



Law Society
of Scotland

Consultation Response

Principles and Purposes of Sentencing

A Scottish Sentencing Council Consultation

October 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Sentencing Council consultation, *Principles and Purposes of Sentencing*. The Committee has the following comments to put forward for consideration.

Question 1 - Do you agree or disagree with the Council's approach to the distinction between a 'principle' and a 'purpose' of sentencing?

We welcome the establishment of the Scottish Sentencing Council and support its role in relation to promotion of consistency in sentencing, including the preparation of sentencing guidelines for use in the Scottish courts. We appreciate the opportunity to comment on this, the first of three general sentencing guidelines that to date the Council has committed to produce.

Production of sentencing guidelines for Scotland follows the practices adopted in other jurisdictions such as England and Wales where the judiciary has had reference to sentencing guidelines for a number of years. With the absence of any Scottish guidelines existing, the Scottish courts have considered and continue to refer to the English Guidelines in relevant cases such as sentencing in road traffic cases as highlighted in *HMA v Russell McKeever* [2016] HCJAC 43.

Articulating a 'principle' and 'purpose' of sentencing is a useful high level first stage in the process. We agree with the Council's approach.

We note that the Council has set out 3 statutory objectives in carrying out its functions. We are committed to the promotion of greater awareness and understanding of sentencing policy and practice.

Lawyers in the criminal justice system are involved in advising and representing their clients, as accused. With the guidelines, lawyers are more aware of the likely sentence and factors to be considered as relevant in the imposition of sentences. That means that appropriate advice can be provided to a client that is in

their best interests leading to more effective pleading and focused advocacy. Such advice will be relevant, pertinent and succinct focused on the salient factors as featured in the publication of sentencing guidelines.

Guidelines allow a realistic approach to be taken in supporting the accused at the earliest stage of criminal process. Clients can and will be made aware of the anticipated range of outcomes for their case especially where use can be made of such guidelines. Where the sentence that is imposed is not what was anticipated, sentencing guidelines for both the Crown and the defence should help to ensure that there is greater clarity about the potential success of any appeal e.g. where the sentence lacks consistency or recognition of the existing published guidelines.

Guidelines will make procedures easier to manage and lead in turn to greater efficiency and consistency within the criminal justice system. What is important to stress is that justice, no matter the sentence, has to be seen to be done. Enhancing consistency in sentencing practices throughout the Scottish criminal courts is supported by lawyers working within the criminal justice system.

Our interest in a fairer and more justice society means that the more information publicly existing about the processes involved in judicial decision making the better. It raises awareness for the public of the likely outcome of cases where they have been involved in any capacity such as a witness, victim or jury member. It is about informing the public about what are the realistic ranges of sentences; there is a role in ensuring the public are better informed. That enhances understanding and reduces dissatisfaction with the whole criminal justice process. That benefits all. It builds up public confidence and reduces the potential for adverse publicity in the criminal justice system. These are the factors motivating the production and publication of sentencing guidelines.

We support the Council's intention to publish guidelines in relation to the sentencing of young persons. Young persons who offend bring a myriad of problems for lawyers in how best to assist them in representation and provision of advice from the police station to appearance in court at what is an early and formative stage of their life. Guidelines will provide support for a range of work undertaken around young persons involved in the criminal justice system. By bringing much needed clarity in identifying the principles and purposes to be achieved in sentencing by outlining the factors that are important, that will assist lawyers representing their clients as young offenders in what is often a very challenging task.

Cases involving death by driving feature prominently in the media. Lawyers are involved with the accused and the victim's relatives in such cases at all stage of the proceedings. The use of the English sentencing guidelines as highlighted above has demonstrated a need for Scotland to have similar resources in such cases for reference purposes.

Question 2 - Should there be an overarching principle of “fairness and proportionality”?

We support the principle of ‘fairness and proportionality’ being paramount as that underpins and is integral to the whole criminal justice system.

Question 3 - Are the supporting principles which underlie the overarching principle of fairness and proportionality (as listed at paragraph 2(i)-(vi)) appropriate?

We agree with the supporting principles set out in the consultation.

In relation to paragraph 2(i), we would highlight the need to be aware of the impact on the victim. That includes a range of potential victims of crime including, for example, those that are vulnerable such as young persons under 18, those experiencing mental health issues and those that have suffered from hate related crime. Examples of steps being taken through the implementation of existing legislation such as the Victims and Witnesses (Scotland) Act 2014 and the results from the current consultation on pre-recording Evidence of Child and other vulnerable witnesses supports the commitment towards those in society that are vulnerable.

In relation to paragraph 2(iv), we welcome that the reasons for sentencing decisions must be expressed as clearly and openly as the circumstances permit. There is benefit to all where the judge has expressed clearly in open court why a particular sentence has been chosen in any case. That is vital to those being sentenced to understand the effect of the crime on which they have been committed and also ensures consistency of practice across Scotland. Sentences in similar cases should broadly reflect the outcome in another.

Since lawyers do represent their clients throughout Scotland, this will benefit the provision of advice to their clients as to the likely outcome rather than be subject to the vagaries of any one court.

In relation to paragraph 2 (v), this is important since guidelines are of course not mandatory. Where there is to be any significant departure from them without justification, this needs clearly stated so that lawyers can give prompt and realistic consideration whether to advise a client to appeal.

In relation to paragraph 2 (vi), we endorse the need for equality. In the interests of justice to the needs of the vulnerable accused also are relevant.

Question 4 - Are the supporting principles expressed clearly and accurately?

We would question the use of 'people' under Paragraph 2 (vi) rather than a general reference to those involved in the criminal process. We entirely support the principle of equality so that everyone involved in the criminal justice system are treated equally.

We would refer to the use of the word 'severe' in relation to paragraph 2 (iii). Sentences should be what are required to achieve the purposes of sentencing in each case. Different offences merit varying sentences which depend how serious the offences actually are. The application of 'severe' in relation to sentence may be rather broad –based and devalue the actual sentence that is imposed since it tends to view them all in degrees of severity. Keeping to what the purpose of the actual sentencing is and ensuring its fairness, transparency and proportionality is what is essential. We want sentences to be just and proportionate.

Exactly how to factor in the question of vulnerability in sentencing may be challenging as it may give rise to double-counting. The victim is vulnerable because of their personal circumstances as well as a propensity to deliberately target a vulnerable victim which could amount to pre-meditation.

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

We have no other supporting principles to suggest.

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?

We agree with the approach to the purposes of sentencing.

Question 7 – Are the purposes as listed at paragraph 5 (a) – (d) appropriate?

Question 8 – Are the purposes expressed clearly and accurately?

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

We agree that the purposes of sentencing at paragraph 5 are appropriate. We have no other purposes to suggest. There is much work being done in relation to sentencing with the support of programmes and local initiatives such as Positive Prisons Positive Futures <http://www.positiveprison.org/> that seem relevant to consideration of paragraph 5(b).

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?

We agree with the general principle that the use of public resources should be considered in relation to sentence. That is recognised in the consideration and application of sentence discounts in respect of early pleas. Case law has been evolving to outline when any practice of sentence discounting is a relevant consideration and how it should be applied building on the principles set out in *Du Plooy v H. M. Advocate* 2003 SCCR 640. Articulating such practices in sentencing guidelines to be issued in due course will improve clarity and consistency of practice.

Question 11 - Is it appropriate to consider efficient use of public resources during the sentencing process?

It is important to recognise the importance of having an efficient criminal justice system that meets the expectations of the public. The saving of court time and the need to avoid witnesses' and victims' time in being required to attend at court are obvious examples of the potential benefit to the public in early resolution of cases. We are concerned that efficiency processes should not be seen as a driver in sentencing as it is vital to uphold the interests of justice by ensuring any pleas of guilty are correctly tendered. Were efficiency to be seen as a purpose or principle in sentencing, there may be concerns that there will be consequential increases in pleas being tendered as a matter of convenience.

Proposed efficiencies as a result of ongoing work such as the consultation on Pre-Recording of Child and Other Vulnerable Witnesses that will, for instance, provide useful information on the presumption to take evidence on advance of the trial are welcomed.

We will consider in due course the Report that is to be issued from the Independent Strategic Review of Legal Aid in ensuring that the challenges to legal aid in Scotland can be met to ensure a properly funded criminal justice system.

Question 12 - Do you agree or disagree that the guideline would lead to an increase in public understanding of how sentencing decisions are made?

We agree that the guideline should raise awareness and interest from the public to be better informed in how sentencing decisions are approached.

Question 13 - Do you agree or disagree that the guideline would lead to an increase in public confidence in sentencing?

We agree that the guideline should increase public confidence in sentencing by promoting how sentencing decisions are to be undertaken. More transparency in what is a complex and challenging process is to be of benefit to the public.

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

We do not know what the costs in relation to the new sentencing principles will be. That will be seen once there is time to carry out an evaluation of the impact of the sentencing guidelines. These may well lead to a reduction in the number of appeals taken by the Crown or the defence since the sentencing process should be fairer and more consistent in practice across Scotland. Alternatively, where appeals arise, these may be less successful as the judge has already taken account of the sentencing guidelines.

Since this is the first time that the Scottish judiciary will have been able to refer to sentencing guidelines, it is not known what the likely impact on their sentencing practices will be. These sentencing guidelines represent a start which will no doubt be refined as time evolves. These sentencing guidelines do not include any actual sentence range. It is perhaps when such guidelines are issued where there may well be divergence within the judiciary as to what the relevant starting point for sentence in respect of any offence may be.

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

As mentioned above, the effect of such sentencing guidelines on appeals is not known.

We do welcome the output of the Scottish Sentencing Council's work as the start of a journey to make the principles, purpose and issue of sentencing more transparent.

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

We do not have any further comments to add at this stage, but if we can offer any further assistance to the Scottish Government in considering these issues, the Criminal Law Committee would be keen to do so.



Law Society
of Scotland

For further information, please contact:

Gillian Mawdsley
External Relations
Law Society of Scotland
DD: 0131 226 8899
gillianmawdsley@lawscot.org.uk