

Principles and Purposes of Sentencing

A Scottish Sentencing Council Consultation

August 2017

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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. We published our first Business Plan in October 2016, setting out our priorities and indicating what sentencing guidelines we intend to prepare.

As a first step, we have decided to prepare a guideline setting out the general principles and purposes of sentencing.

Although some guidance is available - in the form of court decisions - on appropriate sentences in particular cases, the fundamental principles and purposes of sentencing have not been expressly defined in any single piece of legislation or court judgment.

We believe that developing a sentencing guideline which clearly sets out both the principles underlying sentencing decisions and the overarching purposes of sentencing will bring significant benefits both to the public and to the courts.

I am pleased, therefore, to introduce this public consultation on the Council's first draft guideline, Principles and Purposes of Sentencing.

Drawing on expertise and research both in Scotland and in other jurisdictions, this draft guideline aims to set out, clearly and succinctly, the core principles and purposes currently relevant in Scotland. The draft guideline is not intended to be exhaustive but rather to capture those foundational elements which underlie all sentencing decisions.

This work will also inform the development of further general guidelines relating to the sentencing process and the sentencing of young people, as well as forming a principled basis on which to prepare offence specific guidelines in future.

The Council cannot complete this work in isolation; it is vital that we seek views from across Scotland and beyond to inform our work. By participating in this consultation exercise, you

will play a crucial part in allowing us to develop and finalise our first guideline, ensuring that it truly reflects the principles and purposes of sentencing in Scotland and that it is of use to both the public and to the courts.

I hope that you take the time to consider and respond to this consultation and I look forward to receiving your views.

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

Responding to this consultation

Responses to this consultation are welcomed by **noon on 27 October 2017**.

Responses can be submitted electronically at:

<http://www.scottishsentencingcouncil.org.uk/consultations/Principles-and-Purposes-of-Sentencing>.

Alternatively, you can provide your response by email to sentencingcouncil@scotcourts.gov.uk or send a hard copy to:

Scottish Sentencing Council
Parliament House
Parliament Square
Edinburgh
EH1 1RQ

If you do not respond using our website, please ensure that you include a copy of the respondent information form provided at the end of this document. A word version is available at: <http://www.scottishsentencingcouncil.org.uk/media/1506/principles-and-purposes-of-sentencing-respondent-information-form.doc>.

The Scottish Sentencing Council will publish the responses it receives, except where respondents request confidentiality. Where confidentiality is sought, however, it should be noted that the Scottish Sentencing Council is subject to the Freedom of Information (Scotland) Act 2002 and may be required to release some information if requested.

If you have any questions about the consultation process, or encounter any difficulties with the online response form, please contact us by email at sentencingcouncil@scotcourts.gov.uk or by phone on 0131 240 6679.

Introduction

The Scottish Sentencing Council

The Scottish Sentencing Council was established in October 2015.¹ It is chaired by the Lord Justice Clerk, the Rt. Hon Lady Dorrian, and is made up of judicial, legal and lay members.²

The Council has 3 statutory objectives. In carrying out its functions, it must seek to:

- promote consistency in sentencing practice
- assist the development of policy in relation to sentencing
- promote greater awareness and understanding of sentencing policy and practice

Our main responsibilities include:

- preparing sentencing guidelines for the Scottish courts
- publishing guideline judgments issued by the Scottish courts
- publishing information about sentences imposed by the Scottish courts

We also publish information about sentencing, carry out research into sentencing, and provide advice and guidance of a general nature on sentencing matters.

Our first Business Plan, which covers 2015-18, is available on our website and has more information about our work programme.³ The Council's website also contains a [jargon buster](#) which may be helpful in explaining some of the terms used in this consultation.

Developing sentencing guidelines

A key part of our role in promoting consistency is to prepare sentencing guidelines for the Scottish courts. These guidelines must be approved by the [High Court of Justiciary](#) before they have any effect. When sentencing an offender, a judge (this includes judges in the High

¹ The Council was established under Part 1 of the Criminal Justice and Licensing (Scotland) Act 2010.

² <https://www.scottishsentencingcouncil.org.uk/about-us/membership-and-recruitment/>

³ <https://www.scottishsentencingcouncil.org.uk/media/1494/business-plan-2015-18-for-sg.pdf>

Court, sheriffs, summary sheriffs and justices of the peace) must have regard to any relevant sentencing guidelines in relation to the case. If judges decide not to follow the guidelines, they must state their reasons.

Sentencing guidelines can be general and cover all offences or they can be more specific and cover a particular offence or type of offender.

As a first step, we have decided to prepare a set of 3 general guidelines. This consultation is on the first of these – the principles and purposes of sentencing. The principles and purposes of sentencing have never been expressly defined in Scotland before and this guideline will help people to better understand how sentences are decided. The guideline will also be used to underpin our future work by acting as a principled foundation for sentencing in Scotland.

We also intend to develop a guideline on the sentencing process. This guideline will explain the steps taken by judges when they decide what sentence should be imposed and the various [factors](#) that they consider. These will include possible aggravating factors (which may increase the sentence given) and mitigating factors (which may reduce the sentence).

We will prepare another general guideline on the sentencing of young people to reflect the complexities in dealing with such cases.

In addition to these introductory guidelines, we announced in our Business Plan our intention to develop offence specific guidelines. The first of these will relate to causing death by driving and environmental and wildlife crimes. We will also begin research to inform future guidelines on other topics.

Approval process and consultation

Sentencing guidelines developed by the Council must be approved by the [High Court of Justiciary](#) before they apply to decisions about sentencing. Before submitting a guideline for approval, we must publish a draft of the proposed guideline along with a draft impact assessment setting out our views on the likely impact, costs and benefits. We must also

consult the Scottish Ministers, the [Lord Advocate](#) and anyone else we consider should be consulted.

It is vital for us to seek views from organisations across the criminal justice system and from the wider public to ensure that the guidelines are fit for purpose. With this in mind, we intend to consult publicly on all our draft guidelines.

Consultation exercise on the principles and purposes of sentencing

This consultation exercise seeks your views on the draft guideline on the Principles and Purposes of Sentencing, which can be found at **Annex A**.

Part 1 of the consultation paper sets out the reasons why we have developed a guideline on the principles and purposes of sentencing and provides an outline of the approach we are taking.

Part 2 explains the various parts of the draft guideline and sets out the consultation questions in context.

A list of all the consultation questions, along with a response form, can be found at **Annex B** (but note that the consultation can be completed online at:

<http://www.scottishsentencingcouncil.org.uk/consultations/Principles-and-Purposes-of-Sentencing>)

Part 1: Developing a guideline – rationale and approach

Why are we developing this guideline?

We believe that a guideline on the principles and purposes of sentencing will bring significant benefits to the public by increasing awareness and understanding of how sentencing decisions are reached. Although guidance on appropriate sentences in particular cases is available in the form of [court decisions](#), the fundamental principles and purposes of sentencing have not been expressly defined in any single piece of legislation or court judgment.

Some people have suggested that the principles and purposes of sentencing in Scotland are already well known and understood and so there is no need for them to be formally defined.⁴ However, evidence gathered during the development of the legislation that created the Council⁵ showed a wide range of views, with no clear agreement on what the principles and purposes of sentencing are.⁶ In light of this, we think that a guideline should be developed.

We intend the guideline 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

The guideline will also underpin our future work by providing a strong foundation for other sentencing guidelines and for sentencing in Scotland in general.

⁴ The Sentencing Commission for Scotland referenced Chapter 9 of Sheriff Principal Gordon Nicholson, *Sentencing* (2nd edition, W. Green 1992) and Lord Brodie's Opinion in *Dempsey v Parole Board for Scotland* 2004 SLT 1107 by way of example.

⁵ The Criminal Justice and Licensing (Scotland) Act 2010.

⁶ The Scottish Government consultation and responses are available at <http://www.gov.scot/resource/doc/236809/0064977.pdf> and <http://www.gov.scot/Publications/2009/01/26131348/0>.

Approach

We developed the draft guideline with two particular aims in mind:

- to be useful to judges and legal practitioners
- to improve the public's understanding of sentencing

We decided that the guideline should be expressed as clearly and simply as possible. It is therefore not intended to cover every possible situation. Instead, it sets out the core principles and purposes of sentencing currently relevant in Scotland. We have also avoided academic terminology and provided clear explanations of concepts where possible.

We have made a distinction between the principles and purposes of sentencing, and [factors](#) which appear to relate more directly to the sentencing *process*, such as:

- seriousness
- nature of the offence
- the effect of aggravating and mitigating factors

As mentioned earlier, we intend to develop a separate guideline covering the sentencing process and so this draft guideline on the principles and purposes of sentencing does not attempt to cover such factors.

The guideline will apply to the sentencing of all offenders regardless of age, including young people. However, a separate guideline will also be developed to cover the specific issues around the sentencing of young people.⁷

Finally, it should be noted that as the draft guideline is about general sentencing matters, it will be quite different from future offence or offender specific guidelines. We are currently developing and testing a different approach for guidelines on specific topics.

⁷ See our Business Plan 2015-18 at <https://www.scottishsentencingcouncil.org.uk/media/1494/business-plan-2015-18-for-sg.pdf>

Further reading

A brief overview of current academic thinking along with an outline of current practice, both in Scotland and other jurisdictions, is available at:

<https://www.scottishsentencingcouncil.org.uk/media/1510/principles-and-purposes-of-sentencing-in-scotland-and-other-jurisdictions-a-brief-overview.pdf>.

Part 2: The draft guideline explained

Principles vs. purposes

We have given careful thought to what makes a principle different from a purpose. Our view is that principles describe how a judge should approach sentencing, while purposes are outcomes which the judge may be trying to achieve. For example, a principle of sentencing might be that all sentences should be fair, while a purpose of sentencing might be to punish or to rehabilitate the offender.

Q1) Do you agree or disagree with the Council's approach to the distinction between a 'principle' and a 'purpose' of sentencing?

- Agree
- Disagree

Please provide any reasons for your response.

Core principle of sentencing

A challenge highlighted by some academics is that particular principles or purposes of sentencing may be in conflict with each other, making it difficult to follow them all at the same time. However, it has been suggested that an overarching principle or purpose would help to resolve any conflicts between individual aspects.⁸ This is the approach we propose, with a core overarching principle of **fairness and proportionality** and a list of supporting principles which contribute to this core principle.

⁸ Frase, R. Just Sentencing: Principles and Procedures for a Workable System (Oxford University Press, 2013) and Ashworth, A. (2015) Sentencing and Criminal Justice (6th edition).

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

- Yes
- No, it should be another principle
- No, there should not be an overarching principle

Please provide any reasons for your response.

Supporting principles

The supporting principles which contribute to the core principle are explained below.

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”

We think this is essential in ensuring fairness and proportionality.

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

We consider that consistency in sentencing helps support the principle of fairness and proportionality and that it should be specifically reflected in the guideline. We recognise that no two cases are identical and we do not believe that treating cases similarly means treating them in exactly the same way. Further explanation as to what ‘similar’ means in the context of sentencing is provided at paragraph 3 of the draft guideline.

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

Our aim is to encourage judges to take only such action as is necessary to achieve the desired outcome, which we think is an important part of fairness and proportionality.

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

This aims to reflect the idea of transparency, which we consider to be an important part of fairness and proportionality. However, we recognise that there will be rare occasions when

confidential matters relevant to a sentencing decision cannot or should not be made public, and this is reflected in the guideline.

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

We consider that it is important to explicitly state this point in the guideline.

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

This reflects our belief that there should be no discrimination when sentencing.

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

- Yes
- No

Please provide any reasons for your response.

Q4) Are the supporting principles expressed clearly and accurately?

- Yes
- No

Please provide any reasons for your response.

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

Purposes of sentencing

We acknowledge that the different purposes of sentencing may sometimes be in conflict. To suggest that some purposes are more important than others might also carry a risk that this guideline fails to reflect sentencing practice.⁹ In light of this, the draft guideline states that the sentence should best achieve the appropriate purposes of sentencing and that the purposes “may” include those listed at paragraph 5. None of the purposes listed are more important than others. We want to allow sentencers flexibility to apply the right purpose or purposes for each particular case. We will consider in the future whether a different approach should be taken in relation to the sentencing of young people.

Preamble (paragraph 4)

We think that the purposes applied to a particular case should always reflect the core principle of fairness and proportionality. In that way, sentencers can link the principles and purposes together.

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
- Disagree

Please provide any reasons for your response.

5(a) Punishment

It is widely accepted by the public, by academics and by people working within the justice system that one of the purposes of sentencing is to punish the offender. There may be disagreement around how much weight should be placed on punishment compared to other purposes such as rehabilitation, as well as principles such as proportionality. However, we intend that the purposes should be applied in a way which reflects the core principle of

⁹ Lord Carloway, then Lord Justice Clerk, stated in his 2014 Howard League Scotland Lecture “[The Purpose of Sentencing – From Beccaria to the OLR and Beyond](#)” on the purposes of sentencing that “Some [purposes] may be in conflict with each other in a particular case, notably deterrence and reform....[and]...if one aim were to be given particular prominence, or another reduced to insignificance, the balance, which some may think is being struck at present by extensive use of discretion, would be tilted in a direction which is different from that currently prevailing”.

fairness and proportionality. This should reduce any potential confusion around how much weight should be placed on any single purpose.

5(b) Reduction of crime (rehabilitation, prevention and deterrence)

Some people, including some academics,¹⁰ have argued that reduction of crime should not be included as a purpose of sentencing because there is a lack of evidence that sentencing itself has an impact on reducing crime.

While the reduction of crime is not a guaranteed outcome of a sentence, we consider that sentencing may seek to reduce crime in a variety of ways, for example, through supporting the rehabilitation of offenders, the restriction of liberty, or deterrence.

5(c) Reflecting society's disapproval of an offender's behaviour (denunciation)

We think it is important that sentencing reflects the values of society in relation to behaviour which is acceptable and unacceptable.

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.

¹⁰Principles and Purposes of Sentencing in Scotland and Other Jurisdictions: A Brief Review, Scottish Sentencing Council, August 2017. <http://www.scottishsentencingcouncil.org.uk/consultations/Principles-and-Purposes-of-Sentencing>

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

- Yes
- No

Please provide any reasons for your response.

Q8) Are the purposes expressed clearly and accurately?

- Yes
- No

Please provide any reasons for your response.

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

Efficient use of public resources

The efficient and/or effective use of resources was widely suggested as either a principle or purpose of sentencing when the legislation setting up the Council was being considered. We believe that the cost effectiveness of a particular disposal should be taken into account during the sentencing process. However, we do not think it is an aspect of the core principle or a purpose of sentencing, but rather something to be considered when the judge is selecting an appropriate sentence to achieve the relevant purposes of sentencing in an individual case. The draft guideline reflects this at paragraph 6.

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?

- Agree
- Disagree

Please provide any reasons for your response.

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

- Yes
- No

Please provide any reasons for your response.

Potential impacts of the guidelines

The Council must carry out an assessment of the likely costs and benefits of guidelines and of their likely effects on the criminal justice system generally. We must publish this at the same time as publishing any draft guidelines. A draft impact assessment is available at <http://www.scottishsentencingcouncil.org.uk/consultations/Principles-and-Purposes-of-Sentencing>.

We think that the main benefits of this guideline will be to increase public understanding of how sentencing decisions are made and to increase public confidence in sentencing. We do not think that the guideline will result in any significant costs.

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

- Agree
- Disagree

Please provide any reasons for your response.

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

- Agree
- Disagree

Please provide any reasons for your response.

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

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

Further comments

The public consultation process is a critical part of developing sentencing guidelines which will assist judges and the public. We welcome any further comments on this guideline.

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



Principles and Purposes of Sentencing

Draft Sentencing Guideline

August 2017

Internet: www.scottishsentencingcouncil.org.uk

Email: sentencingcouncil@scotcourts.gov.uk

Core Principle of Sentencing

1. Sentences in Scotland must be fair and proportionate.

2. This principle requires that:

- (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;
- (ii) sentencing decisions should treat similar* offences in a similar manner. This helps aid consistency and predictability;
- (iii) sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case;
- (iv) reasons for sentencing decisions must be stated as clearly and openly as circumstances permit;
- (v) sentencing decisions must be made lawfully and sentencers must have regard to any sentencing guidelines which are applicable; and
- (vi) people should be treated equally, without discrimination.

**Similarity*

3. In the context of sentencing, “similar” means having features or factors in common. The aim of individual guidelines will be to identify where cases should be treated as similar. Treating cases similarly does not mean that cases be treated in exactly the same way. Within any offence type, variations in sentencing will occur due to the nature and particular circumstances of the offence(s) in question and of the people involved.

Purposes of Sentencing

4. The sentence selected should best achieve the purposes of sentencing that are appropriate to the particular case, but always reflecting the core principle of fairness and proportionality.
5. The purposes may include:
 - a) **Punishment.** Sentencing may seek to punish the offender as a consequence of their criminal behaviour, normally resulting in some sort of loss depending on the sentence chosen.
 - b) **Reduction of crime.** 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 **detering** offending behaviour.
 - c) **Reflecting society's disapproval of an offender's behaviour.**
 - 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.
6. 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.

ANNEX B – Consultation questions and respondent information form

Q1) Do you agree or disagree with the Council’s approach to the distinction between a ‘principle’ and a ‘purpose’ of sentencing?

- Agree
- Disagree

Please provide any reasons for your response.

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

- Yes
- No, it should be another principle
- No, there should not be an overarching principle

Please provide any reasons for your response.

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

- Yes
- No

Please provide any reasons for your response.

Q4) Are the supporting principles expressed clearly and accurately?

- Yes
- No

Please provide any reasons for your response.

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

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
- Disagree

Please provide any reasons for your response.

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

- Yes
- No

Please provide any reasons for your response.

Q8) Are the purposes expressed clearly and accurately?

- Yes
- No

Please provide any reasons for your response.

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

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?

- Agree
- Disagree

Please provide any reasons for your response.

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

- Yes
- No

Please provide any reasons for your response.

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

- Agree
- Disagree

Please provide any reasons for your response.

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

- Agree
- Disagree

Please provide any reasons for your response.

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

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

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

RESPONDENT INFORMATION FORM

Please note this form **must** be completed and returned with your response (this is included in the online response form). A word version is available at:

<http://www.scottishsentencingcouncil.org.uk/media/1506/principles-and-purposes-of-sentencing-respondent-information-form.doc>.

Are you responding as an individual or an organisation?

- Individual
- Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Sentencing Council would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (without name)
- Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Sentencing Council to contact you again in relation to this consultation exercise?

- Yes
- No

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