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ASSISTING AND ADVISING THE SENTENCING DECISION PROCESS

The Pursuit of 'Quality' in Pre-Sentence Reports

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Pre-sentence reports are an increasingly prevalent feature of the sentencing process. Yet, although judges have been surveyed about their general views, we know relatively little about how such reports are read and interpreted by judges considering sentence in specific cases, and, in particular, how these judicial interpretations compare with the intentions of the writers of those same reports. This article summarizes some of the main findings of a four-year qualitative study in Scotland examining: how reports are constructed by report writers; what the writers aim to convey to the sentencing judge; and how those same reports are then interpreted and used in deciding sentence. Policy development has been predicated on the view that higher-quality reports will help to 'sell' community penalties to the principal consumers of such reports (judges). This research suggests that, in the daily use and interpretation of reports, this quality-led policy agenda is defeated by a discourse of judicial 'ownership' of sentencing.

Introduction

Writing about the demand for probation services in England and Wales, Morgan (2003: 11) observes that 'sentencers are the probation service's core users … their principal customers'. Like any other provider in a marketplace, the service 'seeks to condition sentencer opinion' (Morgan 2003: 10). In daily sentencing work, pre-sentence reports[1] are the primary vehicle to condition opinion and influence action. In this sense, pre-sentence reports share much in common with other professional advice-giving services in which professionals offer relevant information and advice that is useful to the decision-making process. As a wealth of research has shown (e.g. Bottoms and McLean 1976; Smart 1984; Mather *et al.* 2001; Tata 2007*a*), the practical distinction between the provision of mere information and persuasion is blurred. Typically, apparently neutral information is selected and deployed by professional advisers in such a way that it normally persuades the consumer of that information to take a form of action that the professional advice-giver prefers. In the criminal justice sphere, this has been most

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[1] Here, 'pre-sentence reports' is used as an intuitive *generic* term to encompass reports used in different countries and jurisdictions with different names (including, for example, 'social enquiry reports' in Scotland) but nonetheless perform broadly similar functions. Although the precise practices vary, broadly speaking, pre-sentence reports provide the sentencing courts with information, advice and assessment about, *inter alia*, the personal and social circumstances of the convicted person as well as about their character, offending behaviour, physical and mental condition, normally leading to an assessment of sentencing options.

notably seen in lawyer–client relations. In that context (as in others such as physician, psychiatric, financial services), the consumer of advice is, broadly speaking, characterized by relative passivity and dependence on that advice (see, e.g. Bottoms and McClean 1976; McConville *et al.* 1994; Tata 2007*a*).

In most sectors, quality assurance standards are predicated on the view that the consumer has definable (if hard to measure) advice needs. Quality standards seek to assure the consumer and/or purchaser of advice that such needs are (or will eventually be) fulfilled: consumer needs are conceived of as knowable, inert and graspable. However, research reported and discussed in this article suggests that the needs of the principal consumers of reports (judicial sentencers) may be more shifting and elusive than has been supposed than by the logic of quality standards policy. In this sense, 'quality' (defined by current policy as the fulfilment of expressed judicial needs and desires), is not a fixed destination that can be arrived at with enough knowledge, skill and determination on the part of report writers. The evaluation of the 'quality' of reports is also a property of the discourse of judicial 'ownership' of sentencing. This discourse of judicial ownership of sentencing limits the extent to which report writers' sentencing advice and evaluations can be embraced.

Context

Pre-sentence reports are intended to assist the sentencing decision process by providing the court with information, advice and assistance about the personal, social and offending circumstances of the convicted person, and about the suitability of different sentencing options. In Scotland,[2] as in other countries, the court has discretion as to whether or not to call for a report, but there are also a range of circumstances where the law requires that the court must obtain a report before passing sentence (e.g. in relation to those under 21 years of age where the court is considering a custodial sentence, or anyone who may be sentenced to custody for the first time).

In Scotland, such reports (known as Social Enquiry Reports[3] (SERs)) are written by generically trained social workers primarily for judges considering sentence. To the extent that practice follows policy, report writers in Scotland may arguably be more committed to welfare values than their counterparts south of the border in England and Wales. Although, in both jurisdictions, 'public protection' as an official purpose is given headline billing, in Scotland (unlike England and Wales), it is also associated with a commitment to 'anti-custodialism' (Nellis 1995; Robinson and McNeill 2004). Moreover, in contrast to the policy position in England and Wales, in Scotland, rehabilitation is cast as the means to progressing two compatible and interdependent goals: reducing reoffending *and* increasing social inclusion (McNeill and Burns 2005; Robinson and McNeill 2004). At the same time, however, the policy emphasis in both jurisdictions has shifted from reducing the use of custody towards reducing the risk of offending and

[2] Although a constituent part of the United Kingdom, Scotland has always had a separate system of criminal law and justice from England and Wales. This includes separate and distinct systems of: prosecution; the legal profession; judiciary; prisons; and community penalties. Sentencing law and policy are not a UK matter.

[3] Section 207 of the 1995 Criminal Procedure (Scotland) Act requires that reports must be 'from an officer of a local authority or otherwise' to provide 'such information as it can about an offender's circumstances and it shall also take into account any information before it concerning the offender's character and physical and mental condition'. Where a custodial sentence is on the agenda, the report is intended to assist the court in deciding whether 'no other method of dealing with him is appropriate' (Criminal Procedure (Scotland) Act 1995, s. 204(2)). In other words, the law seeks to encourage sentencing judges to think twice before imposing (especially) a custodial sentence.

thereby protecting the public, though how that apparent shift from welfare to risk plays out in practice on the ground appears to be more complex than a simple reading of the headline policy might lead one to suppose (see, e.g. Hannah-Moffat 2005; Maurutto and Hannah-Moffat 2006; Kemshall and Maguire 2001; Robinson 2002; Robinson and McNeill 2004; Tata 2007*b*). Unlike their counterparts in England and Wales, report writers in Scotland are not routinely provided with witness statements and police reports.

In common with other countries, Scotland has witnessed a significant escalation in the number of reports requested by the courts and submitted to them. Between the years 2001 and 2006, a total of 194,703 reports were completed (Scottish Executive 2007)[4]: an increase of 80 per cent on the numbers during 1991–96 (Social Work Inspectorate 1996). This dramatic rise is in spite of the fact that, over this period in Scotland, the number of cases coming before the courts has been broadly stable (McNeill and Whyte 2007; Tata 2007*a*). The concomitant level of financial investment reflects policy makers' recognition of the pivotal role that SERs play in pursuit of governmental objectives for community justice services to the criminal justice system. These objectives include: reducing the use of custody by offering credible community-based alternatives; and more generally seeking to enhance the credibility of community sentences in the eyes of the courts. For some years, reports have been seen by policy officials as having 'a particular role to play in seeking to ensure that offenders are not sentenced to custody for want of information or advice about feasible community-based disposals' (Scottish Executive 2000: 1.6).

In the government's National Objectives and Standards (more commonly known as 'National Standards'), it is clear that the role of SERs is required to be advisory, namely more than mere gathering of facts: it is intended to help assist and advise sentencing decision making:

> Social enquiry reports are intended to *assist* sentencing. They provide information about offenders and their circumstances of general *relevance* to the courts. On the basis of a risk and needs assessment, they also *advise the courts on the suitability of offenders for those community based disposals* …. (Scottish Executive National Standards 2004: 1.2, emphases added)

Since reports are both the key entry point to criminal justice social work services (i.e. community penalties) and the prime opportunity to encourage consideration of the use of these services, it is easy to see why they attract this level of investment and policy attention: reports are expected to do a selling job. The logic implicit in the policy is that the courts will use community disposals more instead of custody *if* the courts are better informed and such disposals are regarded as more credible by the courts (e.g. Scottish Office 1998). In other words, reports are expected to encourage judicial sentencers to realize the benefits of non-custodial disposals over custody:

> The provision of community based disposal of sufficient quality and quantity will enable sentencers to use them in cases *where otherwise they might have imposed a custodial sentence*. The overall aim is to create a situation in which it is practicable to use prisons *as sparingly as possible* through providing community-based disposals which contain and reduce offending behaviour, assist social integration, have the *confidence of the courts* and the wider public, and make efficient and effective use of available resources. (Scottish Executive 2004 National Standards: para. 5, emphasis added)

[4] During the same period, the courts requested 227,464 SERs.

Thus, the policy drive has also been based on the belief that, by setting out the facts logically and presenting the case for non-custodial options adroitly, sentencers will come to realize the value and appropriateness of non-custodial options. National Standards are the key institutional mechanism used to benchmark and drive up the quality of reports (Social Work Services Group 1991). By doing so, it is envisaged that good reports will help judicial sentencers to be persuaded of the value of non-custodial sentences where otherwise they might have imposed custody, and that they will help to increase the general level judicial confidence in non-custodial options. Higher-quality reports are expected to lead to a corresponding effect in the sentencing process. But will the courts use custody more sparingly if they are better informed about community penalties available in each case? Do better-quality reports lead to a corresponding influence in the sentencing decision process (i.e. more sparing use of custody) and, if so, how? This paper reports and discusses some of the findings of a four-year ESRC study into the production, use and interpretation of pre-sentence Social Enquiry Reports (SERs) in Scotland.

The Research: What Gap Did this Research Aim to Fill?

Given the strategic importance of reports to sentencing policy and practice, pre-sentence (or social enquiry) reports have been the subject of 'bursts' of previous research (Haines and Morgan 2007: 183), especially in relation to juveniles. These bursts of research into reports have examined a range of issues, including: the attitudinal and ideological underpinnings of reports (e.g. Curran and Chambers 1982; Horsley 1984; Hudson and Bramhall 2005; Rawson 1982); sentencers' overall satisfaction with reports (e.g. Brown 1991; Burney 1979; Curran and Chambers 1982; Brown and Levy 1998; Bonta *et al.* 2005); the quality of report writing (e.g. Perry 1974; Thorpe 1979; Whyte *et al.* 1995); and the relationship between 'quality' and 'effectiveness' (e.g. Cavadino 1997; Creamer 2000; Williams and Creamer 1989; Hine *et al.* 1978; Gelsthorpe and Raynor 1995; Mott 1977; Parker *et al.* 1989; Downing and Lynch 1997; Thorpe and Pease 1976; Bonta *et al.* 2005; Bateman and Stanley 2003). These various studies have yielded crucial knowledge. However, we still know fairly little about *how sentencing judges interpret and use* reports in routine daily practice. The most commonly employed approach has been to ask sentencing judges about their views of reports in general. Over two decades ago, Bottoms and McWilliams (1986) identified a gap in research—a gap that has only begun to be filled:

> … none of these studies sought to discover what sentencers thought about *particular* [reports] on individual defendants; all simply asked sentencers in general terms for their views and impressions concerning [reports]. (Bottoms and McWilliams 1986: 268, original emphasis retained)

Consequently, important questions about the specific aims and objectives of report writers in producing reports, and the ways in which reports are interpreted and used by sentencing judges, have tended to be addressed in a general way. The research techniques normally used (content analysis, surveys, statistical analysis and interviews) have permitted only a very limited examination of *the communication process* embodied in reports. To a much lesser extent, judges have been asked to discuss their views of individual reports by some researchers (e.g. Gelsthorpe and Raynor 1995; Bonta *et al.* 2005). As important as this has been, to date, there has been almost no work devoted to a *direct comparison between* how sentencing judges interpret and use particular individual pre-sentence reports *and* what the writer of those same individual reports intended to

convey. The study reported and discussed in this paper set itself the task of trying tackling these issues.[5]

The research reported here restricted its focus to 'summary' (i.e. non-jury-triable) cases in Scotland's intermediate Sheriff Courts—where over 75 per cent of all criminal cases are heard, and to which 88 per cent of all SERs are submitted (Scottish Executive 2007). Given the legal and policy imperative that SERs should encourage judicial sentencers to consider non-custodial options, we sought to focus on 'cusp' cases, in which a sentence of custody might be considered a distinct possibility but not inevitable. In contrast to the situation in England and Wales, such 'cusp' cases are not mainly heard by lay magistrates, but by the summary jurisdiction of Scotland's intermediate Sheriff Courts. Sheriff Court judges (who are known by the term 'sheriffs') are lawyers by experience and background. In Scotland, 'sheriffs' are simply judges by another name.[6]

Methods

This research examined pre-sentence social enquiry reporting from the perspective of *both* pre-sentence report writers (social workers) *and* judicial sentencers (sheriffs). The aim of the research was to conduct an in-depth exploration of the communication processes between the producers of reports and their principal consumers (sentencers). Accordingly, the project used entirely qualitative methods. It comprised four complementary parts:

(1) *An ethnographic study of criminal justice social workers in two sites examining the routine social production of SERs.* This included: observations of interviews by report writers with the subjects of reports; home visits; and the working environment in which reports were produced, etc. It also initiated a technique known as 'shadow report-writing' in which the field-based researcher[7] prepared mock (or 'shadow') reports based on the referral information and the observation of the interviews, namely the same information as was available to the social work report writer (Halliday *et al.* 2008). This enabled a comparison between the 'shadow' report and the real report and thus provided a particularly valuable means of eliciting from and discussing with the report writer not only what s/he intended to convey in any given report, but how and why s/he sought to communicate it through particular tactics and strategies in specific reports. The two criminal justice social work offices served their respective local Sheriff Courts. We have called these sites 'Westwood' and 'Southpark'. 'Southpark' is a relatively small–medium office with a closer relationship to its smaller court than the much larger 'Westwood', where workers were organizationally and psychologically more remote from the court. For these reasons, we termed Southpark a 'close' site and Westwood 'remote'.

(2) An *observational and interview-based study with Sheriff Court judges (sheriffs)* in the corresponding sites examining the interpretation and use of the Southpark and

[5] There is not space here to report findings on the context in which reports are routinely written—see McNeill *et al.* (2008).

[6] In reporting the specific methods and findings of the study, the term 'sheriff' is used (since this is used in quotations). In discussing the implications of the findings beyond Scotland, we revert to the generic term 'judge'. As explained, the terms 'judge' and 'sheriff' are practically synonymous.

[7] Dr Nicky Burns.

Westwood SERs in sentencing, including, wherever possible, a follow-through of specific reports whose preparation had already been observed, and interviews with defence solicitors and prosecutors before and after those sentencing hearings.

(3) *A series of focus group discussions with sheriffs throughout Scotland* discussing general and specific issues relating to specific SERs whose production had already been observed. The sheriffs were sent the case papers in advance and asked to review them in the same way in which they normally would.

(4) A series of '*moot' (or simulated) sentencing diets* based on Southpark and Westwood cases whose production had already been observed and involving pre- and post-moot interviews with sheriffs and defence lawyers (solicitors).[8]

Thus, the ability to follow a small sample of cases from preparation through to both 'real' and simulated sentencing enabled a direct comparison between the intentions of individual report writers and the use and interpretation of those same individual reports by sheriffs.

The main sources of data comprised transcripts of: five separate focus groups with sheriffs discussing specific cases; five moot sentencing exercise transcripts; 55 interview transcriptions comprising 22 social worker follow-up interviews, 17 post-sentencing diet observational sheriff interviews, 11 one-to-one defence solicitor interviews, five moot pre-and post-sentencing interviews with defence solicitors, ten court observation diaries, 43 weekly fieldwork diary returns, 29 shadow reports and 29 original reports with their attached papers. The main research participants were: 22 report writers, 26 sheriffs and 11 defence solicitors.

Findings

Here, we outline two of the key findings in terms of the pursuit of quality in (and influence of) reports. These are: role of 'realism' in the perceived credibility of reports; and, second, communication through narrative.

Report writers and 'realistic' sentencing

The point has previously been well made that the simple existence of high rates of 'concordance' between sentencing proposals suggested in reports and sentences passed should not be assumed to be direct evidence of influence in sentencing (e.g. Carter and Wilkins 1967; Morgan and Haines 2007). In performing the job of SER writing, report writers try to develop a sense of what judicial sentencers would regard as a 'realistic' sentence for particular cases. Previous studies have suggested the possibility of social workers 'second-guessing' sentencers (e.g. Creamer 2000; Gelsthorpe and Raynor 1995; Rosencrance 1988; Brown and Levy 1998). Our data confirm that most report writers strive to gain a sense of the sentencing practices of sheriffs in their local area and thus to be able to anticipate what would fall within the range of 'realistic' disposals according

[8] As in many other common law countries, there are two basic branches of the legal profession in Scotland: 'solicitors' (who undertake, *inter alia*, the vast majority of defence and prosecution work and all summary criminal work) and a much smaller cohort of 'advocates' (who conduct work in the superior and appeal courts).

to these sentencing practices. There was a clear consensus among sheriffs and defence lawyers that SERs deemed to be of poor quality are characterized by a lack of 'realism' in report writers' discussion of sentencing options. Almost all of the sheriffs and all of the defence solicitors who took part in this study were critical of 'unrealistic' discussions of sentencing options in SERs and said that an 'unrealistic' proposal rendered the whole report far less credible. For example:

> … if the report's unrealistic, … I think it does diminish the quality of the report. It diminishes the validity and the value of the report, if you're getting such an unrealistic suggestion. … sometimes other social workers making what appears to be a preposterous suggestion! … What concerns me about that is that it makes the sheriff think 'well wait a minute, what about the value of this report?' (Interview, Westwood sheriff 7(ii))

> … but mainly I think what sets a good [report] from a bad one is the realistic or otherwise nature of the disposals suggested by the social worker because there's little point, in my view, in even referring to [an unrealistic report]. (Interview, defence solicitor 9)

Because sheriffs tended to look first at the end of the report (where there is an evaluation of sentencing of options), a report that suggested a sentence that the sheriff saw as unrealistic would risk being dismissed, regardless of the quality of the narrative that led up to that evaluation. This finding appears in contrast to the suggestion made by Crown Court judges in England and Wales, as reported by Gelsthorpe and Raynor:

> … the interviews revealed that an unusually lenient recommendation would not be dismissed out of hand if justified, acknowledged as unusual, and presented by an experienced and known probation officer … so that what was 'unrealistic' to a sentencer *could easily become acceptable if framed in a context of reasoned discussion*—so that sentencers were being *persuaded* rather than 'told what to do'. (Gelsthorpe and Raynor 1995: 196, emphasis added)[9]

Problems in grasping sentencing 'realism'

Sheriffs and defence solicitors expected report writers to gain knowledge of sentencing patterns in their particular court and to write reports accordingly. Furthermore, National Standards observe the central importance of assessing the likely sentencing agenda of the court:

> If a report is to help the court decide whether there are ways of dealing with the offender which avoid the use of custody, the report writer has to assess the extent to which custody will be considered seriously by the court. (Scottish Executive 2004: 4.5)

Having stressed the importance of anticipating the court's likely sentencing agenda, the guidance of National Standards fails to go beyond the most elementary. It tells report writers that custody is more likely in: jury-triable than in non-jury-triable cases; where the subject has been remanded in custody; if the subject has previously been sentenced to custody; and if the court has requested a report on the suitability of community service. 'Other indicators include the nature and seriousness of the offence, the

[9] However, we did find strong support for the suggestion that, in the closer court community of 'Southpark', the reputation of individual social workers really mattered.

seriousness and frequency of any previous convictions and any comments made on the bench' (Scottish Executive 2004: 4.5). Moreover, report writers have no access to systematic information about previous sentencing patterns for different kinds of cases (Tata and Hutton 2003).

Sentencing disparity is central to the practical meaning of 'realism'

It was very widely believed by lawyers, sheriffs and report writers that there was a significant degree of sentencing disparity between sheriffs (whether this be in terms of more punitive or more lenient approaches across cases generally or in particular types of cases).[10]

At the 'close' ('Southpark') site, there was a strong perception *among sheriffs* (and defence solicitors) that report writers tailored their reports to the individual sheriff's approach—a perceived practice that appeared to reassure and please some sheriffs. For example:

> I know that the social workers who sit in my court. … I think [they] have a very good idea of my general approach to sentencing and that they probably are well aware when they are producing the reports of the areas which I will be alert to—they know what I'm looking for, basically. (Interview, Southpark sheriff 2)

> I would expect an experienced social worker, knowing the way the courts work and the sheriffs work, would know [what] is the likely range of sentences. (Interview, Southpark defence solicitor 3)

In contrast to this judicial perception, report writers were generally unable to predict which sheriff would read their report. Although some report writers would 'bump up the tariff' if they thought a particular sheriff was likely to be on the Bench, most report writers generally did not know which sheriff would hear the case, and indeed felt ambivalent about the ethics of trying to tailor their reports about individuals according to disparate approaches of different sheriffs. Our research suggests that although a key quality indicator is whether the sentencing steer is 'realistic', the ability of report writers to grasp and practise 'realism' is thwarted by inter-sentencer disparity.[11] In their reports, report writers were expected to recognize and accept a degree of disparity, and work to the specific proclivities of different individual sentencers. For instance:

> … they know what we want, you know, and they I hope know what we expect in that we don't tend to get silly recommendations. They know, 'well, it's Sheriff [sheriff's own name], you know, he's not going to wear that! … Sheriff [name] may be different, Sheriff [name] may be different.' We all have our own foibles as sentencers. (Interview, Southpark sheriff 1)

Engaging with sentencing through narrative

Although the scope for actively engaging with the sentencing process is limited by the need to present a credible report (central to which is 'realism'), report writers attempted to encourage sentencers to consider and favour particular disposals in particular cases. They did this through the use of 'narrative' about the offender that situates the particular offence within the individual's social background and environment. As required by National

[10] This was also highlighted when we asked different sheriffs to look at the same case materials.

[11] See also Parker *et al.* (1989: 151). Despite the fact that most report writers at the time of writing their reports expected their recommendation to be the sentence passed, 'because of the idiosyncrasies in sentencing … report writers were able to predict sentences in only slightly over half of the cases' (Parker *et al.* 1989: 165).

Standards, this core message addresses, chronologically, what may have led the individual to offend and the prospects for modifying their behaviour in the future, focusing on the attitude of the offender to the offence and the conduciveness of their social environment to behavioural change. This narrative leads up to the discussion of the viability of non-custodial sentencing options. Report writers tried to tell a coherent story about the offender. Nonetheless, we also found that report writers were prepared to complicate or compromise this quest for coherence because of a countervailing desire to be transparent, open and informative—virtues also required by National Standards. This meant that report writers often included information within the report despite recognizing that it may be in tension with the basic message being communicated through the narrative.

Limitations on the persuasive quality of the report narrative

Report writers had mixed success in communicating through this use of narrative. On the one hand, sheriffs commonly understood the basic thrust of a social worker's coded narrative. *However, there were five important limitations on the power of this communicative process, outlined below.*

A. Order effects: sheriffs almost always read reports after they had read the other formal documentation pertaining to the sentencing process: typically, but not invariably, they regarded the report as 'the icing on the cake'. Thus, the sheriffs had already begun the process of creating their own impression of the offender and constructing the provisional sentencing agenda *before* encountering the report narrative. Just like report writers (e.g. Halliday *et al.* 2008; Phoenix 2006; Curran and Chambers 1982; Hudson and Bramhall 2005), sheriffs also employed senses of the 'typical' when interpreting information about a case. They interpreted and filtered information in accordance with case narratives that they recognized as 'typical' and 'normal', but these specific senses of the typical did not always concur with those of report writers. Details about previous convictions coupled with the prosecution's charge narrative, for example, could easily suggest a different narrative about an offender that either 'trumped' the report writer's narrative or at least set up a strong presumptive narrative against which the social workers would have to compete (see also Phoenix 2006).

B. Reading the SER narrative: sheriffs were generally of the view that, in most cases, the personal and social circumstances sections of reports were much less significant than the latter sections, which focused on the offence in question and the individual's pattern of offending behaviour. Although sheriffs valued the presence and 'weight' of personal and social circumstance information, most sheriffs would normally skip or skim-read the earlier sections, unless there was something in the other formal papers that raised suspicions about their particular significance or to which their attention was drawn by the defence solicitor. The following remarks were typical:

I read through the report and bluntly I skip quite a lot of the personal detail …. (Interview, Southpark sheriff 1)

… [s]ome social enquiry reports are almost encyclopaedic in giving the background of the family. Some of these things are valuable, a lot of them aren't. I tend to speed read it .... A lot of that is historic. (Interview, Southpark sheriff 2)

However, this meant that certain important messages that the report writer wished to flag up to the sheriff were missed or misunderstood. For instance, in the report about Mr 'Laverty', the report writer ('Tricia') wrote:

Education/Employment. The accused began his education at [name] Primary School and transferred to [name] School at the age of 7 years because of learning difficulties. He reported he enjoyed school and found the smaller classes beneficial in comparison to mainstream education …. *Conclusion*. During the interview Mr [Laverty] was cooperative , although vague at times, although this may have been due to his perceived level of comprehension. (Southpark SER, case 25)

The 'shadow' report-writing process provided an opportunity to probe report writers' intentions. In this case:

Tricia mentioned his learning difficulties because she wanted to highlight to the sheriff that the level of understanding may be an issue. (Shadow report-writing diary, case 25, Mr Laverty)

In focus groups, almost none of the sheriffs observed the point about learning difficulties without being prompted by the interviewer. For instance:

Intv: 'Education and employment': anything interesting or valuable?

Sh 5: All I picked up from that was that he hadn't worked for some time and I mean, that's possibly a problem.

Sh 14: Yeah, for me all of this biographical material is useful in this kind of case, yeah.

Intv: What about, it's mentioned here, 'his school behaviour suffered because of learning difficulties' … so how does the mention of that—?

Sh 5: I have to say I skipped over that. (Sheriff focus group 7)

National Standards require that a sentencing proposal is gradually developed on the basis of the narrative. For example: 'Conclusions and any views expressed about possible sentencing options must flow from the body of the report' (National Standards 2004: 5.1). But, because most sheriffs (and therefore defence solicitors) tended to skip personal and social circumstance information, the foundations of social work narratives were overlooked, weakening the persuasiveness of the conclusion.

C. Communicating directly to the sheriff: the National Standards encourage report writers to communicate directly to the sentencing sheriff. Yet, most sheriffs normally (though not always) relied on defence solicitors' readings of a report as a kind of back-stop. For instance:

Well I think it is helpful for the agent to refer you to things that he thinks is important in it. Because sometimes you can miss something. I can't recollect but there was something I missed today. (Post-sentencing diet interview, Westwood sheriff 9)

However, defence solicitors (who tend to receive reports on the morning of the sentencing diet) are also under severe time pressures.[12] They tend to read reports in

[12] Recent legal aid changes in summary cases have led, overall, *inter alia*, to a marked reduction in client contact and preparation (Tata 2007*a*). Defence solicitors thus tend to spend much less time with their clients than they used to—this has coincided with the sharp rise in the proportion of SERs being produced in summary cases.

a similar way to how they anticipate the individual sheriff before whom they will appear.

Practices varied widely among sheriffs: some would read reports themselves but most welcomed the use of reports by defence solicitors in their plea in mitigation. Thus, in many instances, the messages contained in reports are mediated, edited and refracted by the defence lawyer. Defence solicitors sought to undermine social workers' narratives where, for example, they were deemed to be negative in their terms, or where they appeared to convey an account of offending in tension with the formal guilty plea (Tata 2008).

D. The dilemma of an evaluative versus a neutral style of reporting: report writers feel constrained in the way they can express themselves. In particular, they are aware that many (though not all) sheriffs dislike reports that appear to be directive or judgemental. For example:

> They shouldn't be recommending sentences. I get very annoyed when I'm told this isn't recommended or that's recommended. It's no business of social workers to recommend and they should stop doing it. (Interview, Westwood sheriff 3(i))

Report writers generally strived to appear to report impartially the facts of offenders' background, their risk of reoffending and the viability of non-custodial sentencing options. This is explicitly required by National Standards and is encouraged through professional training. Nevertheless, report writers know that National Standards require and sheriffs *also* want the report to be useful and relevant to sentencing, and that policy imperatives mean that SERs should try to encourage the consideration of non-custodial options. Thus, report writers often try to communicate their evaluations implicitly so as to lead the sheriff towards a specific sentencing decision without being seen to do so explicitly—a strategy that some, though not all, sheriffs were aware of and welcomed:

> … if they let the judge or sheriff think that he has thought of [a sentence]. There's psychology there, I think, in it. (Interview, Westwood sheriff 7)

By hints, implication and other subtleties, report writers attempt to induce sheriffs to read between the lines of their formally neutral SERs. Although such messages were often picked up by sheriffs, they were also as often missed or interpreted very differently from that intended by the report writer. Indeed, some techniques used by report writers backfired, undermining the credibility of the writer and his/her report. One reason for this is that, despite their formal neutrality and supposed objectivity, reports were often read by sheriffs as attempts to advocate on behalf of the convicted person. A frequently made complaint by sheriffs was that they had the sense that the report writers tended to try to exculpate the convicted person or to provide a sort of plea in mitigation (Tata 2008).

However, even where report writers simply set out contradictions in the offender's account and sought to leave it to the sheriff to draw out the implications, such a strategy could backfire on the credibility of the report writer. An example of this is 'Laura Smythe', who had been convicted of welfare benefits fraud and who said in her interview with the report writer ('Caroline') that she had a long history of depression linked to trauma experienced as a child. In the SER, Caroline writes:

> … she disclosed that she had been subject to significant trauma for several years during her childhood. She stated she has attended various psychiatrists over a thirty year period but continues to struggle with

her past. … Dr [name] commented that according to hospital records, Mrs [Smythe] first had contact with psychiatric services in 1996 and has had intermitted [sic.] contact ever since. He state [sic.] that he anticipates that Mrs [Smythe] will have ongoing contact with this service if she so wishes as she has a long history of depression. *He stated that Mrs Smythe has previously defaulted on appointments* … (Southpark SER, case 13, emphasis added)

Caroline's intentions were explored in the shadow-writing discussion:

Why had Caroline included this [discrepancy]? Caroline pulls a face and slowly begins to speak: 'It tells you something about the person: maybe that other parts of their story lack credibility … It needs to be highlighted to the sheriff that she has not been entirely truthful'. (Diary Southpark case 13)

This tactic, however, tended to backfire on the credibility of Caroline, the report writer. In the focus groups, some (though not all) sheriffs identified the apparent contradiction between what the Laura Smyth had said to the social worker and what her GP had said, but they interpreted this as evidence of the report writer's gullibility and inability to challenge the Laura Smyth's account. For example:

It goes on about her difficulties and so on and how she regrets all this but it doesn't point out the various paradoxes in what she said. I mean she says that she's been at psychiatrists over a 30 year period but the psychiatric services say—well it's only since 1996 which is when all this started. (Sheriff focus group 5, sheriff 7)

E. Punitive narratives were regarded with suspicion: thus, a common complaint among sheriffs and defence solicitors was that report writers were insufficiently challenging of offenders' contradictory or exculpatory accounts[13]:

Well, the writer accepts what he has to say about this without challenging it. (Sheriff focus group 5, sheriff 7)

Sheriffs and lawyers tended to believe that report writers uncritically accepted offenders' accounts of offending. We have already seen that where report writers perceive discrepancies in the offender's account of the offence or offending behaviour, this tended to be reported in an apparently neutral non-judgmental style intended to allow the reader to see the discrepancies for themselves. However, these discrepancies were as likely to be attributed to the report writer's imputed bias towards the accused or simply sloppy practice. This tended to be linked to a wider sense of 'bias' in reports in that custody was never explicitly suggested and report writers were regarded as reluctant to punish.[14] For instance:

And it struck me that really probation, there's nothing in the circumstances of the offence or in the report itself which struck me as providing a focus for probation. It looked to me as if it was just a last throw of the dice as it were by the social worker to think of something to say to avoid custody (Interview, Westwood sheriff 3)

… my next concern is that very rarely do they ever give adequate consideration to the custodial disposal or indeed to the question of punishment. (Interview, Westwood sheriff 6(i))

[13] Likewise, SWIA inspection reports tend to criticize practice if inspectors feel that 'offending was not really probed or challenged …' (SWIA 2004: 3.23).

[14] This was also allied with a feeling that social workers had a limited awareness of the public interest to balance up their concern for and naive closeness to the offender. See also Phoenix (2006: 27), who observes that 'magistrates tend to view [Youth Offending Team] information as biased [partly] because YOT workers seldom recommend custody)'.

Most sheriffs and lawyers appeared to be unaware that policy imperatives meant that report writers should seek the greater use of non-custodial sentences (rather, it was assumed that that report writers simply tended to be lenient). Even when reports tacitly suggested custody, those reports were interpreted by sheriffs and defence solicitors as a poor example of 'mitigation'. For example, in the case of Craig Henderson, under the heading 'Risk Assessment', the report writer wrote:

> [The LSIR risk assessment tool] placed Mr Henderson on the high section of the scale. *A positive* was that he appeared to be reasonably settled at his parents' address. … *Custody* … Mr Henderson has served previous custodial sentences and he indicated that he is fully aware that the court may consider the imposition of a custodial sentence regarding the current matter. *He accepts this situation.* (Southpark SER, case 28, Craig Henderson, emphasis added)

> It was a bit lacking, I think. … It's a bit thin. (Post-moot interview, sheriff 3)

Furthermore, on the much rarer occasions when the report writer's narrative was explicitly condemnatory and punitive, most sheriffs tended to attribute this to a failure of mitigation or prejudice on the part of the report writer.[15]

Reflections and Implications

With a few exceptions, most sheriffs disliked the idea of report writers proposing a sentence or indeed appearing to be directive or explicitly judgmental. Most sheriffs wished to regard the reports as being essentially informative, and most tended to be irked by the suggestion that a report may have 'influenced' their decision. A recommendation of sentence is viewed as an unwelcome intrusion into their decision-making domain. Yet, at the same time, SER information needed (and National Standards require) to be *meaningful and relevant* to the sentencing decision; and sheriffs tended to be critical of reports that seemed not to do this.[16] This, together with policy and legal requirements that SERs should encourage sentencers more seriously to consider non-custodial options than they otherwise would, helps to explain why report writers tend to encode their messages.[17] As we have seen, for a range of reasons, these messages are often (though not always) missed or interpreted by the sentencer in a quite different way from that intended by the report writer.

What sorts of factors might facilitate clearer lines of communication? Professional trust may be one important factor. In the 'closer' ('Southpark') site, sheriffs appeared to have greater confidence in the SERs coming before them.[18] In particular, sheriffs appeared to find the regular presence of social workers in court reassuring. Sheriffs recognized these court social workers (who were also members of the community-based criminal justice

[15] There is not space in this paper to explain this finding further, but see Tata (2008).

[16] National Standards attempt to accommodate expressed judicial wishes by prohibiting 'recommendations' by report writers whilst at the same time encouraging 'advice' and 'assistance' about sentencing. For instance: 'Whilst reports must not include a recommendation as such, report writers may indicate, on the basis of their review and assessment, which non-custodial option is most likely to prevent or reduce reoffending' (Scottish Executive 2006).

[17] There is also the fact that the report can be seen by its subject—a person with whom the report writer may well need to supervise and build up a relationship of trust.

[18] See also Allen and Hough (2007), who report that Gelsthorpe and Raynor (1995) found a higher rate of concordance when the report writer is known to the court. Allen and Hough (2007: 586) state: 'Senior probation officers seem particularly respected by the courts if there is an opportunity to form a relationship over time.'

social work team) as a conduit of information about court cultures to social enquiry report writers. Even if report writers were unable to tailor their reports to the sheriff who would be on the Bench, the belief that this had occurred seemed to have a reassuring effect.

Judicial confidence in reports *might* be further assisted if report writers had access to police reports and witness statements. Without these, the report writer in Scotland generally has little detailed information to go on other than the account presented by the offender: an account that report writers were generally aware might be at odds with what the court would subsequently hear. Certainly, report writers tended to say that they were frustrated not to have access to this information. On the other hand, it may not be safe to assume that if report writers have access to this information, they will feel able to assess and discuss case seriousness in their reports in a more open and confident way. Judges 'own' the evaluation of case seriousness. Ownership of the assessment of seriousness is central to judicial ownership of the allocation of punishment (sentencing). Cavadino (1997) has charted the rise and demise of the provision of explicit judgments of offence seriousness (on the basis of advance disclosure of prosecution evidence) by report writers in England and Wales. By 1995, a revised version of National Standards reversed the earlier 1992 position by discouraging the attempt by report writers to make an explicit assessment of seriousness:

> The reason for this seems to be that the results of the 1992 [national standards] changes were not to everyone's liking, and *there was something of a backlash against the increased prominence and explicitness of judgements about seriousness* in the PSRs. The Home Office Inspectorate of Probation (1993: 21) found that some Crown Court judges 'expressed irritation' about report writers' new responsibility to assess seriousness as set out in the National Standards. (Cavadino 1997: 545–6, emphasis added)

The shifting target of 'quality'

The perceived utility of reports is limited by more fundamental features.[19] In a number of countries, the policy and practice literature on report writing has tended to suggest that there is a more or less corresponding relationship between the level of 'quality' of reports and their influence in sentencing (e.g. Bateman and Stanley 2003; Brown and Levy 1998; Creamer 2000; Swain 2005; Curran and Chambers 1982; Social Work Services Inspectorate 1996). For example, the Youth Justice Board for England and Wales argues, in its practitioner guidance on 'managing the demand for custody', that:

> PSRs [Pre-Sentence Reports] are the key tool used by YOTs [Youth Offending Teams[20]] to demonstrate their credibility and effectiveness in the eyes of courts and sentencers. In areas where the profile of offenders is more serious and challenging, it is especially critical that attention is paid to the quality and effectiveness of PSRs in influencing sentencing decisions. [The YJB has] highlighted the need for improvement in specific aspects of PSR writing. Two key tasks for YOTs to focus on are: developing in-house PSR writing workshops; building more robust quality assurance processes. (Youth Justice Board for England & Wales 2007)

[19] The point has previously been well made that concordance between proposals in SERs and the sentence passed cannot simply be taken to signify 'influence' (e.g. Carter and Wilkins 1967; Morgan and Haines 2007) and that there are several other reasons why high concordance rates may not be due to the intended influence of reports.

[20] There is a YOT in every local authority in England and Wales. A YOT consists of representatives from the police, probation service, social services, etc.

Similarly, NACRO (2005: 4) argues that higher-quality reports will lead to lower use of custody: 'More concretely, research confirms a correlation between the level of custody in a particular area and the assessed quality of reports.' Likewise, inspections by the Social Work Inspectorate Agency (SWIA) use National Standards as a benchmark against which to evaluate SER practice. For example, in the report of a recent inspection, SWIA chided Scotland's largest social work department for not paying sufficient attention to National Standards:

> There is no doubt that Glasgow needs to raise the standard of its report writing …. There was evidence that staff could write good reports …. A good starting point for achieving a better overall standard of report writing would be for all staff … to take a fresh look at the National Standards [which] offer detailed and comprehensive guidance. [National Standards] are clear about the need for information and advice to be relevant, reliable, and impartial. (SWIA 2004: 3.30)

Yet, while National Standards guidance is clear in listing broad virtues of 'good' reports (e.g. relevance, neutrality, clarity, impartiality, evidenced evaluation, avoidance of moral judgment, assessment of character, etc.), it is much less clear *how* these virtues are to be operationalized in individual cases—especially where these virtues appear to collide on a daily basis (e.g. 'judgment-free impartial information' *and* 'relevance'). Beyond the broad general guidance of National Standards, what constitutes a 'good' report in any individual case is more complex and problematic than fixed quality standards appear to suppose—most particularly because the overall policy aim is to try to provide information and advice that will encourage individual sentencers to think about particular options. Furthermore, the expectation that report writers should know what judicial sentencers really mean by a report of 'good quality' in any specific case is perpetually thwarted because the definition and meaning of 'quality' shift between one sentencer and another, and writers generally cannot predict which sentencer will be on the Bench. Even the same sentencer can seem to want conflicting things in the same report.

In attempting to encourage greater parsimony in the use of custody, the policy drive has sought to identify and meet the desires of judicial sentencers. Thus, in policy terms, 'quality' has been understood as what the principal consumers of reports deem to be good quality. Although we do not seek to deny that there are abstract principled ways of conceptualizing of quality in itself, here we are concerned with the dominant policy rationale—a rationale that supposes that giving the principal consumers of reports (sentencers) with what they say they want will lead to correspondingly greater influence in the decision process. Indeed, one of the explicit purposes of National Standards is to try to win the confidence of sentencers by empowering them with a 'reference guide for sentencers … as to what standards of service they are entitled to expect' (National Standards 2004: 12.4).[21]

However, the research discussed in this paper suggests that, while such standards may render reports more consistent and standardized (and thus quicker to skim-read), 'quality-as-influence' is a more complex, case-contingent, contradictory and amorphous concept than the official policy and practice literatures have tended to assume. Thus, in terms of its usefulness to judicial sentencing, report quality is not an objective, fixed entity that can be universally calibrated, regardless of case context and courtroom

[21] Indeed, sheriffs frequently referred to National Standards as a mechanism of consumer empowerment.

personnel. The dominant judicial control of the assessment of evaluative criteria such as 'relevance', 'neutrality' and 'realism' means that judicial perceptions of 'quality' are a constantly shifting target. Judicial perception of 'quality' is a shifting target that is pursued but, under a discourse of judicial 'ownership' of sentencing (Ashworth 2005), it cannot be wholly achieved. Thus, under these conditions of judicial ownership of sentencing, 'quality' is not a fixed destination that can be arrived at if only report writers had sufficient knowledge, skill and persistence. Rather, in its day-to-day operation, 'quality' is also a property of the discourse of judicial 'ownership' of sentencing.[22] This discourse of judicial ownership of sentencing limits the extent to which report writers' sentencing advice and evaluations can be embraced.

Ownership of sentencing

In his seminal work on professions, Abbot (1988)[23] highlights the struggle for control of an area of work by different occupational groups. Different professional groups compete for ownership of social problems. Abbott deliberately avoids a refined trait-based definition of 'profession', favouring instead an emphasis on exclusion and the abstraction of knowledge: 'professions are somewhat exclusive groups of individuals applying somewhat abstract knowledge in individual cases' (Abbot 1988: 318). In this sense, judges can be seen as 'professionals' even if they are not deemed to be professionals according to the trait model of 'profession'.[24] Applying Abbot's insights to sentencing, both social work report writers *and* judges can lay legitimate claim to deciding the allocation of punishment (sentencing). Nearly all sheriffs were sensitive and resistant to any suggestion that their decision process had been or should be 'influenced by' (as opposed to merely 'informed by') reports. Although, at one level, 'influence' as opposed to 'inform' seems a rather trivial distinction, the judicial preoccupation with it connotes a determination to maintain and express what, in the related context of guilty pleas, Roach Anleu and Mack (2001) describe as:

> … professional boundary maintenance: claims that certain practices, tasks, and responsibilities are legitimate legal work and therefore should be performed exclusively by legal personnel …. To achieve this, legal professionals tend to discredit the work of other occupations by claiming they are less professional or competent and more biased when dealing with 'legal issues'. (Roach Anleu and Mack 2001: 158)

We have already seen that legal professionals (especially judges) tended to regard the evaluations of another professional group (criminal justice social workers) as less objective, less realistic and less rigorous than their own. 'Professions use their abstract knowledge to reduce the work of competitors to a version of their own. This is a basic mechanism of inter-professional competition' (Abbott 1988: 36). Thus, judges and lawyers tended to appraise reports in terms of *legal* values and practice. For example,

[22] Moreover, it is far from clear that inspections on the basis of National Standards of SERs (e.g. by SWIA) do or can assess quality in the highly contingent and fluid way practised by sentencers. See also Field's research in Wales, which notes that 'Great confidence was expressed [by magistrates], even in YOTs that had received poor inspection reports' (Field 2006: 324).

[23] Abbot blends the 'new critical' profession literature with close empirical analysis of the actual work (as well as social structures) of a range of professions.

[24] Although, given their background as lawyers, on the trait model, judges might well 'qualify' (see also on this question Paterson 1983).

even where they were attempting to communicate the opposite, social workers were frequently (though not always) seen as naive and gullible and presenting contradictions in their reports, or being insufficiently neutral, objective and/or impartial. The sections of reports where lawyers and judges most clearly acknowledged the superior expertise of social workers (social and personal circumstances) were the sections that were most likely to be skim- or skip-read. Yet, these sections are crucial to establishing the logical bases of social work assessments and proposals. While the presence (and weight) of this narrative was valued in the abstract, it also tended to be skip-read and thus sometimes misread or its implications ignored. Judicial sentencers (and therefore defence solicitors) instead 'homed-in' on offence and offending behaviour sections—thus, they read reports through the lens of legal values emphasizing individual choice and responsibility and so de-emphasized the role of personal and social circumstances.

Abbott suggests that 'the true use of [abstract] academic professional knowledge is less practical than symbolic. Academic knowledge legitimizes professional work by clarifying its foundations and tracing them to major cultural values' (Abbott 1988: 54). Judicial dominance in the ownership of the allocation of punishment is partly sustained by an appeal to formalized and abstract knowledge and principles of law. However, that abstract knowledge which appears to underpin (and thus legitimate) judicial 'ownership' of sentencing is itself indeterminate. Apprehending this abstract knowledge so as to predict sentencing decisions (e.g. how the seriousness of a given case will be assessed) is ultimately elusive. Every abstraction tends to be qualified by the caveat of 'individualised sentencing' that 'it all depends on the facts of each individual case' and so it is not possible to make firm generalizations.[25] The discourse of monopoly judicial ownership of sentencing suggests, on the one hand, that the individual case can only be properly assessed by those schooled in the legal understanding of formal abstract principles. On the other hand, these principles are also said to be largely contingent on the particular circumstances of each individual case. It is this continual and shifting dialogue between reference to abstract principles and the particular unique case that, to some extent, confuses, teases and defeats the quest for quality-as-influence in reports.[26]

Though technical improvements in SERs (e.g. through fixed quality standards or improved training), or judicial familiarity with particular social workers in small courts, may enhance report writers' credibility and standing to some extent, our analysis suggests that such factors can only be expected to have relatively marginal effects in the search to satisfy the principal consumers of reports. Thus, the discourse of judicial ownership of sentencing necessitates that complete quality-as-judicial satisfaction is unachievable.[27] Under the dominant discourse of judicial ownership of sentencing, there can be no single judicial conception of an exemplary report in any given case. Quality (as currently conceived by the dominant policy thinking as the fulfilment of

[25] Hutton (2006) observes that the judicial 'silence about how to assign similarity and difference to cases is produced by the … ad hoc, case by case approach to sentencing … which is part of the habitus of sentencing'.

[26] Some report writers appeared to be more preoccupied by this than others. For some, trying to pin down what sentencers wanted from reports was 'like wrestling with blancmange' (Kenny, Southpark diary). However, our purpose in this paper is to focus on how sheriffs and lawyers use, interpret and evaluate reports rather than on the activities and sensibilities of report writers—a matter that is reported and discussed elsewhere (see McNeill *et al.* 2008; Halliday *et al.* 2008).

[27] By this, we do *not* suggest that individual sheriffs deliberately set out to defeat the search for quality by individual report writers, but that, rather, that is the *effect* of the discourse of monopoly judicial ownership of sentencing.

judicial wants), is not a fixed destination that one day can be arrived at. In this sense, 'quality' cannot be attained, merely pursued. Under this current dominant conception, 'quality' cannot be grasped by a series of flat, non-contingent measures (no matter how sophisticated) that can be applied universally. Rather, the discourse of monopoly judicial ownership of sentencing renders judicial daily evaluations of the quality of reports amorphous, plural, shifting and ultimately elusive.

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