

MEETING OF THE SCOTTISH SENTENCING COUNCIL
03 OCTOBER 2019, HMP EDINBURGH
MINUTES

- Members present:** Lady Dorrian QC, the Lord Justice Clerk (Chair)
Lord Turnbull (judicial member)
Sheriff Principal Ian Abercrombie QC (judicial member)
Sheriff Norman McFadyen (judicial member)
Stephen O'Rourke, QC (advocate member)
Susan Fallone JP (judicial member)
David Harvie, Crown Agent (prosecutor member)
Krista Johnston (solicitor member)
Sue Moody (lay member – victims' expert)
Professor Neil Hutton (lay member)
- Attendees:** Deputy Chief Constable Will Kerr (proposed new constable member)
Julie Brodtkorb (fixed-term researcher)
- Secretariat:** Graham Ackerman (Secretary)
Ondine Tennant (Secretary)
David Dickson (Principal Legal Officer)
Andrew Bell (Principal Research Officer)
David Ross (Senior Policy Officer)
Stuart Ritchie (Communications Officer)
Jessica Doran-Flynn (Business Manager)
- Apologies:** Chief Constable Iain Livingstone (lay member – constable)

1. PROCEEDINGS

Item 1.1: Introduction and welcome

1. The Chair opened the meeting and noted that apologies had been received from Chief Constable Iain Livingstone.
2. The Chair welcomed Deputy Chief Constable Will Kerr who, subject to confirmation from the Scottish Ministers and consultation with the Lord Justice General, is expected to

replace Chief Constable Iain Livingstone on the Council when his term of office expires on 30 November 2019.

3. The Chair also welcomed Julie Brodtkorb, who has been recruited as a temporary researcher for the Council and will be carrying out research on sentencing practice around death by driving offences and indecent images of children offences.

Council membership

4. The Chair informed members that this was the last Council meeting to be attended by Stephen O'Rourke and Neil Hutton, as their terms of office end on 18 October 2019. It was also the last Council meeting during Iain Livingstone's term of office.
5. The Chair also advised members that the Council's summary sheriff member, Jillian Martin-Brown, had been appointed as a sheriff as of 23 September 2019. Her term of office therefore ceased on that date in accordance with the Criminal Justice and Licencing (Scotland) 2010 Act. On behalf of the Council, the Chair congratulated Jillian on her appointment.
6. *Note of thanks: on behalf of the Council, the Chair thanked all departing members for their valuable contribution to the work of the Council.*

Secretariat

7. The Chair informed members that this was also the last meeting for Graham Ackerman as Secretary to the Council, as Ondine Tennant had now returned from maternity leave.
8. *Note of thanks: the Chair thanked Graham for his work over the last 2 and a half years and wished him well in his new role.*
9. The Chair noted that Nicole Vidal had recently been recruited as a second temporary researcher for the Council and will be undertaking judicial engagement on sexual offences and judicial pre-testing of an early draft of the causing death by driving guideline in due course.

Item 1.2: Previous meeting [Paper 1.2]

10. Minutes of the Council meeting of 02 May 2019 were provided at **paper 1.2**.

The Council approved the minutes subject to a minor correction at paragraph 5.

Item 1.3: Progress of actions since last meeting [Paper 1.3]

11. The Council noted the progress of actions provided at **paper 1.3**.

Item 1.4: Private papers

12. The Council agreed not to publish the following papers: 1.3, 1.6, 3.1, 3.1A, 3.1B, 3.1C, 3.2, 3.2A, 4.3, 6.1, 7.1A, 7.1C.

Item 1.5: Council membership – update on recruitment [Oral]

13. The Chair gave members the following update on the recruitment of replacements for Stephen O'Rourke, Neil Hutton, and Iain Livingstone:

- The appointment of a new advocate member is the responsibility of the Lord Justice General, in consultation with the Scottish Ministers. Applications were sought from suitable candidates in August and September. Interviews are due to take place in late October.
- The appointment of the constable and other members is a matter for the Scottish Ministers, in consultation with the Lord Justice General. In respect of Neil Hutton's replacement, the Scottish Ministers recently advertised and are in the process of selecting a suitable candidate.
- As already noted, Deputy Chief Constable Will Kerr has been proposed as the new constable member. This is expected to be confirmed by the Scottish Ministers shortly.
- It is hoped that the replacements for Stephen, Neil, and Iain will be in place in time for the Council's December meeting.
- The appointment of a new summary sheriff member to replace Jillian Martin-Brown is the responsibility of the Lord Justice General, in consultation with the Scottish Ministers. The secretariat will contact the Lord Justice General about beginning the recruitment process shortly.

ACTION POINT

AP1: *Secretariat to liaise with the Lord Justice General and Scottish Government officials regarding, respectively, the recruitment of a new summary sheriff member to replace Jillian Martin-Brown, and the appointment of new lay members to replace Iain Livingstone and Neil Hutton (noting that DCC Will Kerr has been proposed as the replacement for the former).*

Item 1.6: Membership of committees [Paper 1.6]

14. The Chair advised that a significant number of committee vacancies are about to arise, for two reasons. Firstly, under standing order 2.6, “[a] Council member’s appointment to a standing committee will run for a period of three years”. Of the 8 members currently serving on the Research Committee and Communications Committee, 3 reached the end of this period on 13 September 2019. Secondly, 4 Council members are leaving in October and November. This will result in a further 8 vacant positions.
15. In order to allow the Research Committee and Communications Committee to continue to function until new members can be appointed, the Council agreed by correspondence on 17 September 2019 to extend the membership periods of those members not departing the Council until 06 December 2019, and of those departing until the date of their departure.
16. **Paper 1.6** proposed how the Council could fill the various vacancies, but noted that these appointments would be subject to the views of the new Council members who are yet to be appointed; however, if the Council was content to agree these appointments in principle, these could be confirmed by correspondence once new members are in place.
17. The Council agreed, subject to the views of new Council members in due course, the committee appointments set out **paper 1.6**.

ACTION POINT

AP2: *Secretariat to seek the views of new Council members about the proposed committee appointments in due course, with a view to confirming them by correspondence once new members are in place.*

2. COMMUNICATIONS AND ENGAGEMENT

Item 2.1: Communications Committee update [Oral]

18. Sheriff McFadyen provided an update on the work of the Communications Committee. In particular, he noted that:

- The Committee has not met since the last Council meeting.
- The Council's decision on the initial focus for its guidelines on sexual offences was publicly announced on 16 May, receiving significant media attention.
- The Committee's communications strategy around the launch of the public consultation on the draft sentencing process guideline on 10 June appeared to go well.
- The roundtable discussion with stakeholders on sentencing offenders with mental welfare issues, which the Committee helped to plan, took place on 14 June and a report will be circulated to members shortly.
- There was widespread media coverage of the "Public perceptions of sentencing" national survey report prepared by Ipsos Mori for the Council, which was published on the Council's website on 02 September.
- The Council's Annual Report for 2018-19 was laid in Parliament on 19 September and published on the Council's website on 20 September, along with a news release.
- The Council had a stand at the Parliament House Doors Open Day on 28 September. Parliament House received a total of 1553 visitors.
- The Council has featured in 125 media articles this year to date, compared to 75 in the whole of 2018.
- There have been more than 55,000 visitors to the Council's website so far this year, which is a 45% increase on this time last year.
- The Council has launched its own YouTube channel, which contains all the educational videos from the Council's website.

Item 2.2: Updates from recent engagement activity [Oral]

19. The Chair informed members that, since the last Council meeting, she had:

- delivered a speech about judicial discretion and its limits (and addressed the impact of sentencing guidelines in this area) at the Four Jurisdictions Law Conference on 10 May;
 - delivered a speech on the sentencing of young people at the National Youth Justice Conference on 19 June, which has been published on the Council's website;
 - given the Apex Scotland annual lecture on "Sentencing guidelines – challenges and opportunities" on 03 September (this has also been published on the Council's website); and
 - hosted a delegation of Taiwanese judges on 04 September.
20. The Chair also noted that she will be travelling to Taiwan at the end of October to give speeches about the work of the Council and, separately, sexual offences.
21. Sue Moody and Graham Ackerman gave an update on their attendance at the Howard League Scotland 40th Anniversary Conference on 22 May. Sue Moody also updated members on her attendance at the National Youth Justice Conference in June.
22. Andrew Bell informed members about his attendance at the Methods and Data in Sentencing Research conference in Leeds in July.
23. Sheriff Principal Abercrombie informed the Council that members of the Sentencing Young People Committee and the secretariat had visited Hamilton Sheriff Court in August to observe the structured deferred sentence court.

3. SENTENCING GUIDELINES

Item 3.1: Sentencing young people – analysis of responses to judicial consultation and revised guideline [Papers 3.1 and 3.1A-C]

24. **Paper 3.1** updated the Council on the results of the judicial consultation on the sentencing young people draft guideline; sought the Council's views on some policy issues arising from, and proposed changes to the draft guideline in response to, the consultation; and sought the Council's agreement in principle to taking the revised draft guideline forward to public consultation. Changes to the draft guideline proposed by the Sentencing Young People Committee in response to the judicial consultation were outlined at **paper 3.1C**.

25. The Council considered the issues raised in **paper 3.1**. In particular, it discussed the question of how a young person should be defined in the guideline. It was agreed that a final decision on this point could only be made once the literature review of the age at which cognitive maturity is reached had been received and considered in October/November.
26. The Council agreed that the issue of sentencing older people who were young at the time of the offence should not be included within the scope of the guideline (i.e. the guideline should apply only to those who are young people at the point of sentencing), but that the Sentencing Process Committee should explore whether this can be addressed in the Sentencing Process guideline (in particular through strengthening the existing provision around maturity and culpability). The Council also agreed that the guideline should not address the question of gender, but that the Council would keep the question of gender under review as part of its future business planning.
27. The Council discussed whether the draft guideline should refer to “the judge” or the “the court”, with agreement that such references should be consistent throughout the document. It was decided that “the judge” should be used in the draft guideline.
28. The Council agreed a number of further changes to the draft guideline, particularly to address how it should interact with the Council’s ‘Principles and purposes of sentencing’ guideline, and subject to those changes being made agreed in principle that the guideline should be taken forward to public consultation as soon as is practicable.

ACTION POINTS

- AP3:** *Secretariat, in conjunction with the Sentencing Young People Committee, to revise the sentencing young people draft guideline as agreed and circulate this to the Council for agreement by correspondence.*
- AP4:** *Secretariat and Sentencing Young People Committee to consider the literature review on the age at which cognitive maturity is reached and provide advice and a recommendation to the Council on the definition of “young person”.*

Item 3.2: Sentencing young people – draft public consultation paper and timetable [Papers 3.2 and 3.2A]

29. **Paper 3.2** sought the Council's initial views on a draft public consultation paper (at **paper 3.2A**) on the sentencing young people guideline and provided the Council with an update on the proposed timetable for the launch of the public consultation.
30. The Council indicated that it was broadly content with the substantive content of the draft public consultation paper, but that it would need to be updated to take account of the changes to the draft guideline agreed under item 3.1. It would also require to be revised to take account of the cognitive maturity literature review once available.
31. The Council was content with the proposed timetable for the launch of the public consultation, but it was noted that the timetable is dependent on the outcome of the cognitive maturity literature review (in particular, if any further discussion by the full Council is required – rather than dealing with matters by correspondence – this will delay the consultation launch to some extent).
32. The Council agreed that the draft consultation paper and guideline can be shared with certain organisations in order to seek advice on accessibility issues.

ACTION POINTS

- AP5:** *Secretariat, in conjunction with the Sentencing Young People Committee, to revise the draft public consultation paper on the sentencing young people guideline to take account of the changes to the guideline agreed under item 3.1, and the literature review on the age at which cognitive maturity is reached, and circulate this to the Council for clearance by correspondence.*
- AP6:** *Secretariat to liaise with the Sentencing Young People and Communications Committees to develop a communications strategy for the launch of the public consultation on the draft sentencing young people guideline.*

Item 3.3: Guideline committee updates [Oral]

33. David Harvie provided an update on the work of the Death by Driving Committee. In particular, he noted that:

- The Committee has met twice since the last Council meeting, on 10 June and 05 September. It has given careful consideration to whether the scope of the guideline should be extended to include offences of causing serious injury while driving, and sought advice from the secretariat on what the implications of that would be.
- The Committee recommends to the Council that the scope of the death by driving guideline should not be extended, though this may be a topic on which a future guideline should be developed in due course
- The Committee has commenced iterative drafting of the guideline, including consideration of aggravating and mitigating factors and sentencing ranges. This work is still at an early stage, and will be informed in due course by the research being carried out by Julie Brodtkorb.
- The Committee considers that, given some of the issues being examined at present will potentially have an impact on future offence guidelines, it would be useful to have a full Council discussion about these in early 2020.

34. Following David's update, the Council agreed that the scope of the guideline should not be extended to include serious injury offences and that, subject to any further developments, the next Council workshop in February 2020 should consider issues relevant to offence guidelines.

35. Lord Turnbull provided an update on the work of the Sentencing Process Committee. In particular, he noted that:

- The Committee has not met since the last Council meeting.
- The public consultation on the draft guideline opened on 12 June and closed on 06 September. 41 responses were received: 20 from individual members of the public and 21 from organisations.
- The first draft of the analysis of responses by Dr Rachel McPherson has been received. Once the analysis has been finalised, the committee will meet to consider policy issues arising from, and proposed changes to the draft guideline in response to, the consultation.
- The timetable for completion of the guideline will depend in large part on the responses to the consultation exercise and the extent to which the committee considers further revision to be necessary.

36. Sheriff Principal Abercrombie provided an update on the work of the Sentencing Young People Committee. In particular, he noted that:

- The Committee has met once since the last Council meeting, and this was on 26 August. The issues it considered and the decisions it made at that meeting were discussed under items 3.1 and 3.2.
- The Council has been successful in a bid to hold a consultation workshop at the Scottish Youth Parliament's 70th national sitting in October. The workshop will focus on some key questions which the Committee has been considering in relation to the sentencing young people guideline. Members of the secretariat will help to facilitate the workshop and are liaising with the SYP to develop suitable materials. In advance of the workshop, SYP will hold an online survey of MSYPs and their constituents, which will include two of the Council's questions.

37. Lord Turnbull provided an update on the work of the Sexual Offences Committee. In particular, he noted that:

- The Committee held its first meeting on 19 September.
- It agreed that the first guideline to be developed in this area should be one on indecent images, and that iterative drafting of that guideline should commence as soon as practicable. This will be followed by separate guidelines on rape, and on sexual assault, with the priority of these guidelines to be determined once research into these areas is underway.
- It discussed what research might be needed to inform development of these guidelines and agreed to consider this further in conjunction with the Research Committee.

ACTION POINT

AP7: *Secretariat to explore basing the workshop planned for February 2020 on the Council's approach to offence guidelines.*

4. RESEARCH AND INFORMATION

Item 4.1: Research Committee update [Oral]

38. Neil Hutton provided an update on the work of the Research Committee. In particular, he noted that:

- The most recent meeting of the Committee was inquorate, but considered research priorities and plans for the 2020/21 financial year. These proposals will be brought to the full Council in December 2019, and will support the Council's bid under the Spending Review for 2020/21 in due course.
- The Committee had agreed to consider work being undertaken by the secretariat to explore shrieval understandings and experiences of the range of community based disposals available in their local areas.

Item 4.2: Research projects update [Paper 4.2A]

39. Andrew Bell provided a brief update on the following:

- The publication of the Ipsos MORI survey results, which are now available on the Council's website.
- The status of two focus group reports on causing death by driving and sexual offences, both of which are nearing completion.
- Work to assess current sentencing practice in relation to sexual offences and death by driving offences, to inform the development of guideline ranges in relevant guidelines.
- The progress of the cognitive maturity literature review, which is scheduled for completion in November.

Item 4.3: Methodology for the development and testing of guideline ranges [Paper 4.3]

40. **Paper 4.3** provided an update to the Council on the planned approach to the development and testing of guideline ranges in regards to the death by driving guideline, and sought the Council's views on the suitability of this general methodology as a basis for future guideline development.

41. The Council agreed in principle that the proposed methodology should be used as the basis for developing ranges on future guidelines, subject to some minor amendments. It was also noted that this approach would be assessed and further refined as more experience is gained in developing offence guidelines.

ACTION POINT

AP8: *Secretariat to revise the proposed methodology for the development and testing of guideline ranges for the death by driving guideline as agreed.*

5. POLICY DEVELOPMENT

Item 5.1: Process for consideration of policy issues between Council meetings [Oral]

42. The Chair noted that over the past year there have been an increasing number of consultations or other requests for the Council's views on sentencing policy issues arising between Council meetings. In order to simplify the process for preparing the Council's response to such consultations or requests, the Council agreed that the Chair should identify members on a case by case basis to work with the secretariat in developing a draft response. This will allow those with expertise in particular areas to provide input as appropriate, and reduce the chance of any unexpected issues arising when the draft response is considered by the full Council.

6. DECISIONS BY CORRESPONDENCE

Item 6.1: Decisions by correspondence [Paper 6.1]

43. It was noted that since the last meeting, the Council had made six decisions by correspondence in respect of the following matters:

- 1) **Establishment and membership of the Sexual Offences Committee**: the Council agreed to establish the Sexual Offences Committee as a new working group committee, and agreed its membership, quorum, remit and terms of reference, and expected lifetime. The membership as agreed comprises Lord Turnbull, Sue Moody, Krista Johnston, and Jillian Martin-Brown (though it should be noted that the latter is now no longer a member of the Council, and it is expected that she will be replaced on the committee by the new summary sheriff member in due course).
- 2) **Preparation of a draft impact assessment for the sentencing young people guideline**: the Council agreed that the draft sentencing young people guideline which was issued for judicial consultation could be shared (on a confidential

basis) with certain stakeholders for the purpose of preparing a draft impact assessment.

- 3) **Revised research plans and spending authorisation for 2019-20**: the Council agreed to proceed with an expanded research project on sexual offences and death by driving offences involving the appointment of two fixed-term researchers.
- 4) **Annual report 2018/19**: the Council approved the final version of its annual report for 2018-19 and agreed to submit this to the Scottish Ministers
- 5) **Response to public consultation on whole life sentences**: the Council agreed a response to a public consultation exercise carried out by Liam Kerr MSP on a proposal for a Member's Bill to introduce whole life sentences.
- 6) **Limited extension to Research and Communications Committee memberships**: the Council agreed to extend the membership period of a number of members of the Research and Communications Committees in order to allow these committees to continue to function until the Council could meet to discuss proposals for filling vacancies across all committees.

7. REPORTS

Item 7.1: Standing papers: finance overview; correspondence, complaints and FOISA reports; guideline timetable [Papers 7.1A-C]

44. The Council noted the contents of the standing papers, and Graham Ackerman gave a brief update on discussions around the Council's budget for 2019/20 and 2020/21. It was noted that the Secretariat would be taking forward discussions on the Council's budget with SCTS and the Scottish Government as part of any budget revision process.

8. AOB

Item 8.1: AOB

45. It was noted that:

- Members of the secretariat will be attending the Tayside, Central, and Fife sheriffdom conference on 25 October to deliver a short session on the sentencing young people guideline.
- The Council has been invited to deliver a presentation about its work on sexual offences at the South Strathclyde, Dumfries and Galloway sheriffdom conference on 22 November. The secretariat will canvass members to determine if any are available to attend this event.

ACTION POINT

AP9: ***Secretariat to contact members about participation in the SSD&G sheriffdom conference.***

9. FUTURE MEETING DATES

46. The final Council meeting of 2019 will take place on Friday 06 December at the SCTS Tribunals Centre in Glasgow.

Scottish Sentencing Council

October 2019