

Final Business and Regulatory Impact Assessment

Title of Proposal

The Presumption Against Short Periods of Imprisonment (Scotland) Order 2019

Purpose and intended effect

Background

The existing presumption against short sentences was introduced by the Criminal Justice and Licensing (Scotland) Act 2010 and commenced in February 2011. The legislation provides that a court must not pass a custodial sentence of 3 months or less unless it is of the opinion that no other disposal is appropriate.

The presumption was designed to encourage a reduction in the use of short-term custodial sentences and a related increase in the use of community sentences, which are more effective at reducing reoffending.

Objective

The purpose of the instrument is to extend the existing presumption against short sentences from sentences of less than 3 months to sentences of 12 months and less.

This is in line with this Government's aim that prison should be reserved for serious or dangerous offenders and that short periods of imprisonment should only be imposed where there are no other alternatives.

Rationale for Government intervention

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 reoffending¹. Extending the presumption against short sentences is intended to improve the chances of individuals paying back for their offending, being effectively rehabilitated and preventing offending.

The extension contributes to the National Performance Framework outcome 'We live in communities that are inclusive, empowered, resilient and safe'.

Consultation

Within Government

A number of Scottish Government departments/agencies and NDPBs have been engaged on the proposed extension to the presumption both around the time of consultation, when the Programme for Government commitment was made and planning for implementation, including:

- Justice Analytical Services (Scottish Government) on scenario planning and impact upon prison numbers;
- Criminal Justice Division (Scottish Government) on interaction with sentencing policy, the Domestic Abuse (Scotland) Act 2018 and the

¹ <https://www.gov.scot/publications/works-reduce-reoffending-summary-evidence/>

impact of PASS on victims;

- Community Justice Division Finance Team (Scottish Government) on the additional funding available for local authorities to help support the implementation of the extension and with Scottish Exchequer in the context of Spending Review considerations;
- Civil Law Division (Scottish Government) on access to justice and engagement with the Scottish Legal Aid Board.
- Community Justice Scotland (independent NDPB), on the impact on the justice sector;
- Scottish Courts and Tribunals Service (independent NDPB) on the impact of extension on court business;
- Children and Families Directorate (Scottish Government) in relation to adverse childhood experiences, prevention and youth justice;
- Scottish Prison Service on anticipated impact on SPS, prison numbers and work to rehabilitate individuals;
- Areas within Scottish Government including Health, Housing, Fair Work and Social Security on work to improve reintegration; and
- Equalities and Legal Directorates on the impact assessments to accompany the order.

Public Consultation

A Scottish Government consultation was undertaken in 2015 to ascertain views on proposals to extend the presumption against short sentences.

The consultation asked two main questions:

- should the current presumption against sentences of 3 months or less be extended, and if so, by how much (to 6, 9 or 12 months)?; and
- is a more radical review of the presumption and the use of short-term imprisonment, including remand, required? For example, should we consider whether particular types of offences should never result in a custodial sentence, or whether there are some offences which should be outwith the presumption (i.e. offences which should still attract a custodial sentence).

Respondents included local authorities and partnership bodies, third sector agencies, professional bodies and national public bodies.

An analysis of the consultation was published in January 2016 and showed that **85%** of respondents (53 of 62) were in favour of an extension to the presumption, and of those who expressed a view, **84%** (37 of 44) indicated that the new minimum period should be set at 12 months.

There was no clear consensus from respondents on whether specific offences should still attract a custodial sentence, however one respondent organisation was particularly clear that they would not support any extension which did not specifically exclude domestic abuse offences.

Concerns were also raised by victims support groups, and other respondents, who otherwise favoured an extension, in relation to the need to protect victims (and victims of domestic abuse in particular). As a result, it was agreed that the

extension to the presumption would only be implemented once the provisions of the Domestic Abuse (Scotland) Act 2018 were in force (expected 1 April 2019).

The majority of respondents also 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.

Following the consultation, and based on the majority of respondents views, it was considered that the presumption should be extended to 12 months.

Business

As stated above, the Scottish Government consulted widely about the extension to the presumption.

Government officials actively brought the consultation process to the attention of a wide range of stakeholders, encouraging them to participate. A number of organisations from the third sector, who have a particular interest in justice, provided responses to the consultation including Apex Scotland, Sacro and the Wise Group.

Engagement has focussed primarily on the public sector and third sector, given that they will be the most affected by the extension to the presumption. The extension to the presumption is unlikely to have a significant impact on the private sector. Uptake of Electronic Monitoring, which is a demand-led service through a private contractor, will continue to be monitored. Extending the presumption does not change the way the contract works. Provisions in the Management of Offenders (Scotland) Bill which add electronic monitoring as a potential requirement of a Community Payback Order may lead to a further use of community alternatives to custody.

Options

In light of the consultation responses, where 84% of respondents who were in favour of extending the presumption believed it should be extended to 12 months, and having considered concerns about potential impact on victims of domestic abuse, a Programme for Government commitment was made in 2017 to extend the presumption to 12 months, once additional protections in the Domestic Abuse (Scotland) Act 2018 were in force. This commitment was re-affirmed in the 2018 Programme for Government. There are therefore, 2 options. To extend the presumption to 12 months or do nothing. Some commentary is provided on the implications of a presumption of 6 in the scenario planning analysis completed by Justice Analytical Services provided at **Annex A**, though this not considered to be a separate option.

Option 1 - *Extend the presumption against short sentences to 12 months*

This option reflects the majority of the consultation responses.

It would likely have an impact on a number of stakeholders, including:

- the Judiciary, who would be responsible for issuing sentences in line with the

extended presumption;

- Criminal Justice Social Work, who would be responsible for supervising the additional numbers who receive community sentences;
- Scottish Prison Service, who would see a decline in the number of admissions and liberations, and potentially provide additional capacity to support rehabilitative work with those who need to be in custody;
- Scottish Courts and Tribunals Service, who would potentially see an increase in court time in respect of CPO review hearings or breach proceedings;
- the Third Sector, who would be responsible for providing services to the additional numbers on community sentences, on behalf of local authorities and a potential reduction in demand in relation to working with individuals moving on from custody;
- the individuals who are at risk of receiving a custodial sentence between 3 months and 12 months, and their families, loved ones and employers;
- victims and organisations supporting them. It is recognised that there is scope for more engagement with victim's organisation on community sentences both in terms of visibility and awareness as well as any concerns from individuals in the community.

This option demonstrates decisive action to reduce the use of short-term imprisonment and is welcomed by criminal justice and penal reform stakeholders, while acknowledging the importance of ensuring confidence in community sentences is high, with appropriate resources and capacity to manage cases effectively. While this option would mean that the presumption, as extended, would apply to all offences, it would not preclude the Scottish Sentencing Council from looking at the provision of additional guidelines around the imposition of sentences under 12 months. The Scottish Sentencing Council will consider how the extended presumption will interact with any future sentencing guidelines and with its business plan as a whole, taking into account how it operates in practice.

This option can be implemented via secondary legislation. The instrument is being laid under affirmative procedure is subject to Parliamentary scrutiny, which this impact assessment is intended to support.

Extending the presumption using primary legislation would enable consideration of offences which could be exempt from the presumption to be set out in legislation. However, crime type is a relatively poor indicator of the seriousness of a specific incident, the likelihood of reoffending, and the relative impact of prison vs community sentences. The judiciary are best-placed to make a decision based on the circumstances of each case and the offender, rather than apply blanket exemptions based on index offence.

There was no clear consensus from the consultation respondents on whether or not certain offences should be excluded from the presumption, so attempting to set this out in primary legislation may be difficult and controversial. Respondents also questioned whether this was an appropriate role for Government. The role of the judiciary in deciding on the most appropriate sentence remains key and while extending the presumption puts a greater emphasis on use of alternatives, the judiciary can readily explain why a custodial sentence may be appropriate in specific circumstances.

Furthermore, primary legislation would be a more complex and lengthy process and could attract criticism that the Government was delaying action on the issue which has been consulted on and committed to over a period of years. Affirmative secondary legislation which is subject to detailed Parliamentary scrutiny is most appropriate to extend the presumption as planned.

There was some limited evidence of up-tariffing following the 3-month presumption being introduced. A 12 month presumption rather than a 6 month presumption mitigates risk of up-tariffing as 12 months is the limit of summary powers. A 12 month presumption makes clear that all summary courts will give reasons if custody is the appropriate disposal.

Aligning the order with protections in the Domestic Abuse (Scotland) Act coming into force, and the direction of the Management of Offenders Bill, which is also being scrutinised by Parliament, helps ensure that extending the presumption is a proportionate penal reform. This is intended to enhance efforts to reduce reoffending through effective community sentences and have some positive impact on prison population, while providing more time for prison officers to rehabilitate those who need to be in prison. While 80% of custodial sentences are less than 12 months, caution is required in estimating the impact of the reform.

Given the potential for an increase in the number of people receiving community sentences as opposed to short custodial sentences, Option 1 would likely come with an increase in costs for local authorities, who receive ring-fenced funding for criminal justice social work.

The Scottish Government provides ring-fenced funding of just over £100 million to local authorities, which is being protected in the 2019-20 budget to deliver community sentences, support rehabilitation and reduce re-offending. This includes an additional £4 million to support community sentences since 2016-17 – increased to £5.5 million in the 2018-19 budget specifically to support preparations for extending the presumption and enhance access to electronic monitoring. It is also important to note that volumes of criminal justice social work reports and orders fell by over 5% in the last year (as confirmed in Criminal Justice Social Work Statistics for 2017-18), while ring-fenced funding is being protected. Justice social work assess the risks associated with individuals as well as their needs and levels of supervision vary based on assessments.

In their recent report on the prison population in England and Wales², the House of Commons Justice Committee recommended, with cross-party support, that the UK Government should introduce a presumption against short custodial sentences. The report states: “We support the [UK] Government’s approach to the abolition of short, ineffective prison sentences. The scale of the prison population crisis is such that it requires afresh and decisive response. We note with interest the move in

² House of Commons Justice Committee report. Prison population 2022: planning for the future <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/483/483.pdf>

Scotland towards a statutory presumption against custodial sentences of under 12 months. We repeat the recommendation we made in our report on Transforming Rehabilitation that the [UK] Government should introduce a presumption against short custodial sentences and believe, in addition to their welcome move towards avoiding the use of sentences under 6 months, they should model the effects of abolishing sentences of fewer than 12 months.”

Option 2 – Maintain the status quo

In this option, the presumption against short sentences would not be extended and would remain aimed at sentences of 3 months or less.

Given that the presumption has been running for a number of years already, maintaining the status quo would have very little impact on the Judiciary, Criminal Justice Social Work or the Third Sector, all of whom would continue to proceed as per the current legislative presumption

Maintaining the status quo would have the most impact on the individuals who are at risk of receiving a custodial sentence between 3 months and 12 months. Short custodial sentences offer limited opportunities for rehabilitation³. Individuals serving custodial sentences of less than 4 years do not have routine access to rehabilitation programmes. And custodial sentences do little to reduce the likelihood of reoffending. They disrupt families and communities, adversely affecting employment opportunities and stable housing – the very things that evidence shows support desistance from offending⁴.

As the extension to the presumption has been a commitment in the Programme for Government for the previous two years and there remains strong support for extending it from key justice stakeholders, there would likely be objections were this option to be selected.

If the status quo were to be maintained, there would be no additional cost in terms of funding to justice social work. In fact, there would potentially be a reduction given that additional funding has been provided to local authorities in recent years specifically to increase use of community sentences and prepare for the presumption against short sentences being extended. However, there would be a continued detrimental impact on the prison population and efforts to further reduce reoffending. While not readily quantifiable as it is speculative, failure to pursue measures such as this which have a strong rationale in efforts to reduce re-offending has a knock on cost to society, police and the justice system.

Scottish Firms Impact Test

It was not considered necessary for Scottish Government officials to carry out face to face discussions with businesses about this instrument.

³ <https://www.gov.scot/publications/works-reduce-reoffending-summary-evidence/>

⁴ <https://www.gov.scot/publications/works-reduce-reoffending-summary-evidence/>

Competition Assessment

This instrument will not have any impact on competition. It will not limit the number or range of suppliers, limit the ability of stakeholders to compete, limit suppliers' incentives to compete vigorously or limit the choices and information available to consumers.

Consumer Assessment

This instrument will have no negative impact on consumers. Once the extension to the presumption is implemented, local authorities and the third sector will likely see an increase in the number of cases they handle, however they will receive appropriate funding to offset this increase.

Test run of business forms

This instrument does not bring in any new forms for business to complete.

Digital Impact Test

Given that this amendment simply extends the presumption from 3 months to 12 months, thereby potentially increasing the number of cases but not the methods by which cases are dealt with by, the judiciary, local authorities or the third sector, it is not considered that there is any relevant digital impact.

Legal Aid Impact Test

An increase in the number of community sentences issued would likely result in an increase in the number of community sentence review hearings and breach hearings scheduled by the court. This would therefore also have an impact on the number of ABWOR (advice by way of representation) cases handled through legal aid.

In terms of the scenario planning (see Annex A), a decrease in custodial sentences of 20% is likely to result in an increase of around 7.5% in the number of community sentences. As such, the total amount currently spent on ABWOR for review and breach of community sentences (i.e. representation at these hearings), multiplied by 7.5, would give an indication of the likely additional ABWOR costs following the extension to the presumption.

For example, Scottish Legal Aid Board (SLAB) has advised that in 2017-18, it received 9689 cases for ABWOR in community sentence breach hearings. If the number of breach hearings were to rise in line with the number of community sentences, then under the scenario outlined above, this would result in an extra 727 cases for SLAB. The latest average cost for handling these cases is £283 including VAT, therefore an increase in community sentence breach hearings of 7.5% may result in an extra annual expenditure of £206,000.

Any potential increase in ABWOR costs will be assessed alongside potential savings as well as other pressures on the Scottish Legal Aid Board budget, which is

dependent on demand.

Enforcement, sanctions and monitoring

The presumption against short sentences is not a ban. The Judiciary are independent of Scottish Ministers, and sheriffs and judges retain the discretion to pass the most appropriate sentence based on the facts and circumstances of the case. The proposed legislation states that the Court should not pass a sentence of a period shorter than the stated presumption. However, it may do so where it considers that no other method of dealing with the person is appropriate. There is no sanction should the Judiciary choose to impose a sentence of less than 12 months.

Statistics on the number and average length of custodial sentences are currently recorded in the *Criminal Proceedings in Scotland* statistics, published annually, and it is intended that these will continue to inform how the presumption is being applied through analysing the relative use of community sentences against custodial sentences of under 12 months.

In addition, it is intended that the short-term prison population figures will be monitored to ascertain whether the extension to the presumption is having an effect on the 'churn' of those on short sentences received in and discharged from prison.

In the longer term, the *Reconviction Rates for Scotland* statistics, published annually, will provide detailed information on reconviction rates for community sentences versus custodial sentences, including by sentence type.

Implementation and delivery plan

It is intended that the proposed extension to the presumption will come into force in Summer 2019. This comes after the relevant protective measures contained in the Domestic Abuse (Scotland) Act 2018, which bring extra assurance to victims of domestic abuse, have come into force on 1 April 2019.

The biggest impact in terms of funding and resources will be upon local authority Criminal Justice Social Work (CJSW). Costs of the extension will fall to local government in terms of the CJSW capacity to manage greater numbers of community sentences.

There will also be an impact on the Scottish Courts and Tribunals Service (SCTS), as an increase in the number of community sentences issued will likely result in an increase in the number of review and breach hearings dealt with by the court. SCTS have provided information on the potential impact extending the presumption may have on court business in terms of additional hearings and costs. This information is contained at **Annex B** and contains projections for 10%, 20% and 50% increases in community sentences. Scottish Ministers will monitor the impact of the extension to the presumption upon court business and assess it in line with the broader budgetary position.

The extension to the presumption is likely to mainly affect cases dealt with under

summary procedure, which has a maximum penalty of 12 months imprisonment. As such, it is likely to be Sheriff Court summary business which is affected, although there may be some impact on solemn business. There is unlikely to be any effect on High Court business.

As outlined previously, Scottish Ministers allocate around £100 million in funding to local authorities to deliver community sentences, support rehabilitation and reduce re-offending. This funding includes an additional £4 million investment in community sentences which was introduced in 2016/17 and continued in 2017/18, helping to support local authorities to deliver robust community sentences. This was increased to £5.5 million in the 2018/19 budget in anticipation of the extension to the presumption and additional funding may be necessary for 2019/20.

As noted, volumes of criminal justice social work reports and orders fell by over 5% in the last year while ring-fenced funding for Criminal Justice Social Work is being protected in the 2019-20 budget. The Scottish Government also continues to invest in third sector services that support criminal justice social work and community justice partners working together, to reduce reoffending. In 2018-19 this investment totalled over £11.6 million including support for mentoring, Apex, SACRO, the 218 Centre for women, Venture Trust, Turning Point Scotland, Families Outside and Prison Visitor Centres. This approach is intended to provide assurance that local authorities, with the support of community justice partners, including third sector, will be able manage the extension of the presumption of short sentences coming into effect.

Scenario planning by analysts continues to inform the financial planning. For example, assuming that 20% of custodial sentences between 3 months and 12 months would be converted to community sentences, and excluding those sentences covered by the existing presumption, then around 1,300 additional community sentences would be anticipated. The unit cost of a CPO is an average of £1,771 which equates to around £2.5 million. Impact will be monitored closely and will inform future Spending Review considerations and discussions with COSLA around weightings in the formula for criminal justice social work. The Scottish Government recognises that a unit cost is limited as individual cases vary in complexity and level of supervision required. Evidence from practice will inform consideration of the funding formula in future local authorities have flexibility within their resource allocation while meeting statutory obligations.

Extending the presumption is expected to result in savings for the justice system in the longer term. Shorter term, increased costs associated with community sentences are anticipated and the Scottish Prison Service is expected to benefit from a reduction in 'churn' rather than substantial reductions in the prison population. Additional funding for community sentences pre-empted the extended presumption being introduced and evidence from partners including COSLA and local authorities will inform the next Spending Review and next steps on the funding formula. Refreshed guidance on breach and compliance, including additional guidance in relation to domestic abuse cases, has been developed with practitioners and key stakeholders, is being published in January 2019.

Engagement is planned with a number of key stakeholders, including Community

Justice Scotland, Criminal Justice Social Work, Social Work Scotland, Cosla, the Community Justice Voluntary Sector Forum, the Judiciary and the Judicial Institute of Scotland.

Post-implementation review

A formal review is not planned, but the extension will continue to be monitored in the years following the implementation. This will inform approaches to funding and work with partners.

Summary and recommendation

Option 1 is recommended, with the presumption being extended by means of secondary legislation.

There is a strong evidence base to support extending the presumption against short sentences⁵⁶. Steps have been to address concerns about impact on victims, including through ensure the protections in the Domestic Abuse (Scotland) Act 2018 are in force, and extending the presumption has wide support as contributes to reducing reoffending and helping ensure prison is used only for more serious offending which causes a risk to the public, and alternatives are not appropriate.

Although Option 1 will cost more to implement financially than option 2, it is anticipated that it will lead to savings for the justice system and benefits to society, including victims of crime, in the longer term.

Summary costs and benefits table

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	<ul style="list-style-type: none"> Evidence shows that community sentences are more effective at reducing reoffending than short custodial sentences An increase in the number of community sentences would help reduce the number of prison admissions and liberations meaning more offenders would remain in the community. Those who have jobs and houses could retain them and family relationships could be maintained. In the longer-term a reduction in the number of people offending 	<ul style="list-style-type: none"> Increase in numbers of people on community sentences as opposed to short custodial sentences Funding for local authority criminal justice provision is maintained in the budget for 2019/20 with an additional £1.5 million provided specifically to assist with the implementation of PASS Increase in legal aid ABWOR Increase in court time for community sentence breaches and reviews

⁵ <https://www.gov.uk/government/publications/the-impact-of-short-custodial-sentences-community-orders-and-suspended-sentence-orders-on-reoffending>

⁶ <https://www.gov.scot/publications/works-reduce-reoffending-summary-evidence/>

	would have an impact on wider society <ul style="list-style-type: none"> • An increase in the number of people undertaking unpaid work under Community Payback Orders, which often has an environmental focus, would have a positive impact on the environment 	
2	<ul style="list-style-type: none"> • The current presumption against short sentences allows those who would have been sentenced to 3 months in custody or less to receive a community sentence. This would continue, with similar numbers 	<ul style="list-style-type: none"> • Funding would be maintained but likely without the additional £1.5m

Declaration and publication

Sign-off for Final BRIAs:

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:



Date: 13 May 2019

Minister's name: Ash Denham

Minister's title: Minister for Community Safety

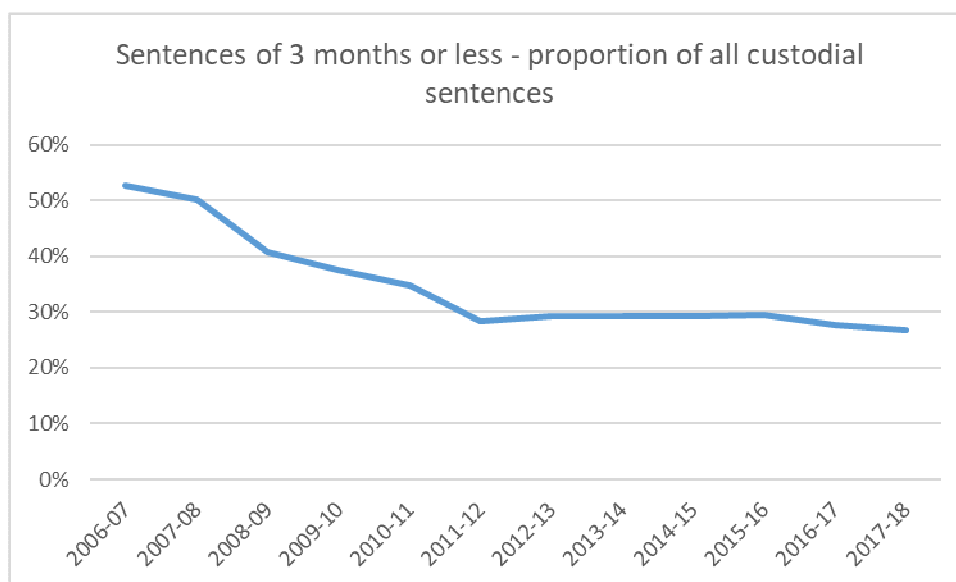
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PASS – SCENARIO PLANNING

1. The degree of impact of the presumption will be dependent on sentencing behaviour, so it is not possible to predict with any certainty the extent to which the extension to the presumption will impact on the number of sentences under 12 months. We have therefore looked to develop some reasonable *scenarios*, rather than *forecasts*. It is also important to emphasise at the outset that the greatest anticipated impact in respect of prisons is in relation to the ‘churn’ and the number of receptions and discharges dealt with by the Scottish Prison Service and other agencies, rather than on the size of the prison population.

2. The scenarios can be informed to a degree by examining the impact of the 3 month presumption in 2011. In 2009-10 (the last full year before the introduction of the presumption) 38% of custodial sentences were for 3 months or less. By 2017-18, this had fallen to 27% - clearly quite a big drop. However, this needs to be seen in the context of a longer-term decline in the use of short sentences prior to the introduction of the presumption:



3. It is therefore quite difficult to work out what the additional impact of the presumption might have been and means that we have to base any assumptions on potential scenarios – for example that a proportion (e.g. 20%) of sentences between 3 and 12 months would be converted to community sentences. If you exclude those sentences covered by the existing presumption and look only at the extension, then in 2017-18 there were 6,304 sentences of 3 months to 1 year and so 20% of that would equate to c.1,300 additional community sentences.

4. To put that in context, in 2017-18 there were 16,830 community sentences in total. So a reduction in the use of short sentences of around 20% might roughly equate to an increase in community sentences of around 7.5%.

5. It should be reiterated that this is all based on a **possible scenario**. We cannot predict what the reduction will turn out to be and it may well fluctuate from year to year.

6. In terms of impacts on the prison population, again we have calculated the potential impact based on a range of scenarios (although as noted above, the impact is anticipated to be on the numbers of receptions and discharges of short term prisoners rather than size of population):

Impact of reducing the number of short sentences on prison places

Reduction of	Three months or less	Six months or less	One year or less
10%	10	40	110
20%	10	90	210
50%	40	220	540

Note: Figures for prison places rounded to the nearest 10.

7. So if the 20% scenario turns out to be correct, then we would expect the extension of the presumption to reduce the total prison population by 200 (which is around 3% of the total prison population) although that depends on there being an equal displacement of all prison sentences of a year or less – whereas in practice, you might expect sentences of 3-6 months to be more affected by the presumption than sentences of 6-12 months.

**Scottish Government
Justice Analytical Services Division**

Information received from Scottish Courts and Tribunals Service on impact of extending the presumption

Type of cost	Presumption applied in 10% of cases (cost per annum)	Number of additional hearings if presumption applied in 10% of cases	Presumption applied in 20% of cases (cost per annum)	Number of additional hearings if presumption applied in 20% of cases	Presumption applied in 50% of cases (cost per annum)	Number of additional hearings if presumption applied in 50% of cases
Recording reason for not applying presumption	£60k	n/a – additional time in court per case	£53.4k	n/a – additional time in court per case	£33.4k	n/a – additional time in court per case
Time taken to impose community disposal	£8.3k	n/a – additional time in court per case	£16.6k	n/a – additional time in court per case	£41.5k	n/a – additional time in court per case
Review hearings	£20k	516	£40k	1032	£100k	2580
Breaches (pre-hearing admin) and initial breach hearing	£15.2k	559	£30.4k	1118	£76k	2795
Breach proof	£6.7k	172	£13.4k	344	£33.5k	860
Applications to vary	£5.8k	215	£11.6k	430	£29k	1075
Total	£116k		£165.4		£313k	