

SENTENCING REFORM IN SINGAPORE

Are the Guidelines in England and Wales a Useful Model?

At the Sentencing Conference of 2014, Singapore's Judge of Appeal Justice Chao Hick Tin announced that Singapore would adopt a system of guideline judgments to enhance consistency in sentencing. This article explores the model of guideline judgments and examines if it has achieved its objective. The article then evaluates the English system of sentencing guidelines and discusses whether Singapore would be better served in adopting the English model instead. The article concludes that Singapore should adopt the English system of guidelines because it produces greater consistency in sentencing and significantly enhances the public's confidence in Singapore's courts and its judges.

Amardeep SINGH s/o Gurcharan Singh*
LLB (Hons) (National University of Singapore),
LLM (New York University),
MSc Criminology and Criminal Justice (Oxon);
Advocate and Solicitor (Singapore).

I. Introduction

1 Recent years have witnessed endeavours by legislatures and courts across various common law jurisdictions "to structure judicial discretion at sentencing".¹ These initiatives aim to foster greater consistency in sentencing and reduce unjustified disparities among

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I dedicate this article to my parents for their unfailing love and sacrifices which ensured that I achieved everything which they could not. Dad and Mum, thank you for everything. I dedicate this article especially to my beloved father who passed away suddenly on 5 March 2016, leaving an irreplaceable void in my life. I miss you, Dad.

Finally, I remain responsible for all errors.

1 Andrew Ashworth & Julian V Roberts, "The Origins and Nature of Sentencing Guidelines in England and Wales" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 1.

judges when sentencing offenders convicted of similar offences.² In this regard, Singapore is no different. At the inaugural Sentencing Conference held in 2014, Chao Hick Tin JA announced that a sentencing council had been created in 2013.³ The Sentencing Council of Singapore (“SCS”) was established “to assist the State Courts in the exercise of their sentencing powers to achieve greater consistency and predictability in the sentences which they impose for similar offences by providing clearer guidance on sentencing and on sentencing methodologies”.⁴ After providing an assessment of the different models for structuring judicial discretion in sentencing, Chao JA stated that Singapore would adopt the system of guideline judgments issued by a special panel of three judges (“three-judge court”) to promote consistency in sentencing.⁵ However, Chao JA made it clear that SCS was not definitively opposed to reconsidering whether a system of sentencing guidelines might be better suited to promote consistency in sentencing in Singapore.⁶

2 This article takes up Chao JA’s willingness to revisit the matter and explores whether a system of sentencing guidelines that exists in England and Wales (collectively referred to henceforth as “England” or “English” where appropriate) is better suited to promote consistency in sentencing in Singapore. This article focuses on the English model of sentencing guidelines for four reasons. First, the Singapore courts frequently refer to English cases and to the English sentencing guidelines in sentencing offenders.⁷ Through practice and the passage of

2 Andrew Ashworth & Julian V Roberts, “The Origins and Nature of Sentencing Guidelines in England and Wales” in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 1.

3 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 2.

4 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 2.

5 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at pp 17–19.

6 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 17.

7 See generally *Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1079 at [47]–[54], where the Singapore High Court referred to the English *Causing Death by Driving: Definitive Guideline* to decide whether the conduct of the victim or a third party should be considered as a mitigating factor and agreed that “where the actions of the victim or a third party contributed to the commission of an offence, this should be acknowledged and taken into account as a mitigating factor”: at [65]; see also *AQW v Public Prosecutor* [2015] 4 SLR 150 at [13]–[18], where the High Court referred to the English *Sexual Offences: Definitive* (cont’d on the next page)

time, the Singapore judges are already familiar with the English style of and approach to sentencing. Second, SCS expressly considered the English sentencing guidelines in their deliberations about which model of structuring judicial sentencing discretion would be appropriate for Singapore. If SCS finds that the system of guideline judgments is inappropriate for Singapore, the alternative would be a system of sentencing guidelines. In this regard, SCS may prefer the English model of sentencing guidelines, as opposed to the American system of sentencing grids, due to Singapore's familiarity with the English sentencing jurisprudence which is increasingly premised on the English sentencing guidelines. Third, accompanying its 31 definitive guidelines, the Sentencing Council for England and Wales ("Sentencing Council") has published many research reports assessing the impact of its definitive guidelines.⁸ There also exists substantial academic literature that assesses the impact of the English guidelines in promoting consistency in sentencing in England. The accumulated knowledge presented in the work of the Sentencing Council and in the academic literature would be extremely helpful in shaping the development of sentencing guidelines in Singapore based on the English model. The practical experience of the English judges would also be of significant assistance to SCS when it develops a system of sentencing guidelines for Singapore. Finally, it is also an opportune moment to examine this issue as the next Sentencing Conference is scheduled to be held in Singapore in October 2017, with consistency in sentencing featuring as one of the topics for discussion.⁹ It is hoped that this article serves as a meaningful contribution to the discussion of this important subject at the conference.

Guideline's factors in assessing the vulnerability of a young victim of a sexual offence, *Wong Hoi Len v Public Prosecutor* [2009] 1 SLR(R) 115 at [30], where the High Court agreed with the English Overarching Principles: Seriousness: Guideline to hold that an offender who committed an offence whilst intoxicated is regarded to be more culpable for his acts, *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [27], where the Singapore Court of Appeal referred to the aggravating factors listed in the advice of the English Sentencing Advisory Panel ("SAP") to the English Court of Appeal on sentencing guidelines for rape offences, *Public Prosecutor v NF* [2006] 4 SLR(R) 849 at [48], where the High Court referred to SAP's Advice on the Sexual Offences Act 2003 to the English Sentencing Guidelines Council ("SGC") on the assessment of harm to the victim in sexual offences and *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [57], where the High Court referred to SGC's Reduction in Sentence for a Guilty Plea: Definitive Guideline in searching for a rationale underpinning sentencing discounts given on account of guilty pleas.

8 Publications by the Sentencing Council for England and Wales are available at <https://www.sentencingcouncil.org.uk/publications/?s&cat=research-report> (accessed 10 May 2017).

9 *Ie*, the Sentencing Conference 2017: Review, Rehabilitation and Reintegration (26 and 27 October 2017).

A. Overview of article

3 This article comprises four parts. The first part provides a brief overview of the sentencing approaches in Singapore and in England. This part also maps out the structure of the recently introduced system of guideline judgments and the progress of the Singapore High Court in promoting consistency in sentencing through this approach. The second part assesses the impact of the English sentencing guidelines in promoting consistency in sentencing. This part assesses the achievements of the English guidelines in promoting consistency in sentencing and highlights those areas where the impact of the guidelines remains limited or unassessed. Specifically, this part examines the English guidelines' limited impact in reducing the use of custodial sentences for female offenders and in reducing racial disparities in sentencing. The third part of the article then turns to the lessons which Singapore can draw from the English experience. In particular, it highlights the shortcomings of the English sentencing guidelines that SCS would need to address before emulating the English style of guidelines in Singapore. This part also analyses the possible reasons as to why SCS may be reluctant to adopt a system of guidelines in Singapore, beginning first with the reasons highlighted by Chao JA and followed by other reasons peculiar to Singapore.

4 This article concludes that SCS's proposal of using the three-judge court to issue guideline judgments is unlikely to enhance consistency in sentencing in Singapore. In contrast, the evidence demonstrates the positive impact of the English sentencing guidelines in promoting consistency in sentencing in England across the various categories of offences for which guidelines have been introduced.¹⁰ In light of the English experience, SCS should replace the system of guideline judgments with a system of sentencing guidelines if it is serious about its desire to enhance consistency in sentencing. At a principled level, such reform would strengthen Singapore's commitment towards ensuring open justice and upholding the rule of law,¹¹ increasing "[the] public understanding of sentencing"¹² and promoting the public's confidence in the Judiciary.

10 Julian V Roberts, "Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues" (2013) 76(1) *Law and Contemporary Problems* 1 at 22.

11 Julian V Roberts, "Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues" (2013) 76(1) *Law and Contemporary Problems* 1 at 22.

12 Sentencing Council for England and Wales, "Home" <<https://www.sentencingcouncil.org.uk/>> (accessed 22 May 2017).

II. Overview of sentencing in Singapore and in England

A. *Brief overview of criminal process in Singapore*

5 In Singapore, the Criminal Procedure Code¹³ (“CPC”) is the main statutory instrument that governs the conduct of criminal proceedings. Column 7 in the First Schedule to the CPC determines whether a particular offence is triable in the Magistrate’s, District or High Courts. The Magistrates’ and District Courts collectively constitute the State Courts of Singapore.¹⁴ As most criminal offences in Singapore are triable in the State Courts, most criminal offenders are resultantly tried and sentenced in the State Courts. Due to the large volume of cases that are processed by the State Courts, SCS principally aims to provide guidance to the district judges and magistrates in the State Courts to improve the sentencing practices there.¹⁵

6 An offender who is tried in the State Courts can either elect to plead guilty or claim trial to the charges. When an offender elects to plead guilty, ss 227(1) and 227(2) of the CPC govern the conduct of the plead-guilty (“PG”) hearing. If an offender elects to claim trial, s 230(1) of the CPC governs the trial procedure. After the court finds the offender guilty and convicts him of the offence, the case proceeds to the sentencing phase of the proceedings.

(1) *Sentencing approach in Singapore*

7 Section 228 of the CPC specifies the procedure for sentencing an offender in both the PG and trial situations. It states:

Address on sentence, mitigation and sentence

228.—(1) On the conviction of the accused, the prosecution may where it thinks fit address the court on sentence.

(2) The address on sentence may include —

- (a) the criminal records of the accused;
- (b) any victim impact statement; and
- (c) any relevant factors which may affect the sentence.

(3) The court must then hear any plea in mitigation of sentence by the accused and the prosecution has a right of reply.

13 Cap 68, 2012 Rev Ed.

14 State Courts Act (Cap 321, 2007 Rev Ed).

15 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 2.

- (4) Where the court is satisfied that any matter raised in the plea in mitigation materially affects any legal condition required by law to constitute the offence charged, the court must reject the plea of guilty.
- (5) After the court has heard the plea in mitigation, it may —
- (a) at its discretion or on the application of the prosecution or the accused hear any evidence to determine the truth or otherwise of the matters raised before the court which may materially affect the sentence; and
- (b) attach such weight to the matter raised as it considers appropriate after hearing the evidence.
- (6) The court must then pass sentence according to law immediately or on such day as it thinks fit.

8 Section 228(6) directs the court to impose a “sentence according to law”. Here, “law” refers to the relevant statutory laws and any binding case precedents.¹⁶ The first of these statutory laws are the offence-creating statutes which prescribe the penalties for the offence in question.¹⁷ In Singapore, judges generally retain broad discretion to pass any sentence from a range of penalties that include fines, probation, imprisonment and community-based sentences except in those cases where the sentences are fixed by law, such as mandatory minimum sentences. The second of these statutory laws are those that stipulate the courts’ sentencing powers.¹⁸ Here, ss 303(2) and 303(3) of the CPC respectively define the maximum limits of the District and Magistrate Courts’ sentencing powers.

9 After the sentence has been imposed, the offender may file an appeal against his sentence if he believes that the sentence imposed on him is “manifestly excessive”.¹⁹ The Public Prosecutor, too, may appeal against an offender’s sentence if he feels that the sentence imposed on the offender is manifestly inadequate.²⁰ All appeals from the State Courts are heard in the High Court²¹ and are known as Magistrate’s Appeals.²² The High Court may summarily reject an offender’s appeal against

16 Andrew Ashworth, “Techniques of Guidance on Sentencing” [1984] Crim LR 519.

17 Andrew Ashworth, “Techniques of Guidance on Sentencing” [1984] Crim LR 519.

18 Andrew Ashworth, “Techniques of Guidance on Sentencing” [1984] Crim LR 519.

19 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 377(1).

20 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 377(1). For the one exception to this general position, see *Public Prosecutor v Lim Choon Teck* [2015] 5 SLR 1395, where the Public Prosecutor appealed against the offender’s sentence for being *manifestly excessive*.

21 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 386(1).

22 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 18.

sentence if it is of the view that the appeal is without grounds.²³ Otherwise, the offender's appeal is heard, as a matter of practice,²⁴ before a single judge in the High Court.²⁵ With SCS's introduction of the three-judge court to hear selected Magistrate's Appeals, some of these appeals would now be heard by three judges instead of one.

10 At first blush, this development may be lauded as a positive step towards promoting more consistent sentencing practices in the State Courts. Closer examination reveals that the proposal still leaves lower court judges with significant discretion in sentencing offenders.

(2) *Special panel of three judges*

11 As Chao JA rightly pointed out, the power to convene the three-judge court to hear appeals against sentence has existed in Singapore's CPC for a long time but, up until 2014, had never been utilised.²⁶ This legal power is codified in s 386(1) of the CPC, which states:

Appeal to be heard by one or more Judges

386.—(1) *An appeal before the High Court may ordinarily be heard by a single Judge, but if the Chief Justice so directs, the appeal must be heard before a court consisting of 3 or any greater uneven number of Judges.*

(2) An appeal before the Court of Appeal may ordinarily be heard by 3 Judges of Appeal, but if the Chief Justice so directs, the appeal must be heard before a court consisting of 5 or any greater uneven number of Judges.

(3) An appeal before 3 or more Judges must be decided in accordance with the opinion of a majority of them.

(4) *If the Public Prosecutor requests in writing at any time —*

(a) *before the hearing of an appeal before the High Court that the appeal be heard before a court consisting of 3 or any greater uneven number of Judges; or*

23 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 384(1). It is unclear if the High Court has relied on this statutory power to summarily reject appeals and if it does, how frequently this occurs.

24 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 18.

25 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 386(1).

26 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 18.

(b) before the hearing of an appeal before the Court of Appeal that the appeal be heard before a court consisting of 5 or any greater uneven number of Judges,

and the Chief Justice consents to the request, the appeal must be heard by such a court.

(5) In any case, the appellate court may, of its own motion or on the application of a party concerned, with reasonable notice to the parties, bring forward or postpone the hearing of an appeal, on such terms as it thinks fit as to the costs of the appeal.

[emphasis added]

12 Under s 386(1) of the CPC, the Chief Justice decides whether or not to convene a three-judge court to hear a Magistrate's Appeal. However, s 386(1) does not specify the factors upon which the Chief Justice relies to decide whether a particular appeal merits the empanelment of a three-judge court. Here, it is worthwhile to note that the Public Prosecutor has the statutory right under s 386(4) of the CPC to request for an appeal against sentence to be heard by a three-judge court. In juxtaposition, the criminal defendant does not enjoy the same legal right. This position is highly odd. One might argue that the Public Prosecutor, as a "minister of justice", should enjoy this statutory advantage because he is vested with the authority to decide what would best serve public interest.²⁷ If the Public Prosecutor felt that a decision in a particular case would have far-reaching consequences, he should be allowed to request for a special panel to hear that appeal. Yet, the criminal defendant's constitutional right to life and liberty is an equally important interest that needs to be safeguarded.²⁸ In order for this constitutional guarantee to be practically effective, the criminal defendant should be entitled to request for a three-judge court if he felt that his case presented a complex or novel issue where a thoroughly considered decision would have broader significance.

13 Returning to Chao JA's proposal, it is envisaged that the three-judge court will be convened to hear "novel" cases.²⁹ SCS has

27 Kumaralingam Amirthalingam, "Prosecutorial Discretion and Prosecutorial Guidelines" [2013] Sing JLS 50 at 55-56; see also Art 35(8) of the Constitution of the Republic of Singapore (1999 Reprint) and s 11(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

28 Constitution of the Republic of Singapore (1999 Reprint) Art 9(1).

29 Justice Chao Hick Tin, "The Art of Sentencing - An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at pp 18-19.

indicated that the general criteria for determining whether a case should be heard by the three-judge court will include:³⁰

- (a) whether a case is sufficiently complex to benefit from the issuance of a guideline judgment;
- (b) whether there exist conflicting High Court decisions that lead to inconsistencies in sentencing approaches, outcomes or philosophies; and
- (c) whether a new sentencing framework is necessary for an offence.

Beyond this general criterion, the specific criteria that will determine whether a three-judge court should hear an appeal against sentence, and the operational framework for referring these cases to the three-judge court, is yet to be finalised.³¹

14 There is little publicly available information that records the number of Magistrate's Appeals involving a sentence heard by the three-judge court hitherto. The official websites of the Supreme Court,³² the State Courts,³³ and the Attorney-General's Chambers³⁴ are unhelpful in this regard. It is difficult to determine if there were appeals against a sentence that justified the issuance of guideline judgments by a three-judge court but which were not flagged for the Chief Justice's attention. Conversely, it is also unclear whether there were cases that were brought to the Chief Justice's attention but which he felt were unsuitable to be heard by a three-judge court. From the information that is available, the three-judge court has issued sentencing guideline judgments in the following six cases (as at the time of writing):

30 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 19.

31 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at pp 19 and 21.

32 Supreme Court of Singapore website <http://www.supremecourt.gov.sg/> (accessed 22 May 2017).

33 State Courts of Singapore website <https://www.statecourts.gov.sg/> (accessed 22 May 2017).

34 Attorney-General's Chambers website <https://www.agc.gov.sg/> (accessed 22 May 2017).

Case	Offence	Issue
<i>Public Prosecutor v Sakthikanesh s/o Chidambaram</i> ³⁵	Failure to comply with ss 3, 9 and 32 of the Enlistment Act, ³⁶ which are offences under s 33 of the same act	Sentencing benchmarks for NS defaulters
<i>Koh Yong Chiah v Public Prosecutor</i> ³⁷	Providing false information to a public servant under s 182 of the Penal Code ³⁸	Sentencing guidelines for s 182 offences
<i>Sim Yeow Kee v Public Prosecutor</i> ³⁹	Various property-related and drug offences under the Penal Code ⁴⁰ and Misuse of Drugs Act ⁴¹	Whether an offender who satisfies the technical requirements to be sentenced to corrective training (“CT”) should be sentenced to that form of incarceration or to regular imprisonment in view of the changes made in 2014 to the regular imprisonment regime and their attendant effect on the operating environment of the CT regime
<i>Chew Soo Chun v Public Prosecutor</i> ⁴²	Falsification of accounts under s 477A of the Penal Code ⁴³	When ill-health would justify exercise of judicial mercy or reduction in sentence
<i>Mohammed Ibrahim s/o Hamzah v Public Prosecutor</i> ⁴⁴	Failing to report for registration for National Service under s 3(1) of the Enlistment Act ⁴⁵	Whether a custodial sentence was warranted for the relevant offence

35 [2017] SGHC 178.

36 Cap 93, 2001 Rev Ed.

37 [2017] 3 SLR 447.

38 Cap 224, 1985 Rev Ed.

39 [2016] 5 SLR 936.

40 Cap 224, 2008 Rev Ed.

41 Cap 185, 2008 Rev Ed.

42 [2016] 2 SLR 78.

43 Cap 224, 2008 Rev Ed.

44 [2015] 1 SLR 1081.

45 Cap 93, 2001 Rev Ed.

<i>Public Prosecutor v Hue An Li</i> ⁴⁶	Causing death by negligent act under s 304A(b) of the Penal Code ⁴⁷	Whether a custodial sentence was warranted for such offences where binding precedents had established that a fine would suffice
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15 Granted, one might interpret the three-judge court’s issuance of six written judgments in appeals involving a sentence as a positive development when compared to the position that existed prior to 2014. The real test of achievement, however, is whether these guideline judgments have enhanced consistency in sentencing in the State Courts. After all, this was the primary objective that led to the decision to invoke the use of a three-judge court to hear appeals against sentence. Based on what is observable, the use of a system of guideline judgments issued by the three-judge court is unlikely to achieve significant results in enhancing consistency in sentencing. Five reasons are advanced for this conclusion.

16 First, it is difficult to comprehend how the three-judge court is any different from the existing model of a single-judge court issuing guideline judgments. The current proposal is no more than simply having additional judges doing the same thing. If guideline judgments issued by a single-judge court did not improve consistency in sentencing in the State Courts, it is difficult to understand how the issuance of guideline judgments by three judges instead would lead to different results.

17 Related to the first point, the second limitation of the three-judge court is that it is not a replacement of the single-judge court. Rather, the former will co-exist with the latter.⁴⁸ This is an odd situation when one considers that both three-judge and single-judge courts will continue to issue guideline judgments. Adding to this confusion, the decisions of the three-judge court are expected to exert greater authority on and merit greater consideration by the single-judge court without them necessarily binding the single-judge court.⁴⁹ Yet, why should the guideline judgment of the three-judge court not bind the single-judge court? Conversely, why should the guideline judgment of the

46 [2014] 4 SLR 661.

47 Cap 224, 2008 Rev Ed.

48 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 18.

49 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 19.

single-judge court not be as authoritative as the guideline judgment issued by the three-judge court? After all, the single-judge court tasked to issue a guideline judgment would be required to explore the same “sentencing alternatives and all the implications of the proposed sentencing framework” as is expected of the three-judge court.⁵⁰ Consequently, the judgments of both the single-judge and three-judge courts should be of equal importance and achieve an identical effect in promoting consistency in sentencing. The current proposal does not clarify how the guideline judgments of a three-judge court would enhance consistency in sentencing more than the guideline judgments issued by the single-judge.

18 The third limitation of the proposal lies in the process by which it would be determined whether a guideline judgment should be issued by a three-judge or single-judge court. Surely, if there is a need for a guideline judgment to be issued, it should mean that the case is sufficiently important to be considered by a three-judge court. It would be illogical to flag a case as being sufficiently important for a guideline judgment but only deserving of consideration by one legal mind instead of three legal minds to fully explore the issues raised.

19 The fourth limitation of Chao JA’s proposal is that it would still be permissible for lower court judges to depart from guideline judgments “if there are good reasons to do so”.⁵¹ This relaxed attitude towards departures from guideline judgments does not fulfil the hope for guideline judgments to enhance consistency in sentencing. Ideally, there should be a more robust expectation for the lower courts to adhere to the sentences articulated in guideline judgments as they are intended to provide guidance on sentencing for the majority of cases that lower court judges handle. Otherwise, guideline judgments would be ineffective in making any systemic improvements to sentencing practices. Hence, a higher standard needs to be satisfied before departures from guideline judgments can be justified. Permitting departures merely on the basis of “good reasons” without any corresponding articulation of principles or accompanying examples to elucidate the principles would render guideline judgments ineffective in promoting consistency in sentencing in Singapore.

20 Finally, Chao JA did not mention the existence of any framework for a meaningful assessment of the effectiveness of the

50 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 18.

51 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 19.

guideline judgments issued by the three-judge court in promoting consistency in sentencing in Singapore to be undertaken. Without such a framework, one wonders how SCS intends to measure the success of its proposal in enhancing sentencing consistency in Singapore. Additionally, without any relevant data relating to use of guideline judgments issued by both the three-judge and single-judge courts in the State Courts, it is difficult to assess whether these guideline judgments have actually enhanced consistency in sentencing. It is equally difficult to assess whether the guideline judgments of the three-judge court have been more effective in promoting consistency in sentencing compared to guideline judgments issued by a single-judge.

21 The preceding discussion highlights the serious deficiencies in SCS's model of guideline judgments issued by the three-judge court. If the model of guideline judgments issued by the single-judge did not constrain judicial sentencing discretion, it is difficult to comprehend how three judges would make any difference. The result is that judges continue to retain significant discretion in sentencing offenders guided only by appellate review, where an appeal is filed by a party and where it succeeds, serving as the main constraint on judicial discretion. Simply stated, the attempts to structure judicial discretion in sentencing in Singapore remain unsatisfactory. In this regard, the English model of sentencing guidelines achieves better results in structuring judicial discretion in sentencing and thereby improving consistency in sentencing. Before the merits of the English model of sentencing guidelines can be meaningfully examined, it is first necessary to understand the structure of the English guidelines and how they operate.

B. Sentencing approach in England

22 Until relatively recently, the sentencing approach of judges in England mirrored the sentencing approach that currently exists in Singapore. The English judges used to exercise broad discretion in sentencing offenders.⁵² However, in 1998, the Sentencing Advisory Panel ("SAP") was established to advise the English Court of Appeal's Criminal Division on sentencing issues.⁵³ SAP's advice would influence

52 Julian V Roberts, "Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues" (2013) 76(1) *Law and Contemporary Problems* 1 at 2.

53 Julian V Roberts, "Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues" (2013) 76(1) *Law and Contemporary Problems* 1 at 2.

the content of the guideline judgments issued by the Court of Appeal.⁵⁴ Three main reasons underpinned the formation of SAP. First, while there was agreement on the need to retain judicial discretion in sentencing, such discretion had to be exercised with reference to “common principles and standards”.⁵⁵ Second, a system of sentencing guidelines would be the most suitable approach to structure judicial discretion but the Court of Appeal alone was ill-equipped to formulate these guidelines.⁵⁶ Finally, as the task of establishing sentencing guidelines essentially concerned the development of sentencing policies, this task required the expertise and participation of other criminal justice professionals.⁵⁷

23 Around five years later in 2003, the Sentencing Guidelines Council (“SGC”) was established pursuant to s 167 of the English Criminal Justice Act 2003⁵⁸ (“CJA 2003”). With the inception of SGC, SAP provided its advice on sentencing issues to SGC, which would subsequently draft and issue definitive guidelines based on SAP’s recommendations.⁵⁹ Sentencing guidelines here was understood as a “set of prescriptive rules of standards that aim to predetermine, to some degree, the punishments that must be judicially imposed for certain offences”.⁶⁰ Due to the cumbersome structure of SAP and SGC, the Sentencing Commission Working Group (“SCWG”) subsequently reviewed how the existing structure could be simplified.⁶¹ This review culminated in the statutory amendments to the English Coroners and

54 Julian V Roberts, “Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues” (2013) 76(1) *Law and Contemporary Problems* 1 at 2.

55 Andrew Ashworth, “Techniques for Reducing Sentence Disparity” in *Principled Sentencing: Readings on Theory and Policy* (Andrew von Hirsch, Andrew Ashworth & Julian V Roberts eds) (Hart Publishing, 3rd Ed, 2009) at pp 243 and 244.

56 Andrew Ashworth, “Techniques for Reducing Sentence Disparity” in *Principled Sentencing: Readings on Theory and Policy* (Andrew von Hirsch, Andrew Ashworth & Julian V Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 244.

57 Andrew Ashworth, “Techniques for Reducing Sentence Disparity” in *Principled Sentencing: Readings on Theory and Policy* (Andrew von Hirsch, Andrew Ashworth & Julian V Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 244.

58 c 44; Julian V Roberts, “Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues” (2013) 76(1) *Law and Contemporary Problems* 1 at 2.

59 Julian V Roberts, “Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues” (2013) 76(1) *Law and Contemporary Problems* 1 at 3.

60 Tom O’Malley, “Living without Guidelines” in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at pp 218 and 219.

61 Julian V Roberts, “Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues” (2013) 76(1) *Law and Contemporary Problems* 1 at 3.

Justice Act 2009⁶² (“CJA 2009”) in 2010, which led to the replacement of SAP and SGC with the Sentencing Council.⁶³

24 Sections 118–136 of the CJA 2009 govern the Sentencing Council and its work. Three provisions are of particular importance. First, in the preparation of any sentencing guideline, s 120(11) requires the Sentencing Council to consider the following matters:

- (11) When exercising functions under this section, the Council must have regard to the following matters —
- (a) the sentences imposed by courts in England and Wales for offences;
 - (b) the need to promote consistency in sentencing;
 - (c) the impact of sentencing decisions on victims of offences;
 - (d) the need to promote public confidence in the criminal justice system;
 - (e) the cost of different sentences and their relative effectiveness in preventing re-offending;
 - (f) the results of the monitoring carried out under section 128.

25 Second, the sentencing guidelines are presumptively binding on the courts. Section 125(1) of the CJA 2009 states:

125 Sentencing guidelines: duty of court

This section has no associated Explanatory Notes

- (1) Every court —
- (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and
 - (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.

62 c 25 (UK).

63 Julian V Roberts, “Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues” (2013) 76(1) *Law and Contemporary Problems* 1 at 3.

26 Finally, the Sentencing Council is statutorily required to monitor the effectiveness of its guidelines. Section 128 of the CJA 2009 states:

Monitoring

This section has no associated Explanatory Notes

- (1) The Council must—
 - (a) monitor the operation and effect of its sentencing guidelines, and
 - (b) consider what conclusions can be drawn from the information obtained by virtue of paragraph (a).
- (2) The Council must, in particular, discharge its duty under subsection (1)(a) with a view to drawing conclusions about—
 - (a) the frequency with which, and extent to which, courts depart from sentencing guidelines;
 - (b) the factors which influence the sentences imposed by courts;
 - (c) the effect of the guidelines on the promotion of consistency in sentencing;
 - (d) the effect of the guidelines on the promotion of public confidence in the criminal justice system.
- (3) When reporting on the exercise of its functions under this section in its annual report for a financial year, the Council must include—
 - (a) a summary of the information obtained under subsection (1)(a), and
 - (b) a report of any conclusions drawn by the Council under subsection (1)(b).

27 This legal duty to monitor the effectiveness of its guidelines ensures that the sentencing guidelines work and if they do not, requires the Sentencing Council to undertake remedial measures to resolve any teething issues arising from their implementation. Additionally, sentencing guidelines would serve no meaningful purpose if courts did not adhere to them when sentencing offenders. Sentencing guidelines would also be ineffective if the public's understanding of sentencing and their confidence in the criminal justice system did not improve. The legal duty to monitor ensures that the Sentencing Council adopts an active role in promoting these objectives.

28 The Sentencing Council and its predecessors focused on developing guidelines that establish a more methodical approach to sentencing⁶⁴ which results in greater consistency in sentencing and thereby promotes fairer sentencing outcomes.⁶⁵ The belief underpinning this approach is that when judges across courts follow an identical methodical process, greater consistency in sentencing outcomes will logically result.⁶⁶ Additionally, these sentencing guidelines would satisfy the public's expectations that judges, whose decisions impact the community, act transparently and consistently.⁶⁷ Sentencing guidelines would also provide the public with a holistic understanding of sentencing.

29 The Sentencing Council issued its first definitive guideline on assault offences⁶⁸ ("Assault Guideline") in March 2011 which became operational in June 2011.⁶⁹ The significance of the Assault Guideline lies in its structure and the detailed enumeration of a nine-step process which has become the standard model for all of the Sentencing Council's subsequent offence definitive guidelines.⁷⁰ Of the nine steps, it is the first two steps that principally determine the sentence that the offender is likely to receive.⁷¹ In order to explain the sentencing methodology, reference shall be made to steps one and two to the offence of assault occasioning actual bodily harm within the Assault Guideline.⁷²

64 Julian V Roberts, "Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues" (2013) 76(1) *Law and Contemporary Problems* 1 at 2.

65 Andrew Ashworth & Julian V Roberts, "The Origins and Nature of Sentencing Guidelines in England and Wales" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 1.

66 Julian V Roberts, "Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues" (2013) 76(1) *Law and Contemporary Problems* 1 at 22.

67 Tom O'Malley, "Living without Guidelines" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 219.

68 Sentencing Council for England and Wales, "Assault Definitive Guideline" (16 March 2011).

69 Julian V Roberts & Anne Rafferty, "Sentencing Guidelines in England and Wales: Exploring the New Format" [2011] *Crim LR* 681.

70 Julian V Roberts & Anne Rafferty, "Sentencing Guidelines in England and Wales: Exploring the New Format" [2011] *Crim LR* 681 at 681–682.

71 Julian V Roberts & Anne Rafferty, "Sentencing Guidelines in England and Wales: Exploring the New Format" [2011] *Crim LR* 681 at 682.

72 Sentencing Guideline, "Assault: Definitive Guideline" (16 March 2011) at pp 11–14 <<https://www.sentencingcouncil.org.uk/publications/item/assault-definitive-guideline/>> (accessed 23 May 2017).

STEP ONE
Determining the offence category

The court should determine the offence category using the table below.

Category 1	Greater harm (serious injury must normally be present) and higher culpability
Category 2	Greater harm (serious injury must normally be present) and lower culpability; or lesser harm and higher culpability
Category 3	Lesser harm and lower culpability

The court should determine the offender’s culpability and the harm caused, or intended, by reference **only** to the factors identified in the table below (as demonstrated by the presence of one or more). These factors comprise the principal factual elements of the offence and should determine the category.

Factors indicating greater harm	Use of weapon or weapon equivalent (for example, shod foot, headbutting, use of acid, use of animal)
Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present)	Intention to commit more serious harm than actually resulted from the offence
Victim is particularly vulnerable because of personal circumstances	Deliberately causes more harm than is necessary for commission of offence
Sustained or repeated assault on the same victim	Deliberate targeting of vulnerable victim
Factors indicating lesser harm	Leading role in group or gang
Injury which is less serious in the context of the offence	Offence motivated by, or demonstrating, hostility based on the victim’s age, sex, gender identity (or presumed gender identity)
Factors indicating higher culpability	Factors indicating lower culpability
<i>Statutory aggravating factors:</i>	Subordinate role in group or gang
Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)	A greater degree of provocation than normally expected

Offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)	Lack of premeditation
<i>Other aggravating factors:</i>	Mental disorder or learning disability, where linked to commission of the offence
A significant degree of premeditation	Excessive self defence

STEP TWO
Starting point and category range

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Offence Category	Starting Point (Applicable to all offenders)	Category Range (Applicable to all offenders)
Category 1	1 year 6 months' custody	1 – 3 years' custody
Category 2	26 weeks' custody	Low level community order – 51 weeks' custody
Category 3	Medium level community order]	Band A fine – High level community order]

The table below contains a *non-exhaustive* list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range ...

Factors increasing seriousness	Exploiting contact arrangements with a child to commit an offence
<i>Statutory aggravating factors:</i>	Established evidence of community impact
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current	Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

offence; and b) the time that has elapsed since the conviction	
Offence committed whilst on bail	Offences taken into consideration (TIC)
<i>Other aggravating factors include:</i>	Factors reducing seriousness or reflecting personal mitigation
Location of the offence	No previous convictions <i>or</i> no relevant/recent convictions
Timing of the offence	Single blow
Ongoing effect upon the victim	Remorse
Offence committed against those working in the public sector or providing a service to the public	Good character and/or exemplary conduct
Presence of others including relatives, especially children or partner of the victim	Determination and/or demonstration of steps taken to address addiction or offending behaviour
Gratuitous degradation of the victim	Serious medical conditions requiring urgent, intensive or long-term treatment
In domestic violence cases, victim forced to leave their home	Isolated incident
Failure to comply with current court orders	Age and/or lack of maturity where it affects the responsibility of the offender
Offence committed whilst on licence	Lapse of time since the offence where this is not the fault of the offender
An attempt to conceal or dispose of evidence	Mental disorder or learning disability, where <i>not</i> linked to the commission of the offence
Failure to respond to warnings or concerns expressed by others about the offender's behaviour	Sole or primary carer for dependent relatives
Commission of offence whilst under the influence of alcohol or drugs	
Abuse of power and/or position of trust	

[emphasis in original in bold italics]

30 Step one of the guideline requires the judge to identify the applicable offence category after assessing which of the exhaustive set of factors relating to harm and culpability are present in the offender's case.⁷³ These factors reflect the "principal factual elements of the offence" and are determinative of the applicable category.⁷⁴ After determining the relevant category, the judge relies on the presumptive starting point sentence linked to the particular offence category as reflected in step two. At step two, the judge identifies the aggravating and mitigating factors that are present in the specific offender's case. Here, the list of aggravating and mitigating factors is non-exhaustive. The judge accordingly calibrates the sentence in light of the identified aggravating and mitigating features. There is nothing that bars a judge from arriving at a tentative sentence that is outside the prescribed band for the specific category that he identified in step one. Hence, the judge may reach a provisional sentence that falls within a band for either the higher or lower category. In deciding on the eventual sentence, the judge is required to consider the following issues sequentially:⁷⁵

- (i) whether any sentence reduction applies on account of co-operation with authorities;
- (ii) whether any guilty plea discount applies;
- (iii) whether an indeterminate sentence applies if the offender falls within a class of dangerous offenders;
- (iv) whether the overall sentence needs to be adjusted so that it does not contravene the totality principle;
- (v) whether ancillary orders such as compensation orders need to be made; and
- (vi) whether the offender deserves any reduction in sentence on account of time spent in remand.

31 The final sentence should not exceed the upper limit of the sentence for the guideline offence range.⁷⁶ This is because the specific offence guidelines are designed to apply to most of the cases that are heard in the English courts.⁷⁷ Nevertheless, there may be a few cases

73 Julian V Roberts & Anne Rafferty, "Sentencing Guidelines in England and Wales: Exploring the New Format" [2011] Crim LR 681 at 682–683.

74 Julian V Roberts & Anne Rafferty, "Sentencing Guidelines in England and Wales: Exploring the New Format" [2011] Crim LR 681 at 683.

75 Julian V Roberts & Anne Rafferty, "Sentencing Guidelines in England and Wales: Exploring the New Format" [2011] Crim LR 681 at 688–689.

76 Julian V Roberts & Anne Rafferty, "Sentencing Guidelines in England and Wales: Exploring the New Format" [2011] Crim LR 681 at 687.

77 Julian V Roberts & Anne Rafferty, "Sentencing Guidelines in England and Wales: Exploring the New Format" [2011] Crim LR 681 at 687.

where the offender deserves a sanction that is outside the offence range, whether at the extremes of severity or leniency.⁷⁸ For these cases, s 125(1)(b) of the CJA 2009 permits the judge to impose a sentence that falls outside the total offence range, but within the statutory limits for the offence, if it is in the interests of justice to do so. Irrespective of whether the judge imposes a sentence that is within the offence guideline or which departs from the guideline, the judge is duty-bound to provide his reasons for the eventual sentence.

32 As the preceding discussion demonstrates, the English system of guidelines imposes a methodical approach to sentencing in England. Yet, have the guidelines resulted in actual consistency in sentencing in the courts? The next part of the article addresses this question.

III. Promoting consistency in sentencing: Have the English guidelines achieved their objective?

33 The substitution of a system of guideline judgments with the system of sentencing guidelines in England was undertaken with the strong belief that the latter would be a superior mechanism in enhancing consistency in sentencing. This part of the article assesses the effectiveness of the sentencing guidelines in achieving that objective.

A. *Areas where the English guidelines have promoted consistency in sentencing*

34 Sentencing guidelines have promoted consistency in sentencing in three ways. First, the available evidence demonstrates that sentencing guidelines have improved actual sentencing practices for a range of offences. The Crown Court Sentencing Survey (“CCSS”) collated sentences imposed in 2011 on assault offences.⁷⁹ Thereafter, cases where a sentence of at least one month’s imprisonment was imposed on three specific assault offences, namely, actual bodily harm, grievous bodily harm (“GBH”) and GBH with intent were analysed.⁸⁰ This study examined the reliance placed by Crown Court judges on the sentencing guidelines and the consistency with which the factors enumerated in the

78 Julian V Roberts & Anne Rafferty, “Sentencing Guidelines in England and Wales: Exploring the New Format” [2011] Crim LR 681 at 687.

79 Jose Pina-Sanchez & Robin Linacre, “Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey” (2013) 53 *British Journal of Criminology* 1118 at 1124–1125.

80 Jose Pina-Sanchez & Robin Linacre, “Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey” (2013) 53 *British Journal of Criminology* 1118 at 1124–1125.

guidelines were used.⁸¹ The results of the study revealed that the courts applied the sentencing guidelines for assault offences as intended by the Sentencing Council.⁸² The findings also revealed that the legal factors specified in the guidelines had the intended effect on the length of imprisonment⁸³ and that there was consistency among the courts in their treatment of the legal factors.⁸⁴

35 The conclusion above is corroborated by the Sentencing Council's recent publication of the findings of its research into the impact and operationalisation of the Assault Guideline.⁸⁵ The research evaluated the responses provided during interviews with judges, magistrates, prosecutors and defence lawyers in England and also extrapolated court sentencing data collated by the Ministry of Justice. The results of the research highlighted the positive support amongst criminal justice stakeholders for the Assault Guideline and concluded that the Assault Guideline had promoted consistency in sentencing.

36 Second, the English guidelines have enhanced consistency in sentencing by specifying the aggravating and mitigating factors that should apply in similar offences. The various offence definitive guidelines are internally consistent in relation to the exhaustive set of aggravating and mitigating factors listed in step one when a judge has to determine the applicable offence category.⁸⁶ In step two, the various aggravating and mitigating factors such as premeditation, good character and remorse are featured in the various offence-specific guidelines.⁸⁷ While these factors would have also featured in a non-guidelines sentencing environment, practically, there was little consensus about the factors to be applied in specific offence situations or

81 Jose Pina-Sanchez & Robin Linacre, "Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey" (2013) 53 *British Journal of Criminology* 1118 at 1119.

82 Jose Pina-Sanchez & Robin Linacre, "Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey" (2013) 53 *British Journal of Criminology* 1118 at 1126.

83 Jose Pina-Sanchez & Robin Linacre, "Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey" (2013) 53 *British Journal of Criminology* 1118 at 1126.

84 Jose Pina-Sanchez & Robin Linacre, "Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey" (2013) 53 *British Journal of Criminology* 1118 at 1130.

85 Sentencing Council for England and Wales, "Assault Offences: Assessment of Guideline" (22 October 2015).

86 Tom O'Malley, "Living without Guidelines" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 233.

87 Tom O'Malley, "Living without Guidelines" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 233.

the weight to be ascribed to those factors.⁸⁸ Unsurprisingly, the lack of unanimity on the applicable aggravating and mitigating factors in similar offences became one underlying source of sentencing inconsistency in the past. By clearly identifying these factors now, sentencing guidelines inculcate consistency in sentencing by requiring judges across courts to administer common factors to similar cases.⁸⁹

37 Notwithstanding the clarity provided by the guidelines' specification of the relevant aggravating and mitigating factors to judges, there remains insufficient guidance about the weight to be attributed to these factors and on the interaction between aggravating and mitigating factors in practice.⁹⁰ This is unfortunate when research demonstrates that judges accord different weight to the same factors in similar cases.⁹¹ Such dissimilar treatment of aggravating and mitigating factors result in irreconcilable outcomes for similar offenders, thereby violating the offender's right to be treated equally and fairly.⁹² Apart from the unfairness to the offender, there is also a risk of damage to the public confidence if such disparities are not eliminated. Without any clarity as to why offenders who commit similar offences face contrasting punishments, the public may view the administration of criminal justice as arbitrary and consequently lose faith in the system and its administrators.⁹³ This would clearly undermine the Sentencing Council's efforts to enhance the public's confidence in the sentencing process.⁹⁴

38 In order to rectify this limitation, the Sentencing Council could guide judges on how to weigh these factors when sentencing offenders⁹⁵ in two ways. First, it could articulate principles on how aggravating and mitigating features should be assessed within the different offence categories and how the presence of a greater number of either aggravating or mitigating factors relates to the type of sanction to be

88 Tom O'Malley, "Living without Guidelines" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at pp 233–234.

89 Tom O'Malley, "Living without Guidelines" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 234.

90 Julian V Roberts, "Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application" [2008] Crim LR 264.

91 Julian V Roberts, "Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application" [2008] Crim LR 264.

92 Julian V Roberts, "Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application" [2008] Crim LR 264.

93 Julian V Roberts, "Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application" [2008] Crim LR 264 at 265.

94 See para 4, n 12 above.

95 Julian V Roberts, "Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application" [2008] Crim LR 264 at 264.

imposed.⁹⁶ Second, it could incorporate, within each offence guideline, illustrations drawn from past cases that could help judges understand how they should treat the case that is before them using the guideline factors.⁹⁷ Providing judges with guidance on which aggravating or mitigating factors carry the weight to move an offender above or below the custodial threshold would result in the application of the appropriate outcome in a given case.⁹⁸ Consequently, consistency in the weight to be attached to aggravating and mitigating factors in similar cases is likely to result in more “equitable and proportionate sentencing outcomes”.⁹⁹

39 Third, the Sentencing Council continues to issue sentencing guidelines since it issued its first guideline in March 2011. There are now 31 definitive guidelines that cover specific offences, such as burglary and robbery, and matters of general application, such as how courts should treat offences taken into consideration and when courts should impose community or custodial sentences. The significance of this development is heightened because s 125(1) of the CJA 2009 obliges the English courts to follow the guidelines when sentencing offenders and not merely “have regard to” them unless “it would be contrary to the interests of justice to do so”.¹⁰⁰ This provision generates the legitimate expectation that courts will impose sentences that are in line with the Sentencing Council’s guidelines.¹⁰¹ Resultantly, because courts are required to adopt a uniform approach in sentencing offenders who have committed similar offences, consistency in sentencing ensues.¹⁰²

40 The sentencing guidelines have generated greater consistency in sentencing because they are binding on judges when offenders are sentenced. Moreover, the guidelines provide judges with a methodical approach to sentencing using common aggravating and mitigating factors in similar cases. Nevertheless, further refinements to the

96 Julian V Roberts, “Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application” [2008] Crim LR 264 at 271.

97 Andrew Ashworth, “Techniques of Guidance on Sentencing” [1984] Crim LR 519 at 528.

98 Julian V Roberts, “Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application” [2008] Crim LR 264 at 271.

99 Julian V Roberts, “Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application” [2008] Crim LR 264 at 276.

100 Julian V Roberts, “Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales” (2011) 51 *British Journal of Criminology* 997 at 1011.

101 Julian V Roberts, “Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales” (2011) 51 *British Journal of Criminology* 997 at 1011.

102 Julian V Roberts, “Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales” (2011) 51 *British Journal of Criminology* 997 at 1011.

guidelines are required if the full potential of the guidelines in enhancing consistency in sentencing is to be realised. The following section highlights the limited impact of the English guidelines in two areas.

B. Current limitations of the English guidelines in promoting consistency in sentencing

41 Despite the positive impact of the English guidelines in cultivating consistency in sentencing, there are two areas where they either have had limited impact or where their impact cannot be assessed. These two areas relate to the sentencing guidelines' impact on female offenders and on offenders belonging to minority races ("minority offenders").

(1) *Guidelines' impact on female offenders*

42 The first area where the effect of the English guidelines in promoting consistency in sentencing remains unclear is its ability to reduce the disproportionate impact of custodial sentences on female offenders convicted of minor offences.¹⁰³ This problem is exacerbated in relation to female offenders with children because they become unable to fulfil their roles as mothers when they are imprisoned.¹⁰⁴ This situation is further aggravated because a significant proportion of these offenders are the "primary caregivers for [their] children" before their incarceration.¹⁰⁵ As a result, their children are left with inadequate parental supervision, thereby heightening their risk to impaired physical and psychological development.¹⁰⁶ This problem is likely to worsen as the number of women sentenced to prison increases.¹⁰⁷

43 Statutorily, s 120(11) of the CJA 2009 does not specify the promotion of gender equality in sentencing as a matter for the

103 Loraine Gelsthorpe & Gillian Sharpe, "Women and Sentencing: Challenges and Choices" in *Exploring Sentencing Practice in England and Wales* (Julian V Roberts ed) (Palgrave Macmillan, 2015) at p 118.

104 Beth E Richie, "The Social Impact of Incarceration of Women" in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (Marc Mauer & Meda Chesney-Lind eds) (The New Press, 2002) at pp 136 and 139.

105 Shona Minson, "Sentencing and Dependents: Motherhood as Mitigation" in *Exploring Sentencing Practice in England and Wales* (Julian V Roberts ed) (Palgrave Macmillan, 2015) at p 137.

106 Shona Minson & Rachel Condry, "The Visibility of Children Whose Mothers are Being Sentenced for Criminal Offences in the Courts of England and Wales" (2015) 32 *Law in Context* 28 at 35.

107 Shona Minson, "Sentencing and Dependents: Motherhood as Mitigation" in *Exploring Sentencing Practice in England and Wales* (Julian V Roberts ed) (Palgrave Macmillan, 2015) at p 137.

Sentencing Council's consideration. Presumably then, the Sentencing Council may have decided that tailoring a sentence according to the offender's gender or to the number of children she has might undermine its quest to achieve sentencing consistency.¹⁰⁸ The better approach was for sentencing to account only for principles and factors relating to harm and culpability.¹⁰⁹ The only concession that the Sentencing Council made was in its recognition of caregiving responsibilities as a discretionary mitigating factor in step two of its definitive guidelines.

44 Nevertheless, the debate about whether female offenders should be treated in the same manner as male offenders or whether they should be accorded special concessions continues.¹¹⁰ It is noteworthy that prior to its dissolution, SAP had, in its advice to SGC on the overarching principles of sentencing, provided a careful analysis of the special challenges posed by female offenders and made four specific recommendations for female offenders.¹¹¹ First, the principle of parsimony in the use of imprisonment had greater significance for female offenders because of the "multiple harms" they are likely to experience due to imprisonment.¹¹² Hence, a custodial sentence should only be imposed on female offenders for serious offences and in the absence of any suitable alternative sanction.¹¹³ Second, the court should always call for a pre-sentence report before sentencing a female offender so that the judge can make a well-informed decision in her case.¹¹⁴ Third, the court should find ways of identifying a suitable community-based sentence for the female offender and not simply impose a custodial sentence when a community-based sentence is not readily available.¹¹⁵ Finally, the impecuniosity of the offender should not bar the imposition of a fine if that is the "most appropriate sanction" for

108 Tom O'Malley, "Living without Guidelines" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 218.

109 Tom O'Malley, "Living without Guidelines" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 218.

110 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th Ed, 2015) at p 260.

111 UK Sentencing Advisory Panel, "Advice to the Sentencing Guidelines Council: Overarching Principles of Sentencing" (2009) at p 87.

112 UK Sentencing Advisory Panel, "Advice to the Sentencing Guidelines Council: Overarching Principles of Sentencing" (2009) at p 87.

113 UK Sentencing Advisory Panel, "Advice to the Sentencing Guidelines Council: Overarching Principles of Sentencing" (2009) at p 87.

114 UK Sentencing Advisory Panel, "Advice to the Sentencing Guidelines Council: Overarching Principles of Sentencing" (2009) at p 87.

115 UK Sentencing Advisory Panel, "Advice to the Sentencing Guidelines Council: Overarching Principles of Sentencing" (2009) at p 87.

the offence.¹¹⁶ SAP's recommendations are laudable as they recognise that the differences between male and female offenders ought to be reflected in the penal response to female offending.¹¹⁷

45 From a sentencing philosophy standpoint, taking account of the impact of imprisonment on an offender is justified under the retributive theory of punishment.¹¹⁸ As retribution is driven by ideas of proportionality and deservedness, any punishment that creates a disproportionate impact on an offender would count as undeserved punishment.¹¹⁹ To mitigate the disproportionate impact of the sentence on a female offender, a sentence reduction on account of the needs of the offender's children is justified.¹²⁰ Understandably, this might, in practice, lead to the imposition of a lenient sentence on a female offender.¹²¹ Here, a tension is likely to arise between reducing the disproportionate impact of a sentence and ensuring that a proportionate sentence that best reflects the offender's culpability and the harm caused is imposed.

46 In order to resolve this tension, the Sentencing Council could incorporate SAP's 2009 proposals and devise "sentencing principles in relation to the impact of personal factors on the offender's experience of punishment".¹²² Additionally, the Sentencing Council could elaborate on how the step two mitigating factor of caregiving responsibilities interacts with the seriousness of the crime and suggest suitable sentences for female offenders under different offence conditions. Such guidance would lead to greater consistency in the sentencing of female offenders and thereby promote overall consistency in sentencing.

(2) *Guidelines' impact on offenders of minority races*

47 Similar to its silence on female offenders, s 120(11) of the CJA 2009 does not require the Sentencing Council to formulate

116 UK Sentencing Advisory Panel, "Advice to the Sentencing Guidelines Council: Overarching Principles of Sentencing" (2009) at p 87.

117 Home Office, "The Corston Report: A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System" (March 2007) at p 3.

118 Christine Piper, "Should Impact Constitute Mitigation? Structured Discretion versus Mercy" [2007] Crim LR 141 at 150.

119 Christine Piper, "Should Impact Constitute Mitigation? Structured Discretion versus Mercy" [2007] Crim LR 141 at 150.

120 Christine Piper, "Should Impact Constitute Mitigation? Structured Discretion versus Mercy" [2007] Crim LR 141 at 150.

121 Christine Piper, "Should Impact Constitute Mitigation? Structured Discretion versus Mercy" [2007] Crim LR 141 at 150.

122 Christine Piper, "Should Impact Constitute Mitigation? Structured Discretion versus Mercy" [2007] Crim LR 141 at 150.

sentencing guidelines with a view to reducing racial disparities in sentencing. Nevertheless, it is clear that the right to equal protection of the law prohibits the use of an offender's race to determine sentence.¹²³ Two questions arise in the context of the English guidelines. First, have the English sentencing guidelines resulted in a greater use of custodial sanctions against minority offenders than against white offenders?¹²⁴ Second, should the English guidelines, assuming that minority offenders were treated more harshly than white offenders prior to the introduction of the guidelines, be formulated with the goal of reducing racial disparities in sentencing?

48 There is little available research evidence that directly answers the first question. What the available evidence does suggest is that black, Asian and minority ethnic ("BAME") offenders in England are more likely to be sentenced to imprisonment than white offenders.¹²⁵ Analysis conducted on the offender population for 2014 revealed that Chinese and other minority adult offenders and BAME juvenile offenders were more likely to receive immediate custodial sentences than their white counterparts.¹²⁶ These findings are broadly consistent with an earlier study conducted on offenders convicted of recordable offences in 2011 which found that BAME offenders were more likely to receive custodial sentences than white offenders.¹²⁷ Admittedly, these studies may be criticised on grounds such as the imperfection of record-keeping or the fact that some of the data was generated from offenders' self-reporting which might be inaccurate. Nevertheless, these studies are important as they highlight that minority offenders continue to be treated unfairly within the criminal justice system.

49 The available evidence which demonstrates that sentencing guidelines have not reduced racial disparities in sentencing exists in relation to the US federal sentencing guidelines ("FSG"). One of the aims of the US FSG was to reduce disparities in sentences that existed on account of the offender's race.¹²⁸ Hence, under the US FSG, a sentence

123 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th Ed, 2015) at p 252.

124 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th Ed, 2015) at p 252.

125 UK Ministry of Justice, "Statistics on Race and the Criminal Justice System 2014: A Ministry of Justice Publication under Section 95 of the Criminal Justice Act 1991" (26 November 2015) at p 8.

126 UK Ministry of Justice, "Statistics on Race and the Criminal Justice System 2014: A Ministry of Justice Publication under Section 95 of the Criminal Justice Act 1991" (26 November 2015) at pp 53–54.

127 Kathryn Hopkins, "Association between Police-recorded Ethnic Background and Being Sentenced to Prison in England and Wales", Ministry of Justice.

128 Ronald S Everett & Roger A Wojtkiewicz, "Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing" (2002) 18(2) *Journal of Quantitative Criminology* 189.

should primarily be determined by the seriousness of the offence and the offender's criminal history.¹²⁹ However, multiple studies have revealed that under the US FSG, minority offenders continue to be sentenced more harshly than white offenders.¹³⁰ As an illustration, in one study conducted of 59,250 defendants sentenced by the US federal courts between 1991 and 1993,¹³¹ after controlling for all the legally relevant factors, it was found that Black, Hispanic and Native American offenders continued to receive more severe sentences than white offenders.¹³² The implication of such studies is that racial disparities in sentencing remain notwithstanding the existence of sentencing guidelines.

50 The implications of the above discussion on the effects of the US FSG on minority offenders in the USA to England is that the Sentencing Council should examine whether there are racial disparities in sentencing and whether they exist even with the operation of the English sentencing guidelines. Otherwise, the quest to attain consistency in sentencing through the guidelines would be thwarted if minority offenders consistently receive harsher sentences than white offenders.

51 Notwithstanding the scope for further refinement, the English sentencing guidelines have, on the whole, enhanced consistency in sentencing in England. The guidelines have reduced the sentence disparities that existed under the old regime of broad judicial discretion which was constrained mainly by appellate review. The question that arises is whether Singapore could benefit from a model of guidelines in its quest for sentencing reform. The next part of this article addresses this question.

IV. The English guidelines: Lessons for Singapore

52 While the system of guidelines may be suitable for England, one must be cautious before concluding that such a model of guidelines would be equally suitable for Singapore or would enhance sentencing

129 Ronald S Everett & Roger A Wojtkiewicz, "Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing" (2002) 18(2) *Journal of Quantitative Criminology* 189 at 208.

130 Cassia Spohn, "The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era" (2013) 76(1) *Law and Contemporary Problems* 75 at 84.

131 Ronald S Everett & Roger A Wojtkiewicz, "Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing" (2002) 18(2) *Journal of Quantitative Criminology* 189 at 195–196.

132 Ronald S Everett & Roger A Wojtkiewicz, "Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing" (2002) 18(2) *Journal of Quantitative Criminology* 189 at 206–207.

consistency in the same manner as it has in England. However, there is good reason to believe that Singapore would reap similar benefits from the adoption of the English type of guidelines. This is because Singapore shares the same objectives as England that led to the latter's adoption of a system of guidelines. Like England, Singapore desires to "achieve greater consistency and predictability in the sentence which [judges] impose for similar offences by providing clearer guidance on sentencing and sentencing methodologies".¹³³ Simultaneously, Singapore clearly desires to bolster the public's confidence in the sentencing process.¹³⁴

53 Chao JA stated that SCS might replace a system of guideline judgments if there was evidence that demonstrated the superiority of an alternative model in promoting consistency in sentencing and in strengthening the public's confidence in sentencing.¹³⁵ The English sentencing guidelines have proven to be such a model. It is now, therefore, an opportune moment for SCS to consider the English model of sentencing guidelines for Singapore.

A. *Any outstanding issues to be resolved before a system of sentencing guidelines can be introduced in Singapore?*

54 Before adopting the English model of guidelines, SCS should address seven conceptual, methodological and structural issues if a system of guidelines is to be effective in Singapore. A satisfactory resolution of these issues would facilitate the actualisation of the full potential of the guidelines. Additionally, it would facilitate SCS's ability to monitor the effects of its guidelines in improving sentencing consistency. This would resultantly equip SCS with the ability to identify areas for reform within the guidelines.

133 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 2.

134 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 4, quoting Lord Bingham in *R v Howells* [1999] 1 WLR 307 at 312.

135 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 17.

(1) *Defining consistency in sentencing*

55 First, SCS needs to establish a clear understanding of what consistency in sentencing means.¹³⁶ Only then can it decide how the concept of consistency in sentencing should be operationalised.¹³⁷ Consistency in sentencing could mean either “consistency of approach” or “consistency of outcomes”.¹³⁸ While the former means that the process by which judges sentence an offender should be consistent across all cases, the latter means that the sentence dispositions for similar cases should be identical.¹³⁹ The Sentencing Council for England and Wales has adopted the former definition of consistency in sentencing.¹⁴⁰ The rationale for adopting this definition is that if judges follow an identical process in sentencing, consistency in sentencing outcomes in similar cases will be the likely result.¹⁴¹ In relation to Singapore, SCS appears to have adopted a definition that combines consistency in outcomes and consistency of approach.¹⁴² Whether or not this is what SCS actually understands of consistency in sentencing remains unclear. What is clear is that this definitional issue will be a matter for SCS to address before adopting a model of guidelines in Singapore.

(2) *Measuring consistency in sentencing*

56 Related to the first issue of what consistency in sentencing means, the second issue concerns the way that the guidelines’ impact on enhancing sentencing consistency ought to be assessed. This could be measured in three ways. The first way would be to measure the “compliance rate” whereby the focus turns to the number of sentences

136 Jose Pina-Sanchez & Robin Linacre, “Refining Measurement of Consistency in Sentencing: A Methodological Review” (2015) 44 *International Journal of Law, Crime and Justice* 68 at 70–71.

137 Jose Pina-Sanchez & Robin Linacre, “Refining Measurement of Consistency in Sentencing: A Methodological Review” (2015) 44 *International Journal of Law, Crime and Justice* 68 at 70–71.

138 Jose Pina-Sanchez & Robin Linacre, “Refining Measurement of Consistency in Sentencing: A Methodological Review” (2015) 44 *International Journal of Law, Crime and Justice* 68 at 71.

139 Jose Pina-Sanchez & Robin Linacre, “Refining Measurement of Consistency in Sentencing: A Methodological Review” (2015) 44 *International Journal of Law, Crime and Justice* 68 at 71.

140 Jose Pina-Sanchez & Robin Linacre, “Refining Measurement of Consistency in Sentencing: A Methodological Review” (2015) 44 *International Journal of Law, Crime and Justice* 68 at 71.

141 Julian V Roberts, “Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues” (2013) 76(1) *Law and Contemporary Problems* 1 at 22.

142 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 2.

imposed which fall within the ranges prescribed in the guidelines.¹⁴³ The second way would be to measure the “departure rate” whereby attention is paid to the number of sentences imposed that fall outside the relevant guidelines’ sentences.¹⁴⁴ The third way would be to measure the “process adherence rate” whereby data is collected on the number of times that courts follow the guidelines’ enumerated methodology to sentence an offender. These suggested methods of measurement may be employed individually or jointly. However, there would first need to be agreement as to what is being measured before any decision as to how it should be measured can be made.

(3) *Racial and gender diversity in the sentencing council’s membership*

57 Third, in assessing the jurisdictions that have systems of sentencing guidelines, one issue that weighed on Chao JA’s mind was the composition and structure of the body tasked with developing and issuing those guidelines.¹⁴⁵ Chao JA acknowledged four advantages of having non-judges involved in the process of formulating sentencing guidelines.¹⁴⁶ First, sentencing guidelines that are issued by a body that comprises non-judges would benefit from a greater breadth of experience and expertise.¹⁴⁷ Second, such a body could issue detailed guidance on a greater number of offences.¹⁴⁸ Third, such a body could provide advice on broader issues of sentencing policy and not be confined to individual cases and parties’ submissions in the way

143 Julian V Roberts, “Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales” (2011) 51 *British Journal of Criminology* 997 at 997.

144 Julian V Roberts, “Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales” (2011) 51 *British Journal of Criminology* 997 at 1000.

145 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

146 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

147 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

148 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

appellate courts are.¹⁴⁹ Finally, the guidelines ultimately issued by such a diverse body would be thorough and balanced.¹⁵⁰

58 Notwithstanding the clear benefits, Chao JA also highlighted three problems of having non-judges in a sentencing council.¹⁵¹ First, if the sentencing council and its work is placed on a statutory footing, the process of drafting and issuing sentencing guidelines might become needlessly cumbersome.¹⁵² Second, if the council is placed under the executive branch of government, this may fetter judicial discretion.¹⁵³ Finally, Chao JA felt that sentencing guidelines issued by a sentencing council comprising non-judges would be heavily influenced by statistics and not be reflective of reality and consequently, they might be inapplicable in some cases.¹⁵⁴

59 Chao JA's concerns about the involvement of non-judges in a sentencing council to issue sentencing guidelines are ill-founded. First, it is unclear how he formed the opinion that non-judges would rely heavily on statistics to formulate sentencing guidelines. While it is conceivable for research underpinned by statistics to influence the development of sentencing policies, it is a stretch of logic to conclude that non-judges would rely more heavily on statistics than judges to formulate sentencing guidelines. This is a belief that is uncorroborated by any evidence. Second, as Chao JA rightly observed, the English Sentencing Council is an "independent, non-departmental public body of the Ministry of Justice" established under the CJA 2009.¹⁵⁵ Schedule 15 to the CJA 2009 governs the constitution of the Sentencing Council and clearly provides for the inclusion of judicial and

149 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

150 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

151 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

152 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

153 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

154 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

155 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 10.

non-judicial members. Paragraph 2 of Schedule 15 requires the chair of the Sentencing Council to be a judicial member. In relation to non-judicial members, para 4 of Schedule 15 requires these members to be drawn from one of eight specified areas of expertise.

60 Similarly, SCS could maintain its independence by being an advisory body established pursuant to Division 1 of Pt XVI (entitled, “Sentences”) of Singapore’s CPC. The composition of SCS and its mandate could be clearly specified in Singapore’s CPC. The Chief Justice of Singapore could serve as the president of SCS while not being a member of the council (currently, he sits as an *ex officio* member).¹⁵⁶ While it is essential for significant judicial involvement in the issuance of guidelines,¹⁵⁷ it is equally important for the involvement of non-judges in the sentencing council.¹⁵⁸ Therefore, SCS should consider how many places within the council should be reserved for non-judicial members and the fields of specialisation from which they should be drawn. Ideally, these non-judicial members should possess criminal justice-related expertise. They might include prosecutors, criminal defence lawyers, prisons officials, law enforcement officers, probation officers, youth justice and forensic experts.

61 This diversity should also be reflected in the gender, racial and religious composition of the entire council. SCS currently comprises six members (excluding the Chief Justice), of whom all are Chinese males (with the Chief Justice being an Indian male). Considering that Singapore’s population comprising citizens, permanent residents and other foreign nationals working in Singapore is of a multi-racial and multi-religious mix, there should be greater attempts to ensure that the council is adequately representative of the population. It is also odd that even though there are more females than males in Singapore’s overall population¹⁵⁹ and there is a significant number of female offenders and prisoners, there is no female representation in SCS. Diversity in the membership of SCS is crucial to ensure that the guidelines ultimately

156 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 2.

157 Warren Young & Andrea King, “The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand” in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 205.

158 Warren Young & Andrea King, “The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand” in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 206.

159 Department of Statistics, Ministry of Trade & Industry, “Population Trends 2016”, at pp 1 and 6.

issued will have benefitted from “a wider field of expertise and experience” and will resultantly be “comprehensive” and “balanced”.¹⁶⁰

(4) *Role of public opinion in sentencing*

62 Related to the third point above, the fourth area that SCS should address is whether public opinion plays any role in sentencing and if so, how it should be incorporated in sentencing policymaking. SCS may wish to seize the opportunity presented by recent events that occurred in Singapore in the aftermath of *Public Prosecutor v Joshua Robinson*¹⁶¹ (“*Robinson*”) to consider this issue. In *Robinson*, the defendant pleaded guilty to nine charges for various offences of sexual penetration of a minor, possession of obscene films and exhibiting an obscene object to a minor.¹⁶² Twenty other charges for similar offences were taken into consideration in sentencing.¹⁶³ Partly as a result of his early plea of guilt that spared his three young victims the rigours of a courtroom trial, Robinson was sentenced to a total sentence of four years’ imprisonment.¹⁶⁴

63 Robinson’s sentence led to a public outcry that resulted in an online petition urging the Public Prosecutor to appeal Robinson’s seemingly lenient sentence.¹⁶⁵ Singapore’s Minister for Law, K Shanmugam, subsequently gave an interview to a Singapore news organisation where he spoke about the role of public opinion in

160 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 14.

161 DAC-903922 of 2016; see also Attorney-General’s Chambers press release dated 8 March 2017 for details about the case at <https://www.agc.gov.sg/home/agc-media-release-pp-vs-joshua-robinson> (accessed 25 October 2017).

162 *Public Prosecutor v Joshua Robinson* (DAC-903922 of 2016); see also Attorney-General’s Chambers press release dated 8 March 2017 for details about the case at <https://www.agc.gov.sg/home/agc-media-release-pp-vs-joshua-robinson> (accessed 25 October 2017).

163 *Public Prosecutor v Joshua Robinson* (DAC-903922 of 2016); see also Attorney-General’s Chambers press release dated 8 March 2017 for details about the case at <https://www.agc.gov.sg/home/agc-media-release-pp-vs-joshua-robinson> (accessed 25 October 2017).

164 *Public Prosecutor v Joshua Robinson* (DAC-903922 of 2016); see also Attorney-General’s Chambers press release dated 8 March 2017 for details about the case at <https://www.agc.gov.sg/home/agc-media-release-pp-vs-joshua-robinson> (accessed 25 October 2017).

165 “Public Prosecutor Decides Not to Appeal Joshua Robinson Sentence” *Channel NewsAsia* (Singapore) (8 March 2017). To obtain a sense of the public’s reaction, see Bertha Henson, “The Curious (and Repulsive) Case of Joshua Robinson” *The Middle Ground* (7 March 2017) and Martha Soezean, “Netizens Enraged by ‘Light’ Sentence for 39-yr-old Foreigner Who Sexually Assaulted and Filmed Two Teenage Girls” *The Online Citizen* (3 March 2017)

sentencing.¹⁶⁶ With a clear reference to *Robinson* and its surrounding public disquiet, the minister articulated that public opinion should be reflected in the criminal laws and in sentencing.¹⁶⁷ This is because society expects the courts to reflect the former's "abhorrence" for certain categories of offences through the sentences courts impose on offenders.¹⁶⁸ If the eventual sentences do not reflect such public expectations, the law risks losing its credibility and enforceability.¹⁶⁹ Hence, individuals entrusted with the responsibility of devising criminal laws and sentencing policies have to assess the merits of public opinion and determine what weight it should be accorded.¹⁷⁰ This does not mean that all public opinion must be followed.¹⁷¹ Otherwise, this may result in the introduction of policies that are drafted according to populist sentiment.¹⁷²

64 In light of the minister's comments, SCS may wish to determine (i) whether there is a role for public opinion in sentencing policymaking, (ii) what constitutes public opinion and (iii) how it should be incorporated within sentencing policymaking.¹⁷³ One useful way to answer these questions is to consider whether lay persons should be included in SCS's membership. Membership in the council would be an effective method to understand the public's views on sentencing as their views can be contemporaneously heard and discussed during the formulation of sentencing policy. Membership in the sentencing council will also serve as an important avenue for judges to directly understand the common citizens' perspectives on criminal justice and sentencing issues.

(5) *Establishing clear legal duties for the sentencing council*

65 The fifth area for SCS's consideration is whether there should be an institutionalised duty to monitor the effect of its guidelines similar to the one that exists on the English Sentencing Council and how that duty

166 Kelly Ng, "Penalties for Crime Must Reflect Public Opinion: Shanmugam" *Today* (24 April 2017).

167 Kelly Ng, "Penalties for Crime Must Reflect Public Opinion: Shanmugam" *Today* (24 April 2017).

168 *R v James Henry Sargeant* (1974) 60 Cr App R 74 at 77.

169 Kelly Ng, "Penalties for Crime Must Reflect Public Opinion: Shanmugam" *Today* (24 April 2017).

170 Kelly Ng, "Penalties for Crime Must Reflect Public Opinion: Shanmugam" *Today* (24 April 2017).

171 Kelly Ng, "Penalties for Crime Must Reflect Public Opinion: Shanmugam" *Today* (24 April 2017).

172 "Academic Donald Low Apologises to Shanmugam for Comments on 'Populism' in Drafting Laws" *Channel NewsAsia* (28 April 2017).

173 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th Ed, 2015) at p 110.

should be operationalised.¹⁷⁴ A duty to monitor compliance with its guidelines would necessitate the collection of sentencing data from judges and its analysis after a guideline has been issued. This would require a systematic procedure for data collection to be established in the State Courts to permit a thorough analysis of the effectiveness of the sentencing guidelines to be performed.¹⁷⁵ To facilitate such data collection, judges must be required to keep detailed records about individual cases and explain how they used a particular sentencing guideline in that case.¹⁷⁶

(6) *Justifying departures from sentencing guidelines*

66 The sixth area that SCS needs to address is whether judges could depart from the guidelines and if so, when such departures would be justified. In England, s 125(1) of the CJA 2009 permits judges to depart from the guideline sentences if the interests of justice necessitate it.¹⁷⁷ Yet, s 125(1) does not explain “interests of justice” or provide any examples that could illustrate its meaning. One instance when the “interests of justice” could arise is where a court has to sentence an offender within a factual matrix which the sentencing guidelines had not envisioned.¹⁷⁸ Hence, in sentencing offenders who were prosecuted for their roles in the August 2011 riots across various cities in England, some judges imposed sentences that fell outside the limits of the guideline sentences.¹⁷⁹ In deciding the appeals against sentence filed by some of the rioters, the English Court of Appeal felt that it was acceptable for the lower courts to deviate from the sentencing guidelines as the offences that occurred during the riots were of a type of gravity that the guidelines were ill-equipped to handle.¹⁸⁰

174 Andrew Ashworth & Julian V Roberts, “The Origins and Nature of Sentencing Guidelines in England and Wales” in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 10.

175 Jose Pina-Sanchez & Robin Linacre, “Refining Measurement of Consistency in Sentencing: A Methodological Review” (2015) 44 *International Journal of Law, Crime and Justice* 68 at 69.

176 Jose Pina-Sanchez & Robin Linacre, “Refining Measurement of Consistency in Sentencing: A Methodological Review” (2015) 44 *International Journal of Law, Crime and Justice* 68 at 69–70.

177 Oren Gazal-Ayal, “Foreword: A Global Perspective on Sentencing Reforms” (2013) 76(1) *Law and Contemporary Problems* i at ii.

178 Oren Gazal-Ayal, “Foreword: A Global Perspective on Sentencing Reforms” (2013) 76(1) *Law and Contemporary Problems* i at ii.

179 Oren Gazal-Ayal, “Foreword: A Global Perspective on Sentencing Reforms” (2013) 76(1) *Law and Contemporary Problems* i at ii.

180 Oren Gazal-Ayal, “Foreword: A Global Perspective on Sentencing Reforms” (2013) 76(1) *Law and Contemporary Problems* i at ii.

67 Consequently, it is essential for SCS to explain if departures from the guideline sentences are permissible and to establish clear legal standards to justify such departures. SCS could elaborate upon this by articulating principles that would guide any departures and by providing examples that explain those principles.

(7) *Identifying clear aims for sentencing guidelines*

68 Finally, SCS needs to consider whether the sentencing guidelines should address the disproportionate impact of custodial sentences on minority offenders. Race and religion are very delicate matters in Singapore. This could account for the little public dialogue that discusses the link between race and offending in Singapore. While the Singapore Prisons Service's annual statistics provides a breakdown of the prison population according to the age, gender and educational status of the offenders, no data is provided about the number or type of offences committed with reference to the race or gender of the offender.¹⁸¹ It is possible for such data to exist within the internal records of the courts, various law enforcement agencies or the prisons. One possible reason for not making such data publicly available could be the Government's worry that such data might colour the perceptions of citizens and consequently lead to the development of stereotypical views among citizens of the various races. Such perceptions could resultantly undermine the racial harmony that exists in Singapore.

69 Notwithstanding the sensitivities that exist in Singapore on matters of race and religion, there is a need for these issues to be discussed publicly and not behind closed doors. An honest and frank acknowledgement of offending behaviour that confronts particular communities allows for a more targeted problem-solving approach to be adopted in alleviating a particular community's hardships. One recent example of this is the public acknowledgement by Singapore's Malay-Muslim community that drug crime affects its community acutely.¹⁸² The same news report highlighted that Malays accounted for more than half of the drug abusers arrested in 2016.¹⁸³ The statistics provided by the report are corroborated by the official statistics published by the Singapore government,¹⁸⁴ based on data collected by

181 Singapore Prison Service, "2016 Singapore Prison Service Annual Statistics Release", at p 4.

182 Zaihan Mohamed Yusof, "Malay/Muslim Community Leaders Call on Community to Fight Drug Scourge" *The Straits Times* (30 April 2017).

183 Zaihan Mohamed Yusof, "Malay/Muslim Community Leaders Call on Community to Fight Drug Scourge" *The Straits Times* (30 April 2017).

184 See official data from the Government of Singapore, "Demographic Profile of Drug Abusers" at https://data.gov.sg/dataset/demographic-profile-of-drug-abusers?resource_id=0bfb208d-17f8-40c6-a0e9-1cdb302cf019 (accessed 2 May 2017).

the Central Narcotics Bureau, the agency responsible for fighting drug crimes in Singapore.¹⁸⁵ This news report is significant because it publicly acknowledges the disproportionate rate of drug offending among Malay-Muslims in Singapore and the resulting high rate of incarceration of these offenders. The question remains whether SCS should aim to reduce the disproportionate impact of harsh sentences on minority offenders through its guidelines. This is an important and sensitive issue that deserves thorough consideration.

70 The seven conceptual, methodological and structural issues raised above require SCS's close attention and satisfactory resolution if it wishes to develop a successful system of sentencing guidelines in Singapore. Apart from these foundational issues, it remains to be assessed whether there are any reasons peculiar to Singapore that make the adoption of a system of guidelines unsuitable. The next section addresses this issue.

B. *Any reasons why sentencing guidelines might be unsuitable for Singapore?*

(1) *Is Singapore too small for a system of sentencing guidelines?*

71 First, does Singapore's small size as a country render a model of sentencing guidelines unsuitable? According to Chao JA, due to Singapore's small size with a corresponding low crime rate, there is "no compelling need at present for legislation, whether to codify the purposes of sentencing or to establish a framework for the creation of a sentencing council or for issuing of sentencing guidelines or sentencing judgments".¹⁸⁶ Understood in its proper context, Chao JA does not suggest that Singapore is too small for a system of sentencing guidelines but rather, Singapore is too *small for legislation* that places matters relating to sentencing on a statutory footing. This statement is baffling. To begin with, Singapore is a strictly regulated country with laws that touch on most forms of human conduct. More significantly, matters pertaining to sentencing are already legislated for within Singapore's CPC and other similar legislation. What then is Chao JA's real concern?

72 The real concern lies in his apparent fear that the statutory codification of "sentencing principles" and "aggravating and mitigating

185 Central Narcotics Bureau, "Overview of Singapore's Drug Situation in 2016" <https://www.cnb.gov.sg/Libraries/PDE_ArticlesFiles/CNB_Annual_Stats_Release_for_2016.sflb.ashx> (accessed 26 October 2017).

186 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 17.

factors” could unduly fetter judicial discretion.¹⁸⁷ It is unclear how this would occur. In the English context, there is no evidence that the statutory provisions that codify the sentencing principles and articulate the court’s duty to follow the sentencing guidelines have in any way constrained the exercise of judicial discretion. In this regard, two provisions are noteworthy. First, s 142 of the CJA 2003 states:

Matters to be taken into account in sentencing

142 Purposes of sentencing

- (1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing —
- (a) the punishment of offenders,
 - (b) the reduction of crime (including its reduction by deterrence),
 - (c) the reform and rehabilitation of offenders,
 - (d) the protection of the public, and
 - (e) the making of reparation by offenders to persons affected by their offences.

73 Section 142 of the CJA 2003 does not bind the judges to apply any particular sentencing rationale in a specific case. Rather, it serves as a reminder to judges about what sentencing ought to achieve and requires them to articulate which principle underpinned the final sentence that was imposed on an offender. The second provision is s 125(1) of the CJA 2009,¹⁸⁸ which requires courts to sentence an offender according to the applicable sentencing guideline. Collectively, these provisions do not fetter the exercise of judicial discretion. Rather, they structure the exercise of judicial discretion.

74 Additionally, these provisions serve an important public function of educating the public about sentencing. As Chao JA correctly observed, “codifying these factors help bring about more clarity, transparency and legitimacy”, especially to unrepresented defendants.¹⁸⁹ In addition to criminal defendants, statutory codification also allows members of public to have unrestricted access to justice. Justice will not be served if the laws on sentencing are known only to judges or are available only through paid subscription to a legal database. Of course,

187 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at p 16.

188 This is reproduced in para 25 above.

189 Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective”, speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at pp 15–16.

the extent of statutory codification is a matter for further discussion. At a minimum, SCS should not lose sight of the importance of the public to be educated about the purposes of sentencing and the sentencing process.

(2) *Is there hostility towards attempts at structuring judicial discretion?*

75 The second reason why a model of sentencing guidelines might be unsuitable for Singapore is that the Singapore judges may be resistant to any attempts aimed at structuring their discretion. Without any evidence, it is difficult to conclude whether Singapore judges are in fact resistant towards or supportive of sentencing reform. However, it has been noted that one of the biggest obstacles “to sentencing reform in many jurisdictions has been the insistence on preserving wide judicial discretion”.¹⁹⁰ In relation to England, there was considerable initial judicial opposition to the introduction of sentencing guidelines.¹⁹¹ There were fears that the English sentencing guidelines might resemble the restrictive types of sentencing grids that exist in the USA¹⁹² and that they might severely restrict judicial discretion because judges would be obliged to follow the guidelines when sentencing offenders.¹⁹³

76 If the initial English judicial attitudes are indicative of how Singapore judges might react to attempts at structuring their sentencing discretion, one might surmise that they may similarly be resistant to the introduction of sentencing guidelines in Singapore. If any endeavours to structure judicial discretion are to succeed, they must enjoy the full support of judges. In this regard, it might be useful for SCS to obtain the views of Singapore judges about the prospect of implementing a model of sentencing guidelines in Singapore. This process would enable SCS to address any legal issues or other concerns, which it had not considered, that could hinder the establishment of sentencing guidelines in Singapore.

190 Andrew Von Hirsch, “The Project of Sentencing Reform” in *Sentencing and Sanctions in Western Countries* (Michael Tonry & Richard S Frase eds) (Oxford University Press, 2001) at p 416.

191 Julian V Roberts, “Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales” (2011) 51 *British Journal of Criminology* 997 at 999 and 1008.

192 Julian V Roberts, “Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales” (2011) 51 *British Journal of Criminology* 997 at 999.

193 Julian V Roberts, “Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales” (2011) 51 *British Journal of Criminology* 997 at 1008.

(3) *Do sentencing guidelines shape criminal behaviour?*

77 A third possible reason as to why Singapore judges might be reluctant to adopt a model of sentencing guidelines is their fear that transparency about sentencing practices could shape the behaviour of prospective offenders. At first glance, this concern may seem puzzling. After all, by the time the case is set for sentencing, the offence would have long been committed and the offender would have already been convicted. However, in the context of establishing and publishing prosecutorial guidelines, Singapore's public prosecutor presented this argument as the main justification for not publishing prosecutorial guidelines.¹⁹⁴ A subsidiary concern was that the publication of prosecutorial guidelines might spur satellite litigation by those who were dissatisfied with prosecutorial decisions.¹⁹⁵

78 It is highly doubtful if the existing research evidence supports the public prosecutor's position that the publication of prosecutorial guidelines has a direct effect on shaping criminal behaviour.¹⁹⁶ While the link between published guidelines and offending behaviour was drawn in the context of prosecutorial guidelines, it is unclear if a similar fear exists among the members of SCS in the context of promulgating and publishing sentencing guidelines. Assuming if this was a concern, there is no evidence from those jurisdictions with systems of sentencing guidelines to support the view that sentencing guidelines influence criminal offending.

79 The three possible reasons that may militate against the adoption of the English model of guidelines in Singapore do not withstand scrutiny. What does withstand scrutiny is that there are clear benefits to a system of sentencing guidelines. Should Singapore, therefore, adopt a system of sentencing guidelines? The final section answers this question.

194 See Steven Chong SC, "Publication of Prosecutorial Guidelines: Publication for Whom, and Publication to What End", speech at Association of Criminal Lawyers of Singapore Annual Lecture 2013 (12 November 2013) at pp 11–12, Aedit Abdullah, "Publishing Prosecutorial Guidelines: Promise, Risk and Reality" *The Straits Times* (22 May 2013) and Attorney-General's Chambers' press release dated 20 January 2012, "The Exercise of Prosecutorial Discretion".

195 Aedit Abdullah, "Publishing Prosecutorial Guidelines: Promise, Risk and Reality" *The Straits Times* (22 May 2013).

196 Kumaralingam Amirthalingam, "Prosecutorial Discretion and Prosecutorial Guidelines" [2013] Sing JLS 50 at 61–62.

C. *Should Singapore follow the English model?*

80 Singapore should adopt the English model of sentencing guidelines only if SCS has satisfactorily resolved the seven conceptual, methodological and structural issues highlighted above.¹⁹⁷ The available research evidence assessing the effectiveness of the English sentencing guidelines clearly demonstrates their positive impact in enhancing consistency in sentencing in England. Arguably, one may highlight that without an adequate assessment of the three-judge-court model in enhancing sentencing consistency in Singapore, it may be premature to conclude that it is ineffective and hence should be replaced. However, closer scrutiny of the specific three-judge-court proposal for Singapore¹⁹⁸ and of a system of guideline judgments generally reveals that this model is ineffective in promoting consistency in sentencing. In particular, two general limitations of this model are discussed.

(1) *Guideline judgments have limited influence on lower courts*

81 The first limitation of guideline judgments in enhancing consistency in sentencing is their limited impact on influencing sentencing practices and outcomes in the lower courts.¹⁹⁹ Based on research conducted of the impact of guideline judgments in England, the evidence suggested that the lower courts did not impose sentences that were in line with the applicable guideline judgments.²⁰⁰ In those instances where defendants appealed against their sentences, the appellate court hesitated to overturn the lower court's sentence even if it did not agree with the sentence imposed.²⁰¹ This is because the appellate courts will generally overturn a sentence only if it finds the original sentence to be manifestly excessive.²⁰² Otherwise, the appellate courts are likely to let the original sentences stand.²⁰³ The resulting effect of this appellate reluctance to interfere in the original sentence is that it provides lower court judges with an affirmation that their sentences

197 See paras 55–69 above.

198 See paras 11–21 above.

199 Cyrus Tata, "Institutional Consistency: Appeal Court Judgements" in *Principled Sentencing: Readings on Theory and Policy* (Andrew von Hirsch, Andrew Ashworth & Julian V Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 276.

200 Cyrus Tata, "Institutional Consistency: Appeal Court Judgements" in *Principled Sentencing: Readings on Theory and Policy* (Andrew von Hirsch, Andrew Ashworth & Julian V Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 276.

201 Cyrus Tata, "Institutional Consistency: Appeal Court Judgements" in *Principled Sentencing: Readings on Theory and Policy* (Andrew von Hirsch, Andrew Ashworth & Julian V Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 277.

202 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 394.

203 Cyrus Tata, "Institutional Consistency: Appeal Court Judgements" in *Principled Sentencing: Readings on Theory and Policy* (Andrew von Hirsch, Andrew Ashworth & Julian V Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 277.

were correct and consistent with the relevant guideline judgment.²⁰⁴ Consequently, lower courts continue to impose sentences that are outside the guideline range even though they should not impose such sentences.²⁰⁵

82 The finding above is corroborated by empirical evidence that demonstrates inconsistent sentencing outcomes among English judges who should have applied the same guideline judgments.²⁰⁶ The evidence gathered highlighted that the eventual sentence imposed on offenders by English magistrates depended more on the locality of the court than on the offence in question.²⁰⁷ This was attributable to the existence of distinct “sentencing cultures” in different towns.²⁰⁸ Thus, for example, an offender convicted of theft in Sunderland was two times more likely to be imprisoned there than a similar offender in Newcastle.²⁰⁹

83 While such disparities among localities are inapplicable to Singapore due to our geographic conditions, it is conceivable for disparities to exist among judges in the same court due to their personal beliefs. After all, it is common to hear the refrain among criminal defence lawyers, prosecutors and even judges that some judges impose harsher punishments than others.²¹⁰ It is hard to conclude if such disparities exist among Singapore judges without any credible data that could shed light on the sentencing practices of different judges involving similar offenders. Assuming such disparities existed, they would undermine the effectiveness of guideline judgments in enhancing sentencing consistency because a particularly strict judge could easily find a way to impose a sentence that departs from the guideline judgments by giving greater prominence than necessary to certain

204 Cyrus Tata, “Institutional Consistency: Appeal Court Judgements” in *Principled Sentencing: Readings on Theory and Policy* (Andrew von Hirsch, Andrew Ashworth & Julian V Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 277.

205 Cyrus Tata, “Institutional Consistency: Appeal Court Judgements” in *Principled Sentencing: Readings on Theory and Policy* (Andrew von Hirsch, Andrew Ashworth & Julian V Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 277.

206 Mirko Bagaric & Richard Edney, “The Sentencing Advisory Commission and the Hope of Smarter Sentencing” (2004–2005) 16 *Current Issues in Criminal Justice* 125 at 136.

207 Mirko Bagaric & Richard Edney, “The Sentencing Advisory Commission and the Hope of Smarter Sentencing” (2004–2005) 16 *Current Issues in Criminal Justice* 125 at 136.

208 Mirko Bagaric & Richard Edney, “The Sentencing Advisory Commission and the Hope of Smarter Sentencing” (2004–2005) 16 *Current Issues in Criminal Justice* 125 at 136.

209 Mirko Bagaric & Richard Edney, “The Sentencing Advisory Commission and the Hope of Smarter Sentencing” (2004–2005) 16 *Current Issues in Criminal Justice* 125 at 136.

210 The Right Honourable Sir Anthony Hooper, “Sentencing: Art or Science – A Personal View” (2015) 27 SAclJ 17 at 18.

aggravating factors. In this regard, sentencing guidelines would serve to minimise disparities in sentencing among judges because judges would be bound to follow the methodical approach in the relevant guideline taking account only of clearly specified sentence ranges and aggravating and mitigating factors.

(2) *Guideline judgments and judges are ineffective in developing meaningful sentencing policy*

84 The second limitation of guideline judgments is that the appellate court is poorly qualified to undertake the kind of detailed research required to devise a well-considered sentencing policy.²¹¹ The appellate court does not possess the time and relevant expertise to make evidence-based sentencing policy recommendations through guideline judgments.²¹² It also does not have the means to inquire into the broader implications of its intended sentencing policy.²¹³ Moreover, appellate courts are confined to the case that is before them and usually depend on parties' submissions to resolve the issue that is presented to it.²¹⁴ Although an appellate court could invite *amicus curiae* submissions in deliberating a particular issue, the ability of these submissions to influence the development of sentencing policy remains limited. Considering that the appellate court has to usually issue its decision expeditiously, its ability to develop a meaningful sentencing policy through a guideline judgment is severely restricted.²¹⁵

85 Moreover, a sentencing policy does not only affect the offender in a particular case. It also implicates similar offenders, the offenders' families, prison services, probation services, law enforcement agencies, courts, prosecuting agencies and victims. As sentencing policymaking implicates wider interests, this necessitates greater debate and deliberation to be undertaken and requires the input of various

211 Sean J Mallett, "Judicial Discretion in Sentencing: A Justice System That Is No Longer Just?" (2015) 46 VUWLR 533 at 541.

212 Sean J Mallett, "Judicial Discretion in Sentencing: A Justice System That Is No Longer Just?" (2015) 46 VUWLR 533 at 541.

213 Sean J Mallett, "Judicial Discretion in Sentencing: A Justice System That Is No Longer Just?" (2015) 46 VUWLR 533 at 541.

214 Warren Young & Andrea King, "The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 204.

215 Warren Young & Andrea King, "The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 204.

stakeholders in the development of a sound sentencing policy.²¹⁶ Otherwise, any sentencing policy that is adopted in a guideline judgment will be seriously deficient and at worst, unintended consequences might ensue.

86 In contrast to the model of guideline judgments, a model of sentencing guidelines is clearly superior because there is a transparent and clearly established framework for sentencing.²¹⁷ Judicial discretion is regulated in terms of how it ought to be exercised within that sentencing framework and how it ought to be exercised whenever judges have to impose a sentence outside that framework.²¹⁸ A system of guidelines holds judges to greater accountability because they are required to demonstrate that they adhered to a methodical approach in sentencing the offender and not on their personal proclivities.²¹⁹

87 In addition to placing judges on a more secure footing to defend their sentences, sentencing guidelines increase the public's confidence in sentencing because the public is equipped with a better understanding of how the judge arrived at a particular sentence.²²⁰ In relation to the English sentencing guidelines, the evidence demonstrates that publishing and explaining them to the public collectively improve the public attitudes towards judges and their sentences.²²¹ This resultantly reduces unwarranted criticisms of judges and invalidates allegations that judges impose lenient sentences on offenders that are not reflective of the public's expectations.²²² One can similarly envision how the availability of sentencing guidelines in Singapore could have minimised public criticisms of the court and its sentence in *Robinson*. The importance and effectiveness of sentencing guidelines in educating the

216 Sean J Mallett, "Judicial Discretion in Sentencing: A Justice System That Is No Longer Just?" (2015) 46 VUWLR 533 at 542.

217 Neil Hutton, "The Definitive Guideline on Assault Offences: The Performance of Justice" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 89.

218 Neil Hutton, "The Definitive Guideline on Assault Offences: The Performance of Justice" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 89.

219 Neil Hutton, "The Definitive Guideline on Assault Offences: The Performance of Justice" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 100.

220 Neil Hutton, "The Definitive Guideline on Assault Offences: The Performance of Justice" in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 100.

221 Julian Roberts, Mike Hough, Jonathan Jackson & Monica M Gerber, "Public Opinion towards the Lay Magistracy and the Sentencing Council Guidelines" (2012) 52(6) *The British Journal of Criminology* 1072 at 1084–1086.

222 Julian Roberts, Mike Hough, Jonathan Jackson & Monica M Gerber, "Public Opinion towards the Lay Magistracy and the Sentencing Council Guidelines" (2012) 52(6) *The British Journal of Criminology* 1072 at 1086.

public about sentencing and thereby conferring greater legitimacy to the criminal justice system should not be underestimated.²²³ At a fundamental level, a system of sentencing guidelines is a platform for the incorporation of a more diverse range of views and expertise that result in the establishment of sound sentencing policies.²²⁴ Consequently, such a model will be more effective in promoting consistency in sentencing among judges.

V. Conclusion

88 Twenty-five years ago, the retired US Federal District Judge Marvin Frankel reminded us about the “lawlessness” in sentencing that existed prior to the introduction of the US Federal Sentencing Guidelines.²²⁵ He perceptively pointed out that punishment itself is “an evil” and its imposition is an infliction of harm.²²⁶ Hence, judges must exercise care and restraint when inflicting harm upon offenders through punishment.²²⁷ Sentencing guidelines, thus, serve to civilise sentencing by structuring and guiding judicial discretion in sentencing.²²⁸ Judge Frankel’s views remain applicable today. Two of the key objectives of Singapore’s undertaking of sentencing reform are to promote consistency in sentencing and to enhance the public’s confidence in sentencing. Consistency in sentencing aims to ensure that similar cases are treated alike and similar offenders face similar punishments. In this regard, the English sentencing guidelines have demonstrated their superior ability to achieve these objectives over a system of guideline judgments that currently exists in Singapore.

89 SCS should adopt the English model of guidelines as a means of promoting consistency in sentencing in Singapore. However, it would first need to satisfactorily address the conceptual, methodological and structural issues which were highlighted in part IV of this article and for

223 Julian Roberts, Mike Hough, Jonathan Jackson & Monica M Gerber, “Public Opinion towards the Lay Magistracy and the Sentencing Council Guidelines” (2012) 52(6) *The British Journal of Criminology* 1072 at 1086–1087.

224 Warren Young & Andrea King, “The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand” in *Sentencing Guidelines: Exploring the English Model* (Andrew Ashworth & Julian V Roberts eds) (Oxford University Press, 2013) at p 204.

225 Marvin E Frankel, “Sentencing Guidelines: A Need for Creative Collaboration” (1992) 101 Yale LJ 2043 at 2044.

226 Marvin E Frankel, “Sentencing Guidelines: A Need for Creative Collaboration” (1992) 101 Yale LJ 2043 at 2051.

227 Marvin E Frankel, “Sentencing Guidelines: A Need for Creative Collaboration” (1992) 101 Yale LJ 2043 at 2051.

228 Marvin E Frankel, “Sentencing Guidelines: A Need for Creative Collaboration” (1992) 101 Yale LJ 2043 at 2051.

which practical solutions were suggested. Additionally, strong judicial support is essential before a model of sentencing guidelines can be successfully adopted and implemented. After all, it is judges who will ultimately be sentencing offenders according to the guidelines. A system of sentencing guidelines promises to generate more consistent, predictable and fair sentences for offenders in Singapore. This, in turn, will confer greater legitimacy to Singapore's criminal justice system and strengthen the public's confidence in its administration and its administrators. It now remains to be seen if SCS will effect meaningful sentencing reform by promptly substituting the current system of guideline judgments with the English model of guidelines.
