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'To Inform and Advise'?
The Interpretation and Use of Pre-Sentence Reports in the Sentencing Process

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Summary

In many countries, pre-sentence reports are an increasingly prevalent feature of the sentencing process. Broadly speaking, such reports aim to provide the court with relevant information about the background, personal circumstances and attitude of the convicted person towards the offence, and to advise the court on the suitability of offenders for community based disposals. Yet although judges have been surveyed about their general views about pre-sentence reports, we know relatively little about *how* such reports are *interpreted* in specific cases. How do report writers try to select and present relevant information to sentencing judges and how do sentencing judges try to make sense of and interpret this information? This paper summarises some of the main findings of a four-year qualtitative study[5] in Scotland examining how reports are constructed by report writers and what the writers aim to convey to the sentencing judge; and then how those reports are used and interpreted. Using a variety of qualitiative techniques, the study followed-through a small sample of cases from the initial interview by the report writer with the convicted person through to the sentencing hearing.

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Introduction and Context

Pre-Sentence Reports are intended to inform and assist the sentencing process. In Scotland[6], such pre-sentence reports, (commonly known as Social Enquiry Reports[7] (SERs)), are written by social workers primarily for judges considering sentence. As such, SERs represent an important and interesting point of exchange between two professional groups in the criminal justice system with different responsibilities, backgrounds and perspectives. In Scotland[8], reports are written by generically trained social workers[9] who continue to work within local authority social work departments; and who may be more committed to welfare values than their counterparts in other jurisdictions, such as England and Wales. The discretionary sentencing context in Scotland, set alongside the possibly more welfare-oriented professional identity of pre-sentence report writers authors, make both the nature of the practice of social enquiry and its significance for sentencing matters of particular interest.

Dramatic Rise in the Use of PSRs

In common with other jurisdictions, Scotland has witnessed a significant escalation in the number of reports prepared for the courts. The Scottish Executive (2006) reports a

[6] Scotland has a separate system of criminal law and criminal justice from that of England and Wales, with appeals being heard by the Court of Criminal Appeal in Edinburgh (there is no appeal in criminal cases to the House of Lords). The legal profession of Scotland is separate from that of England and Wales, as is the independent prosecution service - Crown Office and Procurator Fiscal Service (COPFS).

[7] The term commonly used in Scotland is Social Enquiry Report – roughly equivalent to Pre-Sentence Report in other jurisdictions such as England and Wales. Although 'Social Enquiry Report' is used in policy documentation (such as National Objectives and Standards), it does not actually appear in the legislation. S207 of the 1995 Criminal Procedure (Scotland) Act simply states that such a report must be "from an officer of a local authority or otherwise." The report is required to provide "such information as it can about an offender's circumstances and it shall also take into account any information before it concerning the offender's character and physical and mental condition". Where a custodial sentence is on the agenda, the report is intended to assist the court in judging whether "no other method of dealing with him is appropriate". (Criminal Procedure (Scotland) Act 1995, s204(2)). More generally, there are a range of circumstances in which a court must always obtain a report (for example in relation to those under 21 years of age where the court is considering a custodial sentence or anyone who may be sentenced to custody for the first time). In other words, the law seeks to encourage sentencing judges to think twice before imposing (especially) a custodial sentence : "the courts actions are constrained by law to ensure social work information is available before making key decisions." (McNeill and Whyte 2007: 68) Furthermore, there is a clear policy expectation that there should be an impact on sentencing practice : "The provision of community based disposal of sufficient quality and quantity *will enable* sentencers to use them in cases *where otherwise they might have imposed a custodial sentence*. The *overall aim is to create a situation in which it is practicable to use prisons as sparingly as possible* through providing community-based disposals…" (Scottish Executive 2004: para 5)

[8] In Scotland, local authorities have a statutory duty to make "available to any court such social background reports and other reports relating to persons appearing before for the court which the court may require for the disposal of the case". (Social Work (Scotland) Act 1968, s27(1(a)).

[9] The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provided for the development of National Objectives and Standards (NOS) (frequently referred to as 'national standards') among the various local authorities. NOS require that reports are prepared by a qualified social worker.

70% increase since 1996. The Social Work Services Inspectorate's figures show that by 2005, 40,265 SERs[10] were completed annually. This dramatic rise is in spite of the fact that over this period in Scotland the number of cases coming before the summary courts was broadly stable.[11] The estimated annual cost of producing SERs is now running at around £9million (ie: around Canadian $19 million). This level of financial investment reflects policy makers' recognition of the pivotal role that SERs play in pursuit of governmental objectives for community justice services to the criminal justice system. These objectives include reducing the use of custody by offering credible community-based alternatives.[12] Increasingly, however, the policy emphasis has shifted from reducing the use of custody towards reducing the risk of offending and thereby protecting the public. Since SERs are both the key entry point to criminal justice social work services and the prime opportunity to encourage consideration of the use of these services, it is easy to see why they attract this level of fiscal investment and policy attention.

What gap in knowledge did the research aim to fill?

As an important feature of the sentencing process, pre-sentence (or social enquiry) reports have been the subject of considerable previous research. A range of projects has explored: the ideological underpinnings of reports[13]; sentencers' overall satisfaction with reports[14]; the quality of report-writing[15]; and the (complex) relationship between 'quality' and 'effectiveness'[16]. Although these various research studies have offered many important insights, the research techniques which were used (content analysis, surveys, statistical analysis, and interviews) have permitted only a very limited examination of *the communication process* embodied in reports. In particular, there has been almost no exploration of what sentencing judges think about and how they make sense of particular individual SERs and how that might compare with what the report writer intended to convey. Remarking on the paucity of research examining what courts think about and interpret specific *individual* SERs, Bottoms and McWilliams observed that:

[10] Including supplementary SERs (McNeill and Whyte 2007).
[11] This issue has been analysed by the Stephen and Tata (2006 – full report).
[12] For some years, policy documentation and national standards have suggested that SERs "have a particular role to play in seeking to ensure that offenders are not sentenced to custody for want of information or advice about feasible community-based disposals". (Scottish Executive 2000: 1.6)
[13] For example: Curran and Chambers (1982), Hardiker (1975), Horsley (1984), Hudson and Bramhall (2005).
[14] For example: Brown (1991); Burney (1979); Curran and Chambers (1982); Brown and Levy (1998); Bonta et al 2005; see also institutional surveys eg National Probation Service for England & Wales (2007)
[15] For example: Perry (1974); Rawson (1982); Thorpe (1979); Whyte et al., (1995);
[16] For example: Cavadino (1997); Creamer (2000); Williams and Creamer (1989); Hine, McWilliams and Pease (1978), Gelsthorpe and Raynor, (1995); Downing and Lynch (1997); Thorpe and Pease (1976); Bonta et al (2005).

"none of these studies sought to discover what sentencers thought about *particular* SERs on individual defendants; all simply asked sentencers in general terms for their views and impressions concerning SERs."[17]

This neglect has meant that important questions about the specific aims and objectives of social workers in writing reports, and about how they are interpreted and valued by sentencing judges, have only been answered at a level of relative generality.[18] Equally, the significance of the wider professional contexts in which reports are routinely written and utilised may not have been fully appreciated. This project set itself the task of addressing these issues.

Target of the research: 'cusp' cases

The research[19] reported here restricted its focus to summary cases in Scotland's intermediate Sheriff Courts[20] – where over 75% of all criminal cases are heard. This was for two reasons. First, over 90% of SERs are produced for summary cases. Secondly, given the legal and policy imperatives that SERs should encourage judicial sentencers to consider non-custodial options, we sought to focus on 'cusp' cases where a sentence of custody might be considered a distinct possibility but not a foregone conclusion. Such cases are most commonly found in the summary sheriff courts.

Research Objectives

There were five objectives for this project and all of them have been successfully addressed:

1. *To understand the methods by which social workers seek to inform the sentencing process through the production of social enquiry reports*

[17] Bottoms and McWilliams (1986: 268), original emphasis retained.
[18] In a similar vein, Bonta et al (2005) underline the point that "[i]t is one thing to ask people what they consider to be important in general but how they act when faced with a real case could be quite different."
[19] The research was funded by the UK Economic Research Council (ESRC Award Number RB000239939). The project was a collaboration between the Universities of Strathclyde, Oxford, and Glasgow. We are most grateful to all of the sheriffs, social workers, defence and prosecuting lawyers and convicted persons for their assistance with this study; and to Dr Nicola Burns who conducted the bulk of the fieldwork.
[20] Scotland's Sheriff Courts are presided over by sheriffs (who are professional lawyers by background) and hear both solemn (jury-triable) and summary (non jury triable) cases. The District Courts are largely presided over by lay justices (although in Glasgow they are presided over by stipendiary magistrates and have the same sentencing powers of the summary sheriff courts) and hear summary cases only. At first instance, the High Court of Justiciary hears only solemn (jury-triable) cases. Unlike England and Wales, the 'accused' person has no right to elect for jury trial.

Two intensive 6 month periods of daily observation were spent with two teams of social workers in different sites. Through processes of observation, 'shadow-writing' of SERs (where the researcher drafted a mock report after observing interviews, exchanged reports with the professional report writer, and they then discussed comparisons between the two reports), and post-observational interviewing, we gained unique insights into report writers' attempts to inform and communicate with sheriffs, and their techniques for doing so.

2. *To understand how sentencing sheriffs interpret social enquiry data and what significance social enquiry reports have in the sentencing process*

   Twenty-six sheriffs (approximately 19% of permanent sheriffs in Scotland) took part in the research. A combination of interviews, focus groups and moot sentencing exercises, many of which focused on specific cases and SERs, has produced a rich and detailed picture of how sheriffs use SERs and the significance of the reports in the sentencing process.

3. *To investigate the environmental conditions which shape the ways in which social enquiry reports are produced by social workers and used by sheriffs*

   The detailed picture of the day-to-day reality of writing and reading SERs reveals how these activities are shaped by the environmental conditions in which social workers and sheriffs operate. These conditions include the regulatory context of social work and the criminal justice context of report reading. In relation to the regulatory context of social work, we had the unanticipated bonus of both social work teams being inspected by the Social Work Inspection Agency ('SWIA') during fieldwork. This gave unexpected and invaluable insights into the regulatory environment in which reports are written.

4. *To produce ethnographic data which may assist social workers and sheriffs to communicate more effectively with each other.*

   Our dataset highlights a number of barriers to effective communication between social workers and sheriffs. Some of these barriers are outside the control of social workers, and not entirely within the control of sentencers (e.g. the mediation of SERs by defence solicitors in pleas in mitigation - see 'Findings'). The notion of increased effectiveness of communication is also subject to the limitations on the influence of social enquiry referred to above. Nevertheless, there are also some clear policy implications from the research about overcoming crossed lines of communication and frequent misunderstandings between social workers and sheriffs, and about the positive effects of granting social workers' access to a wider set of case documentation.

5. *To explore and assess a policy-driven process of communication between two different professional groups.*

   Our findings also shed light on the limitations that the wider context of power relations within the field of criminal justice impose on the pursuit of the policy aims underpinning social enquiry.

Research Methods

This research examined social enquiry reporting from the perspective of both the social worker and the sheriff. Given that sheriffs and social workers have different professional tasks, perspectives and responsibilities, one might expect that there may be important differences in the ways that SERs are constructed, read, interpreted and employed. The aim of the research was to conduct an in-depth exploration of these processes. Accordingly, (and given the character of previous research) the project used entirely qualitative methods to try to understand these communication processes. It comprised four complementary parts:

1. *An in-depth observational study of criminal justice social workers in two sites examining the routine social production of SERs*. This included the observation of client interviews; client visits, etc. It also involved the use of 'shadow' report-writing in which the field-based researcher attempted to prepare a report based. This enabled a comparison between the 'shadow' report and the real report and so proved to be a particularly valuable way of finding out from the report writer what s/he intended to convey in specific parts of the particular report and the reasons for doing so.

2. An *observational and interview-based study with Sheriff Court judges* in the corresponding sites examining the interpretation and use of SERs in sentencing, including a follow-through of specific reports whose preparation had already been observed.

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

4. A series of *sheriff interviews following moot sentencing diets*.

Thus, the ability to follow-through cases from preparation through to sentencing has enabled a direct comparison between the intentions of individual report writers and the use and interpretation of those individual report by sheriffs.

Thus the main sources of data comprised:

- 5 Sheriff focus group transcripts
- 5 Moot sentencing exercise transcripts
- 5 moot pre-and post sentencing interviews with solicitors
- 54 Interview transcripts comprised of:
- 22 social worker follow-up interviews
- 17 post observational sheriff interviews
- 11 one to one solicitor interviews
- 10 court observation diaries
- 43 Weekly fieldwork diary returns
- 29 shadow reports
- 29 Original reports with attached papers

Main research participants:

- Social workers (22)
- Sheriffs (26)
- Solicitors (11)

Anonymity

Anonymisation of individual persons and places throughout the duration of the project included:

- applying pseudonyms to individual social workers (eg in the weekly fieldwork diaries)
- applying pseudonymns to individual accused persons/clients
- manual anonymisation of paper data
- anonymisation of interview transcripts and focus group data
- Applying pseudonyms to the two social work sites (referred to as ‘Westwood’ and ‘Southpark’)

Findings - a summary[21]

Note: in the interests of brevity, we have included only a very few illustrations. However, it is intended to provide a few more illustrations of these during the oral presentation.

The principal findings of the research may be summarised as follows:

1. Role tension in criminal justice social work

Social workers experienced a degree of 'role tension' in their work. On the one hand, they were very conscious of their formal mandate to assist the court in sentencing – that the court was their client. On the other hand, they often felt drawn towards the needs and welfare of the convicted person. Such concerns were an intrinsic aspect of their professional value system. In engaging with offenders for the purposes of constructing SERs, social workers often took on the role of supporting clients and valuing their efforts to change. Indeed, in writing a report, social workers had to be cognisant of the fact offenders can see the report (or at least are told about it by their defence solicitor). Moreover, after the sentencing diet the social worker may well need to build up a positive relationship of mutual trust with the offender. In other words, in serving the court as client, report writers were at the same time practising social work with and for offenders. This tension is something which most sheriffs tended to be acutely conscious (even critical) of. Yet at the same time *because* of this perceived closeness to the subject of the report sheriffs also found reports to be a source of insight into the convicted person's attitude.

2. Assessing risk of re-offending and suitability for community-based disposals

As a result of policy shifts, social workers have become increasingly concerned to focus on the risk of an offender re-offending. Since the mid-1990s, risk of re-offending has overtaken reduction in the use of custody as the chief policy focus of social enquiry. In both sites, social workers used a risk/need assessment tool (the *Level of Service Inventory-Revised* [LSI-R]) which structured their enquiry, informed their professional judgement and employed a calculus to assess the level of risk of re-

[21] This summary of findings draws on all of the methods use in the study, not solely on the research in the two sites. The findings reported here are therefore not specific to either of the two sites, except where clearly indicated in the text. It would not be safe to assume, for example, that our summaries of sentencing judges' views about social enquiry necessarily reflect the views of sentencers in either of the sites, since sentencers from across Scotland were involved in the study.

offending. Other more narrative tools were also available to social workers in cases where risk of significant harm was a concern. These were used less frequently.[22]

Report writers, rather than allowing tools to supplant their professional judgement, tended to deploy them to support it. Further, consonant with other recent research in other countries[23], we found that social workers viewed the assessment of risk as overlapping with and supporting longer-established discourses around welfare, in the sense that risk of re-offending would be reduced through welfare-oriented social work intervention.

More generally, in assessing suitability for community-based disposals, and with it the offender's 'redeemability', the perceived compliance of offenders with social work intervention was a core concern. Generally speaking, risk of defaulting on such penalties (and risk of re-offending) was deemed to be higher where offenders were judged to be either non-compliant with the social enquiry process or somehow duplicitous in their engagement with it. Decisions about compliance and honesty were often based on an offender's attitude and behaviour in the SER interview and on whether or not their 'story' was subsequently corroborated. Compliance and corroboration operated as proxy measures for judging future compliance with social work programmes.

Sheriffs' views of risk instruments such as LSI-R were mixed. Few claimed any knowledge about them and most seemed to regard them negatively as being too crude a method of assessment. Equally, however, most sheriffs seemed to view social workers' professional judgement about risk as being unsatisfactory. More generally, we found little evidence of sheriffs being as preoccupied with risk assessment as social workers were.

3. The regulation of SER writing

The writing of SERs is regulated by several regimes and pressures. These regimes promulgate various and competing images of what good practice entails. A basic tension exists between a stress on the efficient production of SERs (promulgated by Audit Scotland) and a stress on the value of professional expertise in assessing issues of responsibility and risk of re-offending, and in helping offenders to change (promulgated by the Social Work Inspection Agency (SWIA) and locally based training at both a formal and informal level). The practical job of writing SERs requires the constant juggling of these competing demands. The recent increase in the

[22] Official inspection reports by SWIA have tended to be critical of criminal justice social work departments for not making 'sufficient' use of risk assessment tools. For example, in its criticism of ground-level practice in Glasgow (Scotland's largest city), SWIA states: "Practitioners were ambivalent about carrying out structured risk assessments….The department had put considerable investment into introducing the LSI-R structured risk assessment tool but the evidence was that it had not been fully implemented the policy at practitioner and senior social worker level." (SWIA 2004: 3.17 and 3.28)
[23] Robinson (2002); Maurutto and Hannah-Moffat (2006)

numbers of social enquiry reports being requested by the courts has exacerbated these tensions.

An additional regulatory pressure was felt by social workers in relation to being 'realistic' and credible in the eyes of the sheriffs in terms of how they wrote SERs – an indirect form of regulation.

4. Explaining the dominant pressures within the regulatory space: the double-marginalisation of social workers

We observed a difference between sites concerning the regulatory power of SWIA. Although frontline social workers were uncertain about the prospects of long-term change following SWIA inspections, there was certainly evidence of some change within 'Southpark' (the 'close' site) following the inspection, particularly in relation to the explicit addressing of risk of re-offending backed up by the use of risk assessment tools. This finding may be explained by the position of Southpark as a member of a criminal justice partnership with neighbouring local authorities. In this sense, the significance of SWIA's oversight was enhanced through the pressures of 'mutuality' within the criminal justice partnership.

Nevertheless, our overall finding is that the most powerfully felt regulatory pressures emanated from socialisation within local teams and from the scrutiny of SERs by sheriffs. These had greater regulatory force than the oversight of the SWIA and the auditing mechanisms of Audit Scotland. This finding can be understood by reference to social workers' professional contexts and in particular their concerns and anxieties. Criminal justice social workers are a marginalised group in two senses. First, they feel on the margins of the social work profession. At the same time, however, they feel insecure in the legal world of criminal justice. This 'double-marginalisation' increases social cohesion within local teams. Social workers learn most about practising criminal justice social work in this setting. Pressure to conform to group standards concerning good practice is therefore high.

Social workers' insecurity about their role within the legal world of criminal justice is revealed both in their feelings about relatively low status in that professional world and in their related preoccupation with credibility in the eyes of sheriffs. Such insecurity was compounded in 'Westwood' (the 'remote' site) by the general lack of feedback from sheriffs about their assessments of SER quality.[24] However, our data from 'Southpark', (the 'close' site where a level of informal feedback was possible but professional insecurity was comparable to the 'remote' site), indicates that social workers' insecurity is rooted in wider cultural dynamics concerning the power of law in society and the status of judges within the legal world. Social workers' insecurity imposes a systemic limit on the power of social enquiry in that there are strong

[24] This is notwithstanding (almost legendary) tales of the odd individual sheriff who might call in a report writer to explain him or herself.

pressures on social workers to substantially anticipate and mimic, rather than to actively shape, judicial sentencing practices. This is evidenced in their attempt develop 'realistic' sentencing expertise.

5. Social workers and 'realistic' sentencing expertise

In performing the job of SER writing, social workers try to develop expertise in judging what sheriffs would regard as a 'realistic' sentence for particular cases. Previous studies have suggested the possibility of social workers 'second-guessing' sentencers. Our data reveals that many social workers strive to gain a sense of the sentencing practices of sheriffs in their area and thus to be able to anticipate what would fall within the range of reasonable disposals according to these practices. Social workers feel they need this kind of expertise in order to be viewed as credible professionals by sheriffs and to be able to engage them. However, the requirements of realism in discussions of sentencing options are usually perceived by social workers as still permitting some scope for attempting to encourage sheriffs actively to consider a disposal favoured by the social worker. Rather than requiring the social worker to predict exactly the single disposal favoured by the sheriff, 'realism' usually affords a small range of potential disposals.

6. The importance of sentencing realism to sheriffs and defence agents – why 'realism' is difficult for social workers to apprehend

Our finding about sentencing realism accords with the data from sheriffs and solicitors. There was a clear consensus that poor quality SERs are characterised by a lack of 'realism' in social workers' discussion of sentencing options. Social workers' credibility in the eyes of sheriffs and solicitors was severely diminished where they were deemed to be 'unrealistic' in their discussion of sentencing options. Almost all of the sheriffs and all of the defence solicitors who took part in this study were critical of 'unrealistic' discussions of sentencing options in SERs. This criticism was not levelled against all social workers, though it seems that most sheriffs observe it to an extent within their courts. At the same time, the ability of report writers to be 'realistic' is undercut by other drivers:

- It was very widely believed by lawyers, sheriffs, and report writers that an important factor determining the sentencing outcome of a given case was who the sentencer is. In other words, sentencing disparity[25] between sheriffs was widely perceived (whether this be is in terms of more punitive or more lenient approach across generally cases, or, in particular types of cases). This was also highlighted when we asked different sheriffs to look at the same case materials

[25] By disparity, it is meant that like cases are not treated in a like or consistent manner. In other words, the sentence depends in part on a matter of chance: who the sentencing judge is.

- Report writers typically were unable to predict which sheriff would read their report
- Even where report writers might be able to predict which sheriff would read their report, report writers tended to be ambivalent about the ethics of altering the tone of their report so as to be perceived as more realistic by a particular sheriff
- Even if sentencing disparity did not exist, report writers have very limited sources for determining the normal 'going rate' for different kinds of cases. Scotland does not have a substantial body of sentencing guidelines; nor do report writers have access to a sentencing database of previous decisions.[26] The national standards, which social workers are expected to refer to for guidance, provides very limited practical help (Scottish Executive 2004: 4.5).[27]

At the 'closer' [Southpark] site, there was a strong perception among sheriffs that report writers tailored their reports to the individual sheriff and this was welcomed by the sheriffs. For example:

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

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

However, although some report writers would, "bump up the tariff" if a particular sheriff was likely to be on the bench, most report writers , who generally did not know which sheriff would hear the case, felt less comfortable with this approach. Even if they felt able to predict which sheriff was likely to read their report, most did not feel that they ought to alter their report for that reason.

7. Engaging with sentencing through narrative

Although the scope for actively engaging with the sentencing process is limited by professional insecurity and the demands of 'realism', social workers do attempt to encourage sentencers to consider and to favour particular disposals in particular cases.

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[26] See Tata (2005)

[27] The guidance in the National Standards barely goes beyond the most elementary: that custody is more likely in solemn than summary cases; where the subject has been remanded in custody; if the subject has previously been sentenced to custody; and if the court has requested a report on the suitability of community service. Report writers have to work out for and amongst themselves how sentencers might judge case seriousness. The National Standards merely remind report writers that: "Other indicators include the nature and seriousness of the offence, the seriousness and frequency of any previous convictions and any comments made on the bench." (Scottish Executive 2004: 4.5) Report writers are also referred to the now very dated 'Dunscore'.

They do this through the use of 'narrative', in the sense that they attempt to tell something like a story about the offender which situates the particular offence within the individual's social background and environment. This core message addresses, chronologically, the question of why the individual has offended and their prospects for modifying their behaviour in the future, focusing on the attitude of the offender to the offence and the conduciveness of their social environment to behavioural change. This 'narrative' leads up to the discussion of the viability of non-custodial sentencing options. Social workers try to tell a coherent story about the offender, but their quest for coherence is complicated by their desire to be transparent, open and informative. This latter pressure means that social workers often include information within the SER which they recognise as being in tension with the basic message being communicated through narrative.

8. Five limitations on the ease of communicating through narrative

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

A. Order Effects

Sheriffs almost always read the SER after they had read the other formal documentation pertaining to the sentencing process. Thus, the sheriffs had already begun the process of creating their own impression of the offender and constructing the provisional sentencing agenda prior to encountering the social worker's narrative. Just like social workers, sheriffs also employed senses of the typical when interpreting information about a case. Details about previous convictions coupled with the complaint in question, for example, might suggest an alternative narrative about an offender which either 'trumped' the social worker's narrative or at least set up a strong presumptive narrative against which the social worker's would have to compete.

B. Writing and reading the SER narrative

Sheriffs were generally of the view that, in most cases, the early sections of reports outlining personal and social circumstances were much less significant than the later sections which focussed on the offence in question and the individual's offending behaviour more generally. Under pressure of time, sheriffs would normally skim-read these personal and social circumstances sections, unless there was something in the other formal papers which raised suspicions about their particular significance, or to which their attention was drawn by the defence solicitor. In this sense, in many cases the foundations of social work narratives were overlooked or not examined in detail,

weakening the power of the narrative as a whole. The following remarks were typical:

> I read through the report and bluntly I skip quite a lot of the personal detail…[Interview, Southpark Sheriff]
>
> …[s]ome social enquiry reports are almost encyclopaedic in giving the background of the family. Some of these things are valuable, a lot of them aren't. I tend to speed read it …and I'm more concerned with what has happened in the period of offending rather than the fact that he went through school and there was no involvement with the children's panel or something like that. A lot of that is historic. [interview Southpark sheriff 2].
>
> I wasn't very much interested in the fact that he had bronchitis as a child![28] [sheriff focus group 4]

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

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

Focus group sheriffs did not observe this point about learning difficulties. For example in foucs group 5, the interviewer sought to prompt the sheriffs about the subject's education:

> Intv: Is there anything unusual in his education?
> Sh 5: I don't think there is at all. Learning difficulties -
> Sh 7: No, not at all. Learning difficulties is one.
> Sh 6: But you would want to know if somebody had learning difficulties. You would want to know if someone had gone to a special school.
> Sh 5: But what we don't know is what [difficulties] he had, if any.
> Sh 7: Well I wouldn't want to know –
> Sh 6: There aren't!
> Sh 5: The usual ones?
> Sh 7: But it said he left because of learning difficulties – what are they? Eh?
> Sh 6: Oh right, I'm sorry about that.
> Sh 7: You see?
> Sh 5: Yes but that was at the age of 7. "He then found a smaller class was beneficial in comparison to mainstream education."
> Sh 6: I obviously didn't pay enough attention! [focus group 5]

Similarly, in another focus group:

> Intv: 'Education and employment': anything interesting or valuable?
> Sh 5: All I picked up from that was that he hadn't worked for some time and I mean, that's possibly a problem.
> Sh 14: Yeah, for me all of this biographical material is useful in this kind of case, yeah.

[28] For the avoidance of doubt, there was no reference to bronchitis in the particular SER being discussed.

> Intv: What about, it's mentioned here, "his school behaviour suffered because of learning difficulties"[…] so how does the mention of that…?
> Sh 5: I have to say I skipped over that. [Focus group 7]

Sheriffs often (though not always) relied on defence solicitors' readings of a report as a kind of back-stop. For instance,

> Well I think it is helpful for the agent to refer you to things that he thinks is important in it. Because sometimes you can miss something. I can't recollect but there was something I missed today. [interview westwood sheriff 9]

However, defence solicitors, (who often receive reports on the morning of the sentencing diet), are also under severe time pressures.[29] They tend to read reports in a similar way to how they anticipate the individual sheriff before whom they will appear:

> I have to admit that in my own case, in the last few years, you would always go to the last page. You would go to see what in fact are the options and if there's an option which is a sensible option for your client and you anticipate the sheriff is likely to follow that, then you almost don't require to read any more. [Interview, defence solicitor 8].

C. *The sections of the report which seemed to matter most to sentencers (ie: those dealing with offending) were also the least credible*

Social workers did not have access to police reports or witness statements and so had to rely on offenders' account in their discussions of the offence to be sentenced. When the full information available to the sentencer suggested an alternative version of events, this would undermine social workers' credibility in the eyes of sheriffs. Given sheriffs' scepticism about risk assessment, social workers' statements about possible future offending carried similarly little weight. This fundamental vulnerability renders the influence of social enquiry fragile.

D. The dilemma of an evaluative versus a neutral style of reporting.

Social workers feel constrained in relation to the manner in which they may express themselves. In particular they are aware that many (though not all) sheriffs dislike reports which appear to be directive. Report writers generally strive to avoid making explicit moral judgements about the offender. They attempt to appear to report impartially the facts of offenders' background, their risk of re-offending and the viability of non-custodial sentencing options. This is explicitly required by national standards and is encouraged through professional training and socialisation. Nevertheless, report writers know that sheriffs also want the report before them to be

[29] Recent legal aid changes in summary cases have, overall, led to a marked reduction in client contact and preparation (Tata and Stephen 2006). Defence solicitors thus tend to spend much less time with their clients than they used to – this has coincided with the sharp rise in the proportion of SERs being produced in summary cases.

useful and relevant to sentencing. Thus, report writers often try to communicate their moral judgements implicitly about, for example, an offender's honesty. By hints, implication and other subtleties they attempt to induce the sheriffs to read between the lines of their formally neutral SERs. Although such messages are often picked up by sheriffs, such encoded messages are also often missed or interpreted very differently from that intended by the report writer. Sheriffs often did not read between the lines in the ways intended by report writers. Indeed, some techniques used by report writers backfired, undermining the credibility of the social worker and his/her report. One reason for this is that reports are often read with the belief that report writers are trying to be the advocate of the convicted person. Many of the sheriffs said that they had the sense that the report writers tended to try to exculpate the convicted person or be provide a sort of plea in mitigation. For example:

> The report in my view is to give me background - it is an enquiry report – to identify matters, for example attitude to offence. That's where the problem creeps in because some of those who prepare the reports perhaps empathise too closely and rather than set out the attitude to the offence - for example: 'he displayed remorse, he displayed little understanding'- tend to be swayed by what the accused said, 'that he never really thought that this would have happened or such and such', which is properly the province of the solicitor, to make the plea in mitigation.[Interview Southpark sheriff 2]

Thus, when report writers report themselves attempt to flag concerns (for example about the subject's honesty) by simply setting out contradictions and leaving the judge to draw out the implications, this can backfire on the report writer. An example of this is Mrs 'Laura Smythe', who had been convicted of social welfare fraud. She also had a long history of depression which was linked to sexual abuse as a child. During the interview by 'Caroline' (the report writer),

> [Laura]'s eyes fill up with tears and she looks down. [Laura] gently asks if everything is ok. [Laura] tells her she was abused when she was a child. Tears are running down her face. Softly, Caroline asks if it was physical or sexual abuse. 'Sexual.' [Caroline] stops writing and tells her she's sorry: she knows this must be very difficult. 'Was the person brought to court?' Laura shakes her head and whispers 'dead.' […] [Laura] shrugs – she still has nightmares and she didn't go out for years. Suddenly she asks in a panicked voice: 'This won't be read out in court?' [Caroline] looks unsure and says she will need to check with her senior. […..] [Two days later], [Caroline] decides not to mention Laura's abuse, although it has had a significant impact on her life – it didn't make her defraud the benefits agency.[…][Caroline] *was of the opinion that the sheriff would be able to see that it was sensitive information and there would be no need to mention this*. [diary Southpark case 13 – observed interview of convicted person with report writer, emphasis added]

In the SER, Caroline attempted to convey the personal trauma and the effect that this may have had without breaching Mrs Smythe's request that it should not "be read out in court":

> …she disclosed that she had been subject to significant trauma for several years during her childhood. She stated she has attended various psychiatrists over a thirty year period but continues to struggle with her past. [SER Southpark case 13]

Yet during sheriff focus groups, it was felt that the nature of the trauma was unclear and some sheriffs saw this was a failing attributed squarely to the report writer:

> Well, apart from anything else, the main thrust of this appears to be her difficulties but there's not one solitary word about what these difficulties were, all we know is she was 'subject to significant

> trauma', according to her – well what? And what is the basis of this trauma and the basis of her going to a psychiatrist because I mean the sentencing options – custody is dismissed on the strength saying she shouldn't be, given her history of depression, full stop. [Focus group 5, sheriff 7]

However, although the report writer's narrative is at its most vulnerable when discussing the subject's attitude to the offence and offending behaviour because the report writers was perceived to tend to be too close to the offender, at the same time that supposed closeness was also regarded as an opportunity to gain a direct insight into the offender. In other words the imputed naïveté of the report writer was felt to provide the offender's voice. In that sense SERs were helpful precisely *because of* the report writer's supposed naiveté.

E. *For many sheriffs the main way in which they digest the SER is through the defence solicitor*.

Report writers tend to be encouraged to write *for* the sentencing judge. Practices varied widely among sheriffs: some would read SERs on their own, while others tended to welcome the use of SERs by defence solicitors in their plea in mitigation. Thus, in many instances, the messages contained in SERs are (to a greater or lesser extent) mediated, edited and refracted by the defence lawyer. Most sheriffs tended to be phlegmatic about, and indeed welcome, the selective and partisan deployment of SERs by defence solicitors. Defence solicitors undermine social workers' narratives where, for example, they are deemed to be negative in their terms, or where they conveys images of criminal responsibility which sit in tension with the formal guilty plea.

Furthermore, a defence solicitor's oral plea in mitigation enjoys certain advantages over the SER written document. The defence solicitor knows which sheriff they will appear before and can thus tailor his/her message accordingly. Secondly, that message in court can be adjusted flexibly in immediate response to the sentencing judge's reaction both verbally and non verbally. For example:

> Without you addressing him, you stand up and you get an immediate reaction. You can look at them - most sheriffs, you can actually look at them, you can get, read their eyes. You can read their face and so on and you get an immediate reaction. [Interview defence solicitor 8].

9. Sheriffs' ambivalence towards social and personal circumstances in SERs

National Standards require an investigation of the offender's personal and social circumstances "which puts the subject's offending in context. Key areas to investigate are the offender's finances, family relationships, education and training, employment, accommodation, health, use of drugs and alcohol and lifestyle." (Scottish Executive 2004: 2.9)

Sheriffs generally displayed ambivalence towards personal and social circumstance information under apparently biographical headings (eg 'family circumstances', 'education', 'leisure' etc) in SERs. On the one hand, as indicated above, they valued these early sections much less than the later sections, often regarding them as making the SER too long, and usually skim-reading them. On the other hand, *and at the same time*, they (and thus defence solicitors) valued detail, including the biographical sections, as a marker of general quality. For example,

> Sh 16: I think it's a very good report though, it's very comprehensive, isn't it, you know? It has no obvious omissions.
> Sh 17: Yeah, there's nothing missing. [focus group 6]

> Interviewer: what makes a bad report?
> Defence Solicitor: Well certainly not having enough detail but I mean I think they all have a minimum standard. […] I'm trying to think what else would make a really good one. I suppose it is about detail, isn't it? [Interview, defence solicitor 4]

This apparent paradox can be understood as a reflection of the basic dialogue between two visions of justice in sentencing: tariff sentencing (and its need for consistency) and individualisation (with its need to treat every case as unique). It is also indicative of the tension between the routinisation of sentencing as a social practice and the normative demands of 'individualised' sentencing. The routinisation of sentencing inclines sheriffs towards the view that the biographical sections of SERs are fairly standard, common in their themes, and, accordingly, superfluous. However, the normative demands of 'individualised' sentencing require that sentencing decisions are reflective of the particular circumstances of the offender. The individualised detail of SERs supports the normative aims of sentencing and so is valued in the abstract. But it is also a source of frustration for sheriffs in the social reality of producing a high volume of sentencing decisions within a fairly tight timeframe.

Concluding remarks.

With a few exceptions, most sheriffs generally did not like social workers to recommend a sentence or indeed appear to be directive as to sentence or to imply a judgement about the seriousness of the case. Most sheriffs regard social workers' role as being essentially informative rather than explicitly evaluative. An explicit recommendation of sentence or offering an assessment as to the appropriate sentence is viewed as an unwelcome intrusion into their decision-making domain. Yet at the same time SER information needed (and was expected by sheriffs) to convey a *meaningful and relevant* story about the subject and what led to the offending behaviour. Such a narrative is expected to assist the sentencing decision process. This, together with policy and legal requirements that SERs should encourage sentencers to think carefully about non-custodial options, helps to explain why SER writers tend to

convey messages in a coded style.[30] As we have seen, for a range of reasons, these messages can easily be interpreted by the sentencer in a very different way than intended by the report writer.

What sorts of factors might facilitate clearer lines of communication? Professional trust may be one important factor. In the 'closer' ('Southpark') site, sheriffs appeared to have greater confidence in the SERs coming before them than in more 'remote' sites. In particular, sheriffs appeared to find the regular presence of the same social workers in court reassuring. Sheriffs recognised these court-based social workers as a conduit of information about court cultures to report writers.

Judicial confidence in reports might be further assisted if report writers had access to police reports and witness statements. Without these, the report writer generally has little detailed information to go on other than the account presented by the offender: an account which report writers were generally aware might be at odds with what the court would subsequently hear.

These points notwithstanding, the utility of SERs may be limited by more fundamental cultural features. Much of the policy literature has worked on the basis that improvement in the 'quality' of SERs will necessarily lead to greater relevance to and use in the sentencing process. The drive therefore has been towards 'national standards' and fixed measures of quality. However, the research reported in this paper suggests that while such processes may render SERs more readable, the judicial perception of SER 'quality' is more complex, case-contingent, and less measurable than the official policy literature has tended to assume. Thus, in terms of its usefulness to sentencing, SER 'quality' is not an objective concept which can be calibrated by the use of universal measurement tools, or indeed, by common sense. 'Quality' is, in this sense and to a significant degree, in the eye of the individual judicial beholder.

Moreover, judicial 'ownership' of sentencing places limits on the extent to which SERs can openly influence the sentencing outcome. The perception of social workers as an external professional group which lacks relative status within the criminal justice field is a form of resistance to their potential influence over sentencing. Judicial ownership of sentencing is protective in this sense, requiring that the limited influence of social workers in the sentencing process is maintained. Ultimately, then, the role to be played by SERs in sentencing is determined by the power relations between these two professional groups (social workers and judges) rather than by technical issues of SER quality. Though technical improvements in SERs (for example, through fixed quality standards or improved training), or judicial familiarity with particular social workers in small courts, may enhance social workers' credibility and standing to some extent, our analysis suggests that such factors can only be expected to have marginal effects on the utility of SERs in the sentencing process.

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

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