

Name

Community Justice Scotland

Publication consent

Publish (Post consultation contact)

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.

We would submit that in addition to 'principle' and 'purpose', it may also be appropriate for any approach to sentencing to require that sentencers consider 'outcomes'. We make this submission on the basis that according to our understanding, an outcome is the consequence of an action taken, as distinct from a purpose, which reflects the intention behind the action. In this connection, we note that in the explanation of the draft guidelines, there is, indeed, reference to the "outcomes which the judge may be trying to achieve." In sum, therefore, we would submit that in addition to 'principle' and 'purpose', the separate factor of 'outcomes' should also be an essential component of any approach to sentencing.

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

No

Please provide any reasons for your response.

We have a concern regarding the definition and connotations of "fairness" in this context. As is highlighted later in the guidelines, the sentencer is being asked to apply the somewhat ambiguous principle of "fairness" to the separate factors that influence that balance: the victim, the offender, and the seriousness of the offence. We would argue that in this context, fairness is an inherently ambiguous concept, and is itself unfair to impose as a requirement.

We are of the view that the prime consideration for the judiciary is for the sentence to be lawful, which includes the requirement that it be necessary and appropriate with the law. If applied, this concept should negate the need to include proportionality as a separate principle. As detailed above, sentences should be in relation to their efficacy in improving outcomes.

We would submit that sentences should focus on their efficacy in improving outcomes for people and reducing the likelihood of them offending again, rather than

in terms of the intended purpose itself. Sentencers should be encouraged to use sentencing options that are known to be effective, and don't have unintended adverse impact on those involved. For example, prison sentences can have unintended negative consequences for the outcomes of the individual sentenced, their families, and communities. Sentences should be what is necessary to achieve identified outcomes and be proportionate; we would welcome the expectation that the rationale for any particular sentence be made available where appropriate, as presented in supporting principle (iv). Custodial sentences should be used only in limited circumstances, for example, where necessary to protect safety.

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.

We have some further comment in relation to the supporting principles as outlined below. Numbers refer to the principles.

ii) We support the principle of similarity, though we would submit that there is a need to retain flexibility to allow each case to be considered on its merits. For example, two individuals with disparate backgrounds, contexts of offence, deficits, assets and victim(s) can commit broadly similar offences. However, for a sentence to be effective in achieving a desired outcome (such as reducing the likelihood of that person offending again) very different sentencing options may need to be applied. Additionally, any sentence should take into account the ways in which a sentence may have unintended consequences which would affect different individuals disproportionately because of their specific circumstances. When all of the factors of a case are under consideration, the primary consideration should be for a sentence that has the potential to deliver the desired outcome.

iii) We support this principle, however some aspects require further clarity. The word "severe" in this context is open to different interpretations and we would welcome clarification. We also propose that "outcomes" would be a more suitable term than "purposes". As detailed previously, an outcome is the result of action taken, whereas purpose is solely reflecting the intention. Sentencers should be encouraged to use sentencing options that are known to be effective in addressing specific issues.

iv) We support this principle, and this includes supporting the "rare occasion" caveat that in some circumstances it will not be appropriate for the rationale to be laid bare. We have further reflections on the potential for this principle to have far-reaching and positive implications for the transparency and openness of justice in Scotland that may be beneficial to our shared awareness of the purpose of justice. We would also like to submit that this requirement for a clear rationale could invite greater transparency over the justification for the use of custody instead of community-based sentencing options. This is particularly the case for decisions to impose custodial

sentences and could be applied to other decisions such as the use of remand instead of bail. Improved transparency is helpful across the whole sentencing spectrum.

If the sentencer departs from a sentencing principle or presumption the reasons for doing so should be stated in open court and in any subsequent report.

v) We support this principle. We would suggest however that the language could be strengthened - "have regard to" is weak, "apply" or "are required to consider" would be an improvement. If sentencers are not giving due regard to accepted guidelines, this begs the question why have guidelines in the first place. We would suggest this could be connected to a requirement for the rationale behind sentencing decisions to be stated openly as in (iv).

vi) We support this principle. We would submit that if a sentence is to be lawful and effective, it must also be equal. We would add, however, that equality is not a passive activity and the justice system deals with people at profound disadvantage; including those with trauma-related physical and mental problems, learning disabilities, and deprivation. Custodial sentences may be potentially discriminatory and sentencers should consider the unintended impact of sentences. Sentencers may use sentencing options which may be disproportionately punitive for certain offenders or their families; for example, a custodial sentence for someone who is a primary carer of a person with disabilities.

Q4) Are the supporting principles expressed clearly and accurately?

Yes

Please provide any reasons for your response.

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

As highlighted in our response to Q3, we have some thoughts on potential inclusions, either to be integrated into the principles as they stand or included as separate points.

- We recognise that the following may be an aspect of 2(i) and consideration should be given to emphasising the following in any explanatory notes to accompany the guidance: the impact on offenders' families, including children. Many sentences passed are also served by the family of the offender. The judiciary should play a part in reducing the creation of new trauma. For example, we know that the imprisonment of a parent has a severe adverse impact on a child, which can contribute to poorer outcomes in later life. The United Nations Committee on the Rights of the Child have highlighted the need for sentencers to take cognisance to the UN Convention on the Rights of the Child in considering any secondary impact of

a custodial sentence on families . Moreover, given that the Scottish Government is currently considering modifications to Scots law to reflect the principles of the United Nations Convention on the Rights of the Child in policy and legislation, this would be appropriate to take into consideration for sentencing protocol.

- This may be considered as a factor in 2(ii): sentences should be selected on the basis that they will be effective in achieving the desired outcomes (see previous discussion of efficacy vs. purpose). Where custody is used as an option, either at remand or as a final sentence, the rationale for this should be explicitly identified. We understand that the use of custody is important and in some cases the most appropriate option for sentencers to use, particularly for people who cause serious harm to individuals or communities. Nonetheless, there are individuals who pose little risk to the public where community sentencing options would be more effective and we would propose that guidelines should encourage active consideration of community sentencing options with a presumption to set out the rationale.

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.

As we have stated previously as well as the purposes set out here we believe that there is a need to set out outcomes to be achieved.

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

No

Please provide any reasons for your response.

As detailed previously, we submit that it would be appropriate to include “outcomes” as distinct from “purposes”. We also have some concerns regarding the content of the “purposes” as detailed:

a) We accept that punishment is a legitimate purpose of the criminal justice system. This should be informed by rationality, lawfulness, and efficacy. Custodial sentences should be used only in limited circumstances, for example, where necessary to protect safety.

b) We agree that the reduction of crime should be a key outcome for sentencing. This principle includes the assertion that sentencing should reduce the risk of crime by imposing preventative measures. If this is applied to the example of custody, whereby crime is reduced by removing the offender temporarily from the community, we would submit that this is a short term and expensive temporary measure rather

than a desirable outcome. We would submit that temporary respite is not a solution to offending behaviour. As submitted previously, custodial sentences should be used only in limited circumstances, for example, where necessary to protect safety, and it would be appropriate to encourage the increased use of community disposals, which are more effective in reducing reoffending, and provide increased opportunities for rehabilitation during community sentences and avoidance of the negative unintended consequences of imprisonment, such as losing employment or housing .

We would also question the assertion that sentencing as a deterrent is a factor in reducing crime. There is limited evidence that sentencing has any dissuasive effect on criminal behaviour. The Scottish Government's "What Works to Reduce Reoffending" report (2015) states that custodial sentences do not deter people from re-offending, nor do deterrence-based interventions such as "Scared Straight" .

We would submit that the principal factor for consideration should be the efficacy of the proposed sentence in achieving identified outcomes. We would retain, and strengthen, (b)(i) and the focus on effective rehabilitation to enable behavioural change and prevent future harm.

c) "Reflecting society's disapproval of an offender's behaviour" runs the risk of contributing to inconsistent and disproportionate sentencing, undermining the other principles outlined in the guidelines. Society's attitudes change regularly, and can be influenced or even manipulated by a mercurial and impassioned media and popular consciousness. For example, public attitudes to homosexuality have shifted considerably in a short space of time; we are now appalled at the judgements made in the not-so-distant past. We are concerned that sentencing might be unduly influenced by the public mood.

d) We welcome the inclusion of d).

Q8) Are the purposes expressed clearly and accurately?

No

Please provide any reasons for your response.

See response previously.

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

We believe there is a need for the inclusion of purposes aligned to achieving positive outcomes, with the ambition of making Scotland a safer, healthier country. Sentencing forms an important constituent part of a wider network of organisations, systems and processes centred on one individual. Purposes and desired outcomes need to be linked to what other organisations are trying to achieve within their own part of the CJ system, and it would be most effective if the outcomes and purposes

of the sentencers reflected the aims of local and national partners, plans and strategies.

As stated previously, we would welcome, wherever possible the inclusion of a purpose with a requirement to actively consider community-based sentencing options.

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.

Though we agree that efficient use of public resources should be considered in sentencing, we would disagree about how that is reflected in this paragraph. We believe that sentencing should be fundamentally about quality and efficacy in achieving desired outcomes rather than a simple measure of 'cost', and we recognise that 'value for money' is difficult to quantify in specifics when the value can include abstract concepts such as social impact. We do, however, know the cost of a prison place for a year and that, on balance, a community sentence is generally less expensive and linked to better outcomes. We believe efficient use of public resources should be extended beyond the implications for court costs (as implied by the inclusion within the guidelines of the statement "Early guilty pleas are recognised as increasing the efficient use of public resources.") and should consider the costs of the whole sentence applied in relation to efficacy in achieving desired outcomes.

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

Yes

Please provide any reasons for your response.

See previous answer – but this should be fundamentally about outcomes rather than basic cost. Least expensive should not be the primary concern and should not have more influence in sentencing than the quality of results and achievement of desired outcomes.

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.

We agree that the guidelines would lead to an increase in public understanding and that they have the potential to be a useful asset in raising public understanding about the sentencing process. This will, however, not be effective unless paired with community engagement and promotion.

We would also highlight the relationship with media influence. No matter how transparent the rationale and purpose of sentencing guidelines and resulting judgements, a substantial degree of public awareness will be filtered through the selective interpretation of interested parties, including a potentially hostile media sphere.

In the interests of improving public awareness, the guidelines should also include a clear expression of purpose linked to the desired outcomes for those who come before sentencers.

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.

We support the aim of increasing public confidence in sentencing, but reiterate that the guidelines alone will not do this. Cooperation between justice stakeholders and working in partnership with the judiciary, combined with a consistent focus on the efficacy of sentencing measures in reducing harm and achieving outcomes can contribute to increased public confidence. Again, the guidelines could be a useful aid to this in that clarity of purpose and active communication could balance media influence on public attitudes; but only if sentencing decisions are effective in their aims of achieving outcomes.

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

Public awareness and confidence in sentencing could result in an increased use of community sentences, which comes with a resource implication for the courts, local authorities and communities.

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

An increase in transparency and accountability for sentencing in relation to efficacy in achieving stated outcomes, which would enable all partners in justice to be more

informed about how we respond to crime.

We also anticipate the following potential benefits:

- Opportunity to reduce custodial sentences and consequential cost savings
- Increased transparency
- Potential reduction in offending; and,
- Potential reduction in costs of offending.

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

We would submit the need for the impact assessment to take into account the impact of these sentencing guidelines on:

- Victims and their families
- People convicted of a crime and their families (with particular reference to children given the evidence from ACEs research etc. about the intergenerational impact of having a parent in custody)
- Communities
- Wider costs to the justice system (e.g. costs of custody vs. community-based provision)