

The impact of three guidelines on consistency in sentencing

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1. Summary

A methodology to measure consistency of approach to sentencing was developed and applied to data covering three Sentencing Council guidelines, to understand whether these guidelines have achieved the Council's aim of promoting greater consistency in sentencing.

The analysis found that for domestic burglary and supply/ possession with intent to supply a controlled drug, there is some evidence of an increase in consistency following the introduction of these guidelines. However, for theft from a shop or stall, no increase in consistency was observed.

When looking at specific guideline factors, it was found that the majority of the factors tested were associated with consistent sentencing. A small number were found to have been associated with inconsistent sentencing, including several factors related to the use of or addiction to alcohol/ drugs, and whether the offender had any previous convictions. A number of possible reasons were given for these inconsistencies; however, more research would be needed to understand this further.

The Council will consider how this research can assist when developing and evaluating future sentencing guidelines.

1.1 Key points

The Sentencing Council aims to promote greater consistency in sentencing, specifically focusing on promoting consistency in approach. This is because no two offenders or situations are the same and sentencers take into account a wide range of factors when sentencing. Guidelines encourage a consistent approach by guiding sentencers through structured, step by step decision making, whilst still allowing judicial discretion around the final sentence. This allows for a consistent approach to sentencing, but some variation in outcomes for offences that, on the face of it, appear to be very similar.

Measuring consistency in sentencing is challenging. The Council commissioned a project to develop a methodology to measure consistency of approach to sentencing, and to apply this methodology to sentencing data. The aim was to assess whether there were any changes in consistency following the introduction of a selection of the Council's definitive guidelines.

A variety of different methodologies were reviewed and considered, including qualitative techniques, simulations, experimental designs and multi-level modelling techniques. Given that quantitative methods allow findings to be generalised across courts, and that multi-level modelling is flexible and suitable for the data and the aim of the analysis, an approach of combining several types of multi-level modelling techniques was chosen as the most appropriate and robust way to measure consistency of approach to sentencing. However, while this approach is robust, there were issues in its application to some aspects of the guidelines due to data scarcity, and so the conclusions are limited in some areas.

In order to compare sentencing consistency before and after a guideline came into force, two measures were considered: the predictability of sentencing outcomes (whether the proportion of cases where the sentencing outcome could be predicted using the case

characteristics in the data changed when the guideline came into force) and the level of between-court disparities (whether the level of unexplained differences in sentencing across different courts changed when the guideline came into force). An increase in consistency of approach to sentencing would be shown by an increase in the predictability of sentences and/ or a decrease in between-court disparities.

When this approach was applied to domestic burglary, there was some evidence of an increase in consistency of approach to sentencing following the introduction of the burglary offences definitive guidelines, with a small but statistically significant increase in the predictability of sentencing outcomes. Before the guideline, the sentencing outcome (immediate custody, community order, fine, etc) could be predicted accurately based on the characteristics of the case in just under 77 per cent of cases. This percentage increased to just over 78 per cent after the guideline came into force. However, there was no change in the level of between-court disparities (unexplained differences in sentencing across courts) after the guideline came into force.

When applied to supply/ possession with intent to supply a controlled drug, there was some evidence of an increase in consistency of approach to sentencing following the introduction of the drug offences definitive guidelines. The analysis showed that between-court disparities in sentencing decreased by 22 per cent once the guideline was in place. However, there was no statistically significant change in the proportion of sentencing outcomes that could be predicted based on the case characteristics.

When applied to theft from a shop or stall, there was no evidence of a significant change in consistency of approach to sentencing when the theft offences definitive guidelines came into force. The analysis looking at disparities in sentencing between courts and the predictability of sentencing outcomes for theft from a shop or stall both showed no significant changes once the guideline came into force.

For each of the guidelines, the vast majority of individual guideline factors tested that related to harm, culpability, aggravation and mitigation were found to be applied consistently across courts. A small number were found to be applied inconsistently, including several different factors related to the use of or addiction to alcohol/ drugs, and whether the offender had any previous convictions (although a number of possible reasons were given for this, and it is not thought that the factor related to previous convictions is necessarily problematic).

The Council will consider how this research can assist when developing future sentencing guidelines (for example, using the findings to refine the wording of factors), and will aim to apply the methodology developed through this project for the evaluation of other guidelines where the relevant data are available. However, due to the limitations of the methodology and the fact that a large volume of data are needed to conduct this type of analysis, the Council will continue to explore options for measuring consistency. This may include exploring whether any qualitative approaches could provide insight into this area.

2. Introduction

The Sentencing Council of England and Wales was created in 2010 and issues sentencing guidelines for use in all criminal courts. Analysis and research is an integral part of the Council's work and is used in the development and evaluation of the guidelines.

As explained in the separate paper '*A Review of Consistency in Sentencing*',¹ the Council aims to promote consistency of approach to sentencing. However, it is difficult to measure whether greater consistency has been achieved by the Council's guidelines for several reasons. First, historical data shows that a wide range of different sentences lengths and disposal types are observed even within an offence type. This primarily reflects variation in the seriousness of offences and in the characteristics of the offenders being sentenced. Another source of this variation in sentences may be inconsistency of approach to the sentencing process. It is difficult to disentangle these two forms of variability in sentencing, and as a result, the level of consistency is hard to establish.

Some of the Sentencing Council guidelines have now been in place for some time and the Council wished to assess whether they have promoted a greater degree of consistency of approach to sentencing.

The Sentencing Council therefore commissioned a project to develop a methodology for assessing consistency of approach to sentencing, and to apply this methodology to sentencing data for select offences covered by some of the Council's existing guidelines. Offences were chosen if they were sufficiently high volume, if survey data were available containing information on culpability, harm, aggravating and mitigating factors and sentencing outcomes, and if the data were available both before and after the relevant guideline came into force. Assault offences were not included as they had already been analysed in a previous study (Pina-Sánchez and Linacre, 2014). The following three offences were therefore chosen as they satisfied the criteria:

- Domestic burglary;²
- Supply/ possession with intent to supply a controlled drug,³ and;
- Theft from a shop or stall.⁴

The Council's aim with its guidelines is to achieve consistency of approach (not necessarily consistency of outcome). Therefore, the focus of the work was on the consistency in the way that courts apply the guidelines. Consistency of outcome alone is not an appropriate measure of consistency of approach as, even if the facts of a case are identical, offender circumstances can differ widely, leading to different sentencing decisions and outcomes.

This work has also not looked at how consistency may have affected the severity of sentencing outcomes, or how the two concepts may be related, as that was outside the scope of this study.

Academics at the University of Leeds⁵ were commissioned to work with analysts from the Office of the Sentencing Council to conduct this research: to develop a methodology to assess consistency of approach to sentencing, and to apply the chosen methods to data for several offences.

¹ Sarah Poppleton, Elaine Wedlock, Amber Isaac and Emma Marshall (2021)
<https://www.sentencingcouncil.org.uk/publications/item/investigating-the-sentencing-councils-impact-in-three-key-areas>

² <https://www.sentencingcouncil.org.uk/offences/crown-court/item/domestic-burglary/>

³ <https://www.sentencingcouncil.org.uk/offences/crown-court/item/supplying-or-offering-to-supply-a-controlled-drug/>

⁴ <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-from-a-shop-or-stall/>

⁵ The academics were Jose Pina-Sánchez and Albert Varela Montane.

3. Methodology

3.1 Approach

To analyse consistency of approach to sentencing for the selected offences, information on the factors taken into consideration when sentencing was required.

Two data sources were used for this project: data from the Sentencing Council's Crown Court Sentencing Survey (CCSS)⁶ and data from a bespoke data collection that the Council carried out for theft offences.

These datasets include information on the sentencer's assessment of the culpability and harm involved in the offence, any aggravating or mitigating factors taken into account, guilty plea timings and reductions, and the final sentence outcome. It also includes fine amounts and lengths of custodial sentences. In some of the datasets, there is also information on the level of community orders.

The data used in this analysis only includes the principal offence for which the offender was sentenced (the offence for which the most severe sentence was imposed) as this is the basis on which Sentencing Council data is collected.

Choosing offences to be included

At the time the analysis was conducted, ten offence-specific Sentencing Council guidelines were in force,⁷ covering a large number of different offences. Due to data limitations⁸ (such as not having a sufficient volume of data for some offences), it was not possible to include every individual offence covered by the guidelines in this study. Therefore, offences were chosen for the analysis if they fulfilled the following criteria:

- Survey data were available covering several months of sentencing practice from both before and after the associated definitive guidelines came into force, allowing a 'pre-post' comparison of the two periods;
- A high volume of records was available for analysis, ensuring that the analysis would be as robust as possible and that the impact of individual factors on consistency could be explored; and,
- It was clear which guideline would have been applicable, and therefore used, when sentencing.⁹

⁶ During the period 1 October 2010 to 31 March 2015, the Sentencing Council conducted a data collection exercise called the Crown Court Sentencing Survey (CCSS). The CCSS recorded details on the factors taken into account by the judge when determining the appropriate sentence for an offender (such as harm and culpability factors, and aggravating and mitigating factors), and the final sentence given. For further information see <http://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/>.

⁷ These were Assault; Burglary; Drug Offences; Environmental Offences; Sexual Offences; Fraud, Bribery and Money Laundering; Theft Offences; Health and Safety Offences, Food Safety and Hygiene Offences and Corporate Manslaughter; Robbery and Dangerous Dog Offences. Additionally, four overarching guidelines were in place: Totality, Allocation, Children and Young People, and Reduction in Sentence for a Guilty Plea.

⁸ Obtaining a large volume of data that contains the level of detail needed for this or similar types of analysis is challenging, and in addition, the Council may not have the resources to obtain such data in the future.

⁹ For some offences, such as conspiracy to defraud, more than one individual guideline applies to the offence, and it is not always clear from the data which guideline was used when sentencing. For those types of offences, the CCSS data was not appropriate for analysis of consistency of approach.

Assault offences were not included because earlier projects studying consistency had already been conducted for assault offences, and these used some of the same methods as used in this study.¹⁰

Using the above criteria, domestic burglary, supply/ possession with intent to supply a controlled drug and theft from a shop or stall were chosen for the analysis.

Crown Court Sentencing Survey (CCSS) data

The CCSS¹¹ was a paper-based survey completed by the judge passing sentence in the Crown Court. It collected information on the factors taken into account by the judge in working out the appropriate sentence for an offender and the final sentence given. This included information on harm and culpability factors, aggravating and mitigating factors, guilty plea reductions and timings and sentence outcomes. The CCSS ran from October 2010 to the end of March 2015, and covered all principal offences sentenced in the Crown Court. The survey achieved an approximate response rate of 60 per cent, and so provided a large volume of detailed sentencing information. Data collected through the CCSS were used within this project for the analysis of consistency of approach to sentencing for domestic burglary and supply/ possession with intent to supply a controlled drug (see the previous section for why these offences were chosen). For both offences, data from 2011 was taken as the pre-guideline period, and data from both 2013 and 2014 was taken as the post-guideline period.

Magistrates' court data collection

From November 2015 to January 2016 (the pre-guideline phase) and from September to December 2016 (the post-guideline phase), the Council collected data from a sample of magistrates' courts to capture information on sentencing cases of theft from a shop or stall. The types of information collected were very similar to those in the CCSS (culpability, harm, sentencing outcomes, etc).

Development of the methodology

A review of possible methodologies was undertaken to determine which methods would be most appropriate for measuring consistency of approach to sentencing. Methods considered included those described in the main evidence paper: qualitative methods (such as focus groups, simulations and interviews) and quantitative methods (dispersion/ variability in sentencing outcomes, compliance rates – the percentage of cases sentenced within prescribed sentencing ranges, and regression techniques, among others).

The strengths and limitations of each method were evaluated – see the separate paper for discussion of some of these. It was decided that regression analysis was the best fit for the offences and data that were available for this study. Studies based on regression techniques seek to control directly for the legitimate variability in sentencing by including the relevant case characteristics in the analysis, and therefore compare approximately 'like

¹⁰ Pina-Sánchez and Linacre (2013) explored inconsistencies in the use of aggravating and mitigating factors in assault offences sentenced in the Crown Court, Pina-Sánchez and Linacre (2014), and Pina-Sánchez (2015) detected significant increases in consistency following the introduction of the new Assault guideline. The full publications can be found here, <https://academic.oup.com/bjc/article/53/6/1118/415099>, here, <https://link.springer.com/article/10.1007/s10940-014-9221-x>, and here, https://link.springer.com/chapter/10.1057/9781137390400_5

¹¹ See <http://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/> for further information on the Crown Court Sentencing Survey.

for like' cases. Its main limitation stems from the difficulty in controlling for all relevant case characteristics. Using data from the CCSS or similarly detailed sources facilitate this task, but since there is not a finite list of relevant factors it is ultimately impossible to control for all of them. For example, these datasets do not include information on whether the offender is in employment or training, whether they have fixed accommodation, their ability to pay a fine, or whether a pre-sentence report was available to the sentencer. Additionally, for the type of regression analysis used in this study, the same factors needed to be available in both the pre- and post-guideline datasets, and this further limited the number of factors available to be analysed. Therefore, it has not been possible to include all factors or to produce a value that represents the overall level of consistency of approach.

However, this limitation can be minimised if the focus is on measuring the level of disparities observed between courts, instead of on an overall measure of consistency of approach. This is because unexplained variability between courts is harder to justify than unexplained variability between cases (as unexplained variability between cases is more likely to be affected by a relevant variable being missing from the data). In other words, the issue of relevant variables being missing from the data should apply approximately equally across different courts, and so the issue of missing variables is less important (to some extent) in analysis of differences between courts than in analysis of differences between individual cases. The disparities between courts can be studied using a statistical technique called multi-level modelling.¹² However, measures of between-court disparities should only be taken as approximations of the overall level of consistency of approach to sentencing since there may also be inconsistencies in sentencing within courts, which cannot be captured by this method. In other words, by focusing on whether courts sentence consistently with one another, we are missing part of the picture because we are not looking at whether courts sentence consistently within themselves. Despite this limitation, the flexibility of multi-level modelling can help us to obtain further insights regarding between-court variability in the application of specific sentencing factors, i.e. looking at whether each factor is applied in the same way in each court, and therefore learn more about the guidelines' impacts on consistency of approach to sentencing. For these reasons, this method of multi-level modelling was chosen for the analysis.

It should be noted that although consistency of approach is the focus of this analysis, the method is applied, and the findings are produced with reference to data on sentencing outcomes. How factors are taken into account by sentencers is compared across courts by looking at whether the way they are applied to sentences is consistent. This does not mean that the focus is on sentencing outcomes, just that data on sentencing outcomes are used as a reference tool for measuring consistency of approach. This is because data on the sentence starting point, as chosen by the sentencer, are not available. Without information on how the sentencer reached a starting point sentence by accounting for the levels of culpability and harm at step one in the guidelines, or how they used the guideline from beginning to end, the final sentence has to be used as a proxy. Therefore, while variation in outcomes alone would be a measure of consistency of outcome, we seek to investigate the extent to which those outcomes are explained by the relevant case characteristics and explore any unexplained variability across courts, and this gives a way of measuring consistency of approach. In other words, whilst we know that variation in

¹² Multi-level modelling is a type of statistical regression modelling where the hierarchical (also known as "clustered" or "nested") nature of the data is taken into account. It is assumed that offenders are nested within courts: it is expected that offenders sentenced within the same court are likely to be sentenced more similarly to each other than to those sentenced in other courts. This technique allows us to assess how sentencing differs at court level and at an individual level. The combination of these different "levels" gives rise to the term "multi-level modelling".

outcomes does not necessarily mean an inconsistent approach, we can assume that where there are more consistent outcomes there are likely to be more consistent approaches.

Another issue to consider is that we expect there to be variation in the weight given to each factor. For example, the level of planning may be a key factor in one case and a relevant but less important factor in another, and therefore the factor may lead to different changes in sentence in each case (it may increase the sentence more in one case than another). We therefore do not expect perfect consistency. Instead, we expect that across lots of cases, the average application of factors across different courts should be roughly similar. The method will therefore identify if, across many cases, courts are not applying the guidelines in a consistent way. Statistically significant differences in the different measures (explained further in the next section) are therefore interpreted as potential inconsistencies in approach to sentencing. Throughout this paper, phrases such as 'sentencing disparities' etc, therefore refer to consistency of approach with reference to sentences, and not directly to sentencing outcomes.

3.2 Application of the methodology

To apply the chosen method of multi-level modelling, the analysis was split into three parts. Each part is described below:

1. Multi-level models¹³ were constructed to predict the main sentence imposed (discharge, fine, community order, suspended sentence order or immediate custody). These models used the case characteristics available in the data to make these predictions.¹⁴ The proportion of cases that the model was correctly able to predict was calculated in the pre- and post-guideline samples, and these were compared. If the predictability of the sentencing outcome increased, and if that change was found to be statistically significant,¹⁵ then it can be concluded that there is likely to have been an increase in consistency of approach to sentencing after the guideline came into force. In other words, sentences can be more accurately predicted based on the characteristics of the offence and the offender.
2. The models were also used to compare differences (pre-guideline versus post-guideline) in sentencing across courts (any differences are referred to here as 'between-court disparities'). These are the average differences in sentencing across courts that, even after holding all the available offence and offender characteristics constant, still exist. If there was a statistically significant decrease in between-court disparities once the guideline came into force, then it could be concluded that there had been an increase in consistency of approach to sentencing. It is, however, important to remember that the data does not include every possible case characteristic, and so some of the unexplained differences may be due to factors that have been taken into account appropriately, but just not included in the data.
3. The analyses mentioned above involved looking at overall sentencing practice before and after the guidelines came into force. Part 3 involved looking at individual factors:

¹³ The specific models used were random intercept ordered logit models.

¹⁴ Only factors that were available in both the pre-guideline and post-guideline samples were used for this analysis. This is a limitation of the methodology, which meant that some important factors were not included. See the Findings section for details of how this affected the analysis for each offence covered.

¹⁵ Two sample t-tests were conducted to check for statistical significance at the 5% level.

disparities between courts in how specific harm, culpability, aggravating and mitigating factors are applied. This analysis focused on the post-guideline sample to assess the consistency of the effect of each factor on sentencing outcomes.^{16,17} A low level of between-court disparities associated with a specific factor may suggest that a factor is being applied relatively consistently, whereas a high level of between-court disparities may suggest that a factor is not being applied consistently.

4. Findings

4.1 Summary

The findings for each of the three guidelines are summarised in the following table, with further detail given in the subsequent sections.

¹⁶ To explore the inconsistent application of specific factors, multilevel models with random slopes were used.

¹⁷ It was possible for more factors to be included for this analysis than used for parts (1) and (2) because the focus for part (3) was only on the post-guideline sample (i.e. the analysis was not restricted to those factors that appeared in both the pre- and post-guideline samples).

Table 1: Summary of the findings on between-court disparities, predictability of outcomes, and consistency of application of specific factors

Offence	Predictability of sentence outcomes (pre-guideline vs post-guideline)	Between-court disparities (pre-guideline vs post-guideline)	Consistency of the application of specific factors (post-guideline factors only)
Domestic burglary (Crown Court) [see page 12 for more detail]	A statistically significant increase in the proportion of sentencing outcomes predicted	No statistically significant change	30 factors found to be associated with consistent sentencing, 4 factors found to be associated with inconsistent sentencing
Supply/ possession with intent to supply a controlled drug (Crown Court) [see page 15 for more detail]	No statistically significant change	A statistically significant decrease in between-court disparities	25 factors found to be associated with consistent sentencing, 2 factors found to be associated with inconsistent sentencing
Theft from a shop or stall (magistrates' courts) [see page 16 for more detail]	No statistically significant change	No statistically significant change	10 factors found to be associated with consistent sentencing, 1 factor found to be associated with inconsistent sentencing

4.2 Domestic burglary

For the offence of domestic burglary,¹⁸ around 5,100 offenders were included in the pre-guideline sample and 10,200 were included in the post-guideline sample. The analysis showed that there was no statistically significant change in sentencing disparities (no change in the variability of the application of sentencing factors) between courts following the introduction of the guideline. However, the predictability of sentencing outcomes increased when the guideline came into force suggesting that consistency of approach also increased. Using the pre-guideline model, it was possible to predict accurately the sentencing outcome for 77 per cent of offenders, whereas in the post-guideline model, this increased to 78 per cent. This represents a small but statistically significant increase, and

¹⁸ The Council has published initial and further assessments of the impact of its burglary offences guidelines: <https://www.sentencingcouncil.org.uk/publications/item/burglary-offences-assessment-of-guideline/>

overall, this analysis provides some evidence of an increase in consistency of approach to sentencing following the introduction of the Domestic burglary guideline.

The analysis of individual factors in the post-guideline sample showed the vast majority (30 out of the 34 factors analysed) were associated with consistent sentencing, whereby the level of adjustment in sentencing associated with these factors did not vary in a statistically significant way across courts. This suggests they were applied consistently.¹⁹ However, the level of adjustment of four factors was found to vary across courts, suggesting they were applied inconsistently. These were (in order from most to least consistently applied):

- Commission of offence whilst under the influence of alcohol or drugs;
- Determination and/ or demonstration of steps taken to address addiction or offending behaviour;
- Remorse; and,
- Previous convictions (whether the offender had any recent or relevant previous convictions).

For the first three factors in this list, it is not clear whether there is a problem with the factors (with sentencers interpreting the factors in different ways) or whether the nature of each of these factors differs from one offender to another. For example, the effect of the factor 'Commission of offence whilst under the influence of alcohol or drugs' may differ depending on the offender's circumstances: if they are addicted to or have a history with alcohol/ drugs, the extent to which the offence was influenced or exacerbated by the alcohol/ drugs, the foresight that the offender should have had that the alcohol/ drugs may lead to this type of offending, etc. Research has also been conducted which demonstrates the variability in the way intoxication-related factors are applied, including whether they aggravate or mitigate the sentence (Lightowlers and Pina-Sánchez, 2018) and how they can be applied differently depending on the gender of the offender (Lightowlers, 2019).

However, expanded explanations for each of these factors were added to the digital guideline²⁰ in October 2019, after the period when the data used for this analysis were collected. Sentencers can click on these factors to see further information about how they should be taken into account when sentencing. For example, the expanded explanation for the factor 'Commission of the offence whilst under the influence of alcohol or drugs' is:

The fact that an offender is voluntarily intoxicated at the time of the offence will tend to increase the seriousness of the offence provided that the intoxication has contributed to the offending.

This applies regardless of whether the offender is under the influence of legal or illegal substance(s).

In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has sought help or engaged with any assistance which has been offered or made available in dealing with the addiction.

¹⁹ For any factors that were ticked very infrequently on the forms (fewer than 150 forms in total), it can be difficult to accurately detect whether factors are applied inconsistently, and so these were excluded.

²⁰ <https://www.sentencingcouncil.org.uk/offences/crown-court/item/domestic-burglary/>

An offender who has voluntarily consumed drugs and/ or alcohol must accept the consequences of the behaviour that results, even if it is out of character.

Expanded explanations such as this should help sentencers to take account of these factors in an appropriate and more consistent way, while acknowledging that factors will continue to carry different weight in different circumstances.

Similarly, the circumstances where the factor 'Steps taken to address addiction or offending behaviour' applies may vary widely. Firstly, addressing an addiction may be treated differently to addressing offending behaviour. For an addiction, the extent or circumstances of the offender's addiction and how it related to the offence, and the number and type of steps taken to address that addiction may all play a part in the weight that is placed on that factor when deciding the sentence. If instead, the offender did not have an addiction but had addressed their offending behaviour, then this may range from simply not committing any further offences since the offence being sentenced, to taking proactive reparative or rehabilitative steps. For some offenders, it might be that both an addiction and the offending behaviour have been addressed, and so this factor might have more weight in those cases. This wide range of circumstances in which the factor may apply may have led to the inconsistencies observed in the analysis. However, further research would be needed to understand this in more detail.

For 'Remorse', it is unclear why this factor was found to be applied inconsistently. It may be that the expanded explanation for this factor, added to the relevant guidelines after this analysis was conducted, has improved consistency of the use of this factor. An evaluation of the expanded explanations will be conducted in due course and may consider whether any further guidance is needed for this factor.

When considering previous convictions, sentencers take several factors into account, including the number of previous convictions, the time that has elapsed since a conviction and the nature of the offence to which a conviction relates and its relevance to the current offence. Therefore, one possible reason that the factor related to previous convictions was found to be applied inconsistently might be because this detailed information on the nature (and similar) was not included in the analysis. It might be that the details of the specific convictions taken into account differ widely from one offender to another, and therefore were given a different weight and have a different effect on the sentence.²¹ For example, someone with a very recent conviction for the same offence as they are now being sentenced is likely to be dealt with differently to someone with a slightly less recent conviction for a similar but less serious offence. The details of the types of previous convictions taken into consideration were not recorded on the CCSS forms and so could not be taken into account in the analysis. Therefore, it is not thought that this finding necessarily represents an issue with the previous convictions factor, and instead points to this factor being necessarily wide-ranging in its application.

As explained earlier, since this analysis was conducted, the Council has issued expanded explanations of factors which are now available in the digital guidelines.²² These include more information on the circumstances of the offence that the sentencer may need to

²¹ Although data on the number of previous convictions was collected on the CCSS forms, it was not included in the analysis. Only factors that are binary (i.e. factors that were either present or absent for the offence/ offender) were included in the analysis. A numeric variable like the number of previous convictions (or any other variable with a scale, order or number) was not included as it would not have been possible to test it using this method in a way that is comparable to the rest of the of the factors included, which were all binary.

²² The guidelines can be found on the Sentencing Council's website: <https://www.sentencingcouncil.org.uk/>

consider when determining whether a factor is relevant and the extent to which it should be taken into account in the sentence. Additional guidance of this kind should help sentencers to apply factors such as those listed above more consistently.

4.3 Supply/ possession with intent to supply a controlled drug

For supply/ possession with intent to supply a controlled drug,²³ around 4,900 offenders were included in the pre-guideline sample and around 11,100 were included in the post-guideline sample. The analysis was limited as it was not possible to include any of the aspects of step one of the guideline (the role of the offender or the quantity/ amount of drug, as these were not captured in the pre-guideline data). Only binary factors were included in the analysis of individual factors.²⁴ This means that some of the 'main' factors – the step one factors which should drive the sentence, were not included.

The analysis showed that there was a statistically significant decrease in the variability of application of sentencing factors between courts after the guideline came into force (between-court disparities²⁵ decreased by 22 per cent), suggesting that there was an increase in consistency of approach to sentencing. However, no statistically significant change was detected in the predictability of sentencing outcomes (which remained at 62 per cent both pre- and post-guideline) which suggests there may not have been any change in consistency of approach to sentencing.

The analysis of individual factors suggested that, out of the 27 factors tested,²⁶ 25 were applied consistently across courts. Two were found to be applied inconsistently, namely (ordered from more to less inconsistently applied):

- Supply only of drug to which offender addicted; and,
- Previous convictions (whether the offender had any recent or relevant previous convictions).

It is unclear why the factor 'Supply only of drug to which offender addicted' was found to be applied inconsistently. However, it may be for similar reasons as given earlier for the factors related to alcohol, drugs and addiction: that the nature of the addiction or how the offender has dealt with it may have an effect on how this factor is applied. This means that there is the potential that an offender who has a severe addiction and who has sought help in the past but received none, might be treated differently to an offender who has not made

²³ The Council has published an assessment of the impact of its drug offences guidelines:

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

²⁴ Both culpability and harm are structured as factors on a scale (for example, from leading role down to lesser role). These factors are not binary and so the analysis would not be comparable to the other factors included in the models. The results would therefore not be meaningful, and so these factors were not included in the analysis. Another reason for their exclusion from the analysis of individual factors is that, within the guideline, the role of the offender is assessed by considering a number of factors. For example, a leading role can be demonstrated by a list of characteristics, including: directing or organising buying and selling on a commercial scale, substantial links to and influence on others in a chain, expectation of substantial financial gain, etc. However, on the CCSS forms, only the overall role of the offender was collected (e.g. 'leading role'), and so the individual factors that may have led the sentencer to choose a certain role are not known. Including these overall roles in the analysis may result in a false or misleading impression of how roles are sentenced. The same is true for the quantities of the drugs, which were also not collected through the CCSS. The analysis was therefore limited to factors from step two, predominantly focusing on aggravating and mitigating factors.

²⁵ This was calculated by comparing the standard deviation of the unobserved between-court disparities from the pre-guideline sample with the post-guideline sample.

²⁶ Following the same method as for the other offences, only factors that were ticked on 150 or more forms were included in the analysis.

any attempt to address their addiction or who has refused help. However, further research would be needed to understand this issue in more detail.

As noted earlier, there are several reasons why the factor related to previous convictions may be applied inconsistently, and so it is not thought that this necessarily indicates a problem with this factor.

4.4 Theft from a shop or stall

For the analysis of data for theft from a shop or stall,²⁷ around 2,600 offenders were included in the pre-guideline sample and around 1,500 were included in the post-guideline sample. The smaller number in the post-guideline sample was due to a lower response-rate for the post-guideline data collection, and a larger number of missing records that had to be excluded.

The analysis looking at disparities in sentencing between courts and the predictability of sentencing outcomes for theft from a shop or stall both showed no significant changes once the guideline came into force (for example, it was possible accurately to predict the sentencing outcome in 43 per cent of cases in both the pre- and post-guideline samples). This suggests that the guideline did not affect consistency of approach to sentencing for this offence. However, this may partly be because the overall sample size is considerably smaller than the samples used for the analysis of the other two offences considered earlier (for which the sample sizes were around twice as large for their pre-guideline samples and around seven times as large for their post-guideline samples). While the total volume of data is still high, the data are being compared across 79 different courts and so the sample size for each court is therefore smaller. This may have made it more difficult to detect differences across courts.

In addition, quite a few of the step one harm and culpability factors had to be excluded from the analysis of individual post-guideline factors, as the results would only be considered to be meaningful for binary factors (for example, a factor that was either present or absent, such as the use of a child to facilitate the offence) and not a factor that is part of a scale (such as a high, medium or low level of planning).²⁸ This means that fewer factors remained in the analysis for this offence, compared with the analysis for domestic burglary and supply/ possession with intent to supply a controlled drug, and that some of what could be considered to be the 'main' factors, which drive the sentence at step one, were not included.

Of the 11 factors that were included in the analysis, 10 were found to be applied consistently across courts.²⁹ The only factor found to be applied inconsistently was whether the offender had previous convictions, but this may be for the same reasons as stated for the other two offences considered earlier.

²⁷ The Council has published an assessment of the impact of its theft offences guidelines: <https://www.sentencingcouncil.org.uk/publications/item/theft-offences-assessment-of-guideline/>

²⁸ The step one factors not included in the analysis are: the role of the offender, the level of planning, the use of threat and the value of goods stolen.

²⁹ Following the same method as for the other offences, only factors that were ticked on 150 or more forms were included in the analysis.

5. Conclusions

5.1 Conclusions and next steps

The analysis was limited in a number of important ways: some of the main aspects³⁰ of the guideline for supply/ possession with intent to supply a controlled drug and theft from a shop or stall could not be included in the analysis due to their structure, and the smaller sample size for theft from a shop or stall may have contributed to it being more difficult to detect any changes when comparing pre- to post-guideline sentencing practice.

However, for both domestic burglary and supply/ possession with intent to supply a controlled drug, there is some evidence that following the introduction of the guidelines, there was an increase in consistency of approach to sentencing.

In addition, for the vast majority of individual factors tested (for all three guidelines), no inconsistencies in their application across courts were detected. A very small number of factors were found to be applied inconsistently, including whether the offender had any previous convictions (which was found to be applied inconsistently across all three guidelines). However, there may be various reasons for this, some of which may not be an issue, although further work would be needed to understand these reasons more fully. Several factors related to addiction to drugs or being under the influence of alcohol or drugs were also found to be applied inconsistently. The Council will aim to look into this in more detail as part of the evaluation of the expanded explanations, and if necessary, will consider further work to understand these findings more fully. However, the Council's publication of expanded explanations for factors in guidelines may already increase the consistency with which these types of factors are taken into account.

This project has shown that measuring consistency of approach to sentencing is challenging, and even with a very detailed sentencing dataset, limitations need to be considered. The Council will consider how this research can assist when developing future sentencing guidelines and will aim to apply the methodology developed through this project for the evaluation of other guidelines where the relevant data are available. However, due to the limitations of the methodology and the fact that a large volume of data are needed to conduct this type of analysis, the Council will continue to explore other options for measuring consistency. This may include exploring whether any qualitative approaches could provide insight into this area.

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³⁰ The main aspects referred to are the culpability and harm factors from the 'supply/ possession with intent to supply a controlled drug' guideline, and the role, the level of planning, the use of threat and the value of goods stolen from the 'theft from a shop or stall' guideline.

References

See the separate paper '*A Review of Consistency in Sentencing*'³¹ for a full list of references.

³¹ Sarah Poppleton, Elaine Wedlock, Amber Isaac and Emma Marshall (2021)
<https://www.sentencingcouncil.org.uk/publications/item/investigating-the-sentencing-councils-impact-in-three-key-areas>