



Principles and Purposes of Sentencing

Scottish Sentencing Council report on public consultation exercise

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Contents

Chair's foreword	page 3
Introduction	page 4
Part 1: Response to public consultation exercise	page 6
Part 2: Next steps	page 13

Chair's foreword



The Scottish Sentencing Council was established on 19 October 2015 as an independent advisory body to promote consistency in sentencing, including through the preparation of sentencing guidelines for the courts.

The Council took an early decision to consult publicly on all of our draft sentencing guidelines. We consider that seeking views from across Scotland is a vital part of the guideline development process, helping ensure that any guidelines issued are of assistance both to the judiciary and to the wider public.

In August 2017, we published our first public consultation, on the draft Principles and Purposes of Sentencing guideline. We received responses from a wide variety of organisations and individuals, which have been invaluable in informing our work to finalise the guideline and in highlighting areas for potential future consideration.

The final guideline will shortly be submitted to the High Court of Justiciary for its consideration. Ahead of this, however, we consider it important to issue a report on the public consultation exercise, setting out our views on the key points raised and indicating how we have adjusted our approach as a result.

I am pleased to introduce this report and would like to thank all those who took the time to consider the consultation and to offer their views. Your contributions, and your interest in the work of the Council, are greatly appreciated.

Rt. Hon Lady Dorrian
Lord Justice Clerk and Chair of the Scottish Sentencing Council

Introduction

Public consultation exercise

1. The Scottish Sentencing Council launched a public consultation on its first draft guideline, the Principles and Purposes of Sentencing, on 01 August 2017. The consultation ran for 3 months, with views invited by 27 October 2017.
2. Sixty responses were received from a wide range of organisations and individuals. We have published the [responses](#)¹ from the organisations, along with those from individuals who gave their consent for this. An [analysis](#)², conducted independently by the Research Shop, examines each of the questions posed by the consultation and summarises the key points and themes.

Council response

3. The findings from the public consultation exercise informed our work to finalise the Principles and Purposes of Sentencing guideline, which will be submitted to the High Court of Justiciary in 2018.
4. The purpose of this report is to set out the Council's views on some of the most common matters raised during the public consultation exercise and to give an indication of how the guideline submitted to the High Court will differ as a result. Should the guideline be approved (either as submitted or with modifications), it will be published by the Council shortly afterwards.
5. We have deliberately focused on addressing those matters which appear to be of most interest to respondents. While not all points raised are covered in this report, all of the responses received have been considered.

¹ <https://www.scottishsentencingcouncil.org.uk/consultations/principles-and-purposes-of-sentencing-consultation-responses>

² <https://www.scottishsentencingcouncil.org.uk/media/1639/principles-and-purposes-of-sentencing-consultation-analysis.pdf>

6. **Part 1** of this report sets out the Council's views on the public consultation exercise, including the actions which will be taken as a result.
7. **Part 2** explains the likely next steps in relation to the Principles and Purposes of Sentencing guideline.
8. The original consultation paper, associated documents, responses, and analysis can be accessed at: <https://www.scottishsentencingcouncil.org.uk/consultations/principles-and-purposes-of-sentencing>.

Part 1: Response to public consultation exercise

Approach to providing views

9. The Council’s views on the key points raised in relation to each part of the draft guideline are set out below. We have also indicated how the guideline submitted to the High Court for approval will differ as a result of these, and what other action may be taken.
10. While a brief summary of the key points raised is provided, we suggest that you refer to the [consultation analysis](#)³ (or its [executive summary](#)⁴) for further context.

Principles vs. purposes

11. Question 1 of the consultation sought views on the distinction between “principles” and “purposes” of sentencing.
12. There was a high level of support for the Council’s approach to distinguishing between a principle and a purpose of sentencing, with no significant objections raised.

What does the Council intend to do?

13. Given the support for the approach taken in the draft guideline, there will be no changes made in relation to this area.

Core principle of sentencing

14. Question 2 of the consultation asked whether those responding supported the core principle of “fairness and proportionality”.
15. Support for the core principle was strong. Of those who offered comments, some respondents did express the view that the word “fairness” may be too vague. There were

³ <https://www.scottishsentencingcouncil.org.uk/media/1639/principles-and-purposes-of-sentencing-consultation-analysis.pdf>

⁴ <https://www.scottishsentencingcouncil.org.uk/media/1640/principles-and-purposes-of-sentencing-consultation-analysis-executive-summary.pdf>

also some concerns raised about possible difficulties with the principle including two different concepts, and around how to balance fairness with proportionality.

16. While the Council appreciates these points, we consider that the level of detail provided in the guideline at present is appropriate. The terms used in the guideline are generally well understood by the courts and are intended to be interpreted widely. A more detailed explanation or definition of terms such as “fairness” would not only add to the complexity of the guideline but also risk inadvertently restricting its use. In addition, the core principle is not presented in isolation; the subsequent supporting principles are intended to expand upon and explain its use.

17. To assist with these and similar points raised elsewhere in the consultation, however, we consider that it may be useful to publish explanatory material alongside the guideline.

What does the Council intend to do?

18. While we consider that the guideline does not need to be amended as a result of these points, we will consider the development of an illustrative case study or studies to help demonstrate how some of the concepts in question may operate in practice.

Supporting principles

19. Questions 3-5 related to the supporting principles, which contribute to the core principle of fairness and proportionality.

20. Respondents broadly agreed with the supporting principles. A number of issues were raised, however.

21. In particular, there were some suggestions that further detail should be provided around the meaning of terms such as “relevant factors”, “similarity”, and “equality”. As in relation to the comments about the term “fairness”, we consider that any definition in the guideline would risk narrowing what are intentionally broad concepts. However, we accept that it may be useful to consider these points when developing any case studies which are published alongside the guideline.

22. In relation to the third supporting principle (“sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case”), some respondents suggested that exceptions may be necessary in cases where a victim is at continuing risk of harm.
23. While we consider this underlying concern to be valid, any circumstances which may require a longer sentence (for example, to protect a victim of domestic abuse) would, in our view, already be covered by this supporting principle. The principle clearly states the need to achieve the appropriate purposes of sentencing in each case – which, in those cases given as examples, may well include public protection.
24. When asked whether any other supporting principles should be included, a number of key themes emerged. In particular, it was suggested that consideration should be given to any impact on a victim’s wider family; that judges should treat prison as a last resort; and that decisions on sentencing should be taken in a timely manner.
25. The Council agrees that a reference to considering the impact on others affected by the offence (including the victim’s family, the offender’s family, or others) would be useful. In relation to treating prison as a last resort, the guideline states that “sentences should be no more severe than is necessary”, and we consider that any further comment on a specific disposal would not be appropriate for a general guideline. We consider that the comments around timing could cover a number of different areas, some of which are outwith the court’s control (for example, the preparation of reports to assist with sentencing), and that this would also not be an appropriate topic for a general guideline.
26. Lastly, there were suggestions around how some of the supporting principles might be stated more clearly and in relation to avoiding the impression of creating a hierarchy of principles, which we agree would be beneficial.

What does the Council intend to do?

27. In response to the points noted above, the guideline submitted to the High Court for approval will:

- Include a reference to giving consideration to the impact on others affected by the offence (in addition to the victim) in the supporting principles
- Present the supporting principles as a bulleted list to reduce any suggestion of a hierarchy
- Include some minor drafting changes to improve the clarity of some of the supporting principles

28. We also intend to consider the issues raised in relation to the definition of various terms should any supporting case studies be developed and published alongside the guideline.

Purposes of sentencing

29. Questions 6-9 sought views on the proposed purposes of sentencing.

30. There was strong support for the Council's overall approach to the purposes of sentencing. There were some suggestions, however, that an explicitly hierarchical approach be adopted, setting out which purposes should be prioritised. We do not agree – the most relevant purpose or purposes of sentencing in each case will depend on its own particular facts. Each case is unique, and we consider that the presiding judge is in the best position to determine which purposes should be prioritised. Indeed, as with the supporting principles, we consider that it would be beneficial further to emphasise that the purposes are in no particular order.

31. Views on the specific purposes of sentencing were more mixed, with a significant proportion of respondents expressing disagreement with those proposed. There were a number of suggestions that rehabilitation – which attracted broad support – should be listed as an individual purpose of sentencing. There was also support for including the concept of public protection. While both of these areas are already covered to some extent by the draft guideline, we agree that placing more emphasis on these areas would be worthwhile.

32. The purpose “reflecting society's disapproval of offending behaviour” attracted some criticism and appeared to be interpreted by some respondents as suggesting that

sentencers would be unduly influenced by current public views on specific offences. This was not the Council's intention. This purpose was intended to describe the concept of denunciation, which is not about being guided solely by public sentiment. It is a means of expressing, in a measured way, society's concern about and disapproval of the offending behaviour under consideration. While we intend to retain this concept as a purpose, we consider that it requires to be stated more clearly given the comments received.

33. There were also some questions raised in relation to the purpose "giving the offender the opportunity to make amends", specifically about the statement that "this may be with the co-operation of those affected". It was suggested that if this is a reference to restorative justice, no such action should take place without the express consent of the victim and others involved.

34. We are conscious that restorative justice has a variety of definitions depending on context. This purpose was not intended to signal the use of any new disposals or the involvement of restorative justice in the sense of direct contact between a victim and an offender. As the consultation paper notes, we consider that restorative justice is primarily a parallel or alternative to the sentencing process rather than an integral part of it. This purpose reflects the fact that some disposals - such as community payback orders - can have a restorative element, in that they enable the offender to make a contribution to society (for example, by cleaning graffiti or collecting litter), and that this can be one of the purposes of a particular sentence.

35. We consider that any guidance around what might be involved in the use of particular types of disposals would be more appropriately addressed in guidelines which focus on specific offences or types of offender. We therefore intend to simplify the drafting of this purpose, and to take into consideration the comments made around restorative justice in general when developing future guidelines.

What does the Council intend to do?

36. In response to the points noted above, the guideline submitted to the High Court for approval will:

- Present the purposes of sentencing as a bulleted list and include additional wording to reduce any suggestion of a hierarchy
- Include “rehabilitation of offenders” and “protection of the public” as distinct purposes, replacing the “reduction of crime” purpose
- Include a clearer description of the “reflecting society’s disapproval of offending behaviour” purpose more accurately to represent the concept of denunciation
- Include a simpler version of the “giving the offender the opportunity to make amends” purpose
- Include some minor drafting changes to improve clarity and readability overall

37. We also intend to give consideration to the points raised in relation to restorative justice in the context of developing future offence or offender specific guidelines.

Efficient use of public resources

38. Questions 10 and 11 asked about the Council’s proposed approach to considering the efficient use of public resources during sentencing.

39. There was reasonably strong support for considering the use of public resources during sentencing, though more mixed views on how this was approached in the draft guideline. In particular, a number of respondents appeared to interpret the relevant section as requiring the efficient use of public resources to be a determining or primary factor in sentencing. This was not the Council’s intention – while it may be appropriate for the court to consider the efficient use of resources, this is not the determining factor when making sentencing decisions.

What does the Council intend to do?

40. The guideline submitted to the High Court for approval will contain some drafting changes to the sections referring to the efficient use of public resources, to clarify that this is simply something which may be considered by the court while achieving whatever purposes of sentencing are appropriate in the individual case.

Potential impact of the guideline

41. Questions 12-15 sought views on the likely impact of the guideline, including in relation to potential costs and benefits.

42. The comments received were broadly supportive of the Council's approach, while noting the need for further public education in this area. No benefits or costs were raised which require any significant changes to the impact assessment which accompanied the draft guideline.

What does the Council intend to do?

43. We do not consider that any changes to the guideline or impact assessment are required to address any of the views provided in this section, but we intend to give further consideration to the comments relating to the need for public education as part of our ongoing work to raise public awareness and understanding of sentencing.

Part 2: Next steps

Submission of guideline for approval

44. Sentencing guidelines developed by the Council must be approved by the High Court of Justiciary before they apply to decisions about sentencing. The High Court has the power to approve or reject a guideline, or to approve it with modifications.⁵

45. The Council finalised the Principles and Purposes of Sentencing guideline at its meeting in March 2018 and agreed to submit this to the High Court for approval as soon as is practicable.

Entry into force

46. Should the guideline be approved (either as submitted or with modifications), it will likely come into force later in 2018, though this is a matter for the High Court to determine. We intend to work with the judiciary ahead of this to ensure they are familiar with the guideline and its applicability, as well as carrying out further public education and awareness raising work.

47. Further details about this guideline will be made available on the Council's website at www.scottishsentencingcouncil.org.uk in due course.

Future guidelines and engagement with Council

48. The Council has committed to consulting publicly on all of its draft guidelines. Future consultations will be available on the Council's website.

49. We welcome views from all interested parties on our draft guidelines, business plan, or sentencing in general. If you wish to get in touch with the Council, you can do so at: <https://www.scottishsentencingcouncil.org.uk/contact-us>

⁵ See section 5 of the Criminal Justice and Licensing (Scotland) Act 2010 (<http://www.legislation.gov.uk/asp/2010/13/section/5>)

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