

SENTENCING GUIDELINES AND A SCOTTISH SENTENCING COUNCIL

The Royal Society of Edinburgh (RSE), Scotland's National Academy, welcomes the opportunity to comment on the proposals for *Sentencing Guidelines and a Scottish Sentencing Council*. We first address important contextual issues before addressing the questions set out in the Consultation Paper.

OVERARCHING ISSUES

We are not in favour of the proposed Sentencing Council. The proposal is, for the reasons which we set out in this response, in conflict with the independence of the judiciary, and is in any event unnecessary. In fact, Section one of the recent Judiciary and Courts (Scotland) Act 2008¹ provides a statutory commitment to continued judicial independence. We note that paragraph 1.1 of the Consultation Paper appears to found on the recommendation of the Sentencing Commission for "the creation of a procedure for giving effect to sentencing guidelines". However, examination of the Report of the Sentencing Commission shows that it recommended in favour of a sentencing advisory body and against a sentencing guidelines council (paragraphs 9.14 et seq). The Consultation Paper contains no acknowledgement of this fact, let alone any justification for the decision that there should be a sentencing council. We also note that, according to the Sentencing Commission at paragraph 1.7, there was little empirical evidence of widespread inconsistency in sentencing in Scotland. We note the references in the Consultation Paper to the system for sentencing guidelines in England and Wales. This is reasonably informative and useful for the purpose of comparison but it should be understood that there are significant differences from Scotland. The scale of the criminal jurisdictions in England and Wales is much larger, and the range of offences with which sentencers have to deal are numerous and, unlike Scotland, largely prescribed by statute.

While we are not in favour of the proposed Sentencing Council we will give our considered comments on the details of what is proposed. Those details give rise to a number of important matters of principle which deserve careful consideration by the Scottish Government and its legal and other advisers. They are as follows.

First, we consider that the purpose of the Sentencing Council is open to grave objection on constitutional grounds. Though much is said in the Consultation Paper about the objective of improving consistency in sentencing, which was the subject of the report by the Sentencing Commission, it is plain that it is intended that the Sentencing Council should formulate sentencing policy to which all courts would have a statutory duty to adhere (see paragraphs 2.9 and 2.11). Sentencing policy is, and must remain, a matter for the legislature on the one hand and the Appeal Court on the other. It is fundamentally wrong that sentencing policy should be determined by an unelected Sentencing Council.

Secondly, it is also fundamentally wrong that in reaching its decisions any court should be subject to the determinations of a lay body such as the Sentencing Council. This would be a gross derogation from the independence of the judiciary and entirely unwarranted. It is nothing to the point that, as the Consultation Paper states in paragraph 2.11, it would be possible for a court to depart from a guideline in the circumstances of a particular case, since what is objectionable is that the court would have to justify that departure. Paragraph 2.12 implies that it would rarely be the case that the Appeal Court would be faced with applying a guideline with which it did not agree. That seems to us to be unrealistic. It states that in such circumstances the Appeal Court could request the Sentencing Council to review the guideline. It appears that in the meantime it would have to apply the guideline even if it considered that to be not in accordance with doing justice in the individual case. This could well raise a question as to whether the Appeal Court was an independent and impartial tribunal for the purposes of the European Convention on Human Rights. If, after reviewing the guideline, the Sentencing Council determined that it should remain unchanged, there would be an impasse for which the Consultation Paper offers no solution. These considerations strongly indicate that sentencing guidelines should, at most, be no more than advisory.

¹ Received Royal Assent on 29 October 2008

Thirdly, it would be unconstitutional and wholly inappropriate for the Executive to have any influence on the formulation of sentencing guidelines. We note that according to paragraph 2.8 of the Consultation Paper, as read with paragraph 2.5, the Sentencing Council when producing draft sentencing guidelines would be required to consult the Scottish Ministers and the Lord Advocate, and possibly the Secretary of State and the Advocate General for Scotland.

Fourthly, the proposal for the membership of the Sentencing Council is ill-advised and inappropriate. We see the composition of the Sentencing Council as extremely important. It should call for a preponderance of judges and other members who have direct experience of the courts and the range of issues with which they have to deal. According to the Consultation Paper, while a senior judge would be the chairperson, judges would be in a minority. This strongly contrasts with the Sentencing Guidelines Council in England and Wales in which there are seven judicial members out of a total membership of eleven. The remaining members have experience of policing, criminal prosecution, criminal defence and the interests of victims (Annex B to the Consultation Paper). We should add that we question the extent to which any useful contribution could be made by two additional members referred to in paragraph 3.3 of the Consultation Paper.

Fifthly, the Consultation Paper is pervaded, as it seems to us, by an ill-founded view of the extent to which it is possible to achieve consistency in sentencing. Sentencing is not an exact science. It involves the exercise by a judge of his independent discretion in regard to the circumstances of the individual case. There is no such thing as the “correct” sentence for a given set of circumstances, and no sentencing guideline can provide for all circumstances, let alone the “correct” answer for any of them. It is, and will remain, entirely possible for two judges, in the proper exercise of their discretion, to reach different sentences in respect of the same set of circumstances. Both sentences would be justified. The Sentencing Council should not be expected to be prescriptive as to the level of sentencing for a particular offence, or the grounds for departing from a given guideline (see paragraph 2.3 of the Consultation Paper).

RESPONSES TO SPECIFIC QUESTIONS

Proposed Remit and Functions of a Sentencing Council

Question 1: Do you think that the proposed remit is appropriate? If not, what alternative would you suggest?

The proposed remit sets out a number of objectives to which the work of the Scottish Sentencing Council is to be directed. Leaving aside those relating to the provision of information and education, they are to:

- Promote consistency in sentencing practice;
- Ensure that sentencing practice and policy is (sic) transparent and understandable;
- Enable development of sentencing policy to be based on a broad range of experience and expertise;

The first of these objectives is in line with the recommendation of the Sentencing Commission that, for the purpose of promoting and encouraging consistency in sentencing, there should be sentencing guidelines. As we mentioned earlier, this is based on an apparent perception, rather than the reality, of inconsistency.

The background to the second appears to be the assertion that “it is difficult for the Scottish public to understand the sentencing process” (paragraph 1.5). However, we caution that it may well be even more difficult for the public to understand the process when there are sentencing guidelines in place. They will not supersede the need, or deny the opportunity, to refer to decisions of the Appeal Court, legislation, and textbooks. In future, argument in court will be concerned with not only the normal sentencing considerations but also the question whether a given sentence was in accordance with the relevant guideline or guidelines and, if not, whether there were good reasons why it was not. Furthermore, we are concerned that the public will assume that transparency means that there should be a “correct” sentence in any given case. As we have observed above, sentencing is not an exact science and there may be a range of sentencing options in any given case. A sentence must be appropriate for the offence and also appropriate for the offender. We add that we do not understand how the Sentencing Council would ensure that sentencing policy is transparent and understandable.

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The third objective is vague and should be clarified.

We would add that an examination of the Introduction to the Paper yields a number of further purposes of sentencing guidelines which do not appear to be reflected in the proposed remit.

First, we note that in paragraph 1.2 it is recorded that the SNP, confusingly referred to as “we”, stated in their manifesto that one of the purposes was “fairness”, which is mentioned again in paragraph 1.11. It is not clear by whom sentences are to be judged to be fair. Secondly, in paragraph 1.8 it is said that “people have a right to expect that this (the sentencing process) will take account of their interests and concerns”. This suggests concerns as to the adequacy or appropriateness of sentences. However, it is one thing to issue guidelines to help sentencers achieve consistency. It is a different matter altogether to issue guidelines as a means of driving the level of sentence for a given type of offence either up or down, or expressing a policy for or against a particular type of disposal. That would go well beyond the recommendation of the Sentencing Commission. Thirdly, in paragraph 1.10 it is said that steps should be taken to ensure that sentencers use the “revitalised” community penalties.

It is unclear what part these considerations are intended to play in the remit of the Sentencing Council. Some of them appear to relate to sentencing policy which is a matter for the legislature and the Appeal Court.

Question 2: Do you think that the proposed functions are appropriate? If not, what alternatives would you suggest?

Further to the issues raised in our previous answer if, in an attempt to maintain judicial independence, sentencers are to be permitted to depart from sentencing guidelines if the circumstances of the case require it, it would be wrong for the Sentencing Council in advance to seek to circumscribe the circumstances in which departure would be permitted (see paragraph 2.3 of the Consultation Paper). To do so would be to interfere with judicial independence. Once a sentencer has departed from guidelines, it should be for the Appeal Court to decide whether or not his action was justified.

We agree that the Sentencing Council has an important function to provide information to the public about sentencing as indicated in paragraph 2.3. The Sentencing Council could have a valuable research and monitoring function as well as an educative function. In these respects

it could consider the range of disposals available to sentencers and provide an evidence base as to the efficacy of disposals. Part of this could involve considering the use of disposals in other countries. This would help inform public opinion and understanding.

Question 3: Do you think our proposals in relation to the production of sentencing guidelines are adequate?

In paragraph 2.9 it is said that the public should have an opportunity to comment on draft guidelines “providing ordinary people with a greater opportunity than ever before to influence sentencing policy in Scotland”. The Sentencing Council is to make and publish its assessments of costs and benefits of its draft guidelines. These proposals confirm our concern that the intention is that sentencing policy, to which sentencers are to be obliged to adhere, is to be set by the unelected Sentencing Council rather than by the Parliament and the Appeal Court.

Also, importantly, Scottish Ministers, or the Lord Advocate, or the Secretary of State or the Advocate General should not play any part in the formulation of sentencing guidelines (paragraph 2.8). There is an important constitutional issue here. The legislature can pass laws which the courts must then follow and apply, but Ministers, the executive arm of Government, have no right to tell the courts what to do, and must not be seen to be doing so. It has long been recognised in Scotland that the Lord Advocate and the prosecution service have no role to play in sentencing, and it would be wholly inappropriate and unconstitutional for the Lord Advocate or the Scottish Ministers to be seen to be influencing the way in which sentences are imposed. Parliament can tell the judges what to do, but Ministers cannot.

Question 4: Do you think that we are proposing the correct level of consultation on draft sentencing guidelines?

The Sentencing Council has a role in determining who should be consulted. This would depend upon the nature of the issue.

Question 5: Do you consider that our proposals for the relationship between the Sentencing Council and the Courts is appropriate?

No. The incompatibility between sentencing guidelines prepared by the Sentencing Council and judicial independence in the courts is at the heart of the matter. As raised in the overarching issues it is plain that it is intended that the Sentencing Council should formulate sentencing policy to which all courts would have a statutory duty to adhere (paragraphs 2.9 and 2.11). Sentencing policy is, and must remain, a matter for the legislature on the one hand and the Appeal Court on the other. As presently conceived membership of the Sentencing Council is predominantly non-judicial and it is fundamentally wrong that in reaching its decisions the Appeal Court should be subject to the determinations of such a lay body. At paragraph 2.11 the Consultation Paper states that it would be possible for a court such as the Appeal Court to depart from a guideline in the circumstances of a particular case but it is objectionable that the Appeal Court would have to justify that departure. Paragraph 2.12 implies that it would rarely be the case that the Appeal Court would be faced with applying a guideline with which it did not agree. That seems to us to be unrealistic. It states that in such circumstances the Appeal Court could request the Sentencing Council to review the guideline. It appears that in the meantime it would have to apply the guideline even if it considered that to be not in accordance with doing justice in the individual case. This could well raise a question as to whether the Appeal Court was an independent and impartial tribunal for the purposes of the European Convention on Human Rights. If, after reviewing the guideline, the Sentencing Council determined that it should remain unchanged, there would be an impasse for which the Consultation Paper offers no solution.

Question 6: Do you agree that the Scottish Sentencing Council should have the power to carry out, commission and co-ordinate research?

Yes. As stated in our answer to question two we agree that the Sentencing Council should have a role in informing public understanding.

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?

We agree that the Sentencing Council's statutory functions should include providing information in its

annual report on how its functions have been carried out. The expectation from the Consultation Paper is that the Sentencing Council should go far beyond this requirement. However, paragraph 2.17 states that it is for the Council to decide how its functions are discharged. In terms of the Council's activities in relation to the provision of information, considerable thought will need to be given to how such activities will be resourced and funded. At this point we also reiterate that it may well be even more difficult for the public to understand the sentencing process with sentencing guidelines in place.

Question 8: What measures might be taken by the Scottish Sentencing Council to make the sentencing process more transparent?

Please bear in mind the earlier concerns we raise in relation to the public assuming that there should be a "correct" sentence for a given set of circumstances. As already pointed out above, it is, and will remain, entirely possible for two judges, in the proper exercise of their discretion, to reach different sentences in respect of the same circumstances. Both sentences would be justified.

Proposed Structure of the Sentencing Council

In this part of the Consultation Paper, and in the Glossary, there are inaccuracies and inconsistencies in drafting that convey an unfortunate ignorance of Scotland's criminal justice system.

- The Lord President has no criminal jurisdiction, and no part to play in sentencing. The reference in paragraph 3.2 and in subsequent paragraphs should be to the Lord Justice General.
- In the Glossary the Lord Justice Clerk is referred to as Deputy to the Lord President. This is not the case.
- In the Glossary the Stipendiary Magistrate is described as a "Judge", whereas the Sheriff is only "analogous to a judge".
- In the Glossary the sentencing powers of the Stipendiary Magistrate are given, but not those of the Sheriff, let alone the fact that in the Sheriff Court the Sheriff sits with a jury in the solemn (more serious) cases, and on his own in summary cases.
- In the Glossary it is misleading to convey that mitigating factors exist only where there are "unusual or extreme elements leading up to or attending the commission of the offence".

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Question 9: Do you agree that the chair of the Scottish Sentencing Council should be a senior member of the judiciary?

We are in no doubt that the chair of the Scottish Sentencing Council should be a senior member of the judiciary.

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?

We see the composition of the Sentencing Council as extremely important and do not consider the proposed membership of the Council, as set out in paragraph 3.2, to be appropriate. Under the current proposal the Sentencing Council would consist of a majority of non judicial members and as such they would not have the requisite professional expertise, experience and skills in respect of the courts and the range of issues with which they have to deal. This strongly contrasts with the Sentencing Guidelines Council in England and Wales in which there are seven judicial members out of a total membership of eleven. The remaining members have experience of policing, criminal prosecution, criminal defence and the interests of victims (Annex B to the Consultation Paper). We also question the extent to which any useful contribution could be made by the two additional members referred to in paragraph 3.3 of the Consultation Paper.

As such, we suggest the following membership which would be more suitable.

- The Lord Justice General
- The Lord Justice Clerk
- Three Lords Commissioner of Justiciary
- Two Sheriffs, one of which could come from an urban sheriff court district and the other from a more rural district to take account of court business in these different areas.
- One justice of the peace or stipendiary magistrate
- One nominee of ACPOS
- One nominee of the Faculty of Advocates
- One nominee of the Law Society of Scotland

- One representative of a victim's organisation or specialist in victim's issues
- One representative of social work services

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).

Given the paramount importance of the principle of separation of powers it would be constitutionally undesirable for a representative of the executive arm of Government to be present at meetings of the Sentencing Council even as an observer. We are concerned that the principle is not sufficiently recognised in the Consultation Paper.

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?

Periods of tenure on the Council should be staggered so that there is not a wholesale replacement at any one time. Retirements should be phased to allow for continuity.

Question 13: Do you agree with our proposals for how the Scottish Sentencing Council should be resourced and supported?

We agree that appropriate funding would need to be made available to ensure that the Sentencing Council is properly resourced.

Statutory Statement of the Purpose and Principles of Sentencing

Question 14: Do you agree with our proposals for a statutory statement on the purpose of sentencing?

The purposes of sentencing are well known and do not require to be embodied in statute.

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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?

We believe there is no need for a set of statutory principles in relation to sentencing. Setting out a set of statutory principles would inhibit the considerable expertise, skills and experience of sentencers in making sentencing decisions. However, if it is deemed necessary for public reassurance reasons that a set of statutory principles should be devised, those principles would have to go well beyond those specified in paragraph 4.5. The statement in paragraph 4.5 is lamentably inadequate and betrays a shallow understanding of the most significant factors in sentencing.

It concentrates on “all of the facts and circumstances surrounding the offence and the offender”, but makes no mention, in that context, of:

- the seriousness of the particular offence (as opposed to the type of offence), including matters such as the injury or damage caused by it
- previous convictions

It makes no reference to:

- a plea of guilty
- statutory provisions, such as those relating to first or young offenders.

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).

As mentioned in the Consultation Paper, High Court judgements have made it clear that alcohol or intoxication should not be regarded as a mitigating factor. There is thus no need to state this in statute.

ADDITIONAL INFORMATION AND REFERENCES

In responding to this consultation the Society would like to draw attention to the following Royal Society of Edinburgh responses which are of relevance to this subject:

- The Royal Society of Edinburgh’s submission to the Scottish Prisons Commission (April 2008)

Any enquiries about this submission and others should be addressed to the RSE’s Consultations Officer, Mr William Hardie (email: evidenceadvice@royalsoced.org.uk).

Responses are published on the RSE website (www.royalsoced.org.uk).

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