



The sentencing process

Draft impact assessment

June 2019

Introduction

1. This document fulfils the Scottish Sentencing Council's statutory duty¹ to provide an assessment of the costs and benefits to which the implementation of the guideline is likely to give rise, and an assessment of the likely impact of the guideline on the criminal justice system in general.

Rationale and aims of the new guideline

2. The Criminal Justice and Licensing (Scotland) Act 2010 contains provision enabling the Council to prepare guidelines of general applicability with regards to the sentencing of offenders.
3. The Council believes that a guideline on the sentencing process will promote consistency in how the courts approach sentencing, and help to increase public knowledge and understanding of how courts, in a general sense, make sentencing decisions.
4. This guideline is the second guideline of general application. The first, outlining the principles and purposes of sentencing, was approved by the High Court in October 2018. The 'Sentencing process' guideline is designed to complement the 'Principles and purposes of sentencing' guideline, and courts should have regard to both when sentencing.
5. The guideline is intended to explain the various steps courts take when deciding on the appropriate sentence to impose. These include taking into account factors such as the harm, or risk of harm, to a victim; the extent to which the offender is at fault; and the aggravating and mitigating factors, applying to the case or the offender, which might increase or reduce a sentence.
6. The guideline will also act as a foundation for future guidelines dealing with specific offences.

¹ Under section 3 of the Criminal Justice and Licensing (Scotland) Act 2010.

7. As this guideline relates to general sentencing matters, it will necessarily be quite different in nature from an offence or offender specific guideline. As a result, some sections of this impact assessment are less relevant than they will be for future guidelines.
8. As the 'Sentencing process' guideline arose in large part from the Council's work on the 'Principles and purposes of sentencing' guideline (the two topics were originally intended to be covered in a single guideline), the expected impacts are very similar as both guidelines codify and explain current sentencing practice in a general context.

Current sentencing practice

9. The 'Sentencing process' guideline will be applicable to all sentencing decisions in Scotland. As such, all current sentencing practice falls within scope of this impact assessment.
10. Analysis of current sentencing practice and trends in Scotland is published by the Scottish Government as part of the Criminal Proceedings statistical bulletin, available at <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/PubCriminalProceedings>. Given the scale of this topic and the focus of this guideline on approaches to sentencing rather than sentencing outcomes, further analysis of current disposals has not been undertaken.

Key assumptions

11. In assessing the impact of any new guideline, the Council considers how, if at all, it will affect sentencing, the business of the courts, the operation of the wider criminal justice system, and society in general. Such assessments are based upon research and analysis conducted during the creation of the guideline, consultation with external stakeholders, including judges, and, where appropriate, relevant experiences in other jurisdictions. In this case, we are not aware of any relevant evidence around the codification of analogous sentencing processes in other jurisdictions. This assessment also draws upon work undertaken as part of the Council's development of the 'Principles

and purposes of sentencing' guideline (including the relevant impact assessment), as the development of the current guideline stemmed from this work.

12. This assessment also requires strong assumptions to be made regarding sentencers' behaviour in response to the new guideline, as it is not possible to predict how it will impact sentencing across all possible scenarios. Where possible, these assumptions will be based upon previous evidence and experiences but this evidence base is limited. As a result, assumptions regarding the impact of the guideline must have a large degree of uncertainty about them.
13. This impact assessment does not attempt to include any future changes to sentencing behaviours that are not a result of the implementation of this guideline (e.g. historic trends in sentencing or the impacts of other guidelines).
14. **It is assumed that the 'Sentencing process' guideline will influence judicial approaches to sentencing and increase consistency in approach, but that any changes to sentencing outcomes will be neutral on average.**

Impacts on the criminal justice system as a result of implementing the new guideline

Changes to sentencing

15. The 'Sentencing process' guideline will promote consistency in approaches to sentencing.
16. The guideline sets out an eight-step process for the sentencing of an offender. Steps 1 to 4 and step 8 apply in all cases, while steps 5 to 7 deal with other considerations which may apply in specific cases. It is assumed that this will lead to a change in approach to sentencing by some courts. Although it is not possible to estimate the degree to which this will be the case, consultation with the judiciary suggests changes to current practice will be relatively limited as the guideline generally codifies common practice.

17. It is possible that any change in approaches to sentencing may result in a change to sentencing outcomes in individual cases but it is assumed that the overall effect on sentencing outcomes in general will be neutral.

18. It may be the case that sentencers interpret the guideline in a different fashion than that intended by the Council, which could result in the guideline having unexpected consequences for sentencing practice which cannot be predicted. The Council has taken steps to mitigate this risk by consulting with members of the judiciary.

Changes to court business

19. No significant changes to court business are expected. It is possible that, by codifying the sentencing process in the form of a guideline to which the court must have regard, the introduction of the guideline *may* increase the number of appeals against sentence, with appeals being lodged due to a court's perceived failure to take the guideline into account. It is not possible to estimate the magnitude, if any, of this change. Conversely, it is also possible that the number of appeals may decrease as a result of increased consistency in approaches to sentencing.

20. As the guideline contains a step requiring that courts must state reasons for sentencing decisions, it *may* lead to an increase in sentencing statements given by courts, an increase in the length of sentencing statements, or both. This could have an impact on the amount of business a court was able to conduct in any given day. However, it is impossible at this stage to estimate the scale, if any, of the change this guideline may cause and so the overall impact cannot be predicted. In addition, this step reflects an existing requirement in the 'Principles and purposes of sentencing' guideline to state reasons as clearly as possible and so it is anticipated that courts will already be doing this.

21. Additionally, as the guideline enumerates specific steps which may currently be undertaken holistically by courts, it *may* result in an increase in the time required for sentencing decisions to be made should courts start considering each element in isolation. However, as above, it is impossible at this stage to estimate the scale, if any, of the impact of this possible change. Furthermore, the guideline explicitly accounts for the

possibility of courts undertaking steps in a holistic manner, limiting the likelihood of an impact being felt as a result of this aspect of the guideline.

22. It may be the case that as the number of potentially applicable guidelines increases, courts begin to see an impact on the duration of sentencing hearings as a result of having to consider a guideline or guidelines before imposing sentence. Any increase in relation to this guideline is expected to be very minimal and limited to the early stages of guideline use. It is anticipated that courts will incorporate the guideline into their sentencing approach quickly and no substantive changes will be observed over the longer term.

Changes to the provision of disposals

23. As the guideline is assumed to be neutral regarding sentencing outcomes, there are presumed to be no impacts on the provision of disposals.

Impacts on equality in the criminal justice system

24. It is not anticipated that any specific groups will be disproportionately affected by this guideline, and so we do not foresee any negative impacts on equality in the criminal justice system. There is, however, a possibility of minor positive impacts as a result of the 'Sentencing process' guideline including specific steps requiring consideration of an offender's age, maturity, mental health, family responsibilities and other personal factors. This may result in an increase in consideration of factors which can affect particular groups.

Costs and benefits

Costs

25. As the guideline is assumed to be neutral regarding sentencing outcomes, there are presumed to be minimal costs associated with the implementation of this guideline for the criminal justice system.

26. As mentioned previously, a possibility exists of an increase in appeals, with an attendant increase in resources required to sift and hear these appeals, as well as in legal fees for

such actions (both privately and publicly funded) and the resources required by the Scottish Prison Service to service prisoners' needs during their appeals. However, such an increase is not certain to occur and the magnitude is impossible to estimate. Similarly, any decrease would have a commensurate cost saving associated with it but is equally difficult to estimate. This impact is shared with the 'Principles and purposes of sentencing' guideline and, as in that guideline's impact assessment, arises from the same aspect of codification of previously unwritten practice. Any future monitoring of this impact will be undertaken in tandem with monitoring of the 'Principles and purposes of sentencing' guideline

27. Although it is not possible to provide a cost estimate at this stage, we anticipate that any additional costs would be minimal.

Benefits

28. The 'Sentencing process' guideline is intended to increase transparency and understanding of how courts, in a general sense, make sentencing decisions.

29. As with the Council's 'Principles and purposes of sentencing' guideline, the increased transparency associated with this guideline is expected to provide the wider public with a greater understanding of the sentencing process, with a particular focus on understanding the steps involved in reaching a final sentence. This may go some way to addressing the disconnect between public perception of sentencing and the actual sentences given.² Improved public understanding of sentencing may also begin to address the perceived inconsistency in sentencing identified by the Sentencing Commission for Scotland.³

30. The guideline will also promote consistency in the approach to sentencing, contributing to one of the Council's statutory objectives, and provide a structural foundation which will inform the development of future guidelines.

² For a Scottish perspective see Anderson, S., Ingram, D. and Hutton, N (2002) *Public Attitudes Towards Sentencing And Alternatives To Imprisonment* Scottish Parliament Paper 488 session 1 2002 Edinburgh: HMSO.

For a more recent, but England and Wales focussed, perspective see Hough, M., Bradford, B., Jackson, J. and Roberts, J. R. (2013) *Attitudes to sentencing and trust in justice: exploring trends from the crime survey for England and Wales*. Ministry of Justice analytical series, London: Ministry of Justice.

³ Sentencing Commission for Scotland (2006) *The Scope to Improve Consistency in Sentencing*, <http://www.gov.scot/resource/doc/925/0116783.pdf>, retrieved 12/02/2017.

Scottish Sentencing Council
Parliament House
Edinburgh
EH1 1RQ

sentencingcouncil@scotcourts.gov.uk
www.scottishsentencingcouncil.org.uk

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