

JUSTICE COMMITTEE

PRESUMPTION AGAINST SHORT SENTENCES

SUBMISSION FROM THE SCOTTISH SENTENCING COUNCIL

1. The Scottish Sentencing Council is grateful to the Justice Committee for its invitation to make a written submission on the proposed extension of the presumption against short sentences.

Impact of the current presumption against short sentences

2. The Committee has invited views on the impact of the current presumption against short sentences of 3 months or less. The Council has not carried out its own analysis of this, but it notes that the Scottish Government's consultation on extending the presumption states that "in practice however, the three month limit has had little impact on sentencing decisions". The consultation goes on to make reference to an evaluation of the presumption carried out in 2015 which, among other things, noted that the sheriffs interviewed as part of this work were of the view that "custody was always treated as a last resort". This is consistent with the Council's view on how sentences of imprisonment are generally treated by the courts, which is explored in more detail below.

Impact of the proposed extension of the presumption against short sentences

3. The Council's first sentencing guideline, "Principles and purposes of sentencing"¹, states that the core principle of sentencing in Scotland is that sentences "must be fair and proportionate". Among other things, this principle requires that:

"sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case"

4. The Council considers that this reflects and further emphasises what is already an established approach to sentencing in Scotland: that prison – as the most severe sentence available – is only used when no other sentence is considered appropriate.
5. In principle, therefore, the Council's view is that the extension of the presumption should not involve a significant change in approach. If an offender can be dealt with appropriately through use of a non-custodial sentence, this would typically be the preferred option regardless of whether or not a presumption against short sentences exists.

¹ <https://www.scottishsentencingcouncil.org.uk/media/1964/guideline-principles-and-purposes-of-sentencing.pdf>

6. And in this context it may be worth bearing in mind that, as well as the existing presumption against the use of short custodial sentences, there are other statutory presumptions presently in force which militate against the use of custodial sentences in general. The Criminal Procedure (Scotland) Act 1995 provides² that, for a person under 21, a court shall not impose a sentence of detention unless it is of the opinion that no other method of dealing with the offender is appropriate. For offenders aged 21 or over, the 1995 Act also provides³ that a court shall not pass a sentence of imprisonment on someone who has not been previously sentenced to imprisonment or detention, again unless the court considers that no other method of dealing with the offender is appropriate.
7. In practice, it will not be possible to determine the extension's impact until evidence of sentencing behaviour is available. However, by requiring further consideration of non-custodial options, it is likely that the number of community disposals will increase to some degree. The size of any increase will probably depend on the extent to which the extended presumption alters judicial sentencing behaviour in cases which are finely balanced between custodial and non-custodial disposals; notwithstanding the established approach noted earlier, such cases have the greatest potential to be affected by the change. Furthermore, the Council notes that the effectiveness of community-based disposals – and the overall success of any policy aimed at reducing the use of imprisonment – is dependent on there being sufficient resources available, on a consistent basis across Scotland, to ensure that these can be fully implemented and robustly enforced.
8. In addition to the overall impact of the extension to the presumption, the Council has given some consideration to the types of sentence to which it may apply.
9. The primary impact of the extended presumption will clearly be on the sentencing of summary offences, and the Council notes that the change in the types of case to which the presumption will apply is significant. At present, the 3 month presumption applies to comparatively low level offending, generally prosecuted at summary level. The 12 month presumption, however, will apply to almost any custodial sentence imposed at summary level as well as those at the lower end of the solemn level, which will encompass a much wider spectrum of offending behaviour, including some offences which may be considered as notably more serious.
10. There may also be occasions where the extended presumption will apply to solemn cases which attract a sentence longer than 12 months' imprisonment. For

² Section 207(3)

³ Section 204(2)

example, a court could regard a headline sentence of 18 months' imprisonment as appropriate for a particular case, but then apply a discount of up to one third because of an early guilty plea⁴, potentially bringing it down to 12 months, and thus within the scope of the presumption. The Council has undertaken some initial investigations into this, which indicate that for solemn charges in the sheriff court in which a custodial sentence was imposed in 2017-18, around 1 in 10 received a headline sentence of over 12 months which was subsequently discounted to 12 months or less⁵.

Other matters relating to the proposal

11. The Committee has asked whether there should be an outright ban against sentences of a particular length. The Council does not think that a ban would be helpful, for the following reasons:

- It would limit judicial discretion; there may be circumstances where, in the opinion of the court (which is in by far the best position to consider the unique facts of each case), a short custodial sentence is the most appropriate disposal. That may apply where, for example, an offender is found to have failed to comply with a community payback order, and the court is satisfied that the order should be revoked and a sentence of imprisonment imposed.
- It might have the unintended consequence of leading to longer sentences being imposed (or what is sometimes referred to as “up-tariffing”), where a court is of the view that a custodial sentence is the only effective and appropriate sentence which can be imposed.

12. The Committee has also asked about the effectiveness of short prison sentences and community-based alternatives. Evidence on reconviction rates in Scotland published by the Scottish Government in 2018⁶ suggests that prison sentences of up to one year have higher one year reconviction rates than community payback orders do (although care should be taken when comparing these figures, as those offenders assessed as suitable for community payback orders may be less likely to reoffend as a result of factors other than their index disposal). The extension of the presumption may lead to an increase in the use of community-based alternatives to custody, and possibly support an increase in rehabilitation and a reduction in reoffending. However, it cannot be assumed that offenders who would previously have been sentenced to imprisonment but are, after the

⁴ Under the Criminal Procedure (Scotland) Act 1995, s196

⁵ Note that, due to the way the data are held, it is not possible to distinguish between discounts given for guilty pleas and discounts given for other reasons (such as time spent on remand), therefore these figures should be treated as indicative only.

⁶ <https://www.gov.scot/publications/reconviction-rates-scotland-2015-16-offender-cohort/> tables 8 & 9.

extension of the presumption, sentenced to a community-based disposal will show similar reconviction rates to those currently disposed of with community sentences.

13. In addition, the effectiveness of community-based alternatives is, as noted above, dependent on sufficient resources being consistently available across the country to the relevant criminal justice bodies to ensure that appropriate programme requirements can be identified, implemented, and enforced; and on the judiciary and public having confidence in them as an alternative to custody.
14. It is worth noting that, in the Council's view, community-based sentences are not a "soft option", as is sometimes suggested. Community payback orders can impose severe restrictions on offenders, and can last months or years. They can include both elements of punishment, such as unpaid work; and rehabilitation, such as programmes to help stop further offending behaviour.

The impact of the extension of the presumption on the Council's work programme

15. The extension of the presumption will undoubtedly have some impact on the Council's work programme. Indeed, in its most recent business plan, the Council noted that:

"As much of the work in developing guidelines depends on establishing and evaluating current practice, we believe it prudent to await the change and monitor its impacts before considering the development of a guideline in any areas which will be significantly affected".⁷

16. The Council is currently considering how the presumption might be reflected in offence guidelines (those dealing with a specific offence or group of offences) where the typical sentencing ranges may fall, in whole or in part, below 12 months. In terms of its current work programme, this may have some relevance for the Council's guideline on causing death by driving, particularly insofar as it relates to causing death by careless driving, and potentially on work around sexual offences (depending on the nature of the offences being covered by a particular guideline). This issue will continue to be explored as offence guidelines are developed further, in discussion with the Scottish Government and other relevant stakeholders.
17. More immediately, the Council intends to make reference to the presumption in its second guideline, which sets out the sentencing process for all offences. The current draft, which will be issued for public consultation soon, states that the

⁷ <https://www.scottishsentencingcouncil.org.uk/media/1926/scottish-sentencing-council-business-plan-2018-21.pdf>, page 30.

court must have regard to any statutory presumptions relating to sentencing, and it specifically mentions the presumption against short term prison sentences as an example. This aside, however, the Council's current view is that if any provision relating to the presumption is necessary in sentencing guidelines, it is likely that this would be more effectively made on an offence-specific basis.