

---

# Sentencing Review

Consultation Response

---

## Introduction

1. The Bar Council is the regulatory and representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar welcomes the opportunity to comment on the Department of Justice's consultation on sentencing policy in Northern Ireland. This submission also reflects the views of the Criminal Bar Association which represents the views of prosecuting and defence counsel, serving to ensure an independent and quality source of specialist criminal law advocacy in Northern Ireland. The Bar's response addresses a number of the general questions and also some of the specific areas which have raised particular challenges for the criminal justice system.

## Principles and Purposes of Sentencing

Q1. Do the proposed principles provide the appropriate standards for sentencing?

3. Yes. The Bar agrees that the general principles outlined in chapter 1, including proportionality, fairness, transparency and using punishment sparingly, are the appropriate standards for sentencing. Sentencing is vital to legitimising the rule of law and maintaining the confidence of citizens in our society's justice system and therefore a clear understanding of the relevant principles would help to improve public awareness levels around how these decisions are reached by the judiciary.

Q2. Are there other principles that should be included?

4. No.

# Sentencing Review

## Consultation Response

### Q3. Are the proposed purposes of sentencing appropriate?

5. Yes – The Bar notes that the five broad purposes of sentencing proposed at paragraph 1.20 appear to mirror Section 142 of the Criminal Justice Act 2003 in England and Wales, namely punishment, protection of the public, deterrence, rehabilitation and reparation. We consider that these supporting purposes should be expressed as concisely as possible in any future guidance and welcome the clarification at paragraph 1.33 of the consultation paper that prioritisation of these purposes is not appropriate given that it could unduly constrain the judiciary.
6. In considering the development of proposed principles and purposes of sentencing, it is important to highlight that judicial discretion must remain integral to our criminal justice system. Judges must be allowed to retain a discretion to decide upon a sentence that is appropriate for the particular facts of an individual case. The exercise of this discretion, based upon a full consideration of the individual case, must be safeguarded and appropriately balanced with any guidance around the principles and purposes of sentencing.

### Q4. Are there any other purposes which should be included?

7. No

### Q5. Should a definition of the principles and purposes of sentencing be created in legislation?

8. No – The Bar considers that policy guidance detailing the principles and purposes of sentencing would be preferable to creating legislation. The development of such guidance might be best situated with a sentencing guidance mechanism if it is to be established as is explored later in the consultation paper.

## Public Perceptions of Sentencing

### Q6. Are there other methods of communicating with the public, not identified in this chapter that would help to improve knowledge and perceptions of sentencing matters?

# Sentencing Review

## Consultation Response

9. Yes – The Bar welcomes the Department’s commitment to providing sentencing information to the public to help ensure a wider and more informed understanding of court and sentencing matters. The outreach and communication plans detailed at paragraph 2.2.8 appear to be practical and useful. Members consider that one area for further consideration as part of this programme of work should specifically focus on improving public knowledge around aggravating and mitigating factors that can form part of a sentencing decision.

Q7. Can any steps be taken to improve the provision of a victim personal statement to the court and its use?

Q8. Can any steps be taken to improve the awareness or use of community impact statements?

10. No view.

## Sentencing Guidance

Q9. Should the power and remit of the Northern Ireland Court of Appeal to issue a guideline judgment be established in legislation?

Q10. If yes to Q.9, should legislation require the Northern Ireland Court of Appeal to consider relevant information on sentencing before issuing a guideline judgment?

11. Yes – The Bar considers that there may be some benefit in doing this. A limited number of cases come before the Court of Appeal on an annual basis and legislation to empower the Court to provide guideline judgments could be useful in further developing the Sentencing Group’s current practice of identifying relevant judgments as the need arises which are of use to the prosecution, defence and sentencing judges.

12. No – As stated above, only a limited number of cases per year will be of relevance in terms of guideline judgments. The Bar does not believe it is necessary to require the Court of Appeal to consider other information when issuing guideline

# Sentencing Review

## Consultation Response

judgments if the power is established in legislation. It has been the experience of criminal practitioners that the Court of Appeal, which usually sits with three members of the judiciary, has the knowledge and experience to consider all relevant factors, including the relevant aggravating and mitigating factors. However, if a sentencing mechanism is to be established then this may merit further consideration.

Q11. Should a statutory duty be placed on relevant sentencing judges requiring them to: (i) have regard to sentencing guidelines; or (ii) follow sentencing guidelines?

Q12. Should sentencing judges have power to depart from sentencing guidelines: (i) in the interests of justice; (ii) having provided reasons for that departure?

13. The Bar considers that a statutory duty could be placed on judges requiring them to have regard to sentencing guidelines in Northern Ireland. However, it will be important for the sentencing judge to be able to have the flexibility and discretion to depart from these based on the circumstances of an individual case.
14. The Bar notes the position in other parts of the UK around departing from sentencing guidelines as outlined in the consultation paper at table 4. The Bar believes that the judiciary should continue to have the discretion to depart from a guideline judgment if the circumstances merit such a departure. This is likely to be on the grounds of strong mitigating circumstances and is therefore likely to already apply an 'interests of justice' assessment. The Bar further believes that the judiciary should have the discretion to depart from a guideline in circumstances where there are justifiable reasons for doing so.

Q13. Is there sufficient transparency in sentencing within Northern Ireland?

15. Yes – Open justice is a fundamental principle which has been a pillar of our criminal justice system for many years and it represents a vital element in commanding public confidence in the court system. Sentencing forms an important part of this which takes place in open court permitting entry to the public and the media (save for the inability to name defendants in the majority of Youth Court cases). Furthermore, the judiciary is bound by Article 6 ECHR to provide reasons for their decisions. Judgments from a range of important cases are placed on the Judiciary NI website, often accompanied by a press release.

# Sentencing Review

## Consultation Response

Meanwhile counsel in the Magistrates' Court and Crown Courts perform an important role in explaining sentencing to both victims and defendants.

Q14. Should a sentencing guidance mechanism be established that builds on the current arrangements, namely, guideline judgments and the work of the Sentencing Group?

Q15. If yes to Q.14, should the mechanism be created in legislation?

Q16. If yes to Q.15, should the legislative purposes include the promotion of consistency of approach and public confidence in sentencing?

Q17. Should any mechanism established in Northern Ireland for providing sentencing guidance carry out the following ancillary functions:

(i) analysis and research on sentencing;

(ii) research on the impact of any guidelines or guidance judgments issued;

(iii) outreach to the community to improve understanding of the sentencing process;

(iv) other?

Q18. Should Northern Ireland criminal justice agencies, such as the Public Prosecution Service, Police or Probation Board be included in or excluded from a sentencing guidance mechanism for Northern Ireland?

Q19. Should prospective non-judicial members of a sentencing guidance mechanism compete for selection based on their expertise, knowledge and skills relevant to sentencing and criminal justice?

16. Yes – a sentencing guidance mechanism could be useful in Northern Ireland to build on the work of the Sentencing Group. If a guidance mechanism was to be established in legislation, the Bar takes the view that it would be best placed to perform functions such as the preparation and publication of draft sentencing guidelines, the monitoring of the operation of these and the collation and dissemination of information on sentences imposed by the courts.

17. The Bar considers that under any sentencing mechanism it will be important for there to be representation from qualified legal members with experience in criminal justice, such as a barrister, solicitor and prosecutor, to sit alongside judicial members. The Bar agrees that non-judicial members should be required

# Sentencing Review

## Consultation Response

to compete for selection based on their knowledge, expertise and skills relevant to the law, sentencing policy & practice and other relevant qualities.

### Tariff Setting for Murder

Q20. Do the starting points currently operated in Northern Ireland adequately reflect your concerns and the culpability of the offender?

18. Yes - these starting points have long been fixed in a practice direction and in Court of Appeal case law. They are clear and provide for lengthy sentences which reflect simply the tariff, before an offender is then eligible for release on life license by the Parole Commissioners. This process therefore is only the first in a two-stage judicial consideration of the length of time an offender will spend in custody.

Q21. Should starting points be recorded in statute or continue to rely on case guidance from the Northern Ireland Court of Appeal?

19. The starting points are well established amongst practitioners and the judiciary and the Bar does not believe this will be enhanced if moved into legislation.

Q22. Should legislation introduce different starting points for Northern Ireland than currently apply?

Q23. If yes to Q.22, should the lowest starting point be:

- (i) 12 years;
- (ii) 15 years; or
- (iii) 16 years?

20. No – the current arrangements are considered to operate effectively by practitioners. The Bar is strongly opposed to imposing fixed starting points in statute. The caselaw referenced in paragraphs 4.46 and 4.47 highlight the Court of Appeal’s view that the levels continue to be appropriate for Northern Ireland.

Q24. Should legislation introduce a range of statutory starting points for categories of victims or murders?

21. No – see reasons given in response to Q22.

# Sentencing Review

## Consultation Response

Q25. Should any legislation to introduce a specific statutory starting point for certain murders occurring in Northern Ireland include:

- (i) multiple murders;
- (ii) murder of public servants like police and prison officers who are exposed to risk by the nature of their employment;
- (iii) child murders?

- Please indicate the preferred starting point for any category selected: 20, 25 or 30 years, and provide reasons for your response.

22. No – these factors would already be considered as aggravating factors when the judge is assessing and setting the tariff.

Q26. Are there any other categories of victims not listed at Q.25 which should be included?

- Please specify the category or categories of victim and indicate the preferred starting point: 20, 25, or 30 years and provide reasons for your response.

23. No

Q27. Should any category of victim listed at Q.25 be excluded?

24. No view

Q28. Should existing whole life tariff provisions be:

- (i) retained;
- (ii) replaced with a tariff period of 30 years; or
- (iii) replaced with a tariff period greater than 30 years?

25. No view – It is noted that the instances of whole life tariffs throughout the UK and specifically Northern Ireland are extremely rare.

## Unduly Lenient Sentences

Q29. Should the Director of Public Prosecutions have the power to refer:

- (i) all sentences imposed in the Crown Court (including those imposed where the defendant elected for jury trial - Option B); or
- (ii) all sentences imposed in the Crown Court and sentences for offences

## Sentencing Review

### Consultation Response

with a maximum penalty of 12 months' imprisonment or more when tried in a Magistrates' Court (Option C)?

26. The Bar is concerned by both of these suggested proposals. This could lead to a potential increase in the number of cases being referred to the Court of Appeal. It is well understood why sentences for some very serious offences should be open to challenge but to widen this to all sentences could offend the principle of finality in a judgment and could be seen to remove the discretion currently afforded to the judiciary in the Crown Court.

27. The Bar is particularly concerned about the prospect of a prosecutorial appeal from the Magistrates' Court to the County Court, for the following reasons:

- The Magistrates' Courts are not Courts of record and, as such, there would be no formal record of the plea in mitigation or the sentencing remarks of the District Judge, making an assessment of the factors relied upon and considered extremely difficult.
- If an appeal was afforded on the grounds that a Magistrates' Court sentence was unduly lenient, it would require a formal record to be taken in the Magistrates' Court in all cases, which the Bar would view as a disproportionate cost given the Magistrates' Court is a court of summary jurisdiction.
- An appeal by a defendant to the County Court is a de novo hearing. However, it is unknown whether an appeal of an unduly lenient would intend to also be a de novo hearing. If it is, this would be strongly opposed as it offends the principle of finality of judgment.
- It would be envisaged that an appeal to the County Court would incur further costs in both legal aid payments to defence practitioners and PPS costs to prosecutors. At present, for defence appeals a simple notice of appeal is completed and submissions made orally to the Court. In an unduly lenient sentence case, it is likely that a more detailed prosecution notice of appeal and skeleton arguments from both parties would be required which would inevitably create further costs.
- The Bar is unaware of complaints regarding unduly lenient sentences in the Magistrates' Courts and therefore we believe that more research should be conducted on this before further consideration of any change.

Q30. We would welcome your views on the provision of information and advice, at court, about unduly lenient sentencing, to better inform victims and their families on whether or not to pursue an unduly lenient sentence referral.



# Sentencing Review

## Consultation Response

28. No comments.

### Community Sentencing

Q31. Should greater use of community sentences be made by the courts as an alternative to short prison sentences?

29. Yes - Practitioners are well aware of the current difficulties encountered in having offenders attend any type of rehabilitative or educational treatment programmes whilst in custody serving a short sentence. Consequently, there is concern that once released the offender has not been provided with any guidance or assistance in reducing their risk of re-offending. The PBNI and others can provide a range of assistance in terms of guidance, education, dealing with addiction issues, anger issues, training and supervision meaning that community-based disposals are viewed much more effective in terms of rehabilitating an offender.

Q32. Should all community orders include a restorative or reparative element?

30. No – Whilst restorative justice approaches can be very beneficial, requiring community orders to include this may not always be necessary or practical. For example, a victim may not wish to engage or it may not be appropriate based on the nature of the offending. The Bar believes that some, rather than all, community order could certainly include a restorative or reparative element.

Q33. Should the public be made aware of the benefits achieved through unpaid work and reparative activities as a result of community sentences?

31. Yes – This may help to alter some views within the public that community sentences are the ‘soft option’. It could also help to reinforce the link between community order success and lower rates of reoffending.

Q34. Is there value in non-justice agencies becoming involved in the delivery of programmes for use in community sanctions?

32. Yes – the collaborative delivery of activities from across a range of agencies through the Problem Solving Justice approach aimed at tackling the root causes of offending behaviour already appears to be beneficial in terms of reducing

# Sentencing Review

## Consultation Response

harm. Future development of this work should be coordinated by a justice agency, such as the PBNI.

Q35. Should the enhanced community order be implemented as an alternative to short prison sentences of up to 12 months?

33. Yes – the evaluations referenced at paragraph 6.45 and 6.46 show that ECOs can be effective as an alternative to custody in promoting rehabilitation in a way tailored to meet the needs of offenders within the community setting.

Q36. Would additional judicial involvement during community sentences benefit such orders and promote greater likelihood of change by the offender?

34. Yes – However, it would be useful to consider an evaluation of the Substance Misuse Court pilot before any future action is considered on this.

Q37. Should a conditional discharge sentence have the option to include community sanctions, administered by the Probation Board for Northern Ireland and/or a restorative justice element?

35. Yes – although it would be important that this is carefully planned to ensure that the addition of probation or restorative elements do not result in it resembling a Probation Order rather than a traditional Conditional Discharge.

Q38. Would a 'structured deferred sentence' be a useful new sentencing option?

Q39. Would a 'supervised suspended sentence' be a useful new sentencing option?

36. Yes - at present offenders are often tasked with not offending within a set period up to 12 months but this can leave offenders who perhaps have addiction, mental health or other issues to combat these without assistance.

Q40. Would a diversionary type community intervention be appropriate for minor first time offences for adults?

# Sentencing Review

## Consultation Response

37. Yes – particularly to reflect a current problem that has been noted in the Magistrates’ Court where an offender is 17 years old at the commission of an offence and must be sentenced as if a youth yet because of investigative or prosecutorial delay the offender is then 18 years or age. Instead of appearing before a Youth Court, defendants appear in the Magistrates’ Court with a completely different range of sentencing options and a lack of a diversionary disposal that would otherwise be available in the Youth Court. See *R v James Francis McDonnell and Arthur Michael Fearon* [2013] NICC 16 at paragraph 20.

### Hate Crime

Q41. When a hate crime has been identified during the prosecution process, should prosecutors be under a duty to flag this to the court?

Q42. When dealing with a hate crime, should the courts be required to record the fact that aggravation due to hostility has been considered in the sentencing decision?

Q43. When dealing with a hate crime, should the courts be required to explain how the fact that the offence is aggravated due to hostility has affected the sentence?

Q.44 Should any other changes be made to ensure appropriate sentencing for hate crimes?

38. It is the experience of the Bar that prosecutors regularly identify whether an offence is motivated by hostility to the Court prior to sentencing, as per Article 2 of the Criminal Justice (No 2) (Northern Ireland) Order 2004. It is further the experience of the Bar that the judiciary do treat the hostility as an aggravating factor when sentencing and state this in open Court.

39. It is further the understanding of the Bar that the PPS receives an automatic prompt on their recently introduced tablet unit system to remind the prosecutor to alert the Judge that the particular offence was motivated by hostility.

40. The judiciary conduct a careful and weighted assessment of aggravating and mitigating factors when assessing the starting point of a sentence. To indicate precisely how the hostility affected the sentence could disturb this careful assessment.

# Sentencing Review

Consultation Response

## Attacks on Frontline Public Services

Q45. Is the current range of offences and penalties combined with sentencing guidelines adequate to deal with assaults on those providing frontline public services in Northern Ireland (Option A)?

Q46. Should the maximum penalty on summary conviction for attacks on specified public workers be increased to 12 months' imprisonment (Option B)?

Q47. If yes to Q.46 should any increased sentence for specified public workers be extended to include those involved in the provision of front-line healthcare in hospitals, prison officers, social workers and others providing direct care in the community (Option C)?

Q48. In other assault offences, should the fact that the victim was a specified category of public servant be made a statutory aggravating factor (Option D)?

Q49. If yes to Q.48, should there be an obligation to state publicly that aggravation occurred; and record both that fact and the impact the fact had on the sentence imposed?

41. Yes - many of the assaults on public services workers have maximum sentences in the Magistrates' Courts of 6 months (that is, common assault contrary to section 42 of the Offences Against the Person Act 1861 or assault on police contrary to section 66 of the Police (NI) Act 1998). However, the PPS has the discretion to lay a charge of assault contrary to section 47 of the Offences Against the Person Act 1861, which has a maximum sentence of 12 months.
42. The Department may further wish to grant a District Judge the power to refuse jurisdiction in assault cases involving public sector workers if they deem they do not have sufficient sentencing powers.

## Crimes against Older and Vulnerable People

Q50. Reflecting our stakeholders' views, should any new legislation deal with 'vulnerable' people, whether by age or other personal circumstances, as opposed to simply 'older' people?

Q51. If yes to Q.50, should a definition like the one found in the Human

# Sentencing Review

## Consultation Response

Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 be used?

Q52. Are current guideline judgments and sentencing guidelines sufficient for sentencing purposes as they stand as regards crimes against older/vulnerable victims (Option A)?

Q53. Should either of the following be a statutory aggravating factor (Option B):

- (i) the vulnerability of a person (by virtue of their age or other factors); or
- (ii) motivation on the basis of the victim's perceived vulnerability (by virtue of their age or other factors)?

Q54. Should a new offence of assault on a vulnerable person (by virtue of their age or other factors) be created (Option C)?

43. It is the experience of the Bar that the age and vulnerability of a victim is taken into account when sentencing and if the victim is elderly or vulnerable then these are aggravating factors that weight heavily in the final sentence.

### Driving Offences Causing Death or Serious Injury

Q55. Does the existing maximum sentence of 14 years for each of our 3 offences provide the court with sufficient powers to reflect the most serious culpability of that offending behaviour?

Q56. If no to Q.55, should the variation be for:

- (i) an increased fixed period of 20 years; or
- (ii) a maximum sentence equivalent to that for the offence of manslaughter and other serious violent offences, namely a discretionary life sentence?

44. Yes - the Courts currently have significant powers to impose very lengthy prison sentences if the offence justifies it.

Q57. Should a distinction in maximum sentence be made between any of the 3 offences:

- (i) causing death by dangerous driving;
- (ii) causing death by careless driving while under the influence of drink or drugs; or
- (iii) causing death by careless driving and failing to provide a

# Sentencing Review

## Consultation Response

specimen?

45. No - the combination of careless driving and the use of alcohol has been viewed as akin to dangerous driving in terms of sentencing ranges for some time.

### Driving Offences Causing Grievous Bodily Injury (GBI)

Q58. If the maximum sentence for causing death by dangerous driving is increased, should parity be maintained by similarly increasing the sentence for causing grievous bodily injury by dangerous driving?

Q59. If the maximum sentence for causing death by careless driving while (i) under the influence of drink or drugs or (ii) failing to provide a specimen is increased, should the sentence for the equivalent careless driving offences which cause grievous bodily injury also be increased?

46. Yes

### Causing Death When Driving While Disqualified

Q60. Is an increase to the maximum sentence of 2 years warranted for causing death or grievous bodily injury when driving while disqualified?

Q61. If yes to Q.60, should the increased maximum sentence for causing death when driving while disqualified be:

- (i) 4 years;
- (ii) 10 years;
- (iii) Other?

Q62. 2 If yes to Q.60, should the increased maximum sentence for causing grievous bodily injury when driving while disqualified be:

- (i) 4 years;
- (ii) 10 years;
- (iii) other?

47. Yes – The Bar notes that 2 years is the same maximum penalty as for the offence of driving while disqualified. Consideration should be given to an increase to 4 years.

# Sentencing Review

## Consultation Response

### Obligatory Disqualifications

Q63. Do the current minimum periods of disqualification (2 years or 3 years for a repeat offender) remain appropriate for the causing death or serious injury driving offences which carry a maximum of 14 years imprisonment?

Q64. If no to Q.63, should the minimum period of disqualification of 2 years be increased to:

- (i) 3 years;
- (ii) 4 years;
- (iii) other?

48. Yes - these are minimums only and the Court will often depart from the minimum period taking into account both the punitive and deterrent element required as well as the primary purpose of protecting the public from risk (see *R v Holywood* [2019] NICA 28)

Q65. Should the current mandatory minimum disqualification for repeat offenders in a 10-year period be doubled from 3 years to 6 years minimum?

49. No – these are minimum periods that the Judge can apply their discretion to increase.

Q66. Should the power of the courts to reduce the disqualification period be limited, as in Ireland, so that it is not reduced below 2/3rds of the period or the mandatory minimum for the offence whichever is the greater?

Q67. Should a repeat offender for these 14-year maximum offences, or the offence of driving while disqualified, be prohibited from applying to remove any disqualification until the minimum period required to be imposed on a first time offender for that offence has expired?

50. No – the Bar is aware of a number of anecdotal examples of offenders who have turned their lives around upon having a disqualification removed and have re-engaged positively in society. The Court of Appeal has further recognised the potential negative impact of a disqualification on an offender, including financial

---

# Sentencing Review

Consultation Response

---

difficulties and ability to obtain employment (see *R v Holywood* [2019] NICA 28 para 39-41)

Q67. Should any driving disqualification take account of the custodial component of a sentence?

51. Yes – note that the statutory amendments to allow for this under the Coroners and Justice Act 2009 have not yet been commenced in Northern Ireland (see *R v Holywood* [2019] NICA 28 para 31-32)