

Name

Faculty of Advocates

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.

The Faculty of Advocates agrees that there are some concepts which describe how a judge should approach sentencing, described usefully as ‘principles’ in the draft guidelines. Similarly, it is agreed that there are certain outcomes which a court is aiming for in a particular case, described as ‘purposes’ in the draft guidelines. Having titles for each of those two concepts is useful as a shorthand to promote understanding of these concepts, and provides a useful vocabulary for discourse moving forward.

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

Yes

Please provide any reasons for your response.

Placing fairness of sentencing and proportionality of sentencing at the heart of sentencing, with other principles supportive of but subordinate to the overarching principle, is a logical and principled approach.

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.

Q4) Are the supporting principles expressed clearly and accurately?

No

Please provide any reasons for your response.

The Faculty of Advocates considers that it would be desirable, so far as possible, to express the supporting principles as concisely as possible. For example, 2(ii) could be expressed simply as 'sentencing decisions should be consistent and predictable'. That would remove the necessity of attempting to define 'similar' as is done in the draft guidelines. Consistency and predictability in sentencing is what is aimed for: that is the principle. The present expression, of similar offences being treated in a similar manner, is a consequence of that principle of consistency and predictability.

It is unclear if 2(iii) adds anything as presently drafted, given that 'proportionality' is part of the overarching principle. It may also be that it sits awkwardly with, for example, minimum sentence provisions.

It is also unclear if there is a hierarchy, whether implied or intended, within the supporting principles. The use of Roman numerals implies some order of importance, but it may well be that such a hierarchy is not intended.

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

While lawfulness and lack of discrimination imply consideration of human rights, it may be that it would be appropriate to specifically state that consideration should be had of the human rights of the offender and, in certain circumstances, the family and other dependents of the offender. Similarly, while what is presently 2(i) mentions "impact on the victim" it may be that it should make reference to the victim's family or dependents, especially when one considers cases in which the victim is deceased.

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.

The Faculty of Advocates agrees that the main purpose of sentencing should be to reflect the overarching principle of sentencing.

It is wondered, however, whether such an approach is helpful. It is already implicit, if not explicit, that all sentences should be arrived at in line with sentencing principles, in the first paragraph of the draft guidelines. Sentencing purposes would always, therefore, have to be understood as subordinate to the sentencing principles. That, in turn, means that the sentencing purposes section could simply be a list of the

appropriate purposes of sentencing which may or may not arise in any particular case.

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

Yes

Please provide any reasons for your response.

Q8) Are the purposes expressed clearly and accurately?

Yes

Please provide any reasons for your response.

For the most part the various purposes are clearly and accurately expressed. In particular the use of short, emboldened, words or phrases is commendable for concisely making the point and highlighting at a glance what each purpose is. It is wondered whether the explanations could, however, be more concisely expressed. For example, in respect of punishment: 'Sentencing may seek to punish the offender for their criminal behaviour, normally resulting in some loss for the offender.' Such an approach would have the advantage, it is submitted, of ensuring that the guidelines overall are as easily understood as possible, helping to meet the aim of demystifying the sentencing process for the wider public.

It is also not clear at present if the purposes are intended to follow a hierarchy. In any event, punishment and rehabilitation would appear to be the most important purposes, and they are first and second.

The consultation document states that none of the purposes listed are more important than any of the others, but there is no mention of that idea in the draft guidelines themselves. It is submitted that it may be helpful to put such a reference into the draft guidelines.

It is regretted that there is, at present, no explanation offered in respect of the denunciation sentencing purpose, 5(c).

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

None

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.

Early guilty pleas are recognised as increasing the efficient use of public resources. In terms of section 196 of the 1995 Act, as most authoritatively interpreted in *Gemmell v HM Advocate* 2012 JC 223, a court must consider the timing of a plea of guilty when selecting sentence. The justification for the discounting of a sentence in such circumstances is the utilitarian value of the plea. An aspect of the utilitarian value of the plea is the saving in resources for the prosecution and the courts when a matter resolves without the necessity of a trial, or even full preparation therefor. If that is what paragraph 6 is intended to convey then this could, perhaps, be set out in terms.

It is somewhat unfortunate that it has not, so far, been possible to acknowledge effective use of resources as a purpose or a principle of sentencing.

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

Yes

Please provide any reasons for your response.

If it is intended as reflection of the utilitarian value of an early plea then, as a statutory obligation, that is a factor which is extremely relevant to sentencing.

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.

At present sentencing can be as clear to court practitioners and other professionals as it is opaque to the public. Judicial descriptions of sentencing as being an 'instinctive synthesis' or referring to 'normal, well-established principles of sentencing' without explaining fully what those are; where to find them; or how to define them is, perhaps, unhelpful.

Having guidelines or, ultimately, a series of guidelines, will allow the public access to brief, easily understood, documents which will explain the reasons for particular sentences in particular cases.

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

Agree

Please provide any reasons for your response.

It is anticipated that the guidelines would lead to a greater public understanding of sentencing practice. As long as the guidelines themselves were acceptable to the public, and were followed and applied by the courts, then it could only be hoped that public confidence in sentencing would be increased.

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

None

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

The introduction of this guideline would give a definite, brief, easily understood, document which would explain the often broad and undefined principles and purposes which underpin the sentencing process as exercised in the criminal courts day and daily.

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

None