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EMPIRICAL RESEARCH ON JUDICIAL ATTITUDES TO GUIDELINE SENTENCING

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Empirical Research on Judicial Attitudes to Guideline Sentencing

Abstract

Sentencing guidelines represent attempts to guide or structure the sentencing process and to make sentences more consistent, predictable, and transparent. The most structured form of sentencing guidelines are the grid systems used in several jurisdictions in the United States of America. Knowing what factors influence judicial officers' attitude towards using grids and other types of sentencing guidelines will provide insight into whether such reform initiatives will be viable options for Australian courts. This paper presents findings from a nation-wide survey of judicial officers' beliefs, attitudes, norms and preferences regarding various aspects of sentencing, including the use of sentencing guidelines. Judicial officers' attitude towards using guidelines was predicted by the degree to which they believe that sentencing disparity is a problem and by their perceived normative pressure to use guidelines. In addition, judicial officers' attitude towards using guidelines and their perceived normative pressure to use guidelines predicted their intention to use guidelines if they were available and voluntary. Judicial officers' attitude towards using guidelines were not influenced by their penal philosophy, as measured by choice of sentencing aims and a rehabilitative or non-rehabilitative orientation, nor by a desire for sentencing discretion, as measured by the requirement for more information to determine sentences. Nevertheless, the findings suggest that these factors may influence if and how guidelines are used. About two-thirds of the participants preferred a system of guidelines that provides guidance on how to apply relevant sentencing principles to certain types of cases. Judicial officers' beliefs, attitudes, perceived norms, and intentions distinguished between those who preferred some system of guidelines (either structured or for guidance only) and those who preferred no guidelines at all. Implications for sentencing theory and practice and the use of sentencing guidelines will be discussed.

Background

The aim of this research was to examine the factors that influence judicial officers' attitude towards using sentencing guidelines (see Slide 2).

Slide 2: Aim of the research

- To examine the factors that influence judicial officers' attitude towards using sentencing guidelines

To achieve this aim I designed and administered a survey to test a number of hypotheses and research questions (see Slide 3). As with any survey, especially one dealing with this topic and this population, there were many methodological issues to consider. Three of these can be seen in the aim itself, that is, the operational definition of 'guidelines', 'attitudes', and 'judicial officers'.

For the purpose of the study, sentencing guidelines were defined as 'any documented system of applying salient factors or principles to compute or select a sentence'. It could refer to minimum sentences, non-binding guideline judgments, or structured systems

such as grids. Attitudes were defined according to the theory of reasoned action (see below), an expectancy-value theory of attitudes and behaviour. For the purpose of the study, judicial officers included Supreme Court Justices, District and County Court Judges, Stipendiary Magistrates, and Criminal Lawyers. Preliminary analysis showed little differences in attitudes between these groups, thereby allowing the groups to be pooled into a single sample.

Slide 3: Hypotheses and questions

- Judicial officers with a rehabilitative penal philosophy will have a negative attitude towards using sentencing guidelines. → no
- A positive attitude towards using sentencing guidelines will be related to a willingness to use a limited amount of information to determine sentences. → no
- A positive attitude towards using sentencing guidelines will be related to a belief that sentencing disparity is a problem. → YES
- Attitude towards using sentencing guidelines and subjective norms about using sentencing guidelines will predict intention to use sentencing guidelines. → YES
- Are there regional differences in attitude towards using sentencing guidelines? → no
- Can preferred type of sentencing guidelines be distinguished by judicial officers' attitudes, subjective norms, and intentions to use sentencing guidelines? → YES

The findings relating to the hypotheses and research questions can be summarised as follows:

- The hypothesis that judicial officers with a rehabilitative penal philosophy will have a negative attitude towards using sentencing guidelines was not supported.
- The hypothesis that a positive attitude towards using sentencing guidelines will be related to a willingness to use a limited amount of information to determine sentences was not supported.
- The hypothesis that a positive attitude towards using sentencing guidelines will be related to a belief that sentencing disparity is a problem was supported.
- The hypothesis that attitude towards using sentencing guidelines and subjective norms about using sentencing guidelines will predict intention to use sentencing guidelines was supported.
- The answer to the question 'Are there regional differences in attitude towards using sentencing guidelines?' was no.
- The answer to the question 'Can preferred type of sentencing guidelines be distinguished by judicial officers' attitudes, subjective norms, and intentions to use sentencing guidelines?' was **yes**.

For the purpose of this presentation I will focus on the findings concerning preferred guidelines system and the influence of subjective norms on judicial officers' attitudes and intentions.

The survey questionnaire was posted to 331 Supreme Court Justices and District/County Court Judges, 349 Magistrates, and 126 Lawyers from April to November 2000 and

from August 2001 to April 2002. A total of 199 useable questionnaires were returned (see Slide 4).

Slide 4: Return rates by state and legal position

	Judges		Magistrates		Lawyers	
	Q'aires	Return rate (%)	Q'aires	Return rate (%)	Q'aires	Return rate (%)
NSW	24	22.2	25	26.6	11	29.0
Vic	15	18.1	26	26.0	5	33.3
Qld	6	14.7	15	23.8	1	9.1
SA	4	11.4	13	43.3	7	46.7
WA	8	22.2	15	40.5	2	25.0
Tas	2	40.0	2	18.2	3	21.4
NT	3	37.6	4	33.3	1	25.0
ACT	2	20.0	–	–	5	29.4
Total	64	19.6%	100	28.8%	35	28.7%

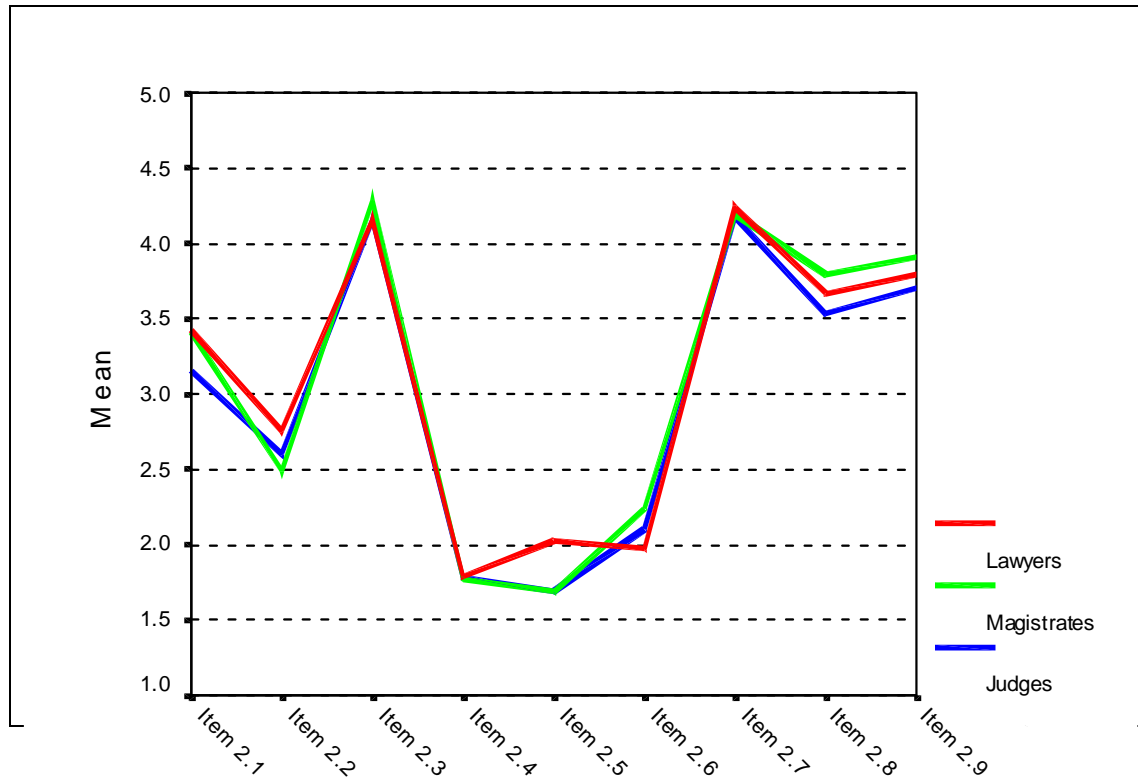
As well as completed questionnaires, a number of judicial officers sent replies indicating support for the research while declining to participate. Only a few judicial officers expressed concerns or reservations about the study.

Survey findings

One section of the questionnaire contained items on various aspects of sentencing and sentencing guidelines (see Slide 5). The responses show how closely the judicial officers participating in the study as a whole considered such issues.

Participants were asked a number of questions regarding preferred guideline system and use of sentencing guidelines (see Slides 6 & 7). These included:

- ‘How often would you use sentencing guidelines (if they were available and optional)?’
- ‘If you could choose, what type of guidelines would you prefer?’
- ‘If you could choose, what kind of guidelines system would you prefer?’

Slide 5: Views and beliefs on sentencing, by legal position

- Item 2.1 'Disparity in sentencing is a problem'
 Item 2.2 'Sentencing disparity cannot be justified'
 Item 2.3 'Some degree of sentencing disparity cannot be avoided'
 Item 2.4 'Sentencing guidelines should be mandatory rather than optional'
 Item 2.5 'Mandatory sentencing guidelines are a necessity'
 Item 2.6 'Mandatory sentencing guidelines will eliminate disparity in sentencing'
 Item 2.7 'Generally speaking, sentencing is a difficult task'
 Item 2.8 'The sentencing judge can benefit by using guidelines'
 Item 2.9 'The sentencing process should be periodically reviewed and, if necessary, reformed'.

Slide 6: Preferred guidelines

Intended frequency of using guidelines:		
Never	On a case-by-case basis	Always
5	151	35
Preferred guidelines type:		
Mandatory	Optional	None
9	153	31

Slide 7: Preferred guidelines system

A system in which a couple of important factors (eg, offence seriousness & prior record) are used to select a sentence from a grid	12
A system that assigns weights to the factors of a case in order to compute a sentence	10
A system that provides guidance on how to apply relevant sentencing principles to certain types of cases	124
Some other system	12
None	26

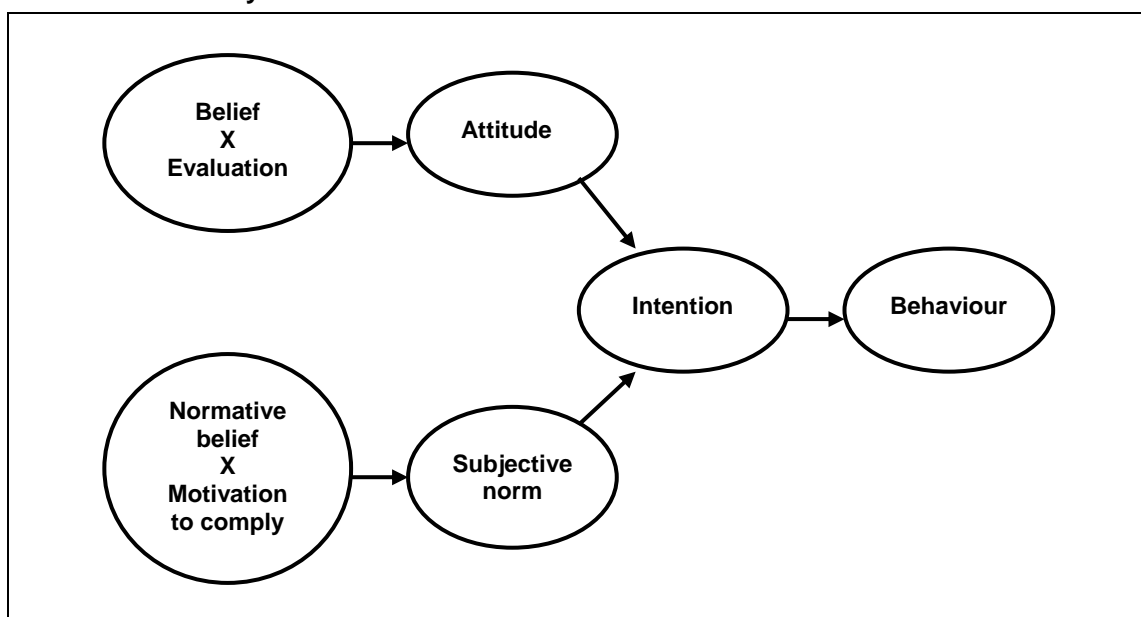
When the responses to these three questions were cross-tabulated (see Slide 8), it can be seen that almost half the participants preferred a system of sentencing guidelines that provides guidance on sentencing, is optional, and can be used on a case-by-case basis.

Slide 8: Intended frequency of using sentencing guidelines by preferred guidelines type, by preferred guidelines system

Preferred guidelines system	Intended frequency of using guidelines	Preferred guidelines type		
		Mandatory	Optional	None
Grid	Never	0	0	0
	Case by case	0	5	2
	Always	2	2	0
Weights	Never	0	0	0
	Case by case	0	7	0
	Always	0	2	0
Guidance	Never	0	1	0
	Case by case	2	95	4
	Always	2	17	0
Other system	Never	0	0	0
	Case by case	0	8	0
	Always	1	3	0
None	Never	0	0	3
	Case by case	0	2	19
	Always	0	1	0

To test some of the hypotheses and research questions, the questionnaire was broadly designed along the lines of the theory of reasoned action (Fishbein & Ajzen, 1975) (see Slide 9).

Slide 9: The theory of reasoned action



According to the theory of reasoned action, whether or not we perform a behaviour is determined by our intention to perform it. Intentions are determined by our attitude towards the behaviour and by the amount of social (normative) pressure we perceive others (especially significant others) are placing on us to perform it. Our perceived normative pressure (subjective norm) is a function of our perception of the pressure or expectation from others to perform the behaviour (normative belief) and our motivation to comply with these normative expectations. In the theory of reasoned action, attitudes reflect how favourable or unfavourable we feel towards performing a behaviour, such as whether we feel it is appropriate or inappropriate. They are conceptualised as a function of our beliefs about the consequences of performing a behaviour (behavioural beliefs) and the value we place on the consequences of the behaviour (outcome evaluations). The theory of reasoned action has been applied to behaviours such as dental care, safe sexual practices, smoking, wearing seat belts, and so forth. In the three decades since the theory was first published it has been expanded upon by the inclusion of the influence of control over intended behaviours and by the inclusion by some researchers of past behaviour as a direct and indirect determinant of future behaviour.

A central theme of the theory of reasoned action is that attitudes are influenced by our beliefs about the consequences of an action weighted by our evaluations of the consequences. This means that the theory is an expectancy-value model of attitudes. So, a judicial officer will have a positive attitude towards sentencing guidelines if he or she believes that using them will lead to positive outcomes, such as decreased disparity. The judicial officer's intention to use sentencing guidelines will be a function of this attitude and the perceived normative pressure to reduce disparity.

There is one noteworthy caveat related to the theory of reasoned action. The theory works best when the behaviours in question are under volitional control. To account for situations in which behaviours are not fully under volitional control, Ajzen (1985) developed the theory of planned behaviour. Given that the judicial officer in Australia has much control over the sentencing process (within statutory constraints), the theory of reasoned action is an appropriate model to use in this context. This would also be the case if sentencing guidelines were voluntary rather than prescriptive.

Path analysis (a method of structural equation modelling) was used to see if judicial officers' intention to use sentencing guidelines could be predicted by their attitudes, norms and beliefs regarding the use of sentencing guidelines. The model tested was based on the theory of reasoned action (see Slide 10) and included the following variables:

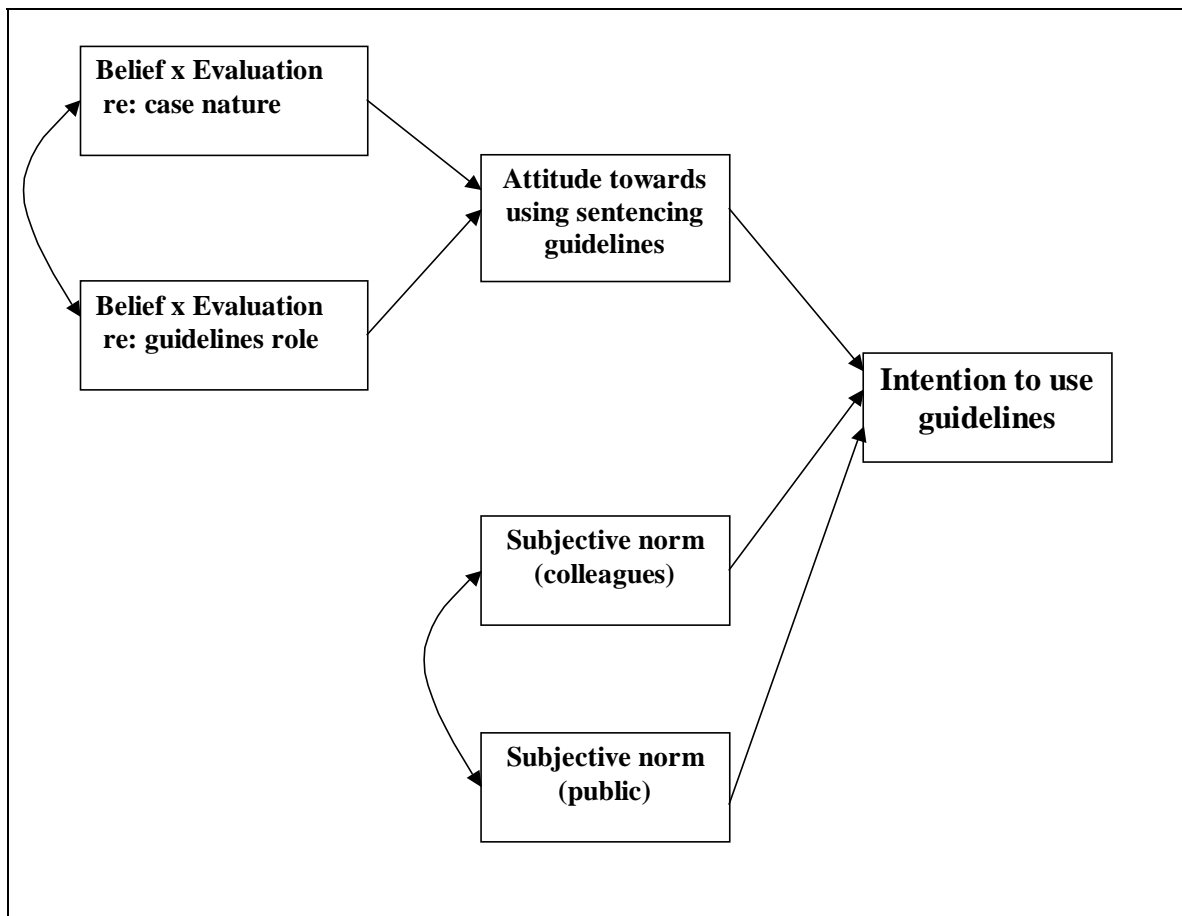
- Intention to use sentencing guidelines
- Attitude towards using sentencing guidelines
- Subjective norm from the perspective of colleagues (ie, perceived peer expectations)
- Subjective norm from the perspective of the public (ie, perceived public expectations)

- Beliefs and evaluations regarding the nature of the case when using guidelines (eg, unusual cases)
- Beliefs and evaluations regarding the role of guidelines (eg, to reduce disparity).

Unfortunately, ‘motivation to comply’ was not included in the model as, due to length considerations, it was not included on the survey questionnaire.

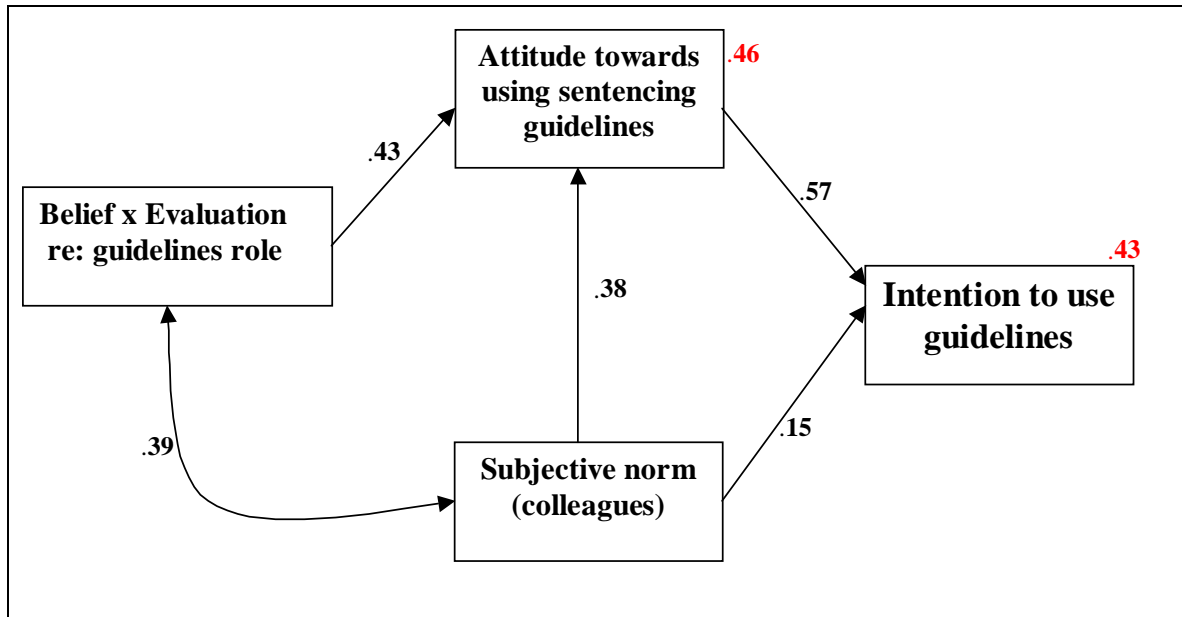
The path analysis produced the model shown in Slide 11.

Slide 10: Path analysis of intention to use sentencing guidelines: the tested model



Note: ‘Belief x Evaluation’ is a weighted score.

Slide 11: Path analysis of intention to use sentencing guidelines: the fitted model



Notes: 'Belief x Evaluation' is a weighted score; black numbers are path coefficients, red numbers are squared multiple correlations.

As expected, the fitted model showed that intention to use sentencing guidelines was predicted by attitude towards using guidelines and by subjective norm from the perspective of colleagues, but not from the perspective of the public. Attitude towards using sentencing guidelines was predicted by beliefs and evaluations regarding the role of guidelines, but not by beliefs and evaluations regarding the nature of the case when using guidelines.

An unexpected but potentially important finding was that subjective norm from the perspective of colleagues was revealed as a predictor of attitude towards using sentencing guidelines. The finding was unexpected because of how the theory is constructed, but it makes intuitive sense and reflects the importance and strength of perceived peer norms in all cultures and subcultures.

Summary of survey findings

Notwithstanding the various inherent caveats in research such as this (eg, construct validity with respect to terms such as “sentencing disparity” and “sentencing guidelines”, representativeness of the sample, reliability of the findings where small cell sizes are involved), a number of interesting conclusions could be drawn from the survey phase of the research (see Slides 12 and 13).

The overall pattern of results points to a complicated web of relationships between judicial officers' beliefs, attitudes, intentions, norms, and preferences about sentencing guidelines. Knowing about judicial officers' attitudes is important because they, together with norms, predict intentions, which in turn largely predict behaviours.

Slides 12/13 combined: Key Findings

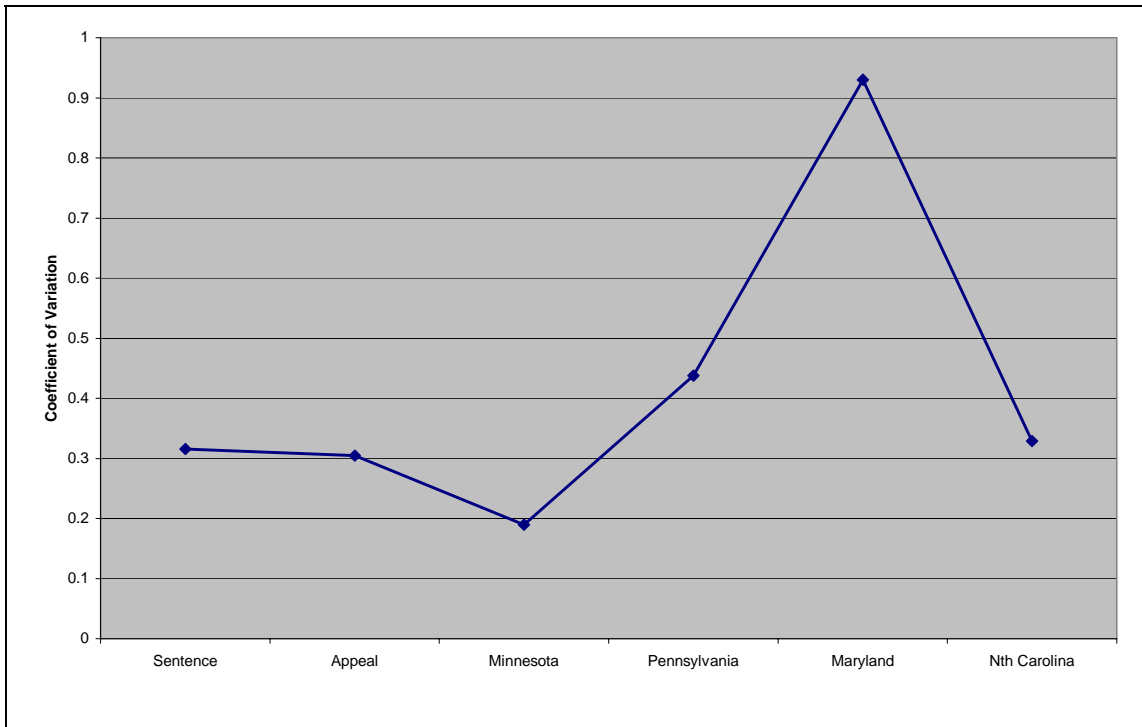
- Judicial officers' attitude towards using guidelines was predicted by the degree to which they believe that sentencing disparity is a problem and by their perceived normative pressure to use guidelines.
- Judicial officers' attitude towards using guidelines and their perceived normative pressure to use guidelines predicted their intention to use guidelines if they were available and voluntary.
- Judicial officers' attitude towards using guidelines were not influenced by their penal philosophy, as measured by choice of sentencing aims and a rehabilitative or non-rehabilitative orientation, nor by a desire for sentencing discretion, as measured by the requirement for more information to determine sentences.
- About two-thirds of the participants preferred a system of guidelines that provides guidance on how to apply relevant sentencing principles to certain types of cases.
- Judicial officers' beliefs, attitudes, perceived norms, and intentions distinguished between those who preferred some system of guidelines (either structured or for guidance only) and those who preferred no guidelines at all.

Guidelines simulation study

In addition to the survey study, I conducted a study in which a selection of American guideline systems were applied to data from Australian cases to answer the question 'would American-style sentencing guidelines eliminate, or at least reduce, sentencing disparity in Australian courts?' In other words, what might be the impact of taking an American grid system off the shelf for use in an Australian jurisdiction?

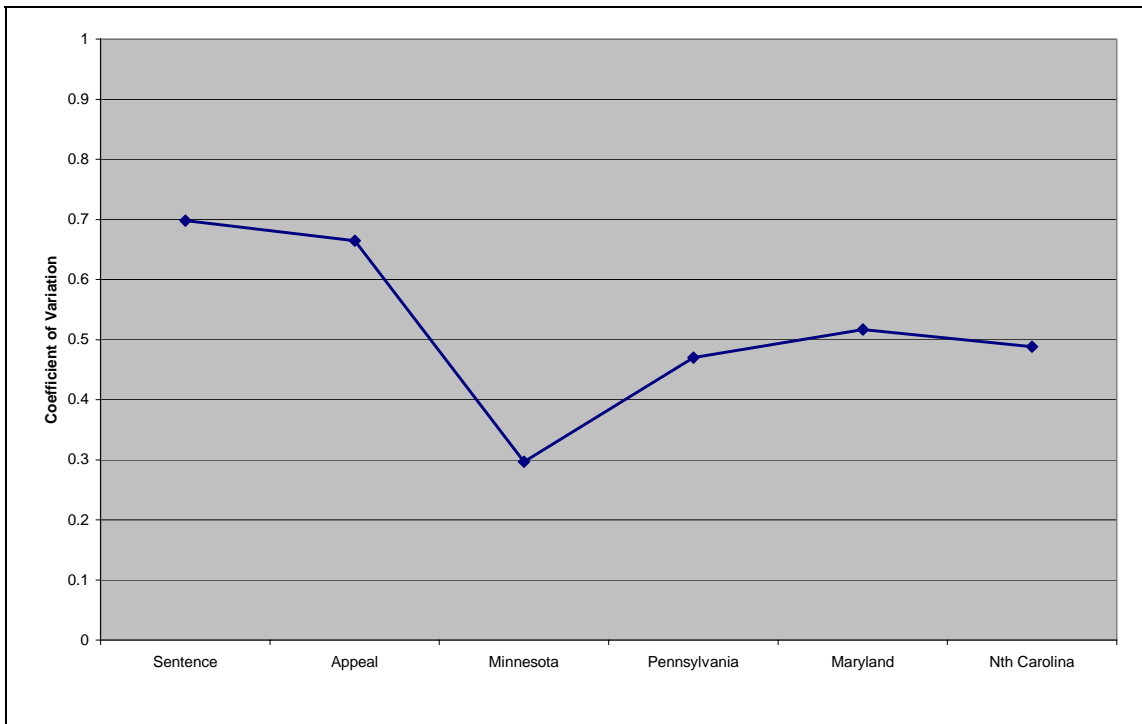
The exercise involved a complicated adaptation of different guideline rules and sentencing scales to 60 randomly selected burglary, aggravated burglary, and rape cases. The findings from the simulation showed that, depending on the type of offence and system used, an American grid system may decrease or even increase sentencing disparity (see Slides 14 and 15). For example, when the Maryland system was used with Victorian aggravated burglary cases, disparity in the original sentence was significantly increased. On the other hand, when the Minnesota system was used with Victorian rape cases, disparity in the original sentence was significantly reduced.

Slide 14: Plot of coefficients of variation by sentencing system, aggravated burglary (Victoria)



Note: The coefficient of variation (CV) is a measure of relative variation used commonly in medical research and is calculated by dividing the standard deviation by the mean so that the higher the CV, the greater the variability relative to the mean. This provides a measure of disparity independent of sentence scale.

Slide 15: Plot of coefficients of variation by sentencing system, rape (Victoria)



Note: The coefficient of variation (CV) is a measure of relative variation used commonly in medical research and is calculated by dividing the standard deviation by the mean so that the higher the CV, the greater the variability relative to the mean. This provides a measure of disparity independent of sentence scale.

The findings from the simulation phase of the study reinforced the message that, not only should legislators take into account the attitudes and norms of judicial officers before structuring the sentencing process as these might be important in determining compliance, they also need to consider the potential impact of such reforms on sentencing outcomes such as disparity and prison populations.

References

- Ajzen I, 'From intentions to actions: A theory of planned behavior' in J Kuhn & J Beckman (eds) *Action Control: From Cognition to Behavior*, Heidelberg: Springer, 1985, 11–39.
- Fishbein M & Ajzen I, *Belief, Attitude, Intention, and Behavior: An Introduction to Theory and Research*, Reading, MA: Addison-Wesley, 1975.