



# Sentencing Guidelines: Challenges and Opportunities

**THE RT HON LADY DORRIAN**  
Lord Justice Clerk

Apex Scotland  
Annual Lecture

**EDINBURGH CITY CHAMBERS**  
**3 SEPTEMBER 2019**



## Previous Apex Scotland Annual Lectures have been delivered by:

4 September 2018

**John Swinney** MSP

Deputy First Minister and Cabinet Secretary for  
Education and Skills

5 September 2017

**The Rt. Hon. James Wolffe** QC

Lord Advocate

6 September 2016

**Fraser Kelly**

Chief Executive, Social Enterprise Scotland

1 September 2015

**Michael Matheson** MSP

Cabinet Secretary for Justice

2 September 2014

**Professor Lesley McAra**

Co-Director, Edinburgh Study of Youth Transitions  
and Crime, University of Edinburgh

3 September 2013

**Sir Stephen House**

Chief Constable of Police Scotland

4 September 2012

**Jeane Freeman** OBE

6 September 2011

**Tam Baillie**

Scotland's Commissioner for Children and  
Young People

7 September 2010

**Baroness Vivien Stern** CBE

Senior Research Fellow at the International  
Centre for Prison Studies King's College London

8 September 2009

**Professor Fergus McNeill**

Professor of Criminology and Social Work,  
University of Glasgow

9 September 2008

**Kenny MacAskill**

Cabinet Secretary for Justice and  
**Richard Jeffrey**, The Prisons Commission

11 September 2007

**Professor Wesley Skogan**

Institute for Policy Research (IPR),  
Northwestern University, Illinois

12 September 2006

**The Rt. Hon. Lord Cullen of Whitekirk**

13 September 2005

**Cathy Jamieson** MSP

Justice Minister

15 September 2004

**Duncan I Murray** WS

President of the Law Society of Scotland

16 September 2003

**The Rt. Hon. Jack McConnell** MSP

First Minister

18 May 1998

**Henry McLeish** MP

Minister for Home Affairs and Devolution,  
Scottish Office

## Foreword

The 2019 Apex Scotland lecture was given by the Lord Justice Clerk of Scotland, Lady Dorrian, who is the first woman in Scotland ever to hold this post and is the Chair of the Scottish Sentencing Council. Coming just the day after the publication of an IPSOS MORI poll commissioned by the Sentencing Council on public perceptions of justice, Lady Dorrian's lecture was both timely and insightful.

Before a packed house at the Edinburgh City Chambers Lady Dorrian explained the role and function of the Sentencing Council in setting the guidelines which help to ensure that justice is as fair and consistent as possible within the constraints of judicial independence and public opinion. In particular she addressed the challenges of conveying progressive ideas on justice to a public brought up on retributive principles; the opportunities to consider research and evidence around brain maturation and criminal responsibility; and the constraints that an inconsistent provision of community services and alternative sentencing options places on attempts to bring forward more progressive ideas on how justice should be implemented. In a persuasive and well informed manner she called for greater investment in and research on community based programmes and interventions designed to reduce our apparent growing dependence on custodial care, assuring her audience that the Sentencing Committee were supportive of establishing a justice environment where such ideas could be effective and also publicly acceptable.

In a lively question time she picked up on questions around youth justice, post-code lottery sentencing and addressed some of the findings of the survey rounding off a hugely informative evening with a further call for greater emphasis on consistent services.

ApexScotland, as a partner with justice services across Scotland, welcomes not only the ongoing dialogue between all stakeholders on how best to ensure fair and just responses to crime, but also the positive discourse around prevention of crime and how best to ensure that those who offend do not continue to do so. We are grateful to Lady Dorrian not just for her significant input into the progressive justice agenda but also for her clear commitment to finding practical and achievable ways to achieve it, including utilising the resources which the third sector can bring as part of a multi-sectoral community based approach. It is our hope that we will see increasing opportunity to work with people at an earlier stage before they get into the justice system. In part of my summing up on the night, I echoed a sentiment which has been to the forefront of recent lectures. "A successful justice system is one which is measured not by how many it brings in but by how many it can keep out".

### Alan Staff

Chief Executive  
Apex Scotland

## Introduction

I was delighted to be asked to give Apex Scotland's annual lecture this year, an event which offers a valuable opportunity to reflect on some of the key issues arising within the Scottish justice system and, with any luck, to provoke discussion and debate.

The title of my lecture this evening is "Sentencing Guidelines: Challenges and Opportunities" and, as that suggests, I will be speaking principally in my capacity as Chair of the Scottish Sentencing Council.

The creation of the Sentencing Council in 2015 marked a significant change in the Scottish legal landscape. For the first time, we have an independent body charged with promoting consistency in sentencing, primarily through the creation of sentencing guidelines; assisting in the development of sentencing policy; and promoting greater awareness and understanding of sentencing. And it has been created at a time when all three of these objectives are, in my view, capable of having a significant effect.

I'd like to use my time with you this evening to explore a few distinct, but related, challenges currently arising around sentencing policy and practice in Scotland and the opportunities which the creation of the Sentencing Council may present.

First, I'd like to look at issues relating to public awareness and understanding of sentencing, and the role that the Council, through the development of guidelines and otherwise, may have to play in addressing these.

Secondly, I'd like to talk about our work around the sentencing of young people, where we think there is significant potential to influence the way in which harmful behaviour is addressed.

And finally, I'll say a little about alternatives to imprisonment, an area of increasing focus and debate and one which is, of course, of particular relevance both to the work of Apex Scotland and many of those in the audience this evening.

## Public Attitudes Towards Sentencing

Turning first to public awareness and understanding of sentencing, we know that the Sentencing Commission, which led to the setting up of the Sentencing Council, found that there was little empirical evidence to suggest a widespread inconsistency in sentencing but that there was a public perception of inconsistency, but that was 15 years ago. What do we currently know about public attitudes? This is important because if the Council is to promote greater public knowledge in this area, we obviously need to know what people think, but information about this hitherto has tended to be fairly limited both in scope and depth.

For that reason, the Sentencing Council commissioned Ipsos Mori to carry out a nationally representative survey, with a focus both on people's overall attitudes to sentencing generally, and their views on sentencing for certain specific offences. The results have just been published (you can find them on the Scottish Sentencing Council's website) and what they tell us is both encouraging and challenging for the Council and, I think, for the wider justice system.

Starting on a reasonably positive note, the majority of respondents were confident that Scotland's criminal justice system is fair to all although it is, I think, disturbing that a sizable minority (35%) were not, which itself brings us certain challenges.

For about half of respondents the single most important aspect of sentencing was protection of the public, with rehabilitation of the offender the most important for a quarter of them. Interestingly, and I would suggest, encouragingly, a different response was found in relation to the sentencing of young people, where a majority felt that there should be a greater emphasis on rehabilitation. I will return to this point later but even in the context of adults the response to that research may suggest a recognition that rehabilitation is an important aim, as long as the public feel that public safety is not thereby compromised.

Awareness and knowledge of sentencing was fairly mixed; 47% of respondents felt that they knew a lot or a moderate amount, while 53% thought they knew little or nothing at all about the process. Views on community sentencing were also divided; around half of respondents feeling that community sentences did not help to reduce reoffending.

When asked about their overall perceptions of sentencing, 56% of respondents felt that sentencing in general was too lenient, which is consistent with previous surveys and other research. However, when we asked respondents how offenders should be sentenced in specific scenarios – which focused in this case on causing death by driving offences and sexual offences – the most common response was broadly in line with the sentences which were likely to have been imposed by a court for four out of five of the offences covered.

This finding echoes the outcome of research carried out in other Western European jurisdictions: first, that people tend to think that sentencing is far more lenient than it actually is; and, secondly, when people are given the responsibility of mock-sentencing a hypothetical case, for example on the “if you were the judge” section of the Sentencing Council's website, their responses tend to be much closer to those of actual sentencing practice than they had expected, and far more complex than high level opinion polls might suggest. This research also showed a slightly more nuanced picture, suggesting that public attitudes vary depending on the specific offence in question; for example, attitudes to offences involving indecent images of children were more severe than in respect of other offending behaviour.

Overall, these findings offer a fascinating insight into how the people of Scotland view sentencing, and it's clear that public opinion cannot be as easily summarised as some might suggest. I think this will also be the case with some further research we hope to publish later this year, exploring public views, including those of

victims and their families, around causing death by driving and sexual offences in considerably more depth in preparation for development of guidelines in these areas. This initial piece of research does present us with a number of challenges, particularly around overall awareness and knowledge of the sentencing process.

Sentencing is undoubtedly a complex and potentially confusing topic, but if we cannot explain in clear and simple terms how a vital aspect of our criminal justice system works, and how effective different sentencing options are, what does that mean for public confidence in the justice system, and for our collective ability to have an informed, rational debate about how Scotland should tackle offending behaviour?

This mismatch shown in our research and elsewhere, between the generalised opinion that sentences are too lenient and the more nuanced conclusions reached when carrying out a mock sentencing exercise, shows how vitally important it is to provide the public with a much greater awareness and understanding of the whole sentencing process. The promotion of this awareness and understanding is a statutory objective of the Scottish Sentencing Council, and is a challenge which we take extremely seriously. That is why we have been developing our website into a comprehensive sentencing resource, containing:

- clear explanations of how sentencing works;
- a jargon buster;
- a myth buster;
- interactive sentencing exercises where you can “be the judge”;
- explanatory videos (also available on YouTube) describing the sentencing process; and
- a range of educational materials which we consider to be of great importance for use by teachers as part of the modern studies curriculum.

The resources have been designed for use by as broad an audience as possible and we hope they will be of assistance not only to the public but also to people working in criminal justice, for example to assist in staff training, or in advocacy and support work. I would encourage you all to take a look at our website and the materials there, which are free to all to make use of.

This dissemination of information helps promote knowledge and understanding. But apart from that, another part of the solution lies in the development of clear, concise, and evidence-based sentencing guidelines, involving full public and judicial consultation; and that is the subject to which I'd now like to turn.

### **Sentencing Guidelines**

The introduction of a system of sentencing guidelines in Scotland could have a significant effect on the justice system because, after all, once approved by the High Court, courts have to regard any guidelines which are applicable, and if a court decides not to follow the guidelines, it must state its reasons.

In addition to supporting and assisting judicial decision-making, we believe that the guidelines will play a key role in addressing some of the issues which our and other research has highlighted, ie. increasing public understanding of sentencing, providing more clarity and transparency around how decisions are reached, and explaining the various factors which are taken into account. In this way we hope that the mismatch I referenced a moment ago can be addressed.

We think this is of critical importance, particularly for those involved in the case, be it as witnesses or as victims. It's unlikely, I suppose, that we'll ever reach a point where everyone agrees with the final sentence being imposed, but it should at least be clear *why* that sentence was imposed. With that in mind, the Council took an early decision to focus initially on several general guidelines, applying to all offences, in order to describe some of these foundational elements which underpin all sentencing decisions in Scotland.

We fully recognise the interest in the development of more specific guidelines on particular offences and that, of course, is likely to be ultimately our primary focus and we have started work on a number of these. But at the outset we were conscious that, unlike in many other jurisdictions, the fundamental principles and purposes of sentencing in Scotland have never been expressly defined in any single piece of legislation or any single court judgment, so we decided that that should be the focus of our first guideline. Similarly, the sentencing process – namely the steps which judges go through to make a sentencing decision – has not been described in detail. We considered it absolutely vital to address these matters as a first step, and we expect that the resulting guidelines will be of benefit not just to the judiciary but to the public, and it will also form a principled framework for the preparation of offence-specific guidelines in due course.

The first guideline on principles and purposes of sentencing, was approved by the High Court and came into force last year. It has already been referred to in several court decisions. It states that the core principle of sentencing in Scotland is fairness and proportionality, and that this requires a number of supporting principles, including that “sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case” and that “reasons for sentencing decisions must be stated as clearly and openly as circumstances permit”.

It also sets out the purposes which sentences may seek to achieve which include:

- protection of the public;
- punishment;
- rehabilitation;
- giving the offender the opportunity to make amends; and
- expressing disapproval of offending behaviour.

Now, in practice of course, most sentences will be selected with a view to achieving more than one of these purposes. And there will, in some cases, undeniably be a tension between these different purposes, when the sentencer must strive to achieve the correct balance between these potentially competing purposes as dictated by the particular circumstances of the given case. It is not difficult to imagine a case, perhaps a serious sexual offence, where the sentencer carefully has to balance the goals of public protection, disapproval of the offending behaviour, punishment, and rehabilitation. The guideline does not provide a hierarchy of these purposes, so it will always be for the court to decide, in individual cases, whether any particular purpose or purposes apply, and which, if any, has to be given greater or lesser emphasis. This allows the sentencer to take full account of all the individual circumstances of each case.

This work on principles and purposes guideline naturally flows into the question of how courts actually arrive at sentencing decisions; how do they put these principles and purposes into practice? That became the subject of our second general guideline: the sentencing process, about which we are near the end of a consultation process which we hope to finalise and present to the High Court early next year.

That guideline explains how courts reach sentencing decisions: it sets out the various steps which the court takes, assessing the seriousness of the offence, looking at the harm caused, looking at the aggravating and mitigating factors, and so on. The sentencing process as a whole is, in our experience, not always well understood, and it is our hope that this guideline will assist in explaining how the courts operate and will contribute substantially to public knowledge and understanding of the process. We also hope that by creating these guidelines in general terms means that we will not need to repeat the foundational elements and the steps in every offence specific guideline, making these more concise, simpler to understand and easier to use.

The way in which we develop the guidelines is also critical if they are to serve the various different roles I've suggested. We took an early decision that our work should be evidence-based, that involves extensive research and engagement. We are committed to taking the necessary time to understand current practice, to look at what works and why, and to listen to those involved in, and affected by, the sentencing process, including victims, taking on board what they have to say.

Significantly—and I think this approach is vindicated by the research into public perceptions – this includes carrying out a full public consultation on all of our guidelines. We want to hear from as wide and diverse an audience as possible in formulating our guidelines, because the intention is that they should be of use to everyone who has cause to consult them, whether that be as a member of the judiciary, a legal practitioner, a victim of crime, or an interested member of the public. But this is not a box-ticking exercise; in finalising a guideline, we do take into account the views we hear. For example, in our draft principles and purposes guideline “protection of the public” and “rehabilitation of offenders” naturally both featured. But as a result of the public consultation they were given a greater prominence and feature as distinct purposes of sentencing as opposed to being wrapped up within other purposes.

Of course this approach means that guidelines will not be developed overnight. But, given the potential impact of guidelines which have not been properly considered and tested, we do not think it would be appropriate to curtail research and consultation which are so vital.

### **Sentencing Young People**

I mentioned our proposed guideline on the sentencing of young people. This is a topic which we included in our first business plan, and which we felt was a natural progression from our first two general guidelines. It applies to all offences where the offender is a young person. It is more narrowly focused therefore on a group of people

who, as the justice system already recognises, should be treated differently for sentencing purposes. We believe that a guideline on sentencing of young people will bring a number of benefits, in particular it should:

- increase public knowledge and confidence by explaining why the process of sentencing a young person is different from that of sentencing an older person;
- increase transparency by ensuring that young people and others interested in the case understand what is happening during the process, why a particular sentence has been imposed, and what it means;
- assist the judiciary and legal practitioners, through identifying the particular factors that should be considered when sentencing a young person; and
- promote consistency in the sentencing of young people.

So the guideline will apply to all offences, but only where the offender is a young person. We intend to attempt to capture those particular factors which should be taken into account in such cases: for example, the lack of maturity which can lead to risk taking behaviour and impetuosity, the vulnerability to negative influences, and the fact that personality being less well formed as in an adult, the capacity for change is generally considered to be greater. And, unlike our principles and purposes guideline which, as I said, does not provide a hierarchy of sentencing purposes, this guideline will specifically address the question of whether, with a young person, particular emphasis should be given to any specific sentencing purpose.

The most obvious candidate for priority in this context is rehabilitation: as UNCRC says<sup>1</sup>, and as our own courts have confirmed, the best interests of someone under 18 must always be a primary

consideration when sentencing them<sup>2</sup>. And as I have already mentioned, a significant proportion of the public already identify rehabilitation as the most important purpose of sentencing in relation to young people. In taking account of the best interests of the young person, regard must also be had to the desirability of the child's reintegration into society<sup>3</sup>.

In selecting a sentence, therefore, the three factors already mentioned: lack of maturity; susceptibility to negative influences; and capacity for change all require to be considered. In England and Wales, *R (Smith) v Secretary of State for the Home Department*<sup>4</sup> Lady Hale noted that:

*"...the first of these meant that a juvenile's irresponsible conduct was not as morally reprehensible as that of an adult; the second meant that juveniles had a greater claim to be forgiven for failing to escape the negative influences around them; and the third meant that even the most heinous crime was not necessarily evidence of an irretrievable depraved character."*

This can be particularly challenging for the court, especially in the most serious offences where the court may find itself having to balance a number of sentencing purposes, even when giving priority, where possible, to the need to facilitate and encourage rehabilitation of the young person. This general approach to the sentencing of young people cannot be crudely caricatured as simply giving a young person a "lighter" or "softer" sentence than an older person. As with every single sentencing exercise, it is about selecting the most appropriate sentence in the case before the court, taking into account the circumstances of the offence and the particular circumstances of the offender. Fundamental to doing so, however, is recognition that the sentencing of a young person is an entirely different exercise from the sentencing of an adult.

1. United Nations Convention on the Rights of the Child, Article 3.1

2. *Hibbard v HMA* 2011 SCCR 25; *Greig v HM Advocate* 2012 SCCR 757; *McCormick v HMA* 2016 SLT 793

3. United Nations Convention on the Rights of the Child, Article 40

4. [2006] 1 AC 159

In our work we have been giving careful consideration to the cardinal question of how a young person is to be defined for the purposes of the guideline. Although it may be difficult to establish a clear line between a young person and an adult, we consider it vital that the applicability of the guideline is as clear and transparent as possible. We decided that definition by age was the only practical, realistic way of achieving this.

We are considering three different potential age limits: 18, 21, and 25 years of age. The existing statutory framework provides support for either 18 or 21. As we know, a sentence of detention cannot currently be imposed on anyone under 21 unless the court considers that no other sentence is appropriate. And in respect of age 25, we have been considering research into brain development and maturation over the last two decades which suggests that the brain may not be fully developed until the mid-20s.

Research we have considered so far indicates that there are three stages of brain development:

1. physical maturity of the brain, which happens around ages 12-13.
2. intellectual maturity, (the “*fundamental logical-operational thought processes*”), which evolve during adolescence, and continuing up to age 18.
3. emotional maturity, which develops during young adulthood. This is the final and most cognitively sophisticated phase involving the development of higher “*executive functions*” such as the ability to plan, and to control emotions. Our understanding at the moment is that advances in functional neuroimaging suggest these do not fully develop until about the age of 25.

So this issue is one of the key areas which we are interested in exploring in our public consultation on the draft guideline, which we intend to launch within the next few months. We recognise that it is potentially controversial to suggest that

those up to the age of 25 should be treated as young people for sentencing purposes. For that reason, we have commissioned a further review examining in detail current research on brain development to inform our eventual decision on this area of age and to provide an evidence base for the public and others to consider. It is worth stressing, however, that whatever precise age limit is selected in the draft guideline will not materially affect the general approach taken.

The experience of those working directly with people who have offended is vital in ensuring that we take fully informed and evidence based decisions. I would very much like to encourage you to respond to the consultation when it comes out.

### **Alternatives to Imprisonment**

From all that I have said it is clear that, when sentencing a young person – however we define “a young person” – it is essential that courts have available to them as wide a range as possible of robust, meaningful, and effective alternatives to imprisonment. But of course it goes much wider than that. As I mentioned earlier, our principles and purposes guideline states that “sentences should be no more severe than is necessary”. If we want courts to impose prison sentences only when no other sentence is appropriate, and that that is the most appropriate sentence – and we do – these alternatives have to be available to the courts, no matter the age of the offender.

And by “available” I mean that they must be available to courts across Scotland in a joined-up consistent manner, and judges need to have full and detailed information about what can be done in their area. If these factors are present, then the Council can play its part in ensuring that non-custodial disposals are applied by courts in a clear, consistent, and transparent way: one which enhances public confidence in community-based disposals – which, as we've seen from the research, cannot be taken for granted – and which delivers proportionate justice in respect of offenders, and facilitates a reduction in the likelihood of re-offending.

In a speech to Sacro in 2013, the then Lord Justice Clerk, Lord Carloway, pointed out:

*"...if the stated principles are not mere rhetoric, and if the courts are to have regard to, for example, the need to reduce crime through deterrence or to the reform and rehabilitation of offenders, the courts have to know, amongst other critical matters, what demonstrably operates as a deterrent, what has been shown to rehabilitate effectively and what values should be put on each element in a given case."*

Now, anecdotally (and it was touched on in the introduction by Apex's Chair), the Council is aware that levels of availability and information aren't always all that they might be. Given the increasing focus in this area, we plan to engage with the judiciary at a local level to explore what issues may be arising, though clearly the adequate provision of alternatives to custody falls outwith our remit. I note in that connection that the Government's National Community Justice Leadership Group met for the first time in August<sup>5</sup>, and for my part I support its aims of further strengthening community justice services and alternatives to custody, and increasing public and judicial confidence in community justice by demonstrating its effectiveness in supporting rehabilitation and reducing reoffending. But it is important that those aims are achieved and are not merely aims.

I should make two things clear. Firstly, this does not necessarily mean that provision across the country should be *entirely* uniform, or that sentences imposed in different parts of the country must be *exactly* the same for similar offences. There will always be a place for innovation, and local innovation at that, and the Council is watching with interest initiatives such as the various problem-solving courts which have grown up around Scotland. We will, generally, support any move to make effective sentencing options more widely available, and to roll out examples of best practice around the country.

And, secondly, I am not making a political point here. There will always be a place in our system for the appropriate use of custody, and I would not expect any judge in Scotland to shy away from that. At the same time, though, there needs to be recognition that the *inappropriate* use of custody carries with it a significant cost. And I don't just mean the cost to the state, in monetary terms, of keeping someone locked up, although that is considerable. I mean also the cost to the individual, to families and to the community of depriving someone of their liberty, when there is an appropriate alternative available. Someone who is in prison is unlikely to be able to keep a job; on release, they may be less likely to find employment; their links to their family and their community will be disrupted; their housing may disappear; the impact on the family can be significant; short sentences do not always facilitate the use of rehabilitative programmes. We know that all of this has an impact on the likelihood of re-offending.

## Conclusion

I've mentioned a number of topics this evening ladies and gentlemen, but in my view there is a common theme running through all of them, and that is the importance of knowledge and understanding, both in terms of what the public know about sentencing, and what we within the criminal justice system know about public views and perceptions.

It is clear from our research to date that the Council still has a job to do in relation to promoting greater public awareness and understanding of sentencing. Our research and engagement provide us with empirical evidence of public attitudes to, and knowledge of, sentencing, both in general and in relation to specific offences. This helps keep us focused. It reminds us of the work that we need to do help us to meet our statutory objective in this area, and gives us some insight into where we should be concentrating our efforts.

---

5. <http://www.journalonline.co.uk/News/1027736.aspx#.XV1YNGdYZgc>

By further developing our knowledge of what sentencing options are and are not available, in addition to what public attitudes are to sentencing, we are better able to contribute meaningfully and in an informed way to the development of sentencing policy including, where appropriate, doing what we can to encourage the provision of a range of meaningful and effective sentencing options, allowing the courts to select the most appropriate sentence, rather than be unduly restricted because of a lack of those options.

Without sufficient knowledge and understanding, public debate and discussion around sentencing is at risk of becoming a simplistic and uninformed argument between prison and "soft touch" justice, between being tough on crime and letting offenders walk free. The reality of sentencing, as everyone in this room knows, is far more complex, far more nuanced, and I think the challenge for the Council, and for all of us, is to create the conditions under which we can have a more informed, more constructive discussion about how best to deal with offending behaviour in Scotland.

Thank you.



Apex Scotland  
9 Great Stuart Street  
Edinburgh EH3 7TP  
Tel: 0131 220 0130  
Email: [admin@apexscotland.org.uk](mailto:admin@apexscotland.org.uk)  
[www.apexscotland.org.uk](http://www.apexscotland.org.uk)



Apex Scotland is a company limited by guarantee. Registered in Scotland No. SC126427  
Registered as a Scottish Charity, Scottish Charity No. SC023879