**SCOTTISH SENTENCING COUNCIL CONSULTATION**

**THE SENTENCING PROCESS**

**SUBMISSION FROM HOWARD LEAGUE SCOTLAND**

**6 SEPTEMBER 2019**

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Howard League Scotland (HLS) believes that public support for the criminal justice system is important for its legitimacy. We support measures which increase public confidence in the system through public education, with the Scottish Sentencing Council’s public consultation on the sentencing process being a good example of this. Whilst it is acknowledged that sentencers may have distinctive sentencing styles[[1]](#footnote-1), it is important that there is increased understanding of the process by which courts make consistent sentencing decisions. HLS believes that the guideline is generally an explanation of current practice and is primarily a tool for external understanding.

On this basis, the guidance on assessing seriousness – by reference to culpability (the blameworthiness of the offender) and harm (the effects of the offender’s actions on others)- is helpful, particularly when there may be an imbalance between the two.

We would note, however, that with reference to the word “harm” itself (para 13.), it may be useful to make it explicit (a) that harm can be material or non-material, and physical or non-physical; and (b) that what matters is the harm with which the relevant law or offence-definition in concerned (i.e. the ‘mischief’ at which the law is aimed).

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS agrees that the approach to avoiding double-counting set out in the guideline is appropriate, whereby aggravating and mitigating circumstances should not be included in the initial assessment of the seriousness of the offence, except for when any aggravating factors are regarded as integral to it. This reflects the Scottish Sentencing Council’s core principle of sentencing that “[s]entences in Scotland must be fair and proportionate” [[2]](#footnote-2) with which we agree.

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

As per our answer to Question 1., HLS believes that the guideline is generally an explanation of current practice and is primarily a tool for external understanding. On this basis, it is helpful to highlight that cases may have both aggravating and mitigating factors, and that some aggravating factors will have already been taken into account in assessing the seriousness of the offence.

The groupings of aggravating and mitigating factors by theme should be helpful to members of the public in understanding what may be taken into account in assessing reduced or increased levels of harm caused; and reduced or increased culpability on the part of the offender. The examples given are clear and realistic, demonstrating the broad range of factors sentencers will consider when setting an individual’s sentence.

We note, however, that sentencers could take aggravating factors into account which have not been proved beyond reasonable doubt. We would therefore suggest that the guideline makes this requirement clear in order to ensure that sentencers bear this in mind, and to reassure the public.

HLS is pleased to see an example of a mitigating factor looking beyond the offender and victim alone: where a sentence may have a negative impact on people other than the offender, such as a child for whom the offender has caring responsibilities; and that in this instance, a court may decide to pass a different sentence in order not to have a disproportionate effect on the child. This would also be in keeping with The Human Rights Act 1998, the United Nations Convention on the Rights of the Child and the Council of Europe’s recommendations[[3]](#footnote-3) which state that the best interests of children with a parent in the criminal justice system should be at the heart of any sentencing decisions.

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS believes that Annex A of the guideline constitutes an appropriate, non-exhaustive list of general aggravating factors.

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

As per our answer to Question 1., HLS believes that the guideline is generally an explanation of current practice and is primarily a tool for external understanding. On this basis, it is helpful to include examples of statutory aggravations at Annex B, in order to differentiate between them and the non-exhaustive list of general aggravating factors at Annex A.

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

🞏 Yes

🗷 No

Please provide any reasons for your answer. If answering ‘Yes’, please indicate what additional factors should be listed.

Annex A and Annex B are non-exhaustive lists, containing examples (only) of general aggravating factors and statutory aggravations respectively. It is therefore unnecessary to list additional aggravating factors of either type.

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS believes that Annex C of the guideline constitutes an appropriate, non-exhaustive list of general mitigating factors.

Q8) Should any additional mitigating factors be listed?

🞏 Yes

🗷 No

Please provide any reasons for your answer. If answering ‘Yes’, please indicate what additional factors should be listed.

Annex C is a non-exhaustive list containing examples (only) of general mitigating factors. It is therefore unnecessary to list additional mitigating factors.

Q9) Is the guideline on selection of the headline sentence helpful?

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS believes that the guideline of selection of the headline sentence is helpful. It is clear that arriving at a headline sentence takes place after the seriousness of the offence has been assessed and also takes into account any aggravating and/or mitigating factors.

It is also important for public confidence that the court states its reasons for any decision that it takes not to follow any applicable guidelines. We would therefore suggest that an example of this is included for clarity.

Q10) Is the guideline on multiple offending helpful?

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS believes that the guideline on multiple offending is helpful, however, we would suggest that it is expanded to give an indication of what should guide the crucial decision about whether sentences should be served concurrently or consecutively. The reasons for the decision (whether the sentences be served concurrently or consecutively), should also be made clear in the court’s explanation of the sentence.

We agree that in any case of multiple offending, the total headline sentence should reflect the Scottish Sentencing Council’s core principle of sentencing that “[s]entences in Scotland must be fair and proportionate” [[4]](#footnote-4).

Q11) Is step 5 on sentence discounting helpful?

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS believes that step 5 on sentence discounting is helpful, however, we would suggest that it is expanded to include an explanation of what a sentence discount reflects i.e. a potential saving of time and resources for the justice system. It may also be useful to include reference to any minimum or maximum discount levels.

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS believes that step 6 on consideration of time spent in custody is helpful, however, we would suggest that para 39. also includes a reference to the fact that a custodial sentence could be backdated so as to take account of that time, and therefore may result in no further time being spent in custody.

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS believes that Annex D of the guideline constitutes an appropriate, non-exhaustive list of ancillary orders.

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

HLS believes that this is the most helpful part of the guidance, not only for members of the public, but also for solicitors and their clients. For solicitors: a clear understanding as to why a certain sentence was imposed allows for better explanation to the client and also easier consideration of a sentence appeal, where necessary. For offenders and victims: it reduces confusion and misunderstanding.

Ideally explanations of sentencing decisions should be made available in writing in all courts. This may also go some way to reducing misunderstanding and misreporting by the media, which can reduce public confidence in the criminal justice system as a whole.

We would like to see a strong presumption in favour of clarity and openness. However, the qualifying statement “set out the reasons for its decision as clearly and openly *as circumstances permit*” (emphasis added), envisages circumstances in which the reasons for the sentence need not, or should not, be explained. Where this is the case, we believe that the guideline should identify examples which might warrant non-clarity or non-openness.

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS believes that the overall sentencing process set out in the guideline is appropriate. We would note, however, that the guideline may be interpreted as one dealing with custodial sentences, rather than all sentences. The inclusion of a further Annex E which lists all available sentencing options from Absolute Discharge to Life Sentence may alleviate this.

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

🞏 Yes

🗷 No

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

No, HLS believes that all relevant steps have been included.

Q17) Are the steps in an appropriate order?

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS believes that the steps are in an appropriate order.

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

🗷 Yes

🞏 No

Please provide any reasons for your answer.

Yes, HLS believes that the steps and accompanying explanatory sections are expressed clearly and accurately.

Q19) 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 answer.

HLS believes that the guideline has the potential to lead to an increase in public understanding of how sentencing decisions are made. It should be considered as a first step only, however. Information should be provided in a variety of formats (visual and oral) to so as to be understood by those with literacy issues. It should be communicated widely and actively, rather than being only available on the Scottish Sentencing Council’s website for example. A feedback mechanism should also be included, whereby members of the public can make suggestions for improvements with a view to it being updated on a regular basis.

Q20) 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 answer.

Accessible guidelines have a part to play in increasing public confidence in sentencing, but cannot do so in isolation of many other factors. Current views held by the Scottish public about punishment are situated in the context of very little knowledge existing about the criminal justice system, sentencing practices or rationale. For example, the Scottish Crime and Justice Survey (2017/18) showed that 76% of the public did not know very much, or anything at all, about the criminal justice system[[5]](#footnote-5); whilst recent research from the Scottish Sentencing Council found that 53% of respondents surveyed stated that they knew “a little or nothing at all about the sentences given to people convicted of crimes in Scotland”[[6]](#footnote-6).

Populist arguments expressed in the media can quickly gain traction, dismissing legislative frameworks and undermining confidence in individual sentencers and the criminal system itself. Research has shown that the more information that is provided to the public about the circumstances of crimes, the less punitive they become. For example, Balvig et al found that:

“When asked simple questions, the public want stiffer sentences. In their assessments of the vignette crimes, the public demands on average lower prison sentences than judges, and this tendency becomes stronger in the focus group study. The propensities towards punitiveness seem to diminish with more information”.[[7]](#footnote-7)

We therefore support measures which increase public confidence in the system through public education, whilst acknowledging that it is not only the responsibility of the Scottish Sentencing Council to do so.

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

Whilst we would not envisage any financial costs arising directly from the introduction of this guideline, indirect costs would be involved in its promotion (see answer to Question 19.) It is important that the judiciary supports the guideline’s introduction, and do not see it as unnecessarily constraining when there is a desire to adopt more creative responses to sentencing. Written explanations of sentencing decisions should therefore not be seen as a solely administrative exercise, but one which encourages openness and transparency.

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

HLS supports the Scottish Sentencing Council’s view that “the increased transparency associated with the guideline is expected to provide the wider public with a greater understanding of the sentencing process, with a particular focus on understanding the steps involved in reaching a final sentence. This may go some way to addressing the disconnect between public perception of sentencing and the actual sentences given”[[8]](#footnote-8)[[9]](#footnote-9)

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

None.

1. Scottish Sentencing Council Principles and Purposes of Sentencing – Consultation Responses; Valasquez, Anderson and McNeill (Response 04). Available at: <https://www.scottishsentencingcouncil.org.uk/closed-consultation/principles-and-purposes-of-sentencing-consultation-responses/> [↑](#footnote-ref-1)
2. Scottish Sentencing Council Principles and Purposes of Sentencing, Sentencing Guideline, effective from 26 November 2018. Available at: <https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf> [↑](#footnote-ref-2)
3. Council of Europe (2018) Recommendation CM/RM (2018)5 of the Committee of Ministers to Member States Concerning Children with Imprisoned Parents. Available at:

<https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807b3175> [↑](#footnote-ref-3)
4. Scottish Sentencing Council Principles and Purposes of Sentencing, Sentencing Guideline, effective from 26 November 2018. Available at: <https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf> [↑](#footnote-ref-4)
5. Scottish Crime and Justice Survey. Available at: <https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/crime-and-justice-survey> [↑](#footnote-ref-5)
6. Public Perceptions of Sentencing National Survey Report, Ipsos MORI Scotland for the Scottish Sentencing Council, published 2 September 2019. Available at:

<https://www.scottishsentencingcouncil.org.uk/media/1996/20190902-public-perceptions-of-sentencing-report.pdf> [↑](#footnote-ref-6)
7. Balvig F. et al (2015), ‘The public sense of justice in Scandinavia: A study of attitudes towards punishments’, European Journal of Criminology, 12(3): 342 – 361. Available at: <https://journals.sagepub.com/doi/full/10.1177/1477370815571948>. See also Warner K. et al (2011), Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study. Available at: <https://aic.gov.au/publications/tandi/tandi407> [↑](#footnote-ref-7)
8. Scottish Sentencing Council, The Sentencing Process, Draft Impact Assessment, June 2019. Available at: <https://consultations.scottishsentencingcouncil.org.uk/ssc/the-sentencing-process/user_uploads/the-sentencing-process---draft-impact-assessment.pdf> [↑](#footnote-ref-8)
9. For a Scottish perspective see Anderson, S., Ingram, D. and Hutton, N (2002) Public Attitudes Towards Sentencing And Alternatives To Imprisonment Scottish Parliament Paper 488 session 1 2002 Edinburgh: HMSO. For a more recent, but England and Wales focussed, perspective see Hough, M., Bradford, B., Jackson, J. and Roberts, J. R. (2013) Attitudes to sentencing and trust in justice: exploring trends from the crime survey for England and Wales. Ministry of Justice analytical series, London: Ministry of Justice. [↑](#footnote-ref-9)