

Response: Scottish Sentencing Council Guidelines 2019

This response has been submitted by the Centre for Youth & Criminal Justice, hosted within the University of Strathclyde. CYCJ is dedicated to supporting improvements in youth justice, contributing to better lives for individuals, families and communities. Our vision is a Scotland where all individuals and communities are safe and flourish; and where Scottish youth justice practice, policy and research are internationally renowned and respected. We contribute to this by developing, supporting and understanding youth justice practice, policy and research in Scotland, and through seeking and sharing learning internationally.

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

In relation to an individual's maturity at the time of the offence, additional measures to secure an appropriate assessment of this factor ought to be incorporated within this guidance. Submission from defence lawyers and within the body of a criminal justice social work report may not adequately contextualise the complex nature of maturity and the impact that brain development has upon this characteristic. It is important that those passing sentence take into consideration the full range of factors that impact upon someone's ability to make rational, reasoned decisions.

Culpability for a particular offence may require deeper examination than is apparent from the guidance in its current form. It is not clear how a court may necessarily determine any or all of these factors, particular in cases of those who have pled guilty at an early stage, and therefore not had an opportunity to put forward their case during trial. For those who are sentenced without the benefit of assessment provided by a criminal justice social work report, there appears to be no particular way in which their culpability can be examined without representation from their legal representative at a very late stage of proceedings. Similarly, measuring the impact of an offence upon victims is a task that may require additional attention. It is not clear how the views of victims in each case will be captured and presented before court. Further clarity on this principle would be welcome.

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

No. Reference to 'double-counting' is made in passing within Section 22 of the guidance, but ought to be more explicit at an earlier stage of the final version. Providing a real-life case scenario would be beneficial in clarifying the Sentencing Council's position on this.

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

The first sentence of Section 21 - which states that "aggravating factors are facts and circumstances which may make the offence more serious for sentencing purposes" - requires clarification. Making clear that the *impact* and *details* of the offence are being affected, rather than the offence itself would be clearer for those who may read this guidance.

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

It is helpful for those who come into conflict with the law to have access to guidance which will assist their understanding of the process. Annex A contains a statement regarding aggravating factors which could be integral to the offence. This should be clarified, with real life examples provided for clarity.

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

Yes. Inclusion of information that simplifies and clarifies the sentencing process will be of benefit to those involved in the criminal justice system; both those in conflict with the law and those who have been victims of crime.

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

No. Whilst the list of factors outlined are not exhaustive, they provide sufficient example of the issues that may be relevant during the sentencing process.

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

Broadly, yes. However, the inclusion of remorse as a mitigating factor is of concern. Remorse is a particularly subjective term that has little empirical evidence to support it. Young people in particular may find it difficult to demonstrate remorse in a formal, sterile environment such as court, whilst their immaturity may also hinder their capacity to experience empathy.

Q8) Should any additional mitigating factors be listed?

Of note is the absence of youth and age from the mitigating factors. Whilst often associated with maturity, the two concepts ought to be considered separately. Both of these factors may lead to an individual taking risks, engaging in criminal behaviours and coming to the attention of court. The cognitive, biological, psychological and social factors that can impact upon behaviour should also be incorporated within mitigating factors.

Furthermore, consideration should be given to the influence of third parties in the commission of the offence, mindful that some young people - and indeed those who are not young - can become involved in criminal behaviours due to the exertion of pressure by others. By way of an example, children who are manipulated into carrying drugs from one place to another ought to be supported as victims of Child Criminal Exploitation, with this issue therefore considered as significant mitigation when sentencing them in court, if indeed court is the best arena within which to address such behaviours.

CYCJ note that the definition of 'mental illness or disability' may be unnecessarily narrow, and that adopting a broader term such as 'mental wellbeing and health' may be advantageous to sentencers. Given the significant number of people appearing in court with undiagnosed mental health difficulties, a broader approach to this area would enable the court to consider the individual's condition in a more holistic manner, rather than merely relying on diagnostic criteria.

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

Yes. Whilst helpful, this section could be further improved by making specific reference to the purposes of sentencing outlined in the principles and purposes of sentencing document.

Q10) Is the guidance on multiple offending helpful?

No. CYCJ are concerned that this part of the guidance is not as accessible to young people and those with Speech, Language and Communication Needs as it could be. A graphic representation in this instance may be of benefit, and could assist those at conflict with the law and victims of crime to form a better understanding of the "cumulo" and "consecutive" processes which may otherwise be difficult to fully comprehend.

Q11) Is step 5 on sentence discounting helpful?

As before, this step could be made more accessible to those who experience Speech, Language and Communication Needs.

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

Yes.

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

Yes. It will provide context and understanding of the factors that contribute to the sentencing process.

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

Yes. Provision of comments from Court, stipulating which disposal has been handed down, and the reasons behind it will be advantageous to those receiving the sentence, and achieve a greater sense of justice on their part. Were these comments also provided in written form, it would assist the individual to reflect and understand the process, which at the time may seem incomprehensible and confusing. Similarly, clear direction from the court would prove beneficial to any victims present who would better understand what decision has been reached, and the reasoning behind it.

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

Yes.

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

No.

Q17) Are the steps in an appropriate order?

Yes.

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

Whilst the explanatory guidance is helpful, there remains a risk that some aspects may be overly complicated in parts. The Sentencing Council may wish to seek support from Royal College of Speech and Language Therapy in order to address any potential issues.

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

Disagree. Production of this guideline alone will do little to increase public understanding of sentencing decision. For most people - particularly those young people who come into conflict with the law - this guideline will not feature in their general awareness, and will remain an obscure, esoteric document that exists to inform and advise those involved in the judicial process. It is unlikely to be accessed by many young people. In order to increase public awareness and understanding of this guideline in particular - and the sentencing process in general - a more sophisticated, age appropriate and participatory means of cascading the content is required.

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

Disagree. For the reasons outlined above, there is limited likelihood of this guideline alone affecting change in public confidence in sentencing. If, however, the content of this guideline could be disseminated to the public in a more engaging and inclusive manner – rather than merely existing in a corner of the internet where it will be forced to compete with multiple and outdated documents - then it may be more successful.

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

At first glance implementation of this guideline appears to be cost neutral, although court proceedings may be extended in some instances in order to ensure that all information is available at the time of sentencing. This may have cost implications, some of which could be counterbalanced through increased use of Diversion from Prosecution and through the Presumption Against Short-term Sentences.

As alluded to previously within this submission, there may be a need to create a means by which the views and opinions of victims are routinely gathered and expressed within court. It is almost certain that current supports to victims do not have the capacity to perform this function, thus requiring enhanced support and provision from central and local government, or the court itself. Similarly, whilst a large number of matters are dealt with following the production of a criminal justice social work report, there may be a need to fully inform the court of an individual's circumstances through the production of similar

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reports that provide analysis of culpability, intent and the other factors that will be taken into consideration in the process of passing sentence. There are some instances where a criminal justice social work report will not be requested, thus limiting an individual's opportunity to have their circumstances made known to court.

There is a risk, however, that guidelines result in the sentencing process becoming formulaic, lacking the subjectivity that is required when dealing with the lives of those who are in vulnerable, precarious situations. The ability to adopt creative responses to sentencing should be preserved throughout the creation of this and future guidelines.

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

Some parts of the guideline require clarification in order to make it comprehensible to younger people, or to those who experience Speech, Language and Communication Needs. Creation of sentencing guidelines may be of benefit to the public understanding of the sentencing process, and illuminate the myriad elements that sentencers must consider when reaching decisions in court. These broad, complex issues are often misunderstood by the public at large, and thus any measure which may assist in this regard should be seen as a positive step. If made easily available, the benefits of this guideline would be: to improve public confidence in the process by which sentencers deliberate and set disposals, improve clarity of decisions, and improve transparency in the judicial process.

The creation of sentencing guidelines ought to be of benefit to all parties within the sentencing process. Supposing that the content of the sentencing guidelines is satisfactorily explained to the broader public, those facing sentencing should have a greater awareness of what may lay before them. This -in turn - will be of benefit to the welfare of that individual and their family.

On a public service level, those supporting and supervising those facing sentencing may also have a greater chance of anticipating the outcome of court, and thus have a greater sense of certainty when organising care provision. For example, accommodation for young people is often dependent on the outcome of court matters, and whilst guidelines will not lead to absolute certainty in gauging the likely outcomes, they may remove some degree of uncertainty over the outcome.

One can also envision the benefit provided to the sentencers themselves, in their task of deciding the fate of the individual standing before them. In cases where there is some uncertainty, these guidelines may assist them to structure their decision within a framework that has been adopted across the judiciary.