

**The Sentencing Commission
for Scotland**

**The Scope to Improve Consistency in
Sentencing**

Report – 2006

CHAIRMAN'S FOREWORD

I have pleasure in presenting the report of the Sentencing Commission for Scotland on the scope for improving consistency in sentencing. This is our fourth, and final, report.

It is generally accepted that there should be consistency in sentencing at every level of our courts. That is an aspect of fairness and justice. These principles demand that similar crimes committed in similar circumstances by offenders whose circumstances are similar should attract similar sentences. Consistency in sentencing is thus important not only to the offender, but also to those directly affected by the crime and to the public, since a perception of inconsistency in sentencing is likely to lead to a loss of public confidence in the criminal justice system.

While there is little research evidence measuring the extent to which there is inconsistency in sentencing in the courts in Scotland, there is a public perception that such inconsistency exists, and the Commission has concluded that that perception is in some measure well founded. We have therefore considered what steps might be taken to promote and improve consistency.

We have made a number of recommendations, the central one being the introduction of a procedure for giving effect to sentencing guidelines. We recommend the creation of a statutory body, the Advisory Panel on Sentencing in Scotland (APSS). That body would be responsible for the preparation of draft sentencing guidelines for consideration by the Appeal Court of the High Court of Justiciary. The APSS would be responsible for the necessary research and consultation, and for framing the draft guidelines. The adoption of these guidelines, however, with or without modification, would be a matter for the Appeal Court. The membership of the APSS would have a strong judicial component, but it would also include people who would bring other relevant skills and experience to its work. In that way, the recommendations of the APSS would reflect a breadth of experience and thorough investigation, while the role of the Appeal Court in deciding whether to approve draft guidelines would ensure that sentencing remained essentially a judicial function. We envisage that the introduction of sentencing guidelines would be a gradual process. Particular guidelines, once adopted by the Appeal Court, would guide the sentencer, but would not dictate the sentence in the individual case. They would, we consider, promote and encourage consistency of approach, and thus improve consistency in sentencing, while preserving the important element of judicial discretion. We see the system for the preparation and adoption of sentencing guidelines which we have recommended as complementary to the existing, but little-used, power of the Appeal Court to pronounce guideline judgments.

I am grateful to my colleagues on the Commission, and to our Secretariat, for their work in producing this report. I hope that the Scottish Executive, all those operating within the criminal justice system and the general public will find our recommendations helpful in achieving the ultimate goal of fairness and consistency in sentencing.

Rt Hon Lord Macfadyen
Chairman
August 2006

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PART ONE: INTRODUCTION

1.1 The Sentencing Commission for Scotland (“the Commission”) is an independent body set up by the Scottish Executive under its policy statement “A Partnership for a Better Scotland.” The members of the Sentencing Commission, appointed by the Scottish Ministers, are:

The Rt Hon Lord Macfadyen (Chair): High Court Judge
The Rt Hon The Lord Mackay of Drumadoon: High Court Judge
Sheriff Charles Stoddart: Sheriff of Lothian and Borders
Sheriff Rita Rae QC: Sheriff of Glasgow and Strathkelvin
Sheriff Bill Gilchrist: Sheriff of Tayside, Central and Fife
Chief Constable David Strang: Chief Constable of Dumfries and Galloway Police
Mr Alex Prentice: Advocate Depute (formerly of McCourts Solicitors)
Ms Valerie Stacey QC: Vice-Dean of the Faculty of Advocates
Mr Jim Dickie: Director of Social Work at North Lanarkshire Council
Councillor Eric Jackson: Chair of the Social Work Committee of East Ayrshire Council
Ms Bernadette Monaghan: Director of Apex Scotland
Ms Kaliani Lyle: Chief Executive of Citizens Advice Scotland
Mr David McKenna: Chief Executive of Victim Support Scotland
Professor Neil Hutton: Dean of the Faculty of Law, Arts and Social Sciences at the University of Strathclyde
Professor Chris Gane: Chair of Scots Law at Aberdeen University
Mrs Sue Brookes: Governor at HMI Cornton Vale
Professor David McCrone: Department of Sociology at Edinburgh University (until April 2005).

1.2 The Commission has a secretariat of five: Mr Alan Quinn (Secretary), Mrs Kay McCorquodale (Solicitor), Mrs Diane Machin (Principal Researcher), Mrs Rona Tatler (Assistant Secretary) and Ms Taryn Forrest (Office Manager).

1.3 The Commission was launched in November 2003 with a remit to review and make recommendations to the Scottish Executive on:

- the use of bail and remand¹;
- the arrangements for early release from prison and the supervision of short-term prisoners on their release²;
- the basis on which fines are determined³;
- the effectiveness of sentences in reducing re-offending;
- the scope to improve consistency of sentencing.

¹ The Commission reported on this in April 2005. See The Sentencing Commission for Scotland (2005) - Report on The Use of Bail and Remand. Published by Astron. At: <http://www.scottishsentencingcommission.gov.uk/docs/scorubr.pdf>

² The Commission reported on this in January 2006. See The Sentencing Commission for Scotland (2006) – Report on Early Release from Prison and Supervision of Prisoners on their Release. Published by Astron. At: <http://www.scottishsentencingcommission.gov.uk/docs/scorubr.pdf>

³ The Commission reported on this in June 2006. See The Sentencing Commission for Scotland (2006) - Report on the Basis on which Fines are Determined. Published by Astron. At: <http://www.scottishsentencingcommission.gov.uk/docs/scorubr.pdf>

1.4 Subsequently, the Executive provided the Commission with a more detailed remit in which it pointed out, inter alia, that the effectiveness of sentences should be a pervading theme throughout the Commission's deliberations rather than treated as a separate strand of the remit.

1.5 As regards reviewing the scope to improve consistency in sentencing, the Commission agreed that its consideration of the topic should focus on:

- what is meant by and should be encompassed within the term 'consistency in sentencing';
- whether there is a factual basis for concluding that there is some lack of consistency in sentencing in Scotland;
- whether the existing legislation and procedures, with which sentencers in Scotland require to comply, could be developed in order to promote consistency in sentencing in Scotland; and
- international approaches to improving consistency in sentencing of which there is a wide range, including the approach taken in England and Wales where the Sentencing Advisory Panel has existed since July 1999 and where the UK Government also established a Sentencing Guidelines Council in 2004.

1.6 This report contains the views of the Commission on the scope to improve consistency in sentencing in Scotland and proposes a framework for encouraging a wider and fuller understanding of sentencing in Scotland and the achievement of greater consistency in sentencing.

Our Approach

1.7 We have not thought it necessary, nor did we consider it practicable in the time available to us, to commission independent research to establish whether, and if so to what extent, there is inconsistency in sentencing in Scotland. A comprehensive study would take years and considerable resources. The McInnes Report noted that they had found plentiful anecdotal evidence and some (rather dated) research indicating that sentencing levels vary a great deal from one sentencer to another and from one court to another. The Report expressed the view that such variation was to an extent that could not be accounted for other than in terms of differences in sentencing practice.⁴ That accords with the experience of many of the members of the Commission and views expressed to the Commission in the course of its work. We have therefore felt comfortable proceeding on the basis that:

- the Commission understand that all those involved in the criminal justice system support the general principle that there should be broad consistency in sentencing at every level of the judiciary;
- that understanding coincides with the views of those who in 1994 responded when the Government of the day consulted on whether sentencing guidelines should be introduced in Scotland⁵(see paragraph 4.6);

⁴ The Summary Justice Review Committee (2004) - Report to Ministers. Astron.

⁵ The Scottish Office (1994) - Sentencing and Appeals. HMSO: Edinburgh.

- such research evidence as does exist, limited though it is, supports the view that there is some inconsistency in sentencing in Scotland;
- the experience of members of the Commission, including their consideration of the decisions and Opinions of the Criminal Appeal Court, and anecdotal evidence regularly encountered by them points to the occurrence of some inconsistency in sentencing in Scotland;
- the statutory powers of the High Court of Justiciary when dealing with appeals against sentence to issue ‘guideline judgments’, which were enacted in the Criminal Procedure (Scotland) Act 1995 (‘the 1995 Act’), have been used only to a limited extent (see paragraphs 4.8 to 4.12);
- given the limited natures of the existing mechanisms for promoting consistency of sentencing, it is not surprising if there is a measure of inconsistency in sentencing;
- it is reasonable to conclude that if more were done to promote consistency in sentencing, greater consistency in sentencing would be achieved and would be capable of being demonstrated to have been achieved.

1.8 We have discussed the topic of consistency in sentencing at length within the Commission and we have held informal discussions with members of the judiciary, legal practitioners, other professionals engaged in the criminal justice system, prison staff and serving prisoners. Commission members themselves cover a broad range of interests within the criminal justice system in Scotland and, as such, they have brought their background knowledge and practical experience to the Commission’s deliberations.

1.9 We are conscious of the fact that there are some who hold the view that the current arrangements for sentencing in Scotland work satisfactorily and that no change is required. They argue that there is no firm evidence, and in particular no recent research evidence, which demonstrates that inconsistency in sentencing is a problem in Scotland. We do not share that view. Whilst there may be limited empirical research evidence available that indicates that sentencing in Scotland lacks consistency and shows the extent and prevalence of such inconsistency, we are persuaded that there is a significant body of anecdotal evidence which demonstrates that inconsistency in sentencing actually occurs. Whatever the actual degree of inconsistency in sentencing in Scotland, we are satisfied that there is a very clear perception amongst both practitioners and the public in general that sentencing in this country is inconsistent. Such a perception is damaging to public confidence in the criminal justice system. The Commission considers that it would lead to a material improvement in the criminal justice system if there were a framework to promote, that could be seen by the public to promote, greater consistency in sentencing. Promoting and encouraging consistency in sentencing would also make an important contribution to achieving fairness in sentencing. Fairness in sentencing is important to the victims of crime, the public in general, the media, politicians, and those accused who are convicted. In preparing our report, we have become aware of work that is being done in other parts of the world, notably in New Zealand and Australia, to promote greater consistency in sentencing. Against that background we consider it would be surprising if our system for sentencing in Scotland could not benefit from some alterations designed to promote and encourage greater consistency in sentencing.

1.10 In this report where we refer, in the context of sentencing in Scotland, to a ‘guideline judgement’ we are referring to an Opinion of the High Court of Justiciary dealing with the Court’s decision on an appeal against sentence in a particular case, which also includes, in pursuance of the Court’s powers under sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995 (‘1995 Act’), the Court’s opinion as to the sentence or other disposal or

order that would be appropriate in any similar case. For ease of understanding in this report we intend to refer to the High Court of Justiciary when dealing with appeals as ‘the Appeal Court’.

1.11 By ‘sentencing guidelines’ we mean stand-alone documents containing guidance on sentencing, and in certain instances guidance as to the ranges of sentences for particular categories of crimes and offences. Later in this report, we deal with possible procedures for drafting and approving sentencing guidelines.

PART TWO: SUMMARY OF RECOMMENDATIONS

2.1 In order to improve consistency in sentencing we make the following recommendations which we believe will result in the creation of a comprehensive and visible framework around which sentencing can be structured.

Recommendations

1. We **recommend** that in the interests of transparency and with a view to promoting consistency in sentencing:
 - the Criminal Procedure (Scotland) Act 1995 should be amended so as to provide that in every appeal against sentence the original sentencer as well as the accused should be informed in writing of the outcome of the appeal;
 - in every appeal in which the sentence is altered, reasons for the Appeal Court's decision should be stated in open court and electronically recorded; and
 - in any appeal in which the reasons for the Appeal Court's decision have been recorded, which would inevitably include some appeals in which the original sentence was affirmed, the Appeal Court on its own initiative, or on application by a party to the appeal or the original sentencer, should be able to have the reasons for its decision transcribed and a copy of those reasons made available to parties and the original sentencer and made accessible to the wider public (paragraph 9.3).
2. To increase the accessibility of reference materials for sentencers we **recommend** that steps should be taken by the Scottish Executive, the universities in Scotland, the Faculty of Advocates and the Law Society of Scotland, including the provision of funding, to encourage the production of more textbooks on sentencing, which will be of practical assistance to sentencers and others involved in the criminal justice system (paragraph 9.4).
3. We consider that a useful step in promoting consistency in sentencing would be to enshrine the purposes of sentencing in statute and we so **recommend** (paragraph 9.5).
4. We **recommend** that the Scottish Executive in consultation with the Lord Justice General should determine the future for the SIS. In particular, consideration requires to be given to the practicability of restoring and maintaining the SIS as a comprehensive record of High Court sentences imposed in the period which it covers. We consider that if a sentencing advisory body is created (see paragraphs 9.14 to 9.38) such a body would find the data contained in the SIS (if so restored and maintained) helpful in the drafting of sentencing guidelines for more serious crimes and offences (paragraph 9.11).
5. We **recommend** that the Appeal Court should consider making greater use of its power to issue guideline judgments under the provisions of sections 118(7) and 189(7) of the 1995 Act (paragraph 9.13).
6. We **recommend** that where the Appeal Court uses the powers vested in it by the 1995 Act to issue a guideline judgment, it should be required to make reference within the Opinion to the fact that the Court regards the Opinion as constituting a guideline judgment (paragraph 9.13).

7. To assist the Court in providing further guidance to sentencers, and in particular handling the introduction of sentencing guidelines into sentencing practice, we **recommend** that a sentencing advisory body, to be known as the Advisory Panel on Sentencing in Scotland (“APSS”) should be created (paragraph 9.14).
8. We **recommend** that the APSS should have around ten members. They should include at least one sentencer from each level of the judiciary, in other words including lay justices as well as members of the full-time judiciary. Additionally, its membership should be drawn from individuals from the law enforcement agencies, the prosecuting authorities, the legal profession, offender management services, organisations that work with victims, academia and the wider community (paragraph 9.17).
9. We **recommend** that the judicial members of the APSS should be appointed by the Scottish Ministers, on the nomination of the Lord Justice General. The non-judicial members should be recruited by open competition and be appointed by the Scottish Ministers, after consultation with the Lord Justice General. There should be a power for the APSS to co-opt specialists where this is considered to be necessary (paragraph 9.18).
10. While we do not consider an official of the Scottish Executive should be a member of the body, we do see merit in such a person acting as an observer at meetings, so as to assist in the communication process between the Executive and the APSS. We consider that such communication should take place. We also consider that it would be in the public interest that all members of the APSS should be able to take part in such communication and that would be best achieved by an official of the Scottish Executive being able to attend meetings of the APSS. We so **recommend** (paragraph 9.19).
11. We **recommend** that the chair of the APSS (who we consider need not necessarily be a member of the higher judiciary) should be appointed by the Scottish Ministers after consultation with the Lord Justice General (paragraph 9.20).
12. We **recommend** that the APSS should draft guidelines for the consideration of the Appeal Court on general topics relating to sentencing, on new sentencing disposals introduced by parliamentary legislation and on particular categories of crimes and offences (paragraph 9.22).
13. We **recommend** that the statute creating the body should provide details of those whom the body should be obliged to consult in the context of drafting guidelines (paragraph 9.23).
14. We **recommend** that the Appeal Court, sitting with a quorum of at least three judges, should be able to approve the draft guidelines. The Appeal Court should also have power to remit the draft guidelines back to the APSS, for that body to re-consider the draft guidelines and to amend them, if it chose to do so, in the light of any points raised by the Court. On that having been done, the APSS would be able to resubmit the draft guidelines to the Appeal Court for its further consideration (paragraph 9.25).

15. We **recommend** that the Appeal Court, having re-considered the draft guidelines, and any further advice from the APSS, should have the power to approve the draft guidelines, subject to any amendment it considers appropriate. It should also have power to decline to approve the draft guidelines (paragraph 9.26).
16. We **recommend** that statutory duties should be placed on sentencers to have regard to relevant sentencing guidelines and to state in open court, at the time of sentencing, their reasons for any departure from such guidelines (paragraph 9.27).
17. We **recommend** that the Appeal Court should be required to respond to the APSS's draft guidelines, or amended draft guidelines as the case may be, within not more than six months from the date of their submission to the Court (paragraph 9.29).
18. In the event that no appeal(s) against sentence, in which it would be appropriate to consider particular draft sentencing guidelines, come before the Appeal Court within six months of those guidelines having been submitted by the APSS, we **recommend** that the Appeal Court be granted the power, by statute, to fix a special hearing for the specific purpose of considering the draft guidelines whether they be in their original form or as amended by the APSS (paragraph 9.29).
19. We **recommend** that provision be made to allow special hearings to take place before the Appeal Court, sitting with a quorum of at least three judges. The Lord Advocate would be entitled to appear at such a hearing, in his capacity as public prosecutor, and would be free to make such submissions about the draft guidelines as was considered to be appropriate. The Appeal Court should have the power to appoint counsel to act at the hearing as *amicus curiae* ("friend of the court") who would place before the Court any submissions relevant to the approval of the draft guidelines, either as a matter of principle or in its existing terms. The Appeal Court would do one of the following:
 - approve the draft guideline; or
 - approve the draft guideline subject to amendment, with an explanation for the amendment; or
 - decline to approve the draft guideline and remit it back to the APSS for that body to consider the points raised by the Court.

In the case of rejection of the draft guidelines by the Appeal Court and referral back for further work, the APSS would require to resubmit the guidelines to the Appeal Court for its further consideration. The Appeal Court, having fully considered the Panel's further advice, should have the power to decline to approve the draft guidelines in which case it is to be expected that it would issue an Opinion explaining the reasons for its decision (paragraphs 9.30 and 9.31).

20. With regard to draft sentencing guidelines on more general topics, including the introduction of new sentencing disposals, we **recommend** that provision be made for such draft guidelines to be approved by the same procedure, as we have recommended above. At the initial hearing before the Appeal Court the Court would have the power to approve the draft sentencing guidelines or remit them back to the APSS for re-consideration. In the event that the draft guidelines were resubmitted to the Appeal Court, the Court could approve the draft guidelines, without or with amendment or

decline to do so. If it declined to approve the draft guidelines the Appeal Court could give any view that it wished to express in a guideline judgment (paragraph 9.33).

21. We **recommend** that the legislation creating the APSS should detail those who would be entitled to invite the APSS to produce draft guidelines. We consider that the statute should provide that the Appeal Court should be able to require the APSS to draft sentencing guidelines on specific topics, that the APSS should itself should be able to initiate the drafting of sentencing guidelines and that the Scottish Ministers, and separately the Lord Advocate, in his role as independent public prosecutor, should be able to invite the body to draft sentencing guidelines for particular offences or for new sentencing disposals (paragraph 9.34).
22. We **recommend** that the APSS should give priority to guidelines on those offences that normally, or at least frequently, result in the imposition of a sentence of detention or imprisonment and to areas of the criminal conduct in which it is considered that there is a particular need for sentencing guidelines (paragraph 9.35).
23. We **recommend** that the APSS should, at the outset, promote a sentencing guideline focusing on the seriousness of offences (paragraph 9.36).
24. There would be a need to ensure that the guidelines were reviewed at reasonable intervals and we **recommend** that the APSS, in consultation with the Lord Justice General, identifies and puts in place the necessary review procedures (paragraph 9.37).
25. We **recommend** that an Appeal Court constituted by at least five judges should have power to amend, and if it is in the public interest to do so, withdraw sentencing guidelines previously approved by a Court constituted by three judges. We consider that the Appeal Court should have the right to invite the APSS to comment on the need to amend or withdraw sentencing guidelines that have previously been approved by the Court, but we do not consider that the Appeal Court should be under any obligation to do so (paragraph 9.38).

PART THREE: WHAT IS CONSISTENCY IN SENTENCING?

3.1 In considering the question of what is meant by and should be encompassed within the term “consistency in sentencing”, the Commission agrees with the following statement contained in a recently published report of the Australian Law Reform Commission⁶ that:

“It is a fundamental principle of the criminal law and the sentencing process that like cases should be treated in a like, or consistent, manner. As Mason J stated in *Lowe v The Queen* [7]

“Just as consistency in punishment—a reflection of the notion of equal justice—is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.”

3.2 Sentencing is consistent when offenders committing similar offences are punished with similar penalties by different sentencers, whether those sentencers sit in the same court or different courts. That is not to say that there is a “right” sentence for every offence. Treating like cases alike does not mean treating them in exactly the same way. Sentencing is neither a scientific nor a mechanistic process. A large number of different circumstances can legitimately be taken into account by sentencers. Crimes and offences falling within the same category vary in their seriousness; the personal circumstances of offenders vary widely; the impact of crimes and offences on victims can vary; the pattern of offending by individual offenders varies, as does the pattern of offending in different parts of the country and the public’s reaction to that offending. All of that explains why any move to introduce more guidance for sentencers may give rise to criticism from some that such guidance would amount to an interference with judicial discretion and would impede every case being treated on its own facts and circumstances. However, the Commission considers that were the guidance available to sentencers to remain as limited as it currently is, that paucity would result in continuing criticism about a lack of consistency in sentencing. It would also fuel perceptions of unfairness and injustice to offenders and victims.

3.3 In some quarters it is argued that because no two cases are exactly alike, each sentencing decision is a totally unique decision, which must be made on its own merits. This line of argument suggests that there cannot be consistency in outcome, whereby offenders with similar characteristics, who have committed similar crimes, receive similar sentences, irrespective of where they are sentenced and by which sentencer. Indeed it is suggested that there can only be consistency in the approach of sentencers to sentencing, in other words that sentencers across the country, and at all levels of the court system should be taking the same factors into consideration when deciding on sentence. It is argued that this is as much as should be done, otherwise the appropriate margin of discretion required by individual sentencers will not be preserved.

⁶ Australian Law Reform Commission (2006) - ALRC Report 103 Same Crime, Same Time: Sentencing of Federal Offenders. At: <http://www.austlii.edu.au/au/other/alrc/publications/reports/103/index.html>

⁷ *Lowe v The Queen* (1984) 154 CLR 606, 611.

3.4 The Commission does not consider that line of argument to be realistic or persuasive. While it is correct to say that no two cases will ever be exactly alike, that does not mean that two cases cannot have many features and factors in common. For sentencing purposes they may fall to be treated as being, in all practical respects, indistinguishable. This is more likely to arise with statutory offences, for example those involving drug dealing and road traffic offences, but it is also true for other categories of crime. It is, of course, difficult to define what constitutes similar cases. This, we suggest, is one of the roles of sentencing guidelines. Sentencing guidelines should attempt to define what should be treated as similar cases for the purpose of imposing sentence.

3.5 In the Commission's view there requires to be both consistency in approach to sentencing and greater consistency in outcome than is presently being achieved. Both are important objectives in a modern criminal justice system. We consider that an improvement in consistency in approach is likely to promote consistency in outcome. As was stated by the Australian Law Reform Commission in its recently published report⁸

“Consistency in approach and consistency in outcome are related to each other because judicial officers are more likely to achieve consistent outcomes if they adopt a similar approach to sentencing. Conversely, substantially different outcomes in similar cases may indicate differences of approach.”

3.6 The Commission considers that sentencing policy should promote as one of its essential elements the concept of securing consistency in sentencing. We consider that this involves sentencers following a structured and coherent approach to sentencing. Individual sentencers should be expected to approach their duties in a consistent manner, in the sense that they should have regard to the same principles and purposes of sentencing and to the same categories of aggravating and mitigating factors, including the personal circumstances of the accused.

3.7 The Commission, however, also considers that a structured and coherent approach to sentencing is one:

- that is sufficiently flexible to allow sentencers to take account of the circumstances particular to individual cases, whilst being one that results in accused persons, who have committed similar crimes and offences in similar circumstances receiving roughly the same sentences, unless some relevant factor(s) can be found that distinguishes an individual case and warrants the imposition of a sentence falling either above or below the normal range of sentence;
- whose procedures and guidance to sentencers are fully publicised, well documented and readily accessible to all, whether by reference to statutory provisions, sentencing guidelines, guideline judgments, appeal court decisions, sentencing information systems, the internet, text books and other published materials;
- that enables the prosecution and defence lawyers involved in individual cases to anticipate the approach the sentencing judge will adopt to the imposition of sentence and the range within which the sentence is likely to lie;
- that enables the prosecution and defence lawyers involved in individual cases to understand the decision of the sentencing judge at the point of sentence and, if necessary, to review the sentence imposed and assess (a) whether the correct approach

⁸ ALRC, *op cit*.

has been followed, (b) whether the sentence imposed fell within the range of sentences that was likely to be anticipated and (c) if not, whether the sentencing judge has explained why that range of sentences has been departed from;

- that allows and encourages sentencers, and in particular an appeal court, to take appropriate account of the input that others can legitimately make to the evolution and development of the sentencing policy to be applied by sentencers.

3.8 We would stress that we do not consider that introducing steps to encourage consistency in approach and consistency in outcome would mean an end to judicial discretion. Any system must involve a balance between consistency in outcome and individualised sentencing. Most of the sentencing grid systems that operate in other jurisdictions – primarily in the USA - offer sentencers a range of penalties, which can be extensive. Most guidelines systems allow sentencers to depart from the guideline sentence, provided that they give reasons for their departures. This is a reflection of the fact that guidelines are no more than what the term indicates, namely guidelines and not a means of creating mandatory sentences.

PART FOUR: SENTENCING IN SCOTLAND

4.1 Scotland has no penal code defining all the crimes and offences that are prosecuted in our courts and specifying minimum and maximum penalties for those crimes.

4.2 A large proportion of prosecutions in Scotland are for the commission of common law crimes, ranging from, at the more serious end, murder and rape, down to minor assault, theft and breach of the peace. Subject to one exception provided for by statute⁹, there are no mandatory sentences for common law offences. As far as maximum sentences are concerned, there are no limits on the penalties that may be imposed, other than the limits on the sentencing powers of sentencers in the particular court in which a criminal prosecution takes place. The maximum sentence of imprisonment or detention that can be imposed, under summary procedure, in the sheriff court and in the stipendiary magistrate's court, is currently three months or, in the event of certain repeat offences, up to six months.¹⁰ The maximum sentence of imprisonment or detention in the district court is 60 days. Under solemn procedure the maximum sentence that can be imposed in the sheriff court is five years. If a person is convicted of a common law crime in the High Court of Justiciary a life sentence of imprisonment or detention can be imposed.

4.3 Statutory offences are created by Act of Parliament. When creating such offences Parliament sets the maximum sentences available to the courts. In certain instances, Parliament also prescribes the minimum sentences that must be imposed, for example mandatory disqualification from driving following conviction for a number of road traffic offences.¹¹

4.4 In Scotland there is no system of sentencing guidelines. Nor has the Appeal Court issued a substantial body of 'guideline judgements'.

4.5 In Chapter 9 of his book on Sentencing, published in 1992, Nicholson¹² pointed out that

“When a judge comes to determine the appropriate disposal in a particular case he must consider and weigh in the balance several or, on occasion, many factors.”

He went on to set out those factors, namely sentencing objectives, aggravating and mitigating factors, background information on the offender and the different sentencing disposals available to sentencers. He pointed out that in Scotland the Appeal Court had not sought to

⁹ The Murder (Abolition of Death Penalty) Act 1965 prescribes a mandatory sentence of life imprisonment for murder.

¹⁰ Section 33 of the Criminal Proceedings etc. (Reform) (Scotland) Bill increases the maximum sentence of imprisonment which can be imposed by a sheriff for a common law offence in a summary case from three months to 12 months. As a consequence of this change the sentencing powers of a stipendiary magistrate will likewise increase.

¹¹ In particular, the Criminal Justice Act 2003 s.287 prescribes minimum sentences of three years for offenders aged 16 to 20 years and five years for those aged over 20 years convicted on indictment of illegal possession or distribution of prohibited firearms. The Criminal Procedure (Scotland) Act 1995 s.205B prescribes minimum sentences of seven years imprisonment for offenders aged 18 years or more convicted in the High Court of a Class A drug trafficking offence where the person has previously been convicted in any court of two other Class A drug trafficking offences, unless there are specific circumstances relating to the offences or the offender which would make that sentence unjust.

¹² Sheriff Principal Gordon Nicholson, Q.C., M.A., LL.B. (1992) – Sentencing (2nd edition). W. Green.

enunciate sentencing principles, as the Court of Appeal (Criminal Division) in England and Wales had done, but he noted that

“While the English approach no doubt has the merit of providing judges with reasonably clear guidelines when dealing with individual cases, it may equally be an approach which would inhibit some of the flexibility which is a feature of the Scottish system.”

4.6 In 1994 the Government of the day canvassed views on whether sentencing guidelines should be introduced in Scotland¹³. The outcome of that consultation – which was contained in the White Paper entitled “Firm and Fair” published in June 1994 - was broad support for the formulation of such guidelines. As recorded in that document

“Many respondents pointed out that a substantial amount of guidance on sentencing matters was available in the reported decisions of the Appeal Court, although these do not deal with the question of the appropriate range of sentences in particular categories of case. Considerable support was expressed for the development of such sentencing guidelines. Apart from their potential to improve consistency and provide a benchmark for decisions to appeal, respondents considered that guidelines could contribute a more logical and transparent approach to sentencing.”

(The Scottish Office, 1994, pg. 22)

4.7 In view of the substantial support that had been expressed for the introduction of sentencing guidelines, the Government introduced legislation giving the Appeal Court statutory powers to include in its opinions disposing of appeals against sentence guidance for sentencers required to deal with similar cases in the future. The Government stopped short of seeking statutory provision for the creation of a body, independent of the Court, which would have any responsibility for drafting or issuing sentencing guidelines. Instead the Government decided to vest in the Appeal Court statutory powers to enable the Court to include in opinions guidance for sentencers in handling future cases. At that time it was envisaged by the Government that such guidance would include what the Government referred to, during the parliamentary debates, as ‘sentencing guidelines’.

4.8 The new powers of the Appeal Court now form sections 118(7) and 189 (7) of the 1995 Act. Those sections provide that in disposing of an appeal the High Court may pronounce an opinion on the sentence or other disposal or order which would be appropriate in any similar case. Section 197 of the 1995 Act provides that “... a court in passing sentence shall have regard to any relevant opinion under section 118(7) or 189(7) of this Act.”

4.9 On 7 December 2005, after those statutory provisions were enacted, but before they came into force, the Appeal Court decided an appeal taken by the Lord Advocate in the case of HMA v Lee 1996 SCCR 205. In the Opinion of the Court, delivered by Lord Justice General Hope, it was explained, at page 212,

“It has not been the practice in Scotland for the appeal court to lay down sentencing guidelines. But decisions of the appeal court in appeals against sentence, especially those in which it has held a sentence to be unduly lenient, do from time to time provide guidance as to what is or is not appropriate. A sentencer who fails to take

¹³ The Scottish Office (1994) - Sentencing and Appeals. HMSO: Edinburgh.

account of that guidance cannot be said to have acted within the proper limits of his discretion as a sentencer.”

4.10 Against that background, the statutory provisions relating to guideline judgements came into force on 1 April 1996. However since that date only a comparatively limited number of opinions that constitute guideline judgments have been issued. That is clear from Morrison’s ‘Sentencing Practice’¹⁴ which indicates, under the heading ‘Guidelines’, whether the Appeal Court has issued guidance on the appropriate sentence or range of sentence for each of the particular categories of crimes and offences with which the book deals. In relation to most categories of crimes and offences, it is noted that there are no ‘Guidelines’. Nevertheless, since 1 April 1996, a number of important guideline judgments have been issued, for example in Ogilvie v HM Advocate 2002 JC 74 (which addresses the appropriate level of sentences for offences of downloading and possession of indecent images of a child); Ansari v HM Advocate 2003 JC 105 (which deals with the imposition of discretionary life sentences), Kelly v HMA 2001 JC 12 and Robertson v HMA 2004 JC 155 (which deal with the imposition of discretionary life sentences on sex offenders) and Du Plooy v HM Advocate 2005 JC 1 (which gives guidance on the appropriate level of sentence discounts in cases in which the accused has pled guilty).

4.11 It is not clear why the Appeal Court has made comparatively little use of its statutory powers to issue guideline judgments. In dealing with appeals against sentence the Appeal Court has never indicated why it has restricted its use of its statutory powers to the extent it has. Nor is it possible to discern from reported cases the Appeal Court’s policies on (a) when the statutory powers should be invoked, (b) the identification of appeals against sentence in relation to which it might be appropriate for the Court to exercise those powers and (c) the procedure which should be followed by the Court itself, and by the parties to an appeal, when the issuing of a guideline judgment is being mooted. The Court does not specifically state that an Opinion issued is a guideline judgment, using its powers in the 1995 Act, and so relevant Opinions are neither reported nor indexed as such.

4.12 Indeed, notwithstanding the enactment of the statutory provisions that came into force in 1996, the Appeal Court’s current approach to the giving of guidance to sentencers remains much as was set out by Lord Justice General Hope in HMA v Lee 1996 SCCR 266. In the very recent case of Wright and Others v HMA [2006] HCJAC 60, the Appeal Court dealt with appeals against sentence brought by four appellants who had each pled guilty to being concerned in the supply of heroin. In the Opinion of the Court, which was issued on 10 August 2006, the Court stated in para. [18]

“There is, of course, no set tariff for a sentence in a case such as this. It is a matter for the discretion of the sentencing judge. There are no guidelines as such for him to follow. It has not been the practice of the Appeal Court to lay down such guidelines. But, although each case turns on its own facts and circumstances, previous decisions of the Appeal Court in appeals against sentences do in their own way provide guidance for the sentencing judge as to the appropriate range for particular types of cases. See HMA v Lee 1996 S.C.C.R 205, at page 212. It is important for our system of justice that, subject always to the particular facts and circumstances of the case, and subject also to the consideration that exemplary sentences may sometimes be appropriate, sentences should fall within the appropriate range for cases of that type.”

¹⁴ Morrison, N.M.P. QC (Ed) (2000) – Sentencing Practice. Thomson W. Green.

4.13 It appears that, in the absence of any system of comprehensive sentencing guidelines, or an extensive set of guideline judgments, sentencers in Scotland base their sentencing practice on their professional experience of court practice – including experience before appointment to the Bench, judicial precedent, statutory constraints, training provided by the Judicial Studies Committee (“the JSC”) and intuition or a feel for what is fair and just.

4.14 In a study of sentencing and the prison population in Scotland, Tombs (2004)¹⁵ carried out one-to-one interviews with five High Court judges, 34 sheriffs and one stipendiary magistrate. The issues covered in the interviews included the aims of sentencing, the nature of the sentencing decision making process and the social and political factors that impinge on the decision making process. The sentencers were asked to describe their general approach to sentencing. In particular they were asked whether the decision making process involved was primarily structured or more intuitive and based on experience. Just over 42% of the sentencers interviewed described a process with structure. Most interpreted and described the structure involved in terms of stages in the sentencing task, while others defined structure in terms of the factors taken into consideration in the decision-making process.

4.15 Thirty percent of the sentencers interviewed by Tombs regarded their sentencing practice as based primarily on experience and intuition with structure playing a limited part; 27% reported basing their practice only on experience and intuition. The sentencers interviewed also advised that they keep up to date with Appeal Court judgments through reported material contained in such reference sources as Green’s Weekly Digest, Scottish Criminal Case Reports and Scots Law Times periodical publications, the Scottish Courts website, and the loose-leaf textbook “Sentencing Practice”, edited by Sheriff N.M.P Morrison, Q.C.

4.16 Unlike the situation in other jurisdictions such as Canada and Australia, comprehensive data (including statistics and narrative information) on sentencing is not routinely collected in Scotland. On an annual basis, the Scottish Executive publishes information on sentencing profiles in the sheriff and district courts¹⁶ but this is of limited use in exploring issues of consistency (see paragraphs 5.3 to 5.6).

4.17 An electronic Sentencing Information System (“SIS”) was developed for use in the High Court, with the aim of providing sentencers with quick and easy access to past decisions of the High Court. The system became fully operational in 2002 but has not been widely used by the judiciary and it appears that it has now fallen largely into abeyance (see paragraphs 8.22 to 8.27).

4.18 There are, of course, appeal procedures, which ensure that sentences that are perceived by the accused to be excessive or by the Crown to be unduly lenient can be challenged. The available statistics show that in 2004-05 out of 82,098 persons with a charged proved in the sheriff summary courts only 1,715 (2%) of sentences were the subject of an appeal¹⁷. In 807 (17%) of the 4,669 cases sentenced under solemn procedure in the

¹⁵ Tombs, J. (2004) – A Unique Punishment: Sentencing and the Prison Population in Scotland. Scottish Consortium on Crime and Criminal Justice.

¹⁶ See Scottish Executive Section 306 publications on ‘Costs, Sentencing Profiles and the Scottish Criminal Justice System’ published under section 306 of the Criminal Procedure (Scotland) Act 1995.

¹⁷ Scottish Executive (2006) – Criminal Proceedings in Scottish Courts, 2004/05. CRJ/2006/03 Astron

sheriff courts and the High Court of Justiciary was there an appeal¹⁸. Of this total of 2,522 appeals against sentence 722 (29%) were successful.

4.19 These figures are informative and might be thought to suggest that there is not too much wrong with the range of sentences that are currently being imposed and that only some relatively minor modifications to the existing arrangements are needed. There are, however, other factors that ought to be considered. The Appeal Court is a court of appeal, not a court of review. In appeals against sentence the test that must be applied is whether the sentence imposed was excessive or, in the case of an appeal by the Crown that the sentence or other order made was unduly lenient or, in certain instances, inappropriate. In disposing of an appeal the Appeal Court can either affirm the sentence or order made or it can quash it and impose another sentence or order, in substitution, whether more or less severe.

4.20 When it deals with an appeal against sentence, the Appeal Court does not always issue a formal opinion. Indeed, we have been informed that the outcome of an appeal against sentence is not always communicated to the original sentencer. Our recommendations in this regard, which are aimed at improving transparency and consistency in the sentencing process, can be found in Part 9.

¹⁸ Scottish Executive (2005) – Criminal Appeal Statistics, Scotland, 2004/05. At: <http://www.scotland.gov.uk/Publications/2005/11/29155935/59363>

PART FIVE: EVIDENCE OF CONSISTENCY/INCONSISTENCY IN SENTENCING

Scottish Research

5.1 Research on consistency in sentencing in Scotland is virtually non-existent. In the first half of the 1990s a study by Hutton and Tata¹⁹ explored the custodial sentencing practices of ten sheriffs in three sheriff courts in Scotland. The researchers developed, in consultation with the sheriffs participating in the research, two scales of seriousness, a numerical and a narrative scale. Details of 1,281 cases previously sentenced by the ten sheriffs were collected and each case was categorised according to its perceived seriousness. The research showed that there was variation between the ten sheriffs in the length of custodial sentences passed for offences that were regarded as being of broadly similar seriousness. Analysis was carried out on cases falling within the lower, middle and upper thirds of the scales of seriousness. Whether the accused was tried under summary or solemn procedure, whether there were previous convictions and whether there were previous custodial sentences were also taken into consideration. For each set of circumstances the mean length of sentences passed by all sheriffs was identified and compared with the mean lengths of sentences passed by each of the ten sheriffs. While some sheriffs sentenced close to the overall mean, some were shown to impose shorter periods of custody and some were shown consistently to impose longer periods of custody. For example, for sentences passed under solemn procedure for offences rated at the upper third of the scales of seriousness, the mean length of sentence passed by all sheriffs was 17.87 months. However, the mean length of sentence passed by individual sheriffs ranged from a low of 13 months to a high of 24.69 months. The research showed both consistency and disparity in the lengths of custodial sentences passed for similar cases. However, the study was not able to consider the question of whether the degree of disparity demonstrated was acceptable.

5.2 In 2001 the Justice 1 Committee of the Scottish Parliament commissioned NFO System 3 to undertake a study of public attitudes to sentencing and alternatives to imprisonment.²⁰ The research entailed a survey of a nationally representative sample of 700 adults from across Scotland and a series of nine focus group discussions held in four locations around Scotland.²¹ The researchers reported that the issue of consistency ‘came up repeatedly in the course of the focus groups’ and that while occasionally the courts were criticised for the absence of sentencing guidelines, most commonly the criticisms related to sentencers being perceived as poorly trained and/or out of touch. A need for greater consistency was expressed both by those who were not offenders and those who had appeared in court as accused, with the latter arguing that sentencing should not be a matter of ‘luck-of-the-draw’ but clearly based on a combination of nature of the offence and previous record. However, some members of the focus groups argued for discretion in sentencing as they felt it was important for the circumstances of the offender and the reasons for the offence to be understood and taken into consideration. On the basis of the information gathered in the focus groups the researchers conclude that:

¹⁹ Hutton, N. and Tata, C. (1995) – Patterns of Custodial Sentencing in the Sheriff Court. The Scottish Office Central Research Unit.

²⁰ NFO System 3 (2002) – Public Attitudes to Sentencing and Alternatives to Imprisonment. At: <http://www.scottish.parliament.uk/business/committees/historic/justice1/reports-02/j1r02-pats-02.htm>

²¹ Participants in the focus groups were recruited from the general population and comprised males and females aged 18 years and over from all socio-economic groups.

“There is ... a persistent concern about inconsistency in sentencing - though this is balanced, to some extent, by a belief in the importance of discretion and ‘treating each case on its merits’.”

They suggest that public confidence in the courts and the judiciary might be restored by looking at ways of improving perceptions of consistency and fairness in sentencing.

Scottish Statistics

5.3 The only other source of information on the consistency or otherwise in sentencing in Scotland is the Scottish Executive’s annual Section 306 publication on “Costs, Sentencing Profiles and the Scottish Criminal Justice System.” This provides comparative information on the use of custody, community service and probation in sheriff courts, together with details of the average fine and the average length of custodial sentences and community service orders imposed in each sheriff court. Details are provided for a range of different types of offences. The reports also provide information on sentencing in the stipendiary magistrate and district courts, focusing on the use of fines and admonishments. Details of the information contained in the most recent report are contained in Annex A.

5.4 Although the Section 306 reports provide a very broad indication of sentencing patterns in Scotland’s sheriff and district courts and show that both the use of custody and the average length of custodial sentences imposed varies widely between sheriff courts, the reports are of limited value and do not provide conclusive evidence of inconsistency in sentencing. The data presented in the reports are unable, for example, to take into consideration the seriousness of the cases heard at each sheriff court or the characteristics of the offence and/or the offender. Thus, the fact that 23% of the 915 cases heard at Alloa sheriff court in 2003 resulted in custody indicates that a high proportion of the cases heard in this court were serious enough and/or the offender’s criminal history was serious enough to merit a custodial sentence. In Stonehaven, however, the fact that only 2% of the 286 cases heard there in 2003 resulted in custody may simply reflect the fact that the cases arising there were less serious, or the criminal records of the offenders were less serious than those being dealt with at Alloa sheriff court. Likewise with individual offence types. The data appear to suggest that housebreakers sentenced in Stranraer sheriff court are twice as likely as housebreakers sentenced in Arbroath sheriff court to receive a custodial sentence (42% versus 21%). However, the difference in custody rates may simply reflect the fact that the court in Stranraer dealt with more serious cases or offenders with worse criminal records than the court in Arbroath. The same consideration applies to variations between courts in the average length of custodial sentences imposed. The average length of custodial sentences for cases of housebreaking sentenced in Campbeltown and Peebles sheriff courts in 2003 was 30 days and this may reflect that those imprisoned by these courts had committed crimes that, while serious enough to merit imprisonment, were at the lower end of the scale of seriousness. Many of those sentenced at Wick and Stornoway sheriff courts, however, where the average length of sentence was 182 days, may have committed crimes that were at the upper end of the scale of seriousness.

5.5 The latest Section 306 publication was met by a mixed commentary. Some media reports referred to it as exposing a ‘postcode lottery’ of sentencing which also revealed that imprisonment appears to be more likely for offenders who commit property crime than it is for those who commit crimes of violence.

5.6 The Section 306 report is the only source of published data on sentencing patterns in the Scottish courts but it does not enable basic questions about the degree of consistency in sentencing across the country to be addressed because the statistics do not compare like with like.

5.7 The sentencers on the Commission regard the publication as no more than a collection of bare statistics. Neither they, nor, in their experience, other sentencers pay any heed to the figures contained in it in the context of informing their sentencing practice.

Research in England and Wales

5.8 A range of studies of consistency in sentencing using a variety of methodologies have been undertaken in England and Wales over the last 30 years. Some studies have used court records to look retrospectively at sentencing patterns, some have employed paper-based case study exercises in which sentencers are presented with case scenarios and asked to say what sentence they would impose in each case, while others have involved interviews and/or discussions with sentencers. The studies undertaken in England and Wales have focused on both the magistrates courts and the Crown Court and all have found evidence of inconsistency in sentencing. Findings from some of the more recent studies are considered in Annex B.

5.9 It is apparent from the studies summarised in Annex B that a variety of different methods have been used to explore consistency in sentencing in the UK and all point to varying degrees of inconsistency. Each of the approaches used has benefits and shortcomings. In particular, retrospective studies of court records are difficult because of the need to ensure that cases of similar seriousness are being compared – and some of the studies described were not able to address this question. Undertaking case study exercises with sentencers avoids this problem but introduces a degree of artificiality in that sentencers are not making their decisions in a court setting with all the parties, including the offender, present.

PART SIX: THE NEED TO IMPROVE CONSISTENCY IN SENTENCING

6.1 While there may be many reasons to justify variations in sentencing between similar cases, that does not necessarily mean that every such variation is warranted. Neither, it must be stressed, do all differences in sentences between cases that appear to be alike constitute the occurrence of inconsistency. Differences in sentences may be reasonable and justifiable reflections of material variations in the circumstances of the individual cases that come before the courts. In some instances, however, differences in the sentences imposed in similar cases may be a reflection of individual approaches of different judges or by differences in approach of the judges in one court when compared with the approach of judges in other courts. In other instances, difference in the sentences imposed in similar cases may reflect variable approaches by the same judge, which are caused, at least in part, by the absence of sufficient sentencing guidance to assist individual judges to maintain a consistent approach to sentencing.

6.2 The Commission takes the view that when offenders, who have committed the same or similar offences, are dealt with at the same court level they should be treated similarly, by whichever sentencer is imposing sentence and in whichever court they are appearing. An offender should not receive a sentence which is widely different from the sentences, which have been or are likely to be imposed by the majority of sentencers in similar cases.

6.3 Legal practitioners (whether prosecutors or defence lawyers) also benefit when the judiciary strives for and, so far as possible achieves, the imposition of sentences that are understandable and can be considered to be consistent with sentences that the same or other judges have imposed or are liable to impose in similar cases. Such consistency in sentencing assists prosecutors in deciding in which courts to prosecute individual cases and whether to appeal sentences that are considered to be unduly lenient. It also assists defence lawyers in advising their client, at an early stage in criminal proceedings, about the sentence that is liable to be imposed if they plead guilty and the sentence they are liable to receive if they are convicted after trial. It further assists defence lawyers in advising their clients on whether they should appeal against the sentences that have been imposed.

6.4 A lack of transparency also gives rise to complaints of a lack of consistency. Victims are entitled to have an understanding of what sentence is likely to be imposed on the person who has perpetrated an offence against them. Lack of consistency in sentencing also matters to the public generally and is a regularly expressed criticism of the criminal justice system in Scotland. Perceptions of inconsistency lead to complaints of injustice.

6.5 Although the approach of reliance on judicial precedent and judicial training is said to have the advantage of allowing sentencers wide flexibility to reflect the circumstances of the individual case, opinions have frequently been expressed by academics, legal practitioners, politicians and members of the general public that confidence in the criminal justice system is undermined by the absence of a structured and coherent approach to sentencing designed to promote consistency and predictability in sentencing.

6.6 In April 2006, a member of the Law Society for Scotland's criminal law committee, when commenting in the 'Scotsman' on the Commission's recommendations for changes to the law on the early release of prisoners, observed that

“In our view, any [sentencing] guidelines would be welcomed because there is clearly a degree of inconsistency in sentencing. It is a problem all over the country. There are people getting greater sentences in some parts of the country than they do in others, for no particular discernible reason.” (Scotsman 18 April 2006)

6.7 As we have already made clear, we agree with the view that the current approach to sentencing in Scotland gives rise to inconsistency. However, lack of consistency is maximised in a system in which judicial discretion is relatively unfettered. Inconsistency leads to a measure of unpredictability. This may have undesirable practical consequences. During visits to prisons, members of the Commission were informed by prisoners that in courts in which more than one judge or sheriff presides accused persons are on occasion advised to seek an adjournment or maintain a plea of not guilty, in cases where the ultimate intention is to plead guilty. This takes place simply to avoid their cases calling before a judge or sheriff who is perceived to be a hard sentencer. That accords with the practical experience of the judicial members of the Commission and the other legally qualified members of the Commission, who have been, or remain, in practice in the criminal courts.

6.8 It is, of course, inevitable that until any sentence is pronounced there cannot be certainty about the penalty that will be imposed. However, accused persons may be more reluctant to plead guilty if they have little idea what penalty they are likely to face, notwithstanding the fact that a discount in sentence is normally applicable to a sentence following upon an early guilty plea. In some jurisdictions in the USA, it is normal for the court to give an indication of the likely sentence in advance of the trial for the purpose of encouraging earlier plea decisions. That forms no part of the procedure in Scotland and we are not attracted to the idea that it should.

6.9 When considering appeals against sentence, the Appeal Court frequently refers to “the range of sentences” that was open to the original sentencer. Indeed in his book “Sentencing Practice”, Morrison²² points out that the purpose of the book is

“to provide judges, practitioners and others with a means of obtaining some guidance of what might be the appropriate range of sentence for a particular case being considered.”

That chapter further records that

“Occasionally the High Court of Justiciary, on appeal, indicates that a sentence is ‘within the range’ or ‘at the top or (bottom) of the range’, but the range is rarely, if ever, indicated.”

Examples of this can be found in Cassidy v HM Advocate 1999 G.W.D 13-482²³ where the court said:

“We are satisfied that the sentence selected by the judge was within the appropriate range and the appeal is refused.”

In Ogilvie v HM Advocate 2002 JC 74²⁴ it said:

²² Morrison, *op. cit.*

²³ Also at <http://www.scotcourts.gov.uk/opinions/c64598.html>

²⁴ Also at http://www.scotcourts.gov.uk/opinions/c183_01.html

“We now turn to consider what is the appropriate range of sentences for an offence of the kind committed by the present appellant,we consider that it would only be in the most exceptional circumstances that any sentence in excess of 9 to 12 months would be imposed for an offence of this nature.”

In Kay v HM Advocate [2005] HCJAC48,²⁵ it stated:

“...we are of opinion that, placing the appellant's case appropriately in the scale of penalties now provided for by Parliament, the length of custodial term selected by the sheriff was within the range properly available to him in the exercise of his discretion.”

In the recent case of Anderson v HM Advocate [2006]HCJAC24,²⁶ the court stated:

“...the trial judge took as a starting point in the determination of the appropriate sentence the period of 8 years. Having regard to the degree of culpability involved we consider that period to be within the appropriate range.’

6.10 As noted by Morrison, the Appeal Court seldom indicates even in broad outline, let alone in any detail, what the appropriate range of sentence might be. Whilst a reference to the range might mean something to judges and sheriffs, and to some others working in, or knowledgeable about, the criminal justice system, there are no documents which they and others can readily consult for details about the ‘range’ of sentence being referred to by the Appeal Court for the particular category of crime or offence that was involved in the appeal against sentence that had been before the court. Such references are of very little assistance to the general public and the media, who are left to speculate about what “the range” for the crime or offence in question could be. The Commission considers this can only increase concerns about a lack of transparency in sentencing and undermine confidence in the criminal justice system. The Commission also considers the practice of referring to the appropriate range of sentence, without specifying what it is, does not assist judges and sheriffs in seeking the level of consistency in sentencing, which it is confident sentencers would wish to achieve.

6.11 Since the issuing of the guideline judgement in Du Plooy v HM Advocate there has been a marked increase in guilty pleas in both the sheriff court and the High Court. That increase follows upon the guidance provided by the Appeal Court on the level of discount in sentence that should be allowed following upon such a plea. The Appeal Court’s opinion in that case illustrates how guidance from the Appeal Court can have a practical impact, of some significance, in the promotion of consistency in sentencing. Indeed the number of sentence appeals that have come before the Appeal Court since Du Plooy was decided, in which the level of discount allowed by the original sentencer has been the subject of challenge may support the view that sentencers would welcome more detailed guidance on the whole topic of discounts in sentencing following pleas of guilty.

6.12 As has already been mentioned, the Commission considers that, the existence of more extensive and comprehensive sentencing guidance, including sentencing guidelines, would make it easier for legal representatives to give advice on the marking of appeals against sentence. If that were so, it could have the consequence of fewer appeals being marked, since

²⁵ <http://www.scotcourts.gov.uk/opinions/2005hcjac48.html>

²⁶ <http://www.scotcourts.gov.uk/opinions/2006hcjac24.html>

there would then be clear “benchmarks” against which particular sentences could be compared. On the other hand, if sentencers ignored or departed from sentencing guidelines, without explaining their reasons for doing so, that might give rise, at least initially, to a larger number of appeals.

PART SEVEN: SENTENCING STRUCTURE IN OTHER JURISDICTIONS

7.1 Throughout the world there is a range of approaches to achieving consistency in sentencing which include such features as complete codification of criminal offences and penalties, mandatory and statutory minimum penalties, guidelines issued by sentencing commissions, and guidelines promulgated by superior courts, all of which have the effect of limiting the discretion of the sentencing judge to a greater or lesser degree. Sentencing frameworks can be regarded as lying along a continuum, ranging from highly prescriptive systems that afford individual sentencers very little discretion – such as the Federal sentencing guidelines system in operation in the United States of America - to systems that impose very few constraints on sentencers' decision making and allow them to exercise wide discretion in sentencing individual cases - such as the systems in place in Scotland and some other Western European jurisdictions. In Annex C we describe various sentencing guideline systems in operation around the world. *(For a more comprehensive review of guideline systems around the world see the Commission's website at <http://www.scottishsentencingcommission.gov.uk/>)*

7.2 In January 2006, a small delegation from the Commission attended a meeting of the Sentencing Guidelines Council (“SGC”) held in London, having earlier attended a meeting of the Sentencing Advisory Panel (“SAP”) in November 2005. The SGC is chaired by the Lord Chief Justice and comprises 10 members (seven of whom are judicial members) and attended by the Director of Offender, Law and Sentencing Policy, National Offender Management Service, acting as an observer. The SGC is an independent body that is responsible, along with the Court of Appeal, for issuing sentencing guidelines for use by the courts in England and Wales (see paragraphs 2 and 3 of Annex C).

7.3 The main impressions of the SAP and SGC that the members of the Commission took from attending these meetings were:

- the amount of work undertaken by the members of the SAP and the SGC, including the reading of papers, debate and deliberation, is substantial, as is the level of research and drafting undertaken by the full-time staff in their Secretariat;
- the commitment of members of the SAP and SGC in attending one meeting a month (together with reading time) is considerable, especially for the members of the senior judiciary who are involved;
- a strong contribution to the discussions is made by all members of both bodies;
- having different levels of sentencers on the SGC – ranging from members of the Court of Appeal to the Magistrates Court – is valuable;
- in the context of the arrangements operating in England and Wales it is useful having a Home Office representative (as distinct from the officials from the SGC Secretariat) attend meetings, not as a member, but as an observer to provide an understanding of the Ministerial perspective on sentencing policy and practice and
- the work undertaken can be the subject of controversy in the political arena. For that reason it is necessary for members of the SAP and the SGC to be comfortable taking decisions in a non-politically partisan way.

7.4 These were most instructive visits, which greatly assisted those who attended, and subsequently the full Commission, with their deliberations on this matter.

7.5 The Law Commission of New Zealand has recently begun consulting on sentencing reform²⁷ and is proposing the creation of a Sentencing Council in order to address:

- deficiencies in the way sentencing policy is developed;
- inconsistency in sentencing between judges and regions;
- unpredictability in sentencing practice and
- the absence of any consideration of costs in the sentencing process.

7.6 The proposed Sentencing Council in New Zealand would be responsible for:

- drafting a set of presumptive guidelines as to both sentencing levels and custody thresholds for offence types and sentencing principles;
- drafting Parole Board policy guidelines, including guidelines about best practice in the assessment and management of the risk of re-offending;
- collating and providing information for sentencing judges and publishing and making accessible information about sentencing to the wider public;
- providing policy advice on sentencing issues at the request of the Minister of Justice and on its own initiative;
- considering the costs and benefits to the community of proposed sentencing and parole guidelines and
- analysing and interpreting sentencing statistics, publishing conviction and sentencing data and forecasting prison numbers, and monitoring and reporting on the impact of the guidelines.

7.7 The consultation paper proposes that the Council should comprise two District Court judges, one High Court Judge, one Appeal Court Judge, the Chair of the Parole Board and five other members with expertise or understanding in a variety of areas of criminal justice. One or more members of the executive should be appointed to the Council as observers. It further proposes that the Chair of the Council should not be a member of the judiciary.

7.8 The proposed Council will be responsible for drafting guidelines and those for offence types will have both numerical aspects (guidance on the bands of sentence) and narrative aspects (text expanding upon the approach to be adopted for different categories of offence) while those about sentencing principles will be purely narrative. Guidelines for offences will include numerical ranges and will cover those imprisonable offences coming routinely before the courts that result in a significant number of sentences of imprisonment. It is proposed that judges will be obliged to adhere to the guidelines ‘unless they are satisfied that to do so would be contrary to the public interest’.

7.9 Rather than producing guidelines incrementally, it is proposed that the Council will develop and promulgate a comprehensive set of guidelines within a ‘reasonable’ period (suggested as two years). The Council will be empowered to consult as it considers appropriate on its draft guidelines. The guidelines will be presented to Parliament and referred to the appropriate Select Committee for approval. They will come into effect 30 sitting days after they have been presented to the House, unless the House rejects them. The House will be able to disallow the guidelines on the grounds that ‘the overall sentence severity levels are excessive or inadequate’. If the guidelines are disallowed they will be sent

²⁷ New Zealand Law Commission (2006) – Reform to the Sentencing and Parole Structure. Consultation Draft. Copy provided by Dr. Warren Young, 1 June 2006.

back to the Council and the Council must vary them, taking into account the basis upon which they have been disallowed by Parliament. Parliament will not have the power to make changes or recommend to the Council particular changes; the guidelines must be accepted or rejected as a whole.

7.10 We have thought it appropriate to refer, somewhat extensively, to the developments in New Zealand because in terms of the size of its population it is similar to Scotland and, like Scotland, its criminal justice system is fundamentally a common law jurisdiction.

PART EIGHT: OPTIONS FOR IMPROVING CONSISTENCY IN SENTENCING

8.1 We consider that sentences imposed by different sentencers in similar cases are more likely to be consistent if there is a comprehensive sentencing framework in place, the details of which are publicly available and readily accessible to sentencers, legal practitioners and all with an interest in the criminal justice system in Scotland. We consider such a framework should be capable of facilitating the provision of clear guidance for sentencers as to the general level of sentence appropriate for particular types of crimes and offences. Making it possible for sentencers easily to access factual information about the sentences that have been imposed by other sentencers, and have been upheld or imposed by the Appeal Court, in similar cases would also help to promote consistency in sentencing.

8.2 The Commission considers that there are a variety of options for providing sentencers with the guidance and practical assistance required to promote consistency in sentencing:

Statutory Enactment of the Purposes of Sentencing

8.3 So far as consistency in approach to sentencing is concerned this is frequently pursued by enshrining the broad purposes of sentencing in statute. For example, the Criminal Justice Act 2003 (Chapter 44) includes at section 142 the following in respect of England and Wales:

“Purposes of sentencing

(1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing-

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.”

8.4 In Scotland, while these purposes or objectives of sentencing are not promulgated in statute, they are nonetheless understood by sentencers. Some would argue that most, if not all, of such purposes of sentencing are taken as read by sentencers in the context of their sentencing decisions.

8.5 Nicholson in Chapter 9 of his book on Sentencing²⁸ describes what he refers to as

“the main objectives which from time to time and in varying proportions, figure in sentencing decisions.”

These are listed, in no particular order, as:

- punishment
- protection of [the] public
- deterrence
- denunciation

²⁸ Nicholson *op cit*.

- rehabilitation
- restitution
- economy of resources
- reduction of crime

8.6 In his Opinion in the case of Dempsey v Parole Board for Scotland 2004 SLT 1107²⁹ Lord Brodie stated

“In his opinion in Giles in the House of Lords, Lord Hutton, at para 61 ([2003] 3 WLR 758D) quoted the following passage from the judgment of Lawton LJ in R v Sargeant at (1974) 60 Cr App R 74 at 77 and 78:

“What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: **retribution, deterrence, prevention and rehabilitation** [emphasis added]. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.”

Lord Brodie went on to say that

“the passage from R v Sargeant is also useful for its enunciation of what Lawton LJ describes as the classical principles of sentencing and his recognition that in any particular case one or other of these principles may predominate in its influence on the sentencing judge's decision making. There will be cases where one or other of the principles (however they may be described by the sentencing judge) will have little or no application. In Ansari v HM Advocate the Lord Justice Clerk refers to the element in a sentence attributable to the protection of the public as the risk element. At para 33 of his opinion, (supra 2003 JC 114I), he explains the process by which a sentencing judge will decide on what sentence he or she will impose: ‘In imposing a determinate sentence in a case like this, the sentencing judge would not assess specific periods for retribution, deterrence, protection of the public and so on, and then aggregate them. He would simply use his judgment to decide what, in light of the circumstances overall, should be the appropriate sentence. In some cases, where the likelihood of the accused's re-offending was remote, the risk element would scarcely come into account.’”

8.7 Although we do not consider that enshrining the purposes of sentencing in statute would be liable, by itself, to deliver greater consistency in sentencing, we do consider that it would be a useful first step in the creation of a comprehensive and visible framework around which sentencing can be structured.

Judicial Education and Training

8.8 Sentences imposed by different sentencers are more likely to be consistent if judicial education continues to address the law and practice of sentencing. The Judicial Studies

²⁹ Also at http://www.scotcourts.gov.uk/opinions/p940_03.html

Committee, which is responsible for the training of judges and sheriffs in Scotland, plays an important role in this regard. A number of its training activities require particular mention.

(a) Sentencing exercises at judicial training courses

8.9 These are a feature of all Induction and Refresher courses run by the JSC for newly appointed High Court judges and sheriffs. Indeed, similar exercises are used by judicial training organisations in other jurisdictions. Real case studies are undertaken, which allow participants to see how the disposals, which they would have imposed, compare with the sentences chosen by other course members. Typically a sentencing exercise will involve all course participants being provided with sets of papers relating to a number of offenders, including the indictment/complaint, copy previous convictions (if any) and any background or medical reports about the accused. Judges and sheriffs convene in groups of around six to eight to discuss their provisional views and then each notes the sentences they would have imposed on the individual accused had the cases called before them in court. The anonymised results from each group are discussed in a plenary session with course leaders, when the actual result of the case, both at first instance and on appeal, is disclosed. All the cases chosen are of recent origin and are suitably anonymised. This technique has been employed for a number of years and is widely regarded as useful for both sheriffs and High Court judges.

8.10 The technique used at Judicial Skills Courses run by the JSC is slightly different. Participants are given a set of case papers with background reports to consider the evening before the sentencing exercise. The next day the judge or sheriff presides in a mock courtroom and is addressed on behalf of the Crown and defence, before selecting the appropriate sentence. The sentencer will be expected to give reasons for his or her decision; thereafter the reasoning process and sentencing technique will be explored in discussion with colleagues, before the actual result is revealed. While the emphasis at these skills courses is more on the effective communication of the sentence and the reasons for it, the discussions that follow do address issues of consistency.

(b) Lectures on Sentencing

8.11 For a number of years the JSC has used outside speakers from the Universities to present lectures to sentencers on sentencing principles and policies. These talks have been given at Induction Courses and at Refresher Courses for new sheriffs. Among the materials referred to at these sessions have been the annual Statistical Bulletins on Criminal Proceedings in Scottish Courts and the statutory report on “Costs, Sentencing Profiles and the Scottish Criminal Justice System” (the annual “Section 306” report referred to elsewhere in this report), both of which are published by the Scottish Executive and disclose levels of sentencing throughout Scotland.

(c) Sheriffdom Study Days

8.12 For some years, a number of Sheriffs Principal have, with the assistance of the JSC, organised Sheriffdom Study Days on which court business is severely curtailed to enable all the sheriffs of that Sheriffdom to meet together in a programme of lectures and discussions. Such an event requires to be organised many months in advance, but the programme for the day is often finalised at relatively short notice so that matters of current concern may be discussed. Study days are particularly useful in Sheriffdoms in which the individual courts

are at some distance apart. Sentencing exercises are a feature of all of these study days and provide the opportunity for sheriffs to discuss (in addition to wider matters) issues of local sentencing practice in response to the prevalence of particular crimes in the locality.

(d) Bench Books and Sentencing Checklists

8.13 The Sheriffs' Association has for many years produced its own Criminal Bench Book in which practical information is given regarding the sentencing process, including the various sentencing disposals available for each type of offence. The current edition dates from June 2002 but a new edition is in the course of preparation, with assistance from the JSC. In view of the pace of legislative change it is intended to update this book more frequently. In addition the JSC has issued guidance to sentencers in the form of Sentencing Checklists written by the former Director, Sheriff Nigel Morrison, QC. These checklists do not contain sentencing guidelines, although they do refer to guideline judgments issued by the Appeal Court.

(e) Briefing materials on new disposals

8.14 Although not strictly related to the matter of consistency in sentencing, the JSC regularly produces briefing materials on new sentencing disposals, along with information on commencement dates and about whether the sentencing disposal is simply being piloted in a particular area. However, the JSC has no locus to suggest that a particular new disposal (or any other disposal) is appropriate in any particular case or indeed to determine the sentencing policy that should apply to the use of new sentencing disposals.

(f) Electronic circulation of recent Appeal Court decisions

8.15 The JSC has, since its inception, maintained a system whereby the Scottish Courts Website is searched on a daily basis and case summaries are prepared for immediate electronic circulation to the judicial community. These summaries include all those sentencing appeal decisions, which have been posted on the website. But while the summaries are routinely brought to the attention of all judges and sheriffs, not all sentencing appeal decisions by the Appeal Court are posted on the website. It is for the Chair of the Bench to decide whether or not the written opinion of the Appeal Court in a sentencing appeal is posted on the website.

(g) Training for lay justices of the peace ("JPs")

8.16 This is currently the responsibility of the Justices Committee in each local authority area. The amount (and type) of training provided therefore varies significantly throughout the 30 local authority areas which have district courts. In addition, the District Courts Association holds an annual training conference. As a consequence of provisions within the Criminal Proceedings etc. (Reform) (Scotland) Bill, which is currently progressing through the Scottish Parliament, JPs will be required to undergo induction, refresher and ongoing training provided by the JSC. It is envisaged that the JSC will run a website for JPs with training information on it and will send out summaries of relevant information, such as recent judgments which are of interest to JPs, which can then be incorporated into locally delivered training. It is also planned to produce a new Bench Book for justices and a more detailed manual for legal assessors of the type commercially produced in England and Wales (Stone's Justices' Manual).

8.17 Judicial training is clearly a worthwhile exercise and the Commission encourages members of the judiciary, at all levels, to take full advantage of the training opportunities made available to them. Judicial training has the real benefit of improving communication between judicial colleagues. It provides a means for constant self-assessment and reassessment in the approach to some of the most difficult individual decisions any sentencer has to make. As a means of improving consistency it is certainly a useful tool.

Information available to sentencers

8.18 As we have indicated, consistency in sentencing is also likely to be promoted if sentencers are aware of, or have ready access to, clear information of the sentences imposed by other sentencers in similar cases. This can be achieved by reference to relevant materials such as textbooks on sentencing, publications which provide reports of previous cases such as Green's Weekly Digest, Scottish Criminal Case Reports and Scots Law Times, and websites such as the Scottish Courts Website. There are, however, a very limited number of up-to-date analytical textbooks on sentencing practice, as opposed to the law and statutory procedures of sentencing.

8.19 It is highly unsatisfactory that there is currently only one text book dealing with sentencing practice, which is of practical assistance to sentencers in determining which sentence and the level of sentences to impose. That book is Morrison: "Sentencing Practice", which is a compilation, in loose-leaf form, of summaries of decisions of the Appeal Court in appeals against sentence. The book is the work of a number of sheriffs, whose contributions are written in their spare time. Given that sentencing is such an important and complex element of the criminal justice process it is essential that sentencers should have access to as much guidance and collective experience as possible. As a minimum, the provision of full-time editorial assistance to Sheriff Morrison and his shrieval colleagues would undoubtedly assist them in keeping this excellent manual fully up-to-date. In addition we suggest that consideration should be given to enabling members of the judiciary, who are prepared to write or contribute to textbooks to be released from their judicial duties in the same way as judges and sheriffs are released to participate in and conduct judicial training.

8.20 In the Commission's view, further funding requires to be made available for the production of more textbooks for use by sentencers and we make a recommendation in this regard in paragraph 9.4. We are of the view that professional bodies such as the Law Society of Scotland and the Faculty of Advocates should consider encouraging and commissioning academics and practitioners to produce more textbooks, designed to be of practical assistance to those involved in one capacity or another in the sentencing process.

8.21 Other jurisdictions, for example New South Wales and in the United States, collect and publish comprehensive data on sentencing. The Judicial Commission of New South Wales has access to data, updated on a quarterly basis, on sentencing outcomes in all Higher Court, Local Court and Children's Court cases. The Commission uses these statistics, together with information on principles and practice, case summaries and court judgments to produce a package of information intended to assist the courts in achieving consistency of approach in sentencing. Sentencers in Scotland do not have access to detailed sentencing statistics. Whilst they do have access to the very broad brush information published by the Scottish Executive in its Section 306 reports this is regarded as being of little value (see paragraphs 5.3 to 5.7). To assist sentencers in the carrying out of their sentencing role it is

clear that there is a need to ensure that the information available to them on patterns of sentencing for different types of offences, and on patterns within different courts or sheriffdoms, is at an optimal level.

Sentencing Information System

8.22 Another way in which a sentencer can be made aware of the sentences imposed by other courts for comparable offences is by the use of an electronic sentencing information system. The principal argument in favour of sentencing information systems is that they provide sentencers with a readily accessible source of information on existing sentencing practice that can be used to inform sentencing decision making and increase consistency within and between sentencers. Information systems are seen as being less restrictive than sentencing guideline systems as they impose no constraints on the discretion of the sentencer; they simply inform the decision making process. Miller (2004)³⁰ notes that

“An SIS would let judges know the distribution of actual sentences in similar cases, including whether other judges were sentencing at high or low ends of available ranges, or making use of available non-prison sanctions. Judges could see the impact of specific sentencing facts on the distribution of sentences.....” (pp. 143)

8.23 Such a system became fully operational in the High Court in Scotland in 2002. Development of the SIS began in 1993 and was initiated by the then Lord Justice Clerk, Lord Ross with the support of the then Lord Justice General, Lord Hope. The original system comprised a ‘Penalty Statistics database’ which judges could use to ‘look up’ previous sentences passed for similar cases. The judiciary were closely consulted about the nature of the information required for the system and this led to the development of two complementary approaches to ‘looking up’ previous sentences. The Principal Offence Approach allows judges to look up sentences on the basis of the principal offence, with the addition of further offence characteristics. The Modified Offence Approach attempts to reflect the judicial practice of looking at cases ‘as a whole’ and also allows the key characteristics of the offender to be specified. The original system contained information on all sentences passed in the High Court between 1989 and 1993. A ‘closed’ version of the system (one that the judges could examine the content of but not add new cases to) became operational in the High Court in the late 1990s. After this initial trial the system was altered to an ‘open’ system to which judges and/or their clerks could add new sentences, and was updated to include all sentences imposed by the High Court between 1993 and 2002. The system became fully operational in the High Court in February 2002.

8.24 The SIS contains information on around 15,000 sentences imposed by the High Court since 1989. Case details are added to the system by judges or their clerks through the data entry subsystem and the entire database is updated on a monthly basis. In addition to the information on the characteristics of the case the system enables the sentencing judge to include a brief narrative account of the case and reasons for imposing the sentence that they did.

8.25 The SIS comprises two main subsystems – the data entry subsystem that allows information about individual sentences to be recorded on an on-going basis and the data retrieval subsystem that retrieves retrospective data about all the recorded sentences. The

³⁰ Miller, M (2004) – Sentencing Information Systems. In Tonry, M. (Ed.) – The Future of Imprisonment. Oxford University Press.

data retrieval subsystem can be searched on a range of dimensions – offence category, classification and characteristics, offender characteristics and previous convictions. The subsystem identifies the number of cases found that match the selected criteria and displays the information on sentences imposed in table or chart form. Sentences imposed on appeal can also be explored.

8.26 Analysis of the content of the SIS undertaken by the Commission revealed that few cases have been entered into the system since the end of 2004 and there are problems with the accuracy of the data that have been entered. Analysis of individual offence types provided information on the range of sentences imposed in previous cases. For example, in cases of seriously aggravated assault in which the offender was a male aged over 25 years, the SIS retrieved 1,256 sentences that ranged from life imprisonment to admonition. Ninety percent of disposals were custodial. The length of these custodial sentences ranged from less than 12 months to 25 years. Using the pre-set sentence bands within the SIS, the analysis showed that 19% of sentences of imprisonment were of two to four years, 33% were of four to six years and 24% were of six to eight years. Narrative information from judges appears to have been entered into the SIS only rarely. Anecdotal evidence, together with the experience of the High Court judge members of the Commission, has also suggested that judges rarely use the system to look at past sentencing decisions, because they do not find the SIS sufficiently informative or user friendly. It appears to the Commission that currently the SIS does not have anything other than the most marginal of impacts on the imposition of sentences in the High Court.

8.27 Notwithstanding that impression, the Commission consider that the SIS had, and still has, the potential to provide useful information on sentencing for judges in the High Court. However, in order to fulfil its intended function, it would require to be updated and amended to take into account the impact of the Du Plooy ruling on sentence discounts and it would need to be utilised by judges as it was intended that it should be. In the light of the anecdotal evidence, and the experience of those Commission members from the higher judiciary, we regret to say that we are not encouraged to suppose that this is likely. On the other hand the contents of the SIS might - if obvious data errors were corrected - be useful in the development of sentencing guidelines, although care would require to be taken in respect of cases in which the accused pled guilty, as the data contained within the system cover many sentences imposed prior to the decision in Du Plooy. Moreover the data added since Du Plooy was decided do not detail the extent of the impact of Du Plooy on the sentences imposed in individual cases.

Sentencing Guidelines

8.28 As stated in paragraph 3.4, sentencing guidelines should attempt to define what should be treated as similar cases for sentencing purposes. Guidelines for categories of crimes and offences are likely to have both narrative and numerical aspects, although guidelines on sentencing principles are likely to be in purely narrative form. Guidelines may also be formulated to provide guidance on the application of new statutory penalties. An example of what a guideline might look like can be seen by reference to the Sentencing Guidelines Council's guideline on Robbery, reproduced at Annex D. That draft guideline subdivides the offence into different categories and then identifies levels of seriousness which attach a range of sentencing disposals to each. Finally, aggravating and mitigating factors are identified in a narrative form. This reflects the interpretative process that a sentencer is

expected to follow when passing sentence and assists the public in understanding that process.

8.29 A number of potential advantages of sentencing guidelines can be identified. The most commonly cited reason for introducing sentencing guidelines is to improve consistency between sentencers. It is important to bear in mind, however, that consistency by itself is a limited objective. It implies no judgement about appropriate levels of sentencing and could be satisfied simply by a closer grouping of sentences around existing norms. Indeed some proponents of greater consistency may desire consistency around a particular approach to sentencing, for example less use of custodial sentences, whether generally or for particular categories of offenders, or more severe custodial sentences for certain types of offence. For that reason, the achievement of greater consistency might prove disappointing to some who call for it, because greater consistency in sentencing could result in the reinforcement of sentencing norms of which they disapprove. In these circumstances it is important to recognise that the introduction of sentencing guidelines would not only assist in promoting consistency in sentencing. It would afford the opportunity of providing sentencers with clear guidance as to the range and levels of sentences appropriate for particular categories of crimes and offences, which has been formulated having taken into account a wider range of information, research, expertise and experience than the Appeal Court could be expected to have access to when dealing with appeals against sentence in actual cases. Such guidance in the form of sentencing guidelines would be readily accessible to sentencers and legal practitioners. Equally importantly it would be readily available to the public and the media. Whilst the introduction of sentencing guidelines would not ensure absolute consistency in sentencing, – that is unattainable in practice – it would have the potential of reducing the number of sentences that attract widespread, and in many instances unwarranted, criticism for being unduly lenient or manifestly excessive.

8.30 Secondly, sentencing guidelines should be able to promote and improve consistency to a greater extent than a sentencing information system could achieve. That is because they would be more readily accessible than a SIS could be and would contain clear guidance about the range of sentences that would be appropriate in the majority of cases falling within particular categories of crimes and offences.

8.31 Thirdly, sentencing guidelines should provide greater predictability about sentencing decisions. This might encourage more realistic pleas by accused persons, some of whom may maintain a plea of not guilty out of fear of the unknown. Such predictability might also create more realistic expectations in victims, who are often disappointed with sentences which those in regular contact with the criminal justice system might consider to be appropriate, if not indeed on the high side.

8.32 Fourthly, sentencing guidelines should provide benchmarks for the taking of decisions as to whether to appeal against sentences. Sentences which appeared to be within the guidelines, or which departed from them for clearly expressed reasons might be less likely to be appealed.

8.33 Sentencing guidelines would have the potential to achieve such consequences, without unduly constraining the discretion of sentencers in individual cases. Guidelines should simply guide, not direct, and should provide clear and practical advice to sentencers. They should not constrain sentencers in cases where there are good reasons for departing from the range of sentences set out in the guidelines. This is fundamental to maintaining the principle

of judicial independence. Guidelines would, however, encourage the giving of reasons for the sentences being imposed and thus improve transparency in sentencing.

8.34 The Commission is conscious that some hold the view that sentencing guidelines are unnecessary in a jurisdiction the size of Scotland, which has a relatively small number of sentencers. It is contended that judges and sheriffs are aware of the sentences that other judges and sheriffs have imposed, and of the reported decisions of the Appeal Court. It is also suggested that there is always the opportunity for sentencers to consult their colleagues if they are in doubt as to the sentence that should be imposed in a particular case. While there may be a degree of truth in that with respect to the High Court judges, it is not generally applicable in the sheriff courts, particularly for floating sheriffs and part-time sheriffs, who are expected to sit in a number of sheriff courts and for those sheriffs who sit on their own in the smaller sheriff courts.

8.35 At an informal meeting with representatives from the Commission in January 2006, members of the senior judiciary, including the Lord Justice General and the Lord Justice Clerk, expressed the view that the case for sentencing guidelines in Scotland was unconvincing given that there is no empirical evidence demonstrating inconsistency; they observed that Scotland is a small jurisdiction and opinions of the Appeal Court, relating to matters of sentencing practice, are published on the Scottish Courts Service website and are also available in such publications as Green's Weekly Digest. The members of the senior judiciary whom the Commission met considered that there is currently a broad consensus about sentencing amongst judges in the High Court. However, it was acknowledged that the lower judiciary might welcome guidelines, because of the range of offences that come before sheriffs.

8.36 The senior judiciary did recognise that although sentencing guidelines might not tell sentencers much that they did not know already about sentencing, they would nevertheless provide a matrix of issues for a sentencer to negotiate his or her way through, in order to ensure that all aspects of a case had been considered. It was acknowledged that sentencing guidelines would also be of assistance to legal practitioners and others with a relevant interest in the criminal justice system.

8.37 An informal meeting was subsequently held with members of the shrieval bench. They expressed the personal opinions that in the courts in which they currently presided, or in which they had sat in the past, there were clear inconsistencies amongst sheriffs in their sentencing of offenders. It was also their experience that in all courts in which there is more than one sentencer there is an element of "judicial shopping", in other words, practitioners and their clients are aware of the 'tough' and 'lenient' sentencers and tailor their actions to achieve as low sentences as possible. The sheriffs expressed some support for more extensive guidance on sentencing to be developed and promulgated by the Appeal Court, supported by a research facility, along the lines of the Sentencing Advisory Panel in England and Wales.

8.38 In the recent case of Purvis and Pryde v MacDonald 2006 SCCR 47, the Appeal Court expressed its support for the aim of promoting consistency in sentencing. That case concerned appeals against fines imposed by a district court in the Borders where the justices based their sentences on guidelines devised and issued by the Justices Committee for the whole area of the Borders. These guidelines had been devised in private and had not been published. It had not been known by the accused that it was likely that the guidelines would

be taken into account in dealing with their case. Whilst holding that the manner in which the fines had been decided upon had not been in accordance with natural justice the Court said

“We do not doubt that the aim of promoting consistency in sentencing is a worthy one, and that there is much to be said for an appropriate body deliberating on, and arriving at, recommendations or suggestions as to the range within which sentences of a certain type would generally fall. Such recommendations or suggestions might in due course be endorsed by the High Court by reference to sections 118(7) and 189(7) of the 1995 Act. However, such an endorsement would depend on a number of considerations, such as whether they were preceded by consultation, whether they had been publicised and whether in themselves they appeared to be satisfactory.”

8.39 The Lord Cullen of Whitekirk (the former Lord Justice General) presided over the Appeal Court in that case and the view expressed by the Court accords with what Lord Cullen had himself stated three years earlier when, in his written evidence to the Independent Inquiry Into Alternatives To Custody sponsored by the Esmee Fairbairn Foundation (“the Coulsfield Inquiry”), he commented:

“In Scotland it has not been the general practice of the Court to issue sentencing guidelines. However, it has to be borne in mind that in Scotland decisions of the Appeal Court set a pattern from which a sentencer can derive guidance. Information about sentences imposed for different types of crime are available to sentencers in the High Court. While sentencing guidelines may be useful, they cannot cover every type of circumstance or replace the judgment of the individual sentencer as to what is right in a particular case.” (Cullen, 2003³¹)

8.40 As noted earlier in this report, in Scotland many offenders are prosecuted for common law crimes. Some of those crimes, such as assault, breach of the peace, malicious mischief and reckless conduct, can cover a broad range of offending behaviour. However, it is the Commission’s view that it should nevertheless be possible to identify the most common forms of such crimes, which come before the courts, and draw up guidelines for those.

8.41 If the case for sentencing guidelines were accepted, how should the preparation of such guidelines be approached?

8.42 One option would be to rely on more detailed guidance being issued by the Appeal Court. That would be the most straightforward constitutionally. As explained in paragraph 4.8, when disposing of an appeal against sentence, the Appeal Court has had, since 1996, statutory power to pronounce an opinion on the sentence or other disposal or order which is appropriate in any similar case to the case then under appeal (a ‘guideline judgment’). In terms of section 197 of the 1995 Act, a court in passing sentence is required to have regard to any relevant opinion pronounced under either of these subsections. But, as noted earlier, the Appeal Court has taken the opportunity to issue ‘guideline judgments’ in only a handful of cases (see paragraph 4.10). This may be because of a difficulty in identifying suitable cases. The Appeal Court, after all, has no control over the number of appeals against sentence that are marked. Furthermore, the Crown has only a minimal role in hearings of appeals against sentence, limiting the opportunity for debate about sentencing principles, and the majority of appellants are only interested in the outcome of the appeal in their own case. In addition,

³¹ At: <http://www.police-foundation.org.uk/files/POLICE0001/responses/LORD%20CULLEN%20OF%20WHITEKIRK.pdf>

appeals against sentence are normally heard before two judges whereas it is the practice that the Appeal Court should be constituted by three judges before a ‘guideline judgement’ is issued. If the High Court is to make greater use of its power to pronounce detailed guidance for sentencers by way of ‘guideline judgments’ then a mechanism needs to be found to enable potentially suitable cases to be identified at an early stage in the appeal process.

8.43 A second option is to establish an independent non-departmental public body created by statute and made up of judges, criminal justice practitioners, academics and lay members with responsibility for framing and revising sentencing guidelines such as the Sentencing Guidelines Council in England and Wales. Its purpose would be to give authoritative guidance on sentencing, thereby supporting sentencers in making decisions on sentencing. This could be achieved either by the publication of guidelines on relevant topics, coupled with a duty being placed on all sentencers to have regard to the guidelines, or by providing advice to the Appeal Court. Membership of the body from all levels of the judiciary could ensure that the sentencing guidelines were informed by judicial experience of the range of circumstances and complexities that arise regularly in our criminal courts.

PART NINE: THE WAY FORWARD

9.1 It is a widely held opinion that there should be a broad consistency in sentencing at every level of our courts. As we have indicated there are some who believe that this is currently the case. They point to the lack of any empirical evidence to the contrary. We do not agree. For the reasons we have already mentioned, the Commission is quite satisfied that there is a measure of inconsistency in sentencing in Scotland. Equally importantly, we are satisfied that there is a widely held perception that inconsistency in sentencing exists in Scotland. The fact that there is such a perception is itself an issue which requires to be addressed. In saying that, we acknowledge that absolute consistency (or uniformity in sentencing) is an outcome that is neither realistic nor desirable. That could only be achieved by a sentencing system akin to the sentencing grids used in some US jurisdictions (notably the Federal system), which have attracted substantial judicial disquiet and disharmony. These systems have seen offenders given life sentences for relatively minor transgressions because judicial discretion had been substantially, and in some instances, completely removed. We would not support the introduction of sentencing grids in Scotland.

9.2 Having deliberated carefully over what needs to be done to promote and improve consistency in sentencing in Scotland, we make the following recommendations.

Transparency in Sentencing

9.3 In the interests of transparency and with a view to promoting consistency in sentencing we **recommend** that:

- the Criminal Procedure (Scotland) Act 1995 should be amended so as to provide that in every appeal against sentence the original sentencer as well as the accused should be informed in writing of the outcome of the appeal;
- in every appeal in which the sentence is altered, reasons for the Appeal Court's decision should be stated in open court and electronically recorded; and
- in any appeal in which the reasons for the Appeal Court's decision have been recorded, which would inevitably include some appeals in which the original sentence was affirmed, the Appeal Court on its own initiative, or on application by a party to the appeal or the original sentencer, should be able to have the reasons for its decision transcribed and a copy of those reasons made available to parties and the original sentencer and made accessible to the wider public.

Information available to sentencers

9.4 To increase the accessibility of reference materials for sentencers we **recommend** that steps should be taken by the Scottish Executive, the universities in Scotland, the Faculty of Advocates and the Law Society of Scotland, including the provision of funding, to encourage the production of more textbooks on sentencing, which will be of practical assistance to sentencers and others involved in the criminal justice system.

Purposes of Sentencing

9.5 We consider that a useful step in promoting consistency in sentencing would be to enshrine the purposes of sentencing in statute and we so **recommend**. The purposes commonly accepted by most jurisdictions are punishment or retribution, protection of the

public or incapacitation, deterrence and rehabilitation or reform. To these are sometimes added denunciation, reparation, crime reduction and economy of resources.

9.6 A number of jurisdictions, including England and Wales in the Criminal Justice Act 2003 and New Zealand in the Sentencing Act 2002, have adopted this practice. However, this step in itself will not deliver greater consistency in sentencing. These purposes are open to different interpretation and weighting and can be contradictory. We do not consider that the purposes should be “ranked” or prioritised in any sort of a way. This is because the emphasis to be placed on individual purposes will vary from case to case.

9.7 In England and Wales the first guideline issued by the Sentencing Guidelines Council was entitled “Overarching Principles: Seriousness”³². This guideline – which is reproduced at Annex E - sought to establish a framework for the courts to pursue greater consistency in sentencing by re-establishing proportionality as a primary rationale for sentencing. The Law Commission of New Zealand in its recently published report³³ on sentencing reform has proposed that a Sentencing Council be established to draw up a comprehensive set of sentencing guidelines. The New Zealand Commission has argued that the Sentencing Act 2002 did not do enough to deliver consistency in sentencing because it provided

“little or no assistance in determining the ‘tariff’, custody threshold or sentence length appropriate for the average case of each type coming before the courts”

(NZ Law Commission, 2006 paragraph 32)

9.8 The New Zealand Commission recommends that the guidelines should (amongst other aims) ensure

“that there is, at a minimum, a consistent judicial approach and a predictable pattern in sentence severity”

(NZ Law Commission 2006, paragraph 74)

9.9 A further product of sentencing guidelines is that they ensure that there are appropriate relativities between offences. This effectively means that the guidelines will be firmly based on the principle of proportionality. Proportionality is a term that some find nebulous. In this context, however, it means quite simply that similar cases should receive similar sentences and that the relativities between sentence levels for different sorts of cases should reflect the different levels of seriousness of those cases. In ordinary language this means that sentencing should be driven by adherence to the fundamental principle of fairness. Guidelines based on proportionality can indicate what the appropriate range of penalty is for cases of a particular category or type, broadly defined. The guidelines can also indicate the aggravating factors that would push a case to the more severe end of the band and the mitigating factors that would push the case to the lower end of the band. Sentencers would be able to use their discretion to individualise the sentence to the particular facts and circumstances of the case and to pursue the purposes of sentencing which are relevant to the case. Offenders whose offences and circumstances are similar should receive broadly similar punishment, regardless of which court they appear in or which judge happens to be on the bench.

³² At: http://www.sentencing-guidelines.gov.uk/docs/Seriousness_guideline.pdf

³³ Law Commission (New Zealand) (2006) - Sentencing Guidelines And Parole Reform (Report 94)

9.10 As noted above, we accept that the incorporation of the purposes of sentencing into statute will not, in itself, achieve the objective of greater consistency in sentencing. However, adherence to the principle of proportionality coupled with the purposes of sentencing being enshrined in statute would be an important step in the creation of a comprehensive and visible framework around which sentencing can be structured.

Sentencing Information System

9.11 It is the Commission's view that the SIS certainly has the potential to provide useful information on patterns of sentencing in the High Court, whether to High Court Judges or to those responsible for drafting sentencing guidelines. However, as we have mentioned the system is not regularly used by judges nor is it being kept fully up-to-date with details of new cases. We **recommend** that the Scottish Executive in consultation with the Lord Justice General should determine the future for the SIS. In particular, consideration requires to be given to the practicability of restoring and maintaining the SIS as a comprehensive record of High Court sentences imposed in the period which it covers. We consider that if a sentencing advisory body is created (see paragraphs 9.14 to 9.38) such a body would find the data contained in the SIS (if so restored and maintained) helpful in the drafting of sentencing guidelines for more serious crimes and offences. At present, of course, only High Court judges have access to the data stored in the SIS.

9.12 It needs to be borne in mind, however, that some 96% of the sentences imposed in Scotland are imposed in the summary courts. When account is taken of sentences imposed in the sheriff courts under solemn procedure, only around 2% of the sentences imposed in Scotland are imposed in the High Court. The case for setting up a sentencing information system for the sheriff courts was discussed in the Summary Justice Review Committee's report in 2004. The Committee recorded, inter alia:

“We consider that a sentencing information system would have benefits in furthering consistency in sentencing and reducing the phenomenon of “sheriff shopping”, thereby encouraging more early pleas.....” (Summary Justice Review Committee pg. 211)

Issue of Guideline Judgments

9.13 We **recommend** that the Appeal Court should consider making greater use of its powers to issue ‘guideline judgments’ under the provisions of sections 118(7) and 189(7) of the 1995 Act. It should, for example, be possible to devise procedures for identifying appeals against sentence that would be suitable for guideline judgments and to draft a Practice Note dealing with the management and conduct of such appeals. We further **recommend** that where the Appeal Court uses the powers vested in it by the 1995 Act to issue a guideline judgment, it should be required to make reference within the Opinion to the fact that the Court regards the Opinion as constituting a guideline judgment. This would greatly assist with the indexing and referencing of guideline judgments. We would also encourage the Appeal Court to consider what other steps it could itself take to promote and achieve greater consistency in sentencing. There might, for example, be some scope for arranging that members of the judiciary who have had practical experience of summary criminal business might be involved in dealing with appeals relating to sentences imposed in the summary criminal courts. We would not suggest that these ideas are all that might be done and we would encourage the Lord Justice General and his colleagues to look carefully at these issues.

Creation of a Sentencing Advisory Body

9.14 To assist the Court in providing further guidance to sentencers, and in particular handling the introduction of sentencing guidelines into sentencing practice, we **recommend** that a sentencing advisory body, to be known as the Advisory Panel on Sentencing in Scotland (“APSS”), should be created. The APSS should be of similar composition and have similar powers to those of the Sentencing Advisory Panel in England and Wales. The creation of such a body would ensure that sentencing would 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, including, possibly, members of the public with the necessary knowledge and experience. We consider that those who contribute to, and manage the outcome of, the sentencing process, including sentencers from all levels of the judiciary, are in a position to have some involvement in and make a valuable contribution to the development of sentencing policy in Scotland.

9.15 We regard this approach as preferable to the creation of a sentencing commission, or a body like the Sentencing Guidelines Council in England and Wales, in which other individuals are involved along with judges not only in the drafting of such guidelines but also in their finalisation and promulgation. We do not support such an innovation. While different models to that which we propose operate in other jurisdictions, we consider that in Scotland the Appeal Court should be allowed to remain in overall control of sentencing policy, subject of course to any legislation that either the Westminster Parliament or the Scottish Parliament may enact.

9.16 However, we also consider that judges in Scotland should be aware of, and take account of, how their sentences are perceived by the public and moreover of the responsibility, which they share with many others, to do all that can be done to maintain respect for, and confidence in, the law of our country. 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. It should be noted that we did consider whether the proposed body should comprise only individuals drawn from the various levels of the judiciary, but we rejected that model in favour of that which we have recommended.

Membership

9.17 We **recommend** that the APSS should have around ten members. They should include at least one sentencer from each level of the judiciary, in other words including lay justices as well as members of the full-time judiciary. Additionally, its membership should be drawn from individuals with relevant expertise and experience from the law enforcement agencies, the prosecuting authorities, the legal profession, offender management services, organisations that work with victims, academia and the wider community.

9.18 We **recommend** that the judicial members of the APSS should be appointed by the Scottish Ministers, on the nomination of the Lord Justice General. The non-judicial members should be recruited by open competition and be appointed by the Scottish Ministers, after consultation with the Lord Justice General. There should be a power for the APSS to co-opt specialists, to assist with their workload, when this is considered to be necessary. We

envisage that the work of the APSS will be demanding, involving the reading of a considerable volume of paperwork and attendance at regular meetings. For that reason, care would require to be taken to ensure that those appointed to the APSS were not only well qualified by expertise and experience to be a member of that body, but were able to meet the demands on their time which membership of the APSS would bring.

9.19 While we do not consider an official of the Scottish Executive should be a member of the body, we do see merit in such a person acting as an observer at meetings, so as to assist in the communication process between the Executive and the APSS. We consider that such communication should take place. We also consider that it would be in the public interest that all members of the APSS should be able to take part in such communication and that would be best achieved by an official of the Scottish Executive being able to attend meetings of the APSS. We so **recommend**.

Chair

9.20 We **recommend** that the chair of the body should be appointed by the Scottish Ministers, after consultation with the Lord Justice General. That is not to say that we consider the chair should necessarily be a member of the higher judiciary. There are arguments for and against the body being chaired by a senior judge. On the one hand such an appointment might increase the body's status and authority, but on the other hand he or she would require to be the public spokesperson for the body, which could place them in the spotlight on potentially high profile matters.

Secretariat

9.21 The APSS would need to be supported by a secretariat including suitably qualified and experienced lawyers, personnel with experience in analytical services (social research and statistical analysis) and media relations, as well as those possessing administrative and secretarial skills. The size of the staff would, we suggest, need to be on a par with that of the Sentencing Advisory Panel in England and Wales, details of which are contained in that body's latest annual report.³⁴ This is quite simply because the range of the issues to be reviewed and considered in Scotland is no less than that in England and Wales.

Drafting and Endorsement of Guidelines

9.22 We **recommend** that the APSS should draft guidelines for the consideration of the Appeal Court on general topics relating to sentencing, such as the issues covered in the Sentencing Guidelines Council's Guideline on "Overarching Principles: Seriousness", which is reproduced in Annex E, Discounts in Sentences following Pleas of Guilty and new sentencing disposals introduced by parliamentary legislation. As far as new sentencing disposals are concerned, we consider that before the relevant statutory provisions come into force, it would be beneficial to sentencers to have guidance from the APSS, as approved by the Appeal Court, as to how the statutory powers could be applied. We also envisage sentencing guidelines dealing with particular categories of crimes and offences.

9.23 We anticipate that in preparing draft sentencing guidelines the APSS will wish to carry out such research or other investigations and undertake such discussions as it considers

³⁴ <http://www.sentencing-guidelines.gov.uk/>

necessary. The statute creating the APSS should provide details of those whom the APSS should be obliged to consult in the context of drafting guidelines and we so **recommend**. That would not prevent the APSS from consulting more widely if it deemed that desirable in the context of the development of any particular guideline.

9.24 In the light of its deliberations, and where relevant its consultations, we envisage that the APSS would submit draft guidelines, together with a memorandum explaining the background to, and any comments on, the detailed terms of the draft guidelines, to the Appeal Court for its consideration. Guidelines for categories and types of crimes and offence would have both narrative and numerical aspects although guidelines on sentencing principles, for example, would be in purely narrative form. We stress that it would be for the APSS to determine the format and style of the sentencing guidelines it decided to place before the Appeal Court for approval. We are not suggesting that they would necessarily wish to follow the approach taken by the Sentencing Guidelines Council in England and Wales.

9.25 We **recommend** that the Appeal Court, sitting with a quorum of at least three judges, should be able to approve the draft guidelines. The Appeal Court should also have power to remit the draft guidelines back to the APSS, for that body to re-consider the draft guidelines and to amend them, if it chose to do so, in the light of any points raised by the Court. On that having been done, the APSS would be able to resubmit the draft guidelines to the Appeal Court for its further consideration.

9.26 The Appeal Court, having re-considered the draft guidelines and any further advice from the APSS, should have power to approve the draft guidelines, subject to any amendment it considers appropriate. It should also have power to decline to approve the draft guidelines. We so **recommend**. We would expect that in the event that the Appeal Court declined to approve draft guidelines, or approved them subject to amendment, it would issue an Opinion making clear the reasons for its decision. In the event that the Appeal Court declined to approve sentencing guidelines drafted by the APSS, we would not envisage the Appeal Court drafting and issuing its own guidelines. We consider that it would be inappropriate for there to be two categories of guidelines, one drafted by the APSS and approved by the Appeal Court and the other drafted and issued by the Appeal Court. In the event that the Appeal Court declined to approve sentencing guidelines drafted by the APSS, any guidance that the Appeal Court deemed it appropriate to provide on issues covered by the rejected draft guidelines could be included in a guideline judgment issued by the Court under its existing statutory powers.

9.27 It would thus be sentencing guidelines approved by the Appeal Court to which sentencers would require to have regard. We **recommend** that statutory duties should be placed on sentencers to have regard to relevant sentencing guidelines and to state in open court, at the time of sentencing, their reasons for any departure from such guidelines. There is, of course, already a statutory requirement on sentencers to have regard to the terms of guideline judgments issued under sections 118(7) and 189(7) of the 1995 Act.

9.28 We envisage that the Appeal Court would be able to deal with the process of approving draft guidelines whilst hearing appeals against sentence in cases that fall within the scope of the draft guidelines. During such a hearing, both the Lord Advocate and counsel for the accused would have the opportunity of addressing the Court on the draft guidelines that were before the Court. Once the APSS had submitted draft guidelines to the Appeal Court, the Court might wish to assemble a number of appeals relating to the category of crime or

offence covered by the draft guidelines, which could be heard at the same time as the draft guidelines are being considered by the Court. In the event that the Appeal Court was able to consider draft guidelines in the course of hearing an appeal or appeals against sentence, the Appeal Court's decision in respect of the draft guidelines could be dealt with in the guideline judgment issued in respect of the Court's decision of the appeal(s) before the Court.

9.29 We **recommend** that the Appeal Court should be required to respond to the APSS's draft guidelines, or amended draft guidelines as the case may be, within not more than six months from the date of their submission to the Court. We also **recommend** that in the event that no appeal(s) against sentence, in which it would be appropriate to consider particular draft sentencing guidelines, come before the Appeal Court within six months of those guidelines having been submitted by the APSS, the Appeal Court should be granted the power to fix a special hearing for the specific purpose of considering the draft guidelines, whether they be in their original form or as amended by the APSS.

9.30 We **recommend** that provision be made to allow special hearings to take place before the Appeal Court, sitting with a quorum of at least three judges. The Lord Advocate would be entitled to appear at such a hearing, in his capacity as public prosecutor, and would be free to make such submissions about the draft guidelines as was considered to be appropriate. We consider that it would be in the public interest for the Lord Advocate in his role as public prosecutor to be able to address the Court before draft sentencing guidelines are approved. We consider that the Appeal Court should have the power to appoint counsel to act at the hearing as *amicus curiae* ("friend of the court"). We envisage that an *amicus curiae* would place before the Court any submissions that are relevant to the approval of the draft guidelines, whether as a matter of principle or in their existing terms. We would also envisage that both the Lord Advocate and the *amicus curiae* would address the Court on any issues about which the Court itself had invited submissions. For these reasons, we propose that the Lord Advocate and any *amicus curiae* appointed by the Court should have the right to take part in any hearing fixed by the Appeal Court for the purpose of considering draft sentencing guidelines. Indeed there may be an argument for the Court being given power to appoint an *amicus curiae* to take part in any sentencing appeal in which the approval of sentencing guidelines is to be discussed.

9.31 At a hearing fixed specially for the purpose of dealing with the approval of draft sentencing guidelines, the Appeal Court could approve the draft guidelines, approve the draft guidelines subject to amendment, with an explanation for the amendment, or decline to approve the draft guidelines and remit them back to the APSS for that body to consider the points raised by the Court. In that event, the APSS would require to resubmit the guidelines to the Appeal Court for its further consideration. The Appeal Court, having further considered the Panel's advice, would have power to approve the draft guideline, with or without amendment. If it declined to do, it is to be expected that it would issue an Opinion explaining the reasons for its decision.

9.32 We recognise that a hearing of the Appeal Court, sitting with a quorum of at least three judges simply to consider draft sentencing guidelines, is a departure from the traditional role of that Court. However, we consider it essential for the Appeal Court to have the opportunity to consider draft guidelines in the context of a judicial hearing, where the merits and terms of proposed guidelines are debated in open court. That will enable the Appeal Court to come to an informed decision on the merits, or otherwise, of the draft sentencing guidelines.

9.33 With regard to draft sentencing guidelines on more general topics, including the introduction of new sentencing disposals, we **recommend** that provision be for such draft guidelines to be approved by the same procedure, as we have discussed in the last four paragraphs. At the initial hearing before the Appeal Court the Court would have the power to approve the draft sentencing guidelines or remit them back to the APSS for re-consideration. In the event that the draft guidelines were resubmitted to the Appeal Court, the Court could approve the draft guidelines, without or with amendment or decline to do so. If it declined to approve the draft guidelines the Appeal Court could give any view that it wished to express in a guideline judgment.

Requests for Sentencing Guidelines

9.34 We further **recommend** that the legislation creating the APSS should detail those who would be entitled to invite the APSS to produce draft guidelines. We consider that the statute should provide that the Appeal Court should be able to require the APSS to draft sentencing guidelines on specific topics, that the APSS should itself be able to initiate the drafting of sentencing guidelines and that the Scottish Ministers, and separately the Lord Advocate, in his role as independent public prosecutor, should be able to invite the body to draft sentencing guidelines for particular offences or for new sentencing disposals.

Prioritisation of Requests for Sentencing Guidelines

9.35 It should be within the power of the Chair of the APSS, in consultation with the members, to determine the prioritisation of the body's workload. That should result in sentencing guidelines being promulgated incrementally by the Appeal Court. There will not be a plethora of guidelines coming on stream simultaneously. We consider that to attempt to produce a comprehensive set of guidelines for all crimes and offences in a single set of guidance would be totally impracticable. However, in the early days of the new body, it will be important, so far as it is practicable, to deal with the ranges of sentences appropriate for more serious offences. It is sentences for such offences that generate the most controversy and in relation to which the public express greatest concern. Commonsense dictates that it will not be practicable for the APSS to recommend sentencing guidelines for every act that constitutes a criminal offence. We therefore **recommend** that the APSS should give priority to guidelines on those offences that normally, or at least frequently, result in the imposition of a sentence of detention or imprisonment and to those areas of criminal conduct in which it is considered that there is a particular need for sentencing guidelines.

9.36 We **recommend** that the new body should, following the example of the Sentencing Guidelines Council in England and Wales, at the outset promote sentencing guidelines focusing on determining the seriousness of offences. Under the guideline in force in England and Wales - "Overarching Principles: Seriousness" - a court is required to pass a sentence that is commensurate with the seriousness of the offence or, in other words, a proportionate sentence. The seriousness of the offence is determined by two main parameters: the culpability of the offender and the harm caused or risk being caused by the offence.

Review of Sentencing Guidelines

9.37 There would be a need to ensure that sentencing guidelines were reviewed at reasonable intervals and we **recommend** that the APSS, in consultation with the Lord Justice

General, identifies and puts in place the necessary review procedures. This would ensure that the guidelines remained up-to-date and reflected, amongst other things, public opinion and changing circumstances within society, for example the emergence of particular crimes, such as an increase in “knife crime”, and the need for the courts to react to such conduct.

Amendment of Sentencing Guidelines

9.38 We also envisage that situations will arise in which sentencing guidelines drafted by the APSS and approved by the Appeal Court require to be amended as a matter of urgency. The need for such amendment may become apparent during the hearing of an appeal against sentence in the Appeal Court. It may arise because a question of law has arisen which had not been considered previously or for some other good reason, such as the enactment of new legislation. Whatever the cause, it would be in the public interest that such amendment could be carried out quickly. It would not be desirable for sentencers to continue to have regard to sentencing guidelines which members of the Appeal Court considered should be amended, and possibly even withdrawn. For these reasons, we **recommend** that an Appeal Court constituted by at least five judges should have power to amend, and if it is in the public interest to do so, withdraw sentencing guidelines previously approved by a Court constituted by three judges. We consider that the Appeal Court should have the right to invite the APSS to comment on the need to amend or withdraw sentencing guidelines that have previously been approved by the Court, but we do not consider that the Appeal Court should be under any obligation to do so.

COMPARATIVE SENTENCING STATISTICS – SECTION 306 REPORT, 2003

1. The latest “Section 306” report³⁵ shows that Alloa and Lochmaddy sheriff courts make the greatest use of custody (in 23% of all cases) while Dunoon and Stonehaven use it least (in 4% and 2% of cases); Jedburgh and Peebles sheriff courts make the greatest use of community service (in 11% and 10% of all cases), while Stornoway uses it in just 2% of cases; Dunoon and Glasgow sheriff courts make the greatest use of probation (in 16% and 14% of cases), while Lochmaddy did not use this disposal at all in 2003 and Duns, Kirkcudbright, Rothesay and Stranraer sheriff courts used it in just 3% of cases. The average length of custodial sentences ranged from a low of 65 days in Campbeltown sheriff court to 123 days in Kirkcaldy sheriff court.
2. The average length of community service orders imposed ranged from 106 hours in Selkirk sheriff court to 204 hours in Dornoch sheriff court. In sentencing cases of housebreaking, custody was imposed in none of the cases heard in Dornoch, Duns, Fort William, Kirkwall and Lochmaddy sheriff courts but in 67% of cases heard in Jedburgh and Lanark sheriff courts. The average length of custody imposed in housebreaking cases ranged from 30 days in Peebles sheriff court to 182 days in Stornoway and Wick sheriff courts. The average length of sentences for cases of theft ranged from 61 days to 152 days, in cases of other dishonesty from 57 days to 182 days, in cases of common assault from 71 days to 166 days and for cases of breach of the peace from 43 days to 152 days.
3. The report also contains information on the rates of custodial sentencing within each sheriff court over a four year period. The data show that custody rates are largely stable in some courts, while in others they fluctuate widely. For example, the proportion of cases resulting in custody at Edinburgh sheriff court between 2000 and 2003 was stable at 17% and 18%. At Stirling sheriff court custody rates fluctuated from 11% to 13% of cases and at Dundee from 18% to 20% of cases. At Glasgow sheriff court there was slightly greater fluctuation from 19% to 23% of cases, while at Rothesay sheriff court custody rates varied from 4% to 20% of cases per annum, at Duns from 4% to 16% of cases and at Dunfermline from 7% to 17% of cases per annum.
4. With regard to sentencing in the stipendiary magistrates and district courts, 84% of all cases sentenced in 2003 resulted in a fine and 10% were admonished. Rates of fining varied from 62% of cases heard in East Dunbartonshire to 99% of cases heard in Eilean Siar and 95% in Clackmannanshire. Rates of admonishment ranged from 35% of cases heard in East Dunbartonshire to 1% of cases in Eilean Siar and 2% in Clackmannanshire. In cases of theft the use of fines ranged from 23% of cases in East Dunbartonshire to 100% of cases in Eilean Siar and 96% in East Lothian.
5. If taken at face value the figures suggest that there is very wide variation (i.e. inconsistency) between courts, both in their use of sentence types and in the severity of the sentences imposed.

³⁵ Scottish Executive (2005) - Costs, Sentencing Profiles and the Scottish Criminal Justice System, 2003. CP(S)A Section 306. Astron.

RESEARCH ON CONSISTENCY IN SENTENCING IN ENGLAND AND WALES

1. Davies and Tyrer³⁶ carried out a project with 51 judges from 12 Crown Court centres in England and Wales in which the judges were asked to give their views on an appropriate sentence in response to five domestic burglary scenarios. By coincidence four of the five scenarios used equated with the definitions of different types of burglaries used by the Sentencing Advisory Panel in their guideline on sentencing burglary cases. These were:

- a ‘standard domestic burglary’ (displaying most of the following features: theft of electrical or personal items, damage only from break in, some turmoil or damage and no injury or violence);
- a burglary with a ‘medium level’ of aggravation (which has any one of the following factors: vulnerable victim but not targeted; victim at home (day or night); goods of high value (economic or sentimental); working in groups);
- a burglary with a ‘high level’ of aggravation (which has any one of the following factors: force used or threatened; victim injured; especially traumatic effect; professional planning, organisation or execution; vandalism; racial aggravation; vulnerable victim);
- a standard burglary with mitigated features (these being no damage to property; no property or low value property stolen).

2. Case study 1 related to a standard domestic burglary in which the offender had two previous convictions for non-domestic burglary and pled guilty. The vast majority of judges selected custodial sentences but some selected a non-custodial disposal. Custodial sentences ranged in length from 6 months to 24 months. Across the 11 courts the mean custodial sentence length was 18.1 months, ranging from an average of 11.24 months in one court to 25.5 months in another.

3. Case 2 was a standard domestic burglary with high level aggravation. The offender had three previous convictions for burglary, the most recent of which was for dwelling house burglary for which he served a custodial sentence. The offender pled guilty. All judges agreed that a custodial sentence was necessary in this case and imposed sentences ranging from 30 months to 84 months. Across the 11 courts the mean sentence length was 44.39 months, ranging from an average of 33 months in one court to 69 months in another.

4. In case 3, a standard burglary with medium level aggravating factors in which the offender had no previous convictions, two judges selected community disposals and the remainder opted for custodial sentences. The length of custodial sentences ranged from nine months to 36 months. Across the 11 courts the mean sentence length imposed was 23.6 months, ranging from an average of 12 months in one court to 29.6 months in another.

5. In case 4, a standard domestic burglary with mitigating features in which the offender had no previous convictions, was in part-time employment and pleaded guilty at the earliest opportunity, all but two of the judges opted for a non-custodial disposal. The disposals

³⁶ Davies, M. and Tyrer, J. (2003) – “Filling in the Gaps” – A Study of Judicial Culture: Views of judges in England and Wales on sentencing domestic burglars contrasted with the recommendations of the Sentencing Advisory Panel and the Court of Appeal Guidelines. *Criminal Law Review* pp. 243-265.

selected included conditional discharge, suspended sentence, curfew order, community service and probation. One judge opted for a custodial sentence of nine months.

6. The purpose of Davis and Tyrer's study was to compare how judges sentenced with the advice provided in the Sentencing Advisory Panel's guideline on sentencing burglary cases and the Court of Appeal's subsequent guideline in *McInery and Keating*. As such the researchers made little comment on the issue of consistency between sentencers and courts. It is apparent from the findings presented, however, that there is wide variation between individual judges in the length of custodial sentences imposed and between sentencers in different courts.

7. In an earlier report on the pilot exercise for this study Davies et al. (2002)³⁷ explored the views of a small number of judges in England and Wales on the purposes of sentencing and the process of sentencing offenders convicted of domestic burglary. These views were obtained during the course of a focus group discussion and revealed that the judges within a single Crown Court Centre had widely varying views on the purpose of sentencing burglars and this led to variations in the degree of importance attached to each of the characteristics of a case. While the judges were clear that their primary objective was to pass 'just sentences', the researchers concluded that without a consensus on rankings of seriousness and judgements about desert and the purpose of sentencing, 'the idea of a just sentence becomes difficult to demonstrate'.

8. Recent research by Tarling³⁸ compared the use of different types of sentences in 25 magistrates courts in England and Wales in 1975 and 2000. Focusing on males aged over 21 years sentenced in courts that dealt with in excess of 200 such offenders per annum, the research showed considerable variation between the 25 courts in the use of different disposals. For example, in 1975 the use of the fine ranged from a low of 46% of cases in one court to a high of 76.1% in another, while the use of immediate imprisonment ranged from a low of 3.1% of cases to a high of 19.1%. By 2000 these percentages had changed, for fines to a low of 21% of cases to a high of 50.6% and for immediate imprisonment from a low of 8.6% of cases to a high of 27.7%. Sentencing practices were also examined for two particular types of offences, burglary and shoplifting. For burglary there was a difference of 32% between those courts using custodial sentences least and most frequently, while for shoplifting the difference was 22%.

9. The researcher concludes that while patterns of sentencing in the magistrates courts have changed over 25 years, in the sense that the use of community sentences and imprisonment have both increased, while the use of fines, suspended sentences and conditional discharge have declined, wide variations between courts in the extent to which they use each type of disposal remain. The researcher points out that this is despite the advent since 1989 of detailed Magistrate's Association Sentencing Guidelines for almost every offence that comes within their jurisdiction. He notes that interviews with magistrates and clerks for the original 1975 study revealed that 'the courts were really only interested in maintaining consistency within their own practice' and that no-one interviewed on behalf of a court 'claimed that any attempt was made to achieve consistency with its neighbours or with courts over a wider area or with what was thought to be national practice.' The researcher

³⁷ Davies, M.; Takala, J. P. and Tyrer, J. (2002) – Sentencing Burglars in England and Finland: A Pilot Study. In Tata, C. and Hutton, N (eds.) – Sentencing and Society: International Perspectives. Ashgate.

³⁸ Tarling, R. (2006) – Sentencing Practice in Magistrate's Courts Revisited. The Howard Journal Vol 45 (1) pp. 29-41.

suggests that the apparent lack of impact of the sentencing guidelines on consistency may be due to the fact that conformity with the guidelines is not monitored in any way and the courts are not held accountable for adhering to the guidelines. This contrasts with most states in the US where guidelines are in operation where sentencers have to submit in writing their reasons for deviating from a guideline.

10. Moxon et al. undertook a study in the early 1990s of the use of compensation orders in the magistrates' courts in England and Wales.³⁹ As well as looking at the relative use of orders for different types of offences, they undertook a sentencing exercise with magistrates at seven courts. The magistrates were given four case studies to consider privately before coming together as 'benches' of two or three to discuss sentence. They were asked to say what sentence they would have passed, whether or not they would have awarded compensation and what factors influenced their decision. Forty-four benches participated in the exercise.

11. In case study 1, which dealt with physical assault, all the benches indicated that they would have awarded compensation but the amounts awarded ranged from £150 to £1,100. Case study 2 dealt with the taking of a motor vehicle without consent and 34 of the benches indicated that they would have awarded compensation, while ten would not. The sums awarded in this case ranged from £100 to £500 and discussions with the sentencers revealed that they found it difficult to determine an appropriate level of compensation in the absence of evidence of the value of the damage caused. Case study 3 involved the theft of items from a locker. All of the benches indicated that they would have awarded compensation ranging from £50 to £260 but discussion revealed that there was no consensus about how to deal with compensation in cases where the loss was primarily of sentimental value. In case study 4, which dealt with assault causing severe stress, 37 of the benches indicated that they would have awarded compensation, while 7 would not. Awards ranged from £100 to £1,250 but discussion revealed that sentencers found it very difficult to assess the level of compensation that should be awarded for the stress caused as opposed to the physical injury. The researchers concluded that the wide variation in awards reflects the problems that arise when sentencers have little to inform their decisions by way of precedence or other guidance. They suggested that uniformity in decisions on whether to award compensation 'is probably not attainable' but that there was scope for encouraging a more consistent approach.

12. Hough et al. (2003) undertook a study of the decisions involved in sending offenders to prison.⁴⁰ Sentencing decisions were explored in 11 focus groups with a total of 80 magistrates and 4 cases which lay on the 'cusp' between custody and community penalties were discussed in 48 one-to-one interviews with Crown Court judges, recorders and district judges. The one-to-one interviews revealed that in 'cusp' cases that resulted in custody, sentencers' decisions were based on two considerations:

- Offence seriousness and/or
- Offender's previous convictions and failure to respond to previous sentences.

13. In 'cusp' cases that resulted in a non-custodial disposal, a much wider range of factors were regarded as being important in the decision. In particular, issues relating to the offender's personal circumstances, such as their family responsibilities and employment

³⁹ Moxon, D; Corkery, J. M. and Hedderman, C. (1992) – Developments in the use of Compensation Orders in the Magistrates' Courts Since October 1988. Home Office Research Study No. 126. London: HMSO.

⁴⁰ Hough, M.; Jacobson, J. and Millie, A. (2003) – The Decision to Imprison: Sentencing and the Prison Population. Prison Reform Trust.

status, and the offender's response to prosecution – such as whether the offender demonstrated genuine remorse and had co-operated with the prosecution process - were felt to be particularly important. The researchers concluded that in general, sentencers 'first make a decision about whether or not an offence, in its own terms, merits custody' and if it does, 'will then consider whether personal mitigation can pull it down from custody to a community sentence'. However, the magistrates in one of the focus groups indicated that they followed a different approach – their decisions about custody were made *only* with regard to the offence itself and not with regard to its aggravating or mitigating features. Mitigating features relating to the offender could be used to reduce the length of a custodial sentence but did not, they said, alter a decision to impose a custodial sentence. Study of the sentences imposed in the court revealed that this particular bench was above average in its use of custody. The researchers concluded from their discussions with sentencers that despite the presence of Magistrates' Association guidelines and sentencing guidelines, sentencing is a value-laden process where great emphasis is placed on personal characteristics, making the process highly subjective. They further conclude that

“The inevitable subjectivity of the process of assessing hope or failure can help to explain sharp inconsistencies in sentencing practice between sentencers”

(Hough et al. 2003 pp. 42)

SENTENCING GUIDELINES SYSTEMS AROUND THE WORLD

1. The systems in place in Western Europe governing sentencing are varied. Many of the mainland European countries (e.g. France, Germany, Italy, Finland, Denmark, and Sweden) have Penal or Criminal Codes which typically set out the range of penalties for each type of crime and specify maximum and sometimes minimum sentences. Appeal courts also tend to play a fairly important role in guiding sentencing. The Netherlands has a Penal Code that specifies the range of penalties that can be imposed but also has an increasingly comprehensive set of national prosecution guidelines. These are expressly intended to produce greater equality in sentencing by providing a framework that enables prosecutors to make uniform sentencing proposals. Evidence suggests that for some types of offences the prosecution guidelines have had a harmonising effect on sentencing.

2. England and Wales have a complicated and bureaucratic two-tier structure comprising the Sentencing Advisory Panel and the (more recently established) Sentencing Guidelines Council. Sentencing guidelines are developed through a seven step process:

Step 1: The Council decides to consider a particular topic for a guideline.

Step 2: The Council commissions the Panel to provide advice on the topic.

Step 3: The Panel consults widely on the issue.

Step 4: The Panel develops its advice and submits it to the Council.

Step 5: The Council forms a preliminary view on the advice and issues a draft guideline for comment.

Step 6: The Council allows up to two months to receive comments on the draft guideline and then issues a definitive guideline which is binding on all courts in England and Wales.

Step 7: The Council then keeps the guideline under review so that it can be amended and developed as required.

3. This Council has a dual responsibility for issuing guidelines along with the Court of Appeal.

4. In Ireland, sentencing is largely at the discretion of the judiciary although the Superior Courts have developed a substantial body of case law setting out the general principles of sentencing. In 1996 Ireland's Sentencing Reform Commission recommended against the introduction of statutory sentencing guidelines, in favour of non-statutory guidelines to link the severity of the sentence to the seriousness of the crime. The subsequent Working Group on the Jurisdiction of the Courts also recommended that in order to achieve consistency a 'cadre of judges should be dedicated to hearing appeals in the Court of Criminal Appeals' for a period of at least two years.

5. The Commonwealth countries – Canada, parts of Australia and New Zealand - have started to move towards sentencing guideline systems in recent years. In Canada in 1996 a clear set of principles and purposes of sentencing was set down in Chapter 22 of the Statutes of Canada. These accompanied a scheme of Mandatory Minimum Penalties, originally introduced in 1977, for 28 types of (mostly firearms) offences. The 2002 *Youth Criminal Justice Act* brought a formal sentencing guideline system a step closer by laying down in statute a very clear set of principles that should govern the sentencing of juveniles.

6. In Australia the state of Victoria established an independent Sentencing Advisory Council in 2004 and amended the *Sentencing Act 1991* to enable the Court of Appeal to issue guideline judgements. A guideline judgement can be made after an application from any party to an appeal or by the court on its own initiative. In deciding to give or review a guideline judgement the Court of Appeal must notify the Sentencing Advisory Council which, in turn, must submit its views on the guideline to the Court of Appeal. To date Victoria is still awaiting its first guideline judgement. New South Wales' Sentencing Council became operational in 2003 and is responsible for advising the Attorney General on offences suitable for standard non-parole periods (i.e. standard minimum sentences) and on offences suitable for guideline judgements. Standard non-parole periods were introduced in 2002 for a number of serious offences dealt with on indictment and provide a reference point for sentencing. The Court of Criminal Appeal was empowered in 1999 to give guideline judgements on its own motion or on the application of the Attorney General. A number of guideline judgements have been issued and are regarded as being a useful tool in achieving consistency in sentencing. Western Australia and the Northern Territory have not introduced sentencing guidelines, opting instead for mandatory sentences for certain property offences. These have proved to be particularly punitive and have been universally condemned by criminal justice practitioners and commentators. Northern Territory repealed its mandatory sentences in 2002 but those in Western Australia remain in effect.

7. New Zealand's sentencing guideline system is based on case law rather than specifically developed guideline judgements. A synthesis of pre-existing first instance sentences is used to inform the sentencing decision in current cases. The purposes and principles of sentencing are laid down in statute as are the aggravating and mitigating circumstances that the court can take into account in deciding a sentence.

8. The United States of America has been at the forefront of developing sentencing guideline systems. At present 22 American states have guidelines systems in place and a system also governs the sentencing of federal offenders. These frameworks vary in their approach to informing the sentencing process and have been developed in different ways.

9. The federal sentencing guidelines, developed by the independent United States Sentencing Commission, are based on detailed analysis of pre-guidelines sentencing practice and take the form of both detailed narrative guidance and a numerical grid. The sentencing table comprises 43 offence levels and six criminal history categories and offenders are sentenced according to the point on the grid at which their offence category and their criminal history score intersect. Each cell in the grid contains a guideline sentence range which the judge must impose unless a reason for departure is identified and recorded. The federal sentencing guidelines were mandatory but several recent cases have challenged their constitutionality and the Supreme Court ruled at the start of 2005 in the cases of United States v Fanfan; United States v Booker⁴¹ that federal judges are no longer bound by the guidelines but need only consult them in sentencing federal offenders. A fifteen year evaluation of the federal sentencing guidelines has demonstrated that they have had a significant impact on the severity of sentencing in federal cases and the guidelines are widely regarded as imposing severe restrictions on the discretion of sentencers.

10. Minnesota was the first of the American states to introduce sentencing guidelines and uses a numerical grid that deals with sentences of imprisonment for felony offenders only.

⁴¹ 543 US (2005)

Each cell in the grid specifies a narrow sentence range and a presumptive sentence that the judge is expected to impose unless there are ‘substantial and compelling’ circumstances to justify departure.

11. Pennsylvania established a Sentencing Commission in 1978 and its first set of guidelines came into effect in 1982 and have been revised a number of times since. Again the guidelines take the form of a numerical grid that assigns an ‘offence gravity score’ ranging from 1 to 15 to every statutorily defined felony and misdemeanour and a ‘prior record score’, based on the number and seriousness of previous convictions, to every offender. Each cell in the grid contains a three-part recommendation that the sentencer must consider – the standard, the aggravated and the mitigated sentence recommendation.

12. Ohio’s sentencing guidelines take the form of narrative sentencing plans for felony offences, adults convicted of misdemeanours and juveniles. Felonies are divided into five felony levels, the statutory range of imprisonment is set by the General Assembly for each level and sentencers are not permitted to deviate from the range. For felonies that do not attract mandatory imprisonment a sentencing table identifies the available sentencing options including the appropriate range of prison terms.

13. Delaware’s sentencing guidelines take the form of a narrative Benchbook, designed to assist sentencing judges, prosecutors and defence attorneys in the formulation of sentences that are consistent with the principles of sentencing set down in Delaware’s statute. Every offence, with the exception of road traffic offences, is classified into one of seven classes and categorised according to whether it is violent or non-violent in nature. The Benchbook identifies recommended sentencing ranges for every offence by class and category. It also identifies five levels of supervision of offenders and the presumptive sentences specify the supervision level as well as the length of sentence.

14. Virginia’s Criminal Sentencing Commission was established in 1995 and develops guidelines to provide the judiciary with sentencing recommendations in felony cases. The guidelines were developed on the basis of past sentencing practice and cover all felony offences which are divided into 14 offence groups according to seriousness. The guidelines are offence-specific and provide a recommended sentence range for each felony. Sentencers use a sentencing guidelines worksheet which allows the individual characteristics of each case to be taken into consideration to arrive at a ‘score’ for each case they hear. The score is then converted into a guideline recommended sentence range.

15. Guidelines were introduced in Washington D.C. on a two year pilot basis in June 2004 and comprise two numerical grids - a Master Grid that covers all offences except drug offences and a separate Drug Grid. Offences are ranked into nine groups according to seriousness, and criminal history is ranked from 0 to 6+. The sentence in any case is determined by the point at which the two scores intersect on the grid. Each cell contains information on the offender’s eligibility for a suspended sentence and probation, together with a recommended sentencing range for a prison sentence. In developing the guidelines appropriate sentences were identified through an analysis of eight years past sentencing practice.

16. In 1980 Alaska introduced a system of presumptive sentencing in order to ‘eliminate disparity in sentences imposed on defendants convicted of similar offences’. Presumptive sentences are laid down in statute for murder, other unclassified felonies, unclassified sexual

offences, Class A, B and C felonies, Class A and B misdemeanours and violations. Statute specifies the minimum, maximum and presumptive length of imprisonment for each class of crime, where the presumptive sentence is the sentence that applies if the crime is regarded as being as serious as the 'typical' crime of this type and the offender's criminal history is typical for this type of offender. For cases in which presumptive sentencing does not apply, Alaska's court of appeals has created a series of 'benchmark' or typical sentences, based primarily on the court's interpretation of the principles implicit in the presumptive sentencing scheme. Alaska's court of criminal appeals is regarded as having had a profound impact on sentencing policy and in 1993 Alaska's Sentencing Commission recommended against replacing the existing system with more systematised sentencing guidelines.

17. It is common for sentencing commissions to have within their remit the collection and analysis of data on sentencing practice and data from those jurisdictions in which guidelines have existed for a number of years tends to show that sentences of imprisonment have become more severe. A more detailed account of these and other sentencing guidelines systems around the world can be found on the Commission's website at <http://www.scottishsentencingcommission.gov.uk/>



Sentencing Guidelines Council

Robbery

Guideline

FOREWORD

In accordance with section 170(9) of the Criminal Justice Act 2003, the Sentencing Guidelines Council issues this guideline as a definitive guideline. By virtue of section 172 of the Act, every court must have regard to a relevant guideline. This guideline applies to the sentencing of offenders convicted of robbery who are sentenced on or after 1st August 2006.

Part 1 of this guideline provides starting points and sentencing ranges that are applicable to three types of robbery; street robbery or 'mugging', robberies of small businesses and less sophisticated commercial robberies. For other types of robbery, relevant guidance from the Court of Appeal should be applied; this is summarised in Part 2 of this guideline.

The guideline makes clear that robbery will usually merit a custodial sentence but that exceptional circumstances may justify a non-custodial penalty for an adult and, more frequently, for a young offender. In this way it is not intended to make a significant change to current practice. Over the past ten years the majority of young offenders sentenced for robbery have been given a non-custodial sentence. This contrasts with adult offenders where the majority sentenced for robbery have been given a custodial sentence.⁴²

The Council Guideline *New Sentences: Criminal Justice Act 2003* recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. Consequently the sentencing ranges and starting points in this guideline take that principle into account.

The Council has appreciated greatly the work of the Sentencing Advisory Panel in preparing the advice on which this guideline has been based and for those who have responded so thoughtfully to the consultation of both the Panel and the Council. The advice and this guideline are available on www.sentencing-guidelines.gov.uk or from the Sentencing Guidelines Secretariat at 85 Buckingham Gate, London SW1E 6PD. A summary of the responses to the Council's consultation also appears on the website.

Chairman of the Council
July 2006

⁴² In 2004 37% of youths and 87% of adults sentenced for robbery were given custodial sentences.

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ROBBERY

A. Statutory Provision

Section 8(1) Theft Act 1968 provides:

‘A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.’

B. Forms of Robbery and Structure of the Guideline

For the purposes of this guideline, five categories of robbery have been identified and established from sentencing ranges and previous guidance. They are:

1. **Street robbery or ‘mugging’**
2. **Robberies of small businesses**
3. **Less sophisticated commercial robberies**
4. **Violent personal robberies in the home**
5. **Professionally planned commercial robberies**

The guideline is divided into two parts.

- 1.1 **Part 1** - This part covers categories 1-3 above.

For each of the three categories, three levels of seriousness have been identified based on the extent of force used or threatened.

For each level of seriousness a sentencing range and a starting point within that range have been identified.

Adult and youth offenders are distinguished and the guideline provides for them as separate groups.

- 1.2 **Part 2** - No guideline is provided for categories 4 and 5. Violent personal robberies are often accompanied by other serious offences which affect sentencing decisions. For professionally planned commercial robberies, existing case authority is still valid and this is summarised in Part 2.

ROBBERY

C. Part 1

Street robbery or 'mugging'

Street robberies will usually involve some physical force (or threat) to steal modest sums, although in some cases there is significant intimidation or violence. The victim may or may not be physically injured.

1.3 Robberies of small businesses

This category covers robberies of businesses such as a small shop or post office, petrol station or public transport/taxi facility which may well lack the physical and electronic security devices available to banks or building societies and larger businesses.

Less sophisticated commercial robberies

This category covers a wide range of locations, extent of planning and degree of violence including less sophisticated bank robberies or where larger commercial establishments are the target but without detailed planning or high levels of organisation.

D. Assessing Seriousness

The offence of robbery will usually merit a custodial sentence but exceptional circumstances may justify a non-custodial penalty for an adult and, more frequently, for a young offender.

The factors to be taken into account in assessing seriousness are:

- It is the element of violence that is the most serious part of the offence of robbery, but it is not the only determinative factor.
- The relative seriousness of each offence depends on factors such as the degree of injury to the victim or the nature and duration of threats.
- The degree of force used is important in determining the seriousness of the offence but the degree of fear which is experienced by the victim is a relevant consideration.
- The use of a weapon or presence of a weapon even if not used.

(i) Levels of Seriousness

Three levels of seriousness are identified by reference to the features or type of activity that characterise an offence at each level and the degree of force or threat present. **The levels apply to all three categories of robbery but it will be very rare for robberies of small**

businesses or less sophisticated commercial robberies to have the features of the lowest level of seriousness.

Level 1 – Threat and/or use of minimal force

The offence includes the threat or use of force and removal of property such as snatching from a person's grasp causing bruising/pain and discomfort.

The relative seriousness of a level 1 offence depends on:

- a) the nature and duration of any force, threat or intimidation
- b) the extent of injury (if any) to the victim
- c) the value of the property taken
- d) the number and degree of aggravating factors

Level 2 – Use of weapon to threaten and/or use of significant force

A weapon is produced and used to threaten, and/or force is used which results in injury to the victim.

The relative seriousness of a level 2 offence depends on:

- a) the nature and duration of the threat or intimidation
- b) the extent of injury (if any) to the victim
- c) the nature of the weapon used, whether it was real and, if it was a real firearm, whether it was loaded
- d) the value of the property taken
- e) the number and degree of aggravating factors

Level 3 – Use of weapon and/or significant force and serious injury caused

The victim is caused serious physical injury, such as a broken limb, stab wound or internal injury, by the use of significant force and/or use of a weapon. Offences at this level are often accompanied by the presence of additional aggravating factors such as a degree of planning or the targeting of large sums of money or valuable goods.

The relative seriousness of a level 3 offence depends on:

- a) the extent of the injury to the victim
- b) the nature of the weapon used**
- c) the value of the property taken
- d) the number and degree of aggravating factors

The presence of one or more aggravating features will indicate a more severe sentence within the suggested range. If the aggravating feature(s) are exceptionally serious, the case may move to the next level of seriousness.

Aggravating factors particularly relevant to robbery

(a) Degree of force or violence

- Use of a particular degree of force is more serious than the threat (which is not carried into effect) to use that same degree of force.
- Depending on the facts, however, a threat to use a high degree of force might properly be regarded as more serious than actual use of a lesser degree of force.

(b) Use of a weapon

- Possession of a weapon during the course of an offence will be an aggravating factor, even if it is not used, because it indicates planning.
- Possession of a firearm which is loaded is more serious than possession of a firearm which is unloaded.
- Whether the weapon is real or imitation is not a major factor in determining sentence because the amount of fear created in the victim is likely to be the same.
- In cases of robbery in which a firearm is carried by the offender, a separate offence of possession of a firearm may be charged. In such circumstances, sentencers should consider, where appropriate, the use of consecutive sentences which properly reflect the totality of the offending.

(c) Vulnerability of the victim

- Targeting the elderly, the young, those with disabilities and persons performing a service to the public, especially outside normal working hours, will aggravate an offence.

(d) Number involved in the offence and roles of offenders

- Group offending will aggravate an offence because the level of intimidation and fear caused to the victim is likely to be greater.
- It may also indicate planning or 'gang' activity.

- The precise role of each offender will be important. Being the ringleader in a group is an aggravating factor. However, an offender may have played a peripheral role in the offence and, rather than having planned to take part, may have become involved spontaneously through the influence of others (see Mitigating Factors below).

(e) Value of items taken

- Property value may be more important in planned/sophisticated robberies.
- The value of the property capable of being taken should be taken into account as well as the amount/value of the property actually taken.

(f) Offence committed at night/in hours of darkness

- A victim is more vulnerable while in darkness than during daylight, all other things being equal.
- The degree of fear experienced by the victim is likely to be greater if an offence is committed at night or during hours of darkness.

(g) Wearing of a disguise

- The wearing of a disguise in order to commit an offence of robbery usually indicates a degree of planning on the part of the offender.
- The deliberate selection of a particular type of disguise in advance of the offence, for example, a balaclava or a mask, will be more serious than the improvised use of items of clothing such as a hat or hood.

Mitigating factors particularly relevant to robbery:

(a) Unplanned/opportunistic

- Many street robberies are unplanned or opportunistic by their nature so the extent of the mitigation in such cases may be limited.

(b) Peripheral Involvement

- Where, as part of a group robbery, the offender has played a peripheral role in the offence this should be treated as a mitigating factor although it should be borne in mind that by participating as part of a group, even in a minor role, the offender is likely to have increased the degree of fear caused to the victim (see Aggravating Factors above).

(c) Voluntary return of property taken

- The point at which the property is returned will be important and, in general, the earlier the property is returned the greater the degree of mitigation the offender should receive.

The court will also take account of the presence or absence of other factors including:

- **Personal mitigation**
- **First offence of violence**
- **Clear evidence of remorse**
- **Ready co-operation with the police**
- **Response to previous sentences**

A list of the most important general aggravating and mitigating factors can be found in the Guideline *Overarching Principles: Seriousness*.⁴³ These factors are reproduced at Annex A for ease of reference.

Young Offenders

- Young offenders may have characteristics relevant to their offending behaviour which are different from adult offenders. Also, by statute, the youth justice system has the principal aim of preventing offending by children and young persons.⁴⁴ Because of this, there may be factors which are of greater significance in cases involving young offenders including:

- **Age of the offender**
- **Immaturity of the offender**
- **Group Pressure**

Sentencers should recognise the varying significance of these factors for different ages.

(iii) Reduction in Sentence for Guilty Plea

Having taking account of aggravating and mitigating factors the court should consider whether the sentence should be reduced to take account of a guilty plea and by how much, in accordance with the Council Guideline: *Reduction in Sentence for a Guilty Plea*.

⁴³ Paragraphs 1.22-1.25

⁴⁴ Crime and Disorder Act 1998, s.37

E. Public Protection Sentences – Dangerous Offenders

Robbery is a serious offence for the purposes of section 225 of the Criminal Justice Act 2003 and sentencers should consider whether a life sentence or sentence for public protection should be imposed.

F. Ancillary Orders

In all cases, courts should consider making the following orders:

- **Restitution Order**⁴⁵ - requiring the return of property
- **Compensation Order**⁴⁶ - for injury, loss or damage suffered.

Where a non-custodial sentence is imposed, courts may also consider making:

- **Anti-social behaviour order**⁴⁷ - to protect the public from behaviour causing harassment, alarm or distress. This order may be particularly appropriate where the offence of robbery forms part of a pattern of behaviour but such an order may be unnecessary if it will simply prohibit what is already criminal conduct. It may be used to prevent some offenders associating with other offenders with whom offences of robbery have been committed.

⁴⁵ Powers of Criminal Courts (Sentencing) Act 2000 s.148-149

⁴⁶ *ibid.* s.130

⁴⁷ Crime & Disorder Act 1998, s.1 as amended

G. Factors to take into consideration – Adult Offenders

1. Robbery is a serious offence for the purposes of section 225 of the Criminal Justice Act 2003 and sentencers should consider whether a life sentence or sentence for public protection should be imposed. **The following guidelines apply to offenders who have not been assessed as dangerous.**
2. The sentencing ranges and presumptive starting points apply to all three categories of robbery detailed above:
 - **Street robbery or ‘mugging’**
 - **Robberies of small businesses**
 - **Less sophisticated commercial robberies**
3. **The ‘starting points’ are based upon a first time offender who pleaded not guilty.**
4. A reduction to the appropriate sentence, taking account of seriousness and aggravating and mitigating factors, will need to be made if an offender has pleaded guilty. The effect of applying the reduction may be that the sentence imposed for an offence at one level of seriousness may fall within the range suggested for the next lowest level of seriousness.
5. The relative seriousness of each offence will be determined by the following factors:
 - Degree of force and/or nature and duration of threats
 - Degree of injury to the victim
 - Degree of fear experienced by the victim
 - Value of property taken
6. Use of a particular degree of force is more serious than the threat (which is not carried into effect) to use that same degree of force. Depending on the facts, however, a threat to use a high degree of force might properly be regarded as more serious than actual use of a lesser degree of force.
7. If a weapon is involved in the use or threat of force, the offence will be more serious. Possession of a weapon during the course of an offence will be an aggravating factor, even if it is not used, because it indicates planning. If the offence involves a real firearm it will be more serious if that firearm is loaded. Whether the weapon is real or imitation is not a major factor in determining sentence because the amount of fear created in the victim is likely to be the same.
8. The value of the property *capable of being taken* as well as the actual amount taken is important.
9. The presence of one or more aggravating features will indicate a more severe sentence within the suggested range and, if the aggravating feature(s) are exceptionally serious, the case will move up to the next level.
10. In all cases, courts should consider making a restitution order and/or a compensation order. Where a non-custodial sentence is imposed, the court may also consider making an anti-social behaviour order.
11. Passing the custody threshold does *not* mean that a custodial sentence should be deemed inevitable.⁴⁸

⁴⁸ Guideline *Overarching Principles: Seriousness*, Para 1.32

ROBBERY

**Street robbery or ‘mugging’
Robberies of small businesses
Less sophisticated commercial robberies**

Robbery is a serious offence for the purposes of sections 225 and 227 Criminal Justice Act 2003

Maximum Penalty: Life imprisonment

ADULT OFFENDERS

Type/nature of activity	Starting point	Sentencing Range
The offence includes the threat or use of minimal force and removal of property.	12 months custody	Up to 3 years custody
A weapon is produced and used to threaten, and/or force is used which results in injury to the victim.	4 years custody	2-7 years custody
The victim is caused serious physical injury by the use of significant force and/or use of a weapon.	8 years custody	7-12 years custody

Additional aggravating factors	Additional mitigating factors
<ol style="list-style-type: none"> 1. More than one offender involved. 2. Being the ringleader of a group of offenders. 3. Restraint, detention or additional degradation, of the victim. 4. Offence was pre-planned. 5. Wearing a disguise. 6. Offence committed at night. 7. Vulnerable victim targeted. 8. Targeting of large sums of money or valuable goods. 9. Possession of a weapon that was not used. 	<ol style="list-style-type: none"> 1. Unplanned/opportunistic. 2. Peripheral involvement. 3. Voluntary return of property taken. 4. Clear evidence of remorse. 5. Ready co-operation with the police.

H. Factors to take into consideration – Young Offenders

1. A youth court cannot impose a custodial sentence on an offender aged 10 or 11. If the offender is aged 12, 13 or 14, a detention and training order can only be imposed by a youth court in the case of persistent young offenders. In the Crown Court, however, long-term detention in accordance with the Powers of Criminal Courts (Sentencing) Act 2000 can be ordered on any young offender without the requirement of persistence. The Crown Court may also impose an extended sentence, detention for public protection or detention for life where the young offender meets the criteria for being a “dangerous offender.” **The following guidelines apply to offenders who have not been assessed as dangerous.**
2. If a youth court is considering sending a case to the Crown Court, the court must be of the view that it is such a serious case that detention above two years is required, or that the appropriate sentence is a custodial sentence approaching the two year limit which is normally applicable to older offenders.⁴⁹
3. The sentencing ranges and presumptive starting points apply to all three categories of robbery detailed above:
 - **Street robbery or ‘mugging’**
 - **Robberies of small businesses**
 - **Less sophisticated commercial robberies**
4. **The ‘starting points’ are based upon a first-time offender, aged 17 years old, who pleaded not guilty. For younger offenders sentencers should consider whether a lower starting point is justified in recognition of the offender’s age or immaturity.**
5. Young offenders may have characteristics relevant to their offending behaviour which are different from adult offenders. Also, by statute, the youth justice system has the principal aim of preventing offending by children and young persons.⁵⁰ Because of this, there may be factors which are of greater significance in cases involving young offenders. Sentencers should recognise the varying significance of such factors for different ages.
6. A reduction to the appropriate sentence, taking account of seriousness, and aggravating and mitigating factors, will need to be made if an offender has pleaded guilty. The effect of applying the reduction may be that the sentence imposed for an offence at one level of seriousness may fall within the range suggested for the next lowest level of seriousness.
7. The relative seriousness of each offence will be determined by the following factors:
 - Degree of force and/or nature and duration of threats
 - Degree of injury to the victim
 - Degree of fear experienced by the victim
 - Value of property taken

⁴⁹ *W v Southampton Youth Court, K v Wirral Borough Magistrates’ Court* [2003] 1 Cr App R (S) 87

⁵⁰ Crime and Disorder Act 1998, s.37

8. Use of a particular degree of force is more serious than the threat (which is not carried into effect) to use that same degree of force. Depending on the facts, however, a threat to use a high degree of force might properly be regarded as more serious than actual use of a lesser degree of force.
9. If a weapon is involved in the use or threat of force, the offence will be more serious. Possession of a weapon during the course of an offence will be an aggravating factor, even if it is not used, because it indicates planning. If the offence involves a real firearm it will be more serious if that firearm is loaded. Whether the weapon is real or imitation is not a major factor in determining sentence because the amount of fear created in the victim is likely to be the same.
10. The value of the property *capable of being taken* as well as the actual amount taken is important.
11. The presence of one or more aggravating features will indicate a more severe sentence within the suggested range and, if the aggravating feature(s) are exceptionally serious, the case will move up to the next level.
12. In all cases, courts should consider making a restitution order and/or a compensation order. Where a non-custodial sentence is imposed, the court may also consider making an anti-social behaviour order.
13. Courts are required by section 44(1) of the Children and Young Persons Act 1933 to have regard to the welfare of the child, and under section 37 of the Crime and Disorder Act 1998 to have regard to the overall aim of the youth justice system of preventing re-offending.
14. Passing the custody threshold does *not* mean that a custodial sentence should be deemed inevitable.⁵¹
15. Where there is evidence that the offence has been committed to fund a drug habit and that treatment for this could help tackle the offender's offending behaviour, sentencers should consider a drug treatment requirement as part of a supervision order or action plan order.

⁵¹ Guideline *Overarching Principles: Seriousness*, Para 1.32

ROBBERY

**Street robbery or ‘mugging’
Robberies of small businesses
Less sophisticated commercial robberies**

Robbery is a serious offence for the purposes of sections 226 and 228 Criminal Justice Act 2003

Maximum Penalty: Life imprisonment

YOUNG OFFENDERS*

Type/nature of activity	Starting point	Sentencing Range
The offence includes the threat or use of minimal force and removal of property.	Community Order	Community Order - 12 months detention and training order
A weapon is produced and used to threaten, and/or force is used which results in injury to the victim.	3 years detention	1-6 years detention
The victim is caused serious physical injury by the use of significant force and/or use of a weapon.	7 years detention	6-10 years detention

Additional aggravating factors	Additional mitigating factors
<ol style="list-style-type: none"> 1. More than one offender involved. 2. Being the ringleader of a group of offenders. 3. Restraint, detention or additional degradation, of the victim. 4. Offence was pre-planned. 5. Wearing a disguise. 6. Offence committed at night. 7. Vulnerable victim targeted. 8. Targeting of large sums of money or valuable goods. 9. Possession of a weapon that was not used. 	<ol style="list-style-type: none"> 1. Unplanned/opportunistic. 2. Peripheral involvement 3. Voluntary return of property taken. 4. Clear evidence of remorse. 5. Ready co-operation with the police. 6. Age of the offender. 7. Immaturity of the offender. 8. Peer group pressure.

** The ‘starting points’ are based upon a first-time offender aged 17 years old who pleaded not guilty. For younger offenders, sentencers should consider whether a lower starting point is justified in recognition of the offender’s age or immaturity.*

I. Part 2

Relevant guidance from the Court of Appeal should apply to cases falling within the two categories of robbery listed below which is summarised for reference.

Violent personal robberies in the home

The sentencing range for robbery in the home involving physical violence is 13-16 years for a first time offender pleading not guilty. In this type of case, the starting point reflects the high level of violence, although it is clear that longer terms will be appropriate where extreme violence is used.⁵²

This category overlaps with some cases of aggravated burglary (an offence which also carries a maximum of life imprisonment) where comparable sentences are passed.

Consideration will need to be given as to whether the offender is a “dangerous offender” for the purposes of the Criminal Justice Act 2003.

Professionally planned commercial robberies

The leading Court of Appeal decision on sentencing for robbery is the 1975 case of *Turner*.⁵³ This focuses on serious commercial robberies at the upper end of the sentencing range but just below the top level - planned professional robberies of banks and security vehicles, involving firearms and high value theft, but without the additional elements that characterise the most serious cases. The Court of Appeal said it had ‘come to the conclusion that the normal sentence for anyone taking part in a bank robbery or in the hold-up of a security or a Post Office van should be 15 years if firearms were carried and no serious injury done.’

The Court also said that 18 years should be about the maximum for crimes which are not ‘wholly abnormal’ (such as the Great Train Robbery).⁵⁴

In cases involving the most serious commercial robberies the Court has imposed 20-30 years (15-20 years after a plea of guilty).

Consideration will need to be given as to whether the offender is a “dangerous offender” for the purposes of the Criminal Justice Act 2003.

⁵² *O’Driscoll* (1986) 8 Cr App R (S) 121

⁵³ (1975) 61 Cr App R 67

⁵⁴ *Wilson and others* (1964) 48 Cr App R 329

Extracts from Guideline *Overarching Principles: Seriousness*

This is a general list which is included here for ease of reference. Not every factor will apply to an offence of robbery.

(i) Aggravating factors

1.22 Factors indicating higher culpability:

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

1.23 Factors indicating a more than usually serious degree of harm:

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable
- Location of the offence (for example, in an isolated place)
- Offence is committed against those working in the public sector or providing a service to the public

- Presence of others e.g. relatives, especially children or partner of the victim
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business).

(ii) Mitigating factors

1.24 Some factors may indicate that an offender's culpability is **unusually** low, or that the harm caused by an offence is less than usually serious.

1.25 Factors indicating significantly lower culpability:

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

(iii) Personal mitigation

1.26 **Section 166(1) Criminal Justice Act 2003** makes provision for a sentencer to take account of any matters that 'in the opinion of the court, are relevant in mitigation of sentence'.

1.27 When the court has formed an initial assessment of the seriousness of the offence, then it should consider any offender mitigation. The issue of remorse should be taken into account at this point along with other mitigating features such as admissions to the police in interview.

Extracted from Guideline, Overarching Principles: Seriousness, Sentencing Guidelines Council, December 2004

Sentencing Guidelines Council

Overarching Principles:

Seriousness

Guideline

FOREWORD

In accordance with the provisions of section 170(9) Criminal Justice Act 2003, the Sentencing Guidelines Council issues this guideline as a definitive guideline. By virtue of section 172 of the Act, every court must have regard to a relevant guideline.

The Council was created in 2004 in order to frame Guidelines to assist Courts as they deal with criminal cases across the whole of England and Wales.

The Council has stated that it intends to follow a principled approach to the formulation of guidelines to assist sentencers which will include consideration of overarching and general principles relating to the sentencing of offenders. Following the planned implementation of many of the sentencing provisions in the 2003 Act in April 2005, this guideline deals with the general concept of seriousness in the light of those provisions and considers how sentencers should determine when the respective sentencing thresholds have been crossed when applying the provisions of the Act.

This guideline applies only to sentences passed under the sentencing framework applicable to those aged 18 or over although there are some aspects that will assist courts assessing the seriousness of offences committed by those under 18. The Council has commissioned separate advice from the Sentencing Advisory Panel on the sentencing of young offenders.

This is the first time that it has been possible to produce definitive guidelines not only before new provisions come into force but also before much of the training of judiciary and practitioners.

The Council has appreciated greatly the work of the Sentencing Advisory Panel in preparing the advice on which this guideline has been based and for the many organisations and individuals who have responded so thoughtfully to the consultation of both the Panel and the Council. The advice and this guideline are available on www.sentencing-guidelines.gov.uk or from the Sentencing Guidelines Secretariat. A summary of the responses to the Council's consultation also appears on the website.

[signature]
Chairman of the Council
December 2004

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SERIOUSNESS

A. Statutory Provisions

1.1 In every case where the offender is aged 18 or over at the time of conviction, the court must have regard to the five purposes of sentencing contained in *section 142(1) Criminal Justice Act 2003*:

- (a) the punishment of offenders
- (b) the reduction of crime (including its reduction by deterrence)
- (c) the reform and rehabilitation of offenders
- (d) the protection of the public
- (e) the making of reparation by offenders to persons affected by their offence

1.2 The Act does not indicate that any one purpose should be more important than any other and in practice they may all be relevant to a greater or lesser degree in any individual case – the sentencer has the task of determining the manner in which they apply.

1.3 The sentencer must start by considering the *seriousness* of the offence, the assessment of which will:

- determine which of the sentencing thresholds has been crossed;
- indicate whether a custodial, community or other sentence is the most appropriate;
- be the key factor in deciding the length of a custodial sentence, the onerousness of requirements to be incorporated in a community sentence and the amount of any fine imposed.

1.4 A court is required to pass a sentence that is commensurate with the seriousness of the offence. The *seriousness* of an offence is determined by two main parameters; the **culpability** of the offender and the **harm** caused or risked being caused by the offence.

1.5 *Section 143(1) Criminal Justice Act 2003* provides:

“In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.”

B. Culpability

1.6 Four levels of criminal culpability can be identified for sentencing purposes:

1.7 Where the offender;

- (i) has the **intention** to cause harm, with the highest culpability when an offence is planned. The worse the harm intended, the greater the seriousness.
- (ii) is **reckless** as to whether harm is caused, that is, where the offender appreciates at least some harm would be caused but proceeds giving no thought to the consequences even though the extent of the risk would be obvious to most people.
- (iii) has **knowledge** of the specific risks entailed by his actions even though he does not intend to cause the harm that results.
- (iv) is guilty of **negligence**

Note: *There are offences where liability is strict and no culpability need be proved for the purposes of obtaining a conviction, but the degree of culpability is still important when deciding sentence. The extent to which recklessness, knowledge or negligence are involved in a particular offence will vary.*

C. Harm

1.8 The relevant provision is widely drafted so that it encompasses those offences where harm is caused but also those where neither individuals nor the community suffer harm but a risk of harm is present.

To Individual Victims

1.9 The types of harm caused or risked by different types of criminal activity are diverse and victims may suffer physical injury, sexual violation, financial loss, damage to health or psychological distress. There are gradations of harm within all of these categories.

1.10 The nature of harm will depend on personal characteristics and circumstances of the victim and the court's assessment of harm will be an effective and important way of taking into consideration the impact of a particular crime on the victim.

1.11 In some cases no actual harm may have resulted and the court will be concerned with assessing the relative dangerousness of the offender's conduct; it will consider the likelihood of harm occurring and the gravity of the harm that could have resulted.

To the Community

1.12 Some offences cause harm to the community at large (instead of or as well as to an individual victim) and may include economic loss, harm to public health, or interference with the administration of justice.

Other Types of harm

1.13 There are other types of harm that are more difficult to define or categorise. For example, cruelty to animals certainly causes significant harm to the animal but there may also be a human victim who also suffers psychological distress and/or financial loss.

1.14 Some conduct is criminalised purely by reference to public feeling or social mores. In addition, public concern about the damage caused by some behaviour, both to individuals and to society as a whole, can influence public perception of the harm caused, for example, by the supply of prohibited drugs.

D. The Assessment of Culpability and Harm

1.15 Section 143(1) makes clear that the assessment of the seriousness of any individual offence must take account not only of any harm actually caused by the offence, but also of any harm that was intended to be caused or might foreseeably be caused by the offence.

1.16 Assessing seriousness is a difficult task, particularly where there is an imbalance between culpability and harm:

- ❑ sometimes the harm that actually results is greater than the harm intended by the offender;
- ❑ in other circumstances, the offender's culpability may be at a higher level than the harm resulting from the offence.

1.17 Harm must always be judged in the light of culpability. The precise level of culpability will be determined by such factors as motivation, whether the offence was planned or spontaneous or whether the offender was in a position of trust.

Culpability will be greater if:

- ❑ an offender deliberately causes more harm than is necessary for the commission of the offence, or
- ❑ where an offender targets a vulnerable victim (because of their old age or youth, disability or by virtue of the job they do).

1.18 Where unusually serious harm results and was unintended and beyond the control of the offender, culpability will be significantly influenced by the extent to which the harm could have been foreseen.

1.19 If much **more** harm, or much **less** harm has been caused by the offence than the offender intended or foresaw, the culpability of the offender, depending on the circumstances, may be regarded as carrying greater or lesser weight as appropriate.

The culpability of the offender in the particular circumstances of an individual case should be the initial factor in determining the seriousness of an offence.

1.20 Sentencing guidelines for a particular offence will normally include a list of aggravating features which, if present in an individual instance of the offence, would indicate *either* a higher than usual level of culpability on the part of the offender, *or* a greater than usual degree of harm caused by the offence (or sometimes both).

1.21 The lists below bring together the most important aggravating features with potential application to more than one offence or class of offences. They include some factors (such as the vulnerability of victims or abuse of trust) which are integral features of certain offences;

in such cases, the presence of the aggravating factor is already reflected in the penalty for the offence and ***cannot be used as justification for increasing the sentence further***. The lists are not intended to be comprehensive and the aggravating factors are not listed in any particular order of priority. On occasions, two or more of the factors listed will describe the same feature of the offence and care needs to be taken to avoid “double counting”. Those factors starred with an asterisk are statutory aggravating factors where the statutory provisions are in force. Those marked with a hash are yet to be brought into force but as factors in an individual case are still relevant and should be taken into account.

1.22 Factors indicating higher culpability:

- Offence committed whilst on bail for other offences*
- Failure to respond to previous sentences#
- Offence was racially or religiously aggravated*
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)#
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)#
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed #
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
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- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable
- Location of the offence (for example, in an isolated place)

- ❑ Offence is committed against those working in the public sector or providing a service to the public
- ❑ Presence of others e.g. relatives, especially children or partner of the victim
- ❑ Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- ❑ In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

(ii) Mitigating factors

1.24 Some factors may indicate that an offender's culpability is **unusually** low, or that the harm caused by an offence is less than usually serious.

1.25 **Factors indicating significantly lower culpability:**

- ❑ A greater degree of provocation than normally expected
- ❑ Mental illness or disability
- ❑ Youth or age, where it affects the responsibility of the individual defendant
- ❑ The fact that the offender played only a minor role in the offence

(iii) Personal mitigation

1.26 **Section 166(1) Criminal Justice Act 2003** makes provision for a sentencer to take account of any matters that 'in the opinion of the court, are relevant in mitigation of sentence'.

1.27 When the court has formed an initial assessment of the seriousness of the offence, then it should consider any offender mitigation. The issue of remorse should be taken into account at this point along with other mitigating features such as admissions to the police in interview.

(iv) Reduction for a guilty plea

1.28 Sentencers will normally reduce the severity of a sentence to reflect an early guilty plea. This subject is covered by a separate guideline and provides a sliding scale reduction with a normal maximum one-third reduction being given to offenders who enter a guilty plea at the first reasonable opportunity.

1.29 Credit may also be given for ready co-operation with the authorities. This will depend on the particular circumstances of the individual case.

E. The Sentencing Thresholds

1.30 Assessing the seriousness of an offence is only the first step in the process of determining the appropriate sentence in an individual case. Matching the offence to a type and level of sentence is a separate and complex exercise assisted by the application of the respective threshold tests for custodial and community sentences.

The Custody Threshold

1.31 *Section 152(2) Criminal Justice Act 2003* provides:

“The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.”

1.32 In applying the threshold test, sentencers should note:

- ❑ the clear intention of the threshold test is to reserve prison as a punishment for the most serious offences;
- ❑ it is impossible to determine definitively which features of a particular offence make it serious enough to merit a custodial sentence;
- ❑ passing the custody threshold does not mean that a custodial sentence should be deemed inevitable, and custody can still be avoided in the light of personal mitigation or where there is a suitable intervention in the community which provides sufficient restriction (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime. For example, a prolific offender who currently could expect a short custodial sentence (which, in advance of custody plus, would have no provision for supervision on release) might more appropriately receive a suitable community sentence.

1.33 The approach to the imposition of a custodial sentence under the new framework should be as follows:

- (a) has the custody threshold been passed?
- (b) if so, is it unavoidable that a custodial sentence be imposed?
- (c) if so, can that sentence be suspended? (sentencers should be clear that they would have imposed a custodial sentence if the power to suspend had not been available)
- (d) if not, can the sentence be served intermittently?
- (e) if not, impose a sentence which takes immediate effect for the term commensurate with the seriousness of the offence.

The Threshold for Community Sentences

1.34 *Section 148(1) Criminal Justice Act 2003* provides:

“A court must not pass a community sentence on an offender unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant such a sentence.”

1.35 In addition, the threshold for a community sentence can be crossed even though the seriousness criterion is not met. *Section 151 Criminal Justice Act 2003* provides that, in relation to an offender aged 16 or over on whom, on 3 or more previous occasions, sentences had been passed consisting only of a fine, a community sentence may be imposed (if it is in the interests of justice) despite the fact that the seriousness of the current offence (and others associated with it) might not warrant such a sentence.

1.36 Sentencers should consider all of the disposals available (within or below the threshold passed) at the time of sentence before reaching the provisional decision to make a

community sentence, so that, even where the threshold for a community sentence has been passed, a financial penalty or discharge may still be an appropriate penalty.

Summary

1.37 It would not be feasible to provide a form of words or to devise any formula that would provide a general solution to the problem of where the custody threshold lies. Factors vary too widely between offences for this to be done. It is the task of *guidelines for individual offences* to provide more detailed guidance on what features within that offence point to a custodial sentence, and also to deal with issues such as sentence length, the appropriate requirements for a community sentence or the use of appropriate ancillary orders.

1.1 Having assessed the seriousness of an individual offence, sentencers must consult the sentencing guidelines for an offence of that type for guidance on the factors that are likely to indicate whether a custodial sentence or other disposal is most likely to be appropriate.

F. PREVALENCE

1.38 The seriousness of an individual case should be judged on its own dimensions of harm and culpability rather than as part of a collective social harm. It is legitimate for the overall approach to sentencing levels for particular offences to be guided by their cumulative effect. However, it would be wrong to further penalise individual offenders by increasing sentence length for committing an individual offence of that type.

1.39 There may be exceptional local circumstances that arise which may lead a court to decide that prevalence should influence sentencing levels. The pivotal issue in such cases will be the harm being caused to the community. It is essential that sentencers both have supporting evidence from an external source (for example the local Criminal Justice Board) to justify claims that a particular crime is prevalent in their area and are satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

The key factor in determining whether sentencing levels should be enhanced in response to prevalence will be the level of harm being caused in the locality. Enhanced sentences should be exceptional and in response to exceptional circumstances. Sentencers must sentence within the sentencing guidelines once the prevalence has been addressed.