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# Comparative Research into Sentencing Guidelines Mechanisms

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This paper provides comparative research on sentencing guidelines mechanisms in 16 jurisdictions in Europe, Australia and New Zealand, the United States and South Africa

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## Key Points

This paper is about the role of sentencing guidelines bodies. There are different approaches to sentencing guidelines policy and bodies in other jurisdictions.

Some jurisdictions do not have sentencing guidelines bodies but rely on alternative mechanisms. These include for example mandatory minimum sentencing in legislation (eg Canada) or sentencing information systems as alternatives to sentencing guidelines bodies (eg Ireland). It should be noted that the approach to sentencing (mandatory minimum sentencing) in Canada may not easily be transposed to Northern Ireland as Canada has a codified system of criminal law.

Other jurisdictions have established sentencing guidelines bodies either to draft sentencing guidelines or to advise courts on sentencing matters. The Northern Ireland Department of Justice has issued a consultation paper in which it puts forward three different models for a sentencing guidelines mechanism: an independent sentencing guidelines council with a statutory remit for producing guidelines; an independent sentencing advisory panel with a statutory remit to draft guidelines for approval of the Court of Appeal; and a judicial oversight committee known as a Sentencing Group to be established by the Lord Chief Justice.

A review of the literature on sentencing guidelines bodies suggests the following issues for consideration:

- Whether **objectives** underpinning a sentencing guidelines mechanism should be **set out in legislation**. There are broadly similar objectives that sentencing guidelines bodies in England and Wales, Scotland and as proposed in Northern Ireland have to pursue when considering sentencing guidelines. These include promoting consistency and ensuring public confidence. In England and Wales, objectives for the Sentencing Guidelines Council are not set out explicitly in statute, though there are certain 'needs' that the Council has to consider when discharging its functions. In Scotland, legislation sets out the statutory objectives of the Scottish Sentencing Council.
- **The functions of a sentencing body-** The primary function of the sentencing bodies is to produce (or advise on) sentencing guidelines. Some bodies have functions relating to parole or to assist in the development of legislation and policy. Would a Northern Ireland sentencing body would have a role in considering government's

policy proposals or assisting in the development of sentencing policy or have functions in respect of assessing the impact of guidelines on resources (for example prison resources)?

- The success of **sentencing guidelines mechanism in addressing levels of public confidence in sentencing**- The Department suggests that public confidence in sentencing is low in Northern Ireland, indicating that only 24% of respondents believe the courts are effective in giving a punishment that fits the crime and this figure is the same in England and Wales. It has been suggested **further analysis** should be undertaken in relation to models in Australia which focus more on research and education rather than guiding the judiciary. Research from New South Wales Sentencing Council in Australia suggests that low public confidence is also an issue amongst its residents with 66% of residents thinking that sentences given by the courts are too lenient.
- The **format** of sentencing guidelines to be used in Northern Ireland. From the literature, there are two main types of guidelines: narrative guidelines (used in England and Wales) and numerical guidelines (used in the US). The Sentencing Commission Working Group in England and Wales concluded that the numerical model was too restrictive of judicial discretion. This may be suitable for consideration later in the process.
- **The membership of a sentencing body and duration of terms.** Membership ranges from 8-14 across the models considered in this paper. Some models have a greater number of judicial members (England and Wales), others a balance of judges and non judicial members (Scotland). Some Australian models have no judges. Non judicial members tend to include representatives with experience of the criminal justice system, legal professionals and victims groups. In some models the members can sit for one term only, but there are some models where terms are renewable for another term. It was suggested in research in England and Wales, if a sentencing body was established, the need for the Criminal Court of Appeal Division in issuing guidance would be reduced. It was suggested that a positive working relationship between the Guidelines mechanism and the Court of Appeal is therefore important and more likely to be achieved with judicial membership and leadership of the sentencing guidelines body.
- **Equality Considerations.** It has been suggested that Department should undertake an equality screening exercise, particularly focusing on the impact of those with caring responsibilities and dependents, young men and those convicted of scheduled offences who fall under the equality scheme on the basis of political opinion given the greater impact sentencing guidelines would have on these groups. Other policies

have noted the disproportionate effects of imprisonment on women in Northern Ireland. Consideration may therefore need to be given as to whether there is a need to include members with familiarity with any specific groups in the Northern Ireland model. Some models include members with experience of working with particular groups such as indigenous or ethnic minority groups.

- **Supporting the work of the body-** Most of the bodies considered have a secretariat to support their work. An option to consider is whether the proposed sentencing guidelines body should have its own dedicated staff; staff seconded from other bodies; or staff shared with other bodies, such as the Courts Service.
- **The final decision in approving guidelines-** In some models, guidelines bodies simply propose guidelines and it is for the legislatures or courts to approve or veto them. In other models, it is for the guidelines bodies to approve the guidelines after consultation with the legislatures or the courts.
- **The relationship between a sentencing guidelines body in Northern Ireland and the Assembly,** in particular the Assembly's Justice Committee. In England and Wales, the House of Commons Justice Select Committee has a role in scrutinising draft sentencing guidelines. In other jurisdictions such as Minnesota and as legislated for in New Zealand, the legislatures have a role in disapplying or vetoing guidelines.
- **Securing accountability-** Some of the jurisdictions require the sentencing guidelines body to submit annual reports to their respective legislatures.
- **The role of the courts in departing from guidelines-** In Northern Ireland, it is proposed that courts must have regard to the guidelines and they must, in court, state reasons for departure from these. Other models have what appear to be stronger duties to follow guidelines unless there are special reasons not to. Will the courts have other duties such as **notifying a guidelines** body when issuing guidelines judgments? This is the case in the Victorian model in Australia.



## Executive Summary

The Hillsborough Agreement in 2010 contained a commitment to establish a sentencing guidelines council. Recently the Department of Justice (DOJ) published a consultation document “Consultation on a Sentencing Guidelines Mechanism”, which sets out three options for a sentencing guidelines body: an independent sentencing guidelines council with a statutory remit for producing guidelines; an independent sentencing advisory panel with a statutory remit to draft guidelines for approval of the Court of Appeal; and a judicial oversight committee known as a Sentencing Group to be established by the Lord Chief Justice.

This paper provides information on comparative sentencing guidelines mechanisms in a number of jurisdictions including England and Wales, Scotland, Republic of Ireland, Australia, Canada, Minnesota, US (federal level), New Zealand (legislated for but not established), South Africa (proposed but not legislated for), Germany, France and the Netherlands. The paper examines a number of issues to be considered in establishing a guidelines body: the objectives of sentencing guidelines bodies, their functions, format of guidelines, membership and structure and relationships with other institutions and alternatives to sentencing guidelines bodies.

Sentencing guidelines bodies in England and Wales and as legislated for in Scotland have similar objectives to those proposed for Northern Ireland. In some jurisdictions concerns have been raised about increases in prison population, including in England and Wales, New Zealand, South Africa and Minnesota. Therefore some bodies have objectives in relation to the management of prison resources. In England and Wales, the Sentencing Council must conduct must publish a resource assessment in respect of the guidelines to include information on the likely impact of the guidelines on prison places and contain information in its annual report on sentencing factors including an assessment by the Council on changes in sentencing practice likely to have an effect on prison resources.

Sentencing bodies carry out a range of functions including: drafting guidelines, public education, information dissemination and resources functions. In England and Wales other functions include publishing resources assessment in respect of guidelines and monitoring the operation and effect of guidelines. Some bodies have functions beyond sentencing matters; for example bodies in Australia and New Zealand have functions relating to parole matters. Other bodies have functions in relation to the development of legislation and crime policy such as bodies in the United States.

This paper outlines how the format of guidelines may differ. Guidelines in England and Wales are described as narrative in nature; legislation sets out how guidelines should be structured including: different categories of offence illustrating degrees of seriousness, factors including the offenders culpability and harm caused, the range of offences and starting points in the offence range. In contrast, the mechanism used in some of the United States models has been described as numerical. Minnesota operates a grid system includes two axes; one axis takes into account the seriousness of the offence and the other takes into account the offender's criminal record. The point where the seriousness of the offence and criminal history intersect determines the range of the offender's sentence. The numerical models have been criticised for impacting on judicial discretion.

Sentencing guidelines bodies examined in this paper vary in membership, for example in size and in the composition of judicial and non judicial members. Some models such as the Sentencing Council in England and Wales have a greater number of judicial members. Scotland has legislated for a balance of judicial/non-judicial membership. Some sentencing bodies in Australia have no judicial representation. Furthermore some sentencing bodies in Australia and as proposed in New Zealand sentencing body have representatives with experience of working with particular groups, for example indigenous or ethnic minority groups. The DOJ proposes that members will be appointed for a fixed non renewable term. This is the same as the position in Scotland, however some models allow for a renewal of membership for example in the New Zealand and South Africa models.

In its consultation document, the DOJ has proposed a secretariat to support a Northern Ireland body carry out its functions. Most of the bodies examined in this paper are supported by a secretariat with various support functions including legal expertise, research and analysis, community engagement and administration functions. The Scottish Government in its policy consultation paper outlined a relationship between the Scottish Sentencing Council and the Scottish Court Service in the provision of IT support. Consideration may need to be given to staff such as IT support services in a Northern Ireland model.

The paper considers relationships between a sentencing guidelines mechanism and other institutions such as courts. The consultation document does not make reference to a relationship with the Northern Ireland Assembly but does set out a proposed relationship between the council and the Justice Minister. Some of models examined have relationships with their respective legislatures in approving or vetoing guidelines,

for example in New Zealand and in Minnesota. Interestingly, the House of Commons Justice Select Committee has a role in the scrutiny of guidelines. An example of the scrutiny role is the holding of inquiries into draft sentencing guidelines. Some of the bodies have direct relationships with the courts. For example guidelines may have to be approved by courts or the courts may propose the drafting of guidelines. In Victoria the Court has to notify the sentencing advisory body when issuing a guidelines judgment.

In the consultation document, the DOJ has highlighted that courts will be under a duty 'to have regard to' sentencing guidelines and state reasons if a sentence differs from a guideline this was the previous position in England and Wales and is the current position in Scotland. Some models appear to have more robust "departure tests" such as in England and Wales where the courts must follow guidelines unless satisfied it is contrary to the interests of justice to do so.

There are some jurisdictions that do not have sentencing guidelines. For example in some jurisdictions such as Germany, France, Netherlands and Canada, sentencing matters are set out in Penal or Criminal Codes or in Ireland where some offences in criminal law set out minimum sentences. It should be noted that in the Netherlands, the Penal Code does not impose limits on the type or severity of sanctions that can be imposed enabling judges to exercise discretion in sentencing matters. In Canada, the Criminal Code makes provision for principles and purposes of sentencing and establishes mandatory minimum sentences of imprisonment in a range of offences. It has been suggested that the Youth Criminal Justice Act (2002) in Canada goes some way to introducing sentencing guidelines into legislation as it contains a range of sentences that can be imposed on juveniles. In the Republic of Ireland, judges largely have discretion in sentencing matters, except for some offences which carry maximum and in some cases minimum penalties.

Another approach is the use of sentencing information systems. The judiciary in the Republic of Ireland have developed a pilot project, the Irish Sentencing Information System (ISIS) is a website which provides information to judges on sentencing practices in criminal proceedings. The value of such systems has been noted with benefits including judicial sentencing authority, discretion and transparency. However in response to a recent discussion paper in the Republic of Ireland on the White Paper on crime, some concerns have been raised regarding the re-enforcement of questionable practices if used long term. The future of this mechanism is uncertain as the development of the website has resource implications and it has been

acknowledged this will need to be considered in the current financial climate. The issue of sentencing guidelines has been the subject to consultation in recent white paper in which submissions favoured sentencing guidelines as a means to addressing perceived inconsistencies in sentencing practices. It remains to be seen whether a formal system of sentencing guidelines will be introduced.

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# 1 Introduction

The Hillsborough Agreement in 2010 contained a commitment to establish a sentencing guidelines council. Recently the Department of Justice (DOJ) published a consultation document “Consultation on a Sentencing Guidelines Mechanism”, which sets out a number of proposals detailing options for a sentencing guidelines body.

The value of sentencing bodies producing guidelines separate from the courts and parliament has been commented on by a leading criminal justice academic who claims that there are advantages in guidelines produced by a separate independent body as opposed to the appeal courts include: the ability to work more systematically; to devote more time to the task; as well as developing guidelines which are less case driven.<sup>1</sup> He also cites the advantages of developing a sentencing body independent of the legislature including: ability to work independently and devote more time to the task; insulation from need to pursue policies to secure votes and ability to resist political pressures and hype.<sup>2</sup> Another criminal law academic agrees, stating “even within sophisticated criminal justice systems, eventually proper sentencing needs a sentencing guideline commission of some kind to guide the sentence discretion.”<sup>3</sup> The contrasting opinion that “sentencing guideline frameworks are unconstitutional and an unjustified interference with judicial discretion”, puts more emphasis on the desirability of judicial autonomy in sentencing matters.<sup>4</sup>

The aim of this research paper is to set out briefly the current arrangements for sentencing in criminal cases in Northern Ireland and consider the possible options for establishing a sentencing guidelines mechanism for Northern Ireland contained within the DOJ consultation document. This paper also considers information from other jurisdictions with other sentencing guidelines. This is structured according to the different issues raised by the decision to create such a body: the objectives of sentencing guidelines bodies, their functions, format of guidelines, membership and structure and relationships with other institutions. The models studied include those in England and Wales, Scotland (legislated for but not yet established), Republic of Ireland, Australia, Canada, Minnesota, US (federal level), New Zealand (legislated for but not established), and South Africa (proposed but not legislated for). It is interesting to note that although the New Zealand body was legislated for, the Government announced it was not proceeding with the ‘extra bureaucracy’ of the sentencing council in order to prioritise victims of crime by establishing the offender levy.<sup>5</sup> The paper also briefly considers models in Germany, France and the Netherlands.

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<sup>1</sup> M Wasik “Sentencing Guidelines in England and Wales-State of the Art ” CLR, 2008,4, 253-263, 254.

<sup>2</sup> As cited above,

<sup>3</sup> SS Terblanche “Sentencing Guidelines for South Africa: Lessons from Elsewhere” SALJ (2003), 882

<sup>4</sup> This was the view of some judges consulted in England and Wales according to the Sentencing Commission Working Group Report “Sentencing Guidelines in England and Wales: An Evolutionary Approach”, 10. Available at <http://www.justice.gov.uk/publications/docs/sentencing-guidelines-evolutionary-approach.pdf>

<sup>5</sup> See <http://www.beehive.govt.nz/release/budget-2009-simon-power-victims-crime-benefit-50-offender-levy>

## 2 Northern Ireland

### 2.1 Current Arrangements for Sentencing in Northern Ireland

Currently Northern Ireland does not have a sentencing guidelines body. In sentencing, judges may rely on a number of factors including: the seriousness of the offence; the maximum and minimum penalties set out in criminal law; the range of available disposals; the offender's circumstances and previous convictions; the impact of the offence on the victim; protection of the public; and aggravating or mitigating factors.<sup>6</sup>

Judges also rely on guideline judgments issued by the Court of Appeal.<sup>7</sup> Guideline judgments are useful as they provide reasons for deciding sentences in particular cases and guidelines for the judiciary when sentencing in similar cases.<sup>8</sup> The Lord Chief Justice highlighted that there are weaknesses in this aspect of the current arrangements as the Court of Appeal can only issue guidelines in cases that come before it.<sup>9</sup> The DOJ notes that there are no sentencing guidelines for a majority of offences that come before the Magistrates court and that a mechanism should address this gap.<sup>10</sup> Guideline judgments also tend to cover really serious cases.<sup>11</sup> Judges in Northern Ireland may consider sentencing guidelines developed by the Sentencing Council in England and Wales "where those guidelines accord with local experience."<sup>12</sup> Finally, the Judicial Studies Board also has a role in promoting consistency in sentencing by providing workshop and lectures to the judiciary.<sup>13</sup>

In considering sentencing policy, the relevance of Article 6 of the European Convention on Human Rights should perhaps be born in mind. By virtue of the Human Rights Act 1998 (section 6) and the Northern Ireland Act 1998 (section 6(2)) no public authority may act inconsistently with this right and the Assembly may not legislate incompatibly with it. Article 6 provides that everyone has a right to be tried by an "independent and impartial tribunal".<sup>14</sup>

<sup>6</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism" (2010) 6.

<sup>7</sup> As cited above.

<sup>8</sup> As cited above at 7.

<sup>9</sup> Lord Chief Justice's Office "Priority List of Areas for Sentencing Guidelines" (2010)

<sup>10</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism" (2010), 14.

<sup>11</sup> SS Terblanche "Sentencing Guidelines for South Africa: Lessons from Elsewhere" SALJ(2003), 870

<sup>12</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism" (2010),7

<sup>13</sup> As cited above, 8.

<sup>14</sup> The full text of Article 6(1) is "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Articles 6 (2) and (3) deal with the presumption of innocence and the rights of persons charged with a criminal offence.

## 2.2 Policy drivers underpinning Proposals for a Sentencing Guidelines Mechanism in Northern Ireland.

The Department of Justice has indicated that in addition to the commitment set out in the Hillsborough Agreement to establish a Sentencing Guidelines Council, there are four main policy drivers underpinning the potential for reform: public confidence, transparency, community engagement and consistency. Each of these is considered in turn below.

Firstly, the paper indicates that public confidence in sentencing in criminal courts is low. The consultation document cites figures from the 2008/09 Northern Ireland Crime Survey which states that only 24% of respondents felt that the courts are effective in providing sentences which fit the crime and that only 24% of respondents felt that the Criminal Justice System got the right balance between offenders' rights and those of the victims.<sup>15</sup> Furthermore the department refers to the effect of media coverage on the public's perception of crime and sentencing and that media coverage may foster an impression that courts do not respond to concerns of communities.<sup>16</sup>

It should be noted that concerns have been expressed by the Committee on the Administration of Justice (CAJ) in its consultation response to the Department's proposed options. CAJ point out that in England and Wales the figures are the same and therefore question the Department's reasons for proposing a similar model given that "the sentencing guidelines mechanism in England and Wales has not been particularly successful in building public confidence."<sup>17</sup> It has been suggested that an explanation should be given as to why models in Australia with a greater focus on research and education were not chosen but a model based on the England and Wales body has been, given it has been apparently less successful in addressing public confidence. It has been recommended that further analysis is undertaken in relation to the Australian models.<sup>18</sup> Research has been published by the New South Wales Sentencing Council in Australia on public confidence in 2009 which acknowledges that "the issues raised in the literature has worldwide resonance".<sup>19</sup> Some of the figures from this research suggest:<sup>20</sup>

- A majority (66%) of NSW residents believe that sentences handed down by the courts are too lenient;
- A majority (62%) of NSW residents think that the criminal justice system does not meet the needs of victims;

<sup>15</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism" (2010) 9.

<sup>16</sup> As cited above, 10.

<sup>17</sup> Committee on Administration of Justice (CAJ) "CAJ's response to the consultation on Sentencing Guidelines Mechanism" January 2011, <http://www.caj.org.uk/contents/793>

<sup>18</sup> Committee on Administration of Justice (CAJ) "CAJ's response to the consultation on Sentencing Guidelines Mechanism" January 2011, <http://www.caj.org.uk/contents/793>

<sup>19</sup> New South Wales Sentencing Council (2009) Public Confidence in the New South Wales Criminal Justice System, 9 [http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll\\_scouncil.nsf/vwFiles/monograph\\_2.pdf/\\$file/monograph\\_2.pdf](http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/monograph_2.pdf/$file/monograph_2.pdf)

<sup>20</sup> New South Wales Sentencing Council (2009) Public Confidence in the New South Wales Criminal Justice System, 3 [http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll\\_scouncil.nsf/vwFiles/monograph\\_2.pdf/\\$file/monograph\\_2.pdf](http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/monograph_2.pdf/$file/monograph_2.pdf)

- A majority (65.6%) of NSW residents think that the criminal justice system does not deal with cases promptly;

The second driver for policy reform in the DOJ document is transparency. The document highlights research undertaken in England and Wales which finds that the public are misinformed in relation to sentencing practices and the public credit the judiciary with more lenient sentencing practices than is the reality. The document highlights that, in contrast to public perception of lenient sentencing practices, the prison population in Northern Ireland has increased by 52% between 2001 and 2009.<sup>21</sup> The DOJ has indicated that education and information have a vital role to play in increasing public knowledge of sentencing and improving public perceptions.<sup>22</sup>

The third policy driver in the consultation document is community engagement and the Department notes that whilst the public can participate in changes to sentencing policy via public consultation, that there remains only little opportunity for criminal justice practitioners and the general public to have input into the development of sentencing policy. The Department points to examples of sentencing guidelines bodies in other jurisdictions which have enhanced public participation as they are often comprised of a mix of judicial and non judicial members and they provide for consultation on draft guidelines.<sup>23</sup>

The fourth and final policy driver set out in the document is consistency in sentencing as there is a public perception that there is inconsistency in sentencing and that there are “anecdotal allegations” of varying standards. The DOJ has stated that “victims and offenders should expect that crimes of the same seriousness, committed in similar circumstances by comparable offenders should attract similar sentences.”<sup>24</sup>

Having considered the main policy drivers behind the department’s policy proposals, the following section sets out the three options in the DOJ paper for sentencing guidelines mechanisms for Northern Ireland.

## 2.3 Proposed Models

### 2.3.1 Option 1 –An Independent Sentencing Guidelines Council with a Statutory remit to produce sentencing guidelines

It is proposed under Option 1 to establish an independent sentencing guidelines council which would have a statutory function to produce, publish and promulgate sentencing guidelines and could prepare guidelines on any offence without waiting for a live case. The council could also act on referral from the Court of Appeal or Justice Minister. The Court of Appeal would also continue to issue guideline judgements on the

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<sup>21</sup> Department of Justice “Consultation on a Sentencing Guidelines Mechanism” (2010)

<sup>22</sup> As cited above, 11.

<sup>23</sup> As cited above, 12.

<sup>24</sup> As cited above, 13.

cases that come before it. Once the council prepared guidelines they would be published as draft guidelines for consultation. There would be a number of bodies or specified persons with whom the sentencing council would be required to consult, a list would be compiled with the Justice Minister in consultation with the Attorney General. In drafting guidelines, the sentencing council would have a statutory requirement to consider: current sentencing practice; the need to promote consistency in sentencing; the need to promote public confidence in sentencing; the effectiveness of various sentences in reducing offending and their relative cost; and the impact of sentencing decisions on victims. The sentencing council would also have public education and research functions. The courts would have a statutory duty to have regard to relevant guidelines and if the sentence differs from the guideline, to state the reasons for deviation. The consultation document proposes a secretariat of seven staff members. It is estimated in the consultation document that annual running costs for the sentencing council would amount to £470,000.

The Sentencing Guidelines Council would be comprised of 10-14 members. The sentencing council would consist of judicial and non judicial members but have a judicial chair. The document has noted that the balance of judicial to non judicial members would be considered subject to views expressed in the consultation. Judicial members would be nominated by the Lord Chief Justice after consultation with the Justice Minister and come from all court tiers. The Justice Minister would nominate non judicial members after consultation with the Lord Chief Justice and representation would be derived from criminal justice agencies, the Attorney General's office, defence counsel, academics and representatives with experience of victims' issues. Membership would be for a non-renewable fixed term.

The Department of Justice has published the results of its consultation on a Sentencing Guidelines Mechanism for Northern Ireland in which there were 24 respondents. 13 out of 24 respondents to the Department's consultation commented on option 1 and the majority of those who commented (nine respondents) considered that option 1 met the objectives for a sentencing guidelines mechanism. Three other respondents rejected option 1, two on the grounds that the model was too restrictive of judicial independence and the other respondent on the grounds that the proposed option did not fully address issues of engaging the community and providing greater transparency.<sup>25</sup>

In relation to the issue of whether there should be a judicial chair, 8 respondents to the Department's consultation commented. Out of the 8 respondents, five of these respondents agreed with the concept of a judicial chair, whilst three respondents were in favour of a non judicial chair. Alternative suggestions were made by two of the respondents such as a lay person of community influence as chair with a professional as secretary or vice chair or a senior civil servant.<sup>26</sup>

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<sup>25</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism- Summary of responses", March 2011, 6

<sup>26</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism- Summary of responses", March 2011, 6

In relation to judicial/non judicial balance on the council, four out of ten respondents who commented favoured an equal balance between judicial/legal members and non judicial/non legal members. Four respondents recommended that there should be inclusion of members who can represent the views of victims. Three respondents suggested that the council should have representatives with expertise to address the impact of fiscal and environmental crimes on society, public health and the economy.<sup>27</sup>

Five respondents to the consultation paper commented on the proposed functions for the council and it has been reported that all respondents were in broad agreement with the proposed functions. One respondent suggested that outreach and meaningful consultation with the community should be statutory functions. Another respondent raised concerns about developing guidelines 'in an abstract context' and the use of a 'live case' might be more appropriate and would enable potential and aggravating factors to be taken into account.<sup>28</sup>

Five respondents commented on the aspects of sentencing to be considered by the council in the preparation of guidelines. Two respondents highlighted the impacts of environmental crime and that the aggravating and mitigating factors in the commission of this crime should be considered in the development of guidelines. Concern was expressed by one respondent on the issue of considering the relative costs of sentences in developing guidelines.<sup>29</sup>

### **2.3.2 Option 2- An Independent Sentencing Advisory Panel with a remit to draft sentencing guidelines for the approval of the Court of Appeal**

Option 2 proposes an independent Sentencing Advisory Panel with a remit to draft sentencing guidelines for the approval of the Court of Appeal. The membership of this model differs from Option 1 in that membership would be comprised of 10-12 members and there would be a greater number of non-judicial members as the Court of Appeal would have the ultimate decision as to whether to accept the guidelines or not. Unlike Option 1, the panel would have a statutory function to draft guidelines for the approval of the Court of Appeal. Referrals could be made to the panel for guidelines by the Court of Appeal; in addition, the panel could propose to the Court of Appeal, either on their initiative or through a direction by the Justice Minister for drafting of guidelines for a particular category of offences. The panel as is the case in Option 1 would have a statutory requirement to consider when drafting guidelines: current sentencing practice; the need to promote consistency and public confidence in sentencing; the effectiveness of sentencing in reducing offending and relative costs; and the impact of sentencing on victims. Like Option 1, the panel would also have a public education and research role. The Court would also have a statutory duty to have regard to any relevant guidelines.

<sup>27</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism- Summary of responses", March 2011, 7-8.

<sup>28</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism- Summary of responses", March 2011, 8.

<sup>29</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism- Summary of responses", March 2011, 9.

In terms of costs, the Department states that there are no significant savings over Option 1.

In response to the DOJ consultation, 7 respondents commented on Option 2. Four were in favour of option 2 because it maintained the independence of the Court of Appeal, or took an 'incremental approach' to the development of a sentencing guidelines body. Three respondents felt that option 2 did not meet the objectives for a sentencing guidelines mechanism as effectively as option 1 for a number of reasons. These included:<sup>30</sup>

- Approval of guidelines by the Court of Appeal could encourage veto by some members of the judiciary;
- The membership aspects of the panel seemed less structured;
- The body might be seen as a 'quango' at time when public expenditure and budgets are under scrutiny.

Out of the 4 respondents to the department's consultation who commented on whether there should be a non judicial chair, all thought this was 'appropriate'.<sup>31</sup> 5 respondents commented on the proposed membership, four favoured a balance of judicial to non judicial membership. The other respondent suggested that there needed to be effective lay involvement to ensure public confidence.<sup>32</sup>

### **2.3.3 Option 3- A mechanism for sentencing guidelines based on measures being introduced by the Lord Chief Justice to enhance procedures for monitoring and developing sentencing guidance**

As a result of recommendations made by a Sentencing Working Group established by the Lord Chief Justice<sup>33</sup>, a judicial oversight committee, referred to as the Sentencing Group will be established. Membership will be comprised of representatives from all court tiers (The Northern Ireland Court Structure is contained in **Annex A** to this paper) and chaired by a judge from the Court of Appeal. The functions of this Sentencing Group would be: to take views from other judges and the public on priority areas where sentencing guidelines are needed; to provide the Lord Chief Justice on an annual basis with priority areas identified; and to consider Court of Appeal and First Instance sentencing cases which may merit inclusion on the Judicial Studies Board Website.<sup>34</sup> This sentencing group will facilitate the work of the courts in giving guidance on

<sup>30</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism- Summary of responses", March 2011, 11-12.

<sup>31</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism- Summary of responses", March 2011, 12.

<sup>32</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism- Summary of responses", March 2011, 13.

<sup>33</sup> The Lord Chief Justice is the President of the Courts in Northern Ireland and Head of the Judiciary in Northern Ireland. <http://www.courtsni.gov.uk/en-GB/AboutUs/RCJ/>

<sup>34</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism" (2010) 35.

sentencing in designated priority areas.<sup>35</sup> It should be noted that the Lord Chief Justice has recently conducted a consultation on a list of priority areas for sentencing guidelines. The provisional priority list of areas in the consultation include: domestic violence; serious sexual offences; people trafficking; attacks on public workers and vulnerable people; duty evasion and smuggling and environmental crime.<sup>36</sup> It has been noted that this model would be delivered at limited extra cost to the Criminal Justice System.<sup>37</sup>

9 respondents commented on whether Option 3 meets any or all the objectives for a sentencing guidelines mechanism. Out of the 9 respondents who commented, 7 respondents took the view that this option did not fully meet the objectives for a sentencing guidelines council. The reasons given were:<sup>38</sup>

- Does not incorporate other interests or expertise;
- Would be weighted towards the judiciary;
- Independence is limited;
- Could have less impact on public confidence than other options;
- Provides no mechanism for, or reference to increasing public understanding or awareness of sentencing;
- Looks only at priority areas.

Two of the respondents were in favour of allowing the work of this body to continue with a view to reviewing and assessing its effectiveness. Two respondents were opposed to this as a further review would be time consuming and resource-intensive.

### 3 Sentencing Guidelines Bodies

This section considers a range of sentencing guidelines bodies in a number of jurisdictions. The models studied include those in England and Wales, Scotland (legislated for but not yet established), Republic of Ireland, Australia, Canada, Minnesota, US (federal level), New Zealand (legislated for but not established), and South Africa (proposed but not legislated for). There are a number of themes considered in the following sections including: objectives, functions, membership, structure and appointments, the format of guidelines, relationships with other institutions including legislatures and courts and finally costs.

#### 3.1 Objectives of Sentencing Guidelines Bodies

The DOJ has highlighted in the consultation document that a sentencing guidelines mechanism in Northern Ireland will contribute to a number of objectives, including:

<sup>35</sup> As cited above

<sup>36</sup> Lord Chief Justice's Office "Priority List of Areas for Sentencing Guidelines" (2010).

<sup>37</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism" (2010) 37.

<sup>38</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism- Summary of responses", March 2011, 16.

promoting public confidence; providing greater transparency in sentencing practice; engaging the community and raising awareness of sentencing practice; and promoting consistency in sentencing for similar offences committed in similar circumstances.<sup>39</sup>

In England and Wales, objectives for the Sentencing Council are not set out explicitly in the statute. However, section 120(11) of the Act indicates that in discharging its functions the Council should have regard to a range of matters including the 'need to promote consistency in sentencing' and the 'need to promote public confidence', which gives some guidance as to its objectives. The Council indicates that it will: promote a clear, fair and consistent approach to sentencing; produce analysis and research on sentencing; and work to improve public confidence in sentencing.<sup>40</sup> In Scotland, the legislation sets out statutory objectives for the Scottish Sentencing Council, providing that it shall: 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.<sup>41</sup> It was suggested during the Committee stage of the Criminal Justice and Licensing (Scotland Bill) that the Scottish Sentencing Council could look at policy areas such as the incarceration of women and children.<sup>42</sup>

The United States Sentencing Commission has three principal purposes: to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; to advise and assist Congress and the Executive Branch in the development of effective and efficient crime policy; and to collect, analyse, research, and distribute a broad array of information on federal crime and sentencing issues serving as an information source for Congress, the executive branch, the courts, criminal justice practitioners, the academic community or the public.<sup>43</sup> In New Zealand, the purposes or objectives of the Sentencing Council are to produce guidelines about sentencing or parole: to promote consistency in sentencing and parole practice; ensure transparency in sentencing policy and parole practice; facilitate provision of reliable information to ensure effective management of penal resources; inform policy makers and members of Parliament about sentencing practice and options for reform; and educate and inform the public on sentencing practice and parole policy with a view to improving public confidence in the criminal justice system.<sup>44</sup>

### 3.2 Functions of Sentencing Guidelines Bodies

It has been proposed in Northern Ireland in relation to Options 1 that a sentencing guidelines mechanism will be tasked with producing, publishing and promulgating

<sup>39</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism" (2010) 15

<sup>40</sup> <http://www.sentencingcouncil.org.uk/about-us.htm>

<sup>41</sup> Section 2 of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>42</sup> Justice Committee Official Report 2, June 2009, Col 2015. Available at the Scottish Parliament's website.

<sup>43</sup> An Overview of the United States Sentencing Commission. Available at

[http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf), last accessed on 22 March 2011.

<sup>44</sup> Section 8 of the Sentencing Council Act 2010

sentencing guidelines. In relation to Option 2 in the DOJ paper, the Sentencing Advisory Panel would have the function of drafting guidelines for the approval of the Court of Appeal. In relation to both options, the body would have public education and research roles. The DOJ has noted that the public education role could be a statutory duty placed on the council to promote public understanding or awareness of sentencing.<sup>45</sup>

In England and Wales, the primary function of the Sentencing Council is to produce sentencing guidelines.<sup>46</sup> However the Sentencing Council has other functions including to: publish a resource assessment in respect of guidelines;<sup>47</sup> monitor the operation and effect of guidelines;<sup>48</sup> publish information on sentencing practice in local areas;<sup>49</sup> and promote awareness on sentencing matters including sentences imposed by courts and operation and effect of sentencing guidelines.<sup>50</sup> The Council must also publish in its annual report: information on sentencing and non sentencing factors which are likely to have impact on prison places, probation provision and youth justice resources.<sup>51</sup> Finally the legislation imposes a duty on the Council, when requested by the Lord Chancellor, to assess the impact of government policy proposals which the Lord Chancellor considers may have a significant effect on the resources required for prisons, probation and youth justice services.<sup>52</sup> An example of a government policy proposal considered by the Sentencing Council was the government's Green Paper on sentencing reform.<sup>53</sup> Lord Justice Leveson, the Chair of the Sentencing Council has highlighted that the role of the Sentencing Council in assessing the impact of government's policy proposals is an 'interesting' area for the Council, stating:

*"legislation comes at a cost and it is vital that the true cost of proposals is publicly foreshadowed so that Parliament understands the figures and can be seen to balance benefit against the cost that must be met."*<sup>54</sup>

The Scottish Sentencing Council has similar functions to those in England and Wales and as proposed for the Northern Ireland models. The Council may prepare guidelines, although for approval of the High Court of Justiciary.<sup>55</sup> The Council must also prepare an assessment of the costs and benefits which may arise from implementation of guidelines.<sup>56</sup> The Council may also publish and disseminate information about

<sup>45</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism" (2010), 28.

<sup>46</sup> Section 120 of Coroners and Justice Act 2009

<sup>47</sup> Section 127 (2) of the Coroners and Justice Act 2009

<sup>48</sup> Section 128 (1) of the Coroners and Justice Act 2009

<sup>49</sup> Section 129 (1) of the Coroners and Justice Act 2009

<sup>50</sup> Section 129 (2) a-c of the Coroners and Justice Act 2009

<sup>51</sup> Section 130 of the Coroners and Justice Act 2009

<sup>52</sup> Section 132 of the Coroners and Justice Act 2009

<sup>53</sup> Meeting of the Sentencing Council, 17 December 2010, Available at [http://www.sentencingcouncil.org.uk/docs/web\\_17-12-2010.pdf](http://www.sentencingcouncil.org.uk/docs/web_17-12-2010.pdf)

<sup>54</sup> Lord Justice Leveson "Sentencing in the 21<sup>st</sup> Century". Conkerton Lecture 2010, 13. Available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-leveson-conkerton-lecture-sentencing-in-the-21st-century-21102010.pdf>

<sup>55</sup> Section 3 (1) of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>56</sup> Section 5 of the Criminal Justice and Licensing (Scotland) Act 2010. In New Zealand there is a similar function to take account of the overall costs and benefits of the guideline, see section 2 of the Sentencing Council Act 2007.

sentencing matters including sentencing guidelines and practices of the courts in relation to sentencing. The Council also may conduct research into sentencing matters.<sup>57</sup> The Scottish Government considered in its policy consultation on a Scottish Sentencing Council and guidelines, that the Council should be able to develop guidelines on offences in reserved areas of law (equivalent to reserved and excepted matters in the Northern Ireland Act 1998) which remained under the remit of Westminster.<sup>58</sup> The Scottish Government proposed to consider the role of the UK Government in being consulted by the Council on draft guidelines relating to reserved matters.<sup>59</sup> Any such role would clearly require consultation with the UK Government and consideration of the legislative competence of the Assembly to enact such a provision.

Some sentencing bodies have functions in relation to parole as well as sentencing matters. In New Zealand, the Sentencing Council Act 2007 sets out that the Sentencing Council's functions include producing guidelines, giving advice, collating and providing information about parole matters.<sup>60</sup> Similarly, the Sentencing Advisory Council in New South Wales, Australia, has a function in advising the Attorney General on the minimum period prisoners jailed for certain serious offences must serve before being eligible for parole.<sup>61</sup> In Northern Ireland, the Parole Commissioners are an independent body responsible for making the decisions on the release of all life sentence prisoners.<sup>62</sup>

Some bodies also have functions in obtaining the views of the public as well as public education functions. In Victoria, Queensland and Tasmania, the sentencing advisory bodies may gauge public opinion on sentencing. Some bodies have functions in relation to legislation and crime policy development. In the United States, the United States Sentencing Commission can advise and assist Congress and the executive branch of government in the development of effective crime policy.<sup>63</sup> Similarly in Minnesota, the Minnesota Sentencing Guidelines Commission can propose changes in sentencing for legislative consideration.<sup>64</sup>

Some of the sentencing guidelines bodies examined have functions in respect of prison resources. The legislative framework in New Zealand sets out that the purposes of the Sentencing Council is provision of reliable information for the effective management of penal resources when drafting guidelines.<sup>65</sup> Furthermore, the New Zealand Sentencing Council has a statutory function to state the effect of guidelines on the prison

<sup>57</sup> Section 11 of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>58</sup> The Scottish Government "Sentencing Guidelines and a Scottish Sentencing Council" (2010), 9

<sup>59</sup> As cited above.

<sup>60</sup> Section 9 of the Sentencing Council Act 2007.

<sup>61</sup> Part 8B, Section 100J of the Crimes (Sentencing and Procedure) Act 1999.

<sup>62</sup> See the Parole Commissioners website <http://www.parolecomni.org.uk/intro.htm>, last accessed 22 March 2011.

<sup>63</sup> The United States Sentencing Commission "An Overview of the United States Sentencing Commission", available at the following link: [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf)

<sup>64</sup> Minnesota State Guidelines Agency Profile available at <http://www.msgc.state.mn.us/index.htm>

<sup>65</sup> Section 8 of the Sentencing Council Act 2007

population.<sup>66</sup> The rational use of correctional resources is one of the policy drivers behind sentencing guidelines in Minnesota in the United States.<sup>67</sup> Effective management of penal resources was also a consideration by the South African Law Commission in the development of the Draft Sentencing Framework Bill 2000; the Law Commission was concerned about problems of prison overcrowding.<sup>68</sup> In Scotland, the Scottish Sentencing Council must, when preparing sentencing guidelines, prepare an assessment of the effect of sentencing guidelines on the criminal justice system generally.<sup>69</sup>

The increased prison population was also considered by the Carter Review of Prisons in England and Wales in 2007.<sup>70</sup> The Sentencing Council in England and Wales also has statutory duties in relation to prison resources: the council must publish a resource assessment in respect of the guidelines to include information on the likely impact of the guidelines on prison places, as is the case in New Zealand.<sup>71</sup> Furthermore the Council must contain information in its annual report on sentencing factors including an assessment by the Council on changes in sentencing practice likely to have an effect on prison resources.<sup>72</sup> During the Committee stage of the Coroners and Justice Bill Edward Garnier, a Conservative MP, raised concerns in relation to the relationship between sentencing and resources and argued that the issue of resources should not impinge on sentencing.<sup>73</sup> Maria Eagle, Parliamentary Under Secretary of State for Justice, stated that judges would not be fettered in sentencing decisions and “there would not be an obligation on the individual sentencer in an individual case to take into account available resources such as the local prisons.”<sup>74</sup> Mr Garnier suggested an amendment during the Committee stage that “courts whilst having regard for correctional resources, could not pass a sentence wholly determined by resources assessments....”<sup>75</sup> However the amendment was defeated by 10 votes to 7

### 3.3 Factors to be taken into account when drafting guidelines

In Northern Ireland, it is proposed in Options 1 and 2 that the guidelines body would have statutory requirements to consider various aspects of sentencing when drafting guidelines including: current sentencing practice; the need to promote consistency and

<sup>66</sup> Sections 9 of the Sentencing Council Act 2007

<sup>67</sup> Minnesota State Guidelines Agency Profile available at <http://www.msgc.state.mn.us/index.htm>

<sup>68</sup> South African Law Commission Report “Project 82: Sentencing (A New Sentencing Framework) November 2000, xviii

<sup>69</sup> Section 3 of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>70</sup> The Carter Review in 2007 was tasked with considering options for improving the balance between the supply of prison places and the demand for them. The report recommendation that the Government should establish a working group to consider the advantages, disadvantages and feasibility of a structured sentencing framework and permanent sentencing commission, see Lord Carter’s Review of Prisons “Securing the Future: Proposals for the efficient, sustainable and effective use of custody in England and Wales,” 35. Available at <http://www.justice.gov.uk/publications/docs/securing-future.pdf>

<sup>71</sup> Section 127 (3) of the Coroners and Justice Act 2009

<sup>72</sup> Section 130 of the Coroners and Justice Act 2009

<sup>73</sup> House of Commons Public Bill Committee Stage of the Coroners and Justice Bill , Col 22, <http://www.publications.parliament.uk/pa/cm/200809/cmpublic/coroners/090203/am/90203s01.htm>

<sup>74</sup> As cited above

<sup>75</sup> As cited above, col 653

public confidence in sentencing; the effectiveness of sentencing in reducing offending and relative costs; and the impact of sentencing on victims.<sup>76</sup>

This is similar to the Sentencing Council in England and Wales which, when drafting guidelines, has to consider: sentences imposed by the courts; the need to promote consistency in sentencing; the impact of sentencing decision on victims; the need to promote confidence in the criminal justice system; the cost of different sentences and effectiveness to reoffending. The Sentencing Council in England and Wales is also under a statutory duty to have regard to the results of the monitoring on the effectiveness of guidelines.<sup>77</sup>

### 3.4 Format of Guidelines

The consultation document published by the DOJ does not appear to make reference to what format the guidelines should take. In broad terms, guidelines can be either narrative or numerical and can be developed incrementally or in a comprehensive package.

Sentencing guidelines in England and Wales are narrative guidelines in contrast to the sentencing guidelines in the United States which are numerical.<sup>78</sup> Section 121 (2)-(9) of the Coroners and Justice Act 2009, sets out the format in which guidelines should be structured. The guidelines should contain different categories of offences which illustrate degrees of seriousness and include factors such as an offender's culpability and harm caused.<sup>79</sup> The guidelines should also specify the range of offences and the starting points in the offence range.<sup>80</sup> Furthermore guidelines should contain a list of aggravating or mitigating factors.<sup>81</sup> Finally the guidelines should contain the criteria or guidance that should be given when determining the weight of previous convictions.<sup>82</sup> Examples of sentencing guidelines can be found at the Sentencing Council website.<sup>83</sup>

Similarly in Scotland, the guidelines prepared by the Council may relate to: the principles and purpose of sentencing; sentencing levels; the particular types of sentences that are appropriate for particular offenders or offences; and the circumstances in which guidelines may be departed from.<sup>84</sup> The Scottish Government stated in its consultation paper that it expected the format of guidelines would be varied, for example some might provide narrative guidance on issues including aggravating factors or repeat offending and others may have a mixture of narrative and numerical guidance, setting out sentence ranges.<sup>85</sup> It should be noted that the

<sup>76</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism" (2010), 27

<sup>77</sup> Section 120 (11) of the Coroners and Justice Act 2009.

<sup>78</sup> Sentencing Commission Working Group "Sentencing Guidelines in England and Wales: An Evolutionary Approach", 24.

<sup>79</sup> Sections 121 (2) and (3) of the Coroners and Justice Act 2009

<sup>80</sup> Sections 121 (4) and (5) the Coroners and Justice Act 2009

<sup>81</sup> Section 121(6) (a) the Coroners and Justice Act 2009

<sup>82</sup> Sections 121 (6) (c) the Coroners and Justice Act 2009

<sup>83</sup> <http://www.sentencingcouncil.org.uk/guidelines/guidelines-to-download.htm>

<sup>84</sup> Section 3 (3) of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>85</sup> The Scottish Government " Sentencing Guidelines and a Scottish Sentencing Council: Consultation and Proposals", 6.

legislation establishing the Scottish Sentencing Council does not provide for the structure of guidelines in the detailed way that the Coroners and Justice Act 2009 does.

In contrast, models in the United States operate on a numerical type grid system. The United States Sentencing Commission, responsible for developing federal sentencing guidelines established a sentencing table.<sup>86</sup> The point where the offence level and criminal history intersect determines the range of the offender's sentence. Guidelines in Minnesota are similar to the United States Federal Guidelines in that they operate a grid system with two axes, one setting out the severity of the offence and the other setting out the offender's criminal history.<sup>87</sup> An example of the Minnesota guidelines grid is contained in **Annex B**.

It is worth noting that the Sentencing Commission Working Group in England and Wales was established to consider the advantages, disadvantages and feasibility of structured sentencing frameworks operated particularly in Minnesota and North Carolina in the United States in response to Lord Carter's review on prisons. However the working group concluded that these mechanisms were "overly formulaic and mechanistic" and "are far too restrictive of judicial discretion to be acceptable."<sup>88</sup> One concern was that the weight put on previous criminal convictions had a "disproportionate effect in comparison with other factors such as aggravating and mitigating factors." Furthermore, the Working Group highlighted concerns in relation to restrictions on the use of some mitigating factors.<sup>89</sup> Other disadvantages have been highlighted including unwarranted uniformity, and the effect of stimulating plea-bargaining.<sup>90</sup>

Guidelines can be developed incrementally or as comprehensive set of guidelines. The DOJ has not set out in the consultation document how any Council would initially develop guidelines. In New Zealand it was proposed that the Sentencing Council would develop inaugural guidelines in contrast to England and Wales which has developed guidelines incrementally.<sup>91</sup> However in South Africa, the Law Commission proposed that sentencing guidelines would be gradually developed and indicated that guidelines for major offences would be developed within five years.<sup>92</sup>

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<sup>86</sup> For further information on the Sentencing table, see

[http://www.ussc.gov/Guidelines/2010\\_guidelines/Manual\\_PDF/Sentencing\\_Table.pdf](http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Sentencing_Table.pdf)

<sup>87</sup> Minnesota Sentencing Guidelines Commission, 2010, 57. Available at the following link:

<http://www.msgc.state.mn.us/guidelines/guide10.pdf>

<sup>88</sup> Sentencing Working Group Commission "Sentencing Guidelines in England and Wales: An Evolutionary Approach" (June 2008), 13.

<sup>89</sup> As cited above

<sup>90</sup> M Hough and J Jacobsen "Creating a Sentencing Commission for England and Wales: an opportunity to address the prisons crisis" (2008) viii.

<sup>91</sup> W Young and C Browning "New Zealand's Sentencing Council" [2008] Criminal Law Review 294.

<sup>92</sup> South African Law Commission Sentencing (A new Sentencing Framework) Project 82, 65.

<http://www.justice.gov.za/salrc/dpapers/dp91.pdf>

## 3.5 Membership and Structure of Sentencing Councils

### 3.5.1 Membership

It has been proposed that a sentencing body in Northern Ireland would have between 10 and 14 members for Option 1 and between 10 and 12 members for Option 2. Option 3 provides for a membership of judicial members from all court tiers chaired by a judge from the Court of Appeal. Option 1 proposes to have a mix of judicial and non judicial members with a judicial chair. Option 2 proposes a greater number of non judicial members than judicial members as the Court of Appeal has the final decision on guidelines. Non judicial members would be drawn from criminal justice agencies, the Attorney General's Office, legal professionals, academics and those with experience of working with victim's issues.

Looking at comparative models in other jurisdictions, membership ranges from 8 members, for example in the proposed South African sentencing body and in the United States Sentencing Commission, to 14 members in England and Wales and in New South Wales. In England and Wales, a body with a greater percentage of judicial membership, there is a judicial chair, currently Lord Justice Leveson, a Court of Appeal judge.<sup>93</sup> Similarly in Scotland, where there is a balance between judicial and non judicial members, the chair Lord Justice Clerk is a judicial member.<sup>94</sup>

Interestingly there are comparative models which have no serving judicial members. For example in New South Wales, the legislation provides for a retired judicial officer, who is also chair.<sup>95</sup> In Victoria, there are no judicial members with membership drawn from academics, prosecution and defence lawyers, and representatives from community organisations or community legal centres with experience in criminal justice matters, and members with experience of the operation of the criminal justice system.<sup>96</sup>

Some models provide for members who have experience of working with particular groups. For example in New Zealand, the legislation sets out that non judicial members must have experience working in a number of specified areas including the effects of the criminal justice system on Maori and people from minority ethnic cultures.<sup>97</sup> Similarly in New South Wales, the model includes a member with expertise or experience in Aboriginal matters.<sup>98</sup> The Department of Justice document does not make reference to the need or desirability to have representation from any particular minority group, although its section on equality does refer to the possibility of a disproportionate impact on men.<sup>99</sup> Equality considerations have also been raised as an issue by CAJ who urge the Department to undertake an equality screening exercise,

<sup>93</sup> <http://www.sentencingcouncil.org.uk/about-us.htm>

<sup>94</sup> See Schedule 1 of the Criminal Justice and Licensing (Scotland) Act 2010. Note that the Lord Justice Clerk is deputy to the Lord Justice General

<sup>95</sup> Part 8B, Section 100I, of the Crimes (Sentencing and Procedure) Act 1999

<sup>96</sup> Part 108 F of the Sentencing Act 1991

<sup>97</sup> Schedule 1 of the Sentencing Council Act 2007

<sup>98</sup> Part 12, Section 202 of the Penalties and Sentences Act 1992.

<sup>99</sup> Department of Justice "Consultation on a Sentencing Guidelines Mechanism" (2010), 38.

particularly focusing on the impact of those with caring responsibilities and dependents, young men and those convicted of scheduled offences who fall under the equality scheme on the basis of political opinion given the greater impact sentencing guidelines would have on these groups.<sup>100</sup> Other policies have noted the disproportionate effects of imprisonment on women in Northern Ireland.<sup>101</sup> Consideration may therefore need to be given as to whether there is a need to include members with familiarity with any specific groups in the Northern Ireland model.

Consideration also needs to be given to the terms of membership. In Northern Ireland, the Department of Justice propose that the terms of membership would be for a non renewable fixed term. Similarly in Scotland, the Criminal Justice and Licensing (Scotland) Act 2010 states that previous members may not be reappointed.<sup>102</sup> However some bodies do allow for renewal of membership. The New Zealand model allows for a five year term, renewable for one further term.<sup>103</sup> The proposed South Africa model would also allow for reappointment on expiration of a term of office.<sup>104</sup>

Consideration may need to be given to the issue of remuneration of members which has not been included in the DOJ consultation document. In England and Wales, the Coroners and Justice Act provides that the Lord Chancellor may pay to any non judicial member such remuneration or expenses the Lord Chancellor determines.<sup>105</sup> In New Zealand, the legislation also makes provision for remuneration and expenses for non judicial members and those members who are not an employee in any part of the state services.<sup>106</sup>

### 3.5.2 Appointment of Members

Option 1 in the DOJ consultation document proposes that appointments of judicial members would be carried out in consultation with the Justice Minister and appointment of non judicial members would be made by the Justice Minister in consultation with the Lord Chief Justice. The document does not specify the arrangements for appointment of members in options 2 or 3. In England and Wales, Lord Chief Justice is responsible for appointing eight judicial members in agreement with the Lord Chancellor. The Lord Chancellor is responsible for appointing the six non judicial members in agreement with the Lord Chief Justice.<sup>107</sup> In Scotland, the Lord Justice General is responsible for appointment of members other than the chair, the

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<sup>100</sup> Committee on Administration of Justice (CAJ) "CAJ's response to the consultation on Sentencing Guidelines Mechanism" January 2011, <http://www.caj.org.uk/contents/793>

<sup>101</sup> Department of Justice "Strategy for the Management of Women Offenders and Those Vulnerable to Offending Behaviour." (2010)

<sup>102</sup> Schedule 1, para 4 of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>103</sup> Schedule 1 of the Sentencing Council Act 2007.

<sup>104</sup> Clause 7 of the Draft Sentencing Framework Bill 2000.

<sup>105</sup> Schedule 15, para 9 of the Coroners and Justice Act 2009.

<sup>106</sup> Schedule 1, para 12 of the Sentencing Council Act 2007.

<sup>107</sup> Schedule 15, para 1 of the Coroners and Justice Act 2009.

Lord Justice Clerk and lay members in consultation with Scottish members.<sup>108</sup> The Scottish Ministers are responsible for appointing lay members in consultation with the Lord Justice General.<sup>109</sup> In New Zealand, legislation provides that judicial members are appointed by the President of the Court of Appeal (in respect of judicial members from the Court of Appeal) and the Chief High Court Judge (in relation to judicial members from the High Court). These appointments are made in consultation with the Chief Justice. Non judicial members are appointed by the Governor General on the recommendation of the House of Representatives.<sup>110</sup> The three judicial members of the Minnesota Sentencing Guidelines Commission are appointed by the Chief Justice of the Supreme Court and the remaining eight members are appointed by the Governor to coincide with his term of office.<sup>111</sup> In the United Sentencing Commission, the seven voting members are appointed by the President and confirmed by the Senate.<sup>112</sup>

### 3.5.3 Staffing Structure

The DOJ consultation paper proposes a secretariat of seven staff for the sentencing guidelines body in Option 1 (The proposals are not as explicit regarding Option 2, but indicate that Option 2 does not offer any significant savings over Option 1 implying a similar staffing arrangement). The secretariat includes a Head of Secretariat, secretary to the Sentencing Council, 2 research/policy officers, a communication officer and 2 administrative support staff.

Bodies in other jurisdictions have a secretariat to support their work. In England and Wales there is a small staff structure, divided into 3 areas, each with a Head of the area: legal; analysis and research; and policy and confidence. There is also a Head of the Sentencing Council.<sup>113</sup> The Victoria Sentencing Advisory Council has a secretariat of 16 which assists them in their functions including: research and analysis; managing community engagement; community education and administrative support.<sup>114</sup> The New South Wales model is supported by an Executive Unit which consists of an Executive Officer, 3 researchers, 3 consultants and 2 student interns.<sup>115</sup> Although a much larger model, the United States Sentencing Commission employs 100 staff which is organised into five offices supervised by a staff director, including: General Counsel; Education and Practice; Legislature and Public Affairs; and Administration.<sup>116</sup> In Scotland, the body is yet to be established, however it was proposed that there would be a team of

<sup>108</sup> The Lord Justice General is the most senior judge in Scotland and head of the Scottish Judiciary, the Lord Justice Clerk is the deputy of the Lord Justice General, see <http://www.scotland.gov.uk/Topics/Justice/legal/judiciary> See Schedule 1 of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>109</sup> See Schedule 1 of the Criminal Justice and Licensing (Scotland) Act 2010 for process of appointments.

<sup>110</sup> Section 10 of the Sentencing Council Act 2007.

<sup>111</sup> <http://www.msgc.state.mn.us/msgc5/commission.htm>, last accessed 25 March 2011.

<sup>112</sup> An Overview of the United States Sentencing Commission, [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf)

<sup>113</sup> <http://www.sentencingcouncil.org.uk/about/contact-us.htm>

<sup>114</sup> <http://www.sentencingcouncil.vic.gov.au/page/about-us/staff>

<sup>115</sup> New South Wales Sentencing Council Annual Report "Report on Sentencing and Trends and Practices 2008-2009." Available at [http://www.lawlink.nsw.gov.au/Lawlink/scouncil/ll\\_scouncil.nsf/pages/scouncil\\_publications](http://www.lawlink.nsw.gov.au/Lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_publications)

<sup>116</sup> The United States Sentencing Commission, Annual Report 2009, 1. Available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2009/chap1\\_09.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/chap1_09.pdf)

support staff including legal specialists, researchers, analysts and administrators.<sup>117</sup> It was also proposed that, whilst the body would have its own staff, the Council could also draw on the resources of the Scottish Court Service for matters such as IT support and human resources.

## 3.6 Relationships with Other Institutions

### 3.6.1 Relationships with legislatures

The relationships between sentencing guidelines bodies and legislatures vary. Of course, legislatures have a role in setting penalties in criminal law, usually specifying maximum and sometimes minimum penalties.<sup>118</sup> Apart from setting out this legal framework, there are other ways in which the Assembly could engage with a sentencing guidelines body. Comparative experience suggests that the strength of this relationship will depend on whether the emphasis is placed on the need to secure democratic accountability or the need to limit political influence in the judicial system.

The DOJ consultation paper does not discuss any relationship between a sentencing guidelines body and the Assembly, though it does refer to relationships with the Justice Minister. In Option 1, the Council would act on referrals from the Justice Minister. In Option 2 in the DOJ document, the advisory panel would be able to propose to the Court of Appeal that guidelines be drafted at the direction of the Justice Minister as well as on its own initiative. Option 3 does not set out a role for the Justice Minister.

In England and Wales, the Sentencing Council is required to consult the Lord Chancellor and the Justice Committee on draft sentencing guidelines.<sup>119</sup> A report by the House of Commons Select Committee has noted that the legislation provides for the Parliamentary Select Committee to be consulted on draft guidelines but does not make provision for Parliamentary approval of guidelines.<sup>120</sup> Whilst previous discussions considered the approval of guidelines by Parliament, the Government decided that guidelines would be referred to Ministers and the Justice Select Committee.<sup>121</sup> The Government viewed this mechanism as effective in “importing sufficient democratic scrutiny without undue political influence.”<sup>122</sup> The Justice Select Committee is currently holding an inquiry into a draft sentencing guideline on assault.<sup>123</sup>

In other jurisdictions the legislature has a role in approving or vetoing guidelines. In New Zealand, the House of Representatives may disapply guidelines and, if this is

<sup>117</sup> The Scottish Government “Sentencing Guidelines and a Scottish Sentencing Council” (2010),14,15

<sup>118</sup> Department of Justice “Consultation on a Sentencing Guidelines Mechanism” (2010),4

<sup>119</sup> Section 120 of the Coroners and Justice Act 2009

<sup>120</sup> House of Commons Justice Committee “Sentencing Guidelines and Parliament: Building a Bridge” Sixth Report of Session 2008-09 (HC715), 5.

<sup>121</sup> A Ashworth “Sentencing Guidelines and the Sentencing Council” (2010) Criminal Law Review 389-401, 392

<sup>122</sup> As cited above

<sup>123</sup> See the following link: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/sg-iii-050111/>

done, the Council must reconsider the guidelines.<sup>124</sup> The NZ Law Commission concluded that Parliamentary involvement was essential for “democratic and governance reasons.”<sup>125</sup> Similarly in relation to the United States federal guidelines, guidelines developed by the Commission are referred to Congress for final approval; Congress can modify or disapprove the guidelines.<sup>126</sup> In Minnesota, the Commission places guidelines before the Minnesota legislature which have effect unless they are vetoed.<sup>127</sup> The Sentencing Commission Working Group in England and Wales considered the issue of approval of guidelines by Parliament but concluded “it would be a fundamental departure from the accepted relationship between the judiciary and the legislature.”<sup>128</sup>

As regards accountability to Parliament, in England and Wales, the Sentencing Council must submit an annual report to the Lord Chancellor who will lay the report before Parliament.<sup>129</sup> Similarly in Scotland,<sup>130</sup> New South Wales,<sup>131</sup> and the bodies in the United States<sup>132</sup> considered in this paper are required to report to their respective legislatures.

### 3.6.2 Relationships with the Courts

The DOJ has proposed in Option 1 that the Council may act on referrals from the Court of Appeal. The DOJ consultation has also proposed in Option 2 that the Sentencing Advisory Panel would draft guidelines for the approval of the Court of Appeal.

In England and Wales, the Court of Appeal may propose, when deciding an appeal concerning a particular offence, that the Sentencing Council adopts or revises sentencing guidelines relating to that offence.<sup>133</sup> In Scotland legislation provides that the Scottish Sentencing Council will also be able to prepare sentencing guidelines; however these guidelines must be approved by the High Court of Justiciary, otherwise they will have no effect.<sup>134</sup> Some of the sentencing advisory bodies in Australia may write to the Court of Appeal to state their views on the giving or reviewing of a guidelines judgment, for example in Victoria<sup>135</sup> and Tasmania.<sup>136</sup>

An issue to be considered is the duty of the court to the sentencing body when giving a guideline judgment. In England and Wales it was suggested that under new

<sup>124</sup> Sections 18, 19 and 22 of the Sentencing Council Act 2007

<sup>125</sup> Law Commission New Zealand “Sentencing Guidelines and Parole Reform.” Report 94, (2006), 40.

<sup>126</sup> D Machin, “Sentencing Guidelines around the World” (2005), 3.

<sup>127</sup> Sentencing Working Group Commission “Sentencing Guidelines in England and Wales: An Evolutionary Approach” (June 2008), 13.

<sup>128</sup> As cited above

<sup>129</sup> Schedule 15 (3) and (4) of the Coroners and Justice Act 2009.

<sup>130</sup> Section 13 of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>131</sup> Section 108P of the Sentencing Act 1991

<sup>132</sup> [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2009/chap1\\_09.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/chap1_09.pdf) and [http://www.msgc.state.mn.us/msgc5/reports\\_to\\_leg.htm](http://www.msgc.state.mn.us/msgc5/reports_to_leg.htm)

<sup>133</sup> Section 124 of the Coroners and Justice Act 2009.

<sup>134</sup> Section 5 of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>135</sup> Section 108C of the Sentencing Act 1991

<sup>136</sup> Part 12, section 199 of the Penalties and Sentences Act 1992.

arrangements of the unified body, the need for Criminal Appeal Court Division (CACD) guidance would be reduced as the new body would have capacity to develop guidelines more quickly than under the previous two body arrangement of the Sentencing Advisory Panel and Sentencing Guidelines Council.<sup>137</sup> The importance of the need for a positive working relationship was highlighted which would be achieved by judicial membership and leadership of the body.<sup>138</sup> In Victoria, the Court of Appeal is required to notify the Sentencing Advisory Council when giving or reviewing a guideline judgment.<sup>139</sup> This was also proposed by the South African Law Commission in the drafting of the Draft Sentencing Framework Bill.<sup>140</sup> This is important given that the DOJ has proposed that the Court of Appeal would be able to continue giving guideline judgments.

### 3.7 Application of Sentencing Guidelines

The DOJ has proposed that the courts in Northern Ireland will be under a duty to “have regard to” sentencing guidelines and, where the sentencing differs from the guideline, to state the reasons.

In other jurisdictions, legislation sets out the duties of the court in applying sentencing guidelines; these have been described by the Sentencing Commission Working Group as “Departure Tests”.<sup>141</sup>

In Scotland, the courts have the same duties to those proposed in Northern Ireland in that they must have regard to any sentencing guidelines applicable to the case and must state a reason when they depart from a guideline.<sup>142</sup>

However in other jurisdictions there are more robust departure tests. In England and Wales, the court “must follow” sentencing guidelines unless it is satisfied that it would be contrary to the interests of justice to do so.<sup>143</sup> The departure test under previous arrangements was the same as the duties of the court proposed in the Department of Justice consultation.<sup>144</sup> The Sentencing Commission Working Group in looking at the New Zealand model which uses the “must follow” formula thought that there should be a strong presumption that the guidelines be applied. To this end they proposed the change in wording to ensure consistency, transparency and predictability.<sup>145</sup> During the Committee stage of the Coroners and Justice Bill, one of the Committee members, Edward Garnier, noted the position of the Conservative party stating that “we do not

<sup>137</sup> M Hough and J Jacobsen “Creating a sentencing commission for England and Wales” published by the Prison Reform Trust (2008), 37

<sup>138</sup> As cited above, 37

<sup>139</sup> Section 6AD of the Sentencing Act 1991

<sup>140</sup> Chapter 3, Section 12 of the Draft Sentencing Framework Bill 2000

<sup>141</sup> Sentencing Working Group Commission “Sentencing Guidelines in England and Wales: An Evolutionary Approach” (June 2008), 25.

<sup>142</sup> Section 6 (1) of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>143</sup> Section 125 of the Coroners and Justice Act 2009

<sup>144</sup> Criminal Justice Act 2003

<sup>145</sup> Sentencing Working Group Commission “Sentencing Guidelines in England and Wales: An Evolutionary Approach” (June 2008), 25

accept that the new sentencing council should have the power to require sentencers to follow its guidelines as opposed to taking them into account.”<sup>146</sup> However the amendment suggested by Mr Garnier to change the wording of the clause from “must follow” to “have regard to” guidelines was defeated.<sup>147</sup> It has been highlighted that the “must follow” requirement is arguably no stronger than the “have regard to” formula as it was applied fairly tightly by judges. Judges had to give reasoned decisions for departing from the guidelines and could not do so just because they disagree with the approach of the guideline.<sup>148</sup>

In South Africa, the Law Reform Commission proposed in the Draft Sentencing Framework Bill 2000 that in order to ensure consistency, the courts may only depart from sentencing guidelines in the following circumstances:<sup>149</sup>

- (a) Upwards or downwards, in circumstances that increase or decrease substantially the degree of harmfulness or risked harmfulness of the offence or culpability of the offender; or
- (b) Downwards where there are substantial and compelling circumstances, other than the degree of harmfulness or risked harmfulness of the offence or culpability of the offender, that justify such departure.

Similarly the Minnesota Sentencing Guidelines Commission’s guidelines manual provides that “the sentencing ranges provided in the sentencing guidelines grids are presumed to be appropriate for the crimes to which they apply.”<sup>150</sup> The manual states that although the guidelines are advisory, the sentencing judge should only depart from the sentence set out in the guidelines where “substantial and compelling circumstances exist”.<sup>151</sup> In relation to United States Federal guidelines, the sentencing guidelines manual provides that a court may depart from a guideline specified sentence only when it finds that there are certain aggravating or mitigating factors not taken into account by the United States Sentencing Commission (USSC) in developing the guideline.<sup>152</sup> The manual also provides that a court may consider departing from a sentencing guideline in an atypical case, “one to which a particular guideline linguistically applies but where conduct differs from the norm.”<sup>153</sup> The USSC states that one of the reasons for this departure policy is that “it is difficult to develop a single set of guidelines that

<sup>146</sup> House of Commons Public Bill Committee Stage of the Coroners and Justice Bill , 10 March 2009, Col 630, <http://www.publications.parliament.uk/pa/cm200809/cmpublic/coroners/090203/am/90203s01.htm>

<sup>147</sup> As cited above, col 653.

<sup>148</sup> A Ashworth “Sentencing Guidelines and the Sentencing Council” (2010) *Criminal Law Review* 389-401, 395.

<sup>149</sup> Clause 6 the Draft Sentencing Framework Bill 2000

<sup>150</sup> Minnesota Sentencing Guidelines Commission “Sentencing Guidelines and Commentary” Revised August 2010, 28

<sup>151</sup> Minnesota Sentencing Guidelines Commission “Sentencing Guidelines and Commentary” Revised August 2010, 1.

<sup>152</sup> 2010 Federal Guidelines manual and supplement, 6. Available at [http://www.ussc.gov/Guidelines/2010\\_guidelines/Manual\\_PDF/Chapter\\_1.pdf](http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_1.pdf)

<sup>153</sup> 2010 Federal Guidelines manual and supplement, 6. Available at [http://www.ussc.gov/Guidelines/2010\\_guidelines/Manual\\_PDF/Chapter\\_1.pdf](http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_1.pdf)

encompasses the vast range of human conduct potentially relevant to a sentencing decision.”<sup>154</sup>

### 3.8 Costs

The Department of Justice has noted in the consultation document that the annual running costs for Option 1 are estimated at £470,000 and that Option 2 will have no significant savings over Option 1. The document does not specify if there are any additional set up costs. The costs include members’ fees and expenses, staff salaries, office expenditure, research and website. The document also highlighted that Option 3 “would be delivered with limited extra cost to the criminal justice system.”<sup>155</sup>

In response to the Department of Justice’s consultation on a sentencing guidelines mechanism, 9 respondents commented on the annual costs of the Sentencing Council, three respondents viewed this option as representing value for money, one respondent took the opposing view highlighting that the posts and associated salaries would concern the public. One respondent recommended that reductions should be sought on in administrative costs.<sup>156</sup>

An impact assessment of the Sentencing Council in England and Wales has estimated that the average annual cost is £1,793,000.<sup>157</sup> The annual running costs for the Scottish Sentencing Council are anticipated to be around £1.1 million.<sup>158</sup> It was highlighted in the Finance Committee’s report on the Financial Memorandum of the Bill that these costs included fees and expenses for council members; cover for judicial absence as membership includes judicial members; support office costs including staff salaries; research, publications and website costs. It was also anticipated that there would be one-off set up costs amounting to £450,000.<sup>159</sup> The Justice Committee in its Committee stage report noted the costs of establishing a sentencing council in Scotland and asked the Government “to consider further whether this cost is still a priority for the use of scarce Justice Department resources at a time of financial stringency.”<sup>160</sup> A written question for the Justice Minister sought to ascertain when the provisions to establish the Sentencing Council would commence. In response, the Justice Minister Kenny MacAskill responded that further consideration was being given

<sup>154</sup> [http://www.ussc.gov/Guidelines/2010\\_guidelines/Manual\\_PDF/Chapter\\_1.pdf](http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_1.pdf), 7.

<sup>155</sup> Department of Justice “Consultation on a Sentencing Guidelines Mechanism” (2010), 37.

<sup>156</sup> Department of Justice “Consultation on a Sentencing Guidelines Mechanism- Summary of responses”, March 2011, 10-11.

<sup>157</sup> An Impact Assessment of Sentencing Council for England and Wales , 1 January 2008. Available at <http://www.justice.gov.uk/publications/docs/coroners-justice-bill-ia-sentencing-council.pdf>

<sup>158</sup> The Scottish Parliament Finance Committee Report. Report on the Financial Memorandum of the Criminal Justice and Licensing (Scotland) Bill , para 10. See <http://www.scottish.parliament.uk/s3/committees/finance/reports-09/fir09-CriminalJusticeLicensing> Bill.htm <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor1126-02.htm#Col21574>

<sup>159</sup> As cited above

<sup>160</sup> Justice Committee Report, 18<sup>th</sup> Report 2009 (Session 3) Stage 1 Report of the Criminal Justice and Licensing (Scotland) Bill. See <http://www.scottish.parliament.uk/s3/committees/justice/reports-09/jur09-18-01.htm>

to options for the establishment of the Sentencing Council in light of the current fiscal climate, stating “it is not the intention to commence the provisions prior to May 2011.”<sup>161</sup>

In New Zealand, the proposed budget allocation for the Sentencing Council in 2008/09 was \$1.479m (approximately £713,000 GBP).<sup>162</sup> The Minnesota Sentencing Guidelines Commission has a budget allocation of \$1,213,000 (approximately £750,819 GBP) for two years.<sup>163</sup> The United States Sentencing Commission has a much larger annual budget at \$16,225,000 (approximately £10,043,246 GBP).<sup>164</sup>

## 4 Alternatives to Sentencing Guidelines Bodies

There are a number of countries that do not have sentencing guidelines bodies. In some of these there are codified penal codes or various pieces of criminal law which set out the purposes and principles of sentencing and sentencing, minimum and maximum sanctions for various offences.<sup>165</sup> The following sections consider models in Germany, France, the Netherlands, the Republic of Ireland and Canada.

### 4.1 Germany, France and the Netherlands

In Germany, criminal law is set out in federal and penal codes. The Penal Code sets out provisions with a broad range of sentences for particular offences. The Penal Code mostly contains maximum penalties however there are a number of provisions of the Code that provide for minimum penalties. Section 38 of the Code provides for a minimum fixed term imprisonment of one month and section 47 of the Code states that a term of imprisonment of less than six months shall only be imposed in extraordinary circumstances.<sup>166</sup> In France, the Penal Code divides criminal offences into three categories according to their seriousness: felonies, misdemeanours and petty offences.<sup>167</sup> The penalty for a felony offence is a minimum period of five years imprisonment with a maximum life term.<sup>168</sup> Misdemeanours are punishable by a term of imprisonment ranging between two months and ten years or a fine not exceeding 1000

<sup>161</sup> The Scottish Parliament, Parliamentary Questions and Answers, S3W-38997. In recent correspondence via email, 02.06.11 with a colleague from the Scottish Parliament Information Centre ( sPICE) it was highlighted in a previous Parliamentary Question (PQ3360) that the Criminal Justice and Licensing (Scotland) Act 2010 was a large piece of criminal legislation and may take some time to implement. The Officials are now currently working on the advice received in relation to the establishment on the Sentencing Council and will formulate a proposal to go the Cabinet although this is not likely to be until early 2012.

<sup>162</sup> See <http://www.beehive.govt.nz/release/budget-2009-simon-power-victims-crime-benefit-50-offender-levy>

<sup>163</sup> Minnesota Sentencing Guidelines Commission Agency Profile available at <http://www.msgc.state.mn.us/index.htm>

<sup>164</sup> [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2009/chap1\\_09.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/chap1_09.pdf)

<sup>165</sup> D Machin (2005)“Sentencing Guidelines Around the World” paper commissioned by the Sentencing Commission for Scotland

<sup>166</sup> C Nestler “Sentencing in Germany” Buffalo Criminal Law Review [2004] Vol 7 109: 112, <http://wings.buffalo.edu/law/bcl/bclrarticles/7/1/nestler.pdf>, last accessed 07.06.11; D Machin (2005) Sentencing Guidelines Around the World, 42.

<sup>167</sup> The Penal Code, Article 111-2 [http://195.83.177.9/upl/pdf/code\\_33.pdf](http://195.83.177.9/upl/pdf/code_33.pdf)

<sup>168</sup> The Penal Code, Article 131-1

euros.<sup>169</sup> In the case of petty offences, the penalties available are fines ranging from 38 euros to 3000 euros in the case of persistent offenders.<sup>170</sup>

In the Netherlands, the Penal Code enables judges to exercise discretion in sentencing as there are few limits contained within the Code on the type or severity of sanctions.<sup>171</sup> The Code sets out a statutory minimum sentence of imprisonment of one day which applies to all crimes irrespective of seriousness. The statutory maximum prison term is 15 years which can be extended to 20 years in murder cases. Life sentences can be imposed for murder and in some manslaughter cases, although this is rare and can be replaced with a sentence of up to 20 years.<sup>172</sup> It has been noted that there is wide inconsistency in sentencing practice however disparity has been reduced as Prosecutors in the Netherlands are required to propose a sentence in each case which is informed by sentencing directives issued by the Prosecution Service.<sup>173</sup>

The following sections will focus on two common law systems, the Republic of Ireland and Canada.

## 4.2 Republic of Ireland

The Republic of Ireland does not currently have sentencing guidelines or a sentencing guidelines body. The Irish Constitution provides for the independence of the judiciary and, therefore, there is significant judicial discretion in Irish Criminal Law with regards to sentencing matters.<sup>174</sup> However there are some exceptions to judicial discretion sentencing such as a conviction for murder where the penalty is a mandatory life sentence.<sup>175</sup> Furthermore there are some offences under Irish Criminal Law which have minimum sentences which must be handed down unless there are extenuating circumstances, for example in certain drug offences as set out in the Criminal Justice Act 1999.<sup>176</sup>

The discussion paper highlights a pilot project developed by the judiciary, in particular a computerised system which provides information to judges on sentencing practices and other penalties imposed in criminal proceedings. This project known as the Irish Sentencing Information System (ISIS) has been piloted in Dublin, Cork, Limerick Circuit Criminal Courts, Dublin District Court and the Court of Criminal Appeal. The project is overseen by a steering committee made up of judges and an expert in sentencing law.

<sup>169</sup> The Penal Code, Art 131-4 and 131-5

<sup>170</sup> The Penal Code, Art 131-13.

<sup>171</sup> M Hough and J Jacobson (2008) "Creating a Sentencing Commission for England and Wales: an opportunity to address the prisons crisis" Published by the Prison Reform Trust, 14; See also SS Terblanche "Sentencing Guidelines for South Africa: Lessons from Elsewhere" SALJ (2003), 875

<sup>172</sup> D Machin (2005) "Sentencing Guidelines Around the World" paper commissioned by the Sentencing Commission for Scotland, 36

<sup>173</sup> M Hough and J Jacobson (2008) "Creating a Sentencing Commission for England and Wales: an opportunity to address the prisons crisis" Published by the Prison Reform Trust, 14.

<sup>174</sup> Department of Justice, Equality and Law Reform "White Paper on Crime: Discussion Document No 2" (February 2010), 28.

<sup>175</sup> As cited above

<sup>176</sup> As cited above

Members are appointed by the Courts Service Board.<sup>177</sup> In Dublin Circuit Criminal Court, two practising barristers have been retained as researchers to collect information on sentencing outcomes in cases, according to criteria approved by the steering committee.<sup>178</sup> Sentencing information contained in the database includes offences that judges deal with on a daily basis including: robbery, burglary, motor offences and drug offences. Sentencing information has been included in less common offences such as possession of child pornography, threats to kill, possession of firearms, theft and fraud offences amongst others.<sup>179</sup> Researchers for the pilot suggest that there can be complications in presenting sentencing information in certain cases, for example when dealing with cases where the accused is sentenced in several offences or where different accused are sentenced on the same offence. In order to deal with this, separate matters are dealt with separately on the database.<sup>180</sup>

Literature suggests that sentencing information systems are of value and can be a “boon even to the most successful guideline systems”.<sup>181</sup> It is also suggested that they ensure judicial discretion, individualisation, transparency and principle decision making.<sup>182</sup> However in responses to the Department of Justice and Equality’s discussion paper on criminal sanctions, some consultees were concerned, that while the Irish Sentencing Information System was useful, there were limitations, for example the re-enforcement of questionable sentencing practices if used on a long term basis. The future of this pilot project is uncertain as it has been proposed that the project will be assessed and it has been suggested that the development of the website has resource implications which will have to be considered in the current financial context.<sup>183</sup>

However the issue of sentencing guidelines has been the subject of recent policy discussions. The Department of Justice Equality and Law Reform in a recent discussion paper on criminal sanctions has noted that current arrangements can result in criticisms of inconsistency.<sup>184</sup> The discussion paper notes previous work undertaken by the Law Reform Commission which recommended the introduction of non statutory guidelines.<sup>185</sup> The Department consulted on whether sentencing guidelines would have value and it has been reported that submissions favoured the introduction of sentencing guidelines as a means of addressing perceived inconsistency in sentencing

<sup>177</sup> <http://www.irishsentencing.ie/>

<sup>178</sup> <http://www.irishsentencing.ie/>

<sup>179</sup> For full details see B Conroy B.L and P.G Gunning. B.L “The Irish Sentencing Information System ISIS: A Practical Guide to a Practical Tool”, 3-4. Available at <http://www.irishsentencing.ie/en/ISIS/Pages/WP09000222>

<sup>180</sup> B Conroy B.L and P.G Gunning. B.L “The Irish Sentencing Information System ISIS: A Practical Guide to a Practical Tool”, 4

<sup>181</sup> M.L. Millar “Sentencing Reform “Reform”: The Sentencing Information System Alternative to Sentencing Guidelines” published in in M Tonry (ed) *The Future of Imprisonment in the 21<sup>st</sup> Century*, Oxford University Press, 2004, 28.

<sup>182</sup> M.L. Millar “Sentencing Reform “Reform”: The Sentencing Information System Alternative to Sentencing Guidelines” published in in M Tonry (ed) *The Future of Imprisonment in the 21<sup>st</sup> Century*, Oxford University Press, 2004, 28

<sup>183</sup> <http://www.irishsentencing.ie>

<sup>184</sup> M.L. Millar “Sentencing Reform “Reform”: The Sentencing Information System Alternative to Sentencing Guidelines” published in in M Tonry (ed) *The Future of Imprisonment in the 21<sup>st</sup> Century*, Oxford University Press, 2004 30.

<sup>185</sup> Department of Justice, Equality and Law Reform “White Paper on Crime: Discussion Document No 2” (February 2010), 31.

practices.<sup>186</sup> However there were a number of suggestions for sentencing guidelines including a system of matrices like the sentencing guidelines model in the United States or a National Sentencing Body such as the model in England and Wales.<sup>187</sup> It was suggested in the consultation responses that a sentencing council would avoid this issue.<sup>188</sup> It remains to be seen whether a sentencing guidelines mechanism or body will be established in the Republic of Ireland as the Justice Minister Alan Shatter T.D announced that the White Paper on Crime would lead to the development of a comprehensive framework for future crime policy in the form a national anti-crime strategy.<sup>189</sup>

### 4.3 Canada

Canada does not have sentencing guidelines or a sentencing guidelines body; however the Canadian Criminal Code makes provision for principles and purposes of sentencing and establishes mandatory minimum sentences of imprisonment.<sup>190</sup> Judges do not have discretion to reduce sentencing in cases where the offence carries a mandatory minimum sentence.<sup>191</sup>

#### 4.3.1 Purposes and Principles of Sentencing

In 1995, an amendment to the Criminal Code regarding sentencing was enacted.<sup>192</sup> Section 718.1 of the Canadian Criminal Code states:

“The fundamental purposes of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just and peaceful society by imposing just sanctions which must have one or more of the following objectives:

- To denounce unlawful conduct;
- To deter the offender and other persons from committing offences;
- To separate offenders from society where necessary;
- To assist rehabilitating offenders;
- To provide reparations for harm done to victims or to the community; and

<sup>186</sup> Department of Justice, Equality and Law Reform “White Paper on Crime: Second Discussion Document, Overview of Submissions received August 2010.” Available at the following link: [http://www.justice.ie/en/JELR/Pages/WPOC\\_Doc2\\_sub\\_recd\\_pub#\\_Toc270596325](http://www.justice.ie/en/JELR/Pages/WPOC_Doc2_sub_recd_pub#_Toc270596325)

<sup>187</sup> As cited above

<sup>188</sup> As cited above

<sup>189</sup> The Department of Justice and Equality “Justice Minister announces White Paper on Crime to lead to a comprehensive national anti-crime strategy” 29 April 2011, <http://www.justice.ie/en/JELR/Pages/PR11000050> last accessed 13 June 2011.

<sup>190</sup> Canadian Criminal Code, available at: <http://laws.justice.gc.ca/PDF/Statute/C/C-46.pdf>

<sup>191</sup> Department of Justice Canada “Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models” (2005), 9.

<sup>192</sup> Department of Justice Canada “Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models” (2005), 9.

- To promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community.”

Section 718.1 also states that the sentence must be proportionate to the offence and reflect the degree of responsibility of the offender. Section 718.2 also states that when a court imposes a sentence it shall take aggravating or mitigating factors into account including offences motivated by prejudice or hate, evidence of spousal abuse or offence against a child, abuse of position of authority, that the offence was committed for the benefit, at the direction of, or in association with a criminal organisation or if the offence was a terrorism offence. Section 718.2 also provides for consistency in sentencing in that a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances.

#### 4.3.2 Mandatory Minimum Sentences

There are a number of mandatory minimum sentences set out in the Canadian Criminal Code. There are four types of mandatory minimum sentences in Canada which can be broken down into four categories:<sup>193</sup>

- Mandatory Life sentences for high treason, first degree and second degree murder;
- Mandatory Minimum sentences in offences involving firearms, trafficking and possession of weapons and living off the proceeds of child prostitution;
- Repeat Offenders;
- Hybrid offences which can proceed by way of summary or indictment. For summary offences, penalties are lower than on indictment therefore there are no mandatory minimum sentences.

The mandatory minimum penalties for these offences are set out in more detail in Annex C of this paper.

It has been suggested that although Canada has no ‘formal’ system of sentencing guidelines, the Youth Criminal Justice Act (2002) takes a step in introducing sentencing guidelines into law.<sup>194</sup> Section 38(1) of this legislation sets out the purposes of principles of sentencing

“The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her

<sup>193</sup> Department of Justice Canada “Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models” (2005), 10, 37.

<sup>194</sup> D Machin (2005) “Sentencing Guidelines Around the World” paper commissioned by the Sentencing Commission for Scotland, 33.

rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.”<sup>195</sup>

Section 38 (2) establishes a number of sentencing principles including that the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances.<sup>196</sup> Section 42 sets out a range of sentences that can be imposed on juveniles. For example in a case involving first degree murder the maximum sentence that can be imposed is ten years with a maximum of six years in custody and placement in the community under condition supervision.<sup>197</sup>

The relevance of the Canadian approach, however, to Northern Ireland may be limited as Canada, unlike Northern Ireland, has a codified system of criminal law.

## 5 Conclusion

The need to promote consistency and public confidence in the criminal justice system has led to the development of sentencing guidelines mechanisms in the United Kingdom, Australia, Canada and the United States. Mechanisms have also been considered but not implemented in New Zealand and South Africa. A number of issues have arisen in the examination of these models:

- There are broadly similar objectives that bodies in England and Wales, Scotland and as proposed in Northern Ireland have to pursue when considering sentencing guidelines, including promoting consistency and improving public confidence.
- The primary function of the sentencing bodies is to produce or advise on sentencing guidelines. Some bodies have other functions including matters relating to parole (New Zealand) and functions relating to development of legislation in relation to sentencing and crime policy (United States) or assessing impact of government's policy or legislative proposals on resources (England and Wales).
- This research has identified two main types of guidelines: narrative guidelines such as the system in England and Wales and numerical guidelines as utilized in the United States models. The Sentencing Commission Working Group in England and Wales concluded that the numerical model adopted in Minnesota was far too restrictive of judicial discretion. The research also identified that guidelines in

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<sup>195</sup> Section 38(1) of the Youth Criminal Justice Act 2002, (S.C 2002, ch1), available at <http://laws-lois.justice.gc.ca/eng/acts/Y-1.5/page-22.html#h-27>

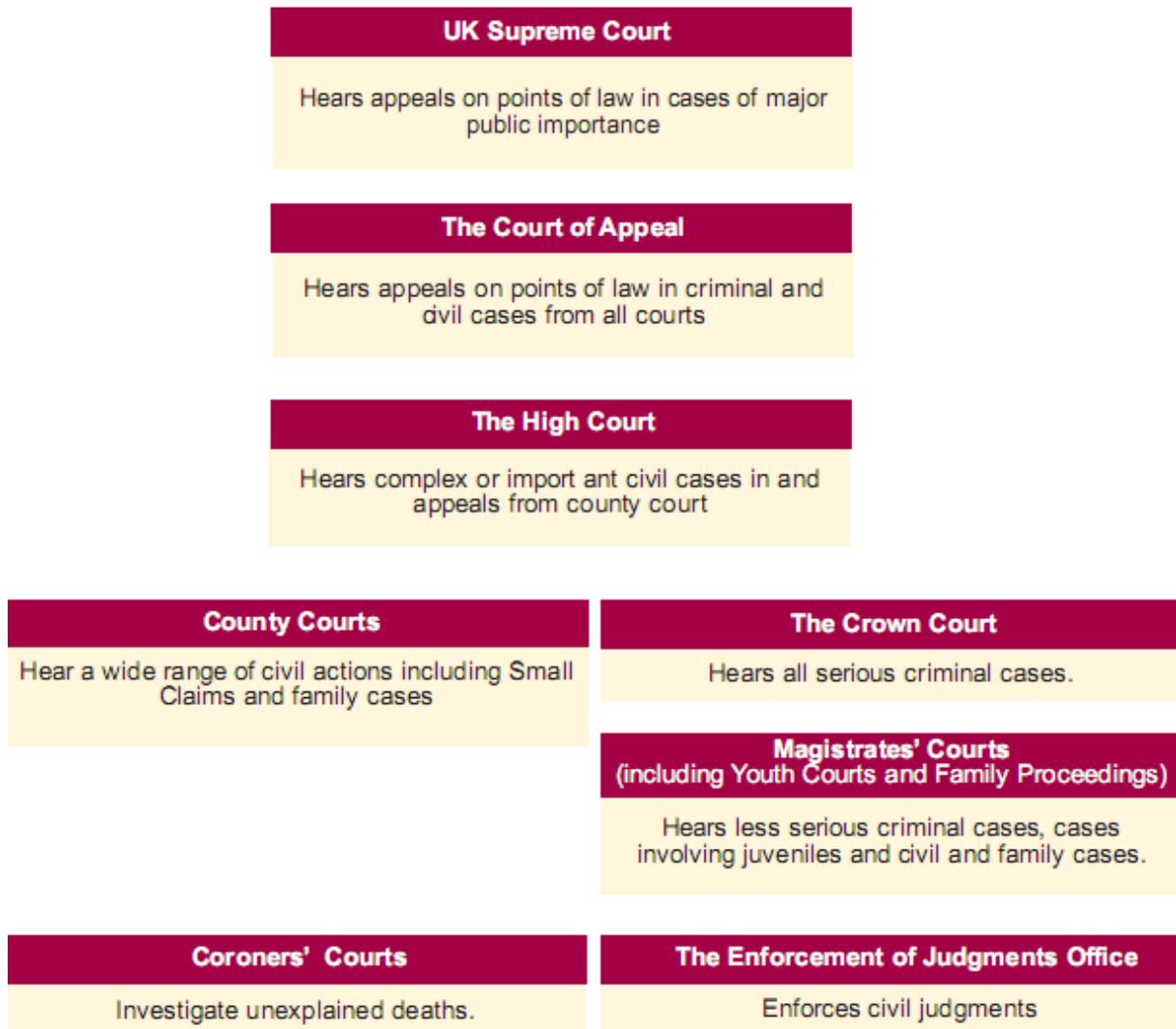
<sup>196</sup> Section 38(2) of the Youth Criminal Justice Act 2002, (S.C 2002, ch1), available at <http://laws-lois.justice.gc.ca/eng/acts/Y-1.5/page-22.html#h-27>

<sup>197</sup> Section 42 of the Youth Criminal Justice Act 2002, (S.C 2002, ch1), available at <http://laws-lois.justice.gc.ca/eng/acts/Y-1.5/page-22.html#h-27>

England and Wales have been adopted incrementally, whereas in New Zealand it was proposed that there would be a set of comprehensive inaugural guidelines.

- Membership ranges from 8-14 members across the models. Some models have a greater percentage of judicial membership such as England and Wales, or a balance of non judicial membership such as the Scottish model. Other models provide for no judicial membership such as some of the models in Australia.
- Non judicial members tend to include representatives with experience of the criminal justice system, legal professionals and victims groups. Some models include members with experience of working with particular groups such as indigenous or ethnic minority groups such as New Zealand and Australia.
- In some models the members can sit for one term only, but in others terms are renewable for another term such as New Zealand and South Africa.
- Most of the sentencing bodies considered have a secretariat to support their work. The support functions include: legal expertise, research and analysis, community engagement and public education and administration.
- This paper has identified that sentencing guidelines bodies have relationships with other institutions including legislatures and courts. In some models, bodies simply propose guidelines and it is for the legislatures or courts to approve or veto the guidelines. In other cases it is for the guidelines bodies to approve the guidelines after consultation with the legislatures or the courts.
- In some of the models, courts must have regard to sentencing guidelines and state reasons for departure in court. Other models have what appear to be stronger duties, for example in England and Wales, the courts must follow sentencing guidelines unless satisfied it is contrary to the interests of justice to do so. In Minnesota and as proposed in South Africa there must be substantial and compelling circumstances for departure. In the US federal guidelines, system judges can depart from guidelines if there are certain aggravating or mitigating factors not taken into account by the body in developing the guideline which would result in a different sentence or if the sentencing guideline linguistically applies by the conduct differs from the norm.
- Some jurisdictions do not have formal guidelines or guidelines bodies. In the Republic of Ireland judges largely have judicial discretion in sentencing matters, except in some cases where there are mandatory and minimum penalties. The Judiciary has also set up a pilot project which is an information exchange for judges on sentencing practice. Canada also does not have sentencing guidelines or a guidelines body but the Criminal Code establishes mandatory minimum sentences in a range of offences. Other European jurisdictions such as Germany, France and the Netherlands also provide sentencing ranges in penal codes, although judicial discretion in the Netherlands is very wide.

## Annex A- Northern Ireland Court Service Structure<sup>198</sup>



<sup>198</sup> Information obtained from Northern Ireland Court Service website <http://www.courtsni.gov.uk/en-GB/AboutUs/OrganisationalStructure/>

## Annex B- Example of Sentencing Guidelines Grid- Minnesota, United States<sup>199</sup>

SEVERITY LEVEL OF CONVICTION OFFENSE (Common offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree</i> (intentional murder; drive-by-shootings)	XI	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 <sup>2</sup>	426 363-480 <sup>2</sup>
<i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree</i> (unintentional murder)	X	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Assault, 1st Degree</i> <i>Controlled Substance Crime, 1<sup>st</sup> Degree</i>	IX	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
<i>Aggravated Robbery, 1st Degree</i> <i>Controlled Substance Crime, 2<sup>nd</sup> Degree</i>	VIII	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI</i>	VII	36	42	48	54 46-64	60 51-72	66 57-79	72 62-84 <sup>2</sup>
<i>Controlled Substance Crime, 3<sup>rd</sup> Degree</i>	VI	21	27	33	39 34-46	45 39-54	51 44-61	57 49-68
<i>Residential Burglary</i> <i>Simple Robbery</i>	V	18	23	28	33 29-39	38 33-45	43 37-51	48 41-57
<i>Nonresidential Burglary</i>	IV	12 <sup>1</sup>	15	18	21	24 21-28	27 23-32	30 26-36
<i>Theft Crimes (Over \$5,000)</i>	III	12 <sup>1</sup>	13	15	17	19 17-22	21 18-25	23 20-27
<i>Theft Crimes (\$5,000 or less)</i> <i>Check Forgery (\$251-\$2,500)</i>	II	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19	21 18-25
<i>Sale of Simulated Controlled Substance</i>	I	12 <sup>1</sup>	12 <sup>1</sup>	12 <sup>1</sup>	13	15	17	19 17-22

Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the guidelines by law. See Guidelines Section II.E., Mandatory Sentences, for policy regarding those sentences controlled by law.

Presumptive stayed sentence; at the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in this section of the grid always carry a presumptive commitment to state prison. See, Guidelines Sections II.C. Presumptive Sentence and II.E. Mandatory Sentences.

<sup>199</sup> Sentencing Grid obtained from Minnesota Sentencing Guidelines and Commentary, revised 2010, available at <http://www.msgc.state.mn.us/guidelines/guide10.pdf>

## Annex C-Mandatory Minimum Sentences Canada<sup>200</sup>

### Canada

#### 1. Mandatory Life Sentences

Section	Offence	MMS	Enacted
s. 47(1)	High Treason	Life (25)	1976
s. 231(1) – (6.1)	1 <sup>st</sup> degree murder	Life (25)	1976
s. 231(7)	2 <sup>nd</sup> degree murder	Life (10-25)	1976

#### 2. Mandatory Minimum Sentences

Section	Offence	MMS	Enacted
s. 236(a)	Manslaughter with firearm	4 yrs	1995
s. 239(a)	Attempted murder with firearm	4 yrs	1995
s. 244	Causing bodily with intent with firearm	4 yrs	1995
s. 272(2)(a)	Sexual assault with firearm	4 yrs	1995
s. 273(2)(a)	Aggravated sexual assault with firearm	4 yrs	1995
s. 279(1.1)(a)	Kidnapping with firearm	4 yrs	1995
s. 279.1 (1)(a)	Hostage taking with firearm	4 yrs	1995
s. 344(a)	Robbery with firearm	4 yrs	1995
s. 346(1.1)(a)	Extortion with firearm	4 yrs	1995
s. 220 (a)	Criminal negligence causing death with firearm	4 yrs	1995
s. 85(1)	Using a firearm during the commission of an offence	1 yr	1976
s. 85(2)	Using imitation firearm during commission of offence	1 yr	1995
s. 99	Weapons trafficking	1 yr	1995
s. 100	Possession for purpose of weapons trafficking	1 yr	1995
s. 103	Import/export firearm knowing it is unauthorized	1 yr	1995
s. 212 (2.1)	Living off the avails of child prostitution	5 yrs	1996

<sup>200</sup> Department of Justice Canada “Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models” (2005), 37-38.

### 3. Repeat Offenders

Section	Offence	MMS	Enacted
s. 92(1)	Possession of firearm knowing it is unauthorized	2 <sup>nd</sup> conviction – 1 yr, 3 <sup>rd</sup> & sub – 2 yrs less a day	1995
s. 92(2)	Possession of weapon/device /ammunition know its possession is unauthorized	2 <sup>nd</sup> conviction – 1 yr, 3 <sup>rd</sup> & sub – 2 yrs less a day	1995
s. 202(b)	Betting, pool-selling, book-making, etc.	2 <sup>nd</sup> conviction – 14 days 3 <sup>rd</sup> & sub – 90 days	1976
s. 203(e)	Placing bets on behalf of others	2 <sup>nd</sup> conviction – 14 days 3 <sup>rd</sup> & sub – 90 days	1976
s. 253(a)	Operating while impaired	2 <sup>nd</sup> conviction – 14 days 3 <sup>rd</sup> & sub – 90 days	1954
s. 253(b)	Blood alcohol over .08	2 <sup>nd</sup> conviction – 14 days 3 <sup>rd</sup> & sub – 90 days	1976
s. 254	Fail/refuse to provide breath sample	2 <sup>nd</sup> conviction – 14 days 3 <sup>rd</sup> & sub – 90 days	1976

4. Hybrid offences - A hybrid offence is an offence where the Crown has the option to proceed summarily or by way of indictment. Crown election in each case will be the deciding factor as to whether the offender will receive a minimum sentence. If the Crown proceeds summarily, there is no mandatory minimum in place. However, if the Crown elects to proceed by way of indictment, the offender, if convicted, will face a minimum sentence.

Section	Offence	MMS	Enacted
s. 95	Possession of prohibited or restricted firearm with ammunition	Indictment – 1 yr Summary – no MMS	1995
s. 96(2)(a)	Possession of weapon obtained by commission of an offence	Indictment – 1 yr Summary – no MMS	1995
s. 102(a)	Making automatic firearm	Indictment – 1 yr Summary – no MMS	1995