

Consultation Stage Resource Assessment

Drug Offences

Introduction

This document fulfils the Sentencing 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

In February 2012, the Sentencing Council's definitive *Drug Offences* guideline came into force. An assessment of the guideline published in June 2018² found that the nature of drug offending had changed since the guideline came into force, with the research suggesting that some drug offending was becoming more serious. The Council therefore decided to revise the existing guideline, to ensure that it fully reflects the type of offending currently coming before the courts.

In addition, in May 2016 a number of new offences were created under the Psychoactive Substances Act 2016, for which no current guideline exists.

The Council is consulting on draft sentencing guidelines covering these new offences, along with all of the offences covered by the existing guideline, for use in all courts in England and Wales.

The Council's aim in developing the guideline has been to ensure that sentencing for these offences is proportionate to the offence committed and to 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 following offences:

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

² <https://www.sentencingcouncil.org.uk/publications/item/drug-offences-assessment-of-guideline/>

- Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug, Misuse of Drugs Act 1971 (section 3) and Customs and Excise Management Act 1979 (section 170(2));
- Supplying or offering to supply a controlled drug, Misuse of Drugs Act 1971 (section 4(3));
- Possession of a controlled drug with intent to supply it to another, Misuse of Drugs Act 1971 (section 5(3));
- Production of a controlled drug, Misuse of Drugs Act 1971 (section 4(2)(a) or (b))/ Cultivation of cannabis plant, Misuse of Drugs Act 1971 (section 6(2));
- Possession of a controlled drug, Misuse of Drugs Act 1971 (section 5(2));
- Permitting premises to be used, Misuse of Drugs Act 1971 (section 8);
- Importing or exporting a psychoactive substance, Psychoactive Substances Act 2016 (section 8);
- Supplying, or offering to supply, a psychoactive substance, Psychoactive Substances Act 2016 (sections 5(1) or 5(2));
- Possession of psychoactive substance with intent to supply, Psychoactive Substances Act 2016 (section 7(1));
- Producing a psychoactive substance, Psychoactive Substances Act 2016 (section 4);
- Possession of a psychoactive substance in a custodial institution, Psychoactive Substances Act 2016 (section 9).

The *Drug Offences* guideline applies to sentencing adults only; it will not directly apply to the sentencing of children and young people.

Current sentencing practice

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

The intention is that the draft revised guideline will encourage consistency of sentencing and in the majority of cases will not change overall sentencing practice. In order to develop a guideline that maintains current practice, knowledge of recent sentencing was required.

Sources of evidence have included the analysis of transcripts of judges' sentencing remarks, sentencing data from the Court Proceedings Database, findings from the *Drug Offences* guideline assessment, and references to case law and news articles. 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 guideline.

Research is also being conducted with sentencers to explore whether the draft revised guideline will work as anticipated. This research will provide some further understanding of the likely impact of the guideline on sentencing practice, and the subsequent effect on the prison population.

Detailed sentencing statistics for drug offences covered by the draft revised 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.>

Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug (“importation offences”)³

The statutory maximum sentence for these offences is life imprisonment for class A and 14 years’ custody for classes B and C. In 2018, around 260 offenders were sentenced for these offences.^{4,5} Just over half of offenders (57 per cent) were sentenced for class A offences, 27 per cent for class B, and 16 per cent for class C.

In 2018, the vast majority of offenders sentenced for class A offences were sentenced to immediate custody (96 per cent). The average (mean) custodial sentence length (ACSL) for those sentenced to immediate custody was 8 years 8 months, after any reduction for guilty plea.

For offenders sentenced for class B offences, just over three quarters were sentenced to immediate custody in 2018 (78 per cent), and a further 16 per cent received a suspended sentence order. The ACSL in 2018 was 3 years 11 months.

Fifty-nine per cent of offenders sentenced for class C offences in 2018 were sentenced to immediate custody, and a further 29 per cent received a suspended sentence order. The ACSL in 2018 was 1 year 11 months.

Supplying or offering to supply a controlled drug/possession of a controlled drug with intent to supply it to another (“supply/PWITS”)

The statutory maximum sentence for class A offences is life imprisonment, and for classes B and C it is 14 years’ custody. Around 8,600 offenders were sentenced for these offences in 2018. The majority were sentenced for class A (71 per cent), followed by class B (28 per cent) and class C (one per cent).

The vast majority of offenders sentenced for class A offences in 2018 received a custodial sentence, either immediate (83 per cent) or suspended (13 per cent). The ACSL for class A in 2018 was 3 years 10 months.

³ The figures provided for fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug include other sections of legislation not specifically covered by the draft revised guideline, but for which the guideline could still be applied, such as sections 50(2), 170(1). In 2018, these other offences comprised 28 per cent of the total.

⁴ 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 mean average custodial sentence length values for offenders sentenced to determinate 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>

⁵ Cannabis was reclassified from class C to class B in January 2009, and ketamine was reclassified from class C to class B in June 2014. Figures shown here categorise cannabis and ketamine as per their legal drug classification. The figures for classes B and C may therefore differ from figures published by the MoJ, which are based on how drug offences were coded by the courts.

Just under half of offenders sentenced for class B offences in 2018 received a suspended sentence order (46 per cent). A further 31 per cent were sentenced to immediate custody, and 18 per cent received a community order. The ACSL in 2018 was 1 year 5 months.

The most common sentencing outcome in 2018 for class C offenders was a suspended sentence order (40 per cent), followed by immediate custody (38 per cent) and a community order (15 per cent). The ACSL for class C in 2018 was 1 year 3 months.

Production of a controlled drug/cultivation of cannabis plant (“production/cultivation offences”)

The statutory maximum sentence for production/cultivation offences is life imprisonment for class A, and 14 years’ custody for classes B and C. Around 2,000 offenders were sentenced for these offences in 2018, and the vast majority were sentenced for class B (fewer than 10 offenders were sentenced for classes A and C combined).

For class B offences, 29 per cent of offenders in 2018 were sentenced to immediate custody. A further 23 per cent received a suspended sentence order, 21 per cent received a community order, and 18 per cent received a fine. The ACSL in 2018 for class B offences was 1 year 8 months.

Possession of a controlled drug

Possession of a controlled drug is the highest volume offence covered by the draft revised guideline, with around 20,700 offenders sentenced in 2018. Just under two thirds of offenders were sentenced for class B offences (64 per cent), around one third were sentenced for class A (34 per cent) and two per cent for class C.

Most offenders sentenced for class A offences in 2018 received a fine (61 per cent). A further 12 per cent received a discharge, and 11 per cent received a community order. Seven per cent of offenders were sentenced to immediate custody, and the ACSL was four months.

The majority of offenders sentenced for class B offences in 2018 received either a fine or a discharge (59 per cent and 23 per cent, respectively). Three per cent of offenders were sentenced to immediate custody, and the ACSL was one month.

For class C offences, the most frequently used sentence outcome in 2018 was a fine (43 per cent) and one third of offenders received a discharge. Seven per cent of offenders were sentenced to immediate custody, and the ACSL was three months.

Permitting premises to be used

In 2018 around 220 offenders were sentenced for permitting premises to be used. The majority were sentenced for class B (61 per cent), while 38 per cent were sentenced for class A, and one per cent for class C.

For class A offences, the most common sentencing outcome in 2018 was a suspended sentence order (39 per cent), followed by immediate custody (33 per cent) and a community order (20 per cent). The ACSL in 2018 was 10 months.

For class B offences, 38 per cent of offenders sentenced in 2018 received a community order, 27 per cent received a suspended sentence order and 15 per cent received a fine. Three per cent of offenders were sentenced to immediate custody in 2018 (fewer than five offenders), and the ACSL in 2017 was 10 months.⁶

Importing or exporting a psychoactive substance (“importation offences”)/supplying, or offering to supply, a psychoactive substance/possession of psychoactive substance with intent to supply (“supply/PWITS”)/producing a psychoactive substance (“production offences”)/possession of a psychoactive substance in a custodial institution

These offences are low volume, with around 110 offenders sentenced overall in 2018. Since these offences came into force in May 2016, fewer than 10 offenders have been sentenced for importation and production offences combined.

The vast majority of offenders in 2018 were sentenced for supply/PWITS (92 per cent), with a further seven per cent sentenced for possession in a custodial institution and two per cent sentenced for production.

For supply/PWITS, 39 per cent of offenders received a suspended sentence order in 2018, 29 per cent were sentenced to immediate custody, and 24 per cent received a community order. The statutory maximum sentence for these offences is 7 years’ custody, and in 2018 the ACSL for supply/PWITS was nine 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 draft 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 draft guideline are therefore subject to a large 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, the data available are limited. The assumptions thus have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the proposed draft guideline, and an assessment of the effects of changes to the structure and wording of the guideline where a previous guideline existed.

The resource impact of the draft guideline is measured in terms of the change in sentencing practice that is expected to occur as a result of it. Any future changes in

⁶ For class B offences, ACSL information has been provided for 2017, due to the very low number of offenders sentenced to immediate custody in 2018.

sentencing practice which are unrelated to the publication of the draft guideline are therefore not included in the estimates.

In developing sentence levels for the different 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 current cases would be categorised across the levels of culpability and harm proposed in the draft guideline, 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 remains difficult to estimate with any precision the impact the guideline may have on prison and probation resources. To support the development of the guideline and mitigate the risk of the guideline having an unintended impact, research interviews are being undertaken with sentencers, which will provide more information on which to base the final resource assessment accompanying the definitive guideline.

Resource impacts

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

Summary

The expected impact of each guideline is provided in detail below. Overall, the guideline aims to improve consistency of sentencing, but not to change average sentencing practice.

For importation offences, supply/PWITS and production/cultivation offences, there have been some changes to the quantities provided in the revised guideline (see section below for further details). These changes mean that it is possible the guideline may have an impact on correctional resources (although it is not possible to quantify what this impact might be).

Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug (“importation offences”), supplying or offering to supply a controlled drug/possession of a controlled drug with intent to supply it to another (“supply/PWITS”), production of a controlled drug/cultivation of cannabis plant (“production/cultivation offences”)

The draft guidelines for these offences are broadly similar to the existing guidelines. A number of changes have, however, been made in relation to the culpability factors listed in the guidelines,⁷ and wording around sentences over 20 years has been moved to a different position within the guidelines.

An analysis of transcripts of Crown Court judges’ sentencing remarks was undertaken to assess whether there might be any potential resource impact related to these changes. Based on this analysis of a sample of cases, these changes in the

⁷ For more details of these changes, please refer to the consultation document, available here: <https://www.sentencingcouncil.org.uk/publications?s&cat=consultations>

revised guideline are not expected to result in an impact on prison and probation resources.

The existing guideline for importation offences contains wording in harm category 4, directing sentencers to either the possession or supply/PWITS guideline. The revised guideline for these offences has replaced this wording with sentence levels, which are broadly similar to the sentence levels in harm category 4 of the supply/PWITS guideline.

There are, however, some differences; some sentence levels are now slightly higher than those in category 4 of the supply/PWITS guideline, some are lower, whilst others remain the same.

It has not been possible to estimate the potential resource impact of this change in the revised importation offences guideline, due to a lack of data available on how many cases fall within each culpability category (within harm category 4) for each type of drug. Given that the sentence levels are broadly similar, and that volumes for this offence are relatively low, it is likely that any resource impact would be minimal.

Ecstasy tablets

The current guideline for importation offences, supply/PWITS, and production/cultivation offences provides numbers of ecstasy tablets based on an average purity of 100mg of MDMA per tablet. Evidence from the Metropolitan Police and National Crime Agency suggests that the average purity has now increased to 150mg per tablet. The indicative numbers of ecstasy tablets in the revised guideline have therefore been adjusted accordingly.⁸

Transcript analysis of Crown Court judges' sentencing remarks showed that on occasion sentencers adjusted the starting point due to the actual quantity of drugs in the case being slightly different to the indicative quantity in the guideline. This is corroborated by the findings from early research undertaken with a small number of Crown Court judges, which also found that sentencers use the indicative quantities and then adjust the starting point according to the quantities in the case. Overall, therefore, it seems likely that changing the quantities of ecstasy tablets given in the guideline may result in an increase in sentences in some cases as, for example, in category 1 harm the indicative quantity has been lowered from 10,000 tablets to 7,000 tablets.

It is likely, however, that in current cases involving tablets with a purity of around 150mg (i.e. higher than that upon which the quantities in the existing guideline were based), sentencers are using the aggravating factor 'High purity' to increase the sentence from the starting point. As the new guideline takes account of the fact that the average purity is now higher, this aggravating factor is less likely to be used, and therefore the net impact of revising these quantities may be small.

⁸ For example, category 1 harm in the current guideline gives an indicative quantity of 10,000 ecstasy tablets (based on an average purity of 100mg per tablet). Given that average purity is now around 150mg per tablet (i.e. it has increased by a factor of 1.5), the revised guideline gives the quantity of 7,000 tablets in category 1 harm, as 10,000 tablets at a purity of 100mg roughly equates to 7,000 tablets at a purity of 150mg.

MDMA

The revised guideline for importation offences, supply/PWITS and production/cultivation offences also includes quantities in grams/kilograms for MDMA (the current guideline does not include this).⁹ Analysis of sentencing transcripts found that in a small proportion of cases, the new MDMA weights given in the guideline might result in different categorisations or adjustments from the new indicative quantity starting points, but it is expected that any impact would be small.

Cannabis plants

In the current production/cultivation guideline, indicative numbers of cannabis plants are given based on the assumption that the average yield of a plant is 40g. Evidence has shown that over time, the average yield of a cannabis plant has increased and is now around 55g. Therefore, similarly to ecstasy tablets, the indicative numbers of cannabis plants indicated in the revised guideline have been adjusted.¹⁰

Analysis of transcripts suggested that in some cases, sentencers adjusted the starting point according to the actual number of plants in the case. It therefore seems likely that, as with ecstasy tablets, changing the number of plants indicated in the guideline may result in an increase in sentences in some cases as, for example, in category 3 harm the indicative quantity has been lowered from 28 plants to 20 plants.

Given the changes to indicative quantities for ecstasy tablets and cannabis plants, along with the additional indicative quantities for MDMA, it is possible that the revised guidelines for these offences may have an impact on correctional resources (although it is not possible to quantify what this impact might be).

Synthetic cannabinoid receptor agonists

Harm categorisation in the revised guidelines for importation offences, supply/PWITS, and production/cultivation offences now also includes descriptive factors for synthetic cannabinoid receptor agonists (SCRAs), also known by the street name 'spice'.¹¹

Analysis of a small number of transcripts for SCRA offences found that information relating to weights or quantities was rarely mentioned. It therefore remains difficult to estimate whether the guideline will result in any changes to sentencing practice for these offences.

The lack of data available means it is not possible to say whether there will be an impact on prison and probation resources for SCRA offences. However, given that there is currently no guideline for these offences, it is likely that sentencing will become more consistent following the introduction of the guideline.

⁹ Methylendioxyamphetamin (MDMA) can be found in powder form, whereas ecstasy is often used to refer to MDMA in tablet or capsule form.

¹⁰ For example, category 4 harm in the current guideline gives an indicative quantity of 9 plants, and in the revised guideline this has been adjusted to 7 plants, as 9 plants with a yield of 40g each roughly equates to 7 plants with a yield of 55g each.

¹¹ Quantities for SCRAs are also included within the permitting premises guideline. Details of this are covered within the 'Permitting premises' section below.

Possession of a controlled drug

The revised possession guideline is very similar to the existing guideline; both the structure of the guideline (where the offence category is determined by the class of drug) and the sentence levels have remained unchanged.

It is therefore not anticipated that this guideline will have an impact on prison and probation resources.

Permitting premises to be used

The revised guideline for permitting premises to be used contains two levels of culpability and two levels of harm (as per the existing guideline). The combination of these two components determines the appropriate offence category, in the form of a two by two sentencing table (for each class of drug). This differs from the existing guideline which contains three offence categories for each class of drug.

As with the importation offences, supply/PWITS, and production/cultivation guidelines, the guideline for permitting premises to be used now also includes descriptive factors for synthetic cannabinoid receptor agonists (SCRAs). As mentioned previously in relation to those guidelines, it is not possible to say whether this will have an impact on resources, however it is likely that sentencing will become more consistent for these offences.

There have, however, been some small changes to the culpability and harm categories in the revised guideline for this offence.¹² Transcripts of judges' sentencing remarks were analysed for a sample of these cases, to assess how sentences might change under the revised guideline. This analysis of a small sample of cases indicated that sentence levels would remain either the same or broadly similar under the revised guideline. It is therefore not anticipated that this guideline will have an impact on prison and probation resources.

Importing or exporting a psychoactive substance (“importation offences”)/supplying, or offering to supply, a psychoactive substance/possession of psychoactive substance with intent to supply (“supply/PWITS”)/producing a psychoactive substance (“production”)/possession of a psychoactive substance in a custodial institution

There is currently no guideline for these offences, which cover psychoactive substances (harmful substances which are not controlled under the Misuse of Drugs Act 1971). These offences are relatively low in volume, with around 110 offenders sentenced in total in 2018.

The draft guidelines for importation and production offences have three levels of culpability and three levels of harm. These offences have a statutory maximum sentence of 7 years' custody. The sentencing table in the importation offences guideline spans from a discharge to 6 years' custody, whereas for production the range is a fine to 6 years' custody.

¹² For more details of these changes, please refer to the consultation document, available here: <https://www.sentencingcouncil.org.uk/publications?s&cat=consultations>

Fewer than 10 offenders have been sentenced in total for importation and production offences since they came into force in 2016. Due to the limited information available it is not possible to say whether the draft guideline for these offences will have an impact on correctional resources. It is anticipated, however, that sentencing will become more consistent following the introduction of the draft guideline, and given the very low number of offenders sentenced for these offences, any impact on resources is likely to be minimal.

The draft guideline for supply/PWITS has three levels of culpability and three levels of harm, with a sentencing range from a fine to 6 years' custody. The statutory maximum sentence for these offences is 7 years' custody.

Transcripts of judges' sentencing remarks for these offences were used to assess how sentences might change under the draft guidelines. The analysis indicated that overall, some sentences would be likely to increase under the draft guidelines. Based on the data available, however, it is not possible to estimate the potential resource impact, as the transcripts analysed include substances which are now controlled under the Misuse of Drugs Act 1971 (such as some variants of 'spice' which are now classified as class B drugs). The transcripts do not therefore provide sufficient evidence upon which to calculate a robust estimate. It is anticipated, however, that sentencing of these offences will become more consistent following the introduction of the guideline.

The draft guideline for possession in a custodial institution has two offence categories (the appropriate category is determined by assessing a number of culpability factors). The sentencing table ranges from a community order to 2 years' custody (the statutory maximum sentence for this offence).

Due to the low number of offenders sentenced (around 10 offenders were sentenced for this offence in 2018) it has not been possible to estimate the resource impact of this guideline. Given the low volumes, however, it is expected that any resource impact would be minimal, and as with the other guidelines for psychoactive substances, it is likely that sentencing will become more consistent once the guideline is in force.

Risks

In attempting to estimate the likely resource impacts of this guideline, there are two main risks to consider:

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 guideline comes into effect.

This risk is mitigated by information that is gathered by the Council as part of the consultation phase. This includes research interviews which are being undertaken with sentencers, where case scenarios will be used to test whether the guideline has

the intended effect. However, there are limitations on the number of scenarios which can be explored, so the risk cannot be fully eliminated. The Council has also included a question in the consultation document, asking for consultees' views on the potential impact of the proposals. This information will provide further information on which to base the final resource assessment.

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

If sentencers do not interpret the guideline 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 a new guideline to try to ensure that sentencers interpret it as intended. Sentencing ranges have been agreed on by considering sentencing ranges in the existing *Drug Offences* guideline, in conjunction with Council members' experience of sentencing. Sentencing data have also been considered, and transcripts of Crown Court sentencing remarks for drugs cases have been studied to gain a greater understanding of current sentencing practice.

Research carried out with sentencers should also enable issues with implementation to be identified and addressed prior to the publication of the definitive guideline.

Consultees can also feed back their views of the likely effect of the guideline, 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 to ensure any divergence from its aims is identified as quickly as possible.