RESPONSE
BY THE
SHERIFFS’ ASSOCIATION
TO THE
CONSULTATION DOCUMENT:
SENTENCING GUIDELINES AND A SCOTTISH SENTENCING COUNCIL

The Sheriffs’ Association welcomes the opportunity to respond to this consultation document. The Sentencing Commission Report published in August 2006 recognised that 96% of sentences imposed in Scotland are imposed in the summary courts and, when account is also taken of sentences imposed in the sheriff courts under solemn procedure, only around 2% of sentences imposed in Scotland are imposed in the High Court. The Sheriffs’ Association, representing the body of the judiciary, which imposes the vast majority of sentences, considers it is uniquely placed to respond to the proposals in this consultation document.

We are concerned that the proposals proceed in the absence of any evidence that there exists any inconsistency in sentencing or lack of public confidence in the system of sentencing. The Sentencing Commission did not commission independent research to establish if there existed any inconsistency in sentencing and recorded that research into inconsistency in sentencing in Scotland is virtually non-existent. The Sheriffs’ Association therefore considers that before any proposals are introduced proper independent research needs to be carried out to establish whether or not there is any significant inconsistency in sentencing in Scotland.

The Sheriffs’ Association believes the current procedure for dealing with any sentences that are imposed outside the normal parameters is effective and commands respect. Any sheriff, or other judge, subject to an appeal against sentence has to give cogent reasons for the decision made and, if that reasoning does not stand up to scrutiny, the sentence will be reduced, or increased.

We do not accept that the solution to those cases where a sentence falls outside the recognised parameters is by way of the burdensome and, we suspect, expensive bureaucracy that will be the result of these proposals.

The consultation document at paragraph 1.1, quotes the late Lord Macfadyen that, “a perception of inconsistency in sentencing is likely to lead to a loss of public confidence in the criminal justice system”.

The consultation document leaps from that hypothesis to the conclusion expressed at paragraph 1.5, that because sentencing works on an individual case basis, supplemented by recognised sources relied upon by judges, the public do not understand the sentencing process, or the reasons behind decisions and states that,
“This has helped to create a common perception that sentencing in our courts is inconsistent which, consequently, has had a negative effect on confidence in the criminal justice system.”

No evidence is produced to support these claims. They are contradicted at paragraph 1.7 where it is recorded that particularly amongst practitioners the view is held that sentencing is not inconsistent but is dealt with on an individual basis. The Sentencing Commission found little empirical evidence to support the view that there was widespread inconsistency in sentencing in Scotland.

The Sheriffs’ Association is concerned that, in the absence of any evidence to support the notion that there exists widespread inconsistency in sentencing which require guidelines to be introduced, the aim of this policy is more to do with Government concerns over a rising prison population and thereby to interfere with judicial independence by limiting the number of offences which merit a sentence of imprisonment. We note in paragraph 1.10 the comment that sentencing decisions are not made in isolation but have consequences for other parts of the criminal justice system which have to implement the sentence. That comment is open to the interpretation that in imposing a sentence the judiciary should take account of the impact on the Scottish Prison Service of sentencing an offender to custody. In our view it is essential that the judiciary remain free to impose the appropriate sentence for the offence committed, regardless of the impact that sentence may have on the prison population. Any attempt to influence any sentencing decision in that way would be an attack on judicial independence.

While the consultation document claims to recognise that sentencing is a complex matter and has become more complicated, as a result of legislation and decisions of the Appeal Court in recent years, what is proposed will, in the view of the Sheriffs’ Association, make sentencing even more complex. The proposals will also, in our view, have a significant impact on judicial, particularly shrieval, resources.

It is proposed in paragraph 1.13 that where any sentence is outwith the range provided by the guidelines the judge has to explain in full the reasons for departing from the guidelines. Those reasons have to be given at the point of sentencing, see paragraph 2.11.

The impact of the proposals on court time will be considerable particularly in the sheriff court. It is not uncommon for a sheriff in a busy court to impose in excess of 50 sentences a day. In addition to all the factors which that sheriff already has to take into account before imposing any sentence it is proposed that guidelines will also have to be consulted before sentencing. That will be time consuming and will have to be taken into account in every case. It will be impossible to do so without allowing for out of court preparation time. Moreover, since a departure from the guidelines will require the judge to state full reasons for doing so at the point of sentencing, it is envisaged the court will have to adjourn to allow that judge to prepare his statement. That will have an impact on the number of cases it will be possible to deal with in a
day. The cumulative effect of these proposals will result in the need for additional judicial resources to cover the additional courts that will be required to dispose of business, or current targets for disposal of cases will be greatly exceeded.

While the Sheriffs’ Association remains opposed to the introduction of sentencing guidelines we wish to comment on the proposed model for any Sentencing Council, which will draft such guidelines. While the Sentencing Commission referred to the existence of sentencing guidelines in other jurisdictions, such as England and Wales, some USA States and countries in Western Europe the consultation document has rejected those in favour of the New Zealand model. We have reservations about the reasoning behind that choice. The consultation document explains that the creation of a Sentencing Council in New Zealand was due to concern over “a burgeoning prison population” as a result of which its Sentencing Council has to prepare a statement on the likely impact of sentencing guidelines on the prison population. The Sheriffs’ Association is concerned that the preference for the New Zealand model may lie in a desire to achieve a reduction in the prison population. For the reasons already stated we consider attempts to achieve that end by means of sentencing guidelines is a potential threat to judicial independence.

The consultation document goes on to argue that the New Zealand model is attractive because of New Zealand’s similarity to Scotland in terms of population and its legal system. We do not find these arguments convincing as a reason for adopting the New Zealand model. It seems to us that any model which is adopted should be one from a country with a strong connection with Scotland in terms of suffering from the same social and cultural problems which lead to offending. New Zealand does not satisfy that criteria.

While New Zealand has a population of 4.5 million it has an economy based on agriculture and tourism. We are not aware of New Zealand being a society that suffers from the effects of binge drinking, a drugs culture, a culture of carrying weapons or of gang culture, and the crimes committed as a result thereof. These problems are prevalent in Scotland and underlie the commission of a considerable number of offences. In our view a more appropriate model is to be found in that of England and Wales, which has similar social problems to that of Scotland.

It is also of concern that the New Zealand model was introduced as recently as November 2007 by the New Zealand Sentencing Council Act, and its effectiveness, or otherwise has not been tested. Indeed we believe that, following the recent election in New Zealand leading to a change in Government, the Sentencing Council may be abolished. It is understood the new Government does not agree with the Sentencing Council’s aim of reducing sentences by 25%, and intends to divert the $1.5 million funding for the Sentencing Council into providing services for victims of crime.
We note that the Sentencing Council in New Zealand has a minority of judicial members. The Sheriffs’ Association is opposed to any Sentencing Council which does not have a majority of judicial members. As the consultation document points out in paragraph 3.1 the composition of the membership of any Sentencing Council is important since those who have to comply with the guidelines have to have confidence that the guidelines are drawn up by those with the appropriate expertise, experience and skills. The Sheriffs’ Association is of the view it is unlikely that the shrieval branch of the judiciary would have confidence in any Sentencing Council that did not have a majority of judicial members.

If a Sentencing Council is to be introduced it would be appropriate, in our view, to adopt a similar membership to the structure in England and Wales set out in Annex B of the consultation document, which has a majority of judicial members.

The Sheriffs’ Association however remains opposed to the proposal that a Sentencing Council be created to draft sentencing guidelines. If sentencing guidelines are to be introduced, which for the reasons stated we are convinced are unnecessary, we prefer the model recommended in 2006 by the Sentencing Commission, chaired by the late Lord Macfadyen. It recommended that a sentencing advisory body, the Advisory Panel on Sentencing in Scotland (“APSS”) be created to frame draft sentencing guidelines with the adoption, or otherwise, of those guidelines being ultimately a matter for the Appeal Court. That recommendation recognised the importance that the Appeal Court remain in overall control of sentencing policy.

The omission of any reference in this consultation paper to the recommendation of the Sentencing Commission that an Advisory Panel on Sentencing in Scotland (“APSS”) be created, as opposed to a Sentencing Council, is an omission we find surprising. The notion of creating a Sentencing Council was rejected by the Sentencing Commission. We agree with the reasoning behind that decision, see paragraph 9.15 of its report. The Sheriffs’ Association regard it as fundamental to the constitutional principle of judicial independence that sentencing remains a judicial function, and maintaining the role of the Appeal Court in overseeing that function would ensure the protection of judicial independence.
The Sheriffs’ Association, subject to the observations made in our introductory remarks, responds to the questions in the consultation document as follows:

**Remit of the Scottish Sentencing Council**

**Question 1** – Do you think that this proposed remit is appropriate? If not, what alternative would you suggest?

No. The Sheriffs’ Association does not consider that the proposed remit is appropriate for the following reason. Since the aim of the Sentencing Commission in proposing sentencing guidelines is to promote and improve consistency in sentencing, to increase public confidence and to recognise the final decision on sentence is based on the fact of the case and is for the judiciary, we consider the proposed remit should be restricted to those aims. We are of the view that if there is to be a Sentencing Council then the principle of promoting greater understanding and enhancing public confidence in the criminal justice system may be worthwhile including in the remit.

We suggest the remit of any Sentencing Council should be to:

“Promote consistency in sentencing practice; to ensure that sentencing practice is transparent and understandable, while preserving the important element of judicial discretion; “Inform and educate the public about sentencing decision making, with a view to promoting greater understanding and enhancing public confidence in the criminal justice system.”

We consider the references to policy should be removed from the remit, as should the reference to developing sentencing policy, and the reference to informing the Scottish Ministers and Parliament on sentencing practices and areas for reform. This would recognise that any Sentencing Council should be judicially led and should not encroach into the area of policy.

**Question 2** – Do you think that these proposed functions are appropriate? If not, what alternatives would you suggest?

No. The proposed functions are not appropriate. So far as sub-head one is concerned sentencing levels for particular offences are already prescribed both for common law and statutory offences. Any attempt to have sentencing powers more narrowly circumscribed within the parameters already set is an interference with judicial independence and would be contrary to section 1 of the Judiciary and Courts (Scotland) Act 2008.

The requirement in sub-head two that judicial guidelines should be produced on particular types of sentences, disposals and other orders available at the time of sentencing is unnecessary since judges are aware of their sentencing limitations at present.
We consider sub-head three is an attack on judicial independence. The notion that judges be faced with a list of grounds justifying a judge’s departure from sentencing guidelines is also offensive. The consultation document fails to recognise that at present there exists a perfectly adequate system for dealing with any sentence imposed which is outwith the recognised parameters, and that is by appeal to the Court of Criminal Appeal.

Sub-head four is objectionable. It could allow a provision to be introduced that the judiciary had to take account of prison capacity when considering the appropriate sentence to impose.

Sub-head five refers to guidelines being produced to support research and academic work relevant to the Council’s remit. This is inappropriate at this stage. The time to carry out research is before considering implementing proposals thereby ascertaining whether there is any need for these reforms.

The purpose of sub-head six is objectionable in its suggestion that information on, compliance with, and departure from sentencing guidelines is to be collected and that information is to be published. The proposal is a potential attack on the independence of the judiciary particularly if the identity of the judges who do not comply is included.

Sub-head seven and the proposal that the public should be provided with information about sentencing is too vague. If implemented it will lead to confusion and misunderstandings.

The Sheriffs’ Association does not suggest any alternative function. We suggest that proper independent research is carried out to establish whether there is any inconsistency in sentencing which would justify the establishment of a Sentencing Council to produce sentencing guidelines.

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

No. While the consultation document professes to allow the Sentencing Council to establish its own method of working including procedures for producing sentencing guidelines it then goes on to impose controls on how the Council is to work. The Sheriffs’ Association considers that a Sentencing Council has to be a judicially led body with a majority of judicial members and what is proposed does not provide for that essential element.

The Sheriffs’ Association finds it objectionable that office holders including the Scottish Ministers, the Lord Advocate, possibly the Secretary of State for Scotland and the Advocate General for Scotland would have to be consulted in relation to the business plan. Any Sentencing Council must remain independent and to carry out its function in accordance with this remit it should be adequately funded.

The introduction of the role of Lord Advocate to the sentencing process is objectionable given her role as head of the prosecution service.
The Sheriffs’ Association finds objectionable the suggestion that Ministers, including the Lord Advocate, should be able to ask the Sentencing Council to produce guidelines on particular issues and, if the reference were not taken up, the Sentencing Council would have to explain its reasons for not doing so in its annual report. That could allow political interference in the sentencing process. For any Sentencing Council to have any credibility it must remain free of political interference.

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

No. Certain office holders are named as being required consultees. For the reasons given above we consider that those office holders should not be consulted.

We note in particular that the judiciary is conspicuous by its absence as one of the parties to be consulted. As the sentencing process is in our view solely a judicial function it is obvious it should be the main consultee.

The suggestion that the public should have the opportunity to comment on draft guidelines before they are finalised is mistaken. It could be abused by special interest groups with their own agenda.

We regard as unacceptable the proposal that any Sentencing Council will require to have in mind when framing guidelines the costs of particular dispositions and the likely impact on the prisoner population. The judiciary currently do not consider such factors when selecting sentence as such considerations interfere with judicial independence. In imposing any sentence, whether it is a custodial or non-custodial sentence, a judge has a number of important principles to consider but the cost of any such disposal should never be a consideration. The judiciary must remain free of any attempt by the Executive to influence judicial decision making because of cost implications.

**Question 5** – Do you consider that our proposals for the relationship between the Sentencing Council and the courts are appropriate?

No. The proposal that judges of all courts, including the Court of Criminal Appeal should be under an obligation to adhere to the sentencing guidelines effectively elevates the Sentencing Council above the courts and is a clear interference with the independence of the judiciary.

The suggestion that if the guidelines are departed from the judge is required to formally state, and also record, detailed reasons for doing so when sentence is imposed will have a considerable impact on the running of the courts and will inevitably lead to a need for more judicial resources particularly in the sheriff court where the majority of sentences are imposed. Since the proposal demands a record with detailed reasons, this will involve a written report by the judge. That report will require to be compiled prior to imposing the sentence and will lead to courts being adjourned on a regular basis for the
judge to prepare that report. The notion that a judge should provide a report
to the Sentencing Council is objectionable in principle. It is to the Appeal
Court that any judge has to justify the reason for his sentence and not a
Government sponsored body.

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

Yes. Sentencing guidelines would have no credibility unless based on
research and carried out by truly independent researchers.

**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?

7 (a) We have no difficulty with this proposal and see no harm in explaining
the sentencing process so long as it does not interfere with the process itself.

7(b) The proposals are so complicated that in our view the process is likely to
be less clear and less understandable to the public but how any Sentencing
Council sets about achieving a process that is clearer and more understandable
to the public would be a matter for them.

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

We do not understand what is meant by this question. We consider the
sentencing process is already transparent and is enhanced by accurate and
adequate press reporting. The judiciary in imposing sentence is obliged to
explain the reasons for imposing any particular sentence and does so in a clear
and concise manner.

**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?

We are emphatically of the view that the Chair of the Scottish Sentencing
Council must 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?

No. It is essential that a Scottish Sentencing Council has a majority of judicial
members. The proposed composition of the Sentencing Council in the
consultation document is unacceptable. It proposes a Council with a minority
of four judicial members with seven non-judicial members. That composition
flies in the face of the statement in the consultation document which claims to
recognise that for judges and others to have confidence in sentencing guidelines they should be drawn up by those with the appropriate expertise, skills and experience. Those with that experience are the judges who impose sentences as they have the detailed and up to date experience of sentencing, while remaining an independent body not representing any faction or single interest group.

Sentencing is a wholly judicial function. We therefore propose that the model in England and Wales is the appropriate model to adopt which has a majority of judicial members comprising eight judicial members representing every tier of the court system.

**Suggested Membership of a Scottish Sentencing Council**

The Sheriffs’ Association considers that any membership of the Scottish Sentencing Council should reflect that the function of sentencing is wholly judicial. We propose that the Chairperson should be the Lord President, in his capacity as Lord Justice General, or the Lord Justice Clerk. There should be in addition one Inner House Judge with experience of sitting on sentencing appeals, and one Outer House Judge with experience of presiding over High Court trials and sentencing at first instance.

In addition the number of sheriffs on any Sentencing Council should be increased to reflect the position that the majority of sentencing in Scotland is carried out by sheriffs, both at summary and solemn level. We propose that there should be six sheriffs to reflect the number of sheriffdoms in Scotland, and the diversity of local communities within those sheriffdoms. In addition there should be one Justice of the Peace or Stipendiary Magistrate.

We propose that the four non-judicial members are appointed conform to the English model. Those four non-judicial members would be individuals restricted to one each of those with experience of policing, criminal prosecution, criminal defence and the interests of the victims.

**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).

No. Such a presence would interfere with the requirement for total independence of the judiciary and of the sentencing process. Having a Government observer would give rise to the grounds of suspicion that the Sentencing Council was Government controlled or at least influenced. Any Sentencing Council has to be, and be seen to be, independent of Government.

**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?

No. We find the notion that the Lord President should consult with the Scottish Ministers before appointing judicial members objectionable. The Lord President should be free to appoint whoever he wishes as judicial members without any political or other outside input.
The Sheriffs’ Association agrees that it is appropriate that appointments be for a fixed term of five years to ensure independence and impartiality. This should not include the chairman who will be there ex officio.

We agree with the proposal that Ministers will appoint non-judicial members after consulting with the Lord President.

**Question 13** – Do you agree with our proposals for how the Scottish Sentencing Council should be resourced and supported? If not, what alternative arrangement do you think would be more appropriate and/or effective?

We are not convinced that it is appropriate to give the financial and administrative responsibility for a Sentencing Council to the Scottish Court Service.

We are of the view that whatever organisation or model is adopted it should not be allowed to impinge on the current services provided by Scottish Court Service or the resources of that service.

We are particularly pleased to note that the consultation document states that the Sentencing Council should be set up in such a way as to ensure its independence from Government. It is therefore crucial in our view that the points we have already made which indicate a lack of distance from Government in the operation of the Council is recognised.

**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?

No. Enshrining the purpose of sentencing in statute is unnecessary. The factors enumerated are all ones which every judge considers when imposing a sentence.

**Question 15** – Do you agree with our proposals for a statutory statement on the principles of sentencing? If not, how do you think these proposals could be modified to make them more effective?

No. We regard the proposals for a set of statutory principles as unnecessary. What are described as statutory principles are the factors which all judges currently have regard to when selecting an appropriate sentence to impose. It is apparent to many judges when they impose a sentence in open court that not only the accused person but also the victims and indeed the accused’s family understand the reasons for the sentence imposed.

We are concerned that the sub-headings of paragraph 4.5 do not specifically include the danger that an offender may present to the public but is relegated along with the general consideration of other factors. In our view the danger that an offender may present to the public is of paramount importance and together with the seriousness of the offence should be included at sub-head one.
The circumstances of the offender, their willingness to reform etc. as encompassed in a Social Enquiry Report are factors which are always considered by judges and have a major significance on the sentence which is ultimately imposed. It justifies a higher priority.

The desirability of consistency with sentencing levels is of lower priority to public danger or willingness to reform.

**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).

No. We consider it is unnecessary as there is already sufficient guidance from the Appeal Court.

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