

Principles and Purposes of Sentencing in Scotland and Other Jurisdictions: A Brief Overview

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Remit

1. This paper provides a brief review on the principles and purposes of sentencing in Scotland and in other jurisdictions. It is intended to provide a summary of key background theories and current practices within which context the proposed Principles and Purposes of Sentencing guideline can be considered.
2. A consideration of a number of jurisdictions demonstrates that, when it comes to assisting the judiciary in sentencing matters, there are three broad traditions.
 - grid based guidelines (e.g. the American Federal approach)
 - narrative guidelines (e.g. the England & Wales approach)
 - precedential guidelines, whether by means of a body of case law, or specific 'guideline cases' (e.g. the current approach in Scotland)
3. The grid and narrative guideline approaches usually draw upon additional background information – such as numbers being sentenced or comparative seriousness with other offences – while the precedential approach is based upon cases and submissions drawn from lawyers focused on the instant case.
4. This paper looks at some jurisdictions in order to identify what, if any, discernible summaries of sentencing principles or purposes there are in those jurisdictions. This exercise will assist in informing consideration of a draft guideline for Scotland which seeks to encapsulate Scottish sentencing principles and purposes.
5. This paper does not recommend or evaluate specific principles and purposes, nor does it seek to recommend or evaluate any guideline systems (or none) that any particular jurisdiction follows. Instead, it summarises at a high level some of the academic jurisprudential thinking around the principles and purposes of sentencing, before examining current systems relevant to the Scottish legal system.

What are 'principles' of sentencing?

6. Identifying the principles that underpin sentencing might be thought of as encouraging a more rational and accountable approach to sentencing in general. Such principles might include that sentencing should be about the just allocation of punishment, or that sentencing should respect rule of law values and principles. However, the main principles set out in a number of jurisdictions - and referred to in standard textbooks (e.g. Ashworth, 2015) – tend to be as follows:

- Proportionality: punishment should be proportionate to the seriousness of the offence. This enables rule of law values such as certainty and predictability to be achieved.
- Parsimony: punishment should be used as sparingly as possible.
- Transparency: decisions should be taken openly and by reference to standards declared in advance.
- Offenders should be treated as citizens capable of choice.
- Sentencing should respect the rights of victims and offenders and their families.

Principles of sentencing and judicial discretion

7. Judicial discretion has been posited as vital in producing just sentencing decisions, and there have been some concerns that limitations placed on this discretion through established principles may cause inflexibility and unjust sentencing. The example often given is the United States Sentencing Commission Guidelines (the Federal Guidelines) which have been subjected to significant criticism by judges for their inflexibility and perverse outcomes. As each case is unique, judicial discretion is therefore necessary to allow the distinctiveness of particular combinations of facts to be properly taken into account to produce sentences which are just.

8. However, Ashworth makes the distinction between discretion over the interpretation of facts and discretion over the pursuit of sentencing principles or purposes (see following section).

“It is one thing to agree that judges should be left with discretion so that they may adjust the sentence to fit the particular combination of facts in an individual case. It is quite another to suggest that judges should be free to choose what rationale of sentencing to adopt in particular cases of types of case. Freedom to select from the various rationales is a freedom to determine policy, not a freedom to respond to unusual combinations of facts” (Ashworth 2015 p80-81).

What are ‘purposes’ of sentencing?

9. The purposes of sentencing tend to follow a standard and well recognised list. It is often specifically stated that the list order is of no consequence – however it is likely that the order, to some degree, tends to lend emphasis. The ‘standard list’ tends to run as follows:

- Retribution
- Reduction of Crime / Deterrence (both general deterrence and individual deterrence)
- Rehabilitation
- Incapacitation (protection of the public)
- Reparation (restorative justice)

Retribution

10. Retribution is based on a belief or sentiment that offenders deserve punishment rather than a rational argument which uses evidence to justify the imposition of punishment as necessary to achieve desired social control outcomes (Von Hirsch 1986). That said, punishment is in fact a widespread response to offending across many jurisdictions and has been so historically. It also commands wide public support. Most jurisdictions agree that punishment is an appropriate and unavoidable response to offending.

The instrumental purposes: deterrence, rehabilitation, incapacitation, reparation

11. These purposes justify punishment on the grounds that it achieves, or is intended to achieve, instrumental benefits for society. General deterrence operates to discourage most of us from committing offences. Individual deterrence discourages an offender from re-offending. Rehabilitation controls crime by either stopping or reducing offending

behaviour. Incapacitation protects the public from further offending by an offender for at least some period of time. Reparation goes some way towards meeting the needs of victims and/or communities and making recompense for at least some of the harms caused.

Academic support for the purposes of sentencing

12. Ashworth has argued that the provision of multiple purposes to sentencing, from which those relevant to the current case may be selected “cafeteria” style, does not sit well with rule of law principles of predictability, certainty and proportionality. The purposes can often be mutually incompatible. Different judges might choose different purposes for the same case or the same purpose for different cases. This can be confusing for the public. A further difficulty is that particular principles or purposes of sentencing may be in conflict with each other. However, there are academics (e.g. Frase (2013) and Ashworth (2015)) that suggest an overarching principle or purpose would help to resolve any conflicts between individual factors.
13. Ashworth has also argued that these purposes should be seen as justifications for criminal justice processes more generally and should not be used as justifications for sentencing decision making in particular. Sentencing is only one stage of a series of more or less independent processes often, but mistakenly, described as the criminal justice “system”.
14. It is impossible to test whether there is a general deterrent effect. The conclusion seems to be that there is probably such an effect but that the effect is not sensitive to levels of punishment, i.e. making punishment more severe probably does not improve general deterrence. The existence of criminal justice has a general deterrent effect, regardless of the detailed nature of those criminal justice processes.
15. Individual offending can be deterred but only when particular conditions are present: knowledge of the penalty, perception of a high probability of detection, certainty of enforcement. This happens very rarely in practice (speed cameras being a rare example) (Von Hirsch et al, 1999).

16. From the 1950s, rehabilitation came close to achieving the status of a general justification for punishment. There was a major loss of faith in the early 1970s when research seemed to show very modest success rates. Since then, there has been a focus on “what works” and the literature on “desistance” argues that most offenders will stop offending and need support to enable them to take the responsibility of making changes. This however may take several attempts and require more patience than the courts are usually prepared to offer. Reoffending rates for most community sanctions are better than those for imprisonment, but more offenders still continue to re-offend than stop offending (Bottoms and Von Hirsch, 2010).
17. Incapacitation is only ever effective for a limited period of time and even then, the costs may outweigh the benefits from reduced crime. There are however strong arguments in favour of protecting the public from dangerous offenders especially violent and or sexual offenders. At the same time, there are limits to the accuracy of risk predictions at the level of the individual offender.
18. In conclusion the view of most scholars would be that while criminal justice processes in general should try to manage and control crime, protect the public and rehabilitate offenders, the modest rates of effectiveness make these ethically very weak justifications for sentencing decision making.

England & Wales (narrative guidelines)

Purposes of sentencing

19. The purposes of sentencing are set out across sections 142-146 of the Criminal Justice Act 2003. At Section 142, the purposes of sentencing are defined as follows:
- a) the punishment of offenders
 - b) the reduction of crime
 - c) the reform and rehabilitation of offenders
 - d) the protection of the public
 - e) the making of reparation by offenders to persons affected by their offences
20. In respect of offenders under 18, in addition to the purposes identified at section 142 (with the exception of (b)), the court must have regard to: (a) the principal aim of the youth justice system, namely to prevent offending or re-offending by persons under 18; and (b) the welfare of the offender (section 142A).
21. In considering the seriousness of any offence, the court is required to consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused (section 143). If the offence was committed on bail the court is required to treat that fact as aggravating the seriousness of the offence.
22. Reduction in sentence is afforded depending upon the stage in the proceedings at which an offender pleaded guilty, and the circumstances in which that indication was given (section 144).
23. Offences involving a racial or religious aggravation, or an aggravation related to disability or sexual orientation, require the court to treat that fact as aggravating the seriousness of the offence (sections 145 and 146).

General guidelines

24. By reference to what might be termed 'general' guidelines, rather than offence specific guidelines, there are the following (all as produced by the Sentencing Council for England & Wales):

- 'Reduction in Sentence for a Guilty Plea', Definitive Guideline, Revised 2007
- 'Offences Taken Into Consideration and Totality', Definitive Guideline, 2012
- 'Overarching Principles – Sentencing Youths', Definitive Guideline, 2009
- 'Overarching Principles: Domestic Violence', Definitive Guideline, 2006
- 'Overarching Principles: Assaults on children and Cruelty to a child', Definitive Guideline, 2008
- 'Overarching Principles: Seriousness', Guideline, 2004¹

25. Recently, the remit and work of the Sentencing Council for England & Wales has been criticised for possibly leading to an increased level of incarceration. Allen (2016) notes that the Council's original remit was limited to making sentencing consistent, effective and predictable and, while the Council may have created a more transparent sentencing regime, he is critical of the Council's inability to engage with ineffective use of imprisonment. Allen suggests that the Council's remit should be expanded to explicitly include a purpose of controlling prison numbers and reducing the use of incarceration.

¹ Published guidelines for England and Wales can be found online:
<http://www.sentencingcouncil.org.uk/publications/?s&cat=definitive-guideline>

United States (grid based guidelines)

Purposes of sentencing

26. The Federal Sentencing Statute (US Code reference 18 U.S.C. § 3553(a)) sets out factors to be considered by the court in imposing a sentence as follows.

(a) Factors to be considered in imposing a sentence. - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed)

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for)

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section

994(a)(1) of title 28, United States Code , subject to any amendments made to such guidelines by act of Congress

(regardless of whether such amendments have yet to be

incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

- (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);*
- (5) any pertinent policy statement—*
- (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code , subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);*
- and*
- (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.*
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and*
- (7) the need to provide restitution to any victims of the offense.*

27. The United States Sentencing Commission (USSC) produces an annually updated [Guidelines Manual](#)². Chapter 1 of the Manual sets out General Application Principles at Part B as follows.

§1B1.1. Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

- (1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.*

² <http://www.ussc.gov/guidelines/2016-guidelines-manual>

- (2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.*
 - (3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.*
 - (4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.*
 - (5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.*
 - (6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.*
 - (7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.*
 - (8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.*
- (b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. See 18 U.S.C. § 3553(a)(5).*
- (c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. See 18 U.S.C. § 3553(a).*

28. The website of the USSC can be found at www.ussc.gov and the US Federal Sentencing Table can be viewed [here](#)³.

³ <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-5>

Northern Ireland: Magistrates' Courts sentencing guidelines (narrative guidelines)

Purposes of Sentencing

29. Following recommendations to the Lord Chief Justice in 2010, a Sentencing Group was established tasked with: (i) considering and advising upon sentencing guidelines for the magistrates' courts; and (ii) considering the introduction of guideline judgements for the Crown Court and Court of Appeal. Both aspects were followed through by the Sentencing Group and Northern Ireland now has Sentencing Guidelines which apply to the magistrates courts.

30. The general principles of sentencing are addressed at the outset of the guidelines as follows:

'The sentence for the individual offender in court is set by the judge hearing the case. The judge will take into account the law, guidelines, expert reports and all the circumstances, to decide what will be the correct sentence for that offender, who committed that offence against that victim, in that situation. The purpose of the sentence is to satisfy retribution and deterrence. That is to say, its aim is to meet the legitimate public desire to punish wrongdoing and also to discourage the offender and other members of the public from committing similar offences in the future. In certain circumstances part of the sentence may also be aimed at protecting the public from future offending by that offender.... The overall sentence imposed by the court will be commensurate with the overall seriousness of offence(s) which the offender has been convicted of, taking into consideration all the circumstances of the offence and the offender.'

Guidelines

Step 1: assessment of 'seriousness'

31. The general approach to determining the 'seriousness' of a given offence requires the assessment of two elements: culpability and harm.

Culpability

32. This is the degree of fault or responsibility to be attributed to the offender in committing the offence and will fall into one of four descending categories:

- a) intention to cause harm
- b) recklessness as to whether harm is caused
- c) knowledge of specific risk but no intention to cause harm
- d) negligence

33. The higher the culpability the more serious the offence.

Harm

34. This is the effect or intended effect of the offending. The nature of the harm will depend on the personal characteristics and circumstances of the victim(s) and includes the physical, psychological and financial effects of the offending. In some cases, the offending may also (or instead) cause harm to the wider community. The greater the harm the more serious the offence.

35. This initial assessment of culpability and harm will allow the judge to determine the basic 'nature' or 'category' of the offence committed. This is the judge's starting point for assessing the commensurate sentence to be imposed for the offence.

Step 2: identification of aggravating factors

36. Having made the initial assessment of the basic seriousness of the offence, a judge will then identify the specific aggravating factors of the offence and the offender (i.e. the individual circumstances of the offence or the offender which cause the offence to be more serious than the basic offence used in calculating the starting point). Aggravating factors may include:

- a) The offence was committed in the context of hostility
- b) The offence was committed while the offender was on bail for another offence
- c) The offence was committed in the context of domestic violence
- d) The victim was engaged in providing a service to the public

- e) The offender's character (including previous convictions)
- f) The impact of the crime

37. ...and many more, including deliberate targeting of vulnerable victims(s), location of the offence, advance planning, use of a weapon, etc.

38. The weight to be attributed to any such factor, or possible other factors, varies depending upon the individual circumstances of each case.

Step 3: identification of mitigating factors

39. Having identified the aggravating factors of the offence and the offender, the judge will then identify the mitigating factors which exist in relation to the offence or the offender (i.e. the individual circumstances of the offence or the offender which reduced the overall seriousness of the offence). Mitigating factors may include:

- a) The offender's age
- b) Whether the offender has assisted the police with the investigation of related or other unrelated offences
- c) The offender has pleaded guilty to the offence

40. ... and many more, including showing genuine remorse, playing only a minor role, suffering from chronic health, suffering from mental illness or disability, being induced or pressured into committing an offence, provocation, significant delay/passage of time since index offence, etc.

41. The weight to be attributed to any such factor, or possible other factors, varies depending upon the individual circumstances of each case.

Step 4: identifying sentencing options

42. Sentencing options are listed in order of progressive seriousness. The sentence imposed by the court is made commensurate with the overall seriousness of the offence(s).

Step 5: the principles of totality

43. Where a court is sentencing an offender for several offences which have been tried together, the over-riding concern must be that the total global sentence, whether made up of concurrent or consecutive sentences, is appropriate. In some cases a judge may achieve this result more satisfactorily by imposing consecutive sentences, in others by imposing concurrent sentences. Whether concurrent or consecutive, the over-riding and important consideration is that the total global sentence should be just and appropriate.

Step 6: ancillary orders

44. Depending upon the circumstances, the court may impose further obligations on an offender. This may take the form of paying the victim compensation or restitution for injury, loss or damage suffered as a result of the offender committing the offence. In driving offences, it may take the form of imposing penalty points on the offender's driving licence or, alternatively, disqualifying him or her from driving. In sexual offences, it may mean imposing a Sexual Offences Prevention Order or the offender may be made subject to the sexual offences notification requirements. Other examples might include anti-social behaviour orders, compensation or restitution orders, deportation recommendations and restraining orders.

Republic of Ireland (precedential guidelines)

45. In the main, sentencing in Ireland is at the discretion of the judiciary, subject to the maximum penalties laid down in statute by the *Oireachtas* (the Irish legislature). Over time the supreme courts have developed a substantial body of case law setting out general principles of sentencing. These include the following.

- a) A sentence should be proportionate to the gravity of the offence and the personal circumstances of the offender
- b) Save in exceptional circumstances a person convicted of rape should receive an immediate and substantial custodial sentence
- c) A guilty plea should ordinarily attract a reduction in sentence
- d) Any sentences for offences committed while on bail must be ordered to run consecutively to each other or to any previous sentence

New Zealand (precedential guidelines and statute law))

46. The sentencing guideline system in place in New Zealand is based on a general body of case law rather than specific guideline judgements. A synthesis of pre-existing first instance sentences is accordingly used to inform the sentencing decision in the index case. The decision is also informed by the provisions of the Sentencing Act 2002 which, at section 7(1), sets out the purposes of sentencing as follows (the sequential order being of no significance – section 7(2)).

7 Purposes of sentencing or otherwise dealing with offenders

(1) - The purposes for which a court may sentence or otherwise deal with an offender are—

- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or*
- (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or*
- (c) to provide for the interests of the victim of the offence; or*
- (d) to provide reparation for harm done by the offending; or*
- (e) to denounce the conduct in which the offender was involved; or*
- (f) to deter the offender or other persons from committing the same or a similar offence; or*
- (g) to protect the community from the offender; or*
- (h) to assist in the offender's rehabilitation and reintegration; or*
- (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).*

(2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

47. Section 8 of the 2002 Act then sets out the principles of sentencing as follows.

8 Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court—

- (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and*
- (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and*
- (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and*
- (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and*
- (e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and*
- (f) must take into account any information provided to the court concerning the effect of the offending on the victim; and*
- (g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and*
- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and*
- (i) must take into account the offender's personal, family, whanau⁴, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and*
- (j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).*

⁴ An extended family or community of related families.

Australia (narrative/precedential guidelines, varying state to state)

48. The [Judicial Conference of Australia](#)⁵ has recently published a document entitled “Judge for Yourself: a Guide to Sentencing in Australia.” Under one of its opening sub-headings, entitled ‘Our Brutal Past’, the guide includes the following statement.

‘Australia used to torture prisoners with some of the harshest punishments imaginable. We subjected convicts to hangings, brutal floggings, or solitary confinement in chains and iron masks. One aim was to reform criminals so they would never offend again. But we slowly learned the inescapable truth; brutal punishment creates angrier and more violent people.

Today, sentencing laws are designed to be much more effective as well as humane. They allow courts to impose financial penalties or loss of freedom ranging from life imprisonment to having to complete unpaid community work several hours a week. They may also provide for offenders to be diverted to treatment or other programs designed to prevent them from re-offending.’

49. The guide goes on to outline the purposes of sentencing as follows.

‘All sentencing legislation in Australia outlines the purposes that may be considered when imposing a sentence. The main purposes are:

Punishment – usually means imposing a sentence that inflicts some kind of pain or loss on the offender.

Rehabilitation – means imposing a sentence that will help to change the offender’s behaviour into that of a responsible citizen.

Specific deterrence – means discouraging the particular offender from committing more crimes.

⁵ <http://www.jca.asn.au>

General deterrence – refers to the idea that potential offenders in the community will be discouraged from committing a particular crime when they see the penalty imposed for that kind of offence.

Denunciation – is a formal public expression that the behaviour is unacceptable to the community.

Community Protection – means both protecting the community from the offender and from crime generally.

Restorative justice – means promoting the restoration of relations between the community, the offender and the victim.’

50. There is then a further section as follows.

‘Balancing the reasons for a sentence

Often the purposes of sentencing overlap, and it is very rare for a sentence to be imposed for only one purpose.

For example, a prison sentence could be imposed for "specific" and "general" deterrence, as well as for rehabilitative purposes. The court might think that the convicted person should receive psychiatric treatment or be placed in a drug or alcohol management program while in prison.

Of course, a prison sentence might simply be imposed to punish the offender by depriving him or her of freedom for a period.’

51. Practice varies across the Australian states, for example New South Wales has a [Sentencing Council](http://www.sentencingcouncil.justice.nsw.gov.au)⁶, the prescribed statutory functions of which include:

⁶ <http://www.sentencingcouncil.justice.nsw.gov.au>

- a) To advise and consult with the Minister in relation to offences suitable for guideline judgements and the submissions to be made by the Minister on an application for a guideline judgement.
- b) To monitor and to report annually to the Minister on sentencing trends and practices, including the operation of standard non-parole periods and guideline judgements.

52. The approach across Australia is helpfully summarised on the [US Library of Congress](#)⁷ website.

⁷ <https://www.loc.gov/law/help/sentencing-guidelines/australia.php>

Canada (precedential guidelines/statute)

53. Section 718 of the Canadian Criminal Code provides as follows.

Purpose and Principles of Sentencing

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Objectives — offences against children

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

Objectives — offence against peace officer or other justice system participant

718.02 When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

Objectives — offence against certain animals

718.03 When a court imposes a sentence for an offence under subsection 445.01(1), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,*
 - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
 - (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,*
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
 - (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,**
 - (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,*
 - (v) evidence that the offence was a terrorism offence, or*
 - (vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the Corrections and***

Conditional Release Act

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Scotland (precedential and specific guidelines/statute)

54. In a 2005 paper for the Sentencing Commission for Scotland, it was suggested that judges are presently afforded a wide discretion in the sentencing process. It was mentioned that there is no penal code defining crimes and specifying minimum or maximum penalties⁸; that there is no system of sentencing guidelines, and no substantial body of appeal court guideline judgements (at least as at 2005). Statutory power to issue guideline judgements was conferred on the High Court by section 118(7) of the Criminal Procedure (Scotland) Act 1995, which provides as follows.

'(7) In disposing of an appeal under section 106(1)(b) to (f) or 108 of this Act the High Court may, ... pronounce an opinion on the sentence or other disposal or order which is appropriate in any other case.'

55. The 2005 paper went on to state as follows.

'In the absence of a system of comprehensive sentencing guidelines, sentencers in Scotland base their sentencing practice on their professional experience of court practice, intuition and training provided by the Judicial Studies Committee.'

56. In 2006 the Sentencing Commission for Scotland, under the Chairmanship of Lord Macfadyen, recommended the introduction of Sentencing Guidelines (the report can be viewed [here](#)⁹). Thereafter, the Criminal Licensing and Justice (Scotland) Act 2010 (the 2010 Act) provided for the creation of a sentencing council, and the [Scottish Sentencing Council](#)¹⁰ was established in October 2015. Section 3 of the 2010 Act provides as follows.

3 Sentencing guidelines

(1) *The Council is from time to time to prepare, for the approval of the High Court of Justiciary, guidelines relating to the sentencing of offenders.*

⁸ With the 3 exceptions of the mandatory life sentence for murder, the minimum specified sentence for illegal possession or distribution of a firearm, and the minimum sentence of seven years for offenders aged 18 years or more convicted in the High Court of a Class A drug trafficking offence, where the person has already been convicted of two other Class A drug trafficking offences. It should also be mentioned that many statutory offences do specify a maximum and/or minimum sentence and that Scotland's courts have defined sentencing powers.

⁹ <http://www.gov.scot/resource/doc/925/0116783.pdf>

¹⁰ <https://www.scottishsentencingcouncil.org.uk>

- (2) *Such guidelines are to be known as “sentencing guidelines”.*
- (3) *Sentencing guidelines may in particular relate to—*
 - (a) *the principles and purposes of sentencing,*
 - (b) *sentencing levels,*
 - (c) *the particular types of sentence that are appropriate for particular types of offence or offender,*
 - (d) *the circumstances in which the guidelines may be departed from.*
- (4) *Sentencing guidelines may be general in nature or may relate to a particular category of offence or offender or a particular matter relating to sentencing.*
- (5) *The Council must, on preparing any sentencing guidelines, also prepare—*
 - (a) *an assessment of the costs and benefits to which the implementation of the guidelines would be likely to give rise,*
 - (b) *an assessment of the likely effect of the guidelines on the criminal justice system generally.*
- (6) *The Council—*
 - (a) *must from time to time review any sentencing guidelines published by it, and*
 - (b) *may prepare, for the approval of the High Court of Justiciary, revised guidelines.*
- (7) *In this section and sections 4 to 13, references to sentencing guidelines include references to revised sentencing guidelines.*

Sentencing principles and purposes

57. At present, Scotland does not have an articulated set of principles and purposes of sentencing. There have in the past, however, been some indications. By way of example, in the context of considering prison policy, the Scottish Prison Service in 1990 produced a report entitled *Opportunity and Responsibility: Developing new approaches to the Management of the Long Term Prison System in Scotland*. In the foreword to that report, the then Secretary of State for Scotland (Malcolm Rifkind, MP) stated as follows.

‘The Government’s penal policy is that the prison sentence should be imposed upon those, and only those, for whom an alternative disposal is not appropriate. But we are also concerned that, so far as consistent with deprivation of liberty and the protection

of the public, the disruption to family ties and work prospects, consequent upon a sentence of imprisonment, should be minimised, and the prisoner should be given opportunities to address his offending behaviour and to contribute positively to society on discharge.'

58. The same report, at Chapter 2, begins as follows.

'On 10 January 1988, the Secretary of State for Scotland made a speech to the Scottish Prison Service, in which he set out the central aims of current penal policy. The Secretary of State's speech reviewed the objectives of the various sentencing options available to the courts, including imprisonment. He stated their purpose as:

*to punish appropriately those who have been convicted of crimes and offences by the courts;
to protect the public from dangerous criminals;
to deter people from committing crimes; and
to encourage offenders to turn away from crime and to contribute more positively to society on discharge.*

The Secretary of State also said:

The balance between deterrence, punishment and protection of the public on one side and attempts to rehabilitate the offender on the other is always difficult. It is vital, however, that the balance should be carefully assessed by the courts at the time of sentence and constantly kept in mind by the agencies which enforce sentences...'

59. The Criminal Justice and Licensing (Scotland) Act 2010 introduced a presumption against sentences of less than three months. The Act requires the court to (i) only pass a sentence of three months or less if no other appropriate disposal is available and (ii) record the reasons for this view. The Scottish Government has stated that this presumption fits with the Government's policy objective of reducing reoffending (Scottish Government, 2016 paragraph 1.3). This may be seen as encouraging rehabilitation as a purpose of sentencing within the Scottish system.

60. Much more recently, in his lecture, [Sentencing: Beyond Punishment and Deterrence](#)¹¹, given on 5 November 2013, while Lord Justice Clerk, to the Scottish Association for the Care and Resettlement of Offenders (“SACRO”), the Lord Justice General made the following observations.

‘The court requires to sentence the offender. It is important to observe that the word used is “sentence” and not “punish”. Just what a particular judge is doing when carrying out his duty in this regard ought to depend, to a material degree it might be thought, on what he or she considers the exercise is intended to achieve. It is not an essential element of a law degree, nor a requirement to qualify as a solicitor or an advocate, that a course in criminology, social work or penology be undertaken. Equally, since neither the solicitor nor the advocate is called upon to undertake the task of sentencing, it does not form part of the necessary knowledge or experience required for appointment as a sheriff or judge. He or she may have a background of attending sentencing diets in solemn and summary cases, but that is not a compulsory element in the appointment process. Hopefully, all High Court and sheriff court sentencers are familiar, at least from their knowledge of philosophy, with traditional theories describing how justice is achieved in the sentencing process and from which we ultimately derive the principles of punishment. Starting from this point of abstract thinking, and echoing Hart in his Prolegomenon to the Principles of Punishment, most will be aware, on the one hand, of the retributivist school, following on the work of Kant and Hegel, which seeks to impose upon the offender his “just deserts”; that is to say, that the punishment should fit the crime. Those two words actually appeared in the Conservative government white paper which preceded the Criminal Justice Act 1991 for England and Wales and they were repeated by the then Lord Chancellor in his foreword to the Ministry of Justice’s Breaking the Cycle policy as one of two fundamentals, along with public safety, which a state should offer its citizens. Many of a more liberal persuasion, on the other hand, will seek to follow the utilitarian school, from the teachings of Bentham and Mill, which has at its heart the idea of social protection, achieved by means of preventing the particular offender from committing further crimes and of deterring others. This, of course, holds that punishment in an individual case should benefit society as a whole and may have as

¹¹ http://www.sacro.org.uk/sites/default/files/media/lord_carloway_sacro_lecture_-_5_november_2013.pdf

part of its purpose the rehabilitation of the offender as well as his incarceration. The two schools proffer different ideas, but they are not entirely inconsistent.

In the modern era, retribution and deterrence, which are key elements from each school, remain central pillars in the theory of judicial thinking on sentencing. Both elements expressly feature in the 2003 legislation which introduced the “punishment part” as a requirement of a life sentence. The third element in the process is expressly described as being the protection of the public. On this basis, it would seem, the Parliament has determined that, at least in a custodial sentence, there are three principal components: retribution, deterrence and protection of the public.

The extent to which the Scottish courts have actually expressed retribution, deterrence or protection of the public, as the critical elements in the sentencing process in a given case, is limited. The difficulty which judges faced in fixing punishment parts using this methodology was that none had hitherto thought in terms of compartmentalising parts of a custodial term into discrete periods.

...Scotland does not have a statement of the general principles of sentencing enshrined in law. England, for example, does. They are expressed in the form of general matters which the court must have regard to, notably: (a) the punishment of the offenders; (b) the reduction of crime (including its reduction by deterrence); (c) the reform and rehabilitation of offenders; (d) the protection of the public; and (e) the making of reparation by offenders to persons affected by their offences. Are the English provisions glimpses of the blindingly obvious, which do not require expression in statutory or other form? Should we be looking to England in the first place or to smaller jurisdictions similar to our own? This is something requiring further analysis. Nevertheless, 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.’

61. The Lord Justice General delivered a further lecture on the subject of sentencing, while Lord Justice Clerk, to the Howard League Scotland on 22 October 2014, entitled [The purposes of sentencing: from Beccaria to the OLR and Beyond](#)¹². The lecture which, as the title suggests, includes a consideration of the purposes of sentencing from the Enlightenment to modern times, concludes with the following section.

'The Way Forward

In a democratic European society, the purpose of sentencing is what that society wants it to be. It can proceed down a retributivist route. England has done this to an extent with the just deserts approach, exemplified by the grid iron guidance which has a "sentence fits the crime" starting point. Alternatively, it can adopt a much more offender based focus such as that when the High Court determines whether an OLR is appropriate for a person posing an indefinite danger to the public. Whichever approach is taken, in each there will be balancing elements taken from the opposing theory. Where consensus is required, a hybrid may well be the result. That is not to say that compromise is the best way forward.

Whether the purposes of sentencing should be laid down in statute is a matter for Parliament to determine. It may have the advantage of giving the public a clear view of the general objectives being pursued. However, on the assumption that the purposes when stated are broadly the same as those in the English legislation, or as formerly proposed in the Bill that led to the 2010 Act in Scotland, listing them will not be of much practical assistance to the Scottish judge. They will provide only very limited help to either the offender or the victim in predicting the likely sentence.

The purposes of sentencing are relatively well known; in the sense that a number of purposes can be identified in textbooks and legislation. Some do not assist at all. For example, a statement that a purpose of sentencing is the punishment of offenders is almost tautological. Some may be in conflict with each other in a particular case, notably deterrence and reform. It is in this area that real difficulties arise. No doubt that is why there has been a reluctance on the part of the legislature, government and the courts to frame any structure involving a prioritisation of purposes. It may, in

¹² <http://www.scotland-judiciary.org.uk/Upload/Documents/LJCHowardLeagueScotlandThePurposeofSentencing22October2014.pdf>

reality, not be possible because of the range of criminal offences, which spans from murder to parking.

If it were decided that the new Sentencing Council should undertake the task of proposing priorities in sentencing goals, the result would be likely to involve a significant change in the substantive law. The formalisation of a hierarchy of purposes would alter the current approach, which is that all the various factors commonly mentioned require to be taken into account, if at all relevant, in the single sentencing exercise. If one aim were to be given particular prominence, or another reduced to insignificance, the balance, which some may think is being struck at present by the extensive use of discretion, would be tilted in a direction which is different from that currently prevailing.

The introduction of statutorily sanctioned purposes, and especially a hierarchy of objectives, is likely to be perceived, at least by some, as creating a fresh start in the judicial sentencing process. The existing sentencing jurisprudence, such as it is, may be rendered obsolete. The courts would require to re-think the sentencing exercise on the basis of the newly created hierarchy of purposes. It is likely that there would be a substantial number of appeals based upon the failure of the first instance judge to take a particular factor into account, or to give it due weight, or upon the judge taking into account some factor which is not on the prescribed list, or giving it undue weight.

That may or may not be a bad thing. Perhaps the best thing that could happen is that a new Beccaria will emerge, who will guide us all forward towards the promised land. That country may be one in which, whilst the offender who is assessed as a continuing danger to the public should be subject to some relatively restrictive regime of incarceration and/or intense supervision in the community, all others should be paying back to, and learning in, the community and not removed from it and put behind the walls and barbed wire that future generations may regard, as we now do the practices prevalent in Beccaria's day, as barbaric.'

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