

Scottish Hazards

Response to the Scottish Sentencing Council Consultation on the first draft guideline, the Principles and Purposes of Sentencing

Scottish Hazards (SC044785) is a Scottish Charitable Incorporated Association (SCIO), registered with and regulated by the Office of the Scottish Charity Regulator



Introduction

Scottish Hazards is a registered charity promoting higher standards of health and safety in Scottish workplaces. We work with trade unions, the Scottish Centre for Healthy Working Lives, the Scottish Government and other health and safety organisations to ensure workers are protected from occupational injury, disease or ill health and we are an active participant in the Partnership for Health and Safety in Scotland.

Our interest in this consultation is in relation to the approach taken by sentencers when employers have been convicted of health and safety offences and how the proposed principles, if applied across our judicial system, would lead to more consistent sanctions in such cases. More importantly, we believe greater clarification of the purpose of the sentence or sentences being imposed would provide more confidence to those who suffered harm due to employer negligence, including families who have lost loved ones in work related fatal injuries, that justice has seen to be done.

We see the ongoing work of the Scottish Sentencing Council as important and we would like to provide responses to the specific questions as follows;

Question 1

Do you agree or disagree with the Council's approach to the distinction between a 'principle' and a 'purpose' of sentencing?

Scottish Hazards would agree with the approach being taken by the Council, we feel it is important to distinguish between the purpose of the sanction being imposed, the reasons for doing so and the method whereby the sentencer can justify the sanction based on factors that can be applied consistently across every court in our justice system and for every offence.

Q2) Should there be an overarching principle of "fairness and proportionality"?

We believe there should be an overarching principle to assist judges consider and impose sentences ensure offenders, both individuals and corporations, are dealt with fairly, while guaranteeing justice has been seen to be done for victims of crime including the families of workers killed at work as a result of employer negligence. The principle of fairness and proportionality would be an appropriate overarching principle to provide the foundation for sentencing guidelines that provide consistency across the justice system. However and perhaps more importantly, there should be transparency to ensure the rationale for imposing sentences is fully explained to victims, particularly where there appears to be inconsistency with sanctions imposed for similar offences by other Courts in Scotland and elsewhere in the United Kingdom. For avoidance of doubt, Scottish Hazards would include as victims, families who lose loved ones following work

related fatal incidents, many of whom feel let down by the justice system following conclusion of legal proceedings.



Q3) Are the supporting principles which underlie the overarching principle of fairness and proportionality (as listed at paragraph 2(i)-(vi)) appropriate?

Scottish Hazards believes the principles appropriate, although with some reservations, based on our experience of sentences imposed for employers convicted of health and safety offences.

In relation to supporting principle 2(i) we believe that more needs to be done to ensure that on conviction of health and safety offences employers, especially where lives have been lost, are sanctioned appropriately. This should ensure that where the level of negligence by an employer has resulted in loss of life, or lives, the sentence imposed should be consistent, as far as possible with any other case involving involuntary killing. We would agree that the circumstances of the offender should be fully considered. In relation to health and safety cases in Scotland, the vast number of which only involve financial penalties and not custodial, this should include forensic examination of the company's finances. Finally in relation to this particular point we believe all victims of health and safety crime, including family members of loved ones killed at work, should be allowed to provide victim impact statements to the sentencing judge prior to sentencing as this would be consistent with the opportunity afforded to other victims of crime.

Scottish Hazards agrees that this overarching principle is essential in ensuring fairness and transparency but will only be successful in its objective if it is applied consistently for all convictions of individuals or corporations and for all offences.

Regarding principle 2 (ii) Scottish Hazards view sanctions imposed by Scottish Courts for offences under reserved regulations should be consistent with those applied by courts in England and Wales. In November 2015 the Sentencing Council for England and Wales issued new sentencing guidelines that allowed for greater sentences to be imposed on conviction of health and safety offences resulting in death. These guidelines were felt necessary following inconsistency in sentences imposed on conviction of offences resulting in worker deaths with the aim of addressing these inconsistencies. Scottish Hazards believes this has resulted in sentences that not only reflect the seriousness of deaths caused by employer negligence but also demonstrate a more consistent approach to proportionality where large corporations and companies with significant financial resources can expect significantly higher financial penalties than previously, and certainly in excess of that considered for smaller employers.

In a recent case involving Scottish Power, albeit a non fatal one, but nonetheless resulting in significant life changing scalding injuries to the victim, the company argued on appeal the fine of £1.75 million imposed on conviction for health and safety breaches leading to the injury that the sentencing Sheriff had erred in applying the sentencing guidelines for England and Wales, resulting in a higher fine being imposed than was allowed. The Appeal Judges, while not necessarily agreeing with the argument, took the view that the Sheriff's reasoning for imposing the original fine was unclear and reduced the fine to £1.2million.

Scottish Hazards strongly believes that this particular overarching principle requires clarification to avoid similar confusion in the future, it would appear from our reading of the Scottish Power appeal that the appeal judges did not take a



view on whether the Sheriff used the guidelines for England and Wales inappropriately but felt the original fine was disproportionate to the culpability involved.

Our view would be that for health and safety offences it is important this principle is consistently applied across Scotland, England and Wales as we suggest in our response to Question 16.

On 2(iii) we would agree but note that in health and safety cases our understanding is judges are required to impose sentences that do not impact on the financial ability of the convicted employer to continue trading. Our view would be that where the level of culpability is so serious, particularly where lives have been lost, and no action has been taken by the employer to remedy the issues or behaviours that led to the breach, then imposing a penalty that forces a business to cease trading should be considered to avoid risk of further harm.

We would support 2(iv) as we believe all possible information to explain and perhaps justify the sentence imposed should be provided, especially where judges have issued a sanction that may be perceived to be too lenient when compared to offences of a similar nature. This may help victims understand the rationale of sentencer's thinking in taking the decision they did.

Q4) Are the supporting principles expressed clearly and accurately?

We believe the principles are expressed clearly and accurately and have no further comment on this question.

Q5) Are there any other supporting principles which should be included at paragraph 2?

Scottish Hazards believes the overarching and underlying principles are sufficient.

Q6) Do you agree or disagree with the approach to the purposes of sentencing as set out at paragraph 4 of the draft guideline?

We would agree with the approach as set out.

Q7) Are the purposes as listed at paragraph 5(a)-(d) appropriate?

Scottish Hazards believes that the purpose of punishment outlined in 5(a) is appropriate. In the case of health and safety convictions punishments imposed need to have an impact on employers behaviour to force change in their

workplace health and safety culture. Inadequate punishments send out the wrong message and Scottish Hazards feels sentences imposed for health and safety offences sometimes do not reflect the seriousness of the breach and are disproportionate to the severity of the offending behaviour. As outlined in Question 3 Scottish Hazards does not believe lower financial penalties should be imposed with the purpose of allowing employers to continue trading where no



evidence can be presented to show all necessary lessons have been learned to prevent future harm.

In relation to 5(b) we believe that sentencing provides the opportunity not only to reduce offending behaviour by the convicted party but also by others in society. This is particularly relevant to health and safety offences as high profile cases tend to focus the mind of other employers to review their health and safety management, driven by potential for reputational damage. Scottish Hazards would support sentences that provide for preventative measures to be included as part of health and safety sentences providing such measures were adequately enforced requiring closer work between the judiciary and regulator.

We would agree that a purpose of sentencing should reflect society's disapproval of an offender's behaviour, 5(c); this should also include the behaviour of corporate offenders. In most cases individuals would share our view that it is a basic human right individuals should be protected from harm at work. Quite often this view will manifest itself during high profile cases involving workplace tragedies, ones where workers have been killed at work. Placing increased emphasis on public opprobrium in all health and safety cases would, in our view, provide victims and families with a greater sense of justice as well as place criminal health and safety behaviour on an equal footing with society's disapproval of wider criminality.

Regards 5(d) and health and safety convictions, Scottish Hazards feels more needs to be done to make employers and understand the impact their failings have had on victims and their families. We believe that families of those killed at work, and others injured during the course of employment, should have the right to provide sentencers with a victim impact statement ahead of sentencing. While 5(d) may suggest this is under consideration by the Council it is not explicit; we see this as vital in helping those directly affected by employer negligence come to terms with their loss and receive some comfort that the employer has a greater understanding of the pain and suffering they have had to endure as a result of their negligence.

Q8) Are the purposes expressed clearly and accurately?

The purposes are expressed clearly and accurately

Q9) Are there any other purposes which should be included?

We do not believe that there are any further purposes that need to be included.

Q10) 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?

Scottish Hazards would disagree with the approach set out particularly in relation to guilty pleas being seen as efficient use of public money. In our experience of health and safety cases the plea bargaining process is not trusted by victims or bereaved families due to lack of transparency.



Q11) Is it appropriate to consider efficient use of public resources during the sentencing process?

We would see it appropriate to consider efficient use of public resources. This would have to be on the premise of ensuring openness and transparency with full explanations given to victims throughout the plea bargaining process. It should also be considered whether it would be appropriate in the name of efficient use of public service resources to have a wider consultation on regulators such as the HSE being awarded costs on conclusion of successful prosecutions in Scotland.

Q12) Do you agree or disagree that the guideline would lead to an increase in public understanding of how sentencing decisions are made?

Scottish Hazards believes that the guideline could increase public understanding of how sentencing decisions are made. This will depend on how the Council intends to raise awareness of the guideline outside the legal establishment following publication. It would be useful if judges were encouraged to reference the principles and purposes in sentencing statements and how they relate to the sanction imposed.

Q13) Do you agree or disagree that the guideline would lead to an increase in public confidence in sentencing?

The response to this question would obviously depend on the level of public awareness after the guideline has been issued. If judges continually make reference to their obligation to follow the guideline we believe there will be increased public confidence in sentencing gained through victims having a greater understanding of the sentence being imposed and the rationale of sentencing judge.

Q14) What costs (financial or otherwise) do you see arising from the introduction of this guideline, if any?

No response

Q15) What benefits do you see arising from the introduction of this guideline, if any?

Please see response to Q12 and Q13

Q16) Would you like to make any other comments in relation to any matter arising from this consultation?

Scottish Hazards believes that is a basic human that every worker should return to their families from work not having been exposed to harm or injury. Unfortunately and, in our view, too often workers are exposed to risk of injury, ill health and occupational disease. In the worst cases the exposure to unacceptable levels of risk result in fatal injury and bereaved families seeking answers and justice.



In cases we have been aware of families, often at the end of long and protracted legal processes, feel the sentences imposed do not reflect the seriousness of the employers negligence that led to their loss. We would welcome any moves by the

Scottish Sentencing Council to ensure sanctions imposed by sentencers not only provide some level of solace to bereaved families but also take into account the effect that negligence has had on families.

Scottish Hazards is disappointed that the Scottish Sentencing Council has not seen the need to include specific work on sentences imposed by courts for health and safety offences in its first business plan for 2015-18. We are also concerned that from information available on the Council's website this is not on the agenda for the period covering 2018-21.

Inconsistency in health and safety sentencing throughout the UK has been a concern for the Hazards movement, trade unions and academics for many years. This is now being addressed by the Sentencing Council for England and Wales. our fear is that without similar guidelines in Scotland we will have a reserved health and safety regulatory system where the most serious breaches of legislation may be treated differently by sentencers in Scotland on conviction.

This will only lead to confusion and inconsistency and we would urge the Scottish Sentencing Council to examine the guidelines for sentencers in England and Wales and how they could be adapted to provide similar guidance for the Scottish Judiciary.

**Scottish Hazards
September 2017**