

SENTENCING GUIDELINES AND A SCOTTISH SENTENCING COUNCIL

CONSULTATION AND PROPOSALS

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AND A
SCOTTISH
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FOREWORD

Difficult and life changing sentencing decisions are made every day by our judges, sheriffs, justices of the peace and stipendiary magistrates. Decisions based on full and careful consideration of the facts and circumstances relating to every offence and every offender. This is an awesome responsibility and one that the judiciary discharges with distinction.

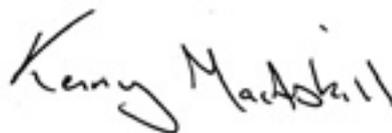
The complete independence of the judiciary in making these decisions is at the heart of the criminal justice system in any society that considers itself free and fair. Scotland is no exception. Judicial independence is a fundamental principle of our justice system and our democracy. This Government will never threaten that principle.

We believe that Government does have a responsibility to ensure that Scotland has the appropriate framework in place to promote fairness and justice in sentencing.

In 2006, the Sentencing Commission for Scotland recommended that a system of sentencing guidelines should be put in place in this country. A variety of such systems already exist in a large number of other jurisdictions around the world – from New Zealand and Australia to South Africa, the United States, much of the European Union and even our closest neighbours in England & Wales.

We believe that there is a case for a system of sentencing guidelines to help deliver more consistent and transparent sentencing – and a Scottish Sentencing Council to oversee that system. Greater clarity and openness will help to improve public confidence in our criminal justice system, which is why we also want to outline in statute for the first time the purpose of sentencing and the key principles that underpin judicial decision making.

This consultation is your opportunity to consider our proposals and help shape a sentencing framework appropriate to 21st century Scotland. Together, we can ensure that the Scottish justice system continues to be respected and envied throughout the rest of the world.



Kenny MacAskill MSP
Cabinet Secretary for Justice

01. INTRODUCTION

Sentencing Guidelines and the Scottish Sentencing Council

1.1 The judicially-led Sentencing Commission, set up by the previous administration, examined the issue of consistency in sentencing. The central recommendation of the Commission's 2006 report, *The Scope to Improve Consistency in Sentencing*, was the creation of a procedure for giving effect to sentencing guidelines. The late Lord Macfadyen, the Commission's Chair, recorded in his foreword:

*"It is generally accepted that there should be consistency in sentencing at every level of our courts. That is an aspect of fairness and justice. These principles demand that similar crimes committed in similar circumstances by offenders whose circumstances are similar should attract similar sentences. Consistency in sentencing is thus important not only to the offender, but also to those directly affected by the crime and to the public, since a perception of inconsistency in sentencing is likely to lead to a loss of public confidence in the criminal justice system....[Guidelines] would, we consider, promote and encourage consistency of approach, and thus improve consistency in sentencing, while preserving the important element of judicial discretion."*¹

1.2 At the time of the last General Election, we made clear in our manifesto that we supported this stance and stated that:

"Our solution is to create a new Sentencing Council to provide sentencing guidelines for the Judiciary. This will increase consistency, fairness and transparency in sentencing so that there is increased public confidence that justice is being done.

*The final decision on a sentence based on the facts of the case would be for the Judge or Sheriff."*²

1.3 Additionally, the independent Scottish Prisons Commission recommended in its July 2008 report that:

*"To drive forward consistency and improve the effectiveness of sentencing.....the Government [should] establish an independent National Sentencing Council (NSC) to develop clear sentencing guidelines that can be applied nationwide."*³

1.4 In this consultation paper we shall not go over the ground covered by either the Sentencing Commission or the Prisons Commission. Instead we shall set out our plans for the establishment of a Scottish Sentencing Council to produce

¹ The Sentencing Commission for Scotland, *The Scope to Improve Consistency in Sentencing*, published 19 September 2006.

² SNP Manifesto 2007, p62 – published 19 March 2007.

³ The Scottish Prisons Commission, *Scotland's Choice*, published 1 July 2008.

sentencing guidelines. We firmly believe that such a body is needed and that it will improve consistency and transparency in sentencing and so crucially improve public confidence in our criminal justice system.

1.5 At present, sentencing practice in Scotland operates mainly on a case-by-case basis in the criminal courts, with reference to the wide experience of sentencers in criminal cases and Appeal Court decisions. This is supplemented by legislation where Parliament has made specific provision about the use of certain sentencing options or about sentencing for certain offences, and by the Appeal Court's little-used power to issue guideline judgements⁴. In addition, textbooks such as *Morrison* and *Nicholson* gather together information on sentencing law and practice. As a result, it is difficult for the Scottish public to properly understand the sentencing process, or to see clearly the reasons behind decisions in individual criminal cases. This has helped to create a common perception that sentencing in our courts is inconsistent which, consequently, has had a negative effect on public confidence in the criminal justice system.

1.6 Much has been done in recent years to improve the public perception of the criminal justice system – High Court reform and improved support for victims and witnesses are just two examples – but it is important to keep building on this work and make sure that every part of the system is contributing to the improvement. If people do not have confidence in the criminal justice system, they are unlikely to feel that they live in a safe, strong, Scotland.

1.7 There is a view, especially amongst practitioners, that sentencing is not inconsistent but instead is individualised and tailored to the facts and circumstances of each case. We respect this view and recognise the importance of judicial discretion in determining the appropriate sentence in each case. However, the Sentencing Commission examined the available evidence and concluded that, even though there is little empirical evidence to support the contention that widespread inconsistency in sentencing exists in Scotland, the public perception of inconsistency was well founded. That perception is itself something that must be addressed. It is only right and proper that sentencing should focus on the particular aspects of an offence and the circumstances of the offender but that does not mean that it cannot be within expressed parameters.

1.8 We believe that the public should be able to understand the sentencing process. Furthermore, people have a right to expect that this process will take account of their interests and concerns, just as those interests and concerns are taken into account when the law itself is made, through the representations of democratically elected MSPs, MPs and MEPs.

1.9 In recent years, sentencing has also become more complex than was traditionally the case in previous decades. An increasing range of factors must be taken into account before any decision on the appropriate sentence in an individual case can be made – these include possible aggravating and mitigating factors, background information on the offender, the impact on the victim, and the growing

⁴ Sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995.

array of disposals available to sentencers. While this can on occasion be a difficult and complex process for even experienced sentencers to navigate, it is often nearly impossible for ordinary members of the public to follow.

1.10 Furthermore, we recognise that sentencing decisions are not made in isolation. They have consequences for other parts of the criminal justice system which must implement the sentence when the offender leaves court, and which try to ensure that the individual does not offend again in the longer term. These decisions also have a significant impact on the delivery of other criminal justice initiatives. There would be little point, for example, in the steps we are taking to revitalise community penalties if we could not be reasonably sure that there would be a reaction in terms of how they are used by sentencers. We consider that these issues need to be addressed, and that there is room for dialogue between sentencers, other criminal justice professionals, and the Government in doing so.

1.11 We are therefore satisfied that the Sentencing Commission's recommendation to create a regime of sentencing guidelines should be taken forward. It is our view that such a regime would ensure greater consistency, fairness and transparency in sentencing, and help to reassure the public that justice is being done.

1.12 We expect that guidelines would be varied in nature, depending on their subject matter. Some might provide narrative guidance, for example on overarching issues such as aggravating factors or repeat offending, and provide a framework on which sentencers could base their reasoning. Others might set out a mixture of narrative and numerical guidance, setting out the appropriate range of sentences – both custodial and non-custodial – for a particular offence, and allowing for upward or downward adjustment depending on the facts and circumstances of the case.

1.13 There is no question that the final decision on sentencing in an individual case would be for anyone other than the sentencer. It is they who hear the facts pertaining to the case. We do not want a system of guidelines that specifies the 'correct' sentence for each case. The discretion of sentencers will still be vital in using the system of guidelines eventually created to tailor the sentence to the offence and offender. Where, however, a sentence was imposed outwith the range provided by a guideline, we think that the sentencer should be required to explain in full his or her reasons for departing from that guideline. The regime we envisage would be less prescriptive than that in the majority of Western jurisdictions – including England and Wales – with the fundamental principle of judicial discretion remaining at the core of the system.

1.14 As the Sentencing Commission's report recorded, sentencing guidelines are a feature of a number of jurisdictions, such as England and Wales, numerous states in the USA, and various countries in Western Europe. The degree of prescription varies. In developing our policy in this area we have taken particular notice of the model proposed by the New Zealand Law Commission in its report *Sentencing Guidelines and Parole Reform*, and the subsequent Sentencing Council Act which came into force in November 2007 and provides for the establishment of a statutory Sentencing Council. The New Zealand model is particularly attractive given the country's similarity to Scotland in terms of population and legal system (for example,

New Zealand, like Scotland, is predominantly a common law jurisdiction). Brief summaries of the systems currently in operation in New Zealand and England & Wales have been provided at annexes A and B to this document.

1.15 While it would be possible to set up some sort of Sentencing Council on a purely administrative basis, we do not consider that this is the best option. To give the Council and the product of its work the weight and status that we believe it should have, we think that the new body, and the guidelines that it promulgates, should be underpinned by statute.

Statutory statement of the purpose and principles of sentencing

1.16 The Sentencing Commission also considered that a useful step towards the elimination of any unwarranted disparities in sentencing would be to enshrine the purpose of sentencing in statute. The Commission made particular reference to the provisions of New Zealand's Sentencing Act 2002, which sets out both the purposes and the principles of sentencing. A similar approach has already been adopted in England and Wales through sections 142 of the Criminal Justice Act 2003, which creates a statutory purpose for sentencing which the courts must have regard to when dealing with an offender.

1.17 As with sentencing guidelines, we consider that similar legislation could play a useful role in Scotland. If we are to improve public confidence in our criminal justice system, it is important that we are able to lay out clearly and unequivocally the overarching function and rationale behind the sentencing process itself.

02. PROPOSED REMIT AND FUNCTIONS

2.1 Having set out our reasons for establishing a Sentencing Council, we will now consider what remit and functions it should have before moving on in the next chapter to consider what might be the best structure and shape for the new body.

Remit of the Scottish Sentencing Council

2.2 Against the background of the recommendations made by the Sentencing Commission, and the role assigned to sentencing councils in other jurisdictions, we propose that the Scottish Sentencing Council should be given a statutory remit to do the following:

- Promote consistency in sentencing practice;
- Ensure that sentencing practice and policy is transparent and understandable;
- Enable development of sentencing policy to be based on a broad range of experience and expertise;
- Inform the Scottish Ministers and the Scottish Parliament on sentencing practice and related areas for reform; and
- Inform and educate the public about sentencing policies and decision making, with a view to promoting greater understanding and enhancing public confidence in the criminal justice system.

Question 1

Do you think that this proposed remit is appropriate? If not, what alternative would you suggest?

Functions of the Scottish Sentencing Council

2.3 In order to fulfil the remit outlined above, we propose that the Council should also be given a series of statutory functions, mandating it to:

- Produce sentencing guidelines on:
 - Sentencing levels for particular offences;
 - Particular types of sentences, disposals, and other orders available at the time of sentencing;
 - Grounds for departure from sentencing guidelines; and
 - Other matters relating to sentencing

- Support research and academic work relevant to the Council’s remit;
- Collate information on sentencing decisions, and on compliance with and departure from sentencing guidelines, and publish this information; and
- Provide information to the public about sentencing.

Question 2

Do you think that these proposed functions are appropriate? If not, what alternatives would you suggest?

Procedure

2.4 It is our view that the Sentencing Council should be allowed to establish its own method of working including the detailed procedures for producing sentencing guidelines and carrying out its other functions. This will allow the body to approach its work in a flexible way. However, we do think that the Sentencing Council should operate within a basic framework – our proposals for this are set out in the paragraphs which follow.

Setting the Agenda

2.5 We propose that the Sentencing Council should be required to prepare and submit to the Scottish Ministers an annual business plan covering all aspects of its remit. This plan would be laid before the Scottish Parliament. The Council would be required to consult certain named office holders who have a close interest in its work when producing the business plan. These would be the Scottish Ministers and the Lord Advocate and, possibly, the Secretary of State and the Advocate General for Scotland. We think that the Council should be able to issue guidelines on offences in reserved areas of law for which the UK Government has responsibility, such as road traffic or drugs. We are currently considering how this might best be achieved, including the role of the UK Government in being consulted by the Council on draft guidelines that relate to such areas.

2.6 We also consider that these same office holders should be able to invite the Sentencing Council to produce guidelines on particular issues or for specific offences. The Council would not be obliged to take on such references. If it did decide to act on a reference, this would need to be reflected in its annual report (see below). If, during the course of the year, an issue arose for which it was considered guidelines were urgently needed, it is our view that the Council should be able to address this without the need for a referral. Any such decision would also have to be highlighted in the Council’s annual report.

2.7 The Council would be required to prepare and submit to the Scottish Ministers an annual report covering all aspects of its remit and activities. These documents would be laid before the Scottish Parliament. We propose that, where the Council has declined to deal with a reference from one of the office-holders referred to in

paragraph 2.5, it would be required to provide the reason(s) for so doing in its annual report.

Drafting and Producing Sentencing Guidelines

2.8 We consider that the Sentencing Council should produce draft guidelines on which it would require to consult the same specific named office holders as it does when preparing its business plan. This would not preclude wider consultation with other interested parties. Indeed we would expect the Council to seek views from all individuals and groups with an interest in its work.

2.9 We firmly believe that there should also be an opportunity for the public to comment on draft guidelines before they are finalised – providing ordinary people with a greater opportunity than ever before to influence sentencing policy in Scotland. We propose therefore that the Sentencing Council should be required to publish draft guidelines and allow time for these to be commented upon before they are finalised. The body would also be required to produce an assessment of the costs and benefits of any draft guidelines it proposes, and of the likely impact of those guidelines on the prison population, community disposal capacity, and the wider criminal justice system. These assessments would be published at the same time as the draft guidelines, to help inform the public debate.

2.10 Following the consultation period, and once the Council has had an opportunity to consider in detail any representations made by individuals or organisations, the guidelines would be finalised and published. Finally, we also think that the Sentencing Council should be under a duty to review each guideline periodically to determine if it requires to be updated.

Question 3

Do you think our proposals in relation to the production of sentencing guidelines are adequate?

Question 4

Do you think that we are proposing the correct level of consultation on draft sentencing guidelines?

Relationship with the Courts

2.11 Once guidelines are finalised and published, we propose that sentencers in all Courts, including the Appeal Court, should be under a statutory obligation to adhere to those guidelines in disposing of any relevant case which comes before them. Under this system, sentencers would be able to depart from guidelines if the circumstances of a case required it, but would be required to formally state and record detailed reasons for doing so at the point of sentence.

2.12 We believe that the Appeal Court should continue to be able to exercise its powers, under sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995, to issue guideline judgements. However, as with any other court, the Appeal Court would be required to apply any sentencing guideline promulgated by the Sentencing Council. If the Appeal Court were ever to be faced with applying a Sentencing Council guideline with which it did not agree, we propose that it should be able to request that the Council reviews the guideline. The Council would be placed under a statutory obligation to comply with any such request.

2.13 Finally we also propose that a duty should be placed on the Lord Advocate, when exercising his or her power to appeal against a sentence on the grounds of undue leniency, to have regard to sentencing guidelines pertaining to the offence in question.

Question 5

Do you consider that our proposals for the relationship between the Sentencing Council and the Courts is appropriate?

Supporting Research and Academic Work

2.14 We propose that the Sentencing Council should have the power to independently commission and carry out research. This function would be relevant to every aspect of the Council's overall remit. However, it would have special significance in enabling the Council to help develop national sentencing policy based on the available evidence, in addition to broadening public understanding of sentencing patterns and practices. Accordingly, we would be keen to confer on the Council a power to carry out, commission or co-ordinate research and publish the results of such research. This would include the power to make grants to academics or research organisations for this purpose.

Question 6

Do you agree that the Scottish Sentencing Council should have the power to carry out, commission and co-ordinate research?

Dissemination of Information

2.15 Gathering together and publishing information on sentencing practice and decision making will play a major part in improving transparency in the sentencing process and, in our view, improving public confidence in the workings of the Scottish criminal justice system.

2.16 It is for this reason that we have proposed that the Sentencing Council's statutory functions should include collating information on sentencing practice and decision making and on compliance with, and departure from, sentencing guidelines. This information would be disseminated to the judiciary to help increase practitioners'

knowledge of patterns and variations in sentencing and assist efforts to improve consistency. We also believe that the Council can and should play a crucial role in providing clear information to the public about sentencing practice and procedures, to make the process more transparent and improve public understanding.

2.17 As with the sentencing guidelines themselves, the detail of how these functions are discharged should be for the Council to decide. However, at a minimum, we consider that the Council should be obliged to provide information on how these functions have been carried out in its annual report. We would expect the Council's activities in this area to extend far beyond this basic requirement, both in the volume and form of communication used.

2.18 The sentencing process is often considered to be arcane or inaccessible to those outwith the criminal justice system. We believe that this situation can be rectified. Ordinary members of the public – particularly victims of crime and their families – should be presented with a process that is clear and transparent. While it is unlikely that victims will always agree with the sentence handed down in individual cases, they should be able to understand how and why the decision to impose that sentence was made.

2.19 The Sentencing Council can play an important role in educating people about the sentencing process, and the many factors which must be considered by judges when making sentencing decisions. It is our belief that a clearer, more accessible process will help to improve public confidence that justice is being done.

Question 7

a) Do you agree that the Scottish Sentencing Council's statutory functions should include providing information to the public about the sentencing process?

b) If yes, how do you think that process could be made clearer and more understandable to ordinary members of the public?

Question 8

What measures might be taken by the Scottish Sentencing Council to make the sentencing process more transparent?

03. PROPOSED STRUCTURE

Membership

3.1 The composition of the membership of the Sentencing Council will be important – it will need to command legitimacy in the eyes of sentencers, the wider criminal justice community, and the public in general. Sentencers and other criminal justice professionals will need to have confidence that the guidelines with which they are required to comply have been drawn up by those with the appropriate expertise, experience and skills. Equally, the public would expect that the views of all those with an interest in the process and outcome of sentencing practice should be represented.

3.2 We believe that a blend of judicial and non-judicial membership would be the best approach, with a senior judge (either the Lord President, Lord Justice Clerk or a senior judicial colleague to be named by them) as chairperson. The make up of the majority of the membership would be stipulated in statute. We consider that the following mix would strike the most appropriate balance:

- 1 High Court Judge
- 1 Sheriff
- 1 Justice of the Peace or Stipendiary Magistrate
- 1 nominee from the Crown Office and Procurator Fiscal Service (COPFS)
- 1 nominee from the Association of Chief Police Officers in Scotland (ACPOS)
- 1 nominee from the Faculty of Advocates
- 1 nominee from the Law Society of Scotland
- 1 representative of a victims' organisation or specialist in victims issues

3.3 In addition, and to ensure that the views and concerns of the general public are properly taken into account when guidelines are being developed, the membership should include two independent, non-judicial members. These posts would be filled following a fair and open appointments process and the eventual members could be drawn from a range of backgrounds including offender management agencies, victims groups and other non-governmental organisations, academia and the wider community. This process would be regulated by the Scottish Commissioner for Public Appointments

3.4 We believe that such a membership would provide the opportunity for dialogue between the different parts of the criminal justice community and wider Scottish society, while reflecting the essentially judicial function of sentencing.

Question 9

Do you agree that the chair of the Scottish Sentencing Council should be a senior member of the judiciary? If not, who do you think would be a more suitable chairperson?

Question 10

Do you consider the proposed membership of the Council to be appropriate? If not, what alternative membership do you think would be more suitable?

3.5 It is not proposed that there should be a representative of the Scottish Government on the Council. However, it may be helpful for a Scottish Government official to attend meetings of the Council as an observer only. This official would play no part in developing or finalising sentencing guidelines, but would facilitate the flow of information between policy makers and the Council and so enhance the work of both as a result. This could be a valuable tool in helping the Government and the Council take account of each other's work as it develops, particularly around assisting and informing policy development and helping in the management of the prison population and wider penal policy.

Question 11

Do you agree that there should be a Scottish Government observer at meetings of the Council? If not, it would be helpful if you could provide your reason(s).

3.6 We would propose that judicial members should be appointed to the Council by the Lord President after consultation with the Scottish Ministers. Non-judicial members would be appointed by the Scottish Ministers after consultation with the Lord President. Appointments would be for a fixed term of five years, with no possibility of renewal. We consider that this arrangement would help to demonstrate the complete integrity of the Council and eliminate any risk of accusations that the prospect of re-appointment could compromise the independence and impartiality of the body.

Question 12

Do you agree with the proposed appointments process? If not, how do you think the process could be modified to make it more effective?

Organisation

3.7 We consider that the Scottish Sentencing Council should be constituted as an Executive Non Departmental Public Body (NDPB). This would place the body on the necessary statutory footing while underlining its independence from Government.

3.8 We recognise that, in order to carry out its functions effectively, the Scottish Sentencing Council will require a team of dedicated and professional support staff drawn from a range of backgrounds, including first class legal specialists, researchers, analysts and administrators. Through the Judiciary and Courts (Scotland) Bill, currently making its way through the Scottish Parliament, we aim to create a reconstituted and judicially led Scottish Court Service (SCS). Subject to the

successful passage of the Bill, we consider that the office which would support the Council could be managed and supported within the SCS, which would be well placed to provide the body with necessary back office functions such as IT and human resources services.

3.9 From a practical point of view, such an arrangement would help to keep administrative costs to a minimum while ensuring close ties between the Council and the hub of the court/judicial system. It would also underline the central importance of the judiciary to improving consistency and transparency in sentencing. The appropriate funding would of course be made available to ensure that the Council was properly resourced without having any negative impact on the other valuable services already delivered by the SCS.

Question 13

Do you agree with our proposals for how the Scottish Sentencing Council should be resourced and supported? If not, what alternative arrangements do you think would be more appropriate and/or effective?

04. STATUTORY STATEMENT OF THE PURPOSE AND PRINCIPLES OF SENTENCING

The purpose of sentencing

4.1 We consider that the purpose of sentencing should be laid down in statute to create a straightforward and transparent framework around which sentencers can base their decisions in individual cases. We propose that the purpose of sentencing should draw on each of the following to a varying degree, depending on the circumstances of the case:

- punishment
- protection of the public or incapacitation of the offender
- deterrence
- rehabilitation and reform
- reparation and/or restoration

4.2 Our proposal is aimed at strengthening confidence in the sentencing process by helping the public to understand that, while punishment of the offender is rightly a central feature of that process, it is not the only feature. Sentencing should also provide the court with the ability to take action to protect the public from violent, sexual and other dangerous offenders.

4.3 The courts should be able to use sentencing as a deterrent – to send a clear message to those within our society who might consider committing a crime that offending behaviour is not to be tolerated. Sentencing should also offer offenders the opportunity to reform and rehabilitate, to become valued, productive members of Scottish society and steer clear of the criminal behaviour that ruins lives – their own and those of the people they offend against. Finally, we consider that sentencing should have regard to the interests of the victim – by demonstrating that justice has been done and, where appropriate, ensuring that victims are properly compensated.

Question 14

Do you agree with our proposals for a statutory statement on the purpose of sentencing? If not, how do you think these proposals could be modified to make them more effective?

The principles of sentencing

4.4 Outlining the *purpose* of sentencing in statute will provide people with a much clearer understanding of what sentencing is actually for. By taking a similar approach to the *principles* of sentencing, we can help to ensure that the public is clear on the key factors that every sentencer must have regard to when making

decisions in individual cases. Once again, we consider that this will increase transparency and lead to a greater appreciation of the sentencing process.

4.5 New Zealand's Sentencing Act 2002 created a set of principles for sentencing by detailing the various elements that the courts must consider when dealing with an offender. We consider that a similar approach should be adopted in Scotland. The set of principles we propose reflects a series of established factors already taken into account by the courts in Scotland. This has not, however, always been clear to the general public. To reassure the public that the courts take a consistent approach, and to provide greater clarity and transparency, we propose that the courts should have regard to the following statutory principles when making sentencing decisions:

- All of the facts and circumstances surrounding the offence and the offender, including:
 - the seriousness of the offence in comparison with other types of offences;
 - the effect of the offending on the victim or victims;
 - the range of penalties available for the particular type of offence;
 - the desirability of consistency with sentencing levels for similar offences; and
 - the particular circumstances of the offender, including their family situation, level of risk and willingness to reform.

4.6 The current use of Social Enquiry Reports is, in some cases, a formal reflection of this final principle. However, the principle itself should be an element for consideration in every case. An offender's family situation should be taken into account. Similarly, the danger that an offender may present to the public at large should form part of the consideration of sentence, as should their willingness and/or ability to rehabilitate or reform.

Question 15

Do you agree with our proposals for a set of statutory principles in relation to sentencing? If not, how do you think these proposals could be modified to make them more effective?

Intoxication as a mitigating factor

4.7 Since the 1980s, High Court judgements have made it clear that alcohol or intoxication should not be regarded as a mitigating factor in the commission of crimes. However it is still the case that intoxication is often presented to the courts by the defence as an excuse or reason for offending behaviour. We know that this concerns a great many people in Scotland – particularly in relation to violent crime.

4.8 We believe that being voluntarily drunk or intoxicated is never an excuse for offending. In our recent consultation paper on alcohol misuse, *Changing Scotland's Relationship with Alcohol*, we demonstrated that in 2006-07 it cost our criminal justice system and emergency services a total of £385 million to deal with the effects of alcohol misuse⁵. We also know that there is a very strong link between alcohol and offending. For example, almost half (45%) of those serving a custodial sentence in 2007 said they were drunk at the time of the offence⁶. Analysis carried out by Strathclyde Police has shown that, of the 5,000 prisoners processed by one Glasgow police station in 2006-7, over 60% were under the influence of alcohol and/or drugs⁷. The same study revealed that a massive two-thirds of those detained for violence were under the influence of alcohol.

4.9 Whilst it is not set out in statute, the Sentencing Guidelines Council for England and Wales has issued a guideline on seriousness and sentencing. Included in that guideline are lists of factors which would tend to indicate higher and lower culpability. One of the factors considered to indicate higher culpability is the commission of an offence while under the influence of alcohol or drugs. In New Zealand's aforementioned Sentencing Act 2002, voluntary intoxication has been listed as a 'statutorily excluded sentencing factor'.

4.10 To make clear the fact that being drunk cannot be an excuse for offending behaviour, we propose to enshrine in statute that the commission of an offence while voluntarily under the influence of alcohol should not be considered as a mitigating factor by the courts.

Question 16

Do you agree with our proposals to state explicitly in statute that voluntary drunkenness or intoxication can never be considered a mitigating factor by the courts? If not, it would be helpful if you could provide your reason(s).

⁵ The Scottish Government, *Changing Scotland's Relationship with Alcohol: a Discussion Paper on our Strategic Approach*, published 17 June 2008.

⁶ The Scottish Prison Service, *Prisoner Survey 2007*.

⁷ The Scottish Government, *Changing Scotland's Relationship with Alcohol: a Discussion Paper on our Strategic Approach*, published 17 June 2008.

SUMMARY OF QUESTIONS

Question 1

Do you think that this proposed remit is appropriate? If not, what alternative would you suggest?

Question 2

Do you think that these proposed functions are appropriate? If not, what alternatives would you suggest?

Question 3

Do you think our proposals in relation to the production of sentencing guidelines are adequate?

Question 4

Do you think that we are proposing the correct level of consultation on draft sentencing guidelines?

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GLOSSARY

The Court of Session

The Court of Session is the supreme civil court in Scotland and is situated at Parliament House in Edinburgh. It sits in an appeal capacity and also as a civil court dealing with disputes between people or organisations. These might involve cases relating to debt, damages, divorce or children. The principal judge is called the Lord President. Administrative functions are mainly dealt with by the General Department and the Petition/Extracts Department.

The High Court of Justiciary

The High Court of Justiciary deals with criminal appeals and serious criminal cases. Trials are held before a judge and jury. In Scotland a jury consists of fifteen people who are selected for each trial by means of a ballot. People cited to attend for jury service are chosen randomly from the electoral roll. Although the Court is based in Edinburgh, trials are held in towns and cities throughout Scotland as a means of reducing inconvenience to witnesses, jurors and court users. The principal judge is called the Lord Justice General.

Lord President

The Lord President of the Court of Session is head of the judiciary in Scotland, and presiding judge (and Senator) of the College of Justice and Court of Session, as well as being Lord Justice General of Scotland and head of the High Court of Justiciary, the offices having been combined in 1836.

Lord Justice Clerk

Deputy to the Lord President.

Sheriff

Analogous to a judge and sits in a second-tier court, called the Sheriff Court. A Sheriff is legally qualified. The Sheriff Court is a court of first instance for the majority of both civil and criminal cases.

Justice of the Peace (JP)

A lay person who sits (with a legally qualified clerk) in judgement in a Justice of the Peace court. The maximum sentence that a JP may impose is 60 days imprisonment or a fine of £2,500.00.

Justice of the Peace (JP) Court

District Courts are administered by local authorities. Justice of the Peace Courts were created by the Criminal Proceedings etc (Reform) (Scotland) Act 2007 and will replace District Courts on a phased basis. JP Courts are administered by the Scottish Court Service.

Stipendiary Magistrate

A full time, permanent legally qualified Judge who presides over a Stipendiary Magistrate's Court. Stipendiary Magistrates have the same powers as sheriffs sitting summarily. They may impose up to three months' imprisonment - or twelve months for a second or subsequent conviction - or a fine up to £10,000. Currently, only Glasgow has a Stipendiary Magistrate's Court.

Appeal Court

Any court of law that is empowered to hear an appeal of a trial court or other lower tribunal.

Guideline judgements

Sentencing judgements issued by the Appeal Court.

Aggravating factors

Any circumstance attending the commission of a crime which increases its guilt or enormity or adds to its consequences, but which is above and beyond the essential constituents of the crime itself (e.g. racially or religiously aggravated offences).

Mitigating factors

Facts which reduce the gravity of an offence by reason of unusual or extreme elements leading up to or attending the commission of the offence.

Disposals

Sentences or otherwise decisions of the court to deal with an offender.

Community penalties

A sentence that does not consist of mandatory custody of the offender.

Common law

Common law refers to law and the corresponding legal system developed through decisions of courts and similar tribunals, rather than through legislative statutes or executive action. The common law is created and refined by judges: a decision in the case currently pending depends on decisions in previous cases and affects the law to be applied in future cases. When there is no authoritative statement of the law, judges have the authority and duty to make law by creating precedent. The body of precedent is called "common law" and it binds future decisions.

Crown Office and Procurator Fiscal Service (COPFS)

Provides an independent public prosecution service, investigates sudden and suspicious deaths and handles complaints against the Police in Scotland. The Service has extensive responsibilities in the investigation and prosecution of crime. It decides whether or not to start criminal proceedings, even if the accused has not yet been arrested or charged by the police, and the Crown is not required to give any reason for the decision.

Faculty of Advocates

An independent body of lawyers who have been admitted to practice as advocates before the courts of Scotland.

Law Society of Scotland

The professional governing body for Scottish solicitors.

Executive Non Departmental Public Body (NDPB)

A category of public body. NDPBs are not an integral part of a government department and carry out their functions at arm's length from Ministers, although

Ministers are ultimately responsible to Parliament for the activities of bodies sponsored by their department.

Executive NDPBs employ their own staff, who are not civil servants, manage their own budgets and carry out administrative, commercial, executive or regulatory functions. They often have a national remit and provide specialist advice to Ministers and others.

Scottish Court Service

The Scottish Court Service (SCS) was formed in 1995 and is currently an agency of the Scottish Government. Its purpose is to provide the people, buildings and technology to support the operation of the Courts and the Office of the Public Guardian.

HOW TO RESPOND

We welcome your views on any or all of the consultation points raised in this document. Please answer any/all questions as you wish.

Comments should be made by **Friday 21 November 2008**. Earlier responses will be very welcome. Please remember to include the **Respondent Information Form** to ensure that we treat your response appropriately.

We would be grateful if you could indicate clearly in your response which part of the consultation paper you are responding to as this will aid our analysis of the responses received.

You can respond by filling in an **online response form** on the Scottish Government website at <http://www.scotland.gov.uk/Consultations>. Look for the consultation title among the list of 'current consultations'. The online form is located at the top of the contents page. The Respondent Information Form is included as part of the online response form.

Or

You can **post** your response to:

Sentencing Policy Unit
Criminal Justice Directorate
GW.15, St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Telephone: 0131 244 2212
Fax: 0131 244 3297

Please remember to include a completed Respondent Information Form, available on page 27.

Or

You can **e-mail** your response to:

scottishsentencingguidelines@scotland.gsi.gov.uk

Please remember to attach a completed and scanned **Respondent Information Form** available at <http://www.scotland.gov.uk/Consultations>. Look for the consultation title among the list of 'current consultations'. The Respondent Information Form is listed as part of the contents.

Acknowledgements

All responses will be acknowledged either in writing or electronically.

Additional Copies of the Consultation Document and Response Paper

Further copies of both the consultation document and the response document are available from the above address or can be downloaded from the Scottish Government's web site at:

<http://www.scotland.gov.uk/Consultations>

For further information, or if you would like the consultation document in another format or language, please contact the above address. We will try to meet your needs.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out the location of your nearest public internet access point.

The Scottish Government now has an e-mail alert system for consultations (SEconsult: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows stakeholder individuals and organisations to register and receive a weekly e-mail containing details of all new consultations (including web links). SEconsult complements but in no way replaces SE distribution lists and is designed to allow stakeholders to keep up to date with all SE consultation activity and to be alerted at the earliest opportunity to consultations of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form (as mentioned above) as this will ensure that we will treat your response appropriately. If you ask for your response not to be published, we will regard it as confidential and we will handle it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made under the Act for information relating to responses to this consultation exercise.

Where respondents have given permission for their response to be made public, copies will be made available to the public in the Scottish Government library and on the Scottish Government web pages by 24 December 2008. Where agreement to publish has been given, we will check all responses for any potentially defamatory material before logging them in the library. You can make arrangements to view responses by contacting the Scottish Government library on 0131-244-4565. Responses can be copied and sent to you but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help Ministers reach a decision on the way ahead.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them the address above.

RESPONDENT INFORMATION FORM: SENTENCING GUIDELINES AND A SCOTTISH SENTENCING COUNCIL – CONSULTATION AND PROPOSALS

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick)

As an individual (go to Q2a/b and then Q4)
On behalf of a group/organisation (go to Q3 and then Q4)

Individuals

2a. Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government website)?

Yes (go to 2b below)
No, not at all (We will treat your response as confidential)

2b. Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick)

Yes, make my response, name and address all available
Yes, make my response available, but not my name or address
Yes, make my response and name available, but not my address

On behalf of groups or organisations

3. The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you also content for your response to be made available? (please tick)

Yes
No (We will treat your response as confidential)

Sharing responses/future engagement

4. We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response? (please tick)

Yes
No

ANNEX A – EXISTING SYSTEMS: NEW ZEALAND

The New Zealand *Sentencing Council Act*, which came into force in November 2007, provides for the establishment of a Sentencing Council to draft sentencing and parole guidelines. The guidelines are intended to increase the consistency and transparency of sentencing and parole decisions, and to provide reliable information for the effective management of penal resources.

The impetus for the reform of sentencing and the creation of a Sentencing Council in New Zealand was concern over a burgeoning prison population. To that end, the Sentencing Council must also prepare a statement on the likely impact of the guidelines on the prison population. The Commission which examined the issue of an increasing prison population approached the task by examining the sentencing framework and its deficiencies from first principles.

On the recommendations of the Commission, the New Zealand Government agreed that a Sentencing Council should be established to draft sentencing and parole guidelines.

The Council will be comprised of four judicial members, the Chairperson of the Parole Board and five lay members. Judicial members will be appointed by the respective heads of bench in consultation with the Chief Justice. Lay members will be appointed by the Governor-General on the recommendation of the House of Representatives.

A Sentencing Establishment Unit (SEU) was set up within the New Zealand Law Commission in November 2006 to develop an inaugural set of draft guidelines that will form the basis of the Sentencing Council's work when it becomes operational. The Sentencing Council will be free to accept, reject or revise the draft guidelines.

Sentencing Guidelines

The purposes of the guidelines are to:

- Promote consistency in sentencing practice between different courts and judges.
- Ensure transparency in sentencing policy.
- Promote consistency and transparency in Parole Board practice.
- Facilitate the provision of reliable information to enable penal resources to be effectively managed.

Parole guidelines

In addition to producing sentencing guidelines, the New Zealand Sentencing Council must also publish guidelines about the granting of parole. It is envisaged that the parole guidelines will focus on critical and overarching matters for the granting of

parole. This is likely to include, for example, guidance on the amount of time offenders can expect to serve according to identified risk categories.

The guidelines will be subject to extensive public consultation and Parliamentary scrutiny before coming into force, under a process laid down in the 2007 Act. The guidelines are not expected to come into force until October 2009 at the earliest.

ANNEX B – EXISTING SYSTEMS: ENGLAND & WALES

In England and Wales, the Sentencing Advisory Panel (SAP) and the Sentencing Guidelines Council (SGC) work together to ensure that sentencing guidelines are produced which:

- Encourage consistency in sentencing throughout the courts of England and Wales
- Support sentencers in their decision making

The Sentencing Advisory Panel was created by the *Crime and Disorder Act 1998* to assist and advise the Court of Appeal in producing sentencing guidelines. In 2003, the Sentencing Guidelines Council was created by the *Criminal Justice Act 2003* to issue sentencing guidelines with the SAP acting much as it had before by advising the Council rather than the Court of Appeal.

The SAP's role is to advise on sentencing guidelines for particular offences or categories of offences, and other sentencing issues. Following a period of wide consultation, and research if required, the Panel produces advice which is submitted to the SGC for consideration. The SGC takes this advice and formulates draft sentencing guidelines. These draft guidelines are published, consulted on and, if necessary, revised. Final sentencing guidelines are then issued, ready to be used by sentencers.

Membership

There are twelve members of the Sentencing Advisory Panel, including judges, academics and criminal justice practitioners, as well as representatives of the public. Members are all appointed by the Lord Chancellor, in consultation with the Lord Chief Justice.

The Sentencing Guidelines Council, chaired by the Lord Chief Justice, has seven further judicial members from every tier of court that deals with sentencing in criminal cases. Judicial members are appointed by the Lord Chief Justice, after consultation with the Lord Chancellor. Four non-judicial members, with experience of policing, criminal prosecution, criminal defence and the interests of victims, are also appointed.

The Chairman of the Sentencing Advisory Panel attends meetings of the Council to enhance the link between the Council and the Panel. The Director of Offender, Law and Sentencing Policy in the National Offender Management Service is also able to attend and speak at all meetings but is not a member of the Council.

The future

Lord Carter's review of prisons¹, published in December 2007, recommended the establishment of a working group to examine the advantages, disadvantages and

¹ Lord Carter's Review of Prisons, *Securing the Future: Proposals for the effective and sustainable use of Custody in England and Wales* (December 2007)

feasibility of a structured sentencing framework and permanent sentencing commission for England and Wales. The Working Group was established in January 2008 by the Lord Chief Justice and the Lord Chancellor under the chairmanship of Lord Justice Gage. In March 2008, the Working Group published a consultation² paper inviting views on possible improvements in the operation of the criminal justice system in relation to sentencing. That consultation closed on 2 June 2008.

The Working Group's final report³ was published on 10 July 2008. Its recommendations include:

- the creation of an enhanced Sentencing Guidelines Council (SGC) combining the current SGC and the Sentencing Advisory Panel in one body;
- the collection of more data on sentencing practice including undertaking a national sentencing survey;
- placing a duty on the SGC to estimate the effect of its guidelines in terms of the prison population and other correctional resources and to provide an overview of all the factors that impact on the prison population and alert the UK Government to significant developments; and
- obliging the UK Government, when introducing a Bill or launching a new policy, to invite the SGC to assess its impact on correctional resources.

² http://www.judiciary.gov.uk/docs/consultation_ssfsc_310308.pdf

³ <http://www.justice.gov.uk/docs/sentencing-guidelines-evolutionary-approach.pdf>



**The Scottish
Government**

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