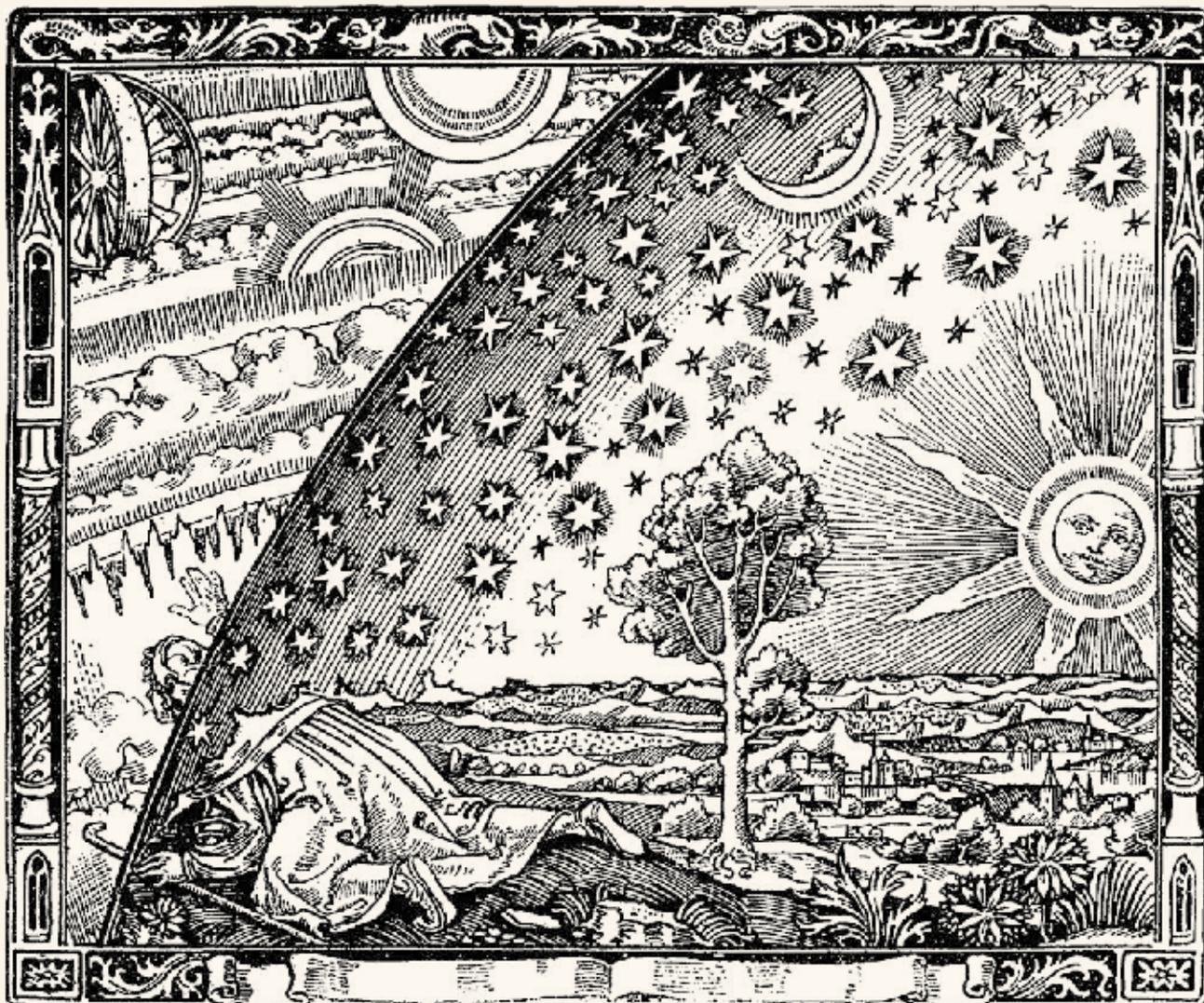


scottish justice ' matters

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REIMAGINING PUNISHMENT AND JUSTICE

A NEW ERA

Ondine Tennant introduces the new Scottish Sentencing Council

THE SCOTTISH SENTENCING COUNCIL was established in October 2015 to promote consistency in sentencing, and will provide guidelines on a systematic basis in Scotland for the first time. It was formally launched at an event in Parliament House in November and held its inaugural meeting in December.

History

Introducing a mechanism to promote consistency in sentencing in Scotland was a key recommendation of the Sentencing Commission, chaired by the late Lord Macfadyen, in its 2006 report *The Scope to Improve Sentencing in Scotland*. The Commission found that a perceived lack of consistency was damaging to public confidence, and concluded 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”. The Scottish Prisons Commission, which reported in 2008, also supported the creation of a sentencing council for Scotland, to “drive forward consistency and improve the effectiveness of sentencing”.

In 2009, after consultation, the Scottish Government brought forward legislative proposals for the establishment of a Scottish Sentencing Council to the Scottish Parliament. The Government’s stated policy aims were to “help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system.”

Objectives and functions

Under the Criminal Justice and Licensing (Scotland) Act 2010, the Council has statutory objectives to:

- ❖ promote consistency in sentencing practice;
- ❖ assist the development of policy in relation to sentencing; and
- ❖ promote greater awareness and understanding of sentencing policy and practice.

All of the Council’s work must be carried out in pursuance of these objectives.

One of the Council’s primary functions is the preparation of sentencing guidelines to assist the Scottish criminal courts when sentencing offenders. It also has responsibilities to publish guideline judgments issued by the appeal courts and to publish information about sentencing.

Sentencing Guidelines

The High Court and Sheriff Appeal Court, when deciding criminal appeals, can require the Council to prepare or review sentencing guidelines on any matter, while the Scottish Ministers may, at any time, request that the Council prepare or review guidelines. The Council must have regard to, but may decide not to comply with, a ministerial request; it must, however, comply with a request from the Courts. It will also be open to the Council to prepare guidelines at its own instance or at the suggestion of others.

The selection and prioritisation of guideline topics will be a critical question which the Council will need to address early in its work programme. The Council is currently preparing a business plan, to be published in autumn 2016. This will set out how it will carry out its functions over a three year period and what guidelines it will prepare.

The Council has broad discretion in how it develops guidelines and will need now to consider the most appropriate format, topics and content.

Guidelines can deal with the principles and purposes of sentencing; with sentencing levels; or with sentences for particular types of offence or even types of offender. A first question is whether guidelines should be offence or offender specific.

Guidelines must be approved by the High Court before they can come into effect. Once given effect, the courts must have regard to any applicable guidelines when sentencing an offender. If a court considers that there is reason to depart from a guideline, it must state those reasons when doing so. This requirement will help ensure the sentencing process is transparent and help make it clear how guidelines operate in practice.

Membership

Membership of the Scottish Sentencing Council encompasses a wide range of expertise and experience across the criminal justice system. In addition to the Lord Justice Clerk, the *ex officio* Chair of the Council, the membership is as follows:

- ❖ **The Hon. Lord Turnbull**, Lead Preliminary Hearings Judge and Administrative Judge for First Instance Criminal Cases
- ❖ **Sheriff Principal Ian R. Abercrombie QC**, Sheriff Principal of South Strathclyde, Dumfries and Galloway
- ❖ **Sheriff Norman McFadyen**, sheriff of Lothian and Borders sitting in Edinburgh
- ❖ **Allan Findlay**, stipendiary magistrate in Glasgow and Strathkelvin, sitting in Glasgow
- ❖ **Gillian Thomson**, Justice of the Peace in Tayside, Central and Fife, sitting in Stirling
- ❖ **Catherine Dyer**, Crown Agent for Scotland, prosecutor member
- ❖ **Stephen O’Rourke**, advocate member, Terra Firma Chambers
- ❖ **John Scott QC**, solicitor member, Capital Defence Lawyers
- ❖ **Assistant Chief Constable Val Thomson**, police constable member
- ❖ **Sue Moody**, victims expert, Chair of the Scottish Refugee Council
- ❖ **Professor Neil Hutton**, lay member, Professor of Law at the University of Strathclyde



The Lord Advocate Frank Mulholland QC; Cabinet Secretary for Justice, Michael Matheson; and former Chair of the Council, Lord Carloway, then Lord Justice Clerk (pictured above left to right) at the launch of the SSC at Parliament Hall, Edinburgh in November 2015.

The Council has extensive experience of sentencing matters. Membership includes representation from each court tier, from both a judicial, prosecution and defence perspective, and importantly, includes lay members. Collectively, the Council has a broad and deep understanding of the impacts of sentencing on offenders, victims, families, communities and society more widely. This will help to ensure that the Council is able to take into account the range of diverse issues relevant to the sentencing process in carrying out its work.

Lessons from elsewhere

There are well established sentencing guideline frameworks in other jurisdictions, notably the United States (which has a federal Sentencing Commission and guideline systems in over a third of its states), Australia (with sentencing advisory bodies in four of its six states), and England and Wales (where a Council was created in 2010).

While the High Court in Scotland has had, since 1996, the ability to issue guideline judgments in appeals (in which the Court sets out the appropriate sentence in cases similar to that before it), the Sentencing Council will provide a mechanism for producing sentencing guidelines on a systematic basis for the very first time. Given the fundamental nature of the task in hand, the Council is eager to learn lessons from elsewhere to help develop the best approach for Scotland. This will be especially important in the Council's formative years, during which the foundations of this new framework for sentencing will be laid.

With this in mind, research is being carried out into sentencing systems in other countries. This will include a programme of engagement involving counterpart bodies in neighbouring UK jurisdictions and beyond. The Council has already established links with the Sentencing Council for England and Wales and with colleagues in Ireland, Northern Ireland and Australia.

Research and information

As well as benefiting from the experience of other established systems, it will also be essential to gain a comprehensive picture of the current practices in Scotland. Members will soon be embarking on a series of visits and events designed to broaden understanding of different aspects

of the sentencing process and highlight examples of best practice. The Council will also be able to carry out, commission and disseminate research relevant to sentencing, as well as the effects and efficacy of different disposals. It is important that the Council's decisions are informed by robust evidence and that the potential effects of guidelines are as well understood as possible. A research commissioning framework is currently being developed, with the principles of fairness, transparency and best practice in procurement in mind. This will enable the Council to launch commissioned projects swiftly.

In developing individual guidelines, the Council will actively consult and seek input from those with relevant experience and knowledge, including judicial office holders, practitioners, those working in the administration of criminal justice, academics, and, not least, individuals with experience of the criminal justice system.

Openness and inclusion

In addition to the work described above, a number of decisions were made at the Council's first meeting demonstrating its commitment to transparency and to working productively with others.

All sentencing guidelines will be subject to full public consultation before being finalised. Other measures include:

- ❖ easy read documents prepared where appropriate for the public to help explain the sentencing process generally and the Council's work in particular
- ❖ details of Council meetings published on the Council's website, including non-confidential or sensitive meeting papers
- ❖ website development to provide explanatory information on sentencing, including a jargon-buster

It is hoped that all of this work will also serve to support the Council's objective to promote greater understanding and awareness of sentencing.

The advent of the Sentencing Council marks the start of what Lord Carloway has termed "a new era for sentencing" in Scotland (Scottish Sentencing Council, 18.11.15). Through the Council there will be opportunities to: understand better the effects and efficacy of different sentencing options; provide the courts with better tools and information for carrying out what is often a difficult and complex task; expand the field of knowledge in relation to sentencing; and demystify the process for the public, and thereby improve public confidence, in the criminal justice system.

Ondine Tennant is the secretary to the Scottish Sentencing Council. She is part of the senior management team of the Scottish Courts and Tribunals Service and previously had responsibility for establishing the Scottish Civil Justice Council.

Scottish Sentencing Commission (2006) *The Scope to Improve Sentencing in Scotland* <http://www.gov.scot/Resource/Doc/925/0116783.pdf>

Scottish Sentencing Council (18.11.15) *News: Council launch event* <https://www.scottishsentencingcouncil.org.uk/communications/news/official-launch-event/>

Scottish Sentencing Council: <https://www.scottishsentencingcouncil.org.uk/>