

Consultation Stage Resource Assessment

Perverting the Course of Justice and Witness Intimidation

Introduction

This document fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services.¹

Rationale and objectives for new guideline

No current guideline exists for offences relating to perverting the course of justice, a common law offence. The Council is consulting on a new sentencing guideline for these offences, for use in all courts in England and Wales.

In May 2008, the Sentencing Guidelines Council (SGC) published the Magistrates' Court Sentencing Guidelines (MCSG), covering most of the offences regularly going before magistrates' courts. This included the offence of witness intimidation under section 51(1) and section 51(2) of the Criminal Justice and Public Order Act 1994. The MCSG only apply to sentences passed at magistrates' courts, and so there are no existing guidelines for this offence for use in the Crown Court. The Council is consulting on a new sentencing guideline for this offence, for use at all courts.

The Council's aim in developing the new and revised guidelines is to provide sentencers with a clear approach to sentencing these offences that will ensure that sentences are proportionate to the offence committed and in relation to other offences. It should also promote a consistent approach to sentencing.

Scope

As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the guideline on the prison service, probation service and youth justice services. Any resource impacts which may fall elsewhere are therefore not included in this assessment.

This resource assessment covers the new and revised guidelines for the following offences:

- Perverting the course of justice contrary to Common Law.

¹ Coroners and Justice Act 2009 section 127: www.legislation.gov.uk/ukpga/2009/25/section/127

- Intimidating a witness contrary to sections 51(1) and 51(2) of the Criminal Justice and Public Order Act 1994.

These guidelines apply to sentencing adults only; they will not directly apply to the sentencing of children and young people.

Current sentencing practice

To ensure that the objectives of the guidelines are realised, and to understand better the potential resource impacts of the guidelines, the Council has carried out analytical and research work in support of them.

The intention is that the new and revised guidelines will encourage consistency of sentencing, especially where no guideline currently exists to better reflect current case law.

Knowledge of recent sentencing was required to understand how the new guideline may impact sentences. Sources of evidence have included the analysis of transcripts of Crown Court judges' sentencing remarks for offenders sentenced for perverting the course of justice and witness intimidation, as well as sentencing data from the Court Proceedings Database.^{2,3} Knowledge of the sentences and factors used in previous cases, in conjunction with Council members' experience of sentencing, has helped to inform the development of the guidelines.

During the consultation stage, we intend to conduct research with sentencers, to explore whether the draft guidelines will work as anticipated. This research should also provide some further understanding of the potential impact of the guidelines on sentencing practice, and the subsequent effect on prison and probation resources.

Detailed sentencing statistics for the offences covered by the draft guideline have been published on the Sentencing Council website at the following link:
<http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=statistical-bulletin&topic=&year>.

Perverting the course of justice

In 2020, around 400 offenders were sentenced for perverting the course of justice and all of these were sentenced at the Crown Court. Around half of these offenders

² The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics. The data presented in this resource assessment only include cases where the specified offence was the principal offence committed. When a defendant has been found guilty of two or more offences this is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe. Although the offender will receive a sentence for each of the offences that they are convicted of, it is only the sentence for the principal offence that is presented here. The average custodial sentence lengths presented in this resource assessment are average custodial sentence length values for offenders sentenced to determinate, immediate custodial sentences, after any reduction for guilty plea. Further information about this sentencing data can be found in the accompanying statistical bulletin and tables published here:
<http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>.

³ Figures presented for 2020 include the time period since March 2020 in which restrictions were placed on the criminal justice system due to the COVID-19 pandemic. It is therefore possible that these figures may reflect the impact of the pandemic on court processes and prioritisation and the subsequent recovery, rather than a continuation of the longer-term series, so care should be taken when interpreting these figures.

(51 per cent) were sentenced to immediate custody and a further 42 per cent were given a suspended sentence order. Community orders accounted for 4 per cent of sentences and 2 per cent were recorded as otherwise dealt with.^{4,5}

Perverting the course of justice is a Common Law offence and, as such, the statutory maximum sentence is life imprisonment. For those receiving immediate custody in 2020, the average (mean) custodial sentence length (ACSL) was 1 year 2 months.

Witness intimidation

In 2020, around 180 offenders were sentenced for intimidating a witness, with most (63 per cent) sentenced to immediate custody. A further 26 per cent received a suspended sentence, 7 per cent received a community order, 1 per cent received a fine and 2 per cent were recorded as otherwise dealt with.^{4,5}

The statutory maximum sentence for witness intimidation is 5 years' custody and in 2020, the ACSL for this offence was 11 months.

Key assumptions

To estimate the resource effect of a new guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is based on the objectives of the new guideline and draws upon analytical and research work undertaken during guideline development. However, some assumptions must be made, in part because it is not possible precisely to foresee how sentencers' behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the new guideline are therefore subject to a substantial degree of uncertainty.

Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural change. In addition, for low volume offences, and those which have only recently been created, there are limited data available. The assumptions thus have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the proposed new guideline, and an assessment of the effects of changes to the wording of the guideline where a previous guideline existed.

The resource impact of the draft guidelines is measured in terms of the changes in sentencing practice that are expected to occur as a result of them. Any future changes in sentencing practice which are unrelated to the publication of the draft guidelines are therefore not included in the estimates.

In developing sentence levels for the new guidelines, existing guidance and data on current sentence levels has been considered. While data exists on the number of offenders and the sentences imposed, assumptions have been made about how

⁴ The category 'Otherwise dealt with' covers miscellaneous disposals. Please note that due to a data issue currently under investigation, there are a number of cases which are incorrectly categorised in the Court Proceedings Database (CPD) as 'Otherwise dealt with'. Therefore, these volumes and proportions should be treated with caution.

⁵ Percentages may not sum to 100 per cent due to rounding.

current cases would be categorised across the levels of culpability and harm proposed in the draft guidelines using relevant transcripts, due to a lack of data available regarding the seriousness of current cases. As a consequence, it is difficult to ascertain how sentence levels may change under the draft guideline.

It therefore remains difficult to estimate with any precision the impact the guidelines may have on prison and probation resources. To support the development of the new guidelines, and to mitigate the risk of the changes having an unintended impact, research will be undertaken with sentencers during the consultation period, utilising different scenarios. Along with consultation responses, this should hopefully provide more information on which to base the final resource assessment accompanying the definitive guidelines.

Resource impacts

This section should be read in conjunction with the draft guideline available at: <http://www.sentencingcouncil.org.uk/consultations/>.

Overall impacts

The expected impact of each guideline is provided in detail below.

For both perverting the course of justice and witness intimidation offences, it is difficult to estimate the impact of the draft guidelines. However, it is anticipated that the new guidelines will improve consistency of sentencing for these offences, but not lead to any notable changes in sentencing severity.

Perverting the course of justice

There is currently no guideline for perverting the course of justice and the proposed guideline has three levels of culpability and three levels of harm. This leads to nine offence categories with sentences ranging from a community order to seven years' custody. The Council's intention with the new guideline is not to change sentencing practice and, as such, sentencing ranges have been set with current sentencing practice in mind.

Perverting the course of justice is an indictable only offence and as such all offenders are sentenced at the Crown Court. Analysis of a sample of Crown Court judges' sentencing remarks⁶ has been undertaken to understand the possible effects of the guideline on sentencing practice. However, it should be noted that these types of cases vary as there are a number of different underlying offences for which an offender could be sentenced for perverting the course of justice. The sample of transcripts analysed covers a range of these underlying offences and as such offers some insight into the circumstances of the cases and the reasoning behind the sentence given. However, it is not possible to obtain information on all relevant underlying offences and for those cases for which we do have transcripts, they do not always provide all the information needed to accurately assess the seriousness and

⁶ A total of 27 transcripts of Crown Court sentencing remarks for perverting the course of justice from 2015, 2016 and 2017 were analysed to assess the impact this guideline may have on prison and probation services.

nature of the offence, as this can often vary from case to case. Therefore, findings presented in the resource assessment should be treated as indicative only.

Case law suggests that offences of perverting the course of justice often warrant a custodial sentence but that these do not always need to be long custodial sentences.⁷ Only one sentence range in the guideline has a non-custodial sentence outcome (category C3) and the analysis suggests that very few cases would fall into this category (none of the transcripts in the sample analysed). This is in line with current sentencing practice that shows that fewer than 10 per cent of offenders received a non-custodial sentence in 2020.

The analysis also suggested that sentences using the draft guideline are broadly in line with the outcomes given by sentencers prior to the guideline. It suggested that the sentence types would remain similar under the new guideline; for example, offenders currently receiving a suspended sentence order would continue to do so, as would offenders currently receiving a sentence of immediate custody. The analysis did suggest that the small number of offenders currently receiving a non-custodial sentence (fines or community orders) may receive a short custodial sentence instead, under the new guideline.⁸ However, current sentencing practice indicates that non-custodial sentences account for fewer than five per cent of sentences each year and so these would likely be eligible for suspension.⁹ Therefore, it is anticipated that there will be limited impact on prison and probation resources.

The analysis further suggested that the sentence lengths for immediate custody given for these offences would remain broadly similar under the new draft guideline and that there would be limited, if any, need for additional prison places. However, further research will be conducted during the consultation stage to estimate the potential resource impact of the guideline and to understand how the guideline will be applied in practice.

Witness intimidation

The existing MCSG guideline for witness intimidation contains three categories of seriousness reflecting the 'nature of activity'. The new draft guideline adopts the Sentencing Council's standard stepped approach and applies to all courts. It is based on three levels of harm and three levels of culpability. The sentencing ranges have been set with current sentencing practice in mind, with a sentencing table ranging from a community order to four years' custody.

Most offenders sentenced for offences of witness intimidation are sentenced at the Crown Court (73 per cent in 2020) and analysis of a sample of Crown Court judges' sentencing remarks¹⁰ has been undertaken to understand the possible effects of the guideline on sentencing practice. As with perverting the course of justice, it is

⁷ *Abdulwahab* [2018] EWCA Crim 1399.

⁸ Very few transcripts were analysed for those sentenced to fines or community orders, however, all those that were included in the analysis, saw the sentence increased to custodial sentence. Therefore, this estimate provides an indication of the movement of sentences in relation to these cases.

⁹ Sentencers are able to suspend sentences of between 14 days and two years.

¹⁰ A total of 18 transcripts of Crown Court sentencing remarks for witness intimidation from 2015, 2017 and 2020 were analysed to assess the impact this guideline may have on prison and probation services.

anticipated that the sentencing levels will remain relatively stable under the new guideline.

The analysis also suggested that the sentence outcomes for witness intimidation would remain generally the same under the new draft guideline; for example, offenders currently receiving a suspended sentence order would continue to do so. There was some variation in the lengths of sentences given but, overall, it is anticipated that the lengths of sentences received by offenders sentenced to immediate custody will remain broadly stable. As such, it is anticipated that any impact the guideline has on prison or probation resources would be limited. However, further research will be conducted during the consultation stage to estimate the potential resource impact of the guideline and to understand how the guideline would be applied in practice.

Risks

Risk 1: The Council's assessment of current sentencing practice is inaccurate

An important input into developing sentencing guidelines is an assessment of current sentencing practice. The Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Inaccuracies in the Council's assessment could cause unintended changes in sentencing practice when the new guidelines comes into effect.

This risk is mitigated by information that is gathered by the Council as part of the guideline development and consultation phase. This includes providing case scenarios as part of the consultation exercise which are intended to test whether the guidelines have the intended effect and inviting views on the guidelines. However, there are limitations on the number of factual scenarios which can be explored, so the risk cannot be fully eliminated. Transcripts of judges' sentencing remarks have provided a more detailed picture of current sentencing practice for these offences which has formed a large part of the evidence base on which the resource impacts have been assessed. However, it should be noted that due to the limited information within the transcripts and the case-specific nature of these offences, the findings of the resource assessment should only be interpreted as indicative of any resource impacts.

Risk 2: Sentencers do not interpret the new guidelines as intended

If sentencers do not interpret the guidelines as intended, this could cause a change in the average severity of sentencing, with associated resource effects.

The Council takes a number of precautions in issuing new guidelines to try to ensure that sentencers interpret them as intended. For the new draft guidelines, sentencing ranges have been decided on by considering sentence ranges in the MCSG witness intimidation guideline, in conjunction with sentencing data and Council members' experience of sentencing. Transcripts of sentencing remarks of relevant perverting the course of justice and witness intimidation cases have been studied to gain a greater understanding of current sentencing practice and to ensure that the guidelines are developed with current sentencing practice in mind. Research with sentencers due to be carried out during the consultation period should also enable

issues with implementation to be identified and addressed prior to the publication of the definitive guidelines.

Consultees can also feed back their views of the likely effect of the guidelines, and whether this differs from the effects set out in the consultation stage resource assessment. The Council also uses data from the Ministry of Justice to monitor the effects of its guidelines.

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