SENTENCING GUIDELINES AND A SENTENCING COUNCIL

CONSULTATION AND PROPOSALS

RESPONSE BY JUDGES OF THE HIGH COURT OF JUSTICIARY

Introduction

We note that the Scottish Government is committed to introducing a Sentencing Council. At the outset of our response we seek to stress the importance of the role of the Court of Criminal Appeal in determining sentencing policy in Scotland over many years. Through the cumulative effect of many individual decisions in both defence and Crown appeals relating to sentence, and the use of the powers of the Appeal Court to issue ‘guideline judgments’ under the provisions of sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995, a body of guidance for individual sentencers has already been developed. In their report, “The Scope to Improve Consistency in Sentencing” (August 2006), the Sentencing Commission for Scotland recommended that the Appeal Court should consider making greater use of its powers to issue guideline judgments. The Appeal Court has already responded to that recommendation and has recently issued a number of guideline judgments.

We welcome the recognition in the consultation paper of the importance of retaining judicial discretion in the model chosen for the development of a Sentencing Council in Scotland. In particular, we welcome the statement of intent at paragraph 1.13 that the fundamental principle of judicial discretion should remain at the core of our system of sentencing. It seems to us that, subject to certain statutory limitations, the imposition of any sentence is essentially an exercise of judicial discretion and must remain so. Each sentence requires to be tailored to the individual circumstances of the particular case. For these reasons we welcome the intention that the Scottish model should be less
prescriptive than those of the majority of Western jurisdictions which have established
Sentencing Councils.

However, despite these statements of intent, there are, in our view, aspects of the current
proposals which are liable to undermine, to a significant and potentially serious extent,
the principle of judicial independence in its application to sentencing. We have a number
of concerns in relation to certain of the proposals. We consider that the membership of
the Sentencing Council should comprise a majority of judicial members. We note that
the proposals for consultation in the course of preparation of guidelines do not include
any requirement of consultation with the judiciary. We are particularly concerned about
what is proposed as to the relationship between the Sentencing Council and the Appeal
Court. We address these issues in detail below.

Remit

Question 1

With respect to the remit to ensure that sentencing practice and policy is transparent and
understandable we would point out that when sentencers pass sentence they do as a rule
explain in straightforward language the basis for the particular sentences selected. In
addition, if a judge or sheriff decides that it would be appropriate to do so, the judiciary’s
Public Information Officer will arrange for copies of the sentencing statement made by
the sentencer at the point of sentence to be sent to the media, for the purpose of
accurately informing the wider public about the sentence imposed and the reasons for it.
With respect to the development of sentencing policy we have concerns as to the risk of
conflict between the Sentencing Council and the Appeal Court in the development of
such policy and as to the creation of confusion as to what that policy is. This stems from
the proposals as to the relationship between the Council and the Court which we address
more fully in our response to question 5.

Question 2
We have no comment to make.

**Procedure**

*Questions 3 and 4*

We have no comment to make on the proposals that the Sentencing Council should be required to prepare a business plan which would be placed before the Scottish Parliament. Nor do we have any comment to make on the proposal that the office-holders referred to in paragraph 2.5 should be entitled to suggest topics for consideration by the Council. We do, however, have concerns about the proposal that the Council should be required in its annual report to provide reasons for declining to deal with a reference from an office-holder. We would be concerned if that were to result in the Sentencing Council, the membership of which would include senior members of the judiciary, becoming subject to the supervision or direction of the Scottish Government and members of the Scottish Government. We are concerned lest actual or at least perceived interference with the independence of the judiciary might result. Were that to occur, it might increase the impression of political pressure being brought to bear on individual sentencers in relation to particular cases. The objectives of establishing a Sentencing Council should include that of trying to keep politics out of sentencing.

For the same reasons, we would resist any proposal that the Justice Committee of the Scottish Parliament should be entitled to call members of the Sentencing Council before it for the purposes of discussing the terms of any draft guidelines currently out for consultation.

We note with concern that the present proposals do not include the judiciary as a body that requires to be consulted in the preparation of any guidelines. Given that sentencing is a judicial function we consider the absence of a proposal to include the judiciary in the list of those who must be consulted, to be surprising and unacceptable. This absence
gives even greater cause for concern when it is considered along with (a) the current proposals in paragraphs 2.11 – 2.13 of the consultation paper as to the relationship between the Appeal Court and the Sentencing Council, which we address in our response to the next question; and (b) the proposal that judicial members should be in the minority on the Sentencing Council, which we address in our response to questions 9 and 10. It seems to us that the package of proposals in their present form would result in wholly inadequate input from the judiciary into the work of the Sentencing Council.

**Question 5**

The proposals which are focused in this question give us most cause for concern. We consider that the proposals at paragraphs 2.11 – 2.13 in the consultation paper as to the relationship between the Sentencing Council and the Appeal Court are unsatisfactory, unworkable and unacceptable. In our view the model contemplated in the consultation paper would have significant impact on the independence of the judiciary and would fundamentally alter the position of the Appeal Court in its role of controlling the development and application of sentencing policy. The Appeal Court would lose its current responsibility for control of sentencing policy, subject to particular statutory provisions. There would be an inevitable interference with the discretion of that Court. The authority of the Appeal Court would be likely to be diminished. This aspect of the proposals raises real concerns about erosion of the principle of separation of powers. In addition, the proposals may well create the potential for conflict and friction between the Court and the Council with the prospect of irreconcilable differences emerging.

In our view the ultimate responsibility for the development and application of sentencing policy should remain with the Appeal Court, subject to the right of the legislature to enact primary legislation regulating the powers of sentencers. This is in accordance with the principle that sentencing is a judicial function. We prefer the recommendations of the Sentencing Commission for Scotland in Part Nine of their report (supra). The Commission considered that sentencing should continue to be a judicial function but that the Appeal Court would have the benefit of advice from a body drawing on a range of
relevant skills and experience. The Commission rejected a model in which the Sentencing Council would be involved not only in drafting guidelines but also in their finalisation and promulgation. The Commission concluded at paragraph 9.16:

“An advisory body, comprising a reasonably compact group drawn from across the criminal justice spectrum, including sentencers from every level, and other individuals with relevant experience and expertise, would, we consider, provide material assistance to the Appeal Court in carrying out the vital duties which the Appeal court requires to perform.”

The Commission recommended that such a body, to be known as the Advisory Panel on Sentencing in Scotland (“APSS”), should be created. The Commission went on to recommend that the APSS should draft guidelines for the consideration of the Appeal Court. They further recommended that the Appeal Court should be able to approve the draft guidelines and should also have the power to remit the draft guidelines back to the APSS for reconsideration and amendment in the light of the comments of the Appeal Court. Ultimately, under the scheme contemplated by the Commission, the Appeal Court would have the power to approve, or to decline to approve, the draft guidelines.

We note that the Commission carefully considered whether the English model was suitable for application in Scotland. While the Commission recommended that the APSS should be of similar composition and have similar powers to those of the Sentencing Advisory Panel in England and Wales, it rejected the model of the Sentencing Guidelines Council in England and Wales in which other individuals are involved along with judges not only in the drafting of guidelines but also in their finalisation and promulgation. We are aware that the system that operates in England and Wales has recently been reviewed in the Report of the Sentencing Commission Working Group (“the Gage Report”).

We agree with the approach of the Sentencing Commission for Scotland. In our view a model along the lines contemplated by that Commission could be of considerable assistance to the Appeal Court and to individual sentencers across the country. A
Sentencing Council with an appropriate membership, adequately staffed, and supported by sufficient resources, could ingather material from various sources, including other jurisdictions, conduct relevant research and analysis, and produce informed draft guidelines. Sentencing guidelines underpinned by such research and approved by the Appeal Court would powerfully inform individual sentencers at every level in imposing sentence in a particular case. The fact that the guidelines had been approved by the Appeal Court would fortify sentencers in applying them. That in turn may help to command public support for the criminal justice system in Scotland

Question 6

We agree that the Scottish Sentencing Council should have the power to carry out, commission and co-ordinate research. We consider that such research would provide evidence to inform sentencing policy. We consider that such research could provide the judiciary with useful information in relation to sentencing. We recognize that such research would require significant time and resources and stress the need for a Sentencing Council to be properly resourced in order to meet this and other demands on it.

Questions 7 and 8

While we have no objection to these proposals we have some difficulty in identifying how these proposed functions might be fulfilled beyond the publication of an annual report.

Structure

Questions 9 and 10

We agree that the membership of the Sentencing Council will be important. As is pointed out in the consultation paper the Sentencing Council will need to command legitimacy in the eyes of sentencers, the wider criminal justice community, and the general public. We agree that a blend of judicial and non-judicial membership would be appropriate and that a senior judge should take the chair. However, we consider that the
balance of judicial and lay membership in the proposal is not appropriate. In our view the appropriate combination of expertise, experience and skill, together with a recognition of wider interests would best be produced by a Sentencing Council with a majority of judicial members. As already observed sentencing is a judicial function, involving the exercise of judicial discretion, subject to certain statutory provisions. Members of the public are well aware of sentencing as something which judges of all levels do on a daily basis. We believe that members of the public would expect a Sentencing Council to comprise primarily of those with practical experience in sentencing and would be surprised if a Sentencing Council did not have a majority of judicial members. Furthermore, we anticipate that the workload of the Council will be considerable. The drafting and revisal of guidelines will require considerable input from the judicial members of the Council. In our view the membership should include at least two High Court judges, two sheriffs and possibly also a Sheriff Principal.

Question 11

We have no comment to make.

Question 12

We have no objection in principle to the proposals for appointment and terms of office. We suggest that some degree of flexibility might be desirable in order to avoid too large a turnover of members at any one time.

Question 13

We agree with the proposal that the Sentencing Council should be established as an Executive Non Departmental Body. We agree that the Council will require a considerable support staff. We repeat our view that the Council must be given adequate resources to carry out its function in a meaningful way. If the Council were to be based on the model recommended by the Sentencing Commission, the office could be managed
and supported through the Scottish Courts Service in its reconstituted form. We doubt, however, if that would be appropriate were the Council to be given power to issue guidelines to which the Criminal Appeal Court would be required to adhere. The reconstituted Scottish Court Service will be judicially led. As such it is doubtful whether it could have administrative and financial responsibility for a body that had statutory power to supersede the views of the members of the Appeal Court on sentencing policy.

**Statutory statement of purpose and principles**

*Question 14*

We have no comment to make.

*Question 15*

We question whether it is necessary or appropriate for the principles of sentencing to be set out in statute. It seems to us that the identification of principles of sentencing might well be a matter for the Sentencing Council itself to consider.

*Question 16*

We do not agree with the proposal to state explicitly in statute that voluntary drunkenness or intoxication can never be considered a mitigating factor by the courts. We consider this to be unnecessary. This is already a well recognised rule and there is no need for a statutory statement to this effect.