

Name

Javier Velasquez, Lawyer, PhD Researcher in Criminology, SCCJR Glasgow, University of Glasgow; Sarah Anderson, PhD Researcher in Criminology, SCCJR Glasgow, University of Glasgow; Fergus McNeill Professor Fergus McNeill. Professor of Criminology, SCCJR Glasgow, University of Glasgow

Publication consent

Publish response with name

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

Agree

Please provide any reasons for your response.

In this response, we draw on our collective academic experience but in particular recent research undertaken by our lead respondent, Javier Velasquez, on the sentencing practice at the Sheriff Courts in Scotland.

We are of the view that the distinction between a 'principle' and a 'purpose' of sentencing by the Sentencing Council is appropriate. In the context of comparative criminal law, we can find analogous distinctions in England and Wales (Ashworth & Horder, 2013; Ashworth, 2010), Germany (Roxin, 2014) and Spain (Silva, 2002; Mir Puig, 2002).

During the almost four years Javier Velasquez has been studying the Scottish Criminal Law System he has arrived at the view that Scottish practitioners widely accept, or tolerate, the fact that different Judges may have different sentencing styles. The Scots Common Law provides its judges with flexibility in regards to determining which purposes of sentencing are the most suitable for a given case. Sentencing by different judges may reflect different views on this, allowing different views about relevant sentencing purposes to produce different outcomes even in broadly similar cases. Even so, if the sentences reflect internal consistency (i.e. in the judges' applications of their individual views about which purposes take priority), then we cannot criticise the Judges for arriving at different decisions. We suspect that the Appeal Courts' Judges may offer a fascinating view on this.

The way that the distinction between principles and purposes has been articulated seems appropriate but does not address this complexity. While we understand why the SSC wants to allow "sentencers flexibility", the current draft does not provide any guidance to help judges to determine which sentencing purposes are most important for any given type of case. We think this is the kind of guidance that might promote consistency in sentencing.

The recent legislation that has been introduced on sentencing clearly aims to reduce the use of imprisonment. More generally, policy and professional discourses in

Scotland favour community sentences, especially for young offenders, first-time offenders and women offenders. Thus, it seems that although Judges are free to choose the sentencing purposes that they deem more suitable for an individual, there is implicitly a social and political context that encourages Judges to favour rehabilitation and reintegration.

So, if the SSC deem that it is not appropriate to provide general goals to achieve through sentencing, these matters could be discussed in a preamble to this guideline. The primary objective is to indicate to Judges that some sentencing purposes may be more desirable than others at least in the abstract, without prejudice in relation to which is more suitable for individual cases.

Ashworth, A., & Horder, J. (2013). Principles of criminal law. Oxford University Press.
Ashworth, A. (2010). Sentencing and criminal justice. Cambridge University Press.
Roxin, Claus. "Prevention, Censure and Responsibility: The Recent Debate on the Purposes of Punishment." Liberal Criminal Theory: Essays for Andreas von Hirsch. Trans. Antje du Bois-Pedain. London: Hart Publishing, 2004. 23–42.
SILVA SÁNCHEZ, J. M. (2010). Aproximación al derecho penal contemporáneo, 2ª.
Puig, S. M. (2002). Introducción a las bases del derecho penal: concepto y método.

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

No, it should be another principle

Please provide any reasons for your response.

From a formal point of view, we agree with this overarching principle. The notion of fairness is a positive principle that tells the Judges and Society how punishment ought to be. The notion of proportionality is a negative principle that states what the limits of punishment should be.

However, the notion of proportionality does not, in and of itself, accurately capture the nature of limiting constraints on the severity of sentencing. Professor Ashworth states that one constitutional principle of Criminal Law is "that the criminal law should respect fundamental rights and freedoms" (Ashworth and Horder, 2013, p.48). Ashworth states that there are two sources of fundamental rights relevant to the UK: The European Community Law (at least until Brexit happens) and the European Convention on Human Rights that was incorporated into the UK legislation through the Human Rights Acts 1998.

The argument is simple: Once we have agreed that fairness is an appropriate positive principle of sentencing, we need to find a negative principle that can encompass all the boundaries of punishment. Stating that sentencing should be fair and that it must "respect fundamental rights and freedoms" is a better overarching principle for several reasons:

1. The notions of fairness and human rights provide the Judges with a broad and flexible framework providing a way to determine a more humane approach to

sentencing.

2. This also allows the SSC, the High Courts and Appeal Judges to use these two overarching principles as a source to derive or create new supporting principles.

3. Furthermore, this human rights based limiting principle encompasses the notion of proportionality.

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

Yes

Please provide any reasons for your response.

Without prejudice to what we have stated above, the principles seem to be appropriate and clearly and accurately expressed.

However, even though Lady Dorrian has stated that the "draft guideline is not intended to be exhaustive", we think it would be helpful for the SSC to clarify in the draft if this list of supporting principles is restrictive. This is to say if the SSC will allow the Courts to create or derive supporting principles and if so, to which extent. And if they are not, who or whom are the institutions that could have the "power" to introduce new ones or modify them.

The main issue that the SSC has to address here is that these supporting sentencing principles are dynamic; they are going to be affected by future legislative changes and the evolution of sentencing practice. This is one of the inevitable consequences of any codifying process, even though, in this particular case, these are general guidelines.

One way to avoid having to continually modify this guideline would be to include a reference to how, and in which situations, this guideline, and its interpretation, could be determined. This is to say, to create an open system that could be enhanced by the High Court, judicial sentencing practice and Jurisprudence.

Q4) Are the supporting principles expressed clearly and accurately?

No

Please provide any reasons for your response.

Regarding sentencing principle 2(i), it is worth noting that there are two different approaches to how to consider the relevant factors for sentencing. In England, section 143 of the Criminal Justice Act 2003 uses the seriousness of the offence as the starting point to consider the relevant factors of the case. However, in Germany, paragraph 46 of the StGB (German Criminal Code) establish the culpability of the offender as the starting point for sentencing. This is to say that in England and Wales, sentencing is constructed from an assessment of the offence and then a study of the accused's blameworthiness, whereas in Germany the analysis of the relevant facts starts by determining the offender's culpability and only then does it move to the seriousness of the offence. All this is to say that the order in which a Judge analyses the factors may produce different results, thus affecting consistency.

Concerning sentencing principle 2 (ii), there are two issues we wish to raise. During Javier Velasquez's research around Scotland, he has found that:

(a) Similar cases may be treated differently in different parts of Scotland, not because the Judges ignore how these cases may be dealt with elsewhere but because they may be of the view that those kinds of offences are a particularly serious matter in their jurisdictions. This is often associated with the impact that offences may have in individual communities, particularly small ones.

This suggests that "seriousness of the offence" should be defined or at least interpreted with a certain amount of flexibility in relation to relevant local circumstances.

(b) There are also differences in the sanctions available for each court and in their content and how they are put into practice in different localities. This means for example that the logistics behind supervision in Glasgow are significantly different to those that shape supervision in the Highlands. Specific programmes addressing alcohol problems or domestic violence offences may not be available in some localities.

Hence, it would be advisable that paragraph 3 includes a reference to "variations in sentencing that will occur due to the available disposals in each court and modes of implementation in its locality".

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

Rather than suggesting more supporting principles, we believe it would be more beneficial to break down sub-principle 2 (i), and state briefly what all the different factors mean and if they should, or should not, be analysed in any specific order.

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.

The way that paragraph (4) is worded seems correct and appropriate to the purposes that the SSC seeks.

However, the way that this preamble is explained in the "The Draft Guidelines Explained" document seems confusing, at least to us. This affects particularly the way the sentencing purposes are shaped. Please see responses to question 8 below.

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

No

Please provide any reasons for your response.

Please see response to question 8 below.

Q8) Are the purposes expressed clearly and accurately?

No

Please provide any reasons for your response.

The way that this part of the draft is worded is particularly problematic. In the document "Principles and Purposes of Sentencing: A Scottish Sentencing Council Consultation", page 15 states "None of the purposes listed are more important than others. We want to allow sentencers flexibility to apply the right purpose or purposes for each particular case". Then in paragraph 5 (a) the first purpose stated is "Punishment". The document further explains "It is widely accepted by the public, by academics and by people working within the justice system that one of the purposes of sentencing is to punish the offender".

Furthermore, the guideline draft states in paragraph 5 (a) "Punishment. Sentencing may seek to punish the offender as a consequence of their criminal behaviour, normally resulting in some sort of loss depending on the sentence chosen". This wording is highly problematic because it seems to be suggesting that any penal sanction imposed by a Judge under any other sentencing purposes might not be seen as a punishment.

(a) There is perhaps confusion here between sentencing purposes and theories of punishment. The former is a consequence of the latter, but that does not mean that they are the same. In the continental criminal law, instead of talking about "sentencing", the process is described as the "individualisation of punishment". This is so because it is understood that, regardless of the purposes behind sentencing, penal sanctions are always a punishment.

This understanding of punishment seems to be recognised by the draft guideline itself when it states that punishment involves "some sort of loss depending on the sentence chosen". However, there is more to it than that; punishment should be understood as the deprivation of a fundamental right or rights by the State, imposed on a citizen because he or she has committed a criminal offence.

If we characterise punishment as such a deprivation, then we see more clearly that custodial sentences are certainly not the only punitive penal sanction. For example, Restriction of Liberty Orders deprive offenders of freedom of movement; Supervision imposes compulsory requirements and surveillance which, if breached, may lead to further deprivation of fundamental rights; Unpaid Work deprives offenders of time; Fines deprives them of financial means, etc.

All this is to say that the punitive nature of penal sanctions does not depend on the purposes that ultimately justify the imposition of such sanctions. It is particularly important to understand this when we analyse how the principle of proportionality can be applied to determine the length of the supervision component in the Community Payback Orders.

(b) We are well aware that it is within the sentencing powers of the Judges in Scotland to dispose of cases by way of Absolute Discharge. Furthermore, in several Sheriff Courts, there is the practice of deferring sentence for good behaviour. However, the way that the guideline is worded does not allow us to understand this distinction, and it may lead to confusion.

(c) Our primary concern is that the lack of clarity on this point may reinforce the perception that Community Sentences are not a real punishment. This is particularly an issue in light of clear evidence of the "pains" that supervision can inflict on the individuals (Fitzgibbon, W., Graebisch, C. and McNeill, F, 2017; McNeill and Beyens, 2016; Durnescu, I,2011). In other words, we risk not recognising the punitive nature of supervision, even if it is imposed for other purposes (for example, rehabilitation). Please, see our answer to question 9 for a suggestion on how to avoid these issues.

Fitzgibbon, W., Graebisch, C., & McNeill, F. (2017). Pervasive punishment. Routledge International Handbook of Visual Criminology, 305.

McNeill, F., & Beyens, K. (2016). Offender Supervision in Europe: COST Action IS1106 Final Report. Glasgow and Brussels, Belgium: COST Action IS1106.

Durnescu, I. (2011). Pains of probation: Effective practice and human rights. International Journal of Offender Therapy and Comparative Criminology, 55(4), 530-545.

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

We believe that the following modifications should be appropriate:

1. In paragraph 5(a) the word 'punishment' should be replaced by 'retribution' or "just desert". From the overall context of the guide, and without prejudice that English law uses that word, we understand that the sentencing purpose that is referenced here refers to retributive theories of punishment. See answer to question 8 above for more details.

2. Paragraph 5(b) is problematic due to the fact that it is mixing several different sentencing purposes. While we recognise that this is for the sake of brevity, it is confusing and does not reflect the complexities behind these sentencing purposes.

For example:

a. There is little evidence for deterrence in many cases, so extreme caution is required in consideration of the utility of pursuing this purpose.

b. There is also significant concern about prevention as a penal purpose. An example of this was the Imprisonment for Public Protection sentences in England. Also, this kind of concern is not consistent with fairness and proportionality.

c. Even rehabilitative logics can be problematic since the person may be kept too long or unduly disadvantaged by the lack of certain provision within their area (which begs questions of accountability for this lack of provision and its penal consequences).

d. There is a need to ensure that rehabilitation is not equated with meeting health and welfare needs. Such a conflation relates to the concern that the criminal justice system becomes a mechanism for getting welfare help that may not be available to offenders outside the criminal justice system. Even at their best, penal sanctions are not the proper mechanism for meeting social needs.

e. As stated above, there is the need to recognise the harms of both prison and community sentences: while it is important that prisons and community sentences provide help for rehabilitation, sentencing should always be consistent with minimal intervention. The best thing for rehabilitation and prevention may be to do as little as possible (see the Edinburgh Study of Youth Transitions).

As a quick solution to these issues, it would be advisable to break down this paragraph and deal with these different sentencing purposes on their own merit, particularly rehabilitation.

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?

Agree

Please provide any reasons for your response.

See reply to question 11 below.

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

Yes

Please provide any reasons for your response.

We consider that the answer to question 10 and 11 is yes. This is an issue that several Judges no doubt have to deal with on a daily basis. However, as we have stated above this is the direct consequence of how much funding the government provides to the councils and the SPS. It is important that the Judiciary provide the government with their assessment of how the penal sanctions are currently carried out along the different Scottish Sheriffdoms and how these impact their sentencing decisions.

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

Agree

Please provide any reasons for your response.

See answer to question 13 below.

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

Agree

Please provide any reasons for your response.

We believe that this guideline can help to improve the public perception of sentencing. However, it is worth noting that the only way to improve public understanding of sentencing is with a permanent effort of explaining decisions and support better informed public dialogue on these matters. Also, the success or failure of this guideline to improve that knowledge would depend on how the Judges use it and acknowledge their use in their decisions.

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

None.

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

We believe that this guideline will ensure the aims of the SSC:

- (a) promote consistency in sentencing
- (b) assist the development of sentencing policy
- (c) promote greater awareness and understanding of sentencing.

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