

Applying generic sentencing aims in domestic violence cases in England and Wales

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Abstract

There is an enduring legacy of trivialisation and ineffectiveness at various stages in the criminal justice process when it comes to responding to domestic violence. One area of contention relates to sentence. Sentencers in England and Wales are bound by law to have regard to a number of aims: the punishment of offenders; deterrence; public protection; rehabilitation; and reparation. Whilst commentators have criticised the framework on the basis that it is contradictory and engenders inconsistency, it will be argued that granting sentencers discretion to balance the prescribed aims maximises the potential for a successful outcome in individual cases.

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1. Introduction

Domestic violence is a widespread social problem. Recent government statistics estimate that 29% of women and 16% of men in England and Wales have experienced some form of domestic abuse (Home Office, 2011a: 68). Legal responses to domestic violence related offending have become a high priority on the governmental agenda over the last decade. Following the Home Office's 2006 national domestic violence plan the legal response to domestic violence has led to greater multi-agency approaches and the creation of Specialist Domestic Violence Courts (Robinson, 2010) which have been evaluated positively (Cook et al.,

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2004). The multi-agency approach is further galvanised through the accreditation of these specialised courts which are now overseen by the cross-government National Steering Group consisting of the Ministry of Justice, the Home Office and the Crown Prosecution Service. At the end of 2010 143 specialist domestic violence courts had been created (CPS, 2010–2011). It must be acknowledged that many factors, such as policing practice, will have an effect on who is convicted and in a position to face sentence. Robinson and Stroshine have also shown that police practice affects the willingness of victims to participate at later stages of the criminal justice system (Robinson and Stroshine, 2004).

In the absence of a discrete offence of domestic abuse, sentencing provides an opportunity for the law to address the distinctiveness of the offending. Common to this offending in particular is the systematic nature of the harm and its occurrence between intimates or family members (Tadros, 2004–2005). It is important to recognise that there are limits to what the criminal law and sentencing can realistically achieve (Guzik, 2008). Any effective strategy must involve the criminal law but not be limited by it (Ursel, 2002). Prior to the 2006 Sentencing Guidelines a Home Office study revealed that sentencing practices in the courts of England and Wales were widely disparate, with the use of custody as a sentence ranging from 11 per cent to 50 percent (Hester and Westmarland, 2005). To some extent sentencing disparity can be explained on the basis that many of the offences commonly associated with domestic violence, such as assault occasioning actual bodily harm, encompass considerable degrees of violent conduct within the substantive definition (see later). Additional considerations may affect domestic violence cases although recent Australian research (Ringland and Fitzgerald, 2010) found that the factors which influenced the sentencing of domestic violence offenders relate primarily to the harm caused. Sentencing inconsistency though is seen as one of the rationales for the establishment of Specialist Domestic Violence Courts (Robinson, 2010).

The Sentencing Guidelines Council in 2006 continued the trend towards a more robust official response towards domestic violence related offending. An unequivocal message was sent out: courts must regard offences committed in the domestic setting as seriously as those that are not (SGC, 2006 para. B2.1). Despite this positive progression and the recognition that domestic violence is frequently made up of a series of offences, the complexities with sentencing individual cases involving domestic violence remains. The same guidelines are not blind to these difficulties noting that despite the need for the sentence to reflect the adequate condemnation of the violating conduct, caution may be required. This will occur particularly where the victim and the offender both mutually desire to continue their relationship without the violence. In such circumstances the Sentencing Guidelines advise that where the violence is towards the lower end of the scale of seriousness, it may be appropriate for the court to impose a sentence that provides the support necessary to continue the relationship (SGC, 2006). The difficulty of ensuring and justifying state censure of violence within a domestic setting is inevitably complex and must allow for individual circumstances, albeit at the expense of consistency.

Current sentencing practice is not the focus of this article. We have neither the funding nor the relevant expertise to undertake such research. Instead we seek to subject sentencing policy, as distinct from actual sentencing practice, to analysis to see if it hampers an effective holistic response to domestic violence offending. Current practice partly justifies this exercise, not least if rampant discrepancies are apparent. Yet this masks the fact that sentencing is a normative as well as a practical process. The imposition of state punishment has to be justified in each case. Our argument, put simply, elevates discretion above consistency as a jurisprudential aim. So does the current sentencing framework.

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