

The sentencing process

Impact assessment

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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 a guideline is likely to give rise, and an assessment of the likely impact of the guideline on the criminal justice system in general.

Executive summary of anticipated impacts

2. The guideline is expected to:
 - improve consistency in approach to sentencing decisions;
 - be neutral in terms of sentencing outcomes;
 - be neutral in terms of costs; and
 - significantly improve public understanding of the sentencing process.

Rationale and aims of the new guideline

3. 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.
4. 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.
5. This is the Council's second guideline of general application. It is designed to complement the Council's first guideline, 'Principles and purposes of sentencing', which

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

came into force on 26 November 2018. Courts must have regard to both guidelines when sentencing.

6. This 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 any victim; the extent to which the offender is culpable; and the aggravating and mitigating factors which might increase or reduce a sentence.
7. The guideline will also act as a foundation for future guidelines dealing with specific offences.
8. 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.
9. As the '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

10. The 'guideline will be applicable to all sentencing decisions in Scotland. As such, all current sentencing practice falls within scope of this impact assessment.
11. Analysis of current sentencing practice and trends in Scotland is published by the Scottish Government as part of the Criminal Proceedings statistical bulletin, the latest version of which is available at <https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/>. 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

12. 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 members of the judiciary; 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.
13. 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.
14. This impact assessment does not attempt to include any potential changes to sentencing behaviours that are not a result of the implementation of this guideline (e.g. trends in sentencing or the impacts of other guidelines).
15. It is expected 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

16. The 'Sentencing process' guideline will promote consistency in approaches to sentencing.
17. 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 in some instances. 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.
18. 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.
19. 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.
20. It is anticipated that the guideline will be of particular use for new members of the judiciary and will be of value during judicial training. Consistency of approach is therefore likely to increase as a result over the medium to long term.

Changes to court business

21. 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. Submissions received to the public consultation supported both of these possibilities, suggesting uncertainty in the wider criminal justice system as to the impact of this guideline on appeals.

22. As the guideline contains a step requiring that courts must state reasons for sentencing decisions, it *may* lead to an increase in the number of sentencing statements given by courts, an increase in the length of sentencing statements, or both. This could have an impact on the time required for a court to conclude its allocated business on any given day. However, it is impossible at this stage to estimate the extent of additional court time this will require 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 stating reasons.

23. 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. This concern was raised by two respondents to the public consultation. However, as above, it is impossible at this stage to estimate the extent of additional court time this will require. 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.

24. 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. Further, the Council has undertaken some initial testing of multiple guideline cases with sentencers and no concerns on this point were raised.

Changes to the provision of disposals

25. As the guideline is assumed to be neutral regarding sentencing outcomes, it is assumed that it will be neutral in terms of disposals. As such, there is no anticipated increase or

decrease in the number of prison places required or the number of community based disposals imposed as a result of this guideline.

Impacts on equality in the criminal justice system

26. 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 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

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

28. As mentioned previously, a possibility exists of an increase in appeals, with an attendant increase in resources required to sift and hear these appeals; legal fees for the conduct of these appeals; (both privately and publicly funded) and the resources required by the Scottish Prison Service to facilitate the attendance of those appellants who are in custody at their appeals. However, such an increase is not certain to occur and the extent of any such increase 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.

29. Dissemination costs were highlighted during public consultation. However, the Council intends for its guidelines to be disseminated electronically using pre-existing systems, mitigating this cost. Some judicial time cost must be assumed during the initial

dissemination of the guideline as sentencers make themselves aware of the content of the guideline. It is not possible to provide an estimate of this time, but it is not expected to be significant.

30. Overall, although it is not possible to provide a cost estimate at this stage, we anticipate that any additional costs which arise as a result of this guideline would be minimal.

Benefits

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

32. 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 determining the sentence imposed. This may go some way to addressing the disconnect between public perception of sentencing and the actual sentences imposed.² Improved public understanding of sentencing may also begin to address the perceived inconsistency in sentencing identified by the Sentencing Commission for Scotland.³ This impact was supported by the results of the public consultation, where a majority of respondents felt the guideline would improve public understanding.

33. The guideline will promote consistency in sentencing practice; and promote greater awareness and understanding of sentencing policy and practice, meeting two of the Council's statutory objectives. The guideline will also provide a structural foundation which will inform the development of all future guidelines, with a particular value for the development of offence specific 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 and also see Black, C, Warren, R, Ormston, R and Tata, C (2019) *Public perceptions of sentencing national survey report* Scottish Sentencing Council, Edinburgh.

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.

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