Magistrates' Decision-making:

Personality, Process and Outcome

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Abstract

The thesis examined personality and socio-demographic characteristics of individuals and their relationship to the way in which magistrates approach the sentencing of offenders and the choices they make. It was based on a review of the theoretical approaches to models of decision-making and the concept of individual differences. A pluralistic methodology was adopted, combining a quasi-experimental approach in the first study, with two further qualitative studies. Study 1 reported the profile data for the participants, all practising magistrates, and their responses to case study vignettes. Study 2 considered participants' perception of the sentencing process and the factors that influenced their decisions using an interpretative phenomenological approach, while Study 3 applied content and discourse analysis to transcripts of a sentencing training exercise in which magistrates had participated. Analyses of the first study were mostly correlational. Modest associations between Locus of Control and Legal Authoritarianism with severity of sentence were demonstrated and also small gender differences in sentencing choice. The study concluded that there was no support for hypotheses linking other personality trait measurements with the severity of sentence or the approach adopted, using an algebraic model to represent the process. In the subsequent studies, evidence emerged to suggest a more holistic approach to sentencing, guided by advice on structured decision-making, while accommodating the influences of probation service reports, diverse sentencing aims and the advice of the legal professionals. The impact of group interactions was also apparent. This varied with individual characteristics and acquired competences, necessary for satisfactory appraisal. The interpretation of 'roles' on a sentencing Bench and their potential effects on the process and outcome of sentencing was observed.

Acknowledgements

The presentation of this thesis brings together two very personal themes in my life. The first is my abiding interest in the magistracy and the many aspects of my own work as a magistrate over the last twenty-five years. The second is a more recently acquired interest in academic psychology. However, some would argue that many magistrates, despite their lay status in legal matters, practise an amateur knowledge of folk-psychology in their work.

Its completion would not have been possible without the guidance and support of my Director of Studies, Joanna Adler; I hope her own high standards and meticulous attention to detail are reflected, at least to some degree, in the end product. Tracey Cockerton, too has been of great assistance in reviewing material and suggesting ideas, along with Andy Guppy, who provided useful input in the early stages as a member of the supervisory team. I am indebted to each of them, as, indeed, I am to my family. They have tolerated my efforts over the last five years and provided all manner of support, from the purely technical to the emotional and moral support that the whole endeavour has required. I am most appreciative of all their help.

The most important people, without whom none of this research would have been possible, have to be the many magisterial colleagues who have contributed to the data collection. I am especially grateful to the members of my own Bench for their co-operation and encouragement.

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Preface

Magistrates' courts form a fundamental building block in this country's judicial system. The guiding principle in their creation and preservation is that offenders should be judged by people who represent the communities that they serve and who are, thereby, empowered to act on their behalf. Associated with this is a belief that, if the magistracy is properly representative of that community, its decisions will be acceptable to the public, encouraging support for its work and respect for the justice that it delivers. As the vast majority of magistrates are lay, unpaid volunteers,[1] it is also a cost-effective approach. While their decisions rarely command the attention that cases dealt with in the higher courts sometimes attract, magistrates, nevertheless, perform an important public function. They deal with over 95% of all criminal cases, along with decisions about family matters and some civil proceedings. Specialist panels adjudicate in the majority of cases involving offending by young people 10-17 years, (Magistrates' Association, 2005).

However, as a practising magistrate, the author is aware that the Bench is not immune to criticism for some of the decisions that are made. Often, this seems to stem from a sense of arbitrariness, related to which individuals adjudicate on a particular case. There is a perception that some people will react in a different way to others, in terms of the judgements they make about the same facts. As a result, the way in which evidence is

[1] Magistrates are entitled to be reimbursed for travel costs, subsistence and financial loss incurred in the performance of their duties (Department of Constitutional Affairs (DCA), 2005)

handled and the decision that is made become unpredictable, apparently inconsistent and, sometimes, out of tune with the public mood. This is particularly relevant in sentencing decisions.

Magistrates are recruited for their personal qualities and suitability for the tasks they undertake. Representativeness is based on certain socio-demographic parameters. However, the extent to which this objective is accomplished, and the possible impact on the decisions magistrates make as a consequence of any disparity in matching the chosen parameters, has been challenged (Gifford, 1986; Darbyshire, 1997). Following the Auld recommendations (2001), enacted in the Criminal Justice Act (2003), magistrates' sentencing powers are currently being increased from their existing maximum of six months custody and/fine of £5000 for each offence. Further, the Sentencing Guidelines Council (2004), (SGC), has commenced its work of advising the judiciary, sometimes in great detail, how to deal with its sentencing task in the future. The judicial system has recently been reorganised into a unified courts' authority, incorporating all levels within a single structure, Her Majesty's Courts Service. Given the importance of maintaining public confidence in the work of magistrates as they contribute to this work, it seemed timely to investigate to what extent the perception of individual differences and their effect on *process* and/or *outcome* in sentencing was valid.

The research is presented in ten chapters constructed around three empirical studies. Collectively, these address the over-arching question of whether there are individual differences within the magistracy that affect either the way in which they undertake sentencing decisions i.e. *process*, or influence the sentencing choice i.e. *outcome* of those decisions. However, different approaches were adopted to explore the themes in the most productive way. Study 1 was essentially quantitative, while Studies 2 and 3 relied on qualitative analyses.

Chapter 1 sets the scene for the research. In its description of the magistracy, it provides context for the studies that were undertaken. It indicates the recruitment criteria that underpin the selection procedures and the performance competences that are addressed through on-going appraisal. It also serves to introduce some of the specialist vocabulary relevant to magistrates' activities, especially their sentencing role, and the way in which they are prepared and assisted in that task.

Chapter 2 considers the primary psychological literature relevant to the two underlying themes of the studies: legal decision making and individual differences. It explores different psychological models of decision-making, particularly those that have been successfully applied in the legal field. Observations about other jurisdictions and decision-making in general are pertinent, as there is relatively little material relating to the English judicial system and even less pertaining to magistrates' activities. Throughout the literature review indications of good practice in psycho-legal methodology were noted.

The search for individual differences focused mainly on personality traits, and their effect on various behaviours relevant to decision-making, to identify factors that might have predictive value. Authoritarianism, (e.g. Carroll, Perkowitz, Lurigio and Weaver, 1987; Boehm, 1968; Mitchell and Byrne, 1973), Locus of Control, (Solana, Garcia and Tamayo, 1998) and Need for Cognition, (Davis, Severy, Kraus and Whitaker, 1993), had previously been demonstrated to be influential in this context. No studies were found that applied more general personality descriptors to legal decision-making. As the NEAOC model of personality (Costa and McCrae, 1992) represents the most commonly acknowledged comprehensive, yet parsimonious, model of personality (Goldberg, 1993), the five factors of this model were chosen for further exploration. A selection of socio-demographic variables were also identified as potentially influential in generating a

comprehensive description of the participants and predicting their activity as, for example, in Lemon (1974).

Study 1 is reported in the next two chapters. It was essentially, a quantitative, quasi-experimental, questionnaire study, containing three separate sections. The methodology for the work, along with the results from Sections 1 and 2 only, are reported and discussed in Chapter 3, while the results and discussion for Section 3 are reported, separately, in Chapter 4. This division seemed to flow naturally from the distinct themes of each section and the nature of the results, with the material gathered in Section 1 and 2 being used to set the scene for the activity in Section 3. Thus, Chapter 3 reports the measurement of individual differences and the creation of a sentencing severity scale of punishments. These measurements and the scale were then used to analyse and interpret the sentencing of three case studies that appear in Chapter 4. While most of the analyses were correlational, limited qualitative examination of the data was also undertaken.

The nature of the results and the analytical treatment adopted in Study 1 represented a novel approach, substantiating the findings of some previous studies to an extent, but, also, suggesting avenues to explore further and aspects of sentencing not fully addressed. It lacked ecological validity as individuals working alone had completed the questionnaires. Thus, it could not take into account the possible effects that interaction with colleagues might produce when magistrates work in groups of three, as they generally do to sentence.

For these reasons, a second study was undertaken using a different approach. Further literature research on qualitative methods of investigation suggested that an Interpretative Phenomenological approach might be suitable, so magistrates, themselves, would have an opportunity to talk about the activity of sentencing from their perspective. The relatively unsophisticated mathematical model used previously to analyse the case studies was

replaced by a more discriminating approach that explored the nuances of sentencing in the words of the practitioners. Individual interviews with magistrates followed a semi-scripted schedule, with provision for prompts where material was unclear or merited further investigation. Chapter 5 introduces the proposed approach, describes the methodology of this study and the framework of the qualitative analyses of the results that follow.

Ten separate themes emerged from that data. These are reported in Chapter 6 in the order they arose in the interview. They addressed the personal qualities and socio-demographic aspects of the sentencers and how they affected sentencing, together with an indication of how magistrates trained and prepared for their work. The impact of different sentencing aims; the influence of the Pre-Sentence Report (PSR); those sentences which magistrates found 'difficult' to determine and their ideas about sentencing models were explored to shed further light on the findings of Study 1. Finally issues of how magistrates resolved sentencing dilemmas, focused on the group nature of their work and explored, speculatively, the relationship with the Legal Advisor (LA) and the influence of the different roles of Chairman and winger.

Chapter 7 draws on the proceeding chapter to inform the discussion of the results overall, as they pertained to the research question of individual differences and their effect on process and outcome. As the interviews included individual contributions to the sentencing activity and reflected on aspects of group working, this study came closer to replicating actual practice than the individual results of Study 1. With its completion, there was now considerable quantitative and qualitative information about magistrates and their activity. However, each of the previous two studies allowed magistrates to work in isolation or reflect theoretically about their interaction with colleagues.

Study 3, which is reported in Chapters 8 and 9, attempts to close the gap between theory and practice in the most realistic manner available. During a regular training exercise, devoted to improving the consistency of approach and understanding the rationale for the chosen outcomes, magistrates came together to discuss the sentencing of fictitious cases, presented as vignettes. One of the groups was recorded, with the agreement of participants. With the transcript of three cases that the group completed to provide data, content analysis of the dialogue between magistrates and their Legal Advisor was undertaken to recognise the themes of their discussions and the structure of their exchanges. The primary purpose of this study was to explore the extent to which magistrates actually did what they believed themselves to be doing, as they had described it in Study 2. The results are reported and discussed in Chapter 8.

Chapter 9 uses contributions from the same source but focuses on roles and interactions. One of the cases was taken, in its entirety, and examined using in-depth content and discourse analysis, seeking insight into the way that individuals maintained their roles and contributed to the group effort. The validity of the descriptions given previously in Study 2 could be assessed and a degree of triangulation provided for the themes, generally.

The thesis concludes with a consideration of what the research has achieved and how far it met the objectives described at the outset. Chapter 10, also, considers the limitations of the approaches used and how these might be improved. A two-stage model representing the effect of a variety of individual differences on the sentencing activity is developed. Some of the implications of the findings for recruitment and training are identified and suggestions made for future investigation that would further inform our understanding of magistrates' decision-making and the way in which personality differences and other factors influence the process or outcome of their sentencing deliberations.

1

The Magistracy

"... Without fear or favour, prejudice or ill will"[1]

This chapter offers a basic overview of the role and function of the magistracy, providing contextual background for the sentencing activity that was investigated. An explanation of the place of magistrates' courts in the judicial system overall and demographics of current appointments is provided. The system for recruitment, the criteria applied for appointment and the extent of magistrates' existing functions are explored. The training provision, along with details of the competences required for successful appraisal, to ensure high standards and consistency throughout the system, is considered as an important aspect of the preparation that magistrates receive to undertake the type of sentencing activity that was investigated. Finally the impact of recent legislation and judicial review, as it relates to the decision to initiate this type of study at this time, is considered. (For more detail of the history and background of the magistracy, the reader should consult Appendix 1)

1.1 Jurisdiction

Magistrates represent the lowest level of legal jurisdiction within the criminal and civil

[1] Extracted from the Judicial Oath sworn by magistrates on appointment.

court system. Sitting in a part-time, unpaid, voluntary[2] capacity, a minimum of 26 half-day sittings each year, they exercise their duties typically as a group of three, although two lay magistrates are sufficient to proceed in most circumstances. Even a single justice has limited powers. Magistrates need possess no legal qualification, although a small minority will through their professional experience. In procedural and legal matters, a professional Legal Advisor (LA) assists magistrates. The LA will be a qualified solicitor or barrister. S/he sits with the magistrates in court to ensure that the 'rules' are observed and relevant information is provided. The LA is available to accompany the magistrates to provide guidance and advice when they retire to make decisions. A Practice Direction (Justices: Clerk to the Court, 2000) has been issued to provide specific guidance on the responsibilities and limitations expected of a person acting in this role, (See Carter 2001, p. 126, for detail).

Magistrates have jurisdiction in all summary matters and other charges that are triable 'either way' i.e. may be heard in either the magistrates' court, with the consent of the defendant, or in the next most senior court, the Crown Court. The current maximum penalty that justices[3] may impose is £5,000 or 6 months imprisonment for a single offence[4]. Some offences are so serious that they can only be heard in the Crown court before a judge and jury. These cases are currently 'previewed' in the magistrates' courts during committal. Magistrates have criminal and some civil jurisdiction. Appeals against decisions of the magistrates are dealt with in higher courts, as shown in the diagram below. Specialist panels to deal with offending by young people and the resolution of family

[2] See previous note re: expenses

[3] Magistrate, justice and JP are all terms that are used in connection with the office and refer essentially to the same activity. The only practical distinction arises from the observation that JP is a lifetime designation, whereas, individuals cease to be active magistrates on passing the retirement age of 70.

[4] Sentencing powers are revised under the Criminal Justice Act 2003 that is gradually being implemented. The maximum penalty for many offences dealt with in the magistrates courts will be increased.

disputes are also present at this level to which magistrates may apply to be appointed, in addition to their adult responsibilities.

Over 95% of all criminal matters are dealt with in the magistrates' courts, ranging from serious personal assaults and burglary to much more trivial road traffic offences. In 2002, there were 2.5 million defendants in completed criminal cases in the magistrates' courts. Of these, approximately 100,000 were committed to the Crown Court for trial, leaving an estimated 2.4 million defendants who were dealt with entirely in the magistrates' courts, (Magistrates Association site, 2004a).

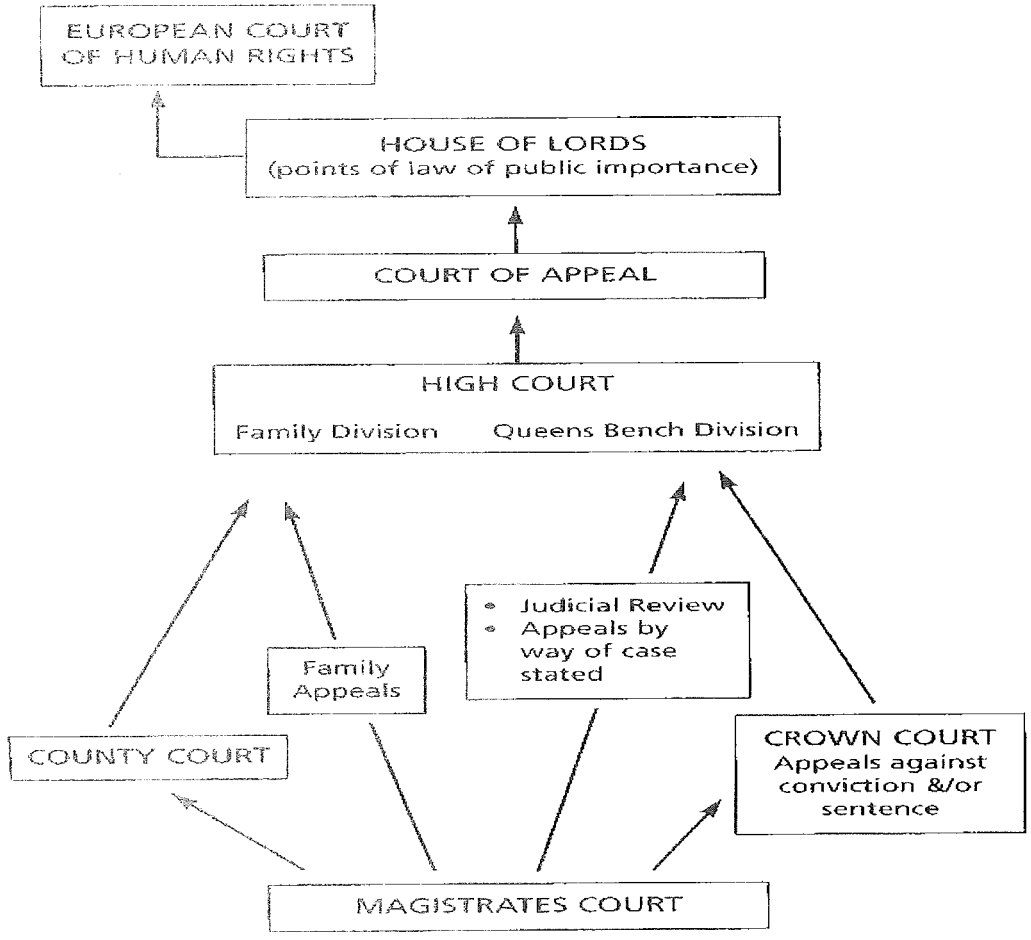

Figure 1.1 Structure of the judicial system (Carter, 2001 p 2)

For judicial purposes, England and Wales have been divided into 42 administrative areas[5] and magistrates are appointed by the Lord Chancellor or Chancellor of the Duchy of Lancaster to sit at courts within these areas. Each area is divided into smaller Petty Sessional Divisions (PSD) (known locally as Benches[6]) and each of these divisions will have one or more courthouses, together with an administrative centre and staff. A Justices' Clerk, possibly shared with other areas, whose main purpose is to act as senior legal advisor to the magistrates, serves each Bench. The Justices' Chief Executive (JCE) is responsible for the administration and day to day management of the service within each area.[7]

1.2 Demographics

According to judicial statistics (DCA, 2004) at the 1st of Jan 2004 there were a total of 28,029 lay magistrates working alongside 106 District Judges. Of the lay magistrates, 49.4% were women. The DCA also provides statistical information on the age, ethnicity and political affiliation of lay magistrates (DCA, 2004). Details of appointments can be found in Appendix 2, Table A 2.1. The totals shown in the edited table exclude the Duchy Of Lancaster, approximately 4000 people, but are introduced to indicate an overall picture, including detail of the areas sampled in the present studies.

A breakdown of magistrates' occupations is currently being undertaken by the DCA, in an effort to find an improved indicator of social balance. The present system relies on political affiliation to ensure balance by attempting to achieve a political distribution on a

[5] Currently under reorganisation within the Unified Courts Authority, now re-named Her Majesty's Court Service (HMCS).

[6] A Bench can refer to all the magistrates within a division or merely the selection of three magistrates that adjudicate in a particular case.

7 Restructuring of the commission areas in London is currently being undertaken so that JCE has been replaced by a Bench Legal Manager, serving under a regional Justices Clerk. Practice varies but in some areas one person is both the JCE and the Justices' Clerk.

Bench that reflects the community that it serves. This was criticised by Auld (2001), and will be referred to later.

1.3 Recruitment

Magistrates are appointed following recommendations from locally appointed Advisory Committees. Written applications are received and most candidates are offered a preliminary interview with representatives of the committee, to gauge suitability, exploring the factual information provided in their application and the extent to which they possess the personal qualities required. Following preliminary screening, a second interview is undertaken with the selected candidates to assess how they might perform in the role of a magistrate, undertaking sentencing exercises and recognising relevant factors.

The required personal qualities are listed on the DCA web-site, (2005, p22), as follows;

> "**Personal Qualities of a Magistrate**
>
> The following are the six key qualities sought in those applying to be magistrates.
>
> **Good character**
>
> Personal integrity - respect and trust of others - respect for confidences - absence of any matter which might bring them or the Magistracy into disrepute - willingness to be circumspect in private, working and public life
>
> **Understanding and communication**
>
> Ability to understand documents, identify and comprehend relevant facts, and follow evidence and arguments - ability to concentrate - ability to communicate effectively.
>
> **Social awareness**
>
> Appreciation and acceptance of the rule of law - understanding of the local communities and society in general - respect for people from different ethnic, cultural or social backgrounds - experience of life beyond family, friends and work.

Maturity and sound temperament

Ability to relate to and work with others - regard for the views of others - willingness to consider advice - maturity - humanity - courage - firmness - decisiveness - confidence - a sense of fairness - courtesy.

Sound judgement

Common sense - ability to think logically, weigh arguments and reach a balanced decision - openness of mind - objectivity - the recognition and setting aside of prejudices.

Commitment and reliability

Reliability - commitment to serve the community - willingness to undertake at least 26 and up to 35 half day sittings a year - willingness to undertake the required training - ability to offer requisite time - support of family and employer - sufficiently good health."

In addition, there is a requirement to live within 15 miles of the boundary of the commission area to which the magistrate is seeking appointment so that they have "a reasonable degree of knowledge of the area". Candidates will usually be over 27 years of age (although this has been lowered to 18 years recently) and must be under the age of 65 years at first appointment.

People with certain occupations and their close relatives are precluded from applying[8].

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[8] These are identified on the DCA (2005, p23) web site as;

- a member of the Special Constabulary or their spouse or partner
- a traffic warden or their spouse or partner
- anyone who has a close relative (father, mother, son, daughter, brother or sister or in- law and some other relationships) who is employed as a police officer, special constable, a civilian employee in a police force or a traffic warden in the Petty Sessional Division (court area) to which they might be appointed
- a full time member of HM forces
- anyone, in addition to those above, whose work or community activities or, those of their spouse or partner, are such as to be clearly incompatible with the duties of a magistrate e.g. employees of the Crown Prosecution Service, Prison Service, Probation Service or Magistrates' Courts Service
- an undischarged bankrupt

The interpretation of Sound judgement, listed in required personal qualities, is of particular relevance to the present studies, together with that for Maturity and Sound temperament. However, the range of potential individual differences in those considered for appointment and the way those differences contribute to the role, as interpreted by the DCA, is apparent.

1.4 Magistrates' Judicial functions

According to the Magistrates' Association web-site (2005), the duties and responsibilities of a magistrate are described below.

> "**Criminal matters**
>
> Over 95% of all criminal cases are dealt with by magistrates, either in the adult court, or in the youth court. The work involves, amongst other things, deciding on applications for bail, whether a defendant is guilty or not and passing sentences as appropriate. For a single criminal offence committed by an adult, magistrates' sentencing powers include the imposition of fines, community service orders, probation orders or a period of not more than six months in custody. Magistrates may also sit in the Crown Court with a judge to hear appeals from magistrates' courts against conviction or sentence and proceedings on committal to the Crown Court for sentence.
>
> **Civil matters**
>
> Magistrates decide many civil matters, particularly in relation to family work. Specially selected and trained members of the family court panels deal with a wide range of matters, most of which arise from the breakdown of marriage e.g. making orders for the residence of and contact with children. Proceedings relating to the

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- anyone who, or whose spouse or partner, has been convicted of a serious offence or a number of minor offences in the area to which they might be appointed
- anyone who is a member of Parliament or has been adopted as a prospective candidate for election to Parliament or paid as a full time party political agent if part of their constituency is covered by the Petty Sessional Division

care and control of children by Public authorities, along with some private family applications, are also dealt with in family proceedings courts.

The civil jurisdiction also involves the enforcement of financial penalties and orders such as those in respect of non-payment of council tax.

Other duties

Members of specialist committees are responsible for the administration of the liquor licensing system and for the grant or refusal of applications for licences and permits relating to betting and the registration of gaming clubs. Most magistrates carry out some routine licensing work."...

"Magistrates are expected to play a part in the life of the Bench and where possible, attend Bench meetings etc. They may undertake work out of court, as members of committees. They are also expected to deal, at home, with requests for warrants for arrest and search and to take declarations of various kinds." (Magistrates Association, 2005)

1.5 Pre-Sentence Report

On a finding or admission of guilt, magistrates may request a pre-sentence report (PSR) to assist them in their choice of the most appropriate disposal for a particular offender. This is prepared by the probation service after interviews with the offender. It reflects the probation officer's opinions on the offender's attitude to the offence, the risk of re-offending, social background information and personal mitigation. Consideration of possible sentences, and a recommendation as to the most appropriate one in a particular case, is made[9]. Broadly speaking, sentencing disposals fall into three bands; discharges

[9] The contents and format of the PSR has recently been reviewed. However, the description covers the type of information available at the time of data collection and reflects the continuing input to the sentencing process.

and fines, community penalties and for the most serious of offences, custody or committal to a higher court with greater powers. A PSR is only requested where the preliminary judgement has indicated a sufficiently high level of seriousness of offending for the offender to be punished with a community penalty or custody, but all options usually remain open to the sentencing Bench.

1.6 Training

Since 1980, all newly appointed magistrates have agreed to fulfil a minimum quota of training hours each year. The undertaking includes a requirement to complete such training as the Lord Chancellor designates as compulsory.

A form of Induction training has been available for a number of years but each Court could develop its own material and deliver it locally. The Magistrates' New Training Initiative (MNTI) developed by the Judicial Studies Board (JSB), was introduced in 1998, in an attempt to standardise performance and inform training needs.

1.6.1 Magistrates New Training Initiative

The provisions of MNTI 1 ensured that a newly appointed magistrate was assigned to a more experienced colleague who acted as personal mentor during the induction training period, lasting approximately two years. During this time, essential information to allow the new magistrate to 'sit' in court was front-loaded and the magistrate could be a contributing member of a working Bench within 6-8 weeks of appointment. However, training continued throughout the period, both formally and informally towards first appraisal. This confirmed that the individual had acquired the necessary skills and information for continuing to act as a competent magistrate.

1.6.2 Competency Framework

Under MNTI 1 and its successor MNTI 2[10], appraisal is competency based. Details of MNTI 1 are summarised here, since these were the relevant criteria throughout the duration of the field-work. Its successor, MNTI 2, modifies the mentored preparation for first appraisal and makes alterations to the specifications that interpret the competences required for successful appraisal. The two versions are compared later.

The competency framework and the general MNTI guidance provided an indication of the extent to which the expectations of the role have been specified by the JSB. For the general magistrate, adjudicating adult crime, there were four basic competences, broken down into statements of required knowledge or demonstrable behaviours. These were verified by interview /discussion and /or observation by a trained, peer appraiser.

Competences 1 and 2 were, essentially, knowledge-based, concerned with factual understanding of the jurisdiction within which the magistrate would operate, along with procedural rules and case management information and organisational issues..

Competence 3 concerned thinking and acting judicially. This was broken down into statements that required the appraisee to demonstrate a knowledge of the full implications of the judicial oath, how to reach impartial decisions, an aspect of which specifically referred to the *use of structured decision-making* and how to maintain the interests of justice. This referred to the application of the model for decision-making that the JSB and the Magistrates' Association encouraged, based on a consideration of the aggravating and mitigating features. It is an aspect of sentencing that is of central importance in the research that was undertaken.

[10] MNTI 2 was implemented in April 2005 and New became National.

Competence 4 was ability based, relating to working as a member of a team. It required the appraisee to demonstrate the ability to participate effectively on the Bench and in the discussion in the retiring room. Thus, the relevance of personal characteristics in the process is introduced.

For those taking the Chair, there were additional competences to be demonstrated. Competency 5 was concerned with managing people and processes. The competent Chairman[11] should be able to lead the team. Consulting with wingers[12] both in and out of the courtroom is mentioned along with using the wingers effectively. The competent Chairman needed to work in partnership with the Legal Advisor (LA), through an understanding of the LA's role and responsibilities and by creating a working relationship. Alongside an ability to apply routine legal procedures, the Chairman should also be able to use knowledge of sentencing powers and process in a variety of fields.

Competence 6 (for Chairmen only) related to Communication in Court covering such areas as speaking effectively with clear pronouncements and active listening, establishing and maintaining decorum and managing behaviour.

Competence 12 required knowledge of and the ability to apply effective enforcement of financial penalties.

Other competences, in relation to the specialised jurisdictions of youth and family, were also developed.

[11] Chairman is a generic term for the person who presides in court proceedings, man or woman.
[12] Wingers are magistrates who together with the Chairman/Chair make up a Bench

1.6.3 Appraisal

Assessment of all competences was based on competent/adequate performance, with no grading system for excellence. Where a competency was patchy or displayed some shortcomings, further work was required. In the event that a competency was considerably below the standard expected, further training was required before the magistrate was deemed suitable to act in the role appraised. No national standards were developed and these were left to local Bench initiatives. In addition, an incomplete weighting system was devised that prioritised as essential, important or desirable certain aspects of various competences over others. Appraisal was undertaken two years after appointment and every three years thereafter, unless the magistrate assumed a new role that required additional appraisal. Ultimately unsuccessful appraisals could lead the Bench Training and Development Committee to recommend to the Lord Chancellor that a particular magistrate be removed from office.

In practice, the system developed in such a way that the only competences to be reported in appraisal for general magistrates were competences 3 and 4 and for Chairs 3, 4, 5, & 6. This has been recognised with the introduction of MNTI 2

MNTI 2 was published December 2003 by the JSB. It is constructed around three core competences:

1 Managing yourself

2 Working as a member of a team

3 Making judicial decisions

There is an additional competency for Chairmen

4 Taking the Chair: managing judicial decision-making

These are further interpreted in terms appropriate for specialist panel competences.

As previously, each competence is broken down into a number of elements, defined by performance criteria and supporting knowledge.

The following tables taken from the JSB web-site, 2005a summarise points of difference and areas of similarity between the existing scheme and its successor.

Table 1.1 Indications of the differences between MNTI 1 and its replacement MNTI 2

What makes MNTI 2 different from the current scheme?	**Competence** - MNTI 2 has changed the emphasis within the competences. The new competence framework will focus to a greater extent on the skills and behaviours required and to a lesser extent on knowledge requirements. Experience has shown that most newly appointed magistrates are ready for their appraisal at 12-18 months, rather than after two years as in the original scheme. **More up-front training** for new magistrates to ensure they have necessary underpinning knowledge and understanding before they sit for the first time. **Post-sitting reviews** will be held at the end of each court session. They will be crucial to the development of existing magistrates - enabling a continual review of performance. **Cross-bench appraisal** is introduced, as a method of quality assurance. The JSB is prepared to consider alternative methods of quality assurance that Magistrates Courts Committees might develop as an alternative, if this is logistically difficult. **Mentoring** will stay primarily the same as under MNTI 1, but where it is difficult to roster mentored sittings, three of the six mentored sittings can be conducted by a trained mentor who is not specifically assigned to the new magistrate concerned.

Table 1.2 Indications of the similarities between MNTI 1 and MNTI 2

In what ways is MNTI 2 the same as the current scheme?	The following aspects of the current scheme will remain: **Competence framework** remains. There are four competences, which are broken down into elements, which contain performance criteria (i.e. what a magistrate needs to do) and underpinning knowledge and understanding (i.e. what a magistrate needs to know). This differs to MNTI 1, which contained more knowledge. The knowledge elements and performance criteria in MNTI 2 vary across the adult, Youth and Family Courts. **Assessment** will continue to be based on observed evidence with formal assessment undertaken by an appraiser. **Threshold appraisal** - Competence must be developed at each threshold level before the magistrate can move on to a different judicial role. There are thresholds for new magistrates, chairmen in the adult court, members of the specialist panels and chairman of the specialist panels. Formal assessment takes place when a magistrate has reached a threshold in his/her magisterial career and at least once every three years thereafter in each of the judicial roles s/he holds as a magistrate. Informal assessment will take place continuously.

Overall, the competences that represent the framework remain similar but with an increased emphasis on observable skills and behaviours. The style of the reporting has also altered. MNTI 2 is in the early stages of roll out and there is little experience of its implementation among most practising magistrates, excluding some who, as members of their Bench Training and Development Committees, may have received some early training for its introduction. Full details are provided on the JSB web site 2005b.

The stated purpose of appraisal is for the assessment of each magistrate's performance on the Bench against the relevant competence framework and for any training and development needs to be identified. Since all the participants in the present studies will be preparing for or have been appraised under MNTI 1, the earlier competency framework represents the baseline expectation of their judicial knowledge and practice at the time of the present studies. The emphasis on particular aspects of the role, such as the use of structured decision-making, working as a team and the interpretation of acceptable

chairmanship, suggests ways in which individuals may develop differentially that might have implications for their sentencing practice.

1.6.4 Training Material

Much of the training material and overall guidance has, traditionally, been generated locally. Since its creation in 1979 following the Bridge Report, the Judicial Studies Board has developed its objectives to include:

> "To advise the Lord Chancellor on the policy for and content of training for lay magistrates, and on the efficiency and effectiveness with which Magistrates' Courts Committees deliver such training." (JSB 2005 c)

The increasing influence of the Board in the provision of prescribed materials for required training, practice guidance on the role and function and the overall supervision of forms of reporting and assessment of performance has led to a more standardised approach across courts. Since 1998 and MNTI 1, formal guidance on structured decision-making, when sentencing decisions are being made, has been provided by the JSB. (An example of the current checklist can be found in the Adult Court Bench Book published by the JSB Oct 2003, incorporating the most up to date Guidelines from the Association).

The Sentencing Advisory Panel, established under the Crime & Disorder Act 1998, has provided additional guidance since July 1999. While this panel continues to exist, its advice will, in future, be channelled through a new body set up under the Criminal Justice Act (CJA), 2003. This is the Sentencing Guidelines Council (SGC). It takes over the responsibility for co-ordinating the work of the Court of Appeal and the Magistrates' Association, to provide sentencing advice.

The Magistrates' Association, to which approximately 85% of magistrates belong, in addition to other functions, fulfils a training purpose. It has developed materials, initially

independently but increasingly in co-operation with other interested parties, to assist magistrates when sentencing matters that are 'regularly and frequently' dealt with in their courts. In the September 2000 edition of the Guidelines it is emphasised that these

> "Provide a method for considering individual cases... from which a discussion should flow; but *they are not a tariff and should never be used as such*, (their emphasis)". (Magistrates Association Guidelines Issue Sept 2000, p v.)

The guidance was based on the Criminal Justice Act 1991 that reaffirmed the principle of 'just desserts' as the appropriate approach to sentencing. Accordingly, the penalty must reflect the seriousness of the offence and the personal circumstances of the offender. Magistrates were advised to start the sentencing process by taking full account of all the circumstances of the offence and make a judicial assessment of the seriousness category into which it fell. In every case the sentencer was required by the Act to consider an escalating penalty scale. This commenced with consideration of whether a fine or discharge was *appropriate*, moving through an assessment of whether it was *serious enough* for a community penalty, to whether it was *so serious* that only custody was appropriate which may exceed their powers, necessitating committal to the Crown Court. Guidelines are available in all magistrates' courts, sometimes with local adaptation, for easy reference. They were regularly reviewed to reflect new sentencing provisions or revised financial penalty schemes.

For each offence, whether the generic JSB model is applied or the specific Association Guideline is followed, the structured approach is the same;

- Consider the seriousness of an average offence of this type, taking into consideration the maximum penalty and any guidance from the Association or case law.
- Consider aggravating and mitigating factors of the offence that make it depart from the average and the weight to be given to each factor.

- Have your considerations caused you to alter the initial level of seriousness and revise as appropriate?
- Are there any other factors that affect seriousness eg, offence committed on bail, racially or religiously aggravated, serious risk of harm to the public, relevant previous convictions? Revise again as appropriate.
- Consider offender personal mitigation. Background, attitude, previous good character, remorse, age, social pressures and co-operation with the police are provided as qualifying examples and each must be weighted appropriately before revising the sentencing assessment.
- Is a report providing additional information required?
- What are the sentencing options? – the three sentencing bands referred to above with their limitations are indicated.
- Is credit for a Guilty plea appropriate?
- Are there any other considerations – what are the sentencing objectives? Check final decision in respect of overall seriousness (proportionality), movement from the original level of sentencing, totality, restriction of liberty, offender's circumstances.
- Good practice suggests that you check your decision with the LA and use them to assist in drafting reasons for the sentence pronounced.

(This is an edited version, full details in the Adult Court Bench Book, Oct 03 sect 1 pp. 35-41 published by the JSB)

The Association Guidelines specify an 'Entry Point' for each offence that it deals with. The 'entry point' represents their suggestion as to the guideline penalty for a first time offender, initially pleading not guilty to a particular offence. Re-assessments of an individual case against this standard are made, as different factors are taken into consideration. The purpose of this suggestion is to encourage a common sentencing approach in an attempt to influence consistency throughout the country but its very

existence imposes a structure on the sentencing decision with which any theoretical model, identified for investigation, needs to be compatible.

1.7 Legislative Influences

Recent developments in the British criminal justice system make this an opportune time to undertake a new study of magistrates at work.

The Human Rights Act, (HRA), (1998), implemented October 2000, gave an increased importance to articulating the reasons for making a particular decision. Encouraged to adhere to structured decision-making (MNTI 1) and announce the findings and factors that contributed to a decision, Benches now have an explicit means of recording the aspects of a case which appear most pertinent to them in reaching a sentencing decision. A huge compulsory training programme has been completed to ensure that all magistrates are fully aware of this and other aspects of the Act. Forms have been developed to assist magistrates to record their reasons for announcement in open court and all magistrates should be familiar with their completion.

The review of the work of the criminal courts undertaken by Lord Justice Auld made far-reaching recommendations for the future of magistrates' courts. Far from reducing the importance of their contribution as many had predicted, Auld (2001) recommended an enhanced role for lay magistrates. They should continue to work along side professional magistrates (District Judges, DJ's) in a new Unified Courts Authority with increased sentencing powers and a full range of cases, indeed in some events more serious offences than they currently deal with. Auld, also, urged increased involvement of the JSB with magistrates' training, a reform that has already taken place and recommended recruitment on a wider front, to reflect more broadly the communities that magistrates serve. These reforms are being implemented and the challenge of operationalising the provisions of the

new Criminal Justice Act (2003) undertaken. A large-scale training programme was organised for the introduction of the HRA (1998) and preparation for the implementation of the CJA (2003) has been provided for every magistrate.

The combination of these events, make this an apposite time to enquire further into how magistrates make sentencing decisions, what the effect of training and appraisal has been and whether there are individual differences in those recruited that improve or detract from the quality of justice that they deliver.

Based on the statistics available in Appendix 2, the image of the magistracy created in this chapter presents a group of predominantly lay members, mainly white, evenly balanced according to gender, with an age distribution skewed towards those of 50+ years and politically representative of all major parties or none. Increasingly well trained and appraised against a standard competency framework, the group has responded to the challenges of new legislation and the recommendations of a Judicial review. In its approach to sentencing, the demands of appraisal, along with the guidance offered by the Association, provide a model for structured decision-making that should be familiar to all, together with a method for recording the structure of that decision.

While recruitment and appraisal may have raised an expectation of certain personal qualities and modes of working, the purpose of the research will be to discover more about the reality among practising magistrates. In subsequent chapters, their approach to sentencing decisions will be explored and the effects, if any, of individual differences on those decisions analysed.

2

Literature Review

"Because of the problem-driven nature of most jury research, however, no overarching model has emerged around which to structure a comprehensive review of the broad empirical literature." (Devine, Clayton, Dunsford and Seying, 2001)

This chapter examines the theoretical perspectives and empirical work relevant to the two major themes of the research: legal decision-making and individual differences. It focuses on:

- Models of decision-making that have been applied previously in a legal context; and
- Specific individual characteristics that the present studies have been designed to examine.

As legal proceedings may have important implications for participants' lives, experimentation is restricted and the privacy of the retiring room is sacrosanct, precluding some types of field research. Therefore,

- The methodology of previous attempts to explore legal decision-making will, also, be reviewed, to the extent that it informs the present studies.

Inevitably there will be overlap in the information generated in individual studies that can inform more than one of the primary areas for report. Methodology, in particular, ran through

and across all studies with varying degrees of relevance. Thus, it has, for the most part, been subsumed within the major reporting themes, to be drawn on as appropriate.

Decision-making Models

Within general decision-making literature, three categories of model are regularly represented:

- Normative, which are essentially mathematical, according to Van der Pligt (1996), and predict the decision that *ought* to be taken (Abelson and Levi, 1985), as opposed to the decision that may *actually* be made;
- Descriptive; and
- Heuristic processing.

In the **normative/mathematical** models, the brain, functioning as an information processing system, is believed to be capable of making comparative calculations of the significance, likelihood and frequency of events and outcomes. These are factored into a mathematical computation, often of extreme complexity, to predict the choice. A **descriptive** approach is more concerned with representing the process as an expression of thoughts, feelings and emotional reactions and, Abelson and Levi (1985) would say, serves to explain departures from the 'norm'. It uses the language of social cognition to recreate what seems to be happening, as these aspects combine and interact, to influence the decisional choice. **Heuristic processing** represents the variety of "short-cuts" that people use, pragmatically, in real life situations under external constraints to make "good enough" decisions. It may not ensure ideal or thorough deliberation of all the circumstances but typically suffices for most purposes, providing a fair representation of what actually may be occurring. It might be either mathematical or descriptive in nature.

Categorising approaches in this way has not been straightforward. Normative models are based on mathematical techniques for handling data. However, descriptive approaches lead to theories that generate models that need to be tested by applying mathematical analyses. Some apparently comprehensive descriptive approaches are vulnerable to heuristics within their cognitive construction. In this way, boundaries become obscured. However, the value to the present studies of this type of representation lies in distinguishing families of related approaches from which the most appropriate exemplars may be identified for further investigation. Some perform better than others in different aspects of the sentencing task that is the subject of this research.

Two aspects of decision-making will be considered in the present studies:

- *Process* the way in which individual participants approach a task, how they engage with the information and the way the information is pulled together to make a decision and
- *Outcome* the decisional choice that is made.

The context of the research work is *sentencing decisions* taken by *lay magistrates* in *English* courts. Any model chosen for further consideration needs to assist in illuminating either or both aspects of their task. A suitable model must have, also, the capacity to mimic the elements of structured decision-making that magistrates are trained to observe, referred to in Chapter 1.

Studies that are closely related to sentencing activity with English magistrates will be the primary source of background information to generate models. However, comparable work, involving other legal decisions or decisions derived in foreign jurisdictions have been introduced where relevant. General psychological literature on decision-making has been

consulted and is included, to the extent that it provides a context for an application in the legal field, (for an overview of decision-making models see, for example, Abelson and Levi (1985) or Semin and Fiedler (1996)).

Individual Differences

There is limited material available that supports sentencing predictions in relation to identified characteristics of the sentencer but what has been explored is represented in the studies reviewed. As far as is known, no studies have attempted to measure the personality traits represented in the five- factor model of Costa and McCrae (1985, 1992) in a judicial context. Predictions for these traits must, therefore, be derived from the general literature of personality studies.

2.1 Decision-making Models

2.1.1 Normative/Mathematical Models (outcome directed)

The review considered two mathematical approaches; Baysian calculations and information integration (algebraic modelling, attribute and attitude combination).

2.1.1.1 Bayesian theory

Bayesian theory is based on a probability calculation to predict the outcome of a decision. No examples of sentencing decisions using this approach have been found but there are references in the literature of its application to jury verdict decision-making. Fenton & Neil (2000) demonstrated the usefulness of Bayesian networks for predicting verdicts, recommending that they should be more widely accepted, especially in the Courtroom setting. Accepting that the underlying mathematics was too daunting to appeal to most legal practitioners, they used a

computer program to calculate the probability of evidential combinations. The process generated something like a decisional-choice flow-chart which could be more simply applied. In preliminary tests of the model, their predictions appeared to be consistent with some examples drawn from conviction rates in recent crime statistics, available within the English system. However, no experimental study or natural field observation was undertaken to test the conclusions and no comparable programme exists for sentencing decisions.

Penrod and Hastie (1979) reviewed six different mathematical approaches, including Bayesian calculations, to predict American jury verdicts, looking at the degree of fit with normative data and modifications that might be required. While the mathematical models performed adequately in several respects, they provided little insight into the process of deliberation or the performance of individual jurors, which would be disadvantageous for the present studies.

In related work with American 'jurors', Pennington and Hastie (1986) referred to four main categories of traditional model in decision-making:

1. Information integration, (see some examples below);
2. Bayesian models based on comparison of prior and posterior probabilities, as new evidence was assimilated, (referred to above);
3. Poisson process stochastic models concerned with random distributions and the accumulation of evidence towards a critical event that fixes the weight at a final value and;
4. Algebraic sequential weighting models (see below), all mathematical in approach.

While each was capable of assisting in the accurate prediction of verdict, they were limited in their capacity to deal with some empirically observed phenomena, such as interpretation of evidence and other aspects of the decision process. Similar limitations would apply in the

present context. This led these authors to develop a more descriptive approach in the 'story' model of evidence evaluation, (see later).

Each of the previous studies dealt with a dichotomous choice situation – guilty or not guilty - in the context of group sizes up to twelve people. They failed to take into account some of the behavioural characteristics associated with groups in general, such as groupthink (Janis, 1982; Janis and Mann, 1977), group polarisation and risky shift, (Moscovici and Zavalloni, 1969). Further, it is likely that the application of Baysian probability theory or stochastic mathematical approaches would prove particularly problematic if applied to multi-option sentencing disposals. Certainly, complex calculations of probability do not feature in the conscious reports of sentencers. In the magistrates' courts the potential group size is limited, usually, to three people, a number so small that 'typical' group behaviour cannot be assumed. Opinions vary but Corbett (1987) and Dhami (2002) have suggested that the differences predicted between group behaviour, as when three magistrates collaborate, and individuals making the same type of decision may not become manifest in the work of magistrates. In fact, these authors indicated that results obtained for individual decision-makers could reasonably be considered to represent the behaviour of a Bench of magistrates. Repetitive 'voting' for the preferred option, implicit in the American studies, is not a common feature of magistrates' sentencing and decision rules are not explicit. Particularly in the two probabilistic models referred to, no means of 'tapping' the cognitive representations or interpretative effects is available in the type of calculation undertaken. Along with all normative/mathematical decision-making models, they predict only what the sentencer *ought* to choose. In a realm where probabilities are highly subjective and there are no right answers, the sentencer may come to a variety of conclusions, each of which s/he is able to justify as 'correct'. For all

these reasons, models based on Baysian calculations or Poisson processes may be considered unsuitable for further application to a sentencing task.

2.1.1.2 Information Integration

(a) **Algebraic Modelling**: Hastie (1993) discussed four mathematical approaches to legal decision-making, of which algebraic modelling was the most straightforward. Hastie considered that it had

> "... the advantages of a clear formal representation... accompanied by useful scaling procedures that allow the user to quantitatively assess individual juror's values of legally important concepts such as the weight of evidence, (and) pre-decision presumptions..." p. 28.

Linear combinations of weighted evaluations of evidence to predict outcome were the most common, although non-linear relationships had been explored. The basic weighted average model integrated all inputs simultaneously, to derive an average, whereas the sequential version relied on an up-dating of previous evaluations, in combination with a new contribution, to obtain the resultant average. By comparing this with the standard required for conviction, a verdict decision could be made. In either representation, Hastie (1993), observed that,

> "The averaging process for combining evidence to reach a conclusion has considerable common-sense, intuitive appeal", p.17.

In the context of the present studies, a simple algebraic approach to the consideration of aggravating and mitigating features of an offence does, indeed, have intuitive appeal and maps well onto the JSB and the Magistrates' Association guidance on sentencing approach (see Chapter 1). It also offers the possibility of some insight into the type of information that has

been taken into consideration in making the sentencing decision. However, the exploration of weighting may be challenging and experience suggests that it would be difficult to distinguish simultaneous from sequential approaches within the proposed methodology.

(b) **Attribution**: In the general attribution literature, Anderson (1965) discussed an information integration model for handling cognitive input in the formation of impressions through the consideration of positive and negative attributes. Attributes were integrated, according to a variety of rules summative averaging or weighted averaging - to produce an overall impression. Attributes informed schemata in creating a cognitive structure that represented knowledge about a concept and the relations among its attributes. Schemata will be discussed later among more descriptive approaches.

From attributes, inferences are made that allow us to ascribe meaning and causality to observed behaviour. Different models for assigning causal attributions have been developed. Kelley's covariation model (1967, 1973) identified the aspects of consistency, distinctiveness and consensus information as persuasive in establishing causality. With low consistency between observations, an alternative explanation was sought. With high consistency, high distinctiveness and high consensus, an external (situational) attribution was made, whereas high consistency but low distinctiveness and low consensus led to an internal attribution (within the person) as an explanation for the behaviour. For single observations, reliance on previously developed causal schemata, built up from experience, was introduced (Kelley, 1972). An extension of Kelley's model led to the development of Weiner's (1985) attributional theory concerned with the causes for and consequences of the attributions made for people's success or failure on a task.

Ewart (1996) used such an attributional approach to understand sentencing in English Magistrates' courts and the Crown Court. Weiner's attributional theory of motivation (Weiner, 1985) used the three dimensions of causal locus (internal versus external), stability and controllability to define an activity, in this context, the offending activity. This theory was applied to predict sentencing outcomes in a sample of both real and hypothetical cases, manipulated in respect of the three dimensions. Following Carroll and Payne (1977), Ewart felt that this particular model had the intrinsic merit of replicating factors that sentencers' reported taking into account viz. the degree of responsibility of the defendant (locus), the likelihood of re-offending (stability) and the blame-worthiness of the offender (controllability). Further, it could be used to accommodate concepts of aggravation and mitigation that are important elements in structured decision-making (Shapland, 1981). Simulated sentencing tasks explored the attributions made and the sentences imposed, supplemented by analyses of actual case records, using the reasons recorded for the imposition of a particular sentence.

Results indicated that the sentencing of certain types of crime were better represented by an attributional model that others. In explanation of this, Ewart (1996) introduced the ideas of Reitman (1965) to suggest that different models applied in different circumstances. For some offences the goal state i.e. the appropriate sentence was well defined, as when the over-riding sentencing principle was proportionality, and a 'tariff' approach could be applied. In others this was less clear because of the particular information about the offence or offender, leading to an alternative choice of model for the decision. The two alternative approaches are represented in the diagram.

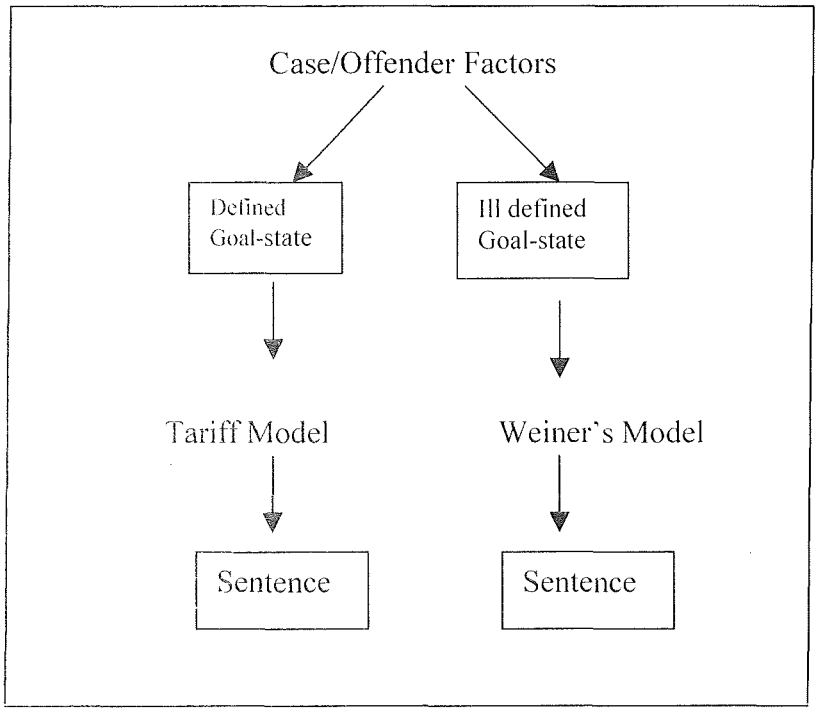

Figure 2.1 Ewart's Schematic representation of the role of Weiner's attributional model within an explanation of sentencing, after Ewart (1996), p. 30

For the present research this model has the attraction of accommodating many of the relevant legal factors but also alerts the researcher to the possibility that model choice may vary between cases, dependant on the goal-state. Goal-state, itself, may be related to the type of offence, as Ewart (1996) suggested, or perhaps to the variety of sentencing aims.

Carroll and Payne (1977) compared the judgements of American students and experts (parole officers) evaluating crime seriousness and the risk of recidivism, through their causal attributions. Results indicated that attribution theory was successful in providing a useful description of the student / 'naïve' group processes but not the decisions of the experts that seemed to reflect the experts' specific knowledge about crime and criminals. This, the authors

considered, diminished the value of the model for work with an expert sample who appeared to bring the insight of experience to the task in a more complicated manner, especially in the judgement of recidivism, diminishing the external validity of the work. The difference between naïve and expert decision-makers was one of the factors taken into consideration in the present studies where all the participants had training and experience in sentencing.

Any attributional approach is vulnerable to the Fundamental Attribution Error identified by Ross (1977). This described people's tendency to ascribe causal responsibility for a person's behaviour to internal, dispositional aspects over situational variables in the environment over which there was less control. In the sentencing context, this would have the effect of attaching disproportionate culpability to the defendant, over aspects of the circumstances of the offending, that might be considered to contribute towards mitigation. A further, attributional bias arises in the 'false consensus effect', identified by Ross, Greene and House (1977), in which individuals tended to perceive their own behaviour as more typical than, in fact, it is. For the sentencer, this observation risks distorting the evaluation of deviance of others when determining the seriousness of an offence or the degree of mitigation, producing misleading observations upon which to base model predictions.

(c) **Attitude**: Attitude models of decision-making such as Theory of Reasoned Action (TRA) (Fishbein and Ajzen, 1974; Ajzen and Fishbein, 1980) appear in the general decision-making literature. Described as an example of a subjective expected utility model (SEU), it is a function of two factors: attitude towards the behaviour and subjective norm. These may be combined to predict behavioural intention, a concept that the researchers considered was the most reliable predictor of actual behaviour. This theory related to activity that was assumed to be under the control of the subject. To account for the problem of volition, Ajzen (1988)

introduced a further concept of perceived behavioural control, represented in the Theory of Planned Behaviour (TPB) model. A model such as this, which is an example of a more general multi-attributional utility model (MAU), might be adapted to reflect the elements of a sentencing task. Attitude towards the behaviour would be represented in the assessment of seriousness of the offence. Subjective norm would appear as an indication of what the magistrate believes society expects, in combination with his/her own sentencing philosophy and the value placed on those expectations, with perceived behavioural control represented in the reality of limitations imposed by practical considerations and the sentencing options available. The successful application of the model would need to accommodate potential for cognitive dissonance (Festinger, 1957). This concerned attitudes that an individual held that appeared to conflict, so that adjustment was required to reduce emotional turmoil, as, perhaps, when sentencing aims and seriousness of the offence are difficult to reconcile. Analysis of MAU models is usually undertaken by the application of linear regression techniques to determine the relative contribution of the component variables. Such an approach might be capable of representing each of the variables that the research needs to consider. However, large numbers of participants would be required as the number of independent variables under investigation grows which may be beyond the resources of this project.

McKnight (1981) applied a multi-attributional utility model in combination with personal construct theory (Kelly, 1955), to identify the causal attributes relevant to the sentencing task, as magistrates perceived it, and the importance of each attribute in a specific case context. Applying a linear combination representation of these weighted attributes in a MAU model, he collected data to compare magistrates' actual sentencing decisions with mathematical predictions. Nine magistrates were interviewed for sessions lasting approx. 2 ½ hours each. McKnight (1981) reported good correlation between the two, indicating reasonably high

predictive power for the model. Apparent 'inconsistency' between participants could be explained, according to the researcher, as a result of the combination of beliefs and values arrived at by subjective construction for each individual. Comparison measurements of group and individual decisions produced "fair or better" agreement in two of the three cases studied. Indications of sample size and participant tolerance should be noted.

Moore and Gump (1995) used an information integration approach, based on Anderson (1981), to juror decision-making in an American simulation study with jury eligible, student participants. Their analyses supported a simple averaging model for the combination of pieces of information against a more general additive rule, a finding that may relate to the present task.

Information integration was the basis of analyses conducted by Ebbesen and Konečni (1975) into Bail decisions in American courts. These authors regarded the application of this type of weighted averaging model of information integration as a type of heuristic. Techniques of multiple regression were used to examine the impact of different types of information on the decisions made by judges.

Data were generated in two studies, one from actual cases and the other using simulated material. Contradictions between factors that seemed to assume importance in the fictional cases and decisions made in real cases were apparent. In practice, judges appeared to be strongly influenced by the recommendations of the prosecuting authority. The recommendations of both the prosecution and the defence appeared to be more strongly related to the severity of the offence than other factors that judges reported as important in the fictional studies.

Cautious about the apparent disparity in field and simulated studies, the authors argued for the importance of naturalistic observations even though the control available in laboratory experiments had to be sacrificed. Further they observed that integration models offered "a coherent and intuitively reasonable interpretation", (Ebbesen and Konečni, 1975, p 820) of this particular process. Later studies, (Konečni and Ebbesen, 1991) into methodological difficulties in the field of legal decision-making reiterated these reservations about the value of experimental simulations and the validity of their findings to the legal system. The methodological point is significant for the present studies.

Konečni and Ebbesen (1982) raised concerns regarding the extent to which the reasons provided for a sentencing decision represented the actual reasons for that decision. Despite indicating at interview that they regarded sentencing as a multi-faceted, complex task, judges, actually, appeared to base their decisions on relatively few factors, essentially seriousness of offence, prior record of offender, and the recommendation of the probation officer in his report to the court. This was endorsed in later work (Konečni and Ebbesen, 1984) which suggested that despite its context within an objectively complex social world, with a subjectively complex intuitive/phenomenological approach, legal decision-making was actually much simpler than reported and relied on relatively few factors to reach a conclusion. This conclusion was further supported by the work of Kunin, Ebbesen and Konečni (1992), who demonstrated that only two factors directly affected the judgement in decisions over child custody disputes: counsellor recommendation and to a much lesser extent; the child's wishes. For the present studies it suggests a plausible approach but should alert the researcher to possible discrepancies between idealised reports and actual practice, thorough versus heuristic processing, but also draws attention to the significance of input from the probation report.

2.1.2 Descriptive Models (Inform Process and Outcome)

According to Tada (2001), there was a considerable volume of literature related to content-dependent descriptive models of decision-making. Such models represented strategies used by individuals in different situations. Findings suggested that individuals appeared to have preferences for some decision strategies over others and certain strategies seem to be preferred for a given situation, especially for difficult decisions. Again, the possibility is raised that no single model of decision-making is universally applied. Individuals may vary their choice with the particulars of a situation. Sentencing is an example of a 'difficult' decision and magistrates may each have their own preferred mode for dealing with a problem.

Five descriptive approaches were considered: 'Story' models; anchored narratives; Prospect theory; frames of reference; and schemata.

2.1.2.1 Story-telling:

According to Pennington and Hastie (1986), the story-telling model used a narrative story structure to organise and interpret evidence. Applying the concept of an episode schema, evidence was organised on the basis of causal and intentional relations between the different pieces of information. The juror constructed a 'story' in his/her mind that made best sense of the evidence as presented. This was then matched against the verdict categories available, to determine verdict choice. Results demonstrated that jurors' representations of the evidence did, indeed, contain the elements of story structure and that those who chose different verdicts had made different interpretations of the evidence, consistent with their choice. Pennington and Hastie (1986) p. 254, suggested that, "a juror with different attitudes, experiences and beliefs about the social world would reach different conclusions", lending support to the search for individual difference effects, at least in this context.

Pennington and Hastie (1988) reported that manipulation of the elements in the evidence was consistent with a *causal* relationship between the inferences of the story construction and the decisions made. The model should, they considered, be viewed as complementary to the mathematical approaches for the insight it could provide. Pennington and Hastie (1992) tested this model's performance against mathematical approaches, suggesting that elements of consistency, completeness, plausibility and uniqueness were persuasive in characterising the confidence that participants expressed in the decision they reached and that different approaches performed more appropriately under different test conditions.

Testing the 'story' model, Wiener, Richmond, Seib, Rauch & Hackney (2002) collected qualitative data from jury eligible adults about the imposition of the death penalty. The results suggested that the model, generally, worked well. However, jurors who were prepared to convict and were then asked to consider sentence, found it more difficult to understand mitigating circumstances because they did not retain this information in their stories. The context of this study and the choice of case has no relevance for the present work. Nonetheless, the inability to retain information effectively that does not support one's initial conclusions could have implications for sentencing. If a preliminary disposal is arrived at too soon in the consideration of sentence, it may preclude thorough processing of all the information available in reports.

While no applications of this model appear to have been tested on sentencing decisions, Filkin (1997) applied the story-telling model to investigate potential biases, related to mental representations of crimes and stereotypes of criminals, in juror decision-making. He found that the representation of the crime affected the verdict decision more than information about the

criminal. This might have parallels in sentencing if the demands of the offence were in competition with the best interests of the offender and a similar bias influenced the sentencers.

Despite the fact that much of the derivative work on the story-telling model is based on American studies of jury-eligible, and not actual juror participants, *and* the model has only been applied to verdict decisions, the approach may have some value for the present research. In relating their understanding of a case, sentencers may identify features of the information provided in evidence or reports that were considered relevant. The reasons provided for a sentence may suggest a particular interpretation of that information. However, in sentencing, the culpability of the defendant is already acknowledged and the factual basis of the sentencing choice largely unchallenged. The scope for interpretation is more limited. Individual weightings of the features as in the previously considered mathematical models, rather than selective retention of the material, may be more relevant.

Along with all narrative models, any story constructed may be subject to the general psychological threats of 'primacy' competing with 'recency' in the minds of the sentencers, (Hogg and Vaughan, 1998). According to Jones and Goethals (1972), the former effect was more usual. Implications for sentencing activity suggest that initial impressions may dominate subsequent deliberations. While incomplete information was often supplemented by positive assumptions, (Sears, 1983), any negative information assumed disproportionate importance, indicative of a negativity bias, (Fiske, 1980). Once a negative impression had been formed it appeared to be much more difficult to alter in the light of subsequent positive information than the effect of a positive impression, subsequently undermined by additional negative information, (Hamilton and Zanna, 1972). These observations may all be relevant to the order in which input from legal submissions and reports is handled, with aggravating features

preceding mitigating factors in the consideration of sentence when the JSB model of structured decision-making is applied.

Psychological phenomena of 'illusion of control', (Langer, 1975), and belief in a 'Just World Theory', (Lerner, 1977) may also influence the sentencing choice. The former represents a belief that one has more control over one's world than one really does. The latter considers the world to be a predictable place where good things follow good acts and retribution is visited on wrong-doers. Magistrates subscribing to Just World Theory may attribute blame to victims who only get what they deserve and dilute sympathy for the victims of circumstances, such as poor social conditions or unemployment, since this outcome may be deemed to be largely of their own making. As individual beliefs such as these are factored into any model of rational decision-making, distortions of the process are inevitable. The application of any of these biases is likely to operate to the disadvantage of the defendant in his/her attempt to minimise his/her responsibility for criminal acts.

2.1.2.2 Anchored Narratives:

Descriptive narrative was an essential feature of Wagenaar's (1996) approach characterised as "Anchored narratives". The substrate of Wagenaar's landscape, into which the elements of an offence must be "anchored", was composed of "the knowledge of the world in the form of general rules", p. 269, as possessed by the decision-maker, not dissimilar to "reasoning from world knowledge and evidence," (Pennington & Hastie, 1986, p254). Evidence was presented and garnered as a series of narratives, effectively stories that were evaluated for plausibility against generally accepted beliefs. These had to be integrated into a single, all-embracing narrative commanding general acceptance. Stories were constructed with differing levels of complexity before they attained a secure hold.

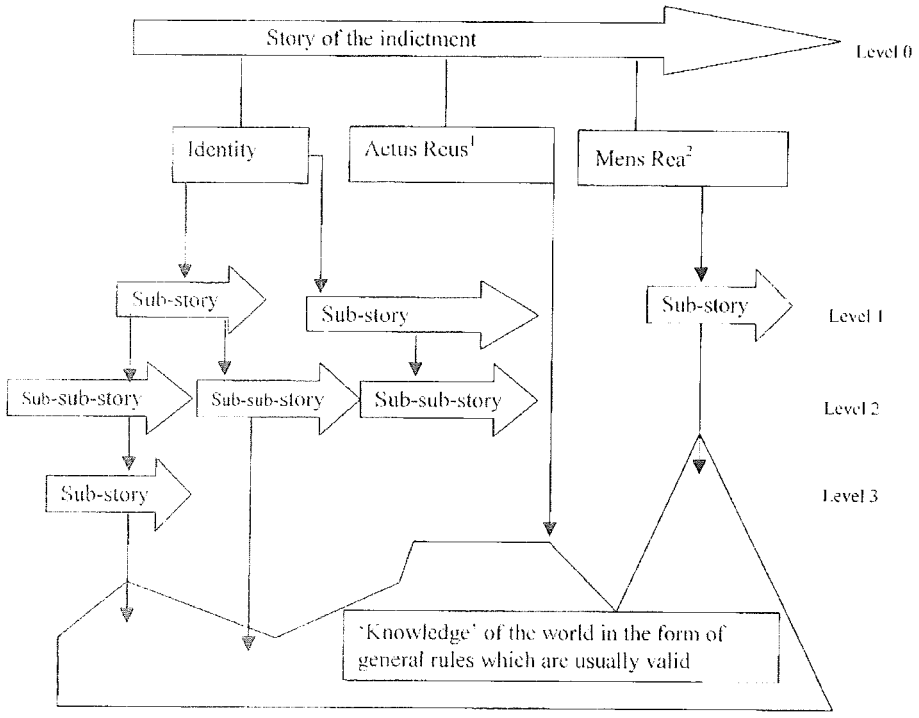

Figure 2.2 Based on a Representation of Wagenaar's (1996) 'Anchored narratives' p. 269 where [1] refers to the unlawful deed and [2] refers to the guilty intent.

Wagenaar (1996) tested the model by considering anomalous verdict results that seemed to contradict the usual rules of evidence. The sample of cases considered were actual trials where the defendant was convicted, then acquitted on appeal. In a small scale study, the judicial construction of identity of the perpetrator, was used as a framework for the examination of narratives. Processing of the evidence continued until the narrative coincided with the "knowledge of the world" expressed through generally accepted beliefs. To the extent that processing was not exhaustive, proceeding only as far as required to reach an "anchor" point, this model could be viewed as a heuristic one.

The relevance of this model for the present studies lies mainly in its application of a story construction approach, along with the endorsement of individual experience as a determinant

of interpretation in an English legal context. Applied to sentencing, anchoring might suggest the operation of stereotypes or simplifying strategies for classification of 'typical' offences or offenders, as magistrates attempt to organise the abundance of information with which they are often presented.

2.1.2.3 Prospect Theory

Kahneman and Tversky (1979) provided a descriptive theory of general decision-making called Prospect theory. This focused on situations of persuasion, negotiation and bargaining, features which might arise in the judicial context, as three magistrates attempt to arrive at a single acceptable sentence. The theory dealt with the effects of *framing*; the importance of presenting the problem in a particular light and the influence that exercise may have on the choice that will be made. Two other phenomena were said to coexist that might affect the choice. The first concerned the *certainty effect*, whereby excessive weight was given to outcomes that were considered certain/reliable, at the expense of those where the outcome was less sure. The other was the *reflection effect*, when the preference reversed between two alternatives, depending on whether the outcome was seen as a gain or a loss.

Habits, experience and norms influenced the framing perception, the construction of the 'problem' and choices available. In general, they found that the decision indicated a preference for certainty when the outcome was positive but more inclined to opt for risk when there was a possible chance of reducing losses.

This approach could easily lend itself to the process whereby magistrates choose between sentencing options. The choice may be affected by the way in which the 'problem' is framed,

the sentencing aims identified and the estimates of successfully achieving those aims, according to the disposal chosen and individual biases.

However, this pre-supposes that the sentencing objectives in a specific case are clearly understood and agreed among the decision-makers. Sentencing policy based on individual philosophic and moral principles, derived from legislation but susceptible to political advice, alters from time to time, at least in the priority it accords to the possible objectives. Von Hirsch and Ashworth (1992) discussed the interpretation of the objectives of sentencing for an offence in terms of

- retribution/ punishment/just desserts,
- incapacitation,
- deterrence of the individual or other people who might be tempted to commit the same offence
- rehabilitation

and the effectiveness of various disposals in achieving each end. The guidance provided by the JSB in the training material for the CJA (2003) draws attention to the enshrinement in statute, for the first time, of the purposes of sentencing in the Act. These are similarly identified as:

- punishment of offenders
- reduction of crime (including reduction by deterrence)
- reform and rehabilitation of offenders
- protection of the public
- reparation by offenders to persons affected by their offences

(Although there appear to be five rather than four purposes, reparation may stand alone but must always be considered, in addition to the other disposals).

Prospect theory, is considered subject to a number of 'shortcuts' and biases (Semin and Fiedler, 1996). Availability, Representativeness and Anchoring are referred to when heuristics are discussed.

2.1.2.4 Frames of reference

The work of Lawrence (1988) attempted to model magistrates' sentence decision-making as an example of experts' problem solving techniques. Magistrates' prior perspectives were called 'Frames of Reference' that "define a problem space, set limits on what it contains and focus attention on its features," p. 231. These interacted with procedures for making sense of the data and generating solutions.

Lawrence (1988) considered that the sentencing decision could be represented as a conditional choice of the IF-THEN variety, which led to a structural equation:

IF ⟶ THEN ⟶ THEN

Frames of reference & External constraints	Information (inferences {Judgement & Sentence})

This study recruited Australian stipendiary magistrates. Fifteen participants were, therefore, working in a foreign, but very similar, jurisdiction and represented a wholly professional, rather than lay, group of practitioners. The data came from magistrates' accounts of their own cognitions. Procedural steps were shown in the centre of the diagram below, with the possibility that frames of reference might intrude at any point in the process. Drawing on previous studies, potentially influential framing perspectives were identified by Lawrence

(1988) as penal philosophies or the decision rules of individual judges. Together with the immediate sentencing objectives, a judge's view of the severity of a particular crime and the definition of the judging role, in relation to a particular case, these comprised the intermediate frame on the diagram. The outside perimeter of the model illustrated the environmental constraints that may interact with a magistrate's processing - statutory limitations, legal constraints and pressure of caseloads, for example. The three concepts were considered interactive in responding to external forces, structuring one's own processes and in choosing and transforming case details.

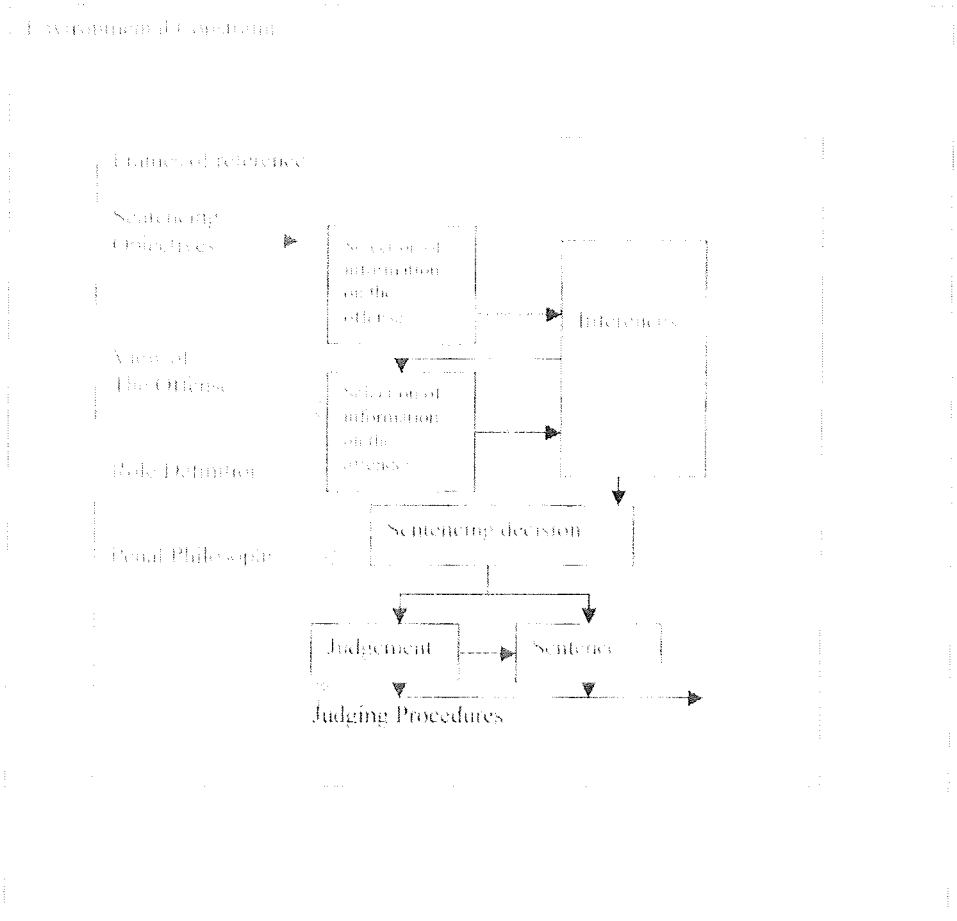

Figure 2.3 Model of Judicial Processes Lawrence (1988, p. 233), in Chi, Glaser and Farr (1988), *The Nature of Expertise.*

The model was applied to analyse how two experienced magistrates and a novice attempted to solve three simulated case studies. Material was read to participants, based on real cases and file data provided, as in a 'real case'. The participants made verbal responses for record and transcription. Lawrence endorsed the appropriateness of this approach with this sample for reasons of sensitivity and conformity to normal court proceedings.

Results showed variation between the sentencing decisions of the experienced and novice magistrates. The experts' intentions and perspectives differed and influenced the types of inference that they made. Experts were more willing to regard the defendants as individuals, to be dealt with according to circumstances, whereas the novice worked to a tariff approach. Differences between types of magistrate were apparent, both at the level of objectives brought to a case and inferences made and, also, on the sentencing solutions they contemplated. Further, experience provided the experts with patterns for reducing work-loads and led to similar goals and perspectives on different types of offence in this small sample.

The study is useful because it provides insight into a successful approach to the process of sentencing and a methodology for collecting the type of data that the present studies wish to examine. Again the difference between experts and novices was highlighted and the areas in which these differences may be most marked. The small sample size is, perhaps, a further reflection of the problems of accessing this group and the amount of time a researcher may expect sentencers to wish to invest co-operatively. Frames of reference fit naturally into the general decision-making literature of schemata and automatic processing.

2.1.2.5 Schemata

According to Fiske & Taylor (1991), schemata were, essentially, narrative ways of representing expectations and their effects based on assumptions that we make. They provided apparently absent information, so that a scenario was more easily understood through scripts that deal with likely sequences of events and a schema that "fills in the blanks" where ambiguities persist. The more automatic was the schema invoked, the more closely the process of accurate consideration blended into a heuristic attempt to reach a "good enough" understanding. This was endorsed in the work of Farrell & Holmes (1991), who studied legal decision-making from a social and cognitive perspective. They reported that those involved in the process, the Court actors, internalised crime stereotypes as cognitive schemata that provided a shorthand for information processing in a system characterised by time and resource constraints.

As the need for accuracy increased and the costs of error multiplied with adverse implications for other people, Neuberg & Fiske (1987) suggested that the use of automatically cued schemata was replaced by an increased attention to the data. This ensured that the most accurate interpretation was achieved as features of the event were individuated. According to Fiske & Taylor (1991), processing moved from a top-down, conceptually driven activity, heavily reliant on one's organised prior knowledge to a preference for a bottom-up consideration of the features of a particular scenario, a transition that might be replicated for magistrates as they wrestle with cases of increased complexity.

Their model represented a continuum of processes, moving from initial categorisation, organising the information about a person or a situation around the already internalised features of a prototype or by comparison with an exemplar, proceeding to confirmatory

categorisation, followed by re-categorisation and then piece-meal integration. This can be contrasted with the consideration of all the individual pieces of information available, each of which must be evaluated before any understanding of the event is achieved. There was also evidence in the work of Fiske & Taylor (1991) that the use of schemata had implications for the way in which information was encoded, retained in memory and the inferences drawn.

2.1.3 Heuristics Models (Outcome directed with limited process insight)

Five heuristic approaches were examined.

2.1.3.1 Fast and Frugal

Dhami and Ayton (2001) studied the decision-making strategies of English magistrates through an examination of their decisions on Bail i.e. the conditions upon which a defendant is released pending a return to court. Contrary to their, sometimes professed, indications that they take all the available information into account, the results showed that magistrates appeared to make decisions based on a relatively small number of information cues.

The researchers combined simulation case studies based on hypothetical scenarios to compare the predictions, as to whether punitive bail decisions would be made, with actual decisions. Eighty-one magistrates from forty-four courts participated, with a 30% response rate to requests for the completion of the postal questionnaire. Court observations were also undertaken.

The results compared the predictions of judgement analysis techniques with those of a simple matching heuristic referred to as a 'fast and frugal' model, based on the "information search, stop and decision-making" format suggested by Gigerenzer & Goldstein (1996). The flowchart

shown below provided a pictorial representation of the decision-making process, as the participant searched the cues to inform his/her decision.

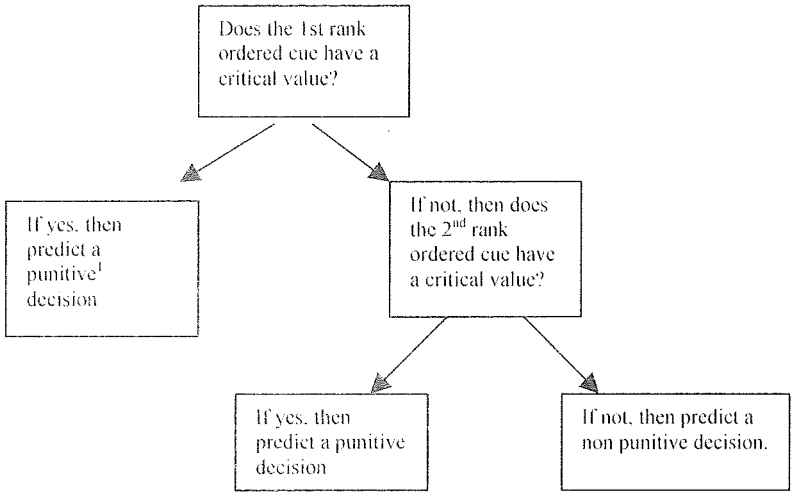

Figure 2.4 Flowchart for the Matching Heuristic that searches through a maximum of two cues. (Dhami and Ayton, 2001)

N.B. a punitive decision includes the with-holding of bail or the imposition of conditions on bail.

Results showed that the number of cues used in a decision ranged between 1 and 1.67 with a mean of 1.1, with previous convictions and bail record being the most influential information. In 75% of the decisions, magistrates used only one cue, 21% relied on two cues and the remaining 3% searched for 3 cues above the critical value, before making a decision. A comparison with the predictions made using two mathematical compensatory integration models indicated that the matching heuristic, characterised by non-compensatory processing of information, performed at least as well, and in some cases better, than the alternatives.

While the model presented an appealingly simple strategy for the resolution of Bail decisions, it is more difficult to anticipate how it could be adapted to accommodate the multi-faceted choices available to a sentencing Bench. Ranking for the competing aspects of offence

seriousness with offender mitigation and diverse sentencing aims is likely to vary with case and individual sentencer, with priorities altering throughout. However, the study does relate to a sample similar to that which the present study needs to access, so indications of participant recruitment and response rates is of assistance.

Additionally, Dhami (2002) examined the effect of Bail Information Schemes on Bail decisions. Of interest was the observation that concurred with Corbett (1987), regarding the equivalence of studies of individual magistrates making decisions on hypothetical cases as an indication of their group/Bench activity in real cases. Dhami (2002) considered that this was in line with the psychological research on small group decision-making that demonstrated how groups, like individuals, are inconsistent and simple in their decision-making strategies.

2.1.3.2 Availability heuristic

Tversky & Kahneman, (1974, 1982) discussed the "Availability" heuristic that may lead to inaccurate estimates of prevalence or association between observations and even to counterfactual thinking. Availability was related to the ease or speed with which associations were generated between events, based on individual experience, that may or may not be typical. Resorting to stereotypes as shorthand to represent the participants in an activity was likely to be influenced by their availability, c.f. Fiske and Taylor (1991) and Farrell and Holmes (1991). Errors and potential unfairness would be implicit in that type of processing.

Counterfactual thinking occurred when observers were presented with a statement of how an event took place. If it appeared easy to construct numerous scenarios that would have avoided the adverse consequences, the observers tended to heap more blame on a transgressor than if the outcome was less easy to supplant in their imagination and an air of inevitability was

reinforced. Wiener and Pritchard (1994) argued that counterfactual thinking affected the decision-making process in legal judgements of negligence claims. In the present sentencing scenario, defendant culpability may be increased as less damaging outcomes, in the circumstances described, are conjectured.

2.1.3.3 Elimination by aspects

Tversky (1972) discussed the 'elimination by aspects' model as an example of a non-compensatory decision model. This author felt that the assumption of simple scalability in probabilistic analyses of choice was inadequate. Instead he suggested, in reality, an elimination process was taking place. The process of choice took place in stages, with a particular aspect in focus at each stage. As the alternatives were considered, those that did not satisfy this aspect were eliminated. The process proceeded to the next aspect on a weighted consideration, again eliminating alternatives, until only one remained.

This appears to be almost a descriptive version of Dhami & Ayton's (2001) mathematical heuristic. The process can be terminated early if the aspect selected for consideration is weighted so far ahead of other aspects, that it permits the early elimination of many of the alternatives. Within the context of the Bail study, for example, if the possibility of repeat offending is prioritised, then a consideration of other aspects such as witness protection or failing to return, need never be addressed. If no conditions can be imposed to satisfy this concern, the possibility of release will, effectively, be eliminated and a decision made after consideration of a single aspect.

If the model were to apply to a sentencing exercise, the information in the pre-sentence report is often couched in just such a manner. Alternative sentencing options are considered but

discarded on the basis that they fail to meet the objectives of the report's author. In this way, the sentencer is being encouraged to follow the same logic in eliminating alternatives and accept the recommendation of the report. However, Ranyard (1976) found that the predicted consequences of this representation of decision-making were violated when the aspects considered were not truly independent.

In determining whether an individual will undertake a thorough examination of all the available information, analytical and intuitive decision-making may be distinguished. The former, involves slow data processing, with high levels of control and high awareness of that processing while the latter is characterised by rapid, limited consideration of the available material. Potentially related to their Need for Cognition, (discussed later) individuals differ in their preferred mode (Kokis, Macpherson, Topiak, West and Stanovich, 2002; Sjoberg, 2003) Even then, the individual may adapt his/her choice of operation to reflect the particular circumstances and nature of the actual decision required. So on a busy day, or towards the end of a sitting, the preferred processing mode may alter, according to the nature of the decision required. However, Hammond, Hamm, Grassia and Pearson (1987) provided evidence to suggest that intuitive and quasi-rational cognition often out-performed analytical cognition in terms of accuracy, so there is no intrinsic reason to suppose that one approach is necessarily better than the other.

2.1.3.4 Costs –Benefits analysis

Zakay (1990) drew attention to the role of personal tendencies in the choice of decision-making strategies. He used a contingency model developed by Beach & Mitchell (1978) for the selection of decision strategies, based on a cost-benefit analysis. Decision-makers were assumed to be motivated to choose the strategy requiring the least investment for a satisfactory

solution. However, this model failed to take into consideration any personal characteristics of the decision-maker. Zakay chose two decision strategies, a compensatory and a non-compensatory process, one an example of a MAU model and the other simpler from a cognitive point of view and less time consuming. He found that a basic tendency toward a specific type of decision strategy influenced the choice of decision strategy in scenarios presented for consideration. Tendencies, he considered, derived from past experience and, perhaps, personality traits. Further, Zakay found support for the contention that decision-makers shift to simpler strategies under time pressure.

2.1.3.5 Other Heuristics

(a) Representativeness is defined by Semin and Fiedler (1996 p. 48) as "the tendency to assess the probability that a stimulus belongs to a particular class by judging the degree to which that event corresponds to an appropriate mental model." For the defendant in criminal proceedings, this heuristic risks cognitive error such as insensitivity to prior probabilities. Recourse to inaccurate stereotypes or schemata, may lead a sentencer to draw conclusions or make inferences about a defendant for which there is no factual basis. Applied in a legal context, Luigio, Carroll and Stalans (1994) discussed the way in which judges used their prior knowledge about crime and criminals to gather, interpret and integrate case facts into a consistent story.

(b) Anchoring and adjustment is an additional heuristic indicated by Tversky and Kahnemann (1974) whereby initial responses serve as an anchor for subsequent considerations. Similar in approach to the work of Wagenaar (1996), (see Descriptive models (2.1.2.2)), Semin and Fiedler (1996), commented that it risked two distinct aspects for potential bias. Firstly, the

anchor identified may not be relevant and secondly, the adjustment as new material is considered may be insufficient.

2.1.4 Other approaches to sentencing

2.1.4.1 Sentencing scales and sentencing severity

Kapardis and Farrington (1981) worked with a sample of English magistrates to develop a sentencing severity scale, (Kapardis, 1985). This was used, along with the results of a sentencing exercise, to suggest case features of importance, in predicting the sentence. Sentencing was undertaken as individuals and in triads. Results linked the severity of the sentence with the severity of the offence. Male offenders of higher social status, with a previous record of offending attracted more severe punishments but the age, race, plea and prevalence of the offence appeared not to have significant effects. Further, sentencing decisions on real and simulated material were similar and groups were likely to be relatively more severe than individuals in their decisional choices as expected, (see previous references to group behaviour – polarisation, risky shift, para. 2.1.1.1).

This study is important to the present research in three respects. Firstly it is a large study of practising English magistrates undertaking a sentencing activity (168 participants) so can inform the methodology, secondly it develops a sentencing severity scale in a manner that will inform the present study. Thirdly it endorses the equivalence of simulated and actual case decisions. However, it looked for predictor variables within the offence and the offender and was not concerned, primarily, with characteristics of those choosing the sentence.

2.1.4.2 Sentencing, consensus and process

Corbett (1987) explored sentencing behaviour in magistrates' courts, in terms of the degree of consensus achieved in their sentencing choices, among the members of each of the courts represented in this study. Data were collected in a simulated sentencing exercise, primarily designed to examine the differential effect of gender, socio-economic status, and ethnicity of the defendant on magistrates' and court clerks' sentencing decisions. Each magistrate, acting alone, previewed seven written vignettes. Three of these were subsequently the subject of group discussion and decision, generating reasons for the choice of sentence and the sentencing aim.

Corbett (1987, p. 206) found "little evidence to suggest that group effects during Bench deliberations provided a steadying influence by reducing the range of sentences chosen." There was little support for the idea that court clerks or senior justices acting as chairmen, influenced their Benches to promote internal consistency among sentencers. Corbett (1987) looked at the relative proportions of aggravation and mitigation within the reasons given. She found that as the proportion of aggravation increased, the severity of sentencing also increased but there was variation among sentencers, in the interpretation of material as either mitigating or aggravating.

Shapland (1981) cast doubt on the strict reliance on the reasons given as the actual reasons for a decision and Fitzmaurice and Pease (1986) challenged the closeness of the stated reasons and the behaviour. However, this study "found a fairly linear pattern between favourable and unfavourable observations and sentence severity", (Corbett, 1987, p 212). Corbett (1987) rebutted the argument that the use of written material such as this is so far removed from reality that the validity of the results is challenged. There were some relevant observations

regarding the influence of the PSR on the sentencing choice – more influential with magistrates than legal advisors – and the influence of the legal advisors themselves on the magistrates' decision. As the legal advisors made more punitive choices generally, they might be expected to 'steer' the magistrates towards harsher disposals.

This study is of particular interest because it used the written record of reasons provided for a sentencing decision to assess the interpretation of aggravation and mitigation. Further, it attempted to relate this assessment to the severity of the sentencing choice, employing a 'penal ladder' representation of sentencing severity scale.

2.1.4.3 Sentencing and the use of 'Reasons'

Gilchrist and Blissett (2002) explored magistrates' attitudes towards sentencing cases of domestic violence. Using a similar methodology to the previous study, self-completion questionnaires generated quantitative demographic data about the sample of participants, along with the sentencing responses for six vignettes. Reasons for the sentencing choice were also recorded and used to inform a qualitative discussion of the justification for different responses. A variety of disposals was represented in the sentences considered appropriate, categorised at three levels of severity only – fine, probation and custody. Results indicated that extra-legal factors appeared to affect magistrates' decisions. The qualitative discussion of the 'reasons' allowed the researchers to elaborate on these factors. Age and the gender of those imposing the sentences did not appear to have an effect on sentence. As indicated in the Corbett (1987) study, some confusion was apparent in the interpretation of information as aggravating or mitigating. Some examples of magistrates attempting to construct explanations for the behaviour suggested elements of the story-telling model discussed previously.

2.1.4.4 Integrating different approaches

Carroll, Perkowitz, Lurigio and Weaver (1987) sought to pull together different approaches to sentencing within an organising framework that moved from general concepts to specific outcomes in a legal context.

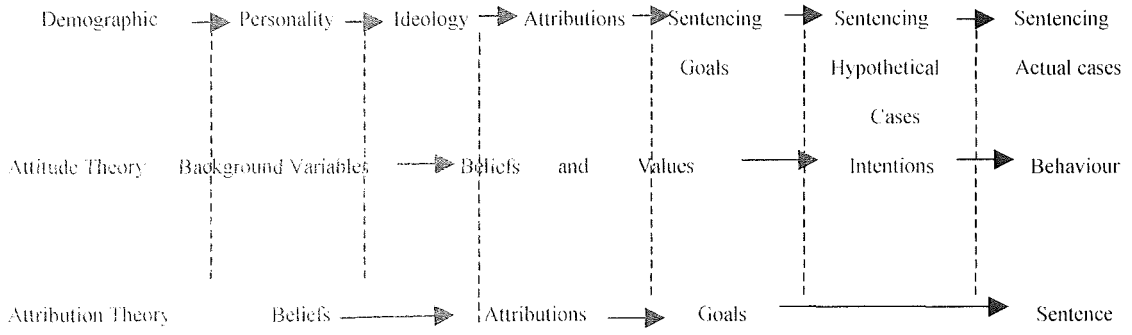

Figure 2.5 Framework for individual differences in sentencing, after Carroll et al., (1987 p109)

The authors looked for analogies between the different features represented in three approaches: individual differences; attitude theory; and attribution theory. Grid lines were used to indicate bands within which similarities in the structures at different stages could be recognised.

Drawing on the work of Alker and Poppen (1973), elements of Attitude theory, Attribution and socio-demographic information could be considered to arise within co-ordinated groups or resonances that created a framework for sentencing activity. Measurements of individual differences that included sentencing goals, attributions, ideology and personality variables, identified two groups. One comprised conservative and moralistic elements: a tough punitive stance toward crime; belief in individual causality for crime; high scores on authoritarianism, dogmatism and internal locus of control; lower moral stage; and political conservatism. The other grouped various liberal elements: rehabilitation; belief in economic and other external

determinants of crime: higher moral stage and belief in the powers and responsibilities of government to correct social problems as characteristics of the members.

The value of this work to the present study was two-fold. Firstly it provided a unifying framework for apparently distinct approaches to decision-making. Secondly there was an endorsement of the search for individual differences that impacted on sentencing and suggested a relationship between them. Variables were identified as relevant to the sentencing task, especially the personality traits of authoritarianism and locus of control which are developed later. It demonstrated their inter-relationship with political ideology and causal attributions. As in previous work the difference between student participants and an 'expert' group with more relevant knowledge and experience was explored. Variations in the strength of the associations were found, but broadly similar resonances could be demonstrated. Among these the centrality of causal reasoning was apparent which also featured in the 'story' model discussed above.

2.1.4.5 Difficulties

Several authors have written, generally, about the difficulties that need to be addressed in devising a model for legal decision-making.

Hawkins (1983) drew attention to the special role of legal discretion in what he suggests is "an immensely complex matter." (p.7). He described the legal process as one shaped by "decisions made in a dynamic, unfolding process... terminating at various salient points", (p. 7). He was critical of much of the early quantitative analyses of sentencing based on a 'black-box' model of stimulus and response. For him, it failed to represent, adequately, the inherent complexity of the task, unable to inform the reader of how the process of connecting the input and output

was being undertaken. He observed that the task was one of imposing order on the data relevant in a case through techniques of simplification, presumption, characterisation and patterning. More insight was required into how people treated material as relevant knowledge and how they processed it towards a decision. Further their interaction with others in the system - fellow decision-makers, similar defendants, supporting staff - may be important. All of this suggests that there may be scope for a qualitative approach to hear the views of the decision-makers themselves on the subject, in addition to any quantitative methods.

Lloyd-Bostock (1988) wrote of sentencing as an example of an 'open' problem-solving task, in that the criteria for the 'right' decision were not clear. She referred to the moral dimension in sentencing as an additional complication in judging the 'rightness' of a sentence, since it might introduce potential conflict between proportionality and sentencing aims. Limitations on the information, its probabilistic nature, the time available for a decision, all combined with the cognitive capacity of the individual to challenge the objective of identifying the 'best' sentencing choice. She suggested that experience was influential in the process. Representing decision-making as a skill-based task falling somewhere on a continuum according to how automatic it was, she considered that as legal decision-makers gained experience the process may become increasingly internally autonomised, as situations were reproduced or essential elements of a case replicated (c.f. Fiske & Taylor, 1991). By contrast novice decision-makers did not possess the same repertoire of rules and categories. She suggested that most of the time, sentencing fell around the middle of the automatic spectrum but varied with the acquisition of experience. She referred to the work of Lawrence and Homel (1986) which reported the responses of a judge/participant as suggesting "... a patterned expectation which was activated as soon as the charge was read" (Lloyd-Bostock, 1988, p63). Judges themselves represented this 'automatic' aspect of their acquired skill "... as an intuitive process, using

terms such as 'instinct', 'hunch' and 'feeling'", (Ashworth, Genders, Mansfield, Peay and Player, 1984, cited in Lloyd-Bostock, 1988 p 63).

Lloyd-Bostock doubted that the provision of reasons in explanation of a decision was any more than a justification of what had already been decided. Further, the explanations of their own decisions by decision-makers often reflected no more than their private theories about the mechanism. However, she indicated that all decision-makers were likely to employ simplifying strategies of some kind to cope with the demands of the task, lending support to suggestions of heuristic processing on occasions.

Lovegrove (1986) provided encouragement for the type of research anticipated when he wrote of the importance of conducting studies within experimental psychology to advance judicial sentencing policy and practice. He addressed some of the particular challenges of attempting to study human behaviour in this applied area,

> "... characterised by complex and authoritative (non-psychological) rules, when the subjects are intelligent and socially powerful enough to be capable of critically evaluating the research and controlling its future... ", p. 254.

He expressed the view that the standard format and approach of empirical psychology

> "... was not consonant with the structure and operational characteristics of sentencing.", p. 254.

Further, its acceptability relied on the extent that,

> "... the research (was) faithful to the structure of legal thought, examine(d) legally salient issues and (was) not at variance with the conventions of the law", p. 255.

Like Lawrence (1988), Lovegrove worked, mainly, within an Australian jurisdiction. He referred to the need to capture the interaction of case fact, policy and penalty while recognising the impact of legal principles and conventions on the scope for change in practice, as a consequence of the findings. Lovegrove (1986) criticised the work of Konečni and Ebbesen to the extent that it ignored the connection with sentencing policy and assumed too high a degree of uniformity between sentencers, whereas, he commended studies that

> "... concentrate on understanding and emphasising differential decision-making...", p. 257.

Commenting on the value of simulation versus actual practice, he felt that fictitious case studies were an acceptable aspect of judicial training. Case details could be made to replicate real life cases and better control of the variable under consideration was achieved. Mathematical correlational analysis, using multiple regression techniques was the most common approach to link evidence and penalty. Lovegrove (1986) raised a concern that it should include *all* the elements necessary to give

> "... the most accurate, comprehensive and comprehensible representation of the tariff (approach to sentencing)", p. 261.

Following the observations of Lovegrove (1986), there is encouragement to use simulated material and explore individual differences in the sentencers but caution as to the limitations of regression analyses. Even with accurate identification of all the factors, the implications for sample size may prove challenging.

The review has indicated a wide variety of approaches to decision-making in general and particular adaptations that have been applied in the area of different examples of legal decision-making. Collectively these studies suggest models that have been successfully

applied in a legal context, along with their limitations and considerations that need to be taken into account in planning how to study the process and outcome of sentencing.

2.2 Individual Differences

The consideration of different approaches to legal decision-making has already produced some indications of individual differences in the decision-makers that researchers have attempted to measure in order to detect an effect, (Pennington and Hastie, 1986; Filkin, 1997; Carroll, Perkowitz, Lurigio and Weaver, 1987; Lawrence, 1988; Farrell & Holmes, 1991; Corbett, 1987; Gilchrist and Blissett, 2002; Lloyd-Bostock, 1988, Lovegrove, 1986). Other studies will now be considered where identified differences appear to indicate an effect on legal decisions, commencing with English studies concerned with sentencing, before considering work in other jurisdictions. Generally, no study explores a single issue but the review looks first at the socio-demographic differences mainly, then studies in which two personality traits, Authoritarianism and Locus of Control have featured regularly in psycho-legal work and occasionally Need for Cognition. No previous work on the five- factor model of personality in a legal context was found, so reports of studies on similar or relevant behaviour in a wider context were examined to inform the hypotheses that were constructed in the next chapter. Some studies, also, refer to the type of decision-making model that was applied or appropriate measuring instruments, with indications of limitations in the methodology for work in this field.

2.2.1 Socio-demographic characteristics

2.2.1.1 Concreteness/Abstractness and Training Effects

The extent to which differences in sentencers were reflected in their decisions, was considered by Lemon (1974). This early study examined the effect of training and experience on sentencing behaviour, the effect of the personality trait of concreteness/abstractness and the influence of certain attitudinal characteristics on the sentencing process.

Concreteness/abstractness was described as a trait which influenced the way in which individuals organised and interpreted material, concreteness being associated with such characteristics as a high need for structure, conformity to rules, low diversity, intolerance of ambiguity and a tendency to "closed-mindedness" (Lemon, 1974) and abstractness the converse. Interviews were conducted using simulated cases presented for magistrates to indicate what sentence was appropriate, and factors that had been considered relevant to the decision. Instrument scales for the measurement of judicial attitudes and the personality dimension of concreteness/abstractness were administered.

Comparisons between newly appointed magistrates and those with more experience showed that magistrates tended to become more punitive with initial training. Untrained magistrates placed greater emphasis on the character of the defendant than experienced magistrates, placed less emphasis on multiple offences taken into consideration and failed to discriminate between the nature of current and previous offending. 'Concrete' magistrates were more punitive than those who scored more highly on 'abstractness', but the extent of the difference appeared to vary with the type of case. 'Abstract' magistrates made more complex interpretations of the material that influenced their sentencing behaviour. While judicial attitudes varied between the two groups, concrete and abstract, training appeared to encourage more punitive attitudes.

Lemon (1974) speculated that the increased punitiveness was a consequence of Bench acculturation but the relationship between attitudes and sentencing behaviour was weak.

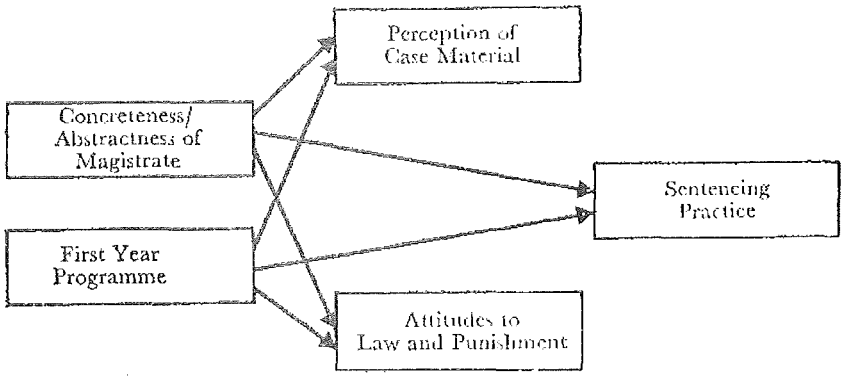

Figure 2.6 Diagrammatic representations of the major conclusions Lemon (1974).

n.b. the 'First Year Programme' represents the criterion for trained/untrained condition.

With this observation, models based on attitude research, such as Theory of Reasoned Action (TRA) (Fishbein and Ajzen, 1974; Ajzen and Fishbein, 1980) and its refinement, Theory of Planned Behaviour (TPB), (Ajzen, 1988) would not appear to be strong candidates for application in this domain. The indication that at least one personality dimension and training affected sentencing practice is useful. However, the study is over thirty years old, training arrangements have been formalised to a greater degree. This is, now, a compulsory, on-going requirement and the conclusions reached should be applied cautiously to current practice.

2.2.1 2 Public representativeness

Furnham and Alison (1994) studied three groups - police officers, offenders and the general public – to investigate predicted differences in their attitude towards punishment, theories of criminality and pre-trial juror bias. The general public showed less extreme responses on any of the purported dimensions, although the specific nature of a crime appeared to exert subtle

influences. Police, as predicted, viewed crime as a deviation from a socially acceptable norm, advocated harsher sentences and evidenced prosecutor bias. Offenders demonstrated defence bias, were more lenient in sentencing and held a 'conflict' ideology, regarding criminals as victims of circumstance. Relevant to the present research is the portrayal of 'the general public', which the magistracy is supposed to represent. The general public group, actually, had a closer relationship with the offender group, in its general orientation towards the explanation of criminality, than with the police approach, something that may become manifest in the sentencing behaviour of magistrates. (For an overview of empirical work on public attitudes, generally, to crime and punishment, see Wood and Viki, 2004.)

Furnham and Alison (1994) used the Juror Bias Scale (JBS) developed by Kassin & Wrightsman (1983) as a predictive measure of individual differences in pre-trial bias. Scores on this measure are moderately correlated with the Internal-External dimension of Locus of Control, but more highly correlated with measures of Authoritarianism. Another instrument, the Conflict-Consensus Attitudes and Beliefs Scale appeared to measure degrees of concrete-abstract belief systems. However, neither instrument was included in the present research. JBS was rejected because, although it addressed a similar construct, a version of The Legal Attitudes Questionnaire (LAQ) more directly measured Authoritarianism in a legal context and was less verdict-oriented. Lemon (1974) did not support a strong relationship between attitudes and sentencing outcome when the dimension of concreteness/abstractness was examined, so this trait was not pursued. While cognitive complexity was of interest, an alternative measure, Need for Cognition, was applied. LOC was investigated but was measured directly, using an instrument specifically devised for this variable. Thus, the study made predictions about how magistrates might respond to crime, if they were indeed

representative of the public and suggested variables around which predictions about the outcome of their responses might be constructed.

2.2.1.3 Other socio-demographic factors

Darbyshire (1997) considered some of the popular rhetoric on the recruitment and practice of magistrates and the extent to which it appeared to be justified. Further, she was interested in the competence of their legal advisors and their influence on the process of magistrates' decision-making.

Darbyshire (1997) endorsed the view that magistrates conformed to the demographic stereotype of "... too white, middle class, Conservative and, I would add, old", p.863. The study reported serious under-representation of ethnic minorities, particularly in cities with concentrations of non-whites in their population. Further, magistrates were predominantly middle class according to residential and anecdotal evidence. This was combined with reported difficulties in recruitment, the predominance of self-reported Conservative supporters in the political profile and an age distribution that was heavily biased towards to the older age groups. All of these aspects challenged the extent to which magistrates as a group could, properly, be considered representative of their communities. Darbyshire (1997, p. 866) was especially critical of the selection process that had been described as a "self-perpetuating oligarchy." Further, *she* represented magistrates' attitudes as too favourable to the police and the evidence they provided and too ready to convict, applying an imperfect understanding of the burden and standard of proof in contested trials. Writing at a date before legal professional qualifications were mandatory for legal advisors, Darbyshire (1997) was sceptical about the quality of advice that LAs provided and their appreciation of the legal limits of their role. The

proposed study will need to be alive to the biases that have been alleged in the magistracy overall and also the potential for interference in the sentencing process by the legal advisor.

Bond and Lemon (1981) observed variations in sentencers' choices associated with their court experience. Studies of the effect of the sentencer's gender on the outcome have been variable. Oswald and Drewniak (1996), in a study of male and female judges working in German courts, reported no difference in the punitivity of their sentencing when considering a case of petty theft. Examination of their attitudes towards punishment, generally, through consideration of their offender-society orientation was undertaken. Contrary to some studies, no preferential concern for individual offenders was observed among the female judges participating, nor was there difference in their intentions to punish. However, the higher their orientation towards society, the more the intention to punish increased across the sample, men and women. This observation may have relevance in the features of offending taken into consideration by some magistrates. Kapardis (2003) cited several studies investigating the relationship between sentencing severity and the gender of the sentencer (Myers and Talarico, 1987; Bogoch, 1999; and Ebbesen and Konečni, 1982) but concluded that the evidence was inconclusive as to whether men or women were more lenient.

Hood (1972) investigated variations in the overall rates of imprisonment in 12 courts across England, for offenders convicted of property offences. He concluded that the differences could not be explained, wholly, by the differences in the offenders. Bench policy and social characteristics of the magistrates *and* the offender affected the decision. Shoham (1966), in a study of Israeli courts, concluded also, that attitudes and disposition of the individual judges affected the sentencing process but neither study was specific in identifying or measuring the variables that they had suggested might contribute.

Davis, Severy, Kraus and Whitaker (1993) looked for personality variables, beliefs, and demographic factors that might assist in predicting the sentencing tendencies of individuals working within the American juvenile justice system. All participants (N=1030) had experience in a variety of professions involved with young people coming before the courts. Along with other personality traits, an abbreviated version of Rotter's I-E scale measured LOC and Cacioppo, Petty and Kao's (1984) scale was used to measure Need for Cognition. The researchers scored the answers on Likert scales, accepting reduced coefficients of reliability for their edited selection of items in the interests of variety and questionnaire manageability.

The results of a simulated sentencing exercise found significant correlations between ten of their fourteen variables and participants' estimate of sentencing severity, averaged across the four different offences considered. The variables included sentencing goals, external LOC, causal orientation, cognitive complexity, attitudes towards women and harm to victim, perceptions of seriousness, offender prognosis, age and education. A full model based on a forward step-wise regression procedure was developed, in which all the variables were entered.

The estimate of seriousness of offence, harm to the victim and prognosis for the offender were the most important indicators of sentencing severity. Together with measurements of community type, age, sex, years in occupation, education, sentencing goals, evaluation of crime causation, Need for Cognition (NC), LOC and attitude towards women the predictor variables could explain 19% of the variance in sentencing across the crimes presented. The specific crime related beliefs, primarily perceptions of seriousness and offender treatability, were the best predictors, in agreement with the work of Ebbesen and Konečni (1975). There

was some variation in the relationships according to the type of offence, particularly related to sexual offences, where the personality/demographic variable made a bigger contribution.

The concept of resonances, as in Carroll et al. (1987), was applied to identify coherent patterns among the variables. A liberal group of individuals, believing in rehabilitation, external causes of crime, a positive prognosis for the perpetrator, with non-traditional views of women, sentenced moderately. A further two types of conservative individuals shared beliefs in the value of punishment and believed in internal causality of crime. Sub-groups with differing attitudes to women, different needs for cognition and beliefs about seriousness were identified with divergent levels of sentencing severity.

While regression analysis was considered in the present study, a very large number of participants would be necessary. If the recommendations of Tabachnik and Fidell (1989) are followed, this study covers the numbers of variables generously but had access to the participants through their professional Associations. Nevertheless, it supports the value of exploring LOC and NC as contributing variables in sentencing disparity and, to a lesser extent, education, age and gender, identifying suitable measuring instruments. In the choice of offences to consider, too much variation was related to the sexual nature of the offences chosen here, so this should be avoided in the selection of research material. Patterns of co-existing groups of attitudes within a system of beliefs and their implications for sentence severity were noted. However, the results should be regarded with the caution appropriate to any collected in a different jurisdiction, specifically focused on young offenders, evaluating simulated case vignettes, using participants who are not actually members of the judiciary.

Socio-demographic characteristics were identified in some of the American work on jury selection as a means influencing the verdict. The effect of the pre-dispositions of certain occupations, different genders, race-ethnicity, appearance, social status, religion, marital status and age were discussed by Fulero and Penrod (1990) in the context of different types of crime. Many of the studies cited are more than 50 years old and appear to relate to stereotypes that might now be considered irrelevant. Much of the work is anecdotal without objective measures in place, and without the capacity to test how rejected jurors might have voted to influence a verdict.

A review of empirical tests of the efficacy of scientific jury selection summarised the work as providing modest support to link demographic and personality variables and verdicts, explaining approximately 5-15% of the variance. The type of case was again identified as relevant to the degree of influence, especially of the demographic factors, and the importance of the legal factor related to the strength of the evidence was noted. Authoritarianism featured as a relevant measure in more than one study (Moran and Comfort 1986; Cowan, Thompson and Ellsworth, 1984, cited in Fulero and Penrod, 1990), along with an indication that cognitive processing may be having an effect (Moran and Comfort 1986). The authors recommended the use of the 'story model' as a tool for further analytical research.

2.2.1.4 Professionalism

Diamond (1990) looked for sentencing outcome differences, related to the lay or professional status of magistrates practising in London. Structured interviews were conducted with lay and stipendiary magistrates (now referred to as District Judges). This approach informed the methodology of Study 2. Using simulated case study material, sentencing and bail decisions were explored. Working with assistants, observations in courts were undertaken and archival

data examined. Following Kapardis and Farrington (1981), a sentencing severity scale was used to make comparisons, an approach that was adapted for the current research in Study 1. Again, multivariate analysis was used, regressing the identified case variables on the judgement of sentencing severity, to explore the contribution of each. Findings indicated that, in comparable cases, when factors such as criminal record of the offender were controlled, the sentences of the lay magistrates were, in fact, slightly more lenient than those imposed by the stipendiaries.

In respect of the lay magistrates, Diamond (1990) demonstrated associations between increased sentence severity and those with additional legal training, based on the decisions of lay magistrates who happened to be legal professionals. No relationship with increased experience (explored in Study 1) was found and there was no evidence that panel/group decisions were more lenient (in contrast to Kapardis and Farrington, 1981). Professional magistrates were more likely than lay magistrates to report that they considered the community view an important factor in their sentencing approach. Professionals identified general deterrence as an important sentencing aim, more often than lay participants did. Diamond concluded that lay magistrates had an increased concentration on the needs of the offender, over those of the community at large.

As justices are encouraged, increasingly by JSB/SGC guidance, to be specific in their aims, which may embrace more than one objective, and tailor sentencing to achieve these aims, divergent views in this respect are likely to be reflected in both the nature and severity of the punishment. This emphasis on sentencing aim was not so explicit at the time of the data collection so that 'reasons' forms had to be adapted, to give participants an opportunity to

indicate what they wished to achieve in their sentencing decisions. It was also followed up in the structured interviews to explore participants' views in this respect.

This study, taken overall, represents a good example of mixed methodology that has been demonstrated as successful in obtaining results along similar lines of enquiry to those pursued in the present research. It had the advantage of LCD sponsorship to recruit participants, especially professional magistrates, additional research assistants to help with data collection and access to court records, not normally available. It endorsed the application of a sentencing severity scale, although some of the positions and discriminations in the scale might be challenged, so an original derivation in the current research seems appropriate. The use of case study material and semi- structured interviews to explore attitudes and interpretation of evidence was informative.

The conclusions, regarding the leniency of lay magistrates, contradicted the findings of Hogarth (1971). He studied a sample of Canadian magistrates and found that, actually, the lay participants were more punitive than their legally qualified counterparts. However, the circumstances of their appointment and daily activity are very different to those in the English system, underlying the importance of drawing conclusions within comparable jurisdictions.

2.2.2 Personality traits

2.2.2.1 Authoritarianism

Boehm (1968) indicated, in research to develop criteria for juror selection during voir dire examination, that a person's liberalism- conservatism attitudes had a systematic effect on the way s/he behaves as a member of a jury. Associating conservatism with authoritarianism she

considered that conservatives would be more prone to convict. A measuring instrument was developed that had psychological and legal validity and relevance, the Legal Attitudes Questionnaire, (LAQ). Application with a student sample demonstrated that Authoritarians were more ready to convict, made tough "errors" and showed differences in the reasons given by those whose biases influenced their verdict choice. Authoritarians seemed prone to using subjective impressions of offender character to guide their decisions.

Mitchell and Byrne (1973) considered the interaction between general attitude similarity of jurors and defendant with verdict decisions and explored the impact of juror authoritarianism on decisions to acquit. The authors suggested that those with similar attitudes would be more reluctant to convict and that in sentencing the defendant, authoritarianism would be negatively related to favourable decisions. They relied on the definition of authoritarianism provided by Adorno, Frenkel-Brunswick, Levinson and Sanford (1950) of individuals who were

> "rigid and intolerant... having the tendency to condemn, reject and punish those who violate the conventional values." (cited in Mitchell and Byrne, 1973, p. 124).

These authors hypothesised that individuals who scored highly on Authoritarianism would be more likely to find a defendant guilty and would sentence a guilty defendant more severely than would individuals, whose score on Authoritarianism was low. This would support the findings of a study by Snortum and Ashear (1972) who had examined the relationship between authoritarian personality characteristics and sentencing severity, finding that high authoritarians were significantly more punitive than low authoritarians.

Mitchell and Byrne recruited a student sample and measured their initial attitudes on a range of topics. The participants, then, made decisions on an alleged case of theft, perpetrated by a student 'defendant' whose attitudinal preferences in respect of a selection of items from the

same topics were represented in a personal statement. This was provided to participants, along with an 'explanation' for the 'offence'. Authoritarianism was measured using an instrument developed by Byrne and Lamberth (1971), so that the subjects could be assigned to one of two groups, authoritarian/egalitarian, according to their score. Offender attitudes were manipulated to test for interaction effects with the attitudes of the 'sentencers' in each group. In both groups attitude similarity was found to affect evaluative responses but egalitarians did not allow this reaction to influence their judicial decisions. Jurors with dissimilar attitudes tended to punish the offender more severely, indicated by their choice of sentence in a written response questionnaire.

Werner, Kagehiro and Stube (1982) studied authoritarianism through a series of experiments conducted to distinguish between the inability to disregard information and biased disposition, as explanations for the trial decisions. The authors used the same definition of authoritarianism and the instrument developed for Mitchell and Byrne (1973) to measure this trait for individual participants. They focused on the effect of introducing incriminating or exonerating inadmissible evidence to a case study, along with the Judge's instructions to ignore it. Results supported a pro- and anti-defendant bias rather than a differential cognitive ability model. Authoritarian subjects were more likely to convict, whether incriminating evidence was admissible or not and could be characterised by an anti-defendant bias that influenced their responses. Finding no indication that there was a difference in initial dispositions of authoritarians and non-authoritarians, Werner et al. (1982) concluded that, authoritarians perceived the extra evidence as more incriminating and gave it extra weight, leading them to convict the defendant, more readily.

Similarly, Solana, Garcia and Tamayo (1998) found evidence of the link between authoritarianism and bias, affecting juror verdicts. Their studies focused specifically on legal authoritarianism, (LA), for which a measure was developed. This embraced the same considerations of authoritarianism as before, but cast it in a legal context with an emphasis on law-abiding behaviour, civil rights and responses to control by the police/legal authorities. This was used to explore the relationship between this personality trait and the interpretation of evidence, including the usefulness of this variable to predict verdicts. Locus of Control, (LOC), and Dogmatism were also examined as potentially influential variables.

To measure LA, these authors used two instruments; a version adapted from the Revised Legal Attitudes Questionnaire (Kravitz, Cutler and Brock, 1993) and the Juror Bias Scale (Kassin and Wrightsman, 1983), with Rotter (1966), for the measurement of LOC. A student sample was presented with two written vignettes for them to indicate a verdict decision, then interviewed about their responses. Step-wise multiple regression of the personality variables, with verdict as the dependant variable was undertaken. Results supported a linear relationship with the variables chosen, with LA as the most predictive, followed by LOC. The interaction of LA with verdict choice demonstrated that those low on LA were less likely to find the elements for conviction within disputed evidence.

The findings were broadly in line with those of Narby, Cutler and Moran (1993) who conducted a meta-analysis of the association between Authoritarianism and jurors' perceptions of defendant culpability and its usefulness in predicting verdict decisions. Their work considered the type of measuring instrument used, traditional authoritarianism or specifically legal authoritarianism, with Narby et al. (1993) commenting that while "there is substantial overlap... the constructs were not completely redundant." p36. They also examined subject

type, presentation medium of the trial and type of crime, as moderators of the effect in a range of 20 studies. They concluded that measurements of legal authoritarianism did indeed correlate more highly with predictions for legal behaviour, in this case verdict choice, than measures of authoritarianism generally. Further, those high in LA perceived the defendant as more culpable, leading to conviction. LA, in preference to traditional authoritarianism, was more strongly correlated with verdict than other factors but each had some effect. The effects were more marked in samples as the realism of participants and presentation increased within the studies.

Although this work focused on juror activity, it is not hard to anticipate how it might relate to the work of sentencing magistrates. In their description of the characteristics of high authoritarian personalities, Narby et al. (1993, p.34) referred to their

> "tendency to hold conventional views; submit to strong leadership, act aggressively towards deviants and out-group members and believe in the rightness of power and control, whether personal or societal".

This replicated the co-variation of elements of Right Wing Authoritarianism (RWA) studied by Altmeyer (1981, 1996); submission, aggression and conventionalism, which referred to a similar construct but cast it in a political context. Hogg and Vaughan (1998, p. 338), too, considered the Authoritarian personality had characteristics

> "such as respect and deference for authority and authority figures, obsession with rank and status, a tendency to displace anger and resentment onto weaker others, intolerance of ambiguity and uncertainty, a need for a rigidly defined world..."

Previous findings had indicated a relationship between moral reasoning and political orientation, the former influencing the latter. Emler, Renwick & Malone (1983) challenged

the direction of the association. They investigated the alternative possibility that inherent individual differences in adult moral reasoning reflected differences in the content of their politico-moral ideology. Results of their study with an undergraduate sample, self defined as left-wing, moderate or right-wing indicated that left-wingers achieved considerably higher scores on moral reasoning tests than either of the other two groups.

Whichever direction the influence is exerted, the main relevance for the present studies is the association between extremism of whichever type and different levels of development in moral reasoning. Further if extremists with a Right Wing orientation can be identified, certain attitudes would be anticipated in their approach to the sentencing task. These attitudes would be expected to impact on the cognitive processes of the sentencer, as s/he interpreted information about the offender. They might also affect the way in which individual sentencers interacted with each other and the Legal Advisor or applied the guidance that they received on structured decision-making.

Altemeyer (1996) felt that the element of submissiveness was central to authoritarians' decision-making capacity. He anticipated that, compared with others, they would not spend much time examining evidence, thinking critically, reaching independent conclusions or testing these conclusions against their beliefs for compatibility. In relation to the present studies these would all represent deficient approaches to sentencing, likely to generate less than optimal decisions as magistrates attempted to reconcile conflicting pieces of evidence or depart from conventional guidance. In support of these assertions, the work of Wegmann (1992, cited in Altemeyer, 1996), concerned with observations of juror processing of evidence following a trial was especially relevant, linking high scoring RWAs with poor critical thinking appraisal test scores. Biases in the judgement of the sufficiency of evidence were

reported with disagreeable conclusions given more scrutiny than those for which the evidence supported a conclusion that Authoritarians found more palatable. In the sentencing group Authoritarians might, therefore, be biased in their original judgements and harder to persuade, if a proposal different to their own was made. High authoritarian individuals were considered especially vulnerable to the Fundamental Attribution Error, discussed previously, over-emphasising the role of personal factors, over situational factors when trying to explain a person's actions. This would have the effect of imposing a similar disadvantage on a defendant as that which a sentencer of high internal LOC (see later) might determine.

2.2.2.2 Locus Of Control

Hogg and Vaughan (1998) believed that LOC was an influencing factor on behaviour. They considered that individuals differed in their predisposition to make a certain type of causal attribution for behaviour. Those with internal LOC were likely to consider that the cause of the behaviour, their own or that of others, was under the control of the individual. Externals considered that situational factors played a more important role in the explanation of behaviour. In a sentencing context this would be likely to influence the degree of personal responsibility ascribed to an offender. Schneider and Hough (1995) considered that LOC was one of the personality traits not easily accounted for in the five-factor model that, nevertheless, allowed useful predictions in relation to job performance. Furnham and Alison (1994), Davis et al. (1993) and Kravitz et al. (1993) referred to it as a variable relevant to studies of legal decision-making, predictive of decision-making severity. Osborne Rappaport and Meyer (1986) investigated the relationship between LOC and the severity of sentence imposed by a group of 'mock' jurors. They found that internally-controlled jurors were, indeed, more severe.

2.2.2.3 Five factor model of personality traits; NEAOC[1]

Carver and Scheier (1992) identified seven perspectives on personality, 1) dispositional - individual traits combining to provide consistent behavioual patterns, replicated over time, 2) biological – genetic, biochemical/physiological characteristics that influence behavioural responses, 3) psychoanalytic, 4) neoanalytic, 5) learning, 6) phenomenological, 7) cognitive self -regulation. While each has its proponents, Furnham and Heaven (1999) believe that in recent psychological research, trait theory has been the most popular and represents, essentially, the dispositional perspective that Carver and Scheier (1992, p. 130), also, refer to as " the most fundamental."

Pervin (1996) argued that there were three distinct traditions within personality research. The clinical approach involved the systematic, in-depth study of individuals. Its strength lay in the richness of data, limited by the reliability and testability of hypotheses. It focused primarily on the abnormal. The second approach was correlational, looking at statistical relationships. However, these were only as useful as the validity of the measures devised to generate the data allowed and, of course, gave no indication of causality. Thirdly, the experimental approach involved the manipulation of variables in an attempt to test for causal relationships. The present studies intend a combination of approaches to exploit the merits of each.

In an historical review of personality research, Goldberg (1993) traced the development of the "Big Five" Factor structure, the trait approach that he regarded as the most comprehensive model of personality, with growing acceptability among researchers. Although derived from different perspectives, some based on adjectival classification, others generated by questionnaires that had been factor analysed, he observed that the multiplicity of factors

[1] NEAOC and OCEAN refer to the same 5-factor model of Costa and McCrae (1985; 1992)

apparent in other such models could, on re-analysis, be accommodated within the dimensions of this more parsimonious structure. The labelling attached to these factors varied a little but there was agreement around the essential nature of the factor, if the factors were regarded as hierarchical.

The first indication of a five-factor model came from the work of Fiske (1949), but was not followed up at that time. The debate continued around the merits of Cattell's sixteen factors, Eysenck's two (Extraversion/Introversion, Neuroticism/Stability) and later three (Psychoticism) dimensions, Peabody's three factor interpretation (Evaluation, Potency and Activity) and Gough's Californian Psychological Inventory with 10 scales based on folk concepts and other combinations. Thanks primarily to the work of Norman (1967) and Digman in the early 80's, numerous researchers became increasingly persuaded that five elements represented the most basic, yet comprehensive, descriptors of personality.

Derived from a three-factor questionnaire measure to explore Extraversion, Neuroticism and Openness to Experience, the work of Costa and McCrae developed to accommodate the ideas of Goldberg. The result operationalised the Big Five dimensions, retaining the initial three factors and grafting on for inclusion, a further two – Agreeableness and Conscientiousness in a questionnaire, popularly referred to as NEO-PI, the Neuroticism, Extraversion, Openness – Personality Inventory, Costa and McCrae (1985). Goldberg (1993) considered that using the framework of NEO-PI, the authors had been successful in integrating the findings of a number of other personality questionnaires. These included MMPI – the Minnesota Multiphasic Personality Inventory, developed mainly as a clinical diagnostic tool, the EPQ – Eysenck's Personality Questionnaire and the Myers-Briggs Type Indicator which derived from a more psychoanalytical, Jungian approach.

Each of the personality questionnaires continues to have its enthusiasts. Lord (1996) considered Cattell's 16 PF to be a comprehensive assessment of temperament, providing a detailed analysis of personality. He observed that it continued to be one of the most widely used questionnaires in occupational assessment in the UK. While not, himself, accepting the resolution into five factors, Cattell's 16 PF contains many of Costa & McCrae's subsidiary factors and may be amenable to hierarchical simplification as Cattell's global factors. Eysenck continued to argue that no more than three factors existed. However, some researchers have found that aspects of some of his primary determinants overlap and others can be broken down further to replicate a five-factor solution. Draycott and Kline (1995) compared EPQ-R and NEO-PI and found some evidence for the interpretation of the Conscientiousness measure as a facet of Eysenck's Psychoticism. Digman (1990) preferred to regard Psychoticism as a blend of low Conscientiousness and low Agreeableness.

The successor to NEO-PI, the revised NEO Personality Inventory (NEO PI-R) (1992), replaced it as a fully integrated instrument, with some items amended, for the measurement of the five domains, each with six facet scales, as follows;

Neuroticism (N) facets: Anxiety, Angry Hostility, Depression, Self-consciousness, Impulsiveness, Vulnerability.

Extraversion (E) facets: Warmth, Gregariousness, Assertiveness, Activity, Excitement-seeking, Positive emotions

Openness (O) facets: Fantasy, Aesthetics, Feelings, Actions, Ideas, Values.

Agreeableness (A) facets: Trust, Straightforwardness, Altruism, Compliance, Modest, Tender-mindedness.

Conscientiousness (C) facets: Competence, Order, Dutifulness, Achievement Striving, Self-Discipline, Deliberation

Based on the NEO-PIR questionnaire, an abbreviated, 60-item version, NEO Five Factor Inventory, NEO-FFI, was developed, to provide a quicker evaluation of the main domains. This instrument was used in the Study 1 to measure the five traits in what is increasingly referred to as the OCEAN model of personality. It was chosen for parsimony, economy of time, comprehensiveness and general acceptability. The details of this instrument are discussed in the methodology section of that study.

2.2.2.3.1 NEAOC and the type of work

In the context of a study concerned with the personality traits of lay magistrates, working in a judicial capacity, the following experimental studies have relevance. Related to the likelihood that particular personality types would be represented in such a sample, Costa, McCrae and Holland (1984) found that investigative vocational interests were most highly correlated with Openness. Extraversion related to positive thinking, rational action and a lack of restraint. Age, sex and education correlations on NEO-PI were very low, implying that the results were independent of demographic variables. Tokar, Fischer, & Subich (1998) reviewed the literature between 1993 and 1997 on personality and vocational behaviour, using the 5-factor model as a framework for personality. They reported links between personality and choice related processes (i.e. job searches, aspirations, attitudes and values, maturity and decision-making).

Neuroticism, Extraversion and Conscientiousness emerged most frequently in associations with vocational behaviour, of which the magistracy may be an example. Comparable with Costa et al. (1984), the most consistent links for both sexes, were positive associations of Openness with artistic and investigative interests. Less consistent and less strong were positive correlations of Agreeableness with social interests and Conscientiousness with

conventional interests. On this basis, the nature of the work undertaken by the magistracy, might be expected to attract individuals with marked characteristics on these traits.

2.2.2.3.2 NEAOC and political affiliation:

Political affiliation has until now been a prime indicator of social balance and features in the selection procedure for magistrates. Findings that connect personality factors with political beliefs may have predictive value for the type of decisions that the individual makes or the way that s/he responds to a colleague, when discussing sentencing options. Cockcroft (1996) used the Five-Factor model to relate personality structure, right wing authoritarianism (RWA) and moral reasoning. He found positive correlation coefficients between RWA and Conscientiousness and to the law and order stage of moral reasoning. Further, RWA correlated negatively with Openness and stages of moral reasoning associated with conscience and principles. Results showed that those high on RWA were, overall, more susceptible to social influence but low RWAs were more differentially responsive to an authority reference group.

Van Hiel, Kossowska and Mervielde (2000) used versions of NEO-PI-R to investigate the relationship between the Openness to Experience dimension of the five-factor model and political ideology. Results, again, showed significant negative correlation between Openness and Right Wing political ideology in a sample of Belgian adults and a separate student sample. Caprara, Barbaranelli and Zimbardo (1999) observed that in a political context, centre-right voters displayed more energy and slightly more Conscientiousness than centre-left voters, whose dominant personality characteristics were Agreeableness (Friendliness) and Openness; Emotional stability was unrelated to either group. This relationship between individual differences and personality and political preferences was not influenced by the demographic

variables of voters' age, gender, age or education. They concluded that personality dimensions had proved to be stronger predictors of political preference than any of these other standard variables. Whether that makes political affiliation a reliable and useful indicator of social balance and a valuable tool in the selection of magistrates is already under challenge but the association with dimensions of the five-factor model may be invoked to generate hypotheses around sentencing behaviour.

2.2.2.3.3 NEAOC and decision-making

It can be argued that decision-making of the type represented in sentencing is a task requiring a level of intellectual ability. The work of LePine, Hollenbeck, Ilgen and Hedlund, 1997, who studied general cognitive ability (g) and Conscientiousness as key resources for hierarchical decision-making in teams, is therefore pertinent. Results showed that decision accuracy was highest when the leader and team were conjunctively high in (g) and Conscientiousness, and that the reaction to the weakest member differed, according to the nature of his deficiency – those low in (g) were helped whereas those low in Conscientiousness were ignored. Again the implications for the quality of individual and group sentencing activity is obvious.

Meyer and Winer (1993) identified a positive relationship between Neuroticism and the level of indecision in an undergraduate sample, similarly noted by Milgram and Tenne (2000) who, also, linked Neuroticism with decisional procrastination and Conscientiousness with task avoidance procrastination. The work of Chartrand, Rose, Elliot, Marmarosh and Cardwell (1993) examined three models relating the Big Five, problem-solving appraisal and decision-making style with the antecedents of career indecision in a sample of college students. Neuroticism, again, proved the strongest predictive influence of any of the Five, was associated with problem-solving deficits, a dependent decision-making style, and both

informational and affective antecedents of indecision. Olsen and Suls (2000) looked for a relationship between the Big Five personality dimensions and participants' responses to decisions in risky and cautious situations. They found that people high in Openness made more extreme self-and ideal- judgements on risky dilemmas. Some sentencing choices might be considered representative of this category. People high in Agreeableness made more extreme, socially valued judgements across risky and cautious dilemmas. People high in Conscientiousness made more extreme ideal judgements on cautious dilemmas, suggesting that personality influences people's perception of risk and caution, with implications for the sentence of choice for each type of individual, in the circumstances described.

2.2.2.3.4 Need for Cognition Linked to NEAOC and decision process:

The nature of the sentencing task may present different degrees of challenge to different individuals so that they undertake it in characteristically different ways. Sadowski and Cogburn (1997) found significant positive relationships between Need for Cognition, (NC), (Cacioppo and Petty, 1982), and Openness, associated with the willingness to entertain new ideas, and Conscientiousness, characterised by descriptors such as purposeful, organised and task-oriented. NC was conceptualised as the tendency to enjoy and engage in effortful thought, related to one's motivation to process persuasive messages. Individuals high in NC attended to the substance of communication and were less influenced by irrelevant factors, evaluating the ideas present and disregarding extraneous distracting information. NC was further, found to be negatively correlated with Neuroticism, a finding consistent with the role for NC hypothesised within the cognitive-experiential self-theory (Epstein, 1994).

Epstein considered that rational and experiential thinking were information-processing modes that influenced people's views of themselves and their worlds. He postulated that those relying

on the experiential mode have more diffuse self-concepts and are more prone to emotional shifts. Thus those low in NC would be expected to use experiential over rational mode of thought more readily, correlating negatively with the dimension of Neuroticism, with its connotations of emotional instability. Levin, Huneke and Jasper (2000) used the Need of Cognition as a tool to investigate individual differences in information processing during a decision-making task. They found that "high NC subjects processed information in a more focused manner with a greater depth and breadth than did low NC subjects and the quality of their selections tended to be higher. ... high NC subjects were more successful at adaptive decision-making". Further evidence of such behaviour might be expected to be reflected in sentencing discussions.

2.3 Overview

The literature review has suggested numerous decision models that have been applied in a variety of contexts, with a special interest in those that have been applied to the sentencing task. Some have more intuitive appeal than others. Some relate more closely to the official guidance on structured decision-making that recognises positive and negative aspects of the information available, integrating them to make an evaluation.

There is reason to believe that no single approach is adopted universally and that individual choice may be task and circumstance specific. Therefore, an example of each type; mathematical, descriptive and heuristic will be carried forward to assist in the interpretation of the data generated in the empirical studies that are reported in Chapters 3-9. The models chosen will be based on (a) algebraic modelling, (b) the story-telling model and (c) the fast and frugal heuristic, as exemplars of each group. Apart from their intuitive appeal, these lend themselves to explanation in terms that participants can easily understand and may recognise

from their training, serving as appropriate tools for the exploration of the type of data generated in the various studies.

Previous studies have shown that individual differences among the decision-makers influence the process and outcome of legal decision-making. Evidence has been educed to justify the choice of the variables in the present studies where they have been identified as relevant in previous work or should be explored speculatively because of their appearance in related activities. In each case, the nature of the effect that they may be expected to have has been discussed. Specific hypotheses linking the chosen characteristics with aspects of sentencing are developed in Chapter 3, along with appropriate instruments for their measurement.

The importance of working with practising magistrate participants and the acceptability of using simulated case studies in the form of vignettes is well supported in previous studies. There is precedent for reliance on 'reasons' recorded in relation to sentencing decisions, to indicate the process that has been undertaken to reach a sentencing choice. Indications of some of the compromises in terms of sample size, time invested in the experimental activities and availability have been noted.

Against this background of information, Study 1 was conceived and implemented. It is reported in the following two chapters. Where the work was, subsequently, developed along alternative lines, the additional relevant literature has been introduced as appropriate.

3

Study 1 (Part 1); Measuring individual differences, profiling the magistrate sample and developing a sentencing severity scale

3.1 Introduction

Study 1 is the first of three empirical studies undertaken. The literature review developed families of decision-making models from which to choose an appropriate example to apply to sentencing activity. It identified individual characteristics that were recognised as potentially influential in sentencing or related areas. Important indications for the way in which empirical data in this area should be collected were noted, along with the limitations that exist.

Based on this literature, hypotheses are developed in this chapter that predict certain characteristics of magistrates and link their individual differences to their performance on a sentencing task.

Further, the chapter describes the methodology of Study 1. It addresses the number and type of participants that were recruited, the 'vignette' style of the sentencing exercise undertaken, the use of the 'reasons' forms to collect sentencing data, the construction of the questionnaire and the procedure undertaken.

The results of the personality and socio-demographic data on individual participants follow. This was used to determine the extent to which the sample was representative of the magistracy and, in turn, how representative the magistracy was of the population in general. The hypotheses relevant to this data were tested.

The questionnaire comprised three discrete sections. The data collected in Section 1 concerned individual characteristics and has already been referred to above. Section 2 developed a sentencing severity scale, with the results reported and discussed in the current chapter.

Section 3 was solely concerned with the sentencing activity that the magistrates undertook. The detail of that section and the results obtained were reserved to the next chapter. They are reported in Chapter 4 where the remaining hypotheses, concerned with sentencing process and outcome, were tested. Further analyses of the three cases used were undertaken there and the results discussed, along with the conclusions of Study 1 overall.

3.2 Hypotheses based on Individual Differences

The individual differences of interest to the present study comprised eight personality traits and seven socio-demographic factors. Some of the latter were of importance in providing a comprehensive description of the sample only. Those indicated below could be identified in testable hypotheses.

3.2.1 Personality Traits

The literature review identified eight personality traits that the study intended to investigate with regard to their effect on either the process or outcome of judicial decision-making,

(Chapter 2, pp 58-82). The nature of Study 1 was, to an extent, exploratory but having considered the previous work, along with the statements of desired qualities for prospective applicants (Chapter 1, para 1.3) and the nature of the activity, certain hypotheses were constructed, based on these relationships. Instruments chosen for the measurement of each trait are described in a later section (3.2.3.1).

Hypotheses were developed in respect of the following:

Neuroticism (N), Extraversion (E), Openness (O), Agreeableness (A), Conscientiousness (C) and Need for Cognition (NC)

- **Hypothesis 1**: Openness > population norm because of the investigative nature of their work (Costa et al., 1984; Tokar et al., 1998).
- **Hypothesis 2**: There will be no significant correlation between NEAOC and age (Costa and McCrae, 1992).
- **Hypothesis 3**: There will be no significant correlation between NEAOC and gender (Costa and McCrae, 1992).
- **Hypothesis 4**: There will be a significant positive correlation between Level of education and Openness (Costa and McCrae, 1992)
- **Hypothesis 5**: Conscientiousness exceeds the population norm, in view of the recruiting policy.
- **Hypothesis 6**: There will be a significant positive correlation between Conscientiousness and the level of detail recorded in the 'reasons' forms (Costa and McCrae, 1992)
- **Hypothesis 7**: There will be a significant negative correlation between Agreeableness and severity of sentence as sentencers accept mitigation with optimal effectiveness. This would be particularly likely in high-risk choices (sentencing departing from guideline indications), (Olsen and Suls, 2000), leading to reduced penalties in such instances.

- **Hypothesis 8**: Those high in conscientiousness will make more extreme decisions, evidenced by substantial departure from the norm for standard offences, than those of low conscientiousness (Olsen and Suls, 2000)
- **Hypothesis 9**: Need for Cognition and Neuroticism should be negatively correlated with each other, (Epstein, 1994).
- **Hypothesis 10**: There will be a significant positive correlation between Need for Cognition and the detail of the sentencing record (Levin, Huneke and Jasper, 2000).

Locus Of Control (LOC)

- **Hypothesis 11**: There will be a significant positive correlation between internal LOC and sentencing severity (Osborne, Rapport and Meyer, 1986).

Legal Authoritarianism (LA)

- **Hypothesis 12**: There will be a significant positive correlation between LA and sentencing severity (Snortum and Ashear, 1972; Mitchell and Byrne, 1973; Altmeyer, 1981)

(The detail of all the references appeared previously in the literature review Chapter 2 p58-82)

3.2.2 Socio-demographic variables

Socio-demographic variables have been implicated in legal decision-making in previous studies, for example, Bond and Lemon (1981), Hood (1962), Fulero and Penrod (1990). The sample will be examined for correlations between measurements of experience, gender and measures of sentencing severity or process.

Hypotheses 1, 2, 3, 4, 5 and 9 were tested with the results of the profiling data in Section 1 of the questionnaire and reported in this chapter. Hypotheses concerned with process or outcome of a sentencing decision, 6,7,8,10,11 and 12 were examined in Chapter 4.

3.3.1 Participants

Only a minority of studies have succeeded in engaging practising English magistrates, (Kapardis and Farrington, 1981; Dhami and Ayton, 2001; Corbett, 1987, for example). Very many more have used jury eligible adults or student samples, drawn from a variety of jurisdictions, to explore legal decision-making. (Moore and Gump, 1995; Caroll and Payne, 1977; Pennington and Hastie, 1988, 1986; Wiener et al., 2002; Mitchell and Byrne, 1973; Kravitz et al., 1993 represent some of the studies reported in this review.) In general, the decision under investigation in many of these studies was verdict, with conviction/acquittal as the criterion variable, providing limited insight into the process that contributed to the choice.

A few studies have involved professional legal decision-makers, mainly conducted in foreign jurisdictions, (Diamond, 1990; Ebbesen and Konečni, 1975; Lawrence, 1988; Oswald and Drewniak, 1996; Hogarth, 1971 used professional judges in England, America, Australia, Germany and Canada respectively). Differences between professionals and lay judges, (Diamond, 1990; Hogarth, 1971), experts and novices (those with no training in the activity), who may actually undertake the activity in an altogether different way, (Carroll and Payne, 1977), and the varying approaches of experts with different levels of experience have been observed, (Lawrence, 1988). Taking this into account, the present study focused on a relatively homogeneous sample in these respects; - all practising lay magistrates but with a range of experience that may be reflected as one of the individual differences in the sentencing activity under examination in the present study.

In many of the previous studies, the number of participants was small, especially when actual practitioners were involved and individual interviews undertaken, (McKnight, 1981 (9); Lawrence, 1988, (3)). Written questionnaires have recruited slightly larger samples,

(Dhami and Ayton, 2001 (81), Corbett, 1987 (149), Kapardis and Farrington, 1981, part 1 (23) for developing the sentencing severity scale which is referred to later in this chapter, and (168) in part 2, the main sentencing study).

The recruitment of participants is detailed in paragraph 3.3.3.1 and 3.3.3.2 when the procedure is discussed.

3.3.2 Materials

3.3.2.1 Vignette approach

The majority of studies have been quasi-experimental, using simulated case material, vignettes, often based on the details of real cases. The present study drew heavily on the observations of Corkery (1992), who reviewed several of the studies referred to in the literature review, within both English and foreign jurisdictions. He strongly endorsed the vignette approach, especially when the sentencing, rather than verdict, decision was being investigated. Triangulation, using a variety of approaches, was, also, encouraged. The particular ethical and legal constraints on interference or discussion of real case decisions were noted.

Of less assistance was Corkery's (1992) opinion that interviews with magistrates were of limited value "... since parties forget or distort their recollection of the deliberations", p 254. However, the present study tries to observe the development of structured decision-making through the contemporaneous completion of the 'reasons' forms and is not retrospective. Until relatively recently information in court records provided very little insight into the reasons for sentencing decisions. Practical observations were noted to be costly in terms of time and money, if the aspirations for a fully comprehensive study were to be fulfilled.

In considering the limitations of simulation studies, Corkery (1992) drew on the work of Campbell and Stanley (1963) to identify five main effects:

- History effects- other things going on during the period of the research that themselves may change the results, such as legislative variation.
- Maturation effects – training may have taken place.
- Testing effects – the act of observing actually distorts the process.
- Instrumentation effects – changes in the measurement process and,
- Differential selection of participants -volunteer or opportunity samples may differ, introducing variables other than the ones under investigation.

While each of these is a potential threat to either the internal and/or external validity of this study, awareness of the problem should allow the researcher to recognise and minimise the effect.

Corkery (1992) acknowledged the criticism of Konečni and Ebbesen (1979) that in vignette form, the information has already been "de-constructed" and is presented in isolation from the context in which it would normally be embedded. However, Corkery felt that, in practice, selection was still required according to the relevancy recognised by the participant from a repertoire of the factors under investigation by the researcher. The quantity of information available in a vignette was discussed and the risks of making the variables too visible or totally obscured in the volume of material available noted.

Moxon, Corkery and Hedderman (1992) provided further support for the sentencing exercise as a tool to explore the development in the use of compensation orders in magistrates' courts, supplemented by personal interviews.

The information available to the sentencer, in the present study was reproduced in the form and content structure, most closely approximating to the material that they were

accustomed to receive in actual court sittings at the time of the study[1]. Competing with this effort towards authenticity, however, one must be conscious of the imposition on volunteers' time and the degree of enthusiasm to co-operate that can be sustained. Hine, McWilliams and Pease (1978) conducted a study into the impact of the comprehensiveness of the information provided on the sentence imposed. The information was increased from details of the bare bones of the offence, to basic social background information, then a more complete report of the defendant's social circumstances, and, finally, a full social report, together with a sentencing recommendation. The results indicated that more information led to more consistent sentencing. When a recommendation was made by the probation officer, it was often persuasive and frequently diverted defendants away from custodial sentences. The present case studies will provide full social background information in the standard form of a Pre-sentence Report (PSR), discussing the implication of various sentencing options and their appropriateness. Further, the author concurs with Devlin (1971), quoted in Corkery (1992), that in relation to the level of detail in a simulated case study, it should be,

> "... sufficient for most people to appreciate the kind of factors under consideration and to make their decisions accordingly." Devlin, 1971:3

The merits of the different written, audio and audio/visual methods of presenting case information were considered. The experience of using anything other than written materials is extremely limited in English psycho-legal research work. In this study, the written format was followed, primarily for efficiency in distribution and management, but guided by the desire for authenticity, as indicated previously.

The nature of the cases presented in the vignettes was considered. In previous English studies, the charges were mostly indictable, but capable of being heard in the magistrates'

[1] The form of the Pre-sentence report still covers similar material but its presentation has altered.

court, with the consent of the magistrates and the defendant ('either-way offences'). Theft and assault appeared frequently, as they do in the lists of offences encountered by magistrates in their daily activity. Offences similar to these were included in the choice of cases for this study. This avoided the problems potentially associated with offences with a sexual element, for which gender effects and inconsistent sentencing have been apparent in previous work. Further, in choosing offences that regularly attract custodial sentences, the sentencing decision will be pushed towards the boundary between community and custodial penalties and should cause the magistrates to take particular care in making their choice. With prolonged deliberation comes the prospect of a more informative explanation of the reasons for the decision. These types of offences against the person and property are, according to Corkery (1992), more likely to give rise to differences in individual responses and reveal differing sentencing philosophies. The third case included in this study was an offence of driving with excess alcohol. As an act of social irresponsibility which, combined with the high reading in this case, placed the defendant again, potentially, at the community/custody boundary (at least at the time of this study), it was chosen to ensure that a full range of disposals ought to be considered.

Hood (1972) reported that, in completing the sentencing exercises in his study, some magistrates expressed doubt that their decisions accurately reflected what might happen in court, primarily concerns around not seeing the defendant and the impact that might have. In practice, with full information, the results for the 'paper' decisions in that study mirrored very closely the actual decisions in the real cases, upon which they had been based. Attempts to support the external validity in some studies were made through reference to national crime statistics (Ewart 1996). No enormous disparity was reported but caution urged in their interpretation, on account of the uniqueness of any case and the inability of the researcher to discover all the circumstances of a decision.

Corkery (1992), particularly commended the appropriateness of using vignettes in pilot work on the basis of quick, efficient feedback on preliminary hypotheses and as a complementary approach to other techniques. The vignette approach was applied successfully by Kapardis and Farrington (1981), Dhami and Ayton (2001) and Corbett (1987), working with English magistrates, so there is substantial support for its application here.

3.3.3.2 Use of 'Reasons' forms

A statement of the reasons for the choice of a particular sentence has always been encouraged, to explain why that sentence is appropriate. In the lower courts the articulation of these reasons has been limited. Such material has been successfully applied to sentencing studies by Corbett (1987) and will be used as a tool to generate data in the present study. With the advent of the HRA (1998), a more explicit statement has been available, with a prescribed format[2], to assist in drafting an explanation, based on the JSB advice for structured decision-making. Participants in the present study were requested to complete a 'reasons' form in respect of each of the three cases considered.

3.3.2.3 The construction of the questionnaire

Study 1 used a self-completion questionnaire (see Appendix 4b), approved by the Psychology Department ethics committee, consisting of three sections. It was sent, along with a letter (available in Appendix 4a) drafted in accordance with BPS ethical guidelines, to introduce the study to participants, in both the pilot and main study. For the main study, the material was provided in a stamped addressed envelope to encourage returns. Completed forms were coded for analysis, to ensure anonymity.

[2] The 'reasons' form used in this study was based on a template drafted by the Justices' Clerks Society. It was in use in courts locally, although practices varied. Adaptations were possible, provided they followed the pattern for structured decision making indicated on the JSB checklist.

3.3.2.3.1 Section 1:Instruments for Trait measurement and socio-demographic data

NEAOC

The NEO Five-Factor Inventory (NEO-FFI)[3] (Costa and Mc Crae, 1992) was applied to measure the five traits Neuroticism (N), Extraversion (E), Openness (O), Agreeableness (A) and Conscientiousness (C) represented in the five-factor model of personality. This was chosen because of its general acceptability within psychological interpretations of personality and for the comprehensiveness of the personality description generated. It was also important to consider the estimated time required for completion, an indication of 10-15 minutes for this instrument. This abbreviated version of the revised complete personality inventory, NEO PI-R (Costa and McCrae, 1992), covers the five major traits in 60 items, by selection of the twelve items in each trait group with the highest loading factor in the original questionnaire. The participant is requested to respond on a 5-point Likert scale, indicating a degree of agreement or disagreement with a statement related to the trait it purports to measure. The validity of this instrument has been tested by comparing NEO-FFI and NEO-PI-R (for which domain coefficients of reliability α ranged 0.86-0.95) and a self-descriptor Adjective scale. Costa and McCrae (1992) demonstrated convergent and discriminant validity, although it was conceded that the shorter scales were slightly less efficient. Test-retest reliability for NEO-FFI was reported to be between 0.79 and 0.83 for the five dimensions (Costa and McCrae, 1992).

The scale is considered suitable for use with an adult population aged 21 years and over, as well as student samples (Costa and McCrae 1992). Separate profile forms are available to interpret the data for men and women if required. Raw scores on each domain may be converted into T-scores that indicate where the participant falls, relative to the population

[3] Reproduced by special permission of the Publisher, Psychological Assessment Resources, Inc., 16204 North Florida Avenue, Lutz, Florida 33549, from the NEO Five-Factor Inventory, by Paul Costa, and Robert McCrae, Copyright 1978, 1985, 1989 by PAR, Inc. Further reproduction is prohibited without permission of PAR, Inc.

in general. For the current study, this information has the disadvantage that the results are standardised on American samples, with little British comparative data available. Appendix 3: Tables A3a, A3b and A3c show means and standard deviation in three independent samples. These refer to the original American results, along with data from two British samples, one of which is an adult and the other a student sample. These were incorporated to expand the data for application to the current sample.

Table 3.1 represents the combined data for men and women from those three sources. It shows similar mean values, with comparable standard deviations, for the American and British adult samples. There is some variation, notably, for the younger age group. Egan, Deary and Austin (2000) agree that the American norms approximate reasonably well to the data that they collected for a British sample.

Table 3.1 A comparative summary of the three personality results tables

Combined[3] Norms (& SD)	Neuroticism (N)	Extraversion (E)	Openness (O)	Agreeableness (A)	Conscientiousness (C)
Costa and McCrae (1992)	19.1 (7.7)	27.7 (5.9)	27.0 (5.8)	32.8 (5.0)	34.6 (5.9)
UK Retailer	19.2 (7.8)	28.2 (6.0)	24.5 (6.3)	31.0 (6.0)	33.6 (6.9)
UK Students	22.0 (6.1)	28.3 (4.7)	25.6 (5.4)	27.2 (5.7)	28.7 (4.7)
Overall Group Mean (& SD)	20.2 (7.2)	28.1 (5.5)	25.7 (5.9)	30.3 (5.5)	32.3 (5.8)

3 all figures corrected to 1 decimal place.

Need for Cognition (NC)

Need for Cognition (NC) was assessed using an abbreviated version of the original NC scale (Cacioppo, Petty and Kao, 1984), based on the work of Cacioppo and Petty (1982). The original NC scale comprised 34 items, but the authors reduced the scale to 18 items without loss of usefulness. Examination of the data from studies using the original scale led Cacioppo et al. (1984) to conclude that little internal consistency was gained by including more than the 18 highest loading items. Comparative data between the long and short version, administered to a sample of 527 American students, produced high correlation between the scores for each, ($r = +.95$, $p < .001$) and showed high internal validity (Crombach's $\alpha = .90$). (Cacioppo, Petty, Feinstein and Jarvis, 1996). Factor analysis further increased confidence in the equivalence of the two scales, endorsed by Sadowski (1992) who administered the short version in a study that identified the dominant factor and supported its gender neutrality in a student population.

In the pilot study for the present research, all 18 items were provided on a separate sheet and participants were asked to indicate whether they agreed or disagreed with the statements. This approach was modified in the full study, introducing a Likert scale similar to the original scoring system, but with only 5 points instead of 9, to conform to other material in the questionnaire.

Legal Authoritarianism (LA)

Six items based on the Legal Attitudes Questionnaire (LAQ), originally constructed by Boehm (1968), to address legal authoritarianism, subsequently revised by Kravitz et al. (1993), were identified. Although there are other questionnaires available to explore authoritarianism, Boehm (1968) set out to study the effect of a person's liberal-conservative attitudes on their behaviour as a member of a jury. Thus, Boehm's concept of authoritarianism was specifically caste within a legal context. Kravitz et al. (1993), in

devising the Revised Legal Attitudes Questionnaire (RLAQ), extended that study, addressing the three strand structure of the original questionnaire. In view of the criticisms of those authors, regarding the reliability of LAQ on Anti-authoritarianism and Egalitarianism and the overall length of the proposed instrument in the present study, only the strand representing Authoritarianism was considered. A selection of the highest loading items from RLAQ –23, an abbreviated version of RLAQ, (internal validity of 0.71), was made. This scale was chosen in preference to the Judicial Bias Scale (Kassin and Wrightsman, 1983) or any other measure of authoritarianism because of the appropriateness and wider level of support that it had attracted in similar work, (Kravitz et al., 1993; Narby et al. 1993, Cutler, Moran and Narby, 1992).

Locus Of Control (LOC)

The measurement of this trait continued to be problematic throughout the pilot studies that proceeded the main quantitative data collection. Initially, short scales, scored Likert-style, consisting of five items from Rotter's (1966) LOC scale, were chosen for reasons of consistency with other trait measurements and in deference to the overall time required for completion. Care was taken to ensure that both agreement and disagreement would be represented in the choice of answers, for questions related to both internal and external belief in LOC. Overtly political or educational context questions were avoided. However, despite piloting different selections of limited number items from Rotter (1966) and considering alternative measuring instruments (Lefcourt, 1976; Pearlin's Mastery scale, Pearlin and Schooler 1978), the alpha co-efficient for reliability remained unsatisfactorily low (<.7). For this reason it was decided to include the original Rotter (1966) scale in its entirety, and score it as a forced choice alternative, as the original, when the pilot study was extended to a full study.

Socio-demographic information

Participants were asked to provide personal information. Questions were included to identify each person within defined age bands, their year of appointment to assess experience, ethnicity, self-defined indications of religious beliefs and their importance, political affiliation, educational level and current or previous employment. Information about magistrates' experience on panels, in addition to adult court work, provided background on their experience with youth offenders, in family proceedings or on licensing activities.

3.3.2.3.2 Section 2: Development of a sentencing severity scale

Each of the participating magistrates was asked to place 16 possible sentencing disposals in rank order, commencing with the sentence that they considered to be the least punitive. These were provided as a randomly ordered list, covering disposals from discharge to committal to the Crown court for sentence. To reduce tied ranks, participants were advised to avoid assigning the same number to more than one disposal, if possible. Kapardis (1985), also, developed a sentencing severity scale, producing very similar results, allowing for sentencing developments in the meantime. However, unlike that study, when the severity scale was derived using a small sample (23 participants) prior to the main data collection, in this study, all participating magistrates (82) each provided a rank order for the disposals. Kapardis (1985) used mean ranks derived from those values assigned to the various disposals in the context of specific cases to generate a scale. Participants in this study made a more general response, unrelated to a particular case. Rather than using mean ranking scores to produce an order, frequency distributions were studied for mean, median and modal responses, using SPSS v11.5 for analysis. Comparisons were also made between the majority Bench to which the researcher belongs and the results for the rest of the participants, to check for consistency across courts but no significant differences were found.

3.3.2.3.3 Section 3: Case Studies

Part 3 contained the vignettes for the sentencing exercise, along with a 'reasons' form for each case to be completed contemporaneously. These had been adapted to provide information about aggravating and mitigating features in the conventional manner but also to indicate the sentencing aim that a participant sought to satisfy in their sentencing choice, along with an indication of perceived seriousness of the offence on a scale of 1-10.

3.3.3 Procedure

3.3.3.1 The pilot study

An initial version of the questionnaire referred to above was piloted with a sample of 22 magistrates, recruited essentially from the researcher's 'home' Bench, with two participants from another local court. Following preliminary analyses of the results, an assessment was made as to the suitability of items and case materials for an enlarged study. Modifications to NC and LOC, referred to previously, were made. Minor wording changes to assist participants in interpreting the instructions for the sentencing severity scale, (tied ranks were discouraged and the necessity to commence with the least punitive disposal was emphasised) were introduced. Following this, approaches were made to six court areas.

3.3.3.2 Main study

All negotiations took place with the co-operation and approval of the Chief Executive/ Clerk to the Justices at the various sites. Three outer London courts were recruited, along with three county divisions. Material was distributed in a variety of ways. For two Benches, the Chief executive distributed the questionnaires on a quasi-random basis to a selection of magistrates who returned them individually to the researcher, in pre-paid envelopes. Two others made the questionnaires available in the retiring room for interested parties to collect and return. In the remaining courts, one of the magistrates distributed their quota to volunteers willing to co-operate so that there was an increased personal

involvement in the return and collection of completed questionnaires. Where questionnaires were returned without being completed, these were re-cycled to alternative participants. The success in retrieving completed questionnaires was above average for a postal survey running slightly in excess of 40%. The participants in the pilot were invited to re-submit the version used in the main study, in respect of the alterations referred to above only, so that they, too, could be included in the final analysis to achieve a total of 82 practising magistrates.

Data were examined to determine the distribution of participants across courts.

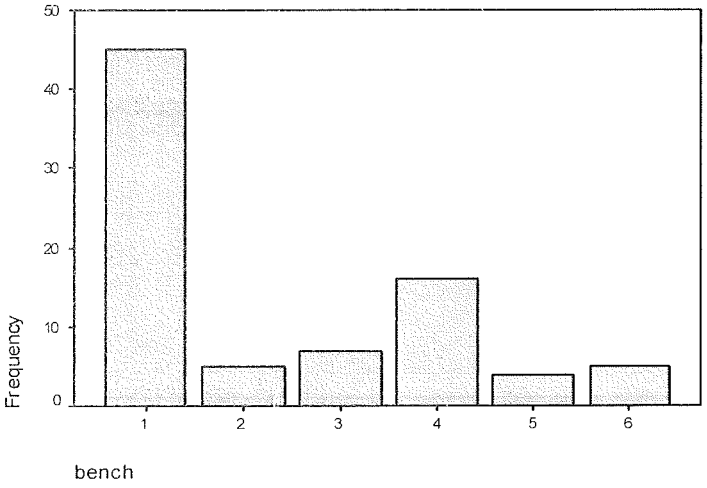

Figure 3.1 The distribution of participants in Study 1.

Six Benches were represented. The majority of magistrates came from the same London Bench as the researcher (referred to as the majority Bench 1), but all courts approached contributed.

3.4.1 Socio-demographic profiling results for the sample and its Representativeness of the Magistracy[1] nationally.

Gender

Men (51%) and women were equally represented, consistent with national statistics for the magistracy.

Age

Figure 3.2 indicates the distribution of the participants by age banding. It was apparent that those in the range 56-65 years predominated.

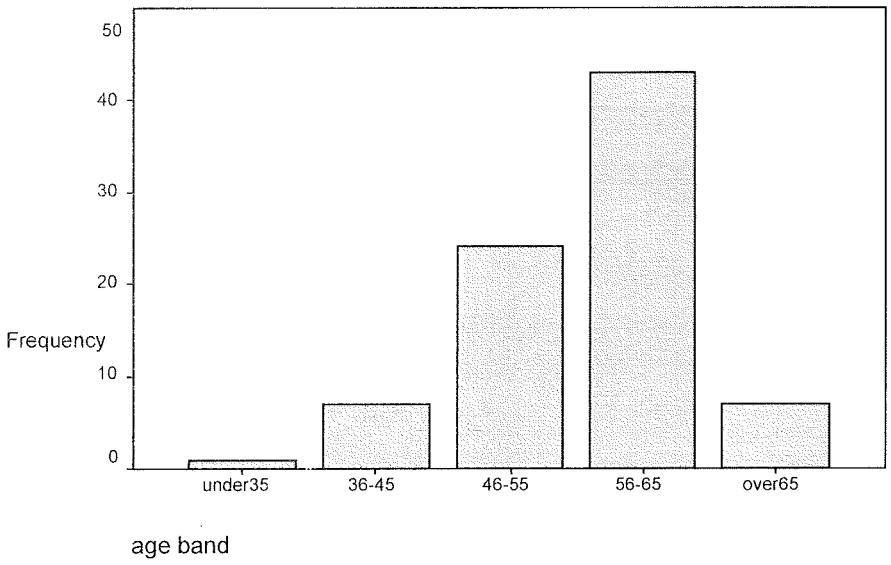

Figure. 3.2 Frequency Distribution according to Age Band

However 40% of the sample was 55 years or under, which should be compared with a national average age for magistrates of 55 years, (Times 26/5/03, article on magistrate recruitment) and a national magistracy distribution with a similar negative skew, see Table A2.1 Appendix 2

[1] All derived statistics are based on analyses as at 2003 when the quantitative data was collected.

Employment

The sample was almost evenly split between those who continued in active employment (51%) and those who considered themselves to be retired, (49%). A wide variety of occupations was represented. Three major areas of recruitment appeared to be business and commercial activity, education and a combination of Social Services with NHS employees. Personnel and civil servants were mentioned as the next largest groups. Diversity of activity was represented in farming, engineering, book editing and journalism, to name a few. A small percentage of the sample had legal qualifications and only two people chose to classify themselves as 'housewives' for their main occupation.

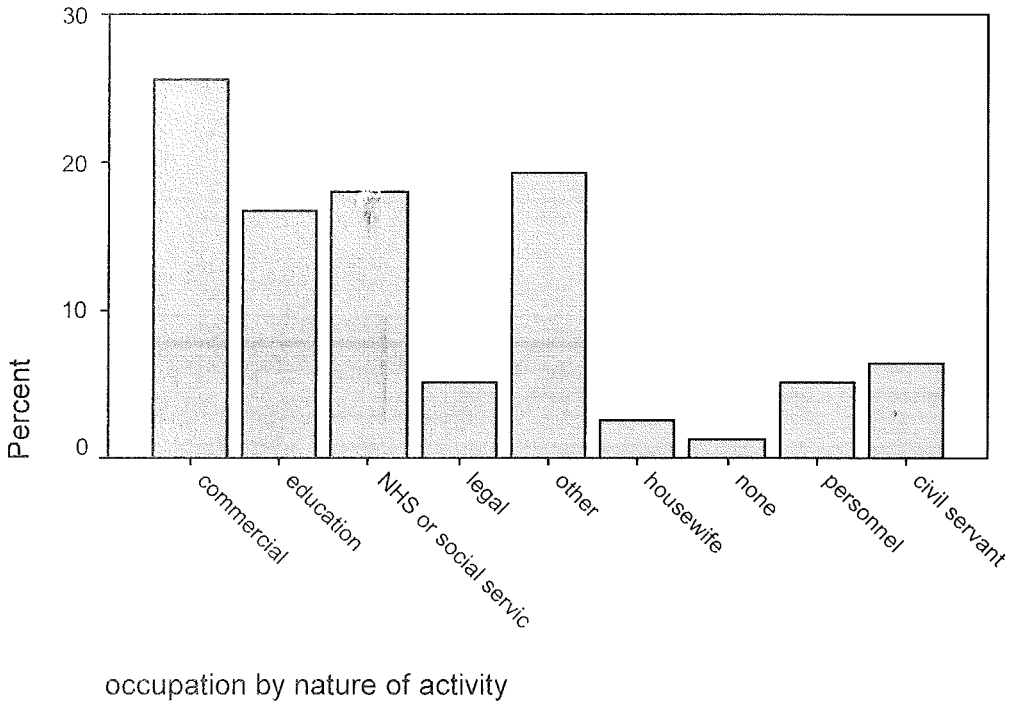

Figure. 3.3 Distribution of the main occupation groups among participants.

Experience

Distribution of magisterial experience, based on four groups, showed approximately equal representation of each of the bands of experience indicated, within the sample.

Table 3.2 Sample represented in four bands of experience

Group 1.	>15 years	23.8%
2.	10 – 15 years	26.3%
3.	5 - 9 years	22.5%
4.	<5 years	27.5%

Individual experience ranged between 36 and 1 year with a mean of 10.9, SD 8.3 years (to 1 dec pl.). There was no significant difference between mean experience for the majority Bench and the rest of the participants.

Panel membership

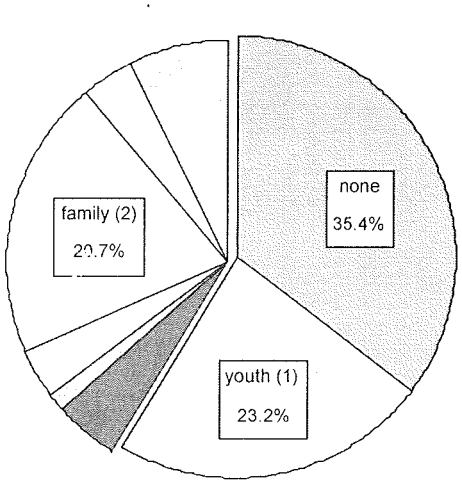

Figure 3.4 Panel membership (in addition to adult court work)

Participants were all practising magistrates in the adult court. Of these, 35.4% chose to confine themselves to this type of work. The proportions indicated had received extra training to allow them to undertake duties in the youth or family courts, in addition to their adult work. The largest unlabelled segment (7%) related to members of the licensing panel only, in addition to their adult work, while the remaining unlabelled segments represented

small percentages of magistrates (all < 5%) who practised in more than one type of specialist court.

Ethnic origin

Participants defined their own ethnicity. Of the sample, 96% was white, with 6% indicating that Jewishness contributed to their ethnic identity. Less than 4% of the total came from Black or Asian ethnic groups. Again, the figures are not dissimilar to the national statistics for the magistracy (94% white, 2% Black and Asian 3% Table A2.1 Appendix 2).

Importance of religion

Responding to the enquiry as to whether religion played an important part in their life, just over a third of the sample provided a positive response. Of these, approximately two thirds chose to describe themselves as Anglicans, with 17% each Jewish or Roman Catholic.

Level of education

Table 3.3 Shows the distribution of increasing levels of education and professional training among participants.

Level of Education	percent	Cumulative percent
Up to 16 years	7.3	7.3
Up to 18 years	8.5	15.9
University or similar	24.4	40.2
Additional professional/graduate training	59.8	100.0

Almost 60% of the sample had higher professional qualifications, beyond university level education. Less than 10% had not undergone any form of tertiary level education and only

six individuals left school at the earliest opportunity, aged sixteen years. Relative to the national average of the UK population, the level of education overall is high, indicating a sample of individuals who have demonstrated the capacity to respond to academic style training in other fields.

Political affiliation

The data were analysed to identify the political make-up of the sample. As political affiliation has hitherto been the prime indicator for social balance in recruitment, it was an important statistic in the assessment of representativeness of the sample, in overall population terms and in relation to statistics for the magistracy.

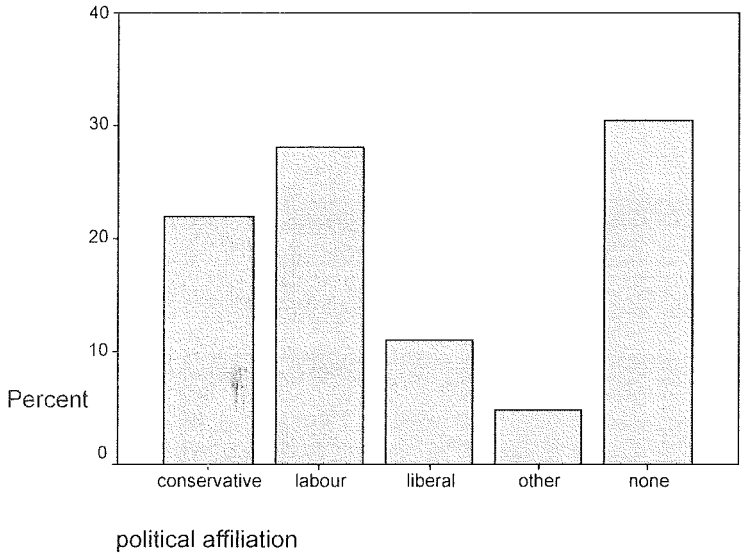

Figure 3.5 Shows the distribution of political affiliation among participants.

While Labour supporters predominated, there were similar numbers of magistrates who considered themselves to have Conservative sympathies, with Liberals also represented as shown. The balance may be slightly skewed towards the inner city type demographics of the majority Bench and the type of electorate it has. A relatively high proportion of magistrates was keen to demonstrate its independence of any formal political party. This compared with a national distribution for magistrates of Lab, 25%, Con. 34%, Lib, 13%

and no formal affiliation 22%, see Table A2.1, Appendix 2, but replicates national voting trends for the major parties in the last general election, May 05.

3.4.2 Personality Trait results and hypotheses testing

Individual traits NEAOC, LOC, NC and LA

The reliability of each of the eight trait scales was checked. Cronbach's α exceeded 0.75 (2dec.pl) in each case. The mean scores on each trait are shown in the Table 3.4 below.

Table 3.4 Descriptive statistics for the eight personality traits: LA, NC, LOC, NEOAC.

	LA	NC	LOC	N	E	O	A	C
N	82	78	66	82	81	81	82	80
Minimum	0	20	1	0	5	12	21	19
Maximum	20	65	20	30	41	41	46	47
Mean	10.35	47.29	8.80	16.00	28.51	28.56	31.39	34.85
Std.Deviation	4.108	8.702	4.062	6.545	6.159	6.215	5.465	5.375
Comparative Overall Group Mean (& SD)			*9.0*	*20.2 (7.2)*	*28.1 (5.5)*	*25.7 (5.9)*	*30.3 (5.5)*	*32.3 (5.8)*

The sample was compared with the norms available[5]. Magistrates appeared to score below the average for N suggesting emotional stability and, perhaps, self-awareness that may link with the recruiting critieria. For E, they were comparable with the norm, above average on O providing support for Hypothesis 1, comparable on A and comparable on C, contrary to the prediction of Hypothesis 5. The distributions conform to population distributions on each of the traits NEAOC, with similar standard deviations for the traits available.

[5] Figures in italics represent the average of mean scores available in Table3.1, above, for NEAOC

No comparative data was available for LA or NC as, in the former scale, a shortened version had been used and for the latter, alternative scoring had been applied. Comparative data for LOC was available, based on student populations (Julian and Katz, 1968; Phares, 1971; Parsons and Schneider, 1974) that produced an indicative mean of 9.0, suggesting that magistrates were marginally below average on this dimension.

Pearson's correlations (r) were examined for associations between the eight trait scores. Throughout a correlation ≥ .3 has been taken as an indicator of a relationship that may be important, based on the observation that anything less than this indicates that no more than 10% of the variance is being explained.

Table 3.5 Pearson correlations for the eight personality traits, LA, NC, LOC, NEAOC

LA								
NC	-.217							
LOC	.063	-.114						
N	.110	-.061	.283*					
E	.010	.115	-.110	-.375**				
O	-.515**	.618**	-.138	-.165	.233*			
A	-.053	.211	-.014	-.263*	.184	.308**		
C	-.041	.071	-.283*	-.183	.320**	-.090	.175	
(N= 82)	LA	NC	LOC	N	E	O	A	C

** Correlation is significant at the p ≤ .01 level (two-tailed)

* Correlation is significant at the p ≤.05 level (two-tailed)

Considering the traits of the five-factor model, significant correlations were noted at p ≤ .05 between N and A, E and O but were too small (< .3) to be relevant. Significant at .01 level and exceeding 0.3, the small but negative association between N and E (-.375), the low positive one between C and E, (.320) and the low positive association between O and

A, (. 308) suggested that their measurements were not completely independent (c.f. Costa and McCrae, 1992).

The large positive correlation between NC and O, (.618) and the negative one between LA and O, (-.515), both significant at $p \leq .01$, indicated associations between these dimensions that may assist in the explanation of the process or outcome of the sentencing activity, discussed in Chapter 4. NC and N were negatively correlated as suggested in Hypothesis 9 but the correlation was not significant.

Parametric analyses have generally been preferred throughout since they are more powerful in their potential to avoid Type 2 errors, the likelihood that the test will fail to detect a significant difference when the null hypothesis is false. In this work, the sample size is of an order that it should not adversely affect the power of any test when up to two groups are considered[6]. Effect sizes are reported in significant findings and alpha levels conform to convention. Where there were concerns about the validity of using parametric tests, non-parametric alternatives have also been applied.

One-way ANOVA tests were performed to look for significant differences on the personality traits LA, NC, LOC, NEAOC, related to magisterial experience (grouped into four bands, defined, as previously), age (4 bands, defined as previously), level of education (4 levels, defined as previously) or political affiliation (5 groups, as previously). Again, a power calculator[7] was consulted to make sure that the number of participants was sufficient to ensure that the power (set at .8) was adequate to detect at least medium effect sizes.

[6] Cohen's (1988) tables indicate that to have an 80% chance of detecting a medium effect size, an appropriate sample size of between 20-30 participants is sufficient.

[7] (http://www.psychnet-uk.com/experimental_design/online_calculators.htm) and Cohen (1992)

Experience: The Levene test for homogeneity of variance was not significant. The ANOVA indicated the only significant difference ($p<.05$) related to NC [$F(3,72) = 3.64$, $p = .017$]. Effect size calculated using Eta squared was medium (.13). Post hoc comparisons using Tukey's HSD tests showed that those of middle-rank experience (10-15 years) appeared to have lower NC mean scores ($M = 43.8$, $SD = 9.4$) than those who had commenced more recently (<5 years) ($M = 51.9$, $SD = 8.0$). Those of greatest experience (>15years) and those of 5-9 years experience did not differ significantly from either of the other two groups.

Age: There was no significant difference on any trait between age groups. Because of the uneven numbers of participants in the groups, the test was repeated with a non-parametric equivalent. The Kruskal-Wallis test also found no significant difference on this variable. The results provided support for Hypothesis 2.

Education: As for Experience, only one significant difference for any trait, ($p<.05$) related to Openness, [$F(3,77) = 3.42$, $p = .02$] was found. Effect size, calculated using Eta squared was large (.12). Post hoc comparisons using Tukey's HSD tests showed that the mean score for O in group 1 (up to age 16yrs ($M = 23.17$, $SD = 8.0$) was significantly different to group 4 (those with post-grad or professional qualifications) ($M = 30.10$, $SD = 5.4$). The middle two groups were not significantly different from either of the others or each other. As previously, Kruskal-Wallis test was applied. This also indicated that those with most education were significantly different to the others and exceeded their mean score on Openness, providing some support for Hypothesis 4.

Politics: A one-way ANOVA looking at the eight traits for the five political grouping found a significant difference, $p<.05$, for Openness only [$F(4,73) = 4.03$, $p = .005$]. The difference in scores was large, using the Eta squared calculation of effect size (.18). Post

hoc comparisons using Tukey's HSD indicated that Conservatives (M= 24.3, SD = 6.4) were significantly different and to either Labour (M = 30.1, SD = 6.7) or Liberal (M= 31.8, SD 4.3) supporters.

Gender: An independent T-test was performed on the two groups, males and females for each of the eight traits but no significant difference was found as predicted in Hypothesis 3.

There were no significant differences between men and women for the mean values of experience in each of the bands identified.

3.4.3 Results for the derivation of a sentencing severity scale.

Rather than using mean ranking scores as Kapardis (1985) had done to produce a scale, frequency distributions were studied for mean, median and modal responses, using SPSS v11.5 for analysis. Comparisons were also made between the majority Bench to which the researcher belongs and the results for the rest of the participants, to check for consistency across courts but no significant differences were found.

The table shows the mean, median and modal values for each sentencing disposal, together with the standard deviation. The sentencing disposals are reported in the randomised order in which they were presented to participants.

Table 3. 6 Analysis of sentencing severity ranking

Sentencing disposal	Mean	Median	Mode	SD
Fine at level C (1½ x net weekly income)	5.27	5.00	5	1.06
Fine at level B (1x net weekly income)	4.22	4.00	4	1.09
Committal to the Crown court	15.62	16.00	16	1.19
Community Rehabilitation Order (CRO)	6.99	7.00	6	1.42
Custody 3-6 months suspended	11.24	13.00	13	2.75
Custody up to and including 3 mths - suspended	9.91	11.00	12	2.62
Custody 3-6 mths	14.82	15	15	0.96
Custody up to and including 3 mths	13.49	14.00	14	1.42
Conditional discharge	2.51	2.00	2	1.57
Absolute discharge	1.16	1.00	1	1.08
Curfew order	8.87	9.00	7	2.57
Combination order (CRO + CPO)	10.28	10.00	9[a]	1.67
Drug testing and treatment Order	8.33	8.00	6[a]	3.03
Community Punishment Order (CPO) 120-240 hrs	10.17	10.00	9[a]	1.80
Fine at level A (1/2 x weekly net income)	3.18	3.00	3	1.34
Community Punishment Order up to and including 120 hrs	8.83	9.00	8	1.82

[a] Multiple modes exist. Smallest value is shown

The rank order of many of the sentencing disposals was unambiguous for the participants (mean, median and mode were close, if not identical, standard deviation small). This permitted the allocation of the following penalties in rank order, commencing with the lowest:

1.Absolute discharge

2.Conditional discharge

3.fine at level A

4.fine at level B

5.fine at level C

At the upper end of the scale, positions were again distinctive.

12.Custodial sentence between 0 and 3 months that will be suspended.

13.Custodial sentence >3months, up to 6months that will be suspended.

14.Custodial sentence of between 0 and 3 months.

15.Custodial sentence, in excess of 3months, up to the current maximum of 6months.

16.Commit for sentence at the Crown Court

In the regions of fines and discharges and also in the custodial options, magistrates were clear and consistent in the interpretation of the severity of the penalty. Community penalties were not so easily defined, reflecting the complexity of sentencing in this area, with the interaction, perhaps, of various sentencing aims. Comparison of the mean, median and mode for these disposals produced the results shown below.

Table 3.7 Detail of community penalties.

	Mean	Median	Mode
Community Rehabilitation order	6.99	7.00	6
Curfew	8.87	9.00	7
Combination order	10.28	10.00	9
Drug Testing and Treatment order	8.33	8.00	6[a]
Community Punishment Order 120-240 hours	10.17	10.00	9[a]
Community Punishment order up to 120 hours		8.83	8

a Multiple modes exist. The smallest is shown

Drawing on the researcher's judicial experience to interpret the data, the following rank order was suggested.

6. Community rehabilitation order - This was clearly lowest in the group on any measure.

7. Drug testing and treatment order – was next on all measures [although this was bimodal]

8=Curfew order and a community punishment order for < 120 hours were difficult to distinguish although a slight preference for ranking CPO above Curfew was noticeable, if the distribution was studied in conjunction with the means. Curfew order was therefore positioned at eight with CPO for <120hrs in ninth position.

10= The same overlap arose in the designation of rank to CPO >120 up to 240 hours and a combination order for which the hours worked is limited to a maximum of 100 hours but a period of rehabilitation is included in the order. Again a study of the distribution in conjunction with the mean and mode suggested that the Combination was considered slightly more punitive. Thus CPO>120hrs was assigned rank order of 10 with Combination order in position 11.

This suggested a final calculated scale position for all the sentencing options as shown.

Table 3.8 Final sentencing severity scale

Ranked Sentence severity
1. Absolute discharge
2. Conditional discharge
3. Fine level A
4. Fine Level B
5. Fine Level C
6. Community Rehabilitation Order
7. Drug testing and treatment order
8. Curfew Order
9. Community Punishment Order < 120 hours
10. Community Punishment Order between 120 and 240 hours
11. Combination Order
12. Custody up to 3 months suspended
13. Custody >3-6months suspended
14. Custody up to 3 months
15. Custody >3-6 months
16. Committal to Crown Court for sentence of > 6 months

The reliability and validity of the scale is discussed in Chapter 4.

3.5 Discussion

The individual data provided measurements for eight personality traits and a variety of socio-demographic information that allowed us to profile comprehensively, the magistrates making up this sample, before they undertook any sentencing exercises.

Relative to the population, in general, magistrates do not appear to display any extreme personality characteristics, contrary to their popular image in some quarters. On the elements of the five-factor model, with the possible exception of below average Neuroticism and slightly increased Openness, they are indistinguishable from the general public from whom they are recruited and of whom they are intended to be representative. None of the five factors demonstrated significant difference for variation in age or gender, supporting Costa and McCrae (1992). Different levels of education indicated a significant difference on the measurement of Openness between those with the most basic education and those who had post-graduate or higher professional training, again, concurring with the findings of Costa and McCrae (1992). Different political sympathies also demonstrated significant differences on the dimension of Openness, with Liberal supporters achieving the highest score and Conservatives lowest in this respect.

While the recruitment policy might have indicated an enhanced requirement for conscientiousness, in practice, individuals provided a normal distribution of this attribute, around a population mean. Nor did they display extreme tendencies towards internally orientated Locus of Control that might have adverse implications for the defendants that they deal with.

Magistrates' general level of education exceeded that of the population, consistent with the need to respond to training, understand complex arguments and observe legal procedure in their judicial activities. With regard to age distribution, it is fair to note that younger people were under-represented. While the formal requirements do not preclude their appointment, it is easy to anticipate the conflict that some younger people may confront as they attempt to establish their careers and have less control over the terms and conditions of their employment. Ethnic minorities, too, were under-represented. This has been the subject of a recent recruitment drive, initiated by the DCA which sponsored Operation

Black Vote during 2003-4 to encourage more applicants from Black and Asian communities by introducing a 'shadowing' scheme to stimulate interest.

While the political affiliations of the sample indicated that party loyalty provides one instrument for ensuring social diversity, it is slow to respond to national trends and difficult to reflect accurately on a local basis. It is also relevant to note the proportion of people who regarded themselves as independent of any particular party. As suggested previously, moves are afoot to replace this criterion for appointment with an indicator of social status based on the nature of employment. No figures are yet available on how this will work but the risk must be that those in publicly sponsored roles, along with the self employed, will continue to find it easier to make themselves available at less personal financial cost than others in the privately employed sector.

In terms of its representativeness of the magistracy as a whole, the sample matches well to national statistics. Men and women were evenly represented. Age distribution, political affiliation and ethnicity were consistent with national patterns.

Thus, the sample recruited was well placed to undertake the sentencing exercise presented in Chapter 4, in a manner typical of magistrates in general. A body of information has been generated to describe their personal characteristics as individuals and groups. To assist in analysing the data produced in section 3 of the study, a sentencing severity scale to apply to their sentencing choices has been developed as described. It provides a 16-point ranking of the different penalties available in the magistrates' courts, according to the severity accorded to each disposal. Although this scale appears to represent ordinal data, it is argued that it will be acceptable to use it in the parametric analyses that follow for two reasons;

a) There is encouragement in literature to regard parametric tests as robust to violations of some of the assumptions upon which they are based, so that there is no necessity to resort to non-parametric tests (Pallant, 2001, Cone and Foster, 1993). In that parametric tests are more powerful in their potential to avoid Type 2 errors, their use is obviously desirable where possible.

b) It may be argued that, although the severity scale was derived from apparently ranked data, this does not fully represent the position. The explanation of the approach participants were expected to take, along with the method of analysis, which relied on multiple ways of assessing the data, render the final scale to be at least of plastic interval credibility. (This conclusion was further supported by the magistrates' comments revealed in their interviews of Study 2). As such the application of parametric analyses was appropriate.

The way in which the magistrates undertook the analysis of the cases presented in Section 3 of the questionnaire and the reasons they provided for their sentencing choice is reported and discussed in Chapter 4. Carrying forward the trait measurements analysed in this chapter informed the testing of outstanding hypotheses related to process or outcome of sentencing.

4

Study 1 (Part 2); Applying Measurements of Individual Differences to Sentencing Decisions

"Sentencing cannot be an exact science; indeed Lady Wooton likened the sentencer to a small boy adding up his sums but with no one to correct his answer." (His Honour Judge P. K. Cooke, OBE, 1989:57)

4.1 Introduction

The previous chapter described the instrument used in Study 1, a questionnaire in three sections, and the methodology of its distribution to participants. Further, the data generated from sections 1 and 2 of that instrument were examined and analysed for the following purposes:

- To build a profile of the participants, comparing them with the general population and assessing their representativeness of the magistracy, in general;
- To develop a sentencing severity scale; and
- To test hypotheses related to the personal characteristics of magistrates.

This chapter considers the sentencing activity undertaken in Section 3 of the questionnaire. It describes the materials used and the construction of the case studies in detail. By testing the remaining hypotheses, it looks for the effects of individual differences on the process or outcome of the decision-making in that section. Further, it presents a descriptive analysis of the processing and outcome choice for each case, using the data supplied

therein. Multiple regression was again considered as an analytic approach to evaluate the importance of different individual variables on the severity of the sentencing choice similar to Davis et al (1993). As discussed in 2.2.1.3, this is considered unsuitable, primarily, but not entirely, because of the participant /factor ratio.[1]

For convenience, the outstanding hypotheses developed in Chapter 3 are summarised:

- **Hypothesis 6**: There will be a significant positive correlation between Conscientiousness and the level of detail recorded in the 'reasons' forms
- **Hypothesis 7**: There will be a significant negative correlation between Agreeableness and severity of sentence.
- **Hypothesis 8**: Those high in conscientiousness will make more extreme decisions than those of low conscientiousness.
- **Hypothesis 10**: There will be a significant positive correlation between Need for Cognition and the detail of the sentencing record. Hypothesis 11: There will be a significant positive correlation between internal LOC and sentencing severity.
- **Hypothesis 12**: There will be a significant positive correlation between LA and sentencing severity.

[1] As previewed in the literature review, Multiple Regression was very seriously considered but with 70-80 participants, realistically, we could explore four, perhaps, five variables only. I had eight traits and two socio-demographic factors that I took measurements for, at an interval level [including gender that I could deal with as a dummy variable]. Other variables – age, education, politics – were categorical and not suitable for parametric techniques. Offence seriousness was available but PSR recommendation was not always specific and had no variability unless all the cases were collapsed which would make seriousness difficult to interpret. Thus, with two major indicators already, I could only consider two/three more of my independent difference factors to explain variability in sentencing severity. Even if I was to collapse variable such as Legal Authoritarianism and Openness that seem to be tapping into the same/similar trait and NC and Conscientiousness, perhaps, the choice among the rest is invidious. More worryingly, the severity data displayed considerable kurtosis and in each case there were notable outliers, neither of which is desirable in MR. Removing the outliers would dilute the external validity of the results since these are endemic. While the regression is relatively easy to run, the output would be extremely difficult to interpret meaningfully.

4.2 Methodology

4.2.1 Participants

Eighty-two participants contributed to all three parts of the questionnaire to be eligible for inclusion in this part of the analysis. Full participant information was provided in the previous chapter (ch. 3 para. 3.3.1).

4.2.2 Materials

The material for Section 3 was selected from a bank of cases considered suitable as training material. This was supplied by one of the Justices' Clerks or chosen from a sample of cases previously used in sentencing exercises by magistrates at the researcher's home court. To ensure maximum external validity, the case descriptions and reports were based on real cases with fictional names, dates and places. The researcher chose three cases. Each case was set out as a statement of the facts, according to the prosecution; a statement in mitigation made by a representative for the defendant; and a Pre-Sentence Report (PSR), written by a probation officer. The PSR provided information about the social circumstances of the offender and his/her attitude towards the offence and offending in general. It also discussed sentencing options.

The cases are identified by the initial of each defendant – T (Thompson), B (Bedi), N (Norris). They are summarised briefly below, providing essential facts only without value-judgements or interpretation. (A full copy of the questionnaire which contains the complete case vignettes is available in Appendix 4 Document 3, along with the sentencing Guidelines provided by the Association for each offence, in Appendix 6. The latter pages were not routinely supplied to participants, although they would be familiar with their existence.)

T – Mr Thompson was charged with threatening violence towards another, under Section 3 of the Public Order Act 1986. He had pursued of a group of people, whom he believed were responsible for injury suffered by a friend in a night-club brawl, with a view to seeking retribution. Police were called to intervene, leading to his arrest.

B – Mr Bedi was charged with theft. He was employed as the assistant manager at a fast-food restaurant. Instead of placing the 'takings' in the safe, he had removed some of the money for his own use and altered the books to cover the loss, on more than one occasion.

N – Mr Norris was charged with driving whilst unfit, having consumed excess alcohol. Following an evening in the pub with friends, the defendant was involved in a traffic accident, while driving home. When police attended, a reading of 110mg/100ml in breath was recorded, against a legal limit of 35mg/100ml in breath, indicating consumption of almost three times the amount of alcohol that the law permits.

The cases were chosen for their representativeness of the work of the courts, generally, and likely range of punishment, biased towards sentencing disposals around the boundary between community penalties and custody, and/or differentiated the length of custody that was appropriate. The Guidelines suggest a sentencing entry point - the band of sentences considered appropriate for a first time offender committing an offence of this type of average seriousness, who had initially pleaded 'not guilty'. For T and B there was an indication that the magistrates' powers might not be sufficient to deal with these offences and committal to the Crown court for sentencing should be considered (rank order 16 on the calculated severity scale derived in Chapter 3). For N, the Guidelines suggested an entry point at the upper end of a community penalty and 30 months disqualification from driving, for the level of alcohol involved. This might have indicated any of the penalties ranked 6-11 on the severity scale, dependant on sentencing aim or length of order chosen.

No attempt was made to control the amount of aggravation or mitigation within a case. This was left to participants to identify, as they considered relevant. All the defendants were relatively young men (under 30) to control for defendant age and gender effects. Only one had a minor previous conviction and each had pleaded guilty at the earliest opportunity. This information was reported in the case studies. Each case was considered on its own merits, without reference to the others, so that three independent outcomes were generated and three examples of process represented.

The data relevant to these analyses were recorded on the completed 'reasons' forms referred to in Chapter 3 (examples in Appendix 5). Participants completed a separate form for each of the three cases. The 'reasons' form comprised four distinct sections, preparatory to the indication of a sentencing choice:

- Impact on the victim;
- Aggravating features of the offence;
- Mitigating features of the offence; and
- Personal mitigation.

The data recorded under each aspect were analysed by categorising the features identified into themes, consistent with the approach in the Guidelines for that particular offence, but not restricted to those suggestions. Together with other features of personal mitigation, independent reference to a guilty plea was noted where indicated[2]. Aggravation was assigned a positive indication, while mitigation was associated with a negative indicator, in accordance with the convention in the Guidelines.

[2] This aspect was relevant because of the guidance to magistrates to acknowledge credit for an early guilty plea. At the time of data collection, up to one third reduction in the severity of punishment should be considered, advice that has subsequently been more precisely formulated and made more prescriptive through the work of the SGC.

An approach based on a simplified algebraic model for decision-making was adopted to look for relationships between individual characteristics of participants and either the outcome chosen or the way in which they processed information towards a decision. The entry point was taken as a base-line or balance point around which the positive or negative features noted would expect to increase or decrease the level of sentencing severity. The actual sentence identified for each case was translated into a degree of severity using the scale developed in Chapter 3.

The 'reasons' forms were adapted to include an indication of the participant's perception of the seriousness of each offence, on an arbitrary scale of 1-10, and the sentencing aims of the sentencer. Aims were assigned to one of the following five categories, consistent with those identified by Von Hirsch and Ashworth (1992) and the CJA 2003;

a) punishment/retribution;

b) rehabilitation;

c) deterrence/prevent re-offending;

d) protection of the public; and

e) any other aim mentioned.

4.2.3 Procedure

The material for the case studies was contained in Section 3 of the questionnaire. As such it was distributed to and collected from the participants in the manner described previously (Ch 3 para 3.3.3).

4.3 Results

4.3.1 Inter-rater reliability

To test for inter-rater reliability, magistrate colleagues of the researcher examined a selection of completed questionnaires for consistency in interpretation of the features identified as aggravating or mitigating. Two people who had not participated in the study independently reviewed the analyses of each of the three cases, for two different participants. Agreement on the features considered relevant and their allocation to aggravation or mitigation, observed over in excess of 25 features in each case, was good. When correlation checks were performed to compare the decisions of the researcher with those of the volunteers and each other, coefficients exceeded .9, $p \leq .05$. Contributions to the departure from perfect correlation were noted in the designation of some aspects of mitigation, as offence or offender related. Rechecks indicated that, in three places, the inexperienced raters had made errors. Other disagreements on interpretation replicated one of the sources of 'error' referred to later but did not interfere with the assessments overall. Accordingly, the summations of features of different types and in different combinations that were used in the later analyses could be regarded as highly reliable in their capacity to be reproduced.

4.3.2 Consistency of scales

Comparisons were made between the rank order of the disposal chosen for each of the three cases by an individual, according to their previously recorded personal scale and the rank order of the same disposal on the scale calculated from the results overall. For T the Pearson correlation for each rank was (r) = .852, for B = .436, and for N = .802, all $p \leq .01$, indicating good agreement between the two scales. Therefore, subsequent analyses were based only on the scale calculated from the results overall.

4.3.3 Comparative overview of the outcome for the three cases

The three cases were examined in respect of the severity of the penalty imposed and the estimation of seriousness for each offence. In two of the three cases, T and B, significant correlation (T, .529, $p \leq .01$ and B .319, $p \leq .05$,) between these two aspects suggested that the magistrates were making proportionate responses to their perception of the seriousness of the offence.

The mean, mode and range of sentencing disposals, according to the calculated sentencing severity scale, for each of the three cases were determined and a comparison with the offence seriousness estimate and the recommended entry point for each was made.

Table 4.1 Results for the mean, modal and range of sentencing disposals by severity ranking, with ancillary orders, for each of the three cases.

	T- level of severity of sentence from calculated scale position	T – length in months of Community Rehabilitation Order	B- level of severity of sentence from calculated scale position	N- level of severity of sentence from calculated scale position	N- period of disqualification in months
Mean (1Dec pl.)	6.8	10.9	9.6	7.7	25.4
Mode	6	12	10	9	30
Minimum	2	3	2	3	0
Maximum	15	24	15	11	36
(N valid)	(78)	(38)	(78)	(76)	(71)

In all cases a range of disposals was represented, from conditional discharge or small fine at the lenient end, to custody in two cases or a combination order at the other extreme. The following three figures show the percentages of the sample plotted against the rank of the

sentencing disposal that was chosen, according to its position in the calculated scale, for each of the cases, T, B and N.

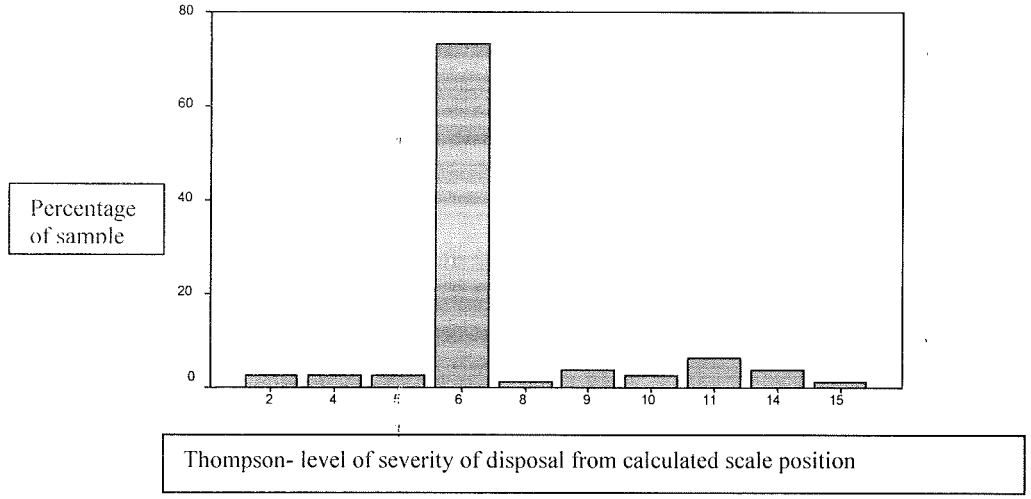

Figure 4.1 The distribution of penalties for case T

For T, the penalty imposed by the vast majority of participants (73%) represented a Community Rehabilitation Order (rank 6) that would last an average of 12 months, according to the indications on the forms.

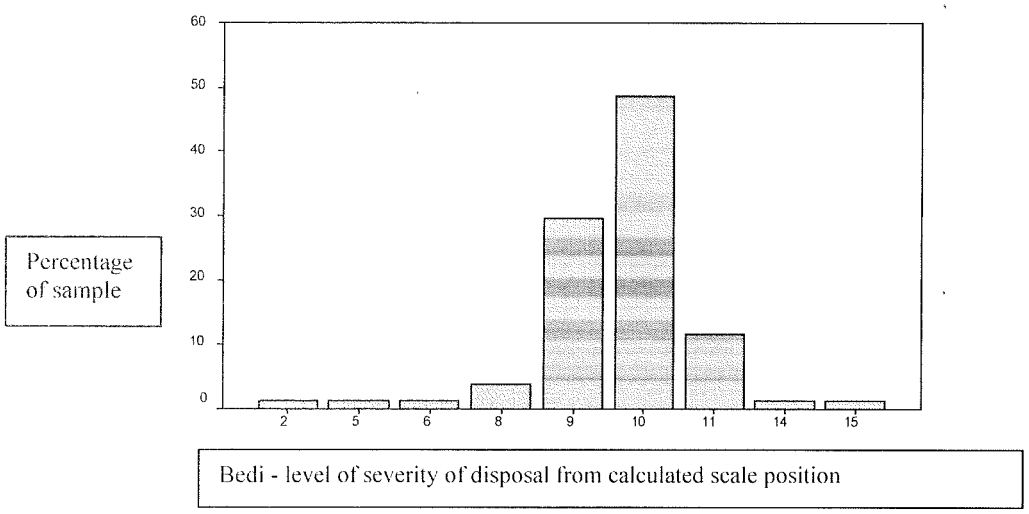

Figure 4.2 The distribution of penalties for case B

For B the modal response (48.7%) was a Community Punishment Order exceeding 120 hours (rank 10), although the distinction between this and a similar order of less than 120 hours (rank 9) was not as unequivocal as the preferred choice in the other two cases.

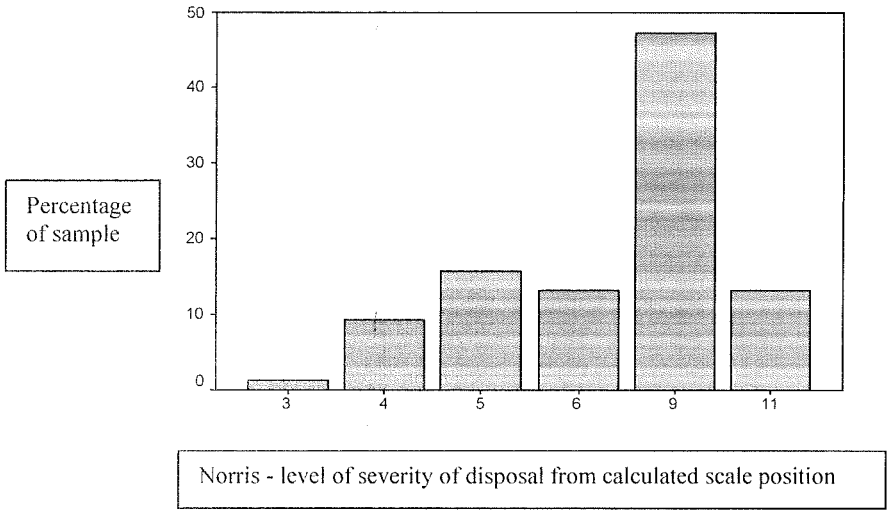

Figure 4.3 The distribution of penalties for case N

For N the modal response (47.4%) was also a Community Punishment Order of less than 120 hours (rank 9), combined with a disqualification from driving of 30 months.

The means were calculated for participants' estimates of seriousness for each offence. The results indicated the same mean value (6 to the nearest whole number on the arbitrary seriousness scale of 1-10) for each offence. Despite this, in the case of T, the modal sentence imposed was ranked 6 on the punishment severity scale, for B, it was ranked 10 and for N it was ranked 9. This suggested that the relationship between the perception of seriousness and the penalty imposed was not a simple one that can be predicted from the judgement of seriousness of offending alone.

Notably, in the two cases T and B, where the entry point indicated by the Guidelines suggested that the magistrates' powers may be insufficient (rank 16), no-one felt unable to deal with the case and the majority preferred a non-custodial option. The agreement

between entry point, here Community penalty, and preferred outcome was closest in case N.

4.3.4 Hypotheses testing – Outcome related

Severity of punishment and evaluation of seriousness were each taken as separate measures of outcome. These were correlated with the personality factors measured and a selection of socio-demographic variables, calculating Pearson correlation coefficients.

Considering the personality factors first, the relevant hypotheses are 7, 8, 11 and 12.

Hypothesis 7: Agreeableness and severity of sentence are positively correlated.

Agreeableness did not correlate significantly with either the estimation of seriousness or the severity of the punishment imposed, for any case. Therefore, the null hypothesis, that there was no relationship between the variables, could not be rejected.

Hypothesis 8: Those high in conscientiousness will make more extreme decisions than those of low conscientiousness.

When the mean level of sentencing severity for each of the three cases was compared for groups identified as high and low in conscientiousness, using a median split, no significant difference was found in their decisions, contrary to Hypothesis 8. Again the null hypothesis, that there was no difference in the responses of those with high scores on conscientiousness, could not be rejected.

Hypothesis 11: Internal LOC and sentencing severity are positively correlated.

Increasing internal measurements of LOC were positively correlated with the severity of punishment for the case of B only (.373, $p \leq .01$), lending some support to the general proposition of Hypothesis 11, but the null hypothesis could not be rejected with confidence.

Hypothesis 12: LA and sentencing severity are positively correlated.

LA correlated significantly with severity of punishment in one case (N) only and this did not exceed 0.3, again providing little support for H12. While consistent with some

experimental results in previous work (Snortum and Ashear, 1972; Mitchell & Byrne, 1973; Altmeyer, 1981), it is of limited support to the general proposition, so again the null hypothesis cannot be rejected.

Socio-demographic individual differences concerning gender and experience suggested from the literature review, upon which the evidence was inconclusive, were explored.

Gender: In two of the cases, T and N, there was an association between gender and severity of punishment, both significant but only the latter exceeding $r = .3$, $p \leq .01$, suggesting that men were slightly more punitive than women on that case. This conclusion was supported by comparing the mean evaluations of seriousness with the severity level of punishment, for men and women separately. There was no significant difference in the evaluation of seriousness on any of the cases. However, in the cases of T and N, there was a significant difference, amounting to one rank on the scale, in the level of penalty imposed, with men indicating a more severe penalty than women, (case T, $t(75) = 2.13$, $p \leq .05$ and case N, $t(72) = 3.3$, $p \leq .01$).

Table 4.2 Comparison of sentencing severity for men and women for Cases T and N

Case	Gender (no. of participants)	Mean severity of sentence by rank	Std.Dev.
T	Male (40)	7.38	3.002
	Female (37)	6.22	1.436
N	Male (39)	8.46	2.162
	Female (35)	6.77	2.237

Experience: There was no significant correlation between individual experience and either the judgement of seriousness or the severity of the punishment imposed. Nor did

there appear to be any significant difference when participants were grouped into high medium and low experience and these variables re-examined for patterns overall. When the means in each group were studied, the trend in both cases T and B indicated that the estimate of seriousness levels off with experience (a ceiling effect) and the identification of the appropriate penalty increases in severity initially, then diminishes as experience increases. For N also, the most experienced group of magistrates chose the least severe penalty.

4.3.5 Hypotheses testing –Process related

As previously indicated, the 'reasons' record was interpreted in a quantifiable manner so that the features of aggravation and mitigation could be examined separately or in combination. Analyses were undertaken to explore relationships between the quantity and nature of the information identified for selection, as the participant studied each case, and the participant's individual characteristics. The relevant hypotheses for personality traits are Hypotheses 6 and 10.

Hypothesis 6: Conscientiousness and the level of detail on the record of 'reasons' are positively correlated.

Various measures of detail were computed. Three different combinations of the number of features recorded were created: (1) total features - impact, aggravation, mitigating features of the offence and personal mitigation; (2) aggravating features - impact on the victim, together with aggravating features of the offence; and (3) mitigating features (offence and personal).

Pearson correlations were computed for each of these with the personality trait C but no significant results were noted. This appeared to indicate that there was no relationship between the level of detail recorded in the form, measured either partially on aggravation or mitigation or by the inclusion of all features, and the individual levels of

conscientiousness. Therefore, the null hypothesis, indicating that there was no relationship between Conscientiousness and level of detail, could not be rejected.

Hypothesis 10: Need for Cognition and the detail of the sentencing record are positively correlated.

The correlation exercise was repeated for the same combinations of aggravating and mitigating features referred to above with the personality variable NC. Again there were no significant correlations. The null hypothesis, predicting no relationship between the variables could not be rejected.

Further exploratory analyses were performed, based on Pearson correlation coefficients.

4.3.6 Exploratory outcome analyses

The algebraic total of the features (summating impact and aggravating features as positive and mitigating features as negative) was used as a measure of the extent of predicted disparity between the sentencing entry point and the actual sentence chosen by each participant. This was applied to adjust the Guideline suggested entry point indicated for that particular offence, by moving up or down the ranking scale an appropriate number of places. The outcome of that computation was correlated with the rank of the actual sentence chosen to test its predictive value. There was a single significant Pearson correlation between the two aspects for the case of T only, ($r = .274$, $p \leq .05$) but this was too small to be considered useful if $r = .3$ is taken as the threshold for meaningful correlation.

There were no other relevant inter-correlations.

4.3.7 Exploratory process analyses

In the cases of B and N only, the total number of mitigating features noted was significantly correlated with Agreeableness suggesting a more sympathetic approach for those of increased Agreeableness. However, in case B, the Pearson (r) coefficient did not exceed .3 and for case N the correlation was low (.308, $p \leq .01$, number of participants =81).

Of general relevance, was the significant correlation of the total number of features noted and the number of aggravating features (including impact on the victim), (T, r =.711, B, r = .608, N, r = .676 all $p \leq .01$, sample size 77). This suggested that the level of detail indicated in the initial stages of case examination i.e. victim impact and offence aggravation was maintained throughout. Further support for this proposition was provided by consideration of the Pearson correlation between the total number of features recorded and the total number of mitigating features, significant in each case, (T, r =.846, B, r =.849, N, r = .823, all $p \leq .01$).

There was, also, significant correlation between the algebraic total number of features, when aggravation was treated as positive and all mitigation as negative, and the number of aggravating features, (T, r = .473, B, r = .495, N, r =.534, all $p \leq .01$). Thus, the magnitude of aggravation identified initially was a positive indicator of the net result for all features taken into account in the sentencing deliberation, suggesting that aggravation was an influential aspect of the process.

4.3.8 Features 'errors' and process

The record of 'errors' was examined. These fell into two groups; material that, in the opinion of the researcher, did not qualify as a relevant feature; and material that *was*

relevant but had been noted at an inappropriate section of the 'reasons' form. The most common example of the latter was personal mitigation appearing under offence mitigation. This type of 'error' made no difference to the previous computations, as the material was transferred and accounted for appropriately, remaining within the same broad categories. However, it indicated a processing deficit for the participants involved, perhaps, identifying a training need for these magistrates.

Table 4.3 Analysis of the errors recorded for each case T, B and N.

Case	% accurate throughout	Maximum errors	% with >2 errors
T	50 (38 participants)	5	10 (7 participants)
B	66 (51 participants)	4	8 (6 participants)
N	62.5 (47 participants)	3	4 (3 participants)

No significant correlations were detected between individual scores on experience or conscientiousness and the number of errors noted in each case. Participants were divided into three groups according to their years of experience and the mean error score for each group compared. No significant differences were found and no consistent pattern emerged. Similar negative findings applied to groups of varying conscientiousness.

4.3.9 Sentencing aims

Multiple sentencing aims were reported. The modal response covered at least two distinct targets for each case and the number of aims ranged T, 1-4, B, 1-3, N, 1-5. The nature of these aims for a particular case will be examined in the descriptive analyses that follow.

4.4.10 Descriptive analysis of each case

The following descriptive analyses considered the data entered on the 'reasons' forms for each case separately, according to the individual sections: impact on the victim; offence aggravation; offence mitigation; personal mitigation, along with the recommendations of the PSR; final sentencing choice; and sentencing aim.

4.4.10.1 Case T

T - Impact on the victim

With a growing awareness of the fear and distress, as well as physical loss or injury that victims may experience as a result of their involvement with an offender, magistrates are increasingly encouraged to include the victim's perspective in their deliberations. In this case the offender confronted the police, who were attempting to prevent him from attacking members of the public. The magistrates' responses were fairly evenly divided between noting and ignoring any impact (56% and 44% respectively). Of those who specified an impact, 90% accurately indicated a response compatible with drawing an adverse inference from this encounter. Those who chose to ignore the impact on the victim/s appeared to do so on the grounds that they were police officers who could expect to be involved in exactly this type of activity without being intimidated. For these participants, no enhanced aggravation was relevant.

T - Offence aggravation

Six main themes were identified in the responses (all percentages rounded to nearest whole number). These are presented in order of diminishing representation: possession of a weapon, a broken bottle (82%); persistence in pursuing the attack (40%); the threat to public safety (31%); efforts to resist arrest (21%); consumption of alcohol (21%); and pre-meditation (13%). Small numbers of participants (<10%) referred to the victims being police officers/public servants and, also, the fact that the defendant had attempted to run

off as additional aggravating features. The 'error' rate was small (< 6%), related, mainly, to misplacing of the impact on the victim into the offence aggravation section.

Of the sample, 28% recorded two aggravating features and the same percentage three features but overall the number ranged 0-5. In combination with the perceived impact on the victim, this became a range of 1-6, for aggravating features of the offence. The distribution of responses overall was bi-modal with comparable peaks at two and four and a mean of 3.17 (sample =77), which was considered to be most representative of this aspect of the process in this case.

T - Offence mitigation

Three themes predominated: provocation (43%); absence of actual injury (22%); and the impulsive nature of the behaviour (18%). A variety of other mitigating factors were reported by small numbers of individuals, each <10%. These concerned the defendant's belief that his assailants would be armed, so he needed to protect himself, and that he had acted alone. Furthermore, the incident was brief, his initial response had been to help his injured friend, he was not targeting an individual for retaliation and, finally, that he had walked away from confrontation with the police.

There was evidence that the same events were capable of aggravating or mitigating the seriousness of the offence, depending on the interpretation the participant chose. Accuracy in this section was not as high as previously, with considerable confusion (25% of the sample) as to which aspects of mitigation related to the offence and which should properly be recorded as personal mitigation. The modal response was one mitigating feature (37%), with a range 0-4 represented.

T - Personal mitigation

This section was possibly the most exhaustively completed, magistrates appearing to make great efforts to draw out all possible aspects of mitigation. The features noted, again in diminishing order of representation were: absence of any previous convictions for this defendant (63%); remorse for his offending (62%); specific acknowledgement of the guilty plea (35%); family responsibilities (35%); the specific circumstance of his father's ill-health (23%); and stable employment (18%). Beyond these, 23% of the participants recorded a variety of minority themes that they considered relevant.

The most frequently indicated feature of personal mitigation is curious. The Guidelines are intended to apply to first time offenders. Previous convictions should aggravate an offence but strict application should not, in practice, have led to a reduction. However, this type of material, referring to the "absence" of a particular aggravating aspect, and re-casting it as mitigating, was not uncommon.

The 'error' rate reflected the confusion referred to previously which related mainly to omissions in this section because the same features had already been noted in the offence mitigation section. The modal response was to identify 3 features but individuals provided a range between 1 and 7.

T - Sentence

As previously reported (Fig 4.1) the modal sentence (73% of participants) was a community rehabilitation order (rank 6). The length of the order varied between 3 and 24 months with 12 months being the most frequently selected option (70% of the sample). This disposal concurred with the recommendation of the PSR. At the extremes, two participants would have been prepared to conditionally discharge (rank 2) the defendant

and four were prepared to send him to prison (rank 15), with most options in between represented to some degree.

T - Sentencing aims

Approximately two thirds of the sample indicated two or more sentencing aims, with up to four aims recorded by one participant. Despite imposing the same penalty in many cases, there was no agreement on what the primary aim should be, 31% favouring punishment/retribution, with equal splits for rehabilitation and deterrence (27% each). Where a second aim was identified, the primary purpose became rehabilitation, with deterrence as the next most popular aim. Overall, rehabilitation featured as desirable in a high proportion of the participants' aims, either as primary or secondary purpose.

A summary of the main features analysis and the sentencing disposals was prepared.

Table 4.4 A summary of the features and sentencing results for the case of T.

Case T	Aggravating features	Mitigating features of offence	Personal Mitigation	Algebraic total	Entry point	PSR disposal	Actual sentence
	+3 (mean)	-1 (mode)	-3 (mode)	-1	16	6	6

Without attempting to assign weighting to the competing features, the data suggested that magistrates considered this offence to be of above average seriousness, with a comparable degree of personal mitigation. Nonetheless, magistrates felt able to depart significantly from the entry point and concur with the recommendation of the PSR, itself, considerably lower than the entry point.

4.4.10.2 Case B

B - Impact

Approximately 20% of the sample failed to record anything in this section. For the rest, the main concern was the financial loss experienced by the employer (58%). Only 6% noted the abuse of trust alone and the remainder a combination of the two. The section was completed with 95% accuracy.

B - Aggravation

In this case, the most frequently identified aggravating features were: breach of trust displayed as an employee (87%); the planned and pre-meditated nature of the deception (58%); the number of times that the same activity was repeated (58%); failure to repay the money when an opportunity arose (32%); and the attempt to blame others for the theft (20%). Small numbers of participants cited the seniority of his employment, the length of time over which he continued offending and the large sums involved as further aggravating features. The modal response was to indicate three aggravating features with a range 1-4. Entries were 99% accurate for this case, in this section.

B - Offence mitigation

Three major themes emerged. In decreasing order of importance these were: lack of sophistication in the method of offending and the inevitability of being caught (38%); sympathy for the expressed motive for offending which generated no personal gain and was intended to help someone else, (14%); and low value of the theft (13%), based on the same sums others had found aggravating. Minor representation of views that he had acted alone, accepted the blame when confronted and was actually quite a junior employee appeared. About two thirds of the sample entered material that could properly qualify in this section. The modal response on mitigating features of the offence was zero but participants varied 0-3 in their individual replies.

B - Personal mitigation

There were six recurring features of personal mitigation, commencing with the most frequently cited: remorse expressed by the defendant (48%); willingness to repay compensation (39%); serious nature of his father's illness (38%); The guilty plea (32%); loss of career, having been dismissed (15%); and to his general family problems, (12%). Individuals remarked on his degree of co-operation, the significant debts that he had and his previously good work record. Entries were 98% accurate with features ranging zero to six and a modal value of three.

B - Sentence

The modal sentence for this case was a community punishment order in excess of 120 hours (rank 10) (see Fig. 4.2). Of the sample, 78% chose this region of the punishment scale, differing only in respect of the number of hours. Overall, penalties ranged from a conditional discharge (rank 2) to imprisonment of between three and six months (rank 15) but the most popular disposal concurred again with the recommendation of the PSR.

B - Sentencing aims

The multiplicity of aims ranged 1-3 with a modal value of two. Punishment was most frequently identified as the primary aim followed by the need to make reparation and to reflect the seriousness of the offence. Only small numbers indicated that rehabilitation or deterrence was intended (4% and 7% respectively).

Table 4.5 A summary of the features and sentencing results for the case of B.

Case B	Aggravating features	Mitigating features of offence	Personal Mitigation	Algebraic total	Entry point	PSR disposal	Actual sentence
	+3 (mode)	0 (mode)	-3 (mode)	0	16	10	10

In summary, the case was represented as an offence with increased aggravation, no mitigation and a similar amount of personal mitigation. None of this would explain the significant departure from the entry point, with the most likely response much less punitive than might be anticipated but again concurring with the recommendation of the PSR, itself, considerably below the entry point, as in the previous case.

4.4.10.3 Case N

N - Impact

Approximately two thirds of the sample noted an impact on the victim, being the owners of the three other cars involved in the collision. Opinion was divided as to whether this was financial, namely the costs of repair, or more personal because of the inconvenience and distress caused. Some participants mentioned both but, generally, material damage attracted greater recognition and was more readily acknowledged. The inclusion of inappropriate material in this section was low (11%).

N- Aggravation

Two major themes emerged to aggravate the seriousness of the offence: the high level of the alcohol reading (92%); and the high cost of the damage to the vehicles (48%). Up to two other features appeared in the data of small numbers of individuals (<10%), concerned with the recognition of a second motoring offence, the distance driven, the fact that an accident took place and the deliberate intention to drive whilst impaired. The total features recorded as aggravation ranged 1-4 with a modal value of 2. When the impact was included this became a range of 1-5 with a bi-modal distribution, mean value 2. Overall accuracy was 97%.

N - Offence mitigation

Only 15% recorded any mitigation: Absence of any personal injuries. A few participants (<10%) referred to the low speed, the defendant's unfamiliarity with the area, the plausibility of his story and the fact that he was insured and did not run off as mitigating the offence for them. Of the responses, 80% were error free. Of those who made mistakes, confusion between offence and personal mitigation was most common.

N - Personal mitigation

Three main features were represented: Defendant's remorse, (55%); Co-operation with the police, (49%); Guilty plea (27%). There was confusion as to whether the absence of previous convictions (8%), which was not an accurate reading of the case, or the absence of previous alcohol related offences (13%) could assist him. If, merely, the features recorded in this section were tallied, the total ranged between zero mitigating features and two. However, if qualifying material which had been placed in earlier sections was relocated, the range of features increased 0-5 with a modal value of two.

N - Sentence

The modal sentence was a community punishment order for up to 120 hours (rank 9) (Fig 4.3). The range of penalties was narrower than in the other two cases, rank 3 (a small fine) to 11 (a combination of curfew and Community Punishment Order). The mandatory driving disqualification ranged 12-36 months with 50 % settling on 30 months. While the defendant was considered suitable in the PSR for a Community Rehabilitation Order, or even a fine depending on the attitude taken by the bench, the primary suggestion from the PSR was in agreement with that chosen most frequently by the sample. It, also, concurred with the entry point in the guidelines that suggested a higher end community penalty.

N - Sentencing aims

As in other cases a multiplicity of aims was reported, up to five, with the modal value two. The primary purpose of the sentence chosen represented punishment, (45%), followed by an effort to mark the seriousness of the offence (24%) and rehabilitation (11%). These were consistent with the disposal identified. Secondary aims shifted the emphasis to deterrence.

Table 4.6 A summary of the features and sentencing results for the case of N.

Case N	Aggravating features	Mitigating features of offence	Personal Mitigation	Algebraic total	Entry point	PSR disposal	Actual sentence
	+2.4 (mean)	0 (mode)	-2 (mode)	0 approx	9-11	9	9

This case identified in excess of 2 aggravating features, no mitigating features of the offence and a similar amount of personal mitigation, predicting that the offence would be treated in line with the indication of the Guidelines, as the actual choice confirms. This again, also agreed with the recommendation of the PSR.

4.5 Discussion

The quantitative data analysed in this chapter, failed to provide any substantial support for the specific hypotheses constructed. These hypotheses concerned individual differences in five personality traits and two socio-demographic factors and the effect they might have on either the manner in which information was handled, i.e. process, or the outcome decision based on that information. There were modest indications only that LOC and LA could be associated with harsher sentencing in the expected direction (analyses on p146). Gender effects were demonstrated through a significant difference in the mean severity of sentence

for two cases T (male rank 7, female rank 6) and N male rank 8, female rank 7), women choosing marginally less severe sentences than men. A trend towards the choice of less severe sentences, chosen by more experienced magistrates did not amount to a pattern of significant difference, (analyses on gender and experience on p146).

Other individual personality traits of the participants failed to demonstrate any significant correlation with their sentencing choice or process approach. The sample overall had generated a normal distribution of these factors, closely representative of the population in general, with similar S.D., and notable absence of scores at the extremes. To this extent the recruitment policy is fulfilling its objectives but the narrow spread of scores made it unlikely that significant differences based on sub-groups would be detected. However, within the normal distribution, a range of characteristics *was* represented. Subsequent work in Study 2 sought the magistrates' views on whether and how these impacted on each other and affected their work.

Magistrates' individual perception of the severity of a sentencing disposal concurred well with the judgement of their colleagues overall. There was, also, some indication that the level of punishment correlated with their individual perception of offence seriousness. Even though the mean estimate of seriousness overall was the same for each offence, the severity of disposals varied considerably. None appeared to support a simple algebraic relationship between the entry point recommended and the interpretation of the case as indicated from the record of aggravating and/or mitigating features.

In two cases, T and B, the Guidelines suggested that the powers of magistrates were considered to be marginal in terms of imposing the appropriate penalty. Even though substantial aggravation was detected in these cases, relieved by a comparable amount of offence and personal mitigation, no participants chose to commit to the Crown court for sentencing. Both offenders were dealt with in a manner well within the summary powers

of the magistrates concerned and considerably more leniently than the Guidelines suggested. In the third case, N, although the interplay between aggravation and personal mitigation was similar, the disposal coincided with the Guideline entry point. This was an example of an offence that is dealt with very commonly in the magistrates' courts. The outcome may have been an indication of a different processing approach, akin to a tariff, where the seriousness of the offence, per se, is the primary indicator and individual attributes of the offence and/or the offender play lesser part, as suggested in Ewart (1996).

The specific acknowledgement of the guilty plea was noted to varying degrees in the personal mitigation of each case (T, 35%, B, 32%, N, 27%). However, it was not apparent that the third defendant had benefited to anything like the same extent as the other two, in the credit given and subsequent reduction of sentencing severity.

Categorisation of the aggravating and mitigating factors appeared to indicate that the participants were observing close adherence to the themes identified in the Guidelines and could use the 'reasons' forms without major difficulty. There were very few examples of magistrates identifying irrelevant features and the proportion of the sample that entered material in inappropriate sections was low (generally <10%). This type of structured decision-making is a foundation block in the training process and its use a fundamental requirement for successful appraisal. Further exploration of its applicability, usefulness or disadvantages was merited, aspects that were pursued in Study 2.

Importantly for all the cases, the disposal chosen most frequently coincided with that advocated by the probation officer in the PSR (Konečni and Ebbesen, 1984). In two of the cases (T and B), the PSR suggestion was considerably lower than the entry point recommendation from the Guidelines. The influence of the PSR recommendations merit further investigation.

The entry point takes into account only the seriousness of an offence and aims to identify proportionate punishment, whereas, the PSR considers personal information about an offender and may have a different aim, in reaching its suggested sentence. For Case T, a sentence such as the Order chosen by the majority of participants would generally be considered rehabilitative. The primary aim expressed by most sentencers, in that case, was one of punishment. However, this disposal accommodated that aim by imposing on the offender's time to participate in working the order, while accommodating the competing aim of rehabilitation for this offender, an aim that was also of interest to many participants. In case B, the primary sentencing aim, punishment and reparation, and the sentence imposed appear even more compatible than in the previous case, imposing on the offender's time and generating unpaid labour for the community.

Having considered these observations, the sentencing aim emerged, potentially, as a key determining influence in the sentencing choice and became a significant factor for exploration in Study 2. The application of a simple algebraic approach failed to provide a useful indicator for predicting how the final sentence might move in relation to the entry point, although the amount of aggravation appeared influential. The next study provided the participants with an opportunity to reflect on this aspect of their decision-making, consider alternative models for decision-making and the influence of sentencing aims.

All the data analysed in this study were acquired as a result of individuals considering the information alone. The studies of Dhami (2002) and Corbett (1987) had supported this approach. However, actual sentencing activity takes place in small groups. When they deliberate as a Bench of three, magistrates potentially demonstrate some of the effects associated with group decision-making, for example, groupthink (Janis, 1982; Janis and

Mann, 1977), group polarisation and risky shift, (Moscovici and Zavalloni, 1969). In the next study magistrates addressed their interaction with colleagues.

So far, no distinction has been drawn between the contribution of individual magistrates functioning on a Bench in the different roles of Chairman[3] or 'winger'[4]. Study 2 explores the magistrates' understanding of this aspect of their work and whether individual differences, either personality traits or socio-demographic indicators, exert any influence from these positions. The public face of the Bench permits little analysis of the individual contributions to the group discussion that precedes a sentencing decision. In the absence of direct observations of the exchanges in the retiring room[5], the reflections of the magistrates reported in Study 2 provide a useful insight as to how they believe themselves to function.

Thus, the quantitative work of Study 1 allowed the profiling of the sample along a variety of personality and socio-demographic indicators. It generated data that could be examined to explore the potential effects of individual differences on the process and outcome of sentence decision-making. Study 2 built on and extended the findings of Study 1 to seek greater insight into the decision-making activity.

[3] Chairman is a generic term to describe the person who presides in a court and performs the speaking part on behalf of the bench. It is used, regardless of gender, a convention that will be applied throughout this thesis.
[4] A 'winger' sits beside the chairman, making up a group of three (usually) for the purposes of decision-making.
[5] The retiring room is located away from the public areas of a courtroom. Magistrates and their legal advisers use it for private discussions.

5

Study 2 (Part 1); A qualitative investigation of Sentencing Practice, exploring Individual Approaches and Group Effects

5.1 Introduction

The previous two chapters described and discussed Study 1. That study investigated individual differences and their potential effect on the sentencing decisions of magistrates with an essentially quantitative approach. The differences were measured using standardised scales and the output of the sentencing exercise was quantified for analysis. In the latter part of Study 1, a more qualitative interpretation was commenced, to look for commonalities in the approach of individual participants to the cases dealt with in the sentencing exercises.

From the discussion of the results of Study 1, it was apparent that modelling in the way attempted offered limited guidance. A structured approach to decision-making that complied with JSB and Association guidance was evidenced. Whilst the record of aggravating and mitigating features failed to support a simple algebraic model of the sentencing decision, it provided some insight into the approach being adopted. The coincidence between PSR recommendation and sentence chosen by the magistrates was notable. Sentencing aims were rarely singular and appeared to be a possible influence on the sentencing choice. Constrained by the nature of the information sought in the 'reasons' forms, these conclusions may have been an artifice of the questionnaire construction.

Accordingly, more detailed interviews with individual magistrates were organised to allow them to provide their own perceptions of the process and to explore their approach further, using qualitative techniques.

Study 2 is written in three chapters. The current chapter presents the background and methodology for the study. It summarises the main themes of the semi-structured interviews and discusses the approach taken to analyse the material, together with an indication of the organisation of the presentation the results in the following chapter.

5.2 Background

5.2.1 Approach

Interpretative Phenomenological Analysis (IPA) was identified for use in Study 2 to explore participants' experience of sentencing decisions further. Smith and Osborn (2003) p51, consider that such an approach

> "... involves detailed examination of the participants' lifeworld; it attempts to explore personal experience and is concerned with the individual's personal perception or account of an object or event itself, as opposed to an attempt to produce an objective statement of the object or event itself."

According to Willig (2001) phenomenoloy is concerned with the ways in which people gain knowledge of the world around them and the phenomena that we encounter as we engage with different activities in different contexts. It involves our perception of objects through feeling, thinking, remembering and judgement. Willig (2001) suggests that Interpretative Phenomenology recognises the impossibility of gaining direct access to participants' 'lifeworlds' except through the actions of the researcher in interpreting the participants' experience.

IPA is characterised as an approach that is idiographic, interrogative, illustrating each feature with examples within the study (Smith 2004). It is well suited to explore the concept of sentencing decisions as perceived by practitioners. By exploring the topic, the reader is provided with illustrative quotations to allow one to hear exactly how the participants expressed themselves about what different aspects meant to them. In general, IPA is considered to generate a fuller, richer account of an activity than quantitative instruments permit. As such, it should both supplement and complement the results that Study 1 has generated so far. While an attempt will be made to indicate the prevalence of certain ideas, Smith (1995) has emphasised that the focus in this type of work is aimed at understanding the meaning of something in terms of its content and complexity rather than creating a record of frequency.

In using their own words to describe their experience of sentencing, magistrates may choose to use legal conventions but they are not limited to staying within such parameters. Sentencing is an area where no 'right' answers exist so it is important to hear what the practitioners, themselves, have to say about their experience and what they are aiming to achieve. The application of IPA in this study allows the reader to hear the individual considerations that sentencers deemed relevant and how these were interwoven in decision-making, without becoming embroiled in the anecdotal detail of any specific case.

Some aspects of Grounded Theory were incorporated into the primary approach of IPA, in that some findings from Study 1 were introduced into Study 2 for further exploration and ideas suggested by one participant were on occasions offered to others for comment and development. Reflecting on the problems implicit in work of this nature, Pidgeon and Henwood (1997) p268, considered that

> "... traditional discussions of criteria for judging psychological research... such as evaluating reliability and validity of the work, characteristics of the theory such as

parsimony, empirical content, internal consistency and generality... applied to grounded theory research... risks undermining the very benefits that the approach brings."

The researcher will attempt to indicate where the threats lay in this particular study and how they were dealt with, whilst also referring to the benefits in the approach.

5.2.2 Reflexivity

One of the important challenges throughout the work was to remain as objective as possible. In Study 1, over half the participants (54.9%) were recruited from the researcher's home court and the format for the 'reasons' was the one in use there. Care was taken, through the pilot study, to ensure that possible lack of familiarity with the detail of such a form did not disadvantage those from other courts. Prior to analysis, questionnaire responses were coded to anonymise the results, so that the researcher could not easily identify that participant and would not be influenced by a value judgement about the source.

However, in this study, all the participants and the researcher knew each other as working colleagues. It is relevant to note that the researcher and the participants rarely sit on sentencing Benches together because of the random nature of their rota of sittings. They would not, necessarily, be very familiar with the way each person adjudicated. Notwithstanding, their familiarity with each other might be considered, potentially, to compromise the objectivity of the analysis or inhibit full disclosure. However, in practice, their familiarity should be regarded as a strength.

Because they shared a common vocabulary, a better-informed discussion of the finer points of the sentencing process was facilitated. Participants felt confident in their willingness to offer observations, in the knowledge that contributions would not be identified, but the

context of their comments was well recognised, against a background of shared experience. It also permitted a well-informed examination of specific types of offence and circumstances that only someone intimate with the process in the retiring room, would be aware of, teasing out ambiguities and developing topics in a productive manner. Indeed, the detailed examination of the model of structured decision making advised by the Judicial Studies Board and its interpretation in the Magistrates' Association Guidelines would be extremely difficult to explore satisfactorily, without 'insider' knowledge and experience of the process. That knowledge could be applied to act as a 'bridge' between some of the legal and psychological concepts and the experience was helpful in identifying controversial aspects.

While participants might have felt inhibited in exposing their personal idiosyncrasies to a colleague, in practice, all appeared relaxed in the interview and keen to respond to the questions asked. A general degree of pride in the service they provided and their own competency might have 'glossed over' some of the deficiencies that they were aware of. However, while rarely critical of their own activity, individuals made observations about others that informed the research generally and allowed this sort of less flattering material to be disclosed.

The training and court experience of the researcher was so close to that of most of the participants that it is possible that some lines of enquiry were overlooked or insufficiently explored because aspects were taken for granted. Similarly there was scope for bias, simply because the majority of those involved operated within the same jurisdiction and were unfamiliar with practices elsewhere. There was the additional risk that the experience of this Bench was atypical of other courts either in the training it had received or the standards it expected to achieve through appraisal. Further, the encouragement of the researcher in empathising with some of the problems expressed may have given their

views, in this respect, disproportionate credibility. The contribution of new recruits, not as yet overly familiar with the Bench, and a magistrate from outside this PSD, went some way to address this difficulty by presenting views that had had less opportunity to be influenced by the general Bench culture of the researcher.

On a personal level, as a practising magistrate, the researcher has an approach to sentencing through training and experience developed over several years that leads to a particular view of the process and generates expectations as to how it should operate. For this reason, the researcher was careful throughout the interviews not to lead interviewees in their responses but, nonetheless, certain suggestions could be made that might have been more openly resented coming from a complete stranger. An element of code and jargon enhanced the free exchange of information and the content of some of the responses could more accurately be placed as a result of a shared context.

Pidgeon and Henwood (1997) suggested certain rules of good practice in this type of research, which the researcher has attempted to follow. Firstly, the themes detailed in analysis evolved from a close fit with the data contained in the interviews. The themes that the researcher wanted to pursue were carefully introduced through the structure of the questionnaire. Open questions were used but handled in such a way that all participants covered the same ground. The involvement of the interviewer served only to develop or clarify issues, without providing the researcher's opinions on any of the matters discussed (as can be seen from the transcripts where any verbal prompts and comments were recorded). This should be distinguished from the next study when the researcher was a participant member of the discussion that generated the data.

In analysing the material produced, the researcher reviewed the answers against the background of the findings already available from Study 1. Further, the personal

experience of undertaking similar sentencing activity, repeated many times by the researcher and observed as an appraiser, provided a sound understanding of the process that was being described and the familiarity with the type of interactions between colleagues that were referred to. The researcher has experience in each of the types of courts mentioned, adult, youth and family, and participates as Chairman and winger, experience that would have been known to the interviewees. This may have assisted them in thinking broadly around the topics, placing their answers in different contexts. Taken as a whole, this was of considerable assistance in picking out relevant quotations to support the ideas developed. None of the opinions expressed were so unfamiliar to the researcher that they would influence the on-going relationship with that participant, although the thoughtfulness of some of the participants was unexpected.

Theories of the operating model were tested at different levels of abstraction. The models were described in popular and more scientific terms, explored in specific contexts but also as abstract concepts. A similar approach was adopted with regard to the impact of individual differences.

5.2.4 Ethical considerations

Interviews were conducted in accordance with the British Psychological Society guidelines and approved by the departmental ethical committee of the university. Before seeking their consent to participate, a written protocol (see Appendix 7) was provided to participants. This advised them of the broad nature of the research, informed them of their right to withdraw without penalty and gave an indication of the way in which the material was expected to be used. Participants were given an opportunity to consider the protocol before commencing.

5.3 Methodology

5.3.1 Participants

Ten magistrates volunteered to be interviewed, following approaches from the researcher. The sample was made up of equal numbers of male and female magistrates, of varying years of experience, with a variety of professional backgrounds. It concurs in size with guidance provided by Smith and Osborn (2003).

With the exception of one, all participants were members of the same urban PSD. Two were relatively recent appointments (less than three years) and the others ranged in experience between nine and twenty five years. Of the experienced magistrates, all but one had considerable experience as Chairs[1] of Benches, as well as contributing to sentencing decisions as wingers. Four magistrates were members of the Youth panel, as well as their adult court responsibilities, and three were familiar with Family court work. Five of the group considered themselves to be in employment (in some cases part-time) while others maintained an active portfolio of voluntary appointments/activities.

In the presentation of findings, participants were assigned fictional names to protect their identity and assist in the comprehension of the dialogue. Despite this, on a few occasions, some identification has been omitted when reporting comments. In these instances, the researcher felt it was too easy to identify individuals, certainly by readers who knew the composition of the sample. While it was relevant to discover if a range of approaches existed, it did not detract from the overall discussion to limit the identification.

5.3.2 Materials

The interview was conducted using a script composed of 29 questions (see Appendix 8 for the script and Appendix 9a for an example of a completed response). The total exchange

between researcher and each interviewee was recorded with the agreement of each of the participants and subsequently, a verbatim transcript was prepared. Individual interviews took between one and a half and two hours to complete. They were conducted at pre-arranged appointments that took place either at the home of the researcher or at another location convenient to the interviewee.

The questions in the semi-structured interviews were grouped around ten different themes. There was some cross-referencing and some themes were repeated for consistency checks. Prompts, some scripted, others arising spontaneously, were used to explore further avenues that appeared to elicit fruitful comment.

The individual themes are described below in the order they appeared in the questionnaire. Of these, three pursued ideas already explored in Study 1 (themes 2, 3, and 6). Four arose as a consequence of the findings in Study 1 (themes 1, 4, 9 and 10) and three were speculatively introduced or addressed ideas from the literature that had not been explored previously (themes 5, 7 and 8).

The initial three questions (Q1-3, theme 1) were designed to find out: what the individuals were aiming to achieve in sentencing; what represented satisfaction for them; and whether there were competing aims in achieving the final result. Sentencing aims were not an explicit part of structured decision making at the time of the data collection in Study 1, but had been included in the modified 'reasons' forms. Since the CJA (2003), effective from 1st April 2005, magistrates are requested to specify their aim/s on the most recent version of the 'reasons' record, so its value has been re-emphasised. Further, sentencing aims had emerged in Study 1 as a possible predictor of sentence, or at least a partial explanation of the agreement between PSR and sentencing choice.

[1] The terms Chair and Chairman are used interchangeably and refer to the person who presides during a

Participants then addressed those qualities in their colleagues that they admired, in terms of their sentencing ability. This was investigated through three similar questions, one placed near the beginning and two towards the end of the interview (Q4, 27 & 28, theme 2). The next six questions addressed preparation and training for sentencing and its application (Q5-10, theme 3). A further question, (Q11, theme 4), was specifically directed towards the use of the PSR.

As described previously (Chapter 1.5, p8), a PSR is prepared by a probation officer to inform and assist the sentencing Bench in deciding which sentencing option, in all the circumstances of a particular case, represents the most appropriate choice. It is usually prepared following a personal interview with the defendant, access to prosecution papers and information from any other agency that the author deems relevant. It is sought in cases where there appears to be insufficient information readily available 'on the day' for the final determination of the case. Such a report is required by law where certain sentencing options, namely most community penalties or custody, are under consideration. The report will normally consider the appropriateness of a range of options that the court might be thinking about, with an indication of the one that the writer favours. While the recommendation of the report is in not usually binding on the sentencing Bench, strong concordance rates between the recommendation and the final disposal is generally taken as a measure of effective probation input.

Five questions were concerned with the resolution of sentencing dilemmas, (Q12-16, theme 5) and two looked at the possible effects of general life and magisterial experience on sentencing practice, (Q17&18, theme 6).

particular court session. No gender discrimination is implied.

The interview then moved from ideas that explored sentencing as an individual to a discussion of group working and the interactions between individuals, (Q19-24, theme 7). The different roles of Chairmen and wingers in the sentencing group was discussed.

The contribution of the Legal Advisor to sentencing practice was explored (Q25, theme 8). In their training and through their experience, magistrates should be familiar with the Practice Direction (Justices: Clerk to the Court) 2000, provided by Lord Woolf. This covers the responsibilities of the LA for the legal advice s/he tenders, the way in which that advice is offered and other functions of the LA. Edited excerpts only are reproduced, full text at http://www.lawreports.co.uk/qboct0.2.htm, accessed May 2005,

> "3. It shall be the responsibility of the legal adviser to provide the justices with any advice they require to properly perform their functions whether or not the justices have requested that advice, on: (i) questions of law (including European Court of Human Rights jurisprudence and those matters set out in s2(1) of the Human Rights Act 1998); (ii) questions of mixed law and fact; (iii) matters of practice and procedure; (iv) the range of penalties available; (v) any relevant decisions of the superior courts or other guidelines; (vi) other issues relevant to the matter before the court; (vii) the appropriate decision-making structure to be applied in any given case. In addition to advising the justices it shall be the legal adviser's responsibility to assist the court, where appropriate, as to the formulation of reasons and the recording of those reasons."

This is the context, against which the reality of the LA's input was discussed.

The interview concluded with participants' reflections on a specific case that had impinged on their memory because of the challenges it presented (Q26, theme 9) and their ideas about a psychological model for the decision making task, (Q29, theme 10). While most of the other questions were self explanatory, the prompt for Q 29 is included here, in full, to

explain its construction. The model descriptions were presented, typically, to the participants by the researcher, as follows:

> "One of these is the story-telling model where you construct a story, select pieces of information that appear to you to support a logical, consistent understanding of what's happened.
>
> Another model is called the algebraic model where there are positives and negatives and you balance them off against each other.
>
> The third is called a heuristic where you take a shortcut. You focus on **an** element and that element is sufficiently persuasive for you, that you are 90% of the way to a decision, without really looking for anything else."

It is acknowledged that these descriptions represent a gross simplification of the models but it did not seem appropriate in an interview of this length and with these participants, to embark upon a more complicated/detailed explanation. While the actual words varied slightly from interview to interview, the sample provided above represents the flavour of the information imparted to each magistrate. It served as a prompt for them to comment and speculate about what they felt the mechanics of decision-making might be and the influences that applied.

Each participant was given a final opportunity to suggest anything else that they felt might be relevant to understanding the role of a sentencer or improving the process, contributions which were incorporated into theme 10.

5.3.3 Procedure

Having given each person an opportunity to read the protocol, participants were reminded that the research was primarily concerned with sentencing, as opposed to other types of decision made by magistrates. Individual interviews were recorded and transcribed as

soon as possible thereafter, while the material was familiar and before other interviews had interfered with the remembrance. The interviews were conducted in such a way as to be sensitive to the realities of the environment in which the participants operated.

5.3.4 Analytical approach

Each themed section of the transcripts was electronically amalgamated for all participants to produce separate documents that recorded the input of all ten magistrates on a particular theme. These documents were then read and re-read, "highlighted" and annotated, to identify recurrent ideas or comments on similar aspects. Examples of a complete transcript for an individual participant and the amalgamated record for one section can be found in Appendices 9a and 9b respectively.

No holistic comparison of scripts was attempted. The way in which the interview was constructed leant itself more appropriately to sectional consideration. Questions were themed fairly specifically and discretely. The responses to each theme needed comparison with each other. While individuals may have displayed a personal style in their choice of words or the formality of their response, the thrust of the research was to look at their views on particular topics, not to reflect on them as individuals. Apart from the open questions at the end of the interview, participants were encouraged to respond to the interviewer's schedule.

While the numbers involved precluded any meaningful statistical analyses, proportions have been indicated as a measure of the transferability and generalisation of ideas. In places, direct quotes from the participants have been woven into the narrative of the analysis. Their use in this way seemed appropriate, as it was often descriptive words or phrases that conveyed the sense of an observation. At other points, where the quotation was longer and more understandable as a 'stand-alone' statement, it has been removed to

an appendix and referred to in the text by the line number and name tag that identifies it in that appendix (see Appendix 9c). This was done in this work to conform with word limits overall and make the study more accessible. Handling the quotations in this way allowed the ideas contained in the exchanges to be revealed clearly, while retaining the richness of the dialogue in an appendix for the interested reader to consult. Thus, the 'message' is conveyed in the participants' own words, enhancing the persuasiveness of the ideas, and supporting the plausibility of the conclusions reached in this world, relatively unfamiliar, to the lay observer. A degree of negative case analysis emerged as later participants disclaimed hypotheses that appeared to emerge from earlier interviews or dissented from a prevailing impression.

5.3.5 Organisation of results

The results for each of the ten themes are reported in the next chapter under the following headings.

- Theme 1: Sentencing aims
- Theme 2: Personal qualities of 'good' sentencers
- Theme 3: Training and knowledge of structured decision-making; its application, limitations and heuristic processing
- Theme 4: The use of the pre-sentence report
- Theme 5: Managing sentencing dilemmas
- Theme 6: Socio-demographic influences
- Theme 7: Group working
- Theme 8: The contribution of the legal advisor
- Theme 9: Difficult sentencing
- Theme 10: Sentencing models and other influences

Having considered the results for the ten themes, elements of these were drawn together to inform the discussion of the overarching research question concerned with exploring the working model for sentencing decisions and looking at the effect of individual differences on the process and outcome of that activity. The discussion in Chapter 7 is informed by the views of individuals but takes group interactions and influences into account.

6

Study 2 (Part2): Presentation of the Results

This chapter reports the findings of the individual interviews. The questions that formed the semi-scripted interview were grouped around ten themes. These are presented primarily in the order in which they arose in the interview. The questions upon which they are based are identified, the main ideas within each theme are summarised, then amplified by reference to supporting quotations within the scripts. The labelling indicates the position of a quotation in Appendix 9c. In general, the fictional names assigned to participants to ensure anonymity have been maintained throughout the chapter. Any departure is explained in context. The results for all themes will be discussed collectively in the following chapter.

6.1 Theme 1: Sentencing aims

This section is based on the collective responses to questions 1,2 & 3.

Participants were asked to consider their sentencing aims under the three descriptors "good", "accurate" and "effective".

- In discussing 'good' sentencing, there was an opportunity for them to articulate what they thought they were trying to achieve, optimally, and indicate any limitations they perceived
- What the terms accurate and effective meant in the context of sentencing; and

- Whether the three terms were connected

6.1.1 Good sentencing

Salient features referred to comprehensiveness, competing aims, the constraints of information available, the importance of procedure and the individualising of the disposal.

6.1.1.1 Comprehensiveness

Magistrates indicated that a 'good' sentencing decision needed to be taken with access to a full picture of events surrounding the offence and knowledge of the offender's personal circumstances. Remarks from *Ann(1), George(2&3), Emma(4), Joan(5), David(6), Helen(7)* demonstrated awareness of the prescribed elements in the JSB sentencing model, (see 1.6.4).

Some participants found this a difficult, thought-provoking, initial question. The answers, generally, made it apparent that there was divergence as to whether outcome or process should be the criterion for evaluation. Just over three-quarters of the sample focused on process. Their approach required them to have gone through all the information, in the way that they felt they had been trained to do. The actual sentence chosen was less important, as long as fairness to all the parties to an offence was demonstrated by taking them into consideration (*Ian(8)*). Frustration that legal constraints sometimes limited this process was expressed by three people (*Charles(9), David(10), Felicity(11)*).

An awareness to look in more than one direction when deciding sentence, acknowledged the need to balance competing interests of victim and offender. Some contributors went further, articulating their responsibility to society in general, in their judicial role. A positive outcome for one magistrate, *Felicity,* was as likely to be the quality of the message

that was communicated to the public by the sentencing choice, as the potential to change offending behaviour. Others, including *Bill,* talked of the importance of "... justice being seen to be done" and the need to demonstrate that to the public, as the essential element of fairness. Fairness was itself the most challenging aspect of sentencing for *Ian (12).*

6.1.1.2 Competing aims

For some, multiple sentencing aims, seeking to achieve deterrence with rehabilitation, were apparent *(Bill(13)),* while *Ann,* felt that the ability to stop the person re-offending was, on occasions, in conflict with the accuracy of the sentencing choice, a view shared by *Bill (14). Ian (16)* endorsed *Bill's* view *(15)* that there was an over-emphasis on the rehabilitative value of sentencing.

Two magistrates, despite the clichéd nature of the expression, both chose, spontaneously, the same Gilbert & Sullivan quotation "let the punishment fit the crime" to summarise their approach for achieving what they considered to be a "good" sentence, perhaps revealing a neo-retributive approach as expounded by von Hirsch and Ashworth (1992)

6.1.1.3 Information gathering

The quantity and quality of available information was held at a premium. More than one magistrate complained about the relative paucity of information available to sentencers on many occasions *(Ian(17), Bill(18)).* The absence of information hampered their endeavours, a sentiment with which *Joan (19), Charles (20)* and *David (21)* agreed. Too often, this related to details of the offence and impact on the victim. According to *Charles,* the defendant's advocate, together with the information contained in the PSR, were perceived as representing one aspect of the sentencing decision very fully, to the detriment of the other elements, as no-one was available in person to properly pursue these other

dimensions. Although victim impact statements are now admissible in legal proceedings when considering the most appropriate sentence, their presentation in the magistrates' courts is an extremely rare event and the prosecution version of case facts can be extremely brief and perfunctory.

6.1.1.4 Importance of procedure

Several magistrates referred to the importance, for them, of using a structured approach if there was to be any prospect of a satisfactory outcome. As suggested previously, some were as concerned to ensure that they had followed the structured approach, as recommended in the Guidelines, per se, regardless of outcome, as with any other aspect of the process, its aims or objectives *(Helen(22), Ian(23))*.

6.1.1.5 Individualising outcome

Participants stressed the effort they made to individualise an offence and personalise the sentence by taking into account *all* the circumstances, as represented on a specific occasion (*Ian(24)* and *George(25))*. There was even a repudiation of the pressure for consistency at the expense of the magistrate's right to exercise a totally independent choice of sentence *(Ian (26), Joan(27))*

The experience of having made a "good" sentencing decision was, for most magistrates, associated with thoroughness of process and individualising of consideration rather than any specified outcome.

6.1.2 Accurate and /or effective, in relation to sentencing choices

Interviewees were asked to consider whether the terms accurate and / effective had any meaning for them in the context of sentencing decisions.

6.1.2.1 Accurate

There was widespread reluctance to associate the term accurate to any extent with this decision-making process or its outcome. This was mostly on the basis that there could be no verifiable measure of accuracy *(David(28), Ian(29)).* However, there seemed to be an acceptance that strict application of the Guidelines, provided a standard of sentencing prediction for comparison (*George(30), Helen(31), Joan(32)).*

Accuracy seemed to militate against the concept of personalised choice or individualised judgements. *Joan(33*), a magistrate with over 25 years experience, rejected the label of accurate sentencing. Similarly reluctant to label the activity in this way, others offered words such as "appropriate", "structured, ... logical and analytical, unemotional" as alternatives for conveying the flavour of the process that the magistrates saw themselves engaged with.

6.1.2.2 Effective

Effective sentencing appeared to be a more relevant descriptor than accurate. The link between the chosen disposal and the commission of further offences was a common measure of effectiveness *((Emma(34), George(35), Helen(36)).*

Magistrates could justify departures from the Guidelines in order to enhance effectiveness *(Ann(37)).* However, *Emma*, actually dismissed consideration of effectiveness as not being within the magistrates' remit when choosing between sentences. *Ian(38)* felt effectiveness was only quantifiable after a sentence had been carried out.

The completeness of the process, in taking all the relevant factors about the offence and the offender, was, again, the over-riding consideration *(Joan(39))*.

6.1.3 Good/accurate/effective

Reviewing the three descriptors overall, good, accurate and effective, magistrates appeared to have difficulty distinguishing them. The majority of magistrates seemed to suggest that a sentence could only be good if it was both effective, in their terms prevented re-offending, and the process for determining that sentence had been accurately applied, by following the structure of decision-making represented in the Guidelines. Accurate and effective were necessary, but not always sufficient conditions to satisfy, before there was any possibility of the sentencers feeling they had made a "good" decision, *Ann* suggesting they were "part of a package" and *Charles(40)* and *Helen(41)* expecting the three to come together.

A few, accepted their responsibility to "do what they had to do", by which they seemed to mean choosing a sentence that had no "positive" element for the defendant, simply because of the strict application of the structured approach as they understood it *(Felicity(42))*.
For them there was no harmony in the terms.

*6.2 **Theme 2**: Personal qualities of 'good' sentencers*

The material in this section was based on the responses to Q 4, 27 & 28. In that similar questions were posed at the commencement and towards the end of the interview, they provided input on the following topics.

- An indication of participant consistency throughout the interview;
- Personal qualities that participants appreciated;

- Qualities that magistrates deprecated in colleagues;
- Other minority individual characteristics that participants identified; and
- Personal qualities as they impinged on group working.

6.2.1 Consistency during the interview

Interviews took between one and a half and two hours to complete. Up to an hour later in the interview, two participants *(David(43), Felicity(44))* explicitly noted that the question about the qualities of good sentencers had been asked before. Both chose to use exactly the same descriptors about their colleagues on each occasion, although each expanded on their initial response and offered additional qualities. Five other participants expressed consistent ideas, sometimes choosing identical words among the two responses: *Ann* "flexible"; *Charles* "intelligent"; *Emma* "focus" and; *George* "Look at the facts...pay attention to the facts" and "rational ... being rational"; or expressing thoughts that related to the same qualities with a altered vocabulary *(Emma(45), Helen(46))*.

All of this supported the view that, from the outset, individual magistrates were clear and consistent in identifying those qualities that they believed were beneficial. There were no examples of contradictory expressions between initial and final thoughts on the subject, although on further reflection, and in response to suggestions for consideration in some cases, some people augmented their list.

6.2.2 Personal qualities appreciated

Participants wanted to engage with colleagues who knew what they were doing, had extensive knowledge of how they were expected to contribute and what the options were. *Ann(47), Emma(48), Felicity(49), George(50),* and *Helen(51)* contributed similar desirable qualities referring to "judicial thinking" and "analytical ability" and ideas for approaching

the sentencing task. Some alluded to ways in which they could support each other, contributing to the evaluation of evidence *(Charles(52), Ian(53), Joan(54))*. There was an early indication that some magistrates were more ready to identify deficiencies in others before themselves, with *Emma* using "slightly social work" to describe colleagues in a deprecating manner.

Throughout these observations, although asked for the qualities of the people making the decisions, participants were already looking for expertise in the elements of the task, as they perceived it. They referred to the search for *relevant* material, the ability to assess the validity of evidence, to balance competing claims, even, in *Joan*'s case, to "know" who was telling the truth.

Fairness, flexibility and balance, were qualities that were generally considered desirable for people to bring to the process. *Ann(55)* wanted people who were "fair" and "flexible" prepared to discuss a decision. Both *Ann* and *David* linked flexibility with open-mindedness, the latter suggesting that flexibility was, in effect, "... similar to open-mindedness and fair-mindedness". *Felicity* spoke of the importance of people being "unprejudiced", "weighing up the evidence", while *George(56)* stressed the value of "alertness to the wider context" which he, like *Helen(57),* indicated were aspects that contributed to fairness. Balance was mentioned specifically by *Ian(58),* an aspect that he linked to a range of judicial experience, and *Joan* (*ln59).* Both *Charles*(60) and *Joan(61)* valued flexibility in their deliberations.

The willingness to engage in a discussion *(Ian(62))*, express points of view and evaluate the contribution of others were elements of the process that many people referred to as desirable. For *Helen*, listening was the most important contribution when she re-considered her choice of desirable qualities while *Joan (63)* saw sentencing discussions as

an opportunity to exercise good people skills, focused on listening, based on a structured approach *(Joan (64))*. *Charles,* too, valued listening, although this was qualified by "intelligently", perhaps, like some others *(David(65))*, differentiating between the willingness to listen and the ability to respond to what another person had said.

Charles' appraisal of desirable qualities focused on the cerebral, generally, and deprecated stupidity. By contrast, *Bill*, while critical of "... people who aren't prepared to listen", admired the more practical talent of good communication with those attending court, especially with young defendants *(Bill(66))*. For him, good Chairmanship ought to redress the inequalities of articulation among colleagues on a sentencing Bench and also deal with people who were not apparently prepared to listen to the views of their colleagues. For *Emma(67),* having initially focused on higher order mental capacities, listening and inter-personal skills were paramount when she re-considered the qualities of a good sentencer.

For two magistrates, at least, an exchange with mutual respect was envisaged (*Emma(67)* , *George(68))* so that a range of views were considered before a decision was made. Again, listening to garner information and discussion to disseminate that information was expected.

6.2.3 Negative qualities

The converse of all the desirable qualities were equally well represented when participants spoke of the qualities in colleagues that they found most difficult to accommodate. Intransigence was deprecated generally, and obduracy condemned *(Ann (69), Charles(70), David(71), Emma(72))*. However, *Ann* recognised that people who couldn't make up their minds might also present a problem and *Bill (73)* emphasised that there was no shame in being "wrong" in one's sentencing choice endorsing the criticism that lack of flexibility attracted. The more severe the punishment, the more willing people should be to reconsider

their choice in the light of the input of colleagues (*Bill(74)*). George mentioned "stubbornness" in his list of undesirable qualities, while *Helen(75)* criticised "strong-mindedness" which she called "dogmatism", similar to *Ian (76). Joan (77)* specifically linked inflexibility with a few magistrates who had served for a long time.

For several people, emotion was the enemy of logical thought and interfered with good decision-making, (*Felicity(78), Joan(79), George(80), David(81), Emma(82)).*

6.2.4 Minority individual characteristics

Individual attributes featured in most peoples' lists, some of which had been explored in Study 1. Open-mindedness was a frequently desired quality, mentioned specifically by half the sample. None of the other traits in the five factor model of personality or the additional traits of locus of control, authoritarianism and need for cognition, that were explored in Study 1, came out spontaneously. Ideas such as agreeableness, conscientiousness, authoritarianism and dogmatism were suggested to some participants by the researcher, for possible consideration. The only one to be picked up with any enthusiasm was conscientiousness *(Emma(83), Felicity(84))*. Emma appeared not to distinguish conscientiousness and open-mindedness, on the basis that the proper exercise of one (conscientiousness) would imply the other for her (*Emma(85)*). She anticipated implications for the outcome of sentencing *(Emma(86))* suggesting that decisions might be pushed closer to the entry point suggested in the Guidelines *(Emma(87))* if magistrates were operating conscientiously.

Ian had no use for conscientiousness, open-mindedness or agreeableness whereas *Joan* could see the value of both conscientiousness and open-mindedness but didn't think agreeableness was "important at all". *Felicity*, too, rejected agreeableness explicitly, almost implying that it might compromise performance. *Joan* expected the effect of

conscientiousness to reflect on the sentencing process by the observation of careful listening and taking accurate notes.

More than one participant mentioned the role of empathy in the sentencing process (*Bill(88)*, *Charles(89)*, *Emma(90)*, *Helen(91)*). Judicial thinking and prejudice featured in the consideration of participants *(Charles(92), Emma(93)*, *Felicity(94))*. For *George(95)* and *Helen(96)* rationality were emphasised and *Joan* (97) joined them in their insistence on the importance of eliminating prejudice.

6.2.5 Group working

The final strand to emerge from this part of the interview concerned the magistrates' ideas on how they worked together as a group. They recognised that in a few cases, whatever their personal feelings, the sentence was in fact the conclusion of *three* peoples' deliberation, when one was considering the work of a lay Bench. This qualified the input of any individual to the final sentencing decision but also related back to inter-personal skills. It acknowledged the value of good team working and might distinguish the outcome of sentencing from the decisions of a District Judge (*Emma(98) & (99))*. Others too referred to the importance of the tribunal approach and its implications for the sentencing activity (*Helen(100)*, *Joan(101)*), alluding to the importance of group discussion and corporate responsibility while implying some sort of levelling effect on extreme views.

6.3 Theme 3: Training and knowledge of structured decision-making; its application, limitations and heuristic processing

This was addressed in Q5-10. Responses broadly informed four topics:

- The training magistrates had received in preparation for sentencing;

- Their understanding of structured decision-making and its application;
- The universality and thoroughness of approach,
- Heuristic processing.

6.3.1 Training and preparation

Views on the quality of the training experience were mixed. There was, however, consensus that whatever it had been in the past, things appeared to have improved in recent years *(Helen(102), Joan(103)).* Joan's comments reflected considerable experience, as well as recent mentoring of new magistrates. This is the system, described previously in Chapter 1, p9, whereby an experienced member of the Bench is assigned as "friend and guide" to assist the induction process for a new appointee. *Joan(104)* expressed enthusiasm for this system to the extent that it assisted not only the learning experience of the new magistrates, but enormously reinforced the skills of the experienced mentors who had to be able to respond to questions in an informed and knowledgeable way.

Two of the sample had undergone induction training within the previous two years. Already one relatively new appointee was unable to remember any specific details about it. The other applied the term "adequate" to the training experience but acknowledged that one-one sessions with the mentor had contributed positively to the process.

Training seemed to fall into two categories for most people. There were 'set piece' presentations of new legislation, with opportunities to practise applications and there were the annual/biennial, small group discussions of a handful of case studies, where chosen outcomes were compared and contrasted, as a means of informing the audience of the reasoning behind the decisions. Training around case studies was undoubtedly, also, about encouraging consistency of approach at least, if not outcome in sentencing.

Enthusiasm for the latter type of training was mixed, some rather bored by the repetition (*Ann(105), Charles(106,)Helen(107), Emma(108)*), others appreciating the group interactions, (*Bill(109), Felicity(110), George(111)*). *David* confirmed that "... a lot of training goes on," but he struggled to identify any that he felt warmly about. He had reservations about its practical value and was dismissive of its content *(David(112) & (113))*, especially in relation to structured sentencing decision-making. However, *Emma* valued the opportunity to practise the structured approach and execute the process more rapidly (*Emma(114)*). For *Ian* training had been "rudimentary". He was particularly critical of his preparation for Chairmanship (*Ian(115)*), although he recognised the value of encouraging people to adopt a formalised approach using structured decision-making (*Ian(116)*).

Finally, from "abysmal" to good, *Joan(117)* had observed the training experience improve to the point where case studies with sentencing exercises provided insight into the views of others.

6.3.2 Structured decision-making; Individual understanding and application to real cases

Everyone in the sample of magistrates seemed to recognise immediately what was being referred to when asked how easy they felt the JSB model for structured decision-making was to apply, in practice. Most of the responses were positive (*Ann(118), Bill(119), Charles(120), George(121)*). However, Charles had reservations about how easy some of his colleagues found its use, mentioning "... people [who] skate around the surface" and others who "mouth the words."

This was the first acknowledgement by anyone that the structure was, on occasions, imperfectly applied, but not by themselves. While *Charles(122)* commented on the improvement over the years, he was aware as an appraiser, observing other magistrates

actually sentencing, that the practice he noted routinely was not always thorough (*Charles(123)*). *David,* also, represented the model as "straightforward to implement," but like *Charles*, he wasn't sure " that it is done with rigour every time" he was involved in a sentencing decision (*David(124)*). He had more time for the structure and its accurate application to address "problem" sentencing (*David(125)*), a sentiment shared by *Felicity(126)* and extended by *Emma(127)*, and *Joan(128)* to deal with problematic colleagues.

Felicity(129) linked resistance to the use of structured decision-making with the practice of some long-serving magistrates who she felt lacked familiarity with it. (Specific training in this aspect may not have formed any part of their formal introduction, having been appointed so long ago). *Bill(130)* and *Joan(131)* supported her in this reservation in this respect, although *George(132)* disagreed .

Felicity's limited experience had initially suggested that the use of structured decision-making was widespread. However, her perception now was that the Legal Advisors found the process, done thoroughly, to be very time consuming, slowing down the throughput and contributing to low case completion rates. This generated a feeling of pressure. For her, exhaustive thoroughness was not necessarily a valuable exercise in all cases, anyway. *Helen(133)* focused on its usefulness as a tool for guiding the discussion in the retiring room. As experienced magistrates, neither *Helen* or *Emma* felt the need to consult the specific examples of relevant features for a particular offence, provided in the Guidelines, using it only as an aid to guide their approach. *Ian* was well aware of these Guidelines and found them "extremely useful", commenting only that, on occasions, they could be of more assistance, if the examples were expanded. This gave him an opportunity to reflect that *some* colleagues struggled in their "proper" application *(Ian(134))*.

A few magistrates had already mentioned the record of aggravating and mitigating features as evidence of their understanding of the model. When each was asked to articulate how they used the advice to "weight the features appropriately" in coming to a decision, several struggled to provide any specific explanation. *Ann* responded with examples of the type of feature that might be relevant in a particular offence. She was aware that there was a different value to be placed on individual aspects but struggled to convey how that value was determined. She strongly resisted any suggestion that aggravating and mitigating features could be numerically scored off against each other or the exercise represented as a simple algebraic computation (*Ann(135)).* In trying to explain what she thought she *did* do, she resorted to words like arrive at "fair", "sensible sentence" and "reach a reasonable decision", indications of the objective but not the mechanism. *Bill* couldn't say how he assigned weightings to the features, beyond rehearsing the elements of the model, offence aggravation, including victim impact, offence mitigation and offender personal mitigation and a need to listen carefully.

When *Bill* was asked to comment if weighting was instinctive or in some way numerical, he suggested that he preferred to "see it as a whole", although he later reverted to a more mathematical representation involving positive and negative aspects (*Bill(136)).* He recognised that "it depends on the strength of each [feature]" and his effort to explain how he estimated this aspect seemed to rely on an evaluation related to his personal experience of similar events, and the impression they had made on him. *Charles(137)* resisted the idea that it was possible to "weigh them [the features] scientifically", preferring to attempt to "hold all the different features in the balance". *David(138)* rejected the idea of a mathematical approach entirely. He went on to describe the model operating with quantitative, but imprecise words, such as "a lot", "not much", and "very little", attached to each aggravating or mitigating feature. This would cause the magistrates to " move up-

scale because there is a lot of aggravation and down-scale with a lot of mitigation" as each feature operated on the entry point for that offence.

Emma's concept of weighting embraced the notion of a positive and negative assignation to each feature when reviewing aggravation and mitigation, again conveying the idea of advancing up or descending a ladder in the penalty representation *(Emma(139))*. The question of how far up or down for specific features was left unanswered, although the idea of simply being able to "neutralise" the effect of an aggravating feature with a mitigating one or summate them algebraically was unattractive *(Emma(140))*. To reinforce that point, she demonstrated a balance mechanism, as in weighing scales, as if the value was somehow instinctive. *Felicity,* too, rejected completely the suggestion that weighting in any numerical way played a part in sentencing, referring to it as " a big time waster". However, her explanation of how aggravating and mitigating features *were* accommodated conceded that it happened through discussion, the effect of each factor on the estimation of seriousness being taken into account, with "listings" of mitigation but without precision *(Felicity(141))*. What she referred to as "judgement" involved discussion, context and listening to the arguments of others *(Felicity(142))*, repudiating the baggage of personal prejudice *(Felicity (143))*.

George(144), also, rejected any sense of numerical values in the weighting process, referring, as had *Bill, David* and *Emma,* to "a relatively personal assessment decision", with the adjective "intuitive" attached to the 'straightforward' decisions of the Bench. As with others previously, he felt that those cases where the outcome was more uncertain or there were divergent views were the ones that led to more considered discussions in the retiring room. Again, discussion was the key to achieving a common understanding of the contribution of any individual feature of a case to the overall estimation of seriousness, *(George(145))*.

Helen, like *Ann*, was much happier to discuss specific features of a specific offence rather than generalities. Imprecise quantitative words such as "weighed very heavily", "substantial aggravation" and "depends on the degree" emerged, as they had with *David.* However, *Helen* talked later, like *Bill,* of assigning "pluses and minuses" to features that had been noted. The word balance was again chosen to summarise the objective, *(Helen(146))*, acknowledging the influence of personal experience on the process. *Ian* knew the process thoroughly but was at pains to point out that every case was unique. The relative contribution of any feature, identified on his list had to be drawn out by being "careful to look behind the circumstances." Features were unlikely to have equal weight, "by a long way", so they couldn't be set against each other in any simple way but he did talk of "moving up from the entry point" when features weighed against the defendant, as *Emma* and *David* had done. In contrast to *Bill* and *Helen*, he, like *Felicity*, dissented from any notion that personal experience should contribute to weighting. *Joan(147)* suggested that weighting was the application of common sense. Like *Bill*, she referred to the importance of the "overall picture", felt numerical assignation of relative values was impossible but recognised that personal experience was, for her, a factor in the estimation of value judgement.

6.3.3 Universality of approach and thoroughness

Magistrates were asked whether they did, indeed, apply the structured advice from the JSB in all cases or whether they differentiated its applicability. Further, they were asked to consider whether they observed colleagues who appeared to apply the structure differently and whether any "short-cuts" were apparent, either for themselves or colleagues.

For many people the deciding factor, as to the exhaustiveness of process and appearance of thoroughness, seemed to be the degree of consensus about the appropriate sentence that

emerged, initially, in court. If the response was one of uniform agreement, no retirement to discuss would be necessary, even though individuals would not be privy to the thought processes of their colleagues *(George(148), Bill(149))*. Speed and throughput of case numbers seemed to be considered advantageous by some *(Joan(150), Felicity(151), David(152))*, especially in relation to the majority of motoring and other trivial offences. Where the issues were more complex or more controversial, magistrates liked to retire for a fuller discussion to take place and the application of structured decision-making undertaken under less time pressure *(Joan(153), Helen(154), Charles(155), David(156), Ann(157))*.

In response to the question of general applicability of the structured approach and the thoroughness with which it was applied, *Ian* distinguished "most/many motoring... other than drink driving", "absolute offences" and "very straightforward ones". For these, the structure was rarely invoked. However, when dealing with offences for which the Bench felt it necessary to retire *Ian* was thorough, with a completely orthodox approach *(Ian(158))*. While acknowledging that retiring from court created the opportunity for a more thorough approach, seven of the ten participants (*Ann(159)*, *Helen(160)*, *Emma(161)*, *Bil(162)*, *Charles(163)*, *David(164)*, *Felicity(165))* explicitly wished to assure the interviewer that the structure was nevertheless being observed implicitly while remaining in the courtroom.

Some participants, definitely regarded motoring offences as a class of their own, with a different expectation. In part, this related to the lack of flexibility in the penalty suggested in the Guidelines but, also, there was an indication that for minor matters, one should only put in a measured degree of exploration, (*Charles(166)*, *David(167)*, *Emma(168)*, *George(169)*, *Helen(170)*, *Ian(171))*. Others felt that in motoring offences, they were mostly dealing with the documentary evidence with little scope to individualise sentencing

(Ian(172), Joan(173)). *Bill(174)*, alone, stood out in his experience of motoring sentencing. Conscious of the impression given to the public, he resisted any appearance of superficiality.

While participants often expressed a desire to be thorough themselves, and possessed a knowledge of what they felt should be done, their observations of the behaviour of colleagues in respect of structured decision were not always so complimentary, *(Charles(175))*. Criticism was qualified by identifying degrees of similarity between the ideal and the actual practice that might be described as human variation. *Emma(176)* and *Helen(177)*, too, thought there were differences in application of the structured approach among colleagues, citing an absence of logic as their main concern. They surmised that this derived from a lack of confidence or inability to distinguish facets of the offence from the offender *(Emma(178, Helen(179))*, endorsing the observations about the nature of some 'errors' recorded in some scripts from Study 1. Logic featured for *Ian(180)*, too, in his criticism of colleagues who rushed to premature conclusions without proper discussion.

Rationality was the key to successful application of structured decision making for *George(181)*. Conscious that he was treading on 'delicate' ground, he, nevertheless, hazarded some observations on gender variations that might have been interpreted as stereotyping by some, distinguishing 'rational' men from 'emotional' women *(George(182))*. *Joan*, as in all her previous explanations, was thorough and accurate in her expectations of what others should be doing. However, she did differentiate her own approach from that of some others, indicating that "They have shortened versions."

6.3.4 Heuristic processing

There was a general distinction between the consideration due to complicated or serious cases and the more routine ones, alongside an acceptance that, if all three magistrates

appeared to agree, explicit discussion was curtailed or superfluous. However, magistrates, for the most part, resisted any suggestion that they operated 'shortcuts'. *Ann(183)* talked of internalised processing that omitted to address explicitly features that would not in practice apply, in a particular case, as did *Bill(184). David(185)* acknowledged that once a pattern had been set for a group of similar offences, individual discrimination was rare.

The pressure of time, when discussions along the lines of the advocated structure became protracted, might have caused *Emma* to compromise her thoroughness. *Helen(186)*, too, was defensive about the time a fully structured decision might take. However, she considered that there were people who could be observed to " cut out considering things." *Joan* talked of times when "We wouldn't use the book, when it's quite apparent." She described a "typical" example of a short-cut for a case of excess alcohol where the Chair might lead with a statement of their own view of the relevant considerations and invite agreement (*Joan(187)). Felicity* felt that over-reliance on the input of the Legal Advisor might be a form of laziness, along with omitting stages of structured decision making *(Felicity(188)).*

George(189) totally repudiated the notion that shortcuts might be acceptable, while *Ian's* idea of a shortcut was a deliberate attempt to set the tone of the subsequent discussion by early intervention. Where he had the opportunity as Chair, he prefaced any discussion of a case by providing an indication of his own view of seriousness (*Ian(190)*).

6.4 Theme 4: The use of the pre-sentence report

This was discussed in answer to Q11.

The quantitative work in Study 1 indicated good agreement between the recommendation of the Pre-sentence report [PSR] and the sentencing choice. This suggested that the PSR may have been a persuasive element, helping to predict the participants' final decision.

In Study 1, participants had considered three case studies, each containing a statement of the prosecution facts, the defence mitigation and a full PSR to use in making their sentencing decision. In two of the cases, the modal disposal concurred with the recommendation of the PSR. In the third case, sentencers opted for a community punishment rather than the financial penalty that was the preferred choice of the PSR writer. However, in following the second preference of that PSR, participants appeared to agree that the number of hours of community punishment required should be kept low, as suggested in the report. The first two cases, where the agreement was best, represented the greatest departures from the recommended entry point sentence for those offences.

On the basis of these observations, the opportunity to explore magistrates' views on the value of a PSR was followed up in the qualitative interviews. Participants' responses addressed four themes.

- Report strengths
- Weaknesses
- Influence/independence
- 'Short-cutting'

6.4.1 Strengths

Of the ten magistrates interviewed, five were complimentary, two identified an improvement curve and three were somewhat ambivalent about the value of PSR's for sentencing.

Ann found them "reasonably good", while *Bill* referred to the PSR as a "very good tool". *Charles* spoke "... more than just a signpost.... put you on the right track to the different

possibilities." Others, too, were complimentary and referred to improvement *(David(191), Emma(192), Ian(193), Joan(194)).*

One of the newer magistrates in the sample was the most openly sceptical in the group, using the phrase "with a pinch of salt" to describe her reaction to PSRs, in general, while the other relatively new magistrate indicated doubt about the consistency in quality. *Helen(195)* responded, apparently, more from convention than conviction, somewhat equivocal in the tone of her praise.

The strengths of the PSR were summarised by *Ann(196),* alluding to someone else having done the preparatory work and identified the options, *Bill(197)* commended their thoroughness and *George(198)* and *Joan(199)* appreciated the value of the author's experience. Words like "sensible" recommendations, "logic... the recommendation is logically built-up... persuasive and determinative", "trust the people who write the reports." were used to justify the confidence people placed in the recommendations. No one embraced PSR's with wholly unqualified enthusiasm.

6.4.2 Weaknesses

Ian(200) alleged defendant bias on the part of the probation officers. Acknowledging that this might be a prejudice in himself, he recognised that his reaction had been to discount the validity of their recommendations, *(Ian 201). Felicity(202)* was wary, also, of bias and over-representation of the defendant's viewpoint. This could be particularly misleading where there had been a contested trial and there was a lack of continuity with the sentencing Bench, *(Felicity203).* Excessive leniency in recommendations, especially those discouraging custody, was sometimes a problem for *David(204)* too. Disagreement over adopting a less severe option than the recommendation was rare *(David(205)).*

George described some PSRs as "a bit scrappy" and "sketchy", while *Emma(206)*, generally positive in her appreciation, distinguished reports on youth and adult defendants because of the perceived limitations in the disposals in the adult court.

6.4.3 Independence

Participants were keen to place the sentencing decisions in context. Special note was made that, notwithstanding credibility or logic, the responsibility for deciding in a specific case lay with the magistrates. They had a more comprehensive viewpoint to represent, taking into account the expectations of society, the impact on the victim and sentencing policy in general, than the one that may have been reflected in the probation officer's report, focused, in their perception, on the interests of the offender. Several repudiated any notion that they might be unduly influenced by a persuasive report. Independent evaluation was always necessary, even if it only served to endorse the recommendation contained in a report, *(Ann207), Charles(208), Emma(209). Bill(210)* was less thorough, perhaps, more trusting, but still the element of personal responsibility in adopting a recommendation was apparent.

As in their explanation of "good sentencing", the responsibility that magistrates believe they carry to satisfy more than one constituency was apparent. In distinguishing this as a possible reason for rejecting a PSR recommendation, magistrates implicitly stereotyped the probation service with an image that the service would wish to shake off - that of "do-gooders" who "side[d]" with the defendants and failed to properly empathise with the victim and the expectations of society.

David(211) conveyed a cautious pragmatism to his reading of reports, where general agreement was apparent, but *Felicity(212)* reinforced her observation that the report writers were often biased and the recommendations needed further exploration. Others asserted

their independence, *(George(213), Helen(214), Ian (215), Joan(216) & (217))*, again, emphasising the individualised approach that was highlighted as "good sentencing". The emphasis on joint decision-making, the product of three people's considerations, was mentioned again *(David(218), Helen(219), Joan(220))*, emphasising the inclusiveness of good sentencing.

6.4.4 Shortcuts

It was suggested to participants that, despite intentions to be thorough, there were occasions when practice fell short of idealism; reports were read with a focus on the conclusion for expedience, or forming a persuasive directive, avoiding more exhaustive processing or original consideration. Participants were mostly resistant to such suggestions but made some concessions, *(Ann(221, Bill(222), David(223))*.

Emma's approach came close to pre-judging the result, noting the offence, advancing rapidly to the recommendations, then "read[ing] the rest" *(Emma(224))*. This approach would be more consistent with the story-telling model of legal decision making, in that it seeks to assimilate the rest of the information available in such a way that it supports the conclusion, if the recommendation is to be considered acceptable. It might also be an example of choice by elimination where the reader looks for discordance in the case as represented. *Felicity* recognised that it was hard to get colleagues to reason from first principles, according to the models provided, underlining for her the importance of continuity between trial and sentencing Benches, *(Felicity(225))*. *Ian's* description of his approach was a combination of consistent story-telling, alongside a model of elimination. If the content of the report argued a convincing case and there were no glaring contradictions he would be fairly accepting of its recommendation, *(Ian(226)*.

George(227), however, said he had never been tempted to look at the conclusions of a report first, likewise, *Helen(228)* and *Joan(229).*

6.5 Theme 5: Managing sentencing dilemmas

Q12-16 explored how magistrates dealt with sentencing dilemmas and diversity of opinion that might arise when a range of views was represented on a Bench. The importance of adherence to structured decision-making when there appeared to be disagreement between colleagues had been mentioned already. Structured decision-making was also relied upon when there was a need to focus attention or 'difficult' decisions were faced. This section explores how individuals actually manage themselves and each other, in such circumstances.

An example of such a situation, the dilemma created when entry points and Guidelines pointed to a wholly different sentence to that which the Bench preferred to impose, was posed. The subsequent responses addressed:

- Personal strategies for dealing with apparently 'harsh' sentences: accommodation; manipulation; and conformity.
- The range, among colleagues, of personal tendencies in sentencing and how they were dealt with through anticipation and negotiation; and
- Coping with divergent views.

6.5.1 Personal strategies

To stimulate discussion, the specific example of a defendant carrying a bladed instrument, Guideline entry point custody, was used. Magistrates, on the Bench represented, rarely impose a sentence of imprisonment for a first offence of this type, even where the offender, initially, pleaded not guilty. Indeed, there are numerous examples where a fine may well

have been considered appropriate or alternatively, community penalties are regularly imposed. No one dissented from the proposition that their experience concurred with this representation of the sentencing decisions in such cases. They recognised that disparity, between guidance and the sentence actually imposed in such cases, apparently, arose fairly regularly, whether they, personally, supported or resisted such sentencing.

6.5.1.1 Accommodation

Ann insisted that she would "stick with the Guidelines" and "...follow the process" but to explain departures, she would, "consider the offence itself more closely". In practice, the example she provided confounded offence and personal mitigation and acknowledged the apparent disparity *(Ann(230))*. She agreed, somewhat reluctantly, that her approach would allow her to "over-weight the personal mitigation" in order to achieve her aim. Similarly *Bill's* approach "taking each one [offender/offence] at the time", could lead to significant differentiation. He, too, agreed that over-weighting of personal mitigation occurred, *(Bill(231))*. Careful consideration appeared to provide *George(232)* with the vehicle he needed to distinguish cases sufficiently that he considered that he *was* applying the Guidelines judiciously, but, again, with compassion for the defendant. Although *Helen* was very cautious about admitting anything other than due process ever occurred, she too, had felt able to reduce the sentence by careful consideration of the personal mitigation, *(Helen(233))*.

6.5.1.2 Manipulation

David(234) was a 'due process' advocate but appeared to be able to adapt it, skilfully, to serve his own purposes. He didn't appear to feel constrained by the Guidelines, adapting them to meet local conditions and choosing to ignore them if it suited him. With the confidence of over thirty years experience, he felt able to acknowledge the guidance on

entry point and then apply his personal judgement to sentence, in the manner he considered appropriate. He conceded that the entry point "may influence the Bench" but where it suited his purpose, he was quite willing to overweight the personal mitigation to effect a less severe penalty.

Without articulating it in psychological language, *David(235)* and *Emma(236)*, referred to the effects of repetition and reinforcement, along with the impact of immediacy when a defendant was present. This may suggest an approach that tested different hypotheses for plausibility or consistency, according to the different sources of information available, or even demonstrated biased judgements, based on physical presence and personal assessment over written reports. Both *David* and *Emma*, referred to the absence of information about the impact of the offence on the victim, long heralded but largely absent in the magistrates' courts.

Ian could manipulate any guidance to arrive where he wanted to get to, even though the examples that he provided, as reasons for differentiation, were not valid. He made a strong case for geographic distinctions related to prevalence but at the same time deprecated lenient sentencing on the grounds of habituation, *(Ian(237))*. Referring to his duty to represent the interests of society, he seemed extremely confident that he knew what it was that society expected of him and criticised colleagues who shrank from their 'duty' to apply the Guidelines rigidly, *(Ian(238))*.

Joan (239) was relaxed about interpreting Guidelines, preferring to focus on the defendant rather than the offence. She attributed the changes over her time as a magistrate to political influence, *(Joan(240))* and felt comfortable over-weighting personal mitigation if she felt that was appropriate *(Joan(241))*.

6.5.1.3 Conformity

Charles(242) was alone in maintaining that the seriousness of the offence should be paramount if there was conflict. *Emma(243)* was a little more equivocal, expressing "... a certain amount of cynicism" over some offender mitigation.

Others tackled the dilemma less robustly. *Bill* was keen to ensure that it would be understood that he felt it was important to uphold the seriousness of certain offences. There were some offences, for example domestic violence, for which he couldn't think of *any* mitigation that would reduce the punishment below custody. *Felicity* could justify lenient or conventional sentencing, adapt guidance to achieve her objective, which ever direction that influenced the outcome, so long as the Bench remained aware of the message it was communicating to the general public and took care to provide an explanation of apparent anomalies, *(Felicity (244))*. For her the particular dilemma of sentencing a woman with young children to custody, to mark the extremely serious nature of the offence, had arisen. On that occasion, she had argued, successfully, with colleagues that the imposition of a community penalty, even a *large* number of hours of community service, instead of a short custodial sentence, would be perceived, "as getting off with it". The seriousness of the offence had predominated. The strength of her conviction on this occasion had been such that she was a persuasive minority interest whose views prevailed (Moscovici, 1980). Realistically, *Charles(245)* observed around him examples of magistrates operating with different priorities which they imposed on the underlying framework of structured decision-making.

The interviews were conducted at a time that coincided with the introduction of a new edition of the Magistrate Association Guidelines, revising some of the previous guidance. Some PSDs in London were also being amalgamated so that Benches were necessarily more aware of their own practices and those of their neighbours. In this context *Charles*

was prompted to surmise that some Benches would find the latest recommendations unpalatable and he was unsure "... how they will react to that." However, the influence of the Legal Advisors might encourage conformity, *(Charles(246)),* to achieve consistency. He felt consistency, generally, was a problem. Possibly because of his own professional legal training, he was sensitised to this issue, *(Charles(247)).*

6.5.2.Individual variation in sentencing severity

6.5.2.1 Sentencing variation

In Q13 and 14, magistrates were asked to consider where they placed themselves in opting for a sentence within the spectrum of possible sentences. This was characterised as a range running from harsh to lenient penalties that an offence might quite properly attract, dependant on the individual sentencer's interpretation of the information available. Participants were, also, prompted to reference this choice against their perception of colleagues' responses. Some names have been omitted to protect the identity of colleagues who will continue to sit together.

Everyone in the group was aware that a variety of opinions would be represented in a collection of their colleagues. For some the range from harsh to lenient appeared to be a distribution with a very narrow standard deviation, *(Ann(248), George(249), Bill(250).*

Of the ten magistrates interviewed, only three considered themselves to be other than "in the middle", "roughly in the middle", "pretty close to the centre", or impossible to classify. The acknowledged deviants were either side of the distribution – two considered themselves to be more harsh than their colleagues, and one more lenient. Five were reluctant to commit to any fixed positioning, their response dependent "on the offence", ... partly... on which colleagues".

Those who were reluctant to classify themselves often used different criteria to compare colleagues. One considered that harshness/leniency was an invalid descriptor because accuracy, which she had previously referred to as "Guideline decision-making", was the standard aspired to. This magistrate was quite critical of anyone who might develop a reputation for being predictably harsh or lenient, indicating that it would be difficult to handle that person. Two other magistrates preferred to use 'fairness' as a comparative measure, implicating that one might end up with an apparently very lenient or very harsh disposal but as long as one could explain it as 'fair', then either was acceptable.

There were particular categories of offence where participants were very keen to explain their response. Possession of cannabis featured for two participants, both content to trivialise the offence, apparently in response to the current muddle surrounding the change in classification of this drug and public perception. Domestic violence would always attract harsh penalties from at least two others in the group. Two believed that their approach to fine imposition would be viewed as more lenient than that of some of their colleagues. However, in their own mind, they considered it more enlightened because it recognised the 'true' financial circumstances of the offenders and would prove more efficient to enforce in the long run.

6.5.2.2 Implications of variation for the sentencing process

Magistrates were asked in Qs15 & 16 to consider whether their anticipation that particular colleagues would hold views that would be more harsh or lenient than their own, altered their own approach to sentencing, to accommodate this divergence. Further, they were asked to describe how, when it arose, differing opinions were reconciled in practice, based on an actual sentencing experience in which they had recently participated. The responses fell into two categories.

6.5.2.2.1 Anticipation

Only one person admitted openly that the perception of colleagues as inappropriately harsh or lenient affected the way in which they discussed a case. Even that occurred to a very limited degree, influencing the manner, rather than the substance of the discussion, (*David(251)*). He gave an example where he might plant the idea of a lesser penalty than he would expect his two colleagues to accept, content that he might be "talked up". To a lesser extent, *Helen(252)*, on the whole, totally conventional in approach, admitted that on the subject of the level of fines, she was prepared to attempt to influence others to her own preferred choice, choosing how to introduce the subject to influence the subsequent discussion. Nonetheless, having had the discussion with colleagues and negotiated some agreement, *Helen(253)* was anxious to ensure that the output was indeed supported by all three. *Joan(254),* also, regarded fines as an area for special consideration.

Entrenched views seemed to provoke argument. *Bill(255),* would challenge those who disagreed with him, as would *Ian(256)*, especially with less experienced 'wingers', in an attempt to understand their viewpoint, *(Ian(257)).* *Ian* felt that dissent encouraged him to greater efforts to explain his sentencing decision, when "... very often a consensus emerges."

6.5.2.2.2 Negotiation

Some participants relied on structured decision-making to counteract the effect of any tendency to extremism. *Ann(258),* like *Ian* and *Helen* valued consensus. However, she admitted that she "may argue a bit more strongly" if faced with colleagues whose own views diverged from hers. *Charles(259)* had a different strategy for handling dissent, resorting to a re-examination of the elements of the Guidelines, also striving for agreement. *Emma(260)* provided an example of alliance formation to resist an unpalatable viewpoint,

reinforced by the introduction of a perceived authority figure, the Legal Advisor. Ever conscious of time pressure, *Emma* also considered this strategy expedient in the face of immovable opposition, observing that she usually found a more lenient colleague easier to influence, *(Emma(261)). George(262)* was pragmatic, arguing on occasions with 'harsh' colleagues but valuing consensus and resigned to "deal[ing]" with a case, one way or the other.

Others recognised that consensus was not always attainable, nor did they, ultimately, place a high premium on it. In fact, some were adamant that, having stated their view, if it was not persuasive to the other two members of the sentencing Bench then they were content to be over-ruled in a majority vote *(Charles(263), Joan(264)).* Widespread acceptance of majority voting to relieve an impasse, in practice, became more apparent when magistrates went on to discuss the resolution of a specific experience.

It was put to the participants that there might be a degree of negotiation strategy involved to achieve the sentencing disposal that they believed appropriate. All ten rejected any attempt to suggest that, on occasions, they might, initially, pitch their sentence towards one extreme or the other in order to effect a satisfactory compromise, following discussion with colleagues. The idea of 'trading' was repudiated by all, sometimes in quite affronted terms, describing it as "playing games".

While participants spoke of explanation, discussion, consensus, the language that they used to deal with dissent seemed, at times, quite combative and determined *(Ann(265), Bill,(266), Charles(267), Emma(268), Felicity(269), George(270), Ian(271)).*

6.5.2.2.3 Coping with divergent views, in practice

Charles and *Ian* claimed not to remember any recent situations in which there had been differing views to reconcile. *Charles* recalled an incident "a long time ago" where he was over-ruled by someone he regarded as a very authoritarian Chair. *Ian* didn't "take his work home with him" and couldn't remember anything specific. In general, he was content with resolution by majority vote *(Ian(272)).* Perhaps predictably, his experience of being in the minority focused on work with colleagues whom he considered too lenient, *(Ian(273)).*

For others, practice varied with the sentencing scenario. Certainly for decisions taken in the courtroom, split, perhaps, between a fine or conditional discharge, *Ann's* experience was that the majority prevailed, unless the dissenter was adamant. Retiring involved a more consensual activity, with discussion and persuasion leading to agreement and compromise, but ultimately the majority prevailed, *Ann(274).* *Bill*, having previously denied any attempt to 'trade' sentencing options, was more open to admitting the pressure he was prepared to apply when really keen to achieve a particular objective. He spoke of having manipulated the Chairman into a position that suited his own aim. In doing so, he took encouragement from the Legal Advisor's apparent disapproval of the Chairman's initial suggestion, establishing an ally, as another magistrate had done in similar circumstances of disadvantage. He had, also, felt confident in overturning the apparent support from the other winger for the Chairman, on the grounds of inexperience. So, while on the face of it, the majority of two should have ensured that the initial suggestion was followed, the minority vote prevailed since, in effect, one person was discounted and the outcome was determined one on one, with outside assistance. *Helen,* too, valued the LA's assistance in times of challenge, especially when it provided endorsement or reinforcement for her position.

Other people gave examples of ways in which they had persevered to achieve their own preference, perhaps with more subtlety. *David(275)* spoke of continued repetition of pertinent features, while *Emma(276), Joan(277)* and *Helen* focused on the minutiae of structured decision-making to control dissent. *Felicity(278)* was aware that her responses had become more assertive with experience, to the point where she would "now.. do battle". Neither she nor *Bill* had experience as Chairs and both obviously felt themselves disadvantaged in the role of winger when it came to prevailing in a split decision. Similarly both spoke dismissively of colleagues who appeared too timorous to express their own views with determination. Both linked this failure, also, to inexperience.

As an experienced Chair, *Helen* clearly distinguished the power she held while acting in that role, as opposed to contributing as a winger. As Chair she was the intermediary, weighing in on the side that she supported to effect a majority while striving to influence a dissenter into agreement. Where her own view was in the minority, as Chair, she had sufficient control of the proceedings to require more time, further discussion, an opportunity to persuade, in advancing her preference but, ultimately *Helen(279)* too, was resigned to a majority decision, views endorsed by *Joan(280)*.

[The distinction between the contributions of Chairs and wingers was addressed again, more specifically, in later questions around group working.]

*6.6 **Theme 6**: Socio-demographic influences*

Using Qs 17 & 18, participants were prompted to reflect on the effect of their own previous/current employment, life experience and time served as a magistrate, in relation to the sentencing choices that they made. Their answers dealt with how these factors:

- Contributed to the process of sentencing;
- Affected the outcome of their decision; and

- Might have altered their responses over time.

Number codes have been used in this section to label the different participants because information about their occupations increased the chance that someone might identify them, especially anyone who was familiar with the sample.

6.6.1 Process

Each magistrate felt that their occupational experience, or general experience through life events, contributed positively, in some way, to their ability to fulfil their role as magistrates.

Four of the ten magistrates possessed professional legal qualifications or claimed legal knowledge by association that they felt was of assistance to their work as magistrates (*M1(282), M2(283), M3(284), M4(285)*). Another relied on the training for any career that required some form of higher education (*M5(286)*), combined with general life experience (*M5* (287)).

Two spoke of specific aspects of their employment concerned with communication and negotiating skills that they had opportunity to practise in their court role, (*M6(288)*, *M7(289)*). The remaining three offered 'softer' skills. The professional lives of these magistrates brought substantial involvement with people, as customers or clients which made them feel comfortable in dealing with the variety of people they encountered in court, both colleagues and defendants, (*M8(290)*, *M9(291)*, *M10(292)*).

6.6.2 Outcome

The capacity to empathise with the defendants, in particular, was more apparent for some than others, and roughly correlated with the type of work that they performed. In the opinion of two *(M8(293)& (294), M4(295))* their particular professions made for a more

sympathetic approach, especially with regard to personal mitigation. *M3(296)* agreed that a more lenient approach based on empathising with the financial limitations of some defendants was one of their personal tendencies.

M1(297), *M6(298)*, *M10(299)* referred, unprompted, to the special challenge of dealing with young defendants in court. One was very conscious of the age gap and his own decreasing familiarity with contemporary youth culture and the others referred to the need for relevant experience of the age group.

6.6.3 Changes over time

When they considered the effects of increased experience on their practice, magistrates, remarked on two aspects; improved performance; and consistency of standards over the years.

6.6.3.1 Improvements

Reflecting on their decision-making ability over time, *M8(300)* now worried less about the decisions that were taken, especially those that resulted in a custodial sentence. *M7(301)* associated experience at structured decision-making with improvement in his own and others' performance, as did *M1(302)*, *M4(303)* and *M2(304)*. Several, including *M10(305)*, credited their improvement to the training they had undertaken. *M6(306)* remarked on her increased confidence and improved Chairing skills.

M10(307) acknowledged the risk of becoming institutionalised that had to be avoided, apparently referring to an approach that was too mechanical, perhaps insensitive to individual circumstances. There was also enhanced sensitivity to the risks of prejudice *(M5(308), M4(309))*.

6.6.3.2 Long-term consistency

Everyone denied that their personal standards had changed over the years, even where they had indicated that their practice had improved with experience or responded to training. Here they were referring to the view they took of offending, the type of punishment that they imposed and the degree of leniency they exhibited. One or two qualified this with references to the need to keep abreast of current legislative changes *(M6(310))* or spoke of particular offences *(M2(311)* to which they, individually, seemed to react more strongly than others. However, they denied that experience was a factor in their response *(M8(312), M7(313), M1(314))*

One magistrate conceded that in a limited respect only, experience had influenced her response *(M4(315))* and she now believed that the penalties for certain offences should be increased and not reduced, in contradiction of the latest Guidelines. Her dissatisfaction with the suggested entry point for these offences related to a lack of enthusiasm for the community penalties that were on offer as meaningful alternatives *(M4(316))*.

6.7 ***Theme*** *7: Group working*

So far in the interview, magistrates had been responding to questions on their role and perceptions as individuals, engaged in a joint enterprise, the sentencing decision. Already there had been references to ways in which the behaviour of others affected proceedings but Qs 19-24 focused specifically on the nature of these group interactions, as individuals came together to form a sentencing Bench. The following aspects featured in participants' accounts.

- Inter-group communication had six strands: equality; listening; taking opportunities; the importance of venue; and the relationship between experience and domination

- The role of the Chairman and his/her functional style
- Comparison of input as Chair or winger.
- Inducting new members

6.7.1 Inter-group communication

Speaking of their experience of working as a group of three, magistrates referred to the way each of the members of a sentencing Bench contributed to the discussion and aspects of interpersonal style that facilitated productive activity. They reflected on the effect of training and experience on individual contributions and the difference between decisions taken in the courtroom and those undertaken in the privacy of the retiring room.

6.7.1.1 Equality of input and its limitations

Eight of the ten participants considered that, in principle at least, each member of a Bench should be considered as having equal input into the eventual decision. Some responses were quite emphatic, *(Charles(317), Felicity(318), Joan(319), Emma(320)).*

Of the remainder, one participant felt that there were circumstances in which he might appear to have virtually no input, *(George(321))* but, actually, this acknowledged tacit agreement with another's sentencing choice. In general, he himself did not feel excluded or ignored, or his views disregarded, *(George(322)). Ian,* had reservations about some colleagues, based on "a combination of [their] experience and personal style" which he considered "limits their ability to contribute". However, he equivocated between the increased value of experience and his professed encouragement to less experienced colleagues to speak up, *(Ian(323)).*

Some participants were less fulsome in their positive expectations about how practice developed than others, distinguishing what they thought should happen, or what they hoped would happen, with their experience of reality. *Ann* and *Charles* certainly believed that each person *should* have input of equal value, as did *Helen* and *Bill,* but in terms that suggested some reservation about practice.

Reviewing the situation against their own years of experience, *Ann(324), Bill(325),* and *Joan(326)* pointed to the improvement that they felt they had observed.

6.7.1.2 Listening

The conduct of the exchanges within the group was characterised by the participants as courteous and facilitative with contributions occurring naturally, ((*Ann(327), Felicity(328)).* Listening was valued, *(Emma(329), Felicity(330)). Emma* and *Joan* both mentioned politeness in their discussions. *Bill(331)* was prepared to listen but expected reciprocity.

6.7.1.3 Taking Opportunities

Some emphasised an individual's responsibility to ensure that opportunities to contribute were taken when they arose, *(Charles(332), Felicity(333), George(334), Emma(335), Felicity(336)).* If wingers, especially, were not heard, it was their own fault for not speaking up. *Bill(337)* and *George(338)* urged wingers to assert themselves. However, most people gave the impression, articulated by *Joan* that their aim, in general, was to promote, "... a much fairer, good discussion" with everyone participating.

6.7.1.4 Comparison of decisions taken in court and those taken in the retiring room

More than one person mentioned that the inclusiveness of a discussion across the three members of the Bench, was limited in a physical sense. *Helen* referred to strategies she employed to involve wingers on each side and the importance of being seen to do so. *Emma(339),* too, required involvement. *George,* noted the contrast between the decision-making process, as an audience might perceive it, when decisions were taken in the courtroom, as opposed to decisions pronounced following a retirement and more protracted discussion in the privacy of the retiring room. This distinction had previously been noted in the discussion of the application of the JSB sentencing model for structured decision making. Compromise over the extent of consultation was accepted as inevitable in the courtroom situation. Even an occasional error was tolerated, discounted as quite trivial by *Emma(340).*

David(341) was more relaxed about his contribution as a winger when sentencing took place in court, emulating *George's* tacit acknowledgement of the decision, unless there was serious disagreement between himself and the other two colleagues.

6.7.1.5 The effect of training

As with other aspects of improved performance, increased training was credited with making a difference to a person's ability to contribute to sentencing discussions, (*Joan(342)). Ann(343)* felt that the training that the new magistrates now received was empowering and according to *Ian(344)* the quality had improved. *Ian,* as part of his personal training effort, tried to ... "reinforce and boost confidence", an important factor for three quarters of the sample, for example *Emma(345).* In a similar vein, *Bill(346)* and *Ian(347)* highlighted the problems associated with reticence.

However, *Charles* recognised that in reality, "people are different" and "some will say more than others". For *David*, this imposed a particular responsibility on the Chair to "encourage", especially someone "who isn't contributing much".

6.7.1.6 Achieving Consensus

As in previous sections, some of the participants were very keen to reinforce the notion of group responsibility for the decision, playing down the importance of any individual *(Charles (348), Emma(349), Joan(350)). George* agreed that it was a group decision, the product of three people's deliberations, while *Helen,* reiterated the relevance of three people's input.

Ann(351)and Ian(352) felt it was important to try to achieve consensus, the former seeing it as a way to neutralise extremism. Encouraging equality of input facilitated consensus.

6.7.1.7 Experience and domination

A general link was made between an individual's capacity to contribute and their experience. A few associated experience, per se, with dominance in the sentencing decisions. *Ann,* implied that there were examples of more recent appointees having their views "discounted" or "not given enough weight by longer standing magistrates." *Charles* had previously referred to his own painful experience of having been over-ruled, as a 'new boy', by a more experienced colleague, while *Joan* "nearly walked off the Bench after a year" when she felt others did not regard her opinions as valid because of her inexperience, something with which *George(353)* could empathise. Although he felt that he was able to deal with them, he, nevertheless, linked " two senior people... both of whom might be fairly dominant individuals", with a need to 'fight his corner'. *Felicity(354),* too, recalled her initial uncertainty. *Ian(355),* approached the contributions of less experienced

colleagues with caution, feeling a need to provide training in structured decision-making, qualified to do so by his own experience. Experienced Benches appeared to him to be able to work faster, although that was no guarantee of quality but ran the risk, perceived by David that "some relatively new magistrates might defer ... to someone with more experience".

Seven of the ten participants were quite clear that the risk of experience dominating was greatest, and certainly there was more opportunity for influencing the process unduly, from the position of Chair, specifically.

6.7.2 Chairmanship and functional style

Participants referred to different aspects of Chairmanship, those that assisted and others that were considered detrimental to the process.

6.7.2.1 Chairmanship and Dominance

Bill resented a "particularly strong Chair" who had seemed to him "bombastic", failing to value the wingers' contributions and *Emma* criticised, "Chairmen who won't listen... ". *Charles(356),* identified the Chair as key to ensuring that everyone participated but felt Chairs varied in the effectiveness of their intervention, and on occasions exerted undue influence*(Charles(357)). David(358)* concurred, although he considered that sometimes the more experienced Chair might properly have a moderating effect, *(David(359)).*

Felicity was conscious that the Chair was in a position to orchestrate the sentencing process, which she considered might have an effect on the outcome: With 'winger' experience only, she observed that "... some Chairs dominate more than others" and she had felt coerced into a decision by one, about whom she had subsequently felt strongly enough to make a complaint, although this was atypical. Interestingly, her own lack of

experience made her feel uneasy sitting with colleagues new to the role of Chair, *(Felicity360).* Also observing as a 'winger', *George(361)* noted variations in Chairmanship style, implying that he found some more inclusive than others.

As Chair, *Helen(362)* was at pains to be seen to be physically inclusive in canvassing the views of others in the courtroom, reserving more protracted discussion for the retiring room. There she acknowledged the potential to influence by restraining herself, soliciting first the views of others, *(Helen(363)).* In the same position, *Ian's* guiding hand was more directive, *(Ian(364)).*

Joan(365) had seen "some atrocious things" in her years as a magistrate, referring to Chairman who made decisions unilaterally, without reference to wingers.

6.7.2.2 Chairs managing the process

Magistrates perceived the position of Chair as conferring power and influence, which some worked hard not to misuse and others regarded as a duty to exercise. In a positive sense, some Chairs took their responsibility very seriously to ensure that the process of structured decision making was properly adhered to, *Ann(366),* involving everyone by rotating the introduction of different aspects, *(Ann(367)). Bill's* representation of good practice was similarly inclusive and structured, *(Bill(368)),* preferring to see the Chairman's contribution come last.

However, participants were not unanimous on the point at which the Chair should come into the discussion. As Chair, *Charles* liked to "set the framework", initiating the discussion, exercising control over the contributions and having the final word as these were collated, *(Charles(369)).* As others had done when they perceived a problem, *Charles(370)* would resort, on occasions, to seeking the help of the Legal Advisor. *Emma*

and *Joan* had indicated elsewhere, such support was regarded as a valuable resource in encouraging colleagues to follow the line preferred by the Chair, by recruiting an ally. Similarly, *Charles,* as Chair, would not easily abandon a point of view that was being resisted by another, if he believed the other to be in error. He obviously felt consensus was important but preferred not to confront the dissenter himself, encouraging the LA to assist. *Emma(371)* saw Chairing as an opportunity to "concentrate peoples' minds" and "focus on the discussion" but was also alive to the power to influence that accompanied the role. She valued speed *(Emma(372))* and preferred to lead purposefully, *(Emma(373)).*

George's(374) observations on the structuring of the discussion, from the perspective of winging in a different court to the majority of the participants, appeared similar to that which was familiar to many of the rest. He had never experienced an impasse in achieving agreement, nor felt pressurised, although he referred to some colleagues as "quite bumptious", believing their opinions to carry "a lot of weight".

Helen(375) provided structure and control as Chair but refrained from introducing her own thoughts too early, where they might stifle debate, or in the event of a disagreement cause her to pursue her own point with disproportionate vigour. She was conscious that "some Chairmen do take that opportunity." *Ian(376)* professed the same reluctance to intervene too quickly and make his contribution as a Chair but also spotted the opportunity to influence outcomes towards his own preference by 'siding' with the winger whose views coincided with his own. Observing the structure of the Guidelines was "vital", "systematising the job", creating the "right forum for discussing in a logical controlled way". "Free debate" of anything else was to be discouraged but he did suggest that his own voice as Chair was pre-eminent, *Ian(377).*

Joan(378) &(379) followed *Helen* in her reluctance, as a Chair, to contribute too early in the discussion, for fear of undue influence, while still ensuring that the recognised procedure was followed. In general, *Joan* was accepting of majority votes even if her own differed. Where the wingers' opinions were divided or the Chair agreed with neither, *Joan(380)* would rein in the proceedings at that stage and express her own dissenting view.

Beyond structuring the discussion, two people felt that the Chair had a duty to exert a restraining influence on some wingers' input (*Joan, (381), Emma, (382)).*

6.7.2.3 Probing

Some of the participants specifically raised that aspect of a Chairman's role that demonstrated the full engagement of the whole Bench. *Ann* actively canvassed input on a rotating basis, so that each person had an opportunity to 'kick-off' some aspect of the discussion. *Charles(383)* provoked 'silent' individuals to contribute, sometimes playing devil's advocate just to stimulate discussion. *Emma* confronted reluctant colleagues with persistent questions "until they [responded]". *David(384)* offered verbal encouragement to less dominant members, while *Helen(385)* employed physical signals and direct invitations to prompt input from each of her wingers.

6.7.2.4 Resolving differences

When opinions diverged, Chairs recognised their role as one of mediation/negotiation to achieve a result that would command the greatest degree of agreement, *(Ann(386), David(387)),* a responsibility that was not so onerous for wingers.

6.7.3 Comparing the roles of Chairman and Winger

Seven of the ten participants had experience of each role. Asked if there were differences in their contribution as a winger or a Chair, most considered that the position as winger was liberating, if less influential. Their reflections were guided to focus on the effect of their different roles on process and the outcome of the decision.

6.7.3.1 Process

Joan, like *Ann*, felt that the content and value of their contribution was the same whether as a Chair or winger, although for *Joan(388)* the manner might be different, acknowledging the inferior position. *Charles (389),* too, recognised that as a winger, his position was altered and *Emma(390)* was "more circumspect", in deference to the Chairman.

Helen(391) noted that as a winger, there had been occasions when she had felt physically excluded by virtue of the seat she occupied, relative to the Chair. *David(392)* was definitely more relaxed about the activity in this the supporting role, as was *Ian(393)*, for the most part. *Felicity* had observed a relatively new Chair, faced with a very experienced winger, whom she had thought might have been a bit intimidated by that experience.

6.7.3.2 Outcome

Whether the style or content of their contribution differed when they acted as a winger or a Chair, no one appeared to feel that the outcome would be altered. *Ann, Charles, Emma,* specifically, stated that they didn't believe that the final decision was different, in whatever capacity they made their contributions. *Helen* felt she might need to stand her ground if she disagreed strongly with the Chair but *Joan* concurred with the others in perceiving a difference in style only.

6.7.4 Inducting new members

It had been a common experience across the sample for the Chairs to seek the views of the newest, least experienced appointee at the outset of a sentencing discussion. Participants were asked for their views on this practice.

Relatively new magistrates, commenting on this proposition, seemed to find it perfectly reasonable *George(394),* although initially the former had felt "very exposed.", a feeling with which *Felicity(395)* empathised. Experienced Chairs were divided in their description of their own habits for ascertaining the views of less experienced colleagues. Most felt that, although they were aware that it was supposed to be common practice, they personally chose to progress in a way that appeared to suit the individuals best. This might well result in the new person contributing after someone more experienced.

Charles(396) thought it was very unfair to expect the least experienced to proceed first. *Ann* would not necessarily go to the least experienced first for a contribution, preferring to seek a volunteer to initiate a discussion of a particular aspect of sentencing, aware like *Helen(397)* that initiating the discussion could be "very daunting". *Joan* always asked the least experienced if they would *like* to give their opinion first. She was aware that that was what you were 'supposed to do' but her own instincts told her that, "It depends on who you have in front of you". Importantly, the contributions of new magistrates needed to be treated with respect, *Joan(398),* as they gained experience.

Ian had no strong views on order, so long as he ensured that he gave appropriate training advice. *David(399)* and *Emma(400)* were alone in feeling that, in general, inviting the least experienced to lead was a good technique but their reasons were entirely protective or

supportive. Implicitly this reinforced the impression that experience dominated discussions but some newcomers did not seem to need such consideration, *(Emma(401))*.

6.8 Theme 8: The contribution of the Legal Advisor

The magistrates were asked in Q 25 to consider what contribution the Legal Advisor (LA) made to the sentencing process. The Practice direction described in Chapter 5.3.2, sets out the general expectations and limitations on the role of the LA. In their responses the participants

- Praised the professional skills of LAs.
- Referred to unwanted interference and poor practice.
- The impact of LAs on sentencing decisions and handling problems

6.8.1 Professional relationships

Several participants had experienced harmonious working relationships with LAs, *(George(402), Emma(403), Felicity(404), Joan(405))*. Most experienced magistrates had very clear ideas on the role of the LA, the areas in which s/he might properly give advice, the nature of that advice and the appropriate point in any discussion at which it should be provided *(Ann(406), Bill(407), Charles(408), David(409), George(410))*. Previewing the sentencing pronouncement for legality, *Joan(411)* or, when reasons for a decision were drafted, advising on wording or, sometimes, case law, each of these was recognised as the proper role of the LA. Some were more accepting of general guidance than others, *(Helen(412))*.

Implicit in these reports seemed to be a need for reassurance, confirmation that individuals have performed their role correctly and made a decision that others will support. Some appeared to value this more than others, perhaps, indicating that individual personality traits, to do with confidence, authoritarianism or possibly merely conscientiousness,

influenced the relationship. Magistrates were careful, also, to differentiate between LAs, both within their personal style and across experience, *(Ann(413), Charles(414), Joan(415)).*

As with other aspects of the sentencing task (structured approach, applying the Guidelines, ensuring a fair discussion, encouraging new appointees) alterations over time had been observed but this time, the evaluation of improvement or deterioration was less clear-cut. *(Bill(416)).* Asked if he considered that the LAs ever 'overstepped the line', delineating proper from unsought advice, *Charles(417)* recognised a changing pattern that he linked to the relative inexperience of his current advisors. *David(418)* agreed that some LAs recognised boundaries better than others, unwanted intrusion being more noticeable in the past, *(Helen(419). Joan(420),* too, detected improvement, while *Emma(421)* felt that the LA's perception of the role had altered.

Some magistrates were unhappy with the perceived attitude of the professional LAs toward themselves and the magistrate's role, perceiving it as derogatory, *(Charles(422), Emma(423). Felicity* had been sensitive to impatience on the part of the LA when lay Benches took too long and attempted to apply the JSB model and the record of reasons, apparently over-conscientiously.

6.8.2 Unwanted interference and poor practice

Of the ten responses, eight participants, including *(Ann(424), David(425), Emma(426), Joan(427)),* indicated that LAs were more involved than the magistrates wished. Two participants, both magistrates, one new, one much more experienced, who contributed only as wingers, made no adverse comment. They may not have felt their role challenged or usurped to the same extent as the others who had obviously had confrontations. Because of the small numbers involved, both participants and more importantly LAs to whom they

had been exposed, it was difficult to untangle whether this uneasiness was the result of individual personality clashes or represented a more general weakness, endemic in the relationship.

Magistrates described experiences of what they considered to be poor practice, when the intervention of the LA was unwanted, *(David(428), Ann(429))*and their intrusion amounted to an attempt to influence sentencing *(Felicity(430)). Emma's* experience of the current LAs was that they were getting their opinions into the sentencing discussion by observations such as "Your colleagues did this", in a rather deprecating manner or "This is what the District Judge would have done." *Felicity(431)* considered that some advisors were nervous about the decisions they believed Benches might take without intervention. *Ian(432)* was especially critical of such challenges, wary that the LA was becoming quite inappropriately involved in the sentencing, trying to exert an influence which he believed always seemed to want to moderate the decision, *Ian(433).*

6.8.3 Handling problems in the relationship and impact on sentencing decisions

Chairmen had their own techniques for warding off potential interference. *Helen* adhered to recommended practice, requesting the LA join the Bench after a short interval, to allow discussion. Creating space, in a similar but more determined manner, *Joan(434)* might delay asking the LA to join the Bench even longer whereas, *Emma(435)* firmly discouraged unwanted LA input. Some Chairs preserved at least the semblance of polite interest, in that they would "listen and then comment on" or take the LA's advice "at face value" but *George(436)* and *David(437)* were emphatic in denying any role for the LA in the sentencing decision.

Three people commented on the effect an intervention from the LA might have on the decision made by the Bench. *Emma(438)* considered that for her, personally, any

unwarranted intervention might have the opposite, perhaps detrimental effect to that intended. *Charles* felt there was at least the possibility that the LAs might on occasions 'nudge' people in a direction that they might not otherwise have gone, but that there would be occasions when that was the proper thing to do. *Ian's* comments indicated he felt that the LA's input inevitably led to a reduction in sentence, moderation that was sometimes justified, *(Ian(439)).*

*6.9 **Theme 9:** Difficult sentencing*

When participants found sentencing straightforward, cases were concluded rapidly. Magistrates were not forced to examine their own approach, compared to that of their colleagues or defend their opinions in the face of dissent. Instances of 'difficult' sentencing dilemmas were, generally, more thought-provoking, challenging participants to provide greater insight into their activity, explaining how the outcome emerged. In Q26, participants focused on an example from their own experience of sentencing in a group when opinions were divided and the conflict needed to be resolved. Their answers touched on five aspects:

- Forgetting as a mechanism for handling potential dissonance;
- The custody threshold;
- Dissatisfaction with limited options;
- The relationship between leniency and caution in difficult decisions; and
- The mechanics of resolution.

6.9.1 Forgetting

About half of the magistrates found it impossible to recall a 'difficult' decision because, like *Charles(440,*and *Emma(441),* they put cases out of their minds fairly rapidly once any decision was made and appeared not to worry further. The latter attributed this lack of

concern about the details of decisions to indifference over trivial outcomes and rarely loosing important debates, *(Emma(442)).* *Helen* and *Joan,* too, were unable to recall a particular case and spoke only in general terms, although *Helen* later confirmed that she might "bring a decision home with her" on occasions but "only if I think something is not right".

Overall, decisions with serious implications for the defendant, or ones where people felt they had erred, appeared to be more memorable than those that people believed to be good decisions, in the circumstances.

6.9.2 Custody threshold

Whether referring to a particular 'difficult' case or speaking in generalities, all participants recalled cases at the borderline of imprisonment. *Charles'* view, endorsed by *Emma(443)* regarded sentences at the custody threshold as "the most difficult ones" because of the serious implications, although he conceded that it was difficult "at any threshold". *David* described a custodial sentence, imposed many years previously, about which he had had reservations at the time but had been over-ruled.

George's example, too, focused on a custodial sentence for an offence of robbery where rehabilitation was an issue, *(George(444)).* *Ian(445)* had found the experience of sentencing a woman with five children, a particularly difficult decision to make, again, because of the implications of a custodial sentence for her, even though he considered that the offence was indeed serious. In both examples the interaction of sentencing aim and sentencing choice, suggested in Study 1 seemed to be raised.

6.9.3 Dissatisfaction with sentencing options

Even where the dilemma was not one of imposing a sentence that deprived someone of their liberty, participants expressed frustration at the number of occasions that there appeared to be no suitable disposal for the particular defendant, *(Helen(446)). Felicity(447)* and *David* felt the problem was particularly acute in the Youth courts. Like *Ian, Joan's* difficulties focused on the effects of her decisions on families and children, *(Joan(448)).*

6.9.4 Leniency and Caution

Almost invariably, when participants felt themselves undecided between options, they expected to end up sentencing less punitively, for a variety of reasons. Some appeared to be 'playing safe', a less harsh sentence rarely being appealed, so their decisions would not be re-examined. Others just seemed to wish to 'give the benefit of the doubt' to the defendant. *Charles,* like *Emma(449)* conceded that faced with a difficult sentencing choice, avoiding discomfort "...probably makes me err on the side of caution and leniency." Uncertainty was obviously a restraining influence on *Bill's(450)* deliberations and *Helen* offered the opinion that, where the sentencing options seemed to be inappropriate for whatever reason, "the defendant normally gets the advantage".

Ian(451) concurred with the proposition that when there was a difficulty with a particular sentence, the problem was usually resolved in favour of a less punitive option, to the defendant's advantage. *Joan* observed that in cases where discussion had been long and involved, there might be a tendency to act conservatively in the final decisional choice.

6.9.5 Mechanics of resolution

Consistent with earlier observations, where there were differences of opinion, the first attempts at resolution involved discussion between the magistrates. In some cases, this was more protracted than others, *(Joan(452)),* depending, possibly, on the person Chairing, as much as the case itself.

Emma(453) ever conscious of the pressure to move along efficiently, relied ultimately on a majority vote to break a deadlock. *Bill(454),* too, while he envisaged discussion, could live with a majority decision.

*6.10 **Theme 10:** Sentencing models and other influences*

Question 29 explored ideas that were probably the least familiar to participants. A précis of three models, prevalent in the psychological literature of decision-making that had been applied to research into legal decision-making by other researchers, was suggested to the participants (One example of each type: mathematical; descriptive; and heuristic, details in Chapter 5.3.2. They were asked to speculate on their appropriateness and make suggestions of their own as to how the sentencing process operated. They were also given an opportunity to make general observations on any influences to which they felt sentencing was subject. In their answers to this question, participants:

- Reflected on how the models offered to them fitted with their own experience of sentencing.
- Suggested alternative approaches.
- Reflected generally on anything they considered relevant to understanding the sentencing decision that had not already been raised.

6.10.1 Observations on the models offered

Commenting on the three examples, no one appeared to prefer the representation based on the story-telling or heuristic model, per se, but both of these featured as aspects of the choice made by a one or two people. In general, the algebraic model, with or without some qualification, appeared to chime most appropriately with the experience of nine of those who explicitly addressed the topic. Only one person rejected anything to do with this model but did so vehemently.

6.10.1.1 Algebraic model

Over half of the sample opted to accept the description of how an algebraic model of decision-making worked, as the most appropriate one to describe the process of making sentencing decisions. It appealed to *Charles* on the grounds that "I try to balance off the different pieces of evidence", but he distinguished his own approach from that which he believed some others employed which he thought might be more "instinctive", *(Charles (455)).* This type of departure might have supported a heuristic model, with a direct relationship between the nature of an offence and the sentence imposed, but he went on to drag in a suggestion that had elements of story construction, *(Charles (456)),* of which he was very critical.

Helen, whose professional training and magisterial experience was similar to *Charles'*, made very similar observations. Endorsing the choice of the algebraic model for herself, she nevertheless observed in others what she thought was, "just a 'gut reaction'" that she condemned. In a more generous explanation she resisted introducing stereotypes and allowed that experience might permit some people to internalise the rational processes, reaching conclusions without articulation, *(Helen(457).*

Ann(458) did not initially respond to a model choice but returned to provide her thoughts on the algebraic model relative to her own practice, drawing analogies with elements of that model. While happy with her own approach she, too, criticised the lack of thoroughness of a minority of colleagues, *(Ann(459)),* having observed some magistrates entering the retiring room with conclusions already formed on a very flimsy basis, *(Ann(460)).* Fortunately she considered that this type of behaviour was "very rare nowadays." *George(461),* and *Joan(462)* opted for the algebraic model, the former by eliminating the other two as unsuitable in various respects while, the latter identified in it a mechanism for introducing "balancing... balancing of the crime, ... balancing of the people", similar to *Ann's* description. *Felicity(463)* "vere[d] towards" the algebraic model but resisted its apparently mathematical precision.

Two others were prepared to accept that the algebraic model formed part of their approach. *Emma* considered it "more appropriate" but to accommodate what she referred to as "the people element" of decision-making, she introduced aspects of the story-telling model to engage the sentencer's emotions, *(Emma(464)).* This was an unusual observation from her as she had previously noted, in discussing personal qualities and ways of handling colleagues, that "you have to keep it unemotional, if you can." In apparently contradicting herself, she now noted the value of picking up the emotional cues but resisting the temptation to allow them to influence the decision-making process. Perhaps to address this anomaly she emphasised "controlled" emotion and the importance of the "public perception of certain offences". *Ian's* preference was also a combination of algebraic with story-telling models but in different proportions, *(Ian(465)).*

Only *David(466)* was adamant that algebraic models had no place in this type of decision-making. In explanation, he referred to "battles that I have, because I feel quite strongly about it", in his capacity as an independent assessor for public appointments in the LCD

[now DCA], with "... people from the Home Office and the Foreign Office". While his initial observations related to the application of selection criteria for appointments, he drew a strong analogy with sentencing, *(David(467))*, utterly dismissive of any attempt at mathematical modelling, insisting it had no place in a "human activity".

His own suggestion, as to what was going on when magistrates made decisions, commenced with a reference to the use of the Guidelines. However, consistent with his previously expressed view that he himself felt able to manipulate these to suit his own requirements, he was critical of the slavish adherence of others to them, *(David(468))*. He spoke of applying the Guidelines by "ticking boxes" which he regarded as bad "for the same sort of reasons that putting numbers against features is bad," because you got the wrong answer. His preferred approach distinguished the automatic processes associated with computers from the aspects of human judgements that discriminated "shades of black, white and grey", *(David(469))*.

6.10.1.2 Story-telling model

Only *Emma*, who had incorporated it into her own explanation of decision-making, said anything complimentary about this model. For her, the story-telling model was the vehicle for introducing a necessary emotional element. Others were less attracted, calling it "woolly", allowing "preconceived notions" from which to "make an inferencing[sic] process...instinctively creating" and "building a picture,... slightly towards the fictional side".

6.10.1.3 Heuristic approach

Even though they alluded to observations of others, however limited, who seemed to be reaching decisions without appearing to apply a fully structured approach, no-one was

prepared to accept that they, themselves, applied any type of shortcut. It may have been that they found the word itself pejorative, although *Helen* defended those who applied 'gut reaction.' Even under extreme time pressure, she insisted that she would resist compromising thoroughness, *(Helen(470)).*

Charles(471) recognised that speed was an factor, linking "instinctive responses" to, "a particular type of crime". *Emma(472)* regarded a decision taken in the way described in the heuristic as "invalid", while *George(473)* deprecated the "lack of rationale", he might have been confusing this with stereotyping. *Ian* thought heuristic processing was "a lazy way", *Joan* that it was "too biased"

6.10.2 Alternative models

Emma identified differences in the approach taken to sentencing in the adult and youth court. This led her to hypothesise on possible differences in the working models in each type of work. Having considered the three models as described by the researcher, she volunteered the suggestion that she was familiar with an " action and consequences" model for which, "You kind of make a decision based on the less, ... minimising ... sort of maximum and minimum". This, she considered, applied particularly in the Youth court where priorities were different to the adult court, emphasising the prevention of re-offending, less conscious of the public perception *(Emma (474)).* This led her to surmise that while the algebraic model might be a bit more useful for certain adult offences, sentencing in the youth court involved a process of risk management. *Felicity(475)*, too, had ideas of her own on possible representations of the sentencing process. For her, while the algebraic model didn't quite fit, it was the nearest of the three suggested. However, an algorithm, which she described as a sort of flow chart structure, a decision tree, reviewing certain aspects, moving on a path according to what was decided, amounted to a closer representation of the process as she perceived it.

6.10.3 Other influences

In reviewing any aspects of sentencing that the questionnaire might not have explored, participants again wanted to remark on the influence of the Guidelines and training, the effect of political influence and the work of the professional District Judge.

6.10.3.1 Guidelines and training

Overarching their views on psychological models of decision-making, participants repeatedly emphasised the significance of the Guidelines and the contribution that training had made to performance overall, mostly for the better, *Charles (476). Joan's(477)* views were more mixed, appreciating their value for many magistrates but resenting the increasingly prescriptive approach and the strictures that Guidelines imposed. She seemed less confident in making independent choices than *David*, for example, but was no less keen to do so, *(Joan(478)).* Thoroughness was vital for *Helen(479)* through the application of structured decision-making and *George(480)* approached sentencing in a similar way. *Bill(481)* relied on the Chair to ensure that structure was imposed.

6.10.3.2 Political and societal influences

Sensitivity to political influence and 'un-informed' newspaper reporting was apparent for some magistrates, *(David(482), George(483)).* Each resented accusations of inconsistency and changing political priorities which led public opinion to criticise the work of magistrates in a manner they considered unfair. *George(484)* anticipated that it was this type of "contextual pressure" that effected alterations in the Guideline entry point for an offence.

6.10.3.3 District Judges

Two people indicated possible differences between lay and professional magistrates but their conclusions differed. One was somewhat ambivalent about the merits of a District Judge (DJ), while the other was impressed. *Emma(485)* argued that a DJ would stick to the Guidelines more rigidly but might have limited personal experience of defendants' circumstances, recruited as most seemed to be from a very narrow ethnic, age, and gender range with limited life experiences. This led her to draw a sharp contrast between the performance, as she described it, of a stereotypical District Judge, "middle-class, white, males", operating alone, with the professional strengths he brought, possibly at the expense of offender empathy, and the diversity that a tribunal of lay magistrates offered. For this reason she, personally was enthusiastic about the representation of three viewpoints in sentencing discussions.

However, *Ian(486)* recommended colleagues observe the DJ in action as an example of good practice, in order to improve their own work. He, also, sought more feedback on sentencing outcomes to assist in future sentencing, *(Ian (487)),* but recognised that measures of effectiveness were complex, especially if recidivism was an issue. This was an area where he felt development of dialogue with the Probation service might be valuable, *(Ian 488)).*

All ten themes have now been reported as they arose in the interview. In Chapter 7, the findings for each are summarised, drawing on them appropriately to inform the thesis topic overall. The discussion of these themes provides an opportunity to consider how the practitioners believe individual differences affect the process and outcome of sentence and develops our insight as to the model of sentencing employed.

7

Study 2(Part 3): Discussion of the Results of the Qualitative Study

"The 'right sentence' is the one that achieves a given penal aim for a given type of offender most effectively and efficiently, providing a challenge for researchers to enlighten judicial officers and the public alike on the issue of 'right' sentences". Farrington (1978)

The results of Study 2 were presented in Chapter 6. Overviews of the ten themes covered in the interviews are provided below to remind the reader of the findings. This chapter discusses these findings as they relate to the research question. It explores the way in which magistrates undertake sentencing decisions, generally, both their engagement with the process and determination of the outcome. Further, it discusses how individual differences, identified by the participants, affect that process or the outcome chosen in this type of exercise.

(Theme 1) Sentencing Aims:

Magistrates reported multiple sentencing aims within a single case that influenced outcome choice. They emphasised the need for comprehensive information to perform optimally in doing justice to the defendant and satisfying others with an interest in the process. They were conversant with the elements of structured decision-making, regarded by some as constricting, and determined to apply the principles. They equated effectiveness with

recidivism and gauged the "appropriateness" of sentence in a type of "matching" operation among alternatives.

(Theme 2) Personal Qualities:

Magistrates aspired to work co-operatively, listen and discuss knowledgeably and effectively, remaining unemotional and non-prejudicial. Again expertise in applying the structure of decision-making was valued, along with empathy and the capacity to differentiate offenders. There was implicit recognition that not everyone achieved the same high standards.

(Theme 3) Preparation, Training and knowledge of structured decision-making: Induction and on-going training had instilled a comprehensive understanding of the style of structured decision-making required, with varying degrees of competency in its application. Elements of an algebraic model emerged although most preferred a more holistic approach. Penalties appeared to be regarded as hierarchical. Pragmatism was, sometimes, a euphemism for a type of heuristic processing, especially when dealing minor offences. Training was well supported.

(**Theme 4) Use of the PSR:** Magistrates espoused an enthusiasm for the merits of the PSR but denied that it was a determining factor in sentencing choice.

(Theme 5) Managing sentencing dilemmas: Challenging sentencing and disputed outcomes were inevitable. A range of strategies existed to bring about agreement. Mostly, differences were resolved by discussion and persuasion, although ultimately, the majority would prevail. Effective application of the Guidelines for structured decision-making was considered crucial. Participation was disadvantaged by inexperience. Shortage of time

was recognised as an external pressure. Magistrates acknowledged that the Chair had a pivotal role in managing the discussion, a position that might be used to their advantage.

Theme 6 Socio-demographic features: The nature of magistrates' employment and their life-experience generally were considered relevant to their sentencing decisions. Education beyond tertiary level was appreciated. Judicial experience, of itself, was not considered predictive of sentencing severity, although participants recognised that personal traits were manifest in the process, to a limited extent. Training was valued for the consistency it brought.

(Theme 7) Group working: As individuals interacted with each other, inclusive, courteous discussions were reported. Listening and arguing one's views was appreciated. Consensus was valued but majority decisions accepted. Experience and the position of Chair might both be used to influence the outcome. The role of Chairman was recognised as one of managing the discussion, using various techniques, to facilitate structured decision-making. The nature of the contribution made as a winger could be distinguished from that made as a Chair which was more influential. New magistrates were inducted in a variety of ways.

(Theme 8) The Legal Advisor: The Legal Advisor could be of valuable assistance to magistrates, ensuring accurate legal procedures and offering guidance on sentencing alternatives. The boundary between their prescribed role and unsolicited involvement in the decision-making process seemed to be a fuzzy one for some advisors and there was caution among the magistrates in maintaining their independence. Interpersonal dynamics were likely to reflect the characteristics of the individuals involved on each 'side'. Supportive alliances between minority views and the LA could boost the influence of a dissenting voice.

(Theme 9) 'Difficult' sentencing: When the sentencing decision was challenging or controversial, magistrates developed strategies to resolve their internal conflict. Custodial sentences were applied reluctantly and the limited range of sentencing options was criticised. There was a general lack of confidence regarding the "punitive" value of Community disposals. In situations where magistrates were undecided, they tended to opt for a lesser penalty. Dissent was again dealt with by re-visiting the Guidelines and looking at the requirements of structured decision-making.

(Theme 10) Sentencing Models and other influences: Magistrates recognised some aspects of the algebraic model in their approach to structured decision-making. There was little enthusiasm for the 'story-telling' model and disdain for the suggestion of heuristic processing. Several emphasised the 'human' aspect and the element of judgement that could not easily be represented in a mathematical statement. Alternative model suggestions were made. Magistrates concluded by reiterating the influence of the Guidelines and other political and societal effects on their sentencing discretion

Some numbered themes contributed to more than one part of the discussion; the relevant themes have been indicated.

7.1 Sentencing process and outcome

This aspect of Study 2 was essentially exploratory. There is published legal guidance on how sentencing should be undertaken and multiple examples in literature of different psychological models, often mathematical, that have been applied to legal decision-making, although few in a sentencing context (see Chapter 2). The interviews were designed to find out directly how individuals felt that they approached the task, in practice, what they were aiming to do, how well prepared they were and their own ideas of how the job was accomplished, in terms of the working model they operated. While engaged in

sentencing, how did they manage the discussion, deal with conflict and what outside influences did they feel themselves subject to? Both the thoughts of participants contributing as individuals, then their reflections on how they worked together as a sentencing group were represented.

Various aspects of *process* and *outcome* will be discussed separately. The initial observations are based on the reflections of individuals on process, followed by the modifications imposed on the process by group working. Thereafter, the material that individuals provided on sentencing outcome is followed by reflections of group working and its impact on outcome.

7.1.1. Individual reflections on the sentencing process

Participants discussed their sentencing aims (Theme 1) in terms of the descriptors 'good', 'accurate' and 'effective'. These were chosen, as words in common parlance, as measures of performance. However, they proved uncomfortable for many, in relation to their sentencing task. Each participant was keen, from an early point in the interview, to indicate familiarity with the JSB advice on structured decision-making and the Magistrates' Association Guidance, linking its application with accurate sentencing. Effective sentencing dwelt on the likelihood of recidivism about which there was little feedback. Good sentencing was difficult to tie down since it relied on so many different sources of information that might limit the activity. Further, outside observers with different expectations of the process might make different assessments. Consistency of approach, was, nonetheless, considered to be important. Magistrates were pragmatic in progressing decisions within those limitations.

All the participants had been involved in training in some form (Theme3). It was generally acknowledged that the structure and delivery of training in the sentencing process had

improved over the years. New appointees had received formal tuition on structured decision-making as part of their induction training. That knowledge was reinforced through experience in court and sentencing exercises which any magistrate could attend.

The majority of participants (nine of the ten) came from the same PSD, so their general training experience would have been similar in recent years. The most senior members, in terms of experience, would not have had explicit instruction in sentencing approach in their early work, so that their style may have already become somewhat entrenched, prior to the introduction of MNTI 1 in 1998. Newer magistrates, especially, perceived some reluctance on the part of these more experienced colleagues, to adapt to conform to the JSB/Association approach to structured decision-making, even though the principles have remained unaltered since the CJA (1991). For their part, the more experienced magistrates, in the sample at least, believed they had adapted successfully although they bemoaned the lack of flexibility in the current advice and regretted the constraints on personalised initiatives.

Training and Magistrate Association Guidance are a national provision. The competences that must be demonstrated on first appraisal (Ch 1 para. 1.6.1), to be confirmed as a magistrate apply to all new appointees, with additional requirements when individuals take on new roles. The model follows the UK competence framework generally, involving both technical and functional competences, alongside behavioural competences. This contrasts with the American approach, where behavioural competencies, only, play a central role (CIPD, 2001). Much of the credit for the introduction and promotion of the idea of competencies as an underpinning tool for recruitment and development relies on the work of Boyatzis (1982). In the context of this particular activity, they need to be applied with caution, primarily because of the peculiarities of the role of magistrate. Uncertain measures of success, varying expectations in the setting of standards, coupled with the

voluntary nature of the appointment make appraisal challenging. Nevertheless, the competency framework is now well established and appraisal is accepted with varying degrees of enthusiasm.

Clearly, their training in structured decision-making has given sentencers a common vocabulary to describe how they have been prepared to approach the task and appraisal has encouraged them to demonstrate that they can apply their learning.

It was not possible to explore how uniform the training programme was throughout the country. While appraisal is a national requirement, its development may not be uniform and other Benches may interpret the standards differently. In general, the Bench from which the participants were recruited has been very active in embracing appraisal. Certainly in this group, it appeared to have had an impact.

Magistrates speculated on their success in translating theory into practice (Themes 3, 9 & 10). As a result of training, each participant appeared to understand the relevance of entry points and how the elements of aggravation and mitigation were expected to factor into the sentencing decision. Some were more dependent on the Guidelines than others. While they resisted slavish adherence, referral back to the structure underpinned good practice and assisted when there were problems.

The widespread familiarity with the Guideline material endorsed the power of this centralised resource to exert influence throughout the magistrates' courts. With the introduction of a statutory body – the Sentencing Guidelines Council, 2003 – whose function is to take over the role of providing guidance – there is potential for improved consistency, but also the risk that sentencing may become increasingly prescriptive. Further, the perceived pressure from political sources to respond in a way that conforms to

their expectations already raised issues that the participants felt lay outside judicial considerations. Individual differences in the willingness to conform, competing with the desire to exercise independent judgement make it difficult to predict the Council's impact on sentencing activity but should ensure that diversity of opinion continues to be expressed. Already there is preliminary evidence that, on occasions, magistrates will be reluctant to follow the lead offered by the SGC (Times 2/3/06)

It was not surprising that this sample described the structure accurately and expressed their commitment to applying it in practice. Knowledge and the demonstration of structured decision-making are required elements of successful appraisal, initial and on going. All of these participants would have been subject to appraisal within the previous three years. Some were, themselves, appraisers and may have been aware that the interviewer was also one. This introduced the potential hazard of social desirability (Coolican, 1994), into their replies, providing answers that they would expect the interviewer to want to hear, over those opinions sincerely held. This may have helped to explain why, when people referred to examples of poor practice, invariably they cited cases where they had observed others under-performing, but not themselves. For the purposes of the research, this was not a serious deficiency, as it allowed participants to give a broader representation, regardless of whom was involved.

Although all magistrates indicated that they knew how to identify the aggravating and mitigating factors, as prescribed, there was real difficulty in articulating how they brought favourable and exacerbating information together, to achieve a result (Theme 3). The lack of Guidance, in this respect, was, for some, the most challenging aspect of the process and for others the key to independent judgement. In terms of modelling, it represented the failure of simple algebraic mapping, but precluded the proper testing of a weighted version, as participants spoke only in qualitative terms when comparing the effect of

different factors. If an attribution model was adopted, as had been done by Stephenson (1992), to represent the decisional choice of a criminal choosing to commit an offence, the element of subjective norm would be similarly difficult to quantify.

Labelling the models as 'algebraic', 'story-telling' and interpreting heuristic as 'short cuts' carried its own problems (Theme 10). For those who did not wish to represent sentencing as mechanistic, algebraic suggested a precision and lack of human discrimination that did not sit comfortably with their understanding of the role. Some reactions to the description provided for this model appeared to translate into very simplistic cost-benefit interpretations. Referring to the way in which features were combined in algebraic modelling, there was room for misunderstanding as to how much information constituted a 'feature'. As a model, 'Story-telling' may have suggested a fictional element, too frivolous for the serious business of sentencing, rather than a narrative structure, for combining and understanding information that might have appeared to have more logical credibility. 'Short-cuts' with the possible implication of sloppiness or superficiality, may have sounded similarly pejorative, and were rejected for that reason. As cues for consideration, the language chosen may have stimulated a hostile reaction among participants, revealing their own bias towards rationality, logic and thoroughness.

With those reservations, magistrates generally favoured a version of algebraic modelling. This generated an unusual example of participant insight, contradicting the general positivist approach (Denzin and Lincoln, 1998). Reflecting on their own cognitions when engaged in sentencing decisions, participants were able to make relevant observations on the ideas that were proposed to them, developing valid alternative representations of the process when invited to speculate on their experience.

There was acceptance that some type of 'balancing' of positive and negative aspects of a case occurred (Theme 3 &10). Some actually referred to a "see-saw" representation to indicate how their thinking moved in relation to recommended entry points. Others spoke of a "ladder" upon which one ascended or descended in relation to the entry point, as information accrued. The difficulty for all arose with attempts to quantify the degree of movement beyond descriptive terms such a "quite a lot" or "not much". The insistence that each case was unique, and factors having different relevance in each case, was reiterated. For some, this indefinable element of the process was the essence of dispensing justice. It transformed the decision-making process, from a mechanical application of pre-determined weightings, into an intrinsically human process that engaged the intellectual and empathetic qualities of the sentencer in a more holistic manner.

The 'story-telling' representation (Pennington and Hastie, 1986) failed to gain much support. It may be that a model derived from research with jurors, whose task is different in that they are hearing disputed evidence and need to form a judgement on credibility, cannot be successfully adapted to describe the sentencing task. A minority suggested that creating a story was an opportunity to engage their emotions and bring an additional aspect to their understanding of the process. However, several of the sample explicitly criticised the inability of their colleagues to preserve an approach based solely on logic, untainted by emotion, which they considered militated against "judicial thinking".

Heuristics were universally dismissed as inappropriate (Themes3&10). Whether for reasons of social desirability or genuine confidence in the thoroughness of their activity on all occasions, no one in the sample conceded that they, personally, routinely operated short-cuts when sentencing. Magistrates dismissed the suggestion that 'short-cuts' or superficial consideration formed any part of their approach to sentencing, in contrast with the findings of Dhami and Ayton (2001), when they studied the 'bail' task. Some

magistrates referred to the indication of an entry point for any offence when deprecating the lack of flexibility. To this limited extent, they recognised that its identification intentionally compromised the range of sentences that should be considered.

However, in discussing their practice, three areas of less than thorough application of the Guidelines were identified. Cases dealt with in court were distinguishable from those for which the Bench retired for more prolonged consideration of the sentence. Cases regarded as trivial by the magistrates were not the subject of such exhaustive deliberations or explicit discussion. Finally, overly familiar offences acquired an air of superficial consideration. It is possible that in these cases, magistrates were applying an alternative model, as had been suggested by Ewart (1996), when 'tariff' offences were considered, implicitly employing heuristic processing rather than fully structured decision-making. Indeed, the layout of the Guidelines for many of the offences mentioned in this category appeared to encourage such an approach, with primary attention directed towards the nature of the offence only, limiting other aspects for consideration.

The more superficial treatment of these offences bore some slight resemblance to the 'story-telling' representation of Pennington and Hastie (1986). Magistrates hear very similar 'facts,' repeated many times over for common offences, especially motoring. Defendants rarely appear. Possibly, the sentencers derive schemata for themselves that approximate to the 'average' case and fail to pay much attention to detail that might distinguish a particular offender or offence, similar to the suggestions of Tata, C., Wilson J.N. and Hutton, N. (1996), discussed below.

There were cases where thorough discussion was precluded simply by the early appearance of consensus among colleagues, without any intimate knowledge of the process by which each individual had arrived at the sentence. Consensus generally was valued and

individuals strove to arrive at a disposal that could command the support of colleagues, consistent with jury research (Stephenson, 1992). Often this relied on conversion effect consistent with the observations of Moscovici (1980), with a dual process model, discussed by Hogg and Vaughan (1995), to distinguish the influences of majority and minority opinions.

Where this failed, majority decisions were acceptable but usually regarded as a last resort. Pressure to agree with each other must run the risk of a 'Bench culture' developing, (c.f. Sherif (1936) studies on conformity). Magistrates may apply the 'usual' disposal for a particular offence without any knowledge as to whether this is consistent with the treatment for a similar offence in other courts, in other parts of the country. Indeed, anecdotal evidence would suggest that this may be the source of a number of anomalies and bears the hallmarks of 'groupthink' (Janis, 1982), where the desire for unanimity over-rides the operation of rational processes.

Some magistrates were more sensitive than others to the pressure to perform within a reasonable time-span. As a result discussion might be truncated. 'Common-sense', by which the participants appeared to mean pragmatism, was a password to legitimise some of the less than thorough practices that were noted. This reaction was consistent with the findings of Davis and Davis (1996), who indicated that under conditions of time pressure individuals tended to switch to simpler judgement strategies and supported the findings of Zakay (1990). Further, according to Dhami and Ayton (2001), time pressure resulted in greater selectivity of information. In such circumstances, individuals' judgement was better characterised by limited information search, with decisions based on only one piece of information (Reiskamp and Hoffrage, 1999; De Dreu, 2003). Verplanken (1993) related the response to time pressure to an individual's Need for Cognition, suggesting that those

low in NC would adopt heuristic processing in conditions of limited time, more readily than high NCs.

Model difficulty prompted Tata et al. (1996) to suggest that the traditional legal-analytical representation of sentencing was insufficient. It relied too heavily on prioritising criminal law categories as a starting point for representation with 'adds-in' of further information to describe the case analytically. As such, it failed to capture the more comprehensive approach that sentencers themselves were describing, with their emphasis on the uniqueness of individual cases. The allusion to uniqueness occurred with all participants in the current study, often raised on more than one occasion during the interviews.

As a prelude to setting up a sentencing information system to assist judges in the Scottish legal system, Tata et al. (1996) discussed sentencing representations. They considered the abstraction of legal factors to be an artificial exercise, fragmenting the information in a case and detracting from the overall meaningfulness of that information. They suggested a more schematic and holistic representation of 'similarity' between cases, similar in some respects to Lawrence's (1988) approach, using frames of reference to model the sentencing decision.

In contrast to the apparent deductive linear reasoning that the JSB model appears to represent, reality suggested that participants developed individual schemata of their own, based on experience, applying them in a less systematic manner. Crombag, Wijkerslooth and van Serooskerken (1975), p169 reported comparable findings using a think aloud protocol with experienced legal problem-solvers to solve a concrete problem.

> " [The] most striking result was that what they said while thinking aloud created a rather chaotic and unsystematic impression. Often a person seemed to have a solution, although a provisional one, at an early stage for which he subsequently

tried to find supporting arguments. Moreover, during the reasoning process, the subject did not seem to complete one part after another, but rather to jump wildly back and forth".

This representation may indeed have more intuitive appeal. It also highlights a difficult aspect of decision-making, referred to by Lloyd-Bostock (1988); whether sentencers have made a decision and draft reasons to support it or whether the reasons they provide are the primary evidence upon which they relied to make that decision. The structure of the 'reasons' forms is obviously encouraging magistrates towards the former path. However, the decision is taken in private, often in the LA's absence. S/he will *then* be asked to join the Bench to assist in drafting the written record of reasons, suggesting at least the possibility of a different sequence of events. Further, the interaction with the LA, itself plays a part in reaching an agreed position, as discussed later. Moving backwards and forwards between options might also relate to occasions when magistrates urged colleagues to revisit aspects of an offence/offender in an attempt to re-interpret the material to secure a different outcome.

One participant's alternative suggestion (Theme 10) for decision-making models endorsed the idea of different models for different occasions, in this case, distinguishing youth and adult offenders. Sentencing aim was the determinant. For young people, the prevention of re-offending was prioritised, so the aim was more specific and the process was one of risk assessment to determine how that might be achieved. For adults, punishment as described by retributive principles assumed a higher priority. This observation endorsed the evidence in the analysis of results Study 1, when sentencing aim was often related to the type of sentence imposed.

Another participant likened sentencing to algorithmic processing, where decisions at different points determined the route through the options and indicated the appropriate penalty. The difficulty with algorithms in this context lies in the need to maintain different aspects in mind, as they run along in parallel. Without being able to dismiss alternatives at any stage, a multiplicity of possibilities surrounds any choice and there is no single 'right' outcome.

Clearly the final decision was a tribunal responsibility, although the influences within the group will be discussed later. As an individual, each magistrate recognised their own duty to contribute and encourage others to participate.

The Guidelines were all pervasive. Individuals relied on them when they were not happy with the direction that a discussion was taking. Similarly when the recommended penalty did not concur with the inclinations of the Bench, or colleagues came to different conclusions on the same evidence, they were relied upon to ensure that material that might otherwise have been overlooked was re-examined with appropriate care. However, there were occasions when colleagues disagreed, notwithstanding. Magistrates had a variety of strategies to deal with such 'problems'.

Discussion and persuasion lay at the heart of most efforts to reach a consensual decision. Sometimes the magistrates appeared to use the device of 'framing' the problem differently, (Kahnemann & Tversky, 1979). On occasions, re-visiting the various stages in structured decision-making allowed magistrates to adjust their personal weightings to achieve a more acceptable result. Alternatively, they were able to challenge each other's interpretation of the seriousness of different aspects of the structure, in an attempt to harmonise the evaluations and achieve agreement on the weightings. In all these circumstances, the

imprecision of the model in mathematical terms created the 'wriggle room' that served each of their interests.

Some of the most testing cases seemed to be those where the serious nature of the offence was juxtaposed with miserable personal circumstances of the defendant. These attracted considerable sympathy and crisis of conscience for some, in determining the appropriate penalty. Many of the participants maintained that there was still strict adherence to the Guidelines but it was clear that they, also, felt able to manipulate elements to suit their own requirements. Women defendants, in particular, benefited from this sympathy, largely on the basis of child-care responsibilities, if appropriate. A few, reluctantly, persevered in imposing the sentence that "justice" required, despite personal discomfort. Conformity to informational and normative influences (Deutsch and Gerard, 1955), in these circumstances might well be a source of cognitive dissonance (Festinger, 1957).

It seems unlikely that any amount of training would be capable of overcoming this personalised reaction to sentencing, with magistrates responding differentially to different aspects. Indeed, it may be one of the strengths of the processing of information that occurs when a sentence is chosen, that there is an opportunity for the personal characteristics of the sentencer to be engaged, differentially.

Some magistrates were unable to recall in any detail, occasions when they had had to deal with difficult cases (Theme 9). The ability to dismiss controversial or challenging decisions from their mind with the conclusion of that case suggested that they maintained a lack of emotional involvement, in those instances. This was not gender related or characteristic of all of their colleagues. It was often associated with an emphasis on competent application of the Guidelines, sometimes on the basis of professional training, or more generally, as a logical approach that minimised, what they considered to be,

unreliable emotional inputs. It may also have been a coping mechanism to reduce cognitive dissonance.

Magistrates discussed various influences on sentencing (Themes 8, 4 & 9), that might sway their sentencing decisions. These included the Legal Advisor, the recommendations of the PSR and political and societal influences.

Magistrates are trained but not legally qualified practitioners. Their LA will be a qualified barrister or, more likely, a solicitor who oversees their activities. In line with the Practice Direction, 2000, s/he will be responsible for ensuring that all procedural matters comply with the requirements of the law and that legal advice is available to the magistrates to assist in the process of decision-making. As such, the LA is an authority figure whose input at times dictates the actions of the magistrates and at other times is more in the nature of guidance. Judging the limits was a difficult task for many magistrates and LAs themselves. There was evidence within the sample that different individuals responded in different ways to the LA's input.

According to the relevant Practice Direction, the LA plays no part in the sentencing decision. His/her role is to give legal advice and ensure that the proposed sentence is legally applicable, in a particular case. In many cases their perceived input was wholly appropriate. While fiercely defensive of their independence in this aspect, most of the magistrates appreciated the advice and involvement of the LA in sentencing discussions, on purely legal points.

While many took care to praise individuals among their own LAs, several magistrates clearly felt that they had experience of a minority of LAs who had become involved in the discussion, beyond the limits set. The emphasis on "minority" and "individual" LAs, who

were perceived to have crossed the line, suggested that the effect was not widespread and may, indeed, have related to personality traits, or the combination of particular characteristics, when certain magistrates and particular LAs interacted. The spectrum of individual differences in either group might cause any combination of magistrate and LA to interact in a unique manner towards each other.

Self-confidence, maturity, technical ability and experience might all affect the way in which an individual reacted. The nature of the interaction would be particularly significant between Chairs and their advisors. A lack of harmony would reflect badly on the dignity of the Court proceedings and an unwillingness to work co-operatively in seeking or accepting advice in the retiring room could jeopardise the integrity of the discussions that take place. Similarly, poor professional practice or unsupportive efforts by the LA could undermine the credibility of the activity. The ability to manage the relationship with the LA satisfactorily is a specified competency and individuals will vary in the manner in which they achieve this target, perhaps delivering performances of different quality on different occasions.

In some situations, a direct influence on the procedure or, in turn, decisional choice was identified. Some LAs were reported as attempting to enter into the discussion in the retiring room, when they perceived magistrates were approaching a conclusion with which they did not agree. The effect was subtle; suggesting a re-examination of points covered or focusing on material that had not been accorded the expected weight. There was no consistent indication as to whether LAs would be inclined to be more or less lenient, to compare results with Corbett (1987), although one magistrate remarked that LAs were sometimes critical of a sentence on the grounds of excessive severity. Sometimes the impression of impatience on the part of the professionals created an additional pressure to

complete discussions more speedily than Chairs wished which might have had implications for their approach and thoroughness.

More experienced magistrates felt that, over time, the role of the LA had altered. They were most sensitive to a more intrusive and prescriptive style in the interpretation of the function. This may have been a product of their own increased confidence and capability, resentful of 'heavy-handed supervision'. However, it is also likely that the expectations in the standards of performance of lay justices and the complexity of the task they undertake has increased during that period, so that the LA needs to perform a more proactive function. Such tension may be implicit in any situation where professional advisors take responsibility for advising lay members. The reported frustration of some LAs with the prescriptive detail of structured decision-making, suggested that they had less confidence in its capacity to direct the process, than to appear to legitimise the outcome (Lloyd-Bostock, 1988).

Having indicated that they did not welcome the LA's involvement when the sentencing decision was being taken, magistrates were not above enlisting support in the event that they, themselves, were being marginalised in a discussion. Forming allegiances, typical group behaviour for increasing influence, might serve their own purpose, if they felt that a discussion was coming to an unwelcome conclusion. The LA was seen as having the authority to prompt the magistrates to revisit their deliberations, with at least some hope of alteration. S/he might be considered to display two of Raven's (1965) six categories of social influence. Possessing informational power and indeed expert power, the LA was well equipped to change minds, consistent with the findings of Bochner and Insko (1966) who demonstrated the capacity of experts to alter opinions.

As a full-time professional, the LA might have contributed to consistency across different benches, dealing with similar offences, although Corbett, (1987), did not find evidence for this effect. Few magistrates were prepared to ignore entirely, the value of the LA's input, but it was obviously a sensitive area in which boundaries had to be respected.

One of the indications from Study 1 was the degree of agreement between the recommendation of the pre-sentence report and the final sentencing choice of the magistrates. Whether the magistrates were following the guidance of the probation officer's report, or coming to a similar conclusion as a result of independent examination of the same evidence, was not clear in that study. In discussing the way in which they used the PSR in Study 2, magistrates themselves believed that the latter was the case.

In part this replicated the findings of Konečni and Ebbesen (1982) to the extent that magistrates claimed to be taking *all* the available information into account in reaching a decision. However, those authors considered that legal decision-makers lacked insight into the relationship between information input and decision. In practice, the recommendation of the PSR was one of only a relatively few factors that appeared to be taken into account. Perhaps magistrates do have limited insight into the actual influence exerted. Alternatively, it could be argued that in both studies, the PSR has high predictive value for the sentencing outcome but the mechanism of effect on the decision remains unclear. The coincidence of choice concurs with the findings of Corbett (1987).

Magistrates appreciated the quality and quantity of information available in the reports. They acknowledged improvement over the years. Reports were considered a useful "tool" in organising the relevant information and the recommendations were usually "sensible" and logically argued. The main reservation, regarding the reports, was a perception that the probation officers were over sympathetic to the needs of the defendant. It appeared to

magistrates that there was too strong an emphasis on the rehabilitative aspect of sentencing, to the exclusion of deterrent or retributive justice. This echoed the findings of Rush and Robertson (1987) who had undertaken an exercise with judges to explore their use of information in the PSR. Their findings also indicated that there was high agreement between the recommendation of the PSR and the judge's final sentencing disposal. However, as with the current sample, judges tended to rate the recommendation of low usefulness.

If, indeed, this apparent bias in interpreting this type of report is widespread, training will need to be undertaken to restore/enhance its credibility. An expensive and valuable resource is being wasted if the information it contains is consistently discounted. Revised formats for information gathering and presentation and the sentencing provisions of the CJA 2003, creating new 'sentencing packages' go some way to addressing the problem.

Magistrates were adamant in their assertion of independent consideration of all the relevant factors, the PSR representing only one element in the matrix. It was agreed that PSRs often provided more information than was generally available in court and that they provided a structure to review the repertoire of sentencing responses that might be appropriate. However, magistrates were keen to indicate that, even where the disposal chosen coincided with the recommendation of the report, that conclusion had been assisted but not prescribed by the input from the PSR. Again, the importance of the structure of the JSB/Association Guidelines for sentencing and the joint responsibility of all members of the tribunal was referred to as the overarching guidance.

Despite assertions that there was no general predisposition to accept the recommendation of the PSR, magistrates conceded that there was a strong case for endorsing its views. In the event that their own instinct and the recommendation of the report coincided, further

consideration was often superficial. Only in cases where there appeared to be conflict between the recommendation and the seriousness of the offence would the discussions of the appropriate sentence be more thorough. This echoed the observation previously that when there was apparent agreement on the sentence, processing was less thorough than when dissension was apparent, further evidence, perhaps, of the influence of groupthink (Janis, 1982). Apparently, what appeared to be heuristic processing was more acceptable in some circumstances than others. It was also likely that the effect of primacy (Asch, 1946), in identifying a possible disposal, planted a suggestion that was more difficult to supplant than if the report was silent and sentencers really did commence with a blank canvas.

Two magistrates referred to the pressure that they recognised from politicians or society, in general, on their sentencing behaviour. Demands of various political elements, whether to reduce or increase the numbers going to prison or encouragement in the popular press, purporting to represent the views of society, to respond more or less punitively to certain categories of offender, appeared to pose an insoluble dilemma.

The recruitment of magistrates is based on the principle that the representatives of society, on behalf of society, will punish offenders. It was clear that the criteria for selection, based upon political representativeness, among other personal qualities, were not sufficient to ensure that the appointees were confident that they knew what society wanted. Neither was it obvious that, on occasions, magistrates believed that society's expectation was, in fact, the desirable outcome. In recent months, the DCA has been exploring the possibility of recruitment based on economic group representation as a fairer way of ensuring representativeness. However, the difficulty of judging the public mood is likely to continue to be a challenge with considerable variation among individuals.

7.1.2 Group working and reflections on the sentencing process

Study 1 had been undertaken with individual participants. This was a limitation imposed by the postal nature of recruiting participants. The reality of sentencing decision-making for lay magistrates requires a minimum of two magistrates to sentence an offender and the norm is a Bench of three individuals, one of whom has the more vocal role in court, acting as Chairman of the proceedings. The literature review had suggested that magistrates did not necessarily display the characteristics of small group interactions, behaving more like individuals than a cohesive group (Dhami, 2002; Corbett, 1987). For this reason Study 1 used the decisions of individuals as representative of sentencing norms on the Benches to which those individuals contributed. Study 2 sought to expand on the information available from Study 1 as to the validity of this assumption by discussing with participants how they interacted with colleagues and what effects this might have on the process or outcome of the sentencing discussion.

Most (seven of the ten) participants had experience of sitting both as a Chair and as a winger. Two were relatively recent appointments and lacked sufficient experience for the role of Chair, while one chose to sit only as a winger so their comments had to be assessed in that context.

The majority of magistrates believed that, in principle at least, each a member of a sentencing Bench should have equal voice in the process of identifying the final decision. This observation was unrelated to their experience or position in the group as a winger or Chair.

Those who had experience of both positions felt that the content and value of their contribution was similar, regardless of the position from which it was made (Theme 7). However, the responsibility for handling the discussion was much less as a winger and

there was an effort not to usurp the Chair's authority when sitting as such. Generally, people were more relaxed about their contributions as wingers. Some used the experience to improve their own performance as Chair, attempting not to reproduce some of the discriminatory behaviour they had experienced at the hands of others.

As Chairs, individuals stressed the importance of ensuring contributions from each member of the Bench. This representation of group functioning encouraged strong group cohesiveness (Festinger, 1950), with co-operative working, similarity of approach and interpersonal acceptance which would facilitate group confidence and conformity to group standards.

Inter-group communication was an improving scenario, assisted by training and appraisal. Using the Guidelines for decision-making created opportunities for the inclusion of all three members of the Bench, reinforcing group cohesiveness. It was not felt necessary for everyone to assess each stage independently on each occasion. Often one person would lead, with assistance from the other two adding any omitted information, representing the task as optimising but disjunctive in construction, (Hogg and Vaughan, 1998).

Lack of confidence was identified as an inhibitor of performance. Magistrates felt that the Chair had responsibility for ensuring that an individual's contribution was not, thereby, diminished. It was the Chair's responsibility to manage the discussion, whether by personal encouragement or tactful handling of the group, to ensure that each person's views were heard and respected. On occasions, participants used quite severe language in relation to the control that they would be prepared to exercise, in order to give each member a fair chance to make their points. Some magistrates, nevertheless, felt that individuals needed to seize opportunities for themselves, to ensure that they were making an effective contribution. These observations sit well with the recruitment criteria that

suggest confidence and the ability to work as a team are important qualities. However, it highlights the spectrum of individual difference that may distinguish participant effectiveness. While engaged in sentencing, individual magistrates will bring different levels of self-confidence both in the value of their contribution and their capacity to communicate it to others. They will each have a unique and perhaps developing concept of how best to express themselves and enter into discussion with others in order to influence the process and outcome.

Individuals linked experience and their own increasing confidence, with implications for the effectiveness of the contributions of those who were still acquiring skills and knowledge. There was, also, a perception that a more experienced Bench might reach a sentencing conclusion more quickly than those with less experience. This could have implications for less experienced Chairs, whose confidence might be undermined by pressure that they perceived from LAs to complete cases more expeditiously. Speed may actually be a manifestation of individuals becoming familiar with each other and the likely sentences of their court so that discussion is less explicit. The tacit agreement of all the individuals may result in less thorough examination of all the details of a case, with suggestions of heuristic processing (Zakay, 1990). Inexperienced wingers, especially, noticed the tendency for their views to be discounted when these diverged from those of the Chair. Their ability to deal effectively with this depended on the interpersonal dynamics between themselves and the other members of that Bench.

As Chair, magistrates recognised that they had the power to control the discussion to their own advantage, if they chose. While the ultimate decision was a majority vote, so two wingers could, theoretically, over-ride the views of a Chair, there was resentment from some of the participants that the role could be abused. Individuals reported experiences of feeling that their contributions were dismissed as worthless by Chairs who held particularly

strong views of their own. The inability to exert proper control of the proceedings and provide firm leadership was equally deprecated.

In these observations, participants were implicitly referring to different styles of leadership, criticising autocratic approaches and feeling insecure with a regime that was too 'laissez-faire', preferring a democratic approach (Lippitt and White, 1943.) The findings of Larson, Foster-Fishman and Franz (1998) endorse the indications that groups with a participative leader discussed more information than groups with a directive leader, thereby enhancing the quality of the decision and the satisfaction of participants. Further, these authors found that directive leaders were more likely to repeat information, supporting the finding that certain Chairs were more reluctant than others to abandon their own view and might prolong a discussion to re-visit a particular point that they wished to make.

Magistrates noted the impracticality of an inclusive discussion within the confines of the courtroom. Some took physical measures to redress this deficiency. Others stressed the importance of creating a space for proper discussion in the retiring room, if it became clear that there was not unanimity. However, it was apparent that compromise was negotiated even within the courtroom to avoid confrontation, especially when the penalty was generally regarded as fairly trivial by the magistrates. This finding was in line with the results of a study by Anderson and Matthew (1999) that investigated the relationship between the communication traits of argumentativeness and verbal aggression and cohesion, consensus and satisfaction in small groups. Their results indicated that group members who are argumentative but not verbally aggressive express satisfaction with their group's communication and perceive that the group is more likely to reach a consensus and experience a sense of cohesion. In a similar way, the magistrates did not complain about opinions that differed but wanted to construct a mechanism for allowing those differences

to be expressed so that views that conflicted were heard. By argument and discussion, the participants implied that consensus could be reached, so that each person would feel satisfaction with the result, and cohesion was enhanced.

In their expectations of the attributes of Chairmen, participants recognised their responsibility for knowing the elements of structured decision making and ensuring that each was properly addressed in the discussion of a sentence. This information was elicited in a variety of acceptable ways, characteristic of a Chairman's personal leadership style. Some provided a summary/framework of their own understanding for wingers to add to, others invited initial input from the wingers, both practices commended by Gouran (2003). Some saw strong leadership as an important, time saving way to focus minds. Others exercised restraint in expressing their own thoughts, in order not to inhibit colleagues. Chairs, generally, recognised that their input might be considered more influential, by virtue of their real or perceived seniority (Franz and Larson, 2002). Listening skills and the ability to question probingly, to encourage maximum participation, were regarded as essential. An ability to mediate between wingers who disagreed was appropriate, on occasions.

Some Chairs acknowledged that discussions in open court were less thorough. Sometimes, there was a sense of agreement as to disposal, even before a discussion had been initiated. Together these references raised doubts, again, as to whether the execution of the process, in the manner prescribed, is always undertaken as a routine procedure or sometimes gave way to heuristic processing or if groupthink (Janis and Mann 1977) was a prevailing tendency. If heuristics were involved, no single model was disclosed. Seriousness of offence as a primary indicator was likely and some conceded that, often, there was little else to assist in making a decision. The sentencing proposal might as likely come from the

Chair or one of the wingers, depending on the practice of the individual Chair, but support from the Chair was often persuasive for the other member/s.

Chairs had a major responsibility for inducting of new colleagues, using different ways of admitting the views of the least experienced. Again, this appeared to relate to leadership style, but also relied on training. Some Chairs wanted to allow the new magistrates to express their views without feeling the pressure to conform to the expectations of their more experienced colleagues. Others regarded this as an intimidating experience, views that may have been consistent with their own early experience or determined by their personality traits. Tentative support for the former procedure was contained in the comments of the only two 'new' magistrates in the sample. Both indicated that they had found the first style daunting, initially, but quickly learnt the value of primacy in establishing lines of thought, relishing the opportunity to mould the discussion in this way.

7.1.3 Individual reflections on sentencing outcome

While magistrates indicated that they all subscribed to a common approach, they were keen to emphasise the personalised nature of the outcome in a sentencing decision. Disposals were individually chosen to take both the seriousness of offending and the circumstances of the offender into account, aspects that might not be appreciated by observers with only a limited perspective.

Consistency of outcome was not mentioned as a goal (Theme 1), although this is an aspect of sentencing that concerns the general public, whose interests the magistrates considered themselves to represent. Although the skeleton of the structure represented in the 'reasons' forms in Study 1 was being endorsed as a working model, the 'unique' nature of any sentence was continually emphasised, making it difficult to predict an outcome with any certainty.

Participants recognised the traditional interpretations of the purposes of punishment: retribution; deterrence; rehabilitation; and protection of the public (Von Hirsch & Ashworth, 1992), as they had been recorded in Study 1 (Theme 3). Further, they acknowledged that in choosing a particular sentence, they were, on occasions, attempting to target more than one aim. Sometimes this occurred to satisfy conflicting expectations from those who had an interest in their decisions. On other occasions it sent more than one message to the defendant, perhaps offering assistance but also seeking to deter future offending. Again, the difficulty for the mathematical prediction of outcome is obvious, if the aim is not explicit or unique.

Penalties appeared to be hierarchical (Theme 3), participants referring to "going up and down" as in a see-saw or ladder representation. This agreed with the approach taken in devising the sentencing severity scale derived in Study 1 (Kapardis, 1985; Corbett, 1987) in which the punitive value of community penalties was consistently ranked above discharges or fines and custody was reserved for only the most serious cases.

Magistrates expressed dissatisfaction, on occasions, with the sentencing options available (Theme 5). Sometimes, when uncertainty played a part in their thinking, magistrates tended to opt for the less punitive alternative, combining caution and leniency. However their leniency served a dual purpose, in that, it could be interpreted as tempering the injustice that might result in the event of error, thereby reducing cognitive dissonance (Festinger, 1957). In such cases, the technique of sentencing by eliminating options that were impracticable, (Tversky and Kahneman, 1974; 1982), for one reason or another, might be applied to identify the 'least unsuitable'.

Magistrates mentioned the particular importance they attached to the custody threshold (Theme 9). The defendants for whom this was a real possibility represented the most

difficult sentencing decisions for many. It was in this type of case that their sentencing aims were most severely challenged. The potential conflict between the personal circumstances and needs of the defendant and the expectation of society, as the magistrates interpreted it, on occasions, represented a real dilemma. While training and Guidelines might indicate one disposal, their everyday experience and human responses created conflict.

7.1.4 Group working and its impact on Outcome

The magistrates felt that the tribunal arrangement ensured a wide representation of views (Theme 7). This was not, in fact, a finding that agreed with the results of Study 1, as magistrates grouped quite tightly around population norms in many of their characteristics and the sentencing choices they made were fairly unanimous. They implied that an 'averaging' effect operated in the final sentencing choice. Achieving agreement may, in practice, have inhibited more extreme views, as Chairmen applied different techniques in an effort to arrive at a consensus (Janis and Mann 1977). The likely effect of this on the outcome would be a dilution of strongly held opinions, as discussion was prolonged, in a re-examination of the elements of structured decision-making. This appeared to contradict the predictions of 'risky shift' studies in which groups opted for more extreme solutions than those of the individual members and also the phenomenon of group polarisation described by Moscovici and Zavalloni (1969).

Chairmen had an enhanced opportunity to promote their own beliefs or provide support to either of his/her colleagues, whoever was most empathetic (Theme 7). There is no reason to hypothesise that this would have a predictable effect on the severity of a sentencing choice, but every reason to believe that the outcome is likely to concur with the Chair's own preference. Persistence might be applied to achieve any outcome considered desirable by him/her. By controlling both the length and thoroughness of discussions, it was

recognised that Chairs had the power to influence the outcome towards their own preference. While there was universal criticism of the practice, participants acknowledged that it sometimes occurred.

7.2 Personal characteristics and their effect on sentencing

Participants identified individual differences among their colleagues that might affect either the process or outcome of sentencing.

7.2.1 Characteristics and process

Magistrates, especially those who adhered most rigidly to the legal-analytical model, admired intellectual ability in colleagues. The overwhelming majority of the sample had tertiary level education or beyond and several referred to the relevance of such. The variety of technical competence and appropriate knowledge might well influence the respect an individual could command or the influence they exerted in a discussion (Franz and Larson, 2003).

In general magistrates did not spontaneously refer to the traits that comprise the five-factor NEAOC model. However, they were indirectly picking up on some aspects.

The ability to articulate one's views was essential and a capacity to listen to and process other people's observations was highly rated (Theme 2). A willingness to engage in discussion around sentencing options was also important, all competences specified for appraisal. Agreeableness as measured in Study 1 should facilitate discussions, with the facets of trust and straightforwardness within this domain being appreciated.

However, participants were sometimes wary of too easy a willingness to 'fit in' and appear to accept the views of others. Magistrates who over-estimated the importance of Agreeableness might be willing to compromise their determination to pursue an argument that was unpopular with their colleagues. Similarly, the high premium placed on consensus might persuade individuals to accept the majority view, in order to avoid controversy, reinforcing group effects even though the number of members in the typical sentencing group is quite small (Anderson and Matthew, 1999).

Extreme introversion may make an individual difficult to engage or reluctant to volunteer information, characteristics that participants deprecated in their accounts. Contributing to group discussions in a positive way is also one of the appraisal competences that is assessed.

In their references to the flexibility required to reach consensus, there was some semblance of the quality of Openness in the five-factor model (Costa and McCrae, 1985). Participants needed to be receptive to more than one possible interpretation of the information, willing to listen to the opinions of others and discuss a variety of possible sentencing disposals.

The desire to ensure thoroughness throughout the process, especially when marshalling fully comprehensive information to inform the sentencing decision, suggested that as a group, magistrates valued Conscientiousness. Their repeated insistence on adhering strictly to the prescribed structure seemed to reinforce this expectation, and related well to facets of Conscientiousness in the OCEAN model indicating competence, order, self-discipline and deliberation (NEO PI-R) (1992).

However, results from Study 1 generated mean values for Conscientiousness that were comparable with the population norms. The conclusion that magistrates are, in fact, no

more conscientious than their contemporaries in the general population, appears to undermine the emphasis placed on this recruitment criterion. While a degree of Conscientiousness must be a desirable trait in any learning experience involving thoughtful consideration of information, demonstrations of raised levels in this respect may be strictly context specific. Further, training and the demands of appraisal may have minimised, or even eliminated, the variation that would otherwise contribute to differences in acceptable performance.

Magistrates spoke of an apparently high Need for Cognition, wanting a complete and thorough understanding of all the facets of sentencing. Evidence from the allusions to heuristic processing in Study 2 reinforced the impression that, for a variety of reasons, in practice, magistrates accepted less than perfect performance, on occasions. Some of their misleading enthusiasm may be attributed to the element of social desirability in their answers, (Coolican, 1994), offering observations that they believed the interviewer might wish to hear. Magistrates expressed difficulty in working with people who were indecisive or confused in their thought processes, both characteristics detracting from the efficacy of the process.

Each participant identified aspects of their work or life experience that they felt assisted their ability to make appropriate sentencing decisions. Sometimes these were information-handling skills, but sometimes they referred to their capacity to empathise with the defendant and his/her circumstances. In general, decision-making devoid of emotional appeals was preferred by the majority. Participants spoke of emotion as the antitheses of logic, interfering with sound decision-making. This appeared to contradict their previous praise for empathy and emotional understanding of the offender.

The area of emotion and emotional intelligence in relation to decision-making is one that was introduced by a small number of the participants only in their responses in this study. As such, it did not feature in the original approach to the research question. Participants' references to it were too superficial, and the relevant data generated so limited, that any greater analysis of it would not do justice to the volume of literature that exists on the topic already in relation to other applications. However, it is an important area for future work, to further inform understanding of its role and relationship with competences.

Sometimes, emotion appeared to be a code for prejudice. Appointments committees endeavour to address prejudice among the recruitment criteria and magistrates are encouraged to challenge one another if such ideas are expressed or unfair stereotypes invoked. Issues of equality and racial awareness have, generally, been included in the training agendas of courts and the sample indicated sensitivity to resisting the potentially damaging effects of ignorance in this area.

Strongly underpinned by discussion and adjustment, moving towards consensus, the decision-making process could be seriously disrupted by individuals who chose to adhere to a single approach and proved unshakeable in their beliefs. For this reason, magistrates recorded that the trait of dogmatism or inflexibility, as some described it, in colleagues was difficult to handle. In practice, the views of such a person were marginalised by majority voting, but not without causing feelings of discomfort among colleagues.

7.2.2 Characteristics and Outcome

When magistrates felt that the strict application of the Guidelines led to the suggestion of a sentence that was too harsh, they had strategies for altering the result (Themes 5,6, 8, 9 & 10). Most were prepared to concede that they felt able to manipulate the information to achieve a more acceptable result, usually to the defendant's advantage. Invariably, this

meant attaching disproportionate weight to the personal mitigation or applying holistic schema that admitted what might, objectively, be dismissed as irrelevant information. This description of the process, led further credence to the suggestion by Lloyd-Bostock (1988) that 'reasons' justified rather than led a decision, at least in problematic cases.

Sometimes it was something about the physical appearance of the defendant that caused magistrates to revisit their preliminary choice. The risk for defendants who do not appear in person, or who fail to evoke the sympathy of the magistrates is the likelihood of a harsher sentence than might otherwise have been the case.

Several participants held very personal views on certain types of offence. The outcome in such cases might be more extreme or more lenient sentencing than the facts commanded. Political muddles about the possession of certain drugs, personal experience of domestic violence, certain characteristics of motoring offences, all distinguished themselves in a way that allowed magistrates to depart from the general guidance. The impact on the sentence chosen was a highly individualistic and not theoretically predictable without intimate knowledge of the sentencer.

Magistrates were extremely reluctant to interfere with someone's employment, even where custody appeared the appropriate sentence. This was consistent with the personal mitigation identified in Study 1. Magistrates empathised with the difficulty that loss of income inflicted, not only on the offender but any dependants. Often this was an important factor in persuading magistrates to adopt a less punitive response, thereby benefiting the offender.

New magistrates carried a greater burden of anxiety in relation to their sentencing choices than those with more experience. Several participants observed changes in themselves

over time. Those with more experience need to be alive to the difficulties of newer colleagues in this respect, without allowing themselves to become desensitised to the information that they are processing.

Experienced magistrates felt that their thresholds for judging seriousness had been consistent over time. However, it was recognised that some of the external pressures that influenced their decisions, or regulations surrounding some decisions, may have altered in the period since appointment, forcing them to sentence in a particular way.

A few magistrates alluded to personality clashes with the LA. As a result, some seemed to choose to move deliberately in a direction, opposite to the advice they were receiving. Others became more entrenched in the views they held, where they felt confident in challenging the input of the LA. In either scenario, the free flow of information was impeded and the outcome of the sentencing discussion affected, but no consistent effect on the level of penalty might be predicted.

Overall there was good evidence that individual characteristics were certainly perceived by the participants to influence both the way in which they engaged with the sentencing process and the outcome of their discussions. The recruitment criteria and the elements identified in the appraisal competences all represented areas for disparity between individuals. While the system of recruitment and the process of appraisal ensured that a minimum standard was being achieved, it was unable to preclude variation above that threshold which might yet exert influence on the process or outcome of a decision because of perceived expertise.

The individual interviews represented a rich source of data from practitioners themselves but it was impossible to avoid the risk that participants, in some aspects, perhaps

unintentionally, described sentencing practice, as they wished it to be or optimistically believed it was happening. In order to test the validity of their description, and provide an element of triangulation, Study 3 was undertaken. Its methodology and findings are discussed in the next two chapters. Chapter 8 introduces the study and commences one type of analysis, while Chapter 9 deals with a different treatment of the results for one of the cases in that study.

8

Study 3 (Part 1); A Qualitative Investigation of Group Working on Sentencing Decisions

The third study in this research was a piece of opportunistic participant observation. It used the chance to take part in a routine training exercise for magistrates, at the researcher's home court, to make a record of the exchanges (with consent and ethical approval).

8.1 Introduction

Study 1 was a good simulation of the sentencing task, in which the structure of a magistrate's decision-making when acting alone was elucidated through the completion of the 'reasons' forms. The main limitation of this study was the lack of interactions that would have arisen during group discussions of real cases.

Study 2 addressed this deficiency by providing the magistrates with an opportunity to reflect on their own practices both as individuals and as groups. In that study, participants talked in general terms about their understanding of the process, how they affected and were affected by colleagues, often in an abstract context. This approach risked the distortion of social desirability in their responses.

Early in the planning of the research project overall, permission was sought from the LCD (now DCA) for the researcher to use material from observations in the retiring room. This was intended to capitalise on the researcher's involvement with the local appraisal programme, to which such observations were integral. However, to protect the confidentiality of real defendants and to maintain the privacy of the retiring room, permission was withheld.

The sentencing exercise, described in Study 3, therefore, created an alternative opportunity to study magistrates in circumstances closer to actual sentencing practice than had been possible in the previous two studies. It is probably unique in the data that it generated. Magistrates were observed discussing sentencing of specific cases, interacting with colleagues directly, demonstrating the degree of familiarity with techniques that they professed to apply and providing direct information about which material they considered relevant. The analysis considers the roles of Chairman and Legal Advisor, the dynamics within the group, insight on modelling the sentencing decision, how the PSR is used and sentencing aims expressed, revealing how participants shared their thoughts through the record of their dialogue.

8.1.1 Ethical considerations

The researcher drew heavily on contributions from this particular Bench throughout the research. For this type of training exercise magistrates gather in pre-assigned groups to discuss the sentencing of cases that they report back to a plenary session. It is organised locally, approximately every two years. On a previous occasion, a similar recording of activity was made, with consent, to test the viability of the approach and the reaction of the participants. This time, the researcher explained to the group to which she was allocated that their permission was sought to record our discussions, to use the material as a potential additional contribution to the studies presented in this thesis. Two of this group had

contributed to previous studies, and all agreed to participate. A recorder was left running inconspicuously throughout the group discussion. Sentencing continued in the manner evidenced in the transcripts and replicated in several previous sentencing activities of this type.

As the material was anonymised, no individual magistrate risked suffering any damage or harm. From their perspective, the magistrates engaged in a planned training activity, the overall purpose of which was unaltered. Other magistrates attending the training session and other participants were not approached, so no attempt was made to record any other group or the plenary session.

8.1.2 Reflexivity

Many of the observations on reflexivity that were noted in Chapter 5, regarding observations on colleagues and interpretation of their dialogue remain pertinent. However, the size and intimacy of this group and the active participation of the researcher imposed additional considerations. As a member of the group that generated the transcripts, the researcher was, perhaps, the most self-conscious participant in that group. Several individuals, each with different styles in their personal interactions, were present and a range of magisterial competence and experience was represented. The researcher is a very experienced member of the Bench overall who has participated in this type of exercise many times but did not Chair any of the reported cases. To that extent, no overall control was explicitly exerted. However, genuine participation from each member was important, if the validity of the training exercise was not to be distorted by failure to ensure that the group produced the most appropriate sentencing solution that it was capable of identifying. For this reason, the researcher attempted to engage in the manner that would otherwise have been undertaken, notwithstanding the recording. Limited personal contributions are included in the analysis where they form part of a developing example of some aspect of

the process or demonstrate the manner of colleagues' responses to a particular observation. However, it should be noted that, having become so familiar with the stages of structured decision-making in particular, some restraint had to be exercised on the part of the researcher to avoid imposing an approach unnaturally on proceedings or steer attention to aspects that might not otherwise have received consideration. Conscious of the remarks made previously in Study 2 by some participants about the tendency of some individuals to defer to experience, the personal contributions of the researcher had also to be limited for this reason. Other members did not appear to feel inhibited by the recording procedure and no one reported any discomfort.

8.1.3 Limitations

The size of the group was much larger than a 'real' sentencing Bench. Thus, the dialogue may have been distorted by the necessity to accommodate so many views and ensure that each person followed the proceedings.

The role of the LA has aspects of artificiality in this exercise. In 'real' sentencing the LA would not have prepared the case to the extent indicated. S/he would, rarely, have had an opportunity to discuss it in advance with colleagues, although the chance to seek advice *is* always available. The LA might, indeed, not be present in the retiring room, during the discussion of the appropriate sentence. Depending on the Chairman or the individual LA, their involvement and opportunity to contribute to any discussion might be extremely limited. In this exercise the LA had an agreed legal approach to suggest and for the group studied, at least, a watching brief to oversee the direction of the discussion.

Because the entire sentencing exercise was undertaken within strict time controls, it was apparent that the consideration of later cases was much more rushed than the initial case. This has a ring of reality since actual cases are dealt with within a list and there are

occasions when compromises are made under time pressure. Magistrates reported similar pressure in their individual interviews in Study 2, so there is no reason to assume that the process is unfairly represented for this reason.

In any 'artificial' sentencing exercise, the single most important deficiency is the personal impact of the defendant. While it is impossible to account quantitatively for this in the determination of the outcome of the sentence, most magistrates are aware of the potential effect. For this reason, they are able to reflect the *process* on occasions such as these with greater accuracy than the *outcome*. The reality of the defendant's physical appearance, attitude towards the offence and any mitigation that is reinforced by a personal submission may all affect the actual choice of sentence in a real case, evoking emotions that a fictitious representation may not engage. In addition, this was an exercise without consequences. Decisions could be taken without actually having to impose the sentence and live with the ramifications for the defendant.

8.2 Methodology

8.2.1 Participants

The sentencing exercise was incorporated into the annual training schedule for magistrates at the court where the researcher practises. Between 60 and 70 magistrates, who responded to a general invitation to the Bench, were accepted for training on a 'first come, first served' basis. Thereafter, those individuals were pre-assigned by session organisers in a quasi- random manner, by alphabetical distribution, into six operating groups, each having a membership of between six and ten people, dependant on who actually arrived on the night.

Each group was assisted by the services of a Legal Adviser (LA) to simulate the real life retiring room scenario of colleagues of differing experience, discussing a case in order to sentence appropriately, with a LA available for consultation. Chairmanship[1] for a particular case was pre-assigned by the course organisers. The LAs had previewed the cases as a group, so there was a common understanding among the advisors of the approach that would be recommended and advice provided if/when requested on any particular case. The researcher was not involved in any of these preparatory arrangements.

The material considered here represents the deliberations, verbatim, of the researcher's group only. Thus the participants in this study were seven magistrates, two of whom were men, assisted by a female LA. A totally separate group of people provided the overarching cohesion in the plenary session held at the end of the event. These chapters are only concerned with material from the group in which the researcher participated, who had agreed permission.

8.2.2 Materials

The magistrates were supplied, in advance, with booklets generated by the team of LAs, in consultation with the local Probation staff. These contained information about four case studies. (Only three of the cases are reported here as the group of which the researcher was a member ran out of time to consider the fourth case properly.)

Each case concerned a different defendant who was to be sentenced for a variety of offences. For each, the information available was similar to the case studies used in Study 1, when individuals had responded on the 'reasons' forms. Magistrates, therefore, knew the details of the instant case, the process that had led to the defendant's appearance on this

[1] As in previous chapters, the person presiding on a Bench is referred to as Chair or Chairman, whether male or female. Both labels are used interchangeably and no gender discrimination is implied.

sentencing occasion, the record of previous convictions (if any) and were provided with a complete PSR to inform their deliberations (full case material available at Appendix 12).

In essence:

- Case 1 referred to a male defendant charged with theft after snatching £110 from a shop till, apprehended at the scene, who had several previous convictions for similar offences;
- Case 2 involved a female defendant, aged 21yrs, who had breached the conditions of a Community Rehabilitation Order, by failing to report for appointments; and
- Case 3 concerned a woman with three children, a single parent, who had made false claims for benefit while employed, defrauding the DSS of a sum in excess of £5000.

8.2.3 Procedure

Magistrates went into break-out groups for about 60 minutes to discuss the case material, reporting back to the plenary session for comment and comparison. The data were collected by contemporaneous recording and transcribed by the researcher. The transcripts of the three cases discussed in full are presented in Appendix 10.

8.2.4 Analyses

A numerical code was used to anonymise each participant. As this was a new study, with different participants to Study 2, an alternative, gender neutral, labelling system to identify participants was employed. Contributions were enumerated, to assist the reader in locating each one. (For example, C1 (24) indicates that the quotation comes from the transcript of Case 1, and represents the 24th contribution to the discussion, as numbered beside the magistrate's identification, in this case, M6, " That's true...). Some quotations are

introduced in full, others are referred to only as additional evidence available in Appendix 10 for consultation.

Transcripts were read and re-read, highlighted and annotated to analyse the major themes and structure of the content. All three cases were considered to identify themes that informed the findings of the previous two studies. Thereafter, one of the transcripts, only, was used as the basis of an in-depth content and discourse analysis, reported in Chapter 9. This informed the research in more detail about the overarching themes of the thesis related to the process of arriving at a sentencing decision and the effect of individual differences on that process and its outcome.

8.3 Results and discussion

8.3.1 Roles: Chairman

8.3.1.1 Controlling the procedure

A tally was made of the individual verbal contributions. Using the numbered case discussions, the separate interventions of each participant could be extracted and summed. The results are shown in Table 8.1, below. These indicated that the Chairman predominated in each case, although the extent to which there were more verbal contributions above the mean, varied between participants who acted in this role. [Case 1; Chair 29% of all contributions, Case 2; Chair 20%, Case 3; Chair 24%]. The length of the discussion, in itself, was a factor. If everyone was talking more, it was more likely that the Chair would make increased contributions, in managing that discussion.

Table 8.1 Shows the number of individual contributions made by each participant for each case.

Magistrate ID	contributions Case 1	Case 2	Case 3
M1	65*	19	14
M2	35	13	14
M3	27	12	21
M4	29	14	12
M5	22	2	29*
M6	24	21*	13
M7	9	5	3
LA	14	14	13
Mean (excluding LA)	28	13	16

* indicates the identity of the magistrate who acted as Chairman for that case.

However, the contributions of M1 as Chair in Case 1 exceeded those of anyone else when Chairing, to an extent not repeated in subsequent cases. Even allowing for the fact that this was the case discussed first and considered in greatest detail, this would appear to suggest that individual Chairs do have a personal style in the frequency of their interventions and overall verbalisation that demonstrates varying degrees of control.

As the group became familiar with the application of structured decision-making and repeated the process in subsequent cases, practice effects and some anticipation of the contributions of others were possible. The implications for the Chair are unpredictable. In one sense, less control would be envisaged as people learnt the routine. Set against this, might be the additional burden of ensuring engagement if participants began to take too

much for granted or developed a pattern of predictable responses to each other. On balance variation is more likely to reflect the individual style of the Chair than the position of the case in the three considered.

A similar risk must exist for any Bench that hears a rapid stream of cases or one that sits together very regularly and begins to learn each other's style. The risks are minimised when magistrates are assigned to Benches on a random rota but may occur at courts where the magistrates customarily sit on the same day each week and become very familiar with the same relatively small group of colleagues.

8.3.1.2 Managing the discussion

In each case study the discussion opened either with the Chairman or Legal Advisor and the other followed as the next speaker, setting the structure for a decision at an early stage. Reference was made to the Magistrates' Association Guidelines right from the start. Thus, the group adopted, immediately, the style of discussion compatible with the JSB advice on structured decision-making when sentencing.

In Case 1 the Chair commenced with:

> M1, "What are we looking for? ... I'd better open the [book]," C1 (1)

referring to the Association Guidance. Had this not occurred the LA was already primed to focus people's attention in a similar direction:

> LA, "I've been advised to ask you to refer to the adult Bench book... p60 of the Guidelines." C1 (2)

Similarly, in Cases 2 and 3, the Chairman, in concert with the LA, directed the discussion towards the appropriate guidance. The sentencing entry point was identified immediately, establishing a consistent starting point for the offence in the sentencers' minds, led by the Chairman. It was obvious why some Chairs might resent the over zealous intervention of a

LA at this stage. As reported in some of the individual interviews, Chairs themselves felt perfectly competent to structure the discussion appropriately and it provided an early opportunity to establish overall control. In the single case where there was relevant case law to consider, the LA provided early guidance before the magistrates had even an opportunity to stray too far from the norm.

The more competent Chairmen took the group through the elements of structured decision-making. Seriousness was addressed, aggravation identified, mitigating factors of the offence discussed and finally personal mitigation considered, in accordance with Chairmanship training and appraisal requirements for the relevant competence, (M1,C1(5) & M5,C3(38)). In Case 3, one of the group appeared to be racing ahead to a premature judgement by their early intervention and the Chair exercised restraint, (C3,M2(3) &C3,M2(5)).

8.3.1.3 Striving for consensus.

Throughout the dialogues, consensus was valued. In Case 3 the Chair checked towards the end for agreement on one aspect of the sentence, (M5,C3(119)), but the LA was also enquiring about agreement (C3,LA(113)). Similar allusions to consensus arose in Case 1, (C1, M1(162)). In Case 2 the Chair addressed one magistrate, specifically, to ensure that the individual has had an opportunity to dissent, (M6, C2(77)), to which the reply:

M4, " Yes I think it's quite an attractive idea...." C2 (78)

indicated that someone, who had expressed other ideas, was now content with the suggestion that commanded general support and agreement had been secured.

The discussion of two of the cases concluded with a summary by the Chairman. These confirmed the agreed position of the group, as the Chairman understood it, using the

elements of structured decision-making, again providing opportunity for correction, challenge or dissent.

8.3.2 Roles: The Legal advisor

8.3.2.1 Providing advice.

Cases 1 & 3 differed from Case 2. The former pair involved straightforward offences of dishonesty, whereas the middle case dealt with the breach of a previous court order. This put it in a slightly different category of complexity, when reviewing the options. The Chair in Case 2 was happy to have advice, at length, from the LA on the possible ways of dealing with the breach and all the members of the group wrestled with the 'correct' logical approach. Examples of the type of advice are shown in LA, C2(21)&(31). Others can be found at LA (C2(5)), (C2(23)), (C2 (100)). All of this represented fairly substantial input by the LA, helping to formulate different approaches, offer alternative solutions and arrive at the correct form of words for a pronouncement.

8.3.2.2 Informing practice.

Considerable 'coaching' as to legally acceptable formulations was apparent. Guidance was available throughout from the LA, without at any stage being too prescriptive. This was a tricky line to observe and some LAs would be tempted to intervene if they perceived the process departing from their expectations. In the relatively informal setting of a training session this was less likely to be adversely received but there was evidence of the LA refocusing the discussion when it was felt, perhaps, that something pertinent had been overlooked, (LA,C1(57), C2(56), C3(41) and C3(91)).

Reference back to the table of contributions (Table 8.1) indicates that the LA maintained the same number of contributions across the three cases, despite their differing lengths and

complexity. This represented proportionately greater input into the two shorter cases and reflected the differing nature of the relationship between individual Chairs and the LA.

8.3.3 Group dynamics

8.3.3.1 Inclusive discussions.

All members of the group contributed in each case but to varying degrees, (see Table 8.1). There was no apparent relationship between experience and the level of contribution. One of the newest and one of the most experienced magistrates maintained a high level of verbal input throughout each case suggesting that this was a product of their own personal style and self confidence rather than the result of training or experience. The other inexperienced magistrate in this group made very limited contribution to the discussions overall but was very persuasive, apparently from a knowledgeable base, on the little that was volunteered, (M7, C3(120). The suggestion was accepted without further discussion and allowed the participants to move on.

8.3.3.2 Inducting new magistrates.

Two of the magistrates in this group were relatively inexperienced, having been appointed within the last three years. However, each contributed fully to the discussion, one more volubly than the other but each with the encouragement of the group to ask questions, seek clarification and maximise the training experience. No consistent pattern for introducing their contributions was observed

8.3.3.3 Structuring the decision.

The Chairman often provided the lead in the sentencing discussion, but all members of the group made contributions at some stage, assisting to identify the elements of aggravation and mitigation. It became a joint enterprise with different people providing different aspects for consideration by the rest of the group. There was evidence of reliance on the

Guidelines as exemplars of possible features that might be relevant - a sort of checklist underpinning independent evaluations and correcting misperceptions, in interpreting the information, (C3(6-10), M5 (C3 (11)), M5 (C3 (48)).

While the group discussed whether the offending took place over a long period of time and the relevance of the amount of money stolen, elements of offence aggravation/mitigation, one member attempted to curtail the discussion of the seriousness of the offence observing,

M6, "There's quite a lot of mitigation." C3 (26)

Another intervened immediately to point out that the mitigation wasn't within the offence and it would be premature to consider this. The discussion resumed around aggravating and mitigating features that contributed to the seriousness of the offence, observing the structure more strictly, before taking account of personal mitigation. However, the exchange replicated one of the areas of confusion apparent in Study 1 where some participants had demonstrated their lack of understanding of the model for structured decision-making by, on occasions, mixing up personal and offence mitigation.

On another occasion, discussion had moved on to consideration of the sentence when one of the group members suggested that mitigation had not been properly explored, (M5,C1(37)). The direction of the conversation altered to accommodate this observation. This supported the contention of Crombag, Wijkerslooth and van Serooskerkan (1975), that processing was not always a linear progression through the stages, but jumped around in a more chaotic manner.

8.3.3.4 Identifying the sentence.

The consideration of aggravation and mitigation was often a relatively small proportion of the total discussion. For Case 1, the first concentration on a specific sentence came about one third of the way through the script, supplied by a group member but prompted by the

LA, (LA,C1(91)& M6,C1(92)). However, another magistrate, emphasised aspects of the mitigation, to challenge the suggestion. An alternative was proposed. Considerable discussion around the suitability of any community-based penalty continued until the Chair attempted to resolve the issue by directly addressing the penalty that others had avoided suggesting,

M1, " ...is it time this guy went to prison?" C1 (128)

There followed a series of contributions justifying why this was not too punitive an outcome for this defendant, ranging from his age, history and the sentencing aim, M5 (C1 (130), M1(C1(136)), M2(C1(38)), evidencing the aversion to custodial sentencing that magistrates had indicated in Study 2.

Against a background of uncertainty that, having gone through the model for structured decision-making, insufficient aggravation had been identified to justify increasing the punishment beyond the advised entry point, the frustration of limited options continued. The language endorsed the impression created in the previous individual interviews that magistrates were choosing between what they considered to be unsatisfactory alternatives (M1 (C1(115)).

The sentencing aim remained unclear, some accepting that the protection of society was a legitimate aim in itself, others wanting to be convinced that no rehabilitation was possible before agreeing, (C1(143 –145), M2 (C1(154)), M5 (C1(156 &160)). While custody was eventually agreed, the actual length of sentence did not emerge until some time later, following a lot of talk about the most suitable way to mark a previous breach of an order, alongside the current offence. When the suggestion finally came for a three-month custodial sentence, the Chairman initially appeared to resist the suggestion, sought guidance from the LA in support of reduction, perhaps, and corrected a colleague who, erroneously, debated the difference between sentence and actual time served as a relevant

consideration. Other members of the group suggested other lengths of sentence, M3 (C1 (188 &191)), M2 (C1 (199)), M1 (C1(207)), summarised by the Chair.

> M1, "So not a brilliant disposal, I think… one month for the previous and two for the present." C1 (217).

In Case 2, the third individual contribution to the discussion made a suggestion of continuing with a community penalty to deal with this case. This may have helped to explain why the Chairman in this case never really attempted to use a structured approach, responding more to arbitrary contributions, rather than meaningfully controlling and leading the discussion.

Age and education worked in favour of this defendant, engaging sympathies, M1 (C2(11)), M3 (C2 (96)). A recital of all the previous penalties that had been tried with defendant in the past, confirmed sentencing by elimination, opting for the least bad disposal, (M6 (C2 (8)), M2 (C2(9), M6 C2(10)). As in the previous case, there was frustration with the limited options, (M4 C2(46), M4 C2 (50)).

Although small variations on the initial suggestion were discussed, there was no great dissent from the original intention. Preoccupation with the legal technicalities involved in sentencing, where a defendant has breached an order, took more time than meaningful discussion of alternative disposals.

Sentencing aims were quite personal to individual magistrates, some wishing to help the defendant (M6 C2(80), M6 (C2 (85)), others to punish M1(C2(74)), a few covering both options(M6 (C2(93), M1 C2(92)). The reluctance to go beyond a community penalty was again apparent and on this occasion prevailed.

Case 3 followed the prescribed structure most formally but was, in many respects, the most obvious in its solution. Case law provided specific guidance for dealing with a female defendant with child-care responsibilities. With such prescriptive sentencing advice, the discussion might have been very limited. Notwithstanding this, the group approached the task in a structured manner and resisted the temptation to sentence without a full consideration of the facts. The sentence suggestion again came about half way through the discussion, made by the most vocal member of the group:

> M1, "So does this bring it down from a community penalty to, in fact, something around what they are asking for?" C3 (54)
>
> Chair M5, ":.. umm, yes which is a CD." C3 (55)

No-one in the group seriously challenged this as the primary sentence but the discussion continued for a considerably longer time around the issue of compensation in this case. More than half of the transcript related to that debate and the fine detail of how much and to what schedule the money that had been defrauded should be recouped. The actual length of the conditional discharge was not revisited until the LA raised it. Again M1 suggested a figure with which there was general agreement. Clearly, whether acting as Chairman or in a supporting role as winger, some of the magistrates would be more assertive in providing their ideas than others. While there was no attempt to insist that such ideas were universally accepted, the advantage of primacy in setting a standard, establishing a position from which departures have to be justified, should not be underestimated.

8.3.4 Modelling the sentencing choice

In one sense even the recognition of an entry point is a heuristic, focusing attention on the level of seriousness and appropriate response for an "average" offence of the type being considered. Already independent evaluation of seriousness has been compromised in the interests of consistency. There was some evidence that, despite proclamations of thorough

processing in the individual interviews of Study 2, the reality of the sentencing choice provided examples of short-cuts. This was most apparent in Case 2 where the suggestion of the PSR concurred with the approach of M1 and was advanced at an early stage. In other cases, the prompts offered in the Guidelines were used as a shorthand vocabulary, often assuming that each person adopted the same interpretation.

Limited story construction existed, speculating on motive and the circumstances of the offending, (M3 (C1(14)), C1(47-53)), C2 (13- 16), M2 (C3 52), C3 (81, 86, 88)).

As in the interviews of Study 2, there was some evidence of algebraic modelling. The concept of a scale or ladder structure was apparent, along with a balancing effect of positive and negative aspects, (M1 C1(20), M2 C1(21), M4 C1(72)). Reference to penalties moving up and down a scale around the entry point and endorsement of the positions that various disposals had taken in the sentencing severity scale in Study 1 was present.

As in the interviews, the imprecision surrounding the allocation of weightings to the various features challenged the notion of balancing competing aggravating and mitigating aspects with any objectivity, (M1 C1(7), M4 C1(74), M1 C1(75)) along with ,

> M6, "There is quite a lot of mitigation C3 (26)
>
> M1, "... because there are quite significant mitigating factors, aren't there?" C3 (57)
>
> M1, "... some, yes a bit of credit." C1 (95).

8.3.5 The use of the PSR

Since a sentencing exercise is deprived of any live contribution from any of the other 'usual' courtroom participants, it must necessarily rely heavily on the information provided

in the written reports for its context and explanation. Notwithstanding that, it was surprising how often the participants resorted to the PSR for guidance and opinion and how persuasive some members found it, (M1 C1(25&33)). Others, too, referred to its advice, M1 C1(36) and M1 C1(121).

This Chairman apparently accepted the constraints imposed by the PSR recommendations and invoked the support of the LA to challenge an alternative view that was proposed by M4, (C1(125-127)). Following this exchange, the discussion moved to suggestions that were more in line with the report so in this instance at least, the PSR was extremely influential but did not prevent an exploration of the process.

In Case 2 the PSR recommendation was adopted. In Case 3, concurrence with the recommendation was again the outcome, in line with the findings of Study 1 when the sentencing decision was approximately the same as the recommendation of the PSR in each of the three cases.

Superficially this result agreed with the findings of Konečni and Ebbesen (1984) that the recommendation of the PSR was the best predictor of sentencing outcome. However, there was good support for the magistrates' own contention in the interviews of Study 2 that they came to their conclusions, assisted by, but independent of, the advice of the Probation officer. Whether through coincidence of sound judgement or acceptance of limited alternatives in some cases, each of the PSR recommendations was explored and challenged before the preferred disposal was confirmed. Magistrates appeared to take responsibility for thinking the decision through, each case on its own merits, noting only afterwards that there was agreement, (C3 (54-56)).

8.3.6 Sentencing aims

In the interviews of Study 2, magistrates provided insight into their sentencing aims – what they felt represented good, accurate and effective sentencing. Some of the conflict that they recognised on that occasion was apparent in these case studies. The tension between assisting the individual and protecting the interests of society was articulated in Case 1, (M6,C1(145)&M2,C1(145)), continuing in C1(149-150). This combined with a sense of obligation to be seen by the public to have acted (M2,C1(180)), underlining the constant awareness of an aspect that magistrates had expressed concern over, namely the need to satisfy the expectations of more than one constituency (C1(209-213)).

In Case 2 the dilemma was less extreme:

> M4, "So basically if we want any sort of rehabilitation, we've got to revoke." C2 (39)

But again the punishment element was not overlooked (M1,C2(74)). Culpability had to be acknowledged M4 (C2 (80-81) and reflected appropriately (C2 (83-84))and there was an indication that the defendant should appreciate the generosity of the disposal (C2(93-(4)).

Case 3 engaged such comprehensive sympathy for the defendant's personal circumstances and the advice from the higher court was so categorical that there was no discussion of the public expectation or the message that the relatively light sentence communicated. The options in this case were so compromised, combined with the general acceptance that further re-offending was unlikely, that no general discussion of aims or effectiveness occurred (Parks and Cowlin, 1995). However, it provided evidence of the differential responses that magistrates may display related to the gender of the defendant (Hedderman, 1994) or the effect of stereotyping as a shortcut to rapid decision-making (Farrell and Holmes, 1991).

8.4 Overview

The themes discussed above ran across the cases recorded and replicated indications of the sentencing process, its challenges and limitations that were raised in Study 2 when magistrates talked of their personal experience. In summary, they supported contentions that:

- The identity of the Chairman is influential in setting the style for a discussion (Gouran, 2003). It provides the incumbent with an opportunity to guide the contributions of wingers. According to Leanna (1985) groups with directive leaders complied with the leader's proposed solution when the leader stated their preference early on in a discussion. This picked up on one of the concerns expressed by Chairs in Study 2 when they described how they handled the discussion. While there was no evidence of insistence that their views were accepted, some Chairmen were clearly better than others at ensuring that their own opinions were well aired, often recruiting the LA for support (Raven, 1965; Bochner and Insko, 1966).
- All magistrates appeared to be very familiar with the guidance on structured decision-making that was available and applied it, mostly, in an accurate and thoughtful way, evidence that training was having an effect on consistency of approach and appraisal may have contributed to ensuring that competences were acquired.
- Groups worked co-operatively, provided training advice to each other and liked to achieve consensus around their decisions. Sporer (1984) has reported that discussion of itself tended to reduce variability within sentencing groups. The discussion of shared information predominated, with unshared information being withheld until a late stage (Chernyshenko, Miner, Baumann and Sniezek 2003; Wittenbaum 2000). Larson, Sargis and Bauman (2004) have commented on the effects of group members who share a large amount of information in common working together to argue their position with increased prospect that their preference will prevail. Everyone in this group was provided with the same initial information so, where factions recognised a

common purpose, they were well placed to concentrate on the issues that had persuaded them towards a particular course.

- The LA could create their own opportunities to influence deliberations by suggesting areas for further consideration and ensuring that legal guidance was fully understood and observed.
- There was limited support for a simple algebraic model but some indications of heuristic processing, despite magistrates' previous dismissal of this suggestion. The transcripts supported an holistic approach, in which all the relevant factors needed to be integrated, although the mechanism was imprecise. This might also have been accommodated within the 'Frames of Reference' representations advanced by Lawrence (1988) or Carroll et al. (1987) which recognised that individuals would interpret information differently, according to aspects of their background or personality, while operating within a common procedural framework.
- Consistent with the results of Study 1, the recommendations of the PSR and the final sentencing choice often concurred. However, the magistrates demonstrated that they undertook independent evaluation of the information, without accepting the report conclusions unquestioningly. This was consistent with the findings of Walsh (1985) who found that, although judges leaned heavily on the professional advice of the probation officer, they were not merely rubber-stamping their recommendations.
- In each study, there was evidence of multi-purpose sentencing aims, something that the new 'reasons' forms developed following the CJA 2003 positively encourages. While this appears to make the sentencing task more comprehensive, and avoids hard choices for the magistrates, there is a risk to defendants that sentencers will attempt to satisfy all those with an interest in the outcome, even where these interests conflict. By introducing additional elements to a community penalty, for example, as the new sentencing framework permits, to meet each aim, the penalty may be more severe than might have been the case where aims were prioritised and sentences less flexible.

- In terms of individual differences between participants, this study recognised the variety of interpersonal group skills, referred to in the appraisal competences. The ability to contribute to a group discussion, to argue one's point effectively while listening to other people's observations was apparent. While all magistrates showed that they were willing to engage in the discussion, quantity was not necessarily a successful measure for predicting which individual opinions would prevail. The quality of expertise was sometimes more persuasive. In line with the findings of Littlepage and Silbiger (1992), unequal participation is not detrimental to group performance but the recognition of expertise is an important factor in the overall performance. Relative argument quality was more important for attitude change than perceived member status, (Garlick and Mongeau, 1993).
- Tendencies to opt for extreme sentences, harsh or lenient were mostly neutralised by the variety within the group, contrary to expectations of 'risky shift' or group polarisation (Moscovici and Zavalloni, 1969) and no strong evidence that Groupthink inhibited rational decision-making procedures (Janis, 1982; Janis and Mann, 1977).
- For individuals the accurate application of a model for structured decision-making using the Guidelines was demonstrated, supporting claims regarding the effectiveness of training, but, also, recognising the educational level of the sample in its ability to respond. If the effects noted by Wang, Liu and Zhang (2003) were reproduced, this type of support system should improve the judgement of the group and facilitate more consistent outcomes.
- Individual participants appeared to recognise intuitively the value of the psychological concepts of primacy presenting their ideas early on in a discussion to "set a tone", although the impact of "recency", concluding or summarising opinions, was also present (Jones and Goethals, 1972).
- For Chairmen, unique leadership styles (Gouran, 2003), different negotiating tactics and alliance formation to achieve one's ends were evident. Ultimately no single

approach was demonstrated as superior to any other, consistent with the findings of Mintu-Wimsatt and Lozada (1999). Different levels of achievement in the knowledge based competences in legal procedures and sentencing powers were revealed. These may have affected the impression of expertise and, thereby, influence that could be exerted (Littlepage and Silbiger, 1992).

- While no formal reference was made to the personality traits discussed in Study 1 and 2, it was apparent that some members of the group were more conscientious than others were, in their preparation and observation of the prescribed elements of structured decision-making. However, consistent with the results of Studies 1 & 2, differences were obscured in the group process, some individuals compensating for their colleagues. In respect of a separate trait, considered previously, Henningsen and Henningsen (2004) reported that Need for Cognition and social desirability each influenced the discussion of shared and unshared information in decision-making groups. Increasing motivation to participate was not sufficient to overcome the in-built bias for the discussion of shared over unshared material and social desirability increased the repetition of the shared elements. On such a small group without measurements of these traits, it was impossible to recognise such influences reliably but superficially, the general approach appeared to concentrate on the shared information for most of the members and some of the information provided in the scripts was discussed more than once.

Agreeableness, as colleagues attempted to work harmoniously and Openness, as ideas were exchanged and opinions altered, could be recognised as factors that the interviewees of Study 2 had indicated were appreciated, easing discussions and facilitating movement towards consensus. Traits such as high assertiveness, internal LOC and authoritarianism would have been expected to manifest themselves in the performance of individuals, (Serrano and Rodrigues, 1993). Again this sample was too

small and the characteristics of the magistrates overall insufficiently differentiated to expect to identify meaningful evidence. Indeed, Thompson (1990) found that personality and individual differences appeared to play a minimal role in determining bargaining behaviour. Perhaps because of situational constraints or homogeneity within the group, factors such as motivation and cognitive style assumed greater importance.

- Experience was recognised as a factor in achieving competence, especially in the knowledge related areas and deferred to accordingly by some. Gender effects were not particularly apparent, some men engaging in a similar manner to some women participants, while the severity of their sentencing proposals did not appear to demonstrate consistent differences.

In the following chapter there is a closer examination of one of the scripts to examine the detail of exchanges in that case. Content and Discourse Analysis was undertaken to seek additional support for the interpretation of the various roles, identified in the present chapter, through the language of participants' contributions. Relationships between group members and personal style were considered, concluding with observations about the dialogue of a representative selection of the participants in this group and the manner in which it evidenced some of the themes referred to above.

9

Study 3 (Part 2); Content and Discourse Analysis of a single Case Study

In the previous chapter, the transcripts of all three case studies were examined as a composite, to look for commonalities in themes, with examples of supporting dialogue drawn from any/all cases, moving backwards and forwards, as appropriate. However, the cases differed in narrative content and diverged from each other on aspects, specific to the nature of a particular case. In this chapter, one case is considered in its entirety, line by line, to see how the dialogue developed. In-depth content analysis of some of the exchanges, with elements of discourse analysis was undertaken. This was used to observe how individuals played out the roles that had been assigned and to identify the extent to which the themes of Chapter 8, and others emerging from the previous studies, could be identified within a single case. The language used by the participants, and their interactions with each other and the LA, informed the research generally on the reality of group working, as the magistrates experience it in their everyday activity.

9.1 Introduction

9.1.1 Context

The material of this analysis formed part of the group discussion that was recorded, as indicated in the introduction to Study 3. This was the third of four cases that the group was supposed to consider and report back on that evening. The first case had been discussed

exhaustively, to the point where there were no further contributions. Only relatively trivial irresolvable unknowns, in the nature of a training exercise, that had to be accommodated in the summary remained outstanding. It was obvious that the group would not finish all the cases, if this allocation of time was repeated, so there was pressure to work faster and more succinctly. A pattern for dealing with structured decision-making had been set in Case 1, muddled through in Case 2, in part due to the different nature of that sentence. It was now to be applied to a third case, so there was the possibility of practice effects and compromises under time pressure. In the event, this case was completed to the satisfaction of all participants and the fourth case was abandoned with a very superficial consideration only, in order to finish with the rest of those attending, for the concluding plenary session.

9.1.2 Reflexivity

A summary of the case material (available in full at Appendix12) is provided below. In it the researcher has attempted to be as objective as possible about the facts the case, in order to provide the reader with a background to the observations. However, even the selection of material considered relevant at this stage is unlikely to be entirely free of bias, representing as it does the researcher's own interpretation, as an active participant in the sentencing exercise. Already there has been some value judgement as to what is essential for the reader's understanding and what is relevant in the opinion of the researcher. The significance of this should be considered less detrimental to an analysis of the type envisaged, which involves looking at the process of interactions, the roles personified and the choice of vocabulary, than might be the case if the outcome of the decision was the only consideration.

Although this was the last case discussed fully by this group, everyone appeared satisfied that they had had an opportunity to make their contribution and it was not terminated prematurely. Each of the magistrates remained engaged in the exercise and their individual

contribution to each case was fairly consistent. The number of interventions from the LA was similar in each of the three cases, even though the overall length of cases varied. To that extent, their behaviour appeared to have been unaffected either by the knowledge that the proceedings were recorded or that the process was being repeated, although after the first exhaustive discussion, subsequent cases were completed with greater efficiency.

Other observations with regard to reflexivity, especially my own feelings of needing to make a valid contribution but exercising restraint, so as not to influence disproportionately the direction that the debate was taking, have been made already in Chapter 8 and remain pertinent. Having become so steeped in the detail of structured-decision making through magisterial experience and research in the field, it would have been improper to intervene too strongly to manoeuvre the pattern of exchanges.

9.2 Methodology

9.1.2 Materials

The case papers, provided in advance, informed the participants that the defendant was charged with deceiving the Department of Social Security (DSS) by fraudulently claiming benefits to which she was not entitled. She had failed to declare a change in her circumstances, in that she had secured employment, while continuing to claim benefits. Four occasions, when false declarations were made, were cited but the deception had continued over a period of time and a significant amount of money was involved. She pleaded guilty at the first opportunity and no previous offending was reported. The PSR provided details of a relationship breakdown with her husband and concerns about the provision for her three children. She had taken them to live with a friend, sharing one room but claiming expenses for independent Bed & Breakfast accommodation, and had failed to disclose that she had found employment. It was said, on her behalf, that the

reason for offending stemmed from fears that the courts might remove the children from her care to that of her husband, if it was considered that they were not being appropriately accommodated. She had expressed remorse, appeared to have insight into the consequences of her offending and had made voluntary arrangements to commence repayment of this debt.

9.2.3 Procedure

The transcript of the dialogue was obtained in the way described in the previous chapter, (available in full in Appendix 10). Each contribution was reported chronologically and coded against the identification allocated throughout Study 3. The system used in Chapter 9 to identify contributions was repeated, omitting the case reference in this report, since all material came from Case 3.

A combination of in-depth content and discourse analysis (Potter and Wetherell, 1987) was undertaken, in order to understand the nature of the discussion and the attitudes held. The transcript was examined systematically for narrative development and social construction, as the discussion proceeded.

The dialogue between the seven magistrates and the LA who made up this group was examined in detail: words; phrases; and line by line consideration, in order to form the opinions discussed. These focused on the manner in which the Chairman interpreted that role and the way in which others in the group responded to this style. The contribution of the LA, in the light of the Practice Direction, 2000 (detailed in Chapter 5, p158), and the remarks made in Study 2 about magistrates' experience of the relationship, were of particular interest. Subsequently the verbal contributions of four of the participants were filtered out and examined independently (see Appendix 11).

9.4.1 Group exchanges

9.4.1.1 The realisation of roles within the group

M5 was pre-assigned the role of Chairman. The initial remark signalled, immediately, the approach of this participant.

M5, "Well the entry point is community penalty" (1)

By opening in this way, the Chair showed instantly that he intended to take control of the discussion, stamping his authority on the proceedings. He was well briefed in applying the Association model of structured decision-making, using the jargon and communicating confidence in his ability to utilise the structure in leading the discussion.

From the outset, this announcement focused minds on the recommended level of punishment commensurate with the estimate of seriousness for such an offence, following a finding of guilt by a defendant with no previous convictions. He was clearly using the Guidelines that were open in front of him. These indicated which of the four bands of punishment was considered most appropriate. Other members of the group also had sight of some copies of this book. Already a 'norm' had been identified, which may have constrained the thinking of some of the participants.

Notwithstanding the confident and accurate introduction that the Chairman provided, the LA had previewed the case with colleagues and appeared anxious to impart their considered wisdom on the subject, especially as case law was pertinent to the magistrates' deliberations. She took no chances that her assistance might be sought at some stage but instructed the group, unbidden, on the particular case that provided very relevant and prescriptive guidance for cases with similarities to this one (LA (2)). Indeed, she went

further in highlighting something from the PSR that would, inevitably, cause a sentencing dilemma for the magistrates (LA (2 cont.)).

From the outset, this LA wanted to ensure that her group focused on the difficult issues. She effectively pre-empted the discussion. The group had had no opportunity to explore whether this particular defendant merited anything more severe than a community penalty, in which case the guidance on custody was irrelevant, or, in the event that a community penalty was appropriate, which of more than one possibility they would opt for. Further she gave credence to assertions in the PSR that might not have been accorded the same significance by the magistrates.

A couple of the magistrates endorsed the steer away from custody, seeking general agreement for that proposition, (M2 (3), M1 (4)). There was a suggestion that a process of elimination was being attempted, removing the most obviously inappropriate penalties first. No reasons for participants' conclusions were advanced, apparently because the exclusion of custody was so obvious, but there was a strong implication, in the tone of voice, that a dissenting view would be regarded with disapproval.

This 'piggy-backing' on the input of the LA may have been an example of allegiance with an authority figure to promote their own conclusions, as some had alluded to in the individual interviews reported in Study 2. The LA was a source of knowledge with regard to legal fact, case law and procedure that the magistrates were not qualified to challenge. As such, magistrates were likely to defer to the advisor's opinions on such matters but might well accept observations falling outside her remit, purely on the basis of the respect that the LAs commanded.

A fairly sympathetic sentencing approach was adopted from the outset in the manner in which the problem was 'framed' (Kahneman & Tversky, 1979). The fact that the defendant was a woman with child-care responsibilities immediately became an important, relevant factor in their consideration, almost as a distraction from her offending.

However, the Chair was firm. He knew the structure that he was advised to apply and intended to pursue it without avoiding aspects of the process. He both controlled the discussion and provided training/guidance on how he intended to proceed, while inviting contributions from the group. The language was inclusive, 'we' repeated often, and aimed at establishing consensus thus far.

> M5, "Well we'll go through it and … So we have agreed that the starting point is a community penalty, then we've got to look at the aggravating and mitigating factors. So…." (5)

The group worked co-operatively, rarely interrupting each other. Verbal contributions on the tape were almost all distinguishable and individually attributable, with few multiple responses overlaying each other.

Further interventions from the Chair made direct reference to the information on the Guideline page, repeating a question until he felt that there was a consensus on the response. Sometimes, he offered his own opinion, usually after others, for further consideration, pursuing the issue if the general consensus appeared not to accord with his own, (M5 (14, 16,20)). He systematically went through each of the suggested possible relevant features, inviting comment, adopting or dismissing them as they pertained to the case in point. There was some evidence that the accuracy of the group memory was enhanced by having multiple participants who corrected each other's record of the events, (Clark & Stephenson, 1995). Examples of such exchanges were found in the transcript,

(M4 (6), M2 (9), M4 (10)) when M4 apologised for the misunderstanding and accepted the correction. In the dialogue between M3 and others in the group, M3 altered the stance adopted initially, as others reinterpreted the material, (M5 (28 – M3 (35)).

In this exchange, there was evidence that M3 went beyond the factual information in the script to impute to the defendant qualities that were not evidenced and in this event would prove disadvantageous. 'Knowing' that one intended to offend and having the 'intelligence' to understand what was being undertaken exacerbated the defendant's position for this magistrate. This provided an example where magistrates appeared to apply common-sense, based on circumstantial evidence within the case, or more loosely intuition, to form a more rounded image of the defendant. To a limited extent the picture was being 'fleshed out' and a story-type model (Pennington & Hastie, 1986) being invoked. M3 was particularly prone to this type of free extrapolation from minimal information. In addition, there was an enthusiasm for the Fundamental Attribution Error (Ross, 1977), attributing blame to the individual, with reluctance to acknowledge that situational factors played a part in determining responsibility. When debating whether the money involved should be regarded as a 'large amount', magistrates blamed the offender, rather than deficiencies of the system, (M1(18), M3(19), M5(25),M3(32)).

9.4.1.2 Structuring the discussion

The responsibility for controlling the direction of the discussion was not left exclusively to the Chair. When a colleague interrupted the discussion of aggravation, with a premature observation on mitigation, M4 intervened to point out that the material did not come next logically in the structure that the group was attempting to follow, (M6 (26), M4(27)), thereby, reinforcing the training and socialising effect that occurs between members of a particular Bench.

This allowed the Chair to resume the consideration to completion, of the aggravation and/or mitigation within the offence, (M5 (38)), again, using the Guideline suggestions as a sort of checklist for thoroughness as well as stimulus.

The point about personal mitigation waiting its place in the structure was further remarked on by M2 (44) and reproduced some of the confusion between offence and personal mitigation that had been apparent in the analysis of the recorded reasons in Study 1. The Chair accepted the observation and demonstrated good listening skills while reasserting control on the proceedings, (M5(48)).

In reality, this evidence of shared responsibility for the application of structured decision-making is likely to be a function of the composition and relevant experience of the members of a particular sentencing Bench. For the training exercise, there was a disproportionate number of very experienced Chairs in this group, each of whom should have been independently competent to lead the discussion. In practice, that situation would rarely be replicated. While very experienced magistrates may, on occasions, sentence together, more often a spread of experience will be represented.

Although familiar with the structure, as required for appraisal, from an early stage, individual confidence and, in some cases, deference to the Chair's experience, might not lead to the type of interventions illustrated. Zarnoth and Sniezek (1997) investigated the relationship between individual self-reported confidence and the participant's influence within a freely interacting group. These authors found that the influence of a particular faction within the a group was greater if its members were more confident, although the effect was more marked on intellectual rather than judgmental tasks. In the context of magistrates sentencing, this aspect may be manifest in the accurate identification of

aggravation or mitigation than in the evaluations of that evidence i.e. the process of structured decision-making rather than in the choice of outcome.

The group appeared to find the personal mitigation easy to identify, uncontroversial and swiftly completed. However, no one explicitly drew attention to credit that should follow a guilty plea and result in a less severe penalty. As this is now a formalised consideration in the SGC advice with 'discounts' of up to one third deemed appropriate, it is an important consideration from which defendants need to obtain advantage. In this case, it was not obvious whether/how magistrates had taken appropriate notice of the information.

Not all members accepted the information, regarding personal mitigation, provided in the script with the same credulity, (M4(49), M5(50). Reluctance was indicated by the tone of voice but no resolution was pursued.

The LA assisted in sharpening up one contribution, with which she appeared to agree, but recognised that it needed to be more explicit, if it was to command general support (39-41), another example of the LA entering into the discussion beyond the strict limits of the role.

9.4.1.3. Using the PSR

The transcript recorded approximately122 contributions. Within 60 contributions, the sentence had, essentially, been determined. The Chair had no opportunity to summarise the features identified in the exercise of structured decision making or indicate how they might be assimilated because M1 intervened. The suggestion to adopt the recommendation of the PSR in which 'they', the probation officer preparing the report, had argued the proposition that a conditional discharge was the appropriate penalty, was stated, initially

without justification, although some limited acknowledgement of the process was indicated, (M1(54)-M1(67)).

Implicit in this exchange was recognition of the concordance with the recommendation of the PSR, a factor that had emerged in both the quantitative study and individual interviews. However, as the participants insisted in those interviews, the recommendation was not driving the sentencing process in determining the outcome. More accurately, it appeared to be a fortuitous coincidence that good sense or well-argued logic had brought both parties, probation and magistrates, to the same conclusion. In that respect, the PSR provided reinforcement for the position that the Bench was considering.

It was interesting to note that between the magistrates, no discussion of the sentencing aim or the appropriate 'discount' for the guilty plea had taken place before the sentence was identified. The reference to the probation service as 'they' was clearly intended to imply separateness, maybe independence. There was almost a resignation in the expressions of M1 that no other course of action *could* be considered. The possible disposals were so limited that discussion seemed irrelevant and acceptance of the recommendation inevitable but the impression that somehow the Bench was accommodating the preference of the probation service, and had in its gift to do so, persisted.

9.4.1.5 Decision-making models

The language of the exchange seemed to refer to a ladder representation of the penalty scale, moving up and down in response to the judgement of seriousness. While effort had been made to follow the structure, the final suggestion was only loosely justified in terms of the various factors that had been identified as relevant.

Almost all of the remaining exchanges dwelt on the detail of how much and in what amounts, compensation should be paid. Everyone, including the LA, had a view on the topic. The group split on the issue of just how much money was outstanding and the capacity of this defendant to discharge her debt. The impossibility of quick repayment on the estimated calculation of the sum obtained fraudulently, with the means disclosed, was obvious to all. M4(74) reverted to consideration of the sentencing aim, referring to a punishment element in an otherwise apparently non-punitive disposal. M1 had a different focus.

M1, "The idea is to get the money" (75)

The LA entered the discussion in an attempt to mediate by suggesting of a compromise, (LA76), which led to an exchange between the LA and another magistrate over the exact nature of the suggestion, (M6(77)-LA(78)).

It was likely that, for the purposes of a training exercise, the group had done as much work on the detail of sentencing as was useful at this stage. They had practised the application of structured decision-making and arrived at a sentence that commanded everyone's broad support. However, the desire to tie down the minutiae of compensation, even though it was apparent that insufficient information was available, was sustained for some time yet. This is an enduring feature of training exercises when cases are created artificially, even though they have been adapted from real cases. Errors or omissions that are not logically consistent creep into the material. It cannot provide factual responses that would be available with a live defendant, answering questions, in this case on income and expenditure, that appear relevant at this stage.

From their level of interest, it appeared that this might be an area where magistrates felt a competence from their own daily living that gave them insight and confidence in this area. M3((79), (81)) in particular wanted to go behind the superficiality of the information

provided to examine, in detail, whether, in her opinion, the summary of expenses and the assessment of capacity to repay, as indicated in the PSR, was accurate. There was a suggestion that physical appearance might be relevant.

This provided a good example of magistrates being informed by the PSR but retaining a scepticism as to whether it had really dug deeply enough into areas of particular interest to them. Presumably, in a court situation, direct questioning might have resolved the difficulties. In the absence of that facility, a degree of improvisation occurred with remarks about how income was made up and might have been spent. The juxtaposition of words appearing to express sympathy with the defendant's circumstances stood in sharp contrast to the imagined lifestyle, (M3(88)).

There had been nothing in the case material to justify the suggestion of extravagant living. While several thousand pounds had been involved in the false claim, the idea that the defendant could be conducting a "fanastic" lifestyle, while looking after three small children in substandard accommodation , while maintaining a fairly low paid job was difficult to justify on the information provided. She would need to have deceived the probation service comprehensibly in the preparation of the report. However, it reflected on the magistrate making the remark that she harboured thoughts that it was possible. Perhaps this was based on more trivial real experiences in court, after which she had developed a perception that defendants were likely to misrepresent their situation to their own advantage. It appeared that at least one other magistrate, also, thought the group was about to stray into the realms of fantasy. This magistrate stuck more rigidly to the limitations of the script, immediately challenging the observation, (M6(89)).

This should have triggered awareness that the exercise was fictitious with practical limitations but, instead, it sent some of the group back to re-examination just how

sympathetic they were toward the defendant and whether the initial sentencing suggestion might have been too lenient, as the LA articulated.

> LA, "Are you thinking this is too soft? Are you thinking of upping the anti instead of bringing it down?" (91)

The choice of language was in stark contrast to the nature of 'judicial' advice that might have been expected. However, having raised the possibility of continued debate, the LA did not want to see it ramble down, what she appeared to consider was an unproductive route. She quickly intervened again, to move the discussion to a wider appreciation of the circumstances of the case, anchored in her legal authority, (LA(97).

This provided further clear evidence of the LA usurping the function of the Chair to lead and direct the discussion, although it might be argued that she was merely drawing attention to judicial guidance from the higher courts. The guidance seemed to be directed towards identifying acceptable and unacceptable applications of the proceeds of crime that is subsumed in the judgement of 'motivation'. As with the theft, (case 2, Study 1), where the defendant had taken the money to assist his father, with no personal gain, the motivation allowed several people to increase significantly the mitigation for that offence. However, the judgement of what is an acceptable use of proceeds is as much a moral as judicial decision, and offers support for the policy of maximising diversity in recruitment, so that a variety of societal views are represented.

Returning to the sentencing aim, M3 articulated the persistent dilemma that magistrates alluded to both in Study 1 and the individual interviews of Study 2. This revolved around their need to respond to the perceived expectations of society with an element of punishment, in combination with any other response. Multiple sentencing aims had been

recorded in the 'reasons' forms of Study 1 and were referred to in the interviews of Study 2.

> M3, "Yes, I know she is going to have difficulty but I would probably [want a] kind of minimal community punishment." (92)

Also expressed in this observation was the frustration associated with the practical limitations on available sentencing disposals and the dismissal of the conditional discharge as in any way punitive. M3 recognised that it was a minority view that was being advanced. Tentative language, attempting to trivialise the disparity of the suggestion was apparent, leaving room to manoeuvre, in the event that the suggestion was wholly unacceptable and a compromise had to be explored. Responses from colleagues appeared to insist on the acceptance of the impracticality of the approach, (M6(93) – M 2(96)), challenging and marginalising the opinions of M3.

When the imposition of compensation continued to be difficult to resolve, the Chair took hold of the discussion but sought assistance from the LA to make progress in an area where he appeared to feel himself technically insecure, (M5(101) – LA(105). Legal advice was properly provided but the Chair, himself appearing to search for a mechanism to achieve a more realistic repayment schedule, persisted in trying to establish the details of arrangements in the future, encouraging contributions that endorsed this view, (M5(109), M6(111), M5(112)).

It was the LA who eventually brought the discussion to a conclusion by re-focusing attention on the primary elements of the sentence.

> LA, "Are you all happy with a CD?" (113)
>
> LA, "... and how long would that be?" (115)

One of the group suggested an apparently arbitrary time and the rest agreed, continuing to be more concerned with the repayment of compensation. M5, as Chair, was keen to ensure that there was, indeed, consensus

M5, "So what is the consensus?" (119)

It was clear from the tape that various repayment arrangements continued to be disputed. One of the least experienced magistrates in the group appeared to have special knowledge, as to the workings of the DSS that was generally accepted without challenge (Littlepage and Silbiger, 1992; Garlick and Mongeau, 1993). This provided an example of unshared information enhancing the participant's influence, even where the effect was mediated by their discussion behaviour (Larson, Sargis, Elstein and Schwartz, 2002). This was an example of an individual's life experience informing the group, an area where the DCA attempts to ensure diversity, so problems are addressed from a variety of angles. It might be replicated any number of times in other circumstances, as magistrates bring their own experience of different walks of life to the table. However, there must be a risk that in areas of specialised knowledge, the information provided may not be accurate and the defendant is deprived of the opportunity to challenge it, if it is exchanged in the privacy of the retiring room.

The Chair summed up the deliberations of the group in this case, for the purpose of reporting back. He listed the penalty agreed among the participants, justified it with reference to aggravation and mitigation of the offence, then personal mitigation, as the structure required. While the rationale of the decision was rehearsed, the mechanism remained elusive. Qualitative words such as

M5, "... large amount of aggravation... lots of mitigation" (122)

reproduced the description provided through the individual interviews of Study 2. Magistrates were applying the combination of positive and negative features in an

algebraic manner but were not comfortable assigning specific weightings to each one, preferring to internalise that calculation in a more imprecise, some might say, holistic manner as suggested by Tata et al. (1996).

In terms of the number of verbal interventions, the Chairman had indeed contributed most, but the LA maintained a constant level of intervention across the cases. M3 appeared to contribute and advance views that departed from the norm. Another magistrate, one of the least experienced of the group was consistently reserved in the contribution made to any of the cases, but clear and assertive when the occasion arose. The group had worked co-operatively, listened to each other's contributions, respected individual viewpoints but achieved a consensus in their final choice of sentence.

9.4.2 Individual contributions

For the purposes of a training exercise, this group was much larger than a normal Bench. However, certain roles were represented in that a Chair was nominated and a Legal Advisor available. It, also, seemed appropriate to consider the contribution of a winger from either end of the spectrum of possible experience. Examination of the individual verbal contributions of the Chair M5, Legal Advisor, M2 a very experienced winger and M3 a more recent appointee produced the following observations, (A consolidated, enumerated record for each is available at Appendix 11)

The verbal style of **the Chair** was mostly declaratory (1), stating the procedure to be adopted (5), acknowledging the points being offered by the group, summarising his understanding of these contributions (48). His contributions were short and specific, (21,25,28). Where he asked questions, they often appeared to be addressed to himself, thinking aloud (62), imposing his own evaluation on the material and seeking confirmation from the group (31). He was guided by the elements of the structure and referred regularly

to the written advice to signpost the direction that the discussion ought to take (14, 21, 28). At no stage did he exercise himself to seek the opinions of the more reticent members in the group. His reference to others was almost a form of reassurance for himself rather than open questioning that might have suggested a totally different course of action (14). From the outset his attitude was wholly sympathetic to the defendant's domestic circumstances to explain her actions and accepting of the limitation on the type of punishment, (40). However, he wrestled with the enormity of the compensation and struggled to find a more meaningful way to ensure its repayment, (72). Although the loser was an anonymous department of State, he appeared to feel a real responsibility to pursue the offender for reimbursement, encouraging others with similar concerns in an attempt to find a solution (84, 101). He was content to accept sentencing suggestions made by others, (55), pausing only to ensure that the proposal commanded wide support so that he could report the consensual conclusions of this group, (119). In that he could be described as a participatory leader (Larson et al., 1998), there was evidence that supported the findings of those authors that information was more widely discussed, shared and unshared, than may have been the case with a more directive leader.

The LA was keen to ensure that the discussion proceeded along acceptable lines and set the tone from the outset by imparting case-law information and dilemmas in the script using formal language, (2). Mostly her interventions were factual, relaying information on behalf of others (13, 15, 97) but there were points where she asked questions of the group to guide their thinking, (41, 91). She obviously had a view, herself, on the repayment of compensation and intervened to make sure the magistrates fully appreciated the legal limitations on the extent of their ability to recoup such a sum even if the debt would take a very long time to discharge (91). With regard to the sentence she struggled to understand the logic of some of the contributions, (78). She attempted to define the apparent shift in the group's thinking with enquiries about magistrates being "too soft", and "upping the

anti" which were very colloquial expressions in the circumstances (91). However, it was finally left to her to ensure that everyone was supporting a common disposal, endorsing the recommendation of the PSR, (113) for a conditional discharge, tying down the detail of length, (114).

M1, an experienced winger, was verbally active throughout the session. She is, herself, an experienced Chair and had spoken confidently and authoritatively in previous discussions. In this case, her contributions were restrained after the early attempt to swing popular opinion behind her own preference for a non-custodial sentence (4). To achieve this she had, almost, implied criticism or, at least, the apparent impossibility of anyone coming to a different conclusion through her tone of voice. The structure of her inputs suggested, initially, that the previous speaker has failed to make clear the implications of their observation and needed assistance, (46).

M1 was the person who first articulated acceptance of the recommendation in the PSR regarding sentence, (54). She appeared to imply that as *she* found this to be acceptable, there would be little purpose in continuing to search for any other solution, characteristic of a more directive leadership style that she had exemplified in another case. Chen, Lawson, Gordon and McIntosh (1996) considered the merits of directive and participative leadership, finding lower quality decisions associated with the former, compared with the quality of those taken in the latter state. Their suggestion that good leaders encourage open enquiry that facilitates a wider exploration of the alternatives, may be a sound training point for all Chairs. Little explanation of the sentencing statement was offered on this occasion. It is possible that M1 had internalised the logic of the structure, needing only to emphasis the extent of mitigation, to justify such an apparently lenient disposal (57). M1 took statements in the PSR at face value (86) but supported the section of the group who felt that repayment was extremely important, placing this as a primary objective

without being able to state how it could be realistically achieved (99). Again it was M1 who took the initiative in specifying the length of sentence without explaining the logic (116). Certainly no one challenged the suggestion, appearing to accept her guidance, perhaps deferring to her experience.

M3 is **a fairly new magistrate** with much less sentencing experience. On this occasion she seemed keen to contribute, generally, and demonstrate understanding of the sentencing structure. Throughout the casework she appeared fully engaged in the exercise. In the initial stages of the discussion she listened to the suggestions of relevant features made by others and endorsed or rejected appropriately, (17,24, 29, 35, 43), providing supporting information for her position, but without initiating discussion on any of the aggravating or mitigating factors. It was not at all clear where/how she gained the knowledge she professed on the machinations within the DSS (19) but, nonetheless, she confidently provided guidance on how they operated. Up to the point where the sentencing suggestion of a conditional discharge was achieving general support, M3 appeared to be implicitly endorsing the common approach. However, she suddenly withdrew that support when she recognised the disparity between the position that logic had appeared to dictate and her own 'gut' feeling for the enormity of the offence, (58). The size of the compensation continued to so distract her from a lenient disposal that she alone continued to battle for a more severe punishment. In commending a community punishment for consideration, she was clearly moving up the scale of disposals in her own hierarchy of sentencing options, (92). She appeared to have departed from any algebraic approach to the overall offending, without mention of aggravation and mitigation but a singular focus on the *amount* of money outstanding. It might be considered that she had attempted to reduce cognitive dissonance (Festinger, 1957) by advancing a penalty that, for her, was more commensurate with the financial enormity of the deception. Certainly her reservations led to a healthy discussion of the options, causing others to have to justify their positions.

While the limitations of such a fictional exercise were clear it was apparent that some magistrates are more inclined than others to challenge the popular perception of someone living in highly straitened circumstances, with limited income and with family responsibilities (88, 106). In attempting to persuade others that the views were reasonable and should attract support, M3 used a mixture of apology, apparent sympathy but unwillingness to accept any information at face value, (88, 106 108). Although the circumstances of a training exercise provided some opportunity to experiment with such ideas, and she gathered some support, the impossibility of appearing to exact 'blood from a stone' eventually defeated the attempt to determine more demanding repayments.

Interestingly, the indication that the dilemma might be avoided or at least ameliorated, by exchanging a higher tariff penalty for the lower CD and, thereafter, looking less harshly on the repayment of compensation, should not be overlooked. This would appear to suggest that for some magistrates, defendants of limited means might be dealt with more harshly than those who could pay fines/compensation so that the package, overall, was seen by society to be sufficiently punitive. The lack of support for the approach of M3 on this occasion might form part of the socialisation process into the culture of this Bench, some individuals proving more malleable than others. Alternatively her lack of success in carrying her argument on this occasion may have undermined her confidence, inhibiting contributions in the future.

The nature of her dilemma echoed the tension that individual participants had articulated in their extended interviews, reconciling the expectations of society, in punishment terms, but being constrained by the lack of variety in the practical sentencing options. It also supported the ideas of Ajzen and Fishbein (1980), whose Theory of planned behaviour, identified societal norms, personal norms and the perceived control over the behaviour anticipated as elements of the decision to act in a particular way. This winger responded to

others in acknowledging the situational factors involved in the offending behaviour but placed considerable weight on the defendant's personal responsibility, (32), consistent with the Fundamental Attributional Error (Ross, 1977)

9.5 Overview

The following conclusions emerged from the analysis:

- Authority was established through acknowledged technical competence but assisted by confident interventions that influenced the structure of a discussion.
- The role of the Chair and the way in which that position could be used or abused to influence the outcome of the discussion was demonstrated. While it was subtlety used in this case to pursue issues about which the Chairman felt quite strongly, others might have exploited the position in a different way to achieve their own ends. Compared to other cases, the leadership style on this occasion was participatory.
- Some Chairmen would be likely to have clearer boundaries than others in the extent to which they encouraged/tolerated the interventions of the LA in managing the discussion. In this case, the Chairman and LA worked harmoniously, assisting each other to follow the Guidance and inform the group of the "correct" approach, as described in the advice on structured decision-making and required in the appraisal competences.
- When providing formal input the language of Advisors was appropriate but on other occasions, all participants used colloquial words or phrases chosen for their effectiveness in conveying a message.
- All members demonstrated commitment to the application of structured decision-making and knowledge of the JSB/Association model.
- There was evidence to support assertions made in the interviews of Study 2 about the manner in which exchanges took place; co-operative and polite.

- For newer magistrates, the way in which they became acculturised to the norms of their Bench and acquired competence at the sentencing decision task was demonstrated.
- Special knowledge may be a two-edged weapon, valued for the insight it seems to bring and the persuasiveness of its message but difficult to challenge.
- The usefulness of the PSR was addressed and the way in which it guided thinking was evidenced but the independence claimed by participants and their scepticism about some of the information remained.
- The exchanges between this group of magistrates produced evidence of the individual differences that exist even among those who all meet the recruitment criteria, detailed in Chapter 1. Some were more effective communicators than others; some appeared to have a better understanding of local communities and society, in general; others had experience beyond their immediate families that informed the discussions. All showed a willingness to consider advice; and some applied it with more humanity or were more decisive than others. In commenting on the soundness of their judgement, while several appeared to rely on common sense to inform their observations, it was not always apparent that they were weighing the arguments to reach a balanced decision. Nor was everyone capable of putting aside entirely their prejudices as the discussion of lifestyles and means had shown.
- As reported in the discussion of the material in Chapter 8, individual differences in the acquisition of the competences required for appraisal was apparent. Experience was a factor that appeared to command respect, according to the evidence of the dialogue where less experienced magistrates had deferred to those who had been doing it for longer. Some might be inclined to defer more than others. Everyone was familiar with structured decision-making but some were obviously more practised than others in its application. The group worked harmoniously, with each person contributing but some would learn to improve the effectiveness of their contribution over time. The person

who acted as Chair on this occasion was competent to do so, if the usual criteria for satisfactory appraisal were applied, although there was scope to improve even some of his knowledge based skills. The balance between technical ability and the 'softer' skills of people management in leading the group, consulting colleagues, encouraging everyone to contribute while maintaining a working partnership with the LA would be different for a range of individuals, all of whom might still be judged competent overall.

As the observations above show, individual differences in the recruitment criteria and the competences acquired through experience are manifest in the sentencing discussions that take place. The final chapter of this thesis draws on the results and discussions of each of the three studies undertaken to compare how the different approaches have informed the research question. It draws conclusions about what has been revealed regarding individual differences and their effect on process and outcome and considers implications, improvements and further work that might be undertaken.

10

Concluding Remarks; Findings of the Research, Discussion of those findings, Observations on the Methodology and Development of a Sentencing Model

"Sentencing is part of a very complex system. Many events and agencies influence the decision, and sentencing can cause anything from a ripple to a tidal wave throughout the system. And so sentencing, in common with other stages in the criminal justice process, cannot be viewed in isolation." (Morgan, Moxon and Tarling 1987:169)

In this chapter, the findings of the three empirical studies are summarised, and the implications for recruitment, training and current practice discussed. The limitations and improvements that could be made to the work are considered, along with areas of potential development. As the approach and emphasis in each study was complementary but distinct, the findings, discussion and limitations of each one are reported together, before the next is considered. Finally, by drawing on the results of the three studies, a model representative of the various aspects of decision-making is suggested.

10.1 Introduction

The impetus for this research stems from the magisterial experience of the researcher and responds to the popular perception that the outcome in court depends on who deals with a case on the day. The work focused on sentencing decisions because these are of

considerable importance to the public. It is also an area where increasingly justices attempt to explain the rationale behind their decisions in open court, shedding more light on the process, than was the case when, by convention, magistrates tended to announce their decision but failed to elaborate on their reasoning.

Study 1 focused on whether significant individual differences existed between those appointed as lay magistrates that would have an effect, either on the way in which they went about making a decision (process) or influence their choice (outcome) or both. In profiling the sample, it became possible to assess both the extent to which the sample was representative of the magistracy nationally and compare the description of magistrates in the sample with those of the general population that they purport to represent.

Study 2 used an alternative qualitative approach to explore the magistrates' perceptions of individual differences as they affected their work and interaction with colleagues. It also sought to reveal more about the way in which decisions were undertaken than was possible in the first study and the influences to which magistrates felt subjected.

Study 3 was mainly corroborative but provided explicit support and practical demonstrations of some of the ideas suggested in the previous two studies and anticipated in the nature of small group working.

10.2 Reviewing Study 1

10.2.1 Findings of Study 1

10.2.1.1 Profiling

Measurements on the eight personality traits and a variety of socio-demographic indices provided comprehensive data to profile the sample. Trait measurements (NEAOC, LOC) indicated that magistrates' data were barely distinguishable from the population norms and distribution. The absence of extreme scores on any dimension was notable. Openness and Conscientiousness were slightly raised and Neuroticism was slightly below average but the differences were marginal.

Younger people and ethnic minorities were severely under-represented compared to the population. Educational level, where the majority of magistrates had qualifications above tertiary level, exceeded that of the population.

Political affiliation was similar to the national figures for the last general election, apart from the large number of magistrates who represented themselves as independent of any party. Different political sympathies indicated significant differences in Openness, Liberal supporters scoring highest and Conservatives lowest in this respect.

Men and women were equally represented in the sample, as in the population, and a variety of occupations were evidenced.

Where comparative data was available, the sample concurred well with the information about the magistracy nationally.

10.2.1.2 Personality Differences and sentencing

There was no strong support for specific hypotheses relating individual differences in the personality traits with either the process or outcome of sentencing. Modest indications, in single cases only, associated increased Locus of Control and Legal Authoritarianism with harsher sentencing.

10.2.1.3 Socio-demographic effects and sentencing

10.2.1.3.1 Experience

There was no individual correlation between experience and either the judgement of seriousness of an offence or the severity of the punishment. A trend of initially increasing sentence severity between the group with less than 5 years experience and those with medium experience, followed by a decline for more experienced magistrates (>15 years) did not amount to a pattern of significant differences. A 'ceiling' effect in their estimates of offence seriousness was indicated across the three groups.

10.2.1.3.2 Gender

Small gender effects were demonstrated in two cases (T & N) with a significant difference in the mean sentencing severity of men and women. Although there was no significant difference in the estimated seriousness of the offence, women imposed marginally less severe penalties than men.

10.2.1.4 Sentencing approach

There was consistency in magistrates' estimates of the severity of possible punishments when determining a sentencing severity scale. Individual perceptions of seriousness for the offences chosen correlated well with those of their colleagues.

Good agreement was evidenced in the choice of a suitable disposal in each case. This correlated well with magistrates' estimate of seriousness.

No support was found for a simple algebraic approach, combining aggravating and mitigating features to predict the sentencing choice relative to the entry point. In one case only it appeared that an alternative model akin to a 'tariff' approach had been applied.

Importantly, the sentencing choice for each of the three cases concurred, broadly, with the recommendation of the PSR.

10.2.1.5 The use of 'reasons' forms and sentencing

10.2.1.5.1 'Reasons' and process

There was good agreement on the type of relevant features, aggravating or mitigating, recorded by individual participants. The Association Guideline prompts featured widely. A few participants confused mitigating features of the offence with personal mitigation.

10.2.1.5.2 'Reasons' and outcome

There was inconsistency in the recognition of the 'credit' given for a guilty plea. Often the same disposal resulted from a different combination of mitigating and aggravating features. Sentencing aims were rarely singular, with the primary consideration focused on retribution. Where other aims were identified, they appeared to relate well to the sentencing choice.

10.2.2 Discussion of the findings of Study 1

10.2.2.1 Representativeness and Recruitment

The finding that the personality characteristics of the magistrate sample matched those of the general population so closely was unexpected. However, it provided reassurance that, in seeking to recruit magistrates representative of the community, the current strategy appears to be successful in this respect. Small departures from the norm on personality variables alone would be insufficient to discriminate between otherwise apparently suitable candidates

Regrettably magistrates would be unable to challenge their image as "white, middle-aged, middle-class", (Falconer, 2004; Darbyshire, 1997), based on the data in this study. While the sample was a good representation of the magistracy nationally, there was insufficient data to make local comparisons on the socio-demographic data, notably the political and ethnicity statistics but the overall picture left room for improvement.

The declaration of political independence by a substantial number of appointees undermined the validity of this 'label' as an indicator of social representativeness. If indeed, magistrates are supposed to be representative of the communities they serve, one would expect to find different proportions of voters for each of the major parties, in different parts of the country. Whether this would lead to fairer or more acceptable justice overall is debatable. In any event, initial political affiliation is unlikely to remain representative of national politics throughout the tenure of a magistrate's appointment. As the primary indicator for social representativeness, political affiliation is being abandoned by the DCA, probably with good reason.

The details of occupation based indicators of social representativeness that will replace it have yet to be published. One of the difficulties with this type of index is likely to be over-representation of better-educated, professionally qualified individuals, if the results on educational level and occupation, reported in the current study, act as a guide. It is difficult to see how the training currently expected of magistrates could be delivered to a large number of people, anyway, if educational standards were relaxed. The task of sentencing as a structured activity demands a certain level of intellectual ability, as the participants in Study 2 later asserted, as well as other qualities. This must continue to influence recruitment towards those with demonstrable expertise of this type.

Further, unless the provisions change, certain types of employer/employee tend to be more generously treated than others, in terms of their availability for court sittings and/or any financial disadvantage suffered as a result of work-place absence. These people will, inevitably, be over-represented in the pool from which candidates are selected. Managing the problem, other than by providing attendance fees or by the imposition of compulsory, quota-based representation, perhaps on a rolling basis, is likely to prove challenging. Either way, the potential damage to the career prospects of individuals is difficult to quantify, so good candidates may not even make themselves available for selection.

Ethnic minorities were under-represented in the sample and in national magisterial statistics, compared with their numbers in the population. Targeted recruitment, in Black and Asian communities especially, is a high priority for the Lord Chancellor. Operation Black Vote set up a shadowing scheme to encourage applicants from minority groups to make themselves available for appointment. It is too early to determine the extent to which this scheme has been successful in translating the initial enthusiasm for the project into new magistrates.

The DCA is alive to the criticism that the age distribution of the magistracy is unrepresentative and has responded by lowering the age of eligibility. Whether this will actually result in a significant shift in the mean age is doubtful, for all the reasons of economic necessity and career-building that have been referred to previously. Judging by the observations of participants in Study 2 about their colleagues, existing magistrates might find it hard to accept that very young people had sufficient life experiences to allow them to deal sensibly with some defendants. Maturity is one of the recruiting qualities identified by the DCA but what this means, in the context of an eighteen-year-old applicant, might be rather different to its expression in an older candidate. Their "experience of life beyond family, friends and work" (DCA, 2005) indicated in the desirable personal qualities might at that stage be rather limited. At the other extreme, if individuals continue in the role for too long, they risk becoming, themselves, 'stuck in their ways' and resistant to new ideas or practices, which would not be attractive either.

10.2.2.2 Personality and Process Effects in Sentencing

Despite being specified in the recruitment criteria and identified later in Study 2 as desirable qualities, magistrates appeared to operate satisfactorily without enhanced Openness or Conscientiousness beyond that of the population generally. There was no evidence that Openness found expression in the record of reasoning. Neither increased Conscientiousness or Need for Cognition appeared to lead to any more detailed consideration of the evidence. As essential qualities for a successful judicial approach, their importance may be over-emphasised.

The inability to discriminate between magistrates in these respects might be a consequence of the overall improvement in training and induction, such that individuals internalise the approach and address all the aspects of structured decision-making automatically. Alternatively, these instructions may have become so prescriptive and detailed that the

chance of any failure to consider some relevant piece of information is negligible. In Study 2, individuals suggested that the group nature of their deliberation acted as a safeguard against individual deficiencies and there was some evidence to support this contention in the data of Study 3, when individuals prompted and corrected colleagues.

The lack of extreme scores on either Openness or Conscientiousness and approximately population norms on other dimensions might suggest that the magistracy is somewhat constrained in its desire to challenge conventional advice or explore original solutions.

10.2.2.3 Personality and Outcome Effects in Sentencing

The results in relation to the severity of sentencing predicted provided only limited support for those of other studies concerned with Locus of Control and Legal Authoritarianism, (Kravitz et al., 1993; Osborne et al.,1986 and Narby et al., 1993; Snortum and Ashear, 1972; Mitchell and Byrne, 1973 respectively). Where significant correlations *were* noted, the direction of the correlation concurred with previous work.

In general, there was too little variation in the sample in the choice of disposal for personality relationships to be discovered. This suggested that other influences might be operating that 'swamped' individual personality variation. Unravelling this effect became the basis of further investigation in Study 2.

10.2.2.4 Socio-demographic effects and Sentencing

10.2.2.4.1 Experience and sentencing

The findings concurred with those of Lemon (1974) suggesting that initial training appeared to lead to more severe estimates of seriousness and harsher punishments for

offenders. While more experienced magistrates (> 15 years practice) recognised the same level of seriousness for an offence as their colleagues of medium experience (10-15 years), they responded in a less punitive sentencing manner.

Perhaps, magistrates become persuaded of the validity of lesser penalties, including community-based options, only over time. It is also possible that experience mellows their response, as they loose confidence in the value of highly punitive sentences. The result has implications for sentencing practice. The prison population stands, currently, in excess of 75,000, an increase of 83% over the last ten years, with a decline in the use of fines in the same period of 32% for indictable/either way offences, (Hough, 2005). If magistrates can be encouraged to use non-custodial sentencing at an earlier stage in their careers, or their confidence in fines as a realistic and enforceable penalty is restored, this trend could be reversed. Further, investigation of this aspect of sentencing practice would be useful to clarify these issues, which may be linked to the confidence that magistrates have in accepting the non-custodial recommendations of a PSR, discussed later with the results of Study 2.

10.2.2.4.2 Gender and sentencing

While the evidence is limited, any indication that men are generally more punitive than women in the sentencing choices for the same offences has implications for the composition of Benches. While 'mixed' Benches are generally considered desirable, the gender balance on a particular Bench would immediately have implications for the likely sentence that a defendant receives and should be carefully considered when sitting rotas are constructed.

10.2.2.5 'Reasons' forms and sentencing

The Association Guidelines specify the recommended approach for structured decision-making in some detail, with appropriate prompts for specific offences (see Appendix 6). Participants had not been instructed to use these at the time of completing the questionnaires and it is unlikely that many of the magistrates would have taken the trouble to seek out copies of the Handbook, containing the Guidelines, for reference while completing the questionnaires. The recurrence of the same features, therefore, alluded to the consistency of approach that training and repeated application had achieved, in this sample, at least. The conformity to the suggested relevant considerations was indicative of their merits for consistency but also the constraints that such a structured approach appears to impose.

However, there was considerable variation between individuals in the manner in which they completed the features record. Some were content to use shorthand to highlight features, others wrote at greater length, as to the implication of a particular aspect of the evidence. Some participants used formulaic descriptors, often cues lifted directly from the Guidance, others were more original. Each of these representations was counted as a single feature but the approach was not capable of assessing their relative importance.

The appropriate 'weighting' of different pieces of information became an aspect of magistrates' sentencing that was increasingly identified as a difficult area in which to seek precision. As subsequent studies showed, it was very unlikely that participants could have been tied down in this respect. In subsequent inputs, magistrates appeared to acknowledge that this was something about which they could not be exact and certainly were not objective. Some magistrates even valued the imprecision, possibly to obscure the detail of individual processing or maintain maximum flexibility. However, ranking the importance

of features might have provided a little more insight as to the way in which aspects were being prioritised.

The way in which participants dealt with 'guilty' pleas was unclear. Although this information was stated in the scripts, some participants acknowledged it explicitly, recording it as a separate factor. The guidance on reduction of sentence with the recognition of a guilty plea is an important part of sentencing advice. It has become more prescriptive since the data were collected[1]. Evidencing the application of the advice, especially where the 'discount' represents movement between sentencing bands (discharges/fines, community penalty or custodial sentence), will be challenging for the magistracy. This may continue to be an area where imprecision is retained, if it offers flexibility to the practitioners but training is needed to reinforcement its relevance.

In some of the questionnaire responses, the motivation of the defendant was identified as relevant mitigation. Since the study was undertaken, guidance from the SGC has indicated that the degree of culpability of the defendant in initiating the offence should *always* be considered in relation to the assessment of seriousness. In this respect the results demonstrated inconsistencies that may have influenced the sentencing decision. A modified format for structured decision-making has been developed since. Magistrates may need time, experience and further training to fully appreciate its implications and adapt their sentencing discussions accordingly. For the moment the Association Guidelines continue to be the basis for considering the relevant features. However, it is likely that the SGC will, over time, draft their own guidance to provide increased assistance on the approach to be adopted and the features that 'qualify' for recognition. This may further compromise the initiatives for independent consideration, especially

[1] The SGC has recommended specific reductions in a penalty, depending on the time when a guilty plea is indicated. Penalties are reduced by a third for an early guilty plea but this may diminish to 10% in some circumstances.

among inexperienced magistrates who will be trained from the outset to adopt this approach and, as Study 2 indicated, are most likely to apply it rigidly.

Confusion existed in the minds of some participants, in distinguishing personal from offence mitigation. In the new SGC advice, personal features may still significantly lower culpability and personal mitigation needs to be considered, if relevant, with specific directions on remorse and admissions. While reference to these appear in current guidance, their acknowledgement was less prescriptive and certainly their recognition was inconsistent across the cases reported in Study 1, so, again, further training on this aspect may be necessary.

10.2.3 Observations on the methodology of Study 1

10.2.3.1 Participants

Participants had responded to requests for volunteers, made through their Justices' Clerk/ Bench Legal Manager. A criticism of any sample of this kind is that it may not be truly random and may have self-selecting characteristics that depart from those that the magistracy, overall, possesses. As the findings later showed, the data generated on the sample matched the national socio-demographic statistics for magistrates closely, providing reassurance in this respect.

A greater geographical spread of participants would have been appreciated, with less emphasis on the members of the researcher's Bench as major contributors to the data. However, the work does encompass more than one London PSD, as well as urban and more rural Benches outside London. This sample of participants is a group that few researchers have engaged successfully and rarely has such detailed information about them, as individuals, been obtained. The sentencing task that they performed took some

time to complete and has not been used in research in this way before, as far as is known. Personal contacts were important here to secure co-operation, and even more essential in the later studies, for successful engagement.

10.2.3.2 Materials

The choice of individual differences to examine was guided by the results of the literature review. These were measured, mostly, using standardised instruments or as specific items on the self-completion questionnaire, developed for Study 1. While the original scales were reproduced in their entirety in the majority of incidences, the scale for one trait (Legal Authoritarianism (Narby et al., 1993)) was truncated and scoring altered for another to conform to the format of the rest (Need for Cognition (Cacioppo et al., 1984)).

While the authors of the instruments consider that their scales have general applicability, the interpretation of traits may be more context specific than they indicate. The characteristics of the participants that were detected may have been too general and aspects of their personality that had particular relevance for the sentencing task under emphasised as a result.

10.2.3.3 Analyses undertaken

Study 1 was successful in measuring the socio-demographic features of the participants, as well as the five factors of the NEAOC model of personality (Costa and McCrae, 1985) and participants' measure of Locus of Control (Rotter, 1966). These had independent merit as contemporary examples of trait measurements on a British sample, using widely acknowledged instruments, generating descriptive indicators for the magistracy, in particular. However, the other traits of LA and NC had no comparable norms. While this limited the potential for comparisons with the population in general, it was not a serious deficiency for the research that was primarily addressing differences within the sample.

Setting up a sentencing severity scale, against which the severity of a disposal could be quantified, was a necessary part of this empirical study. At the top and bottom ends of the scale, rankings were clear. However, in the band of Community penalties, allocations were less categorical. Judgements were applied to interpret the most commonly held views on appropriate positions. While the starting point was participants' ranking frequencies, the experience of the researcher became a factor in distinguishing sentences that were judged as similar and others might dispute those decisions. Participants had been discouraged from using tied ranks, which may, also, have misrepresented the intentions of some magistrates.

In establishing a hierarchy of punishments, all sixteen of the possible disposals were offered for ranking. This was an approach familiar to the participants at the time but the work might not have been seriously compromised by the derivation of a less finely discriminating scale.[2] However, with this reservation, a useful tool was developed for quantifying the severity of outcome.

Collectively, the results of Study 1 provided indications of how material was being processed and predictions that might be made about the outcome of a sentencing exercise. However, it was only ever capable of informing the study as to individual operations. No account could be taken of interaction between colleagues and its influence on process and/or outcome. The practicality of reconstituting groups from the individuals on whom personal information was held was considered but rejected. Study 1 had suggested some ideas that needed exploring further, especially mechanisms for 'weighting' and combining

[2] Following the CJA 2003 the approach to sentencing has been revised. As previously, 'thresholds' between lower, middle and upper rank seriousness in offending are identified. The lower and upper bands continue as currently – discharges or fines and custody or committal. The middle band attracts a generic Community penalty with twelve or thirteen possible requirements from which an appropriate selection is made for a particular defendant. The hierarchy within the Community penalties relates to the number of requirements specified, as well as their length, so ranking has become more complicated. These new provisions were not in force at the time of data collection.

aggravating and mitigating features, the use of the PSR and the relevance of sentencing aims. It had failed to shed sufficient light on the relationship between personal qualities and decision-making; those chosen for exploration; those identified at recruitment; and those that assist or detract from the work thereafter, i.e. the competences that are tested on appraisal.

While it provided detailed profiling data, the quantitative approach was limited in its ability to handle the sentencing data in other than a relatively unsophisticated manner, imposing a particular model to interpret results rather than generating one. It was apparent from the detail on the 'reasons' forms that magistrates were capable of operating according to the requirements of the structured approach, prescribed for them by the JSB and Magistrate Association Guidance.

However, the competent completion of the 'reasons' may have been an artifice of the questionnaire construction. Greater insight could be gained by allowing magistrates to talk about aspects of sentencing in personal interviews, so that the research could discover more about the way in which evidential material was assimilated towards a decision. Further this type of approach allowed the activity to be developed from a single participant strategy to considering individual differences in a group context. For this reason, the next study was qualitative with participants responding to a semi-structured interview.

10.3.1 Findings of Study 2

10.3.1.1 Personal qualities and performance

The personal attributes that magistrates admired and those that facilitated sentencing discussions echoed the ones specified by the DCA as desirable recruitment qualities. The language of the elements of the competences specified for appraisal was apparent. Openness and Conscientiousness and intellectual ability were among the qualities admired. Communication skills and flexibility in order to achieve consensus were stressed. Emotionality was deprecated and inexperienced magistrates were more anxious than others about the decisions they made.

10.3.1.2 Individual sentencing effects

10.3.1.2.1 Process effects in sentencing

Magistrates referred consistently to the importance of structured decision-making as central to their approach. It underpinned good practice, was enlisted to resolve differences and ensured the engagement of the whole group. They seemed conversant with the elements of its construction and competent in its application.

Psychological phenomena of 'primacy', 'recency' and the risks of applying stereotypes were clearly referred to and the Fundamental Attribution Error acknowledged, although not in those terms.

Weighting the aggravating and mitigating features of an offence/offender remained an elusive concept. Applied to specific examples, magistrates could indicate what they

considered relevant and apply relative qualitative terms but their insistence throughout that each case was unique made it impossible to quantify a common approach.

10.3.1.2.2 Outcome effects in sentencing

Individuals regarded the scale of penalties as hierarchical. They complained of limited and, sometimes, quite inappropriate options. Participants were willing to compromise on less severe punishments to achieve consensus. When in doubt, they tended to opt for the lesser punishment.

Describing their sentencing aspirations, participants were familiar with the traditional aims of punishment. Multiple sentencing aims within a single sentence were not uncommon. Participants referred to the social and political pressures they experienced and their difficulty in setting criteria for success in achieving their aims. Insight into the circumstances of an offence or the personal circumstances of the offender encouraged them to deal with some defendants in ways that would not immediately command public support.

10.3.1.2.3 Modelling the sentencing decision

The models that the participants appeared to draw on encompassed aspects of the simple algebraic model but included descriptive elements and referred to individual differences and outside influences. Everyone resented the suggestion of heuristic processing.

10.3.1.3 The effect of Group Working

Working as a group of three, the role that an individual occupied on a Bench, whether Chair or winger, was perceived both by the incumbent and the other members of the group

to alter the balance within that group. The influence on both process and outcome that Chairs as 'leaders' with differing styles might exert was recognised. Chairs could control the direction of a discussion and promote their own viewpoint. Wingers felt less pressure to do more than express their opinion and leave it to others to digest.

Everyone believed that the potential for a range of views to be expressed, even where there was disagreement, was healthy. Debate and discussion were the most fruitful ways to resolve differences. Several techniques were applied to achieve unanimity because of the value attached to this but ultimately a majority decision was acceptable.

Discussion was likely to moderate extreme suggestions. A tendency to defer to others' increased experience of sentencing decisions was noted. Sometimes more experienced groups appeared to reach a decision more quickly.

10.3.1.4 Other Influences on sentencing

10.3.1.4.1 Influence of the PSR on sentencing choice

Individuals praised the comprehensiveness of its input and asserted the value of the PSR. Nonetheless, magistrates were reluctant to accept that it led their thinking, referring to coincidence of conclusions based on independent assessments of the facts. Some had reservations about the objectivity of reports and appeared to regard some of the recommendations as partisan and too lenient, in the circumstances.

10.3.1.4.2 Impact of the Legal Advisor on sentencing

Some of the pressure to reach a decision quickly undoubtedly came from the Legal Advisers. While on the face of it magistrates reported harmonious working relationships, there was an undercurrent of unease about the interaction for some.

Participants suggested that LAs were adept at influencing proceedings to their own ends, without appearing to usurp control form the Chair. Some noted occasions when allegiances with this 'authority' figure had been instigated to influence choices.

10.3.1.5.2 Training effects

Individuals were well prepared for their tasks. Improved induction through mentoring and on-going appraisal were both recognised as useful tools to raise performance standards and work towards greater consistency of approach.

10.3.2 Discussion of Study 2

10.3.2.1 Individual characteristics and sentencing

To the extent that there was harmony between the qualities listed as desirable by the DCA for recruits and those admired by magistrates, the impression that recruitment was focused on the right targets was reinforced. The, perhaps, misplaced emphasis that participants attached to Openness and Conscientiousness has been discussed previously, together with the importance of intellectual ability. The 'soft' skills of engagement, confidence to express a view, clarity and flexibility could be usefully applied to generate and manage productive discussions around the sentencing task. However, individuals have differential skills in these areas may have implications for their ability to contribute, persuade and influence when considering the evidence.

The benefits of striving excessively to achieve consensus should be approached with caution. Some magistrates, particularly those who are less confident, those who lack knowledge or those who seek to make themselves more Agreeable to others, might feel themselves imposed upon to concede, rather than maintain an independent viewpoint that conflicted with the majority. This was evidenced by the changes in the behaviour of the new magistrates when they recalled their initial contributions to discussions in Study 2. Initially some had felt intimidated and reticent, developing more confidence in their ability to contribute meaningfully as their experience increased. It was also apparent in the reflections of more experienced magistrates, especially when they sat as Chairs, attempting to draw colleagues into the debate.

10.3.2.2 Individual approaches to sentencing

10.3.2.2.1 Structured decision-making

The constant references to structured decision-making underlined the importance of this 'tool' in current sentencing practice. Its application as the blueprint for their activity emphasised the value to others in gaining as much insight as possible into its application. The accuracy with which they discussed the prescribed model for structured decision-making, overall, laid a sound foundation for future training and successful appraisal in the prescribed competences.

10.3.2.2.2 Modelling the decision

It was not possible to have encouraged participants to be any more exact in describing how they brought together elements of the decision-making task, simply because flexibility and individuality were regarded by the participants as their most important contributions, the difference between human responses and computerised or mechanical processing. Despite their assertions to the contrary, they acknowledged heuristic approaches implicitly, in the

way they dealt with certain offences. Their own models drew on aspects of the algebraic model applied in Study 1 as a framing concept but needed a more holistic approach to accommodate all the individual differences and outside factors that were introduced by unique combinations of type of offence, evidential input and personal responses.

10.3.2.3 Group effects

The position of Chair was extremely influential. All magistrates recognised occasions when inappropriate activity had occurred, potentially distorting the deliberations of any Bench. However, it was particularly relevant where levels of experience differed widely. Any temptation to defer to the greater experience of another, per se, in the independent consideration of the evidence should be resisted, but simultaneously 'coaching' newer members in the appropriate judicial approach is essential. Different leadership styles will facilitate this to different degrees. Training can assist enormously, both in improving the behaviour of Chairs and encouraging wingers to be competent and confident in their contributions.

The observation that consensus is so highly valued and discussion axiomatic protects against purely idiosyncratic results if it is pursued rigorously. However, when tariff models or heuristic processing apply, no such reassurance is available. Perhaps the chance that all three members will lapse into the same shortcuts simultaneously is some safeguard but threats to group cohesion may constrain an individual's enthusiasm to challenge. Certainly, the opportunity to discuss ideas and justify conclusions provides a 'safety check' against bizarre considerations and participants' observations should provide reassurance that they are responsive to the opinions of others.

10.3.2.4 Other influences

10.3.2.4.1 The influence of the PSR on sentencing.

Study 1 had suggested that the recommendation of the PSR might be an important indicator of the likely sentence that would be imposed. In Study 2 the participants denied that they accepted its recommendations uncritically. Perhaps, magistrates were somewhat naïve or disingenuous in rejecting the centrality of its influence. They appeared to fail to recognise the importance of the effect of 'planting' ideas for them to consider, despite sometimes expressing scepticism about the validity of the report contents.

The pressure that magistrates come under to accept the recommendation of a report, both statutorily where expectations have been raised or pragmatically when other options appear to be difficult or impossible to implement, can be significant. Indeed, any drive to improve efficiency, itself militates against thorough independent consideration of all aspects of the evidence. The fact that someone else has already done so makes the conclusions of the Probation Officer persuasive. The promotion of a particular disposal may itself constrain the initiative to think more creatively and precious time may be saved if recommendations are readily accepted.

This effect is likely to increase with the new sentencing options introduced by CJA 2003. Probation Officers will determine the elements of the new single community disposals that they choose to suggest in reports, unless the Bench has previously made specific requests. Aspects not covered will be slow to explore and difficult to impose in the absence of a recommendation.

10.3.2.4.2 The impact of the Legal Advisor

Reports of inappropriate interference by the LA were not widespread and may have reflected individual differences among either the LAs or the magistrates themselves or, even, particular combinations. Perhaps tension of the type described is inevitable in the context of qualified professionals, whose role is to advise lay people. Work to discover the perspective of individual LAs might inform some of the concerns that participants expressed and redress the balance in the relationship so that each does not feel its competency is threatened or its independence challenged.

Ours is a judicial system that relies upon lay participants who are about to have their sentencing powers increased. It is important to ensure that magistrates receive appropriate advice, while maintaining their independence. Only in this way, will it be ensured that decisions are actually made by the people who are supposed to make them and the decision-makers are properly accountable.

10.3.2.4.3 Training effects

The absence of objective standards in the appraisal process needs to be addressed. Under MNTI 2, there are proposals for cross-Bench appraisal to ensure independence and bring consistency, not only within but across different Benches that should enhance the national effort. However, appraisal now needs to address not only the criteria of essential competences but develop objective standards against which they can be judged.

However, individual differences in the acquisition of the elements that comprise the prescribed competences and standards that exceed the minimum to different degrees will continue to be a source of variation among magistrates. While each person brings a unique blend of characteristics to the sentencing activity, the elements of different competency

requirements have implications for a magistrate's progress to successful appraisal and performance within a group. The differences relate mainly to the acquisition of knowledge, the ability to engage in discussion, the development of relationships with other court users and the interpretation of the different roles of Chair and winger when sentencing.

10.3.3 Observations on the methodology of Study 2

10.3.3.1 Participants

The response of participants to this type of approach exceeded expectations. Although they all covered the same 'core' material, each participant presented a very personal set of views and frequently elaborated aspects that were of concern/interest to them. The ease with which the exchange proceeded was greatly facilitated by the familiarity between interviewer and participant, so that situations were instantly recognisable and jargon and shorthand could be naturally accommodated without loss of comprehension.

To an extent, some identification was limited. This could be justified to preserve the variety of opinions but minimise the risk of stigmatising an individual contributor who would continue to work with others in the sample.

The concentration of participants with a common training and operating experience may have limited the transferability of the observations more generally. Appealing to a wider audience by conducting more interviews could enhance external validity but that was beyond the resources of this particular study and might not have produced such intimate revelations.

10.3.3.2 Materials

The semi-scripted interviews were constructed around ten themes which could themselves be grouped into two categories; those that related to the work of individual magistrates engaged in sentencing activity; and reflections about group working and outside influences that might affect their decisions. The primary themes drew on the results of Study 1, to inform areas which continued to be unclear or to explore ideas that were generated in that study, with other aspects introduced speculatively. In general, the script worked well. Participants were comfortable and keen to contribute in the areas explored and the inclusion of any further lines of enquiry would have imposed unreasonably on their time.

In Study 2, a detailed account of the approach that magistrates believed they adopted, the difficulties as they saw them and the strategies they used to manage problems was available. However, translating theory into practice may sometimes fall short of the aspirations that have been expressed. Study 3 provided an opportunity to explore the extent to which the two matched and the interpretation of the different roles, in practice, on a sentencing Bench.

10.4 Reviewing Study 3

10.4.1 Findings of Study 3

10.4.1.1 Approach to sentencing

The themes considered in Study 3, across the three cases that were discussed, clearly demonstrated the knowledge of structured decision-making that the magistrates claimed to possess in Study 2. Reliance on the Guidelines produced by the Association was apparent. Magistrates rehearsed the elements of aggravation and mitigation and discussed how these

affected the decision. However, the actual mechanics of melding the elements remained unclear.

As in Study 2, the effects of 'primacy', 'recency' and the Fundamental Attribution Error were apparent. There was evidence of training for newer recruits and examples of some of the techniques for managing groups and achieving consensus that had been referred to in Study 2.

Some participants showed independence in their responses to the recommendations of the PSR but many appeared to find it extremely influential. Sentencing aims featured in the discussions.

Language was quite informal. Minority views were tolerated, while work continued to reach a conclusion that would command universal support. Magistrates' reluctance to impose custodial sentences and their treatment of women, especially those with children was demonstrated, in accordance with the views expressed in Study 2.

10.4.1.2 Roles on a Bench

Further support was provided for the claims that had been made for operating the prescribed model of structured decision-making. The Chairman's style was influential. S/He led the discussion, identified the elements and rehearsed his understanding to confirm that each person agreed with the interpretation or had an opportunity to argue an alternative viewpoint. The Legal Adviser played a prominent role in the dialogue. Experience and expert knowledge were respected and influential.

10.4.2 Discussion of Study 3

The nature of the data in Study 3 is probably unique. It was frustrating in the early stages of planning this research, not to obtain the agreement of the LCD to observe magistrates directly, while engaged in sentencing discussions. While the researcher was disappointed not to be able to capitalise on her experience as an appraiser, regularly observing colleagues in the retiring room, the hesitancy that was being expressed as to the perception of outside observers, if material was gathered in this way is understandable. Therefore, Study 3 was based on a training exercise when no individuals were exposed to any harm but the conditions simulated were, to a large extent, those that prevail in actual sentencing. It should, however, raise awareness of the way in which alliances can be formed to promote a point of view or resist another. Dialogues can be prolonged, with the emphasis shifted, if a conversation is not going in the direction intended by one of the parties. This manipulation is easiest to achieve in the role of LA or Chair, so wingers need to be aware of its potential for altering the outcome of decisions, as indeed some of those involved with Study 2 had realised.

Generally, the energy brought to the exercise and the interaction between participants is communicated well through the dialogue. Many Chairs would feel uncomfortable with the level of Legal Adviser input in a real sentencing task. In the nature of this exercise it was more acceptable but it may have reflected the tolerance/susceptibility of this particular Chair.

As in Study 1, the recommendations of the PSR played a central role. Some accepted them fairly uncritically, while others examined their derivation more independently. Some of the scepticism about their observations and conclusions, suggested in Study 2, was apparent. Again the benefits of persuading magistrates to have confidence in the

recommendations is obvious but it is essential that their acceptance never becomes a 'rubber stamp' operation.

10.4.2 Observations on the methodology of Study 3

10.4.2.1 Participants

Participants had volunteered to take part and might therefore be considered to be those who more regularly undertook training and considered it important. The number of people in each group was atypical and the role of the LA was more in the nature of a trainer than the relationship in court permits. The impact of the physical absence of a defendant cannot be estimated when all the material is provided as a vignette. However, the discussions come across with an authenticity that typifies the exchanges that are regularly repeated in different sentencing dialogues, in the experience of the researcher. From that perspective they are as close as most people, who are not themselves magistrates, will get to hearing what goes on when defendants are sentenced.

If imposing on the time of individual magistrates and LAs was not a problem, it would have been useful to consider reconstituting the exercise to set up groups of three, each with their own LA. These could be recorded, all discussing the same case material to generate further examples in group sizes that were closer to the actuality.

10.4.2.2 Materials

Case 2 in this study was not particularly well chosen by the organisers. Dealing with it appeared to dwell more on technicalities than principles, so another case could be

substituted which addressed a more common scenario and created a real dilemma in choosing a disposal.

In their capacity to inform the research question, these dialogues provided triangulation for some of the results already reported, by exploring sentencing using a different approach. Evidence of some of the aspects of individual difference and their impact on decision-making was provided. Again, the difference in knowledge acquired in terms of technical ability, the nature of different contributions to the group discussion in terms of frequency and self-confidence, the importance of different roles and their interpretation, different styles of leadership and susceptibility to other influences were all demonstrated.

10.5 Modelling the decision

Drawing initially on the various ideas behind the decision-making models discussed in the literature review, and the findings of Study 1, a provisional model of the interactions between individual differences and process and outcome was developed. Figure 10.1 suggests a possible way in which these effects might influence the decision-maker.

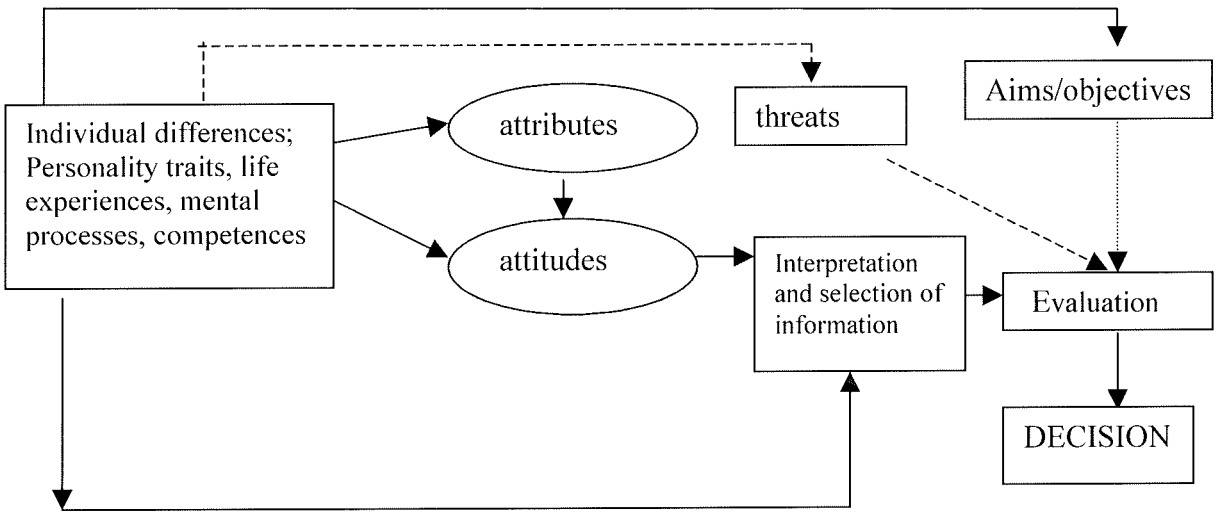

Figure 10.1. A suggested model to indicate how individual differences may interact in the process or affect the outcome of decision-making.

Individual differences, whether derived from personality traits, based on life experiences or innate mental capacities, may colour the attributes that sentencers recognise about the evidence they consider or the attitudes they acquire. The degree to which applicants match the recruitment criteria or develop the appraisal competences, too, will have the potential to influence their response to the evidence and their ability to communicate their conclusions.

As experience, self-confidence and technical knowledge increase, their effects on sentencing alter. Indeed, Kurz, Bartram and Baron (2004) have produced work that links generic competencies with the traits of the five-factor model. In the table below, elements that one might expect to appear in a competency framework are related to those of the NEAOC model.

Table 10.1 Linking competencies and personality factors.

Competence	Personality Trait
Supporting and co-operating	Agreeableness
Interacting and presenting	Extroversion
Creating and conceptualising	Openness
Organising and Executing	Conscientiousness
Adapting and coping	Neuroticism

The table indicates the competency equivalence for each of the five trait factors. To these five competencies, the authors added a further three: Leadership and deciding; Analysing and reporting; and Enterprising and performing to create what they have referred to as the 'Great Eight'. While the last competency has little relevance to magistrates' work the initial five and further two may all be recognised in their performance requirements. Thus, detecting the effects of individual differences in the application of the five-factor, NEAOC model to sentencing is demonstrated to have intimate links with the elements of

competency when individuals are appraised while engaged in sentencing activity. References in the vocabulary of competences can be directly related to the essential factors of the personality trait descriptors developed in Study 1.

Dependent on the selection made from the available information and the interpretation placed on it, an individual's evaluation of that evidence may be influenced by those individual differences.

The studies have shown that in the sentencing task, the choice of disposal, also, depends on the aims that a magistrate is attempting to achieve in relation to a particular defendant. Those aims, likewise, may be susceptible to the effect of individual differences in the make-up of the sentencer. Threats exist that challenge the likelihood of success in achieving the objective(s) set but the nature and extent of the threats may acquire an individual characteristic. As all of this information is factored into the evaluation that must proceed a sentencing decision, it is apparent that there is scope for different people to come to different conclusions, or even the same conclusion, through different assessments of the elements.

The model was conceived as a process and outcome model for individuals acting alone, which predicated the design of Study 1. There was some support for this in the literature as a fair representation of the decision that might be expected from any Bench of magistrates, (Corbett, 1987; Dhami 2002). In the event it failed to properly take account of group interactions or outside influences. These became aspects of importance following the results of Study 1 and the information that magistrates themselves provided in the interviews of Study 2. Ultimately, the model needed to reflect interactions and accommodate the potential effect of such factors as the PSR recommendation, LA's advice, the constraints of time and limited options in the sentencing disposals.

A model with a two-stage representation emerged. This used the aspects of Fig.10.1 to replicate the effect of individual differences as far as influencing the selection and interpretation of evidence was concerned, even as far as reaching a preliminary evaluation. However, a second stage was needed at this point to reflect the interaction in the group, as cases are discussed and 'final' decisions emerged. Some of the latter aspects of the individual model would be susceptible to alteration and modification so that aims, threats might vary and evaluation change in response to the exchanges with other magistrates.

In Figure 10.2, below, each circle represents a magistrate, exchanging ideas with another but, also, exposed to outside influences that might include current Government policy on sentencing, public reaction to a particular type of crime or advice from the SGC. Although all the participants have been represented as equals, in practice, roles are adopted that may, in themselves, exert influence.

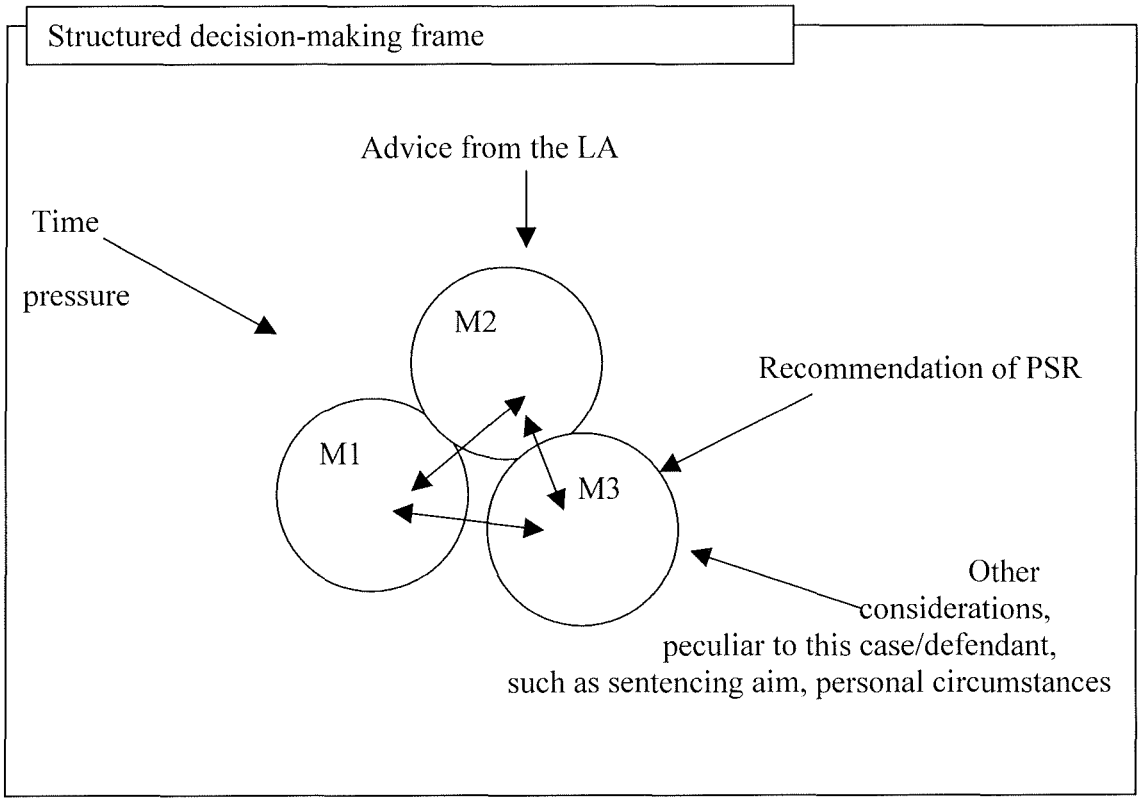

Figure 10.2 Stage 2: An interactive representation of magistrates sentencing as a group

Shapes that could adapt their size, dynamically, would be more appropriate, as individuals contributed differentially or demonstrated different susceptibilities. The whole activity of sentencing is increasingly constrained within the framework for structured decision-making. However, the scope for individual differences in the make-up of the participants, both in their innate capacities and their acquired knowledge and skills, to influence the process of making a decision and alter the final outcome of that choice should be apparent from the complexity of the model.

10.6 Summary

This combination of studies has begun work on several lines of investigation around magistrates making decisions. The results have practical implications for the business of the courts and the work of the DCA, both in its recruitment and training policy and in the work of on-going appraisal to ensure that high standards are maintained.

In summary, the research found manifestations of individual psychological phenomena such as primacy, recency and the Fundamental Attribution Error, in the way that sentencing ideas are exchanged and accepted. The measurement of individual personality traits, while not sufficiently diagnostic for recruitment purposes in this instance, supports the principles of representativeness and the predictions associated with some of those traits involved. It also suggests links to the expected performance on the competences required and supports the expectation of individual differences with implications for behaviour and processing approach.

In respect of modelling the sentencing decision, aspects such as weighting, framing, elimination by aspects, stereotyping and heuristic processing certainly contribute. It is unlikely that sentencing can be comprehensibly described using any one of the models previously applied to verdict decisions but good support emerged for some of the more

holistic approaches that recognised the frames of reference underpinning this type of decision. The significance of the 'instructions' around structured decision-making and the exemplars provided, promote a consistent approach that represent the limit of constraint which magistrates seem prepared to accept.

Although not entirely typical, magistrates do conform to some of the expectations of groups of people acting together. They recognise the potential influence of a leader and the power of forming allegiances, especially with authority figures and the contribution of expert knowledge. They wish to achieve consensus in their discussions, acknowledge a Bench culture, and support each other in maximising the group memory of events. They appear susceptible to the pressure of social conformity, often compromising on less punitive options as a result of their exchanges. They reflect typical patterns of information exchange within groups. Group polarisation and risky shift do not seem particularly prevalent and, because the individuals rarely sit regularly, specific groups may lack cohesion.

While each of the studies indicated that a range of individual differences existed, measured quantitatively, or described qualitatively, the parameters seemed insufficiently differentiated for the effects on the process or outcome of sentencing to be easily detectable. Especially when the interactions of a group, within the framework of structured decision-making, were taken into consideration, the impact of the characteristics of an individual became further obscured. While the considerations identified in the initial model remained valid, prediction became unreliable, without more knowledge of the composition of a Bench on a particular occasion and the roles that individuals undertook, in the context of a specific offender.

Continuing improvement in the selection and training of magistrates and consistency of approach to court processes may help reduce the perception of arbitrariness for some defendants. However, there is a risk that this will also reduce the human factor in their treatment that individual differences currently ensure. It is this human factor which is often seen as one of the strengths of the lay magistracy. Its retention, while balancing these competing aims, will continue to challenge magistrates in their daily work.

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Appendix 1

History of the magistracy

Background

History According to the Magistrates' Association web-site, the part played by lay magistrates in the judicial system of England and Wales[1] can be traced back to 1195 when Richard 1 commissioned certain knights to preserve peace in areas where there was unrest. Accountable directly to the King, they were called Keepers of the Peace[2] with responsibility for ensuring that the law of the land was upheld. Re-named Justices of the Peace in 1361, during the reign of Edward 111, their authority derived from an Act in 1327 that referred to 'good and lawful' men to be appointed in every county to 'guard the peace', (Skyrme, 1979). They were required to meet four times a year, hence the expression 'Quarter Sessions'. Their duties expanded to encompass, not only a range of judicial functions but also many responsibilities for the administration of local government, (Skyrme, 1979). Skyrme (1979), p.3, described them, during the period of the Tudor and Stuart reigns, as "wealthy, well-educated, ... reasonably in accord with national policy, but also ambitious and often lazy." Their activities transcended merely crime control to encompass political and legislative influence, increasing throughout the 18th and early 19th century.

Prior to 1835, an appointment as Justice of the Peace was a local initiative governed by rights granted by charter. Following the Municipal Corporations Act of that date (Magistrates Association, 2005) the Lord Chancellor's Department assumed overall responsibility for their nomination to the boroughs, in consultation with local advisors. In the counties, the Lord Chancellor confirmed the appointment of the Lord Lieutenants, who had their own methods of determining suitable candidates. All appointments were

[1] The jurisdiction is similar in Scotland and Northern Ireland but with differences that are not relevant to the present studies. Throughout this thesis, the judicial system described relates solely to that operating in England and Wales.

ultimately vested in the Crown, on the advice of the Lord Chancellor, with the exception of the Duchy of Lancaster that remained an anomaly within the system.

The appointment system led to a preponderance of Conservatives on Benches, a situation that the Liberal government of 1906 found objectionable. Reform to the property qualification for county justices was instigated and a large number of new appointments were made at the suggestion of the Liberal, Lord Chancellor to redress the balance. The Royal Commission of 1910 recommended the institution of an Advisory committee system to make formal recommendations for county appointments to the Lord Lieutenants. This formalised the arrangement throughout the country (Lancashire continuing as an exception), by which local advisory committees made recommendations for appointment to the Lord Chancellor, broadly in line with the current arrangements. The composition and tenure of membership of advisory committees has been reviewed from time to time in line with current thinking on independence, representativeness and best practice.

Women Women could not be appointed as magistrates until The Sex Disqualification Act 1919 came into force. The first woman appointee assumed office in her ex-officio capacity as a borough Mayor. Female representation on Benches nation-wide progressed slowly until the Royal Commission of 1947 recommended that "steps be taken to ensure all Benches had adequate numbers of women magistrates", (Magistrates Association web site 2005). All the magistrates referred to, so far, held voluntary appointments receiving no financial reward for their services.

District Judges Professional magistrates have their origin in the appointment in London of three salaried justices, called Stipendiaries, and a Clerk, following the Middlesex Justices Act, 1792. They worked alongside the unpaid magistracy but

[2] Custodes Pacis appointed by Simon de Montfort,1262 (Skyrme, 1979)

transferred monies collected in fines and fees directly to the Treasury. As the work of the unpaid lay magistrates became marginalised into licensing and non-fee generating activities, discontent increased, culminating in the recommendation of the Maxwell Commission 1937, that promoted more co-operative working between the two types of magistrate. The Justices of the Peace Act, 1949, instigated a thorough overhaul of the administration, finance and procedure of the lower courts, giving the Home Secretary power to specify the classes of case that lay justices might deal with outside the metropolitan courts. As a result of the unification of the judiciary in 2000, Stipendiary magistrates were re-named District Judges (Magistrates Courts) (DJ), (Carter, 2001). They work alongside lay colleagues, mainly in large urban Petty Sessional Divisions where the workload is high and their services are especially useful in hearing long or particularly difficult cases. Local arrangements vary but often the DJ will be allocated work similar to that with which the lay justices deal. Professional magistrates must be legally qualified with a minimum of seven years experience before appointment. S/he is appointed directly by the Lord Chancellor's Department (LCD), now Department for Constitutional Affairs (DCA). In court s/he sits alone to adjudicate, although, like the lay magistrates, s/he is assisted by a legally qualified advisor. Their powers and authority are identical to the lay magistrates but their employment is a full-time commitment.

Skyrme[3] (1979) commented on the inherent advantages to the Government of using unpaid lay magistrates in the administration of justice, namely cost savings and flexibility in their capacity to respond to work load variations. He subscribed to the view that

> "two, or preferably three, heads are better than one... better still if they combine intimate knowledge, experience and understanding of problems facing different sections of the local community," p. 7.

[3] Sir Thomas Skyrme was Secretary of Commissions for thirty years, following the 2nd World War, responsible under the Lord Chancellor for the appointment, removal and conditions of service of magistrates, lay and stipiendiary in England and Wales

He considered that justices,

> "... represented different shades of opinion, can be effective in dispensing justice acceptable to the public... acted as a check on one another", (Skyrme, 1979, p.8).

Even in the face of these apparent advantages, he observed that the public appeared to prefer to be dealt with by professional judges. The public held, he believed erroneous, views that

> "... they (the justices) are prejudiced, prosecution-minded, middle-class bigots, motivated by a lust for power and totally lacking in any feeling for those around them", Skyrme 1979, p. 8

While there might have been some essence of truth in the past, Skyrme (1979) believed that current recruitment policies ensured that this was no longer the case.

Appendix 2

Demographic statistics:

detail of the areas contributing to Study 1

followed by the

Magistracy Nationally, in bold,

(excluding the Duchy of Lancaster)

Table A2.1 Demographic breakdown of [illegible]

detail from the areas contributing to Study 1 (DCA2004)

Commission Area	Total	Age				Gender		Political Affiliation						Ethnic background				
		< 40	40-49	50-59	60-69	M	F	Con	Lab	Lib Dem	Pl Cy	Oth	Un	W	B	A	O	NK
City of London	120	5	29	52	34	53	67	49	21	12	0	6	32	101	12	4	3	0
Middlesex	712	22	97	310	283	286	426	260	225	94	0	70	63	602	74	21	15	0
Hertfordshire	454	31	86	203	134	217	237	143	113	65	0	40	93	435	5	12	2	0
Leicestershire	511	21	67	243	180	261	250	163	120	62	0	14	152	465	12	26	8	0
East Sussex	368	7	48	162	151	169	199	133	73	44	0	29	89	359	1	3	5	0
National Totals	**24048**	**892**	**3382**	**11477**	**8298**	**12079**	**11969**	**8060**	**6082**	**3114**	**131**	**1338**	**5361**	**22531**	**556**	**756**	**202**	**3**
%	**100**	**4.0**	**14.0**	**48.0**	**34.0**	**50.2**	**49.8**	**33.5**	**25.3**	**12.8**	**0.5**	**5.6**	**22.3**	**93.6**	**2.3**	**3.1**	**0.8**	**0.2**

Legends:

Con = Conservative, Lab = Labour, Lib Dem = Liberal Democrats, Pl Cy = Plaid Cymru, Oth = Other, Un = Uncommitted/not known/other

W = White, B = Black, A = Asian, O = Other, NK = Not known

Appendix 3

Three tables of results for NEO-FFI for different samples

Table A3a: Means and Standard Deviations (PAR,Inc. '85,'89, '92)

Table A3b: UK norms for the employees of a large retailer

Table A3c: Results for a British student sample

Appendix 3

Table A3a: Means and Standard Deviations for NEO-FFI (PAR, Inc, 1985, '89, '92, Table B-4, p 78), American sample.

NEO-FFI scale	Men		Women		Combined	
Adult	M	SD	M	SD	M	SD
N: Neuroticism	17.60	7.46	20.54	7.61	19.07	7.68
E: Extraversion	27.22	5.85	28.16	5.82	27.69	5.85
O: Openness	27.09	5.82	26.98	5.87	27.03	5.84
A: Agreeableness	31.93	5.03	33.76	4.74	32.84	4.97
C: Conscientiousness	34.10	5.95	35.05	5.78	34.57	5.88

Table A3b: UK Norms for the employees of a large retailer, sample size 762 employees, (326 male and 436 female), 1996/7 provided by ASE, a division of NFER-Nelson.

NEO-FFI scale	Men		Women		Combined	
Adult mean age 46.94	M	SD	M	SD	M	SD
Range 16-88 years						
N: Neuroticism	17.35	7.14	20.69	7.89	19.2	7.8
E: Extraversion	28.45	6.16	27.95	5.86	28.16	5.99
O: Openness	24.51	6.37	24.43	6.29	24.46	6.32
A: Agreeableness	29.82	5.89	31.88	5.89	31.0	5.97
C: Conscientiousness	33.84	6.66	33.48	7.07	33.64	6.89

Normative results are available from a study conducted with the staff of a large British retailer in 1996/7, supplied by the publisher of the testing manual, ASE, showing mean values for the raw scores in each of the five domains. These suggest that the values are very similar, if fractionally higher than the published American norms.

A further comparative sample was provided from an unpublished study by Cockerton, T.C. in 2000. Participants were students at a British university.

Table A3c: Results for NEO-FFI with a British student sample.

NEO-FFI scale	Combined	
286	M	SD
participants	(All figs corrected to 2 dec. pl)	
N: Neuroticism	21.97	6.08
E: Extraversion	28.29	4.69
O: Openness	25.57	5.40
A: Agreeableness	27.17	5.69
C: Conscientiousness	28.72	4.73

Appendix 4
The questionnaire used in Study 1
Comprising:

The letter of introduction

Document 1: The instrument for personality trait measurements and socio-demographic information

Document 2: Instrument for developing the Sentencing Severity Scale

Document 3:Sentencing Exercise case Studies, 1-3, with their relevant PSRs

Letter of introduction and questionnaire in three parts, Document 1, 2 &3 Appendix 4

School of Social Sciences
Middlesex University
Queensway
Enfield
Middlesex EN3 4SA

Spring 2003

Dear Magistrate,

I am undertaking a research study as a post-graduate student in the Psychology Department of Middlesex University. This looks at the impact of individual differences on sentencing decisions made by magistrates. I bring to this work, over twenty years experience as a magistrate myself on the Y bench in North London and an interest in applied psychology. I have successfully completed a pilot study with colleagues and now seek your assistance in collecting data on a wider scale.

Enclosed are the following:

- Document 1 -A questionnaire that seeks information about your personal characteristics and biographical data.
- Document 2 – A sentencing severity scale
- Document 3 -A set of three case summaries, together with a "Reasons" statement for each case. You are requested, please, to read each of these and reach a preliminary sentence that you believe to be appropriate. To assist me in understanding how you have arrived at that conclusion, a statement of the reasons, similar to those that would be announced in Court, should be completed. These should record the aggravating/mitigating features of the offence, personal mitigation of the offender and any other relevant considerations, as you see it, together with an indication of your sentencing aim in making this particular choice.
- A pre-paid addressed envelope in which to return the completed material to me. [Within the next two weeks would be ideal but if you miss that deadline, I would still be very keen to have the form back, as soon as possible.] If you decide not to complete the form, I need to have it returned anyway, to comply with the license conditions.

As I need to link the documents for an individual, I would appreciate it if the papers were named, or labelled in some other way, such as a pseudonym, in the first instance. Thereafter, I intend to code each numerically, so that they are, effectively, anonymous for working purposes, as individual identities are irrelevant. I can assure you that all the information provided will be dealt with in strictest confidence. No-one will be identified in any published work. In returning the completed questionnaires, it will be assumed that you are consenting to the inclusion of the information for analysis and in any subsequent publication that may result. As further reassurance, I should tell you that the whole piece of research is tightly supervised and has been discussed fully with representatives of the Lord Chancellor's Department, who are aware of what is proposed. If you are interested in some feedback, I would be happy to provide a summary of the results at the conclusion of the project, if you wish to contact me.

Of course, your participation is entirely voluntary but I would very much appreciate your support. I am seeking, ultimately, to involve a few hundred Magistrates from all levels of experience. If you do choose to take part, whilst it would help me if you answered as many questions as possible, you should feel free to leave out those that do not seem to apply or present problems.

If there is any further information that you require, please feel free to contact me through the address above or via my home e-mail [ormerod@orm.org.uk] or Tel 0208 340 0715.

I hope that your curiosity has been aroused sufficiently to take the time to complete the questionnaires, for which I thank you.
Yours sincerely,
Pamela Ormerod

Document 1

Name:..... Sex: M / F , Bench ..... . Year of Appointment.....

Are you a member of any panels/committees? Youth ( ) Family ( ) Licensing ( )

Please complete the following questions by circling the point on the scale that most closely matches your response.

E.g. I hate getting up in the morning SD D N (A) SA

SD=*strongly disagree*, D=*disagree*, N=*neutral*, A=*agree*, SA=*strongly agree*

1. I am not a worrier.	SD D N A SA
2. I like to have a lot of people around me.	SD D N A SA
3. I don't like to waste my time daydreaming.	SD D N A SA
4. I try to be courteous to everyone I meet.	SD D N A SA
5. I keep my belongings neat and tidy.	SD D N A SA
6. I often feel inferior to others.	SD D N A SA
7. I laugh easily.	SD D N A SA
8. Once I find the right way to do something, I stick to it.	SD D N A SA
9. I often get into arguments with my family and co-workers.	SD D N A SA
10. I'm pretty good about pacing myself so as to get things done on time.	SD D N A SA
11. When I'm under a great deal of stress, sometimes I feel like I'm going to pieces.	SD D N A SA
12. I don't consider myself especially "light-hearted."	SD D N A SA
13. I am intrigued by the patterns I find in art and nature.	SD D N A SA
14. Some people think I'm selfish and egotistical.	SD D N A SA
15. I am not a very methodical person.	SD D N A SA
16.I rarely feel lonely or blue.	SD D N A SA
17. I really enjoy talking to people.	SD D N A SA
18. I believe letting students hear controversial speakers can only confuse and mislead them.	SD D N A SA
19. I would rather co-operate with others than compete with them.	SD D N A SA
20.I try to perform all the tasks assigned to me conscientiously.	SD D N A SA
21. I often feel tense and jittery.	SD D N A SA
22. I like to be where the action is.	SD D N A SA
23. Poetry has little or no effect on me.	SD D N A SA
24. I tend to be cynical and sceptical of others' intentions.	SD D N A SA
25. I have a clear set of goals and work towards them in an orderly fashion.	SD D N A SA
26. Sometimes I feel completely worthless.	SD D N A SA
27. I usually prefer to do things alone.	SD D N A SA
28. I often try new and foreign foods.	SD D N A SA
29. I believe that most people will take advantage of you if you let them.	SD D N A SA

Appendix 4 (cont)

30. I waste a lot of time before settling down to work.	SD D N A SA
31.I rarely feel fearful or anxious.	SD D N A SA
32. I often feel as if I am bursting with energy.	SD D N A SA
33. I seldom notice the moods or feelings that different environments produce	SD D N A SA
34. Most people I know like me.	SD D N A SA
35. I work hard to accomplish my goals.	SD D N A SA

36. I often get angry at the way people treat me. SD D N A SA
37. I am a cheerful, high-spirited person. SD D N A SA
38. I believe we should look to our religious authorities for decisions on moral issues. SD D N A SA.
39. Some people think of me as cold and calculating. SD D N A SA.
40. When I make a commitment, I can always be counted on to follow through. SD D N A SA.

41. Too often, when things go wrong, I get discouraged and feel like giving up. SD D N A SA
42. I am not a cheerful optimist. SD D N A SA
43. Sometimes, when I am reading poetry or looking at a work of art, I feel a chill or wave of excitement. SD D N A SA
44. I'm hard-headed and tough-minded in my attitudes. SD D N A SA
45. Sometimes, I'm not as dependable or reliable as I should be. SD D N A SA

46. I am seldom sad or depressed. SD D N A SA
47. My life is fast-paced. SD D N A SA
48. I have little interest in speculating on the nature of the universe or the human condition SD D N A SA
49. I generally try to be thoughtful and considerate. SD D N A SA
50. I am a productive person who always gets the job done. SD D N A SA

51. I often feel helpless and want someone else to solve my problems. SD D N A SA
52. I am a very active person. SD D N A SA
53. I have a lot of intellectual curiosity. SD D N A SA
54. If I don't like people, I let them know it. SD D N A SA
55. I never seem to be able to get organised. SD D N A SA

56. At times, I have been so ashamed I just wanted to hide. SD D N A SA
57. I would rather go my own way than be a leader of others. SD D N A SA
58. I often enjoy playing with theories or abstract ideas. SD D N A SA
59. If necessary, I am willing to manipulate people to get what I want. SD D N A SA
60. I strive for excellence in everything I do. SD D N A SA

66. Too many obviously guilty persons escape punishment because of legal technicalities SD D N A SA
67. Evidence illegally obtained should be allowed in Court, if such evidence is the only way of obtaining a conviction. SD D N A SA
68. Any person who resists arrest commits a crime. SD D N A SA
69. Defendants in a criminal case should be required to take the witness stand. SD D N A SA
70. Police should be allowed to arrest and question suspicious looking persons, to determine whether they have been up to something illegal. SD D N A SA
71. Upstanding citizens have nothing to fear from the police. SD D N A SA

The following information about yourself would be helpful.

Age. Under 35, 36 –45, 46 – 55, 56 – 65, over 65.

Occupation .....[please indicate active/ retired].....

Ethnicity: White/ Black/ Asian / Mixed Race [please specify]...../ Other[specify].....

Would you say religion plays an important part in your life? Y / N ,

if Y, please specify which religion.....

Education: a)Completed up to 16 years of age Y / N b)Completed up to 18 years of age Y/N

c)University degree or other further education.Y /N d)Additional Professional or graduate qualification.Y /N

Political affiliation: Conservative, Labour, Liberal Other....., None.

THANK YOU VERY MUCH FOR YOUR CO-OPERATION.*

Again SD = *STRONGLY DISAGREE*, D = *DISAGREE*, N = *NEUTRAL*, A = *AGREE*, SA = *STRONGLY AGREE*

Please indicate your response by circling the appropriate letter	
1. I would prefer complex to simple problems.	SD D N A SA
2. I like to have the responsibility for handling a situation that requires a lot of thinking.	SD D N A SA
3. Thinking is not my idea of fun.	SD D N A SA
4. I would rather do something that requires little thought than something that is sure to challenge my thinking abilities.	SD D N A SA
5. I try to anticipate and avoid situations where there is a likely chance that I will have to think in depth about something.	SD D N A SA
6. I find satisfaction in deliberating hard and for long hours.	SD D N A SA
7. I only think as hard as I have to.	SD D N A SA
8. I prefer to think about small daily projects to long-term ones.	SD D N A SA
9. I like tasks that require little thought once I've learned them.	SD D N A SA
10. The idea of relying on thought to make my way to the top appeals to me.	SD D N A SA
11. I really enjoy a task that involves coming up with new solutions to problems.	SD D N A SA
12. Learning new ways to think doesn't excite me very much.	SD D N A SA
13. I prefer my life to be filled with puzzles that I must solve.	SD D N A SA
14. The notion of thinking abstractly is appealing to me.	SD D N A SA
15. I would prefer a task that is intellectual, difficult and important to one that is somewhat important but does not require much thought.	SD D N A SA
16. I feel relief rather than satisfaction after completing a task that required a lot of mental effort.	SD D N A SA
17. It's enough for me that something gets the job done; I don't care how or why it works.	SD D N A SA
18. I usually end up deliberating about issues even when they do not affect me personally.	SD D N A SA

In the following pairs of statements, please select the <u>one</u> statement in each pair which you most strongly <u>agree</u> with by circling the appropriate letter a or b. You may feel neither is exactly correct but choose the one that best represents your response

1. Many of the unhappy things in people's lives are partly due to bad luck.....a
   People's misfortunes result from the mistakes they make .....b

2. One of the major reasons that we have wars is because people don't take enough interest in politics... a.
   There will always be wars, no matter how hard people try to prevent them.....b

3. In the long run, people get the respect they deserve in the world..... .....a
   Unfortunately an individual's worth often passes unrecognised no matter how hard he tries.....b

4. The idea that teachers are unfair to students is nonsense..... ..a
   Most students don't recognise the extent to which their grades are influenced by accidental happenings .....b

5. Without the right breaks one cannot be an effective leader.....a
   Capable people who fail to become leaders have not taken advantage of their opportunities..... ...b

6. No matter how hard you try, some people just don't like you.....a
   People who can't get others to like them don't understand how to get along with others.....b

7. I have often found that what is going to happen will happen.....a
   Trusting to fate has never turned out as well for me as making a decision to take a definite course of action..... b

8. In the case of the well prepared student, there is rarely, if ever, such a thing as an unfair test.....a.
   Many times exam questions tend to be so unrelated to coursework that studying is really useless.....b

9. Becoming a success is a matter of hard work, luck has little or nothing to do with it.....a
   Getting a good job depends mainly on being in the right at the right time.....b

10. The average citizen can have an influence in government decisions.....a
    The world is run by the few people in power, and there is not much the little guy can do about it.....b

11. When I make plans, I am almost certain that I can make them work.....a
    It is not always wise to plan too far ahead because many things turn out to be a matter of good or bad fortune anyhow .....b

12. In my case getting what I want has little or nothing to do with luck.....a
    Many times we might just as well decide what to do by flipping a coin.....b

13. Who gets to be boss often depends on who was lucky enough to in the right place first.....a
    Getting people to do the right thing depends upon ability, luck has little or nothing to do with it.....b

14. As far as world affairs are concerned, most of us are the victims of forces we can neither understand or control.....a
    By taking an active part in political and social affairs the people can control world events.....b

15. There really is no such thing as "luck".....a
    Most people don't understand the extent to which their lives are controlled by accidental happenings...b

16. It is hard to know whether or not a person really likes you.....a
    How many friends you have depends on how nice a person you are.....b

17. In the long run the bad things that happen to us are balanced by the good ones.....a
    Most misfortunes are the result of lack of ability , ignorance, laziness or all three.....b

18. With enough effort we can wipe out political corruption.....a
    It is difficult for people to have much control over the things politicians do in office.....b

19. Sometimes I can't understand how teachers arrive at the grades they give.....a
    There is a direct connection between how hard I study and the marks I get.....b

20. Many times I feel I have little control over the things that happen to me.....a
    It is impossible for me to believe that chance or luck plays an important role in my life.....b

21. People are lonely because they don't try to be friendly.....a
    There's not much use in trying too hard to please people, if they like you, they like you.....b

22. What happens to me is my own doing.....a
    Sometimes I feel I don't have enough control over the direction my life is taking.....b

23. Most of the time I can't understand why politicians behave the way they do. .....a
    In the long run the people are responsible for bad government on a national as well as a local level.....b

Document 2

Sentencing Severity Scale

To see if we all share the same ideas about seriousness, please rank the following sentencing options. Indicate with a number, in ascending order starting with ***1 as the least*** punitive, how you rate the following disposals. Start with the one you consider to be the most trivial, least punitive response to a plea or finding of guilt.

[There are 16 in total, please try to avoid tied ranks by not using the same number twice]

Custody between 3 and 6 months - suspended.....

Fine at level C [one and a half times weekly income, net of tax and NI].....

Fine at level B [weekly income, net of tax and NI].....

Committal to the Crown Court for sentencing [expected punishment exceeds powers].....

Community Rehabilitation Order [old Probation order].....

Custody up to and including 3 months - suspended.....

Custody between 3 and 6 months.....

Custody up to and including 3 months.....

Conditional Discharge – with/without compensation.....

Absolute Discharge - with/without compensation.....

Curfew Order ["tagging"].....

Combination Order [CRO with CPO].....

Drug Testing and Treatment Order.....

Community Punishment Order between 120and 240 hours [old community service order].....

Fine at level A [half weekly income net of tax and NI] .....

Community Punishment Order up to and including 120 hours.....

Document 3

Sentencing Exercise

Case 1

Defendant: John Thompson

Charge: On 30th September 2002 at High Road, Totterly did use or threaten violence towards another and his conduct was such as would cause a person of reasonable firmness, present at the scene, to fear for his personal safety.
Contrary to Sect 3(1) Public Order Act 1986

First appearance: 3rd October 2002 at Hightown Magistrates Court

Guilty plea entered: 17th October 2002, adjourned to 7th November 2002 for pre-sentence reports, all options left open

Prosecution facts: The defendant and friends of his had spent the night in a night-club. In the early hours of the next day a fracas took place which led to a friend of the defendant suffering injuries that required medical treatment. The defendant approached, carrying an empty bottle. He smashed it and started to threaten the police officers with it. By that time, a crowd of about 30 people had gathered and witnessed what was going on. The police officers attempted to calm him down, without success. One of them attempted to disarm him by hitting the arm that was holding the broken bottle with his Rasp but again, unsuccessfully. Eventually the defendant ran off. He was chased and CS gas had to be used before he could be arrested.

Previous convictions: None

Mitigation: Defendant's solicitor says the following:-
He accepts that he was wrong and regrets his actions. He was upset by the assault on his friend and had gone looking for his assailants. He had been told that the assailants were armed, so he picked up the bottle to arm himself.

When he saw the group of people in the car park, he smashed the bottle and shouted to them to tell him who had assaulted his friend. By this time, the police had arrived and they told him to put the bottle down. Foolishly, he did not do so. The police sprayed him with CS gas and he was arrested.

He was angered by the unprovoked attack on his friend and accepts that he over- reacted. He asks you to give him credit for his contrition and the fact that he pleaded guilty at the first opportunity.
His personal circumstances are outlined in the report.

Defendant: John Thompson
D.O.B.: 24/8/79

Introduction

1. The preparation of this report has been conducted during one interview with Mr Thompson at the Harington Probation Office. Whilst having access to the Crown Prosecution documentation, this did not arrive until after the interview. It is my understanding that the defendant is of previous good character.

Offence Analysis

2. During interview, Mr Thompson explained that he, along with a group of approx. six friends had arranged to go out for the evening. They met at 9pm in a Public house in Totterly. During the time at this venue, Mr Thompson stated that he had only consumed one pint of lager. Later on in the evening, they went on to a night-club, arriving at about 11.30pm.
3. Whilst at the club Mr Thompson tells me that he drank two single measures of vodka and bitter lemon and one glass of champagne. He recalls that he was at the bar, speaking with a friend, when he heard an announcement over the club's loud-speaker system, informing the patrons that a fight had broken out in the club.
4. On hearing the announcement, he returned to join the rest of his group and notice that one of his friends was on the floor, covered in blood and being carried out by two of the club's security staff. As Mr Thompson is qualified in First Aid, he became involved in the initial care of his friend. He proceeded to undertake all the necessary checks and placed his friend in the recovery position, staying with his friend until the ambulance arrived.
5. Mr Thompson then went to say that he was shocked to see what had happened to his friend. His response then turned into a combination of fear and anger towards his friend's assailants. During the commotion, Mr Thompson was informed that his friend had been "jumped" by approx. eight youths and it was thought that they had now left the premises.
6. Without taking stock of the situation, Mr Thompson decided to go outside to try to find out the identities of, and locate his friend's assailants. The defendant had been advised that there was a possibility that his friend's assailants were themselves armed. Not knowing if he was to come face to face with the assailants, he decided to arm himself. Once outside the club, he picked up a bottle from the pavement, smashed it and held it in front of him.
7. By this stage the club had stared to empty and Mr Thompson saw a large group standing around in the car-park opposite and shouted " Who did it?" and "It's not fair." The police had arrived by this stage and witnessed Mr Thompson acting in a threatening and intimidatory manner. The officers tried to contain the situation by asking Mr Thompson to put the bottle down, which he failed to do. He, as I understand it, continued to pace up and down outside the club. The officer dealing with the incident used CS spray to try to disarm Mr Thompson. Mr Thompson, then, turned his back on the officers and proceeded to walk away, discarding the bottle. Mr Thompson was then arrested.
8. Mr Thompson informed me that he was not a regular drinker, and really does not have any interest in drinking. He explained that he is more interested in keeping fit. His current post as a lifeguard requires him to be alert and responsible at all times. He tells me that he does not take drugs and I have no evidence to suggest otherwise.
9. In interview, Mr Thompson explained his actions came about as a result of seeing the consequences of an unprovoked attack on one of his close friends and work mates. He did not try to dissociate himself from his behaviour and fully appreciates, with hindsight, that he over-reacted in a manner that was totally inappropriate in the circumstances. He acknowledges that his behaviour will have been of concern to those who witnessed it and those who ultimately had to deal with it.
10. Clearly, this is a serious matter and whilst he accepts that he could have responded in a more appropriate manner, his behaviour was, none the less, both intimidating and threatening. He regrets his action. His contrition is, I believe, genuine.

Offender Assessment

11. Mr Thompson informs me that he left school, aged 16 years, with 9 GCSEs. He then joined a workplace training scheme in Sports and Recreation at his local leisure Centre, obtaining NVQs, levels one and two, in both these areas. Following the completion of the training programme, he was offered and took up the part-time post of Leisure Assistant/ Lifeguard, remaining there for the following 12 months. He then moved to Greenwich Leisure Services where he was employed as a children's play-worker.
12. For the last three years he has been employed as a Lifeguard at the local swimming pool, recently being promoted to senior lifeguard, incorporating responsibilities for leading the shift and staff management. He works 8 hour shifts, starting at 6.30am or 2pm.
13. Before this matter occurred, he tells me that he had intended to join the Fire Service. In fact the following morning after this offence took place, he had intended to attend an Open Day at the local fire station, in order to look into this possibility further. I would think that this conviction might well hinder any future application he may make.
14. Mr Thompson resides with his father and younger sister. He tells me that his parents separated when he was a small child. He still remains in contact with his mother who lives locally. Mr Thompson then explained that two months ago approx. his father disclosed that he had lung cancer which the hospital had now informed him was untreatable. I get the impression that Mr Thompson, whilst being aware of the situation, seems somewhat overwhelmed by it and feels that both his father and his sister are having

to rely on him. He seems to have few people from whom he can get support when it comes to understanding and dealing with his emotional needs.

15. The defendant has a two year old son from a previous relationship. His former partner and child live in Greenwich, South London. Mr Thompson remains on excellent terms with his former partner and appears to play an active role as a father. He sees his son weekly, which includes staying overnight when his former partner travels abroad to work as a singer.
16. After tax his monthly income is £950. He contributes £41 to the household expenses and generally takes responsibility for the utility bills. He gives his ex-partner £100 per month towards the care of his son. He is paying off a bank loan at the rate of £174 per month. The rest of his income covers the costs of running a car, insurance, clothes and socialising.

Assessment of the risk of harm to the Public and the likelihood of further offending.

17. Although this is Mr. Thompson's first appearance in Court his over-reaction and subsequent behaviour is of concern. It is clear that he allowed himself to be driven by a variety of emotions that on this occasion clouded any rational or focused thinking, propelling him to display behaviour that was both intimidating and threatening. Having said that, I have assessed the risk of further offending as low to medium, which in my opinion can be reduced further by probation intervention. I would assess the risk of harm to the public as medium. Whilst no-one was injured, the situation might have been entirely different if his friend's assailant had been identified.

Conclusion

18. This, as I understand it is Mr Thompson's first offence. Throughout the interview Mr Thompson fully co-operated with me, presenting in a calm and reflective manner. There was no evidence to suggest that he had an anger management problem. I would suggest that he has some difficulty in dealing appropriately with his emotional responses to a situations. Whilst Mr Thompson did not try to use his father's condition to excuse his behaviour, I believe that it has indeed affected him more than he realises. I believe that he is genuine in his remorse. However, this is a serious matter and Mr Thompson is aware that all options, including custody, are open in dealing with the matter today.
19. The imposition of a custodial sentence will indeed punish Mr Thompson. It will also remove him from his family and the support both financial and emotional will be curtailed. It will also prevent him playing an active role as a father and in my view there is every possibility that he could lose his employment. It may also impinge on his school boy ambitions to enter the Fire Service.
20. I have assessed Mr Thompson for Community Punishment Order. Due to his pattern of variable rest days, I have found him unsuitable.

21. In considering a proposal to make to the Court today, I believe that a period of Probation Supervision on a Community Rehabilitation order will benefit Mr Thompson and further reduce the risk of him re-offending. The focus of supervision will be the following:-
    a) To examine this offence and enable Mr Thompson to develop more appropriate responses to situations in which he finds himself.
    b) To look at his own emotional needs. Enable Mr Thompson to identify these and provide appropriate support.
    c) This order to be supervised in line with National Standards.

B. Longley Probation Officer

Case 2

Defendant: Harshadry Bedi

Charge On 11th January 2002, stole £202 belonging to Quik –Bite (Restaurants) Ltd., contrary to Sect 1(1) of the Theft Act1968.

On 18th February 2002, stole £137 belonging to Quik –Bite (Restaurants) Ltd., contrary to Sect 1(1) of the Theft Act1968.

On 22nd February 2002, stole £640 belonging to Quik –Bite (Restaurants) Ltd., contrary to Sect 1(1) of the Theft Act1968.

First Appearance: 20th July 2002

Guilty Plea entered on: 20th July 2002, adjourned to 10th August for sentence, all options open.

Prosecution Facts: The defendant was employed by Quik-Bite, Wood Edge, as an Assistant Manager. One of his duties was to "cash-up" the tills when they were full or a member of staff finished a shift. Company policy requires that all the money is counted and put in bags, amounts and serial numbers being recorded in the cash deposit book.

The cash bags are placed in a safe through a one-way chute. This allows money to be put in but money cannot be removed without opening the main door of the safe. There are two keys for the safe, one held by the restaurant, the other by Securior, who empty the safe on a Monday and a Thursday.
On Monday 11th January, Securior came to collect the money and found that one of the bags was missing. When the records were checked, it was shown that it was one of the bags that the Defendant had recorded as deposited in the cash deposit register. The amount missing was £202.

When asked, Mr Bedi claimed that he must have accidentally left the cash bag on one side and that somebody had probably taken it. The defendant was given the benefit of the doubt and allowed to continue as Assistant Manager.

On Monday 18th February 2002, Securior again reported a cash bag missing. Once again the Defendant was recorded as being responsible for the deposit, in the sum of £137. Mr Bedi was challenged by the Manager but could give no explanation for the discrepancy other than to deny that he had taken the money.

Since 22nd February Mr Bedi failed to appear for work and a further cash loss of £640 has been discovered. The circumstances in this case are slightly different, arising from the way in which Quik-Bite obtains change from Securior. The normal method for obtaining change is to take money out of another safe and to deposit in the safe with the chute; when Securior come to collect the money they bring the change ordered by the restaurant and the money to cover this is already deposited in the safe. .

Mr Bedi had recorded an entry in the cash deposit book, removing £640 from the other safe and transferring it to the safe with the chute. When Securior attended the restaurant on 25th February, they found that the receipts were short by £640.

On Monday 19th April, the defendant unexpectedly attended Quik-Bite. The police were called and he was arrested, making no reply to caution.
At the police station, he was interviewed and denied taking the money. He claimed that the bags do not always go down the chute and someone must have taken the cash.

Previous convictions: None.

Mitigation: Mr Bedi is a married man of 26 years old. He has pleaded guilty and I would ask you to give him credit for his plea.

The offences committed cannot be described as sophisticated. There was really no prospect of Mr Bedi escaping detection after the initial incident in which he attempted to blame an unnamed member of the public. He did not put other members of staff under suspicion and the offences were committed within a relatively short period of time.

Although Mr Bedi was in a position of trust, he is not in a very senior post. The amounts stolen were comparatively small and you will note from para 1 & 2 of the report that it was to be used in a good cause and not simply to support a lavish lifestyle. If you are considering a custodial sentence, I would ask you to accept this as grounds for suspending any term of imprisonment.

In conclusion, Mr Bedi is extremely sorry for committing this offence. He is a hard working man and this offence is entirely out of character, caused by the pressure of personal circumstances. Mr Bedi would very much like the opportunity to remain at liberty so that he can recompense Quik-Bite for the loss incurred.

Defendant: Harshadry Bedi D.O.B. 15/11/76

Introduction

1. In preparation of this report, I have interviewed the defendant on one occasion at the probation office. I have had access to the case summary from the CPS and I am informed that Mr Bedi is of previous good character.

Offence Analysis

2. I understand that the defendant pleaded to three charges of theft from his employer at his first appearance at Court. At the time Mr Bedi was working as an Assistant manager although he had worked in a number of different stores for them since he started five years ago. He was, therefore, an experienced member of staff responsible for large amounts of money including a £2.5 million per annum turnover in his previous store. The circumstances surrounding the commission of the offence relate to MrBedi's attempt to provide money for his father to undergo an operation on his back. His father resides in India and required £2000 for the operation. Mr Bedi describes him as being in severe pain and in danger of becoming permanently disabled and he felt duty bound to provide the money. Particularly as his father had contributed significantly to his university fees.
3. Mr Bedi had made numerous attempts to secure the money through legitimate means. He approached friends, family and also his bank and other loan companies, but was refused, largely because he had taken on a mortgage and a loan for housing repairs only a few months ago and it was considered that he was over-stretching himself. It was while he was making these applications that it first occurred to him to take the money from his company. He states that he did not view it as stealing, believing that it was an "unofficial loan" that he would repay as he was hopeful that eventually one of his loan applications would be successful. The fact that there were three separate occasions when money was taken, indicates a degree of premeditation and pre-planning. However, Mr Bedi said he had signed for the money, knowing that the loss would be attributable to himself and that there was no way this could be a successful attempt at dishonesty. He emphasises that this was not his ultimate intention.
4. In the event Mr Bedi's father returned the £1000 which had been forwarded because he had reached a special agreement with the consultant who agreed to perform the operation on their equivalent of the NHS. By this time Mr Bedi had been arrested for this offence and foolishly he did not return the money at this point. He said he was very frightened by the process and did not think clearly about the correct course of action. Apparently with no income, Mr Bedi used the money to pay his own mortgage. Mr Bedi did not, of course, need to give details of the return of the money as without his frankness it would not have been queried. This is perhaps, a strong indication that he is not normally a person with a deceptive nature although he fully recognises that he made a grave error of judgement which he bitterly regrets. Mr Bedi outlined in the strongest possible terms his desire to repay his employers in full, all the money owed as soon as possible. He is ashamed of his actions and now realises the seriousness of the offences.

Offender Assessment

5. Born in India, the eldest of four children, Mr Bedi recalls a happy and secure childhood, although his father was something of a disciplinarian. He achieved academic success, six GCSE's (including 3 'A'grades) and at sixteen years of age he went on to study motor mechanics. 18 months later, having passed his exam with three credits, Mr Bedi was unexpectedly offered a university scholarship to study in London. In August 1996, he arrived in this country where he completed two A-levels [grade A] before going onto study a three year degree course in mechanical engineering where the £6000 course fees were paid in advance. As he and his father had to pay his general living expenses Mr Bedi, to assist, immediately found part-time employment.

6. From April 1996, he was working for the Quik-bite co on a night shift [where he met his wife], and once he had finished his degree in 1999 he was interviewed for a managerial position with the firm. He was initially placed as a second assistant manager but was quickly promoted again as recognition of his progress. Mr Bedi said that in 2000, he was voted 'Best manager of the Year' for his group of about 25 restaurants. He said he enjoyed a good reputation and there was never any previous discrepancy with his financial handling. Generally, it was a job he loved. Some problems began to emerge in January 2002 when he was transferred to the Woodly Green branch, not an area he wanted to move to, and he was aware that others were being promoted ahead of him. Although dissatisfied with his situation Mr Bedi states that this in no way influenced his decision to commit this offence.
7. Mr Bedi lives in a two- bedroom maisonette, purchased with a mortgage in August 2001. He is suspended from Quik-Bite and obviously expects to be formally dismissed once he has been sentenced for these offences. He remained unemployed for four months [when he began to accrue arrears and debts] but has now secured employment as a labourer in the construction industry working four days a week, for which he receives £800 a month net. His wife is currently undertaking a degree course in Interior Design, however, she is due to take up part-time employment in August which will provide an additional £500 per month towards the family budget He has the normal household expenses and a mortgage of £498 per month. His brother, a student, working part-time, lives with them and contributes to their family budget. Mr Bedi has debts as follows: TV £75, Visa bill of £152 and a TSB loan of £650

Assessment of risk of harm to the Public and the likelihood of further offending

8. Mr Bedi is of previous good character. I have no doubt that he genuinely regrets his actions. He commented to me that he has 'destroyed' his own career largely through his failure to think through the consequences of his own actions and to realise the seriousness of such an offence. The personal consequences will have far reaching, long- term implications and I consider that he is unlikely to re-offend in this way in the future. There is nothing to suggest that he represents any risk to the public.

Conclusion

9. Mr Bedi understands that the Court is considering all options in sentencing him today, which includes the possibility of custody for this serious breach of trust. The prospect is anxiety provoking and because he has no experience of the criminal justice system, he cannot even imagine how he would cope with such a sentence except to say that it would make him 'sick'. He is concerned about his wife and brother and the financial implications, likely to result in the loss of their home. My impression of Mr Bedi is that he of an industrious young man who worked hard to improve his life and until the commission of this present offence, could be described as honest and responsible. He has lost his good character, something he says he will regret for the rest of his life because he was proud to be thought of as trustworthy. Already the implications are apparent in that he has gone from a managerial position to that of a labourer.
10. It is most regrettable that Mr Bedi did not take the responsible position in returning the money to his employers once his father had returned it to him. I can only conclude that, having made the original gross error of judgement and following his fear of arrest, he was unable to think clearly about how to improve his position. What is apparent however is his determination to repay the money as soon as possible and he offers £50 per month which is as much as he can realistically afford at present, to be increased as his prospects improve. I would suggest that he is someone who could remain in the community without risk of further offending. In view of his previous good character and excellent work record, I would ask the court to consider alternatives to custody. His home has been visited and a curfew order could be imposed and operated. Mr Bedi is assessed as suitable for a Community rehabilitation order or a Community Punishment order, either on their own or in combination. There is community work available and I think this will be a more effective disposal than a Rehabilitation order. This coupled with an order for compensation would allow Mr Bedi to make reparation by doing unpaid work for the community, which would act as a reminder of his actions while making up the loss to his employer.

A.N.Other Probation Officer

Case 3

Defendant: Peter Norris

Charge; On the 22nd of March 2000 did drive a motor vehicle, namely a VW Polo, registration H 374 VLK, on New Town High Road after consuming so much alcohol that the proportion of it in your breath exceeded the prescribed limit, contrary to Sect 5[1][a] of the RTA 1988.

First appearance: 20.4.2000
Guilty plea entered on the same date, interim disqualification imposed. Alcohol reading 110 in breath, adjourned to 18.5.2000 for reports.

Prosecution facts: At about 12.45 p.m. on Friday 11th April, Mr Norris was driving his VW, North in the High Road. He took a slip road off into Coronation Drive, leading to the traffic island at the junction of Princess way and King's Drive. On his approach to the Give Way line at the traffic island, Norris' vehicle collided with the vehicle ahead of his, causing it to be shunted into the one in front. Damage was caused to all three cars but no-one was injured.

The police were summoned and Sgt 278 Edmonds attended the scene. On his arrival he noticed that the accused, Mr Norris, was being detained by a member of the public. The officer approached Mr Norris and asked him if he had been the driver of the VW, he replied "yes". The officer noticed that the defendant was having to lean on nearby railings for support and as he approached he noticed that his breath smelt strongly of alcohol.

The officer cautioned Mr Norris and asked him to take a roadside breath test which registered a positive result. Mr Norris was asked if he had been drinking and he replied that he had only had a couple of drinks with some friends and he was terribly sorry but he had no idea that he was anywhere near the limit. Mr Norris was arrested and conveyed to Highly Police Station where the Book 111 procedure was completed.

At the station he provided two samples of breath on the Lion Intoximeter, the lower reading of which was 110micrognammes of alcohol in 100 millilitres of breath. He was subsequently charged and bailed to appear before the Court. Mr Norris co-operated fully throughout.

Previous convictions: speeding in 1998, camera offence 37 mph in a 30mph zone
Mitigation: Mr Norris' representative explained that the defendant is a young man of 26 years who has not lived in London very long. He lives alone in rented accommodation and has recently commenced employment as a computer technician with a local firm, having previously worked abroad. He was not familiar with the road layout and is profusely embarrassed to find himself facing a charge of excess alcohol today.
On the night in question, he and a few work colleagues went out for a meal after working late on a special assignment. He remembers having a couple beers before the meal and some drinks with his food. He does not believe that he drank excessively but accepts that his judgement was inaccurate and he should not have driven home afterwards. He is usually very strict with himself in relation to drinking and driving. However, the fact that he was trying to get to know new friends and he wasn't familiar with the transport facilities in the area appears to have clouded his judgement in choosing to drive home when the group broke up. He bitterly regrets this decision and apologises to the Court.
While he accepts that the reading is more than twice the permitted limit, he hopes that you will feel able to deal with him leniently today. He knows that some disqualification is inevitable but asks that you keep it to a minimum. He lives in an area not well served by public transport so he will suffer considerable inconvenience as a result of being disqualified from driving today. He is able to pay a fine.

Defendant: Peter Norris
D.O.B. 02/04 /74

Introduction

1. The report was prepared following an interview with Mr Norris at the probation office. I have seen the facts presented by the CPS and am aware that the alcohol reading was 110 in breath. It is my understanding that Mr Norris has a previous speeding conviction for which he paid a fine of £50 and received 3 penalty points.

Offence analysis

2. Mr Norris explained to me that he had worked late on the night of the offence and he with four colleagues decided to go out and eat together to celebrate completing a special project. He had only grabbed a sandwich for lunch and he was keen to accompany his new colleagues. They went to a local restaurant and had a couple of beers before sitting down to eat. They continued drinking with were their meal and remained in the Bar area until about midnight. He concedes that some of the group was drinking spirits and he may have joined in "just to be sociable".

3. The group broke up on leaving the premises and Mr Norris returned to his car for the journey home. He says that he felt fine and started off confidently. As he is new to the area, he was not familiar with all the road turnings and when he missed his junction he had to make a detour that took him into roads he had nor travelled before. He feels that it was this distraction in trying to find the correct route that led him to fail to stop appropriately when the car in front braked, leading to the collision that alerted the police.

4. He insists that he was not making any attempt to avoid responsibility but one of the drivers was so irate at the damage to his car that he grabbed hold of him and insisted on calling the police.

5. Mr Norris was totally co-operative throughout, both at the road side and in the police station. He has been driving since he was seventeen and apart from the speeding conviction in 1997, he has no other driving offences. He has no criminal convictions.

Offender Assessment

6. Mr Norris is a young man of 26 years of age. He works as a computer technician and recently started employment with Janes and Whitely in the IT dept. Before that he had been abroad, mostly on temporary contracts and prior to that until 1997, he lived with his family in Newcastle. He is the third of five brothers, completed full secondary education and has had a variety of jobs, mostly to do with computers, ever since. He currently lives in privately rented accommodation that he shares with a friend.

7. He is not usually a heavy drinker and prefers not to drink on nights when he knows he is going to want to drive. On this occasion, he had no intention of drinking when he drove to work in the morning. However, he felt that he wanted to fit in with his new colleagues and so agreed to go for a meal and joined in the activity wholeheartedly. When they all broke up he did not even consider how else he might get home. He admits that he has been rather lonely since he came to London and was, perhaps, tempted too readily to try to fit in when he should have shown more control.

8. He now bitterly regrets his stupidity and is very embarrassed to be before the court. He is aware that the Court will consider that the very high level of breath alcohol constitutes a serious offence that could attract a community penalty or even custody.

9. He tells me that he does not believe that he has an 'alcohol problem' drinking only about the same as his friends on most occasions. As a younger man, he was inclined to have nights out that ended in serious drinking but he says he is no longer in contact with these acquaintances. Losing the use of the car, as he will inevitably be disqualified, will be a heavy punishment for him in itself. In addition, he had to take out a loan to pay for it and will lose out heavily if forced to sell. I have considered whether he would benefit from participation in an alcohol focused rehabilitation programme. While he does not acknowledge an alcohol problem, he has not made responsible judgements in this respect. I believe that he is genuine in his remorse but may not yet have developed a totally mature attitude in respect of his alcohol consumption.

10. He has been assessed as suitable to perform work in the Community.

11. The Court may feel able to consider dealing with this offence by way of a fine. Mr Norris earns £250 a week, over-time is sometimes available. From this, he pays his share of the rent at £120 pw and all the

usual living expenses and repayment of his loan at £100 per month. He has no savings. His travel costs by public transport will now amount to £30 pw.

Assessment of the risk of harm to the Public and the likelihood of further offending

12. Although this is Mr Norris' second motoring offence, I do not believe that he is a persistent offender. He has been severely shocked by the experience of appearing in Court and I believe he has learnt the lesson that drinking and driving are incompatible. He tells me that he does intend to rely on his own judgement of an acceptable quantity of alcohol and assures me that, in future, he will not be using the car when he knows he has been drinking. He is relieved that there was no personal injury on this occasion but can readily accept the potential for harm that his actions might have had. I would assess him as a low risk to public safety if he maintains this resolve.

Conclusion

13. While Mr Norris readily accepts that he has done wrong and deserves to be punished, I think he has learnt a lesson from his experience.

14. If the court feels that Mr Norris requires further punishment, a short Community Punishment, say 40 hours, would serve to underline society's disapproval of drink/drive offences and reinforce the message for Mr Norris. I can confirm that work is available.

15. Mr Norris has had bouts of serious drinking in the past. While I think that for the most part, he has learnt to control his intake, a short period of community supervision, participating in an alcohol education problem may well be useful to stiffen his resolve and assist him to adjust to living in a new community. This is acknowledged to be a very high reading and the gap between his intention and his activity may need some addressing.

16. On balance, Mr Norris will suffer considerable inconvenience as result of his offending, both financially and in his travelling arrangements. If the court feels able to take a lenient view, I consider that he would be able to pay a fine with modest weekly repayments.

G. Smith
Probation Officer

Appendix 5

'Reasons' forms for each case

Appendix 5

Stating the Reasons for the Sentence

1. We are dealing with an offence of: Public disorder contrary to Sect3 (1) of 1986 Act by John Thompson

2. We have considered the impact on the victim which was
.....

3 We have taken the following aggravating features of the offence:
.....

.....

4 And the following mitigating features of the offence:

.....

.....

5 It is not necessary to consider whether the offences were committed on bail or racially aggravated.

6 No previous record

7 We have taken into account the following matters in mitigation:

.....

.....

8 We have taken into account that you pleaded guilty and reduced the sentence accordingly.

9 And, as a result, we have decided that the most appropriate sentence for you is:

.....

10 (*where relevant*) We have decided <u>not</u> to award compensation in this case because:
.....

What was your sentencing aim in deciding to impose this sentence? .....

.....

On a scale of 1 –10, with 1 being lowest, how serious do you consider this offence to be?.....

Your name.....

Stating the Reasons for the Sentence

1 We are dealing with the offences of: Theft x3 by Harshadry Bedi

2 We have considered the impact on the victim which was

.....

3 We have taken the following aggravating features of the offence:
.....

.....

4 And the following mitigating features of the offence:
.....

.....

5 It is not necessary to consider whether the offences were committed on bail or racially aggravated.

6 No previous record

7 We have taken into account the following matters in mitigation:

.....

.....

8 We have taken into account that you pleaded guilty and reduced the sentence accordingly.

9 And, as a result, we have decided that the most appropriate sentence for you is:

.....

10 (*where relevant*) We have decided <u>not</u> to award compensation in this case because:
.....

What was your sentencing aim in deciding to impose this sentence?
.....

On a scale of 1-10, with 1 being lowest, how serious do you consider this offence to be ?.....

Your Name .....

Stating the Reasons for the Sentence

1 We are dealing with an offence of: Driving a motor vehicle having drunk Excess alcohol by Peter Norris

2 We have considered the impact on the victim which was

.....

3 We have taken the following aggravating features of the offence:

.....

.....

4 And the following mitigating features of the offence:

.....

.....

5 It is not necessary to consider whether the offences were committed on bail or racially aggravated.

6 Previous convictions: Speeding offence in 1998

7 We have taken into account the following matters in mitigation:

.....

.....

8 We have taken into account that you pleaded guilty and reduced the sentence accordingly.

9 And, as a result, we have decided that the most appropriate sentence for you is:

.....

10 (*where relevant*) We have decided <u>not</u> to award compensation in this case because:

.....

What was your sentencing aim in deciding to impose this sentence? .....

.....

On a scale of 1-10, with 1 being lowest, how serious do you consider this offence to be?.....

Your Name .....

Appendix 6

Relevant pages from the Guidelines for the three offences used as case studies, reproduced from the Magistrates' Court Sentencing Guidelines, implementation date 1 Sept 2000

Public Order Act 1986 s.3 Triable either way – see Mode of Trial Guidelines Penalty: Level 5 and/or 6 months	**Affray**

CONSIDER THE SERIOUSNESS OF THE OFFENCE
(INCLUDING THE IMPACT ON THE VICTIM)

IS DISCHARGE OR FINE APPROPRIATE?

IS IT SERIOUS ENOUGH FOR A COMMUNITY PENALTY?

IS IT SO SERIOUS THAT ONLY CUSTODY IS APPROPRIATE?

GUIDELINE: → ARE MAGISTRATES' SENTENCING POWERS APPROPRIATE?

⊕ CONSIDER AGGRAVATING AND MITIGATING FACTORS ⊖

for example	for example
Busy public place	Offender acting alone
Group action	Provocation
Injuries caused	Did not start the trouble
People actually put in fear	Stopped as soon as the police arrived
Vulnerable victim(s)	*This list is not exhaustive*
This list is not exhaustive	

If racially aggravated, or offender is on bail, this offence is more serious

If offender has previous convictions, their relevance and any failure to respond to previous sentences must be considered – they may increase the seriousness

TAKE A PRELIMINARY VIEW OF SERIOUSNESS, THEN CONSIDER WHETHER THE CASE SHOULD BE COMMITTED FOR SENTENCE, THEN CONSIDER OFFENDER MITIGATION

for example

- Age, health (physical or mental)
- Co-operation with police
- Voluntary compensation
- Evidence of genuine remorse

CONSIDER COMMITTAL OR YOUR SENTENCE

Compare it with the suggested guideline level of sentence and reconsider your reasons carefully if you have chosen a sentence at a different level. Consider a discount for a timely guilty plea.

DECIDE YOUR SENTENCE

NB. COMPENSATION – Give reasons if not awarding compensation

Remember: These are GUIDELINES only

Appendix 6

Theft in Breach of Trust

Theft Act 1968 s.1
Triable either way – see Mode of Trial Guidelines
Penalty: Level 5 and/or 6 months

CONSIDER THE SERIOUSNESS OF THE OFFENCE
(INCLUDING THE IMPACT ON THE VICTIM)

IS DISCHARGE OR FINE APPROPRIATE?
IS IT SERIOUS ENOUGH FOR A COMMUNITY PENALTY?
IS IT SO SERIOUS THAT ONLY CUSTODY IS APPROPRIATE?
GUIDELINE: → ARE MAGISTRATES' SENTENCING POWERS APPROPRIATE?

CONSIDER AGGRAVATING AND MITIGATING FACTORS

for example
- Casting suspicion on others
- Committed over a period
- High value
- Organised team
- Planned
- Senior employee
- Sophisticated
- Vulnerable victim

This list is not exhaustive

for example
- Impulsive action
- Low value
- Previous inconsistent attitude by employer
- Single item
- Unsupported junior

This list is not exhaustive

If racially aggravated, or offender is on bail, this offence is more serious
If offender has previous convictions, their relevance and any failure to respond to previous sentences must be considered – they may increase the seriousness

TAKE A PRELIMINARY VIEW OF SERIOUSNESS, THEN CONSIDER WHETHER THE CASE SHOULD BE COMMITTED FOR SENTENCE, THEN CONSIDER OFFENDER MITIGATION

for example
- Age, health (physical or mental)
- Co-operation with police
- Voluntary compensation
- Evidence of genuine remorse

CONSIDER COMMITTAL OR YOUR SENTENCE

Compare it with the suggested guideline level of sentence and reconsider your reasons carefully if you have chosen a sentence at a different level. Consider a discount for a timely guilty plea.

DECIDE YOUR SENTENCE

NB. COMPENSATION – Give reasons if not awarding compensation

Remember: These are GUIDELINES only

Appendix 6

Excess Alcohol (Drive or attempt to drive)

s.5(1)(a) Road Traffic Act 1988
Penalty: Level 5 and/or 6 months
Triable only summarily
Must endorse and disqualify at least 12 months: disqualify at least 36 months for a further offence within 10 years

CONSIDER THE SERIOUSNESS OF THE OFFENCE

THE LEVEL OF SERIOUSNESS AND GUIDELINE SENTENCE ARE RELATED TO THE BREATH/BLOOD/URINE LEVEL

⊕ CONSIDER AGGRAVATING AND MITIGATING FACTORS ⊖

for example

- Ability to drive seriously impaired
- Caused injury/fear/damage
- Police chase
- Evidence of nature of the driving
- Type of vehicle, eg. carrying passengers for reward/large goods vehicle
- High reading (and in combination with above)
- *This list is not exhaustive*

for example

- Emergency
- Moving a vehicle a very short distance
- Spiked drinks
- *This list is not exhaustive*

If offender is on bail, this offence is more serious

If offender has previous convictions, their relevance and any failure to respond to previous sentences must be considered – they may increase the seriousness

TAKE A PRELIMINARY VIEW OF SERIOUSNESS, THEN CONSIDER OFFENDER MITIGATION

for example

- Co-operation with police

CONSIDER YOUR SENTENCE

Offer a rehabilitation course.

Compare your decision with the suggested guideline level of sentence and reconsider your reasons carefully if you have chosen a sentence at a different level.

Consider a discount for a timely guilty plea.

DECIDE YOUR SENTENCE

BREATH	BLOOD	URINE	DISQUALIFY NOT LESS THAN	GUIDELINE
36-55	80-125	107-170	12 months	B
56-70	126-160	171-214	18 months	C
71-85	161-195	215-260	24 months	C
86-100	196-229	261-308	24 months	CONSIDER COMMUNITY PENALTY
101-115	230-264	309-354	30 months	
116-130	265-300	355-400	30 months	CONSIDER CUSTODY
131+	301+	401+	36 months	

Remember: These are GUIDELINES only

Appendix 6

Appendix 7

Protocol for Study 2

Appendix 7

Magistrate protocol

Participants will be told that I am gathering material as part of my research towards a PhD at Middlesex University.

Magistrates will be advised that a questionnaire study has already been undertaken with several of their colleagues from their own and five other benches. On the basis of the information contained therein, analysis has generated a few preliminary ideas about how individual magistrates undertake sentencing decisions.

The purpose of the current interview is to explore these ideas in more depth. These interviews will be also analysed so that the results may inform the research overall. The output of the work will form the body of a thesis submission. There may be other publications sought, focusing on aspects of the work.

Participation is voluntary, all information provided will be confidential and anonymity will be ensured in any published material. [This will be achieved by coding the interviews and careful storage of transcripts.] With their permission, the interviews will be taped for fullness and additional accuracy.

Their agreement to participate will be taken as acknowledgement and agreement to these conditions. They will be advised that they have the right to withdraw without penalty at any stage.

Appendix 8

The semi-scripted interview for Study 2

Appendix 8

Questionnaire for semi-scripted interview Study 2

Name: ..... Bench: ..... Year of appointment.....

Panel membership..... Occupational experience.....

1.What is a "good" sentencing decision for you?

2.When making a sentencing decision, do you distinguish effective decision making and/ accurate decision making?

3.How do the three concepts, good, effective and accurate sentencing, come together for you?

4.What personal qualities assist people to make good sentencing decisions?

5.How would you describe your experience of training for making sentencing decisions?

6.How do you feel about the JSB sentencing model? In practice, how easy is it to apply the structure for considering aggravation, mitigation etc.? How do you actually use the advice to "weight features appropriately"?

7.Is the structure equally useful for sentencing across the range of all the different types of offences – motoring to serious personal violence?

8.Do you apply this structure, in the way suggested, on each sentencing occasion?

9.Do you have colleagues who differ in the way in which they apply this structure or the extent to which they use it?

10.Are there any shortcuts that you ever employ?

11.How do you tend to use a PSR, particularly the comments/suggestions regarding a suitable sentence?

12.Where the seriousness of the offence appears to merit a wholly different level of punishment to that which the offender's personal mitigation suggests, what do you do? *[might suggest some cases of carrying a knife, entry point custody, as an example that they may have come across]*

13.For all offences, there will be a spectrum of perfectly justifiable sentences for a particular defendant, depending on how the individual magistrate "reads" the information. Where would you place yourself, typically, on that spectrum relative to average?

Appendix 8 (cont.)

14.Do you have colleagues who you anticipate will be more or less harsh than yourself, given the same information?

15.Does that affect the way in which you discuss the case with such a colleague?

16.Can you give a recent example of the way in which differing opinions were reconciled?

17.Did/does your employment/voluntary work/life experience provide any skills that you regularly use in making a sentencing decision?

18.Has your approach altered over the years?

19.As a group of three, should all magistrates acting as a sentencing bench, have the same input?

20.*If yes* How well does that happen in practice? How do you ensure that your contribution is heard?

If no How might they differ? How does that affect the process?

21.If you Chair regularly, do you perceive any difference in the contribution you make to a sentencing decision in *that* role compared to that made as a winger?

22.*If yes* - How does that affect the final decision?

23.As chair, how do you involve all three magistrates in the final decision? Is there any difference when the decision is made by colleagues of considerably differing experience?

24.When you sit as a winger, is your contribution different in any way, especially in relation to the final decision?

25.What contribution do you feel the Legal Advisor makes to the process?

26.Can you think of a recent "difficult" sentencing decision and tell me the way in which the problem/s were resolved?

27.What personal qualities in your colleagues help to make a good sentencing decision maker?

28.Which are least easy to accommodate?

29.How do you think most people make sentencing decisions?

Thank you for your assistance. Is there anything else you consider might be relevant to the topics we have been discussing or are there any questions you would like to ask me?

Appendix 9a

Example of a completed interview transcript for participant Helen in Study 2

Appendix 9a

Name: Helen... F..... Bench:...Y.....Year of appointment...1992.....

Panel membership...family/adult..... Occupational experience 15years wrote law reports, now freelance peripatetic teaching of art history.....

1.*What is a "good" sentencing decision for you?*
One that you have thought of all the things in relation to the defendant and the offence and you have gone through it in a structured way and we feel happy with the result.

2.*When making a sentencing decision, do you distinguish effective decision making and/ accurate decision making?*
I do [associate the term] effective decisions in that it might have the desired result on the defendant's behaviour. One would like to think that it might have an effect on the defendant's future behaviour but one must also bear in mind the victim of the offence. *And accurate does that feature?* I hadn't thought of that but I suppose accurate is when you reflect the guidelines but also taking into account the personal circumstances of the offence and the defendant

3.*How do the three concepts, good, effective and accurate sentencing, come together for you?*
Hopefully yes, not always. They don't **always** come together but that would be an aim. Yes Effective and accurate.

4.*What personal qualities assist people to make good sentencing decisions?*
Being logical, being able to sift and ascertain what is actually relevant to the offence because there can often be a lot of surrounding information that isn't relevant to the particular offence that is before you. I think an idea as to the motivation of the defendant and the effect of a sentence on the defendant and being able to correlate different sources of information...what defence counsel might say or the defendant if he is not represented, what the probation say and of course the prosecution and try to balance all these sources of information.

5.*How would you describe your experience of training for making sentencing decisions?*
It's obviously got better over the years. I think because I've been a magistrate for quite some time when we have tradditional sentencing exercises, they're often very familiar now, to a certain extent quite repetitive now. *Do you feel you have had training – specifically on sentencing?* Yes there have been several workshops that have just been on sentencing, I think maybe three or four every year. *When you say workshops, are you thinking of the case studies with probation or the judge?* The training sessions that we have had at the court house – the two hour sessions based on sentencing – although often, I think that the documents we bring home with the structured decision making set out with the boxes and arrows is what you should consider and alot of the training exercises just reiterate what is written down.

6.*How do you feel about the JSB sentencing model? In practice, how easy is it to apply the structure for considering aggravation, mitigation etc.?*
Yes I find that very useful and when retiring, if I'm in the chair, I don't have the model in front of me but I would go through it in that way, asking the most junior first for their views. Usually I would set out what we need to consider first, in general format, and then I would go through that model. *But you say you **wouldn't** normally have the book open in*

front of you? No …oh I would if was a particular offence then it might list the aggravating or mitigating circumstances and then I would look at the book for that. *But with one you are familiar with you have internalised ...* The general idea of what you do the general structure of looking at the defendant, the mitigating or aggravating features and then the offence, I know that, but for the individual offence, we would invariably get the book out.

How do you actually use the advice to "weight features appropriately"?
Well that depends on..I think that comes into the circumstances of the case. *Gives an example of the quantity and type of drug affecting the degree of aggravation in a possession case.* That would be weighed very heavily, so we obviously weighted that as **substantial** aggravation. *Offered an example of 3xaggravating and 1xmitigating and asked if there is any sense of "scoring off" against each other.* Well it depends what they are. I think some mitigating factors will be ….it depends on the individual mitigating factor and the **degree** [to which]..how much it would mitigate or not. But yes there would be a certain balance. But I think you have to take each item on its own and then balance to a certain extent depending on how important a mitigating or aggravating feature is. *And is that judgement from your personal experience or is there any other way of operating this balancing effect?* Well, a) of course, it wouldn't just be me and I always **try** to say my piece at the end, if I'm in the chair. It must be to a certain extent. We all bring our own personal experience and our experience on the bench and I suppose common sense as well.

7.*Is the structure equally useful for sentencing across the range of all the different types of offences – motoring to serious personal violence?*
Ehhm…I'm not sure about that. I'm not 100% sure it's as important for…although having said that, most of the aggravating/mitigating features have been carefully thought for each individual offence. *Pressed to identify which type of offence less important. Responds that there is a misunderstanding.* I thought you were referring to itemising for each individual offence. *No ..can the model be used across types of offence?* Probably less so for something like motoring, I would have thought and probably more useful for physical violence, criminal damage. *Any difference in terms of usefulness whether the case is dealt with in court or in the retiring room?* Yes because if we retire, you can spend longer on it, obviously, there's a slightly more relaxed atmosphere and I always personally feel that unless everything is quite clear cut, and we don't need to discuss, I would always retire anyway. But when it's that's decided on the bench, it's a much quicker decision with less opportunity for discussion. So unless it's quite clear cut, we would retire and then the model would come into it's own. I do actually on the bench, when/if I am in the chair, I do always gather the three of us together would say well look we've got to look at these elements. But for the quickness of decision depends not so much on the role model, people have decided quite clearly what the decision is but the role model is valid on the bench, definitely.

8.*Do you apply this structure, in the way suggested, on each sentencing occasion?*
I **think** so. I've got a feeling I possibly apply it more than most people because it's a logical way of thinking for me so I do use it.

9.*Do you have colleagues who differ in the way in which they apply this structure or the extent to which they use it?*
Yes, they do a lot of shorthand. They don't always divide the defendant and the offence and I think you should divide the two up and check whether there are pluses and minuses for both. I think it's a two part decision, looking at the defendant and the offence and then

coming to a conclusion, having considered both elements. Sometimes, I'm not sure, I think they've confused the two together.

10.*Are there any shortcuts that you ever employ?*
Not usually, I don't think so. *What about other people, you used the word shorthand but what you described was probably a poor understanding of what they should be doing?* Yes shortcut is not considering the elements as I logically like to consider them. It doesn't necessarily mean that I spend a lot of time and I don't feel that I **waste** time. I think it's actually a quicker way of doing it because you focus on what you need to focus on and don't get side-tracked into things that aren't relevant. I don't think it actually takes longer. *But where you see others taking short-cuts it tends to be of the sort of generalisation that you described?* Yes and cutting out considering things.

11.*How do you tend to use a PSR, particularly the comments/suggestions regarding a suitable sentence?*
Always **consider** them, especially in the light of a well -written report. On the whole, quite often they're very valid and if...well we'd **still** consider the issues. We'd look at the things we need to look at and look at whether we found that that was a suitable sentence and if it is a suitable sentence we'd go along with it. We'd just go into court and say yes we go along with the recommendation. *But you feel that you are looking at it quite independently, over-persuaded by the recommendation?* No we would have to look at what we need to look at but **quite often** it's a very sensible decision but we would obviously consider whether they were suitable for community service and all these other issues. Having decided that it might be appropriate it also depends on whether they're suitable or not.
So no temptation to go to the back page and see what's recommended?
No I've never done that, never even **thought** of doing that actually, no.

12.*Where the seriousness of the offence appears to merit a wholly different level of punishment to that which the offender's personal mitigation suggests, what do you do? [might suggest some cases of carrying a knife, entry point custody, as an example that they may have come across]*
Well if the offence itself, bearing in mind the seriousness of the offence, perhaps the frequency of the offence, the effect on the victim if there is one, the offence itself is a very important element of the decision making process. And if it's serious enough to warrant a particular... If it's something like shoplifting which on it's own might not seem to be very important but bearing in mind that some are done in a repeated way with intention and bearing in mind that some other sentences may have been tried and not worked, then you might have to go down the line of something more serious. *Prompted on bladed instument.* Yes, I've very rarely done it as well [put someone into custody for this offence]. *How do we get down to a fine or community penalty?* I've done quite a few recently and we have gone **down**, normally to a community penalty but it is viewed as a serious offence. To go down one stage is one thing but to start dropping down to a fine is a long way down but there **might** be circumstances surrounding the offence that might warrant that but there would have to be very substantial mitigation to go down from a guideline of custody, which is very rarely used, to go down from that to a fine, but it **has** happened. I do recall one or two cases where it has dropped right down but they've been very exceptional circumstances.

13.*For all offences, there will be a spectrum of perfectly justifiable sentences for a particular defendant, depending on how the individual magistrate "reads" the information. Where would you place yourself, typically, on that spectrum relative to average?*
More towards lenient, I think.

14.*Do you have colleagues who you anticipate will be more or less harsh than yourself, given the same information?*
Possibly more harsh, although when it comes to fines …yes **and** with fines because several times, people have said "isn't that rather low?" Like motoring, I look at the registration of the car and don't take an average income, as perhaps we are meant to [in the absence of the defendant], I take circumstances ..[into account]. It's better to have a lower fine, even if you have no information about their financial circumstances, you can tell from the registration/model of the car, perhaps, that they are of low income and there's no point in fixing a fine that you have no prospect of getting in.

15.*Does that affect the way in which you discuss the case with such a colleague?*
When it comes to things like fines, I quite often say that **I** think it is a good idea to do this, if you've got no information, looking at the registration and the model, "What's your view?" *So you try to set a **tone** perhaps?* Yes and when it's a sort of regular thing like maybe prostitution I might say do you have a view, I think it's normally £100 or do you want to make it lower? And we get a general idea at the beginning before we go in but it would be a consensus. *Do you have any sense of sense of anticipating harshness and going more lenient than usual to end up at a satisfactory compromise?* No I've not done that, no

16.*Can you give a recent example of the way in which differing opinions were reconciled?*
Well if we are on the bench, I would ask my colleagues first. If they have different views and I have a view that coincides with one of them, I would say that actually I would go along the lies of A and I would mention this to B well I actually agree with A so that's a majority of the bench. If we had a view from the bench that I thought was from **my** point of view inappropriate, I might retire. We would discuss it and then, if that's still the majority view, then and this has actually happened, then that's the majority view because I'm only one of three. But if I felt that it was something that was going along lines that was completely **against** the guidelines but two of my colleagues wanted to do it, we would retire and I would probably, if I felt appropriate, the clerk to join us. But if at the end of the discussion that was still the view, then that's the majority view. *Does the structured decision making assist in those cases?* Yes, yes it would. It would definitely because for me, we would look at the things that **I** felt were relevant and if, having gone through that, it was still the decision…because I wouldn't have this concern unless it was something that I felt was very unusual decision. *Describes a particular example of such a discussion.*

17.*Did/does your employment/voluntary work/life experience provide any skills that you regularly use in making a sentencing decision?*
Well usually it's because it's because I'm a lawyer, I was trained as a lawyer. I read for the Bar so I suppose I do have a logical thought process and I used to write law reports which means you have to sift through a lot of information, get to the nub of something, ascertain important facts then ascertain what was determined in a judgement. So they are skills that are useful and I suppose in my teaching, it's the other way round. Public

speaking, and I suppose the public speaking I've done as a JP probably helped me with teaching.

18.*Has your approach altered over the years? Either in the way you arrive at a decision or the leniency /harshness of the decision?*
I think I am more aware of not imposing fines that have no likelihood of being paid, but there again, things like no insurance, paying for insurance is very expensive and you don't want people to think it's an easier option. Of course, they do get a criminal record and when they do insure it costs them a lot of money so there are all these other issues.
And the way that you make the decision as the JSB model as such was not articulated in the same way when you were first appointed? No that's true. I suppose not but I have used this decision making model for a very long time

19.*As a group of three, should all magistrates acting as a sentencing bench, have the same input?*
I hope so, especially when one retires. I'm very careful to ..I will set out what I think, if I'm sitting in the chair, what **I** think we need to be looking at in general terms, if it's the elements that we need to make an offence, the elements we need to make a decision on and then as far as sentence is concerned what we need to consider. But then I leave it...I try not to make a judgement for myself, I leave it open for the other two members to say what **they** have to say and then I will bring in my thoughts at the end, although it'll be probably

first on the defendant, I'll divide it up and bring in my views after each of my two wingers have made their points on the particular element that we've been considering. Then we'll go through. I won't just talk at the very end.

20.*If yes How well does that happen in practice? How do you ensure that your contribution is heard? What sort of techniques do you use to make sure everyone is heard?*
Oh well we just sit down together, or on the Bench, if I'm sitting actually in court I'll just put my chair back and I always wave my arms to gather the others. *So physically inclusive?* So physically we are together and I try to point to one person for one decision and then second person to begin with.. so alternating but there's always a tendency to look to the right I find so I am quite aware of trying to go to each person. It's happened to me frequently when I've been a winger, that I'm either the person who is always asked or the one who's excluded and that isn't nice. So I try very hard to make sure whoever is on the wing, each person thinks they're important. *And in the retiring room, you take the responsibility for leading the discussion .* Yes but having set out what I think we need to consider, then I leave it to the wingers to make their observations first, then, I make mine

If no How might they differ? How does that affect the process?

21.*If you Chair regularly, do you perceive any difference in the contribution you make to a sentencing decision in that role compared to that made as a winger?*
I think that depends a little bit on who the chairman is I think we all have a different way of doing things and I think I am, perhaps, a little bit more **informal** than other people **, as chair,** so although in the context of being a chair, in relation to the defendants or prosecution and **not** the bench, I **can** be strict, and if I need to I can be **very** firm, but also I can have a more relaxed attitude as well ..I'm not sure if actually I **do** have quite as much input as a winger, not sure, I think it varies very much with the chairman as well, but I certainly **try** to and if I felt that something wasn't right, I would certainly say so. *Do you*

think being chair gives you any greater opportunity to pursue your view? You shouldn't, but I think some chairman probably do take that [opportunity]..yes, but I hope I don't , no. But if I thought things were going in a fundamentally wayward direction, we would **retire** and **consider** it. *Would you ask to retire whether you were on the wing?* Yes
22.*If yes - How does that affect the final decision?*

23.As chair, how do you involve all three magistrates in the final decision?
See Q 20
Is there any difference when the decision is made by colleagues of considerably differing experience? . Do you have any views on how you deal with experience, or someone who is very new?
Sometimes, it depends..I know the rule is to ask the least experienced person first and I try and do that but, having said that they can find that very daunting. It depends on the person, sometimes they don't find it the **slightest** bit daunting because they're very **assured** people anyway. But if someone is going to find it very daunting, it's sometimes helpful to let the more experienced person go first in some instances and gauge how it goes. *And if somebody is a non-contributor?* I'm not sure I'd allow to happen too often because I'd say "what do think in these circumstances?" but I **might** reiterate what we need to think about and I **try** to use very simple language if it's necessary because we are all here to understand what's going on and there's no point in making life complicated if I want the people I'm talking to, to understand exactly what we've got to discuss. And yes I might well reiterate what we need to look at but everyone will have to have an input. *What is your observation of having colleagues of very differing experience, if they're put in the position of not having the same view.* As far as I'm concerned, if we have looked at everything we need to look at and decided each thing in the way we need to decide it and **considered** everything that we need to consider, then obviously each person is going to weigh up, depending, perhaps, where they're coming from, how important things are but if you go by the model it should to a certain extent, iron out a lot, .. if you've got any idiosyncrasies. *And we talked before how you would generally let/invite a less experienced colleague to go first. Why would you do that? What's the merit in that?*
Because I think that otherwise, well I think it's something that has always been viewed as a good idea and I don't want them pressured into agreeing with what someone else has said. And having said that, **most** of the so-called inexperienced people that one gets, still have,... are **more** than able to hold their own and make decisions and have a viewpoint so I try and do that but it also depends on the person, you know and they might feel more comfortable going second.

24.*When you sit as a winger, is your contribution different in any way, especially in relation to the final decision?*
See previously

25.*What contribution do you feel the Legal Advisor makes to the process?*
Well it's obviously important. They would obviously mention anything in the book that was relevant, that we need to consider. I try and.... when we have made a decision just check with the clerk, this is what we have decided upon, and he usually tells us that's all right. But I normally try and do that. If I think there is an issue that I think we might need his/her help on I would ask them to retire, usually after a little while, when we have ascertained the facts and identified the areas the clerks that the clerk is involved in then I do think they can have..[a role]. *Do you have any experience of them wishing to be more involved in the process?* In the olden days there were two particular clerks who are no longer with us who I felt seriously overstepped the mark, sometimes and were

inappropriate, in court as well as in the retiring room. I think that's very rare now. I think that's a measure of the experience of the clerks we have today.

26.*Can you think of a recent "difficult" sentencing decision and tell me the way in which the problem/s were resolved?*
Not recently, but when it is difficult is when there's nothing appropriate. When something's serious enough for community service and a fine might be appropriate but they have no means to pay a fine that commensurate with the offence or where community service would be the appropriate punishment and where they are just not able to have the

discipline to fulfil it. You know, when there's just nothing that actually **fits** and that does happen. You have either the defendant isn't going to be able to comply with the sentence that really is commensurate with what should be given.
Can you generalise as to what normally happens in those circumstances? We normally go **down** to something that's probably...You can't go **up** to custody when the offence is inappropriate for custody, so the defendant normally gets the advantage.

27.*What personal qualities in your colleagues help to make a good sentencing decision maker?*
Listening, careful thinking about what we need to think about, not going off at side tangents and considering things that really are not very relevant and I suppose appreciating that there are three of us really. It's rarely that I've had any....There's only one particular individual on the bench that I've found incredibly difficult to.... I've sat with this person twice and such a very, very strong individual with such preconceived decisions, **prejudices** really, and attitudes that really go **completely** against the guidelines for nearly everything that one wished to look at.

28.*Which are least easy to accommodate?*
Very, very strong-minded, very prejudiced, dogmatic, extraordinary person..

29.*How do you think most people make sentencing decisions?*
Describes the three models and asks for comment as to whether any of those chime with what we're doing? Yes no.2 the algebraic. I hope not no.3 [the heuristic]. Occasionally,, when you hear the prosecution and you think "Oh yes" and then you hear the defence and it's completely different polish on the circumstances and there are two **completely** different ways of looking at something. But then I sit back and we just go through what we need to go through and pick it out. But no I think the second model.

Thank you for your assistance. Is there anything else you consider might be relevant to the topics we have been discussing or are there any questions you would like to ask me?

Do you have any other ideas on how you think people do it, if they aren't using any of those models? Well I think then it's just gut reaction which is not what I think they should do. *And you have observed some colleagues who* ... Yes, a bit more ....and come to a decision and I've said "well I **think** the decision might be right but can we just go through it first. You've made the decision without going through the process to see whether that is the right decision. And sometimes **my** gut feeling is Yes **that how I'm feeling** but I've **always** gone back, at least when I'm in the chair, I feel that too but can we just.... I couldn't make a final decision without knowing I've gone through a process to come to that decision, 'cos then I would go through it at the end of court. *And how do they justify that "gut" reaction.* I don't think they do. It's just "well I think such and such" and my view might be yes I go along with that but can we just decide how we get there because by

going back on the path we might change our minds, or we might not but if we don't I then feel we have done the right thing and the decision is right but I wouldn't feel that the decision was right unless I know how we got there. *Do you get any feeling from them what directs their "gut reaction"?* Oh I think experience and looking at the defendant...*Experience of..?* Experience of that type of offence, that type offender, that sort of track record.. *Perhaps stereotyping?* I think it is more experience I prefer to put it. And I might sometimes, feel that way too but I couldn't agree it until we had gone through it because then I would feel that's right. It might not take that long, you don't have to retire for half an hour but I just have to know in my mind that that is the right decision. *And do you feel any particular time pressure to come to a decision?* Very rarely, depending on one's wingers. It can be quite quick. We have had cases that are perhaps borderline that **are** difficult and if that requires time, well that requires time, depends entirely on the circumstances. *Anything else?* No I find sentencing very easy, very straightforward. I never find it a problem, as long as I go though what I feel we need to go through. *Do bring it home with you?* Only if I think something is not right. Occasionally when we've given someone a fine and, worked on the information before you and then out comes the credit card and you think perhaps we shouldn't have mitigated down quite so much and we have been taken but you have to go with what comes out in front of you. [4]

[4] Interview transcribed 31/3/04

Appendix 9b

Amalgamated record for the responses to one question (Q25)

Summary 8 – the input of the Legal Advisor

Ann

25.*What contribution do you feel the Legal Advisor makes to the process?*
I think the problem with the LA, is..depends on the LA...well not the role of, ... where they fit in ..depends on the LA themselves. Some are much more.... Involved, I think, in the sentencing where perhaps they shouldn't be. They should just give advice when it's asked for or point out, you know, anything that we should be considering in reaching our decision. But in practice, I think, it can happen that they actually make suggestions.

Bill

25.*What contribution do you feel the Legal Advisor makes to the process?*
Point out legal precedents, certain roads,.. there's no point in going down because the legal precedents don't make it worth while doing. Then after that when you've made your decision, the LA can still advise if it is legal to do as proposed or not. I have no experience of the LA entering into the discussion process. No just gives advice on precedents and doesn't exert any influence. Not recently. If I go back a few years, the first three years in the court, I think things were a lot freer in that respect but, having said that, now I sometimes wonder if everything is just too tight.

Charles

25.*What contribution do you feel the Legal Advisor makes to the process?*
I've noticed that they are a lot more pro-active in Court recently, in giving advice *[prompted on the retiring room]*. There are some who are more pro-active than others and they vary in the extent to which they .... There are a number who you feel would be delighted if they didn't have to engage with you. They see themselves as Stipes in all but name. *[Pressed on their intervention to the point of altering sentencing decisions]* In some cases, yes and sometimes rightly. I don't get upset if they are making a point that they are making that our thinking doesn't square with superior court advice, or if we've totally forgotten some issue. *But that's part of their role in the retiring room to advise you of precedent.* It should be yes. *I'm thinking more ...would you ever feel they were nudging you in a direction or towards a decision that is not the one that you as the three magistrates might have come to?* Well they may well do that as part of their proper role. Do I think they make our minds up? *Well do they ever overstep that line* I haven't seen that recently but that could be because more and more of them [LA's] are less experienced. The new ones certainly are more careful.

David

25.*What contribution do you feel the Legal Advisor makes to the process?*
Well...about 3 months ago I had an extraordinary experience, I thought, in that a most senior LA, I wasn't chairing on this occasion, but before the Bench retired to consider a sentence read out the Magistrates guidelines in open court which I thought was an extraordinary thing to do, including all the mitigating and aggravating features. I don't know why he did that. It's only ever happened once but I haven't sat with him that often since then. I think some LA's, emm.. it's a bit of a fine line, but I sometimes get a sense

Appendix 9b (cont.)

that some LA's seek to influence the sentencing outcome which they shouldn't do. Clearly there are guidelines. It shouldn't be necessary for LA's to draw attention to the guidelines in the Bench book. Everyone should know that they are there and should refer to them. It shouldn't be necessary for the LA to draw attention to them. There may be Court of Appeal guidelines in relation to sentencing although it is more likely to be in relation to jurisdiction than sentencing..*gives drug examples* ...and it's right for the LA to draw

attention to those in open court. And of course there was all the controversy recently about domestic burglary.....*discusses advice* ... so all of that should be provided in open court but I'm not sure once that has been pointed out, I'm not sure whether the LA involved in the sentencing discussion. I don't think they should be present ...I had a difficult time with a LA who has now left us, at one stage refused to leave the discussion and let us get on with it. He kept coming in saying "have you reached a decision yet?" and we hadn't and he wanted to stay and join in. Yes there is a tendency for ...the view of the LA as to what the sentence should be to be revealed to the sentencing bench, when it shouldn't be. Now, I suppose it matters not too much if sometimes, it's revealed when you go back and at the door of the court you tell the LA, and I think you should do, before announcing a sentence, tell the LA ..we're going to do this, this and this, in case there is some illegality or ancillary order that we've forgotten about. Well they sometimes reveal their view by a sigh or raised eyebrow or something. Now after you've decided, as long as you don't then reconsider, I guess it doesn't matter. I think it matters before the decision is made if something is said by the LA that influences, well it's not that it matters whether it influences or not, if it reveals whether they have a view as to whether it should be custody or not custody, whether it should be CD or fine ...there have been occasions. *And some LA's are better than others at knowing where the line is..?* Yes, that is my experience, oh definitely. On the occasion when this person, senior and very experienced, when he read the guidelines out he must have been having a bad day, I think, on the same occasion after we had gone back in on a different case and announced our sentence in the case, we then retired again and he came chasing out of court into the corridor and said "You didn't ask for my advice, you didn't ask for my advice.. you've come back in and sentenced and you didn't ask for my advice" Struck me as extraordinary thing to do. Again it was a case where all the advice that I believe we needed was in the book, we'd heard it all in court. So I think there is room for a lot of improvement in the performance of LA's in relation to the sentencing process...namely keeping out of it!

Emma

25.*What contribution do you feel the Legal Advisor makes to the process?*

Well, their role has definitely changed over the ten years, at least **their perception** of their role has definitely changed. They are **not** particularly deferential any more in any way, which is probably a good thing. They don't particularly take a back seat in discussions or wait to be invited or any of those things they used to be. Certainly the newer style Legal advisors tend to right in there with their opinions a lot of the time and I think actually that that can be quite difficult to handle. *How are they getting those opinions in, are they entering the discussion?* Oh yes they will quite often say Oh well your colleagues did **this** in a rather deprecating manner or they'll say this is what the District judge would have done. I get a lot of that. *And what effect or impact does that have on your group?* Group I can't say but on myself..well it's like anyone who has been told what to do, it can actually make you do rather the opposite if you are not careful, you have to be a bit careful. It's called a clash of personalities, I suppose, so it can be detrimental to what you're doing but most of the time one thanks them gratefully and then presses on with what one is discussing. Some of the time they are terribly helpful. It depends really but I think there is a lot more ..it's more overt and the way they tend to despise the lay bench it's much more obvious than it used to be.

Felicity

25. Could you just rehearse the LA contribution again in the sense of ...Sentencing is the province of the magistrates, is it your experience that it is left to them? You seemed to suggest that maybe...

Yes there are occasions when the LA makes their view very obvious, perhaps quite early on.. *Invited to do so?* No no, often because they are nervous about the way they **think**

some of the Bench may be going But not often , I mean I've been with some excellent LA, but sometimes they do, sometimes, they can bring in negative reactions. *And what do the Chairs do then, usually?* Listen and then comment on it.

George

25.*What contribution do you feel the Legal Advisor makes to the process?*
The bench retires, discusses it, seeks to reach a view. If it can't reach a view because perhaps there's circumstances where we're not clear what we could do in terms of sentencing then we would call in the LA to give his/her opinion. Certainly the Clerks we have, they do seem to be fairly objective, on the whole, and give good advice. In another situation, we may have reached a decision about a particular sentence, we would always I think without exception, the clerk is always called in just to tell them what we propose to do and what sentence we propose to give. But there have been occasions where the LA/clerk has said "I don't think you can do that because of a,b or c.." *Are those **legal reasons?*** Legal reasons or guideline reasons, sometimes it could be case law but if it is case law he comes with his book and the page identified. *But you don't invite the LA to join you until you have reached a preliminary sentence?* That's right although there may be circumstances, as I have said where you need help before that point. We reach the decision ourselves. We do not reach it in the presence of the clerk.

Helen

25.*What contribution do you feel the Legal Advisor makes to the process?*
Well it's obviously important. They would obviously mention anything in the book that was relevant, that we need to consider. I try and.... when we have made a decision just check with the clerk, this is what we have decided upon, and he usually tells us that's all right. But I normally try and do that. If I think there is an issue that I think we might need his/her help on I would ask them to retire, usually after a little while, when we have ascertained the facts and identified the areas the clerks that the clerk is involved in then I do think they can have..[a role]. *Do you have any experience of them wishing to be more involved in the process?* In the olden days there were two particular clerks who are no longer with us who I felt seriously overstepped the mark, sometimes and were inappropriate, in court as well as in the retiring room. I think that's very rare now. I think that's a measure of the experience of the clerks we have today.

Ian

25.*What contribution do you feel the Legal Advisor makes to the process?*
Well I suppose the predominant one is to ensure that the sentence that you wish to impose is legal. In some cases, benches are attempting to punish things in away that they're not able to. In others, they don't have a good memory and therefore they don't how many maximum hours you can give, and they don't know what the rules are, particularly with combination orders what you may or may not do. So they **are** useful from that point of view. They do occasionally, ..some legal advisors will say things like "do you **really** feel that length of custody, if that's what it was, is appropriate, bearing in mind the offence, but then they are playing a very big part in it when they say that. I take it at face value, what they've said, based on their experience, and maybe your sentence might be disproportionate, so they would say "do you think that's right, bearing in mind X,Y,Z. So in that case they have now become part of the tribunal, limited but.... They shouldn't. They should purely check the legality of what you want to do, and make no further comment but it doesn't always work that way. I wouldn't say ..I think most Legal advisors

will indicate one way or another that they found a sentence is inappropriate ie too harsh. I can't recall LA's drawing your attention to what they thought was too lenient a sentence.

Joan

25.*What contribution do you feel the Legal Advisor makes to the process?*

It depends who you get. The LA's **can** be very useful. I would always bring them out. Depending on **who** they are they can either come out after 5 mins or they can come out after another 10 minutes. They're getting better now but I **do not** like legal advisors **interfering** with decisions. That's **not** their role and I think I have a good enough relationship with them to know that they don't actually interfere or say an awful lot until towards the end. I would **certainly** use them for asking any legal advice and their **main** role **for me** is actually writing up the reasons because they have the experience of doing it and they can put into about 5 words something that I wouls put into 30. No objection to them sitting in watching the discussion, because I think that's quite good. I quite like talking to them afterwards about the process that we've been through so as to get **feedback** from them on how **they** think we have done because, you don't necessarily have to agree with them but I think it's.... [helpful]. Also I'm very happy, if they're out there, for them to say stop you're not supposed to be considering that, so they can keep you on the rails.

But you have had experience of one or two of them wanting to be a bit more involved?

Oh Yes but I've told them where to go.

Appendix 9c

The record of quotations for Study 2

referred to in the results of Chapter 6

Quotations for Chapter 6

Theme 1 Sentencing Aims

1. *Ann,* "... fits the severity of the crime ... has taken into account the circumstances of the offence and the offender"
2. *George,* "... appropriate to the crime, ... but also the context of the individual who perpetrated it"
3. *George,* "... appropriate to the nature of the offence ... [and] takes proper account of the circumstances of the individual."
4. *Emma* "... if it's taken into account the victim, the offence and the offender",,
5. *Joan,* "... appropriate for the actual crime ... [and][5] the person you are sentencing",
6. *David,* "... enough information about the offence and the offender... to make a suitable determination"
7. *Helen* "... have thought of all the things in relation to the defendant and the offence".
8. *Ian* " Provided it's been discussed properly and particularly if we've followed the laid down routine to arrive at the decision, then I'm content with that".
9. *Charles,* " ... [provided] you haven't been constrained by all the different rules and regulations that we have too much [of]"],
10. *David,* "... where the right sort of powers are available"
11. *Felicity,* "Sometimes you are forced to make a sentence that isn't positive but it's not because you haven't approached it in a methodical way. It's because you have no choice."
12. *Ian* "It's the fairness aspect that probably exercises me most."
13. *Bill,* "You have to be aware that you have to try to stop recurrence [of offending] and give the guilty person a chance,"
14. *Bill* " If you mean by accurate that you don't take into consideration the ability to try to stop the person re-offending, then I do find there's conflict".

15. *Bill,* "I feel the courts, in general, in my opinion, may lean too far in the direction of rehabilitation,"
16. *Ian,* "I think there is a desire on the part of some [magistrates] to involve themselves in long-term rehabilitation. ... some people are not particularly in favour of what I would describe as punishment, particularly imprisonment."
17. *Ian,* "Often there is insufficient information about the offender or the offence... one would always like more information."
18. *Bill,* "Sometimes I get frustrated because I feel often questions haven't been asked that could possibly bring out more... "
19. *Joan,* "Sentencing is only as good as the information you have in front of you",
20. *Charles,* " The more information you have, the more likely you are to be able to make an intelligent decision"
21. *David,* "... enough information... to make a suitable determination"
22. *Helen,* "... one where we've thought all the things through... gone through in a structured way and we feel happy with the result".
23. *Ian* "... particularly if we have followed the laid down routine."
24. *Ian* "... the decision is totally individual to that case",
25. *George* "... appropriate to the crime, to the circumstances but <u>also</u>[6] to the context of the individual who perpetrated it".
26. *Ian* (a magistrate with over ten years experience), "I can't recall having made a sentencing decision on the basis that it's got to be in line with the last one."
27. *Joan,* "Remember that the Guidelines are <u>guidelines</u>, they're not to tell you what to do."
28. *David,* "... accurate implies to my mind science... something is either right or wrong, a sort of scientific quality that the process doesn't possess",

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[5] Square brackets indicate text inserted to assist comprehension.
[6] Underlining indicates participant's emphasis throughout.

29. *Ian*, " It's not an exact process, an exact science... accuracy would pre-suppose you had a way of measuring it",
30. *George*, "I don't know what accurate means unless you are referring to the Guidelines...."
31. *Helen*, "I suppose accurate is when you reflect the Guidelines",
32. *Joan,* "Accurate... means... going purely by the book... accurate inasmuch as it follows the Guidelines."
33. *Joan,* "I don't think a sentence could be [described as] accurate because there is always the personalised approach".
34. *Emma*, "Some sentences are more effective than others, I assume you mean recidivism... if you never see the offender again, that's effective",
35. *George*, "... [effective] means... it deters future conduct",
36. *Helen* "Effective decisions ... might have the desired result on the defendant's behaviour".
37. A*nn* "One might find oneself imposing a sentence that is slightly unusual because it may be more effective".
38. *Ian* "We trust the probation to undertake the various aspects".
39. *Joan,* "Effective... is linking in what the crime was, the circumstances around it and the person, their background and the circumstances and how you feel best, taking everything into consideration to sentence that particular issue at that particular time."
40. *Charles*, "They should do [all come together], of course",
41. *Helen,* "They don't always come together, but that's what we should aim for".
42. *Felicity,* "It's not because you haven't approached it in a methodical way. It's because there isn't a choice."

Theme 2 Personal qualities

43. *David,* "It goes back to what I said... "

44. *Felicity,* "Well, the ones I said before… "

45. Emma "… to dissociate themselves from extraneous material" and later "… remain focused on what they were dealing with"

46. *Helen* [initially wanted to work with people who could] [7] "… ascertain what is actually relevant to the offence", [later appreciated those who] "… [do] not go off at side tangents and consider things that really are not relevant."

47. *Ann*, "… [those] knowledgeable about the options… pick out the relevant facts".

48. *Emma,* "[People with the] ability to dissociate themselves from extraneous material… engage in judicial thinking… that can remain focused on what they are dealing with."

49. *Felicity*, "… analytical ability… to calmly weigh up the evidence".

50. *George,* "… alertness to the broader context that you may need to consider in sentencing… broader set of circumstances that might inform the decision… [an ability to] pay attention to the facts… the evidence may be relevant to the seriousness… understand the variables which are necessarily involved in the gradations of a particular offence and the potential sentence arising from it… ability to absorb and apply facts and knowledge… "

51. *Helen* "… an idea of the motivation of the defendant and the effect of the sentence on the defendant… [while] correlating different sources of information… trying to balance all these sources of information".

52. *Charles,* "The more [able] you are in sifting things together and drawing out the threads, the easier it is to make a decision. … some do [that better than me]"

53. *Ian* "… bring out or bring forward [information] to remind colleagues of things which, perhaps, they had missed."

54. *Joan,* "… [the] ability to know if what they [the witnesses] are saying is true… able to decipher what is true and extract relevant parts of the information… in order to make decisions… [people who could communicate] the options that we've got open, so that

they know what they're talking about... if they don't understand something, to ask questions."

55. Ann, "... not jumping to a conclusion and sticking to it without being prepared to discuss"
56. George "... be aware that there may be a broader set of circumstances that might inform the decision,"
57. *Helen* "... being able to correlate different sources of information".
58. *Ian*, " If you have two relatively inexperienced and one experienced [magistrate] there is some sort of balance,... I'm trying to be as balanced as possible..."
59. *Joan* "You have to balance that[8] [information in the person's background] against the person's ability to be able to carry out the sentence."
60. *Charles,* "[those who] lacked a flexibility of mind."
61. *Joan* "... don't come out with very firm views... that there's no way they are going to change."
62. *Ian,* "Foremost is their ability to engage in the discussion"
63. *Joan* , "... [people] who are able to discuss, who are good at dealing with people...able to put points on each side... coming to a decision by listening to other people."
64. *Joan* "People should be [keeping] a note of what was actually said, the way they talked... [then tell the group], "This is how I feel, these are options that we've got open", so that they all know what they're talking about."
65. *David* "... a willingness to think about, not just listen to but, also, to think about an alternative point of view."
66. *Bill* "[This person]... always make[s] me feel quite happy ....one particular person has a magic way with kids."
67. *Emma* "... how to listen... the use of language. How not to up the anti, in terms of stoking the fires of somebody else's feelings... polite... with those skills, you can get

[7] Square brackets indicate inserted text to assist comprehension.

through most discussions quite quickly... listening to what is being said by other people and so on,"

68. *George* " A willingness to express a opinion... prepared to try to express one [an opinion] that we would not all necessarily share,"
69. *Ann,* "Hard-liners who are very single-minded are difficult to deal with, much more so than people at the other end of the scale... people who are incredibly soft, perhaps",
70. *Charles* "One-sidedness, [people] who can only see one side of the incident and are obsessed with it... those who lack flexibility of mind... is that dogmatism?"
71. *David*, "What is unhelpful is a closed mind... where the person has a fixed idea about what a sentence has to be so that they don't appear to be listening to anything that's said that's different."
72. *Emma*, "There are a lot of irascible and slightly power crazed males ...they come at you with their point of view without waiting to hear what anyone else might think. So, that's because they have their view and that's that."
73. Bill " I can eat humble pie if somebody proves me wrong [having discussed the issues], I'd be quite happy to admit it,"
74. Bill "... especially if it's a question of liberty, I wouldn't be afraid to lose face."
75. *Helen* "... found incredibly difficult... very, very strong minded.... dogmatic, extraordinary person."
76. *Ian*, "... inability to explain their viewpoint, blind adherence to what they believe but are unable to explain to me or the other colleague how they came to that conclusion",
77. *Joan* "... seen it, done it, know it all and quote chapter and verse to you"
78. *Felicity* "Emotionalism, people who bring in personal things that are irrelevant. .... I can't stand people who have an emotional reaction that's not logical",
79. *Joan* , "You have to be careful <u>not</u> to be, in my opinion, influenced by emotion. There's a lot of emotional stuff that goes with it [referring to PSR reports]. "

[8] Underlining indicates participant's emphasis throughout.

80. *George*, "... look at the facts, rather than emotion",

81. *David,* "Some colleagues who get personally and emotionally attached to a particular point of view... react as if they had been personally affronted or slighted or injured or insulted."

82. *Emma,* "You have to keep it unemotional if you can."

83. *Emma,* "... how conscientious people are... is terribly important... Conscientiousness has to be a good thing, taking trouble over it [sentencing]... doing what they're supposed to do... It's called working hard and striving to arrive at the best outcome."

84. *Felicity* "...Well that's listening very carefully, so that you have all the facts"

85. *Emma* "Well, that's what conscientiousness is, isn't it, in a way? It's being open-minded to changes in the law, changes in the way people think, changes in the way we're being told to do things, changes in Government... It's conscientiously paying attention to what we're supposed to be doing, as opposed to treating the job as a kind of hobby, which I think some people do."

86. *Emma* "... are keeping... aware of what is going on in the courts and the judicial system... thinking more carefully about things, listening to what is being said by other people, so I think it must make a difference."

87. *Emma* "... nearer to the entry point, probably, if you are conscientiously sticking to it."

88. *Bill,* "... understanding people, [attributed to]... a wider background, a wider experience of life... particularly important in the Youth court"

89. *Charles,* "... sense of compassion, a knowledge that we're not perfect"

90. *Emma,* "Stipes" [district judges] [unable] to take much into account to do with the offender".

91. *Helen* "... motivation of the defendant and the effect of the sentence."

92. *Charles*, "Nobody can approach it [sentencing] without any preconceptions or prejudices, but you have to be able to put them aside."

93. *Emma,* "... [people need the] ability to dissociate themselves from ... prejudices they may or may not have... judicial thinking is helpful. ... people [who] have minds that can remain focused on what they are dealing with."

94. *Felicity,* "... analytical... unprejudiced", disliking "... people who bring personal things. Something has happened to them in their life that makes them feel strongly one way or the other."

95. *George* "an ability to look at and pay attention to the facts... absence of prejudice",

96. *Helen.* "... such a very, very strong individual, with such preconceived decisions, prejudices really, and attitudes that went completely against the Guidelines for nearly everything that one wished to look at."

97. *Joan*, "... people with prejudices which we still have got, some of the time."

98. Emma, "Three people is always such a good idea", [because], "...people are driven by their own experience, however well trained they are".

99. *Emma* "a trained lawyer... would stick much more rigidly to the Guidelines and be more consistent and stick to the law"

100. *Helen* "... appreciating that there are three of us really",

101. *Joan* "... make them [the colleagues] realise that you are there as a panel of three and you actually have to discuss things".

Theme 3 Preparation, Training and knowledge of structured decision-making

102. *Helen,* "It's obviously got better over the years"

103. *Joan*, " Training in our court has been good. When I was first appointed, I would say it was absolutely abysmal. We had very, very little training, but training as it's gone along, certainly for new magistrates, has got much better"

104. *Joan*, "... as a mentor, I actually probably learnt as much from that as I have from actually going to training sessions."

105. *Ann,* " They've all taken the same format. You always know what they're going to be like. ... I feel it's slightly unsatisfactory... It's all done so quickly".

106. *Charles,* "I would say, on the whole, it [the training in case study format] was pretty useless... no chance to follow up your thought processes and correct [them]... always dealt with in too much of a rush."

107. *Helen* "Traditional sentencing exercises, they're often very familiar now, to a certain extent quite repetitive. ... The documents you bring home with the structured decision-making set out with the boxes and arrows is what you should consider and a lot of the training exercise just reiterates what is written down,"

108. *Emma* "[The case studies are] always slightly skewed towards something they wish you to address... slightly unreal... but it's not too bad. It gives you at least [a chance] to focus on certain ways of looking at things."

109. *Bill,* "Good. The best ones are the case scenarios... It sometimes pulls out ways that you make decisions and gives you better ideas on how to deal with it... It's very important to have learning and experience intermeshed,"

110. *Felicity* "I haven't done anything in the last 12-18 months, ... but they [the studies] were useful, I think working in a group is always useful."

111. *George* "It forces you to discuss in the broader group why you come to a particular point of view and that's useful... Compare and contrast your decision with another group's, ... you can explore and try to understand better why the difference arose."

112. *David* "I can't detect any valuable training about what to do when you are actually in the retiring room considering a case."

113. *David* "... a chart to which reference is made sometimes to take one through the process... the training consists of "look there's a chart, have a look at it and use it.'"

114. *Emma* "It was to allow one to practice making one's way through a checklist of things... in other words the structured decision-making... Training was helpful in practising and getting faster, I think more importantly...

115. *Ian* "In my view, very poor training... it stretched over two years... very inefficient, ineffective way to train anybody." On case studies, "... they were interesting but not very enlightening."

116. *Ian* "The enlightening watershed... where decisions were considered as a logical progression... the Magistrate Association Guidelines helped there... Just by following those, I have found the whole process much more enlightening."

117. *Joan* "Good, if you have a mixed panel... I find it excellent because of the wide range of sentencing."

118. *Ann*, " A very good structure... if you follow the chart from beginning right through, it's extremely useful."

119. *Bill,* "... just picked it up over the years, [fairly easy] ...if you have all the information",

120. *Charles,* "... thought it was fairly straightforward."

121. *George* "... fairly straightforward... rational, progressive... sequential approach.."

122. *Charles* "The way we do it now is so much better than the way we did it before. I think there is progress."

123. *Charles* "... not as much as we would like to see it, but sometimes you don't see a lot of structured decision-making in the appraisal process."

124. *David* "... that I don't often hear, "shall we get the JSB structure and start at box 1 and go down the flowchart?"

125. *David* "If you put aside the cases where there is only one realistic option... then in those cases, I guess the structure is used about half the time, in a conscious sense, I mean... [For the rest], it's being used in a semi-conscious sense as a discussion [tool] and if you listen... you would be able to say that, although the sentencing Bench didn't get hold of the chart, didn't use the language of the chart, that was the process that was being gone through."

126. *Felicity* "... important in a complex case... I have had one major argument about doing it [structured decision-making] in that situation."

127. *Emma*, "The ones who don't think logically, they need them [the Guidelines] very much... I could probably get through the model very fast in my thoughts, if I was on my own, but I think having two people with you, it's [using structured decision-making] helpful to focus some people who are not used to being focused."

128. *Joan*, "In particular, where you have people with very different views, to go through that structured decision-making as a basis helps a tremendous amount in actually keeping within the realms of the guidelines... the actual general structure is good."

129. *Felicity* "One is, I think the more experienced magistrates, [do] not necessarily [use it], particularly the more experienced Chairs, tend to be averse to it.... They'd been using a different method for donkeys' years and they felt nervous and, perhaps, a bit vulnerable and under-confident."

130. *Bill* " If you feel they weren't doing it right, I would try to encourage them... and it's not always the new magistrates."

131. *Joan* "It's got better now, but there was a definite reluctance to use the Guidelines.... The longer you sit, people tend to think "Oh I know it, I've seen it and I don't need to be trained... There, certainly, is reluctance when you sit with senior people."

132. *George,* "No [no difference in structured decision making for colleagues appointed before MNTI was introduced], because those individuals who came to the Bench before those systems were introduced, they have had a lot of experience."

133. *Helen* "... I don't have the model in front of me but I would go through it in that way... Usually I would set out what we need to consider first, in general format, and then go through the model."

134. *Ian* "Some magistrates treat them as gospel. Others have not quite, in my view, grasped the principle of threshold, of things being a guideline and some magistrates are unable to overlay the local conditions."

135. *Ann* "What you are saying is that, it's like a sort of balancing scales? ... No, I'm not sure, but I don't think I do [it like that]."

136. *Bill* "... giv[ing] them a + or a – and you know where to pitch your conclusion."

137. *Charles* " To do it properly, you would have to really point score it in some way [that] we don't have... I don't think we have a structure to weigh them, to point score... We are used to seeing a piece of paper with a central dividing line [referring to the format of the Guidelines]. We just list them, probably in our minds..."

138. *David* "Well, if weight means attach numbers to them [the features] and add up... I've never heard of that... Certainly I don't think weighting is ever done in the sense of attaching numbers... Maybe what's intended... [is] the process that is gone through in quite a proportion of the cases [which is]..."

139. *Emma* "So if the entry point is a community penalty and you think something aggravates it, ... you can go up higher... I think that's my mental image."

140. *Emma* "No, personally, I think you keep them all in both of your hands and when you get to the end of the process, you could see which was heavier, if you see what I mean, on a scale"

141. *Felicity* "It's not done in any precise way... I don't think you can be that precise... you tend to come down on one side or the other and you tend to argue your case... I think it's an impossible question [that of weighting] to answer without being specific about what [offence] you are talking about."

142. *Felicity* "... judgement... it's a matter for a group of people to discuss, ... there isn't a formula to any of these questions... if it was like that, you could put it on a computer."

143. *Felicity* " Everyone has their own hang-ups. I have learnt an awful lot, certainly about my own prejudices, 'cos I thought I hadn't got any but of course we are all riddled with prejudices..."

144. *George* "I am not aware that you do that in a formalistic way, in the sense that you give it a value between one and five... We've not been advised that we should seek to do that."

145. *George* "... weight emerges from a consensual decision during discussions. ... balance of the additional elements"

146. *Helen* "... there would be a certain balance,... balance to a certain extent depending on how important [a feature is],"

147. *Joan* "I don't probably use weighting in the sense of weighting. I think I probably use common sense which is probably weighting, but weighting in the sense that, if you've got far more of the aggravating than the mitigating, obviously you are going to weight it far more on the one side."

148. *George*, "If there is an offence where it's fairly apparent what the decision is and if the Chairman has any doubt that s/he has consensus, then the Chairman, in my experience, would generally suggest we retire to discuss it, in which case we'll go through the elements."

149. *Bill,* "Usually the Chair will sense if something needs discussion over and above what you could discuss behind your hand on the Bench."

150. *Joan*, "You actually get the morning proceeding quite quickly",

151. *Felicity*, "In the real world... it's too slow [to use exhaustive structured decision-making]."

152. *David*, "If the three magistrates think it is a straightforward case... they don't need to invest a whole lot of court time in going through all the detail of what the JSB recommend."

153. *Joan*, "You can't discuss things properly for any length of time [in court]. That's not justice being seen to be done."

154. *Helen*, "If you retire, you can spend longer on it, obviously there is a slightly more relaxed atmosphere and I always, personally, feel that, unless everything is quite clear cut and we don't need to discuss, I would always like to retire anyway,"

155. *Charles,* "In the retiring room there is more time to consider things more carefully and therefore you're more likely to go through the process."

156. *David*, "If you are doing it [sentencing] on the Bench and not in the retiring room, you aren't doing anything very thoroughly".

157. *Ann,* "... would only use it [the structure] if we were retiring to make a decision. Decisions taken in court over fines or maybe a conditional discharge, or something like that, that was taken without retiring."

158. *Ian* "... would certainly need the "sheet" in front of you to remind you to go through the structure of decision-making and it would remind you again, particularly, of the aggravating and mitigating features here and what you need to think about."

159. *Ann*, "... obviously we would be going through the process in court",

160. *Helen*, "I do actually on the Bench... I gather the three of us together and would say "well look we've got to look at these elements..." The role model is valid on the Bench, definitely."

161. *Emma*, "The structure is the same in the book [for all offences]",

162. *Bill*, "I think you have to try to [use the structure for all types of offences]"

163. *Charles*, "I imagine the <u>principle</u> is universal... [but] in <u>certain</u> circumstances, it's more useful if you go through the structured decision-making",

164. *David*, "I think, in theory, it's applicable..."

165. *Felicity*, "... got the impression it was supposed to be across the board."

166. *Charles*, "The principle is universal … but in speeding, for example, there's no victim, as such,… so in certain circumstances it's more useful, I would say if you go through the structured decision-making."

167. *David,* " I've not detected much consideration for [whether it should be] more than six points [on an endorsement]… and as for the financial penalties… it just depends on the person's income and in so many cases there is virtuously no income."

168. *Emma*, "If you are asking me about motoring offences… I don't think we use it at all, probably… I think with motoring, probably not, in fact, definitely not… It is still very difficult to mitigate for no insurance or excess alcohol. So motoring offences, it is a rather different category of sentences."

169. *George*, "… thinking about the way I've approached things, if it's a personal injury matter, you are certainly more aware of the consequences of the offence than, say, if somebody jumped the lights by 1.6 seconds."

170. *Helen,* " I'm not 100% sure that it's [structured decision-making] as important… probably less so for something like motoring."

171. *Ian,* "… for most/many motoring offences, I can't recall actually following the Guidelines."

172. *Ian* "You've got [them] … or you haven't and… the only time I would pause for more thought is if it's repeat offending."

173. *Joan,* "The motoring is more defined… There's not much variation in it….I don't think there is much flexibility in the motoring."

174. *Bill* " They all merit it [structured decision-making] because someone who is accused of a traffic offence and they feel they have a lot of mitigation… if that's not recognised, then they are going to go away pretty sore… and you don't really want that."

175. *Charles* "In my experience, they don't [apply structured decision-making]",

176. *Emma*, " I think it goes back to logical thinking. Some colleagues don't think logically... Some colleagues arrive at decisions before they have looked at the different arms of the offence."

177. *Helen,* "I've got a feeling, I possibly apply it [the structure] more than most people because it's a logical way of thinking, so I do use it."

178. *Emma,* "... a lack of confidence... I think some people rush headlong into it and they aren't confident enough to take their time... [but there are some] for whom it's arrogance rather than a lack of confidence that makes them rush into a decision."

179. *Helen,* "... [some colleagues] do a lot of shorthand ....They don't divide the defendant and the offence... I think they've confused the two together."

180. *Ian* "There are some colleagues who have made a decision as to how they feel it should be disposed of and will open up with that... Provided I've said what I want to say in a logical and lucid way, it's up to others to agree or disagree with me."

181. *George* "I sense that some are less rational... that's not being condescending or superior... but I think they may have a slightly different way of approaching it."

182. *George* "I think, sometimes, men tend to be, can be slightly inclined to take a quickish view of things, when a more measured approach might be more appropriate. Equally, some women can take a less structured approach... but that's where I think the value of discussion comes out."

183. *Ann* "There may be only one sentencing option and that's custody... You wouldn't go through it strictly... You would start at the end because you were all certain of the penalty."

184. *Bill* "Well, you can have a short-cut if there aren't any mitigating circumstances."

185. *David* "You make the determination in the first case of the morning and a lot of cases follow that pattern and you very quickly say to colleagues, "is it the same?"

186. *Helen* "[A] shortcut is not considering the elements as I logically like to consider them. It doesn't necessarily mean that I spend a lot of time and I don't feel I waste

time. I think it's quicker because you don't get side-tracked into things that aren't relevant."

187. *Joan* "A shortcut would be "[I suggest a] fine, do we all agree? This is the standard fine, no mitigation", and the shortcut would be, not necessarily to go out [of the courtroom to discuss it]. The answer would be straightforward, to do it there and then."

188. *Felicity* "What beyond using the Legal Advisor ... In terms of short-cuts, I really do think some cases are … so cut and dried… you don't necessarily have to go through all this palaver,"

189. *George* "My training, my professional background has been that you should seek to find what the facts are, apply things logically… For me, I don't think that [taking shortcuts] would be an appropriate way to look at a set of facts."

190. *Ian* "…to try to get a handle on the seriousness before we go any further... [because] ... Some colleagues can't see the seriousness of what's been done... unless you have decided… the degree of seriousness before you start, you're

Theme 4 Use of the PSR

191. *David*, "It's usually useful… I find the reports helpful, some especially helpful."

192. *Emma,* "By and large, I think our PSRs are very well written."

193. *Ian*, "They have progressively improved over the years… less reading between the lines now, I just take them at face value."

194. *Joan*, "The probation [service], now, have got much better in recommending what they think."

195. *Helen,* "Always consider[ed] them , especially in the light of a well written report. On the whole, quite often they are very valid…."

196. *Ann,* "Some of the work has been done for you… you [can] proceed mostly to look at the options," … We would] probably not go through the structure in the same formal sense,"

197. *Bill,* "The person preparing the report has had time to dig deeper for the information.."

198. *George,* "The probation officers are experienced people."

199. *Joan,* "They [the probation officers] have the experience."

200. *Ian,* "They [PSR writers] were on the side of the defendant, trying to make life a little easier… for him."

201. *Ian,* "I tended to over-compensate for that by not <u>really</u> listening to what they were saying to me."

202. *Felicity,* "Often when they recommend things … whoever has written the report has a very biased idea of what is going on because their source of information is often only the defendant… They do tend to err on the softer side."

203. *Felicity,* "You only have half a picture, if you only have the PSR and you don't know the full story and there is nobody there to tell you… It's not something I feel very happy about."

204. *David,* "The writer might say custody but they don't seem to come [with that recommendation] very often… The recommendations are ones which I usually find can be adopted. Then again, there will be cases where custody is not recommended and <u>you</u> think this is a hopeless case, got to be custody to reflect the seriousness of the offence, failure to comply with previous community penalties."

205. *David* , "… exceptionally [the Bench might] come to a different view, a less severe view… but that doesn't happen very often… that's pretty rare."

206. *Emma,* "There are less disposals in the adult court, so it all becomes slightly academic… If you have asked for a PSR, you're talking custody or a community

penalty and there are only two community penalties... You are really talking length or type of programme,"

207. *Ann,* "[Even where recommendations] were extremely sensible... I don't think one should accept them as a fait accompli, I think you have to really consider what is the best option."

208. *Charles,* "... just a signpost to your thinking... Just because they propose something, it doesn't mean you will necessarily follow it. There might be broader considerations... how the general public will view a particular sentence... how the victim might view it."

209. *Emma,* "... use it along with all the other material you have as a sort of adjunct. But I don't always go along with them, no...I think you can actually rely on their judgement to a certain extent"

210. *Bill,* "By and large I would follow the recommendation unless I could find or had heard something in court, to contradict what they said,"

211. *David,* "I do think that if the whole Bench has read a report and come to a view that a recommendation is right... [we would advise the court] the recommendation is one we think we can follow,"

212. *Felicity,* "... so I'm not saying I would just ignore it, because sometimes what they say, you have to take notice, but I don't think they have necessarily a very full picture of what's going on."

213. *George,* "They might suggest a course of action which, given what you have heard in court, you might not feel appropriate."

214. *Helen* was adamant, "We'd still consider the issues. We'd look at the things we need to look at and whether we found that that was a suitable sentence... If it's a suitable sentence, we'd go along with it."

215. *Ian,* "... read the whole report, see whether the conclusions they have come to bear any logic... It [the recommendation] may even be a starting point... If it was wildly out

of line [with the Guidelines], I would go further into the PSR and find out why there was such a dichotomy",

216. *Joan,* "We are the people to make the decision... I think you should always take into account what they have said but we don't necessarily need to go along with it... You always need to look at the case",

217. *Joan,* "Read the report and think what I would decide, just in reading it for myself, before anything else, before I actually look at the recommendation."

218. *David,* "If the whole Bench has... come to a view... if your two colleagues agree... ",

219. *Helen*, "We'd look at things... ",

220. *Joan*, "You have to look at their report and see and talk to other people, what they feel about it,"

221. *Ann,* "... probably not go through the structure [advised by the JSB] in the same formal sense [when there was a full PSR available],"

222. *Bill,* "There's not much point in having a report if you're not prepared to take notice of it."

223. *David,* "...[if it's] logically built up... it's determinative".

224. *Emma,* "... actually tend[ed] to look at the first page [containing factual background about the offence charged and personal details, address, DOB, previous offending history] and the last page. So I look at the offences and I look at the recommendations and then I read the rest."

225. *Felicity,* "It's very difficult... That's why it's very important, if you feel strongly, to go back on the PSR [for sentencing]"

226. *Ian,* "I would err on the side of support for probation"

227. *George,* "Oh no, I think that would be quite wrong... If you read the conclusion first and then you read the report, you are clouding the basis upon which you absorb and understand what the report says."

228. *Helen,* "I've never even thought of doing that, actually."

229. *Joan,* "... takes the whole point away."

Theme 5 Managing sentencing dilemmas

230. Ann, "... there are obviously times when you are sentencing less severely than the offence is worth on paper."

231. *Bill,* "I think we probably do err [on over-weighting personal mitigation]... [Magistrates tend] not to want to send people to custody, if there is any way to avoid it."

232. George, "... the facts of the case, the entry point and all that type of thing but also the broader context in which the event took place,... one would err in favour of the party who had been found guilty,"

233. Helen, "... gone down one stage... but to start dropping... a long way down... there would have to be very substantial mitigation.".

234. *David,* "I guess it's a question of degree on both sides."

235. *David,* "You have the defendant in front of you... lots of information about the defendant from the PSR... an advocate on behalf of the defendant, stressing personal mitigation,"

236. *Emma,* "You get a feel for that [the validity of personal mitigation] if you have the defendant in front of you,"

237. Ian, "... locally we see so much of it [carrying knives], it's become a common offence and therefore we tend not to deal with it so harshly."

238. Ian, " ... have started at a point where we are unwilling to apply the Guidelines, even if the offence is a middle-of-the-road one. A local sentencing culture builds up..."

239. *Joan,* "I would take the comments about the person [the defendant] more to heart than anything else, more than the actual offence... There are some offences where they

[the Magistrates' Association] have put the rank very high... I'm actually surprised how high... "

240. *Joan,* "You can see why... the climate we are living in... There are certain particular offences which they [the politicians] are trying to deter people from... "

241. *Joan,* "I do think you have always to take the person into consideration... Yes, I would do and have done."

242. Charles, "If I had to choose which to weight more, I would err on the side of what was the right punishment for the offence and less for the offender."

243. *Emma,* "It depends on what kind of seriousness... If you are talking serious[9] violence, for example, I think the seriousness of the offence may well weigh more heavily than any offender mitigation."

244. *Felicity,* "... well not entirely but I think this thing about justice being seen to be done and how the outside world perceives it [is important]."

245. *Charles,* "We operate within a framework... [but] at the end of the day what the magistrates think it ought to be tends to occur more frequently than [adherence to] the Guidelines."

246. *Charles,* "... force us to adopt the Guidelines, for the sake of consistency, but the magistrates won't like it."

247. *Charles,* "On balance, I think that uniformity in decision-making is more valuable and it's wrong that you can get two wildly different decisions on the same set of facts... I'm torn... complaints that going to the magistrates' courts is a pure lottery on the one hand, and on the other hand, sometimes these centrally arrived at decisions don't seem to be appropriate to my own feeling."

248. *Ann,* "Most people would be in the middle"

249. *George,* "I think there are some, yes one or two"

[9] Of, course, serious must be a relative term for the type of cases dealt with in the magistrates' court. Offences above a certain level of seriousness are indictable only and must be heard at the Crown Court.

250. *Bill,* "... as you talk to them. There are particular ones ... more on the softer side than the harder."

251. *David,* "In a particular case, I suppose it might... if people are very harsh-minded... I might emphasise the factors... pointing towards leniency."

252. *Helen,* "When it comes to things like fines, I quite often say that I think it is a good idea to do this – look at registrations [of the vehicles] and the model,"

253. *Helen,* "We get a general idea at the beginning... but it would be a consensus."

254. *Joan,* "Some [colleagues] tend to go with the Guidelines, in particular fines... You need to take into account, in my opinion, other factors... You've got to be realistic... There's always a bit of bartering on finance. ... Split the difference, as long as you come up with something acceptable."

255. *Bill,* "... only be affected [by extreme views] if I was getting opposition to my views. [I would] retaliate... because I felt the way they were understanding and treating it was not correct, in my view."

256. *Ian,* "... draw something to their attention, to broaden their vision."

257. Ian, "...[not to] block somebody out ... but trying to understand what it is they are saying and why."

258. *Ann,* "If you follow the structured decision-making... as a group of three, you ought to arrive at a consensus."

259. *Charles,* "Go back to the Guidelines... get them [the person with a divergent opinion] to explain why they were at the top end... I would rely on the Guidelines to try and bring us to a more intelligent point, a commonly agreed point."

260. *Emma,* "Enlist the help of the Legal Advisor, rather quicker than I might otherwise... to concentrate people's minds on the law."

261. *Emma,* "Lenient is usually slightly more malleable.".

262. *George,* "It [harsh colleagues] might incline me to argue more strongly for the view I hold... You might appear less consensually-minded than might otherwise be

desirable, … [but] I do recognise that you have to reach a decision that is the consensus of that particular panel… Our job is to deal with the matter as it arises."

263. *Charles,* "I have always been willing to allow two to out-vote one… whether I am the two or the one",

264. *Joan,* "I put my point of view but you are sitting as a bench of three… I am always prepared to be over-ruled… I'm prepared to be outdone."

265. *Ann,* "… argue more strongly,

266. *Bill,* "… retaliate more strongly,"

267. *Charles*, " We shouldn't allow ourselves to go off on a frolic."

268. *Emma,* "Some colleagues are actually very aggressive… a lot of very aggressive discussions… I stick to my own view,"

269. *Felicity*, "I always say what I think.",

270. *George,* "… argue more strongly",

271. *Ian,* "… not trying to block somebody, but…"

272. *Ian,* "If I'm out-voted, and I really do believe that I'm right and the other two won't see my point, I can feel a little miffed… but it doesn't last."

273. *Ian,* "… don't really seem to be listening to what I'm saying about seriousness… a reluctance to face up to the job they've been given by society; that's to arrive at and inflict the necessary punishment for the crime."

274. *Ann,* "At the end of the day, it is a majority decision… after having given it sufficient time."

275. *David,* "I've said all the factors in favour of my proposed sentence… I might have said them more than once and there comes a time when you just stop because it's clear that the two colleagues are convinced [by a different disposal]… Ultimately it's a majority decision."

276. *Emma*, "[We used] the structured decision-making very carefully on that one."

277. *Joan,* "So I went through right from the very beginning of doing the structured decision... writing them all down... making, perhaps persuading the person who was on a fine to realise that that was not appropriate... suggesting to the person who wanted custody that it might be better if we moved down a bit. It became apparent that this person [the defendant] actually did need help and the PSR had recommended that so we actually did get an [agreed] decision."

278. *Felicity,* "It's been the other winger who has been nondescript and not said anything so it has ended up with me against the Chair... more experienced... and when I first started, I think I would have given way."

279. *Helen,* "... if that's still the majority view, then that's the majority, I'm only one of three."

280. *Joan,* "I suppose I would have had to come down on one side or the other. Well [in this case], I wouldn't have as I didn't agree with either... I would have tried to use my persuasive powers... to reach a point where either one of them went up to what I agreed on... so it had to be two to one, "

281. *Joan,* "I suppose I would have had to come down on one side or the other. Well [in this case], I wouldn't have as I didn't agree with either... I would have tried to use my persuasive powers... to reach a point where either one of them went up to what I agreed on... so it had to be two to one, "

Theme 6: Socio-demographic influences

282. *M1* "[It] helps you to analyse",

283. *M2* "[The activities undertaken in my professional capacity] involve trying to find out the facts"

284. *M3,* "I do have a logical thought process... means that you have to sift a lot of information, get to the nub of something, ascertain important facts... "

285. M4, "I read a lot, law reports, I come from a legal background".

286. *M5,* "Any form of formal education... It's about marshalling information... so I don't think your job experience matters... It's almost an academic approach to information... It's a way of looking at things."

287. M5, "I think you need a bit of experience to "sus" people out."

288. *M6,* "I have to be fast and accurate... use my voice... use language very accurately... take in large amounts of information and process that quickly... find out what is the important point which can be very useful in decision making."

289. *M7,* "... some deep skills in... negotiating... I've got some advantages [in the retiring room] as an negotiator... I do have an ability to change people's minds and get them to agree with my way."

290. *M8,* "I have some understanding of the circumstances in which many of the defendants live"

291. *M9,* "I have a lot of experience dealing with issues affecting people... dealing with people who are in difficulty in a work situation"

292. *M10,* "[I] talk to quite a varied group... I listen to them... I sometimes debate with them... I think you just factor it in [when you make a decision]."

293. *M8,* "[I] worked on poor estates, and [in] disadvantaged homes, so I perhaps have an awareness of the background, people coming from backgrounds and racial groups other than my own."

294. *M8* "I'm sure it does, I'm sure it does,"

295. *M4* "... experience I get from the office, where people come to me with problems... I think it makes you understand and sometimes, I may be more lenient. Well, I don't call it lenient I call it fair, I think I'm fair... "

296. *M3* "... not imposing fines that have no likelihood of being paid."

297. *M1,* " In my view, we shouldn't be youth magistrates after 60,"

298. *M6,* "... experience with young people which is useful for decision making"

299. *M10,* "... [the] need to have contact with them [kids]. A lot of older adults don't have sufficient contact with young people, from all walks of life, outside of their own peer group and economic group... That influences me on how I deal with young people."

300. *M8,* "When I first started... I'd have sleepless nights over sending someone to prison... I don't do that any more, I don't have sleepless nights but I do sometimes worry about the decision."

301. *M7,* "... adopted the structured decision-making model wholeheartedly.... However clear the decision seems to be, we'll still go through the process... nothing is ever as clear as it seems..."

302. *M1,* "It's got more structured, more scientific... lots more guidelines,"

303. *M5* "that you have to look at the picture in the round... I've got better at doing that."

304. *M2,* "... more familiar with the approaches ... and how to use the 'book'[referring to the Guidelines]"

305. *M10,* "I think my approach has changed with training. Training, hopefully, makes you more dispassionate, so that you actually deal with the facts."

306. *M6,* "... to lead other people in a discussion... a firm believer in training and not just attending the training sessions".

307. *M10,* "... very conscious that you could become institutionalised,"

308. *M5* "... learned that some people that I would have pre-judged, in a sense, I don't any more,"

309. *M4,* "It has taught me that you don't go on first instinct."

310. *M6,* "I don't think that I've changed in terms of my own thoughts... [but] one has changed one's sentencing along the lines of the law. One has to alter the way one thinks of things ... I don't think I've suddenly become more draconian."

311. *M2,* "I think one has views about the nature of some sentences and for me that would be around drug issues... I'm surprised at the lenient nature of the penalties... [but] I think you have to accept the Guidelines."

312. *M8,* "I don't think I approach it differently or I've got stricter or softer",

313. *M7,* "No, it hasn't altered"

314. *M1,* "I don't think I've changed significantly,"

315. *M4,* "I've become harsher on drink driving. I feel very strongly about that... driving disqualified, too"

316. *M4,* "... I do think putting something back into the community is what they need to do but what they haven't come up with... any good projects... to be able to do it."

Theme 7: Group working

317. *Charles,* "All the same. It would be very difficult to tell any one magistrate that they should be less....",

318. *Felicity,* "Oh yes,"

319. *Joan,* "Yes definitely."

320. *Emma,* "I think it's not bad, actually."

321. *George,* "... [on] relatively or very straightforward matters",

322. *George,* "I've not felt that my views were being allowed to be aired for the sake of it,"

323. *Ian,* "... remind[ing] them that their point of view is just as important as the other two."

324. *Ann,* "... a lot better than it did."

325. *Bill,* "... over the last couple of years, I don't think I can think of an occasion when it's happened. Prior to that....",

326. *Joan,* "... it's certainly got much better.."

327. *Ann*, "It just happens... I feel I can participate",

328. *Felicity,* "It's not a problem."

329. *Emma,* "By and large, they are listened to… "

330. *Felicity,* "Most Chairs are aware that they have to listen."

331. *Bill,* "If I'm prepared to listen first… I expect them to listen to my point of view."

332. *Charles,* "All should have the same opportunity for input,"

333. *Felicity*, "Well everyone has the same opportunity"

334. George, "You have every opportunity to make a comment,"

335. *Emma,* "Some people feel they are not getting the input they deserve, partly because of some perception of theirs…they're not being listened to …but it's to do with their own way of communicating. … I assert myself"

336. *Felicity,* "If you don't take the opportunity, that's the fault of the winger."

337. *Bill*, " I'm a pretty laid back sort of bloke but that person got me so wound up that I took them outside and said I wanted to talk to them…"

338. *George,* "… speak up, don't be cowed."

339. *Emma,* "In court I say out loud… 'I am going to consult my wingers'."

340. *Emma,* "Occasionally in court … someone will come to some decision… quite off-beam without having consulted but it's usually not serious."

341. *David,* "I would much more go along with the going suggestion [made by another]."

342. *Joan,* "If you do the sentencing exercises and you do the training… There's a much fairer, good discussion that goes on between us."

343. *Ann,* "[Those] who have joined over the last 4/5 years are now much better trained which gives them more confidence… They're less prepared to have their views discounted."

344. *Ian,* "Newer magistrates seem to have had a much better training than I had when I started. A lot of what I've learnt was learnt on the job… Now they come properly

trained by experienced professional trainers, so that the quality of the work is, I think, much better now."

345. *Emma,* "Some people feel that they are not getting the input they deserve... that they're not being listened to but it's to do with their way of communicating as well. So, it depends on somebody's confidence... "

346. *Bill,* "[It's a problem]... if you get a particularly reticent winger"

347. *Ian,* "... colleagues who have led... 'sheltered lives'. They've never been part of the hurley burley of life."

348. Charles, "We're sitting as a tribunal of three. Part of the confidence that the public has in us, is that we are three."

349. *Emma,* " I spend the entire time allowing the court to realise that we are a tribunal of three."

350. *Joan,* "... never start [a discussion] until you have got all three people there."

351. *Ann,* "... enabled... decisions to be taken with much more consensus, so the perhaps overpowering magistrate... is not able to dominate.",

352. *Ian,* "It's a fairly complex structure, not one we normally find in life... We have to agree to some sort of agreement."

353. *George,* "There have been odd occasions when I have felt that decisions have been taken without any reference to me at all and I've been slightly concerned."

354. *Felicity,* "I was very unsure of myself... I would listen, thinking you know more than I do."

355. *Ian,* "They'll start at the wrong end... part of my function is a training one... make sure that they were adhering to the structured decision-making... It's the only way to get the job done, in my opinion... I think it is a very vital training role and because I have been on the Bench for some time... sentencing with an experienced Bench may seem to be easier but I wouldn't say it was better or worse... I wouldn't confuse speed with accuracy."

356. *Charles,* "You have to rely on the Chair to ensure that everyone has the opportunity to be heard".

357. *Charles,* "Yes some Chairs do. Some stand so far back, they almost vanish and some are right up front and people feel 'rail-roaded'."

358. *David,* "It depends on the person who is Chairing... If someone is chairing well... [they] should encourage... equally, a good Chairman should discourage domination... An experienced Chair might prevail, simply because the two new people might submit."

359. *David,* "... the relatively new [colleagues] take a view that the more experienced [magistrate] wouldn't take because they haven't had the experience of a number of cases as one has had... a view that couldn't be allowed to prevail because it's way out."

360. *Felicity,* "... because they had no experience and that's as bad as an over-dominant one."

361. *George,* "The Chairman pronounces... different people have different styles of being Chairman and some... will check on every occasion",

362. *Helen,* "I put my chair back and I wave my hands to gather the others."

363. *Helen,* "... set out what I think we need to be looking at... then leave it to the wingers to make the first observations... then I make mine,"

364. *Ian,* "I say we're going to do it [use structured decision-making] this way... I'm firm about that. I can't really countenance a lot of back-sliding, effected in that way."

365. *Joan,* "I've seen a Chair who comes out and says "Well this is easy, this is what I think", down to one who lets somebody have a view and then the Chair taking over. A Chairman's role is not to take over. A Chairman's role is to lead and guide... "

366. *Ann,* "...get each [person] to speak in turn. If you take a topic like the aggravating features, you might ask one to say what they are, then the other two of you would add anything that was missing."

367. *Ann,* "You might start with the other one the next time to say the mitigating features… everyone gets a turn."

368. *Bill,* "… open up the book [referring to the Guidelines] and use that as a starting point… Keep a list of what should be talked about… Go round each and check if there is anything missing… If there's anything missing, I will say at the end… I have these points, do you want to discuss?"

369. *Charles,* "Everybody… in turn gets to comment… everyone gets the opportunity to cross-question and raise additional points… then you have to draw the threads together and either come to a consensus or occasionally a majority view,"

370. *Charles,* "I might have involved the Clerk, if you feel people are going down the wrong road… I would bring the Clerk in to explain or to give further advice… that's often resolved a difficult issue."

371. *Emma,* "I try not to sway anybody but, no doubt, I do… If everyone agrees with me, that's great… If I feel very strongly about something and no-one agrees with me… I could try to bring my influence to bear a bit more."

372. *Emma,* "… getting everybody focused on what they're doing and get on with it fairly fast."

373. *Emma,* "I might immediately say, "Right this is the offence, this is what we are considering"… Yes I'd lead initially… You can tell which colleagues are going to pick up the ball and run with it"

374. *George,* "I would be asked to express my opinion… [You wouldn't open the Guidelines?] Oh yes, of course, I would… those Guidelines are designed to seek to impose a consistent approach on all Benches… The Chairman might say "I agree with that" or turn to the third member and ask his/her opinion. If it accords with mine, then again the Chair might say "I agree"… Where the Chair disagreed with both positions… the Chairman would present his/her views for comment… I think there have been one or two instances where the Chairman has not been able to persuade us… the Chairman

has accepted the majority position... I've had the experience [of the Chairman continuing to argue, in those circumstances]... but the majority will prevail."

375. *Helen,* "... very careful... to set out what I think we are looking at, in general terms, if it's the elements of an offence, elements we need to make a decision on and then as far as sentence is concerned, what we need to consider... I try not to make a judgement for myself... Then I leave it open for the other two to say what they have to say and then I bring in my thoughts at the end... or I'll divide it up and bring in my views after each of the wingers have made their points on a particular element",

376. *Ian,* "As a Chair, I don't reveal my bid... until I've heard the other two. I'm then in the enviable position... of picking sides but I'm not waiting to hear what they say... I've already made my mind up. If one of the wingers agrees [with me]... I bring the other winger in and ask them to explain why they believe in what they've said. How can they justify it?"

377. *Ian,* "I do feel I have a more important voice as a Chair where that, in reality, isn't the case or shouldn't be, but I do feel that."

378. *Joan,* "I'd get the book out and ask <u>them</u> to let me know what you feel about this... not necessarily saying to them that they've got to go through the Guidelines because some people are much better at actually just coming out with their views... then afterwards I come in... If they are both of the same opinion and I agree, there's no point in going back so I will agree... go through the book just to check off that we've done things correctly."

379. *Joan,* "Sometimes you can tend, as Chair, to say, "Look, this is what I think." which is actually going to influence the other two... in particular, the younger ones might think, "... they've been there for ages and ages... " and that's not necessarily right

380. *Joan,* "I tend not to say my own personal one until I've got to a point where I would say, "well I'm not sure that I agree with either of you... could we look again?"

381. *Joan,* "You've got to learn to shut people up who are going to go on and on for ever."

382. *Emma,* "... tried very hard to squash the older winger from throwing their weight around."

383. *Charles,* "You have to make sure that everyone has said what they wanted and those that didn't say anything had to respond to questions that you had raised, to get them to say something."

384. *David,* "... encourage a contribution from the less dominant person... As a Chairman I feel more of a responsibility for probing a bit... make sure all the avenues have been looked at."

385. *Helen,* "... so that each person thinks they're important.... I'd say, "What do you think in these circumstances?"... I might reiterate what we need to think about... try to use very simple language...Everyone will have to have an input."

386. *Ann,* "You might have to sort of mediate, if there was a disagreement between the two wingers."

387. *David,* "... might have to reconcile two somewhat different views."

388. *Joan,* "[As a winger], I would give my opinion, whereas, as a Chair, I would reserve my opinion... [I] probably feel freer to actually give my view", qualified by "... if I was asked, I would give my view.",

389. *Charles,* "You make the same contribution, perhaps more subtly but the reality is, you don't want to take over and you probably say less... "

390. *Emma,* "I try to be a little more circumspect as a winger, so that the Chairman doesn't feel... I'm trying to take over... One is a slightly more quieter way... being a winger reinforces different skills."

391. *Helen,* "There's always a tendency to look to the right... It's happened to me frequently when I've been a winger, that I'm either the person who is always asked [for

my opinion] or always excluded and that isn't nice." As a winger, she was "not sure if I actually do have quite as much input... It varies very much with the Chairmen."

392. *David,* "If the Chair and the other winger are satisfied, I'd probably feel it was alright, I'd go along with it [the decision]... If the other two are different, I think I feel less responsibility to make sure all avenues have been looked at... I'd be saying what I thought and if they thought differently, I would have to consider whether I would seek to persuade or whether I'm close enough".

393. *Ian,* "I can sit back and let the others say something and then I will say [what I think]... Sometimes, now, I am more experienced than the Chair...In that role I have to have and to use additional resources, to make sure that the new Chair doesn't feel slightly swamped."

394. *George,* "I don't know if it's a Chairman's training point, but they often seem to go to me as the youngest/most junior and say, "What do you think?"... I don't find anything unacceptable in it... It's a challenge to the new magistrate to begin the process of reaching a decision... It forces you to think about the facts, to think about the relationship to events... brings you to a decision-making attitude."

395. *Felicity,* "Now I love it [the invitation to go first] but when I first started, I didn't know where I was... I had no experience... It depends how inexperienced they are... for a person of six months, I wouldn't do it... I don't feel as timorous as I did when I first started... Now I'm quite assertive and it doesn't bother me."

396. *Charles,* "In fact, I'd probably do it the other way round."

397. *Helen,* "It depends on the person... If someone is going to find it very daunting, it's sometimes helpful to let the experienced person go first ... and gauge how it goes."

398. *Joan,* "They need to be treated with respect... New magistrates have a tremendous amount to contribute because they have new knowledge, new ideas... At the same time, it's a new world... Even very experienced business people are learning the terminology, learning the way it works."

399. *David*, "... to avoid them expressing a view that is influenced by someone else's view. It encourages them to form their own view and then listen to what others say, in an attempt to come towards a consensus."

400. *Emma,* "....might let a new winger go first... gives them a chance to air their vocal chords and feel important and part of the process as an equal... I'd be interested to see what they thought."

401. *Emma,* "Most of the new wingers we've got at the moment are perfectly vocal... don't seem to have a problem in coming forward with their views."

402. *George* "They seem to be fairly objective, on the whole and give good advice."

403. *Emma,* "Some of the time they are terribly helpful."

404. *Felicity,* "I've been with some excellent LAs.."

405. *Joan,* "The LA can be very useful."

406. *Ann*, "...just they should give advice when asked for or point out anything that we should be considering in reaching our decision."

407. *Bill*, "... point[ing] out legal precedents... advise if it's legal to do as proposed or not."

408. *Charles,* [indicating what a LA should point out], "... that our thinking doesn't square with superior court advice or if we have forgotten some issue."

409. *David*, "It shouldn't be necessary for LAs to draw attention to the Guidelines in the Bench book. Everyone should know that they are there and use them... There may be Court of Appeal guidelines in relation to sentencing... It's right for the LA to draw attention to those in open court". He was emphatic, "I don't think they should be present [when sentencing decisions are being discussed]... It matters not too much [if sometimes, the LA's view is revealed at the courtroom door], in case there is some illegality or ancillary order that we've forgotten about."

410. *George*, "We may have reached a decision about a particular sentence, we would always without exception, ... the LA is called in, just to tell them what we propose to do,"

411. *Joan,* "They don't actually say an awful lot until towards the end... I would certainly use them for asking any legal advice and their main role for me is writing up reasons because they have the experience... I like to talk to them afterwards... so as to get feedback."

412. *Helen,* "They [the LAs] would obviously mention anything in the '[Guidance] book' that was relevant, that we need to consider...After we [the magistrates] have made the decision, just check with the LA... We might need his/her help on an issue... I would ask them to retire usually after a little while, when we had ascertained the facts and identified the areas that the LA is involved in... "

413. *Ann,* "[It] depends on the LA... where they fit in... depends on the LA themselves."

414. *Charles,* "Some are a lot more pro-active than others and they vary a lot in the extent to which they [get involved]."

415. *Joan,* "It depends who you get."

416. *Bill*, "If I go back a few years... I think things were a lot freer... Now I wonder if everything is just too tight."

417. *Charles*, "I haven't seen it recently but that may be because more and more of them are less experienced. The new ones are much more careful."

418. *David,* "... had a difficult time with a LA who has now left... [and] about three months ago, I had an extraordinary experience... "

419. *Helen,* "... had a difficult time with a LA who has now left," but equally, "... about three months ago, I had an extraordinary experience... "

420. *Joan,* "They're getting better now"

421. *Emma,* "Their role has definitely changed over the years, at least their perception of their role has definitely changed."

422. *Charles*, "There are some [LAs] who would be delighted if they didn't have to engage with you. They see themselves as Stipes [professional magistrates] in all but name."

423. *Emma*, "They're not particularly deferential any more in any way, which is probably a good thing. They don't particularly take a back-seat in any discussions or wait to be invited or any of those things they used to do… The way they tend to despise the lay Bench, it's much more obvious than it used to be."

424. *Ann,* "… much more involved in sentencing where perhaps they shouldn't be."

425. *David,* "I sometimes get a sense that some LAs seek to influence the sentencing outcome which they shouldn't do."

426. *Emma,* "The newer style LAs tend to be right in there with their opinions a lot of the time… It can be quite difficult to handle"

427. *Joan,* "I do not like LA interfering with decisions… I've told them where to go."

428. *David*, "… [had] a difficult time with a LA who never left us, at one stage refused to leave the discussion and let us get on with it….He wanted to stay and join in. Yes, there is a tendency for the view of the LA as to what the sentence should be, to be revealed… when it shouldn't be… [They] sometimes reveal their view by a sigh or raised eyebrow or something… It matters before the decision is made if something is said by the LA that influences… "

429. *Ann,* "It can happen that they actually make [sentencing] suggestions."

430. *Felicity,* "… when the LA makes their view very obvious, perhaps quite early on… They can bring in negative reactions,"

431. *Felicity*, "… about the way they think some of the Bench may be going."

432. *Ian,* "Some LAs will say things like, "Do you really feel that length of custody… is appropriate?"… Then they're playing a big part in it, when they say that… They have now become part of the tribunal …they shouldn't"

433. *Ian,* "I think most LAs will indicate one way or the other that they found a sentence is inappropriate i.e. too harsh. I can't recall a LA drawing your attention to what they thought was too lenient. "

434. *Joan,* "Depending who they are, they can come out after 5 minutes or they can come out after another 10 minutes... ".

435. *Emma,* "Most of the time one thanks them gratefully [for their advice] and then presses on with what one is discussing."

436. *George,* "We reach the [sentencing] decision ourselves. We do not do so in the presence of our LA."

437. *David,* "A lot of room for improvement in the performance of LAs, in relation to the sentencing process… namely keeping out of it!"

438. *Emma,* "It may actually make you do rather the opposite, if you are not careful… so, it can be detrimental."

439. *Ian,* "… based on their experience, maybe the sentence might be disproportionate".

440. *Charles,* "I tend to put these things out of my mind, once a decision has been made. I'm not troubled by the decisions that I made",

441. *Emma,* "Sentencing decisions don't keep me awake at night."

442. *Emma,* "By and large, I tend to get an outcome that I find acceptable to myself… The ones that I don't find acceptable to myself are usually ones that I don't care about… They're not so important, in other words, either a fine or conditional discharge… obviously not so serious, so it's not quite so important."

443. *Emma,* "The difficult sentencing decisions are nearly always custody or not custody."

444. *George,* "In the end, we didn't send him to prison, which in broad terms would have been justified, but sent him on some sort of rehabilitation."

445. *Ian,* "The indicated sentence for that would certainly have been imprisonment but taking the woman away from her children... might have been out of all proportion. I wrestled with that."

446. *Helen*, "It is difficult when there is nothing appropriate... no means to pay a fine... community service might be appropriate... [but they are] not able to have the discipline to fulfil it... nothing that actually fits... "

447. *Felicity,* "Sometimes you come up with a sentence that you just don't feel happy about but you are left with, "Well, what's the choice?"... You can't do anything else, that's the system, that's the way it works... Sometimes I feel I've done something good but not very often."

448. *Joan,* "... domestic cases, because you have people's lives... and in particular where you have children as well... There have actually been cases, even now, where I've come back and thought, "I don't know, I'm not happy with this, I'm not happy."

449. *Emma,* "If you think you are going to make an error, you tend to err on the side of caution and don't send them to prison."

450. *Bill,* "I sometimes think, in the back of my mind... if the reasons for our decision aren't strong enough, that they could lead to us being overturned. I sometimes consider that the decision that I make... well, it's got to stick pretty well."

451. *Ian,* "You end up... being unable to inflict any sort of punishment because it's impractical".

452. *Joan,* "... quite lengthy discussions, going through points that you have already been through, back to the Guidelines",

453. *Emma,* "One takes a view as to the length of time. So I think half an hour is plenty, personally... you've done the structured decision-making and nobody is going to budge, then you have to go two against one and that's that... I think you have to limit

time... Ultimately, it's got to be a majority decision... but obviously everyone has got to feel they've had their say."

454. *Bill,* "Sometimes it's done by majority... The law isn't an exact science, is it?"

455. *Charles,* "I believe that many people confronted with a particular type of crime will have an instinctive response to that crime."

456. *Charles,* "They will fit the evidence into their preconception and not listen to contrary points."

457. *Helen,* "experience and looking at the defendant... Experience of that type of offence, that type of offender, that sort of track record... I think it's more experience, I would prefer to put it."

458. *Ann,* "I think the thing about weighting – the aggravating and mitigating – now that's quite difficult... It's almost giving points, isn't it? ... I've never really counted one against the other. Although, having said that, it's actually right that, if you have one aggravating and one mitigating, you might think, well, that sort of balances out... That's what you are using to come down or go up on the scale from the entry point... Yeh, there is a bit of a see-saw going on."

459. *Ann,* "... who hadn't adapted to the new structure... their experience leads them to suggest certain sentences without following a structured process... They tend to make very quick decisions."

460. *Ann,* "I've seen many of them [this sort of offence/offender] in my time"

461. *George,* "The algebraic model... would be consistent with trying to be rational."

462. *Joan,* "The algebraic model because with that one, you have got both sides, I understand that."

463. *Felicity,* "but not putting any sort of numerical values... I don't like the word algebraic because of all the connotations with positioning numbers which doesn't seem to me... to be part of it.""

464. *Emma,* "... an element of story-telling, because you have to hear the person's story, to an extent, and ... the victim's story, so there has to be an emotional element, even if it is a well controlled emotional element."

465. *Ian,* "If I was describing myself, I would say it was (a)[story-telling] but with an overlay of (b) [algebraic]... Of the two I think (a) would predominate but with a reasonable amount of (b)."

466. *David,* "What you describe as the algebraic is my bête noir."

467. *David,* "We debate so often... what scoring method are we going to use?... I have an essay that I either say to them or send to them by e-mail, saying "Look scoring methods ain't in it." He was especially critical of any attempt to "write down the qualities and skills and experience that the person to be appointed must have and go down each of them and put a number against each of them... and add them up... it's nonsense... It's a load of rubbish, in my view...I usually persuade them...but they have this form....I say, "Look if you use 1-10 as your scoring method, you are not going to say that this is just as important as that... you're going to be into weightings....the permutations of weighting systems is 10 billion... how long is it going to take... to work out which one is appropriate?... forget the algebraic stuff in anything to do with human activity."

468. *David,* "I think there are people who sometimes overmuch do have regard for what we called the 'black book' [local name for the Bench Book in which the Guidelines are included]. It's getting close to my antipathy to the algebraic approach because with some it's becoming too mechanical... regard[s] the magistrate as some sort of computer."

469. *David,* "... that you stand back a bit... It's all a question of judgement. All of those words [contained in the features illustrated about the offence and the defendant as potentially relevant] are words that might or might not apply... Approaching it as if you are a computer is wrong and the non computer bit is using the words to channel

your thinking in the right sort of direction. … but it has to be shades of black, white and grey for all those things… there are degrees… you have to use whatever judgement we're all supposed to bring to the process."

470. *Helen,* "… very rarely, depending on one's wingers… borderline cases that are difficult and if that requires time well that requires time, it depends entirely on the circumstances,"

471. *Charles,* "… even if the LAs don't think you are quick enough… generally, a lot of decisions are made quite quickly,"

472. *Emma,* "The third model (heuristic processing), definitely not because speed is not always justice and you cannot pick out just one thing… That would make your decision invalid."

473. George, "… almost encourages a lack of rationale, so you might think "that guy is black, so he must be guilty" and that's completely wrong."

474. *Emma,* "decision-making … is a lot to do with risk assessment… In the Youth court there is a lot more emphasis on preventing re-offending, rather than punishing the offender... [in the adult court] you have the public perception of consistency… and the public perception of certain offences has to weighed up in what you do."

475. *Felicity,* "… just the way I think, I put things in columns and there seems to be more here than there and that seems more… I do like to write things down in that way."

476. *Charles*, "… the help they are giving us on these Guidelines, I think that's very helpful. It's better than it ever used to be… How many years have we been trained on these? Quite a few years… we accept them now. We've imbibed them. [And actually adopted them? - interviewer]… Absolutely, I think those that didn't have gone."

477. Joan, "I think what's interesting is how sentencing has changed… in the last 20 years. I would say some for the better and some for the worse because we do have the Guidelines to go to, which I think is actually very good for the majority of people...

There were guidelines before but I think they were slightly less... prescriptive and one actually made more of your own decisions. Now you're being very much structured into a sort of tunnel... You have to justify everything and I'm not always sure that is actually the right decision... Now we make the right decision within a boundary."

478. *Joan,* "There are occasions when I would love to do something totally different, in fact, sometimes you can...No case is like another... They're very different,"

479. *Helen,* "... couldn't make a final decision without knowing I've gone through a process to come to that decision,"

480. *George,* "My approach is to look at the facts, look at a range of possible sentences and reach a rational decision, because that's, through training, the only way I know how to do it."

481. *Bill,* "... a good Chair ... [doesn't] really want to waste time but they'll do that without prompting from one of the wingers - they'll go through it again."

482. David, "It's aggravating when Mr Blunkett or some other minister says magistrates or judges are being too lenient on this sort of offence. Every offence... is different and every offender is different... Of course, newspapers can quote extreme cases, if they want to... There are statistics around but... you have to look at the population... They're very different...the level of unemployment, the social disabilities... Anyone who says "these two are inconsistent", on careful examination that's got to be invalid... Even closely neighbouring boroughs are different".

483. *George,* "I think an area where there seems to be confusion in the minds of magistrates, and I include myself, is the political/ Home Secretary context and the comments which say "Gaols are full of too many people, magistrates shouldn't be sending people to gaol." On the other hand, you get the comment "People are getting away 'Scot free' and there's £n billion amount of fines outstanding, etc." ... I think magistrates are put under quite a lot of conflicting, general contextual pressure, which is confusing. ... Magistrates do have a difficult general context in which to decide how

to sentence... Uncertainty about what society expects of them, in terms of sentencing... might itself lead [one] to put more weight on some [mitigating factors] than you might otherwise, on a rational basis."

484. George, "I suppose in the entry point because, clearly you can't have a mitigating factor "society says X", but it is a political issue, ... [but] it's actually running right through the structure."

485. *Emma,* " The Stipe [old abbreviation for District Judge] who is a trained lawyer... will stick much more rigidly to the Guidelines and be more consistent and stick to the law... [However], you can't get away from the fact that this is a people [driven exercise]... driven by their own experiences, however well trained they are... "

486. *Ian,* "...watch the District Judge, for example, dealing with sentencing... The way he approaches things, the way he speaks in court, the background he brings to bear on things... I think they've got... quite a lot to teach the lay Bench. "

487. *Ian,* "... some sort of play-back as to what the effect of it [the sentence] had been."

488. *Ian,* "Then we would hear that something was working very well or not as the case may be."

Appendix 10

Study 3 Data

Transcription of the sentencing exercises Sept 04

Cases 1-3

Appendix 10

Transcription of sentencing exercise Sept 04
Case 1 Mc cook theft of £100 cash snatch from till in Sainsbury's
Chair M1

1. M1what are the things that we are looking for?...I'd better just open the [book]...
2. LA I've been advised to ask you to refer to the adult Bench book and certainly for the matters he's facing , theft, P 60 of the guidelines
3. M1here it is. So.. just theft is it , is that the only one
4. LA Yes just theft.
5. M1Forgive me everyone, it's been about 4 months since I've done any adult work. Right, Mr cook , facing theft, would someone like to kick off about the seriousness element?
6. M2 well the entry point is ..Is it serious enough for a community penalty?
7. M1The offence *itself* is not a very high level theft, is it?
8. M3 No, no...
9. M4 not very sophisticated.
10. M3 It was premeditated and he has quite an extensive record hasn't he?
11. M2 record yes yes
12. M4 He was also subject to a community rehabilitation order, at the time
13. M5 So he's committed this offence whilst .....
14. M3 And it must have been quite well slightly, scarey I mean he *grabs* it wasn't as if it was surreptitious or anything like that...
15. M2 That's right
16. M1So what are you saying? That increased the seriousness [M6 emm ehm] or are they increasing the aggravating factors?
17. M2 well I think we must – as you said he grabbed, it must have given him quite a shock for the cashier. It not as if he stuck it in his pocket and tried amble out with it
18. M6 it was premeditated
19. M5 But it is aggravating – the answer to your question is yes it's aggravating
20. M1So intrinsically it's not such a serious offence but it's aggravated by all these other factors and by his history. If we all know that yes the entry point is a community penalty, is there anything in your view would take it up to something more serious?
21. M4 Or conversely, there's nothing that really helps him to get down below the [recommended entry point]
22. M5 Yeh, there's no mitigation, is there effectively?
23. M4 and the community penalty is the entry point
24. M6 That's true and he has also been assessed as a high risk of re-offending.
25. M1quoting PSR "I am unable to make a proposal for a community based sentence unless the court feels it is appropriate."
26. M4 The biggest hole in this case is the absence of any assessment for a DTTO.
27. M1Well because he has already breached one.
28. M4 it wasn't a DTTO was it?
29. M1I thought he did,.... "including the condition that he attend ..."
30. M4 but it was a day programme wasn't it
31. M1 right
32. M4 not a residential one. There's some suggestion that he's improved...this was lapse. It would have been interesting if we had that information
33. M1 yes . We could *ask* for it but.... it's pretty clear from this report that they're not keen to have him on a community based programme.

34. M4 It isn't often you see them recommending it
35. M6 It says .... "Unable to make a proposal.."
36. M1What they're actually saying is that *really* we're not prepared to have him back on a community based programme. It says "I have no doubt that the current matter warrants the imposition of a term of imprisonment."
37. M5 Can we just go back. I said there was no mitigation but if you look at the stuff here [in the bench book] it does say.. "impulsive action" which although perhaps we believe it's not ...it *could* be an impulsive action" It does say also low value.
38. M1Yes
39. M2 But it actually has been said that he intended to do it..so it was premeditated so you can't ....
40. M1Yes I felt that it was a fairly impulsive thing to do
41. M6 Don't you think that it was premeditated?
42. M1Yeh I think [it was]
43. M2 He's admitted it
44. M5 If he's admitted it, that's fair enough
45. M2 It says he went out to get the money because he needed it.
46. M3 I think he went out to .....[steal]
47. M1"Admitted that he went out to Sainsbury's pretending to be a legitimate customer"
48. M5 but did he admit that he actually went there to steal cash or that he went there to commit an offence?
49. M1"Waited at the checkout until the till was opened and grabbed the money from it"
50. M5 That sounds impulsive, rather than ....
51. M1Yes that was the first thing that occurred to me
52. M3I No think he went there and specifically waited...
53. M1On the other hand hanging around and waiting until the till was opened that sounds pretty.. [premeditated to me]...
54. M5 sure I'm not saying that that we should take it into account. The point is that we should consider it that's all.
55. M7 He decided to go out and offend.....That's what it says
56. M5 OK as long as we have discussed it, that's fine, I don't have a problem.
57. LA Do you think that it is aggravated by the fact that he is currently breaching a CRO?
58. M5 & M6 Yes, yes it is
59. LA ....For practically the same offence..
60. General agreement
61. M1 Now I want to write down a few things. So what we are saying is that it is not intrinsically the most serious of offence but it's been aggravated by... and if you could just list them for me ... no by what...
62. M6 His history
63. M1His record?
64. M6 Yes
65. M4 If we do the offence is aggravated by ...?
66. M1Yes I'm on the offence, we haven't even moved on to him yet. His record...
67. M2 Sorry are we talking about his record or the offence
68. M1Sorry the offence
69. LA You said before it was planned it wasn't sophisticated, that potentially the cashier was the vulnerable victim of the snatch....but...
70. M1so most of the aggravating factors are him, rather than the offence
71. M5 yes umm
72. M4 there's a degree of aggravation but it's balanced by some mitigation to the extent that it's fairly low value and relatively unsophisticated

73. M3 Yeh but you have to say it's just the fact that he put his hand inside the till, it could have been £500. It's different to someone stealing a jar of coffee, do you know what I mean?
74. M4 yes it's not trivial
75. M1so *relatively* unsophisticated, I suppose
76. M3 Yes
77. M2 But it is also aggravated by the fact that he must have caused some alarm to the cashier.
78. M1& M3 yes umm
79. M2 Mind you not enough to stop the cashier chasing after him
80. M3 yes I did worry about that
81. M1So not massively but if we move on and look at the situation as regards the offender…that's not good news because ..
82. M4 well except that there's the guilty plea,
83. M1Right
84. M4 there's his remorse
85. M1full confession
86. M4 there's co-operation
87. General derision that he hadn't much choice
88. M1So what are the important things about this?.. there's the record…extensive record and failure to comply with a previous community penalty
89. M7 well he's also offended whilst on he's on the CRO as well
90. M2 which was for exactly the same offence
91. LA Would you consider revoking the CRO given that you have read in the report that he's not been attending?
92. M6 Yes …we could consider custody, and it would be..[revoked]
93. M1so now we have to move on to actually make a decision as to what's the best thing in this case….
94. M4 Do we factor in anywhere the fact that this has been a long term problem that he has made some effort to address and that it appears to be a single lapse in a period has been going a *little* better than some have.
95. M1"The drug free since the start of the year, …pledged to remain so ." It says that this offence was committed in order to feed his drug habit .. so the answer again is ..*some* , yes a bit of credit..
96. M2 What's the date of the offence... is it supposed to be today.. so it's only 4 months since the original offence
97. M3 ….and this is an identical offence – I must say I'd missed that
98. M2 ….so how much weight do we give to the fact that this a long-term addiction?
99. M4.. that might it look a *little* more promising than someone who had not even attempted to address this habit and had not undergone this process.
100. M1..so are we saying really that a DTTO perhaps, might have been the right decision last time round, - a proper one
101. M4 ..it's one that should certainly have been *tried* at some stage
102. M7 I think it might have been worth having him assessed for it, ..but the fact that he's not complying with the CRO would have made him unsuitable but I agree he should have been assessed for it.
103. M1That being the case, it's crunch time and are we going to give it another chance with a DTTO or..
104. M6 It says he was referred to an agency to address his crack cocaine…
105. M1But I think that was a voluntary thing..
106. M6.. so obviously, he didn't want to do it
107. M3 ….but it must have been more than just a drop-in because it says he has failed to keep his appointments.

108. M5 that's right ..and he's committed an offence whilst in the middle of that programme.
109. M2 I mean he's been given a chance but he hasn't gone into the programme.
110. M7 They do say that the CRO was *specifically* targeted towards addressing his crack addiction
111. M3 Where does it say that?
112. M5 Look here...at 5.5 and 5.4 is that correct as a statement of fact, pardon my ignorance [refers to the exclusion of Disability living allowance recipient from CPO]
113. M2 is it actually correct?
114. LA confirms that he is excluded.
115. M1So we are in a position that probation are actually saying they don't want this guy for all the reasons given, he can't do a CPO and *yet* do we feel that it is serious enough to push it up to custodial sentence because of the aggravating factors.
116. M5 Is there any sort of curfew that we can ...?
117. M2 How would that help?
118. M4 ..Confirmation that we've restarted the CRO even though we are advised...
119. M2 But how would curfew help?
120. M5 Keep him indoors
121. M1But aren't we asked not to do that. If they say they don't want one we are asked very strongly not to impose one.
122. LA Yes you are
123. M7 ...but the probation service said they didn't think there was anything they could do to help him.
124. M2...give him a 24hour curfew?
125. M1....well they actually saying that "for these reasons I am unable to propose a community rehabilitation order, ie *don't* give another one. This is what I was asking the LA. Under those circumstances we are under great pressure not to do it against their will so we are sticking our necks out hughmungously if we do what M4 suggests which is make one anyway.
126. M4 except it says in 6...."I am unable to a proposal ...unless the court feels that another CRO is appropriate" You can see they're not very keen but.... but I think even they recognise that they are not able to *prohibit* what we can do...
127. LA But then you would have to indicate to them what kind of programme you felt was appropriate and then they would have to run through the ones they thought were not appropriate and they haven't been able on this occasion to suggest one that is. So unless you know something that they possibly don't. ...and you can't be breaching anyone..
128. M1So let's take one side of the story which says that we *could* look at this guy who has offended whilst on his programme, he's breached the programme which was specifically targeted to address his crack cocaine habit. He's gone out and committed another offence, he has a history as long as your arm if I can remember and is it time this guy went to prison.
129. M2 Where's the history?
130. M5 He's been to prison before,
131. LA 3.1 between 12th Nov 73 and 15th June 02 he committed those 17 offences
132. M1mainly robbery
133. M3 ...so he is one of those kind of revolving door sort of...
134. M1yes . SO the advantage of that is that he is out of the public arena, he's not going to be doing any smashing and grabbing or whatever, he's not going to be taking drugs because he's inside. The question is are we justified in doing that, is there *enough* that aggravates the situation to do that?
135. M6 Apart from that he's had financial penalties, he's had community based and custodial sentences.

136. M1And he's not a baby either… he's 42
137. M6 That's right
138. M2 So maybe one should be thinking about the effect on of society
139. M1That's right, keep him out of the way
140. M6 that's what they're doing, that's the very reason …That's what they say
141. M2 He's going to offend again
142. M5 …he's a persistent offender…...he's admitted resisting residential rehabilitation
143. LA Of course one of the things you can think is that even though the amount is relatively small if you decide in your mind based on what you've read, that you would count him as a persistent offender, you would be able to exercise powers of imprisonment on the basis that it is so serious because you are wanting to protect the public.
144. M2 How about risk of re-offending?
145. M6 I don't think you only think towards rehabilitation, you are just saying…
146. M2 I know that's the problem
147. M1But he has been on CRO and …
148. M3 But it's always this question that I find ..[so difficult]
149. M1I know it's not really merited but their interests are not paramount
150. M7 and we are not the social services
151. M2 …But given that he's had specialist help
152. M3 ….and very recently , I think that's an aggravation
153. M6 Yes I know, I know, of course
154. M2 I think we have just got to go through with it
155. M3 I agree
156. M5 I feel uncomfortable sending him to goal but I can't see..
157. M2 What's the choice though?
158. M1I think you could say that about everybody but doesn't this fit the picture, as much or more than anybody if he has had all the chances…..
159. M2 Otherwise you are saying, we won't send you down, but I'm sure he's going to re-offend again and we'll have to put up with it.
160. M5 What's the alternative? But that's the problem and we'll just have to put with it.
161. M3 Maybe he'll get drug treatment in prison
162. M1 Is there general consensus that this situation really with theft is aggravated enough for us to impose a custodial sentence? All right [addresses LA] how am I going to say that?
163. LA Just before you go on to that, in terms of the CRO would you be considering revoking that and sentencing him again on the other theft as well because he's breached?
164. M1Has anyone brought the breach to us?
165. LA Yes
166. M6 I think we have to
167. M4 Well hang on I think we have already taken that into account in getting to the custody threshold, so whatever we are doing think it should be "no separate penalty"
168. M3 Yeh I could go that way
169. M5 It's at 2.4, the previous offence
170. M4 ……effectively *not* increasing the burden
171. M1So do we revoke but we don't …
172. M2 So how long?
173. M6 Wouldn't you think that perhaps whatever sentence we came to, perhaps take a portion and say that is for the previous, otherwise you in effect obviously punishing for the breach
174. M3 Wouldn't you add it on/

175. M1Except he didn't comply. Why should he get credit when he didn't comply with it
176. M2 Well you could that it runs concurrently
177. M6 I think that you have to mention it and say that if you've breached..
178. M4 so you think that it should be consecutive?
179. M3 I certainly wouldn't take anything off the… I'd just go for the sentence and revoke the previous the CRO
180. M2 But you have to mark, you should do something if you revoke.. we should re-sentence
181. M3 Oh I see
182. M1We *can* make it consecutive if we want to…I'm not saying we have to…
183. M6 Yes whatever sentence we want to do, it needn't be more time but I think it should be…
184. M4 But if we have recognised it already in taking us to the custody threshold…..
185. M1Yes that's what I think it should be concurrent
186. M6 But then you have to mention that
187. M1So what are we looking at here?……. How long, how long?
188. M3 Three months?
189. M1Wuff, em
190. M2 no more
191. M3 Well I'm just trying that out
192. M7 Shortest possible to be effective I keep listening to the advice. But I don't know what that is..
193. M1Well it's obviously not the worst sentencing scenario so I don't suppose it's six months, it's not top of the tree, is it?
194. M3 'Cos, realistically, if you did it for 3 months, he'd only….
195. M1But we are not supposed to work like that .
196. M2 … serve 6 weeks
197. M1Course you are right but…
198. M3 OK sorry
199. M2 I'd say at least 4mths
200. M4 We've still got to acknowledge his guilty plea
201. M6 Yes
202. M4 I mean you may feel it …
203. M3 well I just threw that out as a starter
204. M1Can we have some guidance from you about the.. length[sentence]
205. LA The length is as long as you feel is appropriate for the seriousness of the offence
206. M5 I'd put 1 month then 2 months, one month for the first offence, which is the breach and then 2.
207. M1So we are back to three and then do we have to take off for the guilty plea?
208. M2 Well no we've taken that into account if you sentencing for less than 3 months, it's a waste of time.
209. M1On the other hand are we achieving any thing ….?
210. M6 It doesn't matter what we are achieving or not
211. M2 well we are protecting the public.
212. M1Ok
213. M5 Well he is being shown that of he commits the offence again he's going inside
214. M4…..But you have a valid point the record,
215. M3 we shouldn't be thinking that that's all right because he will get better treatment in prison
216. M7 No he won't.. he'll probably get drugs inside

217. M1So it's not a brilliant disposal but I think… 1 month for the previous and 2 months for the present
218. M4 are they concurrent?
219. M1No you wanted consecutive
220. General agreement and revoke the CRO
221. M1And just let's go through once more the reasons why we think it's taken up to the custodial level is because he's breached the previous one, his record and anything else.
222. M4 well there's a small amount of aggravation
223. M6 It was premeditated not impulsive
224. M7 He didn't comply with the previous and he breached it
225. M1 Ok then on to the next one.[10]

[10] Transcribed after sentencing case study 1 by PEO 5/10/04

Transcript of sentencing exercise Sept 04
Case 2 Jones - breach of CRO original offence handling

Chair M6

1. LA I think this p16 of the guidelines – breach of CRO
2. M6 repeats offence of breach of CRO, original offence of handling stolen goods and also fail to surrender.
3. M1 well I've written "have another go" at the bottom I'm afraid. My thought process defies me...I need to refresh my memory.
4. M6 Which is.... by Have another go, you mean another CRO which is actually what the probation [recommended] ...the conclusion they have reached
5. LA Just a practical note on that – she was supposed to have done a think first programme it's a six month programme but according to the notes as they have been written she has missed two months of that so if you wanted her to do that it would a kind of technical exercise of revoking the...putting another one in place then revoking the one she's currently doing so that she could start it again.
6. M7 well they have asked for 12 months because of that, haven't they?... with the new one
7. M1 They say its unworkable without – she's at low to intermediate risk of harm
8. M6 She has 7 previous convictions and she's had a range of penalties. She's had conditional discharge,
9. M2 she's done time in a young offenders institute
10. M6 2 supervision orders , detention centre, community service order
11. M1 and she's only 21
12. M6 agrees
13. M3 does it give any good reason why she failed to turn up for those two appointments?
14. LA There's much about her feeling unsafe in her hostel and ...having difficulties
15. M4 undermined her motivation
16. M3 but there was nothing , no crisis I mean she wasn't having a baby or ....being beaten up by her husband or anything that would have prevented her even getting in touch with probation?
17. M4 No they actually say that the sort of problems that she was having were the type that probation could have advised her on but she chose not to involve them.
18. M7 I think what they seem to be saying is that she doesn't seem to have the relevant life skills or something
19. M4 and some suggestion that she resented having to continue to keep in touch because she had already done a period on remand before she was sentenced and as far as she was concerned that was enough.
20. M3 umm yes
21. LA it's just a point that if you were thinking of revoking and re-sentencing, the fact that she has served a month in remand would be something that you would have to give regard to if you were thinking of going down that route into custody.
22. M6 oh that she's already served...
23. LA yes that you must have regard for custody the fact that she has already served a month *if* you were thinking of a custodial sentence
24. M5 if we compare with the previous case, he's committed an offence whilst he was in breach. She doesn't appear to have committed any further offences, just hasn't complied with the conditions. So I think comparing the two, we could take a more generous view with her.
25. M6 Yes does anyone have any views on that?

26. M1 and she is so young..
27. M3 She *has* offended but did she offend… oh that's the original one
28. M1 and we are sentencing her for the breach
29. M6 and probation say that if you if we were to consider custody – it may fail to address the issues of her offending behaviour and current problems, so they're not keen for that either.
30. M1 But are we re-sentencing her on the previous *and* sentencing her on the breach?
31. LA No what you're doing is thinking to yourself is "she's breached" do we deal with her in the way we would in a breach court or given what probation have said,
32. M1 ….just let run
33. LA ….let it run or take on board that they've said the think first programme is gone so there is a technical issue of ending it and starting another one
34. M1 so that would be the sentence
35. M2 Can't we just extend it?
36. LA No
37. M3 She's missed two months so she has to go back to the start
38. M2 the two months has gone so she's now only got however long…
39. M4 So basically if we want any sort of rehabilitation, we've *got to* revoke
40. M6 yes we have to revoke and restart a different sentence
41. LA if you felt that was the most appropriate thing to do
42. General agreement
43. M1 well we need to give our reasons, don't we
44. M3 Is there any….
45. M6 is that what we want to do? Are we basically thinking that we would revoke and re-start it . We've ruled out custody…?
46. M4 Would we not actually allow the order to continue if it was practical to do so but in that it doesn't achieve what we want in this particular case we are *forced* into revoking so that she can…
47. M6 …Yes 5.1 so that … so is anyone considering custody
48. All no
49. M4 no but I was considering turning it into a combination order which is what I would have done under the "continuing" principle, we would have given her some sort of community punishment or M1 ..but she wouldn't have complied with it.
50. M4 ….even attendance centre in view of her age,…some element of punishment and let it continue but because it doesn't continue for long enough I am *having* to go to re-start it and to get some *penalty* in the re-start I would have to make a combination…
51. M7 I thought that but then I thought that if we gave her some acknowledgement of the fact that she had already served a month on remand and make a point of saying that
52. M4 ah that's an interesting idea
53. M2 …that's the reason why we are not giving her a punishment order and a rehabilitation order
54. M4 yes I quite like that.
55. M6 So can I say that we considered ….., well we ruled out custody
56. LA it would have been a substantial breach just at the beginning
57. M6 right
58. M1 …..so we were considering a combination order *but*
59. M6 right a combination order
60. LA ……but had regard for the fact that she spent a month on remand
61. M6 right
62. Discussion as to whether it was actually a magistrate's order
63. M3…. can I just ask why they remanded her in custody [in the first place]?
64. M7 waiting for her case
65. M4 It doesn't actually say for this offence…

66. M3 No no I just thought that it might be quite interesting
67. M2 That was presumably taken into account in the first place
68. M3 … but we don't hear of many people put into custody because they've breached…
69. M2 no no that was on the original offence
70. M3 Oh I see
71. M7 …and that's why she thinks she shouldn't have had another punishment
72. M2 ..that's probably why they didn't give her a CPO then..
73. M6 ..so as she has already spent a month on remand - what do we feel are we happy just *to re-start* the order
74. M1 that month on remand would serve the punishment element…
75. M6 yes but its already been served
76. M1 It's a bit backward…
77. M6 Are you happy with that?
78. M4 Yes I think that's quite an attractive idea. Either that or a small amount of CPO hours, I don't feel strongly about it
79. M2 what you mean as well
80. M6 Whatever we do should be based on trying to help her. She's had a month on remand which…
81. M4 yes except she was found guilty
82. M1 yes but wouldn't that have addressed the handling?
83. M4 ..and obviously somebody who sentenced her knew that she had served a month on remand and was therefore able to sentence her to a community punishment , so she is possibly getting double benefit for the same thing
84. M2 yes indeed correct
85. M6 yes but at the end of the day we should try to move forward and *help* her..
86. LA if you are revoking and re-sentencing you have to have regard for *any* time spent on remand
87. M6 Fair enough so…
88. M4 Yes because that's what we are doing, revoking and re-sentencing.. for the offence
89. M1 Yes we are re-sentencing for the handling stolen goods and she has already spent the equivalent of a 2 months sentence.
90. M2 so can we be sure…?
91. M2 No it would be nice but we can never be sure!!
92. M1 Well obviously if this doesn't work she knows where she must go
93. M6 yes that's right but at least we have made the effort
94. M2 Maybe that's something that should be said actually – we are giving her another chance basically
95. M1 allow you're right this woman is low to intermediate risk of harm and the risk is reduced by addressing the issue of peer pressure so compared to the last one ….
96. M3 …and she is obviously of a higher level of education so this "Think first" programme ….and she's younger..
97. M1 Yes she's young
98. M3 and for those reasons it really could be of benefit…
99. M1 so are those the reasons why… do we need to give the reasons
100. LA well you can say that you have taken on board her circumstances, the reasons why she hasn't started the course, that you have taken into account the period that she has served on remand already for these matters and that you feel that you are prepared to take on board the recommendations of the report to give her an opportunity to work through what she has work through based on what the report said that she does present a low to intermediate risk and she actually needs to attend a course to assist her thinking processes to keep her out of the system on a long term basis.
101. M2 how long did she get?
102. LA She got an order of 12mths, no 6 months

103. M5 but she didn't turn up for any of it....
104. General discussion of the need to hurry up because we only have 15 mins for the remaining two cases having spent 45 mins on the first two and difficulty of revoking and/ re-sentencing proportionately.

Transcript of Case 3 September 04 sentencing exercise
Social security benefit fraud x 4

Chair M5

1. M5 well the entry point is community penalty
2. LA I'll just bring to your attention the case of Neils 2002. It says that when sentencing females of previous good character who have responsibility for children, imprisonment should be avoided where an alternative is available. The difference that we have in this matter, oh I just need to tell you is that they do say in the report that a community punishment order would not possibly be appropriate because of all the hours she is working and the fact that she is paying money back.
3. M2 I think custody's not app...would we all agree that custody is not appropriate?
4. M1 I hope so..
5. M5 well we'll go through it and ...so we have agreed that the starting point is a community penalty, then we've got to look at the aggravating and mitigating factors. So...
6. M4 ....fraudulent from the start
7. M2 no
8. M4 yes it was
9. M2 I thought she was originally claiming and then she started working....
10. M4 Yes I think you are right, sorry...
11. M5 fraudulent claim over a long period. Have we got a long period here?
12. M6 yes
13. LA I have been asked to change the dates to make sense of the schedule as follows....
14. M5 so going back to "over a long period " is it a long period?
15. LA According to this June 2003 to July 2004
16. M5 I wouldn't say it was a *long* period compared to some of the cases so
17. M3 absolutely
18. M1 well I don't know how long it takes them to pick her up.
19. M3 It takes them about that long. It takes them something like 9 months to pick these things up.
20. M5 So I wouldn't say that it is aggravated by having a long period
21. M5 large amount?
22. M3 £ 1100 per month – that's what it says she has been getting
23. M5 That is a significant amount I would say
24. M3 yes it's doubling her income
25. M5 so aggravating is the large amount
26. M6 there is quite a lot of mitigation
27. M4 yes but not within the offence
28. M5 its not a group offence, planned deception?
29. M3 yes
30. M6 yes it was
31. M5 well no she just carried on didn't she? So...
32. M3 yes but she *knew,* she is an intelligent enough type of person to know.... I put that as an aggravating..
33. M5 oh yes
34. M2 but it wasn't planned from the start
35. M3 no
36. M2 She just didn't...stop when she should have done
37. M6 I don't think it was all spur of the moment

38. M5 I think we are OK then on the mitigation we've got Misunderstanding of the regulations – no pressure from others – no small amount – no
39. M7 although pressure by others – having three children
40. M5 family considerations
41. LA actions of the husband potentially would that count?
42. M2 Frightened of losing her children
43. M3 yes
44. M2 That's a personal mitigation rather than rather than offence mitigation
45. M4 yes true
46. M1 so would she have committed the offence if he hadn't acted in the way he did?
47. M2 but it's not the case
48. M5 so you are saying it's down under here....consider offender mitigation eg co-operation with the police, evidence of genuine remorse , voluntary compensation so
49. M4 she has co-operation she has genuine remorse
50. M5 certainly co-operation
51. M4 ...she has significant voluntary compensation ...
52. M2 yes and I think you can say this sort of age health she under this kind of mental [pressure] she under this tremendous amount of mental strain....
53. M4 yes
54. M1 so does this bring it down from a community penalty to in fact something around what they are asking for?
55. M5 umm yes which is a CD
56. M6 They're asking for a conditional discharge
57. M1 because there are quite significant mitigating factors, aren't there?
58. M3 The only problem is, I hadn't really grasped the amount, how *much* money it was whether there should be ...
59. M2 It is a lot but she paying back at a fair old rate if I remember correctly.
60. M3/M1 yes
61. M6 £100 a month
62. M5 so how much did she actually get – how many months altogether?
63. LA according to the facts it would have been from June 2003 to August 2004
64. M3 well that's 13 months
65. M5 yes
66. M3 about £13,000
67. M5 maybe 15months
68. M3 .....so that's 130 weeks
69. M4 So that's only 2 years
70. M3 but she's paying back a month so it's going to take a long time
71. M1 large amount is an aggravating factor
72. M5 so It's £1100 that's £16,000 upwards so at £100 a month that's going to take an awfully long time isn't it?
73. M1 yes
74. M4 which of itself is a penalty if we do a CD with compensation
75. M1 the idea is to get the money
76. LA at the moment she is paying back voluntarily, so you would formalise it by saying this is how much money you owe the DSS
77. M6 you aren't suggesting that she pay more than £100 a month
78. LA no no no the amount that is outstanding and what you seem to be saying is that it should be formalised.
79. M3 I would quite like to see her in-goings and out-goings because I'm afraid I would quite like to see her...
80. M6 She earns approx £1400 a month...

81. M3 yes and I probably would want to have a look at to see if see could actually pay a lot more
82. M4 But she has been used to living on £2500 a month how will she squeeze it out of the £1400?
83. M7 she's earning £1400and she's got *three* children…
84. M5 but she's probably getting some benefits as well I would imagine so we ought to consider if we can raise the level
85. M4 ..but if we can't?
86. M1 well they say she has taken appropriate measures to repay the debt.
87. M6 well she is re-paying £100 already so where she has been having more..
88. M3 yes I know and I do feel sorry for her but she's been basically racking it in and for all we know having a fantastic lifestyle
89. M6 no we know her situation …she hasn't been…so we do know her situation
90. M5 and she is of good character as well
91. LA are you thinking this is too soft? Are you thinking of upping the anti instead of bringing it down?
92. M3 yes I know she is going to have difficulty but I would probably kind of *minimal* community punishment
93. M6 But when would she do it?
94. M3 yes I know that's the problem
95. M5 She has no time
96. M2 she's got no time to do it - she is working six and a half days a week
97. LA and one of the things they tell you to look in cases like this is 1) obviously look at the amount 2)the length of time the money has been taken and 3) the *use* the money has been put to and on the face of it you seem to be being told that it was used for family because there is no suggestion that there's luxury or expensive cars or anything like that…
98. M2…. but 15years to repay…
99. M1 very unlikely to be repeated as well and out of character . I think the main thing is to get the money back
100. M6 It has been worked out that that it will take 16 years but I don't think we should up it at all.
101. M5 would we have any justification for upping it? Say making it £200?
102. M1 we'd have to go into her means more thoroughly
103. LA …but she has to have the means…
104. M2 It's not part of our jurisdiction is it?
105. LA you have the power to formalise the amount by making the compensation order or you may feel it is enough just to make the CD and allow her to continue paying the money as she is…
106. M3 but how do we know her salary isn't going to go up. I just think 16 years is crazy …
107. M1 what do you mean her salary is going to go up?
108. M3 well most people do over time
109. M5 and taking your point further her responsibility for the youngest child will have disappeared in 16 years time
110. M2 But we can't up it without reviewing her situation
111. M6 and there's child benefit…
112. M5 that's also true
113. LA are you all happy with a CD
114. ALL yes
115. LA and how long would that be
116. M1 2 years
117. ALL general agreement. No costs

118. Discussion about the details of compensation order agree to formalise
119. M5 so what is the consensus?
120. M7 I thought the department could constantly re-negotiate and this will have been worked out with them so my assumption has always been that actually the agreement is between them and DSS.
121. Various arrangements discussed
122. M5 OK so it is a CD the aggravating feature is a large amount but there is lots of mitigation family circumstances, action of husband co-operation remorse, voluntary compensation. She is of good character and CD for 2 years and continue paying as now.

Appendix 11

Study 3: the consolidated record of the transcript of Case 3 for four of the participants only

Appendix 11

Consolidated contributions from M5

1. M5 well the entry point is community penalty

5. M5 well we'll go through it and …so we have agreed that the starting point is a community penalty, then we've got to look at the aggravating and mitigating factors. So…

11. M5 fraudulent claim over a long period. Have we got a long period here?

14. M5 so going back to "over a long period " is it a long period?

16. M5 I wouldn't say it was a *long* period compared to some of the cases so

20. M5 So I wouldn't say that it is aggravated by having a long period

21. M5 large amount?

23. M5 That is a significant amount I would say

25. M5 so aggravating is the large amount

28. M5 its not a group offence, planned deception?

31. M5 well no she just carried on didn't she? So…

33. M5 oh yes

38. M5 I think we are OK then on the mitigation we've got Misunderstanding of the regulations – no pressure from others – no small amount – no

40. M5 family considerations

48. M5 so you are saying it's down under here….consider offender mitigation eg co-operation with the police, evidence of genuine remorse , voluntary compensation so

50. M5 certainly co-operation

55. M5 umm yes which is a CD

62. M5 so how much did she actually get – how many months altogether?

65. M5 yes

67. M5 maybe 15months

72. M5 so It's £1100 that's £16,000 upwards so at £100 a month that's going to take an awfully long time isn't it?

84. M5 but she's probably getting some benefits as well I would imagine so we ought to consider if we can raise the level

90. M5 and she is of good character as well

95. M5 She has no time

101. M5 would we have any justification for upping it? Say making it £200?

109. M5 and taking your point further her responsibility for the youngest child will have disappeared in 16 years time

112. M5 that's also true

119. M5 so what is the consensus?

122. M5 OK so it is a CD the aggravating feature is a large amount but there is lots of mitigation family circumstances, action of husband co-operation remorse, voluntary compensation. She is of good character and CD for 2 years and continue paying as now.

Consolidated contributions from the Legal Advisor LA

2. LA I'll just bring to your attention the case of Neils 2002. It says that when sentencing females of previous good character who have responsibility for children, imprisonment should be avoided where an alternative is available. The difference that we have in this matter, oh I just need to tell you is that they do say in the report that a community punishment order would not possibly be appropriate because of all the hours she is working and the fact that she is paying money back

13. LA I have been asked to change the dates to make sense of the schedule as follows....

15. LA According to this June 2003 to July 20004

41. LA actions of the husband potentially would that count?

63. LA according to the facts it would have been from June 2003 to August 2004

76. LA at the moment she is paying back voluntarily, so you would formalise it by saying this is how much money you owe the DSS

78. LA no no no the amount that is outstanding and what you seem to be saying is that it should be formalised.

91. LA are you thinking this is too soft? Are you thinking of upping the anti instead of bringing it down?

97. LA and one of the things they tell you to look in cases like this is 1) obviously look at the amount 2)the length of time the money has been taken and 3) the *use* the money has been put to and on the face of it you seem to be being told that it was used for family because there is no suggestion that there's luxury or expensive cars or anything like that...

103. LA ...but she has to have the means...

105. LA you have the power to formalise the amount by making the compensation order or you may feel it is enough just to make the CD and allow her to continue paying the money as she is...

113. LA are you all happy with a CD

115. LA and how long would that be

Consolidated contributions from M 1

4. M1 I hope so..

18. M1 well I don't know how long it takes them to pick her up.

46. M1 so would she have committed the offence if he hadn't acted in the way he did?

54. M1 so does this bring it down from a community penalty to in fact something around what they are asking for?

57. M1 because there are quite significant mitigating factors, aren't there?

71. M1 large amount is an aggravating factor
[m5 ...awfully long time]
73. M1 yes

75. M1 the idea is to get the money

86. M1 well they say she has taken appropriate measures to repay the debt

99. M1 very unlikely to be repeated as well and out of character . I think the main thing is to get the money back

102. M1 we'd have to go into her means more thoroughly

107. M1 what do you mean her salary is going to go up?
{LA how long}
116. M1 2 years

Consolidated contributions from M3

M5 I wouldn't say it was a *long* period compared to some of the cases so
17. M3 absolutely

19. M3 It takes them about that long. It takes them something like 9 months to pick these things up

22. M3 £ 1100 per month – that's what it says she has been getting

24. M3 yes it's doubling her income
[M5 its not a group offence, planned deception?]
29. M3 yes

32. M3 yes but she *knew,* she is an intelligent enough type of person to know.... I put that as an aggravating..

[M2 but it wasn't planned from the start]
35. M3 no

[M2 Frightened of losing her children]
43. M3 yes

58. M3 The only problem is, I hadn't really grasped the amount, how *much* money it was whether there should be ...

[M2 It is a lot but she paying back at a fair old rate if I remember correctly.]
60. M3/M1 yes

64. M3 well that's 13 months

66. M3 about £13,000

68. M3 .....so that's 130 weeks

79. M3 I would quite like to see her in-goings and out-goings because I'm afraid I would quite like to see her...
80. M3 yes and I probably would want to have a look at to see if see could actually pay a lot more
88. M3 yes I know and I do feel sorry for her but she's been basically racking it in and for all we know having a fantastic lifestyle
92. M3 yes I know she is going to have difficulty but I would probably kind of *minimal* community punishment
[..when would she do it?]
94. M3 yes I know that's the problem
106. M3 but how do we know her salary isn't going to go up. I just think 16 years is crazy
108. M3 well most people do over time

Appendix 12

Study 3:

Case material for each of the three cases discussed

Appendix 12

------REGION
---------MAGISTRATES' COURT COMMITTEE

SENTENCING EXERCISE

FOR THE MEMBERS OF ------BENCH

MONDAY 20 SEPTEMBER 2004

6.00PM – 8.00PM

----------COURT HOUSE

MAGISTRATES' COURTS COMMITTEE

SENTENCING EXERCISE

MONDAY 20 SEPTEMBER 2004

COURT HOUSE

PROGRAMME

CHAIRMAN: HIS HONOUR JUDGE ---

5.30 pm	Coffee in the Retiring Room
6.00 pm	Introduction by the Chairman (Court 1)
6.05 pm	Syndicate Discussions (members will disperse into syndicates to discuss four cases and the general approach to sentencing which might be adopted in each case)
7.05 pm	Plenary Session (Court 1) The Chairman will be joined by the Chairman of the Bench, Bench Legal Manager, Senior Probation Officer
8.00 pm	Close

After the introduction by the Chairman the syndicates should proceed to the following

SYNDICATE	*ROOM*
A	**Retiring Room**
B	**Court 1**
C	**Court 2**
D	**Court 3**
E	**Court 4**
F	**Meeting Room**

NOTES FOR THE SYNDICATES

There are 4 cases and 6 syndicates (A – F). Each syndicate is asked to consider all 4 cases and Chairmen are asked to note a summary of their syndicate's decisions and reasons. The Chairman of the plenary session will conduct an exploration of each case, will call on selected syndicate Chairmen to present and expand upon their syndicate's summary and invite general debate.

Each syndicate should approach the cases as if they had been fully argued in court and the bench had retired to consider sentence. As the syndicates will be of a larger composition than a normal bench the emphasis should be on discussing and noting the principles of, and approach to, sentencing rather than striving to achieve agreement of specific disposal.

A Legal Advisor will attend each syndicate to assist and advise, acting in the capacity he/she would normally adopt in the retiring room.

Legal Advisors have been allocated to syndicates as follows: -

A	Mr. U
B	Ms. V
C	Mr. W
D	Mr. X
E	Mr. Y
F	Ms. Z

SYNDICATE MEMBERSHIP (names removed to protect identities)

CASE STUDY NO. I

R v McCook

Summary of Facts:

This case refers to the Defendant, McCook snatching £110 cash from a till in Sainsburys Supermarket, Williamson Road, N4 contrary to Section 1 Theft Act 1968.

Police received a call from Sainsburys stating they had detained a male for a till snatch. Officers arrived and were informed by the cashier that the accused snatched £110 in notes from the till after it was opened during a sale. He was immediately chased by the cashier and detained by security outside the front doors of the store. He was then taken to a holding room and police were called.

The allegation of theft was made by the cashier in the presence of the accused. He was asked if he agreed and he stated "yeh". At 5.55pm he was arrested and cautioned for theft and made no reply. He was then taken to Z Police Station.

Later he was interviewed and made a full confession stating he needed it for his addiction. He was charged with theft of the £110 from the till, the charge was read over and he was cautioned. He made no reply. McCook was then bailed to attend X Magistrates Court.

CONFIDENTIAL

PRE-SENTENCE REPORT

For

MAGISTRATES COURT

CONCERNING;

Defendant's full name: Raymond McCOOK Age: 42 years

Address: 10 Glendon House
Amhurst Road
Tottenham

Supervising Court: X Magistrates' Court

Offence(s):
Theft from Shop

Offence date(s):
5/8/04

This Report is based on:

One interview with Mr. McCook conducted at the Probation Office.
I have not had access to the Crown Prosecution statements but I have seen Mr. McCook's list of criminal convictions.

I have also discussed the defendant's case with my colleague Ms. Ann Lescombe, who is his current supervising officer and I have liaised with the Community Service Unit.

The Probation Service currently knows Mr. McCook. The financial, personal and domestic information given to me are not verified.

Date report requested:
Probation Officer: Manny OKE
Office: 34 Englefield Road London N1 4EZ
Tele: 020 7241 9900 Fax 020 7241 9901

Date Report completed and signed:
McCook RAYMOND

2. Offence analysis

2.1 Mr. McCook has pleaded guilty to the offence of Theft from Shop and the adjourning Court indicated that all sentencing options including a committal to the Crown Court were being considered. As I have not had access to the Prosecution statements, I have had to rely on Mr. McCook's version of events.

2.2 By way of an explanation, Mr. McCook stated that prior to his offending a few friends visited him at home to socialise during which crack-cocaine was shared around and smoked. The defendant told me that this was the first occasion that he used illicit opiates since he left Crossroads in September 2003 and the drug had a profound effect upon him. The defendant craved more drugs and because he had no money, he decided to go out and offend. The defendant admitted that he went to Sainsbury's and pretended to be a legitimate customer. He waited at a check out until the till was opened and quickly grabbed money from it. The defendant stated that he stole about £110 and ran out of the store. However, he was caught by security staff and detained until the arrival of the police.

2.3 Mr. McCook admitted to being conscious of the illegality/consequences of his behaviour but he chose to ignore this knowledge in favour of satisfying his craving for illicit opiates. Mr. McCook's offending was both deliberate and premeditated and as such he is fully culpable. The defendant's behaviour led to his arrest, prosecution and he is at serious risk of serving another custodial sentence. However, the defendant accepted responsibility for his behaviour, stating that he felt "ashamed of himself".

2.4 The Court will be aware of Mr. McCook's extensive criminal record, which includes convictions for matters of dishonesty. The Bench will certainly be concerned about the fact that Mr. McCook re-offended whilst subject to a community Rehabilitation Order that was imposed on 10/4/04 by Highbury Corner Magistrates Court, which he has since breached. Indeed Mr. McCook's Order was imposed for an offence of Theft of £220 from Sainsbury's and he has now committed an identical offence.

3. Offender assessment

Pattern of Offending:

3.1 Mr. McCook's extensive criminal record indicates that he has had 17 sentencing occasions that occurred between 12/11/73 and 15/6/02 during which he committed 37 offences. The defendant's antecedents are mainly for matters of robbery. However, the defendant also has convictions for Having Imitation Firearm, TWOC, making off without payment, theft, theft-shoplifting, possession of controlled drugs, Bail Act offence and common assault. Mr. McCook has been given financial penalties, community based and custodial sentences. The defendant clearly has an entrenched habit of offending, which is linked to his association with the criminal fraternity and long-term drug addiction.

Response to Supervision

3.2 On 10/4/04 Mr. McCook appeared before Highbury Corner Magistrates Court and was made subject to a 12 month Community Rehabilitation Order for an offence of Theft from a Shop. The Order included a condition to attend the Hackney Crack Day Programme. The defendant's Order is being supervised by my colleague Ms Ann Lescombe and she informed me that although Mr. McCook's reporting has been erratic, offence focused work has been undertaken with the defendant and he was also referred to the Y Drug Programme and Crossroads in order to address his crack-cocaine addiction. However, Mr. McCook is now in breach of his Order for failing to keep his appointments without acceptable reasons on four separate occasions. Indeed, Ms Lescombe has not had contact with the defendant since 15/06/04. The defendant's case has been listed for a hearing at the Court on 8/10/04. This issue, along with Mr. McCook drug use and re-offending clearly indicate that the Order has had very limited positive impact upon the defendant's difficulties and offending behaviour.

Personal Circumstances

3.3 Mr. McCook is single but has 6 children from his 4 previous relationships, ranging from 24 – 18 years. He also has 4 grand children and he has regular contact with his offspring's. The defendant resides alone at the address given at the head of this report, which he rents from the local council. He is unemployed and in receipt of Incapacity Benefit (due to his drug addiction) of £128 per fortnight. However, he has applied for a job as a bus driver with a transportation company. Mr. McCook was born in Jamaica and came to the UK at the age of 10. He recalls a stable/supportive upbringing and assured me that he has a close relationship with his parents, who have since returned to live in Jamaica with his 2 siblings. Mr. McCook informed me that his sister suffers from renal problems and undertakes dialysis sessions 3 times a week. He supports his sister with her welfare needs. The defendant stated that he left school at the age of 15 and therefore does not have any formal qualifications. However, he assured me that he has no literacy problems. Mr. McCook has outstanding debts of £4,784 in the form of rent arrears and £990 in unpaid council tax.

Drug Use

3.4 Mr. McCook started abusing illicit drugs through cannabis about the age of 13 but crack-cocaine has since been his drug of choice for over 10 years. Mr. McCook has had specialist assistance from drug agencies and has also been admitted for residential rehabilitation. However, the defendant has not managed to permanently rid himself of his addiction and has been experiencing a cycle of abstinence and relapse. He identified boredom as one of the triggers of his substance abuse. However, Mr. McCook informed me that he has been drug free since the start of this year and he pledged to remain so. It remains to be seen how long Mr. McCook would be able to maintain his current anti-drug stance.

4. Assessment of the Risk of Harm to the Public and the likelihood of re-offending

4.1 Mr. McCook has an extensive criminal record, which clearly indicates that his offending behaviour is entrenched. It is also a matter of concern that Mr. McCook continues to offend despite being a middle-aged man and has also not managed to rid himself of his addiction even though he has had specialist assistance. Although Mr.McCook claims that he has not used any illicit opiates since the beginning of

the year, it is anybody's guess how long he will be able to maintain his current motivation and anti-drug stance. Furthermore, Mr. McCook committed the offence before the Court today during the currency of his Order, which he has since breached and the Order was imposed for an identical offence. For these reasons, I believe that to suggest Mr. McCook does not pose a high risk of committing further offences would be unrealistic.

Risk of Harm

4.2 Mr. McCook's antecedents indicate that he poses a risk of harm to the public and he would endanger his health if he returns to drug abuse. However, I am not aware of any issues that suggest a risk to Probation staff.

5. Conclusion

5.1 Mr. McCook is before the court for sentencing for a matter of theft from Sainsburys and the adjourning court has indicated that all sentencing options including a committal to the Crown Court for sentencing were being considered. Mr. McCook is single, unemployed and has been assessed as posing a high risk of re-offending.

Custody

5.2 Mr. McCook is under no illusions about the fact that his liberty is in serious jeopardy and he is no stranger to Penal Institutions. For these reasons I cannot identify any issues that would make such a sentence unduly onerous for him. The defendant has previous convictions for dishonesty and he also committed the offence before the court today whilst subject to a Community Rehabilitation Order that was imposed on 10/4/04 by Highbury Corner Magistrates Court for an identical offence. The defendant has since breached the Order and his supervising officer, Ms Ann Lescombe has not had contact with Mr. McCook since 15/06/04. In view of these issues, I have no doubt that the current matter warrants the imposition of a term of imprisonment. Such a sentence will also protect the public from the defendant's criminal activities and demonstrate to Mr. McCook that his behaviour was completely unacceptable.

5.3 However if the Court is willing to consider other sentencing options, I have made the following observations:

Community Punishment Order

5.4 The defendant is in receipt of Incapacity Benefit, which disqualifies him from the above option.

Community Rehabilitation Order

5.5 I have given consideration to the defendant being made subject to another period of supervision under the auspices of the above option. Mr. McCook is currently subject to a 12 month Community Rehabilitation Order, which was specifically targeted at addressing his crack-cocaine addiction and he is in breach of it. Furthermore, the defendant has committed an identical offence and it is clear that supervision has had very limited positive impact upon his offending behaviour or crack-cocaine addiction. For these reasons I am unable to propose another Community Rehabilitation Order.

6. Proposal

In view of the above-mentioned issues, I am unable to make a proposal to the Court regarding community-based sentences unless the Court feels that another Community Rehabilitation Order is appropriate. However, in the event of a custodial sentence being imposed today I would ask the Court to revoke Mr. McCook's current Order

Signature:

This document has been sent fro the originating office to the Court via a secure e-mail system. A signed "wet ink" copy of this PSR is retained at the originating office

Probation officer: Manny OKE

DRLS/presentencereports/McCook

CASE STUDY NO. 2

CHARLOTTE JONES

LONDON PROBATION AREA
Pre-Sentence Report

Confidentiality

This is a pre-sentence report as defined in Section 36 and81 of the Powers of the Criminal Courts (Sentencing) Act 2000. It has been prepared in accordance with the National Standard for pre-sentence reports. It is a confidential document prepared specifically for this court hearing. It should not be used for any other purpose without the consent of the court or the National Probation Service.
This document has been sent from the originating office to the Court via a secure Email system. A signed copy of this report is retained at the originating office.

NAME:	CHARLOTTE JONES
DATE OF BIRTH:	03/02/1983 **AGE:** 21
ADDRESS:	Flat 12 32 The Avenue Tottenham London
OFFENCE (S) AND DATE (S):	Breach of Community Rehabilitation Order made on 25th June 2004 Original offences: Handling Stolen Goods 9 October 2003 and fail to Surrender 12 March 2004
COURT:	Y Magistrates' Court
DATE OF HEARING:	20TH September 2004
PSA:	Y PNC:
SUPERVISING COURT:	Brent Magistrates' Court
DATE REPORT REQUESTED:	5TH September2004
DATE REPORT COMPLETED:	20TH September 2004
PREPARED BY:	Sioban Maguire
Official Title:	Trainee Probation Officer
ADDRESS:	X Probation Office Church Road X
Tel/Fax No	

Appendix 12 (cont)

1. Introduction

1.1 This report is based on one interview with the defendant at the office.

1.2 The defendant's response to the interview process was:

Co-operative and compliant

2. Offence Analysis

2.1 Ms Jones has pleaded guilty to Breach of Community Rehabilitation Order made on 25th June 2004. She failed to attend the Think First Group on 28th August 2004 and 1st September 2004.

2.2 Ms. Jones was sentenced to a six months Community rehabilitation Order with a requirement to attend the Think First Programme on 25th June 2004 for the offences of Handling Stolen Goods and Failing to Surrender.

2.3 Ms. Jones' explanation for her missed appointments was due to stress related problems. She lives at a North West London Housing Association hostel and is currently in conflict with the hostel staff. Her disagreement with the hostel staff is mainly to do with the peer group she associates with as they visit her at the hostel and stay in her room for long periods at a time. Ms. Jones finds it difficult to ask these associates to leave. She describes them as 'dominant' and would like to find alternative accommodation to break ties with her current peer group.

2.4 Ms. Jones feels unsafe at the hostel, as there have been a spate of burglaries by an unknown offenders. She also reports that there was a resident who was attacked with a knife.

2.5 As well as her accommodation difficulties she is concerned about her financial situation especially with regard to outstanding fines. It appears that Ms. Jones has become overwhelmed by her problems and she lacked knowledge of where to go for professional advice. Ms. Jones acknowledged that should she have sought assistance from her Probation Officer and she may have been able to take steps to solve her problems.

3. Offender Assessment

3.1 Ms. Jones has seven previous convictions. She has received a range of penalties from the Courts. These include a Conditional Discharge, Young Offenders Institution, two Supervision Orders, Attendance Centre and a Community Service Order. The defendant was made subject of a Conditional Discharge of twelve months, at Watford Juvenile Court on 6th March 1998, for an offence of Theft. Barnet Magistrates' Court subsequently varied this on 15th January 1999, and she was ordered to attend an Attendance Centre for 24 Hours to run concurrent with a similar order that was made on 15th January 1999, for an offence of Theft. The defendant was sent to a Young Offenders Institution for twelve months, by Wood Green Crown Court, for offences of Robbery and Wounding. The

defendant disagrees with the sentence as recorded on her antecedents, and told me that she received a Supervision Order for eighteen months for the offence of attempted Robbery. Ms. Jones was made subject to a Community Service Order for one hundred hours, at Barnet Youth Court, for an offence of Common Assault. This order was revoked when the defendant was sent to a Young Offenders Institution for eighteen months, for the offences of Being Concerned in Supplying Controlled Drug (Class A) and Possessing Controlled Drug with intent to Supply (Class A). I have contacted Y Magistrates' Court, fines office, and they have told me that there is an outstanding warrant with regard to unpaid fines.

3.2 Ms. Jones response to supervision was at times ambivalent with regard to the objectives of supervision. She was concerned that she was being punished twice as she told me that she spent a month on remand in custody before the breach occurred. She was referred to Jay Training employment and education service. With their help she has successfully enrolled onto a college course studying Information Technology. However due to Ms. Jones' current problems she failed to attend classes but as agreed it would benefit her to resume her studies. She attended one appointment after she breached her order, but then failed to report to three other appointments. Due to non-attendance she was not offered any further appointments.

3.3 With regard to Ms. Jones' background, she is the eldest of five children, she does have contact with her mother, brothers and sisters. Ms. Jones obtained GCSE's in Mathematics, Science, Geography and Art in 1999. She has not been able to secure employment, but is currently studying Information Technology at college to better her opportunities with regard to employment. Ms. Jones has been living at the same hostel accommodation

for nearly two years and as stated above this has become insecure and is anxious to find alternative accommodation.

3.4 Ms. Jones does not have a partner of any dependants. She is claiming job seekers allowance of £84 a fortnight and has outgoings of £20 for rent per fortnight and £40 for food per fortnight. Ms. Jones has no physical or mental health problems, however she tells me she is suffering from stress due to her financial and housing problems.
She did have a past addiction to crack cocaine, she told me that the time she spent in custody enabled her to abstain from this drug and she has continued to do so. She disclosed that she regularly uses cannabis to quell the feelings of stress.

4. Assessment of the Risk of Harm to the Public and Likelihood of Re-offending.

4.1 I assess the likelihood of Ms.Jones committing further offences as low to intermediate, given that she has not committed any further offences in the past 12 months and her level of motivation to avoid re-offending is high.

However, she would benefit from the Think First Programme to develop her problem solving skills for a more effective approach to her problems.

4.2 I assess Ms.Jones to be a low to intermediate risk of harm to the general public, given her offending history and her association with her current peer group. This risk could be reduced by addressing issues of peer pressure.

5. Conclusion

5.1 Ms. Jones is aware of the seriousness of non-compliance with her Community Rehabilitation Order and that the Court will be considering all options for sentencing. After discussing the situation with her my assessment is that she does possess sufficient motivation to comply with a further Community Rehabilitation Order with the same condition. The present Community Rehabilitation Order is unworkable as there is sufficient time to complete the Think First programme therefore I would ask the court to revoke the current order.

5.2 **Custody –** Ms. Jones is aware that the court will give serious consideration to this option. My assessment is that this option would serve as punishment but may fail to address the issues of her offending behaviour and her current problems.

5.3 **Curfew Order –** I have assessed Ms. Jones to be unsuitable for this disposal as her current accommodation is temporary and she intends to find alternative accommodation.

5.4 **Community Punishment Order –** I have assessed Ms. Jones to be suitable for such an order and she is willing to comply with the requirements.

5.5 **Community Rehabilitation Order –** with a requirement in accordance with Sch 2 (2) of the powers of the Criminal Courts (sentencing) Act 2000 to attend the Think First Programme for 22 sessions. I have assessed that this option is the most suitable of the community penalties. A further order would give Ms. Jones the opportunity to address her offending behaviour and assist her to establish a more organised lifestyle for a law-abiding future. The Think First Programme would provide training in problem solving skills, which she will need to address any future problems that arise in her life. Should the Court consider this option for sentencing I would ask for a 12 month order to be imposed as this gives the opportunity for the necessary motivational work needed to be achieved with Ms. Jones as with all participants of this programme prior to starting the Think First Programme. The other issues which will be addressed during one to one supervision are:

- Housing
- Offending behaviour, peer pressure

- Financial difficulties, action planning to pay his fines
- Pre and post programme work
- Employment and education

Name of Officer: **Sioban Maguire, Trainee Probation Officer**
Kathy Diamond, Practice Development Assessor

Signature: **Date:** 20th September 2004

Case Study No. 3

CISSY MUWANGA

London Probation Area

Court Report Expedited

Offender's Details

Name: Cissy Muwanga
Address: 260a High Road
Tottenham
London N15 4AJ

Date of birth: 01/08/62

Offence Details (by Date)

Offence(s) (dealt with in this report):
False Representation X 4, Failure to Declare Change of Circumstances, various dates.

Court Details

Sentencing Court X

Petty Sessional area of the supervising court Y

Hearing date: 20/09/04 **Date Report requested** Not known

Report Writer's Details

Name of Probation Officer Denise Everitt-Story

Office Location: Telfer House, Church Road, X, N6 4QL

Telephone Number: 020 8341 9060

Date Report Completed & Signed 20/09/04

Sources of Information Sources of Information

Court Interview(s)	**1**	**Cell Interview(s)**	**0**
Prosecution witness statements	**No**	**Case Summary**	**Yes**
		Victim Impact Statement	**No**
Pre-convictions		**Known to Service**	**No**
Probation Case Records	**No**	**Other**	**No**

1. Offence Analysis

Additional Information from today's interview
As the Court will be aware, Ms Muwanga has pleaded guilty to the offences as detailed above. She offered a full and frank account of the offences details. Ms Muwanga explained that she first experienced financial hardship after a series of devastating events. Four years ago, Ms Muwanga had a premature baby that resulted in an extended period in Hospital. When she returned to the family home, her husband had embarked on an affair with her younger sister who was staying with the couple in their home. Her husband expected Ms Muwanga to accept the situation, and indicated that she could stay in the spare room whilst this affair continued, as long as the children remained at home. Ms Muwanga left with her three children to a woman's refuge, and spent a week trying to establish a new life. After a brief reconciliation when her husband had shown some remorse, she returned, but it was clear to Ms Muwanga that the untenable situation was expected to continue. She left to stay with a friend in one room with all three children, but her husband began Court proceedings against her declaring that the children were not cared for properly. Ms Muwanga was terrified of losing her children, and in order to prove to her husband that they had accommodation, she continued to claim benefits for Bed & Breakfast accommodation costing in excess of £1,100 per month whilst she was working. Ms.Muwanga related these events in a pragmatic manner where she takes full responsibility for her offending, and appears to recognise that these traumatic events are not an excuse. However, Ms Muwanga appears to have been in an extremely difficult situation, having to declare herself homeless whilst fearing that her children may be ordered to live with her husband by the Court. She expressed appropriate remorse for her actions, and has been paying £100 per month back to the Department of Social Security (DSS) since February of this year. She continues to work in an NHS Trust Hospital earning approximately £1,400 per month. She is currently working a six-day week in order to maintain payments to the DSS, and lives in a Housing Association flat with her three children aged fourteen, ten, and four.

Current offences part of established pattern of offending No

Current offences indicate an escalation in seriousness of offending behaviour? No

Offender accepts responsibility for offending? Yes
Offender recognises impact and consequences of offence on victim(s)? Yes

Offender recognises impact and consequences of offence on the community Yes

Offender recognises impact and consequences of offence on wider society? Yes

Appendix 12 (cont)

Discriminatory attitudes/behaviour associated with offending? No

2. Offender assessment

Drug misuse

Current drug use?	No
Offending behaviour linked to drug use?	No
Motivation to tackle drug use?	N/A
Is this case suitable for an ASRO/DTTO assessment? (see section 4)	No

Alcohol misuse

Is current use a problem?	No
Alcohol use linked to offending behaviour?	No
Is this case suitable for the Drink impaired Drivers Programme?	No
Motivation to make use of the programme?	N/A

Education, training and employment

Employed?	Yes
Number of hours employed per week:	48
In Education?	No
Number of hours in Education per week:	N/A
Is a basic skills assessment required?	No

Financial, management and income

Income:	£1,400.00	monthly
Outcome:	£	weekly

Mental Health

Current psychiatric problems?	No
Currently in treatment?	No
Specialist report required?	No

Accommodation

Accommodation stable?	Yes
Accommodation suitable for curfew?	No

General Offending Behaviour Concerns

Are there difficulties in recognising and solving problems? No

Are there difficulties with impulsive behaviour and rigid thinking? No

Is this case suitable for a Think First Programme? No

3. Risk issues and Previous responses to Supervision

Are there any serious risks of harm issues arising from the interview? No

If Yes give more details:

There are no significant risk factors in this case.

Is there a risk of re-offending/reconviction? No

If Yes give more details: Ms Muwanga is an individual of previous good character who committed these offences during a very difficult period in her life. She takes full responsibility for her offending, and has taken appropriate actions to make financial recompense to the Department of Social Security. In my view, due process has had a salutary effect on Ms Muwanga, and I would assess the likelihood of re-offending in any manner as negligible.

Has the offender been supervised by Probation previously? No

If Yes give more details:

Previous good character.

4. Conclusion

Report proposal and why

Ms Muwanga has committed these matters during emotional upheaval and unexpected financial hardship. Whilst her circumstances are not an excuse for making false claims for benefits, they offer the Court a context of behaviour that is out of character, and very unlikely to be repeated. With regards to sentencing options, I have formed the view that sanctions available to the Court are limited. Ms Muwanga is working a six-day week to earn overtime to pay back the DSS, and the imposition of Community Punishment may compromise her ability to maintain these payments. Furthermore, as she currently travels to Hammersmith, a Curfew Order may be unworkable; Ms Muwanga leaves at 6.45am, and returns after 7pm when she has picked up her children. As the defendant does not present with any pattern of offending behaviour or substantive issues that require intervention, a Community Rehabilitation Order would also appear inappropriate in this case.

In my view, a Conditional Discharge may act as sufficient deterrent to the defendant. Ms Muwanga presents as a low risk of re-offending and harm, and has taken appropriate measures to pay back her debts to the DSS. She is fully aware of the consequences of breaching such a sentence, and the implications should she do so. I would therefore propose a Conditional Discharge of a length commensurate with the Court's view of the serious nature of today's matters.

If applicable (i) wording of order
(ii) first appointment date/time

Not applicable.

If custodial sentence is imposed, the following information about the offender's circumstances is relevant

If a term of imprisonment were imposed today, Ms Muwanga would be at risk of losing her employment, accommodation and care of her children. As these factors were precisely the circumstances that led to her offending, I would suggest that the risk of re-offending may be *raised*.

In addition, her payments to the DSS would temporarily cease, not affording Ms Muwanga the opportunity to continue repaying her debt in the short-term.

Denise Everitt-Story

Signature: _____

Glossary

(CJA 03)	Criminal Justice Act 2003	(MNTI)	Magistrates' New (later National) Training Initiative
(CJA 91)	Criminal Justice Act 1991		
(DCA)	Department of Constitutional Affairs	(PSD)	Petty Sessional Division; sub-division of a Commission Area to which a magistrate is appointed, referring to the place where sittings are undertaken.
(DJ)	District Judge		
(HRA 98)	Human Rights Act 1998		
(JSB)	Judicial Studies Board		
(LA)	Legal Adviser	(PSR)	Pre-sentence Report
(LCD)	Lord Chancellor's Department	(SGC)	Sentencing Guidelines Council
(MA)	Magistrates Association		

Bench May refer to all the magistrates appointed to a PSD [now renamed Area] or the 2 or 3 magistrates hearing a particular case, on a particular day.

Chair/Chairman May refer to the Chairman of the whole Bench or the Chairman of the group of 2/3 magistrates presiding on a particular case, on a particular day.

Winger Refers to the other magistrates who, together with the Chairman, make up a Bench hearing a particular case on a particular day.

Entry point Indication of the sentence suggested in the Guidelines for a particular offence when dealing with a first time defendant who initially entered a plea of 'not guilty'

Guidelines Magistrate Association Guidelines that provide guidance on the sentencing approach with specific suggestions for identified offences.

'Reasons' The written record completed by a Bench to identify aggravating/mitigating features and any other factors they have taken into account in determining sentence.

Personality Traits (N) Neuroticism, (E) Extraversion, (O) Openness, (A) Agreeableness, (C) Conscientiousness (NC) Need for Cognition, (LOC) Locus of Control, (LA) Legal Authoritarianism

Glossary

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Personality Traits	(N) Neuroticism, (E) Extraversion, (O) Openness, (A) Agreeableness, (C) Conscientiousness (NC) Need for Cognition, (LOC) Locus of Control, (LA) Legal Authoritarianism