

Name

University of Oxford, Sentencing Discussion Group

Publication consent

Publish (Corrected by AB)

Q1) Do you agree or disagree with the Council's approach to the distinction between a 'principle' and a 'purpose' of sentencing?

Disagree

Please provide any reasons for your response.

We do not support the distinction the CD draws between a principle and purpose because it has not done enough, as of yet, to substantiate the divide. The CD is unclear on the relationship between the overarching principle of 'fairness and proportionality' and the purposes of sentencing (punishment, crime reduction, social disapproval, and making amends). The CD distinguishes between principles and purposes as follows: 'principles describe how a judge should approach sentencing, while purposes are outcomes which the judge may be trying to achieve.' This distinction per se does not clarify how conflict between purposes and principles is to be resolved. By way of example, a fair and proportionate sentence for an instance of offence X is four to five years' imprisonment. The judge wants to impose a sentence for a deterrent purpose, but to have a deterrent effect the sentence would need to be six years or longer, which is within the statutory maximum. It is unclear from the draft guidelines whether in such a scenario a six-year sentence could be imposed by the judge or not.

The CD rightly acknowledges that the purposes of sentencing may conflict. But it also maintains that an overarching principle is important to help 'resolve conflicts' between the purposes of sentencing. It is left unclear how the existence of a principle would achieve this. To take an example, a judge could pass down a sentence of five years to reflect social disapproval for an offence or impose a community sanction to allow the offender to make amends for their wrongdoing. How, as currently drafted, would the existence of a principle of 'fairness and proportionality' help the judge to resolve the conflict between social disapproval and making amends?

A preferable approach to the relationship of principles and purposes would be to set the overarching principle as a limit on what sentences could be imposed in each case and thus on which purposes could be pursued through the sentence. There would thus be a clear hierarchy in which the overarching principle would always have to be satisfied, and only purposes that could align with it could be pursued. In other words, once a fair and proportionate range of sentences was set this could not be deviated from to fulfil a purpose of sentencing.

To take an example, a fair and proportionate sentence for offence Y is between three and four years' imprisonment. To have a deterrent effect, the sentence imposed would, however, have to be five years'. The public perception of the offence is that it

is not that serious and so this purpose could be fulfilled by a suspended sentence. In the example, neither purpose – deterrence or reflecting society’s disapproval of the behaviour – could be relied upon because they would not allow for a sentence that aligned with the overarching principle. The judge would, therefore, be left to establish whether either the remaining purposes of punishment or making amends would allow for an appropriate sentence.

If the purposes of sentencing were limited by the overarching principle this could also work to limit the conflict between them. To build on the example of offence Y, a sentence with the purpose of punishing the offender may require, say, three years’ imprisonment and the purpose of rehabilitation could require one year and six months’ imprisonment. The space for the purposes to be vastly different is narrowed by the requirement that each purpose must fit within a sentencing range that is in keeping with the overarching principle of fairness and proportionality before it can be considered. In other words, if the sentences required are very far apart it is unlikely they will both be proportionate, so will not be capable of consideration. If the overarching principle limited the purposes of sentencing that could be pursued, this could also reduce inconsistency: sentences could not be vastly different solely because different judges had picked different purposes in similar cases, every judge would be limited by the same overarching principle. To be clear, the advantage of principle limiting purposes is not that there would be no disparity in the sentences different purposes would lead to, but that the probability and degree of such disparity would be reduced.

It would not require significant reworking of the draft guidelines for the overarching principle to be explicitly made a limiting principle. By way of example, the preamble to the draft guidelines states:

The sentence selected should best achieve the purposes of sentencing that are appropriate to the particular case, but always reflecting the core principle of fairness and proportionality.

This could be replaced as follows:

The sentence selected should fall within a range set with reference to the core principle, and should satisfy one or more of the purposes of sentencing that can be satisfied within this range.

If the final guideline was reworked to this end, it would reaffirm the overarching nature of the principle of fairness and proportionality: the principle would sit not only over other guidelines, but also above the purposes of sentencing.

A second factor which led us to limit our support for the approach to principles and purposes presented in the CD is that it is unclear what role both the principles and purposes will have in relation to future offence-specific guidelines. Are the principles and purposes meant to inform the Council as they draft offence-specific guidelines or are they to be relied on by judges as they apply the future offence-specific guidelines to individual cases? There is some support for both readings in the CD. The Chair’s foreword suggests that the completed principles and purposes guideline will affect the formulation of future guidelines.. Yet the draft guidelines themselves refer to

individual cases which indicates that the judge is to consider the principles and purposes when handing down a sentence.

If offence-specific guidelines – say for property offences – are informed by the principles and purposes in finalised principles and purposes guideline, then they may make a particular purpose – say punishment – central. When a judge later applied a future guideline – say for property offences in a case of criminal damage – he or she could decide to impose the given sentence for a punitive purpose. This would mean that one purpose of sentencing could conceivably be ‘double weighted’. Such an outcome would be hard to align with the claim in the CD that ‘None of the purposes listed are more important than others.’

Further, clarity on the relation between the principles and purposes guideline, and offence-specific guidelines would surely make the process of sentencing easier for judges. We cannot give detailed comment without knowing the content of the future offence-specific guidelines. However, there are two situations that the Council must seek to avoid.

1. A judge has an overarching guideline and the offence-specific guideline to follow and there is no process for applying both and no clear relationship between the guidelines, and
2. A judge decides to use only the offence-specific guideline when they are also meant to be informed by the Principles and Purposes Guideline on a case-by-case basis.

Without further clarification on the relationship of this guideline to future offence-specific guidelines, both situations remain plausible.

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

No

Please provide any reasons for your response.

We do not believe there should be an overarching principle of fairness and proportionality. We instead advocate for an overarching principle that the seriousness of the sentence imposed must be proportionate to the gravity of the offence(s).

It is unclear whether the CD proposes one overarching principle or two. Is every proportionate sentence fair and is every fair sentence proportionate? It is hard to know because the overarching principle is not fleshed out in the CD. If we assume that proportionality means something along the lines of “the gravity of the offence ought to be reflected in the seriousness of the sentences”, there is a conceivable divide between proportionality and fairness. Take Robin Hood as an example: a proportionate sentence for multiple incidences of theft, criminal damage and

offences against the person may be quite high, but would it be fair? “Fair” is a much debated term; while it is not appropriate for the Council to engage in discussions of legal philosophy, there is a need for further work on what is meant by proportionality and fairness. If such work reveals that reference to fairness does not add significantly to the guideline or risks becoming a competing value to proportionality, then perhaps the overarching principle ought to only be proportionality. If we cannot be sure about what the overarching principle of sentencing means, then sentencing guidelines in Scotland will be built on unsure foundations.

We advocate explicit reference to proportionality as proportionality between the gravity of the offence and the seriousness of the sentence for the sake of clarity. We do not believe that such a change is out of keeping with how the Council understand proportionality given the inclusion of supporting principle 2(ii): “Sentencing decisions should treat similar offences in a similar manner. This helps aid consistency and predictability.”

Other jurisdictions articulate clearly that sentences must be proportionate, and they identify offence seriousness and offender culpability as the components of a proportional sanction. No such clarity emerges from the CD or draft guideline. Perhaps paragraphs 2(i)-(vi) – discussed further below – are supposed to be the subcomponents or requirements of a proportionate sentence? This, however, seems unlikely as providing reasons, to take an example, is a requirement of fundamental justice, but has no clear link to proportionality.

In keeping with our comments above, we are also hesitant to support any overarching principle when its relation to the purposes of sentencing and to future offence-specific guidelines is unclear.

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

Please provide any reasons for your response.

Paragraph 2(i) “all relevant factors of a case must be considered including the seriousness of the offence, impact on the victim and circumstances of the offender” This seems too obvious to require inclusion – who would disagree that all relevant factors must be considered? As this provision does not tell the user how to discern whether or not a factor is relevant, it appears to be entirely inoperative. How will this promote consistency across courts or enhance public understanding without further detail of what relevant factors are?

Paragraph 2(ii) “sentencing decisions should treat similar offences in a similar manner. This helps aid consistency and predictability”

We query whether treating “similar offences in a similar manner” is better understood as a rephrasing of a principle of consistency (or the converse, disparity) as opposed to an aid to consistency. We accept that consistency/similarity aids predictability and so are in agreement with the draft guideline in this respect. However, we further

query whether or not the appropriate place for the justification of the principle of consistency/similarity (which certainly goes beyond merely aiding predictability) is the draft guideline; perhaps it ought to be in the CD, which may be a better medium through which to express the reasons for the decisions to draft the guideline in the manner in which it has been drafted. As to the definition of “similar” and “similarity” we say more about this below.

Paragraph 2(v) “sentencing decisions must be made lawfully and sentencers must have regard to any sentencing guidelines which are applicable”

This is not a supporting principle, but rather the first part is a legal requirement. Law will not be made more binding if a guideline says it must be obeyed. It is hard to see how the inclusion of a requirement to be lawful will increase transparency or public confidence. Further, the requirement to have regard to the guidelines is not a principle but a legal requirement for any relevant guidelines. We note that this already exists in section 6 of the Criminal Justice and Licensing (Scotland) Act 2010 and accordingly its inclusion adds nothing to the force and effect of the guidelines. Further, it risks a divergence if either the statute or the guideline were amended in the future. We prefer the wording adopted in England and Wales: that courts must ‘follow’ any relevant guideline, however we note that this is a matter for the Scottish Parliament and not the Council. The Council will be aware that the wording in the Scottish proposal mirrors the status quo in England and Wales prior to the Coroners and Justice Act 2009. The duty to “follow” is consistent with the statutory wording currently applicable in England and Wales.

Paragraph 2(vi) “people should be treated equally, without discrimination”

We maintain that the place for a duty of equality is legislation and not Council guidelines. We also query the use of the word ‘should’ in this context, as opposed to ‘must’, as used in paragraphs 2(iv) and (v). The requirement that the court construct and impose a sentence without discriminating against an individual is surely as strict, if not more, as the requirement that it state its reasons for decision and have regard to the guidelines.

Paragraph 3 Similarity

Though the CD does not ask consultees for their views on paragraph 3, we think here is an appropriate place to comment because paragraph 3 clarifies paragraph 2(ii). First, we query whether paragraph 3 would be better expressed as the principle of consistency, a term which appears to us to be more readily understandable and commonly used. Secondly, the first sentence seems to offer little guidance in terms of “similarity”. Are a multi-million pound fraud and a shop theft “similar” for the purposes of this draft guideline because the offences involve an element of dishonesty? Thirdly, the rest of the provision wisely stresses the point that consistency does not always mean imposing the same sentence. We support this, but wonder what this provision actually tells the user: similar cases should be treated similarly but that “similar” does not mean “the same”. If the Council is able to add more detail, providing a more concrete description of the principle of treating like cases alike, we would welcome such an addition.

Q4) Are the supporting principles expressed clearly and accurately?

Please provide any reasons for your response.

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

A key omission is guidance to sentencing multiple crimes, the so-called 'totality' principle. The English and Welsh Council have a guideline on this, yet it is routinely ignored by the Court of Appeal (Criminal Division) when the issue arises in appeals against sentence. Again, we would encourage the Council to mention this principle. The value of including totality would remain even if there are plans to produce a stand-alone guideline in the future because the principle would then have appropriate status.

We also urge the Council to consider the detailed sentencing statutes in other jurisdictions, many of which contain more comprehensive guidance on the principles to be followed at sentencing. The sentencing law in Israel (2012) and certain common law jurisdictions offer good examples. We also direct the Council to the American Law Institute's Model Penal Code project. This has just resulted in a comprehensive set of sentencing and release provisions following a decade of development.

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

Agree

Please provide any reasons for your response.

If paragraph 4 is to be read as meaning that any sentence imposed for one of the multiple purposes should always be subject to a proportionality restriction, then we are supportive (subject to the next paragraph). In other words, a court must not impose a lengthy prison term in order to achieve deterrence if the resulting sentence would be disproportionate. If our reading is correct, the guideline could and should be redrafted so as to make this clearer. Again, there is a reference to proportionality, and yet there is no description or definition.

We were also concerned at the lack of explanation as to how a judge ought to choose a purpose and that this is not subject to consultation. Two judges could hear similar cases, and impose significantly different sentences if they rely on different purposes of sentencing. When should a judge be rehabilitative? When should they be punitive? How should they decide? The impact of judges choosing different purposes would be lessened if proportionality was made a limiting principle, as

above. Nonetheless, given that the choice of purpose can affect sentence length and consistency, it would be useful to have some guidance on how a judge should choose the purpose of a sentence in a given case.

The risk of varied sentences due to the choice of different purposes is heightened by the draft guideline leaving it open for a judge to rely on a purpose not listed in the guideline:

4. The sentence selected should best achieve the purposes of sentencing that are appropriate to the particular case, but always reflecting the core principle of fairness and proportionality.

5. The purposes may include... (Emphasis added)

The use of 'may' leaves it open to the judge to not apply a listed purpose and not have to justify this because strictly they would not be departing from the guidelines. Surely this is a situation to be avoided. The CD rationalises uses 'may' to suggest that no purposes are more important than others. Such an approach has attracted academic criticism on the basis that it permits wildly different sentences to be imposed for wildly different penological purposes in cases which are very similar or even identical.

It is also unclear whether courts are entitled to take account of purposes of sentencing which are not listed. If not, then the guideline should state so clearly; if so, this, however, begs the question of why the Council has listed four purposes of sentencing and no others. If the Council want it to be open to judges to rely on a purpose of sentencing that is not listed – such as public protection – surely we need to know why the judge has employed it. Therefore, an addition could be made to the draft so that it is clear that a judge must give reasons if they employ an unlisted purpose. This would encourage transparency and clarity in judicial reasoning but consistency in sentencing would also require some description in the guideline of the factors to be considered when a judge chooses any purpose of sentence, be it listed or unlisted.

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

No

Please provide any reasons for your response.

We do not agree that rehabilitation must be subordinated under the heading 'Reduction of Crime'. Drafting the guideline in this way suggests that rehabilitation as a purpose of sentencing is a means to an end only. Effective rehabilitation could bring multiple benefits beyond the reduction of re-offending.

The CD suggests that a purpose of sentencing ought to be 'Reflecting society's disapproval of an offender's behaviour' (denunciation). We take some issue with this purpose as it risks legitimating heightened sentences in light of public outcry and it is

not apparent why public outcry should be able to affect the length of an individual's sentence. We note that public opinion can be substantially affected by what information the public has readily accessible. This would mean the length of a sentence could turn on whether the BBC decided to run a piece on the individual's trial or instead a story about the rapid decline of bee populations. What is more, the degree of public outcry could be affected by alegal factors such as race. Alegal factors could thus indirectly affect the length of the sentence.

To be clear, we consider that public attitudes to a behaviour ought to affect sentencing, but more indirectly than proposed in the CD. For instance, the public should be able to affect statutory maxima – and what behaviours are criminal in the first place – through their elected representatives and have their say on guidance through open consultation. This should be done away from the details of individual cases. We do not think that public outcry in relation to an individual case should impact upon the sentence imposed; reflection of society's disapproval is a factor to be taken into account in the abstract and this should be explicitly stated in the draft guideline.

Q8) Are the purposes expressed clearly and accurately?

Please provide any reasons for your response.

Q9) Are there any other purposes which should 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?

Please provide any reasons for your response.

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

Yes

Please provide any reasons for your response.

We support a reference to efficient use of resources, but do not believe it should be tied exclusively to early guilty pleas. There are many other ways in which this consideration may affect sentencing and the provision should be kept more general. Further, it is unclear in the current draft what information a court could take into account when considering the efficient use of public resources. Would newspaper reports, reports from advocacy or pressure groups, or even the judge's own personal opinion about certain disposals suffice? We would suggest not, and that if this paragraph is to remain in the guideline, it should be accompanied by a statement clearly setting out what is and is not permitted to be taken into account. The ideal situation is, in our view, that the Council provides such information and that that is the only source of such data.

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

No

Please provide any reasons for your response.

We do not agree that the guideline would increase public understanding. The proposal is too skeletal to offer laypersons much insight, or sentencers much guidance. That said, we are sceptical that even a fleshed out guideline would have much impact on public understanding or confidence. Is there any evidence that placing similar objectives on a statutory footing in England and Wales in 2003 had such effects? The primary benefit to be aspired to is surely more consistent sentencing as a result of the guideline.

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

Please provide any reasons for your response.

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

We see no costs arising from this guideline, unless confusion as to how the guidance is to be used results in more appellate cases.

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

We see few benefits arising from the guideline if it remains as drafted, but we do believe that a more comprehensive and detailed guideline would promote a more consistent and principled approach to sentencing

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

We are of the view that the Scottish Sentencing Council can bring much needed consistency, clarity and transparency to the law and practice of sentencing. We applaud the decision to undertake the task of producing guidance on principles and purposes of sentencing as the first definitive guideline. Clearly this is a difficult task and one that has troubled academic and practising lawyers in many jurisdictions. Further, we note the appeal of producing such a guideline as the first product of a newly established sentencing council; it can provide a clear statement for the production and subsequent application of other guidelines. However, the fact that this first guideline will underlie future guidelines increases the importance of a well-developed, detailed and theoretically sound statement of principles and purposes of sentencing. We are of the view that the guideline, as currently drafted, will fail to meet its stated aims and that remedial work is necessary in order to provide useful, principled guidance to courts, practitioners and the public about what is a very important function of criminal courts. We regrettably consider that the draft guideline would, if brought into force, be unlikely to achieve its goals as expressed in the CD. It is certainly succinct, and some specific provisions are very clear, but we believe it is insufficiently detailed or comprehensive to; “provide judges and the public with a clear statement about the aims of current sentencing practice in the Scottish courts”; “increase transparency by providing the public with an understanding of the approach taken by judges when deciding sentences”; or “promote consistency in the approaches taken by judges to sentencing”. We also question why the principle and purposes are not being placed on a statutory footing – as similar provisions are in almost every other common law jurisdiction. While that decision is not something within the Council’s remit, it could certainly use its position to make such a recommendation to the legislature.