

# Scottish Sentencing Council

## How guidelines are developed

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## Introduction

### *What are sentencing guidelines?*

1. One of the functions of the Scottish Sentencing Council is to develop and publish sentencing guidelines. These guidelines will help judges decide what sentences to give to people who have committed offences. They should also help the public to better understand sentences.
2. Sentencing guidelines can be general and apply to all offences. Or they may focus on a particular type of offence or category of person who has offended, for example young people. This will be stated clearly on each guideline.
3. Any guidelines developed by the Council must be approved by the High Court of Justiciary before they have effect.

### *Why do sentencing guidelines matter?*

4. Sentencing guidelines are important because judges have to take them into account when sentencing offenders in a relevant case. This will help to ensure that sentences are consistent, fair, and proportionate. If a judge does not follow a guideline in a case where the guideline applies they must give reasons.
5. Our guidelines will be used by, or be of interest to, all court users – judges, prosecutors, defence lawyers, accused people, and victims and witnesses. They will also provide information about sentencing to the wider public and to the media.
6. We aim to make all our guidelines useful, informative, and accurate. Each guideline will become part of the Scottish criminal justice system and guidelines will have real effects on the people involved in criminal cases. It is important that we do what is necessary to get them right, including:
  - gathering evidence
  - consulting with all those people who can help us to put together useful, informative and accurate guidelines
  - assessing the likely effects on the criminal justice system
  - testing draft guidelines robustly to ensure that they are fit for purpose.

7. We want to make sure that our guidelines meet the aims set for them. So it will take time for us to develop each guideline.

*How does the Council decide what topics to develop guidelines on?*

8. The Council prepares a business plan every 3 years. That sets out what guidelines we intend to work on during those 3 years.
9. The factors we take into account in selecting a topic for a guideline were set out in our first business plan. You can find these factors on our [website](#).

*How does the Council go about developing guidelines?*

10. This document sets out the process that the Council will normally follow in developing sentencing guidelines. We may need to spend more time in developing certain guidelines. For example, extra research may be needed for some topics if they are particularly complicated. This means that some guidelines will take longer to develop than others.

### **The guideline development process**

11. This table shows the 8 stages in the guideline development process. More information on what happens at each stage can be found on **pages 3-10**.
12. A list of all the guidelines we are currently developing and the stage of development for each is available on our [website](#).



## Stage 1: Initial consideration of the guideline topic

13. Once a topic is selected for a guideline, we will set up a committee (made up of our members) to oversee development of the guideline. We can ask suitable experts to assist with the work of our committees. We will also agree:

- the aim of the guideline, including detailed reasons for preparing a guideline on the topic and the issues to be covered
- the scope of the guideline (for example, what offences it will apply to)
- a plan for developing the guideline, including when we expect it to be completed

14. This first stage helps us decide if a guideline on the topic is likely to be useful. We also need to know whether such a guideline can be delivered effectively. At the end of this stage the whole Council will decide whether or not to develop a guideline.

## Stage 2: Development of a draft guideline

15. The committee established at stage 1 will oversee the drafting of the guideline, and all the work involved in developing it.

16. At stage 2, our work will focus on engaging with those who have an interest or expertise in the guideline topic (who we refer to as stakeholders), gathering evidence, and developing a first draft of the guideline.

### *Engagement*

17. We know that many people will be interested in giving their views when we are developing a guideline. Engaging with stakeholders is an essential part of our work, and will continue through all stages of the process. Once we have decided to go ahead with a particular guideline we will speak more extensively to organisations and individuals with an interest or expertise in the area to get their views on what the guideline should cover, and to identify where further research may be needed. For example, we might speak to groups supporting victims of the offence, to people working with those who have offended to help to reduce the chance of them re-offending, or to academics with particular expertise in the area.

18. We will also consider the benefits of holding conferences or other events. In that way we can bring together people who are interested in a particular topic<sup>1</sup>.

#### *Gathering evidence*

19. We are committed to taking an evidence-based approach to guideline development. This means that we will base our guidelines on research and other factual information that we can gather. This includes information on current sentencing practice. For example, it is useful for us to know:

- What sentences are usually imposed for the offence?
- What do judges take into account in deciding on a sentence for the offence?
- Are there any variations or apparent inconsistencies in how the offence is sentenced across Scotland and, if so, why?

20. We will ask for data from the Scottish Government and criminal justice organisations like the Scottish Courts and Tribunals Service (SCTS), the Crown Office and Procurator Fiscal Service (COPFS), the Scottish Prison Service (SPS), and Police Scotland.

21. We will also review information on the subject of the guideline, to find out what research others have carried out and what their findings were.

22. This work might confirm that there is a need for more research and information. Where we think this is necessary in order to make the guideline as useful and accurate as possible we will carry that out. This may mean that developing the guideline will take longer.

23. We might also need to carry out new research to gain a better understanding of sentencing decisions for certain offences. Or we may fund new work to understand public views on sentencing for specific offences, or to explore what works in terms of sentencing.

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<sup>1</sup> See for example the [report of the Council's conference on Sentencing Young People](#)

### *Developing a first draft of the guideline*

24. Based on the evidence gathered during this stage, we will develop a first draft of the guideline. This draft guideline can be discussed and tested with the help of interested parties. This is an important step, but the final guideline may be very different from the first draft.

### **Stage 3: Seeking the views of judges**

25. We need to have discussions with the judges who will use the guideline. This is essential to ensuring that guidelines are useful and will help sentencers. This will help us to understand current sentencing practice and will highlight any areas of difficulty where judges think guidance would be helpful. The judges' views will also be important once we have started to draft a guideline. This will help us to refine our approach and make sure the guideline is as helpful and usable as possible.

26. We will gather the views of judges through a variety of methods. This might include, for example, testing what the draft guideline says and how it will be used with small groups of judges who deal with the relevant offences. We will also discuss with judges the issues surrounding particular types of offence or offender, as well as sentencing matters more generally.

27. We may ask judges for their views during the development stage of guideline preparation, to explore where guidelines would be of particular assistance to them. This might include focus groups, formal discussion papers, in-depth interviews, and larger group discussions.

28. What we learn from judges may lead to revisions to the draft guideline before the next stage in the process.

### **Stage 4: Consulting on the guideline**

29. Once the committee is satisfied with a guideline, it will be put before the full Council to consider whether we can consult formally.

30. We must, by law, consult the Scottish Ministers and the Lord Advocate before we submit a guideline to the High Court for approval. We can also consult anyone else we think can help to make sure that the guideline is useful. We aim to

engage with as wide and diverse an audience as possible in developing our guidelines. At its first meeting the Council agreed a public consultation would be carried out on every guideline.

31. We will start the public consultation process by publishing a consultation paper, along with a draft guideline and draft impact assessment, on our website.
32. The consultation paper will set out the background to the guideline. It will also explain why we've taken the approach we have in the draft guideline, and ask a number of questions about this. The impact assessment will set out what we think the costs and benefits of the guideline will be, and the likely effect of the guideline on the criminal justice system generally.
33. The consultation period will normally last for 12 weeks. But there may be specific reasons for making that period longer or shorter.
34. We are keen to hear from all those who want to comment on a guideline. This includes individuals as well as criminal justice organisations, charities, and other organisations which have an interest in the guideline.
35. We may also consult in different, less formal, ways with targeted individuals and interest groups if we think that could be useful.

## **Stage 5: Finalising the guideline**

36. When the consultation period has finished, all of the responses will be analysed. We will carefully consider what changes we need to make to the guideline in light of these responses.
37. We will publish the responses to the public consultation, unless the person responding has asked us not to do so. If requested, we can publish the response but remove the name of the person responding.
38. We will also publish the analysis of those responses, and we will set out our views on the issues raised. We will indicate any changes that have been made to the draft guideline or impact assessment as a result of the consultation.

## **Stage 6: Submitting the guideline for approval**

39. Our guidelines only take effect if they have been approved by the High Court.



40. We will submit the guideline and impact assessment to the High Court for approval. We will also give the High Court any other information we think will assist it in considering the guideline.
41. When the High Court receives an application for a guideline to be approved, a date will be fixed for the Court to make its decision known. The Court can approve a guideline in full, approve it with changes, or reject it.
42. The Court can ask us for further information before making its decision. The Court may decide not to approve a guideline in full, in which case it must tell us, and give us an opportunity to respond.
43. If the Court approves a guideline, it will also specify the date from which judges must have regard to it (that is, when it is to come into force).
44. After a guideline has been approved, we must publish it, and the impact assessment, as soon as possible.

### **Stage 7: Raising awareness about the guideline**

45. We will take steps to raise awareness of each new guideline once it has been approved, and once we know when it is going to come into force. We will notify individuals and organisations with a specific interest in the guideline. We will also carry out wider communications work to increase public awareness of the guideline. This might include, for example, media interviews, conferences, as well as using digital and social media.
46. We will also work with judges and other members of the criminal justice system where they need to understand the impact of the guidelines on their decisions. This may include helping to develop necessary training.
47. Our communications must be properly planned, working with others in the justice system. We will need to invest time and resources to make sure that all those who have an interest in, or are affected by, a guideline are prepared for it.



## Stage 8: Monitoring and review

48. We must review each guideline from time to time. We have developed a staged approach to this, enabling us to react promptly to any unexpected or undesirable consequences while establishing a solid evidence base for longer term reviews.
49. For offence and offender specific guidelines, in the first year of a guideline's operation we will monitor the application of the guideline through sentencing statements, media reports, internal court documents recording decisions not to follow or to depart from guidelines and, where appropriate, engagement with sentencers. This period of data gathering will focus mostly on ensuring there are no unintended consequences of a guideline.
50. After one year in force, we will review data gathered on relevant cases by the SCTS. We may also engage with sentencers, which may include focus groups, formal discussion papers, in-depth interviews, surveys and larger group discussions. This stage will consider, as far as possible, the degree to which the guideline has had the intended effect and identifying any unintended consequences or emergent trends as a result of the guideline.
51. After three years in force, we will review data gathered on relevant cases by the SCTS, as well as engaging with sentencers on their experiences of using the guideline. At this stage, we will publish a public review of the guideline's operation which will detail the impact of the guideline over the medium term.
52. For guidelines of general applicability for the first year in force we will monitor the impact of the guideline in the same way as for offence or offender specific guidelines (see paragraph 49).
53. Where guidelines of general applicability do not seek to alter practice, we will monitor their on-going effect beyond the first year in force through engagement with sentencers. Where guidelines of general applicability do seek to alter practice we will develop individual methodologies for assessing any impacts as appropriate.
54. As well as our own review timings detailed above, the High Court and Sheriff Appeal Court can also require us to review any guideline, and the Scottish Ministers can request that we review a guideline. In these circumstances we will take an appropriate approach to the review depending on the time the guideline has been in force, the circumstances that have led to the review, and the type of guideline being reviewed.

## Conclusion

55. The work described above will take time to get right. We are mindful that small changes in sentencing practice could have significant impacts, both on those involved in individual cases and on the criminal justice system as a whole. Stages 2-4 are particularly important in ensuring that guidelines are fit for purpose, achieve their aims, and that their potential effects are fully understood.
56. As a result, we must take the time needed to collect information, consult widely with all those who can help us, and test the final guidelines carefully before they come into force.

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