

Name

Criminal Justice Voluntary Sector Forum (CJVSF)

Publication consent

Publish response with name

Q1) Do you agree or disagree with the Council's approach to the distinction between a 'principle' and a 'purpose' of sentencing?

Agree

Please provide any reasons for your response.

CJVSF find the distinction to be a helpful one that is worth making. The distinction between the meaning and function of both "principles" and "purposes" is also clear. Moreover, providing a clear rationale for the sentencing process is fundamentally important given the infliction of punishment and deprivation of liberty that the criminal justice system currently imposes. CJVSF also feel that clear directions to the judiciary, in the form of "principles", is helpful and should help ensure that sentencing decisions are made consistently.

Q2) Should there be an overarching principle of "fairness and proportionality"?

Yes

Please provide any reasons for your response.

CJVSF members feel that the overarching principle of "fairness and proportionality" is appropriate because it accurately captures the considerations that need to be applied to all parties and processes in the sentencing process. An overarching principle of fairness addresses both those who have been convicted of an offence and victims, whilst a requirement of proportionality ensures that sentences are appropriate and not unduly punitive.

Q3) Are the supporting principles which underlie the overarching principle of fairness and proportionality (as listed at paragraph 2(i)-(vi)) appropriate?

Yes

Please provide any reasons for your response.

CJVSF members consider the six supporting principles outlined in the guidance to be appropriate as underpinning the overarching principle of fairness and proportionality. Generally they cover the relevant considerations which the judiciary should be applying when making the decision to impose an appropriate sentence. Members would, however, suggest a number of amendments to strengthen those principles and to ensure that all relevant considerations are given sufficient weight; please see our response to Q4 for these changes.

Q4) Are the supporting principles expressed clearly and accurately?

No

Please provide any reasons for your response.

Whilst generally supportive of the supporting principles, CJVSF members feel that a number of important additions and clarifications should be made.

In relation to Principle 2(i), that “all relevant factors of a case must be considered including the seriousness of the offence, impact on the victim and circumstance of the offender”, members felt that, being a guidance document, further detail about some of the relevant considerations would be beneficial in assisting legal professionals and the judiciary in conducting their duties and in clarifying the nature of sentencing for the public.

In particular, the “circumstances of the offender” could be further developed to highlight the kinds of factors that may be relevant when considering the appropriate sentence for an individual before the court. Relevant considerations may include the potential impact on the employment status of the person convicted, whether they have a family and dependents, whether a custodial sentence would result in the individual being made homeless upon release (e.g. through tenancy loss), or whether they have been engaging with statutory or third sector services prior to the sentencing process. A non-exhaustive list of some of the potential relevant considerations would help to increase clarity in the judicial decision making process.

In relation to Principle 2(iii), which states that “sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case”, CJVSF members felt that this supporting principle could be considerably strengthened by a requirement that imprisonment only be imposed by the court where the risk to the public is so great that no other sentence is appropriate. This would require judges to consider at the first instance whether a non-custodial or community sentence would be appropriate for the individual being sentenced. The judiciary, as those with the responsibility to determine what sentence is imposed, are central to ensuring the effective and consistent use of community based sentences and CJVSF members feel this should be reflected in the sentencing guidelines.

A considerable body of academic research and practitioner experience exists that considers that community based sentences, when they are properly employed,

adequately resourced, and person focused are more effective at addressing offending behaviour than custodial sentences. The Scottish Government has recently increased its focus on community based approaches to justice, with the introduction of the Community Justice (Scotland) Act 2016 and the creation of the new national organisation Community Justice Scotland. These actions have since been followed by the announcements contained within the Scottish Government's Programme for Government 2017 and the statement made by the Cabinet Secretary for Justice, Michael Matheson, to the Scottish Parliament on 14th September that the presumption against short term sentences will be extended to include sentences of up to 12 months and that the use of Electronic Monitoring will be extended. In light of this, we would be keen to see a greater judicial focus on community based sentences as well.

Q5) Are there any other supporting principles which should be included at paragraph 2?

In line with the CJVSF member view outlined above, an additional principle should be that, wherever possible, the court imposes a community based sentence rather than a custodial one.

Q6) Do you agree or disagree with the approach to the purposes of sentencing as set out at paragraph 4 of the draft guideline?

Agree

Please provide any reasons for your response.

Sentences should be linked to achieving a purpose; a sentence which does not serve a socially valuable goal is merely punitive. CJVSF members felt that the purposes 5(b) and 5(d) ("reduction of crime" and "giving the offender the opportunity to make amends") should be the two guiding purposes of sentencing and that sentencing decisions should further these two purposes. In doing so sheriffs should consider what is best for the individual before them, the victim, and for society.

Q7) Are the purposes as listed at paragraph 5(a)-(d) appropriate?

No

Please provide any reasons for your response.

CJVSF members were concerned about the inclusion of punishment as one of the principle purposes of punishment. As the Scottish Sentencing Council's own Principles and Purposes of Sentencing in Scotland and Other Jurisdictions: A Brief Overview (August 2017) observes, "Retribution is based on a belief or sentiment that offenders deserve punishment rather than a rational argument which uses

evidence to justify the imposition of punishment as necessary to achieve desired social control outcomes (Von Hirsch 1986)". Members felt that evidence should be at the heart of sentencing policy decisions and that historical incidence or current prevalence should not be sufficient grounds for continuing to do something that lacks a basis in evidence.

Members also rejected the placing of punishment at the top of the list of purposes of sentencing. While the consultation document makes clear that the list is not a hierarchy and that no one principle is more important than another, the effect of placing punishment at the top is to suggest that it is the central purpose. Given the current over-reliance on punishment as a purpose of sentencing, members felt that it would be more appropriate for it to be included later in the list (if at all). A focus on punishment may also have the detrimental effect of making the public less supportive of sentences which do not "look" like punishment; community based sentences or restorative processes are often viewed dismissively as "soft touch" because they do not reflect the traditional notion of punishment by imprisonment, despite their potential to be a more effective means of reducing crime (and in the case of restorative practices, of helping victims).

CJVSF members also felt that "reflecting society's disapproval of an offender's behaviour" was not an appropriate purpose of sentencing. Members felt that this statement was tautologous; given that, by the sentencing stage, an individual has already been arrested, tried and convicted by the state of a crime that has been defined in law, society's disapproval has already been clearly communicated to them. In many instances society has also already conveyed its disapproval through the democratic process, creating an offence through legislation that often includes a maximum or minimum sentence for the offence.

Furthermore, the adoption of "society's disapproval" as a separate purpose of sentencing introduces the possibility of political or civil interference in the sentencing process. In cases which involve a serious public outcry about the offence or the individual who has committed it, or political (and indeed tabloid) posturing, those sentencing may feel that "reflecting society's disapproval of an offender's behaviour" means awarding a more punitive sentence than might otherwise have been the case. This is clearly contrary to the principles of fairness and legality in sentencing. Given the above, members felt that purpose 5(c) was not an appropriate purpose for sentencing.

Rather, members felt that the purposes 5(b) and 5(d) ("reduction of crime" and "giving the offender the opportunity to make amends") should be the two guiding purposes of sentencing. Members recognised the reality that individuals sometimes need to be incapacitated through imprisonment for the safety of the public (and sometimes for their own safety). Wherever possible, however, individuals should be supported to desist from crime and this should be done in the community with access to appropriate support unless the seriousness of their offence prevents it. Members also welcomed the opportunity to "make amends" contained in purpose 5(d) as being consistent with the principles of community justice and sentences such as community payback orders, as well as with the principles of restorative justice. The opportunity for those who have committed a crime to make amends is fundamentally important, recognising the agency of the individual to address their

behaviours and to begin to take steps to repair any damage they have caused.

Q8) Are the purposes expressed clearly and accurately?

Yes

Please provide any reasons for your response.

Those principles that members supported (5(b) and 5(d)) were considered to be well defined for the most part. Members observed that 5(d) could be strengthened to further reflect the agency of individuals in the justice system.

Q9) Are there any other purposes which should be included?

No.

Q10) Do you agree or disagree with the approach set out at paragraph 6 of the draft guideline in relation to the efficient use of public resources?

Disagree

Please provide any reasons for your response.

CJVSF members felt that cost and the “efficient” use of resources should not be the determining factor in ensuring that an individual receive the sentence they require. If an appropriate sentence is determined for an individual by the court then the cost of that sentence should not be a bar to it entering into effect.

Q11) Is it appropriate to consider efficient use of public resources during the sentencing process?

No

Please provide any reasons for your response.

Members suggested that a more appropriate principle would be the “effective” use of public resources – this would ensure scrutiny of the use of public money without implying that value for money equates to the lowest possible spend. Members were also uncertain that the sentencing process was the best place to consider this.

Q12) Do you agree or disagree that the guideline would lead to an increase in public understanding of how sentencing decisions are made?

Agree

Please provide any reasons for your response.

Members observed that clarity in sentencing processes was to be welcomed wherever possible and would likely increase the understanding of how sentencing decisions are made. The current proposals would therefore help to make the sentencing process more accessible to the public. Increased public understanding of sentencing processes, however, will require broader public awareness raising through the use of the media and public awareness raising activities.

Q13) Do you agree or disagree that the guideline would lead to an increase in public confidence in sentencing?

Please provide any reasons for your response.

Neither “agree” nor “disagree”. Effective sentencing that, when taken together with a holistic approach to dealing with offending and supporting individuals, helps contribute towards reducing crime which, in turn, will help to ensure public confidence. To reiterate our response above, more than the publication of the sentencing guidelines will be required to fully engage the general public.

Q14) What costs (financial or otherwise) do you see arising from the introduction of this guideline, if any?

Any introduction of sentencing guidelines will require judicial training to ensure that sheriffs are aware and fully committed to the principles and purposes of sentencing. This will have a cost implication.

Q15) What benefits do you see arising from the introduction of this guideline, if any?

Provided the comments made by CJVSF members above are included, we feel that the introduction of this guideline would ensure a fairer and more effective judicial approach to sentencing, as well as allowing for a more consistent and widespread use of community justice sentences.

Q16) Would you like to make any other comments in relation to any matter arising from this consultation?