



Faculty Response to

Draft Sentencing Process

Q1. Is the guidance on assessing seriousness - by reference to culpability and harm - helpful?

Yes

Please provide any reasons for your answer.

We consider that the assessment of the seriousness of an offence is absolutely central to the sentencing process. Quite properly that is reflected in the first sentencing step. The culpability of the offender, in terms of their mental attitude at the time to the offence is crucially important. Harm, in terms of actual harm caused or the risk of harm arising from the offender's actions, is also crucial to the assessment of the seriousness of the offence.

We do, however, have slight concerns in respect of culpability and harm. In terms of culpability, the guidelines as presently drafted do not indicate what should be done in circumstances where the mental attitude of the offender is not known and cannot be discerned. Is there to be a 'default' position taken by the court in such cases? A lack of any knowledge of mental attitude could arise at the very lowest level - where, for example, a road traffic offence is pled guilty to by way of letter with no information provided to the court by or on behalf of the offender. It could also arise at the very highest level where, for example, in a trial for attempted murder, the offender who maintains his innocence may be convicted by the jury, though it is unclear if that is because they inferred a wicked intent to kill, or a wicked recklessness as to whether the victim lived or died on the part of the offender.

While harm caused or potentially arising is useful as a guide, it would be helpful to understand how broadly 'harm' is intended to be interpreted. For example, harm seems to infer a physical element - harm caused to someone. It would be helpful if the guideline could be expanded to explain that, presumably as intended, it covers physical harm, but also emotional harm, financial harm, and damage to property, perhaps among other forms of harm. The use of the term 'harm' in the guidelines as presently drafted could be interpreted narrowly, with the effect, for example, that a fraud or an offence against property, which could be devastating to a complainer, may not be seen as 'harmful' in a physical sense and, thus, not particularly serious.

Q2. Is the approach to avoiding double-counting set out in the guideline appropriate?

Yes

Please provide any reasons for your answer.

It is a fundamental element of criminal sentencing that there should not be double counting, whether in favour of the offender (by counting a mitigating factor twice, perhaps) or against the offender (by counting an aggravating factor or circumstances twice, for example). To double count in either direction is unfair.

Q3. Is the guidance on aggravating and mitigating factors helpful?

Yes

Please provide any reasons for your answer.

It is helpful to have a non-exhaustive list of the sorts of factors which may aggravate or mitigate sentence. They assist practitioners and courts by confirming what factors and circumstances are relevant to sentencing. They assist the general public by highlighting the most commonly encountered aggravating and mitigatory factors, which will assist in understanding why a

particular sentence may be higher or lower than otherwise anticipated for a particular offence.

In our opinion, however, the manner in which steps 1 and 3 of the sentencing process have been divided is, in part, uneasy. For example, it is (correctly) emphasised in step 3 that a factor which is integral to an offence should not be considered an aggravating factor at step 3, it having properly been considered at step 1. A simple example may be driving with blood alcohol above the prescribed limit - that the offence was committed after having consumed alcohol is integral to the offence and so should not be considered an aggravating factor at step 3. The possible difficulty that arises is that step 1, as presently drafted, does not stipulate any particular issues to consider beyond culpability and harm. If factors are to be disregarded at step 3 to avoid double counting, it may be that there should be some clear instruction to consider those particular factors at step 1.

We also wonder whether, given the statutory basis of the Annex B aggravations, they might more helpfully be put first, in Annex A, with Annexes B and C then considering the more 'general' aggravating and mitigating factors.

Q4. Are the aggravating factors set out in Annex A of the guideline appropriate?

Yes

Please provide any reasons for your answer.

The aggravating factors listed in Annex A are important to the sentencing process. They are all correctly pointed out as aggravating factors. They are all factors which aggravate the offence and, therefore, can be anticipated to have an impact on sentencing.

In our opinion, however, there is quite a large overlap between some of the factors highlighted for consideration at step 3 and the consideration of the offence in terms of culpability and harm at step 1. We do wonder if it may be possible to expand slightly on step 1 so that a fuller, general consideration of

factors relevant to the seriousness of the offence can take place; before then moving on to consider solely aggravating and mitigating factors at step 3. For example, to target deliberately a vulnerable victim seems like a factor relevant to culpability (deliberate targeting) and harm (the exploited vulnerability of the victim). Thus, that is perhaps something which should, specifically, be discussed at step 1 rather than at step 3.

It is also not immediately apparent why the 'financial gain' aggravating factor has the additional proviso in parenthesis that it is specifically not an aggravating factor if the financial gain is an inherent part of the offence itself. The note which precedes and introduces the list of general aggravating factors specifies that integral features of offences are to be considered at step 1 and not considered at step 3. That is to avoid double counting. The Faculty considers that putting that proviso in the heading of the annex is sensible.

However, giving the 'financial gain' aggravating factor the extra text in parenthesis potentially confuses, when the proviso is not repeated in respect of the other general aggravating factors which may also, in certain cases, be integral parts of the offence. For example, the use of a weapon to frighten or injure a victim is an integral feature of some commonly seen offences. The proviso being absent from that factor, but present for the 'financial gain' factor, may lead to confusion as it may seem that particular emphasis is being placed on the financial gain aggravating factor at the expense of the other potentially aggravating factors which may, in certain cases, be understood as integral features of the offence already considered at step 1 of the sentencing process.

Q5. Is it helpful to include the statutory aggravations at Annex B of the guideline?

Yes

Please provide any reasons for your answer.

Including the list of statutory aggravations is helpful for public understanding. The list sets out the many situations in which the legislature has ensured that courts must take account of the particular factor or factors as aggravating an offence and therefore potentially increasing any sentence which would otherwise be pronounced. The list, therefore, assists the public understanding of the sentencing process in general terms.

The only observation, as discussed above, is whether Annex B would be better placed as Annex A, given that these are factors which have a legal, legislative, basis, rather than the more general factors discussed in Annexes A and C.

Q6. Should any additional aggravating factors (statutory or non-statutory) be listed?

No

Please provide any reasons for your answer. If answering 'yes', please indicate what additional factors should be listed.

In our opinion there are no obvious factors which should be listed which have not been listed already.

Q7. Are the mitigating factors set out in Annex C of the guideline appropriate?

Yes

Please provide any reasons for your answer.

The factors which are present in Annex C are all factors which may appropriately mitigate sentence. The contents of Annex C are, therefore, appropriate.

Q8. Should any additional mitigating factors be listed?

Yes

Please provide any reasons for your answer. If answering 'yes', please indicate what additional factors should be listed.

We consider that there should be specific mention of consideration of the background of the offender and of the general personal circumstances of the offender. For example, the fact that the offender has, themselves, been a victim of crime in their formative years may be seen as a mitigatory factor. Similarly, if an offender has, for example, stolen in order to feed themselves or their family while in dire straits. The circumstances in which an offender finds themselves, and an offender's background, are factors which are not wholly within the control of the offender and which can, on occasion, help to understand and mitigate their offending. We would therefore recommend the following additional mitigating factor:

The offence has been committed in extenuating circumstances (e.g. a theft committed to provide food for a destitute offender's family).

Q9. Is the guidance on selection of the headline sentence helpful?

Yes

Please provide any reasons for your answer.

The concept of arriving at a sentence to be imposed, subject to certain statutory considerations, other than mitigatory or aggravating factors, which may change the sentence, is a sensible one, and allows a crosscheck at that stage against the previous guideline on the Principles and Purposes of Sentencing.

We do, however, have a concern with using the term 'headline sentence' in the guidance. 'Headline sentence' is, at present, a term of art which appears in the caselaw, most notably in *Gemmell v HM Advocate* 2012 JC 223, on the question of the application of section 196 of the Criminal Procedure (Scotland) Act 1995 and, as the Faculty of Advocates understands, no other purpose. To use the

term 'headline sentence' in the guidelines in contexts removed from the section 196 context runs the risk of confusion between the concept of headline sentences as narrowly defined in the caselaw on section 196, and in a broader context as intended, it seems, within the draft guideline.

It is, perhaps, of note that only section 196 imposes a requirement on a court to state that the sentence imposed would have been different but for the timing of the plea, with the practice being that a 'headline' sentence is stated. No such requirement is imposed in, for example, section 210.

Q10. Is the guidance on multiple offending helpful?

Yes

Please provide any reasons for your answer.

In our opinion what is set out in the draft guideline are all of the options which arise for a court when considering sentencing an accused who is already serving a sentence or who appears before the court for sentencing on multiple charges, potentially across multiple complaints and/or indictments.

In our opinion, however, what is absent from the guideline, and which may be of assistance in particular to the public for their understanding, is some explanation of what factors are relevant to consideration of whether a sentence should be consecutive or concurrent. It may be that some part of the discussion of the court in *Nicholson v Lees* 1996 JC 173 could be, in some way, incorporated into the guideline to assist the public in understanding why a sentence may be, for example, imposed concurrently such that it makes no practical difference to a custodial sentence ultimately to be served by an offender.

It may be that step 5, dealing with the issue of discount in terms of section 196 of the 1995 Act, requires to be considered at the time the court is considering whether to impose sentences on multiple offences consecutively, concurrently, or in *cumulo*. For example, if one charge is pled guilty to at the earliest opportunity, and another charge results in a conviction after trial, it may be that

selecting a *cumulo* sentence, even if that is otherwise appropriate, may present difficulties when considering an appropriate discount at step 5 later in the sentencing process.

Q11. Is step 5 on sentence discounting helpful?

Yes

Please provide any reasons for your answer.

In our opinion the issue of sentencing discount is of central importance to sentencing. It is also a factor which, perhaps, is misunderstood or under-appreciated by the public at large. Including it within the draft guideline is essential.

We do consider, however, that more could be done to set out the justification for the idea of sentencing discount, as discussed principally in the opinion of the then Lord Justice Clerk, Lord Gill, in the *Gemmell* case.

We also consider that the guideline is unfortunately phrased where it suggests that the timing of the plea may reduce the headline sentence - that may give the erroneous impression that the headline sentence is reduced by the early plea. In our understanding, a level of discount is deemed appropriate by the court in consideration of the timing of the plea and that level of discount is then applied to the headline sentence to give a resultant sentence to be served. The timing of the plea and any question of discount is not a relevant consideration in the fixing of the headline sentence as discussed in *Gemmell*. It may be this is an issue that arises from the narrow use of 'headline sentence' in *Gemmell*, and the broader usage envisioned by the guideline.

Q12. Is step 6 on consideration of time spent in custody helpful?

Yes

Please provide any reasons for your answer.

Step 6 sets out in clear terms that a court must consider time spent on remand in relevant cases.

Again, however, it may be that the guideline could highlight what, in practical terms, that means. It may be, in that regard, that reference could usefully be made to the reasoning contained in *Martin v HM Advocate* 2007 JC 70. To assist with public understanding, it could make clear that the idea is to, as much as possible, prevent double counting against the offender by providing them with 'full credit' for time spent on remand at an earlier stage in proceedings.

Q13. Is the list of ancillary orders at Annex D of the guideline helpful?

Yes

Please provide any reasons for your answer.

The list of ancillary orders, if only for the public, assists by setting out many of the most commonly encountered ancillary orders that may be made on sentencing. The benefit of that is that it raises public awareness of the tools available to a court to assist in reducing offending going forward and providing protection for persons or categories of persons in the future.

Q14. Is step 8 on imposing sentence and giving reasons helpful?

Yes

Please provide any reasons for your answer.

We consider that step 8 is appropriately short and concise. It sets out what requires to be set out - namely that all that remains for a court, having gone through the preceding seven steps, is to impose the sentence and to set out, as far as possible, how the sentence has been arrived at.

Q15. Is the overall sentencing process set out in the guideline appropriate?

Yes

Please provide any reasons for your answer.

The overall sentencing process set out in the guideline is appropriate, in our opinion. It sets out the various stages and considerations which are appropriate to the sentencing process.

Q16. Are there any additional steps which should be included?

Yes

Please provide any reasons for your answer. If answering 'yes', please note any additional steps you think should be included.

In our opinion it would be helpful for the guideline to make specific reference to the protections afforded by sections 204(2) and 207(3) of the 1995 Act. It may be that this would be a relevant consideration in step 2, the selection of the appropriate sentencing range, or it may be that it should be a distinct step somewhere among the present steps 2, 3, and 4. Including consideration of the protections afforded by those sections will assist the public in understanding why, in certain circumstances, a custodial sentence or sentence of detention is inappropriate when any other method of dealing with the offender is appropriate.

Q17. Are the steps in an appropriate order?

Yes

Please provide any reasons for your answer.

For the vast majority of the guideline, the steps are in an appropriate, logical, order. As has been mentioned above, it may be that some of the factors

discussed in step 3 may be appropriately mentioned in step 1. It may also be that the consideration of multiple sentences, discussed in step 4, should take place after consideration of discounting as discussed in step 5, or that discounting is a factor which can make sense to be considered before or at the same time as considering if and when to impose sentences consecutively, concurrently, or cumulatively.

Q18. Are the steps and accompanying explanatory sections expressed clearly and accurately?

Yes

Please provide any reasons for your answer.

In our opinion the steps and the explanatory sections are expressed clearly and accurately. As has been discussed above, however, there are, perhaps, steps where what is meant could be more clearly stated, such as setting out what consideration of the timing of the plea means in reality and what consideration of section 210 means in practice.

Q19. Do you agree or disagree that the guideline would lead to an increase in public understanding of how sentencing decisions are made?

Agree

Please provide any reasons for your answer.

In our opinion the major benefit of the guideline overall is that it sets out, in a concise and easy to understand document, the various steps through which a court must go when sentencing. It demystifies and places on a formal setting the 'instinctive synthesis' of sentencing.

Q20. Do you agree or disagree that the guideline would lead to an increase in public confidence in sentencing?

Agree

Please provide any reasons for your answer.

We hope that public confidence in sentencing in Scotland is not low. Having an easily understood document which sets out the sentencing process can only assist the public in appreciating the sentencing process.

Q21. What costs (financial or otherwise) do you see arising from the introduction of this guideline, if any?

We consider that, if anything, the guideline will slightly decrease costs moving forward. It is anticipated that the guideline would have no measurable impact on time taken in busy summary courts on sentencing, as courts should already be instinctively following the steps and explaining their sentencing decisions in open court as far as possible. It should not, therefore, lead to a noticeable increase in time (and associated costs) spent on sentencing.

The reason that we consider that costs may slightly decrease is that it may mean that there are fewer appeals against sentence going forward, with courts setting out the basis for their decisions clearly and perhaps assisting courts in avoiding excessive sentences or unduly lenient sentences by providing a clear framework for the sentencing process.

Q22. What benefits do you see arising from the introduction of this guideline, if any?

As discussed above, in our opinion the public will benefit from having an easily understood document which explains and, to a point, justifies the sentencing process. The guideline also formalises what courts require to do on sentencing which will assist as an *aide memoire* to the courts on sentencing, perhaps helping to homogenise sentencing decisions, in a positive sense.

Q23. Would you like to make any other comments in relation to any matter arising from this consultation?

All comments we would wish to make have been set out in our answers to the preceding questions.