POLICY NOTE

THE CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

SSI 2019/XXX

The above instrument was made in exercise of the powers conferred by section 204(3C) of the Criminal Procedure (Scotland) Act 1995[1]. The instrument is subject to affirmative procedure.

The presumption against short sentences is designed to encourage a reduction in the use of short-term custodial sentences and a related increase in the use of community sentences that are more effective at reducing reoffending. The purpose of this instrument is to extend the presumption against short sentences from sentences of 3 months or less to sentences of 12 months or less.

Policy Objectives

1. This order provides for the minimum period specified for the presumption against short periods of imprisonment, as set out in section 204(3A) of the Criminal Procedure (Scotland) Act 1995, to be extended from 3 months or less to 12 (twelve) months or less.

2. While prison remains the right place for those who pose a significant risk to public safety, there is compelling evidence that short sentences do little to rehabilitate or to reduce the likelihood of reoffending; further, they can disrupt housing, employment and family stability[2]. Extending the presumption against short sentences is intended to improve the chances of individuals paying back for offending, being effectively rehabilitated and preventing reoffending. The presumption is not a ban. The court when sentencing retains the discretion to pass the most appropriate sentence based on the facts and circumstances of the case.

3. The Scottish Government also believes that the current rate of imprisonment in Scotland is too high, in particular when viewed against the rates in other comparable European countries[3]. Extending the presumption is intended to reduce churn in the prison system, which will help to improve the quality of interventions with individuals who need to be in prison. Longer term, extending the presumption is expected to have some impact on prison population though this is primarily related to an indirect contribution to reducing reoffending.

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[1] Section 17 of the Criminal Justice and Licensing (Scotland) Act 2010 inserted sub-sections (3A)-(3D) into section 204 of the Criminal Procedure (Scotland) Act 1995, with effect from 1st February 2011

[2] https://www.gov.scot/publications/works-reduce-reoffending-summary-evidence/

[3] International Centre for Prison Studies - World Prison Brief, http://www.prisonstudies.org/

4. Extending the presumption is alongside additional protections for victims, including the implementation of the Domestic Abuse (Scotland) Act 2018. The Scottish Government committed to extend the presumption once these additional safeguards for victims of domestic abuse are in force, as concerns were raised about the potential impact on victims if offenders are not in custody. The policy objective is to support measures which reduce reoffending, which is beneficial to victims and society.

Background

5. Section 204(3A) of the Criminal Procedure (Scotland) Act 1995 provides that *'a court must not pass a sentence of imprisonment for a term of 3 months or less on a person unless the court considers that no other method of dealing with the person is appropriate'*.

6. Section 204(3C) of the Criminal Procedure (Scotland) Act 1995 provides Scottish Ministers with an order making power to *'substitute for the number of months for the time being specified in subsection (3A) another number of months'*. In short, this means that Scottish Ministers have the power to amend the minimum period specified for the purposes of the presumption against short periods of imprisonment. This is the first time the power to amend the number of months specified has been used.

7. This Government seeks to extend the presumption against short periods of imprisonment in light of the evidence that short-term prison sentences are not effective at rehabilitating individuals or reducing reoffending, especially when compared to community alternatives to custody (predominantly Community Payback Orders)[4].

8. The impact of short-term custodial sentences within the prison estate makes it difficult for the Scottish Prison Service to invest time in the intensive rehabilitation of more serious offenders. Whilst extending the presumption against short periods of imprisonment will not have a substantial direct impact on prison numbers, it will reduce the churn in the prison system by reducing the numbers of short-term prison sentences imposed, thus reducing the number of prison receptions.

9. The Scottish Government's Programme for Government for 2018/19 commits to extend the current presumption against short sentences from 3 months to 12 months in the year ahead, once relevant measures within the Domestic Abuse (Scotland) Act 2018 are implemented.

10. The Domestic Abuse (Scotland) Act came into force on 1 April 2019 and creates a new statutory offence of abuse of a partner or ex-partner for which the maximum penalty on conviction on indictment in the High Court is 14 years. It includes the following additional safeguards for victims of domestic abuse:

[4] Reconviction Rates in Scotland: 2015-16 Offender Cohort, https://www2.gov.scot/stats/bulletins/01315

- Court required to have particular regard to the safety of the victim when sentencing for a domestic abuse offence (either the new offence or any offence with a domestic abuse aggravation); and
- Courts in all cases involving the domestic abuse offence or the recently created domestic abuse aggravation, to consider whether to impose a non-harassment order in order to protect the victim with a presumption in favour of doing so unless they consider it is not necessary in a particular case.

11. There remains a strong policy commitment to reducing the prison population and promoting use of effective alternatives to custody for men and women. The Scottish Prisons Commission report[5] and the Commission on Women Offenders [6] continue to inform the approach to policy in Scotland. Justice in Scotland: Vision and Priorities[7] sets out the Government's vision for a just, safe and resilient Scotland. Extending the presumption against short sentences supports the outcomes of the Justice Vision and Priorities and the Community Justice Strategy[8].

12. A process evaluation into the impact of the presumption against short sentences of 3 months or less (along with introduction of Community Payback Orders and the revised template for Criminal Justice Social Work reports)[9] published in 2015 found that the presumption was not featuring prominently in judicial decision making on the basis that: sentences of three months or less were used relatively rarely; custody was always treated as a last resort; and that they would continue to impose short sentences where they felt them to be the only appropriate sanction.

13. Extending the presumption to 12 months is intended to have a greater impact on court decision making with regards to short-term custodial sentences, as well as supporting wider use of robust community alternatives to custody. This includes greater use of Community Payback Orders and electronic monitoring, both through existing legislation and proposed measures in the Management of Offenders (Scotland) Bill. As noted, this measure remains a presumption rather than a ban and extending the presumption does not impact on judicial independence or ability to impose the most appropriate sentence in each individual case.

Consultation

[5] Scotland's Choice: Report Of The Scottish Prisons Commission, http://www.gov.scot/Resource/Doc/230180/0062359.pdf
[6] Commission on Women Offenders, https://www2.gov.scot/Topics/archive/reviews/commissiononwomenoffenders/finalreport-2012
[7] Justice in Scotland: Vision and Priorities, https://www.gov.scot/publications/justice-scotland-vision-priorities
[8] National Strategy for Community Justice, https://www.gov.scot/publications/national-strategy-community-justice/
[9] Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences, http://www.gov.scot/Publications/2015/03/3800

14. A Scottish Government consultation was undertaken between 25 September 2015 and 16 December 2015 to ascertain views on proposals to strengthen the presumption against short sentences. An analysis of the consultation responses revealed that 85% of respondents (53 of 62) were in favour of an extension to the minimum period and, of those who expressed a view, 84% (37 of 44) indicated that the new minimum period should be set at 12 months.

15. Consultation respondents were, in general, critical of the current levels of imprisonment in Scotland and in particular highlighted what they saw as:

- the inappropriate use of imprisonment in cases not involving serious offences or risk to public safety;
- the detrimental impact of imprisonment on the lives of offenders and their families;
- the relative merits of community and custodial sentences in addressing offender needs, supporting rehabilitation, reducing reoffending and protecting public safety; and
- the cost to the public purse.

16. The majority of respondents indicated that they thought extending the presumption would help achieve a reduction in the use of custodial sentences and would be in line with a generally more progressive approach to criminal justice policy.

17. A full list of the organisations who responded to the consultation is attached to the consultation analysis published on the Scottish Government website[10]. It includes local authorities and partnership bodies; third sector agencies; professional bodies and national public bodies.

18. In preparation for extending the presumption, the Scottish Government has continued to engage with a range of stakeholders including local authorities, third sector organisations, the Judicial Institute of Scotland, Social Work Scotland, victims groups, Scottish Women's Aid and public bodies including Community Justice Scotland and the Care Inspectorate. This engagement has informed measures to support implementation, which should not be seen in isolation but as part of a broader approach to implementing the new model of community justice. Engagement was informed by the earlier consultation which highlighted the importance of the availability of adequate and effective services and support in the community; the need to ensure the safety of victims of crime including victims of domestic abuse and the role of the judiciary.

Impact Assessments

19. The Equality Impact Assessment (EQIA) is a tool to assist in how policy may impact, either positively or negatively, on different sectors of the population in different ways. An EQIA was conducted in relation to this instrument, however on the basis that any extension to the legislative presumption would be an amendment to an existing policy, it was considered

[10] Consultation on Proposals to Strengthen The Presumption Against Short Periods of Imprisonment: An Analysis of Responses, http://www.gov.scot/Publications/2016/03/8624

that an extensive EQIA was not required. A copy of the EQIA results document is available on the Scottish Government website.

20. We have also considered the Fairer Scotland Duty in Part 1 of the Equality Act 2010, which came into force from April 2018. It places a legal responsibility on particular public bodies in Scotland to actively consider how they can reduce inequalities of outcome caused by socio-economic disadvantage, when making strategic decisions. As extending the presumption against short sentences is intended to reduce reoffending and avoid the disruption to housing, employment and relationships which can be associated with short custodial sentences, it is expected to have a positive or neutral impact on social-inequality.

21. A Child Rights and Wellbeing Assessment (CRWIA) screening exercise was carried out to determine if a full CRWIA was required for this instrument. On the basis that an extension to the presumption against short periods of imprisonment does not constitute a substantive change in policy direction, and no direct impact on children or young people was identified, the decision was made that a full CWRIA was not required. The screening document is available.

22. The Islands (Scotland) Act 2018 places a duty on Scottish Ministers to consult island communities before making a material change to any policy which, in their opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities. On the basis that the extension would be an amendment to an existing policy, and that the extension would not have a significantly different impact on island communities, a decision was made that it was not necessary to consult island communities on the extension.

23. A Data Protection Impact Assessment (DPIA) contains an assessment to identify and mitigate risks to privacy and identify the ways the project can effectively comply with data protection regulations. Given that extending the presumption is an amendment to an existing policy is not expected that it will have any further impact on data protection and as such a DPIA was not required.

24. A final Business and Regulatory Impact Assessment (BRIA) has been completed and is provided alongside the order and supporting documents. It is intended to ensure consideration is given to whether the legislation is necessary, to apply the five principles of better regulation (proportionate, consistent, accountable, transparent and targeted) and to help ensure that relevant factors such as business impacts and interests are taken account of. The impact of this policy on businesses is expected to be minimal, but there will be some impact upon the public and third sectors. The costs, benefits and impact of the extension have been assessed and included within the BRIA. The BRIA also includes a scenario plan which contains information on the potential impact of the extension, with particular regard to the impact on prison places.

Financial Effects

25. The effects of increasing the length of the presumption will be in part dependent on the impact on sentencing behaviour. Analysis conducted by the Scottish Government's Analytical Services Division suggests that a 20% reduction in the use of custodial sentences of 12 months or less would be likely to result in the imposition of an additional 1,300 community sentences a year. Estimates suggest the additional resource requirement created by this increase will be in the region of £2.5 million p.a. Savings to Scottish Prison Service are not expected to be releasable but are expected to enhance support in prisons as officers spend less time dealing with receptions.

26. Ring-fenced funding for Criminal Justice Social Work of just over £100 million is being protected in the 2019-20 Budget to deliver community sentences, support rehabilitation and reduce re-offending. An additional £4 million has been allocated in each of the past two years to support community sentences and this was increased to £5.5 million in the 2018-19 budget specifically to support preparations for extending the presumption against short sentences. This additional support is being continued in 2019-20. The uptake of community sentences will continue to be monitored closely, alongside the number and length of custodial sentences imposed.

Effect on sentencing

27. In determining what sentence to pass, a court is entitled to take into account the stage in the proceedings where the offender indicated their intention to plead guilty, which may result in a discount being applied to the sentence which would otherwise have been imposed. The level of discount is generally at the discretion of the sheriff, but a discount of one third is generally the maximum, so in practice the maximum discount would be applied only where a plea was tendered at the earliest opportunity. As with the current presumption against short sentences of 3 months or less, the extended presumption will only take effect once the sheriff is at the point of imposing the sentence, having taken all other factors into account. This means that if a sheriff considers, after discount, that a sentence of 12 months (or less) would be appropriate, only then would they consider applying the presumption.

28. The order makes no changes to existing law on consecutive and concurrent sentences. For example, section 167 of the Criminal Procedure (Scotland) Act 1995 makes provision for forms of finding and sentence in summary procedure. Where consecutive sentences are imposed, their aggregate must not exceed the limit of the court's jurisdiction in respect of the most serious offence on the libel. A Sheriff in summary procedure cannot impose an aggregate of sentences for a period in excess of 12 months. Therefore, there will always be a presumption against custodial sentences under summary procedure. Where there are a number of custodial sentences of less than 12 months, the court may want to take account of that in considering whether no other method of dealing with a person is appropriate when considering the presumption.

Commencement of Order

29. When the presumption against short sentences of 3 months or less was first introduced in 2011, it applied only to offences committed on or after the date on which the presumption was brought into force. This transitional provision was made possible by the powers in section 201 of the 2010 Act. However, these powers apply only to orders made under the 2010 Act – the commencement order bringing section 17 of the 2010 Act into force being one such Order. The powers in section 201 do not apply in the present case as the Order is being made under the 1995 Act.

30. Section 204(3C) of the Criminal Procedure (Scotland) Act 1995 contains a power simply to substitute another number of months for the number currently stated in section 204(3A) (currently 3 months) but there is no power in the 1995 Act to make transitional provision where such a substitution is made. Accordingly, Article 3 of the Order makes supplementary provision, using the powers in section 204 of the 1995 Act, to ensure that there can be a smooth transition between the existing presumption of 3 months and the new presumption of 12 months. This supplementary provision ensures that any modification of the presumption made under section 204(3C) (including the modification contained in the present Order) will apply only to offences committed on or after the date on which the modification comes into force.

31. The commencement date, and the supplementary provision, take account of advice from operational partners including the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunal Service.

Scottish Government
Justice Directorate
16 May 2019