

Assessing the impact and implementation of the Sentencing Council's Drug Offences Definitive Guideline

Summary

Analysis of trend data, disposals data and survey data was used to assess the impact of the Sentencing Council's Drug Offences Definitive Guideline. This was the first guideline on these offences which covered both the Crown Court and the magistrates' court, coming into force in February 2012. The analysis focused on the effect of the guideline on sentence outcomes.

Looking across all the drug offences covered by the guideline,¹ in the 12 months after the guideline came into force there was a small but statistically significant decrease in sentencing severity compared to the 12 months before, and there was a small decrease in the average custodial sentence length (ACSL) between these two periods, from 2.5 to 2.4 years.²

This high-level analysis masks different trends within different offences and within different classes of drug. The five highest volume offences will have the greatest influence on the overall picture and, for these offences, it was found that:

- For **possession class A**, sentence severity fell slightly at the point of guideline implementation, then flattened thereafter. Survey data from the magistrates' court on possession class A and class B offences suggested that in their decision-making, sentencers place emphasis on the amount of the drug in the offender's possession, a factor which is not included in the guideline.
- In the case of **possession class B**, which far outweighs all other drug offences in terms of volume of offenders sentenced, sentencing severity did not change after guideline implementation. However, a pre-existing downward trend which began at around the same time as the re-classification of cannabis from class C to class B in 2009 continued.³
- For **production class B/cultivation of cannabis**, a previously upward trend in sentence severity flattened with the advent of the guideline.

¹ The Drug Offences Definitive Guideline covers the following offences: Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug; Supplying or offering to supply a controlled drug; Possession of a controlled drug with intent to supply it to another; Production of a controlled drug; Permitting premises to be used; Possession of a controlled drug. For further details, see: <https://www.sentencingcouncil.org.uk/publications/?cat=definitive-guideline&s&topic=drug-offences>

² All the figures for average custodial sentence lengths quoted in this report are after any reduction for guilty plea.

³ Cannabis was re-classified from class C to class B in January 2009.

- In contrast, for the two ‘supply’ offences (**supply and possession with intent to supply for both class A and class B**) sentence severity gradually increased following implementation. Analysis of disposals and survey data suggests that this increase may be largely due to factors which are unrelated to the guideline: an increase in the number of suspended sentences being handed down post-LASPO⁴ and, in common with importation offences, an actual increase in the seriousness of offences coming before the courts.

The other drug offences covered by the guideline are lower volume: fewer than 1,000 cases annually, where it is the principal offence sentenced. Three of these lower volume offences were analysed, and it was found that:

- For the two ‘importation’ offences analysed (**fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug class A and class B**) the guideline led to an immediate decrease in sentencing severity, but this was followed by an upward trend thereafter. The fall at the point of implementation was the largest change across all the offences analysed, and was most likely due to a lowering of sentences for so called ‘drug mules’,⁵ as intended by the Council. Analysis of survey data suggests that the rising trend thereafter may be due to a coincidental rise in the seriousness of offences coming before the courts in 2013 and 2014, and an increase in the purity or yield of drugs involved in these offences.
- For **permitting premises to be used (class B)** the guideline resulted in a decrease in sentencing severity, and a flattening of a previously upward trend thereafter.

Overall, across drug offences, although there were changes in sentencing severity at the point of implementation and some changes in trend thereafter, these were predominantly small in magnitude, equivalent to small shifts in the types of disposal or small decreases in sentence length. The only exception to this was the sizeable decrease in sentence severity for importation offences, as intended by the Council. It is therefore concluded that the guideline did not have an unanticipated effect beyond the small shifts that might be anticipated following the introduction of a guideline where there was no comprehensive guideline previously. However, drug offending is likely to change over time as, for example, new drugs emerge and purity or strength increases and indeed there are indications in this research that some drug offending may be becoming more serious. It is therefore recommended that research is undertaken to examine the extent to which guideline content remains relevant and appropriate to current offending.

⁴ The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 took effect in December 2012. It increased the maximum length of a sentence which could be suspended from one to two years, and also allowed discretion as to whether or not to impose community requirements on a suspended sentence order (previously there had to be at least one requirement). These changes are likely to have contributed to an increase in suspended sentence orders.

⁵ This term describes a person who carries drugs across an international border (in this case, across the border into or out of the UK) for someone else.

Introduction

The Sentencing Council guideline for drug offences⁶ was one of the earliest guidelines the Council produced, coming into force in February 2012 and spanning both the Crown and magistrates' courts. Prior to this, there was no sentencing guideline for drug offences in the Crown Court, although there were guidelines for various drug offences in the Magistrates' Court Sentencing Guidelines in force at that time,⁷ which was produced by the Council's predecessor body, the Sentencing Guidelines Council (SGC).

The drug offences guideline aimed to increase the consistency of the sentencing process whilst leaving aggregate sentencing, for the most part, unchanged. The main exception to this was sentencing for so called 'drug mules', which the Council aimed to bring down, discussed in more detail below. Sentencing Council guidelines take a two-stage approach for determining the seriousness of the offence on the basis of harm and culpability. Across 'supply', 'importation' and 'production' offences culpability at step one is determined by the role of the offender in the offence, and harm by the quantity of drug involved. The sentencing starting points at step two are further determined by the class of drug. However, for 'possession' offences the offence category is determined solely on the basis of the class of drug, since the Council agreed with earlier consultation responses suggesting that for these offences specifically, quantity is an arbitrary measure of seriousness which could potentially lead to perverse outcomes and disproportionality in sentencing.⁸ This is because quantity in possession at time of arrest is dependent on a number of factors unrelated to culpability, such as the way in which a drug user accesses the market (e.g. buying in bulk to limit contact with the criminal market) and their level of physical tolerance to the drug (e.g. long term users will have a higher tolerance and so are likely to buy more of it).⁹

One of the Sentencing Council's statutory duties under the Coroners and Justice Act 2009 is to monitor the operation and effect of its sentencing guidelines and to draw conclusions from this information.¹⁰ Research and analysis was therefore undertaken to assess the impact of the guideline on sentencing outcomes and to explore whether there were any problems or issues with the guideline's implementation. It should be noted that this is a high-level analysis which focuses on offenders as an aggregate group, rather than looking at separate demographic subgroups (because the guideline did not aim to change sentencing practice for any particular demographic group).

This paper describes the research and analysis undertaken, the findings from this, and how these findings might be interpreted.

⁶ See: <https://www.sentencingcouncil.org.uk/publications/?cat=definitive-guideline&s&topic=drug-offences>

⁷ Magistrates' court sentencing guidelines covered possession of classes A, B and C; class A produce, supply, possess with intent to supply; supply, possess with intent to supply classes B and C; and cultivation of cannabis.

⁸ See: <https://www.sentencingcouncil.org.uk/publications/item/drug-offences-response-to-consultation/>

⁹ In particular, there was a concern that determining offence category for possession for personal use by quantity could result in people with more chronic and entrenched drug problems receiving the most severe sentences for this offence.

¹⁰ See Coroners and Justice Act 2009, Section 128.

Approach

As with previous similar work on assault and burglary,¹¹ in conducting an assessment of the impact of the guideline, a distinction is drawn between impact and implementation issues. The Council's resource assessments are concerned with anticipating any impact on sentencing practice that is estimated to occur as a result of the guideline, over and above any changes caused by unrelated or coincidental issues (e.g. changes in the volume and nature of offences coming before the courts). Because of this, the results of our analytic work are framed in terms of whether or not the anticipated changes happened, and/or whether there were any unanticipated changes. Should unanticipated shifts occur, other data are then explored to try and explain the changes, giving consideration to whether there may be any implementation issues with a guideline (e.g. is a particular factor in the guideline exerting a disproportionate effect on sentencing?).

In the case of drug offences, the resource assessment¹² anticipated only two changes: the first of these was an intentional lowering of sentencing severity for importation offences on the basis of feedback from judges that those lowest in the distribution chain, so called 'drug mules', were usually low culpability offenders for whom lesser sentences than the courts were sometimes giving at that time were thought to be appropriate. In support of this, research undertaken to support guideline development indicated that drug mules were often involved through coercion or exploitation of their poverty.¹³ The second change was an expected increase in sentence severity for some cases of production/cultivation class B drugs. The rise was expected to result from an intentional increase in the proportionality of sentencing in the Crown and magistrates' courts for these offences, because data revealed possible inconsistencies in the way in which cases were treated in the magistrates' courts and the Crown Court at that time. The results of the analysis are therefore framed in terms of whether or not these changes in these specific offences occurred, and/or whether there were unanticipated shifts in sentencing at the point of implementation or afterwards across all drug offences.

A key issue here is that we can never be fully confident of what were the causal factors explaining unanticipated changes because sentencing does not and cannot take place within a controlled experimental setting, where we can isolate the effect of the guideline. Rather, changes may be due to coincidental factors impacting at around the time of guideline implementation, or may be due to a combination of guideline implementation and other external changes. Examples of external changes affecting drug sentencing over the period of interest, 2006-2015, were: the re-classification of cannabis from a class C to class B drug in 2009¹⁴; an increase in the volume of suspended sentences handed down post legislative change in 2012¹⁵; and the emergence of new drugs (like New Psychoactive Substances), which are subsequently banned under legislation.¹⁶ For this reason, in this analysis we only

¹¹ See: <https://www.sentencingcouncil.org.uk/publications/?cat=guideline-assessment&s&topic=>

¹² See: <https://www.sentencingcouncil.org.uk/publications/?topic=drug-offences&s&cat=resource-assessment>

¹³ See: https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_mules_bulletin.pdf

¹⁴ The re-classification of cannabis from class C to B took effect in January 2009.

¹⁵ LASPO (see footnote 3).

¹⁶ New Psychoactive Substances are new drugs that have similar effects to drugs that are internationally controlled. Over 350 such drugs were controlled by the UK Government between 2010 and 2014. See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368583/NPSexpertReviewPanelReport.pdf

venture hypotheses as to why unintended changes have occurred, and make judgements about the likelihood of which explanation is most plausible. Unfortunately, we cannot be more conclusive.

Methodology

Analysis of trend data and interrupted time series analysis

This analysis covers both data on sentencing trends from 2006-2015 (i.e. both pre- and post-guideline implementation), and survey data compiled by judges and magistrates. In the first stage of analysis, data from the Ministry of Justice's Court Proceedings Database (CPD) was used to plot trends in sentencing severity and trends in the average custodial sentence length over this time period, for drug offences as a group and separately. Where volumes were high enough for findings to be robust, trends within offences were examined by class of drug (A, B or C). Changes over time in the types of disposals being imposed for the various drug offences were also examined.

Examination of such overall trends yields only limited information about what happened as a result of the guideline, as opposed to other changes happening around that time or normal fluctuations in sentencing due to shifts in case volume and mix coming before courts. To help isolate the guideline's effect, interrupted time series analysis (ITS analysis)¹⁷ was therefore carried out to establish (a) whether there was a statistically significant change in sentencing severity in the month following guideline implementation (and therefore highly likely to be due to the guideline, in the absence of any other nationwide change in that month); and (b) whether there was a statistically significant change in trend thereafter, which may also indicate that the guideline had a particular longer-term effect. Again, these analyses were carried out for all the drug offences and classes where the volumes permitted robust analysis, and the analyses focused on the Crown or the magistrates' court or both, depending on whether each offence was heard primarily in the magistrates' court, the Crown Court, or was evenly spread across both.¹⁸

Plotting trends in severity and time series modelling both require sentencing data to be presented in comparable units, rather than as a variety of different disposals and sentence lengths. Sentences were therefore converted into a continuous sentencing severity scale with scores ranging from 0 to 100, representing the full range of sentencing outcomes from discharge (at 0) to 20 years' custody (at 100). Whilst this facilitates our analysis and has been used in the assessment of impact of other guidelines,¹⁹ it should not be interpreted as an absolute objective measure of sentencing severity.

Analysis of survey data

Analysis of survey data was also carried out to explore trends and patterns in sentencing. In particular, where interrupted time series analysis suggested that the

¹⁷ Time series analysis looks at whether the observed trend (e.g. in sentencing) has deviated from the trend that would be expected, based on historical data. There are different ways of conducting time series analysis: in this case, the method used was interrupted time series analysis.

¹⁸ Rand Europe carried out the interrupted time series analysis and analysis of all survey data. Rand Europe also administered the survey in the magistrates' courts.

¹⁹ See: <https://www.sentencingcouncil.org.uk/publications/?s&cat=guideline-assessment>

guideline may have had an unintended effect, the possible reasons for this were examined using survey data, provided by magistrates and judges. Two data sources were used for this: a bespoke survey within the magistrates' courts conducted at one point in the time after the guideline had come into effect; and an ongoing 'census' survey of the Crown Courts (the Crown Court Sentencing Survey) which covered the period pre and post-guideline implementation, 2011 to 2014 inclusive. Both survey instruments were paper-based, and were required to be completed by sentencers at or immediately after the point of sentencing. Both surveys asked sentencers to give detailed information on the offence and sentence imposed: type of drug; level of harm and culpability; presence of harm, culpability, aggravating and mitigating factors; information on sentence outcome; and reduction for guilty plea. This data is not available in Ministry of Justice datasets.

The survey in the magistrates' courts covered possession of a controlled drug (class A and B) and production of a controlled drug (class B only) or cultivation of cannabis plant, where these offences were the principal offence only.²⁰ These offences were chosen because the volumes seen in the magistrates' court were high enough to permit robust analysis. The survey was conducted in a sample of 81 magistrates' courts, chosen on the basis of offence volumes. It ran over an eleven-week period, from 16th November 2015 to 29th January 2016, with a break over Christmas between 23rd December 2015 and 4th January 2016. A total of 1,497 forms were returned from the courts (a response rate of 35 per cent), of which 147 cases were unusable for various reasons, yielding a total of 1,350 valid cases. A comparison of the survey data with data from the Court Proceedings Database indicates that the survey data provided a good representation of the overall picture of sentencing in magistrates' courts during this period.²¹

The Crown Court Sentencing Survey covered all drug offences, also on a principal offence only basis, although for some offences volumes of returns were too low to analyse. The survey ran across all Crown Courts from October 2010 to the end of March 2015 and achieved response rates of 60 and 64 per cent in 2013 and 2014 respectively. In 2014, the last full year of data collection, 10,200 surveys on drug offences were returned. The description of the findings below draws on descriptive statistics and multivariate analysis of the survey data to proffer explanations for the patterns observed.

Content analysis of sentencing remarks

A content analysis of Crown Court judges' sentencing remarks was carried out for a small sample of importation class A offences where the offender was identified as a drug mule (4 pre-guideline and 11 post-guideline).²² The aim of this analysis was to gain an insight into how judges were sentencing this type of case, both before and

²⁰ This is in line with CPD data, which covers principal offence only.

²¹ A chi-square test was undertaken for each offence covered by the survey to compare the proportion of sentence outcomes in the survey data with data from the Court Proceedings Database. This showed that there is no statistically significant difference (at the five per cent level) in sentence outcomes between the survey data and the CPD.

²² We were unable to identify drug mules in the administrative data from the courts which was used in the sample selection for this analysis (a cut of data from the Court Proceedings Database). We therefore selected 41 cases (12 pre-guideline, 29 post) which we thought *may* be for drug mules, based on the final sentence and matched information from the CCSS. Out of this group, we could only definitively identify 15 cases (4 pre-guideline, 11 post) as involving drug mules, so this analysis was based on this very limited sample.

after the guideline came into force. As such, findings are tentative, merely suggesting reasons for patterns observed in the quantitative data.

All of the analysis in this paper includes adult offenders only (those aged 18 or over at the time of conviction), as the Drug Offences Guideline is not applicable to children and young people.

Overall findings

We would expect changes in sentencing that may be directly attributable to the guideline to become manifest in the year following guideline implementation. Looking across all drug offences, in the 12 months after the guideline came into force there was a small but statistically significant decrease in sentencing severity compared to the 12 months before, from a mean severity score of 15.8 to 15.3.²³ Similarly, there was a small decrease in the average custodial sentence length between these two periods, from 2.5 to 2.4 years.²⁴

The proportions of offenders receiving different types of disposal changed slightly: discharges increased by 3 percentage points, fines and community orders decreased by 2 and 1 percentage points respectively, and immediate custodial sentences and suspended sentences stayed broadly the same (showing a difference of less than 1 percentage point in each case).

This high-level analysis masks different trends within different offences and within different classes of drug. The five highest volume offences (possession class A; possession class B; production class B; supply and possession with intent to supply class A; and supply and possession with intent to supply class B) will have the greatest influence on the overall picture and it was found that:

- For **possession class A**, sentence severity fell slightly following guideline implementation, then flattened thereafter.
- In the case of **possession class B**, which far outweighs all other drug offences in terms of volume of offenders sentenced, sentencing severity did not change after guideline implementation. However, a pre-existing downward trend which began with the re-classification of cannabis from class C to class B in 2009 continued.²⁵
- For **production class B/cultivation of cannabis**, a previously upward trend in sentence severity flattened with the advent of the guideline.
- For the two 'supply' offences (**supply and possession with intent to supply for both class A and class B**) sentence severity gradually increased following guideline implementation.

²³ The severity score is based on a continuous scale with scores from 0 to 100, representing discharge at 0 and 20 years' custody at 100. See methodology section for more details.

²⁴ Between 2011 and 2013 there was an increase of six percentage points in the proportion of offenders pleading guilty for drug offences. However, at the same time, the reduction in sentence given for guilty pleas lessened: the proportion of offenders receiving a reduction of a third or more decreased by eight percentage points, whilst the proportion receiving a lower reduction of between 21-32 per cent increased by the same amount. It is likely that the increase in the proportion of offenders pleading guilty was to some extent balanced by the countervailing reduction in credit given for plea, therefore we do not expect plea behaviour to have had a notable confounding effect on the trends described here.

²⁵ Cannabis was re-classified from class C to class B in January 2009.

For all the other drug offences in the guideline, the number of offenders sentenced as their principal offence is less than 1,000, annually. Three of these lower volume offences were large enough in number to permit reliable analysis and were considered important to analyse because they were a different type of offence (rather than the same type of offence but different class (e.g. possession class C)):

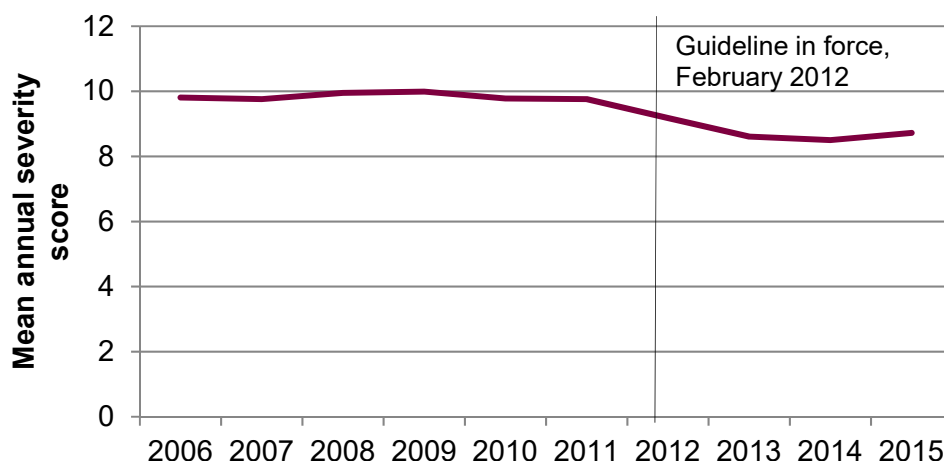
- For the two importation offences analysed (**Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug class A and class B**) the guideline led to an immediate decrease in sentencing severity, but there was an upward trend thereafter.
- For **Permitting Premises to be used (class B)** the guideline led to a decrease in sentencing severity, and a flattening of a previously upward trend thereafter.

The following sections examine the trends in sentencing for the eight offences discussed above in greater detail.

1. Possession class A

The volume of possession class A offences has fallen in recent years, from a high of 14,100 offenders sentenced in 2008 to 8,100 in 2015.²⁶ For this offence, overall sentence severity fell following guideline implementation, and then flattened thereafter (see figure 1).

Figure 1: Sentencing severity for possession class A, across Crown and magistrates' courts, 2006 to 2015²⁷



The resource assessment predicted that the guideline would have no effect on sentencing behaviour and this was examined using ITS analysis on the magistrates' court data (in 2015, the vast majority, 92%, of offenders who were sentenced for possession class A as their principal offence were sentenced in the magistrates' court, hence the ITS analysis focused on the lower court). This suggested that the implementation of the guideline had a small but statistically significant effect in the

²⁶ Where offence volumes are quoted, these are always for the principal offence only.

²⁷ The mean or average severity score denotes the average point at which severity sat during that year. In the ITS graphs, this is plotted on a month by month basis, with each data point representing one month's national data.

direction of decreasing sentence severity in the magistrates' court²⁸ although looking at the trend data, there was no appreciable change in the Crown Court. In particular, at the point of guideline implementation there was an immediate drop in the use of community orders and a concurrent increase in the use of fines (fines being a lower level disposal on the severity scale). To contextualise this reduction, a decrease of around one or two points on the scale at the lower end equates to less than the difference between two bands of fine, and the drop, in this particular case, was less than half a point.²⁹

The survey conducted in the magistrates' courts in 2015/16 covered only one time-period, rather than two (so only the 'post' guideline implementation period) and it is not possible for such a one-off survey to yield robust insights into why sentencing practice may have gradually become slightly more lenient since the introduction of the guideline. However, there were indications from the survey that 'possession' offences often involve mitigating circumstances and/or are viewed quite leniently by the lower court: firstly, mitigating factors were cited in 55 per cent of possession class A offences surveyed, whereas aggravating factors were cited in only 28 per cent of cases (whereas for other offences there is often an equal distribution, or aggravating factors outweigh mitigating in prevalence).³⁰ Secondly, 18 per cent of the sentences given for possession class A were discharges, which is below the sentencing range for this offence as set out in the guideline (although it should be noted that this is not a departure from the guideline: mitigating factors and/or guilty plea can take the final sentence out of range, and indeed 18 per cent of respondents indicated that they had 'dropped down a threshold' because of a guilty plea for a possession class A offence). Lastly, respondents to the survey were asked to write the 'single most important factor' in their sentence in a text box on the data collection form.³¹ Across possession class A and B, 'small quantity' of drug was the most common factor, cited in 22 per cent of cases, which is a very high proportion for an unprompted response. This is a notable finding because the amount of drug in the offender's possession is not a factor in the possession guideline (although it was the key factor indicating seriousness in the previous, SGC guideline). This result suggests sentencers have continued to take small quantity into consideration, perhaps alongside some of the other ten or so mitigating factors in the current guideline,³² bringing overall sentencing down.

2. Possession class B

Volumes of possession class B offences increased enormously following the reclassification of cannabis from class C to class B in 2009, from 3,200 offenders sentenced in 2008, to 17,300 in 2009 and 24,500 in 2010.³³ Volumes remained fairly

²⁸ A statistically significant change in this context means that it is unlikely to have happened by chance and that we are 95% certain the change is due to something that happened at this point. Sometimes, relatively small changes are statistically significant (i.e. unlikely to have occurred by chance) but this does not mean the change is outside the parameters we would expect for normal fluctuations in sentencing.

²⁹ There are six bands of fine, from A (the highest band) to F (the lowest).

³⁰ See <https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf>

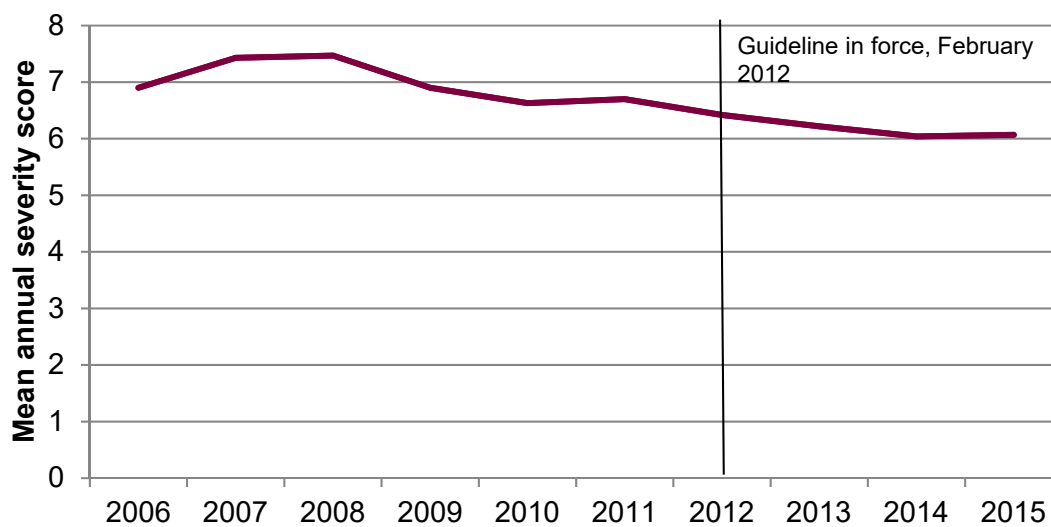
³¹ The question read, 'Taking all things into consideration, what would you say was the single most important factor affecting your sentence?'

³² No specific mitigating factors were included in the SGC 'possession' guideline, although sentencers were invited to consider remorse and features like admissions at police interview when sentencing any offence.

³³ Due to a data issue in the CPD, the figures shown in this section for possession class B offences do not include ketamine (which was reclassified from class C to class B in June 2014).

steady thereafter, although 2015 saw a fall in cases to 18,700. Possession class B is the most prevalent drug offence, comprising more than double the number sentenced for the next most prevalent offence, which is possession class A (at 8,100 offenders sentenced in 2015). As shown in figure 2, sentencing severity fell following the reclassification of cannabis, perhaps because a drug that was previously categorised more leniently then came to make up the bulk of the possession class B caseload (at the time of guideline implementation, 85 per cent of all offenders sentenced for possession class B offences were sentenced for possessing cannabis).³⁴ Sentencing severity continued to fall thereafter, stabilising in 2014-15.

Figure 2: Sentencing severity for possession class B, across Crown and magistrates' courts, 2006 to 2015



The resource assessment predicted that there would be no change in sentencing following implementation of the guideline. The ITS analysis for possession class B supported this prediction: beyond the long term trend of decreasing sentence severity following the reclassification of cannabis, there was no statistically significant change in sentence severity in the magistrates' courts at the point of implementation of the guideline and no change in trend thereafter, indicating that the guideline had no effect (in 2015, 95 per cent of offenders sentenced for this as their principal offence were sentenced in the magistrates' court, hence the ITS analysis only covers the magistrates' court).

3. Production class B and cultivation of cannabis

As per possession class B offences, offence volumes for production class B increased markedly following the re-classification of cannabis in 2009, from 470

³⁴ Source: Court Proceedings Database, 2012

offenders sentenced in 2008 to a high of around 6,300 in 2012. In 2015, 4,600 offenders were sentenced for this offence.³⁵

As shown in figure 3, overall sentencing severity appeared to stabilise following the introduction of the guideline. This pattern can be seen in the ITS analysis of sentencing in the magistrates' courts, which showed a statistically significant fall of about two points in offence severity in the month following implementation and a level trend thereafter (see figure 4). This trend was mirrored in the Crown Court.

Figure 3: Sentencing severity for production class B and cultivation of cannabis, across Crown and magistrates' courts, 2006 to 2015

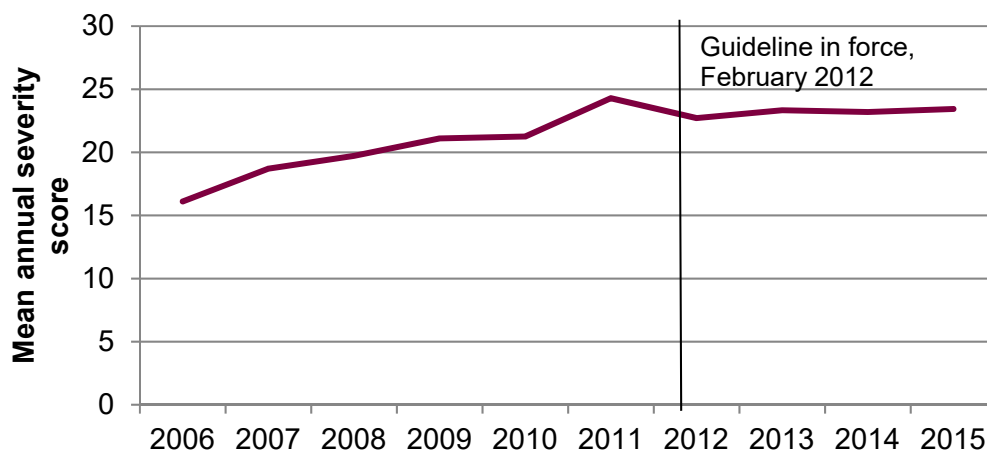
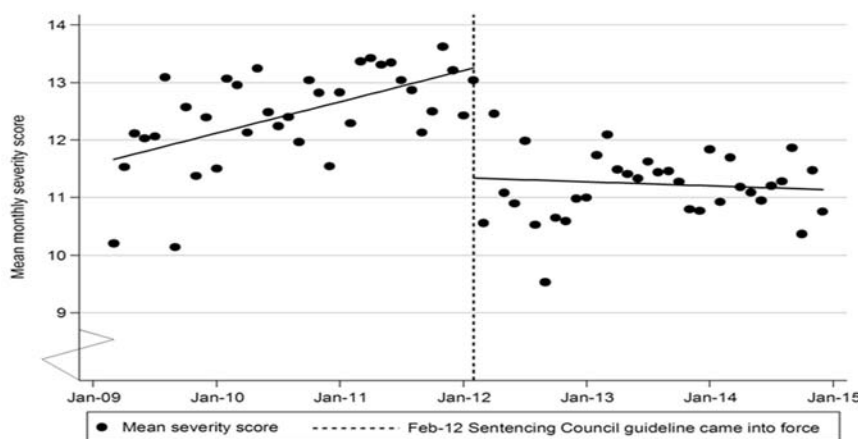


Figure 4: Time series graph showing mean monthly severity score for offenders sentenced for production class B and cultivation of cannabis in the magistrates' court, 2009 to 2015³⁶



An aim of the guideline for this offence was to increase the proportionality of the sentences given in the magistrates' and Crown courts, and an upward shift in severity was predicted for some sentences. However, as the ITS analysis shows, this upward shift did not appear to happen, rather sentencing fell slightly (see the fall

³⁵ Due to a data issue in the CPD, the figures shown in this section for production class B offences do not include ketamine (which was reclassified from class C to class B in June 2014).

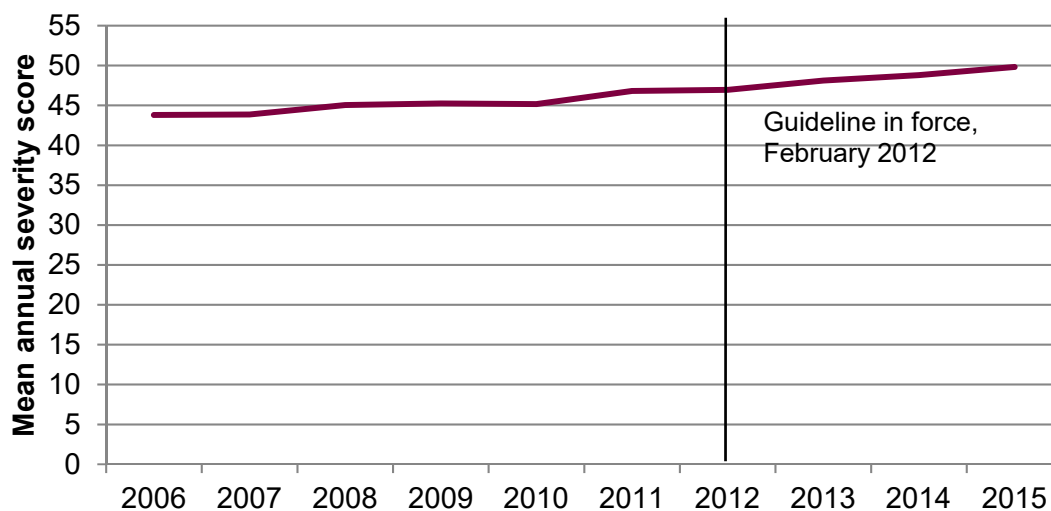
³⁶ Excludes ketamine, cannabinoid receptor agonists and cathinone derivatives.

in the lines of best fit between the pre-guideline period and post-guideline period in figure 4). Specifically, it was estimated that the proportion of custodial sentences could rise and the proportion of fines could fall; however, this estimation was based on the assumption that 60 per cent of cases would fall into harm categories 3 and 4, whereas if 70 per cent of cases fell into these categories, there would be no change in sentencing severity and no change in prison places needed. The two surveys³⁷ found that 95 per cent and 70 per cent of the sampled cases in the magistrates' and Crown Courts respectively were categorised as harm level 3 or 4. The evidence is not watertight because the magistrates' court and Crown Court survey samples are from two different time periods, but since we have no reason to believe that categorisations fluctuate widely, we might conclude that it is *likely* that more than 70 per cent of cases are falling into harm categories 3 and 4 in the guideline, so the impact of the guideline has been either resource neutral, or has resulted in a saving of resources. Because a higher proportion than expected fell into these two categories, sentence severity unexpectedly decreased at the point of implementation, a trend that flattened out thereafter.

4. Supply and possession with intent to supply class A

The volume of 'supply' class A offences declined steadily from 2008 to 2012, then increased steadily after that, standing at around 6,000 in 2015. Sentencing severity did not alter immediately after the introduction of the guideline, but increased thereafter (see figure 5). This is shown more clearly in the ITS analysis, which indicated that there was no significant change at the point of guideline implementation but there was a statistically significant change in the trend thereafter, as shown in the steeper upward slope of the post-implementation line in figure 6.³⁸

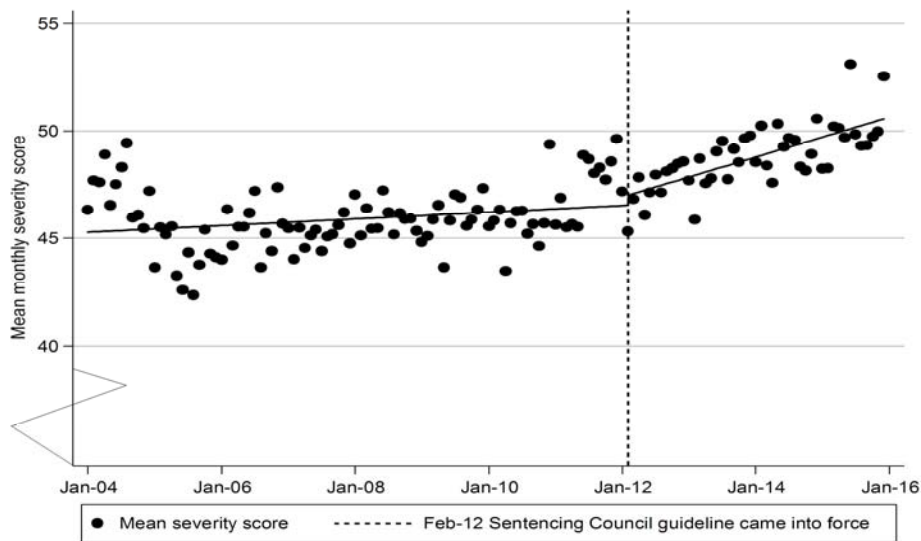
Figure 5: Sentencing severity for supply and possession with intent to supply class A, across Crown and magistrates' courts, 2006 to 2015



³⁷ The survey conducted in the magistrates' courts in November 2015 - January 2016 inclusive, and the CCSS data is for 2013 and 2014 combined. The proportion of cases in harm categories 3 and 4 in the CCSS was 69 per cent in 2013 and 72 per cent in 2014, averaging out at 70 per cent across the two years.

³⁸ In 2015, 99 per cent of offenders sentenced for this as their principal offence were sentenced in the Crown Court.

Figure 6: Time series graph showing mean monthly severity score for offenders sentenced for supply and possession with intent to supply class A in the Crown Court, 2004 to 2016



A potential reason for the change in trend after guideline implementation might be the coincidental changes to suspended sentence orders that occurred with the implementation of LASPO in December 2012. This allowed sentences of up to two years to be suspended, and also allowed discretion as to whether or not to impose community requirements on a suspended sentence order (previously there had to be at least one requirement). Following the introduction of this legislation there was an increase in the use of this disposal across the criminal justice system. We might expect 'supply' offences to be affected by this change because the sentencing range at the lowest level encompasses sentences low enough to be suspended and includes community orders. Indeed, following LASPO, the proportion of offenders receiving a suspended sentence order for this offence rose from 12 per cent in 2012, to 17 per cent in 2013 and stood at 19 per cent in both 2014 and 2015. At the same time, there was a parallel decrease in the proportion of community orders handed down, so the shift from community orders to suspended sentence orders (a more severe disposal than a community order on the severity scale) may account for at least some of the increase in sentence severity since 2012. However, if the LASPO changes wholly explained the change in trend, we would expect average custodial sentence lengths (which cover immediate custodial sentences, only) to stay constant, and this was not the case: ACSL dipped from 3.4 years in 2011 to 3.3 years in 2012 and then rose steadily thereafter, standing at 3.9 years in 2015. We can therefore conclude that either the guideline increased sentencing severity in a way which was unanticipated (the resource assessment predicting no effect for this offence) or the seriousness of offences coming before the courts increased, coincidentally.

Our analysis of CCSS data suggests that there was *both* an unintended effect of the guideline on sentencing practice *and* an increase in the severity of class A offences coming before the courts. The CCSS survey data gives a picture of Crown Court judges' sentencing practice both before there was a sentencing guideline for drug offences in the Crown Court i.e. in 2011, and afterwards, in 2013 and 2014.

Regression analysis of the 2011 data, found that the odds (or likelihood) of receiving a more severe sentence for cocaine or heroin (both class A offences) compared to cannabis (class B) were more than six times higher and nearly four times higher, respectively. This is as expected, given the relative seriousness of class A drugs compared to class B. However, regression analysis of the 2013 survey data showed a marked shift: these odds rose to 11.5 times higher for cocaine, and nearly 13 times higher for heroin, again compared to cannabis in each case. Because the guideline drew a sharp distinction between class A and class B cases for the first time,³⁹ with different sentencing ranges in each case, it seems likely that from the point of implementation the guideline encouraged a divergence between the sentencing of class A and B cases, with class A cases being viewed increasingly more seriously by judges.

Not only this, but CCSS data for all 'supply' offences from subsequent years *after* the guideline came into force (i.e. 2013 and 2014) suggests that in 2014 the courts saw a higher proportion of medium culpability (or 'significant role') cases and a correspondingly lower proportion of low culpability (or 'lesser role') cases than in 2013, with 'lesser role' cases falling from 31 per cent to 26 per cent and 'significant role' cases increasing from 67 per cent to 72 per cent across the two years. This shift may also help to account for the continued rise in ACSL and sentencing severity in the two years after the guideline was implemented.⁴⁰ Since we have no reason to expect that sentencers should start to classify more offenders at higher culpability levels spontaneously over time in the years following guideline implementation, the hypothesis that the increase in sentence severity has been due to the increasing seriousness of offences, combined with the guideline's bifurcation of class A and B cases, seem to be the most plausible explanations for the change in trend.

5. Supply and possession with intent to supply class B

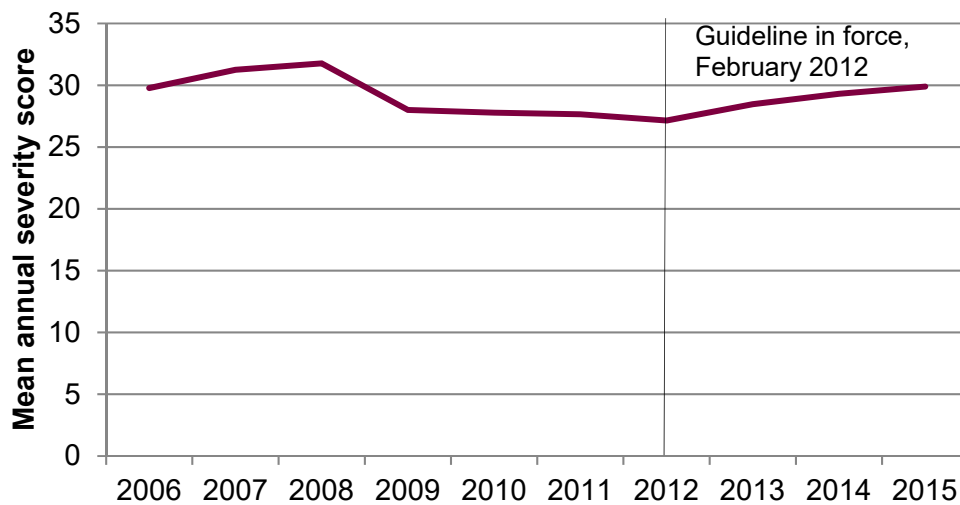
As with all class B offences, volumes of 'supply' class B offences leapt dramatically between 2009 and 2010, following the re-classification of cannabis, from 1,800 offenders sentenced in 2009 to 4,000 in 2010. Volumes gradually increased thereafter, standing at 4,600 offences in 2015.⁴¹

³⁹ Almost all of these cases are sentenced in the Crown Court and there were previously no guidelines for drug offences in the Crown Court, so the seriousness of a class A offence compared to a class B offence was a judgement made by the judges, based on the statutory maxima and other factors, rather than being set out clearly in terms of differing sentencing ranges, as is the case in the guideline.

⁴⁰ In the guideline, where the offence is selling directly to users ('street dealing') the offender should be placed in harm category 3, rather than categorised according to drug quantity. The vast majority of offenders sentenced for this offence were placed in harm category 3 in both 2013 and 2014 (62 per cent in each case), so we do not expect changes in drug quantities or the proportion of offenders who were street dealers to have contributed to the rise in sentencing severity.

⁴¹ Due to a data issue in the CPD, the figures shown in this section for supply class B offences do not include ketamine (which was reclassified from class C to class B in June 2014).

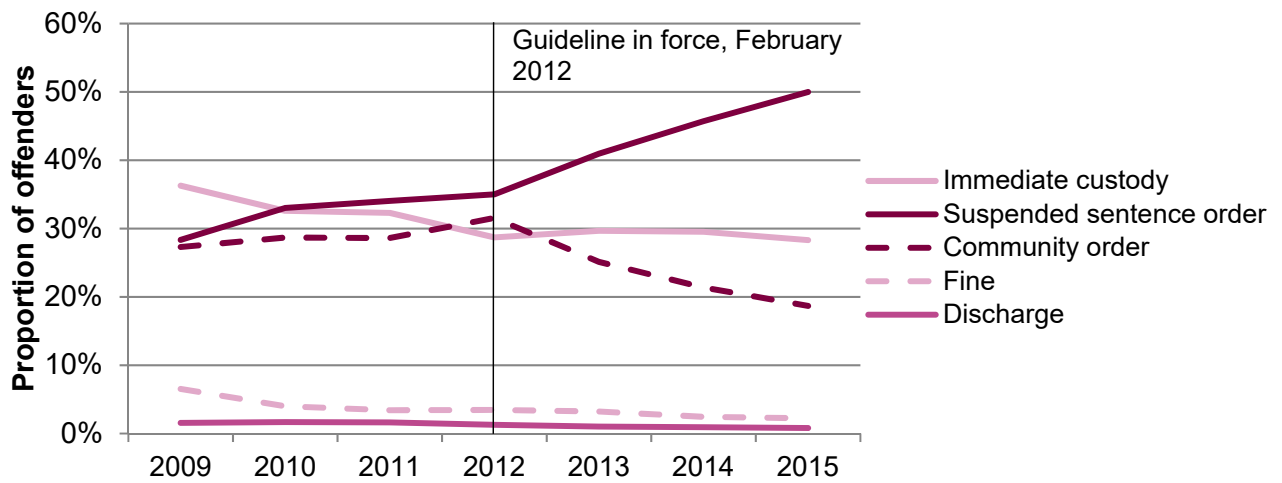
Figure 7: Sentencing severity for supply and possession with intent to supply class B, across Crown and magistrates' courts, 2006 to 2015



As shown in figure 7, sentence severity dipped slightly following the reclassification of cannabis (as per possession class B, see section 2) then increased following guideline implementation. ITS analysis for the Crown Court showed a statistically significant fall of three points in sentence severity at the point of implementation, and a slight rising trend thereafter (although the change in trend was not statistically significant).⁴² The fall in sentencing severity for class B offences at the point of guideline implementation is consistent with the hypothesis outlined in the previous section on class A 'supply' offences: by separating out class A and class B offences for the first time, the guideline encouraged a divergence in sentencing, with class B offences being viewed a little more leniently than had previously been the case. We can therefore conclude that the guideline had a small but unintended effect of decreasing sentence severity (given that the resource assessment predicted no change), with the slight rise in trend thereafter being probably attributable to the coincidental LASPO-related change in disposals (see figure 8, which shows a large rise in suspended sentence orders and decrease in community orders after 2012), and/or changing levels of offence seriousness, as per class A.

⁴² In 2015, 86 per cent of offenders sentenced for this as their principal offence were sentenced in the Crown Court.

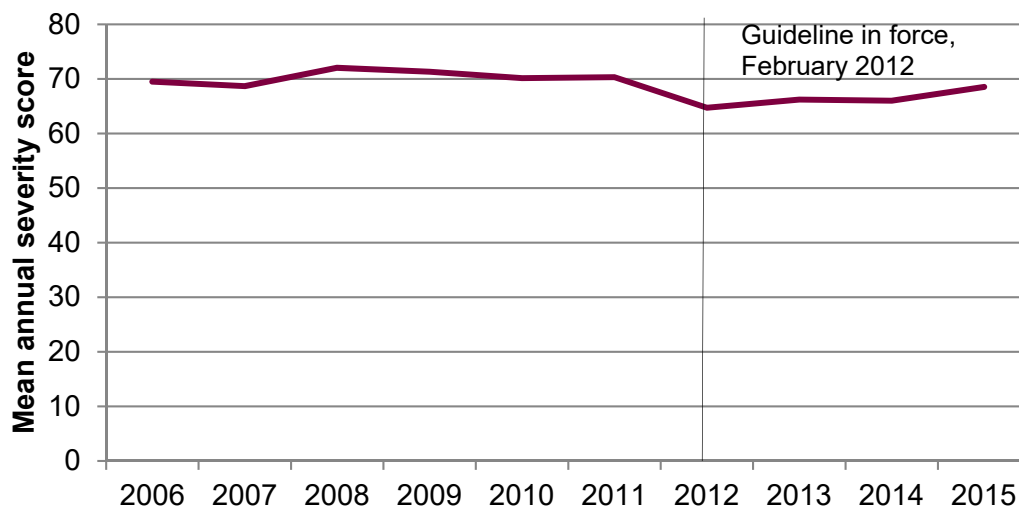
Figure 8: Disposals for supply and possession with intent to supply class B, across Crown and magistrates' courts, 2009 to 2015



6. Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug, Class A and B (importation offences)

Importation offences are low in volume, with 240 class A, 160 class B and 50 class C offenders sentenced in 2015.⁴³ The volume of class A offences has decreased markedly over the last decade, from a high of 610 in 2006 to less than half that number in 2015. As shown in figure 9 for class A,⁴⁴ importation offences showed a fall in sentence severity at the point of guideline implementation, consistent with the stated aim of decreasing sentences for 'drug mules' in the Sentencing Council guideline.

Figure 9: Sentencing severity for importation class A, across Crown and magistrates' courts, 2006 to 2015

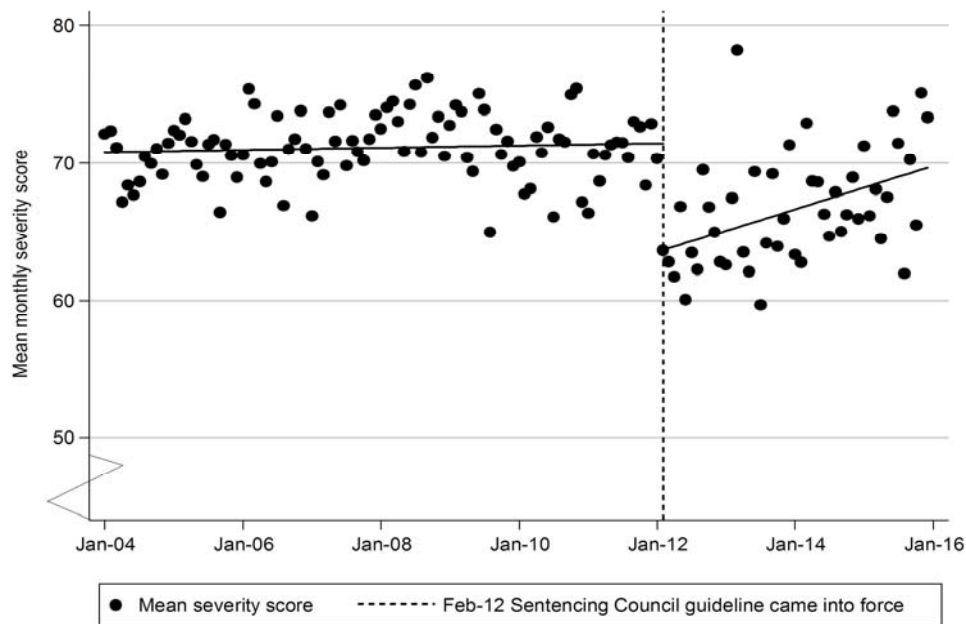


⁴³ The very low numbers for classes B and C make detailed analysis unreliable.

⁴⁴ The pattern was the same for classes B and C, with a more marked drop at the point of implementation.

Indeed, across all the drug offences examined, this was the most sizable shift at the point of guideline implementation, with an immediate decrease of around 8 points on the severity scale for offenders sentenced in the Crown Court, as clearly shown in the ITS analysis of class A (see figure 10). The two graphs also show that sentencing severity then rose thereafter (particularly between 2014 and 2015) and this rise, which occurred some while after the guideline was implemented, is discussed at the end of this section.

Figure 10: Time series graph showing mean monthly severity score for offenders sentenced for importation class A in the Crown Court, 2004 to 2016



Exploring the decrease in sentence severity across importation class A offences in more depth, a comparison of custodial sentences in the 12 months before the guideline's implementation compared to the 12 months after showed a notable increase in shorter sentences compared to longer sentences (see figure 11).⁴⁵ Specifically, there was a redistribution of sentences in favour of shorter terms, with a decrease in the proportion of sentences in excess of 8 years and a marked increase in the proportion of sentences between 4 and 8 years, the latter sentencing band closely corresponding to the guideline's 3 years and 6 months to 9-year range for an offender playing a lesser role, who is likely to be a drug mule.⁴⁶

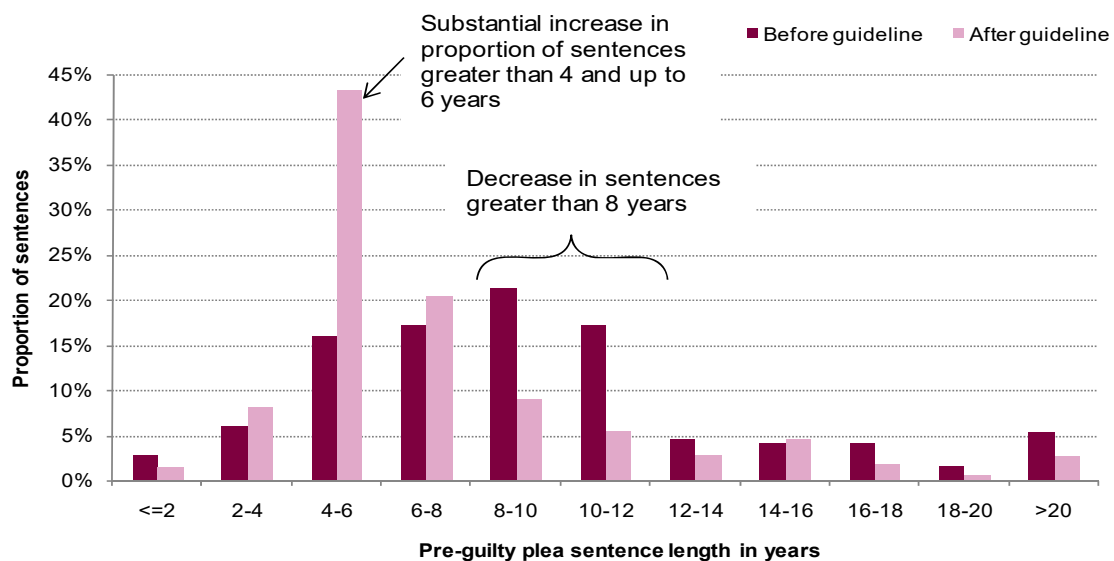
A similar shift to shorter sentence lengths was also evident for importation class B offences in the 12 months following the guideline's introduction, with a substantial increase in sentences up to and including a year, and a decrease in the proportion of sentences over 5 years. This indicates that the intended effect of the guideline on

⁴⁵ Data from the Court Proceedings Database was adjusted using guilty plea rates and reductions from the Crown Court Sentencing Survey database, to estimate pre-guilty plea sentences. This adjustment means that the figures presented are comparable to the sentence ranges in the guideline.

⁴⁶ In this analysis we have taken 'lesser role' as a proxy for drug mule, although clearly this is not an exact match: some offenders in this lowest culpability category will not be drug mules, and some offenders in the two higher culpability categories may be drug mules.

sentencing for drug mules was achieved,⁴⁷ even though later data (from 2014 and 2015) indicated a rise in sentencing which seems to be independent of the guideline (see later). Unfortunately, CCSS data do not permit us to conclusively identify which element of the guideline caused the change at the point of implementation, but since the average number of mitigating factors cited remained broadly stable from 2011 (pre-guideline) to 2013 (post), it is likely that the introduction of ‘lesser role’ and the associated lower sentencing range was the key causal factor in bringing sentencing down at this point.⁴⁸

Figure 11: Pre-guilty plea sentence lengths for class A importation offences, comparing the 12 months pre-guideline with the 12 months post



The content analysis of judges’ sentencing remarks comparing ‘lesser role’ cases pre- and post-guideline lent some support to the finding that judges placed more emphasis on the limited role of the offender in this type of case after the guideline came into force. This qualitative analysis of a small number of cases suggested that judges were taking note of lesser roles before the guideline came into force, but this was on the basis of Court of Appeal judgements and their own instincts. After the guideline took effect, their lenience toward these cases was more closely aligned to the guideline. For example, one judge said:

As to the circumstances, I am prepared, as I have indicated, to treat you on the basis that this was a lesser role. I have to apply the Sentencing Guidelines. This is Category 3. [...] I accept as well as I have said that this is a lesser role really because you were performing in my judgment a limited function – in other words a mule – under the direction of someone higher up and there may have been a degree of pressure that was placed upon you.

⁴⁷ Independent academic research using CPD and CCSS data has drawn the same conclusion, see: Fleetwood, F., Radcliffe, P. and Stevens, A. (2015). Shorter sentences for drug mules: the early impact of the sentencing guidelines in England and Wales. *Drugs: Education, Prevention and Policy*, 22(5):428-36.

⁴⁸ This would be in line with the Council’s expectations: step one factors are deemed to be the most important in determining the sentence, with step two factors (aggravating and mitigating) exerting less of an influence.

Another judge commented:

This is one of those cases where I'm satisfied that I should deal with you as having a lesser role, and this is plainly in Category 3 [...] I can and do assume that you only participated in this out of the combination of pressure and inducement placed your way.

The resource assessment predicted a cost saving to the prison service of between £1m and £5m per annum on the basis of lower sentences for drug mules, who were assumed (at that time) to constitute between 10 and 30 per cent of those sentenced for this offence. CCSS data indicate that lesser role offenders constituted between 45 and 39 per cent of offenders sentenced in 2013 and 2014 respectively, so we would expect the predicted cost saving to have been met or exceeded in those years.

As discussed earlier, the ITS graph for importation of a class A drug shows a rising trend post-guideline implementation (see figure 10), although it should be noted that overall sentencing severity in 2015 was still lower than before the guideline's implementation. As with our earlier discussion of 'supply' offences we cannot be conclusive in our assessment of why this should happen, but analysis of CCSS data suggests that the seriousness of importation offences may have increased post-guideline, a period which has coincided with a notable decrease in offence volumes.⁴⁹ This is indicated by a shift in the proportion of offenders placed into the higher levels of culpability and harm between 2013 and 2014 (the two years following guideline implementation). Across all importation offences, the proportion of offenders in the highest harm category (harm 1) increased from 20 per cent in 2013 to 25 per cent in 2014, whilst the proportion of offenders in the lower harm categories decreased. Since the level of harm relates solely to the quantity of drugs involved, this suggests that at the most serious end of the offending spectrum, the quantity of drugs being smuggled in by offenders was increasing.⁵⁰ Likewise, the proportion of offenders placed in medium culpability (so assessed as playing a 'significant role') increased from 46 per cent in 2013 to 52 per cent in 2014, with a roughly corresponding decrease in the proportion of offenders placed in lower culpability, playing a 'lesser role' (from 45 per cent to 39 per cent), a trend which mirrored the changes in culpability level for 'supply offences' (see section 4). Although the sentencing of 'lesser role' cases has become more lenient, it seems that the courts may be seeing fewer drug mules or other lesser role offenders, and may be seeing higher quantities of drugs, so the decrease in overall sentence severity has not continued over time.

Another factor which also lends weight to the interpretation that importation offences have become more serious is the increasing prevalence of one aggravating factor in the CCSS data, which is '*high purity or high potential yield*'. For all importation offences, there was an increase in the prevalence of this factor (of seven percentage points) between 2013 and 2014. Therefore, as with 'supply' offences, we can

⁴⁹ A decrease in offence volumes can be a result of changing police priorities whereby effort is put into apprehending fewer, more serious offenders.

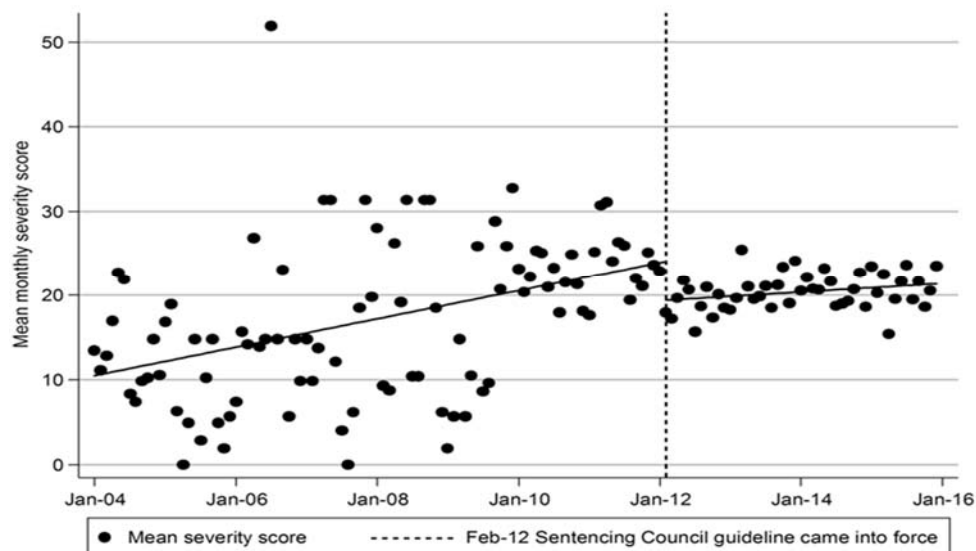
⁵⁰ This change and the apparent increase in drug purity (see following paragraph) may also relate to changes in the type of drugs the courts are seeing: for new drugs, not referenced in the guideline, it may be unclear where to place a drug on the basis of quantity, and the aggravating factor of high purity may be one way in which sentencers seek to reflect the severity of an offence involving a new drug not discussed in the guideline.

hypothesise that against a backdrop of decreasing volumes, those cases reaching the courts may have become more serious in recent years, a trend which is likely to be independent of the guideline.⁵¹

7. Permitting premises to be used (class B)

In 2015, there were 360 offenders sentenced for ‘permitting premises’ class B.⁵² As the ITS analysis in figure 12 shows, the guideline appears to have resulted in an immediate shift downwards and a new, lower baseline of sentencing severity for this offence. Unfortunately, we do not have any survey data on this offence to help understand the trends, but it seems likely that the guideline narrowed the sentencing range for an uncommon offence for which sentencing severity was previously very widely dispersed.

Figure 12: Time series graph showing mean monthly severity score for offenders sentenced for permitting premises to be used for class B in the Crown Court, 2004 to 2016⁵³



Conclusion

Our analysis of the impact of the drugs guideline shows a fairly complex picture in which the guideline appears to have resulted in some changes downward at the point of implementation, and some changes in trend after that (for example,

⁵¹ This hypothesis is corroborated by the National Crime Agency’s report ‘National Strategic Assessment of Serious and Organised Crime 2017’, which describes increased volumes of higher purity cocaine and heroin being seen in the UK (see page 34, paragraphs 123 and 125):

<http://www.nationalcrimeagency.gov.uk/publications/807-national-strategic-assessment-of-serious-and-organised-crime-2017/file>.

Seizures data also shows the purity of heroin, in particular, increasing during these years, (see page 132):

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/669021/UK-drug-situation-2016-report.pdf

⁵² Due to a data issue in the CPD, the figures shown in this section for permitting premises to be used for class B offences do not include ketamine (which was reclassified from class C to class B in June 2014).

⁵³ Excludes ketamine, cannabinoid receptor agonists and cathinone derivatives.

sentence severity flattened for some offences, but for others it gradually rose). Overall, there was a small but statistically significant reduction in sentencing severity across all drug offences in the 12 months following guideline implementation. The largest step change was the decrease in sentencing severity for **'importation'** offences, which was an intentional change predicted in the resource assessment. There were other immediate changes in sentencing severity that are likely to be attributable to the introduction of the guideline but these amounted to only around 2 or 3 points on a severity scale of 0-100, so were small in magnitude. For two offences, **production class B** and **permitting premises to be used**, the guideline appeared to have the effect of checking a previously upward trend, so sentencing plateaued at a slightly lower level thereafter. In the case of **possession class B**, which is by far the highest volume drugs offence that the courts see, the guideline was shown to have no effect, the pre-existing trend towards decreasing sentencing severity since the reclassification of cannabis simply carrying on thereafter.

However, the guideline appeared to lead to an unanticipated change in trend for several offences. As discussed earlier, our analyses of the impact of sentencing guidelines is hindered by the fact that we can never ensure that the introduction of guidelines is the only systematic difference between sentencing before a guideline's implementation and after. As per the case for possession class B, pre-existing trends may continue following implementation or another, coincidental change may make a difference at or around the same time as a guideline is implemented, masking the impact (or lack of impact) of the guideline. In the case of **possession class A**, a pre-existing trend towards lessening sentence severity in the magistrates' courts increased more steeply following the guideline's introduction, perhaps suggesting that the guideline encouraged sentencers to view this offence more leniently. However, for **'supply'** and **'importation'** offences, CCSS analysis suggests that the Crown Court may be seeing more serious offenders and offences, as shown by a shift towards higher culpability which happened after the guideline came in, as opposed to a shift between pre- and post-guideline. There was also an indication that courts are seeing more cases where *'high purity or high potential yield'* is a noteworthy factor. However, none of these changes in trend are particularly marked – most likely they are within the boundaries of normal fluctuations in sentencing, amounting to around five points or less on a severity scale of 0 to 100 – so overall the effect of the guideline is not considered to be a cause for concern. However, drug offending is likely to change over time as, for example, new drugs emerge and the nature of offending changes. This, coupled with the indications in this research that some drug offending may be becoming more serious, leads to the recommendation that research is undertaken to examine how the guideline may need to be revised to ensure that it fully reflects the type of offending coming before the courts today, and to ensure that the guideline is fit for purpose for the future.

Acknowledgements

The Sentencing Council would like to acknowledge Opinion Research Services and Rand Europe for their work in carrying out the data collection exercises in the Crown and magistrates' courts respectively and for Rand Europe's analysis and reporting of some of these data. In addition, the Council particularly thanks all the sentencers who completed the data collection forms.

Blank page