

Name

Families Outside

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.

This distinction seems to be both logical and useful. The wider principles should remain consistent, while the purpose may vary according to the type of offence and circumstances of the person being sentenced.

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

Yes

Please provide any reasons for your response.

An overarching principle of fairness and proportionality again seems logical - not something people are likely to argue against. The more challenging part will be defining what this means depending on the context of the offence and the personal circumstances of the person being sentenced, the victims, and others affected by the sentence. We will discuss these in our answers below.

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.

The supporting principles seem helpful. Each one would benefit from more detailed guidance, however, as they can be interpreted in a range of ways. This includes clarification of phrases such as the impact on the victim, the circumstances of the offender, what circumstances might prevent a statement of clear and open reasons, and what treating people 'equally' means ('equally' does not necessarily mean 'identically', as noted under 2ii).

Q4) Are the supporting principles expressed clearly and accurately?

No

Please provide any reasons for your response.

While the principles themselves are good principles, they would benefit from clear guidance. Principle 2(i) in particular requires further detail about what constitutes a relevant factor and for whom, including what the "circumstances of the offender" may entail. As an organisation working on behalf of children and families affected by imprisonment, Families Outside has long argued that the impact of a sentence extends well beyond the perpetrator.

An offender's children and family have done nothing wrong, yet they often bear the impact of the punishment. They may be the focus of the Family Court but are virtually absent from consideration in the Criminal Court. The Sentencing Guidelines in England & Wales recognise caring responsibilities as a mitigating factor in sentencing, while court cases internationally such as the landmark S v M (2007) case from the Constitutional Courts of South Africa require sentencers to take the impact on an offender's children into account before sentencing someone to prison.

The Scottish Sentencing Council recognised such issues in its discussions with us in March 2017 (<https://www.scottishsentencingcouncil.org.uk/media/1497/sentencing-of-parents-discussion-report.pdf>). It is possible that "consideration" of "all relevant factors" may include action beyond the imposition of the sentence itself, such as ensuring that dependants have the support they need regardless of whether their circumstances mitigate against the use of a more severe penalty. In any case, this principle will require specific training and guidance.

We are pleased that principle 2(ii) makes specific reference to further explanation of the meaning of 'similar' in the draft guidance. 'Similar' precludes a requirement for 'identical' punishments - an important distinction in view of the fact that identical sentences may have very different impacts, depending on the circumstances of the individual, their families, the victim, and the context of the offence.

For principle 2(iii), we endorse the submissions from the Criminal Justice Voluntary Sector Forum (CJVVSF) and Prison Reform Trust that the principle be strengthened to restrict the use of custody to all but the most exceptional circumstances - namely that the risk to the public is so great that no other sentence is possible.

For these and the remaining principles, we anticipate that more detailed guidance and training will assist with their interpretation. Does principle 2(vi), for example, refer specifically to Protected Characteristics under the Equality Act, or does this stretch further? We also encourage the Council to conduct a Child Rights & Wellbeing Impact Assessment (CRWIA) on the proposed principles (and indeed on the purposes).

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

In accordance with the response from the CJVSF, we would include a principle of imposing non-custodial penalties wherever possible.

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

Disagree

Please provide any reasons for your response.

We agree that sentencing should be linked to clear and evidence-based purposes. We are less certain of whether the choice of priority of purpose should be left to the sole discretion of sentencers. While an overall rank order or prioritisation of the purposes of sentencing may not be helpful, clearer prioritisation within certain types of sentences would be both possible and helpful to improve clarity and consistency. For example, a purpose of 'protection of the public' would be a sensible top priority for the use of imprisonment, whereas 'rehabilitation' and 'opportunity to make amends' would be well-suited as primary purposes for community-based sentences.

The Prison Act in Germany specifically prioritises the purposes of imprisonment, citing rehabilitation first: in this way, a sentence that prioritises something else (e.g. retribution) over this primary purpose is subject to legal challenge. Very short prison sentences are therefore inappropriate in Germany because they cannot meet the first priority of rehabilitation as named in the Prison Act.

We are not arguing that rehabilitation should be the primary purpose of imprisonment in Scotland. Quite the reverse: prison is not a therapeutic environment and, while efforts towards rehabilitation and resettlement are important, the primary purpose of prison in our view is protection of the public (incapacitation).

In any case, a rank-ordering of the purposes of sentencing for the various sentence types may be appropriate to guide sentencers towards the most effective sentence for the purpose they wish to achieve.

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

No

Please provide any reasons for your response.

Like the CJVSF as a whole, we have concerns about punishment being listed as the first purpose. We also feel that "punishment" and "reflecting society's disapproval of an offender's behaviour" are perhaps too similar to include as two distinct purposes.

An important question to consider is whether 'punishment' in and of itself is useful as a purpose. The sentence is the punishment, while 'punishment' itself has no further specific function. Research into 'what works' consistently shows that punishment for its own sake is ineffective in changing behaviour (see for example Grimwood & Berman 2012, at <http://tinyurl.com/ybcp8l9p>; Karson 2014, at <https://www.psychologytoday.com/blog/feeling-our-way/201401/punishment-doesnt-work>). From a utilitarian perspective, is punishment of value if it serves no useful purpose? Punishment by definition inflicts harm on the person punished - and in our experience also inflicts harm on those who have committed no offence, merely by their personal affiliation with the offender. For all of these reasons, punishment for its own sake is unhelpful and potentially damaging.

On a similar note, 'reflecting society's disapproval' as a purpose in itself may have little value if it is not combined with another purpose, such as making amends. Without a means of encouraging remorse, societal disapproval may have no meaning for an individual.

In our view, a sentence should have a positive purpose. This may mean a reduction of crime or giving an opportunity to make amends, as noted, but also protection of the public. This latter purpose is missing from the current list but is arguably the primary reason for which prison should be used.

As for the principles of sentencing, and in view of the potential impact by association of these purposes on children and young people, we would recommend use of a Child Rights & Wellbeing Impact Assessment (CRWIA) on the stated purposes of sentencing.

Q8) Are the purposes expressed clearly and accurately?

No

Please provide any reasons for your response.

We are not entirely clear of the distinction between the purposes of 'punishment' and 'reflecting society's disapproval', as punishment by definition is an action that reflects disapproval.

We are not sure that the term 'rehabilitation' is the best choice. 'Rehabilitation' suggests that an individual is somehow in need of moulding or change. While this may be the case, contextual circumstances such as poverty, high unemployment, mental ill health, poor housing or homelessness, and Adverse Childhood Experiences, among other issues, are unlikely to change through an individual's

'rehabilitation'. Rather, support or efforts towards resettlement may be a more constructive phrase to capture the intended purpose.

Finally, as noted above, the purpose of incapacitation (protection of the public) should be included in this list. We recognise the purpose of 'preventative measures' as (presumably) including protection of the public via incapacitation. This should however be stated more clearly. Indeed, separation of rehabilitation (ideally 'support for resettlement'), deterrence, and incapacitation into their own distinct purposes may be more helpful than grouping them together under a single purpose of 'reduction of reoffending'. Each is important in their own right and are likely to take their place as different priorities for different types of sentences.

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

Incapacitation (protection of the public) should be included in this list.

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.

We endorse the view of the CJVSF in noting that the cost and 'efficient' use of resources should not be a determining factor. Rather, the sentence should be based on what is most appropriate in consideration of the individual, their families, the victim, and the wider community. In saying this, the high cost of prison compared to community-based measures should provide yet another reason to avoid prison as a sentence for all but the most exceptional circumstances.

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

No

Please provide any reasons for your response.

We endorse the view of the CJVSF in that a more appropriate principle would be the 'effective' use of public resources - namely whether the resources are most likely to achieve the intended purpose of the sentence in both the short and longer terms.

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

Disagree

Please provide any reasons for your response.

In its current form, the guideline is not adequately detailed to encourage clarity and consistency in sentencing. It is therefore unlikely to increase public understanding unless, as the Prison Reform Trust noted in its response, it is clear which purposes take precedence in which circumstances, especially where purposes may conflict. Where sentencers determine their own hierarchy of purposes without guidance as to which may be best suited for particular offences or sentence types, decisions risk appearing arbitrary.

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

Disagree

Please provide any reasons for your response.

As noted above, the guideline is not adequately detailed in its current form and is therefore unlikely to increase public confidence in sentencing. We also endorse the view of the CJVSF in that full engagement and confidence of the public will require more than publication of the guidelines. We commend the Sentencing Council for the efforts it has made thus far in using other means of promoting public confidence, such as the videos on sentencing now available on the Council's website.

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

We are not best placed to answer this question but do not see any additional cost implications, as sentencers are already required to undergo training on such issues.

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

In principle, once the guideline encompasses further detail to clarify the principles and purposes outlined, its introduction should ensure a clearer and more consistent approach to sentencing.

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

Families Outside welcomes the Sentencing Council's efforts to encourage more consistent, fair, principled, and defensible sentencing practices. We encourage the Council to continue to recognise the impact of sentencing in its broadest sense - not only on the offender and victim but also on the families of perpetrators, who experience the punishment without having committed an offence. We hope the guidelines can identify a way of helping sentencers prevent discrimination against children based on the legal status of their parents, as per Article 2 of the UN Convention on the Rights of the Child, and encourage use of a Child Rights & Wellbeing Impact Assessment as a means of ensuring the principles, purposes, and guidelines are as robust as possible in this regard.

We are grateful for the opportunity to respond to this consultation and are happy to respond to any further queries the Council may have.