



© Crown copyright 2021

You may re-use this information (excluding logos and images) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit http://www.nationalarchives.gov.uk/doc/open-government-licence or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

ISBN: 978-1-912442-38-6

Laying number: SG/2021/311

Provided to the Scottish Ministers in pursuance of section 13 (1) of the <u>Criminal Justice and Licensing (Scotland) Act 2010</u> on 11 November 2021.

Scottish Sentencing Council Parliament House Edinburgh EH1 1RQ

T: 0300 790 0006

E: sentencingcouncil@scotcourts.gov.uk

Published by the Scottish Sentencing Council

November 2021



Contents

Chair's foreword	4
Introduction	8
Statutory objectives and functions	8
Sentencing guidelines	9
Membership	9
Committees	13
Sentencing guidelines	16
Guideline development	16
Methodology for guideline development	16
Key achievements and work in progress	21
Sentencing guidelines	21
Research and information	22
Promoting awareness and understanding	22
Assisting policy development	25
Expenditure	27
Correspondence, freedom of information, and cor	mplaints
	31



Chair's foreword

Rt Hon Lady Dorrian, Lord Justice Clerk, Chair of the Scottish Sentencing Council



I am pleased to introduce the Scottish Sentencing Council's annual report for the period 1 April 2020 to 31 March 2021, a period unlike any other in the Council's history. This is, of course, because the year in question was largely dominated by the COVID-19 pandemic.

As with many organisations and stakeholders across the criminal justice system, and indeed society as a whole, the pandemic had a substantial impact on the Council. Many of those involved in the Council's work, both directly and indirectly, became engaged in essential recovery activity

across the wider criminal justice system, which limited their availability to carry out Council work for a time.

This meant that a significant proportion of our business was adversely affected for a period during 2020. However, work fully resumed by October at which point we were able to pick up where we had left off, albeit in a more restricted fashion, with meetings by video conference the new normal. Like others, our working methods had to be adapted and our project timescales adjusted accordingly.

It is a testament to the hard work and dedication of Council members and staff that we can now look back and note the significant progress made despite the disruption wrought by the pandemic.

In relation to the development of sentencing guidelines, which remains our key function, we considered the results of the public consultation exercises in respect of both the sentencing process and sentencing young people guidelines. Due to the delays caused by the pandemic, we were able to consider these more or less simultaneously. This meant we could take into account the issues raised and views expressed in both consultations when finalising each guideline, in order to ensure that they will interact effectively, particularly in respect of how the harm to victims is addressed. Both guidelines were finalised for submission to the High Court shortly after the end of the reporting year.

Of our other guidelines under development – on offences of causing death by driving, sexual offences (beginning with guidelines on rape, sexual assault, and



indecent images of children), and sentence discounting – work was most advanced on the draft death by driving guideline, with some early testing with sentencers taking place in spring 2021.

Work on the other guidelines primarily consisted of research. We are committed to taking an evidence-based approach to guideline development. This means that it is vital to begin work on each guideline by gathering data and conducting research, the results of which we generally make available on our website in furtherance of our statutory objective to promote greater awareness and understanding of sentencing.

During this year we published a report on public understanding of and attitudes to sentencing for death by driving offences, as well as literature reviews on sentencing for rape, sentencing for sexual assault, sentencing for environmental and wildlife offences (work on which was paused in 2019 pending finalisation of what became the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020, and to give greater priority to guidelines on sexual offences), and sentence discounting. Further research work was carried out in-house.

While work involving stakeholder engagement was limited due to the pandemic, we participated in as many meetings and events as we could. In particular, we were pleased to be able to carry out direct engagement with a number of victims' and survivors' organisations to seek input on the draft sentencing young people guideline and the Council's work more generally.

In early 2021, we carried out an engagement exercise with sentencers and others, which sought to identify any gaps or barriers to the provision of community-based sentences and to ascertain what might improve judicial confidence in such disposals.

We also worked with numerous justice organisations to create impact assessments covering the costs and benefits of the sentencing process and sentencing young people guidelines, and to assess the likely impact of these guidelines on the criminal justice system in general.

As the year drew to a close, we began to turn our attention to the preparation of our next business plan, for the period 2021-24. In doing so, we could, I think, recognise the fact that our achievements during 2020-21 had brought us very close not only to the fulfilment of the key commitments in our previous business plan for 2018-21, but also to the completion of the first phase of our work.

Since the Council was established in 2015, our main focus has been on completing a suite of general guidelines which will set out a high level framework for sentencing in Scotland. The work carried out in 2020-21 was fundamental in enabling the



sentencing process and sentencing young people guidelines to join the 'Principles and purposes of sentencing' guideline as the final parts of that framework, meaning that we are now able to enter a new phase, where our focus will be on offence-specific guidelines.

It is worth highlighting the fact that Council members are volunteers and their positions are unremunerated. I am, as ever, extremely grateful to all members, past and present, for their commitment to the work of the Council but I would like to pay particular tribute to all of those have contributed their time and given the Council the benefit of their expertise in such an unusual and challenging year.

Rt Hon Lady Dorrian
Lord Justice Clerk and Chair of the Scottish Sentencing Council

Introduction





Introduction

The Scottish Sentencing Council was established on 19 October 2015 under Part 1 of the <u>Criminal Justice and Licensing (Scotland) Act 2010</u> ("the 2010 Act").

This annual report, which covers the period 01 April 2020 – 31 March 2021, describes the Council's work in relation to the development of sentencing guidelines, its key achievements and work in progress, its expenditure, and other information relating to its work over the course of the year.

Impact of the COVID-19 pandemic

The Council, like many others, encountered difficulties and delays in respect of the delivery of its work during 2020-21, with a number of projects requiring to be suspended because of the disruption brought about by the COVID-19 pandemic and to enable Council members and staff to assist with essential wider system recovery efforts. Despite this, progress was able to be made in a number of areas, with work being fully resumed during the reporting year and enabling the sentencing process and sentencing young people guidelines to be finalised soon thereafter.

Statutory objectives and functions

The Council is an independent advisory body with the following **statutory objectives**:

- to promote consistency in sentencing practice
- to assist the development of policy in relation to sentencing
- to promote greater awareness and understanding of sentencing policy and practice

The Council's **functions** include:

- preparing sentencing guidelines for the Scottish courts
- publishing guideline judgments issued by the Scottish courts
- publishing information about sentences imposed by the courts

The Council also has powers to publish information about, and conduct research into, sentencing and to provide advice and guidance of a general nature on sentencing matters.



Sentencing guidelines

The Council must prepare sentencing guidelines for the consideration of the High Court of Justiciary, Scotland's supreme criminal court. If the High Court approves the guidelines, it may do so in whole or in part, and with or without modifications.

Guidelines do not have effect unless approved by the Court.

The Council has **broad discretion** as to the format and subject matter of sentencing guidelines. In particular, guidelines may cover:

- the principles and purposes of sentencing
- sentencing levels
- the particular types of sentence that are appropriate for particular offences or offenders
- circumstances in which guidelines may be departed from.

Membership



The Scottish Sentencing Council is made up of a maximum of **12 members**. The categories of

membership are provided for in the 2010 Act.

Six changes in membership took place during 2020-21.

Matt Jackson QC was appointed as a legal member of the Council in October 2020 and Summary Sheriff Paul Brown was appointed as a judicial member of the Council in November 2020. Both were appointed for 5 year terms. Outwith the period covered by this report, both were appointed as sheriffs and their Council memberships came to an end.

Sheriff Principal Iain Abercrombie retired in April 2020 and the tenures of Lord Turnbull, Sheriff Norman McFadyen and Sue Moody ended in October 2020. Sheriff Principal Craig Turnbull was appointed as a judicial member of the Council in July 2020 and Lord Matthews was appointed as a judicial member of the Council in November 2020. Both have been appointed for 5 year terms and will serve until 2025.

Lesley Weber was appointed as a lay member of the Council in January 2021 and Sheriff Iain Fleming was appointed as a judicial member of the Council in March 2021. Both have been appointed for 5 year terms and will serve until 2026.

Council membership during 2020-21 is set out at pages 11-12.



Staff

During 2020-21, the Council's secretariat comprised the following posts:

- Secretary
- Principal Legal Officer
- Principal Research Officer
- Interim Researcher (x 2)
- Senior Policy Officer
- Communications Officer
- Business Manager



Category	Position	Title
Chair	The Lord Justice Clerk, by virtue of that office	The Rt Hon Lady Dorrian
Appointed by the Lord Justice General, having consulted the Scottish Ministers	One other person holding the office of judge who normally sits as a judge of the Outer House of the Court of Session or the High Court of Justiciary	The Rt Hon Lord Turnbull (until October 2020) The Rt Hon Lord Matthews (from November 2020)
	One sheriff	Sheriff Norman McFadyen (until October 2020) Sheriff Iain Fleming (from March 2021)
	Two persons holding the office of summary sheriff or justice of the peace	Summary Sheriff Paul Brown (from November 2020)
		Susan Fallone JP
	One further eligible judicial member or a sheriff principal	Sheriff Principal Ian R Abercrombie QC (until April 2020)
		Sheriff Principal Craig Turnbull (from July 2020)



Category	Position	Title
Legal members Appointed by the Lord Justice General, having consulted the Scottish Ministers	One prosecutor	David Harvie Crown Agent for Scotland
	One advocate	Matt Jackson QC (from October 2020)
	One solicitor	Krista Johnston
Lay members Appointed by the	One constable	Deputy Chief Constable Will Kerr
Scottish Ministers, having consulted the Lord Justice General	One person with knowledge of victims' issues	Sue Moody (until October 2020) Lesley Weber (from January 2020)
	One other person who is not qualified as a judicial or legal member	Dr. Hannah Graham



Committees

The Council has two types of committee: standing committees and working group committees. Standing committees are established on a long term basis to handle particular areas of ongoing work. Working group committees are established for a defined period of time and will generally focus on the development of a particular guideline, lasting only until this work is finished.

Standing committees

The Council's two standing committees, the Communications Committee and the Research Committee, were established in 2016.

The Communications Committee

leads on promotional and public awareness work. A key part of this involves engaging with organisations and individuals to raise awareness and understanding of sentencing, and to encourage participation in the Council's work.

The committee's membership during 2020-21 was as follows:

- Sheriff Norman McFadyen (Chair until October 2020)
- Summary Sheriff Paul Brown (Chair from May 2021)
- Krista Johnston
- Sue Moody (until October 2020)
- Dr Hannah Graham
- Lesley Weber (from January 2021)

 Sheriff Andrew McIntyre (advisor, from January 2021)

The **Research Committee** advises the Council on the commissioning, progress, and dissemination of research projects.

Its membership during 2020-21 was as follows:

- Dr Hannah Graham
- Sheriff lain Fleming (from March 2021)
- Susan Fallone JP

Working group committees

These committees support the development of specific sentencing guidelines, including making recommendations to the Council as to the scope, content, and approach of its work, reviewing draft guidelines, supporting engagement with relevant stakeholders, and overseeing the guideline consultation process.

Working group committees are currently in place to support the Council's work to develop guidelines on the sentencing process, sentencing young people, causing death by driving, and environmental and wildlife offences.

The membership of each committee during 2020-21 was as follows:



Sentencing Process Committee

- Sheriff Principal Craig Turnbull (Chair, from October 2020)
- The Rt Hon Lord Turnbull (Chair until October 2020, then advisor from November 2020)
- Sheriff Norman McFadyen (until October 2020, then advisor from November 2020)

Sentencing Young People Committee

- Sheriff Principal Ian Abercrombie QC (Chair until April 2020)
- Sheriff Principal Craig Turnbull (from October 2020, Chair from December 2020)
- David Harvie
- Krista Johnston
- Sue Moody (until October 2020, then advisor from November 2020)
- John Scott QC (advisor)

Death by Driving Committee

- David Harvie (Chair)
- The Rt Hon Lord Matthews (from January 2021)
- Sheriff Norman McFadyen (until October 2020, then advisor from December 2020)
- DCC Will Kerr

Environmental and Wildlife Crime Committee

- Susan Fallone JP
- DCC Will Kerr

Sexual Offences Committee

- The Rt Hon Lord Turnbull (Chair, until October 2020)
- The Rt Hon Lord Matthews (from January 2021)
- Krista Johnston
- Sheriff Andrew McIntyre (advisor from January 2021)
- Lesley Weber (from March 2021)
- Matt Jackson (from October 2020)

Sentencing guidelines



Sentencing guidelines

Under the 2010 Act, the High Court and the Sheriff Appeal Court may require the Council to prepare or review sentencing guidelines when issuing a guideline judgment under the relevant provisions of the Criminal Procedure (Scotland) Act 1995.

The Scottish Ministers may request that the Council consider preparing or reviewing sentencing guidelines. The Council must have regard to such a request but is not obliged to comply with one.

No statutory requests for guidelines were made of the Council in the period to 31 March 2021.

Guideline development

During 2020-21, the Council considered the independent analysis of responses to the public consultation on the draft sentencing process guideline, which was held in summer 2019. The analysis was finalised in March 2020, shortly before the Council's work was paused due to the first national lockdown of the COVID-19 pandemic. On the full resumption of work in October 2020, we took account of the analysis – which indicated a high level of support for the Council's

general approach – in carrying out further development work on the guideline.

In 2020-21 the Council also concluded a public consultation on a draft guideline on the sentencing of young people. This launched in February 2020, and remained open until August 2020 (the consultation period having been extended to six months instead of the usual three in recognition of the impact of the COVID-19 pandemic on potential consultees).

As part of the consultation exercise the Council carried out direct engagement with a number of victims' and survivors' organisations. The views expressed in those discussions were taken into account in the final decisions about the content of the guideline, alongside the findings of an independent analysis of responses.

Both the sentencing process and sentencing young people guidelines were finalised for submission to the High Court shortly after the period covered by this report.

Methodology for guideline development

Since its establishment, the Council has given considerable thought to how guidelines should be developed, taking into account experience in other jurisdictions and lessons learned during the development of the



"Principles and purposes of sentencing" guideline.

One of the key tasks contained in our first business plan was the development of a methodology setting out how we will take forward the work to prepare individual guidelines. This was published in October 2018 and is now available on our website.

The methodology sets out the process for guideline preparation, and explains the various steps the Council takes to ensure guidelines are robust, evidence based, and useful to both the public and the judiciary.

The guideline development process commences with consideration of possible guideline topics. Once the Council has agreed to proceed with a guideline, we will engage with stakeholders and those with an interest or expertise in the area.

As the Council is committed to an evidence-based approach to guideline development, we will also gather information about the guideline topic.

This might include new research, evidence about current sentencing practice, research into public awareness or attitudes or a review of research and information available from other sources.

Development of a draft guideline then takes place, based on the information gathered.

Thereafter, the Council seeks the views of judges and carries out testing on draft guidelines. Once the draft quideline has been further adjusted we will consult widely on its terms. The Council has made a commitment to carry out a full public consultation on each of its guidelines, and is keen to hear from all those who wish to comment on a guideline. We must also, by law, consult the Scottish Ministers and the Lord Advocate. When the consultation has finished, the responses will be analysed and taken into account in considering whether and what changes need to be made.

Guidelines only take effect if they have been approved by the High Court. Once a guideline has been finalised by the Council, it will be submitted to the High Court, together with an assessment of the guideline's anticipated impact on the criminal justice system. If the High Court approves a guideline we will publish it, and the impact assessment, as soon as we can, together with details of when the guideline is to come into force.

Once a guideline is in force all Scottish courts must have regard to it when sentencing in a case to which the guideline applies. If a court does not follow a guideline it must state its reasons for doing so. The Council will review each of its guidelines from time to time.



Although this process takes time, it is essential in ensuring that guidelines are fit for purpose and that they do not have any unintended or unhelpful consequences for the criminal justice system.

The various steps in the guideline development process are summarised in the table on page 19.

The stage which each guideline currently under development is at is indicated on our website.



Stage 1 – Initial consideration of the guideline topic

We will agree the aims and scope of a guideline and a plan for its development. We will also establish a committee to oversee the work involved.

Stage 2 - Development of a draft guideline

We will focus on stakeholder engagement and evidence gathering when developing early drafts of the guideline.

Stage 3 - Seeking the views of judges

We will seek the views of judges on current sentencing practice and any areas of difficulty in which guidance would be helpful. This will help to ensure that the guideline is useful and that potential impacts are identified.

Stage 4 - Consulting on the guideline

We will take a broad range of views into account in developing guidelines. To that end, we will carry out public consultation on all our guidelines. We are also required to consult the Scottish Ministers and the Lord Advocate.

Stage 5 – Finalising the guideline

We will take into account what we have heard during consultation, and make any necessary revisions to the draft guideline and accompanying impact assessment.

Stage 6 - Submitting the guideline for approval

The High Court requires to approve our guidelines before they can take effect. When approving a guideline, the High Court will also specify when it is to come into force.

Stage 7 – Raising awareness about the guideline

We will take steps to raise awareness of each new guideline once it has been approved. We will work to ensure that all those who have an interest in, or are affected by, a guideline are prepared for it.

Stage 8 - Monitoring and review

We must review each guideline from time to time. We will monitor the operation of guidelines to help us decide whether we need to review or update the terms of the guideline.

Key achievements and work in progress



Key achievements and work in progress

The Council's second business plan (covering the period 2018-21) was laid in the Scottish Parliament on 29 October 2018 and published on 30 October 2018.

In developing this business plan, we engaged with a wide variety of stakeholders to discuss the Council's work to date and what areas we might focus on over the next 3 years. We also, as required by the 2010 Act, consulted with the Scottish Ministers, the Lord Justice General, and the Lord Advocate.

In that plan, we announced our intention to develop sentencing guidelines on sexual offences and sentence discounting, in addition to continuing work on guidelines relating to the sentencing process, sentencing young people, and causing death by driving.

We also noted our intention to carry out preparatory work on domestic abuse to inform a decision on whether to prepare a guideline in future, and to hold initial discussions with relevant stakeholders in relation to sentencing people with mental welfare difficulties, with a view to considering what, if any, activity the Council may undertake in this area.

Sentencing guidelines

During the period covered by the report significant progress was made in relation to both the sentencing process guideline and the sentencing young people guideline.

The results of the public consultation exercises in respect of both guidelines were considered, enabling them to be finalised and submitted to the High Court in quick succession during 2021.

With the approval of the sentencing process guideline, which explains the steps sentencers take in reaching the sentencing decision, the Council is able to begin work in earnest on specific offence guidelines.

Development of a draft guideline on offences of causing death by driving began during 2020, allowing early testing with sentencers to be carried out over spring and summer 2021.

Although the Sexual Offences Committee was unable to meet during the 2020-21 period, work continued under its general auspices, with a range of research to inform guideline development being completed.

Work began on a **sentence discounting** guideline with a literature



review published during the year and data gathering to be carried out in 2021-22.

Work on an environment and wildlife crime guideline was suspended pending the implementation of the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 and to allow the Council to give greater priority to the development of guidelines on sexual offences.

Research and information



The Council primarily undertook inhouse research during the 2020-21 financial year as work involving public engagement was limited due to the COVID-19 pandemic. The projects included work on sentencing factors in death by driving and indecent images cases – including detailed case analysis – and judicial engagement on sexual offences. These projects informed the Council's consideration and initial drafting of its guidelines.

The Council has published a number of project reports and literature reviews during this year. This has included the project report on public perceptions of sentencing in cases of causing death

by driving offences, as well as literature reviews on sentencing for sexual assault, sentencing for rape, sentencing for environmental and wildlife offences, and sentence discounting.

During this year, the Council conducted its largest public consultation exercise to date on the sentencing young people guideline. Analysis of this consultation was conducted and reported back to the Council to inform the final draft of the guideline.

In further support of the sentencing young people and sentencing process guidelines, the Council has worked with numerous justice organisations to create impact assessments covering the costs and benefits of the guidelines, and assessments of the likely impact of the guidelines on the criminal justice system in general.

Promoting awareness and understanding

Much of the Council's active awareness-raising and education work was necessarily paused during the pandemic. The Council, however, continued to promote developments of interest via its website and social media channels and consideration was given over the course of the year to activity to be undertaken following the pandemic.



Openness and engagement

We made an early commitment to demonstrate transparency and to work productively with others.

To raise awareness of the Council's work and encourage engagement with interested parties, meetings have been held with a variety of stakeholders over the course of the year, especially in connection with the public consultation on the sentencing young people guideline.

Direct engagement took place with a number of victims' and survivors' organisations, including some which are part of the Victims Organisations Collaboration Forum Scotland, to seek input on the draft sentencing young people guideline and the Council's work more generally.

We participated in a virtual Doors
Open Day for Parliament House, which
took place on 26 and 27 September
2020, showcasing the Council's online
resources, including explanatory
videos and 'you be the judge' style
quizzes.

Presentations, conferences, seminars, and visits

The following details some of the presentations delivered and conferences, seminars, and visits attended by Council members or staff:



Presentations, conferences, seminars, and visits	Date
Community Justice Scotland policy forum on the Scottish Government's consultation on raising the age of referral	August 2020
Empirical Research on Sentencing network annual conference	August 2020
Apex Scotland Annual Lecture 2020 (Dr Hannah Graham)	September 2020
Meetings with victims' and survivors' organisations	September 2020
Community Justice Scotland policy forum on The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill	September 2020
Tackling Crime and Delivering Justice in Scotland: The Scottish Government's long-term vision	February 2021
The Collateral Consequences of Criminal Records	February 2021
Defra Minister for Environment, Rebecca Pow MP, launching a UN-led assessment of UK wildlife and forestry crime	March 2021
"Ending Domestic Violence: Finding a Long-Term Strategy for Protection and Prevention"	March 2021
Using Restorative Justice in cases of Domestic Abuse	March 2021
"Recover, Renew, Transform: Delivering Scotland's Post- COVID Justice System"	March 2021
'Lifting the lid': Responding to Child Criminal Exploitation in Ireland, Scotland and beyond	March 2021



Assisting policy development

One of the Council's statutory objectives is, in carrying out its functions, to seek to assist the development of policy in relation to sentencing. Our views on what this role involves are set out on the Council's website.

The Council did not formally respond to any consultations or proposals for legislative reform during the period.

An engagement exercise was carried out in early 2021 with a view to identifying any gaps or barriers to provision of community-based disposals and to ascertain what might improve judicial confidence in community-based interventions.

Expenditure





Expenditure

The Scottish Courts and Tribunals Service (SCTS) has the statutory function of providing, or ensuring the provision of, the property, services and staff for the Council, under section 62 of the Judiciary and Courts (Scotland) Act 2008 and The Scottish Courts and Tribunals Service (Administrative Support) (Specified Persons) Order 2015. As such, the costs of the Council are borne by the SCTS.

The Council was allocated a direct expenditure budget of £195,024 for the year 2020-21. Actual expenditure is detailed on the table on page 28.

The Council's staffing budget is administered by the SCTS. Staffing costs during the year were £402,072.



Expenditure 2020-21*

Category	Description	£
General office expenditure	Printing costs, stationery etc.	128
Meetings and events	Venue hire, catering and conference costs	1,705
Training and expenses	Members' and staff travel & subsistence and costs of training associated with Council business	995
Promoting awareness and understanding	Website development, publications, and educational resources	581
Research	Commissioned projects, consultation analysis etc.	89,693
Total		93,102

^{*}All category figures are rounded to the nearest pound and the total provided is the sum of those rounded amounts.



SCTS associated costs

Costs relating to services and accommodation provided by SCTS are not included in the table, such as shared overheads, telephone charges, judicial travel and subsistence, and provision of data relating to sentencing.

Correspondence, freedom of information, and complaints

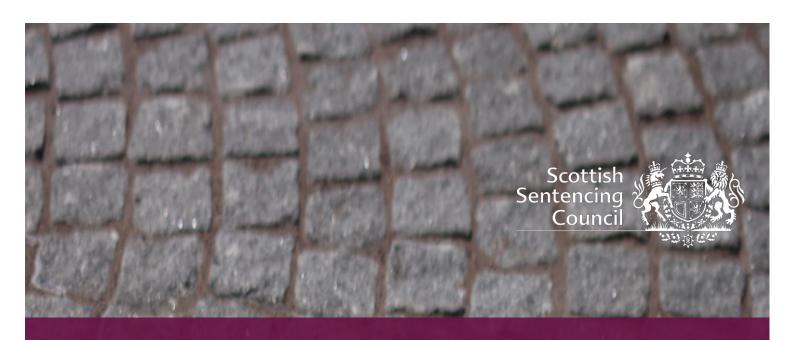


Correspondence, freedom of information, and complaints

The following table provides information on the number of requests received under the Freedom of Information (Scotland) Act 2002 (FOISA) and the Scottish Public Services Ombudsman Act 2002 (the SPSO Act), along with the number of items of correspondence received.

The Council is obliged to report on its complaints handling performance information, under schedule 2 to the SPSO Act. There were no complaints received during the period.

Category	Number
FOISA requests	6
Complaints	0
Items of correspondence	62



Scottish Sentencing Council Parliament House Parliament Square Edinburgh EH1 1RQ

T: 0300 790 0006

E sentencingcouncil@scotcourts.gov.uk

© Crown copyright 2021

ISBN: 978-1-912442-38-6 Laying number: SG/2021/311

November 2021

