

## **Prison Reform Trust response to Scottish Sentencing Council Consultation on the Principles and Purposes of Sentencing – October 2017**

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families.

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### **Introduction**

We welcome the opportunity to submit a response to the Scottish Sentencing Council Consultation on the Principles and Purposes of Sentencing.

The Prison Reform Trust support the creation of a Scottish Sentencing Council and we are encouraged by the decision to publish overarching guidance on the principles and purposes of sentencing in Scotland. This guidance will have an important role to play in achieving greater consistency in sentencing practice, assisting in the development of policy and promoting greater awareness, and understanding, of sentencing policy and practice in Scotland.

Whilst we note that further sentencing guidance will be prepared on the sentencing process and sentencing of young people, it is critical that the development of these overarching sentencing takes account of their probable impact on the use of custody. Scotland continues to report one of the highest incarceration rates in Western Europe<sup>1</sup> and the Scottish Government has recently published its Vision and Priorities for Justice in Scotland which sets out an intention to adopt a more progressive evidence-based approach, supported by partners across the justice sector and beyond.

In this context, we hope that the guidance on the principles and purposes of sentencing will not simply codify the current practice in Scotland, but signal an ambitious vision for sentencing in Scotland. With this in mind we limit our response to a number of broad reflections on the desirability of a sentencing framework that is evidence based, fair, proportionate and takes respect for human rights seriously. We

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<sup>1</sup> World Prison Brief: Highest to Lowest - Prison Population Total, available at <http://www.prisonstudies.org/highest-to-lowest/prison-population-total>

do this with particular reference to the likely impact on the use of custody, the most serious sentencing disposal available to the courts in Scotland.

**1. 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.

We welcome the approach of the Scottish Sentencing Council and the distinction between the principles and purposes of sentencing. We hope this distinction will reinforce the need for all courts in Scotland to reflect upon the core principle that sentences should be 'fair and proportionate' before an individual sentence is selected.

However, we share the concern, expressed in the accompanying 'Principles and Purposes of Sentencing in Scotland and Other Jurisdictions' that the interaction between the principles and purposes is not fully explained and may cause confusion, particularly in difficult cases. Promoting greater awareness and understanding of sentencing policy and practice is a core statutory objective of the Scottish Sentencing Council and we believe that the guidance should be strengthened to make clear that the principles of sentencing supersede, and should in all cases take precedence over, the purposes of sentencing. Or, put another way, in no instances should the courts desire to emphasise one of the purposes of sentencing override the core principle of fairness and proportionality.

**2. 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.

We support 'fairness and proportionality' as the core principle of sentencing in Scotland, subject to the recommended amendments set out below.

**3. 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.

We welcome the supporting principles set out in paragraph 2(i)-(vi). However, we are concerned that this does not currently distinguish sufficiently between the principles of parsimony and proportionality in sentencing. As the accompanying 'Principles and Purposes of Sentencing in Scotland and Other Jurisdictions' makes clear, many

jurisdictions make a clear distinction between the demands of parsimony (that the content of a sentence should be no more severe than is necessary to meet the purposes of sentencing) and proportionality (that the overall punishment must be proportionate to the gravity of the offending behaviour). Both parsimony and proportionality should be included in the list of supporting principles.

Moreover, we are concerned that the omission of proportionality as a distinct supporting principle serves to water down the core principle that ‘sentences in Scotland must be fair and proportionate’. Without adequate guidance to the courts on what the proportionality principle means in practice there is a very real danger that over time this fundamental principle of sentencing will not be given due regard or relegated to other competing interests. Like many of the academic contributions set out in the accompanying brief, we believe that the courts should never impose a sentence which exceeds what is considered appropriate or proportionate for the offence committed.

There is clear evidence of the negative consequences of custody, including loss of accommodation, loss of employment, breakup of families, debt, and an increased risk of mental health problems. We suggest that sentencing decisions should take account of this evidence in weighing up proportionality. Given the particular harm caused by imprisonment, we believe that a proportionality principle should operate to restrict the use of custody to all but the most exceptional circumstances – something recognised by the Scottish Government when they announced the extension of the presumption against short sentences of imprisonment in September 2017. Such a step is an essential safeguard against the slow creep of sentencing inflation seen in England and Wales, which has been closely associated with instrumental arguments such as deterrence, dangerousness and public protection.

#### 4. Are the supporting principles expressed clearly and accurately?

- Yes  
 No

Please provide any reasons for your response.

Whilst recognising the desire to keep the supporting statements short and concise we feel that principle (vi) ‘people should be treated equally, without discrimination’ requires further elaboration. In keeping with established equality law, this should be developed to make clear that discrimination on the grounds of gender, race, religion, age or sexual preference is not acceptable. Moreover, this should encourage a substantive conception of equality that recognises that in some cases a distinct approach may be needed to achieve equitable outcomes. As Baroness Hale DBE, now the President of the Supreme Court, pointed out in her 2005 Longford Trust Lecture, *‘equality is a complicated subject. It is now well-recognised that a misplaced conception of equality has resulted in some very unequal treatment for the women and girls who appear before the criminal justice system’* (Longford Trust, 2005):

- The UN Rules for the Treatment of Women Prisoners and Noncustodial Measure for Women Offenders (the Bangkok Rules) provides a framework for gender sensitive sentencing guidelines and we recommend that the Scottish Sentencing Council include a reference to these rules, noting the UK’s obligation to provide “gender-specific options for...sentencing alternatives”. Women are generally poorer than men, are more likely to have been victims of sexual or domestic abuse, and are much more likely to be primary carers

of children. Financial hardship and family responsibilities do not predispose women to criminality, indeed the overall crime figures suggest the reverse, but it does make them more vulnerable.

- As at June 2013 the Scottish prison population was just over 96% white. The Scotland Census 2011 suggests that the proportion of prisoners classified as being from a white ethnicity is the same proportion found among the general population. The proportion of people from Asian or Black ethnicities within the general population differed from the rate of the prison population. 2.5% of the general population was from an Asian ethnicity, whereas 1.7% of the prison population were reported as Asian. People from black ethnicities accounted for 0.6% of the general population and 1.4% of the prison population. The proportion of Muslims among the prison population was greater than that amongst the general population. According to the 2011 Census, Muslims accounted for around 1.2% of the Scottish population aged 15 and over. In prison the proportion was over twice that at 2.5%. In England and Wales, doubts about the accuracy of rates on the proportion of prisoners from travellers' backgrounds have been expressed by the Chief Inspector of Prisons.
- If the courts are to apply the principles set out in the overarching principles of sentencing it is critical that the courts have access to information about the offender and the sentencing options available to them. As David Lammy noted in his recent independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System,

*Sentencing decisions need greater scrutiny, but judges must also be equipped with the information they need. It is the role of the Probation Service to provide judges with pre-sentence reports (PSRs), which set out greater information about the character and circumstances of an offender. These reports 'assist[s] the court in determining the most suitable method of dealing with an offender' – and may be particularly important for shedding light on individuals from backgrounds unfamiliar to the judge. This is vital considering the gap between the difference in backgrounds – both in social class and ethnicity – between the magistrates, judges and many of those offenders who come before them<sup>2</sup>*

A substantive conception of equality should encourage the courts to reflect upon how the principles and purposes of sentencing are applied in particular cases. This guidance can only be applied effectively if the Scottish Sentencing Council work with the Scottish Government to improve awareness of how outcomes differ between sections of the community - specifically in relation to the protected characteristics set out in the Equality Act 2010 - and the need for high quality data that allows a more informed assessment of the impact of sentencing guidance over time.

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<sup>2</sup> The Lammy Review. An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/643001/lammy-review-final-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf)

**5. Are there any other supporting principles which should be included at paragraph 2?**

We welcome the inclusion in para 2(i) that '*all relevant factors of a case must be considered including the seriousness of the offence, impact on the victim and circumstances of the offender*'. The reference to the circumstances of the offender is significant, but we echo the consultation response from Families Outside who encourage the Scottish Sentencing Council to go further and make explicit reference to those with primary care responsibilities

Although there is a lack of routine data collection in the UK about children affected by the criminal justice system, there is a growing body of research evidence about the harm caused to children by the imprisonment of their mother, who is almost always the primary carer. In 2010, it was estimated that 17,240 children were separated from their mothers by imprisonment across the UK, whilst approximately 3,000 babies aged two years and under have their mothers imprisoned each year. As we argued in a recent report<sup>3</sup> sentencing guidelines should be strengthened by the addition of an 'Overarching Principle' setting out the court's duty to investigate sole or primary caring responsibilities of defendants and to take these responsibilities into account in sentencing decisions.

Given the growing focus on adverse childhood experiences and the need to break the inter-generational cycle of crime we suggest that reference to primary care responsibilities is incorporated into para 2(i).

**6. 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.

We welcome the move to provide greater clarity on the purposes of sentencing in Scotland. It is essential that the general public are aware of the purposes for which a sentence may be selected. However, we are concerned that the guidance that 'the sentence selected should best achieve the purposes of sentencing that are appropriate to the particular case' is tautological and liable to confusion. It is not at all clear to us why the circumstances of an individual case should determine the appropriate purpose of sentencing. As Andrew Ashworth makes clear in the critique set out in the accompanying briefing, sentencing guidance should provide a clear overarching framework within which individual cases are decided, not the other way around;

*"It is one thing to agree that judges should be left with discretion so that they may adjust the sentence to fit the particular combination of facts in an individual case. It is quite another to suggest that judges should be free to choose what rationale of sentencing to adopt in particular cases or types of case. Freedom to select from the various rationales is a freedom to determine policy, not a freedom to respond to unusual combinations of facts".<sup>4</sup>*

<sup>3</sup> Prison Reform Trust (2015) Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children

[http://www.prisonreformtrust.org.uk/Portals/0/Documents/sentencing\\_mothers.pdf](http://www.prisonreformtrust.org.uk/Portals/0/Documents/sentencing_mothers.pdf)

<sup>4</sup> Ashworth, A (2015) Sentencing and Criminal Justice (6th edn, Cambridge University Press), pp80-81

Moreover, experience from England and Wales and other jurisdictions, indicates that the published statement of principles and purposes will set the tone for sentencing practice in Scotland for a generation. Reflecting the Scottish Sentencing Council's statutory objective to 'assist the development of policy in relation to sentencing' we believe the guidance should be stronger in prescribing a hierarchy of purposes that reflect the direction of travel set out in the Scottish Government 'Vision and Priorities for Justice in Scotland'. The decision to extend the presumption against imprisonment shows a willingness to embed a distinct approach in Scotland at a time when outcomes in the criminal justice system remain poor:

- Scotland has one of the highest imprisonment rates in western Europe—142 people in prison per 100,000 of the population. England and Wales have an imprisonment rate of 147 per 100,000, France 103 per 100,000 and Germany 78 per 100,000<sup>5</sup>
- Prison sentences are getting longer. The average length of a custodial sentence in 2014–15 was over nine months (285 days)—56 days longer than in 2005–06.<sup>6</sup>
- The cost of imprisonment continues to rise. It costs an average of £34,399 per prison place—an increase of nearly £2,500 in the last three years.<sup>7</sup>
- 44% of people released from custody are reconvicted within a year—rising to 59% for men and 63% for women with more than 10 previous convictions.<sup>8</sup>

On this basis, we encourage the Scottish Sentencing Council to re-visit the current approach to the purposes of sentencing. We believe the guidance should provide a clearer statement of how the purposes of sentencing should be applied in individual cases. It should make clear how the purposes of sentencing will interact with the overarching principles of sentencing, particularly the requirement that sentences are proportionate to the harm caused by the offence. Where possible, we believe it should indicate a hierarchy of purposes to support the courts to apply this sentencing guidance in individual cases, especially where these purposes come into conflict. We believe these amendments would mitigate the risk of sentencers selecting between sentencing purposes 'cafeteria' style and would greatly improve the predictability, certainty and proportionality of sentencing practice in Scotland.

## 7. Are the purposes as listed at paragraph 5(a)-(d) appropriate?

- Yes  
 No

Please provide any reasons for your response.

Paragraph 5(a)-(d) offers a balanced account of the purposes of sentencing in Scotland. However, in light of the comments set out above, we are concerned that the instrumental purposes of sentencing set out in paragraph 5(b) 'Reduction of Crime' could open the door to external decision-making factors that may, over time, encourage longer or more punitive sentences.

<sup>5</sup> World Prison Brief: Highest to Lowest - Prison Population Total  
<http://www.prisonstudies.org/highest-to-lowest/prison-population-total>

<sup>6</sup> Table 10(c). The Scottish Government (2016) Criminal proceedings in Scotland 2014–15, Edinburgh: The Scottish Government

<sup>7</sup> Scottish Prison Service (2016) Annual report and accounts 2015–16, Edinburgh: SPS and Scottish Prison Service (2013) Annual report and accounts 2012–13, Edinburgh: SPS

<sup>8</sup> Table 8 and 10, The Scottish Government (2016) Reconviction rates in Scotland: 2013–14 offender cohort, Edinburgh: The Scottish Government

As the accompanying 'Principles and Purposes of Sentencing in Scotland and other Jurisdictions', makes clear, the evidence that sentencing practice can achieve instrumental objectives such as rehabilitation, deterrence and prevention is decidedly mixed and make these ethically very weak justifications for sentencing. Individual deterrence is more closely associated with probability of detection and the certainty of enforcement than it is with the sentence imposed by the courts. Likewise, general deterrence does not appear to be closely related to the level or punitiveness of the sentence imposed by the courts. The Scottish Sentencing Council has also reviewed the evidence for rehabilitation and incapacitation to which we would add that in recent years the shift towards dangerousness and public protection as foundational principles of sentencing in England and Wales, and elsewhere, has had a profound effect on the prison population. As the British Academy has recently noted we should approach these considerations with a suitable modesty about what can be achieved by the criminal justice system and a corresponding recognition of the very serious harm it can inflict;

*"we would urge the importance of moderation or modesty in penal ambitions and aims. There are two dimensions to this modesty. One concerns aims or ambitions. It is necessary to recognise the very limited role that criminal law and criminal punishment can play in a) resolving social problems; b) preventing various kinds of harm; c) building a better society; and d) preventing the kinds of harm that directly concern criminal law. Criminal law and punishment are blunt and burdensome instruments. Many other kinds of measure, including education, social welfare, public health, employment and other efforts to remedy social disadvantage and injustice are likely to be more effective in preventing the harms and wrongs that crime causes".<sup>9</sup>*

In light of this, we encourage the Scottish Sentencing Council to draw a far sharper distinction between the purposes of sentencing and the approach taken by practitioners once a court order has been imposed. While we are passionate advocates of fostering a rehabilitative culture within our prisons, encouraging personal responsibility, growth and reintegration into the community as active citizens (something recently emphasised by the Scottish Prison Service),<sup>10</sup> we do not believe that rehabilitation is a proper purpose of imprisonment. The principle of proportionality in sentencing should always take precedence over instrumental factors and the use of imprisonment, the most serious sanction available to the courts in Scotland, should be reserved for cases entailing the most serious harm. In the overwhelming majority of cases a community remedy will be most appropriate.

**8. Are the purposes expressed clearly and accurately?**

- Yes  
 No

Please provide any reasons for your response.

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**9. Are there any other purposes which should be included?**

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<sup>9</sup> British Academy. A Presumption Against Imprisonment: Social Order and Social Values. July 2014

<sup>10</sup> Scottish Prison Service (2014) Delivering a Strategy for Purposeful Activity in the Scottish Prison Service, page 117.

**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?**

- Agree  
 Disagree

Please provide any reasons for your response.

We do not object to the reference to the efficient use of public funds in achieving the appropriate purpose(s) of a particular sentence. Given the high costs of imprisonment vis-à-vis community options, it is critical that the courts are aware of these costs and take them into account when determining the most appropriate sentence in individual cases. However, we are concerned that the further elaboration that *'early guilty pleas are recognised as increasing the efficient use of public resources'* may impact negatively upon vulnerable groups who need additional help to engage fully in the court process and understand the implications of a guilty plea.

As we noted in our recent information pack for magistrates, district judges and court staff 'all defendants have the right to a fair trial'<sup>11</sup>. There are some defendants who are vulnerable and might need additional support. This could be due to their age or developmental immaturity or to particular conditions such as learning disabilities, mental health conditions, or autism. People with mental health conditions, learning disabilities, autism or communication difficulties are not homogenous groups with identical experiences and needs. They are individuals with a wide range of different life experiences, strengths, weaknesses and support needs. Many, however, will share some common characteristics, which might make them especially vulnerable in court. People can experience mild to severe conditions and this will affect the level of support they might need. It is important that the offender understands the terms of the sentence, what is expected of him or her, when and what will happen if he or she fails to comply.

Considering the available evidence, we believe that paragraph 6 should be re-framed to achieve a better balance between the desire to achieve the efficient use of public resources and a principle of equal access to justice. Whilst we would expect the principle of equal access to feature strongly in future Scottish Sentencing Council guidance, mostly notably on court procedure, we feel it is critical that this principle is referenced in the overarching principles and purposes of sentencing to ensure it is given due consideration in all future cases.

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

- Yes  
 Disagree

Please provide any reasons for your response.

As a general rule, the Prison Reform Trust believe that sentencing guidelines should always take into account the likely impact upon public resources. For example, given the delicate balance between the damage prisons impose and the potential for

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<sup>11</sup> Prison Reform Trust publication 'Mental Health, Autism and Learning Disabilities in the Criminal Courts: Information for magistrates, district judges and court staff' <http://www.mhldcc.org.uk/>



rehabilitation, it is clear that community alternatives are a far more efficient use of public resources than short periods of custody. Further, we would emphasise that maintaining a safe and decent environment in prisons cannot be achieved at low cost.

**12. 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.

For the reasons outlined above we are concerned that as presently articulated the guidance will not lead to an increase in public understanding of how sentencing decisions are made. We are concerned that the general public will not understand the relationship between the principles and the purposes of punishment. Moreover, it is not clear to us what will take precedence when the supporting principles and purposes outlined in the guidance come into conflict. There is a risk that the current approach leaves too much scope to judges to determine their own hierarchy of principles and the rationale of sentencing to adopt in particular cases.

We suggest that the guidance is re-drafted to make clear that the principles, with parsimony and proportionality dealt with individually, take precedence over the purposes of sentencing.

**13. 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.

We welcome the publication on new guidance on the principles and purposes of sentencing in Scotland. Subject to the comments set out in this consultation response we believe that a simple, accessible statement of the overarching principles of sentencing in Scotland will, in the long-term, increase public confidence in sentencing.

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

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

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

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