

SPICe Briefing

Criminal Justice and Licensing (Scotland) Bill: Scottish Sentencing Council

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The Scottish Government introduced the Criminal Justice and Licensing (Scotland) Bill in the Parliament on 5 March 2009. The Bill includes provision to create a Scottish Sentencing Council to provide a new sentencing guidelines regime for Scotland.

This briefing provides information on:

- the Scottish criminal courts – including information about their sentencing powers and appeals
- current sentencing guidance and practice in Scotland
- the background to proposals for establishing a Scottish Sentencing Council
- relevant provisions of the Bill
- the operation of sentencing guidelines in England and Wales



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EXECUTIVE SUMMARY

- Historically, the legislature in Scotland has been reluctant to interfere with judicial discretion and there are currently no sentencing guidelines as such in Scotland. Currently, sentencing practice operates mainly on a case-by-case basis in the criminal courts, with reference to the wide experience of sentencers in criminal cases and decisions made by the High Court sitting as a court of appeal. This is supplemented by the Appeal Court's power to issue guideline judgements under provisions contained in the Criminal Procedure (Scotland) Act 1995
- In recent years, a number of independent bodies have been tasked with examining sentencing practice in Scotland. Under the policy statement [A Partnership for a Better Scotland](#) (2003), the parties forming the previous Scottish Executive undertook to set up an independent, judicially-led Sentencing Commission for Scotland. The Sentencing Commission was launched in November 2003 with a remit to review and make recommendations to the Scottish Executive on a number of criminal justice issues, including the scope to improve consistency in sentencing. In addition, the Scottish Prisons Commission was established by the present Scottish Government to examine the purpose and impact of imprisonment in Scotland. It recommended in its July 2008 report [Scotland's Choice Report of the Scottish Prisons Commission](#) that the Scottish Government should establish a National Sentencing Council to develop clear sentencing guidelines
- With regard to sentencing guidelines, the Sentencing Commission emphasised that guidelines should not constrain sentencers in cases where there are good reasons for departing from the range of sentences contained within guidelines as this is fundamental to maintaining the principle of judicial independence. It pointed out that guidelines would, however, encourage the giving of reasons for the sentences being imposed and thus improve transparency in sentencing
- In September 2008, the Scottish Government published a consultation paper [Sentencing Guidelines and a Scottish Sentencing Council: Consultation and Proposals](#). The consultation did not revisit the work carried out by either the Sentencing Commission or the Prisons Commission. The Government made clear that it supported the view taken by both bodies that there was a need to establish a statutory body to give effect to sentencing guidelines. The consultation set out plans for the establishment of a Scottish Sentencing Council. Over 40 responses to the consultation were received with a majority of those in favour of the proposals put forward
- The Criminal Justice and Licensing (Scotland) Bill includes provisions to establish a Scottish Sentencing Council. The Council will consist of a combination of judicial and non-judicial members and will be chaired by the Lord Justice Clerk. The Sentencing Council's objectives, as set out in the Bill, will be to promote consistency in sentencing practice, assist the development of policy in relation to sentencing and to promote greater awareness and understanding of sentencing policy and practice. One of the main functions of the Council will be to prepare and publish sentencing guidelines for the courts on the sentencing of offenders

THE CRIMINAL COURTS IN SCOTLAND

Scotland has a three-tier criminal court system. These are, in order of precedence, the High Court of Justiciary (“the High Court”), sheriff courts and justice of the peace courts (formerly district courts).

Criminal procedure (ie the procedure for the prosecution of crime) is mainly regulated by the Criminal Procedure (Scotland) Act 1995 and is divided into solemn and summary procedures. Solemn procedure involves the most serious of criminal cases and may ultimately lead to a jury trial in the High Court or one of the sheriff courts. Summary procedure is used for less serious offences and may ultimately lead to a trial without a jury in one of the sheriff or justice of the peace courts.¹

The choice of court and whether to prosecute a case under solemn or summary procedure is generally made by the prosecution (the [Crown Office and Procurator Fiscal Service](#) headed by the Lord Advocate) and affects the sentences which are available on conviction².

High Court of Justiciary

The High Court sits both as a “court of first instance” or trial court (ie as a court dealing with the original case against an accused) and as a court of criminal appeal. It is the only court of appeal in criminal cases.

As a trial court, its jurisdiction extends over the whole of Scotland (and sometimes beyond) in respect of all crimes unless excluded specifically or through implication by statute. It has exclusive jurisdiction to try the most serious crimes such as treason, murder and rape and in practice deals with other serious crimes such as armed robbery, drug trafficking and sexual offences involving children. It sits regularly, in its role as a trial court, at various locations throughout the country. Cases are tried by a judge sitting with a jury under solemn procedure. In relation to common law offences, the maximum sentence which may be imposed by the High Court is life imprisonment and/or an unlimited fine. In relation to statutory offences, the maximum sentence is set by the relevant statute.

People convicted of a criminal offence may seek to appeal to the High Court, sitting as a court of criminal appeal in Edinburgh. Appeals may be against conviction, sentence or both conviction and sentence. Applications for leave to appeal are considered first by a single judge of the High Court, who decides whether the papers produced disclose arguable grounds of appeal (a procedure generally known as the “first sift”). The actual appeal is considered by more than one judge – at least two for an appeal against sentence alone and at least three judges in other cases.

The prosecution may also appeal against a sentence, on grounds of undue leniency.

The Scottish Criminal Cases Review Commission (“SCCRC”) was established on 1 April 1999 to review and investigate cases of alleged miscarriage of justice in Scotland. Where the SCCRC believes that a miscarriage of justice may have occurred, and that it is in the interests of justice

¹ The Criminal Proceedings etc (Reform) (Scotland) Act 2007 provides for the establishment of justice of the peace courts to replace district courts on a phased basis.

² The choice of court and/or procedure may also be dictated by the nature of the alleged offence. For example, a charge of murder will always be prosecuted in the High Court.

to do so, it may refer a case to the High Court for review. Once a case is referred, the High Court will determine the case as if it was a normal appeal.

Sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995 provide that when the High Court disposes of an appeal against sentence it can give an opinion on the sentence that may be appropriate in similar cases. Section 197 of the 1995 Act provides that in passing sentence a trial court must have regard to any relevant opinion that has been given under the above provisions. Any previous decision of the High Court on a sentence appeal may be relevant where a trial judge is considering the appropriate sentence in a case – depending on the particular circumstances of the case being dealt with by the trial judge. The provisions in sections 118(7) and 189(7) allow the High Court to go somewhat further in explicitly producing guideline judgements for future cases.

Sheriff Courts

There are a total of 49 sheriff courts throughout Scotland. A sheriff principal or sheriff deals with summary cases (sitting alone) or with solemn cases (sitting with a jury). The sheriff courts are the most important of the inferior criminal courts in terms of jurisdiction (sheriff courts also have jurisdiction in relation to civil matters). They can try any crime not reserved to the High Court including those which can be tried in the justice of the peace courts.³

In relation to sentencing powers, when sitting as a court of summary jurisdiction, a sheriff court may impose a sentence of up to 12 months imprisonment and/or a fine up to £10,000. When sitting as a court of solemn jurisdiction, the maximum term of imprisonment is 5 years and/or an unlimited fine.

Justice of the Peace Courts

A justice of the peace court is a lay court where a justice who is not legally qualified sits with a legally qualified clerk. The clerk provides advice to the justices on matters of law and procedure. The maximum sentence that a justice may impose is 60 days imprisonment or a fine not exceeding £2,500. In Glasgow, some courts at this level are presided over by legally qualified stipendiary magistrates. The maximum sentence that a stipendiary magistrate may impose is 12 months imprisonment or a fine not exceeding £10,000.

Justice of the peace courts were established by the Criminal Proceedings etc (Reform) (Scotland) Act 2007 and are gradually replacing district courts (on a phased basis across Scotland). District courts are (or were) administered by the relevant local authority. This function is performed by the Scottish Court Service in relation to justice of the peace courts, sheriff courts and the High Court.

CURRENT SENTENCING PRACTICE IN SCOTLAND

Historically, the legislature in Scotland has been reluctant to interfere with judicial discretion and there are currently no sentencing guidelines as such in Scotland. Currently, sentencing practice operates mainly on a case-by-case basis in the criminal courts, with reference to the wide experience of sentencers in criminal cases and decisions made by the High Court sitting as a court of appeal. This is supplemented by the Appeal Court's power to issue guideline judgements under provisions contained in the Criminal Procedure (Scotland) Act 1995 (see above). In 2006, the Sentencing Commission for Scotland in its report [The Scope to Improve](#)

³ Section 3(6) of the Criminal Procedure (Scotland) Act 1995 provides that, subject to any express statutory exclusion, "it shall be lawful to indict in the sheriff court all crimes except murder, treason, rape and breach of duty by magistrates".

[Consistency in Sentencing](#) suggested that only a comparatively limited number of opinions that constitute guideline judgements have been issued under the provisions in the 1995 Act:

It is not clear why the Appeal Court has made comparatively little use of its statutory powers to issue guideline judgements. 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. (Sentencing Commission for Scotland 2006, para 4.11)

It should be noted that statutory offences do exist in Scotland and that maximum sentences for such offences may be prescribed by legislation. In certain instances, the legislation will also prescribe the minimum sentences that must be imposed, for example, mandatory disqualification from driving following conviction for a number of road traffic offences⁴.

In recent years, a number of independent bodies have been tasked with examining sentencing practice in Scotland. Under the policy statement [A Partnership for a Better Scotland](#) (2003), the parties forming the previous Scottish Executive undertook to set up an independent, judicially-led Sentencing Commission for Scotland. The Sentencing Commission was launched in November 2003 with a remit to review and make recommendations to the Scottish Executive on a number of criminal justice issues, including the scope to improve consistency in sentencing.

In addition, the Scottish Prisons Commission was established by the present Scottish Government to examine the purpose and impact of imprisonment in Scotland. It recommended in its July 2008 report [Scotland's Choice Report of the Scottish Prisons Commission](#) that the Scottish Government should establish a National Sentencing Council to develop clear sentencing guidelines.

Relevant work of both the Sentencing Commission and Prisons Commission is considered further below.

THE SENTENCING COMMISSION FOR SCOTLAND

Consistency in Sentencing

In considering the question of what is meant by “consistency in sentencing”, the [Sentencing Commission for Scotland](#) (“the Commission”) adopted a statement of the Australian Law Reform Commission:

“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.” (Sentencing Commission for Scotland 2006, para 3.1)

The Sentencing Commission stated that 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. However, the Sentencing Commission acknowledged that treating like cases alike does not necessarily mean treating them in exactly the same way. A number of different circumstances can legitimately be taken into account by

⁴ Another example being section 205B of the Criminal Procedure (Scotland) Act 1995 which prescribes a minimum sentence of seven years imprisonment for offenders aged 18 years or more convicted in the High Court of a Class A drug trafficking offence where they have been previously convicted in any court of two other Class A drug trafficking offences.

sentencers when deciding on sentence. For example, crimes and offences falling within the same category may vary in their seriousness; the impact of crimes on victims can vary; and the pattern of previous offending by individual offenders may also vary.

Given these possible variations, the Sentencing Commission stated that any move to introduce more guidance for sentencers may give rise to criticisms that such guidance would amount to an interference with judicial discretion and would also lead to individual cases not being treated on the basis of individual facts and circumstances relating to each case. (Sentencing Commission for Scotland 2006, para 3.2) However, the Sentencing Commission took the view that, if the guidance available to sentencers remained limited to what is currently available, this would result in continuing criticism about a lack of consistency in sentencing and would also add to perceptions of unfairness and injustice to both offenders and victims.

The Sentencing Commission also examined the argument that, because no two cases are exactly alike, each sentencing decision is unique and therefore must be made on its own merits. The Sentencing Commission stated that this line of argument suggests that there can be no guarantee of consistency in outcome where offenders with similar characteristics, who have committed similar crimes:

“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.” (Sentencing Commission for Scotland 2006, para 3.3)

This line of argument was not found to be realistic or persuasive by the Sentencing Commission which suggested that while it is correct to say that no two cases would ever be exactly alike, this does not mean that two cases cannot have many features and factors in common. The Commission argued that for sentencing purposes such cases could “be treated as being, in all practical respects, indistinguishable”. (Sentencing Commission for Scotland 2006, para 3.4) The Commission acknowledged that it would be difficult to define what constitutes “similar cases” and suggested that one of the roles of sentencing guidelines should be to attempt to define what should be treated as similar cases for the purpose of imposing sentences.

The Sentencing Commission did not consider that introducing steps to encourage consistency and approach in sentencing outcomes would mean an end to judicial discretion and stated that any system must involve a balance between consistency in outcome and individualised sentencing. The Commission pointed out that most guidelines systems in operation in other jurisdictions allow sentencers to depart from the guideline sentence, provided that they state their reasons for doing so:

“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.”
(Sentencing Commission for Scotland 2006, para 3.8)

The Sentencing Commission emphasised that guidelines should not constrain sentencers in cases where there are good reasons for departing from the range of sentences contained within the guidelines as this is fundamental to maintaining the principle of judicial independence. It pointed out that guidelines would, however, encourage the giving of reasons for the sentences being imposed and thus improve transparency in sentencing (Sentencing Commission for Scotland 2006, para 8.33).

Guidance on Sentencing

The Sentencing Commission also examined the use of the statutory powers available to the Appeal Court under provisions in the Criminal Procedure (Scotland) Act 1995 (see section on the High Court of Justiciary above). The Commission pointed out that, in 1994, the Government of the day had consulted on whether sentencing guidelines should be introduced in Scotland and that responses showed that there was broad support for the formulation of such guidelines. A number of respondents to that consultation had pointed out that a substantial amount of guidance on sentencing matters was already available in the reported decisions of the Appeal Court, although these did not deal with more general issues about the appropriate range of sentences in particular categories of case. That consultation had revealed a considerable amount of support for the introduction of such sentencing guidelines. Respondents had felt that such guidelines would have the potential to improve consistency and provide a benchmark for decisions to appeal, and could also contribute to a more logical and transparent approach to sentencing.

“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’. (Sentencing Commission for Scotland 2006, para 4.7)

As mentioned previously, the Sentencing Commission reported that since the statutory provisions relating to guideline judgements had come into force, relatively few guideline judgements had been issued and that it was not clear why the Appeal Court had made comparatively little use of its statutory powers in this area (Sentencing Commission for Scotland 2006, para 4.11).

To improve consistency and transparency in sentencing, the Sentencing Commission recommended that the Appeal Court should consider making greater use of its power to issue guideline judgements under provisions contained in the Criminal Procedure (Scotland) Act 1995. It also recommended the creation of a statutory body – an Advisory Panel on Sentencing in Scotland – which would provide further guidance by the way of draft guidelines on general topics relating to sentencing, on new sentencing disposals introduced by parliamentary legislation and on particular categories of crimes and offences.

THE SCOTTISH PRISONS COMMISSION

The Scottish Prisons Commission (“the Prisons Commission”) report [Scotland’s Choice: Report of the Scottish Prisons Commission](#) was published in 2008.

The Prisons Commission was convened in September 2007 to examine, amongst other things, how imprisonment is currently used in Scotland and how this fits with the Scottish Government’s wider strategic objectives. Its report made a total of [23 recommendations](#) including the

recommendation that imprisonment should be reserved for cases where no other form of punishment is appropriate and that community penalties, involving “paying back” in the community, should become the default position in dealing with less serious offenders.

With regard to sentencing guidelines, the Prisons Commission report stated that:

“In the current Scottish system, judges decide what to do in individual cases in the context of limited guidance from the Court of Appeal. There is great merit in judges having wide discretion – not least because this keeps politics out of individual sentencing decisions. However, it is possible to let judges have discretion in individual cases without sacrificing consistency and public accountability. In many other jurisdictions, penal codes are established by legislation or bodies are set up to provide sentencing guidelines.” (Scottish Prisons Commission 2008, para 3.21)

The Prisons Commission recommended that, in order to promote consistency and improve the effectiveness of sentencing, the Scottish Government should establish an independent National Sentencing Council to develop clear sentencing guidelines that can be applied nationwide. The Prisons Commission argued that disparities in sentencing exist partly because judges receive only limited guidance about sentencing and also do not have much information about how their peers practice sentencing and that a National Sentencing Council would contribute to making sentencing more transparent and explicit.

The Prisons Commission also argued that a National Sentencing Council was required to overcome the problem of “judge-shopping” by defence lawyers. The Commission’s report stated that research has shown that defence lawyers are well aware that similar cases are sentenced differently in different courts and, sometimes, even by different judges in the same courts. The report went on to say that the practice of “judge-shopping” is a waste of public resources and also contributes to an undermining of public confidence in sentencing practice (Scottish Prisons Commission 2008, para 3.22).

PROPOSALS FOR A SCOTTISH SENTENCING COUNCIL

In September 2008, the Scottish Government published a consultation paper [Sentencing Guidelines and a Scottish Sentencing Council: Consultation and Proposals](#) (“the consultation”) (Scottish Government 2008). The consultation did not revisit the work carried out by either the Sentencing Commission or the Prisons Commission. The Government made clear that it supported the view taken by both bodies that there was a need to establish a statutory body to give effect to sentencing guidelines. The consultation set out plans for the establishment of a Scottish Sentencing Council (“the Sentencing Council”). Over 40 responses to the consultation were received with a majority of those in favour of the proposals put forward (Scottish Government 2008, para 39).

Against the background of the recommendations of the Sentencing Commission, the Government proposed that the Sentencing Council should have the following remit:

- to promote consistency in sentencing practice
- to ensure that sentencing practice and policy is transparent and understandable
- to enable the development of sentencing policy to be based on a broad range of experience and expertise
- to inform Scottish Ministers and the Scottish Parliament on sentencing practice and related areas of reform

- to inform and educate the public about sentencing policies and decision making with a view to promoting greater understanding and enhancing public confidence in the criminal justice system

A number of concerns were raised during the consultation process, including the proposed relationship between the Sentencing Council and the Appeal Court.

With regard to the relationship between the Sentencing Council and the Appeal Court, it was proposed that, once guidelines had been published and finalised, sentencers in all courts should be under a statutory obligation to adhere to those guidelines in disposing of any relevant case. The Appeal Court would still be able to exercise its powers under relevant provisions in the Criminal Procedure (Scotland) Act 1995 to issue guideline judgements. However, it was also proposed that the Appeal Court would be required to apply any sentencing guideline promulgated by the Sentencing Council (Scottish Government 2008, paras 2.11 – 2.13). In a response to the consultation, judges of the High Court of Justiciary commented:

“We consider the proposals at paragraphs 2.11 – 2.13 in the consultation paper as to the relationship between the Sentencing Council and the Appeal Court as unsatisfactory, unworkable and unacceptable. In our view the model contemplated in the consultation paper would have significant impact on the independence of the judiciary and would fundamentally alter the position of the Appeal Court in its role of controlling the development and application of sentencing policy. The Appeal Court would lose its current responsibility for control of sentencing policy, subject to particular statutory provisions. There would be an inevitable interference with the discretion of that Court. The authority of the Appeal Court would be likely to be diminished. This aspect of the proposals raises real concerns about erosion of the principle of the separation of powers.” (Scottish Government 2009, response no. 034)

On the other hand, concern was also expressed regarding the freedom of sentencers to depart from guidelines. The consultation document stated that, sentencers would be able to depart from guidelines if the individual circumstances of a case required it but would be required to formally state the reasons for doing so. A response from an academic working at the Centre for Sentencing Research at Strathclyde University said:

“As it stands, this sounds so permissive as to render guidelines worthless: all a judicial sentencer would need to do would be to say that the guidelines are not applicable in the instant case because of the particular facts and circumstances and then narrate those in detail.

This remarkably permissive approach to departures will contradict what is described as one of the two main aims of the proposals – encouraging consistency in sentencing. If what grounds for departure are not set out by the Council, it is likely that there will be even *greater inconsistency* in sentencing for like cases – it is likely that different sentencers will develop different compliance/departure practices in similar cases. Some will be minded to comply whereas in the same case others will find that departure is possible.” (Scottish Government 2009, response no. 019)

PROVISIONS IN THE BILL

Purposes and Principles of Sentencing

Section 1 of the [Criminal Justice and Licensing \(Scotland\) Bill](#) (as introduced) includes provisions which set out the “purposes and principles of sentencing” which courts must have regard to when sentencing offenders. The stated purposes of sentencing are:

- the punishment of offenders
- the reduction of crime (including its reduction by deterrence)
- the reform and rehabilitation of offenders
- the protection of the public
- the making of reparation by offenders to persons affected by their offences

The setting out of these purposes is not intended to prevent a court from considering other matters in relation to cases, and the weight given to each of the purposes will vary according to the individual circumstances of each case. The Explanatory Notes to the Bill point out that no inference should be drawn from the order in which the purposes are listed.

Section 1 of the Bill also sets out a range of other matters which a court must have regard to when sentencing offenders. They include the seriousness of the offence, the range of sentences available to the court in dealing with the offence, and the desirability of ensuring consistency in sentencing in respect of the same type of offence.

Although a court must have regard to the above purposes and principles of sentencing, it may also take into account other factors which may be relevant to the particular case.

Scottish Sentencing Council

The Bill also includes provisions to establish a Scottish Sentencing Council (“the Sentencing Council”). It will consist of a combination of judicial and non-judicial members and will be chaired by the Lord Justice Clerk. Details of the membership of the Sentencing Council and approach to appointments are set out in Schedule 1 to the Bill.

The Policy Memorandum to the Bill states that the objectives of the Sentencing Council will help to ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system. (Scottish Government 2009, para 13) The Sentencing Council’s objectives, as set out in the Bill, will be to promote consistency in sentencing practice, assist the development of policy in relation to sentencing and to promote greater awareness and understanding of sentencing policy and practice.

One of the main functions of the Sentencing Council may be to prepare and publish sentencing guidelines for the courts on the sentencing of offenders. Before publishing final guidelines, it will be required to publish a draft of the proposed guidelines for comment. The Sentencing Council must consult the Scottish Ministers and the Lord Advocate, as well as other persons that it considers appropriate. Guidelines can relate to the purposes and principles of sentencing and can also relate to sentencing levels and/or the types of sentences that are appropriate for particular offences and offenders. In preparing guidelines, the Sentencing Council will be

required to make an assessment of their potential impact on prisons, community justice services and the criminal justice system in general.

Where relevant sentencing guidelines have been published, a court must have regard to these when sentencing an offender unless they consider that there are good reasons not to. If the court decides that it is not appropriate to follow relevant guidelines, it must state its reasons for not doing so. The cogency of any justification given by the court for not following relevant guidelines could, presumably, where either the Lord Advocate or an offender appeals against sentence, be considered by the Appeal Court.

The Policy Memorandum to the Bill notes that under section 108 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), the Lord Advocate has a power to appeal against a sentence. The Bill will require the Lord Advocate to have regard to any sentencing guidelines that are relevant to the matter on which an appeal is being considered.

Similarly, when the Appeal Court is dealing with an appeal, it must have regard to the guidelines that are applicable at the time that it is considering the appeal.

If, in dealing with an appeal, it disagrees with the content of a relevant sentencing guideline or otherwise decides not to follow such a guideline, it can refer that guideline to the Sentencing Council for review. If such a reference is made, then the Council must review the guidelines in question.

Scottish Ministers will, at any time, be able to request that the Sentencing Council undertakes to develop and publish sentencing guidelines on any matter within its remit or review particular guidelines. If such a request is made, the Council must consider it but is not bound to undertake to review guidelines. However, the reasons for deciding not to comply with a request must, in such cases, be given to the Scottish Ministers.

ENGLAND AND WALES

The system of sentencing guidelines in England and Wales currently involves the work of two closely related, independent bodies: the [Sentencing Advisory Panel](#) and the [Sentencing Guidelines Council](#). Prior to the establishment of the Sentencing Guidelines Council, the Court of Appeal in England and Wales was the authority on sentencing guidelines.

The development of sentencing guidelines follows an [8-step procedure](#). The Sentencing Advisory Panel’s role is to advise on sentencing guidelines for particular categories of offences and other sentencing issues. Following a period of wide consultation, and research if required, the Panel produces advice which is submitted to the Sentencing Guidelines Council for consideration. The advice provided by the Panel is central to the development of sentencing guidelines and is used by the Council as a starting point for its formulation of guidelines. The Panel has produced [advice](#) on a wide number of offences including offences involving child pornography, racially aggravated offences, and robbery.

Once the Sentencing Guidelines Council has received advice from the Panel on a particular sentencing topic, it uses this to formulate [draft guidelines](#) which are published, consulted upon and revised before final guidelines are then issued to sentencers in all courts in England and Wales. In sentencing an offender, the court must have regard to any guidelines which are relevant to an offender’s case. Where a sentencing guideline indicates that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence, and

the sentence passed by the court is different, or is outside the range indicated, the court must state its reasons for deciding on a different sentence.

The system of sentencing guidelines in England and Wales has recently been under review and a number of substantial changes to the operation of the present system have been proposed in the [Coroners and Justice Bill](#) (as introduced) which is currently undergoing scrutiny at Westminster. The House of Commons Library research paper [Coroners and Justice Bill: Crime and Data Protection](#) (Almandras, S. et al, 2009) examines, amongst other things, proposals relating to the reform of the sentencing guidelines system.

Provisions in the Coroners and Justice Bill would replace the Sentencing Guidelines Council and the Sentencing Advisory Panel with a unified Sentencing Council for England and Wales. The unified Sentencing Council would be responsible for drawing up sentencing guidelines. It would be able to prepare guidelines on its own initiative or following proposals from the Lord Chancellor or the Court of Appeal.

One of the proposed changes in the Coroners and Justice Bill relates to the courts ability to depart from guidelines which have been produced. Provisions in the Bill would replace the existing duty of the courts to “have regard to” sentencing guidelines (the same phrase is used in the Criminal Justice and Licensing (Scotland) Bill) with a requirement to “follow” the guidelines unless it would be contrary to the interests of justice to do so. The proposal to strengthen the wording was one of a number of [recommendations](#) made by a working group which was set up to examine the advantages, disadvantages and feasibility of a structured sentencing framework and sentencing commission. The working group examined whether sentencing guidelines should continue to be advisory, with the courts only being required to “have regard to” them, or if a stronger presumptive approach should be taken with sentencers having to satisfy a stricter “departure test” before departing from any guidelines.

The working group considered three levels of “departure test”:

- the first level, used in Minnesota, requires the court to follow sentencing guidelines unless it can find (and record) “substantial and compelling reasons” for departing from the guidelines. This level is the most presumptive approach
- the second level, used in New Zealand, requires the court to follow sentencing guidelines relevant to the offender’s case unless the court is satisfied that it would be contrary to the interests of justice to do so
- the third level, currently used in England and Wales, requires the court to have regard to any guidelines relevant to the offender’s case. However, the court retains the discretion to depart from the guidelines, provided it can give reasons for the departure

The working group rejected the first level on the grounds that it is too restrictive of judicial discretion. The majority of the working group recommended that the second level should be adopted. A minority of the working group recommended that the current approach (ie the third level) be maintained.

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