

Principles and Purposes of Sentencing

Consultation Analysis

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Consultation on the Principles and Purposes of Sentencing

Analysis of the responses to the consultation

The Research Shop

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Background

1. The Scottish Sentencing Council (the Council) was established in 2015 as an independent advisory body to promote consistency in sentencing, including through the preparation of sentencing guidelines for the courts.

2. The Council opened a public consultation on its draft guideline on the principles and purposes of sentencing on 1 August 2017, with views invited by 27 October 2017. The Council drew on expertise and research in Scotland and beyond to develop the draft guideline, which sets out the core principles and purposes currently relevant in Scotland. Rather than being exhaustive, the draft guideline aims to capture general foundational elements which underlie all sentencing decisions. The consultation paper was sent to a wide range of organisations and individuals and can be found at:

<https://www.scottishsentencingcouncil.org.uk/consultations/principles-and-purposes-of-sentencing>

3. The Council believes that a guideline on the principles and purposes of sentencing will increase public awareness and understanding of how sentencing decisions are reached.

The guideline 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

4. The consultation document posed 16 questions, most of these containing both closed and open elements. These asked for views on the difference between principles and purposes; the core principle of sentencing; purposes of sentencing; efficient use of public resources; and potential impacts of the guideline.

Overview of the consultation responses

5. There were 60 responses to the consultation – 35 from individuals and 25 from organisations. Some of the individuals identified themselves as involved in criminal justice in a professional capacity.

6. A breakdown in respondent category is below. Annex 1 provides a list of the organisations who responded. Individuals comprised 58% of respondents; while 42% of responses were from organisations.

| Category of respondent | Number | % of all respondents* |
|--|-----------|-----------------------|
| Offender support and representation services | 5 | 8 |
| Community justice | 4 | 7 |
| Legal practitioner groups | 3 | 5 |
| Other justice system professional groups | 3 | 5 |
| Victims' groups | 2 | 3 |
| Other organisations | 8 | 13 |
| Total organisations | 25 | 42 |
| Individuals | 35 | 58 |
| Total responses | 60 | 100 |

*Percentages may not add to totals exactly due to rounding.

7. Forty six respondents chose to submit their responses using the online system set up for this purpose. Fourteen respondents submitted their responses in emails, some using the response form provided in the consultation document, and others providing commentary in free text.

8. All respondents were given the opportunity to request confidentiality and/or anonymity. 29 respondents chose to have their response and name published; 15 asked for anonymity, although were content for their response to be published; six respondents did not want their name nor response to be published; 10 respondents did not indicate their choice, and their responses will be anonymised and not published unless specific permission is provided.

Responses were moderated for personally identifiable data, potentially defamatory statements and obscenity before being published and can be viewed at:

<hyperlink to published responses>

Introduction to the analysis of responses

9. This analysis summarises the views provided in responses against each question posed. Not every single point made in responses is reported, but general themes arising from responses are documented along with other views on each theme, with consensus and diverging ideas highlighted. Some responses were very detailed and lengthy, and salient views have been extracted from these and reported alongside views from those of other, briefer responses. Full submissions can be viewed using the hyperlink on the previous page.

10. Both closed (yes/no or agree/disagree type questions) and open questions were asked. Some respondents chose not to provide a response to the closed aspect of questions, but focussed on broader commentary instead. This is reflected in the tables below which accompany each closed question respectively, in which the number of respondents who did and who did not respond to the question is indicated.

Principles vs. Purposes

Question 1: Do you agree or disagree with the Council’s approach to the distinction between a “principle” and a “purpose” of sentencing? Please provide any reasons for your response.

| Category of respondent | Agree | Disagree | Not Answered | Total |
|--|-----------|----------|--------------|-----------|
| Offender support and representation services | 5 | 0 | 0 | 5 |
| Community justice | 4 | 0 | 0 | 4 |
| Legal practitioner groups | 3 | 0 | 0 | 3 |
| Other justice system professional groups | 3 | 0 | 0 | 3 |
| Victims’ groups | 1 | 0 | 1 | 2 |
| Other organisations | 5 | 1 | 2 | 8 |
| Individuals | 30 | 4 | 1 | 35 |
| Total respondents | 51 | 5 | 4 | 60 |

11. Fifty one of the 56 respondents who provided a view agreed with the Council’s approach to distinguishing between a “principle” and a “purpose” of sentencing. The distinction was considered to be helpful in bringing clarity to the process of sentencing and provided a useful, shared vocabulary for moving forward. A few respondents commented that the distinction should provide greater certainty and consistency in sentencing which will lead to greater efficiency in the criminal justice system, for example, for those providing advice to clients.

12. A few respondents suggested that a fuller explanation of the difference between principles and purposes could enhance clarity and understanding. One comment was that clarity is required on the relationship between principles and purposes referred to in the consultation document and the proposed offence-specific guidelines.

13. Two of the respondents who disagreed argued that the distinction is unnecessary, one suggesting that one set of principles could suffice, with the outcome being judicial adherence to these. Another view was that principles are derived from purposes and a section on purposes should precede that on principles in the guidelines.

14. One respondent considered that a further distinction should be made between purposes and outcomes, the latter perceived as a consequence of action taken, with purposes reflecting intention behind action.

Core Principle of Sentencing

Question 2: Do you agree or disagree that there should be an overarching principle of “fairness and proportionality”? Please provide any reasons for your response.

| Category of respondent | Yes | No, it should be another principle | No, there should not be an overarching principle | Not Answered | Total |
|--|-----------|------------------------------------|--|--------------|-----------|
| Offender support and representation services | 5 | 0 | 0 | 0 | 5 |
| Community justice | 2 | 1 | 1 | 0 | 4 |
| Legal practitioner groups | 3 | 0 | 0 | 0 | 3 |
| Other justice system professional groups | 3 | 0 | 0 | 0 | 3 |
| Victims' groups | 0 | 0 | 0 | 2 | 2 |
| Other organisations | 5 | 1 | 0 | 2 | 8 |
| Individuals | 31 | 4 | 0 | 0 | 35 |
| Total respondents | 49 | 6 | 1 | 4 | 60 |

15. Forty nine of the 56 respondents who provided a view agreed that there should be an overarching principle of “fairness and proportionality”. The most common reason given was that this overarching principle would help to maintain balance in sentencing, to reflect a variety of different needs, including the best interests of the community, impact on victims, and rehabilitation of offenders.

16. The proposed principle was perceived to be logical and encompassing of a variety of sentencing considerations, and would permit the flexibility required to address the individual circumstances of each situation.

17. Seven respondents, including three of the community justice respondents, suggested that “fairness” could be considered too subjective a term to use as part of the overarching principle, without further explanation.

18. Three respondents from different categories questioned whether one overarching principle can contain two different elements, which may not always be seen as harmonious. One suggested that the relationship between “fairness” and “proportionality” should be made clear.

19. Whilst supporting the proposal in the consultation document, one respondent commented that sentencers may need to take account of other relevant legislation, with its own overarching principles, such as aspects of EU law.

20. Amongst the minority of respondents who considered that other principles should apply, one individual recommended that the element of “proportionality” be replaced with “respect fundamental rights and freedoms”. This was perceived as promoting more of a human-rights-based framework for sentencing.

21. Other suggestions were for:

- including protection of the public from being victims of further crime
- including reducing the likelihood of re-offending
- specifying that the seriousness of the sentence imposed must be proportionate to the gravity of the offence
- inclusion of stipulation that, as far as possible, all affected by the offence are included in dialogue about the restoration of harm done, subject to the final authority of the judge as decision-maker
- including the word “justice” within the overarching principle

Supporting Principles

Question 3: Are the supporting principles which underlie the overarching principle of fairness and proportionality appropriate? Please provide any reasons for your response.

| Category of respondent | Yes | No | Not Answered | Total |
|--|-----------|-----------|--------------|-----------|
| Offender support and representation services | 4 | 1 | 0 | 5 |
| Community justice | 4 | 0 | 0 | 4 |
| Legal practitioner groups | 3 | 0 | 0 | 3 |
| Other justice system professional groups | 3 | 0 | 0 | 3 |
| Victims' groups | 1 | 1 | 0 | 2 |
| Other organisations | 6 | 0 | 2 | 8 |
| Individuals | 26 | 9 | 0 | 35 |
| Total respondents | 47 | 11 | 2 | 60 |

22. Forty seven of the 58 respondents who provided a view agreed that the supporting principles are appropriate. Around one-quarter of the individual respondents disagreed.

23. The supporting principles were perceived to be broadly consistent with the overarching principle, and helpful in expanding on this. One legal practitioner group welcomed the flexibility provided by what they considered to be the non-prescriptive approach; two respondents considered that more detail could help to ensure greater consistency in interpretation by sentencers. An offender support and representation service commented that the supporting principles helped to counter-balance populist responses to sentencing, based on retribution. The number of supporting principles was viewed as well-judged, however an individual respondent suggested that it may be helpful for the Council to clarify if this list of supporting principles is restrictive. This is to say if the Council will allow the courts to create or derive supporting principles and if so, to which extent. A legal practitioner asked whether the numbering of supporting principles suggests a hierarchy.

24. Two respondents emphasised that the supporting principles should not compromise the protection and rights of victims, with one suggesting that the rights and protection of victims should be included explicitly.

Question 4: Are the supporting principles expressed clearly and accurately? Please provide any reasons for your response.

| Category of respondent | Yes | No | Not Answered | Total |
|--|-----------|-----------|--------------|-----------|
| Offender support and representation services | 3 | 2 | 0 | 5 |
| Community justice | 4 | 0 | 0 | 4 |
| Legal practitioner groups | 1 | 2 | 0 | 3 |
| Other justice system professional groups | 2 | 1 | 0 | 3 |
| Victims' groups | 0 | 1 | 1 | 2 |
| Other organisations | 3 | 2 | 3 | 8 |
| Individuals | 29 | 6 | 0 | 35 |
| Total respondents | 42 | 14 | 4 | 60 |

25. Forty two of the 56 respondents who provided a view perceived the supporting principles to be expressed clearly and accurately, although just under one-quarter disagreed. Some respondents chose to provide views on specific supporting principles and these are reported below. Where respondents did not provide commentary, nothing can be inferred from their absence of comment.

Comments on the supporting principles

26. Views were provided on supporting principle **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.** Most of the commentary focused on the inclusion of consideration of the impact on the victim and the circumstances of offender, with respondents questioning how these can be determined, and which should take priority. A few respondents suggested that victim statements could be of help in relation to this principle. It was remarked that there may be more than one victim and there may be

indirect victims. One individual suggested that consideration of the impact on the victim could merit its own supporting principle.

27. A recurring view was that more detail is required on what constitutes “relevant factors” (this was raised again in response to question 5). One organisation argued that the nature of the offence should be included as a relevant factor, this being particularly relevant in cases of violence against women. Another view was that this supporting principle facilitated further consideration of the means by which financial penalties are imposed and the possibility of a formal unit fine¹ system in the future. An individual remarked that “seriousness” could be perceived differently depending on local context.

28. The second principle states **2(ii) Sentencing decisions should treat similar offences in a similar manner. This helps aid consistency and predictability.** Several respondents qualified their overall support for the principle, noting that:

- this supporting principle may not be needed if the other principles are applied
- there is still a need to retain the flexibility to allow each case to be considered on its own merits
- it is better to state that sentencing decisions should treat similar offences of a similar type in a similar manner
- there will still be a need to consider previous criminal record

29. One respondent questioned whether treating similar offences in a similar manner is an aid to consistency, and whether the appropriate place for the justification of the principle of consistency/similarity is in a guideline. Another view from an offender support and representation service was that the reference to “similar” was beneficial in that this precluded any requirement to impose identical punishments for similar offences, as identical punishments could have very different impacts.

30. A legal practitioner group suggested that this supporting principle could be made more concise: “Sentencing decisions should be consistent and predictable”. This, they argued, would remove the need to define “similar”.

¹ A unit fine system, at its most straightforward, is one in which the seriousness of the offence is marked by the imposition of a fine of a number of units rather than a specific sum of money, with the value of the unit being determined by the means of the offender in each case, generally with regard to the offender’s disposable income. In such a system the better-off will generally pay higher fines than the less well-off.

31. Views were provided on supporting principle **2(iii) Sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case.** Two main themes emerged from responses. Firstly, a few respondents considered the terminology, such as “severe” and “desired outcome”, to require further definition. Secondly, some respondents suggested that there may be circumstances in which the principle should be overridden, with examples provided from domestic abuse and mental health settings.

32. One legal practitioner group questioned whether this supporting principle is needed, as proportionality is already an integral aspect of the overarching principle. Another questioned the use of the word “severe”, stating that sentences should be what are required to achieve the purposes of sentencing in each case, and should simply be just and proportionate.

33. Supporting principle **2(iv) Reasons for sentencing decisions must be stated as clearly and openly as circumstances permit** attracted the most support of all of the principles and was perceived to have much potential for helping victims, in particular, understand the rationale behind sentencing decisions. Two respondents suggested that further thought be given as to how to communicate to different audiences, taking into consideration age and capacity in particular.

34. Views were provided on supporting principle **2(v) Sentencing decisions must be made lawfully and sentencers must have regard to any sentencing guidelines which are applicable.** One respondent suggested that this presented more as a first part of a legal requirement than as a supporting principle. A legal practitioner group considered it important in the context of non-mandatory guidelines, and where judges still have discretion (which was supported) to depart from sentencing guidelines. A community justice organisation suggested that the language could be strengthened by replacing “have regard to” with “are required to consider”.

35. Whilst supporting principle **2(vi) People should be treated equally, without discrimination** attracted some support, a few respondents questioned the inclusion of “equally” as not necessarily helpful in promoting equality. One offender support and representation service suggested that further clarification of what it means to treat people “equally” in this context could be useful. Another organisation gave their view that the place for a duty of equality is in legislation and not in this guideline. They also suggested that “should” could be replaced with “must”.

36. One legal practitioner group questioned the use of the word “people” arguing that there should be a general reference to those involved in the criminal justice process. An offender support and representation service commented that this supporting principle could be compromised by the disparity in sentencing options available in different parts of the country.

37. Two offender support and representation services considered this supporting principle to need further elaboration. One queried whether it referred to the protected characteristics under the Equality Act 2010 or whether it extended further than this. It was remarked that high quality data will be required to inform the assessment of the impact of the guidance on this supporting principle.

Question 5: Are there any other supporting principles which should be included at paragraph 2?

38. The three themes which emerged from responses were:

- consideration should be given to the impact of the sentence on the victim’s wider family and dependents, for example, if the victim is deceased
- judges should avoid custodial sentences wherever possible, with prison clearly stated as a last resort
- decisions on sentencing, and the sentences themselves, should be undertaken in a timely manner, avoiding delays where possible

39. Other suggestions for additional supporting principles, or for strengthening supporting principles, included:

- make the aims of reparation and restorative justice more explicit
- make the aim of deterrence explicit
- sentencing decisions should be effective in achieving the stated purposes of sentencing
- the human rights of the offender, and the impact on their family and dependents, should be taken into account in sentencing
- the sentencer should have to consider the relative impact of the sentence on individuals in different circumstances
- more than one sentencer should consider cases if there are unusual circumstances

- guidance is required when sentencing multiple crimes, the so-called “totality” principle
- the sentencer should have to outline all sentencing options they deem relevant to the offence, and their reasoning as to why they deem certain disposals more appropriate than others

Purposes of Sentencing

40. The draft guideline states that the sentence selected should best achieve the purposes of sentencing that are appropriate to the particular case, but always reflect the core principle of fairness and proportionality. The purposes may include: punishment; reduction of crime; reflecting society’s disapproval of an offender’s behaviour; and giving the offender the opportunity to make amends.

Question 6: 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.

| Category of respondent | Agree | Disagree | Not Answered | Total |
|--|--------------|-----------------|---------------------|--------------|
| Offender support and representation services | 2 | 3 | 0 | 5 |
| Community justice | 3 | 1 | 0 | 4 |
| Legal practitioner groups | 3 | 0 | 0 | 3 |
| Other justice system professional groups | 3 | 0 | 0 | 3 |
| Victims’ groups | 0 | 0 | 2 | 2 |
| Other organisations | 6 | 0 | 2 | 8 |
| Individuals | 28 | 6 | 1 | 35 |
| Total respondents | 45 | 10 | 5 | 60 |

41. Forty five of the 55 respondents who provided a view agreed with the approach to the purposes of sentencing, although amongst the offender support and representation services, three of the five respondents disagreed.

42. A few respondents emphasised the importance of the purposes of sentencing being linked clearly to the principles of sentencing, which they considered were made explicit in paragraph 4 of the draft guideline.

43. Two main themes emerged from those who considered the approach to the purposes of sentencing, as set out, could be improved. Firstly, several respondents from a range of sectors suggested that the guideline should present a hierarchy of purposes in order to promote consistency in sentencing. This was viewed as important in providing guidance to sentencers on how to choose which purpose to prioritise. Secondly, a few respondents perceived the term “may include” as too open, lacking in clarity, and raising the question of why four purposes have been listed but not others.

44. A few respondents considered paragraph 4 to be ambiguous and suggested re-drafting to ensure clarity. Additionally, paragraph 4 may not have been fully understood by all respondents as one respondent queried whether paragraph 4 meant that any sentence imposed for one of the multiple purposes should always reflect the core principle by being proportionate, which was the express intent of the guideline.

45. A suggestion was made that judges should have to state their reasons if they employ an unlisted purpose, in order to encourage transparency, clarity and consistency.

Question 7: Are the purposes as listed at paragraph 5(a)-(d) appropriate? Please provide any reasons for your response.

| Category of respondent | Yes | No | Not Answered | Total |
|--|-----------|-----------|--------------|-----------|
| Offender support and representation services | 0 | 5 | 0 | 5 |
| Community justice | 2 | 2 | 0 | 4 |
| Legal practitioner groups | 2 | 0 | 1 | 3 |
| Other justice system professional groups | 2 | 1 | 0 | 3 |
| Victims' groups | 0 | 1 | 1 | 2 |
| Other organisations | 4 | 2 | 2 | 8 |
| Individuals | 19 | 16 | 0 | 35 |
| Total respondents | 29 | 27 | 4 | 60 |

46. Respondents were divided overall on whether the proposed purposes of sentencing are appropriate. None of the offender support and representation services perceived the purposes to be appropriate. Several other categories of respondent had mixed views.

Question 8: Are the purposes expressed clearly and accurately? Please provide any reasons for your response.

| Category of respondent | Yes | No | Not Answered | Total |
|--|-----------|-----------|--------------|-----------|
| Offender support and representation services | 3 | 2 | 0 | 5 |
| Community justice | 2 | 2 | 0 | 4 |
| Legal practitioner groups | 2 | 0 | 1 | 3 |
| Other justice system professional groups | 2 | 1 | 0 | 3 |
| Victims' groups | 1 | 0 | 1 | 2 |
| Other organisations | 4 | 1 | 3 | 8 |
| Individuals | 24 | 11 | 0 | 35 |
| Total respondents | 38 | 17 | 5 | 60 |

47. Thirty eight of the 55 respondents who provided a view considered that the proposed purposes are expressed clearly and accurately. One legal practitioner group welcomed the use of bold font to highlight the key focus of each item listed. A community justice organisation commented that the reason for including each purpose is clearly stated (although a legal practitioner group questioned why the purpose at (c) did not have a supporting rationale for its inclusion).

48. An individual respondent perceived the wording to be “problematic” in that it might be seen to suggest that any penal sanction imposed by a judge under any sentencing purpose except the first on the list (punishment), is not a punishment.

49. A few respondents questioned whether or not the purposes were listed in hierarchical form with one suggesting that this be clarified within the sentencing guideline.

Comments on the Purposes

50. Views were mixed on whether **punishment** should be included as a purpose, and on this purpose appearing first.

51. Whilst a few respondents explicitly welcomed the inclusion of punishment as one of the purposes of sentencing, a few of the individual respondents, in addition to two of the offender support and representation services, suggested that punishment describes more a means to an end, rather than constituting an end in itself.

52. A few respondents considered that even though the list of purposes is not intended to present as a hierarchy, placing punishment first in the list gives the impression that this is the most important purpose. One offender support and representation service remarked that listing punishment first may make the public less supportive of sentences which do not “look like” punishment, with community-based sentences and restorative justice appearing as “soft touch”.

53. The purpose of **reduction of crime** through effective **rehabilitation of offenders** received much support from respondents, with repeated suggestions for it to stand alone as a purpose, rather than be sub-ordinated under the heading “Reduction of crime”. It was viewed by several respondents as a primary purpose, with one justice system professional group perceiving rehabilitation to sit uneasily, due to its individual focus, with what they viewed as the more punitive purposes of preventative measures and deterrence aimed at the general population.

54. One offender support and representation service questioned whether “rehabilitation” is the most appropriate term, in that its focus is on individual change, whereas what may need to change are the offender’s circumstances and context.

55. Views were provided on the purpose of **reduction of crime** by imposing **preventative measures** and by **detering** offending behaviour. The most common theme to emerge was that the deterrent effect of sentencing may not be as effective as the deterrent effect created by the likelihood of being detected and prosecuted.

56. Whilst some respondents welcomed the inclusion and presentation of the purpose of deterring offending behaviour, others considered that the guideline should make it clearer

whether or not this is a key purpose, rather than part of a sub-ordinated one. One individual called for deterrence to be a stand-alone purpose.

57. The proposed purpose of **reflecting society's disapproval of an offender's behaviour** attracted most comment, with the majority of those providing a view disagreeing with its inclusion on the grounds that societal views on acceptable behaviour are subject to change and influence. Several respondents envisaged politics, media, "public outcries" and populist views dictating what society should disapprove of, and thereby influencing sentencing and risking the over-representation of certain groups appearing for sentencing, and increasing marginalisation and stigma. One community justice respondent suggested this purpose could result in inconsistent and disproportionate sentencing. Others perceived the purpose to be "fluffy" and subjective.

58. Many respondents expressed their support for the purpose of **giving the offender the opportunity to make amends**. A few suggested that this, along with rehabilitation of offenders, should be the priority for judges when sentencing. The purpose was viewed by some as a cautious acknowledgement of the potential for restorative justice within sentencing.

59. Several respondents emphasised that the full co-operation of all involved is required for offenders to make amends, and the need for such agreement of both offender and victim(s) should be made clear.

Question 9: Are there any other purposes which should be included?

60. Four additional purposes were proposed:

- public protection (8 responses)
- promotion of responsibility on behalf of the offender² (2 responses)
- active consideration of community-based sentencing options (1 response)
- establishment of a structured and prescribed set of boundaries within which an offender can address those factors which have contributed to the crime (1 response)

² It is unclear if this referred to offenders taking responsibility for past actions or encouraging more responsible behaviour in future.

Efficient use of Public Resources

61. The draft guideline states that in achieving the appropriate purpose(s) of a particular sentence, efficient use of public resources should be considered. Early guilty pleas are recognised as increasing the efficient use of public resources.

Question 10: 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? Please provide any reasons for your response.

| Category of respondent | Agree | Disagree | Not Answered | Total |
|--|-----------|-----------|--------------|-----------|
| Offender support and representation services | 1 | 4 | 0 | 5 |
| Community justice | 3 | 1 | 0 | 4 |
| Legal practitioner groups | 1 | 1 | 1 | 3 |
| Other justice system professional groups | 3 | 0 | 0 | 3 |
| Victims' groups | 0 | 1 | 1 | 2 |
| Other organisations | 2 | 3 | 3 | 8 |
| Individuals | 21 | 14 | 0 | 35 |
| Total respondents | 31 | 24 | 5 | 60 |

62. There were mixed views on the approach to the efficient use of public resources as set out in the draft guideline, although an overall majority of 31 respondents out of the 55 who provided a view agreed with the approach.

63. A few respondents stated their agreement that the efficient and/or effective use of resources should not be a principle or purpose of sentencing, in order to allow for flexibility and to avoid any potential conflict with the core principle. Two community justice respondents considered that paragraph 6 achieved a balance between ensuring individual effective disposals, whilst maintaining efficient resource-management and cost-effective public spend.

64. More comments emerged from those disagreeing with the approach set out. Key amongst these were:

- cost should not be a determining factor in sentencing (5 responses)
- rather than a blanket approach, a balance needs to be struck between efficient use of resources and sensitivity to individual circumstances and needs (4 responses)
- efficient use of public resources should be a core principle (3 responses)
- the approach could open the door to arguments for cheaper, less onerous sentences (1 response)

65. One offender support and representation service suggested that the paragraph be re-framed to achieve a balance between the need to achieve an efficient use of public funds, and the principle of equal access to justice. Another justice system professional group considered that the paragraph raised the issue of geographical availability of resources, which may not be consistent, and the impact this will have on sentencing decisions.

66. A few respondents commented that rather than focus specifically on early guilty pleas as a means to increase the efficiency of public resources use, a broader “root and branch” consideration of how the system uses the resources it has could be appropriate.

67. Two legal practitioner groups identified the need for paragraph 6 to articulate more clearly the practice of sentencing discounting, with one suggesting that in due course there will be examples emerging from case law which will help to provide clarity and consistency in practice.

68. A few respondents commented further on the topic of early guilty pleas. An offender support and representation group expressed concern that a focus on achieving an early guilty plea as a mechanism for improving efficiency in use of public resources could compromise the right to a fair trial for vulnerable people. Two individual respondents, whilst supporting the efforts to achieve early guilty pleas, suggested that the emphasis should be on securing these promptly so as to avoid late pleas and waste of public resources.

Question 11: Is it appropriate to consider efficient use of public resources during the sentencing process? Please provide any reasons for your response.

| Category of respondent | Yes | No | Not Answered | Total |
|--|-----------|-----------|--------------|-----------|
| Offender support and representation services | 4 | 1 | 0 | 5 |
| Community justice | 4 | 0 | 0 | 4 |
| Legal practitioner groups | 2 | 0 | 1 | 3 |
| Other justice system professional groups | 3 | 0 | 0 | 3 |
| Victims' groups | 0 | 1 | 1 | 2 |
| Other organisations | 4 | 2 | 2 | 8 |
| Individuals | 27 | 8 | 0 | 35 |
| Total respondents | 44 | 12 | 4 | 60 |

69. Forty four of the 56 respondents who provided a view agreed that it is appropriate to consider efficient use of public resources during the sentencing process. A few of the individuals emphasised the importance of this in view of what they perceived to be the high costs of the sentencing process. Other respondents, from community justice and offender support and representation services, supported the proposal as encouraging more innovative and considered use of community sentences over other options, such as custody.

70. Several respondents qualified their support, stating that they agreed on the appropriateness of considering efficient use of public resources during the sentencing process in one or more of the following contexts:

- where public interest is also a determining factor
- where effectiveness of outcomes is also a key consideration
- where supported with openness and transparency in explaining the rationale of decisions
- where best value is a consideration
- where focus is widened from a narrow focus on securing guilty pleas
- where decisions are reviewed and there is regular dialogue between the judiciary and the Scottish Government to evaluate “what works” with regards to sentencing

71. The view of six respondents (four of them individuals) was that consideration of the efficient use of public resources during the sentencing process should not be the determining factor. A few respondents queried why this factor should be singled out over other factors for consideration, such as public safety and rehabilitation. Two legal practitioner groups shared the view that the integrity of the sentencing process should not be compromised by efficient use of public resources appearing as the key driver in sentencing. As this was not the intent of paragraph 6, these responses may raise concerns over the clarity of this paragraph.

72. Five respondents from three different sectors questioned how cost-efficiency will be judged, with one remarking that this could be complicated, due to the inter-relatedness of the criminal justice system where savings in one area can have cost implications for another.

73. One offender support and representation service and one respondent from the “other” category of organisations suggested that “efficient” be replaced with “effective”, to convey the meaning of resources achieving the intended purpose of the sentence in the shorter and longer terms.

Potential Impacts of the Guideline

Question 12: 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.

| Category of respondent | Agree | Disagree | Not Answered | Total |
|--|-----------|-----------|--------------|-----------|
| Offender support and representation services | 2 | 3 | 0 | 5 |
| Community justice | 4 | 0 | 0 | 4 |
| Legal practitioner groups | 3 | 0 | 0 | 3 |
| Other justice system professional groups | 3 | 0 | 0 | 3 |
| Victims’ groups | 1 | 0 | 1 | 2 |
| Other organisations | 3 | 1 | 4 | 8 |
| Individuals | 26 | 9 | 0 | 35 |
| Total respondents | 42 | 13 | 5 | 60 |

74. Forty two of the 55 respondents who provided a view agreed that the guideline would lead to an increase in public understanding of how sentencing decisions are made. Amongst offender support and representation services, however, three of the five respondents disagreed.

75. The reasons provided by many of those who considered that public understanding would increase included:

- the guidelines are written in a clear, brief and user-friendly manner which makes them readily understandable to the public
- the guidelines highlight the various considerations and complexities which sentencers have to take into account, which demonstrates to the public that there is more to sentencing than simply punishing the offender
- the distinction and connectedness between the principles and purposes of sentencing provide a clear framework for public understanding
- the public may question decisions more frequently as a result of the guideline, which, in turn, may contribute to deeper understanding of sentencing issues

76. Many respondents suggested that increased public understanding would depend on how the guideline is communicated and promoted, and the extent to which the public and the media engage with it. A few individuals considered that the increase in public understanding may not be as great as expected; one offender representation and support service suggested that increased public understanding may manifest over the longer rather than shorter term.

77. Amongst those who did not consider that the guideline would lead to an increase in public understanding, the main reasons given were:

- the guideline is not detailed enough to ensure consistency in sentencing decisions across different sentencers
- the public will not be aware of the guideline unless there is a public education campaign
- history tells us that things can look good on paper, but may not translate into practice
- those who should read the guideline will not engage with it
- the public will not understand the difference between principles and purposes

Question 13: 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.

| Category of respondent | Agree | Disagree | Not Answered | Total |
|--|-----------|-----------|--------------|-----------|
| Offender support and representation services | 3 | 2 | 0 | 5 |
| Community justice | 4 | 0 | 0 | 4 |
| Legal practitioner groups | 3 | 0 | 0 | 3 |
| Other justice system professional groups | 2 | 0 | 1 | 3 |
| Victims' groups | 1 | 1 | 0 | 2 |
| Other organisations | 2 | 0 | 6 | 8 |
| Individuals | 20 | 14 | 1 | 35 |
| Total respondents | 35 | 17 | 8 | 60 |

78. Thirty five of the 52 respondents who provided a view agreed that the guideline would lead to an increase in public confidence in sentencing.

79. Amongst those who considered that an increase in public confidence would result from the guideline, the two main reasons provided were that the guideline helped the public to understand more about the judicial decision-making behind sentences, and provided greater transparency. A few of the offender support and representation services suggested that confidence may increase over the longer rather than the shorter-term.

80. Some respondents considered that the media, politics, and the way the guideline is implemented will influence whether or not public confidence is increased.

81. Several respondents qualified their response, stating that public confidence was likely to increase subject to:

- the courts applying the guideline consistently over time. It was remarked that without this, a drop in public confidence could result (6 responses)
- sentences being perceived as fair and effective (4 responses)
- the public being aware of the guidelines. (3 responses)

82. Two respondents suggested that confidence could be boosted further by making clear that the application of the guideline will be monitored.

83. Amongst those who did not consider that the guideline would lead to an increase in public confidence, the main reason given was that the guideline by itself may have little impact on the public without supporting efforts to engage and educate the public. A few respondents considered that the tabloid press may be more influential in influencing public opinions on sentencing.

84. A few individual respondents gave their view that no matter what guidelines are implemented, particular elements of the public will always consider that sentences are too harsh or too lenient, depending on their perspective.

85. One offender support and representation service considered that the guideline is not detailed enough to make an impact. Another suggested that the guideline could serve to decrease public confidence by making explicit the areas of decision-making left to individual sentencers.

Question 14: What costs (financial or otherwise) do you see arising from the introduction of this guideline, if any?

86. Twenty nine respondents provided a view, with most not envisaging significant costs arising from the introduction of the guideline, and several suggesting that the net effect could be cost-savings.

87. Where financial costs were identified, these related to the following areas:

- training for judges
- administration and printing costs
- increase in the number of victim statements
- more assessments and reports to inform decision-making
- appeals against previous sentences
- launch of the guideline and subsequent communication strategy
- increased costs associated with restorative justice

Question 15: What benefits do you see arising from the introduction of this guideline, if any?

88. Forty five respondents answered this question with 40 of them identifying potential benefits to arise from the introduction of the guideline. Five respondents, including four individuals, did not consider any benefits would arise from the guideline as currently drafted.

89. The benefits identified most frequently were:

- greater awareness and understanding of sentencing and the considerations which the sentencer has to take into account (15 responses)
- greater transparency and clarity in sentencing (12 responses)
- more consistent sentencing (8 responses)
- more effective sentencing; reduced use of custodial sentencing (7 responses)
- increased public confidence in the sentencing process (4 responses)
- greater fairness in sentencing. (4 responses)

Further Comments

Question 16: Would you like to make any other comments in relation to any matter arising from this consultation?

90. There were many positive comments about the consultation and its focus. The document was viewed as clear, concise and in plain English.

91. Positive comments included:

- the efforts to encourage more consistent, fair, principled and defensible sentencing solutions were welcomed
- public participation on this topic was viewed as beneficial
- the decision to undertake the guidance was applauded
- the guidelines were viewed as being extremely positive in increasing awareness and illuminating decision-making

92. Two respondents considered the detail of the draft guidelines to be insufficient to be effective in guiding sentencing (this view already provided by one of them at paragraph 85 above).

93. Several respondents highlighted their interest in being involved in future guidelines in the pipeline. One respondent expressed disappointment that the Council was not intending to address, specifically, sentences imposed by courts for health and safety offences.

94. Amongst the suggestions for improvements, the most frequently raised was that more account should be taken of the impact of sentences on the families of both victims and offenders. Other suggestions were for more emphasis on community sentencing; re-integrating prisoners into society; immediacy of sentencing; and differentiating between crimes against the person and crimes against property.

95. Other substantive comments included:

- a question over why the principles and purpose are not on a statutory footing as in many other common law jurisdictions
- a question over whether the purposes and principles apply equally across all age groups
- the suggestion that resources may need to be made available to support restorative justice, and lessons can be learned from other jurisdictions, such as New Zealand
- a concern over the degree to which public opinion can be allowed to influence legal decision-making
- a question over what impact the consideration of the guidelines will have on appeal court decisions in terms of compliance with Section 6 of the Criminal Justice and Licensing (Scotland) Act 2010

ANNEX 1: ORGANISATIONS RESPONDING TO THE CONSULTATION

OFFENDER SUPPORT AND REPRESENTATION SERVICES = 5

Apex Scotland

Families Outside

Positive Prison? Positive Futures

Prison Reform Trust

Scottish Working Group on Women's Offending

COMMUNITY JUSTICE = 4

Community Justice Partnership, Dumfries and Galloway Council

Community Justice Partnership, Glasgow City Council

Community Justice Scotland

Joint Faiths' Board on Community Justice

LEGAL PRACTITIONER GROUPS = 3

Faculty of Advocates

Sheriffs' Association

The Law Society of Scotland

OTHER JUSTICE SYSTEM PROFESSIONAL BODIES = 3

Scottish Children's Reporter Administration

Social Work Scotland

Whole System Approach Implementation Group

VICTIMS' GROUPS = 2

Scottish Women's Aid

Victim Support Scotland

OTHER = 8

Centre for Youth and Criminal Justice

Chartered Institution of Wastes Management

Criminal Justice Voluntary Sector Forum

Food Standards Agency

Royal Society for the Protection of Birds

Scottish Hazards

UKRPA

University of Oxford Sentencing Discussion Group

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