 2018).

### **Consistency of approach and predictability of sentencing outcomes**

As measuring consistency in outcome is not felt to be desirable in sentencing in England and Wales, studies in the UK have focused on consistency of approach, e.g. are factors being applied in the same way across courts (Pina-Sánchez and Linacre, 2013; Isaac, Pina-Sánchez and Varela Montane, 2021) or focused on the predictability of outcomes, based on 'legal' factors (e.g. Isaac, Pina-Sánchez and Varela Montane, 2021).

These methods control for the offence and offender characteristics available in the data and examine how the sentencing process differs across courts (consistency of approach) or the extent to which outcomes can be predicted by a statistical model on the basis of relevant ('legal') factors (predictability of outcome). Although the focus is on consistency in approach to sentencing, such studies shed light on predictability of outcome because it is thought that if a process is consistent, the outcome should be relatively foreseeable, if not always the same.

### **Unwarranted disparities in outcomes**

Another way of measuring consistency is to focus on unexplained variability (or unwarranted disparities). These may be differences arising from 'non-legal' factors in sentencing. A differentiation can be made between relevant 'legal' factors and other factors (also known as 'non-legal' or extra-legal factors in academic literature). The former are those factors which legitimately (or as a matter of principled judgement) should be taken into consideration when sentencing a given offence, and as explained earlier can include factors such as aggravating and mitigating factors, adjustment of sentence for guilty plea and consideration of previous convictions. The latter are sources of variability



arising from the sentencing context that should not, as a matter of principled judgement, have a bearing on the case (Pina-Sánchez and Grech, 2018). ‘Non-legal’ factors may include sentencers’ responses to superficial characteristics of an offender, but they are not limited to this: for example, time of day, weight of caseload and organisation of the court may all be ‘non-legal’ factors that could potentially have a bearing on sentencing (Pina-Sánchez and Grech, 2018; Reid and MacAlister, 2018).

Sentencing outcomes may not converge because of the complex interplay of relevant ‘legal’ factors discussed above, but the contribution of ‘non-legal’ factors should nevertheless be minimised by adherence to a common, careful approach. We might therefore expect unexplained variability in sentencing to diminish as guidelines increase consistency of approach. A number of high quality UK studies have therefore focused on measuring unwarranted disparities in sentencing (e.g. whether or not the sentencing court makes a difference, once ‘legal’ factors are controlled for), which some feel may be a better measure of consistency of approach than measuring any convergence in sentence outcomes (Johnson, 2014; Pina-Sánchez and Linacre, 2014; Pina-Sánchez and Grech, 2018; Pina-Sánchez, 2019).

## 6. Studies in England and Wales since the Sentencing Council came into operation

Having examined the different ways in which consistency in sentencing has been studied and measured across jurisdictions, the following section presents findings from studies that have taken place in the context of sentencing in England and Wales since 2010 when the Sentencing Council came into operation. Consideration of these findings helps to examine the impact of Sentencing Council guidelines on consistency in sentencing in England and Wales, and where inconsistencies have been found, some of the potential reasons for this.

### 6.1 Consistency across courts

In England and Wales, Pina-Sánchez and Grech (2018) found that some ‘non-legally’ relevant factors which seemed to predict differences in sentencing leniency/ severity across courts (as measured by length of custody) were no longer significant when all the relevant ‘legal’ factors were included in the model and hence case mix was better accounted for. This meant that a possible association between having a high proportion of Muslim residents in the local area and more severe sentencing disappeared when case characteristics were more fully accounted for. In other words, in this study, what looked like bias or evidence of discriminatory sentencing turned out not to be the case, illustrating the importance of a strong research design in studying consistency.<sup>11</sup>

Pina-Sánchez, Lightowlers and Roberts (2017) examined consistency in sentencing in the same way, but this time after an extraneous factor impinged on sentencing practice: namely the 2011 riots.<sup>12</sup> They found that following an influential precedent set by the

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<sup>11</sup> It is important to note, however, that this finding relates to the one study cited here. This is an important area and the Council is committed to further work in the area of equality and diversity.

<sup>12</sup> In August 2011, widespread public disorder featuring the looting of shops took place in London and other major cities across England and Wales.



Recorder of Manchester to sentence riot cases more severely, the likelihood of receiving custody for a commercial burglary offence and the severity of the sentence appeared to rise across the country. However, when comparing courts that were specifically known to sentence riot related cases with courts that did not, the authors found an increase in sentencing severity and increased likelihood of custodial sentences applied only in those courts that sentenced riot cases. For example, they found that after controlling for a number of legal factors the probability of being sent to prison for commercial burglary if sentenced in the Crown Court at Manchester, Crown Square, rose from 47 per cent to 84 per cent, while in in Norwich it declined slightly from 49 per cent to 45 per cent. The Sentencing Council had not at the time released any guidance in relation to sentencing offences that have taken place as part of wider public disorder.

Brunton-Smith, Pina-Sánchez and Li (2020) used statistical modelling of Crown Court Sentencing Survey data to investigate consistency in sentencing both between different courts and within them. They used data from the second half of 2011 covering all cases of assault, including completed and attempted cases of actual and grievous bodily harm (ABH and GBH), common assault and affray sentenced in courts in England and Wales. This period immediately followed the introduction of new sentencing guidelines for assault and the analysis was restricted to the 46 per cent of cases that resulted in a custodial sentence. The authors reported findings of sentence variation both across different courts and within them. They pointed out however, that most of the variation resulted from legitimate differences between the offences being sentenced including the type of assault, harm caused, culpability factors and the offender's previous convictions.

The authors also observed more consistency when the defendant was believed to play a leading role in a group or gang or failed to comply with a current court order. Courts that tended to impose longer average sentences were found to have the least variation in their sentencing practice, and courts that appear to be more lenient showed greater variation. Arguably, however, this could be because when sentences are lower, there is more potential variation in the type of disposal sentencers can impose, for example if a sentence is for two years and under, a sentencer could choose from disposals such as immediate custody, a suspended sentence order or a high-level community order etc.

## 6.2 Consistency across judges

Another recent study used an innovative technique to study unwarranted disparities across both judges and courts in England and Wales (Pina-Sánchez, Grech, Brunton-Smith and Sferopoulos, 2019). UK datasets do not usually contain the identity of the sentencing judge. However, the judge's identity is published within transcripts of judges' sentencing remarks, and this technique involved computer scanning over 7,000 such transcripts of judges' sentencing remarks to extract 52 factors of relevance to the end sentence. As well as the judge's identity, the factors included characteristics such as the type of judge (e.g. High Court judge versus circuit judge) and whether they sat across several courts or just one. It also included offender characteristics such as age and gender and case characteristics such as the offence being sentenced, injuries caused and whether there was a guilty plea.

The authors found disparities, but that most arose at the judge, not the court level. The study found that High Court judges tended to judge more severely than circuit judges and part-time recorders, which the authors noted is likely to reflect the higher seriousness of the cases they hear. Resident Judges in individual courts have a high degree of discretion over how cases are allocated in their court and so the authors suggested that in a similar

way to High Court judges hearing only serious cases, some judges (for example, those with more experience) tend to be allocated cases which are higher in culpability and harm (even within broad offence groups) than others, and this aspect of case mix was not controlled for in this study. This means that it remains possible that legal case characteristics account for all or some of the disparities across judges, rather than simply a bias towards lenience or severity.

The study also found that judges that rotated between courts had a more varied caseload (as indicated by type of offence) than those that sat in the same court, but they sentenced these more consistently. This supports qualitative work from the USA (Hester, 2017) which found that judicial rotation could facilitate the spread of norms and similar sentencing practices. Pina-Sánchez, Grech, Brunton-Smith and Sferopoulos (2019) note that judicial rotation may be another tool, aside from sentencing guidelines, that could encourage consistency in sentencing.

### 6.3 Consistency of approach as measured by use of factors

Since the advent of the Sentencing Council guidelines, a number of studies from England and Wales have focused attention on the degree of consistency with which guideline factors have been applied (Pina-Sánchez and Linacre, 2013; Pina-Sánchez and Grech, 2018; Isaac, Pina-Sánchez and Varela Montane, 2021). All of these studies have found that the vast majority of factors tested are associated with the expected effect on sentencing across courts i.e. they are associated with a change in sentence in the expected direction, either an increase or decrease in the sentence depending on whether they aggravate or mitigate, and carry the expected weight, depending on whether they are considered at step one or two of the relevant guideline. This lends credibility to the idea that the sentencing guidelines in England and Wales have encouraged a consistent approach to sentencing.

However, across studies there have been exceptions to this pattern. For example, Pina-Sánchez and Linacre (2013) found that two variables from the assault guidelines - victim vulnerability and whether an attack was sustained - varied in the magnitude of their effect on the sentence across courts to a 'moderate' extent. The idea that victim vulnerability might be interpreted inconsistently concurs with qualitative research for the robbery guideline, which found that judges differed noticeably in their interpretation of what constituted a vulnerable victim when completing a simulated, scenario-based sentencing exercise.<sup>13, 14</sup>

In a more comprehensive study using more detailed data than are publicly available, Isaac, Pina-Sánchez and Varela Montane (2021) developed a methodology for studying consistency of approach in relation to three Sentencing Council guidelines. They found that the vast majority of guideline factors that could be compared pre- and post implementation of the guideline (11 in total) were applied consistently across courts, but there were a few exceptions. The results of this aspect of the study are summarised in the

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<sup>13</sup> <https://www.sentencingcouncil.org.uk/wp-content/uploads/Robbery-research-bulletin.pdf>

<sup>14</sup> In 2019 the Council published a new general guideline and expanded explanations to aid sentencers' interpretation of guideline factors. A stated aim of this work is to encourage consistency of approach. See: <https://www.sentencingcouncil.org.uk/news/item/new-general-guideline-and-expanded-explanations-published-by-sentencing-council/>

table below. The Sentencing Council commissioned this study and the findings are outlined in more detail in the accompanying report to this evidence review.<sup>15</sup>

**Table 1: Summary of analysis of the association between guideline factors and end sentences across courts (Isaac, Pina-Sánchez and Varela Montane, 2021)**

<b>Guideline</b>	<b>Consistency of the application of specific factors</b>	<b>Factors found to have been applied inconsistently</b>
Domestic burglary	30 factors found to be associated with consistent sentencing; 4 factors found to be associated with inconsistent sentencing	<ul style="list-style-type: none"> <li>• Commission of the offence whilst under the influence of alcohol or drugs</li> <li>• Determination and/or demonstration of steps taken to address offending behaviour</li> <li>• Remorse</li> <li>• Previous convictions</li> </ul>
Supply/possession with intent to supply a controlled drug	25 factors found to be associated with consistent sentencing; 2 factors found to be associated with inconsistent sentencing	<ul style="list-style-type: none"> <li>• Supply only of drug to which offender addicted</li> <li>• Previous convictions</li> </ul>
Theft from a shop or stall	10 factors found to be associated with consistent sentencing; 1 factor found to be associated with consistent sentencing	<ul style="list-style-type: none"> <li>• Previous convictions</li> </ul>

The authors found that the majority of factors were associated with consistent sentencing: the way they were applied to sentences did not vary significantly across courts, but there was significant variation between courts across a handful of factors. Of these, there is academic commentary about how intoxication has been applied as either an aggravating or a mitigating factor in sentencing (see Lightowlers and Pina-Sánchez, 2018) and ‘Commission of the offence whilst under the influence of alcohol or drugs’ has been shown to be open to differing interpretation in other academic research on domestic burglary (Irwin-Rogers and Perry, 2015).

Presence of previous convictions was found to be associated with varying sentences across courts for all three offence types, which might suggest that it is particularly

<sup>15</sup> This report can be viewed here: <https://www.sentencingcouncil.org.uk/publications/item/investigating-the-sentencing-councils-impact-in-three-key-areas>

susceptible to variable interpretation. However, it may also relate to an aspect of the method employed: it was only measured in a blunt way (presence of previous convictions or not) and so this might mask legitimate variation resulting from the number, relevance or recency of convictions, as specified in the guidelines but *not* measured here (Isaac, Pina-Sánchez and Varela Montane, 2021). Overall however, with so few factors varying in this way, the weight of evidence suggests that the guidelines are encouraging consistency of sentencing process.<sup>16</sup>

## 6.4 Studies of consistency before and after the implementation of sentencing guidelines in England and Wales

Lastly, some studies have examined the effects of the sentencing guidelines for England and Wales on sentencing over time, from pre-guideline implementation, to post.

Pina-Sánchez and Linacre (2014) used two complementary techniques to study changes in the consistency of sentence lengths for assault offences in 2011, the year in which the Sentencing Council guideline took effect (in June). The study covered assaults occasioning actual bodily harm (ABH), grievous bodily harm (GBH) and GBH with intent and used Crown Court Sentencing Survey (CCSS) data. This allowed for important case characteristics to be incorporated into the methods, while controlling for as many legitimate legal factors as possible.

Using CCSS data, the authors developed statistical models to examine legal factors before and after the assault guideline was implemented. They monitored how much the predicted outcomes varied from the actual outcomes in sentencing and then compared sentence lengths of similar offences. They found that legal factors could explain a greater degree of variance in sentence after the guideline came into force. Monitoring results over time, they found that variability in sentences continued to decrease throughout 2011. They also found a statistically significant reduction in variance of sentence length in similar offences. The authors concluded that their new methods provide a more robust measure of consistency in sentencing and that sentencing of assault offences was more consistent after the guidelines were implemented. However, they cannot say for certain that the increase in consistency is a direct cause of the guidelines given that there are so many other variables that cannot be taken into account in such statistical modelling.

Most recently, Isaac, Pina-Sánchez and Varela Montane (2021) examined sentencing consistency over three of the Sentencing Council's guidelines: domestic burglary, supply/possession with intent to supply a controlled drug and theft from a shop or stall. As outlined above, they examined how consistently factors were applied and also examined:

- whether sentence outcomes became more predictable post Sentencing Council guidelines, compared to before these guidelines were in force; and,
- the amount of unexplained variability in sentencing across courts after 'legal' factors have been taken into account.

In the first analysis, the authors found no statistically significant change in the predictability of sentencing outcomes pre- and post guidelines for supply/possession with intent to supply a controlled drug or theft from a shop or stall (sentencing outcomes could accurately be predicted for 62 per cent of the drug offence cases and 43 per cent of the

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<sup>16</sup> In 2019 the Council published a new general guideline and expanded explanations to aid sentencers' interpretation of guideline factors. A stated aim of this work is to encourage consistency of approach.

theft cases, both pre- and post-guideline). However, they found a small but statistically significant improvement for domestic burglary: the proportion of cases for which sentencing outcomes could be accurately predicted from the model increased from 77 per cent (already a high proportion of cases) to 78 per cent. It is important therefore to note that the ability to predict sentences for domestic burglary was already high and was improved following the introduction of the guideline.

In the second analysis, the authors found a statistically significant 22 per cent decrease in court disparities between courts<sup>17</sup> for supply/ possession with intent to supply a controlled drug post-guideline, but no such decrease for theft from a shop or stall or domestic burglary.

Pina-Sánchez and Grech (2018) similarly found that ‘legal’ factors predicted which assault cases would receive custody in 80 per cent of cases. It may therefore be that we are not seeing large gains for some offences because sentencing is already quite consistent in the sense of being predictable, so there is limited room for improvement following the implementation of guidelines.

In addition, limitations of the methods used may have contributed to these results. For example, in the modelling carried out to date, when making comparisons pre- and post-guidelines, researchers have only ever included in the models factors which were captured in CCSS data pre *and* post guideline. This means that for some of the analyses, key factors on harm and culpability were not included in the data set.

## 7. Conclusions

This review has demonstrated the different ways in which sentencing consistency can be conceptualised, studied and measured. It is clear that measuring consistency in sentencing approach is extremely difficult methodologically. This is not least because of the lack of full data sources that could cover every potential variable which could have some sway in the nuanced sentencing practice in England and Wales.

Analysis on consistency in sentencing is hampered by a lack of available data in a number of ways. While they are some of the most comprehensive datasets that exist on sentencing factors, the CCSS and a more recent Sentencing Council magistrates’ court dataset still contain only a limited amount of information on factors. The CCSS was also discontinued in 2015 which has led to a relative lack of up-to-date sentencing data for further analysis. There are also little sentencing data available for magistrates’ courts in which the vast majority of cases are sentenced. This means that studies have not been able to examine the influence of all factors that may potentially have an impact on the sentence handed down by the courts.

Even where data on a large number of factors are available, these do not include information on how the factors may have played a greater or lesser part in the offences being studied. For example, for factors related to the use of weapons, the type of weapon can vary widely and this may affect the weight applied to a weapons factor. For the factor related to previous convictions, it would be expected that greater weight would be given to this where a large number of recent and relevant previous convictions were present

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<sup>17</sup> Across different court locations.

compared with a smaller number of previous convictions or where these were some time ago or were less relevant to the current offence being sentenced. Without details of the nuanced differences between the cases, even within factors themselves, it remains difficult to determine whether differences in sentencing are due to legitimate differences in 'legal' factors or differences that cannot be explained even if all factors could be taken into account.

In terms of the studies from England and Wales which have been reviewed here and have looked at whether or not sentencing consistency has increased following the implementation of guidelines, these have found only small gains. For example, after the implementation of the assault guideline Pina-Sánchez and Linacre (2014) found a reduction in variance across matched groups of offenders of seven percentage points. Meanwhile, Isaac, Pina-Sánchez and Varela Montane (2021) found no statistically significant difference pre- and post the introduction of guidelines for theft from a shop or stall, a marginal gain for domestic burglary, although a more appreciable gain on a different measure for supply/ possession with intent to supply a controlled drug. Although only two out of six measures of consistency across the three offences yielded a statistically significant improvement, it is also important to note that there was no lessening of consistency for the other four measures, despite the introduction of many more factors and more sentencing starting points across these guidelines.

Although some findings show only small improvements, this is in the context of the fact that where we have evidence, some of this indicates that sentencing already seems to be relatively consistent. This means that there may only be narrow room for improvement in some cases, particularly in common offences and/ or offences where there is already a guideline.

In addition, as noted at the beginning of this review, the guidelines are intended to impose consistency of approach and encourage individualised sentencing decisions within the steps of the guidelines. For this reason, complete consistency would not be expected and it may be harder to detect changes in the level of consistency. There are also important limitations on the data available at present.

Studying consistency in England and Wales is challenging because sentencing and sentencing guidelines are complex and responsive to the particulars of the offender and offence. Cases are not randomly allocated to courts and sentencers, and it is very difficult to account for all the legal factors which may legitimately affect sentencing outcomes, which can lead us to under-estimate consistency (or over-estimate inconsistency). Nevertheless, the highest quality studies, which statistically control for many case variables, tend to show a high degree of consistency and low levels of variation across courts (Pina-Sánchez and Linacre, 2013; Pina-Sánchez, Lightowlers and Roberts, 2017; Pina-Sánchez and Grech, 2018). For example, Pina-Sánchez and Linacre (2013) found that less than two per cent of variation in the custodial sentence length given in assault cases was attributable to the court where the case was heard and Pina-Sánchez, Lightowlers and Roberts (2017) found, before the disruption of the 2011 riots, only around three per cent of the variability in sentencing of commercial burglary cases was attributable to the court.

Those studies that have specifically looked at the application of sentencing factors have also found a high degree of consistency in how factors are used and their effects on the sentencing decision (Irwin-Rodgers and Perry, 2015; Pina-Sánchez and Linacre, 2013; Isaac, Pina-Sánchez and Varela Montane, 2021).

## 8. Future work on consistency in sentencing

The Sentencing Council continues to work on its statutory duty to promote consistency in sentencing. It does this through feeding its evidence on consistency into the guideline development process and then examining impacts after guidelines have been implemented.

It is also currently considering its future priorities and the way it discharges its statutory duties as part of considering the responses to the 2020 consultation *What Next for the Sentencing Council?* This will include considering the ways in which consistency can be monitored and measured over time and any improvements to data sources that will help to facilitate further work in this area. This may include methods (e.g. interviews, focus groups and simulations) that can look more broadly at consistency of approach and that complement the statistical analyses presented in this review.

In addition, as part of the response to the consultation, the Council aims to undertake a programme of work on equalities and inclusion which will include examination of sentencing guidelines for any potential to cause disparity in sentencing for people with protected characteristics under the Public Sector Equality Duty. The Council also plans to carry out user testing of digital guidelines which will also seek to establish whether sentencers are consistent in the way they use digital guidelines.

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## The authors

Sarah Poppleton, Elaine Wedlock, Amber Isaac and Emma Marshall