

Name

Scottish Women's Aid

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.

We note that the guideline on the principles and purposes of sentencing is intended to:

- “provide judges and the public with a clear statement about the aims of current sentencing practice in the Scottish courts
- increase transparency by providing the public with an understanding of the approach taken by judges when deciding sentences
- promote consistency in the approaches taken by judges to sentencing”.

In our response to the 2008 consultation on the establishment of sentencing guidelines and a Scottish Sentencing Council, we stated that *“The concepts of transparency, predictability, independence, accountability and consistency must be reflected in any Scottish initiatives towards the production of sentencing guidelines and the establishment of a body to produce them. Consistency and transparency in sentencing is important not only to the offender, but also to those directly affected by the crime and to the public generally, since a perception of inconsistency in sentencing is likely to lead to a loss of public confidence in the criminal justice system.”*

We note that the consultation paper defines the “principles” as “...how a judge should approach sentencing...” while the “purposes” are the “...outcomes which the judge may be trying to achieve...” These seem sensible distinctions.

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

Please provide any reasons for your response.

In terms of the overarching principles, our comment here is the question as to who will benefit from sentencing being “*fair and proportionate*”- the offender or the victim, or society as a whole, since there is a potential conflict and tension between what a victim of crime may consider “fair” in terms of reflecting the impact, sometimes

permanent, of the offending on them. This is a matter of considerable interest and relevance to women, children and young people experiencing domestic abuse, who are still, despite numerous reforms to legislation and practice, experiencing discrimination and difficulty in reporting this behaviour and in obtaining the satisfaction of a just response that reflects the, often persistent, repeated and long-term, wrong done to them.

This underlines the importance of the content of the, yet to be developed, specific guidelines intended to address particular offending and crime types and therefore, how the guidelines for domestic-abuse related offending and sexual offending very clearly and unequivocally take these factors into account.

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

No

Please provide any reasons for your response.

See below

Q4) Are the supporting principles expressed clearly and accurately?

No

Please provide any reasons for your response.

See below.

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

Yes

We would comment on the six underpinning principles, in turn, as follows:-
“2(i) all relevant factors of a case must be considered including the seriousness of the offence, impact on the victim and circumstances of the offender;

The nature of the offending is missing from this principle and needs to be added as an additional relevant factor; this is an absolutely crucial element for consideration in crimes of violence against women, specifically domestic abuse related offending, where the victim and offender are partners or ex-partners, or possibly a child of the family, factors which are also relevant in sexual offending and stalking.

- Relevant factors for consideration in determining a fair response, as a general principle but particularly when considering women and children who have been subjected to domestic abuse, is the matter of repeat and serial offending. These, without question, are critical factors in sentencing ongoing domestic abuse- related offending, repeatedly directed against a particular woman and her children and also by serial abusers systematically abusing a number of partners over, an often lengthy, period of time.
- Following on this, it is important to understand that there may be more than one person impacted by the offending so the definition should explicitly include and recognise the impact on “victim(s)”, as opposed to an individual.
- The “circumstances” of the offender are listed as a factor for consideration but this requires careful consideration and guidance, particularly in relation to violence against women. The causes of domestic abuse are not a consequence of a lack of social or educational opportunity, mental health, “stress”, “adverse childhood experiences” or any of the number of other myths and “mitigating” circumstances which may be advanced to “explain” or minimise the abuse.
- While the “seriousness” of the offence must be a consideration, how “seriousness” is defined is the important factor. In relation to violence against women, this could result in consideration of the effect of the offence being diminished where there was no grave physical impact or injury. This will be an important consideration when the new “control” offence of domestic abuse currently before the Scottish Parliament eventually becomes law, as this will involve consideration of a completely different set of circumstances and effects than that currently before the courts.
- The accompanying paper *“Principles and Purposes of Sentencing in Scotland and Other Jurisdictions”* notes that “...principles that underpin sentencing might be thought of as encouraging a more rational and accountable approach to sentencing in general” and , in a number of jurisdictions, tend to be listed as “...proportionality of punishment, transparency, parsimony in use of punishment, offenders should be treated as citizens capable of choice and sentencing should respect the rights of victims and offenders and their families.” Therefore, respect for the rights of victims and protection of victims both need to be explicitly included and stated in the underpinning principles.

“2(ii) sentencing decisions should treat similar* offences in a similar manner. This helps aid consistency and predictability;”

- Whilst recognising the status of these principles as a general position, they will, in turn, be the base for the construction of sentencing guidelines to address specific offending categories. In the sentencing of domestic abuse, consistency and predictability is welcome, so long as the caveats we have set out above are fully incorporated and there is no move to “downgrade” offences where there is no physical abuse.
- Consistency may have to be applied to types of criminality that encompass a number of different offences. For instance, domestic abuse can be prosecuted with the perpetrator being charged with a large number of different offences, such as alarming and threatening behaviour, assaults, stalking, breach of the peace, non-consensual sharing of intimate images, sexual offences, forced marriage, but to name a few. The new “coercive control” offence will

eventually also come into the suite of offences.

“2(iii) sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case;”

We would refer you to our comments above. It is noted that the draft guidelines go on to list the purposes of sentencing as “...*punishment, reduction of crime, reflecting society’s disapproval of an offender’s behaviour and giving the offender the opportunity to make amends*”. However, also stating that “... *the aim is to encourage judges to take only such action as is necessary to achieve the desired outcome...*”, suggests that a “minimum response” position is to be adopted and the pursuance of a policy preference for delivering the least punitive response for the benefit of the offender, as opposed to a proportionate response that acknowledges the wrong and harm done to the victim.

This could lead to the routine imposition of a more lenient sentence where there is doubt as to whether or not it is too severe, preferring the interests of the offender to those of the victim. For instance, this could preclude multiple conditions, some of which would be supportive and protective of the victim, being imposed in community payback orders or the least disruptive conditions, from the offender’s perspective, being applied in the use of electronic monitoring conditions.

This is neither a fair nor proportionate response towards victims of crime. For crimes of violence against women in particular, judicial and public opprobrium of the offending and abusive behaviour is imperative and for any sort of tangible reduction in such abuse to become a reality; the punitive elements of sentencing are crucial. To respond otherwise will produce a hugely negative response from police and other actors in the criminal justice system and if judicial responses are seen as ineffective, then women simply will not report the abuse, with the attendant consequences.

Further, should the guidelines seek to define certain offences as “minor offences” and align them with “less severe” sentencing outcomes, for example, formally relegating certain offences such as breach of the peace, alarming or threatening behaviour or assault to the status of “low level” or “minor” crime, this could result in a wholesale downgrading of the seniority of the court in which these offences are tried, meaning that they would routinely become minor offences triable in the Justice of the Peace courts. This will compromise COPFS policy and the safety of women, children and young people experiencing domestic abuse since the COPFS prosecutes domestic abuse in the Sheriff Court whenever possible which allows access to a more stringent range of sentencing options than the Justice of the Peace courts.

In summary, if the implementation of the overarching sentencing guidelines had the unforeseen consequence of essentially downgrading crimes routinely involving domestic abuse to the status of “low level” or “minor” crime, either through the conditions imposed, the nature of the sentence, or the seniority of the court to which these offences are remitted for trial, this would not convey the appropriate message as how the criminal justice system should view and appropriately sentence such offenders. Such an approach would be complicit in enforcing abuser’s perceptions that their behaviour is tolerated, acceptable, of little interest and consequence to the courts and that the damage caused, either physical or emotional, to women, children

and young people is inconsequential.

This clearly demonstrates why, in devising and implementing both the “baseline” principles and future specific guidelines, the Scottish Sentencing Council and the judiciary must take on board the issues surrounding the complexity and dynamics of domestic abuse, so that guidelines do not pose an increased risk to women, children and young people experiencing domestic abuse, as opposed to an opportunity to get sentencing policy right.

“2(iv) reasons for sentencing decisions must be stated as clearly and openly as circumstances permit;”

We agree with this.

2“(v) sentencing decisions must be made lawfully and sentencers must have regard to any sentencing guidelines which are applicable;”

This is a fair approach to take. To reiterate the comments in our 2008 response, judicial discretion must not be completely fettered, because sentencers must be able to deviate from the guidelines where they consider that the guidelines recommend a sentence that is inappropriately low for the offence or crime in question, particularly, from our standpoint, where domestic abuse was an issue

“2(vi) people should be treated equally, without discrimination.”

We agree with this, on the clear understanding that this applies equally to victims as well as offenders.

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

Please provide any reasons for your response.

The draft guidelines list the purposes of sentencing as including, but clearly not restricted to “...*punishment, reduction of crime, reflecting society’s disapproval of an offender’s behaviour and giving the offender the opportunity to make amends.*” We would comment that if there are other considerations not specifically catered for and explicitly stated, then this is not in line with ensuring clarity for victims.

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

No

Please provide any reasons for your response.

See below

Q8) Are the purposes expressed clearly and accurately?

No

Please provide any reasons for your response.

Purpose 5 a) - Punishment-this is an appropriate purpose, noting that “*sentencing may seek to punish the offender*”, meaning that this will take into account the position of people forced into criminal behaviour, for instance, women experiencing domestic abuse coerced into offending by their abusive partner.

Purpose 5 (b) Reduction of crimes- *Sentencing may aim to protect the public from offending behaviour by seeking to reduce:(i)the risk of reoffending through the effective rehabilitation of offenders, providing people with the opportunity to change and move away from past offending behaviour;(ii)the risk of crime by imposing preventative measures and by deterring offending behaviour.”*

We support “*Reduction of crime*” as a valid outcome of sentencing since a deterrent effect of sentencing is an important part of the determination process. The consultation paper rightly acknowledges that although reduction of crime is not a guaranteed outcome of a sentence, is it appropriate to seek to reduce crime and deter offending through restriction of liberty or deterrence, which supports the use of an OLR, non-harassment order, RLO, Sexual Harm Prevention Orders, etc.

Purpose 5 (d) Giving the offender the opportunity to make amends- *“Sentencing acknowledges the harm caused to victims and/or communities. Sentencing may also aim to recognise and meet the needs of victims and/or communities by requiring the offender to repair at least some of the harms caused; this may be with the co-operation of those affected.”*

In addition to the above purpose in the draft guidance document, the consultation paper states, at page 16 “...5(d) *Opportunity to make amends (restitution, recompense, and restoration)*. Many people support the idea that sentencing should seek to support restitution, recompense and/or restoration, all of which involve the offender making amends in some way for their crime. We agree. Although we consider that restorative justice is a parallel or alternative to the sentencing process, we think that some elements of restorative justice are relevant in this context. The purpose as drafted aims to reflect this.”

It is simply not acceptable for the purpose at 5(d) to state that requiring the offender to repair the harms caused “... may be with the co-operation of those affected...” Any “reparation”, which is effectively a reference to the use of restorative justice, can only be facilitated with the express, informed consent of the victim; the guidance

cannot propose to allow this to happen subject only to the possibility of victims' consent being obtained. If the victim does not consent to this disposal, then it simply does not, and cannot, proceed.

We would also be extremely concerned if sentencing guidelines routinely included some provision for restorative justice since the victim of crime may absolutely not consider this to be in any way appropriate or adequate, and it has been accepted and acknowledged that use of restorative justice practices in relation to domestic abuse and sexual offending is not appropriate and should not take place.

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

Protection of victims requires to be explicitly included and stated as a purpose, since this is not covered in the existing wording expressed under any of the four stated purposes set out in the draft guidelines.

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.

See below

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

No

Please provide any reasons for your response.

With moves toward a more restricted use of imprisonment, and financial considerations playing an increasing central role in dictating sentencing practice, we do not believe that financial or "resource considerations" should play any part in fair and proportionate sentencing, apart from ensuring that the appropriate external support is available to complement community disposals for offenders with specific health or substance use issues. We are concerned this will manifest itself in guidelines placing an undue weight on the impact to the public purse of disposals, with the result that the use and availability of custodial sentences will be limited or discouraged, and undue emphasis placed on the "blanket use" of community sentences, conditional sentences and fines as viable alternatives to custody in cases.

Adopting such a generalised approach to sentencing, particularly when considering

cases involving domestic abuse, is not appropriate, and the use of these disposals requires careful, case-by-case consideration of how appropriate they are in holding the particular perpetrator to account and the implications for the safety of the women, children and young people who have experienced the abuse. We would also reiterate our concerns above on the potential for this consideration to relegate domestic abuse to the status of “low level” crime with the attendant consequences.

Our 2008 consultation made reference to the, still valid, issues addressed by the Sentencing Commission Working Group for England and Wales when they were considering their recommendations on the issue of establishing a new sentencing body. They rejected setting any such constraints or obligation on the sentencing body stating that guidelines must be based on the need to do justice in the individual case, that this principle must not be undermined by resource constraints, that the sentencing body should not consider matters of policy relating to resources, matters which, in their view, are the province of Parliament, and that this could lead to resource issues being prioritised over the justness of an individual sentence.

We would reiterate our previous recommendation relating to financial considerations of creating guidelines that there should be an assessment of the costs, likely effect and risk, including risk of further offending, to the public generally and victims and witnesses of specific crimes, arising from the implementation of the guidelines.

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

Please provide any reasons for your response.

See below

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.

Whether or not the public understand the rationale behind sentencing decision and have increased confidence depends on how the specific guidelines are constructed and implemented.

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

See our response to Question 10, above

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

This guideline may have the result of creating clarity for the public as to the principles and purposes of sentencing but the public will likely be more interested in how this plays out in the drawing up of specific guidelines and how they are then implemented in practice, particularly whether or not they have any tangible results in protecting victims and reducing offending.

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

In relation to appeals, we previously raised the issue of the position of the Appeal Court in relation to sentencing guidelines; since the whole purpose of having an appeal against sentence is to allow the Appeal Court to allow the appeal or deny it, thus reducing, increasing or quashing the sentence, it is not clear what impact consideration of these guidelines will have on Appeal Court decisions in terms of compliance with section 6 of the Criminal Criminal Justice and Licensing (Scotland) Act 2010.

Similarly, section 6 places a duty on the Lord Advocate to have regard to the guidelines and our concern is that this may encroach on the Crown's right to determine whether the facts of a case merit a higher sentence.