

Introduction

Hello, I am Amel Elfallah. I am a sheriff based at Paisley Sheriff Court, however today I am speaking to you as an adviser to the [Scottish Sentencing Council](#).

This is the first of two lectures and will cover the role and the work of the Council. The second lecture covers the sentencing guidelines prepared by the Council for the courts.

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At first glance, sentencing may seem straightforward – the higher the culpability, or level of blame, of the offender and the greater the harm caused to a victim, the more serious the offence will be and the more serious the sentence should be.

However, there are many challenges for the courts in weighing culpability and harm, and in determining the level of seriousness before deciding a sentence. For example, let's say we have a case where a driver with previous convictions for motoring offences speeds along a narrow, twisty road, driving dangerously for a sustained period but who is stopped by police before causing harm.

Contrast that with the case of an experienced driver with a previously good record who causes a fatal crash due to a momentary distraction. One is high culpability with only the potential for harm. The other is low culpability but ends up causing the most serious harm – in this case a death.

How should the judge sentence each of them?
What factors should the judge take into account?

Questions like these are at the heart of the sentencing guidelines which the Council produces.

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I should say, producing guidelines on sentencing is only part of the Council's work. But before I go on to talk about this work in more detail, it may be helpful to talk a bit

about the Council's history. In 2003, the Scottish Executive set up the [Sentencing Commission for Scotland](#), a judge-led group to look at consistency in sentencing.

The Commission carried out wide-ranging research including studies of other sentencing bodies from all over the world. The research showed that, while there was a public perception in Scotland of widespread inconsistency in sentencing, this wasn't backed up by the data. So, it was recommended that a sentencing body be created to produce guidelines for use by the courts, and, importantly, that these guidelines be made available to the public to help people better understand how judges decide sentences.

As a result, the Council was established in 2015 as an independent, advisory body under the [Criminal Justice and Licensing \(Scotland\) Act 2010](#). The [legislation](#) states that the Council has a duty to:

- promote consistency in sentencing practice;
- assist the development of [policy](#) in relation to sentencing, and;
- promote greater awareness and understanding of sentencing.

This includes a responsibility to publish [guideline judgments](#) issued by the courts. It can also conduct [research](#), and provide general advice or guidance. One thing it does not do, though, is deal with individual sentences – they are always dealt with by the judge presiding in court.

I am going to tell you a little more about the Council and its work over the course of this lecture and you can also find out more on the Council website.

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First things first. Who makes up the Council? Well, the Council has 12 [members](#). These are made up of six judges from various court levels, a prosecutor, an [advocate](#), a [solicitor](#), a police officer, someone with knowledge of victims' issues and another person who is not qualified as a judicial or legal member. The chair of the Council is always the Lord Justice Clerk, Scotland's second most senior judge.

All of the members are volunteers and do not receive a wage, and they are supported by a small secretariat team.

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Accountability is a crucial principle for the Council. In terms of the [legislation](#), it prepares a [business plan](#) every three years. For this, the Council consults the Scottish Ministers, the Lord Advocate, who is head of the prosecution service, and the Lord Justice General, who is head of the High Court. But other views are taken

into account as well – for example, the Council also speaks to the Law Society of Scotland, which is the representative body for solicitors in Scotland, the Faculty of Advocates, the Crown Office and Procurator Fiscal Service, which is the Scottish prosecution service, and victims' groups.

Each year, it also prepares an [annual report](#) on its work. These two reports are both submitted to the Scottish Ministers, and then laid before the Scottish Parliament. The current [business plan](#) outlines how the Council plans to spend its budget in the future and the [annual report](#) sets out how it has spent it so far. It also sets out the current programme if you are interested in knowing what work the Council is doing at the moment. One of the key areas of that work is on sentencing guidelines.

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As I said, as part of its statutory duty to promote consistency in sentencing, one of the Council's primary tasks is to produce sentencing guidelines for the courts. To make sure that the guidelines are fit for purpose, it is very important that the work in developing them is always evidence-based. So, before producing a guideline, the Council carries out a wide range of research, including looking at guidelines in other jurisdictions such as England and Wales. Judges are also interviewed to investigate current sentencing practice in Scotland and identify any challenging sentencing areas where a guideline might be helpful.

Data and information are gathered from a range of organisations such as the Scottish Government, the court service, the prosecution service, and the prison service. The Council also gathers evidence from people with a particular interest or expertise in the topic and brings people together to discuss different views. It also looks at public perceptions of sentencing. All of this evidence is used to develop draft guidelines, which are then robustly tested with the help of various interested people, including judges. The Council also consults the public on all of our draft guidelines - any consultations which are presently open are available on the Council [website](#) if you want to take part in the process. There are generally a number of guidelines being worked on at the same time, and these are laid out in the [annual report](#).

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Before I tell you a bit about the guidelines already produced, it may be helpful to give you an idea of what sentences are available to judges in Scotland. Different types of court have different [maximum sentencing powers](#), but [imprisonment](#) is the most serious sentence available to any judge in any court. Different types of offence will attract different sentences, but a life sentence must be given for murder. If a life sentence is imposed, the judge must decide the length of time the offender will stay in prison – what's known as the punishment part - before the [parole board](#) can consider releasing them from [custody](#) to serve the rest of their life sentence in the

community. Most offences do not result in a prison sentence being imposed, though - judges can also impose [community based sentences](#) such as a [community payback order](#).

There are ten different requirements that can be imposed as part of a community payback order including up to 300 hours of unpaid work, meetings with a social worker to address and change offending behaviour and attending a programme to address problems relating to alcohol or drugs. A community payback order can be a very challenging sentence and usually includes a combination of some of the ten possible requirements.

A judge can also order the payment of a fine, or compensation to a victim. Or they can set a curfew for an offender to remain at a certain address, usually their home address, at certain times on certain conditions. This can be monitored electronically by way of what's known as a tag. In certain road traffic offences, a judge can disqualify a motorist from driving, or they can impose penalty points on a licence. The least serious disposals are an [absolute discharge](#) or an [admonition](#), where no punishment is given. There is plenty more information about these sentences and other sentences available on the Council [website](#). Meantime let's go back to discussing the process of developing the sentencing guidelines.

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The Council decided to start with a set of general guidelines that would apply to all Scottish offences. The aim is to make them concise enough to be useful as a quick reference for busy court judges, but also user-friendly for the public, avoiding jargon and technical terms as much as possible.

There are three general guidelines: firstly, on the principles and purposes of sentencing; secondly, on the steps judges should go through when deciding a sentence; and thirdly, on sentencing young people.

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The Council's first guideline, on the [principles and purposes of sentencing](#), came into force in 2018 and is available on the [website](#). It sets out the core principle of sentencing: that sentences must be "fair and proportionate". It also outlines some of the possible purposes of a sentence, such as public protection, punishment, and rehabilitation.

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The [second guideline](#) covers the steps that judges should follow when deciding a sentence. First, a judge must consider the seriousness of the offence which is

determined by the harm caused, or which could have been caused, and the culpability or level of blame of the offender. This sets the level of seriousness of the offence and the sentence range for that level. Once the level is decided, any aggravating or mitigating factors must be taken into account.

Aggravating factors make an offence more serious, while mitigating factors make it less serious. These two general guidelines apply to all offences in Scotland and should be read alongside each other, and any guideline that relates to a specific offence. This makes the offence guidelines more concise and easier for judges to use, especially when they are sitting in high-volume courts dealing with a lot of sentences in one day, with each case often involving different relevant factors at the same time.

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The third general guideline is on [sentencing young people](#) and deals with offenders aged 24 or under at the time of their conviction. The guideline is based on [research](#) which shows that young people are generally less mature than older people and may have a greater potential to change. Taking that into account, the guideline sets out rehabilitation as a primary purpose of sentencing young people.

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The Council also produces guidelines on specific offences. The first of these was on the statutory offences of causing death by driving. There are also a number of offence-specific guidelines under development.

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The offence guidelines are designed to provide guidance to judges while making sure that they have flexibility and discretion to take into account the unique circumstances of each particular case. Even though the specific factors of a particular case will be unique, the guidelines will help to ensure that these factors are always considered at the same stage of the sentencing process. This will support consistency in sentencing.

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All guidelines must be [approved by the High Court and](#), by [law](#), judges must have regard to them. However, they are not required to follow them. There may be times when not following a guideline is appropriate given the particular facts of a specific case. If a judge decides not to follow a guideline, though, they must give their reasons.

The second lecture in this series covers the guidelines in more detail, so let's move on just now to talk about some other types of work the Council does – guideline judgments, policy, research and public education.

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In addition to producing sentencing guidelines, the Council also has a responsibility to publish [guideline judgments](#) issued by the Scottish courts. Appeal court judges have the [power](#) to make decisions in appeal cases that give guidance to other judges about the appropriate sentence to use in similar types of cases. These guideline judgments are still used alongside the Council's sentencing guidelines. See the Council website for more information on [guideline judgments](#).

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As I mentioned at the start of the lecture, the Council also has a statutory duty to assist the development of policy. One of its first pieces of policy work was a [paper](#) on the perspective of judges in relation to community-based sentences. Through engagement with sentencers, it found that they commonly view community sentences as providing a greater chance of rehabilitation, but not all sentencers felt that they had a full awareness of what community-based options were available to them. The Council suggested a range of ideas to improve judicial confidence in using community-based disposals. Those findings have been brought to the attention of the Scottish Government as it continues to develop its community justice work.

Other Council policy work has included contributing to the debate around the extension of the presumption against short prison sentences, and to various consultations from the Scottish Government and elsewhere.

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The Council also has the power to research and [publish](#) information around sentencing and to give advice and guidance of a general nature on sentencing matters. It commissions a range of independent publications including on the research carried out in the development of each of our guidelines. For example, it published a paper on the brain development and maturity of young people, which significantly contributed towards the evidence-base for its [Sentencing young people guideline](#). It also commissions work on general sentencing matters, for example around the obstacles which exist in [comparing sentencing practice](#) between jurisdictions.

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Public education is also an important area of the Council's work. As you will have gathered by now, improving public understanding is one of its key aims and guidelines are intended as much for the public as for the courts. It is not expected that people will be sitting at home with time on their hands to read the guidelines, but we do think that they will serve as educational tools, for example for students.

The Council has also worked to create a number of user-friendly resources on [its website](#). These include [jargon](#) and [myth](#) busters, [interactive case studies](#) where you can play the role of judge, and [videos](#) providing information on our guidelines and different types of sentencing.

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In addition, the Council works with the media. Research suggests that some people's perception of sentencing is influenced by headlines and news stories. So it works directly with certain journalists to discuss how court cases are covered. Independent research, commissioned around sexual offences, showed that members of the public perceived that sentences for these offences was lenient.

However, when members of the public went through a scenario based on a real case, the sentence they selected was similar to that passed by the judge. When told this, participants expressed surprise¹. It may be that some media stories create the perception that sentencing is lenient, for example when headlines say that an offender has been 'spared jail' or 'avoided prison'. However, some community payback orders can be more challenging than some short prison sentences. The Council's work with certain media has led to more detailed information about what sentences entail including what a community payback order may include.

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I hope that you have found this brief introduction to the role and work of the Council helpful. The Council welcomes views on which topics should be considered for future guidelines and would be happy to hear from you at sentencingcouncil@scotcourts.gov.uk. Please also get in touch if you have any questions or other comments in relation to sentencing.

¹ [Perceptions of sentencing of sexual offences \(scottishsentencingcouncil.org.uk\)](#)