

Sentencing Council meeting:
Paper number:
Lead Council members:
Lead official:

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SC(18)MAY06 - Seriousness
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1 ISSUE

1.1 At the April 2018 meeting the Council agreed to consult on a draft general guideline for use where there is no offence specific guideline as the first phase of the project to replace the SGC Seriousness guideline. The consultation will run from June 2018.

1.2 Concerns were raised about the scope of the second phase of the project which is to provide expanded explanations of factors in the digital versions of offence-specific guidelines. Rebecca Crane has very helpfully set out her concerns relating to the project and this paper will seek the Council's views on the points she raises.

1.3 At the January 2018 meeting the Council considered expanded explanations to be made available for factors in the digital version of the assault, burglary, sex, robbery, drugs, fraud, environmental offences, possession of offensive weapon/ bladed article and theft guidelines. Guidelines that are yet to be considered include health and safety, dangerous dogs, intimidatory offences, manslaughter and child cruelty.

1.4 At this meeting the Council will be asked to reconsider the rationale and scope of the second phase of the project; detailed consideration of the content will be undertaken at the June meeting, with a further meeting scheduled for sign off of the consultation draft in October, once feedback has been received from the consultation on the general guideline.

2 RECOMMENDATION

2.1 That the Council considers the concerns raised in relation to the guidelines to replace the SGC Seriousness guideline and agrees the scope and direction of the project.

3 CONSIDERATION

Principles of sentencing aimed at the public

3.1 At the outset of the discussions on replacing the SGC Seriousness guideline the Council expressed the view that a 'principles of sentencing' document should be produced aimed at the public. It was proposed at the September meeting that this should be

incorporated into the work being done to update the Council's website to provide accessible information to the public on sentencing. Work is ongoing on this project. The Council will be updated on progress at a future meeting.

3.2 As is the case with all SC guidelines, both phases of the project to replace the Seriousness guideline would aim to contribute to greater clarity and transparency in sentencing. While the guidelines are designed primarily as a practical tool for use by sentencers and criminal justice professionals they may still be a useful source of information for the public but are not designed to be a standalone 'principles of sentencing' document.

Question 1: Is the Council content that information for the public on the principles of sentencing is not part of the project to replace the SGC Seriousness guideline but is part of the work to revise the website being undertaken by the Communications team?

Addressing issues raised in the Review

3.3 At the July 2017 meeting the Council considered the ways in which the replacement for the SGC Seriousness guideline could address some of the issues raised in Professor Bottoms' Review.

3.4 Providing guidance on the five purposes of sentencing: there was some question as to the usefulness/ necessity of this. It was agreed that offence specific guidelines already identify the relevant purposes in the factors and sentence levels. The draft General guideline contains a reference to the five purposes of sentencing.

3.5 Referring in guidelines to the effectiveness of sentencing: the Council agreed that there was not enough evidence to address effectiveness in guidelines.

3.6 Providing more guidance on aggravating and mitigating factors: the Council agreed that this could be useful and this is integral to the both phases of the project to replace the 'seriousness' guideline.

3.7 Restructuring the lists of aggravating and mitigating factors for example by including a balancing mitigating factor for every aggravating factor and separating offence related and personal mitigation: the Council concluded that the factors could not be balanced as there were not always relevant opposite factors. The Council did not consider that attempting to separate offence and offender mitigation would be helpful as there was not always a clear distinction and existing guidelines do not do so.

3.8 Providing more guidance on the relevance of previous convictions: the Council agreed to do this and include this guidance in the general and offence-specific guidelines.

Question 2: Is the Council satisfied that the decisions made at the July 2017 meeting remain the right ones and that the two phases of the 'Seriousness' project should address those issues that the Council wished to take forward?

Developing a 'dictionary' of terms for use in guidelines

3.9 Consideration of factors across guidelines has highlighted differences in the wording of factors and there is concern that these differences could be confusing and potentially lead to inconsistency. Work has been done by the social research team to collate all of the factors used across guidelines and to compare how they are used. This work has shown a good deal of consistency in the terms used especially in more recent guidelines. In the development of future guidelines reference can be made to this 'dictionary' to ensure consistency.

Question 3: Does the Council wish to refer to past guidelines and to use consistent language across future guidelines where appropriate?

Requiring sentencers to refer to too many guidelines or too much supplementary information

3.10 The Lord Chief Justice has expressed concern about sentencers being required to refer to too many guidelines and therefore over complicating the sentencing exercise. It is undoubtedly the case that in any one sentencing exercise there may be several guidelines that are relevant. For example in sentencing someone for two offences of common assault, in addition to the Assault guideline the sentencer may be required to refer to the Imposition, Domestic Abuse, Totality and Guilty Plea guidelines. The Bottoms' Review (at paragraphs 35 and 54) notes that while sentencers will always use and refer to the relevant offence-specific guideline there is a tendency to take the other guidelines as read and perhaps to overlook them.

3.11 The Council has been urged (for example by Transform Justice) to produce more overarching guidelines rather than offence-specific ones. The Council is already committed to doing so; at this meeting the Council is considering a mental health overarching principles guideline for the first time. The Review recommends that the Council should give 'careful thought' to how it can ensure that these overarching guidelines are regularly referred to.

3.12 Members will recall the demonstration of the digital version of the guidelines at the April meeting. By the end of 2018 all guidelines will be provided in a digital format which will facilitate easy access to the overarching guidelines from within offence-specific guidelines.

3.13 The concern that is specific to the idea of providing expanded explanations in offence-specific guidelines is that a sentencer who fails (or appears to fail) to refer to the detail could be criticised on appeal, thus making it essential that all sentencers refer to the detail in every case, thus over-complicating the guidelines and the sentencing process.

3.14 The proposed expanded explanations will contain information to encourage best practice. In developing the explanations the Council has sought to bring certain considerations to the fore (an example would be age and immaturity). In some cases the explanations are based on Court of Appeal judgments (for example abuse of trust), which courts should be

following in any event. What the explanations can provide is a single accessible source of relevant guidance. The guidance is generally worded in such a way as to allow the sentencer wide discretion.

3.15 If the Council is concerned about explanations tying the hands of sentencers or leading to an increase in appeals this could be addressed by wording in the expanded explanations that make it clear the information is of general application and may not be applicable in all cases. If, despite this, there were to be a short term increase in appeals this could be dealt with in due course by the Court of Appeal stating that a failure by a court to refer in detail to the explanations in a guideline does not in itself render a sentence manifestly excessive (or unduly lenient).

3.16 Alternatively, the Council may feel that some explanations (for example the text on previous convictions and other 'standard' factors) should be an integral part of the guideline to be followed unless it would be contrary to the interests of justice to do so, but that others should be caveated as not applicable in all cases.

3.17 The concern about overburdening sentencers with information can be tested in research with sentencers and would be also be the subject of a question in the consultation.

Problems with different explanations of factors in different guidelines

3.18 There is a related concern that if the explanations of factors vary across guidelines sentencers will always need to click on them to check what is said in the context of each guideline. The Council has expressed a preference for consistency in explanations. The decisions made at the January Council meeting regarding explanations for existing guidelines were to use the standard explanations in most cases and to find explanations of general application for those factors not covered by standard explanations.

3.19 There were proposals to tailor explanations slightly so as to remove any irrelevant or confusing content in the context of a particular offence. It may be that any clarity gained by tailoring the explanations is outweighed by the complication of having similar but different explanations.

3.20 Using standard explanations wherever possible will also be simpler from the practical point of view in creating the digital guidelines.

3.21 The Council may conclude that for some factors in offence specific guidelines (particularly those factors that are tailored specifically for individual guidelines) no expanded explanation is necessary or helpful.

3.22 An alternative approach would be not to link from individual factors but to link to the general guideline or to a single document (or perhaps one document for aggravating factors and one for mitigating factors) which lists the various factors and their general explanations. This would have the merit of making it clear that there was only one set of explanations which once sentencers were familiar with, they would not need to refer to again; and if the document(s) were 'advisory' rather than having guideline status, sentencers would not be criticised for not following the guidance. The only links from individual factors would be to definitive guidelines (such as Domestic Abuse). Additionally, this would be a simpler option to develop and to maintain.

3.23 The disadvantage of this approach is that it would be less easy for sentencers to find the relevant information and make it less likely that they (and other court users) would take notice of it thus diluting the ability of the project to deliver the potential benefits.

Question 4: Does the Council wish to provide explanations for factors in offence-specific guidelines?

Question 5: If so should this be as a link to one (or two) documents or links from individual factors in guidelines?

Question 6: If links to individual factors, should some of the factors have bespoke explanations (subject to detailed consideration at the June meeting)?

Question 7: What status should the explanations have – discretionary guidance or guideline status? Should the status vary depending on the factor?

Next Steps

3.24 At the June 2018 Council meeting detailed proposals will be presented on the explanations to be provided in offence specific guidelines taking into account the decisions made at this meeting. Further work will be carried out over the summer and a draft for consultation will be brought to the October 2018 meeting to be signed off. By then the Council will have the benefit of feedback from the consultation on the General guideline.

Question 8: Does the Council agree to take the work forward as proposed?

4 IMPACT AND RISKS

4.1 The aim of providing expanded explanations is to encourage best practice and therefore no significant impact on sentence levels is anticipated. However, as the project is wide in scope there is the potential for a significant impact. Road testing and the consultation process will highlight any issues that are likely to have unintended consequences.

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