Position Paper:

Sentencing

This paper sets out, in broad terms, the Commission's approach when dealing with this area of law. If you intend to apply to the Commission because you believe that your sentence has resulted in a miscarriage of justice, you may wish to consider the guidance appended to this paper, as well as the Commission's general guidance on submissions.

Contents

Introduction

1. As the single statutory ground, any appeal arising from Scots criminal procedure must ultimately assert that a "miscarriage of justice" has occurred. This is true regardless of the aspect of the original decision that an appellant seeks to review, whether conviction or sentence. From its establishment onwards, the Commission has had the power[1] to review any supposed miscarriage of justice, including those pertaining to sentence[2]. Whilst it is true that most court decisions arising from Commission referrals relate to matters of conviction, sentence reviews nonetheless form a noticeable part of the Commission's workload. In the past 5 years, the number of applications focusing exclusively on sentence questions has been remarkably consistent, ranging from 16 to 19%. This figure excludes cases in which the applicant requests that the Commission review both conviction and sentence, which are common. If anything, the figure underplays the significance of sentence reviews in the Commission's workload. From 1999, approximately 40% of Commission referrals have raised sentence grounds.

2. It would be unrealistic to attempt to provide a comprehensive guide to the Commission's approach to sentence reviews. It would not be feasible within the confines of the present format to provide anything approaching a reasonable summary of the sentencing principles applied to common law crimes. It would be even less so to analyse the thousands of statutory offences in such a manner. In

[1] S194B(1)
[2] With the sole exception of sentences of death, which are not a feature of modern Scots criminal procedure.

1992, CGB Nicholson QC produced a volume[3] that remains the most comprehensive analysis of the "general part" of Scots sentencing law, although it is now very dated in some respects. Morrison's *Sentencing Practice*[4] is a useful digest of sentencing decisions divided and subdivided by category of offence and particular offence. The latter book in particular may be of assistance in determining the range of sentences applicable to a given offence [5]. It too, however, is dated in places. Nicholson and Morrison are valuable reference sources, as is Renton and Brown's *Criminal Procedure*. Nonetheless, although it may be the case that Scots sentencing practice has moved towards a greater degree of systematisation in recent years, it remains the case that, as Nicholson had it a quarter of a century ago, the Scottish approach tends to be more "pragmatic and individualised" than most comparable jurisdictions. Sentencing decisions invariably engage questions of sentencing objectives and social policy, which may vary temporally and geographically. They must be tailored to the offender, both from the perspective of selecting an appropriate punishment for his individual circumstances and from that of managing future risk. Each case turns on its own facts to the extent that it is rarely possible to find an authority that may confidently be described as *directly* analogous to the matter at hand. Accordingly, with limited exceptions, the focus in the present position paper is on those matters of general principle that have tended to recur in the Commission's recent workload.

3. Notwithstanding the above, the Commission notes and welcomes the establishment of the Scottish Sentencing Council[6]. The Council is charged, among other things, with the publication of information about sentences imposed by the courts. It is presently at a relatively early stage in its institutional development[7]. It has, however, begun to make available certain resources to legal practitioners and interested members of the public and has had its first guideline approved by the court[8]. The Commission is hopeful that the Council will, in the coming years, solve some of the problems outlined in the foregoing paragraph.

[3] *Sentencing: Law and Practice in Scotland,* W Green, Edinburgh
[4] W Green, Edinburgh, 2000
[5] On which, see below at paragraph 12
[6] On the statutory framework for the provision of sentencing guidelines, see below at paragraphs 17 *et seq*
[7] See the relevant section, below
[8] See below at paragraph 18

The Commission's Position

General Sentencing Principles

Competence

4. As a matter of broad principle, decisions of any court in Scotland must be within the powers granted to it by law, or, in other words, its competence. A sentence imposed incompetently will, for that reason alone, constitute a miscarriage of justice. Competence is circumscribed by a variety of factors, including: the sentencing power of the court; statutory sentencing maxima (and minima) and certain considerations applicable to the offender being sentenced.

Sentencing Powers in Solemn and Summary Procedure[9]

5. In solemn procedure, the sentencing power of the High Court is generally unlimited, subject to any statutory maximum applicable to the offence charged. Again subject to individual statutory maxima, a sheriff sitting with a jury may impose sentences of up to 5 years' imprisonment[10].

6. At summary level, the sheriff and JP courts may generally impose sentences of up to 12 months' imprisonment[11] and 60 days' imprisonment[12], respectively. Prior to the abolition of that office in 2016[13], when a stipendiary magistrate presided at the JP court, he had the sentencing power of a sheriff[14].

Statutory Maxima

7. Most statutory offences (indeed all modern statutory offences) prescribe maximum sentences. This may vary depending on the mode of prosecution. If lower than the court's general sentencing powers, statutory maxima take precedence. However, the

[9] Although it is competent for the Commission to review any sentence, the vast majority of sentence reviews deal with sentences of imprisonment. The focus in this paper is thus on those sentences.
[10] Criminal Procedure (Scotland) Act 1995 ("1995 Act") s3(3). In the former case, the sentencing powers of the court are unaffected if the case calls before a summary sheriff.
[11] 1995 Act s5(2)
[12] 1995 Act s7(6). It is worth noting in this regard that there is a statutory presumption against the imposition of sentences of imprisonment shorter than 12 months (1995 Act s204(3A)). Sentences shorter than 15 days are incompetent (1995 Act s206).
[13] Courts Reform (Scotland) Act 2014
[14] 1995 Act s7(5). It would appear that, notwithstanding the abolition of the office of stipendiary magistrate, the provision remains in force.

sheriff's powers in relation to older statutory offences may be extended by virtue of ss 3(4) and 3(4A) of the 1995 Act[15].

Bail Aggravations

8. As the court in *Penman v Bott*[16] explained, where an offence is aggravated by breach of an earlier bail order, the general sentencing powers and statutory maxima, through the operation of section 27 of the 1995 Act, increased by 6 months in the High Court or sheriff court or 60 days in the JP court.

Considerations Specific to the Offender

9. If the court is considering an order for lifelong restriction, the court is obliged to order a risk assessment report before proceeding to pass sentence[17].

10. In the case of young people aged between 16 and 21 or older first time offenders[18], a court passing a sentence of detention or imprisonment is obliged to satisfy itself that no other means of dealing with the person is appropriate. In either case, it must state the reasons for reaching this conclusion in open court. A failure to state the reason will render the sentence incompetent[19].

Sentencing Powers, Reasoning and Remit to the High Court

11. In *McGhee v HMA*[20], the court considered a situation in which the sheriff in a solemn case, having decided that the crime merited a sentence of 6 years' imprisonment with a discount of 1 year in recognition of the guilty plea[21], imposed a sentence of 5 years' imprisonment. In that situation, the court concluded that there was no requirement to remit[22] the matter to the High Court for sentence. The terms of the provision permitting the sheriff to remit required him to do so only if he considered that "any competent sentence which he [could] impose [was]

[15] In relation to offences enacted before 1 January 1988 and between 1 January 1998 and the commencement of the Crime & Punishment (Scotland) Act 1997
[16] 2006 SCCR 277
[17] See below at paragraphs 58-64
[18] 1995 Act ss204(2) &207(3)
[19] *Binnie v Farrell* 1972 JC 49; *Finnegan v HMA* 2016 SCL 1003
[20] 2006 SCCR 712
[21] On sentence discounting, see below at paragraphs 30-39
[22] S 195 of the 1995 Act requires the a sheriff when sentencing an offender under solemn procedure to transfer the matter to the High Court ("remit") where it appears to him that his sentencing powers are inadequate or that the risk criteria may be met (on which, see below).

inadequate". A sentence of 5 years was competent in the sheriff court, and 6 years would have been competent if the matter had been remitted. In the circumstances, the court considered that a remit would have served no purpose. Contrastingly, however, in the later Commission referral of *Jordan v HMA*[23], the court considered a situation in which the sentencing judge had provided a sentence "discount" from a starting point that no court could competently impose. In that instance, the court considered that the process of reasoning was inadequate, and quashed the sentence as incompetent.

Comparison with Existing Sentencing Practice

12. A sentence that is competent may nonetheless constitute a miscarriage of justice for a number of other reasons. Of these, by far the most common, in terms both of applications to the Commission and general appeal work, is a disparity between the sentence imposed upon the offender and sentencing practice in general in relation to the offence(s) under consideration.

13. Sentencing necessarily involves an element of judicial discretion. The High Court is not quick to interfere with the sentencing decisions of courts of first instance. In modern practice, it will normally do so only if it concludes that the sentence was excessive[24]. It is thus the case that, unless a particular sentence is specified by law, there will be a range of permissible sentences, from lenient to comparatively harsh. An appeal will succeed only if it can be demonstrated that the sentence "fall[s] outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate."[25]

14. Establishing the range of sentences applicable to any particular offence is a process usually undertaken with reference to the most closely analogous cases available and, where applicable, sentence guidelines or guideline judgments[26]. Well prepared sentence applications to the Commission often make reference to cases that the applicant considers analogous with his own. If the application does cite particular

[23] 2008 SCCR 618

[24] *Addison v MacKInnon* 1983 SCCR 52. The court may also increase a sentence if the sentence is unduly lenient. This is rare in practice. The court may take this step following an appeal against sentence by the Crown or the defence.

[25] *HMA v Bell* 1995 SCCR 244. The court in *Bell* made these remarks within the context of a Crown appeal against sentence. The principle is equally applicable whether the appeal is by the accused against an excessive sentence or the Crown against an unduly lenient one.

[26] Considered in the next section

cases, the Commission will usually consider these when attempting to determine the applicable sentencing range.

15. In the Commission referral of *Paul Collins v HMA*[27], the court, allowing the appeal, observed that:

> *"…of course every case has to be assessed on its own facts; the reported decisions are not in themselves to be taken as setting immutable benchmarks, since judges faced with sentencing decisions are aware of general practice which may not be truly reflected in a selection of reported decisions."*

16. The Commission has, in terms of its founding legislation, a contingent of practising legal members[28]. These members themselves have knowledge and experience of sentencing practice. The Commission's own standing orders require that at least one such member be present in order to constitute a quorum for case-related matters. It is thus the case that any Commission decision touching upon a matter of sentencing practice will benefit from the input of at least one legally qualified member, and more likely three or four.

Sentencing Guidance

Guideline Judgments

17. Under ss118(7) and 189(7) of the 1995 Act, the High Court and Sheriff Appeal Court, respectively, may "pronounce an opinion on…the sentence or other disposal which is appropriate in any similar case." Such cases are generally referred to as "guideline judgments"[29]. S197 of the 1995 Act obliges sentencers to have regard to any applicable guideline judgment. The High Court has used this power infrequently[30].

The Scottish Sentencing Council

[27] Unreported, 22 January 2013
[28] 1995 Act s194A(5)
[29] A complete list of guideline judgments is available on the Scottish Sentencing Council Website at: https://www.scottishsentencingcouncil.org.uk/about-sentencing/guideline-judgments/
[30] See, for example, *HMA v Graham* 2011 JC 1 (child pornography) and *HMA v Boyle* 2010 SCL 198 (murder)

18. The first chapter of part 1 of the Criminal Justice and Licensing (Scotland) Act 2010[31] establishes a body corporate known as the "Scottish Sentencing Council"[32]. The Council is bound to promote consistency in sentencing, assist in the development of sentencing policy and promote awareness and understanding of sentencing policy and practice[33]. It is obliged to prepare sentencing guidelines. It may do so on its own initiative[34] or on the instruction of the court[35]. The High Court must approve any guidelines before they come into force[36]. Any court considering a matter of sentence, whether at first instance or on appeal, must have regard to any applicable sentencing guidelines[37]. If the court decides not to follow them, it must state its reasons for doing so.[38]

19. Although its legislation was enacted some time ago, the Council itself was appointed in the latter half of 2015. The first Guideline, *Principles and Purposes of Sentencing*, received the approval of the High Court on 26 November 2018[39]. A second, *The Sentencing Process*¸ is presently under public consultation. The Council has promised a third "general" guideline, on the topic of sentencing young people as well as upcoming offence-specific guidelines, beginning with a consideration of causing death by dangerous driving.

Use of Guidelines - General

20. In *HMA v Graham*[40], the Lord Justice Clerk (Gill) made the following comments:

> *"…Guidelines provide a structure for, but do not remove, judicial discretion. They are a framework within which the court can categorise the offence in question; reflect the facts of the case, including the aggravating and mitigating factors, and place it appropriately within the relevant range or, if the circumstances should require, outside it…*

[31] Hereinafter "(the) 2010 Act"
[32] 2010 Act s1
[33] 2010 Act s2
[34] 2010 Act s3
[35] 2010 Act s8(1)
[36] 2010 Act s5(1)
[37] 2010 Act s6(1)
[38] 2010 Act s 6(2)
[39] https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf

For an example of this guideline in action, see *HMA v CJB* [2019] HCJAC 45
[40] 2010 SCCR 641

This approach should not be applied too rigidly. Guidelines should not lead to a mechanistic approach. They do not purport to identify the correct sentence. The responsibility for fixing the sentence in every case rests on the sentencer alone… Sentencing therefore should always involve the sentencer's judgment and discretion, which he must in every case exercise by making due allowance for the particular circumstances of the case"

Scottish Guidelines

21. As a matter of general principle, appellate decisions of the High Court, insofar as the ratio of the decision is concerned, are binding unless reconsidered by a larger bench. By necessity, guideline judgments stray beyond what is needed to decide the case at hand and into territory that would traditionally be considered non-binding *obiter dictum*. Nonetheless, it would appear that s197 of the 1995 Act is intended to impart to guideline judgments a degree of authority beyond the merely persuasive. The requirement that a sentencer considers any relevant guideline judgment ensures that, at the very least, it frames the legal debate as to sentence. The provisions of the 2010 Act go one step further than this. Since the sentencing guidelines are approved by the court as a whole, it would appear likely that, *de facto* at least, courts of first instance will consider themselves bound to adhere on the whole to the frameworks established by the guidelines[41]. A decision to step outside the framework provided by a guideline is likely to be exceptional.

22. In determining whether or not it believes that a miscarriage of justice may have occurred, the Commission is bound to apply the correct legal tests[42]. When considering a sentence, it will usually be necessary for the Commission to have regard to any applicable guideline judgments and sentence guidelines.

English & Welsh Guidelines

[41] The court in *Collins v HMA* 2017 JC 99 described the Council as "advisory". That is true in the sense outlined by the court, which made the point that the process of making guidelines required its approval. However, the corollary of this is that a guideline that has been duly approved carries with it the authority of the whole court.
[42] See the "Commission's Statutory Test" position paper at paragraph 6

23. English & Welsh[43] sentencing guidelines are prepared in accordance with Part 4 of the Coroners and Justice Act 2009, which established the Sentencing Council for England and Wales. The English provisions are similar in general structure to the Scots, although the court in Scotland, unlike its English counterpart, has a power of veto over new sentencing guidelines[44]. It has been the case for many years that a wide variety of English guidelines have been available, whilst there has been little guidance published in relation to Scotland. Legal practitioners and the judiciary (as well, indeed, as the Commission) have, from time to time, had regard to English guidelines when considering questions of Scots sentencing law.

24. The comparative approach may, in some circumstances, have much to commend it. The court in *Graham* clearly considered the analogous English guidelines useful, in a situation in which the statutory offences were similar to those found in Scots law, going so far as to incorporate by reference aspects of English guidelines pertaining to child pornography offences[45]. Where UK statutes are concerned, learned opinion from England may be particularly persuasive. There are, however, limitations to this. English material may be positively misleading unless its use is accompanied by the realisation that the jurisdictions differ geographically and, to some extent, in sentencing policy and principle. In *S v HMA*[46], the court was unmoved by counsel for the appellant's recourse to case law and guidelines pertaining to the radically different English law of offences against the person. By way of contrast, the court has encouraged sentencers to "have regard" to the English guidelines on causing death by dangerous driving[47]. In spite of this, in the later case of *Neill v HMA*[48], the court echoed the warning of the Lord Justice Clerk in *Graham* about "mechanistic" implementation of that guideline[49]. In another such case, *Geddes v HMA*[50], the court advised sentencers considering the English guidelines in the following terms:

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[43] Hereinafter "English" should be taken as a reference to both nations.
[44] A discussion of the historical position may be found on the English Council's website at: https://www.sentencingcouncil.org.uk/about-us/history/
[45] See, more recently, *Wood v HMA* 2017 SCL 295. The English "Definitive Guidelines" had altered following *Graham.* Applying *Scottish Power Generation v HMA* 2016 SLT 1296, the court held that the version of the guidelines to be applied was that presently in force, not the version that had been in force when *Graham* was decided.
[46] 2015 SLT 531
[47] *HMA v Noche* [2011] HCJAC 108
[48] [2014] HCJAC 67
[49] Another line of authority (eg *Collins v HMA* 2017 SCL 202 at paragraph 21) suggests that English guidelines could be used as a "cross check to highlight any areas of disparity".
[50] 2015 SCCR 230

"…it may be equally important to have regard to existing [Scots] *precedent…. The sentencing judge may wish to consider how a sentence for this type of offence dovetails with modern sentencing developments in relation to Scottish criminal offences generally, including those for, for example, culpable homicide."*

25. The court in *Collins v HMA*[51] went one step further than this. In that case, it advised that the failure of the parties to cite Scots case law had forced it to do its own research. It underlined that the "first resort" in attempting to identify the appropriate penalty for an offence should be "Scots precedent".

Comparative Justice

26. Where there are multiple co-accused in any given charge, there may be good reasons for distinguishing between them when imposing sentence. They may, for example, have played different roles in the execution of a common criminal enterprise. There may also be personal circumstances applicable to a particular accused (such as an absence of any prior criminal history) but not the other(s). Any such material consideration ought, in principle, to be reflected in the sentences imposed. Even where it is the case that, when looking at one co-accused in isolation, the sentence imposed upon him falls within the range that the sentencer might reasonably have selected, there may, nonetheless, be a miscarriage of justice if it does not reflect material differences between the positions of the various co-accused. This principle is sometimes described as "comparative justice". A comparative justice point may arise as a result of the original sentencing process or following the introduction of an unfair disparity following a successful sentence appeal by one co-accused[52].

27. Renton and Brown's Criminal Procedure[53] observes in this regard that, where people are convicted together, they ought to be sentenced together, or at least by the same judge. It continues by noting that the court has allowed appeals on the basis of comparative justice alone, but has "also sometimes taken the view that they are concerned only with the appellant and will not reduce a sentence because a co-accused was dealt with too leniently." Nonetheless, it would appear to the Commission that, in recent years, the court has been more consistent in the

[51] 2017 JC 99
[52] *Pacitti v HMA* [2019] HCJAC 50
[53] At paragraph 22-23

application of the comparative justice principle[54]. In *Thomas v HMA*[55], the Lord Justice Clerk (Carloway), reaffirmed the principle in the following terms:

> *"The principle of comparative justice must apply as between co-accused convicted of the same offences, whether or not the same sheriff is involved. Thus, a previous sentence on a co-accused, in any case, must be a factor to be taken into consideration when sentencing another accused subsequently on the same charges."*

28. This appears to the Commission to be a sound statement of the current law[56].

29. Where an applicant asserts that there is a comparative injustice when the sentence of one or more co-accused is considered, the Commission may, by virtue of its statutory powers, be in a better position to investigate the matter than his solicitors. The Commission is able, for example, to obtain court papers pertaining to co-accused. This may warrant consideration when deciding whether or not to accept an application to stage 2.

Sentence Discounting

Pleas of Guilty

30. Historically, Scots law adopted a position of indifference or hostility towards the practice, adopted for many years elsewhere, of sentence discounting[57] in recognition of pleas of guilty. The matter appeared settled in 1987, in the case of *Strawhorn v McLeod*[58], in which the Lord Justice Clerk (Ross) described the practice as "an inducement to plead guilty", which undermined the presumption of innocence. However, the 1995 Act introduced a provision[59] ostensibly *permitting* a sentencing court to have account to:

[54] A relatively recent example may be found in the Commission referral of *Ben Young v HMA*, unreported, 16 April 2010
[55] [2014] HCJAC 66
[56] See also *Brown v HMA* 2016 SCL 554, another Commission referral.
[57] The Commission means by this the practice of reducing the sentence that the court would otherwise have imposed, usually by a stated percentage or fraction. Scotland has never adopted the practice, sometimes described in other jurisdictions as "sentence bargaining", in which the prosecution and defence agree a sentence between them. Unless fixed by law, the question of sentence is always a matter at large for the presiding judge.
[58] 1987 SCCR 413
[59] S196

"(a) the stage in proceedings for the offence at which the offender indicated his intention to plead guilty; and

(b) the circumstances in which that indication was given"

31. Application of this provision seems to have remained sporadic[60] until the High Court considered it in detail in *Du Plooy v HMA*[61], for many years the leading case on the question of sentence discounting. The court in *Du Plooy* held, *inter alia,* that the apparently permissive terms of s196 should be read up to *require* a sentencing court to take any guilty plea into account. When awarding a discount, the sentencer should state in open court the proportion by which it had reduced the offender's sentence.

32. *Du Plooy* has been superseded in many respects by *Gemmell v HMA*[62], which now serves as the best starting point for a discussion of the current law in relation to sentence discounting in respect of pleas of guilty. In considering whether or not the application of a sentence discount might have led to a miscarriage of justice, the Commission has derived the following principles from *Gemmell* and the associated case law:

    a. An offender who pleads guilty has no right to an "automatic" discount. The court should apply "careful consideration" before interfering with the discretion of a sentencer who has provided "cogent reasons for declining to apply a discount"[63]

    b. Nonetheless, the court's discretion is not "wholly unfettered"[64]. There may be circumstances in which it is necessary to afford a sentence discount. Where the court does allow a discount, it should do so in accordance with "broad general principles."

    c. The rationale for sentence discounting is distinct from mitigation in general. The practice recognises the value of an early plea in reducing costs and avoiding inconvenience, sometimes referred to as the "utilitarian

[60] Qv *Cleishman v Carnegie* 1999 G.W.D. 36-1764
[61] 2003 SLT 1237
[62] 2012 SCL 385
[63] *Gemmell* at paragraph 80, citing Lord Philip in *RB v HMA* 2004 SCCR 443
[64] *Gemmell* at paragraph 32

value" of the plea. The utilitarian value of a plea is objective, and thus unrelated to the personal circumstances of the offender.[65]

d. The level of discount ought not generally to exceed a third[66] of the headline sentence[67]. The court in *Gemmell* expressed some disquiet about the prospect of sentence discounts as high as a third, but did not go so far as to state that they were never appropriate.

e. Contrary to some of the earlier authority[68], the court in *Gemmell* held that a discount should be applied even to any part of a custodial sentence attributable to the need for the protection of the public[69] and to penalty points in road traffic cases[70]. However, a sentence discount should not be applied to an extension period imposed under ss210A-210AA of the 1995 Act[71], and is subject to any applicable statutory minima[72].

f. Where the selected level of discount would cause an arithmetical problem in road traffic cases by implying fractions of penalty points, the court should round to a whole number.[73]

33. In approaching a case in which the accused has tendered a plea of guilty, the sentencing court should adopt a three stage process. It should firstly determine the sentence that it would impose if it were not for the plea of guilty, sometimes described as the "starting point". Next, it should determine whether, in the circumstances of the case, a discount should be afforded for the plea of guilty. Finally, it should determine the level of the discount.

Assistance to the Authorities

34. At common law, it appears to have been permissible for sentencing judges to take into account confidential information about assistance provided by accused persons

[65] *Gemmell v HMA* at paragraphs 33 *et seq.* See also *HMA v Alexander* 2005 SCCR 537.
[66] In relation to life sentences, see below at paragraph 59
[67] *Du Plooy v HMA; Spence v HMA* 2007 SLT 1218
[68] See, for example, *Weir v HMA* 2006 SCCR 206
[69] *Gemmell* at paragraphs 60-65. See also *Wilson v Shanks* 2018 SCCR 302
[70] *Gemmell* at paragraph 71
[71] *Gemmell* at paragraphs 66 -67. In *O'Neil v HMA* 2016 SCCR 332, the court held that a discount ought not to be applied to a supervised release order.
[72] *Gemmell* at paragraph 68
[73] *Wilson v Shanks* at paragraph 20

to the authorities[74]. The common law has now been replaced by ss91-96 of the Police, Public Order and Criminal Justice (Scotland) Act 2006. That legislation provides for two distinct schemes under which such information may be taken into account in the sentencing process.

35. The first of these schemes arises where the offender has pled guilty and entered into a written agreement with the prosecutor, termed an "assistance agreement"[75]. In sentencing such an offender, the court is obliged to take into account the assistance that the offender has provided to the authorities[76]. In a manner similar to discounting for guilty pleas, the court is obliged generally to state in open court the sentence that it would have imposed but for that assistance[77]. If it does not allow a discount, it must state its reasons, again in open court[78]. However, neither of these "public disclosure" provisions apply if the court determines that it would not be in the public interest to make the information known[79]. The discount may, in a contrast to the position applicable to guilty pleas, be greater than statutory sentencing minima would otherwise provide[80].

36. The most notable departure from the common law position in the "assistance agreement" scheme is section 92, which allows the court to revisit a sentence if the offender fails to adhere to the terms of an assistance agreement, and also permits the prosecutor to enter such an agreement *after* such an offender has been sentenced[81]. In such a case, the court of first instance may alter the sentence even if it would, in terms of s124 of the 1995 Act, otherwise be final.

37. The other statutory scheme may be found in section 95 of the 2006 Act, and tacks much more closely to the pre-existing common law. The section provides that the court "may…if it considers it in the interests of justice to do so" take into account any written report provided to it by a "relevant officer" about any assistance

[74] See *O'Neill v HMA* 1999 JC 1. It should be noted that the court on that occasion found itself obliged to reverse the first instance decisions of the then Lord Justice Clerk (Cullen) and Lord McCluskey not to take such material into account, suggesting that, even in the late 1990s, the position was far from settled.
[75] Police, Public Order and Criminal Justice (Scotland) Act 2006 ("2006 Act") s91(1)
[76] There is a paucity of Scottish case law on the topic. The English Court of Appeal has interpreted "authorities" in a broad sense, to include, for example, the prosecutors of a friendly state such as Germany (*R v X* (1994) 15 Cr App R (S) 750)
[77] S91(3)
[78] S91(4)
[79] Ss91(5)-(6)
[80] S91(7)(a)
[81] S92(2)

provided to the authorities. A "relevant officer" is defined as including a police constable and any "officer of an organisation having functions which are conferred by or under an enactment or rule of law and which consist of or include the investigation of offences." In this instance, the court is required *not* to mention such a report when sentencing the offender[82]. Section 95 is infelicitously drafted in the sense that its wording is open to an objection similar to that raised by the court in *Du Plooy* about the original version of s196 of the 1995 Act. It is not clear when it would be in the interests of justice to *disregard* information provided by a relevant officer about assistance provided to the authorities. That is not to say, however, that such information will inevitably be sufficiently weighty to persuade the court that a sentence discount is in order. As far as the Commission understands the section, it appears to be intended as essentially a statutory restatement of the common law position.

38. Under s96, the High Court acting in its appellate capacity is generally prohibited from revealing the existence or content of a s95 report to anyone other than the prosecutor and offender and, with the agreement of the offender, his solicitor and counsel. That provision, however, does not prevent disclosure to the Commission[83]. If it finds such information disclosed to it, the Commission is placed under the same restrictions about onward disclosure as apply to the High Court. This legislation could potentially place the Commission in the position in which it cannot disclose information salient to the case to the applicant's own solicitors.

39. The Commission will not enquire into any assistance provided by applicants to the authorities unless relevant to the review. The Commission would not expect the court to forward a s95 report unless the Commission were considering the applicant's sentence as part of the review.

Backdating

40. Under s210 of the 1995 Act, the sentencing court is obliged to have regard to any period that the offender has spent on remand[84] and to specify the date of commencement of the sentence imposed. If the court does not select a date earlier

[82] S95(3)
[83] S96(6)
[84] Or detained under another form of pre-trial detention, such as an interim compulsion order.

than the date of sentencing, it must state its reasons for doing so. This applies to all sentences of imprisonment, including life sentences[85].

41. In normal practice, sentences are usually backdated to the date of committal[86]. A failure to do so accompanied by an absence of defensible reasoning in support is likely to amount to a miscarriage of justice. Nonetheless, in deciding whether or not to refer such a case to the court, the Commission would consider itself bound, in applying its interests of justice test, to evaluate the extent of any possible benefit to the applicant[87]. Where a failure to backdate has added a short period a relatively lengthy sentence, the Commission has concluded in the past that it would not be in the interests of justice to refer such a case to the court.

Cumulo, Consecutive and Concurrent Sentences

42. When the court sentences an offender in relation to more than one charge, those sentences may be imposed consecutively to one another or ordered to run concurrently. In *Nicholson v Lees*[88], a full bench set out some of the considerations involved in determining how to approach such a situation. The court in that case emphasised that the sentencing process involved an exercise of judicial discretion. The court disapproved the suggestion that offences that are committed in a single course of criminal conduct ought necessarily to be imposed concurrently. It noted, however, that the sentencing court "may consider it appropriate" to impose concurrent sentences where multiple charges arise from one incident or as part of a course of conduct. An alternative, where all of the charges "would stand or fall together" in the event of an appeal, a *cumulo* sentence may be in order. If the offences on an indictment are "truly distinct", however, the court may consider consecutive sentences to be appropriate. If the court does impose consecutive sentences, then, when considered in aggregate, those sentences must not exceed its maximum sentencing power. Where the court deals with multiple complaints that ought, as a matter of fairness, to be treated as one[89], the total aggregate sentence must not exceed the court's sentencing power in relation to a single complaint.

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[85] *Elliott v HMA* 1997SCCR 111
[86] Renton & Brown, *Criminal Procedure* at paragraph 22-24
[87] See the *Commission's Statutory Test* position paper at paragraph 21
[88] 1996 SCCR 551
[89] For technical reasons, charges that form the part of the same course of conduct are sometimes separated into more than one complaint. That is the situation that pertained in *Nicholson*.

43. A further sentencing option is a "*cumulo*" sentence, which is to say a single sentence imposed in respect of two or more charges. *Cumulo* sentences are not usually imposed where the offences in question are statutory. Renton and Brown note[90] that a *cumulo* sentence may nevertheless be appropriate for statutory offences where the alternatives would produce an injustice, although the sentencer should indicate the individual sentences that he would otherwise have been minded to impose.

Retrospectivity

44. One set of issues that occur much more frequently in the Commission's case load than in the wider body of criminal cases are those pertaining to retrospectivity and changes of law. This is the obvious result of the Commission's position at the end of the criminal justice process and the absence of any definite time limits for applicants seeking Commission reviews. Indeed, arguably the two most significant authorities on the question of retrospectivity, *Boncza-Tomaszewski v HMA*[91] and *Coubrough v HMA*[92], arose from Commission referrals. These cases establish that an appellate court must apply the common law as understood at the date of the appeal proceedings, not at the date of the trial. This principle does not apply to changes of the substantive law brought about by statute. As far as sentencing is concerned, the imperative that there be no punishment without law[93] requires that the court sentence in accordance with the maximum penalty applicable at the time of the offence, even if Parliament has subsequently increased that maximum[94]. There is, however, another rule applicable specifically to sentencing cases, derived from the same principle, which may be found in *Locke v HMA*[95]. Sentencing decisions (or at least those sentencing decisions that do not involve the interpretation of a statute) are not intended to have retrospective effect. Accordingly, the court in *Locke* held:

> *"The sentencing practice of the court at any time reflects the prevailing circumstances, including any statutory maxima and the court's current approach to sentencing generally and to sentencing in relation to particular offences. These*

[90] At paragraph 22-36
[91] 2000 SCCR 657
[92] 2010 SCCR 473
[93] Or *"nulla poena sine lege"*
[94] The decision of the Supreme Court in *R v Docherty* [2017] 1 WLR 181 is of interest in this regard
[95] 2008 SCCR 236

circumstances may and do change over time. It is appropriate that a sentence reflects the practice sanctioned by the Appeal Court as at the original date of sentencing."

45. It is thus the case that, when a substantial period of time has elapsed since the date of the conviction, it is necessary to have regard to the historical sentencing practice.

46. In *HMA v Boyle*[96], the court, applying *Locke*, made a point of stating that, although it was making a guideline judgment, it had not applied those guidelines to the case at hand.

47. Under section 6(5) of the Criminal Justice and Licensing (Scotland) Act 2010, the court, in disposing of a sentence at appeal, is obliged to consider any sentence guidelines[97] in force at the time the original sentence was passed. In terms of s6(6) of that Act, a change to sentence guidelines is not a ground for a Commission referral to the High Court. The Act thus follows the policy of the decision in *Locke*.

48. On the other hand, the court has held[98] that, where an adult is sentenced for offences committed when he was a child[99], the court should not pass sentence as if he were still one. The fact that the offender committed the crime as a child is relevant in determining the level of culpability, but the sentencing regime and rationale used must reflect his adult status. The court has also rejected the notion that it should address historical sentencing practice in cases in which there has been a significant gap between the date of the offence and the conviction[100].

Sentence Appeals and Fresh Evidence

49. Appeals based upon the existence of evidence unheard in the original proceedings[101] present a particular difficulty when they concern matters of sentence. Such grounds of review are much more frequently found in the Commission's case load than in sentence appeals work, often the result of delays

[96] 2010 SCL 198 at paragraph 23
[97] See above at paragraphs 18-19
[98] *Greig v HMA* 2013 JC 115; on the sentencing of child offenders themselves, see *McCormick v HMA;* 2016 SLT 793
[99] A situation arising most frequently within the context of historical sexual abuse allegations.
[100] *Sinclair v HMA* 2016 SLT 600 & *Docherty v HMA* 2016 SCL 627
[101] This subject in its generality is covered in the Commission's *Fresh Evidence* position paper

between sentencing and applications to the Commission. Indeed, the leading case on the subject, *Reid v HMA*[102], arose from a Commission referral.

50. In the *Reid* case, the appellant had, in 1967, been diagnosed as suffering from a "mental deficiency"[103] and made subject to the broad equivalent of a compulsion order. "Mental deficiency" could be diagnosed only if the subject had an IQ of less than 70. From the 1970s onwards, psychometric testing demonstrated consistently that the appellant's IQ was in excess of 70. This indicated that the appellant had not been suffering from "mental deficiency" in 1967. It appears that the 1967 tests had been biased by the method that the psychiatrists had used, which underestimated his intelligence as a result of a number of factors, including his lack of formal education. A full bench accepted this as fresh evidence and quashed the mental health disposal.

51. The full bench decision contains within it little in the way of conceptual discussion regarding fresh evidence in sentence appeals. The opinion of the 3 judge bench that remitted the case[104], however, does. In that opinion, the court discusses the earlier decision in the appellant's unsuccessful 2007 appeal, paraphrasing Lord Eassie on the earlier occasion as holding that:

> "…in a matter such as this, the test whether a miscarriage of justice has occurred has essentially to be applied at the time of the decision under attack."

52. The court was not persuaded by the authorities that counsel for the appellant cited in support of the contention that a different approach had been followed in the past. It thus considered itself unable to depart from the 2007 decision. However, reasoning that it appeared "arguable that there may be circumstances in which to apply the standards prevailing at the time at which the decision was made would perpetuate an injustice" the court remitted to a full bench. In so doing, it noted in passing a possible flaw in Lord Eassie's reasoning. Whilst it was true that the diagnosis of "mental deficiency" relied on more than a simple assessment of IQ, an IQ of less than 70 was the *sine qua non* of such a diagnosis. It was thus the case

[102] 2013 SCCR 70
[103] Learning disability
[104] 2012 SCL 475

that it could be possible to say that it was objectively incorrect to have diagnosed the appellant with "mental deficiency" in 1967.

53. The full bench decision, which proceeded on a Crown concession, clearly accepted that there was evidence that might be considered new in terms of s106(3)(b) and thus, by implication, also accepted that it was addressing a question broader than that considered in 2007. The rationale supporting this course of action was, however, not detailed

54. The appellate court exists to review sentences rather than to conduct sentencing exercises of its own[105] This is reflected in Lord Eassie's view that the test for miscarriage of justice should be applied "at the time of the decision under attack". It is, one might argue, a *necessary* feature of a system that permits appeals against sentence. It is not uncommon for the personal circumstances or risk profile of an offender to change during the course of his incarceration. These would be relevant factors if a sentencing exercise were to be conducted anew. To allow such a development to permit the offender to return to court would be to undermine legal finality. Any sentence, particularly any long sentence, would be forever contingent, the sentencing process open-ended. Prisoners would have a far greater incentive to make insincere shows of reformation. There are legal and administrative systems in place (such as progression, parole license and compassionate release) permitting the prison system and the Scottish Government to respond to changes in the personal circumstances of a prisoner. Opening the sentencing process up would inject a degree of uncertainty that would undermine these systems.

55. In the Commission's view, the decision in *Reid* is not in conflict with the general approach outlined in the foregoing paragraph. The court's treatment of the issue did alter between the 2007 hearing and those that followed the Commission referral. The court moved from a position in which it focused exclusively on the reasonableness of the 1967 decision to one in which, adopting a more pragmatic approach, it considered the underlying reality of the situation. However, the key question in that case was the true state of affairs *in 1967*. As far as the Commission can see, the later testing was relevant because of the implications it

[105] See, for example, *HMA v Bell*

had on that matter. At no time did the court suggest that post-sentencing developments were relevant for their own sake.

56. It would thus appear to the Commission that "fresh evidence" relating to sentence may be relevant, but only generally insofar as it demonstrates that the court at trial or sentencing may have been mistaken about or unaware of the true state of affairs that pertained at the time of the original proceedings. The policy objections to permitting the consideration as "fresh evidence" in a sentencing case of matters arising following the date of the hearing are, in the Commission's view, compelling.

Specific Orders and Offences

57. The Commission will cover in this section considerations arising in relation to certain specific orders. The Commission has selected these areas using as its criterion their relative importance to its work rather than systemic importance to the justice system. Homicide provides the starkest example of this. It comprised just 0.02% of recorded crime in Scotland in 2014-2015[106]. Contrastingly, murder or culpable homicide has been the principal offence in 22.3% of applications to the Commission from 1999 to April 2015[107]. There is, more generally, a very significant bias in the Commission's caseload towards the graver end of criminal behaviour. This trend is, if anything, exaggerated where matters of sentence are concerned; sentences in less serious cases are more likely to have been rendered academic by the passage of time. As a result, the Commission has chosen to concentrate in this paper on life sentences and their like.

Orders for Lifelong Restriction

58. An order for lifelong restriction[108] is, in effect, a form of statutory life sentence. Where an accused person has been convicted of a sexual or violent offence, an offence that endangers life or an offence showing a propensity to commit sexual or violent offences or to endanger life, the court must, if it considers that the "risk

[106] See the Scottish Government's 2014-15 bulletins on recorded crime and homicide, available online at http://www.gov.scot/Publications/2015/09/5338/318201 and http://www.gov.scot/Resource/0048/00486224.pdf

[107] 2014-15 Annual Report at page 18. In 2014-15, the police recorded 59 cases of murder. In the same period, murder was the main conviction under review in 33 applications to the Commission. (It should be noted that this figure does not account for repeat applications by the same convicted person to the Commission.)

[108] Hereinafter "OLR"

criteria" may be met, make a risk assessment order[109]. Such an order requires that the applicant be detained pending the completion of a risk assessment by a risk assessor accredited by the Risk Management Authority[110]. The convicted person may himself instruct a risk assessment report[111]. A risk assessment must, *inter alia,* stipulate whether the risk assessor considers the level of risk posed by the applicant to be high, medium or low[112]. The risk assessment report must be forwarded to the accused, who may intimate any objections that he has to it. Thereafter, the defence and prosecution may adduce evidence[113]. The court must then decide, on balance of probabilities, whether or not it believes that the "risk criteria are met. These are found in section 210E of the 1995 Act, and are in the following terms:

> *"…the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large."*

59. If the court determines that these criteria are met, it must impose an order for lifelong restriction.

60. The risk criteria have engendered a degree of controversy from the legislative process onwards. Both the Justice 2 committee and the then opposition Justice Spokesperson criticised the drafting as unduly vague. However, the MacLean report, which recommended the introduction of the order, and the Scottish Executive of the day appear to have considered that the OLR should be restricted to "exceptional" and "high risk" offenders who were likely to cause "serious harm". In one of the early cases on the subject, *McFadyen v HMA*[114], the court accepted the suggestion of the appellant's counsel that "an order for lifelong restriction is a sentence of last resort, which should be imposed only if the statutory conditions are met and the court is satisfied that such an order is necessary for the protection of the public."[115]

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[109] 1995 Act s210B
[110] Hereinafter "RMA"
[111] 1995 Act s210C(5)
[112] 1995 Act s210C(3)
[113] 1995 Act s210C(7)
[114] 2010 SCL 337 at paragraph 13
[115] *Contra R (J) v HMA* 2017 SCL 814, in which the court stated (at paragraph 10) that there was not an "incremental ladder" of sentencing options that must be ascended before an OLR may be imposed.

However, in the later *LBM v HMA*[116], the court refused to hold that an order for lifelong restriction could only be imposed where the risk assessor had assessed the accused, in terms of the RMA criteria, as posing a "high" risk. The court reconsidered the matter in greater depth in *Ferguson v HMA*[117], which is now the leading case on the subject. The Commission has derived the following principles from that judgment:

a. Following *Liddell v HMA*[118], "likelihood" in the risk criteria should be interpreted to mean "more likely than not"[119].

b. The assessment of the "likelihood" must be at the time of sentencing. However, that assessment is looking forward to the point at which the offender would, but for any OLR, be at liberty.[120]

c. The risk assessor's classification of an offender as "high", "medium" or "low" risk is a tool for the judge. The judge may disagree with the risk assessor's categorisation of the offender. The judge must, however, pay "particular attention to the views of the expert risk assessor".[121]

d. The sentencer should take into account the predicted effects of rehabilitative work that the offender is likely to undertake while in custody and any post-release supervision that might be in place if a determinate sentence were imposed.[122]

e. If the judge concludes in spite of any such predicted protective effects that serious endangerment is likely at any point, he *must* impose an OLR.[123]

61. In the subsequent case of *Kinloch v HMA*[124], the court emphasised that the risk criteria require there to be a link between the offence that constitutes the subject of the conviction and the risk of serious harm that the applicant poses. If there is no such link, an order for lifelong restriction may not be imposed.

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[116] 2012 SLT 147
[117] 2014 SCCR 244
[118] 2013 SCCR 541
[119] *Ferguson* at paragraph 95
[120] *Feguson* at paragraph 99
[121] *Ferguson* at paragraphs 105-106
[122] *Ferguson* at paragraphs 101-102
[123] *Ferguson* at paragraph 102
[124] 2016 SCL 67

62. The Commission has, on occasion, found it necessary to instruct a full risk assessment report. Risk assessment reports are highly labour-intensive, and correspondingly expensive. Serious consideration should be given to the question as to whether or not a full report is necessary. Unless there are good and substantial reasons to doubt the findings of the court-instructed report, it is unlikely that the Commission will consider it necessary to instruct its own. It is particularly unlikely to be an appropriate step if the defence at trial were granted legal aid to instruct their own risk assessment report.

63. The RMA publishes standards for risk assessment reports, which can be found on its website. These may be useful to the Commission's review when the applicant suggests that the risk assessment report was somehow deficient.

64. The RMA operates a "taxi rank" system in which its qualified risk assessors are assigned to cases in succession. The Commission has in the past instructed risk assessors in accordance with the RMA's scheme.

Punishment Parts for Murder

The Sentencing Regime

65. Since the abolition of the death penalty for murder in 1965[125], the sentence for that crime has been fixed by law at imprisonment for life[126]. However, life imprisonment did not (and does not) exclude the possibility of release on licence. Under the regime in place prior to 2001, the decision as to whether or not to release a life prisoner on licence fell to the Secretary of State or latterly to the Scottish Ministers. The Government would act on the advice of the Parole Board. In practice, it usually accepted the Board's recommendations. The trial judge had no direct control over the length of time that the convicted person would spend in custody before his release on licence, although he did have the power, under s205 as it then stood, to make a recommendation about the minimum period that the offender should spend in prison.[127]

[125] Murder (Abolition of Death Penalty) Act 1965 s1
[126] 1995 Act s 205. The sentence imposed on offenders under 21 is detention. Although the sentencing regimes differed significantly between 1993 and 2001, they are now, for present purposes, equivalent.
[127] A fuller description of the old system may be found in *Flynn v HMA* 2004 SLT 863

66. The situation was altered by the Convention Rights (Compliance) (Scotland) Act 2001, which extended the system previously applicable to young offenders and discretionary life prisoners by requiring the trial judge to fix a "punishment part" when sentencing an offender to life imprisonment for murder.[128] The governing legislation is section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993[129], as amended by the 2001 Act, which now concerns itself with all life sentences as well as orders for lifelong restriction. The section provides that the court must specify such a period as it considers necessary to satisfy "the requirements for retribution and deterrence", excluding from its deliberation the need to protect the public.[130] Once this "punishment part" has expired, the life prisoner may require the Scottish Ministers to refer his case to the Parole Board.[131] If it is satisfied that the continued detention of the prisoner is not necessary for the protection of the public, the Parole Board may require the Scottish Ministers to release the prisoner on licence.

Determining the Punishment Part

67. In *Walker v HMA*[132], the court identified[133] a category of murder cases of particular gravity, providing by way of example cases in which the victim was a child or a police officer acting in the execution of his duty, or where a firearm was used. The court suggested that such cases would attract sentences significantly in excess of the starting point that it had identified. Since that case was decided, the court has, on numerous occasions (eg *Jakovlev v HMA*[134] and *Mitchell v HMA*[135]), recognised that there has been an ongoing inflationary trend in the lengths of punishment parts imposed for murder. In *Boyle v HMA*, the court disapproved a suggestion in *Walker* that 30 years was the "virtual maximum" for a punishment part. In all but exceptional circumstances, a murder involving the use of weapon such as a knife should attract a punishment part of 16 years or more. *Boyle* was followed by

[128] The 2001 Act made provisions for a transitional scheme applying to offenders sentenced under the old system. The significance of the transitional scheme to the work of the Commission has been all but completely eroded by the passage of time. There were, however, a relatively large number of Commission referrals to the court on points arising from the decision of the Judicial Committee of the Privy Council in *Flynn v HMA.* All of these were successful. The only reported example is *Stewart v HMA (No 2)* 2005 SCCR 565.
[129] "1993 Act"
[130] 1993 Act ss2(2)-2(2A)
[131] 1993 Act ss2(2) & 2(6)
[132] 2003 SLT 130
[133] at paragraph 8
[134] 2011 SCCR 608 at paragraph 9
[135] 2011 SCL 438 *per* Lord Hardie at paragraph 32

Jakovlev, in which the court held that murders in the grave category identified in Walker ought now to attract punishment parts of approximately 25 years.

68. With regard to sentence discounting for pleas of guilty, the court in *Boyle* distanced itself from "a strictly mathematical approach", but indicated that it was broadly in agreement with the English sentencing guidelines, which stipulated that the total discount ought not to exceed a sixth of the starting point, and should not, in any event, be greater than five years. It would appear that this guidance is unaffected by the decision in *Gemmell*[136].

Punishment Parts for Discretionary Life Sentences and Orders for Lifelong Restriction

69. In terms of s2 of the 1993 Act, the court is obliged to set a punishment part in cases in which it imposes discretionary life sentences and OLRs[137]. In such cases, an additional complication arises, linked to the early release provisions for determinate sentence prisoners. Short term prisoners[138] are released once they have served one half of their sentences. A long term prisoner is entitled to apply to the Parole Board for release when he has served half of his sentence. If a judge imposing an OLR were simply to select a punishment part equal to the determinate sentence that he would otherwise consider appropriate, that punishment part would have a considerably longer effective length than the determinate sentence. Furthermore, since the determinate sentence would include a component to reflect the need to protect the public, which the OLR does through the means of indefinite detention, there would be an element of double counting.

70. There is, accordingly, a process that the sentencing judge must follow when selecting a punishment part for an OLR. For many years, the leading case was the Commission referral of *Ansari v HMA*[139]. The procedure involved[140] first assessing the period of imprisonment that would have been appropriate if a determinate sentence had been imposed, then discarding any portion of that sentence that would have been imposed for the protection of the public (providing a "notional

[136] See above at paragraph 31
[137] Henceforth in this section, "OLR" should be taken as shorthand for both discretionary life sentences and orders for lifelong restriction. The sentencing regimes are identical in this regard, and OLRs are considerably more common in the Commission's case load.
[138] Those serving determinate sentences of less than 4 years
[139] 2003 SCCR 347
[140] qv *Ansari* at paragraph 34 *et seq*

determinate sentence"), and then, finally, reducing the total to reflect early release procedures in place for those serving determinate sentences. The appropriate portion of the sentence to impose in relation to this last factor would usually be between one half and two thirds, but might, in cases of the most gravity, be over two thirds.

71. With regard to the first two steps, the approach in the later *Petch v HMA*[141], now the leading authority at common law, is identical to that in *Ansari*. For the third step, however, the court is required as a matter of general practice to impose one half of the notional determinate sentence. The court approved the suggestion in Lord Reed's dissenting opinion in *Ansari* that this proportion might, in exceptional circumstances (such as where the accused had been convicted on the same indictment of offences other than those that led to the imposition of a life sentence, or where section 16 of the 1993 Act might otherwise apply), be increased, but agreed that it ought not to be as a matter of course.

72. The approach to calculating punishment parts for OLR prisoners was placed on a statutory footing by the Criminal Cases (Punishment and Review) (Scotland) Act 2012, which added the new sections 2A and 2B to the 1993 Act. The statutory scheme largely restates the position in *Petch*. The court may still decline to reduce the notional determinate sentence by half. In deciding whether or not to do so, the court must take account of the following matters[142]:

    (a) the seriousness of the offence, or of the offence combined with other offences of which the prisoner is convicted on the same indictment as that offence,

    (b) where the offence was committed when the prisoner was serving a period of imprisonment for another offence, that fact, and

    (c) any previous conviction of the prisoner.

73. The statutory provisions came into force on 24 September 2012.

74. The decision in *Petch* in particular gave rise to a number of Commission referrals. All of these were successful. The most striking example is the case of *Ross v HMA*[143], a

[141] 2011 SCCR 199
[142] 1993 Act s2B(5)
[143] 2013 SCL 1034

particularly grave attempted murder, in which the sentencing judge had imposed an OLR with a punishment part of 20 years. Such a figure implied a "notional determinate sentence" in excess of 40 years, which would be unparalleled in Scots sentencing law. The court reduced the punishment part to 8 years. In so doing, it emphasised that it would be for the Parole Board to "assess matters with the protection of the public as their foremost priority." Cases such as *Ross* underline the differing roles played by the court and the Parole Board in the statutory sentencing regime. Whilst it is the case that a considerable number of punishment parts were reduced in the wake of the *Petch* decision, very few offenders with OLRs have ever been released[144].

Specific Considerations

75. Although the Commission has no policy requiring a face to face meeting during a stage 2 review, the legal officer assigned to such a case will often meet with the applicant at some point. Such a meeting is less likely to be necessary in sentencing cases. The points raised are usually relatively straightforward and there is generally no need to gather any further information from the applicant.

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[144] The court in *Ferguson* (see above) noted, at paragraph 25, that, at the date of the appeal hearing, over 100 OLRs had been imposed but none of the offenders had been released. It appears that one or more were released while the case was at *avizandum.*

Appendix:

Guidance on Submissions