

20 September 2018

Dear Members

Meeting of the Sentencing Council – 28 September 2018

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine at the Royal Courts of Justice**, on Friday 28 September 2018 at 9:45.

A security pass is not needed to gain access to this building and members can head straight to the meeting room. Once at the Queen's building, go to the lifts and the floor is 2M. Alternatively, call the office on 020 7071 5793 and a member of staff will come and escort you to the meeting room.

The agenda items for the Council meeting are:

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| ▪ Agenda | SC(18)SEP00 |
| ▪ Minutes of meeting held on 27 July | SC(18)JUL01 |
| ▪ Action Log | SC(18)SEP02 |
| ▪ Assault | SC(18)SEP03 |
| ▪ MCSG | SC(18)SEP04 |
| ▪ Mental Health | SC(18)SEP05 |
| ▪ Media coverage | No paper |
| ▪ Drugs | SC(18)SEP06 |
| ▪ Firearms | SC(18)SEP07 |
| ▪ Effectiveness | SC(18)SEP08 |
| ▪ Sentencing Council meeting dates 2020 | |

Members can access papers via the members' area of the website. If you are unable to attend the meeting, we would welcome your comments in advance.

Best wishes



Steve Wade

Head of the Office of the Sentencing Council

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COUNCIL MEETING AGENDA

28 September 2018
Royal Courts of Justice
Queen's Building

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| 09:45 – 10:00 | Minutes of the last meeting and matters arising (papers 1 & 2) |
| 10:00 – 11:00 | Assault – presented by Lisa Frost (paper 3) |
| 11:00 – 11:30 | MCSG – presented by Ruth Pope (paper 4) |
| 11:30 – 12:45 | Mental Health – presented by Mandy Banks (paper 5) |
| 12:45 – 13:00 | Media coverage – presented by Nick Mann |
| 13:00 – 13:30 | Lunch |
| 13:30 – 14:15 | Drugs – presented by Eleanor Nicholls (paper 6) |
| 14:15 – 15:30 | Firearms – presented by Sophie Klinger (paper 7) |
| 15:30 – 16:00 | Effectiveness – presented by Sarah Poppleton (paper 8) |

Sentencing Council

COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

27 JULY 2018

MINUTES

Members present:

Colman Treacy (Chairman)
Rob Butler
Mark Castle
Rosina Cottage
Rosa Dean
Julian Goose
Heather Hallett
Tim Holroyde
Sarah Munro
Alpa Parmar
Alison Saunders
Beverley Thompson

Apologies:

Rebecca Crane
Maura McGowan

Representatives:

Chief Constable Olivia Pinkney for the police
Sophie Marlow for the Lord Chief Justice (Legal
and Policy Adviser to Sir Brian Leveson, Head of
Criminal Justice)
Claire Fielder for the Lord Chancellor (Deputy
Director, Bail, Sentencing and Release Policy)

Members of Office in
Attendance:

Steve Wade (Head of Office)
Mandy Banks
Lisa Frost
Sophie Klinger
Ruth Pope
Phil Hodgson

1. MINUTES OF LAST MEETING

- 1.1. The minutes from the meeting of 22 June 2018 were agreed.

2. MATTERS ARISING

- 2.1 The Chairman noted that it was his last meeting, he thanked all members of the Council past and present and all members of staff past and present for their contributions to the work of the Council during his chairmanship.

3. DISCUSSION ON ASSAULT – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL

- 3.1 The Council finalised factors for a revised draft guideline for common assault, and agreed sentence levels. Culpability factors for a draft guideline for ABH offences were agreed and discussion took place regarding harm factors for all indictable assault offences. It was agreed that further work should be undertaken to consider models for assessing harm and these should be tested over the summer to identify any potential issues with factors.

4. DISCUSSION ON MENTAL HEALTH – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

- 4.1 The Council considered the findings of a review of relevant caselaw, conducted to establish what guidance has so far been given by the CACD (Court of Appeal Criminal Division).
- 4.2 The Council also considered some key questions regarding the scope of the guideline. For example, whether drug and alcohol dependency should be included within the guideline and also questions relating to the available resources for the treatment of mental health issues and other conditions, both within prison and within the community.

5. DISCUSSION ON OVERARCHING LEARNINGS – PRESENTED BY SARAH POPPLETON, OFFICE OF THE SENTENCING COUNCIL

- 5.1 The Analysis and Research team presented an overview of a piece of work which drew together observations from the team's analytic work, to date, across guidelines. The Council discussed this work, which will help to inform future guideline development.

6. DISCUSSION ON MCSG – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 6.1 The Council considered those either way offences for which guidelines were issued by the Council's predecessor body for use in the magistrates' courts but not for the Crown Court. Some of those offences are due to be revised as part of work on other guidelines currently under development. The Council considered the approach to

be taken to those guidelines which would not otherwise be updated as part of a wider piece of work.

- 6.2 It was agreed that the guideline for the offence of carrying a firearm in a public place should be updated as part of the forthcoming firearms guideline.
- 6.3 The Council discussed whether there was a requirement to retain and update the guideline for the offence of vehicle registration fraud given the current low volume of offences, which is falling yet further. Subject to the views of stakeholders, the Council was minded to withdraw this guideline.
- 6.4 The Council discussed the offences of aggravated vehicle taking and dangerous driving. It was agreed that these should be updated when a wider guideline on driving offences is developed. The Council noted that there was an ongoing possibility of legislative changes being made to driving offences more widely and that work ought not to commence until any legislation was settled.
- 6.5 The Council agreed to consider developing a guideline to replace the outdated identity document offence guideline as part of a wider piece of work on immigration and modern slavery offences to commence in late 2018 or early 2019.
- 6.6 The Council agreed to seek the views of stakeholders regarding developing a guideline to replace the unauthorised use of a trade mark guideline.
- 6.7 The Council agreed to develop a guideline to replace the witness intimidation guideline and to consider extending it to also cover perverting the course of justice.

7. DISCUSSION ON FIREARMS– PRESENTED BY SOPHIE KLINGER, OFFICE OF THE SENTENCING COUNCIL

- 7.1 The Council considered a new guideline on firearms offences for the first time. They discussed the scope of the guideline and agreed the offences to be covered. The guideline will include comprehensive guidance on minimum sentences for firearms offences.
- 7.2 The Council decided not to develop separate guidance for sentencing children and young people, given the low volumes committing firearms offences and to maintain the focus on the Overarching Principles – Sentencing Children and Young People guideline.

8. DISCUSSION ON 10 YEAR ANNIVERSARY – PRESENTED BY PHIL HODGSON, OFFICE OF THE SENTENCING COUNCIL

- 8.1 The Council agreed that the 10th anniversary in 2020 should be marked and discussed options for anniversary activities. Suggestions

will be taken to the Confidence and Communication sub-group for further consideration.

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ACTION AND ACTIVITY LOG – as at 20 September 2018

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 13 April 2018					
1	Robbery	Full report for the robbery evaluation to be circulated to Council, once the time series analysis has been updated. Council will then decide whether or not to put robbery back on the workplan.	Sarah Poppleton	ACTION ONGOING: The report will be sent to Members in November. .	
SENTENCING COUNCIL MEETING 18 May 2018					
2	Business Plan	Council agreed to implement 'standard' commencement dates for guidelines coming into force. Office to consider most appropriate dates and plan accordingly.	Steve Wade / Eleanor Nicholls		ACTION CLOSED: Business plan was published in June and included explanation of standard dates for upcoming guidelines.
SENTENCING COUNCIL MEETING 22 June 2018					
3	Child Cruelty	Final version of guidelines, incorporating changes signed off today, to be circulated to members for information.	Eleanor Nicholls		ACTION CLOSED: Final versions circulated and definitive guideline published on 6 September 2018.
4	Expanded factors in offence specific guidelines	Council members to assist with reviewing factors in digital guidelines over the summer	Ruth Pope/ Council members	ACTION ONGOING: This has been delayed while we await the digital version of the guidelines.	
SENTENCING COUNCIL MEETING 27 July 2018					
5	Mental Health	Claire agreed to check the data held in relation to probation reports, specifically, what percentage of reports (oral and written) suggested that psychiatric reports were ordered.	Claire Fielder	ACTION ONGOING- Conversations taking place with MOJ about what data is held and what further may be done given the limited resources available.	

6	Firearms	Alison Saunders/CPS firearms lead to liaise with Sophie to get information and examples from CPS on 3D printing of firearms	Sophie Klinger/Alison Saunders		ACTION CLOSED: Sophie has contacted the CPS firearms lead.
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Sentencing Council meeting: 28 September 2018
Paper number: SC(18)SEP03 – Assault
Lead Council member: Julian Goose & Rob Butler
Lead officials: Lisa Frost & Caroline Nauth-Misir
0207 071 5784

1 ISSUE

1.1 This paper includes feedback and findings from the recent road testing on a previously agreed revised common assault guideline and step one factors for a revised Actual Bodily Harm (ABH) guideline. Based on the road testing findings and the evaluation findings for the existing guidelines, decisions will be sought at the meeting on the appropriate harm models for ABH and Grievous Bodily Harm (GBH.) Approval of sentences for ABH offences will also be sought.

2 RECOMMENDATION

That the Council:

- considers the findings from the recent road testing of a revised common assault guideline and ABH step one factors;
- considers options for revised harm models for ABH and GBH; and
- considers and agrees sentence levels for ABH.

3 CONSIDERATION

3.1 At the last meeting the Council agreed a revised draft guideline for common assault and considered factors for a revised guideline for the offence of actual bodily harm (ABH). Culpability factors for ABH were agreed. These were broadly similar to the factors agreed for common assault, as the only factors that distinguish Common Assault from Assault occasioning Actual Bodily Harm are the degree of injury that results and that ABH may be tried in the Crown Court and attract a significantly higher sentence. Annex A includes the agreed draft common assault guideline and

Annex B a draft revised ABH guideline including agreed culpability factors. Proposed ABH harm models and sentence levels are discussed further in this paper.

3.2 Discussion also took place regarding the evaluation findings and how findings may be addressed by a revised guideline. In particular extensive discussion regarding the harm model for ABH offences took place. Based on decisions made at the last meeting further work has been undertaken to progress or explore points discussed. It was agreed that some early road testing of the common assault guideline and ABH agreed culpability factors and harm models should be undertaken, to achieve early identification of areas for improvement prior to consultation and to assist in developing the approach to harm throughout the revised guidelines.

3.3 As a reminder, a summary of the evaluation findings highlighted three important areas of consideration in revising the ABH guideline;

- i) Analysis showed that there was a shift towards more serious disposal types– an increase in the use of custodial sentences (immediate and suspended) and a corresponding decrease in the use of community orders. This was in contrast to the prediction in the resource assessment which envisaged a drop in the severity of sentencing, due to the decrease in the sentencing range in the Sentencing Council guideline when compared to the previous guideline. It was suggested that some of this may have been attributable to the types of injury being charged as ABH (as cases analysed included a number of ABH cases involving a degree of injury more akin to GBH). This is supported by the following evaluation evidence;
- ii) A regression analysis using CCSS data was carried out and showed that “injury which is serious in the context of the offence” was the most important factor for ABH and added 26 per cent (0.2 years) to the length of immediate custodial sentences. It was noted that this was suggestive of a higher level of injury than may be expected in ABH cases.
- i) Sentencer perceptions were broadly that the sentences in the guideline were too low. This was largely thought to be attributable to the decrease in the sentencing range in the guideline when compared to the previous SGC guideline, although it was noted that the types of cases being charged as ABH may have been a contributory factor.

Road testing of common assault and ABH

3.4 The road testing findings for common assault and ABH are included at Annex C. The draft common assault guideline met with broad approval and no specific issues with factors were identified, although some of the sentence levels were considered too low. Testing is ongoing but findings so far are provided to give early indication of issues which may require further consideration once testing is complete. The predominant focus of this paper is on harm models, as two models were tested to inform the approach which may be appropriate for assessing harm in a revised guideline.

ABH - Harm

3.5 At the last meeting extensive discussion took place regarding harm factors. It was noted that as for common assault, the harm factors in the existing guideline are the biggest concern as they do not provide for cases of medium harm, and interpretation of the term 'within the context of the offence' has proved problematic. The existing guideline harm factors for ABH are as for common assault, save for the greater harm factor relating to the context of the offence specifying that such harm includes disease transmission and/or psychological harm.

3.6 A revised harm model was proposed at the last meeting which included three harm categories. The proposed model sought to provide a continuum from the common assault harm model, and recognise that low level ABH cases may involve minor harm (in the context of an ABH offence);

Harm	
The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.	
Category 1	Serious physical or psychological harm
Category 2	Cases falling between categories 1 and 3
Category 3	Minor physical or psychological harm

3.7 This model was not agreed as use of the word 'serious' to describe harm in an ABH was considered problematic, as 'serious' is used to define GBH type harm. It was agreed that descriptions of injuries to define harm was not appropriate, as the impact of a similar injury may be significantly different. Comparisons between GBH

offences and ABH were also discussed, and the point made that although the legal elements of ABH are more akin to common assault, the harm involved is more akin to GBH in many cases. It was agreed that harm models for common assault and ABH would be tested and findings reported to Council before a harm model was finalised.

3.8 Given the issues discussed in defining harm without describing the injuries involved, it was considered at the last meeting that the 'in the context' approach to assessing harm should be retained but further guidance provided on what should be considered in undertaking this assessment. Discussion took place outside of Council with judicial Council members as to how this guidance should be phrased. It was agreed that for common assault the agreed model would be tested, and that two harm models would be tested for ABH. The ABH harm models it was agreed should be tested are included at Annex D. These models sought to retain the 'in the context' approach to assessing harm, but provide improved guidance as to what is relevant in considering the level of harm present in an offence.

3.9 Road testing of the harm models identified that of the two models tested participants preferred Model B, which included additional explanatory guidance that ABH harm fell between the serious harm in GBH and lower harm in common assault. The majority of magistrate participants preferred a clearer distinction of what should be considered in the harm assessment. Road testing findings also highlighted that sentencers approved of the 'high, medium and low' categorisations of harm, as they believed this provided for flexibility in the harm assessment.

3.10 While the approaches tested seemed to improve on understanding of 'in the context' factor, there are concerns that they may not fully address issues identified in the evaluation of the guideline. The assessment still retains a high degree of subjectivity in requiring sentencers to consider the range of injuries which may be present in the offence, when sentencers' experience or evaluation of injuries may differ. This is supported by the road testing which resulted in differing categorisations of harm when sentencing offence scenarios, although sentencers did appear to consistently assess the same injury types in the same category when asked in a more hypothetical way. It is therefore important to consider the impact of a model which retains a fairly high level of subjectivity.

3.11 The assault guideline evaluation found that the step one factor which had the strongest influence on sentence severity for ABH was "Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence", which added 0.2 years to the average custodial sentence length. In

addition, analysis of data from the Crown Court Sentencing Survey (CCSS) shows that in 2014, this factor was present on 22 per cent of survey forms for ABH (in contrast with just 12 per cent of forms containing the lesser harm equivalent “Injury which is less serious in the context of the offence”). Qualitative research undertaken with sentencers as part of the evaluation found that this greater harm factor was “difficult to interpret in ABH cases as these cover such a wide range of injuries”.¹

3.12 Some of the evaluation findings regarding sentence increases could be attributable to no middle category of harm being available in the existing guideline, which will not be an issue in the revised guideline. However, it is still important to note the interpretation issues with a less descriptive factor which will also mean it is much more difficult to assess the impact of a guideline if it provides for greater inconsistency in the harm assessment. The models tested could be seen to be not much of an improvement on the existing approach, given the degree of subjectivity and flexibility provided.

3.13 As the ‘in the context factor’ is considered to be a contributor to sentence increases, it will be important that the revised guideline adequately addresses this. This is important both in respect of the Council being seen to be responsive to addressing problems highlighted in the evaluation, and to ensure the guideline provides for consistent assessments of harm and relative sentences.

3.14 It has already been agreed that reference to a description of injuries is not an appropriate way to assess harm, as while an injury may be of the same type, the impact may differ. In considering options for harm models for ABH, the previous SGC Assault guideline has been reviewed. SGC guidelines combined culpability and harm in the offence seriousness assessment, but this guideline addressed harm factors using the following descriptions;

¹ <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-assessment-qualitative-research.pdf> (p7)

SGC ABH guideline

Type/nature of activity	Starting point	Sentencing range
Pre-meditated assault EITHER resulting in injuries just falling short of GBH OR involving the use of a weapon	30 months custody	2 – 4 years custody
Pre-meditated assault resulting in relatively serious injury	12 months custody	36 weeks – 2 years custody
Pre-meditated assault resulting in minor, non-permanent injury	24 weeks custody	12 – 36 weeks custody
Other assault resulting in minor, non-permanent injury	Community Order (HIGH)	Community Order (MEDIUM) – 26 weeks custody

3.15 In considering the way other guidelines have defined or described harm it is noted that the SGC guideline did refer to injuries just short of GBH for a high level offence, and used the word ‘serious’ in the description of an injury (although this was qualified as ‘relatively serious’ which is similar to an ‘in the context’ consideration). The clearer definition of injuries or the benchmark for an injury would be likely to provide for more consistent harm assessments. While the models road tested do provide for a higher degree of subjectivity, the reference to other offences in the models tested was broadly found to be useful. It may therefore be possible to provide for a more consistent harm assessment of ABH by reference to harm in other offences being included within factors rather than in additional guidance. A way to address this could be for the lowest ABH harm category to be phrased as ‘low level of injury comparable to injury in a high level common assault.’ This reflects the point made at the last meeting that an ABH injury is not necessarily always more serious than a common assault, and that it is possible for a serious common assault to be as or more serious than a low level ABH. This approach would provide for less subjectivity in assessing a low level of harm while still providing a ‘benchmark’ for this category.

3.16 A further advantage to this approach is that it could also address sentencers perceptions and concerns regarding sentence levels. One of the evaluation findings was that sentencers consider the sentences in the existing ABH guideline are too low. The evaluation noted “*perceptions of the sentencers who were interviewed was that sentences had decreased, particularly for the lower level ABH offences. This view may reflect participants’ awareness that the sentencing range had decreased;*

many felt these were now too low and in interviews, several Crown Court judges said that they often go outside the category range to increase a sentence for an actual bodily harm offence:

Section 47...I will probably go outside the guidelines between 20 per cent and 25 per cent of the time because the ranges aren't appropriate in my opinion; they are too low (Crown Court judge)"

3.17 This finding was supported by evidence considered at the last meeting which illustrated a marked trend of higher sentences above the category range in the lowest category of ABH seriousness. The data illustrated a high proportion (around 40%) of custodial sentences were imposed in this category, which does not even provide for a custodial sentence to be imposed. The Council decided at the last meeting that existing sentence starting points should not be revised to address this, as increasing them may seem to be an unjustified inflationary step. However, if the lowest category is defined to capture a low level (comparable to a common assault) ABH, this may provide for a community order starting point in the lowest categories of seriousness to be considered a proportionate sentence. This would also support the decision at the last meeting to have parity between the high level common assault starting point and the low level ABH starting point.

3.18 An alternative approach would be to include reference to GBH in the highest category as did the previous SGC guideline. However, the existing guideline starting point for a high level ABH is 1 year 6 months custody and for a low level GBH a high level community order. As was noted at the last meeting, any revisions to the guideline need to guard against creating a perverse incentive for an offender to plead to a more serious offence to receive a lower sentence, and it would require significant revision to existing starting point categories to avoid this should GBH be referenced within the highest category of ABH. The difficulty with the two offences having the same statutory maximum sentence is that it will be unavoidable that there be some overlap in the sentences if the Council do not wish to increase sentences for GBH S.20. For this reason and to recognise that ABH offences will contain the broadest range and scale of injuries than other assault offences, it may be preferable to provide a benchmark for the lower level offences but provide more flexibility in categorising the mid and top range of offences.

3.19 Based on the discussion above, a proposed revised model for ABH is included below for consideration. This retains the high and low approach in the tested models, and references common assault to provide a benchmark within the lowest category. This is proposed as an alternative to tested Model B at Annex D, which

sentencers preferred in road testing. Both are included below to provide for comparison of approaches;

3.20 It is also important to note that testing of the ABH harm model with Crown Court Judges is still to be undertaken. Subject to Council consideration of the options both could be tested to explore which is preferred by these sentencers and which achieves greater consistency in harm categorisations.

ABH – proposed harm models

Option 1)

Harm The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.	
Category 1	High level of physical or psychological harm
Category 2	Cases falling between categories 1 and 3
Category 3	Low level of physical or psychological harm where level of injury is comparable to harm in a high level common assault

Option 2)

Harm Assault occasioning actual bodily harm causes injury which is more serious than in cases of common assault, but which falls below the really serious injury in cases of grievous bodily harm. To assess the level of harm caused by the offence, the court must consider;	
<ul style="list-style-type: none"> • The range of injuries (including physical and psychological injury) that can occur in cases of assault occasioning actual bodily harm • Where in that range of injuries the injury caused falls 	
Category 1	High level of physical or psychological harm
Category 2	Medium level of physical or psychological harm
Category 3	Low level of physical or psychological harm

Question 1: Does the Council prefer Option 1 or Option 2 as a revised ABH harm model?

Question 2: Should one or both harm models be tested with Crown Court judges in the ongoing toad testing?

GBH - Harm

3.21 The approach to assessing harm and the potential impact on sentences will be even more important for GBH offences, particularly s.18 offences which carry a statutory maximum life sentence and where sentence increases were most pronounced.

The evaluation of the existing guideline identified that “Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence” was the most influential factor on sentences for both GBH and GBH with intent. This factor was present on around a third of CCSS forms for each offence in 2014, and added 0.3 years and 1.7 years on to the average custodial sentence length for these offences, respectively. As mentioned previously, qualitative research undertaken during the evaluation highlighted that sentencers experienced significant difficulties with this factor: “Crown Court judges, district judges and magistrates admitted to not knowing exactly what it means or what types of injuries should take a case into greater or lesser harm”.²

3.22 As with ABH offences, some of the findings are likely to be attributable to no middle category of harm being available in the existing guideline which will not be an issue in the revised guideline. However, given that all harm in a GBH offence is serious, it is even more important to consider if clearer defined factors would be appropriate in the revised guideline rather than more subjective guidance. There could otherwise be an increased risk of high and medium categorisations of harm, as sentencers may not wish to be seen to describe harm as low in these cases. This is already an issue within the existing guideline, which was highlighted by one sentencer in the evaluation commenting “*I’m not quite clear...how the injury can be less serious in the context of the offence where the alleged injury has to be a very serious bodily injury*”... (Crown Court judge).

3.23 In considering how GBH type harm could be defined, reference has been made to the previous SGC GBH guidelines, and to the Health and Safety guideline

² <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-assessment-qualitative-research.pdf> (p7)

which requires consideration of the impact of any injuries on a victim. Extracts from these guidelines are included below. Again, it should be noted that the SGC guidelines combined culpability and harm in the offence seriousness assessment.

SGC GBH S.20

Type/nature of activity	Starting point	Sentencing range
Particularly grave injury or disfigurement results from a pre-meditated assault where a weapon has been used	3 years custody	2 – 4 years custody
Pre-meditated assault where a weapon has been used OR Other assault where particularly grave injury results or a weapon has been used	18 months custody	12 months – 3 years custody
Pre-meditated assault where no weapon has been used	36 weeks custody	24 weeks – 18 months custody
Other assault where no weapon has been used	24 weeks custody	Community Order (High) – 36 weeks custody

SGC GBH S.18

Type/nature of activity	Starting point	Sentencing range
Victim suffered life-threatening injury or particularly grave injury from a pre-meditated wounding or GBH involving the use of a weapon acquired prior to the offence and carried to the scene with specific intent to injure the victim	13 years custody	10 – 16 years custody
Victim suffered life-threatening injury or particularly grave injury (where the offence was not pre-meditated) OR Pre-meditated wounding or GBH involving the use of a weapon acquired prior to the offence and carried to the scene with specific intent to injure the victim (but not resulting in a life threatening injury or particularly grave injury)	8 years custody	7 – 10 years custody
Victim suffered a very serious injury or permanent disfigurement OR Pre-meditated wounding or GBH OR Other wounding or GBH involving the use of a weapon that came to hand at the scene	5 years custody	4 – 6 years custody
Other wounding or GBH	4 years custody	3 – 5 years custody

Health and Safety guideline

Seriousness of harm risked		
Level A <ul style="list-style-type: none"> • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy 	Level B <ul style="list-style-type: none"> • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition 	Level C <ul style="list-style-type: none"> • All other cases not falling within Level A or Level B

3.24 For GBH offences it is less difficult to define harm as reference can be made to the impact of the injuries on the victim. While the SGC guidelines s.18 and s.20 guidelines differed due to the conflation of harm with culpability in those guidelines, it is considered that harm in a GBH offence will be of the same type and it is proposed that the same harm model could be used for both s.18 and s.20 offences. While GBH type harm is wide and varied, some injuries have lasting impacts – such as disease transmission and brain injuries – while others are lower level injuries which are recovered from with no lasting impact. A proposed revised harm model for GBH offences is included below;

GBH – proposed descriptive model

Harm	
All cases of GBH will involve 'really serious harm', which can be physical or psychological. The court should assess the level of harm caused with reference to the impact on the victim	
Category 1	Injury results in physical or mental impairment resulting in lifelong dependency on third party care or medical treatment Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out normal day to day activities or on their ability to work Particularly grave and life-threatening injury caused
Category 2	Offence results in a permanent, irreversible injury or condition but no substantial and long term effect on victim's ability to carry out normal day to day activities or on their ability to work Grave but non life-threatening injury caused
Category 3	All other cases

3.25 As the recent testing of harm model proposals was undertaken with magistrates and District Judges only, it is proposed that harm models agreed today be tested with Crown Court Judges in the ongoing road testing. It is proposed that this seeks to identify if the ABH and GBH models provide for consistent harm assessments by providing a range of injury descriptions and asking for these to be categorised.

3.26 Subject to the GBH harm model being approved, testing of a less descriptive GBH model including high, medium, and low categories of harm could also be undertaken to identify if this promotes consistency of categorisation. An example of a less descriptive model is provided below;

Harm	
All cases of GBH will involve ‘really serious harm’, which can be physical or psychological. To assess the level of harm caused by the offence, the court must consider;	
<ul style="list-style-type: none"> • The range of injuries (including physical and psychological injury) that can occur in cases of grievous bodily harm • Where in that range of injuries the injury caused falls 	
Category 1	High level of physical or psychological harm
Category 2	Medium level of physical or psychological harm
Category 3	Low level of physical or psychological harm

Question 3: Does the Council prefer the descriptive factors or high medium and low factors GBH harm model?

Question 4: Should one or both harm models discussed be tested with Crown Court judges in the ongoing toad testing?

Actual Bodily Harm - sentences

3.27 Existing sentence starting points and ranges for ABH are illustrated below;

Offence Category	Starting Point <i>(Applicable to all offenders)</i>	Category Range <i>(Applicable to all offenders)</i>
Category 1	1 year 6 months' custody	1 – 3 years' custody
Category 2	26 weeks' custody	Low level community order – 51 weeks' custody
Category 3	Medium level community order	Band A fine – High level community order

3.28 At the last meeting the Council were asked to consider a number of questions to inform sentence level development for ABH.

3.29 The Council considered evidence in relation to the existing guideline, such as the evidence noted earlier that 40% of sentences imposed in the lowest category of ABH were custodial even though the category range does not provide for custodial sentences. As was discussed earlier, it was submitted that this reflects the evaluation finding that some sentencers do not believe the existing guideline sentences are adequate, and that the types of case found to be at the lower end of seriousness in the guideline are considered too serious for the sentencing options available. As noted earlier, if sentence ranges are not to be adjusted revised factors will need to provide for appropriate categorisation of offences and sentence ranges.

3.30 It was also noted at the last meeting that the lowest starting point for an ABH offence was lower than the highest starting point for a common assault, which sentencers may consider does not reflect ABH. However as noted earlier a serious common assault may be comparable to a low level ABH offence. The Council agreed that there should be parity between the highest starting point in the common assault guideline and the lowest starting point in the ABH guideline with each attracting a starting point of a high level community order. As noted earlier in this paper, the proposed ABH harm model (option 1) may support this decision.

3.31 Given that the Council did not wish to adjust sentences significantly, proposed sentences for ABH have been based on the existing guideline sentence starting points and ranges. The proposed sentence levels are included at Annex B. Annex E includes statistics on sentence distribution for this offence.

3.32 The data illustrates the findings from the assessment of the impact and implementation of the ABH guideline which noted the following;

Analysis showed that there was a shift towards more serious disposal types being given – an increase in the use of custodial sentences (immediate and suspended) and a corresponding decrease in the use of community orders. The distribution of sentence lengths for immediate custody also changed, with relatively fewer shorter

sentences (half a year or less) and an increase in the proportion in the range 0.5 to two years.

3.33 The proposed sentences include a balance of custodial and community order starting points. While the starting points are the same as for the existing guideline, a new middle category of harm and revised factors are intended to address the unintended inflationary impact of the original guideline which saw an increase in more serious disposal types and sentence lengths.

3.34 The proposed sentences were tested in the recent road testing exercise to provide an indication of whether they represented a change in current sentencing practice. On the one ABH scenario tested some sentencers felt the sentence arrived at was too high. However, this could be attributable to the characteristics of the offender and the circumstances which led to the offence in the scenario. Sentence levels will be tested further with Crown Court sentencers and during the consultation stage.

3.35 Overall the objective of revising sentences is to provide for a higher level of community orders to be imposed and a shift away from the unanticipated increase in custodial disposals, although as noted in the road testing summary there may be an increase in higher level community orders given the revision to the starting point in an A3 offence. However, lower culpability lesser harm cases would still attract a medium level community order, and if factors are revised appropriately the overall impact should be more proportionate sentences and to address issues highlighted in the evaluation.

Question 5: Does the Council agree with the proposed ABH sentence levels?

4 IMPACT /RISKS

4.1 It will be important reputationally to ensure decisions made in revising the guideline are based on evidence of issues identified in the evaluation, to ensure the Council are seen to be responsive to issues with the guideline. Proposals seek to address inflationary issues by revising factors rather than sentences where possible.

4.2 Early testing of the guidelines with sentencers will continue to be undertaken to identify potential issues and impact prior to sign off and consultation on revised guidelines.

STEP ONE
Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of culpability is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

Culpability demonstrated by one or more of the following:

A - High culpability:

- Targeting of vulnerable victim, where victim vulnerable by personal characteristics or circumstances
- Prolonged assault
- Use of substantial force
- Threatened or actual use of weapon or weapon equivalent*
- Leading role in group activity

B – Lesser culpability

- Lesser role in group activity
- Mental disorder or learning disability, where linked to the commission of the offence
- All other cases not captured by category 1 factors

*Examples of a weapon equivalent can include but are not limited to: a shod foot, use of acid, use of animal in commission of offence.

Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

Category 1	More than minor physical or psychological harm
Category 2	Minor physical or psychological harm
Category 3	No physical injury No/very low level of distress

STEP TWO

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Where the offence is committed in a domestic context, consideration must be given to the definitive guideline 'Overarching Principles: Domestic Abuse' and any aggravating features appropriately reflected in the sentence starting point.

HARM	CULPABILITY	
	A	B
Harm 1	<p>Starting point High level Community Order</p> <p>Category Range Low level Community Order - 26 weeks' custody</p>	<p>Starting point Medium level Community Order</p> <p>Category Range Low level Community Order - 16 weeks' custody</p>
Harm 2	<p>Starting point Medium level Community Order</p> <p>Category Range Low level Community Order - 16 weeks' custody</p>	<p>Starting point Band B fine</p> <p>Category Range Band A Fine - low level Community Order</p>
Harm 3	<p>Starting point Band B fine</p> <p>Category Range Band A Fine - Low level Community Order</p>	<p>Starting point Band A Fine</p> <p>Category Range Discharge – Band C Fine</p>

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

Factors increasing seriousness

Statutory aggravating factors:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

Other aggravating factors:

Spitting

Offence committed against those working in the public sector or providing a service to the public

Offence committed in prison

Presence of children

Gratuitous degradation of victim

Abuse of power and/or position of trust

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Commission of offence whilst under the influence of alcohol/drugs

Other offences taken into consideration (TICs)

Offence committed whilst on licence or subject to post sentence supervision

History of failure to comply with court orders

Factors reducing seriousness or reflecting personal mitigation

No previous convictions or no relevant/recent convictions

Remorse

Good character and/or exemplary conduct

Significant degree of provocation

Age and/or lack of maturity

Mental disorder or learning disability, where not linked to the commission of the offence

Sole or primary carer for dependent relative(s)

Determination and/or demonstration of steps taken to address addiction or offending behaviour

Serious medical conditions requiring urgent, intensive or long-term treatment

STEP ONE
Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of culpability is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

Culpability demonstrated by one or more of the following:

A - High culpability:

- Targeting of vulnerable victim, where victim vulnerable by personal characteristics or circumstances
- Prolonged assault
- Use of weapon or weapon equivalent*
- Leading role in group activity

B – Lesser culpability

- Lesser role in group activity
- Mental disorder or learning disability, where linked to the commission of the offence
- All other cases not captured by category 1 factors

*Examples of a weapon equivalent can include but are not limited to: a shod foot, use of acid, use of animal in commission of offence.

******HARM MODEL TO BE AGREED******

Category 1

Category 2

Category 3

STEP TWO

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Where the offence is committed in a domestic context, consideration must be given to the definitive guideline ‘Overarching Principles: Domestic Abuse’ and any aggravating features appropriately reflected in the sentence starting point.

HARM	CULPABILITY	
	A	B
Harm 1	<p>Starting point 1 year 6 months’ custody</p> <p>Category Range 1 – 3 years custody</p>	<p>Starting point 26 weeks’ custody</p> <p>Category Range HL CO – 1 years custody</p>
Harm 2	<p>Starting point 26 weeks’ custody</p> <p>Category Range HL CO – 1 years custody</p>	<p>Starting point HL CO</p> <p>Category Range LL CO – 26 weeks custody</p>
Harm 3	<p>Starting point HL CO</p> <p>Category Range LL CO – 26 weeks custody</p>	<p>Starting point ML CO</p> <p>Category Range Band C Fine – HL CO</p>

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

Factors increasing seriousness

Statutory aggravating factors:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

Other aggravating factors:

Offence committed against those working in the public sector or providing a service to the public

Offence committed in prison

Presence of children

Gratuitous degradation of victim

Abuse of power and/or position of trust

Spitting

Threatened with weapon

Significant planning

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Commission of offence whilst under the influence of alcohol/drugs

Other offences taken into consideration (TICs)

Offence committed whilst on licence or subject to post sentence supervision

History of failure to comply with court orders

Factors reducing seriousness or reflecting personal mitigation

No previous convictions or no relevant/recent convictions

Remorse

Good character and/or exemplary conduct

Significant degree of provocation

Age and/or lack of maturity

Mental disorder or learning disability, where not linked to the commission of the offence

Sole or primary carer for dependent relative(s)

Determination and/or demonstration of steps taken to address addiction or offending behaviour

Serious medical conditions requiring urgent, intensive or long-term treatment

ABH and Common Assault road-testing findings

Introduction

Twelve interviews were conducted with magistrates and district judges to discuss the potential *Common Assault* and *Actual Bodily Harm (ABH)* draft guidelines. The ABH interviews covered both step one and step two, but were primarily focused on discussing revised approaches to assessing harm. The common assault interviews only focused on step one and starting points, but again focused on the new draft harm model.

The interviews were conducted either over the phone or face-to-face. Each sentencer looked at two scenarios (one each on ABH and common assault, see Table 1), sentencing the scenarios as if they were in court today (using the current assault guideline) and then sentencing using the new draft guideline. The guideline was also discussed in a group setting with around 15 magistrates at a Regional Magistrates' Leadership event.

The research will provide valuable information on how the guideline might work in practice to support development of the draft guideline. However, it should be noted that as there are limitations to this work¹, the research findings presented below should be regarded as **indicative** only and not conclusive. Further research on the draft *Assault* guideline is also being conducted over the forthcoming months and will encompass any further changes to the model in the guideline. This will include two further common assault scenarios which are currently being tested.

Table 1. ABH and common assault scenarios used in road-testing

ABH scenario – J was at the funeral of her mother in law when her estranged husband N arrived with his new partner, K. J was very upset as she suspected he had been having an affair with K during the marriage. She got drunk at the wake, and confronted N for bringing K, and embarrassing her. N told her she was making a scene and embarrassing herself. J became angry and picked up a photoframe, hitting him over the head with it causing a small cut which required gluing. J was extremely upset and embarrassed after the incident and numerous character references expressed shock at such out of character behaviour. J pleaded guilty at the first hearing.

(The objective was to identify how the level of injury was assessed and if the harm model provided for clear understanding and a consistent assessment among sentencers.)

¹ Limitations include: this is a small sample which is not necessarily representative;; scenarios only include limited detail of the actual case, potentially undermining how realistic the sentencing exercise is; and these findings are based on testing from one group of sentencers - further research is taking place with magistrates to understand their views on the draft assault guideline.

Common assault scenario – T and M were on a night out and waiting in line to get into a nightclub for some time. On arriving at the end of the queue the doorman, B, informed them the venue was full and no further entry could be admitted. M became very angry and abusive, shouting that she was cold and needed the toilet and had queued for 45 minutes and was not leaving. This continued for 5 minutes. B then advised her that due to her behaviour and bad language she would definitely not be allowed to enter and told her to leave the premises. M refused and tried to push past B, who held her back. M bit B's hand hard, causing him to let her go. Teethmarks were visible in his skin for some time, and the skin remained red until the following morning. In B's statement he said while the bite was painful it was par for the course in his job. M pleaded guilty at the first hearing and was full of remorse and regretted her behaviour.

(The objective was to identify how the level of injury was assessed and also to explore how a bite was assessed, i.e; was it treated as a weapon.)

Key Findings

ABH

- Most sentencers preferred the new guideline when compared with the current guideline. They found the new guideline simpler and more flexible, particularly with regard to the harm model where the 'low', 'medium' and 'high' levels were seen to give more discretion and open up the discussion between sentencers about the degree of psychological and physical harm caused and where the sentencing should fall. Other reasons for preferring the draft guideline included: removing perceived problematic culpability factors ('intention to commit more serious harm than actually resulted from the offence' and 'deliberately causes more harm than is necessary for commission of the offence'²), including 'spitting' as an aggravating factor and the inclusion of psychological harm. A couple of sentencers, however, preferred the current guideline as they felt it was more comprehensive and one sentencer felt that the 'low', 'medium' and 'high' harm levels in the new guideline were difficult to interpret.
- When sentencing the ABH scenario with the new guideline most sentencers categorised the culpability as expected (high culpability - A) as they considered the photo frame to be a weapon. However, a few sentencers did not consider this to be a weapon and therefore placed the offender in culpability B (lesser).
- Most sentencers categorised the offender as harm category 3 ('low level of physical harm'), as expected. A few sentencers, however, felt that this was 'medium level of physical harm' (category 2) which suggests that there may be some inconsistency when interpreting 'medium' and 'low' harm.

² A few sentencers mentioned having issues with interpreting these factors and as a result were reluctant to use them in their sentencing decisions.

- Alongside the scenarios sentencers were also asked to hypothetically describe the type of injuries that would be classified in the different harm categories. This revealed more consistency, with sentencers generally in agreement about what type of injuries would be placed in each level of harm. High levels of physical harm injuries were seen as broken bones, severe bruising, injuries that required hospital treatment, longer-term injuries, multiple injuries, deep scratches, concussion and, in some cases, leaving scars. Low levels of physical harm injuries were seen as cuts and light bruising that did not require hospital treatment, and a shove or a slap. High psychological harm was having an impact on the way an individual lived their life (e.g. not being able to go out alone) and low psychological harm was being 'upset' at the time of the incident but not causing longer term distress.
- Sentencers were asked to look at two different harm models, one with some additional information about the context of ABH injuries³ and one without this additional information. Most sentencers preferred the harm model which included the additional information, stating that it was a '*helpful introduction*' and '*gives useful context*'. One District Judge who demonstrated that they understood the 'context of the offence' factor in the current guideline recognised that the additional information would be useful for lay colleagues. It should be noted, however, that one Bench Chair person in the group discussion was not in favour of this version, feeling that the additional of this information could be seen as "*patronising*". Despite having a preference for a more detailed version, road-testing found there were no differences in sentence outcomes for this scenario when using either version.
- Using the new guideline most sentencers gave the offender a community order. Just under half of the sentencers gave a sentence lower than the starting point in the guideline, even though in most cases the aggravating and mitigating factors balanced each other out. For the offenders placed in A3 this was just a case of dropping from a high level community order to a medium level or low level community order. However, for offenders placed in A2 this included dropping from 26 weeks' custody to a medium level community order, 6 weeks' custody and to a fine (although this sentencer was undecided between harm 2 and 3). This suggests that sentencers are comfortable with using the full sentencing range available and going outside of this range when necessary. However, this also illustrates that that the starting point may be seen to be too high, particularly as findings from the Leadership event identified that some magistrates felt high level community orders could be too high for this scenario.

³ 'Assault occasioning actual bodily harm causes injury which is more serious than in cases of common assault, but which falls below the really serious injury in cases of grievous bodily harm'.

- Final sentences generally stayed the same when comparing the current guideline with the new guideline. A few sentences increased (from a fine to community order and then between community order levels) and one sentencer went from custody using the current guideline to a community order in the new guideline. This suggests that whilst the new guideline is not going to widely change sentence outcomes, it may result in some higher level community orders.

Common Assault

- Again, sentencers generally preferred the new guideline when compared with the current guideline. They suggested that the new guideline was easier to use and they were particularly content with the structure of the new harm model, with its inclusion of a middle category that allows more room for interpretation by using terms such as ‘more than minor’ and ‘minor’ (although there was some discussion at the magistrates’ event around what is actually meant by “minor” and “more than minor”). Only a couple of sentencers preferred the current guideline (the same sentencers who preferred the current ABH guideline) as they felt this version was more comprehensive.
- Most sentencers categorised culpability and harm as expected by policy (A2). The main reason for not placing the offender in the expected category was due to either not seeing teeth as a weapon (culpability) or the bitemark as a ‘minor’ physical injury (harm). This suggests that different people may have different views on how serious biting is, rather than the guideline per se not working for this type of offence. However, it does also mean that there is a risk that the guideline is not clear on how to assess biting.
- When using the new guideline sentences were generally consistent between sentencers, depending on where the offender was placed in culpability and harm. Most sentencers who placed the offender in A2 gave a starting point⁴ of a medium level community order as outlined in the guideline (one low level community order was also given). The offender who was placed in A1 was given a high level community order as outlined in the guideline and those who placed the offender in A3 or B2 gave a starting point of a fine, as outlined in the guideline.
- Starting point sentences were mostly consistent when comparing the current guideline and the new guideline. However, in a few instances the sentencer ended up giving a lower level of community order or dropping down to a fine

⁴ The common assault fieldwork only asked sentencers to test the current and new guideline for culpability, harm and starting points as this was the main concern in the development of the guideline.

when using the new guideline. This suggests that whilst the new guideline may not widely alter sentence outcomes, it may result in some lower level community orders or more fines being given.

- Of the sentencers who gave lower sentences when using the new guideline most of them felt that this sentence was too low, particularly for the couple of sentencers who dropped from a community order to a fine. There was a similar finding at the magistrates' Leadership event, with the magistrates who gave a starting point of a band B fine stating that this was too low. However, it should be noted that this road-testing only focused on step one of the guideline and the scenario was to test how biting is assessed. Therefore, the opportunity to aggravate or mitigate the sentence using the full sentencing range was not given.

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ABH - Harm Model A

Harm	
To assess the level of harm caused by the offence, the court must consider;	
<ul style="list-style-type: none"> • The range of injuries (including physical and psychological injury) that can occur in cases of assault occasioning actual bodily harm • Where in that range of injuries the injury caused falls 	
Category 1	High level of physical or psychological harm
Category 2	Medium level of physical or psychological harm
Category 3	Low level of physical or psychological harm

ABH - Harm Model B

Harm	
Assault occasioning actual bodily harm causes injury which is more serious than in cases of common assault, but which falls below the really serious injury in cases of grievous bodily harm.	
To assess the level of harm caused by the offence, the court must consider;	
<ul style="list-style-type: none"> • The range of injuries (including physical and psychological injury) that can occur in cases of assault occasioning actual bodily harm • Where in that range of injuries the injury caused falls 	
Category 1	High level of physical or psychological harm
Category 2	Medium level of physical or psychological harm
Category 3	Low level of physical or psychological harm

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Sentencing trends for ABH, 2007-2017^{1,2}

Proportion of adult offenders sentenced for ABH, by sentence outcome, all courts, 2007-2017

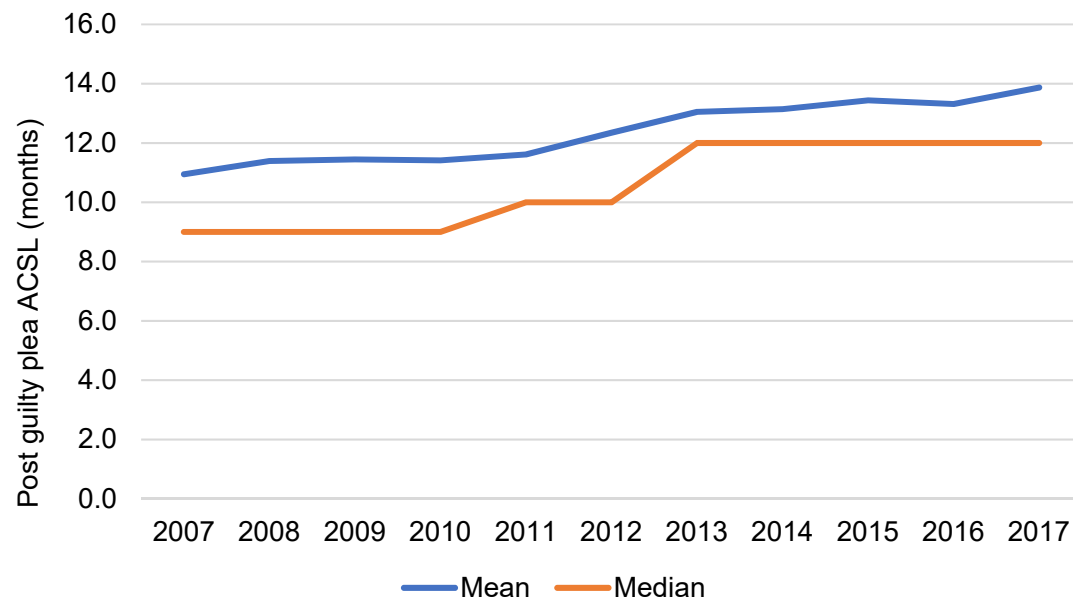
Outcome	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Absolute and conditional discharge	4%	3%	2%	2%	2%	2%	1%	1%	1%	1%	1%
Fine	3%	2%	2%	1%	2%	2%	1%	1%	1%	1%	1%
Community sentence	32%	32%	31%	32%	30%	23%	20%	17%	16%	15%	15%
Suspended sentence	28%	30%	31%	31%	31%	34%	36%	38%	41%	39%	38%
Immediate custody	29%	31%	32%	31%	34%	38%	40%	41%	39%	40%	42%
Otherwise dealt with	4%	3%	2%	2%	2%	1%	2%	2%	2%	2%	2%

¹ Source: Court Proceedings Database, Ministry of Justice

² Excludes youths, section 29 offences (racially/religiously aggravated), and custodial sentences of over 5 years (the statutory maximum sentence for this offence)

ABH sentence lengths

Post guilty plea average custodial sentence lengths (ACSLs) received by adult offenders sentenced to immediate custody for ABH, all courts, 2007-2017

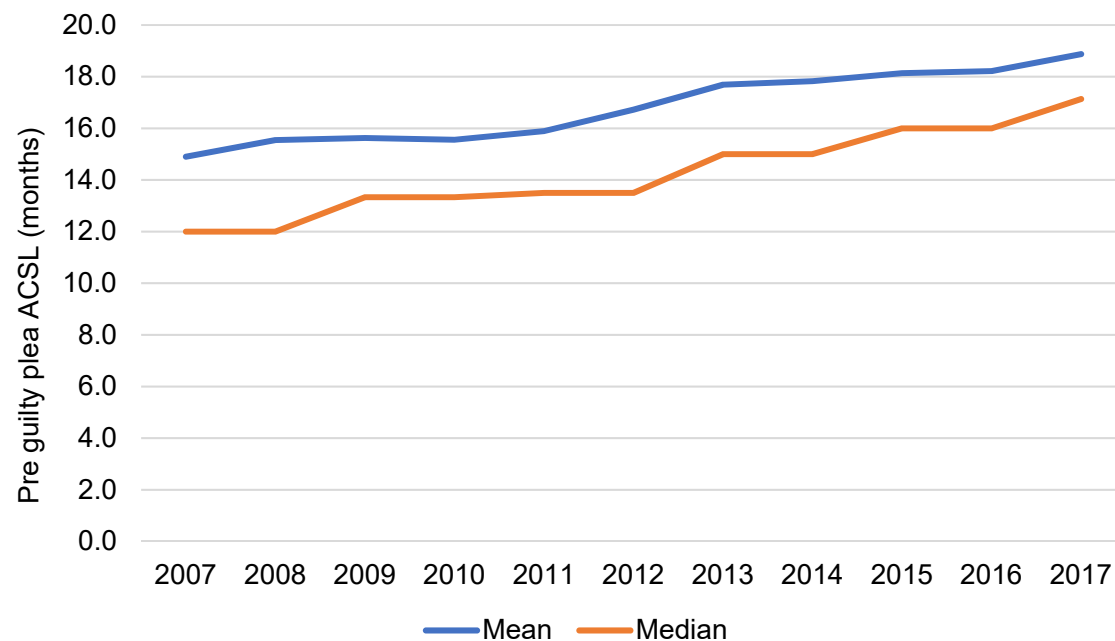


Post guilty plea sentence length bands received by adult offenders sentenced to immediate custody for ABH, all courts, 2007-2017³

Sentence length band	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
1 year or less	71%	70%	69%	70%	69%	65%	60%	59%	58%	57%	55%
Between 1 and 2 years	24%	25%	25%	26%	26%	29%	33%	34%	35%	35%	36%
Between 2 and 3 years	4%	5%	5%	4%	4%	5%	6%	6%	6%	7%	8%
Between 3 and 4 years	1%	1%	1%	1%	1%	1%	1%	1%	1%	1%	1%
Between 4 and 5 years	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%

³ Sentence length bands do not include the lower bound, but do include the upper bound sentence length. For example, the category '1 year or less' includes sentence lengths less than and equal to 1 year, and 'Between 1 and 2 years' includes sentence lengths over 1 year, and up to and including 2 years.

Estimated pre guilty plea average custodial sentence lengths (ACSLs) received by adult offenders sentenced to immediate custody for ABH, all courts, 2007-2017



Estimated pre guilty plea sentence length bands received by adult offenders sentenced to immediate custody for ABH, all courts, 2007-2017⁴

Sentence length band	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
1 year or less	51%	50%	49%	48%	46%	43%	38%	38%	37%	37%	37%
Between 1 and 2 years	34%	33%	35%	37%	38%	40%	43%	42%	42%	42%	38%
Between 2 and 3 years	12%	12%	12%	12%	12%	13%	15%	15%	17%	15%	19%
Between 3 and 4 years	2%	3%	3%	2%	2%	3%	4%	4%	4%	5%	5%
Between 4 and 5 years	1%	2%	1%	1%	1%	1%	1%	2%	1%	1%	1%

⁴ Sentence length bands do not include the lower bound, but do include the upper bound sentence length. For example, the category '1 year or less' includes sentence lengths less than and equal to 1 year, and 'Between 1 and 2 years' includes sentence lengths over 1 year, and up to and including 2 years.

Crown Court Sentencing Survey data for ABH offences, 2013 - 2015 (Q1)^{5,6}

Sentence table in Sentencing Council ABH definitive guideline

Offence Category	Starting Point <i>(Applicable to all offenders)</i>	Category Range <i>(Applicable to all offenders)</i>
Category 1	1 year 6 months' custody	1 – 3 years' custody
Category 2	26 weeks' custody	Low level community order – 51 weeks' custody
Category 3	Medium level community order	Band A fine – High level community order

Proportion of offenders placed in each offence category, Crown Court Sentencing Survey

Offence category	2013	2014	2015 Q1
	(n=3,422)	(n=3,781)	(n=932)
Level 1 (most)	37%	39%	42%
Level 2	54%	53%	50%
Level 3 (least)	9%	9%	8%
Total	100%	100%	100%



Around half of offenders sentenced in the Crown Court are placed within the middle category of seriousness. Over time there's been a shift towards more offenders being placed in the highest category.

Proportion of offenders receiving each sentence outcome: Offence category 1 (most serious), Crown Court Sentencing Survey

Sentence outcome	2013	2014	2015 Q1
	(n=1,263)	(n=1,457)	(n=392)
Immediate custody	73%	68%	61%
SSO	25%	30%	36%
CO	2%	2%	3%
Conditional discharge	0%	0%	0%
Other	0%	0%	0%
Total	100%	100%	100%

⁵ Source: Crown Court Sentencing Survey, 2011-2015 (Q1)

⁶ Excludes youths, section 29 offences (racially/religiously aggravated), and custodial sentences of over 5 years (the statutory maximum sentence for this offence)

Proportion of offenders receiving each sentence outcome: Offence category 2 (middle category), Crown Court Sentencing Survey

Sentence outcome	2013	2014	2015 Q1
	(n=1,847)	(n=1,997)	(n=464)
Immediate custody	34%	36%	30%
SSO	49%	49%	53%
CO	16%	14%	16%
Fine	0%	0%	0%
Conditional discharge	0%	0%	0%
Absolute discharge	0%	0%	0%
Other	0%	1%	1%
Total	100%	100%	100%

Proportion of offenders receiving each sentence outcome: Offence category 3 (least serious), Crown Court Sentencing Survey

Sentence outcome	2013	2014	2015 Q1
	(n=312)	(n=327)	(n=76)
Immediate custody	12%	17%	13%
SSO	23%	30%	30%
CO	54%	42%	39%
Fine	4%	5%	5%
Conditional discharge	6%	6%	12%
Absolute discharge	0%	1%	0%
Other	1%	0%	0%
Total	100%	100%	100%



On average, around 40% of offenders in category 3 received a custodial sentence (immediate custody or SSO), which isn't in this category range.

Post guilty plea mean ACSLs for offenders sentenced to immediate custody, Crown Court Sentencing Survey

	ACSL in years		
Offence category	2013	2014	2015 Q1
Level 1 (most)	1.5	1.5	1.5
Level 2	0.8	0.8	0.8
Level 3 (least)	0.7	0.6	0.6

Estimated pre guilty plea mean ACSLs for offenders sentenced to immediate custody, Crown Court Sentencing Survey

	ACSL in years		
Offence category	2013	2014	2015 Q1
Level 1 (most)	2.0	2.0	2.0
Level 2	1.1	1.1	1.0
Level 3 (least)	0.9	0.7	0.8

Sentencing Council

Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

28 September 2018
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1 ISSUE

1.1 At the July meeting the Council took the decision to revise the guideline for the either way offence of unauthorised use of a trade mark which is currently in the MCSG. The revised guideline would be for use in magistrates' courts and the Crown Court.

1.2 The Council is asked to consider a first draft of the revised guideline at Annex A. The existing MCSG guideline is at Annex B.

2 RECOMMENDATION

2.1 The Council is asked to consider the draft guideline at Annex A and agree:

- The approach to be taken to culpability and harm
- The approach to be taken to sentence levels
- The aggravating and mitigating factors

3 CONSIDERATION

The offence

3.1 The offence of unauthorised use of a trade mark contrary to section 92 of the Trade Marks Act 1994 has a maximum sentence of ten years' imprisonment. The legislative provisions are reproduced at Annex C. In summary the offence can be committed by possessing or selling counterfeit goods or by counterfeiting or possessing the means of counterfeiting goods.

3.2 Information on the nature of the offending has come from an analysis of 19 Crown Court transcripts (covering 43 offenders), and from consideration of a small number of CACD judgments. Cases that are prosecuted typically relate to clothing, footwear or accessories (such as bags), but also include films, music, computer games, cigarettes and tobacco and electrical equipment. Cases vary from the very unsophisticated such as selling a few obviously fake items on a market stall or online, to highly organised and profitable businesses manufacturing or importing a large quantity of high quality counterfeit 'designer' goods.

Sentencing volumes and levels

3.3 The table below shows the sentence outcomes for offenders sentenced for offences of unauthorised use of a trade mark in the period 2007-2017.

Outcome	Number	%
Absolute Discharge	11	<0.5
Conditional Discharge	619	10
Fine	1,736	27
Community Order	1,616	25
Suspended Sentence Order	1,037	16
Immediate Custody	1,207	19
Other	187	3
Total	6,413	100

3.4 The majority of these cases (4,648) were sentenced in magistrates' courts. Of the 1,765 cases sentenced in the Crown Court a significant proportion were sentenced within magistrates' court powers. It is likely that some of those cases were sent to the Crown Court because confiscation was sought.

3.5 Of the 1,207 (or 19%) sentenced to immediate custody, the estimated range of sentence lengths **before reduction for guilty plea** is shown in the table below:

Custodial sentence length (years) pre GP¹	Number	%
Up to and including 0.5	771	64
0.5 to 1	178	15
1 to 1.5	128	11
1.5 to 2	49	4
2 to 2.5	25	2
2.5 to 3	25	2
3 to 3.5	5	<0.5
3.5 to 4	13	1
4 to 4.5	6	<0.5
4.5 to 5	1	<0.5
5 to 5.5	2	<0.5
5.5 to 6	0	0
6 to 6.5	3	<0.5
6.5 to 7	1	<0.5
7.5+	0	0
Total	1,207	100

¹ Ranges include the upper value of the interval but not the lower value (e.g. 1 to 1.5 includes sentences just above 1 year and up to and including 1.5 years).

3.6 It can be seen that the majority of offenders receive a non-custodial sentence, but that sentences of custody (immediate and suspended) represent about a third of all sentences. We do not have data for the length of the custodial term for suspended sentence orders but we know that in all cases they will be two years or less (after reduction for a guilty plea). The small number of transcripts we have for this offence suggest that most SSOs are for less than one year. Taken with the data on sentence lengths for immediate custody, about 96 per cent of custodial sentences passed are for two years or less. There are, however, a small number of cases where the offending is organised, sophisticated and highly profitable where longer sentences are passed.

3.7 If the Council's intention is that the revised guideline should broadly reflect current sentencing practice the guideline will need to provide for a range of non-custodial sentences, with an offence range of a discharge to 7 years' custody.

Question 1: Should the guideline seek broadly to reflect current sentencing practice?

Applicability

3.8 The draft guideline applies to adult offenders. There were only 45 youths sentenced for these offences in the period 2007-2017 and so no guideline for under 18s is proposed. The transcript sample suggests that there may be a small but significant number of organisations sentenced for this offence (often alongside directors). Further work will be done to establish the volumes and the fine levels imposed to enable a decision to be made as to whether a separate guideline for organisations is justified or failing that some narrative guidance on the approach to sentencing organisations.

Culpability

3.9 The suggested approach to culpability is similar to that used in the Fraud offences guideline. There are a number of CACD cases for this offence, none is a guideline case but all consider the role of the offender and the sophistication of the operation to be relevant to sentence. Some more recent cases refer to the Fraud definitive guideline as providing useful assistance.

3.10 At this stage views are sought as to whether this approach is the right one. Further work will be done in consultation with Trading Standards prosecutors to ensure that all of the key factors are covered.

Question 2: Does the Council agree with the approach to culpability?

Harm

3.11 The suggested approach to assessing harm is to use financial values as in the fraud and money laundering guidelines as opposed to the number of items as in the MCSG

guideline. The difficulty is in establishing what aspect of the case to quantify. In the sample of cases for which we have transcripts courts variously refer to the value of the counterfeit goods, the equivalent value of legitimate goods, the turnover of the operation and the profit from the operation; others refer to the number of counterfeit items. Trading Standards have suggested that that the equivalent value of legitimate goods would be relatively easy to establish and could be used to represent the financial harm in a case.

3.12 The figures suggested for the various harm categories are indicative only at this stage. Depending on which measure of harm is used the values will have to be adjusted to ensure a representative spread.

3.13 The text above the harm table notes that: 'The harm caused to legitimate businesses and to the owners of the trademark is reflected in the sentence levels at step two'. This is an aspect of harm that is mentioned frequently in cases. It is present in all cases and it seems likely that the harm increases in proportion to the scale of the offending and therefore the best way to deal with it is to treat it as intrinsic to the sentence levels.

Question 3: Does the Council agree that harm should be assessed with reference to a financial value, and, if so, what value should be used?

Sentence levels

3.14 The sentence levels suggested cover the range of sentences passed and are loosely based on those for fraud offences with a seven year statutory maximum. Those shaded in blue have a non-custodial starting point, those shaded grey have a starting point of less than two years' custody and the remainder have a starting point in excess of two years. This illustrates that a third of the starting points are for less than one per cent of cases. Therefore (depending on changes to the harm and culpability factors) if current sentencing practice is to be maintained, sentence levels may need to be revised downwards.

3.15 The wording beneath the sentence table invites the sentencer to consider combining a community order with a fine. This replicates wording in the existing guideline.

Question 4: Does the Council have any comments on the sentence table?

Aggravating factors

3.16 Factor 1 reflects the harm that can result from counterfeit products not complying with safety standards. This can apply to low level unsophisticated offending as well as large scale offending, and so has been put at step 2.

3.17 Factors 2, 3 and 4 occur in several of the transcripts. The remaining aggravating factors are standard ones taken from the fraud guidelines.

Mitigating factors

3.18 Factor 4 is particularly relevant because these are offences that are often difficult and time consuming to investigate and prosecute. Linked to that, factor 6 was a feature in several cases in the transcripts, with a reduction being made for the delay in bringing the case.

3.19 Factor 5 would apply to those offenders who were paying, VAT and tax and otherwise operating lawfully. It is most likely to apply where the counterfeit trading was only a small part of the operation.

Question 5: Are there any aggravating or mitigating factors that should be added, amended or removed?

Other steps

3.20 Step 6 of the draft guideline is based on that in the fraud guideline and gives some additional guidance on confiscation and compensation. Reference is made to deprivation orders (forfeiture) and director disqualification, both of which are features of these cases.

4 IMPACT AND RISKS

4.1 If the Council decides to maintain current sentencing practise then there is unlikely to be any impact on correctional resources.

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Trade mark, unauthorised use of etc.

Trade Marks Act 1994, s.92

Triable either way

Maximum: 10 years' custody

Offence range: Discharge - 7 years' custody

Step 1- Determining the offence category

The level of culpability is determined by weighing up all the factors of the case to determine the offender's **role** and the extent to which the offending was **planned** and the **sophistication** with which it was carried out.

Culpability demonstrated by one or more of the following:

A – High culpability

- A leading role where offending is part of a group activity
- Involvement of others through coercion, intimidation or exploitation
- Sophisticated nature of offence/significant planning

B – Medium culpability

- A significant role where offending is part of a group activity
- Some degree of organisation/planning involved
- All other cases where characteristics for categories A or C are not present

C – Lesser culpability

- Performed limited function under direction
- Involved through coercion, intimidation or exploitation
- Little or no organisation/planning
- Limited awareness or understanding of offence

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Harm

Harm is assessed by reference to the counterfeit goods involved in the offending by taking the **equivalent value of legitimate goods**. The harm caused to legitimate businesses and to the owners of the trademark is reflected in the sentence levels at step two.

Category 1	£500,000 or more	Starting point based on £1 million
Category 2	£100,000 – £500,000	Starting point based on £300,000
Category 3	£50,000 – £100,000	Starting point based on £75,000
Category 4	£10,000 – £50,000	Starting point based on £30,000
Category 5	£2,500 - £10,000	Starting point based on £5,000
Category 6	Less than £2,500	Starting point based on £1,000

Step 2 – Starting point and category range

Having determined the category at step one, the court should use the appropriate starting point to reach a sentence within the category range in the table below. The starting point applies to all offenders irrespective of plea or previous convictions.

Where the value is larger or smaller than the amount on which the starting point is based, this should lead to upward or downward adjustment as appropriate.

Harm	Culpability		
	A	B	C
Category 1 £500,000 or more Starting point based on £1 million	Starting point 5 years 6 months' custody Category range 4 – 7 years' custody	Starting point 4 years' custody Category range 2 years 6 months' – 5 years' custody	Starting point 2 years 6 months' custody Category range 18 months' – 4 years' custody
Category 2 £100,000–£500,000 Starting point based on £300,000	Starting point 4 years' custody Category range 2 years 6 months' – 5 years' custody	Starting point 2 years 6 months' custody Category range 18 months' – 3 years 6 months' custody	Starting point 18 months' custody Category range 26 weeks' – 2 years 6 months' custody
Category 3 £50,000 - £100,000 Starting point based on £75,000	Starting point 2 years 6 months' custody Category range 18 months' – 3 years 6 months' custody	Starting point 18 months' custody Category range 26 weeks' – 2 years 6 months' custody	Starting point 26 weeks' custody Category range Medium level community order – 1 year's custody
Category 4 £10,000- £50,000 Starting point based on £30,000	Starting point 18 months' custody Category range 26 weeks' – 2 years 6 months' custody	Starting point 36 weeks' custody Category range Medium level community order – 21 months' custody	Starting point Medium level community order Category range Low level community order – 26 weeks' custody
Category 5 £2,500-£10,000 Starting point based on £5,000	Starting point 36 weeks' custody Category range Medium level community order – 1 year 6 months' custody	Starting point Medium level community order Category range Low level community order – 26 weeks' custody	Starting point Low level community order Category range Band B fine – Medium level community order
Category 6 Less than £2,500 Starting point based on £1,000	Starting point Medium level community order Category range Low level community order – 26 weeks' custody	Starting point Low level community order Category range Band A fine – Medium level community order	Starting point Band A fine Category range Discharge – Band B fine

This is an offence where it may be appropriate to combine a community order with a fine

The court should then consider further adjustment for any aggravating or mitigating factors. The following list is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

Factors increasing seriousness

Statutory aggravating factors

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors

1. Purchasers put at risk of harm from counterfeit items
2. Attempts to conceal/dispose of evidence
3. Attempts to conceal identity
4. Failure to respond to warnings about behaviour
5. Failure to comply with current court orders
6. Offence committed on licence
7. Offence committed across borders
8. Blame wrongly placed on others
9. Offences taken into consideration

Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Remorse
3. Good character and/or exemplary conduct
4. Offender co-operated with investigation, made early admissions and/or voluntarily reported offending
5. Business otherwise legitimate
6. Lapse of time since apprehension where this does not arise from the conduct of the offender
7. Serious medical condition requiring urgent, intensive or long-term treatment
8. Age and/or lack of maturity where it affects the responsibility of the offender
9. Mental disorder or learning disability
10. Sole or primary carer for dependent relatives

Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 4 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Step 5 – Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour.

Step 6 – Confiscation, compensation and ancillary orders

The court must proceed with a view to making a confiscation order if it is asked to do so by the prosecutor or if the court believes it is appropriate for it to do so.

Where the offence has resulted in loss or damage the court must consider whether to make a compensation order.

If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).

The court may also consider whether to make ancillary orders. These may include a deprivation order, and disqualification from acting as a company director.

Step 7 – Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

Step 8 – Consideration for time spent on bail (tagged curfew)

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Trade mark, unauthorised use of etc.

Trade Marks Act 1994, s.92

Effective from: 04 August 2008

Triable either way

Maximum when tried summarily: Level 5 fine and/or 6 months

Maximum when tried on indictment: 10 years

[User guide for this offence](#)**Offence seriousness (culpability and harm)****A. Identify the appropriate starting point**

Starting points based on first time offender pleading not guilty

Examples of nature of activity	Starting point	Range
Small number of counterfeit items	Band C fine	Band B fine to low level community order
Larger number of counterfeit items but no involvement in wider operation	Medium level community order, plus fine*	Low level community order to 12 weeks custody, plus fine*
High number of counterfeit items or involvement in wider operation e.g. manufacture or distribution	12 weeks custody	6 weeks custody to Crown Court
Central role in large-scale operation	<i>Crown Court</i>	<i>Crown Court</i>

***This may be an offence for which it is appropriate to combine a fine with a community order. Consult your legal adviser for further guidance.**

B. Consider the effect of aggravating and mitigating factors (other than those within examples above)The following may be particularly relevant but **these lists are not exhaustive****Factors indicating higher culpability**

1. High degree of professionalism
2. High level of profit

Factor indicating greater degree of harm

1. Purchasers at risk of harm e.g. from counterfeit drugs

Factor indicating lower culpability

1. Mistake or ignorance about provenance of goods

Common aggravating and mitigating factors

Form a preliminary view of the appropriate sentence, then consider offender mitigation

Offender mitigation

- Genuine remorse
- Admissions to police in interview
- Ready co-operation with authorities

Consider a reduction for a guilty plea

Consider ancillary orders, including compensation

View guidance on available [ancillary orders](#) and [compensation](#).

Decide sentence

Give reasons

Trade Marks Act 1994 c. 26

Part III ADMINISTRATIVE AND OTHER SUPPLEMENTARY PROVISIONS

Offences

This version in force from: **October 31, 1994 to present**

92.— Unauthorised use of trade mark, &c. in relation to goods.

(1) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—

(a) applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trade mark, or

(b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or

(c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).

(2) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—

(a) applies a sign identical to, or likely to be mistaken for, a registered trade mark to material intended to be used—

(i) for labelling or packaging goods,

(ii) as a business paper in relation to goods, or

(iii) for advertising goods, or

(b) uses in the course of a business material bearing such a sign for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods, or

(c) has in his possession, custody or control in the course of a business any such material with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).

(3) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—

(a) makes an article specifically designed or adapted for making copies of a sign identical to, or likely to be mistaken for, a registered trade mark, or

(b) has such an article in his possession, custody or control in the course of a business,

knowing or having reason to believe that it has been, or is to be, used to produce goods, or material for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods.

- (4) A person does not commit an offence under this section unless—
- (a) the goods are goods in respect of which the trade mark is registered, or
 - (b) the trade mark has a reputation in the United Kingdom and the use of the sign takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the trade mark.
- (5) It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.
- (6) A person guilty of an offence under this section is liable—
- (a) on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;
 - (b) on conviction on indictment to a fine or imprisonment for a term not exceeding ten years, or both.

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Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

28 September 2018
SC(18)SEP05 – Mental Health
Rosa Dean
Mandy Banks
0207 071 5785

1 ISSUE

1.1 At the last meeting the Council considered the results of a review of CACD caselaw to consider what guidance has so far been given on these issues, so to inform the basis of the guideline. Following consideration of this review, the Council agreed that the guideline should be amended to incorporate the following key points and principles:

- The guideline should be discursive/narrative, and follow the approach taken in the youth O/P guideline;
- The guideline should say that careful analysis of evidence is required, it is the Judge’s responsibility to decide, the guideline should give Judges confidence to make decisions;
- To delve into the assessment of culpability more deeply, using the factors highlighted in the CACD review, it is not simply about ‘higher’ or ‘lesser’ culpability;
- That a causal connection between the condition/offence needs to be established, and that conditions should only be relevant where a significant issue is raised, not for general application in every case;
- To give 4 or 5 features of conditions/disorders that may be relevant in the deliberations;
- Incorporate principles from *Vowles*¹ and *Edwards*², and consider *Clarke* and *Cooper*³;
- The guideline must stress the importance of the protection of the public/consider the regime on release when deciding sentence

¹ R v Vowles [2015] EWCA Crim 45

² R v Edwards [2018] EWCA Crim 595

³ R v Clarke and Cooper [2017] EWCA 393

1.2 Over the summer the draft guideline was substantially revised to incorporate these points, as discussed in detail below. The guideline was then sent to Rosa, Rebecca and Tim for comment, and it has greatly benefited from their comments and observations.

2 RECOMMENDATION

2.1 At this meeting the Council are asked to note the revised draft and in particular:

- To confirm if they are content with the revised section on assessing culpability
- To confirm if they are content with the wording in paragraph 12, regarding alternatives to custody in exceptional cases
- To confirm whether the list of disorders/conditions at Annex A of the guideline is to be exhaustive or not
- Whether the guideline should refer to practical difficulties with the assessing/resourcing of mental health treatment requirements, or not.

3 CONSIDERATION

Section 1: General approach

3.1 The draft guideline is attached at **Annex A**, it has been restructured to make it clearer and more straightforward for users, and also now has a contents page at the start. There is a new 'general approach' section, at section one on page 4, similar to the one in the youth O/P, and incorporates reference to the fact that conditions/disorders should only be relevant where a significant issue has been raised, in paragraph 1.

3.2 Paragraph 3 includes a fuller reference to s.157 of the Criminal Justice Act (CJA) 2003, this having appeared only as a footnote in previous drafts. Having referenced this, the paragraph then states that obtaining reports may be unnecessary if existing sources of information can be used, and lists potential sources of information. There is also a new reference to s.39 of the Mental Health Act (MHA) 1983, which provides for a court to request information from health services if a hospital order is being considered. This paragraph has been drafted to try to address the Council's earlier concerns that the guideline shouldn't lead to large increases in the amount of reports requested.

Question 1: Are the Council content with the drafting of section 1 of the draft guideline? Does paragraph 3 adequately deal with earlier concerns expressed regarding reports?

Section 2: Assessing culpability

3.3 Paragraph 6 on page 5 contains new references to the fact that there should be a causal connection between the condition and the offence, and that it is for sentencers to

decide how much responsibility the offender retains for an offence. Paragraph 7 contains new wording stating that careful analysis of all the evidence is required, which the sentencer is best placed to make. It goes on to say that expert evidence, where offered and relevant should be taken into account, but that sentencers must make their own decisions and not be bound by psychiatric opinion, this reflects what the court said in *Vowles (para 51)*.

3.4 Paragraph 8 provides new guidance to help courts reach an assessment of the level of culpability retained by an offender. The factors that were highlighted in the review of CACD cases discussed last month have been used as a basis to ask the sentencer a series of questions in order to assess culpability. As the Council may recall from the review of CACD cases, the applicability of these factors is far from straightforward, in some cases a factor can indicate greater culpability, in others, the same factor can indicate lesser culpability, as cases are so fact specific. Therefore, it is suggested that this new approach may be the best way to provide guidance on what is arguably one of the most difficult parts of the guideline to draft.

Question 2: Are the Council content with the revised guidance on assessing culpability?

Section 3: Determining the sentence

3.5 Section 3 starting on page 6 provides information to assist courts determine the appropriate sentence, and aims to present all the considerations in a balanced way. Paragraph 9 contains a reference to the importance of the protection of the public, a point that the Council agreed, at the last meeting, should be highlighted by the guideline.

3.6 Paragraph 12 states that, if there was a serious risk of imprisonment having a gravely adverse effect on the offender's condition, courts could in exceptional cases look at alternatives to custody. This paragraph has the capacity to be controversial. On the one hand, if the offence calls for custody, with a hospital order not being appropriate, is it appropriate to suggest alternatives to custody? Or, should this ability to look at alternatives remain. For example, could a situation be envisaged whereby a drug dependant third strike burglar could finally be able to go into residential rehab? Or an offender with PTSD who needs community based cognitive behavioural therapy not hospital? For these types of cases, providing this wording would allow for alternatives to custody to be considered in appropriate cases, the emphasis being on treating the cause behind offending and trying to prevent further reoffending.

3.7 Paragraph 13 provides a counterbalance to the preceding paragraph, stating that although consideration of the impact of imprisonment is a legitimate one, any consideration should be balanced against the gravity of the offending, and consideration of the harm done

to victims. This reflects what the CACD said in *Clarke and Cooper* (para 25), suitably adapted as that case was looking at physical ill health and extreme old age considerations.

3.8 Paragraph 14 reflects another point that the Council agreed in July that the guideline should cover, the different release regimes for sentences. Rather than leave courts to find the relevant information on release regimes which is contained within the quite detailed sections later within Annex C, a summary of the relevant information is contained within this paragraph. Unfortunately it is quite difficult to reduce the relevant information any further, as it is not something that can be summarised in one or two lines.

Question 3: What is the Council's view on the wording within paragraph 12? Is the Council content to retain it- with paragraph 13 providing a counterbalance to it?

Question 4: Are the Council content with the drafting of section 3 as a whole?

Section 4: Sentencing disposals

3.9 This section starting on page 8 aims to provide courts at a quick glance with information on what disposals are available, by court. Further detailed information is provided within Annex C but, as that is necessarily detailed, this section just provides what is hoped is a useful summary. The guidance – for the Crown Court only – regarding the appropriate consideration of section 45A and section 37/41 orders is taken from the recently published definitive Manslaughter guideline.

Question 5: Does the Council think the information within section 4 will be a useful summary of disposals for sentencers or not?

Annex A- details on conditions/disorders

3.10 Annex A, starting from page 9 onwards, provides brief detail of each of the main features of conditions/disorders that may be relevant in this context, as per the discussion at the last meeting. New in the list of conditions is dependence syndrome, which was agreed should be included. This information has been checked by a mental health professional (Charles de Lacey at the Old Bailey). Currently the draft does not specify whether the list of conditions at Annex A is exhaustive or not. If the guideline does not specify that the list is exhaustive, then courts may be asked to consider other conditions, the range of which could be quite varied and wide, for example the World Health Organisation has recently classified gaming addiction and compulsive sexual behaviour as mental illnesses.

Question 6: Are the Council content with the revised information within Annex A of the guideline? Does the Council wish to make the list of conditions/disorders that can be considered exhaustive or not?

Annex B - reports

3.11 This annex, starting at page 13 onwards, provides more detailed information on requests for reports. If a report is to be considered (and the section starts with a reminder that they should only be necessary in a limited amount of cases) then there are examples of types of information that courts may wish to request within the reports. This list was suggested by Charles de Lacey, to try to prevent incomplete reports holding up cases.

3.12 There is also a reference to s.38 MHA orders (interim hospital orders). This reference has been caveated to remind courts to think carefully about proportionality when considering s.38 orders, given the pressure on secure beds (reflecting what the court said in *Vowles* (paras 23, 50ii)). There also follows further information on powers to order reports in the Magistrates' Courts and on s.157 CJA Act 2003.

Question 7: Is the Council content with the wording within Annex B? In particular, is the Council content with the reference to s.38?

Annex C – sentencing disposals

3.13 Annex C, from page 16 onwards, provides full detail on each of the applicable disposals available, starting with Mental Health Treatment Requirements (MHTR). As the Council are aware, there is currently a Community Sentence Treatment Requirement Protocol (CSTRP) being tested in five areas across England, following concern about the low use of treatment requirements. There is currently a data collection phase of the evaluation underway, due to finish in October, with a review then due by Ministers ahead of any further roll out. In advance of any definite changes to treatment requirements, and given that there are often practical difficulties regarding resources for assessments and for treatment, the Council may like to consider whether the guideline should refer to these practical difficulties.

3.14 There is now fuller guidance on the release regimes for each of the orders within this section, as discussed earlier. There is also now additional information with regards to s.43 MHA, in reference to the Crown Court being limited to magistrates' courts sentencing powers if a hospital order is not imposed.

Question 8: What are the Council's views of Annex C? In particular, does the Council wish to refer to practical difficulties in relation to MHTRs?

Age applicability of the guideline

3.15 The Council may recall that in one of the earlier meetings the question of whether the guideline should apply to all offenders, or only those over 18 was discussed. During this discussion Rob Butler suggested that young offenders may have different, specific needs

compared to adult offenders, and that it may be difficult to accommodate these within a general guideline. He suggested contacting an expert in this area, Professor Dame Sue Bailey, to ask. Professor Bailey has agreed to consider the question and provide her thoughts. It is suggested that the Council comes back to this question once we have her response.

3.16 Consideration has also been given to an appropriate title for this guideline, to reflect the fact that it is broader than just mental health, although it would be impractical to include in the title all the conditions/disorders listed within Annex A. There are three suggestions for a new title, either '*Overarching Principles: Mental Health and other vulnerabilities*' or '*Sentencing Offenders with mental health conditions or other vulnerabilities*', or '*Sentencing Offenders with mental health or other related, or similar, conditions.*'

Question 9: Which title does the Council prefer? Or does the Council wish to suggest a different title?

Question 10: Is there anything missing from the draft guideline that the Council thinks should be added, or anything that should be removed from the draft?

4 IMPACT/RISK

4.1 In terms of the impact of the guideline, the CPD data, which we would usually draw upon to help develop guidelines, does not include information about whether the offender had a mental health disorder or learning difficulty. The A&R team is continuing to explore what other data is available in this area, including looking at the CCSS, to see if it contains any data on the volumes and sentences involved and to try and assess what the impact of the guideline might be. A lack of data could make the draft resource assessment problematic, in terms of accurately assessing the impact of the draft guideline.

4.2 Officials are also maintaining close links with officials in the MOJ and other Government departments to keep up to speed with developments on the various related initiatives in this area, the L&D scheme, CSTRP, review of the MHA, and so on. On the review of the MHA, it is understood that a final report is expected around November/December this year.

Question 11: is the Council content that the impact/risks have been sufficiently considered at this stage?

Overarching Principles:
Mental Health

Contents

Applicability of guideline	3
Section one: General approach	4
Section two: Assessing culpability	5
Section three: Determining the sentence	6
Section four: Sentencing disposals	8
Annex A: Mental disorders/developmental conditions	9
Annex B: Reports	13
Annex C: Sentencing Disposals-further details	16

Applicability of guidelines

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders aged xx and older, who are sentenced on or after xxxx, regardless of the date of the offence.

Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court -

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.”

This guideline applies only to the sentencing of convicted offenders: it does not address issues of fitness to plead or disposals for those found unfit to plead.

Section one: General approach

1. The guidance given in this guideline will assist sentencers when sentencing offenders who have any of the conditions or disorders outlined in **Annex A**. The mere fact that an offender has such a condition or disorder does not necessarily mean that it will have an impact on sentencing. Where it does, it is likely that it will have been raised as a significant issue by the defence advocate.

2. There are a wide range of mental health conditions and developmental disorders, and the level of any impairment will vary between individuals. Accordingly, in assessing whether the condition or disorder has any impact on sentencing, the approach to sentencing should be individualistic and focused on the particular issues relevant in the case concerned. In particular:
 - care should be taken to avoid making assumptions, as unlike some physical conditions, many mental health conditions or learning disabilities are not easily visible
 - no inference should necessarily be drawn if an offender had not previously been formally diagnosed, or had not previously declared a condition (possibly due to a fear of stigmatisation or because they are unaware they have a condition)
 - it is not uncommon for people to have a number of different conditions, ‘co-morbidity’, and for drug and/or alcohol dependence to be a factor, ‘dual diagnosis’¹
 - difficulties of definition and classification in this field are common, there may be differences of expert opinion and diagnosis in relation to the offender, or it may be that no specific condition can be identified

3. In any case where the offender is or appears to be mentally disordered, the court must obtain and consider a medical report before passing a custodial sentence other than one fixed by law, unless, in the circumstances of the case, the court is of the opinion that it is unnecessary (s.157 Criminal Justice Act 2003)². It may be unnecessary if existing sources of information can be used, such as from probation, defence representatives, prison, police or court mental health teams, or family members. In addition, s.39 of the Mental Health Act (MHA)1983 provides that a court may request information about a patient from local health services if considering making a hospital or interim hospital order. Further information about requests for reports can be found at **Annex B** of this document.

¹ There is more information on co-morbidity and dual diagnosis in Annex A

² There is more information on s.157 of the Criminal Justice Act in Annex B.

4. Where a custodial sentence is passed the court should forward psychiatric and pre-sentence reports to the prison, to ensure that the prison has appropriate information about the offender's condition and can ensure their welfare.
5. Courts should always be alive to the impact of a condition on an offender's ability to understand and participate in proceedings. To avoid misunderstandings, which could lead to further offences, it is important to ensure that offenders understand their sentence and what will happen if they reoffend and or breach the terms of their licence or supervision. Courts should therefore consider putting the key points in an accessible way. Further information can be found at Chapter Four of the Equal Treatment Bench Book:

<https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/>

Section two: assessing culpability

6. Courts should refer to offence specific guidelines to assess culpability, in conjunction with this guideline. If an offender has any of the conditions or disorders listed in **Annex A**, it is possible that it may affect their level of responsibility for an offence. The relevance of any condition will depend on the nature, extent and effect of the condition on an individual and whether there is a causal connection between the condition and the offence. It is for sentencers to decide how much responsibility the offender retains for the offence, given the particular disorder or condition and the specific facts of the case at hand.
7. In some cases the condition may mean that culpability is significantly reduced, in others, the condition may have no relevance to culpability. Assessments of culpability will vary between cases due to the differences in the nature and severity of conditions; it is not possible to be prescriptive in this regard. Careful analysis of the evidence is required to make this assessment, which the sentencer, who will be in possession of all the relevant information, is best placed to make. Expert evidence, where offered and relevant, should be taken into account, but sentencers must make their own decisions and should not feel bound to follow psychiatric opinion.
8. Courts may find the following list of questions to consider helpful, to assist in deciding the level of culpability:
 - Did the offender's condition mean they were unable to exercise appropriate judgement?

- Did the offender's condition impair their ability to make rational choices, or to think clearly?
- Did the offender's condition impair their ability to understand the consequences of their actions?
- Did the offender's condition have the effect of making them disinhibited?
- Were there any elements of premeditation or pre-planning in the offence, that might indicate a higher degree of culpability?
- Were there attempts to minimise their wrongdoing or to conceal their actions, that might indicate a higher degree of culpability?
- Did the offender have any insight into their illness, or did they lack insight?
- Did the offender seek help, but failed to receive appropriate treatment or care?
- If there was a lack of compliance in taking medication or following medical advice, was this influenced by the condition or not?
- If the offender exacerbated their condition by drinking/taking drugs, were they aware of the potential effects of doing so?

This is not an exhaustive list.

Section three: determining the sentence

9. Courts should consider all the purposes of sentencing during the sentencing exercise: the punishment of offenders, reduction of crime, rehabilitation of offenders, protection of the public, and reparation. Just because an offender has a mental health condition, it does not mean they should not be punished, and in the case of serious offences protection of the public may be paramount. For offenders whose condition has contributed to their offending the effective treatment of their condition should in turn reduce further offending and protect the public.
10. Decisions will need to be made on a case by case basis. For example, in a case where an offender's culpability was high, the sentence **may** be more weighted to punishment. In a case where an offender's culpability was low, the sentence **may** be more weighted to rehabilitation.
11. An offender's condition at the point of sentence could have a bearing on the type of sentence that is imposed. Some points to consider are:
 - The existence of a condition at the date of sentencing, or its foreseeable recurrence, could mean that a given sentence could weigh more heavily on the offender than it would on an offender without that particular condition

- Imprisonment can exacerbate poor mental health and in some cases increase the risk of self-harm
- For some prisoners their condition may mean a custodial sentence may have a greater punitive effect than it would for a prisoner without the condition
- Some requirements of community orders may be impractical, consideration should be given to tailoring the requirements of orders, as necessary in individual cases. An offender should not receive a more severe sentence, such as custody, because they would be unable to do unpaid work as part of a community order, for example

12. If there is a serious risk of imprisonment having a gravely adverse effect on the offender's condition, courts will need to consider this risk very carefully, in exceptional cases looking at alternatives to custody, and potentially sentencing outside the range indicated by the offence guideline. Where the offence is very serious and retained culpability high, custody may be inevitable but the condition may still properly impact on sentence length. Courts should refer to any medical evidence or expert reports on this point to assist them.

13. However, although consideration of the impact of imprisonment on an offender is a legitimate one, any consideration should be balanced against the gravity of the offending, including the harm done to the victim(s), and the public interest in appropriate sentences being set.

14. In deciding on a sentence, courts should also carefully consider the criteria for, and regime on release. The graver the offence and the greater risk to the public on release of the offender, the greater emphasis the court must place upon the protection of the public and the release regime. Further details are given at **Annex C**, but in summary:

- A **s37 hospital order** lasts initially for six months but can be renewed for a further six months and then for a year at a time. Discharge from a hospital order can be made by the responsible clinician (RC) or the hospital at any time. The RC can also make a Community Treatment Order (CTO) which allows for the patient to be treated in the community but provides for recall to hospital if needed to ensure that the patient receives the treatment needed. The patient can apply to the tribunal³ for discharge after six months and annually thereafter.
- A **restriction order under s41** lasts indefinitely and does not need to be renewed. The Secretary of State for Justice (SoS) can lift the restriction order at any time if satisfied that it is no longer necessary to protect the public from serious harm. A patient who is still in hospital when the restriction order is lifted is treated as if admitted under a hospital order on the day the restriction order ended. The Tribunal has no general discretion to discharge restricted patients but must conditionally discharge patients who are subject to

³ First Tier Tribunal (Mental Health) in England and the Mental Health Review Tribunal in Wales

a restriction order if it is not satisfied that the criteria for continued detention for treatment under a hospital order are met.

- A **limitation direction under s45A** ends automatically on the patient's 'release date'. The effect of this is that the limitation direction will end at the halfway point of a determinate sentence. If the patient is serving a life sentence, or an indeterminate sentence, the release date is the date (if any) on which the person's release is ordered by the parole board. Although the limitation direction ends on the release date, the hospital direction does not. So a patient who is still detained in hospital on the basis of the hospital direction on their release date, remains liable to be detained in hospital from then on as an unrestricted hospital order patient. While the limitation direction remains in effect, if the patient no longer requires treatment in hospital for a mental disorder, the SoS may direct that the patient be removed to prison (or equivalent) to serve the remainder of their sentence, or else release them on licence.

Section four: sentencing disposals

15. The following is a list of available mental health disposals/orders and relevant guidance (further details on each are at **Annex C**).

Magistrates' courts

- Community Order with a Mental Health Treatment Requirement (MHTR)
- Section 37 Hospital order
- Section 37 Guardianship order
- Section 43 Committal to the Crown Court (with a view to a restriction order)

Crown Court

- Community Order with a Mental Health Treatment Requirement (MHTR)
- Section 37 Hospital order
- Section 37 Guardianship order
- Section 41 Restriction order
- Section 45A Hospital and limitation direction

The following guidance applies in the Crown Court only:

Where:

- (i) the evidence of medical practitioners suggests that the offender is currently suffering from a mental disorder,
- (ii) treatment is available, and
- (iii) the court considers that a hospital order (with or without a restriction) may be an appropriate way of dealing with the case,

the court should consider **all sentencing options** including a section 45A direction and consider the importance of a penal element in the sentence taking into account the level of culpability assessed at section two above.

Section 45A hospital and limitation direction

- a. Before a hospital order is made under s.37 MHA (with or without a restriction order under s.41), consider whether the mental disorder can appropriately be dealt with by custody with a hospital and limitation direction under s.45A MHA. In deciding whether a s.45A direction is appropriate the court should bear in mind that the limitation direction will cease to have effect at the automatic release date of a determinate sentence.
- b. If a penal element is appropriate and the mental disorder can appropriately be dealt with by a direction under s.45A MHA, then the judge should make such a direction. (Not available for a person under the age of 21 at the time of conviction).

Section 37 hospital order and s41 restriction order

If a s.45A direction is not appropriate the court must then consider whether, (assuming the conditions in s.37(2) (a) are satisfied), the matters referred to in s. 37(2)(b) would make a hospital order (with or without a restriction order under s.41) the most suitable disposal. The court should explain why a penal element is not appropriate.

Annex A

The following information provides brief detail on common mental health disorders and developmental conditions, listing the main features that may be relevant in understanding how the condition may affect people with the condition.

Mental disorders – such as (but not limited to) depression, anxiety, schizophrenia, bipolar disorder, post-traumatic stress disorder (PTSD), or personality disorders (particularly associated within the criminal context are anti- social, borderline, narcissistic and paranoid personality disorders). These conditions can affect thought, feelings and behaviour. Conditions can be short or long term, some conditions can fluctuate, and a range of

symptoms can be experienced. The main features that may be relevant for each of the conditions are:

Depression/Anxiety

- difficulties in concentrating and making decisions
- poor memory
- irritability, anger, anxiety, agitation, restlessness, being distressed
- avoiding/leaving situations in order to relieve uncomfortable feelings
- on occasions depression may be accompanied by delusions and hallucinations

Schizophrenia

- hallucinations-experiencing something that isn't really there- most commonly hearing voices
- delusions-strongly holding beliefs that others do not share and have no basis in reality and which may exhibit paranoid thinking
- acting strangely or dangerously as a result of delusional beliefs or ideas
- muddled thinking and speech
- difficulty in relating to others
- apathy, disorganised thinking, difficulty in concentration and following instructions

Bi-polar disorder ('manic depression')

- extreme changes of mood, from severe lows (depression) to highs (mania)
- acting irrationally, unpredictable or unexpected behaviour
- overactive/excitable, excessive energy, become angry quickly or irritable
- unusual beliefs/delusions not based in reality
- spend excessive amounts of money/end up with debts

PTSD

- irritability/aggressive behaviour
- intense distress/panic in response to real or symbolic reminders of the trauma
- involuntary re-experiencing of the trauma with flashbacks, intrusive thoughts, nightmare, and images
- difficulty concentrating

Personality disorders

- reckless/impulsive behaviour
- not trusting others/feeling threatened
- irresponsible and anti-social behaviour
- disregards/violates the rights of others
- easily frustrated/angered
- unable to feel guilt
- emotionally unstable
- grandiose sense of self importance
- temporary psychotic states
- unfounded suspicion of others and bearing grudges

Psychosis- is a symptom of some mental health problems, and not a diagnosis in itself. Most common types of psychosis are hallucinations and delusions, some may also experience disorganised thinking and speech. The word is usually used to refer to an experience. Psychosis affects people in different ways, with some having only one experience, some having short episodes, and other people living with it most of the time. Psychosis, also called a psychotic experience or psychotic episode, is when people perceive or interpret reality in a very different way from others.

Learning disabilities – a life-long condition which includes significant impairment of intelligence (an IQ of less than 70) and social functioning (a reduced ability to cope independently and adapt to the daily demands of a normal social environment). A learning disability can range from mild, moderate to severe. The main features that may be relevant are:

- limited comprehension and communication skills
- being acquiescent and suggestible
- having difficulty understanding social norms.

Learning difficulties – such as dyslexia, Attention Deficit Hyperactivity Disorder (ADHD), or Attention Deficit Disorder (ADD). A learning difficulty is different to a learning disability as it is unrelated to intelligence. The main features that may be relevant for **ADHD/ADD** are:

- impulsiveness
- inattentiveness
- extreme impatience
- inability to relate to others in socially acceptable ways

- inability to express feelings and emotions in an appropriate way
- inability to deal with stress or to be able to think clearly.

People with **dyslexia** may have difficulties with reading, spelling, personal organisation and sequencing, getting dates, times or events in the wrong order.

Autism Spectrum Disorder – (including Asperger’s syndrome) a lifelong developmental disability that affects how people communicate and relate to others, and make sense of the world. The main features that may be relevant are:

- social naivety, potentially leading to being unknowingly being involved in crimes
- may develop highly specific interests in a subject or activity
- difficulty with change or unexpected events
- rigid adherence to rules
- being unaware of the consequences of their actions, due to an inability to link cause and effect
- lack of insight into behaviour
- lack of empathy or a limited ability to express emotion.

Acquired/ traumatic brain injury – an injury caused to the brain since birth, (from falls, or road accidents or illness, such as a tumour or stroke). Injuries can range from mild to severe, with severe brain injuries causing complex long-term problems. The main features that may be relevant are:

- impaired reasoning, affecting the ability to understand rules
- impaired insight into own behaviour and that of others
- loss of control over behaviour and inappropriate behaviour
- rapid mood changes, aggression, impulsivity, irritability and egocentricity
- changes in personality
- memory loss
- reduced capacity to concentrate, reduced capacity to process information

Dementia – a syndrome associated with an ongoing decline of brain functioning, such as Alzheimer’s disease or vascular dementia. The main features that may be relevant are:

- difficulty in controlling emotions, mood swings, aggression

- loss of empathy with others
- difficulty with social interaction
- problems with memory
- in some cases, experiencing hallucinations.
- problems with concentration and reduced ability to focus and pay attention
- reduced ability to reason and make judgements
- problems with speech and language

Dependence syndrome – a cluster of behavioural, cognitive and physiological phenomena that develop after repeated substance abuse and that typically includes a strong desire to take the substance, difficulties in controlling its use, persisting in its use despite harmful consequences, and a higher priority given to using it than to other activities and obligations. The dependence syndrome may be present for a specific substance e.g alcohol, for a class of substances, e.g opioid drugs, or for a wider range of different psychoactive substances. The main features that may be relevant are:

- violent or anti-social behaviour
- reckless behaviour
- chaotic lifestyle
- strong desire or compulsion to consume the substance above all else
- psychotic states
- disinhibition

Co-morbidity

This is the term used to describe people who experience more than one condition, which is common amongst offenders, for example someone may have a mental health condition and a learning disability. Some people with mental health conditions or learning disabilities also may have communication difficulties.

Dual diagnosis

This is the term used to describe people with mental health and substance abuse problems. Many people with mental health conditions use drugs or alcohol to help them deal with their conditions.

Annex B

Requests for psychiatric reports should only be necessary in a **limited amount of cases**, as outlined in paragraph three. If asking for a report courts should make the request sufficiently specific so that the report writer is clear as to **what** is required, and **when** the report is required by. Examples of information that might be requested are:

- background/history of the condition
- diagnosis, symptoms, treatment of the condition
- the level of impairment due to the condition
- how the condition relates to the offences committed
- dangerousness
- risk to self and others
- if there has been a failure of compliance (e.g not attending appointments, failing to take prescribed medication) what is thought to be driving that behaviour
- the suitability of the available disposals in a case
- the impact of any such disposals on the offender
- any communication difficulties and/or requirement for an intermediary
- and any other information the court considers relevant.

Further information on requests for reports can be found within the Criminal Procedure Rules, which can be found here:

<https://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015#Anchor8>.

When requested by clinicians wanting to undertake an inpatient assessment, courts may wish to consider making an interim hospital order (s.38 MHA). However, although such an order may enable a better assessment to be made than in a prison environment, courts should consider carefully the acute pressure on the availability of secure beds.

Power to order reports- magistrates courts

There are limited powers to order reports in the magistrates' courts. S.11 Powers of Criminal Courts (Sentencing) Act 2000⁴ provides for the ordering a report, but it is only post- conviction or a finding under s.37 (3) Mental Health Act 1983 that the defendant did the act or made the omission charged. However, the court can request a report and a duly qualified medical practitioner who provides such a report can be paid out of central funds, using s.19 Prosecution

⁴ <https://www.legislation.gov.uk/ukpga/2000/6/section/11>

of Offenders Act 1985⁵ plus Regulation 25(1) Costs in Criminal Cases (General) Regulations 1986⁶.

Additional requirements in case of mentally disordered offender (s.157 Criminal Justice Act 2003)

(1) Subject to subsection (2), in any case where the offender is or appears to be mentally disordered, the court must obtain and consider a medical report before passing a custodial sentence other than one fixed by law.

(2) Subsection (1) does not apply if, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a medical report.

(3) Before passing a custodial sentence other than one fixed by law on an offender who is or appears to be mentally disordered, a court must consider—

(a) any information before it which relates to his mental condition (whether given in a medical report, a pre-sentence report or otherwise), and

(b) the likely effect of such a sentence on that condition and on any treatment which may be available for it.

(4) No custodial sentence which is passed in a case to which subsection (1) applies is invalidated by the failure of a court to comply with that subsection, but any court on an appeal against such a sentence—

(a) must obtain a medical report if none was obtained by the court below, and

(b) must consider any such report obtained by it or by that court.

(5) In this section “mentally disordered”, in relation to any person, means suffering from a mental disorder within the meaning of the [Mental Health Act 1983 \(c. 20\)](#).

(6) In this section “medical report” means a report as to an offender's mental condition made or submitted orally or in writing by a registered medical practitioner who is approved for the purposes of [section 12](#) of the [Mental Health Act 1983](#) by the Secretary of State [or by another person by virtue of [section 12ZA or 12ZB](#) of that Act] ¹ as having special experience in the diagnosis or treatment of mental disorder.

(7) Nothing in this section is to be taken to limit the generality of [section 156](#).

⁵ <https://www.legislation.gov.uk/ukpga/1985/23/section/19>

⁶ <https://www.legislation.gov.uk/uksi/1986/1335/regulation/25/made>

Annex C

Mental Health Treatment Requirement (section 207 CJA 2003)	
May be made by:	A magistrates' court or Crown Court
In respect of an offender who is:	Convicted of an offence punishable with imprisonment
If the court is of the opinion	<p>The offender suffers from a medical condition that is susceptible to treatment but does not warrant detention under a hospital order.</p> <p>The treatment required must be such one of the following kinds of treatment as may be specified in the relevant order—</p> <p>(a) treatment as a resident patient in a care home an independent hospital or a hospital within the meaning of the Mental Health Act 1983, but not in hospital premises where high security psychiatric services within the meaning of that Act are provided;</p> <p>(b) treatment as a non-resident patient at such institution or place as may be specified in the order;</p> <p>(c) treatment by or under the direction of such registered medical practitioner or registered psychologist (or both) as may be so specified;</p> <p>but the nature of the treatment is not to be specified in the order except as mentioned in paragraph (a), (b) or (c).</p>
And the court is satisfied	That arrangements have been or can be made for the treatment to be specified in the order and that the offender has expressed a willingness to comply with the requirement.

- Use of MHTRs attached to court orders for those offenders with identified mental health issues may result in reductions in reoffending, compared to the use of short term custodial sentences.
- Courts may also wish to consider a drug rehabilitation requirement and/or an alcohol treatment requirement in appropriate cases.
- A community order with a MHTR may be appropriate where the defendant's culpability is substantially reduced by their mental state at the time of the commission of the offence, and where the public interest is served by ensuring they continue to receive treatment.
- A MHTR is not usually suitable for an offender who is unlikely to comply with the treatment or who has a chaotic lifestyle.

Hospital order (section 37 Mental Health Act 1983)		
May be made by:	A magistrates' court or Crown Court	
In respect of a defendant who is:	<i>Where made by a magistrates' court:</i>	<i>Where made by the Crown Court:</i>
	Convicted by that court of an offence punishable on summary conviction with imprisonment, or Charged before that court with such an offence but who has not been convicted or whose case has not proceeded to trial, if the court is satisfied that the person did the act or made the omission charged	Convicted before that court for an offence punishable with imprisonment (other than murder)
If the court is satisfied	On the written or oral evidence of two doctors, at least one of whom must be approved under section 12, that <ul style="list-style-type: none"> • the offender is suffering from mental disorder of a nature or degree which makes it appropriate for the offender to be detained in a hospital for medical treatment, and • appropriate medical treatment is available. 	
And the court is of the opinion	Having regard to all the circumstances, including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with the offender, that a hospital order is the most suitable method of dealing with the case	
And it is also satisfied	On the written or oral evidence of the approved clinician who would have overall responsibility for the offender's case, or of some other person representing the managers of the relevant hospital, that arrangements have been made for the offender to be admitted to that hospital within the period of 28 days starting with the day of the order.	

A hospital order is, essentially, an alternative to punishment. The court may not, at the same time as making a hospital order in respect of an offender, pass a sentence of imprisonment, impose a fine or make a community order, a youth rehabilitation order, or a referral order. Nor can the court make an order for a young offender's parent or guardian to enter into a recognizance to take proper care of and exercise proper control over the offender. The court may make any other order which it has the power to make, eg a compensation order.

A hospital order made **under s37** (without a restriction order) lasts initially for six months but can be renewed for a further six months and then for a year at a time.

- Discharge from the order can be made by the responsible clinician (RC) or the hospital at any time.
- The patient can apply to the tribunal⁷ for discharge after six months and annually thereafter.
- The RC can authorise a leave of absence for a limited period or indefinitely; such leave can be subject to conditions and the patient can be recalled at any time if the RC considers it necessary in the interests of the patient's health or safety or for the

⁷ First Tier Tribunal (Mental Health) in England and the Mental Health Review Tribunal in Wales

protection of other people (the order can be renewed during a period of absence if hospital treatment remains necessary).

- The RC can make a Community Treatment Order (CTO) which allows for the patient to be treated in the community but provides for recall to hospital if needed to ensure that the patient receives the treatment needed. The hospital order is in effect suspended while the CTO is in force so it does not need to be renewed. The CTO lasts for an initial six months and can be extended for a further six months and annually thereafter.

Restriction Order (section 41 Mental Health Act 1983)	
A restriction order (section 41) may be imposed by the Crown Court where a hospital order has been made and:	
If	At least one of the doctors whose evidence is taken into account by the Court before deciding to give the hospital order has given evidence orally
And, having regard to	<ul style="list-style-type: none"> • the nature of the offence • the antecedents of the offender, and • the risk of the offender committing further offences if set at large
The Court thinks	It necessary for the protection of the public from serious harm for the person to be subject to the special restrictions which flow from a restriction order

A restriction order lasts until it is lifted by the Secretary of State under section 42, or the patient is absolutely discharged from detention by the responsible clinician or hospital managers with the Secretary of State's consent under section 23 or by the Tribunal under section 73.

While the restriction order remains in force, the hospital order also remains in force and does not have to be renewed.

- The Secretary of State for Justice (SoS) can lift the restriction order at any time if satisfied that it is no longer necessary to protect the public from serious harm. A patient who is still in hospital when the restriction order is lifted is treated as if admitted under a hospital order on the day the restriction order ended. A patient who has been conditionally discharged from hospital will be automatically discharged absolutely on that date.
- A restricted patient may not be discharged, transferred to another hospital or given leave of absence by the responsible clinician (RC) or hospital without the SoS's consent. Either the RC or the SoS can recall a patient from leave.
- The SoS has the power to discharge the patient conditionally or absolutely.
- The Tribunal has no general discretion to discharge restricted patients but must discharge patients who are subject to a restriction order (other than patients who have been conditionally discharged and not recalled to hospital) if it is not satisfied that the criteria for continued detention for treatment under a hospital order are met.
- The discharge must be conditional, unless the Tribunal is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment, i.e. to be made subject to conditional discharge.

- Where the Tribunal is required to discharge a restricted patient conditionally it may, but does not have to, impose conditions with which the patient is to comply. The SoS may impose conditions and vary those imposed by the Tribunal.

Hospital and limitation directions (section 45A Mental Health Act 1983)	
May be given by:	Crown Court
In respect of a person who is	Aged 21 or over and convicted before that court of an offence punishable with imprisonment (other than murder)
If the court is satisfied	On the written or oral evidence of two doctors, at least one of whom must be approved under section 12, and at least one of whom must have given evidence orally, that: <ul style="list-style-type: none"> • the offender is suffering from mental disorder of a nature or degree which makes it appropriate for the offender to be detained in a hospital for medical treatment, and • appropriate medical treatment is available
And the Court	Has first considered making a hospital order under section 37, but has decided instead to impose a sentence of imprisonment
And it is also satisfied	On the written or oral evidence of the approved clinician who would have overall responsibility for the offender's case or of some other person representing the managers of the relevant hospital, that arrangements have been made for the offender to be admitted to that hospital within the 28 days starting with the day of the order.

This so-called 'hybrid order' enables the court to combine a hospital order with restrictions with a prison sentence. A hospital direction is a direction for a person's detention in hospital. A limitation direction is a direction that they be subject to the special restrictions in section 41 of the Act which also apply to people given restriction orders. A hospital direction may not be given without an accompanying limitation direction (although, as described below, a hospital direction may remain in force after the limitation direction has expired).

- A limitation direction ends automatically on the patient's 'release date'. The patient's release date is the day that the patient would have been entitled to be released from custody had the patient not been detained in hospital. Discretionary early release such as home detention curfew is not taken into account. For these purposes, any prison sentence which the patient was already serving when the hospital direction was given is taken into account as well as the sentence(s) passed at the same time as the direction was given. The effect of this is that the limitation direction will end at the halfway point of a determinate sentence.
- If the patient is serving a life sentence, or an indeterminate sentence, the release date is the date (if any) on which the person's release is ordered by the parole board.
- Although the limitation direction ends on the release date, the hospital direction does not. So if patients are still detained in hospital on the basis of the hospital direction on their release date, they remain liable to be detained in hospital from then on like unrestricted hospital order patients. This includes patients who are on leave of absence from hospital on their release date, but not those who have been conditionally discharged and who have not been recalled to hospital.
- Unlike hospital order patients, hospital and limitation direction patients are detained primarily on the basis of a prison sentence. While the limitation direction remains in effect, the Secretary of State may direct that they be removed to prison (or equivalent) to serve the remainder of their sentence, or else release them on licence.

This is only possible where the SoS is notified by the offender's responsible clinician, any other approved clinician, or by the Tribunal, that:

- the offender no longer requires treatment in hospital for mental disorder, or
- no effective treatment for the disorder can be given in the hospital in which the offender is detained.
- When notified in this way by the responsible clinician, or any other approved clinician, the SoS may:
 - direct the offender's removal to a prison (or another penal institution) where the offender could have been detained if not in hospital, or
 - discharge the offender from the hospital on the same terms on which the offender could be released from prison.
- If the Tribunal thinks that a patient subject to a restriction order would be entitled to be discharged, but the SoS does not consent, the patient will be removed to prison. That is because the Tribunal has decided that the patient should not be detained in hospital, but the prison sentence remains in force until the patient's release date.

Committal to the Crown court (section 43 Mental Health Act 1983)	
A magistrates' court may commit a person to the Crown Court with a view to a restriction order if (s43(1))	
The person	Is aged 14 or over, and Has been convicted* by the court of an offence punishable on summary conviction by imprisonment
And	The court could make a hospital order under section 37
But having regard to	The nature of the offence The antecedents of the offender, and The risk of the offender committing further offences if set at large
The court thinks	That if a hospital order is made, a restriction order should also be made.

*Note: there is no power to commit to the Crown Court for a restriction order where a magistrates' court has made a finding that a defendant has done the act/made the omission charged under s 37(3) MHA.

The Crown Court is required to inquire into the circumstances of the patient's case and either:

- make a hospital order (with or without a restriction order), as if the offender had been convicted before the Crown Court, rather than by the magistrates' court, or
- deal with the offender in some other way the magistrates' court would have been able to originally.

Guardianship order (section 37 Mental Health Act 1983)		
May be made by	a magistrates' court or the Crown Court	
	where made by a magistrates' court	where made by the Crown Court
	convicted by that court of an offence punishable (in the case of an adult) on	convicted before that court for an offence punishable with

In respect of a person who is aged 16 or over and who is	summary conviction with custody or charged before (but not convicted by) that court with such an offence, if the court is satisfied that the person did the act or made the omission charged	imprisonment (other than murder)
if the court is satisfied	on the written or oral evidence of two doctors, at least one of whom must be approved under section 12, that the offender is 16 or over, and is suffering from mental disorder of a nature or degree which warrants the offender's reception into guardianship under the Act	
and the court is of the opinion	having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with the offender, that a guardianship order is the most suitable method of dealing with the case	
and it is also satisfied	that the local authority or proposed private guardian is willing to receive the offender into guardianship	

Guardianship enables patients to receive care outside hospital where it cannot be provided without the use of compulsory powers. The Act allows for people ('patients') to be placed under the guardianship of a guardian. The guardian may be a local authority, or an individual ('a private guardian'), such as a relative of the patient, who is approved by a local authority. Guardians have three specific powers: residence, attendance and access.

- The *residence power* allows guardians to require patients to live at a specified place.
- The *attendance power* lets guardians require the patient to attend specified places at specified times for medical treatment, occupation, education or training. This might include a day centre, or a hospital, surgery or clinic.
- The *access power* means guardians may require access to the patient to be given at the place where the patient is living, to any doctor, approved mental health professional, or other specified person. This power could be used, for example, to ensure that patients do not neglect themselves.

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Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

28 September 2018
SC(18)SEP06 – Drugs revision
Sarah Munro/Rebecca Crane
Eleanor Nicholls – 020 7071 5799

1 ISSUE

1.1 This is the first paper on the revision of the Drug Offences guideline and covers the scope of the project.

1.2 There are four further meetings scheduled to discuss these guidelines, including sign off of the draft guidelines for consultation at the March 2019 Council meeting. The consultation is currently scheduled to run from May to August 2019, and the definitive guideline to be published in May 2020. Depending on the scope of the revision, it may be possible to bring forward consultation and publication of the definitive guideline; we will keep the timetable under review.

1.3 Evidence to support the development of the new guideline is at **Annex A**. This annex contains volumes over time, sentence outcomes, ACSLs for adult offenders for the offences covered by the current guideline and included in the table below.

2 RECOMMENDATION

- That the Council agrees the main offences to include within the guideline
- That the Council agrees to explore options for offences relating to supply of drugs in prisons
- That the Council agrees the most important purposes of sentencing for these offences
- That the Council agrees that, overall, the guideline shall aim to replicate current sentencing practice
- That the Council agrees not to produce a separate guideline for children and young people
- That the Council agrees to revise the current guidance on the statutory minimum sentence for Class A trafficking offences
- That the Council agrees to consider how to provide further guidance on confiscation orders and drug rehabilitation requirements

3 CONSIDERATION

3.1 The current Drug Offences Guideline came into force on 27 February 2012. It was one of the first Sentencing Council guidelines, developed following advice from the Sentencing Advisory Panel. It contains five separate guidelines, covering importation, supply/possession with intent to supply, permitting premises to be used, production/cultivation and possession offences. The evaluation of the guideline was published in June this year (see **Annex B**), and recommended that, whilst the Guideline had not had many unintended impacts, nevertheless, the changing nature of drug offending suggested that further revision may be necessary.

3.2 In addition, since publication of the Guideline, the Psychoactive Substances Act 2016 (PSA) has come into force, creating new offences for which there is currently no guideline. These offences mirror those in the Misuse of Drugs Act 1971 (MDA), although there is no offence of simple possession of a psychoactive substance other than possession in a custodial institution. The main difference between these new offences and those in the MDA is that psychoactive substances are defined by their characteristics in section 2 of the Act, thus there is no list of psychoactive substances equivalent to the lists in schedule 2 to the MDA. The psychoactive substances offences also have lower maximum penalties than the MDA offences. There have so far been few prosecutions and sentences for the offences under the PSA. In 2017, the first full year since the Act came into force, 141 adult offenders were sentenced for offences under the PSA, most (96) for possession with intent to supply. The Home Office has committed to reporting on the implementation of the Act by the end of this year; information from this review may feed into the development of the guideline.

3.3 The MDA offences are high volume. Annex A gives key data on volumes, disposal types and average custodial sentence lengths for the offences covered by the current Guideline, but the volumes of adult offenders sentenced in 2017 are summarised in the following table:

	Total	Mags Courts	Crown Court
Importation Class A	213	7	206
Importation Class B	66	8	58
Importation Class C	33	3	30
Total Importation	312	18	294
Supply Class A	2,405	16	2,389
Supply Class B	745	103	642
Supply Class C	34	11	23
Total Supply	3,184	130	3,054
PWITS Class A	4,105	32	4,073
PWITS Class B	2,266	418	1,848
PWITS Class C	61	14	47

Total PWITS	6,432	464	5,968
Permitting premises Class A	88	2	86
Permitting premises Class B	163	61	102
Permitting premises Class C	5	2	3
Total Permitting premises	256	65	191
Possession Class A	7,404	6,585	819
Possession Class B	14,228	13,304	924
Possession Class C	394	363	31
Total Possession	22,026	20,252	1,774
Production/Cultivation Class A	18	2	16
Production/Cultivation Class B	2,495	1,134	1,361
Production/Cultivation Class C	5	0	5
Total Production/Cultivation	2,518	1,136	1,382
All Offences	34,728	22,065	12,663

Note: the table above refers only to principal offence; in some cases the offender is also sentenced for a more serious offence (such as a serious assault or burglary) so the possession offence is not recorded above. Further detail on all offences, including secondary offences, will be available at a later meeting.

3.4 As can be seen from the table above, the majority of offenders sentenced for possession offences were sentenced in the magistrates' courts, as the majority of these offences relate to class B drugs (mostly cannabis). Nearly half of production/cultivation offences (again mostly relating to cannabis) were sentenced in the magistrates' courts. Most of the importation, supply and PWITS offences relate to Class A drugs and are sentenced in the Crown Court.

3.5 The government published its Drug Strategy in 2017, focusing on reducing demand for drugs, restricting supply of drugs, building recovery for addicts and taking action against drugs internationally. The strategy does not propose any new offences or legislative changes which would affect the offences covered by the guideline, though it may prompt change in behaviour by (for example) the police, which could lead to changes in the nature and number of cases coming before the courts. Some legislative changes are proposed in the strategy, which do not directly involve the drug offences themselves but would affect the enforcement of fines/compensation orders and other offences relating to drug offending such as money laundering.

3.6 The main areas where the Drug Strategy could affect our revised guideline is in relation to drug treatment and to the supply of drugs in prisons. The strategy contains a separate section on drugs in prisons (see 3.13 below) and, separately, it explicitly refers (at page 24) to increasing the use of drug rehabilitation requirements:

Alongside punitive sanctions, the criminal justice system should consider use of health-based, rehabilitative interventions to address the drivers behind the crime and help prevent further substance misuse and offending. The Drug Rehabilitation Requirement (alongside the Alcohol Treatment Requirement and Mental Health Treatment Requirement) is available for use by courts when imposing a community order and suspended sentence order and should be applied, where appropriate, and reinforced by frequent testing to ensure compliance.

3.7 Changes to probation services will also have an effect on the availability of DRRs and other aspects of community sentences. Whilst legislation in this area is unlikely in the near future, we will keep in touch with the MoJ and Home Office throughout the development of this guideline to ensure we understand potential implications of the government's Drug Strategy and probation reforms.

3.8 The National Crime Agency (NCA) has published a Strategic Threat Assessment for 2018 covering all areas of serious and organised crime within its remit, including drugs. It highlights several growing threats relating to drug offences:

- Increase in use and supply of synthetic opioids such as fentanyl
- County lines supply methods, associated with violence and exploitation of vulnerable people.
- High demand for all drug types, and a worrying increase in demand for crack cocaine.
- Threat from use of new technologies, including encrypted online market places through which the main commodity sold is drugs
- Use by drug importers of fast parcel and post services
- Corruption of officials at borders facilitating smuggling of Class A drugs into the UK

3.9 To inform the scope of the revision of the guideline, I have spoken to several key stakeholders including the police, drug expert witnesses, National Crime Agency and the Home Office. We have also had some initial discussions with Crown Court judges at Birmingham and Canterbury (two courts with large numbers of drug offences) to gauge their views on how the guideline is working. We will be doing further work to seek the views of magistrates over the next few weeks.

3.10 Information from the evaluation of the drugs guideline, together with the discussions with judges and information in particular from the NCA suggests that, whilst some changes to the guideline are necessary, many aspects of the guideline are working well.

Offences recommended to be in scope

3.11 The offences covered by the current Drug Offences guideline continue to be the most frequently sentenced drug offences, and I propose that they remain the core of the revised guideline. In addition, I am proposing that we include offence-specific guidelines on those offences in the Psychoactive Substances Act which mirror the MDA offences in the guideline. I therefore propose that the guideline covers the following offences:

Legislation	Description	Maximum penalty	In current guideline?
Misuse of Drugs Act 1971 (s3)	Importation/Exportation of controlled drugs	Class A – Life Class B – 14 yrs Class C – 14 yrs	Yes
Customs and Excise Management Act 1979 s170(2)	Importation/Exportation of controlled drugs	Class A – Life Class B – 14 yrs Class C – 14 yrs	Yes
MDA 1971 s4(3)	Supplying or offering to supply a controlled drug	Class A – Life Class B – 14 yrs Class C – 14 yrs	Yes
MDA 1971 s5(3)	Possession with intent to supply a controlled drug	Class A – Life Class B – 14 yrs Class C – 14 yrs	Yes
MDA 1971 s4(2)(a) or (b)	Production of a controlled drug	Class A – Life Class B – 14 yrs Class C – 14 yrs	Yes
MDA 1971 s6(2)	Cultivation of cannabis plant	14 yrs	Yes
MDA 1971 s8	Permitting premises to be used	14 yrs	Yes
MDA 1971 s5(2)	Possession of a controlled drug	Class A – 7 yrs Class B – 5 yrs Class C – 2 yrs	Yes
Psychoactive Substances Act 2016 s4(1)	Producing a psychoactive substance	7 yrs	No
PSA 2016 s 5(1)	Supplying or offering to supply a psychoactive substance	7 yrs	No
PSA 2016 s7(1)	Possession of a psychoactive substance with intent to supply	7 yrs	No
PSA 2016 s8(1)	Importing or exporting a psychoactive substance	7 yrs	No
PSA 2016 s9(1)	Possession of a psychoactive substance in a custodial institution	2 yrs	No

3.12 Although I propose that the revised guideline include offence specific guidelines for the new PSA offences, it may be that these can be incorporated within the analogous MDA offence guidelines, with some additions for the new offences (such as separate sentencing levels). Further consideration will be given to this as we develop the guideline.

Question One: Does the Council agree that the revised guideline should cover all the above offences? Are there any additional offences that the Council would like to consider for inclusion?

Supply of drugs in prisons

3.13 The Crown Court judges we have spoken to so far highlighted the problem of drugs, including psychoactive substances, in prisons and the need for sentencing guidelines to address this problem more specifically. The supply of drugs in prisons is a serious problem identified by the government's drug strategy. Tackling drug supply in prisons is also central to the MoJ's prison strategy, and one of the key aspects of its recently announced 10 prisons project. The current guideline contains specific guidance on supply of drugs into prison by a prison employee, but not by any other type of offender (such as drugs brought in by family members or friends of prisoners) which judges said was a particular problem. As well as the general drug supply/PWITS offences, there are specific offences of conveying prohibited articles into prisons under s40 of the Prisons Act 1952, which can cover controlled drugs and psychoactive substances. I do not propose at this stage to develop a separate offence specific guideline for these offences, but I would like to explore what guidance we can give within the overall Drug Offences guideline (such as short narrative guidance), particularly as the Council has no immediate plans to produce guidelines on prison offences more generally. If the Council agrees with this, I will present options for how to include this type of offending at a later meeting.

Question Two: Does the Council agree to exploring ways in which the guideline can include offences relating to supply of drugs in prisons?

Orders

3.14 There are two types of orders which are particularly relevant in cases of drug offences: confiscation orders and community orders/suspended sentence orders with drug rehabilitation requirements. Evidence from Crown Court judges, the NCA, and the police is that, for the more serious supply and importation offences, the threat of a prison term is sometimes accepted as part of the drugs business, and that seizure of the drugs, or other materials, and associated loss of profits is a far greater concern to the offenders. There have also been some changes to confiscation orders in the Serious Crime Act 2015, since publication of the current guideline. I would therefore like to explore how further information and/or signposting can be given on confiscation orders, either in an annex or as further detail within the guideline steps, particularly for the supply/PWITS, importation and production/cultivation offences.

Question Three: Does the Council agree to consider whether the revised guideline should provide additional information on confiscation orders?

3.15 As noted above, there is good evidence that drug rehabilitation requirements, as part of a community order or suspended sentence, can work well in rehabilitating offenders and prevent reoffending. The MoJ has been piloting increased use of such requirements in 5 areas, and I would like to see how information from those pilots can be used to bolster the guidance on drug treatment requirements given by the guideline. The current guideline already includes some guidance on this in the text above the sentence levels tables, which reads:

Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence.

3.16 However, it may be possible to emphasise this by changing the wording and position of this guidance, particularly in the digital guidelines, and I propose to consider how drug treatment requirements are being used (analysing case transcripts and using information from the MoJ pilots) in developing a way to make this guidance clearer.

Question Four: Does the Council agree to including additional guidance on use of drug rehabilitation requirements?

Sentencing of children and young people

3.17 The current guideline applies only to offenders aged 18 or over. There is no offence specific guideline for children and young people convicted of drug offences; they would be sentenced under the *Sentencing Children and Young People – Overarching Principles* definitive guideline published in 2017. Children and young people are involved in drug offending, particularly as couriers supplying small amounts of drugs, and there is evidence that they are increasingly being exploited as couriers by “county lines” drug gangs. Some of the judges we spoke to felt that a drug offence specific guideline for children and young people would be helpful, others did not.

3.18 The Council does not ordinarily produce separate offence specific guidelines for children and young people, unless there is a strong reason to do so. There are offence-specific guidelines for a limited number of offences only, including bladed article possession/threats and robbery offences, which under-18s commit in high volumes, and sexual offences, an area that is complex and has distinct characteristics. In the case of drug offences, the factors which are most important are those which are already central to the

Sentencing Children and Young People – Overarching Principles guideline, namely the need to consider the offender’s specific needs and vulnerability, and putting rehabilitation as the main purpose of sentencing a young person. Given this, and the small numbers of young people sentenced for these offences (2,203 out of a total of 36,931 in 2017), I propose not developing a separate guideline for children and young people.

Question Five: Is the Council content not to develop a separate Drug Offences guideline for children and young people?

Other areas to consider

3.19 Discussions so far have suggested that, whilst much of the guideline is working well, there are some areas in particular need of revision. These include:

- the approach to purity, and the information available to sentencers on purity levels and harm caused;
- the approach to quantity, and whether the current approach of listing specific drugs is the best one; and
- the approach to culpability, and whether the role of the offender should be the prime concern, or whether other factors (such as creating a market for a drug or exploiting vulnerable people) are important, particularly in light of new patterns of offending, such as county lines and web-enabled supply.

3.20 In proposing revisions to these parts of the guideline, I intend to consider using not just the current format of guidelines, but consider alternative ways to present information such as annexes or additional text boxes/steps. I will cover these in detail in future papers, but would like to ask the Council whether there are any other areas of the current guideline which you would have me consider.

Question Six: Are there any areas of the current guideline, other than all those discussed above, that the Council would like to investigate and consider for detailed revision?

3.21 The Sentencing Advisory Panel’s advice to the Sentencing Guidelines Council in 2010 set out what it believed were the purposes of sentencing most relevant to sentencing drug offences. The Panel took the view that the purpose varied between the different offences; punishment was an important purpose for “involvement in an offence that has been committed intentionally and which causes social harm” particularly where it was motivated by substantial financial gain. Where offences were “triggered by an addiction” the Panel felt that reform and rehabilitation was the most important purpose. The Panel also discussed the question of deterrence, and advised that for the most serious offences it would not be a

deterrent to increase prison terms beyond the current levels, but that confiscation orders may have more of a deterrent effect. The Sentencing Council took these purposes as the most important in devising the current Drug Offences guideline. Before taking work on revising the current guideline any further, I would like to confirm which purposes of sentencing the Council now feels are most important and whether that varies between offences as suggested by the approach taken in the current guideline.

Question Seven: Which of the purposes of sentencing does the Council feel are most important in the sentencing of these offences?

Sentence levels and current sentencing practice

3.22 Following from consideration of the purposes of sentencing most relevant to this guideline, it would also be helpful to seek an initial steer from the Council on intention as regards sentence levels and current sentencing practice. The current guideline aimed to replicate current sentencing practice, with the exception of the case of so-called “drug mules”, and evaluation shows that this aim has largely been met. There has been an increase in custodial sentence lengths across some of these offences, but this may be attributable to an increase in offence seriousness (for example, larger quantities of drugs seized) rather than a change in sentencing practice for offences of comparable seriousness. Some proposals above, such as further guidance on use of drug rehabilitation requirements, may reduce the use of immediate custodial sentences, and more information on likely impacts of individual proposals will be set out in later papers as the draft guideline is developed. However, I propose that, as an initial assumption, the Council will not aim to change sentencing practice for these offences overall. If there are areas which the Council would like me to investigate with a view to making changes to sentencing practice it would be helpful to know those areas now.

Question Eight: Does the Council agree that, subject to changes made to individual sections of the guideline as it is developed, the overall aim will be to maintain current sentence levels and replicate current sentencing practice? If not, are there areas which the Council would particularly like to see change?

Guidance on minimum sentence provisions for trafficking offences

3.23 All the above MDA offences involving Class A drugs except Possession are classed as “trafficking” offences for the purposes of section 110 of the Powers of Criminal Courts (Sentencing) Act 2000. This provides that a court should impose a minimum sentence of at least seven years imprisonment for a third trafficking offence except where the court is of the opinion that there are particular circumstances which a) relate to any of the offences or to the offender; and b) would make it unjust to do so in all the circumstances. The current

guideline includes some text on this above the sentence levels table, but does not provide guidance on how to apply it. The recent Bladed Articles and Offensive Weapons guideline provides more detailed guidance on how to apply the similar minimum sentence provisions in relation to those offences, and I propose revising the guidance in the Drug Offences guideline in light of the Bladed Articles changes and relevant case law on Drug Offences.

Question Nine: Does the Council agree that the guidance on minimum sentences for Class A trafficking offences should be revised?

4 IMPACT

4.1 A draft resource assessment will be developed in due course. If the Council decides that the aim of the guideline is to replicate current sentencing practice, then the impact on resources within the system is likely to be negligible. Transcripts and other data are being analysed to assess this impact, and we will continue to consider this as the draft guideline develops.

5 RISK

5.1 No significant risks identified at this stage. Work with the judiciary and stakeholders so far suggests that the existing guideline is working well in many areas, but that revision, particularly to areas discussed above, would be welcomed. Drug offending, particularly involving serious and organised crime, county lines or supply in prisons is a controversial subject and frequently discussed in the media, and we will prepare for draft guidelines to be scrutinised and discussed in the press on consultation.

Drug volumes

Table 1: Number of adult offenders sentenced for importation/exportation offences covered by the drugs guideline, by court type, 2007-2017

Legislation	Section	Offence	Court type	Number of adult offenders sentenced											
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	
Customs and Excise Management Act 1979	170(1), 170(2)	Importation/exportation Class A	MC	19	8	6	4	4	1	1	4	3	0	7	
			CC	529	542	558	415	446	356	304	288	235	233	206	
			Total	548	550	564	419	450	357	305	292	238	233	213	
		Importation/exportation Class B	MC	11	4	13	6	11	7	10	8	8	10	8	
			CC	12	18	84	121	159	115	116	93	150	73	58	
			Total	23	22	97	127	170	122	126	101	158	83	66	
	Importation/exportation Class C	MC	17	12	5	0	3	3	7	11	5	4	3		
		CC	236	187	91	26	25	12	19	33	47	65	30		
		Total	253	199	96	26	28	15	26	44	52	69	33		
	Total Importation/exportation			MC	47	24	24	10	18	11	18	23	16	14	18
				CC	777	747	733	562	630	483	439	414	432	371	294
				Total	824	771	757	572	648	494	457	437	448	385	312

Source: Court Proceedings Database, Ministry of Justice

Drug volumes

Table 2: Number of adult offenders sentenced for supply offences covered by the drugs guideline, by court type, 2007-2017

Legislation	Section	Offence	Court type	Number of adult offenders sentenced											
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	
Misuse of Drugs Act 1971	4(3)	Supply Class A - Cocaine	MC	46	36	29	24	33	15	12	11	12	6	6	
			CC	464	648	694	623	613	670	848	920	946	1,067	916	
			Total	510	684	723	647	646	685	860	931	958	1,073	922	
		Supply Class A - Crack	MC	9	11	4	2	1	0	1	3	2	2	2	1
			CC	234	318	252	187	214	299	289	272	232	290	322	
			Total	243	329	256	189	215	299	290	275	234	292	323	
		Supply Class A - Heroin	MC	42	35	22	26	12	7	6	4	5	6	3	
			CC	1,081	1,135	1,131	1,124	1,006	848	820	856	712	868	945	
			Total	1,123	1,170	1,153	1,150	1,018	855	826	860	717	874	948	
		Supply Class A - LSD	MC	0	0	0	1	0	0	0	0	0	0	0	
			CC	1	4	2	1	1	1	0	2	1	1	1	
			Total	1	4	2	2	1	1	0	2	1	1	1	
		Supply Class A - MDMA	MC	11	13	7	6	4	3	1	6	2	0	4	
			CC	124	107	82	40	52	75	85	89	101	121	88	
			Total	135	120	89	46	56	78	86	95	103	121	92	
		Supply Class A - Methadone	MC	3	6	8	3	6	3	3	1	0	1	0	
			CC	12	18	17	16	16	14	13	7	7	4	2	
			Total	15	24	25	19	22	17	16	8	7	5	2	
		Supply Class A - Methamphetamine	MC	0	0	0	0	1	0	0	0	0	0	0	
CC	3		3	2	1	0	3	1	4	0	1	5			
Total	3		3	2	1	1	3	1	4	0	1	5			
Supply Class A - Other	MC	10	16	9	8	10	6	8	5	5	1	2			
	CC	446	489	442	391	314	175	203	205	227	166	110			
	Total	456	505	451	399	324	181	211	210	232	167	112			
Total Supply Class A	MC	121	117	79	70	67	34	31	30	26	16	16			
	CC	2,365	2,722	2,622	2,383	2,216	2,085	2,259	2,355	2,226	2,518	2,389			
	Total	2,486	2,839	2,701	2,453	2,283	2,119	2,290	2,385	2,252	2,534	2,405			

Legislation	Section	Offence	Court type	Number of adult offenders sentenced										
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Misuse of Drugs Act 1971	4(3)	Supply Class B - Amphetamine	MC	20	14	6	21	14	14	5	6	7	8	8
			CC	55	60	94	63	73	68	67	83	96	87	32
			Total	75	74	100	84	87	82	72	89	103	95	40
		Supply Class B - Cannabis, cannabis resin, cannabino, cannabino derivatives	MC	0	5	48	151	187	156	156	96	83	99	88
			CC	0	15	81	269	370	416	419	499	626	496	425
			Total	0	20	129	420	557	572	575	595	709	595	513
		Supply Class B - Ketamine	MC	0	0	0	0	0	0	0	0	0	0	2
			CC	0	0	0	0	0	0	0	0	2	2	3
			Total	0	0	0	0	0	0	0	0	2	2	5
		Supply Class B - Mephedrone (4-Methylmethcathinone, Methcathinone)	MC	0	0	0	0	5	10	6	4	3	1	0
			CC	0	0	0	0	0	13	26	24	16	15	1
			Total	0	0	0	0	5	23	32	28	19	16	1
		Supply Class B - Synthetic cannabinoid receptor agonists	MC	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	0	0	0	0	0	0	0	0	0
			Total	0	0	0	0	0	0	0	0	0	0	0
		Supply Class B - Other	MC	4	3	15	41	46	37	22	17	24	9	5
			CC	6	15	51	202	228	224	314	311	296	268	181
			Total	10	18	66	243	274	261	336	328	320	277	186
		Total Supply Class B	MC	24	22	69	213	252	217	189	123	117	117	103
CC	61		90	226	534	671	721	826	917	1,036	868	642		
Total	85		112	295	747	923	938	1,015	1,040	1,153	985	745		

Drug volumes

Legislation	Section	Offence	Court type	Number of adult offenders sentenced											
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	
Misuse of Drugs Act 1971	4(3)	Supply Class C - Anabolic steroids	MC	1	0	0	1	0	1	0	0	0	0	0	
			CC	2	1	3	1	2	3	4	5	7	3	7	
			Total	3	1	3	2	2	4	4	5	7	3	7	
		Supply Class C - GHB 4-Hydroxy-n-butyric acid	MC	0	0	1	0	0	0	0	0	0	0	0	0
			CC	0	0	1	0	0	0	0	0	0	0	0	1
			Total	0	0	2	0	0	0	0	0	0	0	0	1
		Supply Class C - Gamma-butyrolactone (GBL) and 1,4-butanediol (1,4-BD)	MC	0	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	0	0	0	0	1	0	2	0	0	0
			Total	0	0	0	0	0	0	1	0	2	0	0	0
		Supply Class C - Khat	MC	0	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	0	0	0	0	0	0	0	0	1	0
			Total	0	0	0	0	0	0	0	0	0	0	1	0
		Supply Class C - Piperazines (including BZP)	MC	0	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	0	0	3	1	0	1	0	0	0	0
			Total	0	0	0	0	3	1	0	1	0	0	0	0
		Supply Class C - Cannabis ¹	MC	140	108	46	5	1	3	0	0	0	1	0	0
			CC	165	164	185	62	14	3	0	0	1	0	0	0
			Total	305	272	231	67	15	6	0	0	1	1	0	0
		Supply Class C - Other	MC	31	43	33	33	37	36	24	9	19	12	11	11
			CC	187	234	186	77	57	34	44	43	25	30	15	15
Total	218		277	219	110	94	70	68	52	44	42	26	26		
Total Supply Class C	MC	172	151	80	39	38	40	24	9	19	13	11	11		
	CC	354	399	375	140	76	41	49	49	35	33	23	23		
	Total	526	550	455	179	114	81	73	58	54	46	34	34		

Source: Court Proceedings Database, Ministry of Justice

Drug volumes

Table 3: Number of adult offenders sentenced for possession with intent to supply offences covered by the drugs guideline, by court type, 2007-2017

Legislation	Section	Offence	Court type	Number of adult offenders sentenced										
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Misuse of Drugs Act 1971	5(3)	PWITS Class A - Cocaine	MC	54	58	28	30	20	10	20	13	7	15	14
			CC	1,062	1,404	1,595	1,550	1,301	1,267	1,277	1,522	1,623	1,755	1,811
			Total	1,116	1,462	1,623	1,580	1,321	1,277	1,297	1,535	1,630	1,770	1,825
		PWITS Class A - Crack	MC	9	17	5	3	10	3	1	7	9	13	10
			CC	305	365	327	288	340	374	416	377	476	562	642
			Total	314	382	332	291	350	377	417	384	485	575	652
		PWITS Class A - Heroin	MC	33	57	18	17	10	13	5	10	6	18	3
			CC	1,015	1,158	1,097	1,203	993	911	989	1,033	1,173	1,246	1,212
			Total	1,048	1,215	1,115	1,220	1,003	924	994	1,043	1,179	1,264	1,215
		PWITS Class A - LSD	MC	5	2	0	0	0	0	0	0	0	0	0
			CC	10	8	4	7	1	4	2	2	3	1	8
			Total	15	10	4	7	1	4	2	2	3	1	8
		PWITS Class A - MDMA	MC	27	16	6	3	8	6	5	5	8	8	2
			CC	459	319	190	72	85	163	193	221	240	251	250
			Total	486	335	196	75	93	169	198	226	248	259	252
PWITS Class A - Methadone	MC	2	0	0	4	0	0	1	1	0	0	0		
	CC	3	2	5	7	2	3	4	0	2	1	1		
	Total	5	2	5	11	2	3	5	1	2	1	1		
PWITS Class A - Methamphetamine	MC	0	0	1	2	0	0	0	0	1	0	0		
	CC	0	3	6	3	3	5	13	8	9	20	17		
	Total	0	3	7	5	3	5	13	8	10	20	17		
PWITS Class A - Other	MC	18	38	16	7	6	4	4	6	2	1	3		
	CC	241	223	197	231	168	151	170	134	152	135	132		
	Total	259	261	213	238	174	155	174	140	154	136	135		
Total PWITS Class A	MC	148	188	74	66	54	36	36	42	33	55	32		
	CC	3,095	3,482	3,421	3,361	2,893	2,878	3,064	3,297	3,678	3,971	4,073		
	Total	3,243	3,670	3,495	3,427	2,947	2,914	3,100	3,339	3,711	4,026	4,105		

Legislation	Section	Offence	Court type	Number of adult offenders sentenced										
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Misuse of Drugs Act 1971	5(3)	PWITS Class B - Amphetamine	MC	26	24	38	29	38	37	30	20	24	21	12
			CC	253	292	248	291	263	210	202	234	230	150	112
			Total	279	316	286	320	301	247	232	254	254	171	124
		PWITS Class B - Cannabis, cannabis resin, cannabinol, cannabinol derivatives	MC	0	5	238	583	640	639	596	463	442	448	371
			CC	0	57	396	1,430	1,705	1,890	2,004	2,127	2,109	1,854	1,587
			Total	0	62	634	2,013	2,345	2,529	2,600	2,590	2,551	2,302	1,958
		PWITS Class B - Ketamine	MC	0	0	0	0	0	0	0	0	1	2	0
			CC	0	0	0	0	0	0	0	0	6	11	27
			Total	0	0	0	0	0	0	0	0	7	13	27
		PWITS Class B - Mephedrone (4-Methylmethcathinone, Methcathinone)	MC	0	0	0	9	23	26	18	14	13	8	0
			CC	0	0	0	0	23	43	103	65	92	43	7
			Total	0	0	0	9	46	69	121	79	105	51	7
		PWITS Class B - Synthetic cannabinoid receptor agonists	MC	0	0	0	0	0	0	0	0	0	0	1
			CC	0	0	0	0	3	2	0	0	3	2	1
			Total	0	0	0	0	3	2	0	0	3	2	2
PWITS Class B - Other	MC	3	8	73	108	87	113	63	34	33	31	34		
	CC	15	14	77	424	343	349	288	308	288	210	114		
	Total	18	22	150	532	430	462	351	342	321	241	148		
Total PWITS Class B	MC	29	37	349	729	788	815	707	531	513	510	418		
	CC	268	363	721	2,145	2,337	2,494	2,597	2,734	2,728	2,270	1,848		
	Total	297	400	1,070	2,874	3,125	3,309	3,304	3,265	3,241	2,780	2,266		

Drug volumes

Legislation	Section	Offence	Court type	Number of adult offenders sentenced											
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	
Misuse of Drugs Act 1971	5(3)	PWITS Class C - Anabolic steroids	MC	0	1	1	2	1	0	2	0	1	1	0	
			CC	1	4	5	1	3	2	6	4	3	2	4	
			Total	1	5	6	3	4	2	8	4	4	3	4	
		PWITS Class C - GHB 4-Hydroxy-n-butyric acid	MC	1	0	0	0	0	0	0	0	0	0	0	1
			CC	0	1	0	0	2	0	2	4	0	0	0	0
			Total	1	1	0	0	2	0	2	4	0	0	0	1
		PWITS Class C - Gamma-butyrolactone (GBL) and 1,4-butanediol (1,4-BD)	MC	0	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	0	0	0	0	1	0	0	1	1	1
			Total	0	0	0	0	0	0	1	0	0	1	1	1
		PWITS Class C - Khat	MC	0	0	0	0	0	0	0	0	0	1	0	0
			CC	0	0	0	0	0	0	0	0	0	0	1	0
			Total	0	0	0	0	0	0	0	0	0	0	2	0
		PWITS Class C - Piperazines (including BZP)	MC	0	0	0	0	1	1	0	0	0	0	0	0
			CC	0	0	0	0	9	5	6	4	2	0	2	2
			Total	0	0	0	0	10	6	6	4	2	0	2	2
		PWITS Class C - Cannabis ¹	MC	282	350	187	11	1	6	1	0	1	1	0	0
			CC	501	564	490	118	13	4	4	0	2	0	0	0
Total	783		914	677	129	14	10	5	0	3	1	0	0		
PWITS Class C - Other	MC	51	74	60	57	61	39	39	27	23	14	13	13		
	CC	681	790	605	224	160	115	85	67	65	41	40	40		
	Total	732	864	665	281	221	154	124	94	88	55	53	53		
Total PWITS Class C	MC	334	425	248	70	64	46	42	27	25	17	14	14		
	CC	1,183	1,359	1,100	343	187	126	104	79	72	45	47	47		
	Total	1,517	1,784	1,348	413	251	172	146	106	97	62	61	61		

Source: Court Proceedings Database, Ministry of Justice

Table 4: Number of adult offenders sentenced for permitting premises offences covered by the drugs guideline, by court type, 2007-2017

Legislation	Section	Offence	Court type	Number of adult offenders sentenced										
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Misuse of Drugs Act 1971	8	Permitting premises Class A - Cocaine	MC	0	0	0	0	1	0	0	1	1	2	0
			CC	6	15	19	12	9	15	12	15	25	27	29
			Total	6	15	19	12	10	15	12	16	26	29	29
		Permitting premises Class A - Crack	MC	1	0	0	1	1	1	1	0	1	2	1
			CC	2	4	6	2	3	10	5	8	12	11	13
			Total	3	4	6	3	4	11	6	8	13	13	14
		Permitting premises Class A - Heroin	MC	2	0	0	0	1	4	3	1	0	2	1
			CC	21	24	13	12	11	17	20	24	27	34	24
			Total	23	24	13	12	12	21	23	25	27	36	25
		Permitting premises Class A - LSD	MC	0	0	0	0	0	0	0	0	0	0	0
			CC	2	1	0	0	0	0	0	0	0	0	0
			Total	2	1	0	0	0	0	0	0	0	0	0
		Permitting premises Class A - MDMA	MC	0	0	0	0	0	0	0	0	0	0	0
			CC	7	4	2	0	0	1	1	0	3	0	1
			Total	7	4	2	0	0	1	1	0	3	0	1
		Permitting premises Class A - Methadone	MC	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	0	0	0	0	0	0	0	1	0
			Total	0	0	0	0	0	0	0	0	0	1	0
		Permitting premises Class A - Methamphetamine	MC	0	0	1	0	0	0	0	0	0	0	0
			CC	0	0	0	0	0	0	0	0	0	0	0
Total	0		0	1	0	0	0	0	0	0	0	0		
Permitting premises Class A - Other	MC	1	2	1	2	0	3	1	0	0	0	0		
	CC	5	9	4	7	2	3	10	11	21	13	19		
	Total	6	11	5	9	2	6	11	11	21	13	19		
Total Permitting premises Class A	MC	4	2	2	3	3	8	5	2	2	6	2		
	CC	43	57	44	33	25	46	48	58	88	86	86		
	Total	47	59	46	36	28	54	53	60	90	92	88		
Misuse of Drugs Act 1971	8	Permitting premises Class B - Amphetamine	MC	1	0	0	0	0	1	0	1	0	0	
			CC	4	2	4	7	8	5	5	4	2	0	
			Total	5	2	4	7	8	6	5	5	2	0	
		Permitting premises Class B - Cannabis, cannabis resin, cannabinol, cannabinol derivatives	MC	6	0	39	97	79	98	127	111	81	83	54
			CC	11	11	14	57	111	146	157	187	213	134	81
			Total	17	11	53	154	190	244	284	298	294	217	135
		Permitting premises Class B - Ketamine	MC	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	0	0	0	0	0	0	1	0	0
			Total	0	0	0	0	0	0	0	0	1	0	0
		Permitting premises Class B - Mephedrone (4-Methylmethcathinone, Methcathinone)	MC	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	0	0	1	2	0	0	4	1	0
			Total	0	0	0	0	1	2	0	0	4	1	0
		Permitting premises Class B - Synthetic cannabinoid receptor agonists	MC	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	0	0	0	0	0	0	0	0	0
			Total	0	0	0	0	0	0	0	0	0	0	0
		Permitting premises Class B - Other	MC	0	0	15	22	20	22	20	15	16	14	7
			CC	0	2	9	82	91	119	113	59	47	34	19
			Total	0	2	24	104	111	141	133	74	63	48	26
		Total Permitting premises Class B	MC	7	0	54	119	99	121	147	127	97	97	61
			CC	15	15	27	146	211	272	275	250	267	169	102
Total	22		15	81	265	310	393	422	377	364	266	163		

Drug volumes

Legislation	Section	Offence	Court type	Number of adult offenders sentenced												
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017		
Misuse of Drugs Act 1971	8	Permitting premises Class C - Anabolic steroids	MC	0	0	0	0	0	0	0	0	0	1	0	0	
			CC	0	0	0	0	0	0	0	1	2	3	2		
			Total	0	0	0	0	0	0	0	1	3	3	2		
		Permitting premises Class C - GHB 4-Hydroxy-n-butyric acid	MC	0	0	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	1	0	0	0	0	0	0	0	0	0	
			Total	0	0	1	0	0	0	0	0	0	0	0		
		Permitting premises Class C - Gamma-butyrolactone (GBL) and 1,4-butanediol (1,4-BD)	MC	0	0	0	0	0	0	0	0	0	0	0	0	
			CC	0	0	0	0	0	0	0	0	0	0	0		
			Total	0	0	0	0	0	0	0	0	0	0			
		Permitting premises Class C - Khat	MC	0	0	0	0	0	0	0	0	0	0	0		
			CC	0	0	0	0	0	0	0	0	0	0			
			Total	0	0	0	0	0	0	0	0	0				
		Permitting premises Class C - Piperazines (including BZP)	MC	0	0	0	0	0	0	0	0	0	0	1		
			CC	0	0	0	0	0	1	0	0	0	0			
			Total	0	0	0	0	0	1	0	0	0	1			
		Permitting premises Class C - Cannabis ¹	MC	54	51	15	10	4	11	4	2	2	3	1		
			CC	9	8	16	11	1	2	0	0	0	0			
Total	63		59	31	21	5	13	4	2	2	3					
Permitting premises Class C - Other	MC	2	5	8	1	0	1	1	0	0	0					
	CC	51	51	42	19	4	4	2	2	1	0					
	Total	53	56	50	20	4	5	3	2	1	0					
Total Permitting premises Class C	MC	56	56	23	11	4	12	5	2	3	3	2				
	CC	60	59	59	30	5	7	2	3	3	3					
	Total	116	115	82	41	9	19	7	5	6	6					

Source: Court Proceedings Database, Ministry of Justice

Drug volumes

Table 5: Number of adult offenders sentenced for possession offences covered by the drugs guideline, by court type, 2007-2017

Legislation	Section	Offence	Court type	Number of adult offenders sentenced										
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Misuse of Drugs Act 1971	5(2)	Possession Class A - Cocaine	MC	4,388	5,192	4,924	4,383	4,547	4,242	3,978	3,561	3,363	3,349	3,318
			CC	301	415	490	420	469	378	322	328	322	464	457
			Total	4,689	5,607	5,414	4,803	5,016	4,620	4,300	3,889	3,685	3,813	3,775
		Possession Class A - Crack	MC	1,081	1,408	1,020	876	941	791	749	548	610	718	707
			CC	74	93	90	56	72	44	49	54	66	62	65
			Total	1,155	1,501	1,110	932	1,013	835	798	602	676	780	772
		Possession Class A - Heroin	MC	4,276	4,469	4,521	4,320	2,677	2,438	2,461	2,434	2,211	1,996	1,693
			CC	282	314	285	335	239	173	187	188	208	202	182
			Total	4,558	4,783	4,806	4,655	2,916	2,611	2,648	2,622	2,419	2,198	1,875
		Possession Class A - LSD	MC	38	25	21	11	12	7	7	5	7	4	10
			CC	1	3	4	1	4	2	2	2	0	1	4
			Total	39	28	25	12	16	9	9	7	7	5	14
		Possession Class A - MDMA	MC	1,297	799	512	230	355	460	527	387	435	396	309
			CC	130	115	92	48	25	57	49	49	40	59	72
			Total	1,427	914	604	278	380	517	576	436	475	455	381
		Possession Class A - Methadone	MC	171	170	185	193	174	142	151	108	106	89	63
			CC	10	3	10	18	11	9	6	3	10	6	2
Total	181		173	195	211	185	151	157	111	116	95	65		
Possession Class A - Methamphetamine	MC	6	13	20	23	18	17	36	30	31	44	40		
	CC	0	0	2	2	2	2	4	3	1	1	6		
	Total	6	13	22	25	20	19	40	33	32	45	46		
Possession Class A - Other	MC	629	920	1,010	878	762	647	674	668	640	497	445		
	CC	113	124	132	113	52	49	37	41	27	29	31		
	Total	742	1,044	1,142	991	814	696	711	709	667	526	476		
Total Possession Class A	MC	11,886	12,996	12,213	10,914	9,486	8,744	8,583	7,741	7,403	7,093	6,585		
	CC	911	1,067	1,105	993	874	714	656	668	674	824	819		
	Total	12,797	14,063	13,318	11,907	10,360	9,458	9,239	8,409	8,077	7,917	7,404		
Misuse of Drugs Act 1971	5(2)	Possession Class B - Amphetamine	MC	2,122	2,347	2,149	2,157	2,230	1,751	1,832	1,716	1,490	1,112	862
			CC	105	119	129	139	160	135	88	104	79	82	55
			Total	2,227	2,466	2,278	2,296	2,390	1,886	1,920	1,820	1,569	1,194	917
		Possession Class B - Cannabis, cannabis resin, cannabinol, cannabinol derivatives	MC	582	412	13,164	19,694	21,434	20,450	19,794	17,954	14,971	13,537	11,757
			CC	50	57	304	730	977	822	901	791	814	829	802
			Total	632	469	13,468	20,424	22,411	21,272	20,695	18,745	15,785	14,366	12,559
		Possession Class B - Ketamine	MC	0	0	0	0	0	0	0	0	59	105	88
			CC	0	0	0	0	0	0	0	0	2	8	7
			Total	0	0	0	0	0	0	0	0	61	113	95
		Possession Class B - Mephedrone (4-Methylmethcathinone, Methcathinone)	MC	0	0	0	95	279	563	613	449	353	41	11
			CC	0	0	0	1	15	26	22	33	19	6	3
			Total	0	0	0	96	294	589	635	482	372	47	14
		Possession Class B - Synthetic cannabinoid receptor agonists	MC	0	0	0	0	0	0	0	1	2	0	69
			CC	0	0	0	0	0	0	0	1	0	1	1
			Total	0	0	0	0	0	0	0	2	2	1	70
		Possession Class B - Other	MC	125	202	1,470	1,476	1,249	1,294	1,463	1,229	851	407	517
			CC	11	16	50	188	146	125	94	115	107	123	56
Total	136		218	1,520	1,664	1,395	1,419	1,557	1,344	958	530	573		
Total Possession Class B	MC	2,829	2,961	16,783	23,422	25,192	24,058	23,702	21,349	17,667	15,097	13,304		
	CC	166	192	483	1,058	1,298	1,108	1,105	1,044	1,019	1,041	924		
	Total	2,995	3,153	17,266	24,480	26,490	25,166	24,807	22,393	18,686	16,138	14,228		

Drug volumes

Legislation	Section	Offence	Court type	Number of adult offenders sentenced										
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Misuse of Drugs Act 1971	5(2)	Possession Class C - Anabolic steroids	MC	11	0	0	0	2	1	1	0	0	0	0
			CC	0	0	0	0	1	0	0	0	0	0	0
			Total	11	0	0	0	3	1	1	0	0	0	0
		Possession Class C - GHB 4-Hydroxy-n-butyric acid	MC	3	2	3	9	20	8	6	8	15	9	8
			CC	0	0	0	0	0	0	0	1	0	2	0
			Total	3	2	3	9	20	8	6	9	15	11	8
		Possession Class C - Gamma-butyrolactone (GBL) and 1,4-butanediol (1,4-BD)	MC	0	0	0	0	0	0	0	0	0	0	0
			CC	0	0	0	0	0	0	0	0	0	1	0
			Total	0	0	0	0	0	0	0	0	0	1	0
		Possession Class C - Khat	MC	0	0	0	0	0	0	0	2	10	3	6
			CC	0	0	0	0	0	0	0	0	0	0	0
			Total	0	0	0	0	0	0	0	2	10	3	6
		Possession Class C - Piperazines (including BZP)	MC	0	0	0	0	2	0	0	6	2	4	1
			CC	0	0	0	1	6	2	1	1	0	1	0
			Total	0	0	0	1	8	2	1	7	2	5	1
		Possession Class C - Cannabis ¹	MC	9,469	12,464	2,883	56	23	12	18	7	11	8	1
			CC	218	346	241	67	18	0	0	0	1	0	0
Total	9,687		12,810	3,124	123	41	12	18	7	12	8	1		
Possession Class C - Other	MC	1,136	1,970	1,258	1,088	1,052	834	760	673	607	473	347		
	CC	243	291	217	115	92	53	46	31	49	28	31		
	Total	1,379	2,261	1,475	1,203	1,144	887	806	704	656	501	378		
Total Possession Class C	MC	10,619	14,436	4,144	1,153	1,099	855	785	694	635	494	363		
	CC	461	637	458	183	117	55	47	33	50	32	31		
	Total	11,080	15,073	4,602	1,336	1,216	910	832	727	685	526	394		

Source: Court Proceedings Database, Ministry of Justice

Table 6: Number of adult offenders sentenced for production offences covered by the drugs guideline, by court type, 2007-2017

Legislation	Section	Offence	Court type	Number of adult offenders sentenced											
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	
Misuse of Drugs Act 1971	4(2)	Production Class A - Cocaine	MC	14	4	0	1	0	0	0	0	0	0	0	0
			CC	6	8	9	6	4	8	1	9	4	3	4	
			Total	20	12	9	7	4	8	1	9	4	3	4	
		Production Class A - Crack	MC	0	2	1	0	0	0	0	0	0	0	1	2
			CC	2	6	1	4	0	9	9	5	1	0	0	
			Total	2	8	2	4	0	9	9	5	1	1	2	
		Production Class A - Heroin	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	8	4	2	9	1	4	4	3	1	2	3	
			Total	8	4	2	9	1	4	4	3	1	2	3	
		Production Class A - LSD	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	0	1	0	0	0	0	1	0	0	0	0	
			Total	0	1	0	0	0	0	1	0	0	0	0	
		Production Class A - MDMA	MC	3	0	0	1	0	0	0	0	0	0	0	
			CC	2	2	1	2	1	0	2	1	0	2	1	
			Total	5	2	1	3	1	0	2	1	0	2	1	
		Production Class A - Methadone	MC	0	1	0	0	0	0	0	0	0	0	0	
			CC	4	9	9	8	7	6	3	1	0	1	0	
			Total	4	10	9	8	7	6	3	1	0	1	0	
Production Class A - Methamphetamine	MC	0	1	0	0	0	1	0	0	0	0	0			
	CC	0	0	0	3	1	1	0	0	0	2	0			
	Total	0	1	0	3	1	2	0	0	0	2	0			
Production Class A - Other	MC	6	3	3	1	1	1	1	0	0	0	0			
	CC	2	12	4	6	4	9	20	12	3	8	8			
	Total	8	15	7	7	5	10	21	12	3	8	8			
Total Production Class A	MC	23	11	4	3	1	2	1	0	0	1	2			
	CC	24	42	26	38	18	37	40	31	9	18	16			
	Total	47	53	30	41	19	39	41	31	9	19	18			
Misuse of Drugs Act 1971	4(2)	Production Class B - Amphetamine	MC	5	23	0	0	0	0	1	1	0	0	1	
			CC	0	4	0	4	1	2	5	9	3	3	3	
			Total	5	27	0	4	1	2	6	10	3	3	4	
		Production Class B - Cannabis, cannabis resin, cannabinol, cannabinol derivatives	MC	288	213	889	1,809	2,183	2,671	2,639	2,333	1,906	1,546	1,079	
			CC	265	227	668	1,697	2,653	3,137	2,961	2,816	2,441	1,663	1,269	
			Total	553	440	1,557	3,506	4,836	5,808	5,600	5,149	4,347	3,209	2,348	
		Production Class B - Ketamine	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	0	0	0	0	0	0	0	0	0	1	1	
			Total	0	0	0	0	0	0	0	0	0	1	1	
		Production Class B - Mephedrone (4-Methylmethcathinone, Methcathinone)	MC	0	0	0	0	0	0	0	0	0	1	0	
			CC	0	0	0	0	0	1	0	0	0	0	1	
			Total	0	0	0	0	0	1	0	0	0	1	1	
		Production Class B - Synthetic cannabinoid receptor agonists	MC	0	0	0	0	0	0	0	1	1	0	1	
			CC	0	0	0	0	2	4	4	1	0	1	0	
			Total	0	0	0	0	2	4	4	2	1	1	1	
		Production Class B - Other	MC	3	2	114	164	133	119	93	75	54	51	53	
			CC	1	2	135	488	445	350	356	248	208	178	87	
			Total	4	4	249	652	578	469	449	323	262	229	140	
Total Production Class B	MC	296	238	1,003	1,973	2,316	2,790	2,733	2,410	1,961	1,598	1,134			
	CC	266	233	803	2,189	3,101	3,494	3,326	3,074	2,652	1,846	1,361			
	Total	562	471	1,806	4,162	5,417	6,284	6,059	5,484	4,613	3,444	2,495			

Drug volumes

Legislation	Section	Offence	Court type	Number of adult offenders sentenced											
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	
Misuse of Drugs Act 1971	4(2)	Production Class C - Anabolic steroids	MC	1	0	0	0	0	0	0	0	0	0	0	0
			CC	2	0	4	2	0	4	0	1	0	1	3	
			Total	3	0	4	2	0	4	0	1	0	1	3	
		Production Class C - GHB 4-Hydroxy-n-butyric acid	MC	0	0	0	0	1	0	0	0	0	0	0	0
			CC	0	0	0	0	1	2	0	0	0	0	0	
			Total	0	0	0	0	2	2	0	0	0	0	0	
		Production Class C - Gamma-butyrolactone (GBL) and 1,4-butanediol (1,4-BD)	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	0	0	0	0	0	0	0	0	1	0	0	
			Total	0	0	0	0	0	0	0	0	1	0	0	
		Production Class C - Khat	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	0	0	0	0	0	0	0	0	0	0	0	
			Total	0	0	0	0	0	0	0	0	0	0	0	
		Production Class C - Piperazines (including BZP)	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	0	0	0	0	0	0	1	0	0	0	0	
			Total	0	0	0	0	0	0	1	0	0	0	0	
		Production Class C - Cannabis ¹	MC	1,011	1,363	1,207	1,363	606	101	9	0	1	2	0	
			CC	364	551	498	165	77	7	3	3	0	0	0	
Total	1,375		1,914	1,705	1,528	683	108	12	3	1	2	0			
Production Class C - Other	MC	75	94	42	4	3	4	2	0	1	1	0			
	CC	407	540	365	89	21	6	10	7	2	4	2			
	Total	482	634	407	93	24	10	12	7	3	5	2			
Total Production Class C	MC	1,087	1,457	1,249	1,367	610	105	11	0	2	3	0			
	CC	773	1,091	867	256	99	19	14	11	3	5	5			
	Total	1,860	2,548	2,116	1,623	709	124	25	11	5	8	5			

Source: Court Proceedings Database, Ministry of Justice

Drug outcomes

Table 7: Sentence outcomes for adult offenders sentenced for offences covered by the drugs guideline, 2017

Legislation	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Customs and Excise Management Act 1979	170(1), 170(2)	Importation/exportation Class A	0	2	2	1	8	200	0	213
		Importation/exportation Class B	0	1	1	2	18	44	0	66
		Importation/exportation Class C	0	0	1	1	10	21	0	33
Misuse of Drugs Act 1971	4(3)	Supply Class A	1	2	1	45	388	1,946	22	2,405
		Supply Class B	0	7	14	111	338	259	16	745
		Supply Class C	0	4	5	4	12	9	0	34
Misuse of Drugs Act 1971	5(3)	PWITS Class A	0	3	3	59	670	3,332	38	4,105
		PWITS Class B	0	19	46	365	1,188	612	36	2,266
		PWITS Class C	0	2	1	9	33	15	1	61
Misuse of Drugs Act 1971	8	Permitting premises Class A	0	0	0	10	47	25	6	88
		Permitting premises Class B	0	18	20	62	47	7	9	163
		Permitting premises Class C	0	0	1	2	2	0	0	5
Misuse of Drugs Act 1971	5(2)	Possession Class A	31	919	4,263	927	410	546	308	7,404
		Possession Class B	93	3,049	8,240	1,223	333	423	867	14,228
		Possession Class C	7	118	161	29	16	37	26	394
Misuse of Drugs Act 1971	4(2)	Production Class A	0	0	1	1	3	13	0	18
		Production Class B	3	165	445	490	700	644	48	2,495
		Production Class C	0	0	0	0	2	3	0	5

Source: Court Proceedings Database, Ministry of Justice

Guideline group	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Customs and Excise Management Act 1979	170(1), 170(2)	Importation/exportation Class A	0%	1%	1%	0%	4%	94%	0%	100%
		Importation/exportation Class B	0%	2%	2%	3%	27%	67%	0%	100%
		Importation/exportation Class C	0%	0%	3%	3%	30%	64%	0%	100%
Misuse of Drugs Act 1971	4(3)	Supply Class A	0%	0%	0%	2%	16%	81%	1%	100%
		Supply Class B	0%	1%	2%	15%	45%	35%	2%	100%
		Supply Class C	0%	12%	15%	12%	35%	26%	0%	100%
Misuse of Drugs Act 1971	5(3)	PWITS Class A	0%	0%	0%	1%	16%	81%	1%	100%
		PWITS Class B	0%	1%	2%	16%	52%	27%	2%	100%
		PWITS Class C	0%	3%	2%	15%	54%	25%	2%	100%
Misuse of Drugs Act 1971	8	Permitting premises Class A	0%	0%	0%	11%	53%	28%	7%	100%
		Permitting premises Class B	0%	11%	12%	38%	29%	4%	6%	100%
		Permitting premises Class C	0%	0%	20%	40%	40%	0%	0%	100%
Misuse of Drugs Act 1971	5(2)	Possession Class A	0%	12%	58%	13%	6%	7%	4%	100%
		Possession Class B	1%	21%	58%	9%	2%	3%	6%	100%
		Possession Class C	2%	30%	41%	7%	4%	9%	7%	100%
Misuse of Drugs Act 1971	4(2)	Production Class A	0%	0%	6%	6%	17%	72%	0%	100%
		Production Class B	0%	7%	18%	20%	28%	26%	2%	100%
		Production Class C	0%	0%	0%	0%	40%	60%	0%	100%

Source: Court Proceedings Database, Ministry of Justice

Note:

1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders.

Table 8: Average custodial sentence lengths for adult offenders sentenced to immediate custody for offences covered by the drugs guideline, after any reduction for guilty plea, 2017

Legislation	Section	Offence	Mean sentence length ^{1,3}	Median sentence length ^{2,3}
Customs and Excise Management Act 1979	170(1), 170(2)	Importation/exportation Class A	7 years 4 months	6 years
		Importation/exportation Class B	1 year 10 months	1 year 9 months
		Importation/exportation Class C	9 months	8 months
Misuse of Drugs Act 1971	4(3)	Supply Class A	4 years 6 months	3 years 6 months
		Supply Class B	2 years 1 month	1 year 4 months
		Supply Class C ⁴	1 year 1 month	1 year 3 months
Misuse of Drugs Act 1971	5(3)	PWITS Class A	3 years 5 months	3 years
		PWITS Class B	1 year 2 months	1 year
		PWITS Class C	1 year 3 months	10 months
Misuse of Drugs Act 1971	8	Permitting premises Class A	1 year 4 months	1 year
		Permitting premises Class B ⁴	10 months	8 months
		Permitting premises Class C ⁵	-	-
Misuse of Drugs Act 1971	5(2)	Possession Class A	5 months	1 month
		Possession Class B	2 months	1 month
		Possession Class C	1 month	2 weeks
Misuse of Drugs Act 1971	4(2)	Production Class A	6 years 6 months	6 years
		Production Class B	1 year 10 months	1 year 6 months
		Production Class C ⁶	*	*

Source: Court Proceedings Database, Ministry of Justice

Notes:

- 1) The mean is calculated by taking the sum of all values and then dividing by the number of values.
- 2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order.
- 3) Excludes life and indeterminate sentences.
- 4) These figures should be treated with caution, due to the low number of offenders sentenced to immediate custody for this offence.
- 5) No offenders were sentenced to immediate custody for this offence in 2017.
- 6) Figures have been excluded for this offence, due to the very low number of offenders sentenced to immediate custody in 2017 (less than five).

Table 9: Number of adult offenders sentenced for offences under the Psychoactive Substances Act 2016, 2007-2017^{1,2}

Legislation	Section	Offence	Court type	Number of adult offenders sentenced												
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017		
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	0	0	
			CC	-	-	-	-	-	-	-	-	-	-	1	1	
			Total	-	-	-	-	-	-	-	-	-	-	-	1	1
	5(1) & 10(1)	Supply a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	4	4
			CC	-	-	-	-	-	-	-	-	-	-	-	1	9
			Total	-	-	-	-	-	-	-	-	-	-	-	-	5
	5(2) & 10(1)	Offer to supply a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	0	0
			CC	-	-	-	-	-	-	-	-	-	-	-	0	1
			Total	-	-	-	-	-	-	-	-	-	-	-	-	0
	7 & 10(1)	Possess a psychoactive substance with intent to supply	MC	-	-	-	-	-	-	-	-	-	-	-	6	28
			CC	-	-	-	-	-	-	-	-	-	-	-	5	68
			Total	-	-	-	-	-	-	-	-	-	-	-	-	11
	8(1) & 10(1)	Import a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	1	0
			CC	-	-	-	-	-	-	-	-	-	-	-	0	0
			Total	-	-	-	-	-	-	-	-	-	-	-	-	1
9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	MC	-	-	-	-	-	-	-	-	-	-	-	4	21	
		CC	-	-	-	-	-	-	-	-	-	-	-	2	9	
		Total	-	-	-	-	-	-	-	-	-	-	-	-	6	30
Total psychoactive substances offences		MC	-	-	-	-	-	-	-	-	-	-	-	15	53	
		CC	-	-	-	-	-	-	-	-	-	-	-	9	88	
		Total	-	-	-	-	-	-	-	-	-	-	-	-	24	141

Source: Court Proceedings Database, Ministry of Justice

Notes:

1) No offenders were sentenced during this period for the following offences under the Psychoactive Substances Act 2016: Export a psychoactive substance, Fail to comply with a prohibition / premises order re psychoactive substances, Remain on / enter premises in contravention of access prohibition re psychoactive substances, Obstruct a person entering premises / securing premises against entry re psychoactive substances, Obstruct enforcement officer in performance of functions under Psychoactive Substances Act 2016, and Fail to comply / prevent compliance with requirement / direction under Psychoactive Substances Act 2016.

2) The Psychoactive Substances Act came into effect in 2016, and so no offenders were convicted or sentenced for these offences prior to 2016.

Table 10: Sentence outcomes for adult offenders sentenced for offences under the Psychoactive Substances Act 2016, 2017

Legislation	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance	0	0	0	0	0	1	0	1
	5(1) & 10(1)	Supply a psychoactive substance	0	1	2	2	1	7	0	13
	5(2) & 10(1)	Offer to supply a psychoactive substance	0	0	0	0	1	0	0	1
	7 & 10(1)	Possess a psychoactive substance with intent to supply	0	2	4	22	36	30	2	96
	8(1) & 10(1)	Import a psychoactive substance	0	0	0	0	0	0	0	0
	9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	0	2	0	0	5	22	1	30

Offences under the Psychoactive Substances Act 2016

Legislation	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance	0%	0%	0%	0%	0%	100%	0%	100%
	5(1) & 10(1)	Supply a psychoactive substance	0%	8%	15%	15%	8%	54%	0%	100%
	5(2) & 10(1)	Offer to supply a psychoactive substance	0%	0%	0%	0%	100%	0%	0%	100%
	7 & 10(1)	Possess a psychoactive substance with intent to supply	0%	2%	4%	23%	38%	31%	2%	100%
	8(1) & 10(1)	Import a psychoactive substance	0%	0%	0%	0%	0%	0%	0%	0%
	9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	0%	7%	0%	0%	17%	73%	3%	100%

Source: Court Proceedings Database, Ministry of Justice

Note:

1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders.

Table 11: Average custodial sentence lengths for adult offenders sentenced to immediate custody for offences under the Psychoactive Substances Act 2016, after any reduction for guilty plea, 2017

Legislation	Section	Offence	Mean sentence length ^{1,3}	Median sentence length ^{2,3}
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance ⁴	*	*
	5(1) & 10(1)	Supply a psychoactive substance ⁵	8 months	8 months
	5(2) & 10(1)	Offer to supply a psychoactive substance ⁶	-	-
	7 & 10(1)	Possess a psychoactive substance with intent to supply	10 months	7 months
	8(1) & 10(1)	Import a psychoactive substance ⁶	-	-
	9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	4 months	3 months

Source: Court Proceedings Database, Ministry of Justice

Notes:

- 1) The mean is calculated by taking the sum of all values and then dividing by the number of values.
- 2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order.
- 3) Excludes life and indeterminate sentences.
- 4) Figures have been excluded for this offence, due to the very low number of offenders sentenced to immediate custody in 2017 (less than five).
- 5) These figures should be treated with caution, due to the low number of offenders sentenced to immediate custody for this offence.
- 6) No offenders were sentenced to immediate custody for this offence in 2017.

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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)):

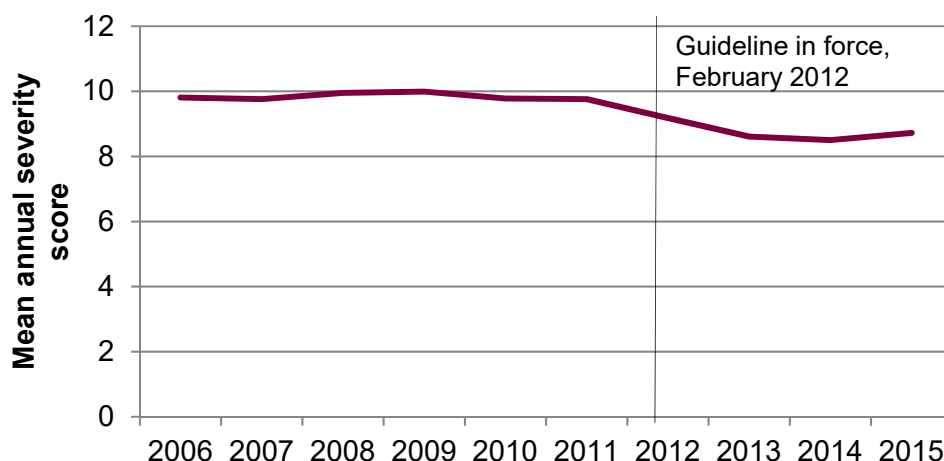
- For the two importation offences analysed (**Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug class A and class B**) the guideline led to an immediate decrease in sentencing severity, but there was an upward trend thereafter.
- For **Permitting Premises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

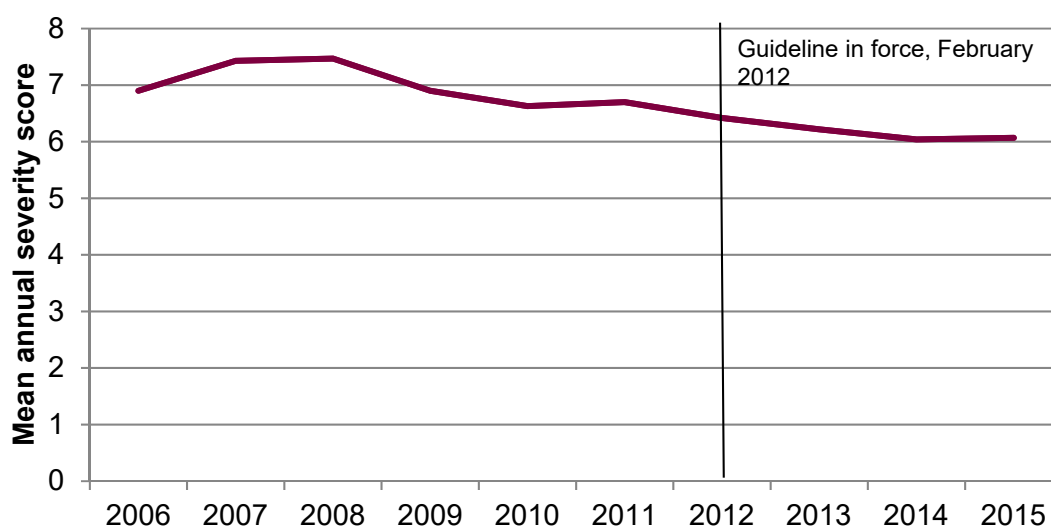
³¹ The question read, 'Taking all things into consideration, what would you say was the single most important factor affecting your sentence?'

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

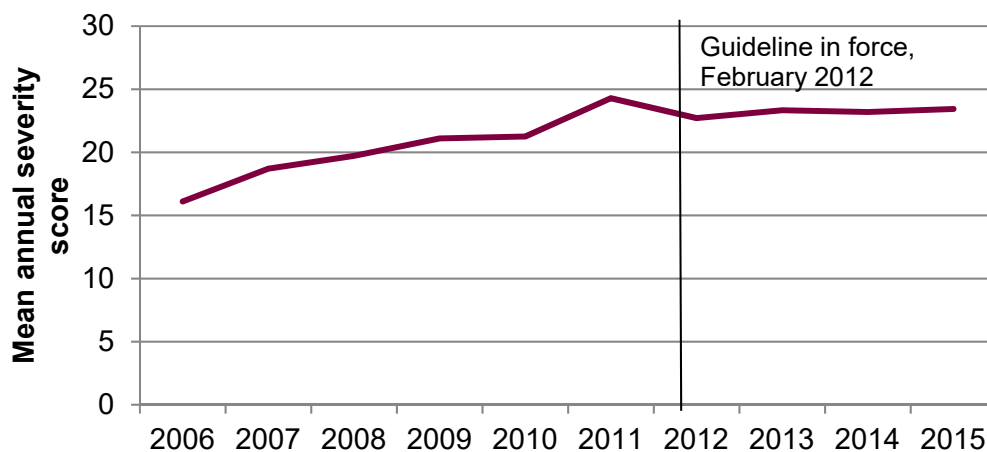
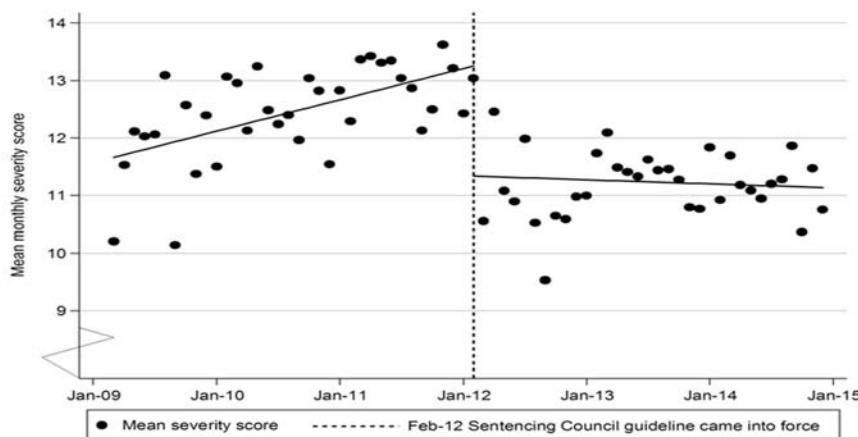


Figure 4: Time series graph showing mean monthly severity score for offenders sentenced for production class B and cultivation of cannabis in the magistrates' court, 2009 to 2015³⁶



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).

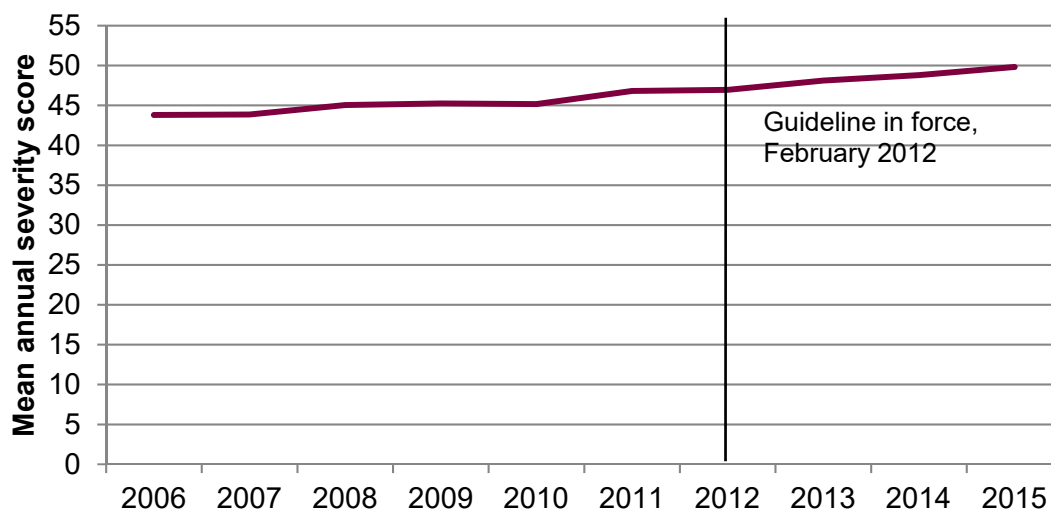
³⁶ Excludes ketamine, cannabinoid receptor agonists and cathinone derivatives.

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

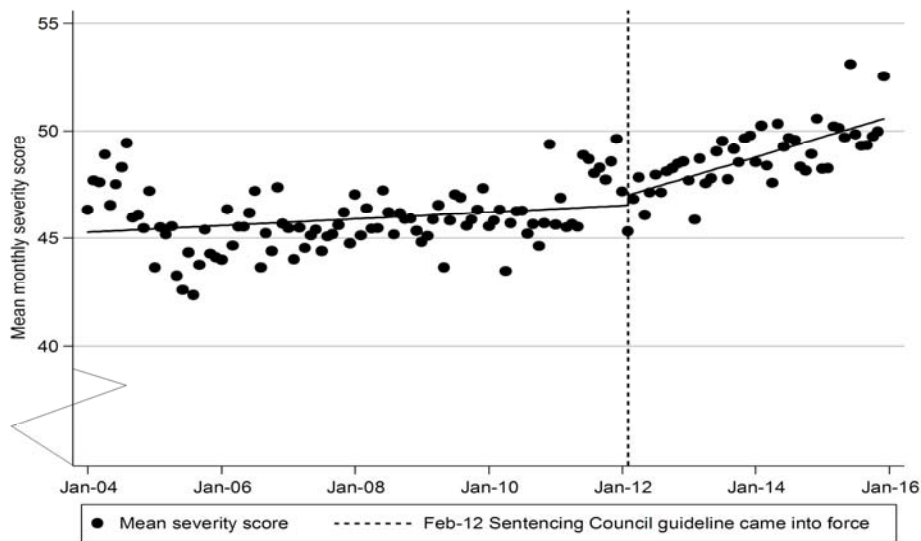
Figure 5: Sentencing severity for supply and possession with intent to supply class A, across Crown and magistrates' courts, 2006 to 2015



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

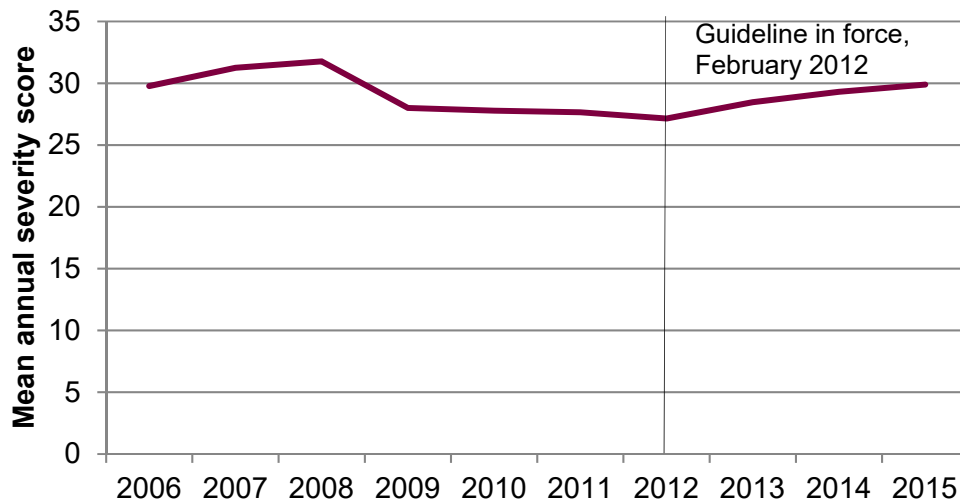
As with all class B offences, volumes of 'supply' class B offences leapt dramatically between 2009 and 2010, following the re-classification of cannabis, from 1,800 offenders sentenced in 2009 to 4,000 in 2010. Volumes gradually increased thereafter, standing at 4,600 offences in 2015.⁴¹

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).

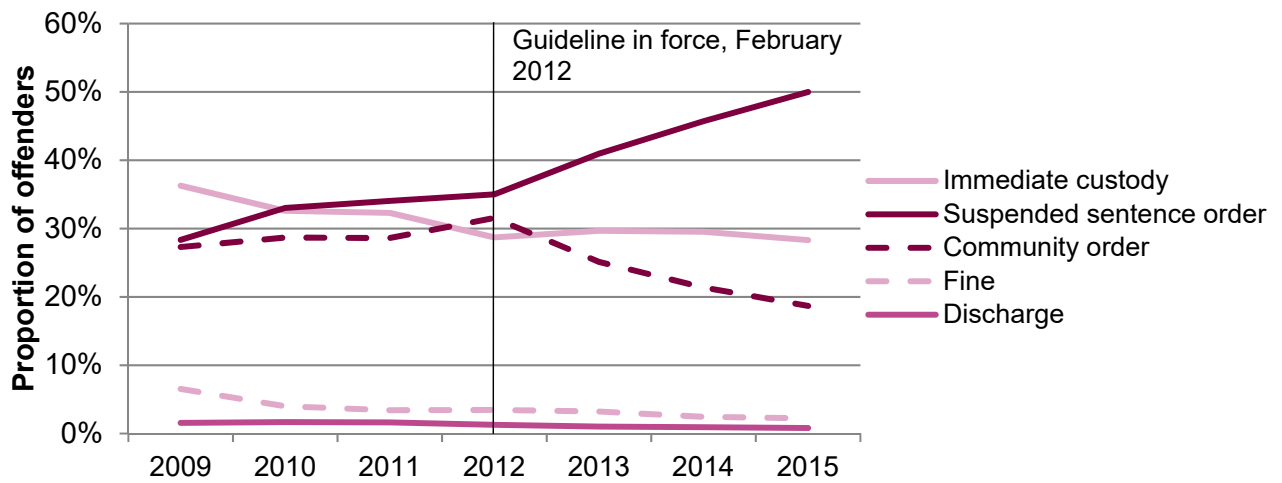
Figure 7: Sentencing severity for supply and possession with intent to supply class B, across Crown and magistrates' courts, 2006 to 2015



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.

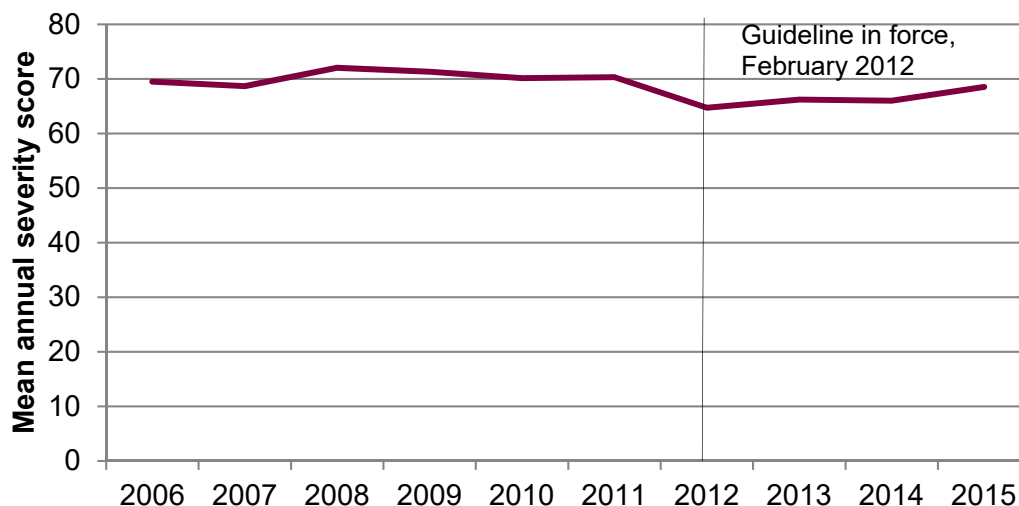
Figure 8: Disposals for supply and possession with intent to supply class B, across Crown and magistrates' courts, 2009 to 2015



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

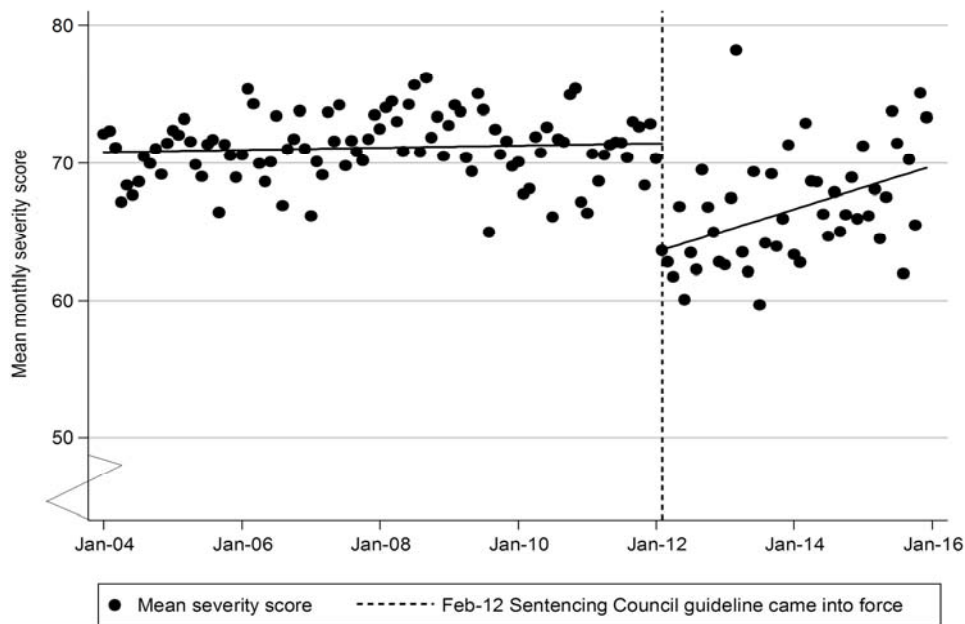


⁴³ The very low numbers for classes B and C make detailed analysis unreliable.

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

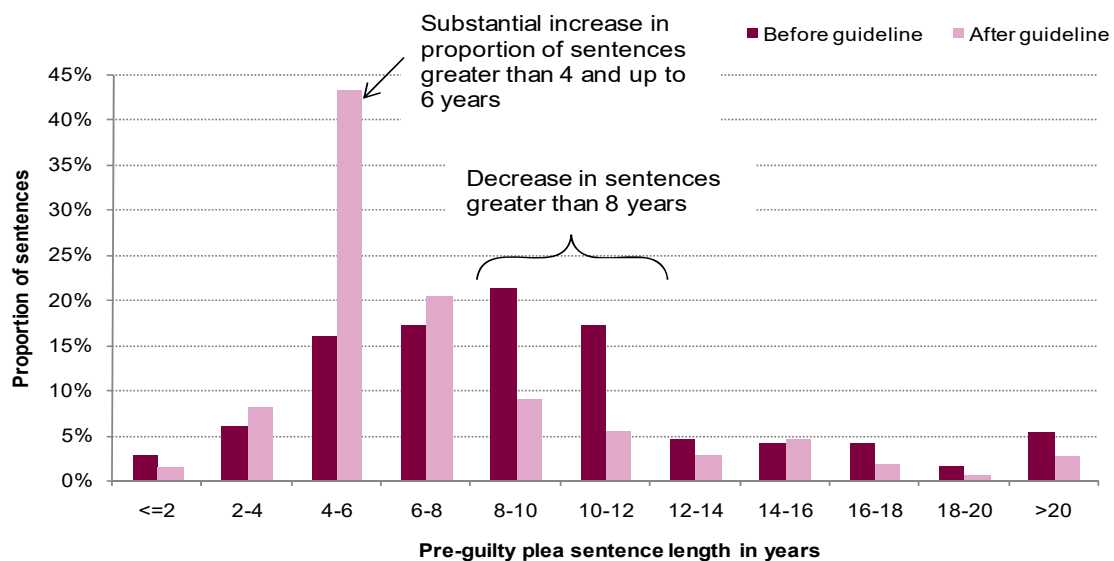
A similar shift to shorter sentence lengths was also evident for importation class B offences in the 12 months following the guideline's introduction, with a substantial increase in sentences up to and including a year, and a decrease in the proportion of sentences over 5 years. This indicates that the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

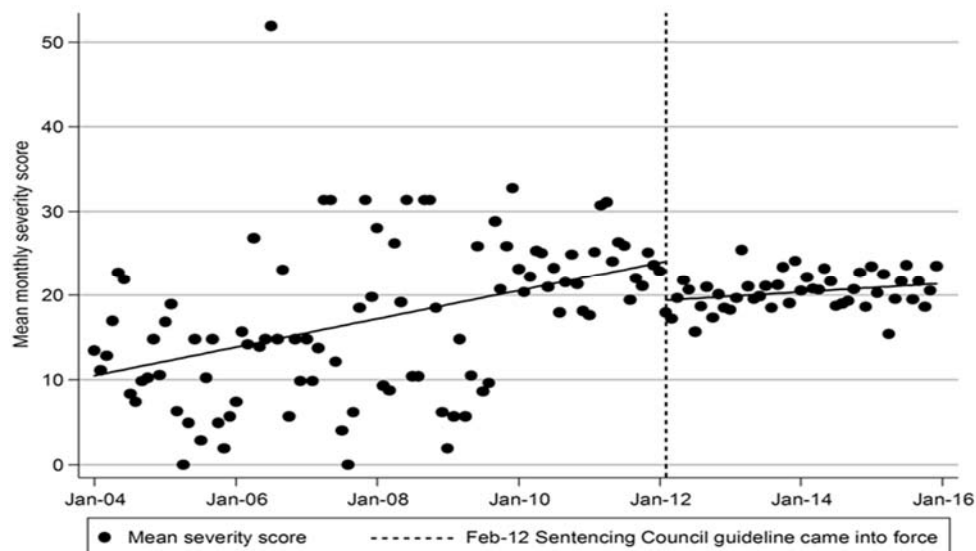
⁵⁰ This change and the apparent increase in drug purity (see following paragraph) may also relate to changes in the type of drugs the courts are seeing: for new drugs, not referenced in the guideline, it may be unclear where to place a drug on the basis of quantity, and the aggravating factor of high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

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Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

28 September 2018
SC(18)SEP07 - Firearms
Maura McGowan
Sophie Klinger
07976 300962

1 ISSUE

1.1 This is the second meeting to consider the firearms guideline. It asks the Council to consider the aim of the guideline, as well as the factors at steps one and two for the four possession offences.

1.2 There are three further meetings scheduled to discuss the firearms guideline, including sign-off of the consultation version at the January 2019 Council meeting. Consultation is planned for April to July 2019.

1.3 It is intended to cover the factors for the remaining offences (the cluster of possession with intent offences, selling/transferring prohibited firearms, and possible guidelines on manufacturing prohibited firearms and possession of articles for conversion) at the October meeting, then sentencing levels across all the guidelines, generic guideline text and the guidance on the statutory minimum sentence in December.

2 RECOMMENDATION

- That the Council agrees the aim of the guideline is to reflect current sentencing levels.
- That the Council considers and agrees the culpability and harm factors in the four possession guidelines.
- That the Council considers and agrees the aggravating and mitigating factors in the four possession guidelines.

3 CONSIDERATION

Aim of the guideline

3.1 The Council is asked to consider whether the aim of the guideline ought to be to maintain current sentence levels for each offence, or whether the Council wishes to make any changes to sentencing practice. Based on this decision, draft sentencing tables for each guideline will be provided for the Council to consider in December, once the harm and culpability levels are agreed. Any changes to sentence levels would have an impact on resources in the system which would need to be addressed in the resource assessment.

3.2 **Annex A** sets out data showing current sentencing practice including sentencing outcomes, distribution of sentence lengths (estimated pre-guilty plea), and ACSLs (also estimated pre-guilty plea) for each offence. The figures for the higher-volume offences are based on 2017 data but in some cases several years have been used where required to get a bigger sample size. For the offence of transferring prohibited weapons (section 5(2A)(b)-(d)), the levels shown are from 2017 so post-date the *Stephenson* case in 2016 which raised sentence levels for that offence.¹

Question 1: Does the Council agree the aim of the guideline should be to maintain sentencing levels?

Draft guidelines for possession offences

3.3 Guidelines for possession offences have been developed first. There are four separate guidelines:

1. Possession of a prohibited weapon (**Annex B**)
2. Possession without a certificate (**Annex D**)
3. Possession by a person prohibited because of previous conviction (**Annex E**)
4. Carrying a firearm in a public place (**Annex F**)

3.4 At this meeting, the Council is asked to consider the factors at step one and step two in each of these guidelines. Broadly, the factors are based on the four areas highlighted in the *Avis* case – that is, the type of weapon and whether it was loaded or has ammunition available; use of the firearm; intended use; and previous convictions.² Previous convictions have been incorporated as usual at step two, consistent with other guidelines. Other factors have also been identified from analysis of transcripts. For consistency, where possible the wording has been carried across from the *Bladed Articles and Offensive Weapons – possession (“Bladed Articles”)* guideline and is the same across the four firearms guidelines.

3.5 The approach to culpability and harm for these guidelines is broadly in line with that taken in *Bladed Articles*, with culpability factors focusing on the type of weapon and its use, and harm focusing on the circumstances of possession. The [MCSG guideline for the section 19 offence](#) of carrying in a public place included only the type of weapon and being loaded or with ammunition in step one, placing other factors such as use or intended use of the firearm and the location under aggravating/mitigating factors. For consistency with the approach in

¹ *Attorney-General’s Reference (Nos. 128-141 and 8-10 of 2015) (R v Stephenson)* [2016] 2 Cr. App. R. (S.) 12

² *R v Avis* (1998) 1 Cr. App. R. 420

Bladed Articles, and given the importance attached to use and intended use in the *Avis* case, these have been included in step one rather than step two.

Guideline 1: Possession of a prohibited weapon – culpability and harm factors

3.6 This guideline at **Annex B** covers possession, purchase or acquisition, without authority, of a prohibited firearm or ammunition under sections 5(1) and (1A). Subsections under (1) and (1A) list the various types of firearms and ammunition that are prohibited. The mandatory minimum sentence applies to specified subsections. It should be noted that section 5 prohibited firearms can be possessed lawfully, either under authorisation from the Secretary of State, or under an exemption from this authority (per section 5A), although this is tightly controlled. Sections 5 and 5A are at **Annex C**.

3.7 As noted above, the culpability model broadly aligns with the approach taken in the *Bladed Articles* guideline. The factors relate to the type of weapon, whether it is loaded, and use or intended use, such as the weapon being used to threaten or being discharged. Some more serious cases involving use or intended use may be charged as simple possession where there is not sufficient evidence of the specific intention required to charge a possession with intent offence or other offence. Three levels of culpability have been used, rather than the four in *Bladed Articles*. It was considered three levels are sufficient to cover the range of culpability.

3.8 Also relating to the use of the firearm, the medium culpability level contains the factor 'Firearm produced (where not at culpability A)'. This factor is intended to catch those cases where the firearm is presented or brought out but not for a criminal purpose, for example to show off the weapon to friends as an act of bravado, or for cleaning the weapon. In most cases where the firearm is used or intended for use, this will be for a criminal purpose, though it is possible to conceive of other situations where the weapon is still produced, not merely stored passively in the person's possession, but falls short of a criminal purpose.

3.9 A central factor in culpability is the type of firearm. It is one of the areas highlighted in the *Avis* case. While all firearms and ammunition that are prohibited under section 5 are dangerous, there is a range in what is covered, from extremely dangerous weapons (such as an automatic weapon) through to a stun gun that may potentially be lethal on occasion but is significantly less dangerous than other section 5 weapons.

3.10 Currently the draft guideline uses a three-tier approach to the type of weapon. This directs sentencers to consider the spectrum of prohibited weapons and make a relative judgement to assess whether it is a:

- ‘Firearm or ammunition at the highest end of dangerousness* for prohibited weapon/ammunition’, with text explaining this is ‘capable of causing serious injury or death to a large number of people at once or in quick succession, over and above the harm posed by other prohibited weapons. For example, a rocket launcher under section 5(1)(ae) or automatic firearm under section 5(1)(a) are likely to fall into this category.’ (High culpability)
- ‘Firearm at higher end of dangerousness for prohibited weapon’ (High or medium culpability depending on whether it is loaded or with compatible ammunition)
- ‘Firearm at lower end of dangerousness for prohibited weapon (an example may include a stun gun under section 5(1)(b) Firearms Act 1968)’ (Medium or low culpability depending on whether it is loaded or with compatible ammunition)

3.11 This approach is considered preferable to one that designates particular types of weapon or subsections of section 5 as high, medium or lesser culpability (beyond the examples given). The types of weapons covered by section 5 will continue to be revised over time and weapon technology and design will continue to develop. Therefore a broader categorisation based on relative dangerousness seems more appropriate and able to accommodate future developments and legislative amendments. The *Bladed Articles* guideline took a similar approach, with ‘Possession of a highly dangerous weapon’ attracting the highest level of culpability. A description of ‘highly dangerous weapon’ was added to *Bladed Articles* after further explanation was called for during consultation.³ Ammunition not at the highest end of dangerousness has been included at medium or low culpability depending on quantity.

Question 2: Does the Council agree with the wording and approach for the type of firearm?

3.12 There are options around the level of detail of the factors. It would be helpful for the Council to indicate at this early stage whether it prefers the factors to be more specific and granular or higher-level and more concise. For instance, under high culpability, currently the last three bullet points are three separate factors relating to use or intended use. The factor ‘used to threaten or cause fear’ is taken from *Bladed Articles*. It would be possible instead to consolidate these factors into a single factor, for instance, ‘Use or intended use for criminal purpose’.

³ The *Bladed Articles* guideline provides: ‘NB an offensive weapon is defined in legislation as ‘any article made or adapted for use for causing injury, or is intended by the person having it with him for such use’. A highly dangerous weapon is, therefore, a weapon, including a corrosive substance (such as acid), whose dangerous nature must be substantially above and beyond this. The court must determine whether the weapon is highly dangerous on the facts and circumstances of the case.’

Question 3: Does the Council wish to retain three separate factors relating to use or intended use under high culpability in the possession of prohibited weapons guideline, or combine these into a single factor?

3.13 A feature of this offending is that sometimes the offender is acting as a custodian, holding the prohibited firearm or ammunition on behalf of another. Discussions with judges and law enforcement have indicated that greater guidance is required on assessing culpability in these cases. It is proposed that possession ‘on behalf of another under pressure, coercion, or intimidation’ and ‘on behalf of another as a result of naivety/exploitation’ be included as factors in lower culpability. This wording is adapted from the *Supplying or offering to supply a controlled drug* guideline. It is proposed that holding ‘on behalf of another without coercion, intimidation or exploitation’ be included under medium culpability.

Question 4: Does the Council agree with the culpability factors? Should any factors be amended, added or moved?

3.14 As with culpability, the approach to harm draws heavily on the *Bladed Articles* guideline. The focus is on the harm caused or risked by the circumstances of possession, rather than the weapon itself, which is covered under culpability. Factors adopted from *Bladed Articles* are: ‘offence committed at a school...’, ‘offence committed in circumstances where there is a risk of serious disorder’ and ‘serious alarm/distress’. This wording was preferred over that in the [MCSG carrying in a public place guideline](#) which used ‘person or people put in fear’ and ‘carrying a firearm in a busy place’.

3.15 Three levels of harm are proposed. The *Bladed Articles* guideline contains two levels but firearms possession appears to be more complex with additional factors at play. Because these possession offences can take place in a private place as well as a public one, and many offences involve the firearm being stored in a person’s residence or vehicle, there are additional factors about a public location, whether the firearm was in view and how it was stored. The factors ‘Firearm or ammunition in open view’ (category 2) and ‘Firearm or ammunition not in view’ (category 3) have been included in harm even though the factor ‘Firearm produced’ is already included in culpability. Although this could be seen as double-counting, most possession cases involve the firearm being recovered in a police search of a property. It is necessary to differentiate those cases where the weapon is left in a place where it could be seen or picked up by someone (although is not actually produced) compared with cases where it is stored out of sight.

3.16 The Council may wish to consider the order of the harm factors. The current order is based on the order in *Bladed Articles*, with factors relating to location first, then factors relating to the people who may be present and the impact on them. The Council may prefer to reorder the factors, in particular to put the factors relating to 'alarm/distress', at the top of the box in each level of harm. However it is desirable to keep the order consistent between guidelines where possible unless there is a strong reason for reordering specifically for this offence.

Question 5: Does the Council agree with the harm factors? Should any factors be amended, added or moved?

Guideline 1: Possession of a prohibited weapon – aggravating and mitigating factors

3.17 Again, a number of aggravating and mitigating factors have been incorporated from the *Bladed Articles* guideline:

- Aggravating factors: 2 (with 'or gang' omitted'), 4, 5, 6, 7, 8 from *Bladed Articles – Possession*, and 9 (significant degree of planning/premeditation) from *Bladed Articles – Threats*
- Mitigating factors: 1-7, 9 (with the addition of 'or came into possession involuntarily' to 9)

3.18 Additional aggravating factors for this firearms guideline include no. 1, that the offender was prohibited from possession because of a previous conviction (where not charged separately), 2 having contact with criminal associates, including through drug purchase or supply, 10 being a registered firearms dealer (as there are often not separate charges in relation to this, only revocation of the registration), 11 attempting to involve or implicate others in possession, and 12 possession as part of a stockpile of weapons. The factor 9 'significant degree of planning and premeditation' has been included as courts have considered it more serious when the offender has taken deliberate steps to obtain the weapon as opposed to coming across it incidentally (for example having found it in a public place) or being given it by another. Conversely 9 'little or no planning or came into possession involuntarily' has been included as a mitigating factor.

3.19 Mitigating factor 10 'Voluntary surrender of firearm/ammunition' has been included as a mitigating factor to address those occasional cases where the offender has recognised the need to take the weapon out of circulation and handed it in to the police.

3.20 Mitigating factor 8 'Firearm incomplete (except where component part or taken into account at step 1) or incapable of being discharged' has been included because sometimes the firearm is not in working order and cannot be fired, for example because it is broken or

rusted, or is missing a relevant part, and courts have regarded this as less serious than a fully-functioning weapon. This factor would also capture cases of stun guns that are not operational because they are de-charged. There may be some cases where the weapon is incapable of being discharged, but there is a simple modification that makes it fireable. These cases have not been excluded from the ambit of this factor, but the court can take into account what would be required to put the firearm into working order in deciding the level of discount that is appropriate.

3.21 There is also mitigating factor 11 'No knowledge or suspicion of presence of firearm/ammunition'. The offence is strict liability so possession offences do arise where a person is keeping an item as a custodian but the nature of the item is concealed, for example in a bag or box, or the firearm has been left at the offender's property without them being aware, for example an inherited firearm stored in an attic. Transcripts have shown courts regarding this as a mitigating factor but only when the offender lacks even suspicion that a firearm is involved.

3.22 Mitigating factor 12 'unaware firearm/ammunition is prohibited' tends to occur in cases involving stun guns, disguised stun guns and pepper spray. In some cases the offender has purchased the item online or overseas and was unaware it is classified as a prohibited firearm and its possession is illegal. This has been regarded as a mitigating factor in several of the transcripts sampled. In most cases it would not be possible for an offender to claim this factor is present as most prohibited weapons are clearly identified in section 5, but there appears to be low public awareness about stun guns and pepper spray being classified as prohibited weapons.

3.23 Because prohibited firearms and ammunition may occasionally be held under authority from the Secretary of State or certificate, mitigating factor 13 'Genuine mistake about whether covered by lawful authorisation' has been included.

**Question 6: Does the Council agree with the aggravating and mitigating factors?
Should any factors be amended, added or moved?**

Guideline 2: Possession without a certificate – culpability and harm factors

3.24 This guideline at **Annex D** covers the possession, purchase or acquisition of a firearm or ammunition under section 1(1), and possession of a shotgun under 2(1), without a certificate. **The** offences occur when the firearm, shotgun or ammunition is possessed, purchased or acquired without holding a certificate in force at the time, or otherwise than as authorised by the certificate, or (for ammunition) in quantities in excess of what is authorised.

3.25 There is an aggravated form of the section 1(1) offence where the firearm is a converted firearm or a shortened shotgun, with a statutory maximum of seven rather than five years. It is quite low volume (14 in 2017 compared with 97 for the non-aggravated form). To cater for the aggravated form, possession of these particular weapons has been placed in high culpability, and wording added to the sentence table to flag the different maximum penalty and that the court may go above the category range for the aggravated form of the offence. Where the offence is aggravated but other factors are present that fall under lower levels of culpability, the court should balance the different factors. Alternatively, a separate table of sentencing levels could be devised for the aggravated form, but there would be limited data for these levels given the low volumes, and the proposed approach is considered more straightforward.

Question 7: Does the Council agree with the proposed approach to addressing the aggravated form of the section 1(1) offence?

3.26 Offences under this guideline should not involve prohibited weapons, so there are no other distinctions proposed regarding the type of weapon within this guideline, other than designating the weapons for the aggravated form as very high culpability. Otherwise the culpability factors are the same as for the prohibited weapons guideline.

Question 8: Does the Council agree with the culpability factors? Should any factors be amended, added or moved?

3.27 The harm factors for this guideline are the same as for the prohibited weapon guideline.

Question 9: Does the Council agree with the harm factors? Should any factors be amended, added or moved?

Guideline 2: Possession without a certificate – aggravating and mitigating factors

3.28 Many of the aggravating and mitigating factors for this guideline are the same as for the prohibited firearms guideline, but there are additional factors relating to different circumstances that may arise under the licensing regime. For example, there are aggravating factors proposed of 13 ‘possession continued after certificate refused or revoked’ and 14 ‘poor record of firearms compliance’.

3.29 Similarly, the following have been included as mitigating factors:

- 12 ‘genuine misunderstanding about terms or validity of certificate’
- 13 ‘steps taken to obtain certificate’
- 14 ‘certificate not obtained/renewed due to genuine oversight’

- 15 'good record of firearms licensing compliance'.

Question 10: Does the Council agree with the aggravating and mitigating factors? Should any factors be amended, added or moved?

Guideline 3: Possession by a person previously convicted – culpability and harm factors

3.30 This guideline at **Annex E** covers possession by persons prohibited from possessing a firearm or ammunition due to a previous conviction under section 21. Upon conviction, persons are prohibited from possession firearms for either five years or life depending on the length of the sentence.⁴ This guideline covers the offence that occurs when the prohibition is contravened. The prohibition covers any firearm or ammunition at all, so it may include an item prohibited under section 5, or one for which a certificate is required. In some cases involving a prohibited firearm, there is a charge of possession of a prohibited weapon and a charge under section 21. Accordingly this guideline needs to accommodate both prohibited weapons and other weapons. Prohibited firearms and ammunition have been placed under high culpability with the rest differentiated by whether or not they are loaded or with ammunition (for firearms) or quantity (ammunition). The other factors are the same as the other guidelines. Harm factors are also the same.

Question 11: Does the Council agree with the culpability factors? Should any factors be amended, added or moved?

Question 12: Does the Council agree with the harm factors? Should any factors be amended, added or moved?

Guideline 3: Possession by a person previously convicted – aggravating and mitigating factors

3.31 These factors are the same as for the prohibited weapons guideline except there is an additional mitigating factor at 11 of 'genuine misunderstanding about terms of prohibition' to address those cases where the offender did not understand they were prohibited from possession or the duration of the prohibition. Law enforcement stakeholders have highlighted that there are some cases, particularly where the sentence is suspended, where offenders are not made fully aware of the prohibition or its duration.

Question 13: Does the Council agree with the aggravating and mitigating factors? Should any factors be amended, added or moved?

⁴ A person who has been sentenced to life or imprisonment for three years or more is permanently prohibited from possessing a firearm or ammunition. A person sentenced to imprisonment for three months or more but less than three years is prohibited for five years from the date of release, or from the date of sentence in the case of a suspended sentence.

Guideline 4: Carrying a firearm in a public place – culpability and harm factors

3.32 This guideline at **Annex F** covers carrying of a firearm in a public place under section 19. It will replace the [existing guideline in the MCSG](#). Section 19 involves a person having with them in a public place: (a) a loaded shotgun; (b) an air weapon (whether loaded or not); (c) any other firearm together with ammunition for it; or (d) an imitation firearm. There is a defence of lawful authority or reasonable excuse. The mandatory minimum sentence applies where the firearm is a specified prohibited weapon from section 5(1) or (1A).

3.33 The culpability factors correspond with the type of weapon and, where appropriate, whether or not it was loaded. The guideline continues a similar approach to the MCSG guideline in terms of the type of weapon, with firearms and shotguns regarded as higher culpability (with the highest level reserved for prohibited firearms); loaded firearms or shotguns or those with ammunition regarded as higher culpability than those without any ammunition; and imitation firearms and air weapons being at lower culpability. In lower culpability there is an additional factor ‘possession falls just short of reasonable excuse’ (consistent with *Bladed Articles*) to address those cases where the reasons for or circumstances of carrying the weapon did not amount to a defence but nonetheless have lowered the offender’s culpability.

3.34 The harm factors are the same as for the other guidelines except that possession in a public place has been removed from category 2, as this forms one of the elements of the offence, and ‘offence committed in an isolated place’ has been added to category 3.

Question 14: Does the Council agree with the culpability and harm factors? Should any factors be amended, added or moved?

Guideline 4: Carrying a firearm in a public place – aggravating and mitigating factors

3.35 The aggravating and mitigating factors are the same as for the other guidelines. Since there may be lawful authority to carry a firearm in a public place, mitigating factor 11 ‘Genuine mistake about whether covered by lawful authorisation’ has been included (consistent with the possession of prohibited weapons guideline).

Question 15: Does the Council agree with the aggravating and mitigating factors? Should any factors be amended, added or moved?

4 IMPACT

4.1 A draft resource assessment will be considered in due course. The resource assessment will be developed in line with the Council’s decision about the aim of the guideline at this meeting. If the Council decides that the aim of the guideline is to replicate current sentencing practice, then the impact on resources within the system is likely to be negligible.

5 RISK

5.1 There continues to be media interest about firearms, including a *BBC Panorama* programme on antique firearms that screened on 20 August. The Home Office is still working on regulations that will prohibit certain antique firearms. The Offensive Weapons Bill is due to have its report stage and third reading on Monday 15 October 2018. This Bill will reclassify two further types of firearm and bump stock devices as prohibited weapons. The guidelines are being drafted to accommodate these and any future changes to the list of prohibited weapons.

5.2 As expected, some complexities and technical questions have arisen in developing the guideline. Input is being sought from CPS, the National Ballistics Intelligence Service and firearms technical specialists at the Metropolitan Police Service where needed to inform the development of the guidelines and ensure technical accuracy.

5.3 As noted above, there are three further meetings scheduled for the Council to consider and agree the consultation version of these guidelines (October, December, and signoff in January 2019), with the consultation planned for April-July 2019. In July Council agreed a wide scope for offences to be covered by the guidelines. This widened scope has put these timelines under pressure but it is important to keep on track since the main staff resource is available through to May 2019, so the consultation needs to be launched by that time. The risk of timescales slipping will be partially mitigated by providing longer slots or multiple slots at meetings through to January 2019.

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Table 1: Number of adult offenders sentenced for firearms offences, by court type, 2007-2017

Guideline group	Legislation	Section	Offence	Court type	Number of adult offenders sentenced										
					2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Group 1	Firearms Act 1968	5(1)(a)-(af), (c)	Possess/purchase/acquire a prohibited weapon (automatic)/ ammunition/ smooth-bore revolver/ rocket launcher/ mortar/ pump action rifle	MC	4	4	9	4	2	1	1	1	0	1	0
				CC	242	335	348	301	165	50	46	26	43	68	54
				Total	246	339	357	305	167	51	47	27	43	69	54
		5(1)(b)	Possess/ purchase a weapon for the discharge of a noxious liquid / gas / electrical incapacitation device / thing	MC	639	625	637	610	531	431	410	313	303	289	204
				CC	174	232	226	215	213	173	153	151	156	173	143
				Total	813	857	863	825	744	604	563	464	459	462	347
		5(1A)(a)	Possess/ purchase prohibited weapon (disguised firearm)	MC	0	0	2	3	1	1	0	0	0	1	0
				CC	3	1	1	0	3	24	52	86	138	190	138
				Total	3	1	3	3	4	25	52	86	138	191	138
		5(1A)(b)-(g)	Possess/ purchase/ sell or transfer military equipment	MC	0	0	0	0	0	0	0	0	0	0	0
CC	7			22	23	12	57	121	124	161	192	218	220		
Total	7			22	23	12	57	121	124	161	192	218	220		
Group 2	Firearms Act 1968	1(1)	Possess a firearm/ammunition without a certificate ¹	MC	-	-	-	-	68	59	50	56	31	49	29
				CC	-	-	-	-	95	80	78	70	70	79	68
				Total	-	-	-	-	163	139	128	126	101	128	97
		1(1)	Possess a shortened shotgun without a certificate; possess a thing converted into a firearm ¹	MC	-	-	-	-	0	1	0	2	0	0	0
				CC	-	-	-	-	13	12	6	13	8	6	14
				Total	-	-	-	-	13	13	6	15	8	6	14
2(1)	Possess shotgun without a certificate	MC	36	36	27	29	19	23	21	22	14	16	22		
		CC	15	19	12	25	19	12	9	15	22	15	19		
		Total	51	55	39	54	38	35	30	37	36	31	41		
Group 3	Firearms Act 1968	21(1) & (4) 21(2) & (4) & Sch 6	Possess a firearm/ shotgun/ air weapon/ ammunition when prohibited for life/ five years	MC	54	34	43	33	41	29	27	26	21	24	20
				CC	48	55	68	62	48	45	35	27	28	36	28
				Total	102	89	111	95	89	74	62	53	49	60	48
Group 4	Firearms Act 1968	19	Possess loaded/unloaded firearm and suitable ammunition in public place	MC	76	38	17	15	10	6	9	5	7	6	2
				CC	20	15	14	8	11	6	7	5	7	6	5
				Total	96	53	31	23	21	12	16	10	14	12	7
		19	Possess a loaded shotgun in a public place	MC	16	12	4	0	2	1	0	0	0	0	0
				CC	8	9	7	7	1	5	4	2	1	2	2
				Total	24	21	11	7	3	6	4	2	1	2	2
		19	Possess a loaded / unloaded air weapon in a public place	MC	340	243	218	178	123	117	95	87	96	62	68
				CC	26	31	32	43	28	10	6	5	7	7	6
				Total	366	274	250	221	151	127	101	92	103	69	74
		19	Possess an imitation firearm in a public place	MC	0	32	70	60	61	55	43	53	55	60	85
CC	0			15	26	24	23	32	46	50	43	52	35		
Total	0			47	96	84	84	87	89	103	98	112	120		

			MC	1	0	1	0	0	0	0	0	0	0	0	
		Possess a firearm/ ammunition with intent to endanger life / enable another to do so	CC	45	58	52	43	67	62	68	44	52	52	76	
			Total	46	58	53	43	67	62	68	44	52	52	76	
Firearms Act 1968	16	Possess shotgun with intent to endanger life / enable another to do so	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	1	3	1	5	0	1	2	0	2	1	1	
			Total	1	3	1	5	0	1	2	0	2	1	1	1
		Possess air weapon with intent to endanger life / enable another to do so	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	1	2	0	0	2	1	0	0	0	0	0	0
			Total	1	2	0	0	2	1	0	0	0	0	0	0
Group 5	Firearms Act 1968	16A	Possess a firearm/ imitation firearm with intent to cause fear of violence	MC	0	0	0	0	0	0	0	0	0	0	
				CC	286	315	246	264	238	216	206	205	229	259	251
				Total	286	315	246	264	238	216	206	205	229	259	251
		Shotgun - possession with intent to cause fear of violence	MC	0	1	0	0	0	0	0	0	0	0	0	
			CC	4	5	1	6	0	5	1	3	3	7	6	
			Total	4	6	1	6	0	5	1	3	3	7	6	
		Air weapon - possession with intent to cause fear of violence	MC	0	0	2	0	0	0	0	0	0	0	0	
			CC	9	7	10	4	12	9	14	13	9	14	4	
			Total	9	7	12	4	12	9	14	13	9	14	4	
Firearms Act 1968	17(1)	Make use / attempt to make use of a firearm/ imitation firearm with intent to resist arrest	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	1	0	5	2	5	3	3	3	1	4	1	
			Total	1	0	5	2	5	3	3	3	1	4	1	
	17(2)	Possess firearm/ imitation firearm/ shotgun/ air weapon while committing Schedule 1 offence	MC	0	0	0	1	0	0	1	0	0	0	0	
			CC	52	55	34	24	24	20	13	24	13	13	16	
			Total	52	55	34	25	24	20	14	24	13	13	16	
	18(1)	Have a firearm/ imitation firearm with intent to commit an indictable offence/ resist arrest/ prevent the arrest of another	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	43	26	34	24	23	11	17	11	10	14	16	
			Total	43	26	34	24	23	11	17	11	10	14	16	
Group 6	Firearms Act 1968	5(2A)(a)	Manufacture weapon / ammunition specified in section 5(1) of the Firearms Act 1968	MC	0	0	0	0	0	0	0	0	0	0	
				CC	0	0	0	0	0	0	0	0	0	4	0
				Total	0	0	0	0	0	0	0	0	0	4	0
	5(2A)(b)	Sell / transfer prohibited weapon / ammunition	MC	0	0	0	0	0	0	0	1	0	0	0	
			CC	0	0	0	0	0	0	0	0	0	10	19	
			Total	0	0	0	0	0	0	0	1	0	10	19	
Group 7	Firearms Act 1968	5(2A)(c)	Possess prohibited weapon / ammunition for sale / transfer	MC	0	0	0	0	0	0	0	0	0	1	
				CC	0	0	0	0	0	0	0	0	0	4	5
				Total	0	0	0	0	0	0	0	0	0	5	5
	5(2A)(d)	Purchase / acquire prohibited weapon / ammunition for sale / transfer	MC	0	0	0	0	0	0	0	0	0	0	0	
			CC	0	0	0	0	0	0	0	0	0	0	1	
			Total	0	0	0	0	0	0	0	0	0	0	1	
Group 8	Firearms Act 1968	4A(1)	Possession of articles for conversion of imitation firearms ²	MC	-	-	-	-	-	-	-	-	-	-	
				CC	-	-	-	-	-	-	-	-	-	-	-
				Total	0	0	0	0	0	0	0	0	0	0	0

Source: Court Proceedings Database, Ministry of Justice

Notes

1) Data for these offences not available prior to 2011.

2) New offence under the Policing and Crime Act 2017; came into force 2 May 2018.

Table 2: Sentence outcomes for adult offenders sentenced for offences under the Firearms Act 1968, 2017

Guideline group	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Group 1	5(1)(a)-(af), (c)	Possess/purchase/acquire a prohibited weapon (automatic)/ammunition/ smooth-bore revolver/ rocket launcher/ mortar/ pump action rifle	0	0	0	0	6	48	0	54
	5(1)(b)	Possess/ purchase a weapon for the discharge of a noxious liquid / gas / electrical incapacitation device / thing	1	30	47	96	95	71	7	347
	5(1A)(a)	Possess/ purchase prohibited weapon (disguised firearm)	0	0	0	3	32	103	0	138
	5(1A)(b)-(g)	Possess/ purchase/ sell or transfer military equipment	0	0	0	2	12	204	2	220
Group 2		Possess a firearm/ammunition without a certificate	2	11	12	5	27	39	1	97
	1(1)	Possess a shortened shotgun without a certificate; possess a thing converted into a firearm (aggravated form)	0	0	0	0	2	12	0	14
	2(1)	Possess shotgun without a certificate	0	8	9	1	9	13	1	41
Group 3	21	Possess a firearm when prohibited for life / five years due to previous conviction	0	4	6	5	9	24	0	48
Group 4	19	Possess loaded/unloaded firearm and suitable ammunition/shotgun/ airweapon/ imitation firearm in public place	0	10	25	75	48	43	2	203
Group 5	16	Possess a firearm/ ammunition/shotgun/air weapon with intent to endanger life / enable an other to do so	0	0	0	0	0	72	5	77
	16A	Possess a firearm/ imitation firearm/ shotgun/ air weapon with intent to cause fear of violence	0	1	0	10	62	185	6	264
	17(1)	Use of firearms to resist arrest	0	0	0	0	0	0	1	1
	17(2)	Possess firearm while committing a Schedule 1 offence	0	0	0	1	1	14	0	16
	18(1)	Carry firearm or imitation firearm with intent to commit indictable offence	0	0	1	0	1	15	0	17
Group 6	5(2A)(a)	Manufacture weapon / ammunition in section 5(1) ²	0	0	0	0	0	4	0	4
Group 7	5(2A)(b)	Sell / transfer prohibited weapon	0	0	0	0	0	19	0	19
	5(2A)(c)	Possess prohibited weapon for sale / transfer	0	0	0	0	0	5	0	5
	5(2A)(d)	Purchase / acquire for sale / transfer	0	0	0	0	0	1	0	1
Group 8	4A(1)	Possession of articles for conversion of imitation firearms ³	-	-	-	-	-	-	-	-

Source: Court Proceedings Database, Ministry of Justice

Guideline group	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with ¹	Total
Group 1	5(1)(a)-(af), (c)	Possess/purchase/acquire a prohibited weapon (automatic)/ ammunition/ smooth-bore revolver/ rocket launcher/ mortar/ pump action rifle	0%	0%	0%	0%	11%	89%	0%	100%
	5(1)(b)	Possess/ purchase a weapon for the discharge of a noxious liquid / gas / electrical incapacitation device / thing	0%	9%	14%	28%	27%	20%	2%	100%
	5(1A)(a)	Possess/ purchase prohibited weapon (disguised firearm)	0%	0%	0%	2%	23%	75%	0%	100%
	5(1A)(b)-(g)	Possess/ purchase/ sell or transfer military equipment	0%	0%	0%	1%	5%	93%	1%	100%
Group 2		Possess a firearm/ammunition without a certificate	2%	11%	12%	5%	28%	40%	1%	100%
	1(1)	Possess a shortened shotgun without a certificate; possess a thing converted into a firearm (aggravated form)	0%	0%	0%	0%	14%	86%	0%	100%
	2(1)	Possess shotgun without a certificate	0%	20%	22%	2%	22%	32%	2%	100%
Group 3	21	Possess a firearm when prohibited for life / five years due to previous conviction	0%	8%	13%	10%	19%	50%	0%	100%
Group 4	19	Possess loaded/unloaded firearm and suitable ammunition/shotgun/ airweapon/ imitation firearm in public place	0%	5%	12%	37%	24%	21%	1%	100%
Group 5	16	Possess a firearm/ ammunition/shotgun/air weapon with intent to endanger life / enable an other to do so	0%	0%	0%	0%	0%	94%	6%	100%
	16A	Possess a firearm/ imitation firearm/ shotgun/ air weapon with intent to cause fear of violence	0%	0%	0%	4%	23%	70%	2%	100%
	17(1)	Use of firearms to resist arrest	0%	0%	0%	0%	0%	0%	100%	100%
	17(2)	Possess firearm while committing a Schedule 1 offence	0%	0%	0%	6%	6%	88%	0%	100%
	18(1)	Carry firearm or imitation firearm with intent to commit indictable offence	0%	0%	6%	0%	6%	88%	0%	100%
Group 6	5(2A)(a)	Manufacture weapon / ammunition in section 5(1) ²	0%	0%	0%	0%	0%	100%	0%	100%
Group 7	5(2A)(b)	Sell / transfer prohibited weapon	0%	0%	0%	0%	0%	100%	0%	100%
	5(2A)(c)	Possess prohibited weapon for sale / transfer	0%	0%	0%	0%	0%	100%	0%	100%
	5(2A)(d)	Purchase / acquire for sale / transfer	0%	0%	0%	0%	0%	100%	0%	100%
Group 8	4A(1)	Possession of articles for conversion of imitation firearms ³	-	-	-	-	-	-	-	-

Source: Court Proceedings Database, Ministry of Justice

Notes

1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders.

2) The data shown for this offence covers the year 2016, as no offenders were sentenced for this offence in 2017.

3) New offence under the Policing and Crime Act 2017; came into force 2 May 2018.

Table 3: Estimated average custodial sentence lengths (pre guilty plea) for adult offenders sentenced to immediate custody for offences under the Firearms Act 1968, 2017

Guideline group	Section	Offence	Mean sentence length ^{1,3}	Median sentence length ^{2,3}
Group 1	5(1)(a)-(af), (c)	Possess/purchase/acquire a prohibited weapon (automatic)/ ammunition/ smooth-bore revolver/ rocket launcher/ mortar/ pump action rifle	7 years 9 months	8 years
	5(1)(b)	Possess/ purchase a weapon for the discharge of a noxious liquid / gas / electrical incapacitation device / thing	1 year 4 months	11 months
	5(1A)(a)	Possess/ purchase prohibited weapon (disguised firearm)	4 years 11 months	5 years
	5(1A)(b)-(g)	Possess/ purchase/ sell or transfer military equipment	6 years 11 months	7 years 6 months
Group 2	1(1)	Possess a firearm/ammunition without a certificate Possess a shortened shotgun without a certificate; possess a thing converted into a firearm (aggravated form) ⁴	3 years 1 month 2 years 5 months	3 years 1 year 11 months
	2(1)	Possess shotgun without a certificate ⁴	2 years 10 months	2 years 3 months
Group 3	21	Possess a firearm when prohibited for life / five years due to previous conviction	1 year 8 months	1 year 3 months
Group 4	19	Possess loaded/unloaded firearm and suitable ammunition/shotgun/ airweapon/ imitation firearm in public place	10 months	6 months
Group 5	16	Possess a firearm/ ammunition/shotgun/air weapon with intent to endanger life / enable an other to do so	12 years 5 months	12 years
	16A	Possess a firearm/ imitation firearm/ shotgun/ air weapon with intent to cause fear of violence	3 years 4 months	2 years 6 months
	17(1)	Use of firearms to resist arrest ^{4,5}	4 years 7 months	4 years 8 months
	17(2)	Possess firearm while committing a Schedule 1 offence ⁵	4 years 8 months	4 years
	18(1)	Carry firearm or imitation firearm with intent to commit indictable offence ⁵	8 years	7 years 3 months
Group 6	5(2A)(a)	Manufacture weapon / ammunition in section 5(1) ^{4,6}	17 years 9 months	20 years 3 months
Group 7 (combined)	5(2A)(b)-(d)	Sell / transfer prohibited weapon, Possess prohibited weapon for sale / transfer, Purchase / acquire for sale / transfer	12 years	9 years
Group 8	4A(1)	Possession of articles for conversion of imitation firearms ⁷	-	-

Source: Court Proceedings Database, Ministry of Justice

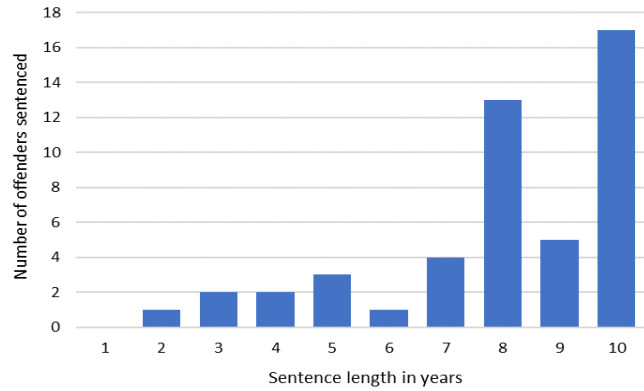
Notes

- 1) The mean is calculated by taking the sum of all values and then dividing by the number of values.
- 2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order.
- 3) Excludes life and indeterminate sentences.
- 4) These figures should be treated with caution, due to the low number of offenders sentenced to immediate custody for this offence.
- 5) The ACSLs shown for this offence cover the period 2013-2017, due to the low number of offenders sentenced for these offences.
- 6) The ACSLs shown for this offence cover the year 2016, as no offenders were sentenced for this offence in 2017.
- 7) New offence under the Policing and Crime Act 2017; came into force 2 May 2018.

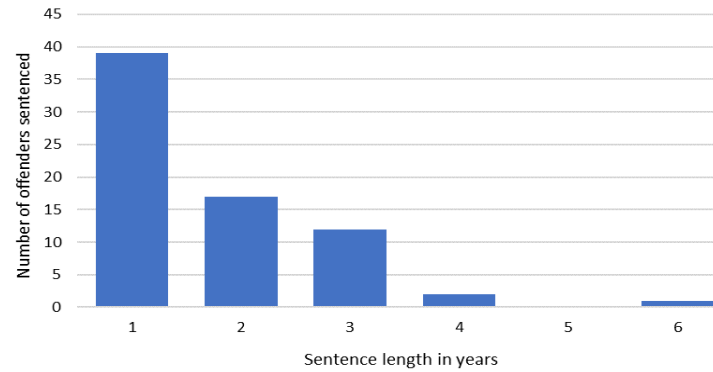
Figure 1: Estimated distribution of custodial sentence lengths for adult offenders sentenced to immediate custody for offences under the Firearms Act 1968, before any reduction for guilty plea, 2017

Group 1

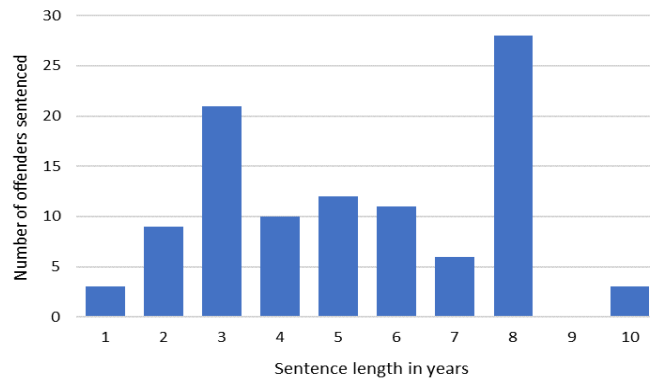
5(1)(a)-(af), (c) - Possess/purchase/acquire a prohibited weapon (automatic)/ammunition/ smooth-bore revolver/ rocket launcher/ mortar/ pump action rifle, 2017



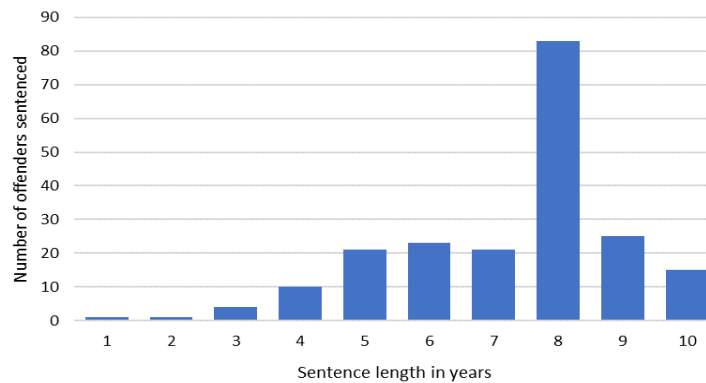
5(1)(b) - Possess/ purchase a weapon for the discharge of a noxious liquid / gas / electrical incapacitation device / thing, 2017



5(1A)(a) - Possess/ purchase prohibited weapon (disguised firearm), 2017

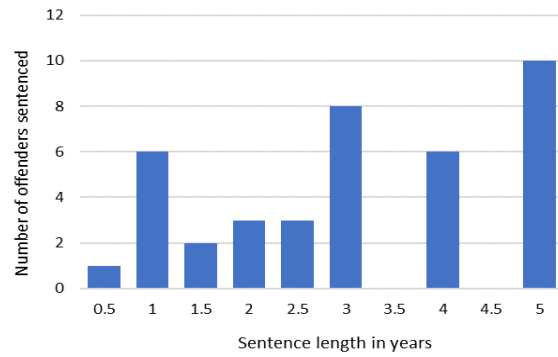


5(1A)(b)-(g) - Possess/ purchase/ sell or transfer military equipment, 2017

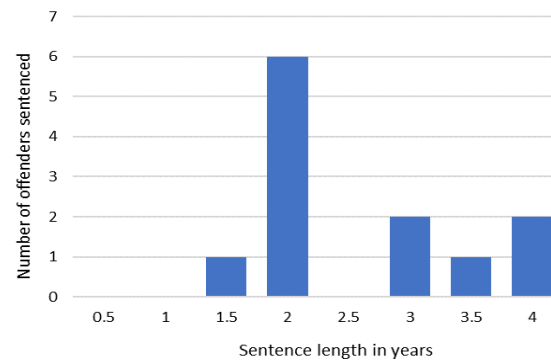


Group 2

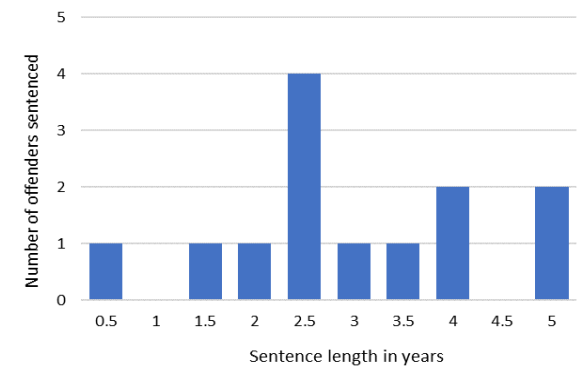
1(1) - Possess a firearm/ammunition without a certificate, 2017



1(1) (aggravated form) - Possess a shortened shotgun without a certificate; possess a thing converted into a firearm, 2017

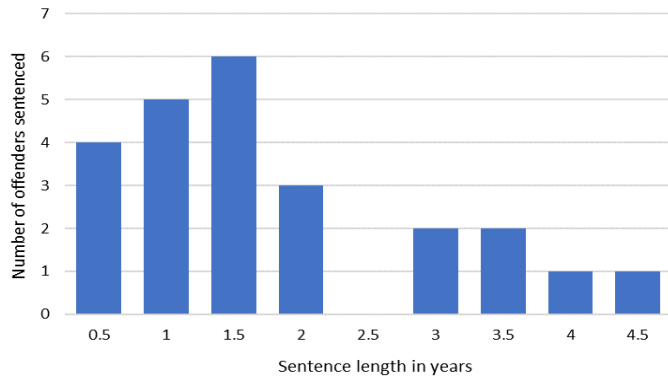


2(1) - Possess shotgun without a certificate, 2017



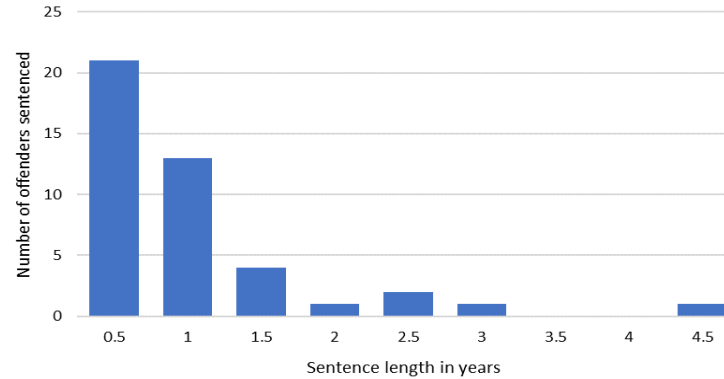
Group 3

21 - Possess a firearm when prohibited for life / five years due to previous conviction, 2017



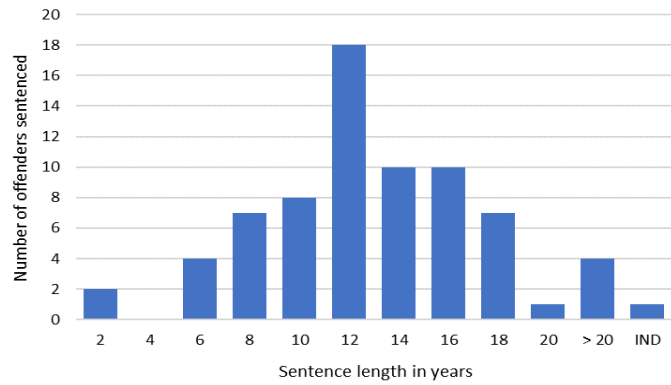
Group 4

19 - Possess loaded/unloaded firearm and suitable ammunition/shotgun/ airweapon/ imitation firearm in public place, 2017

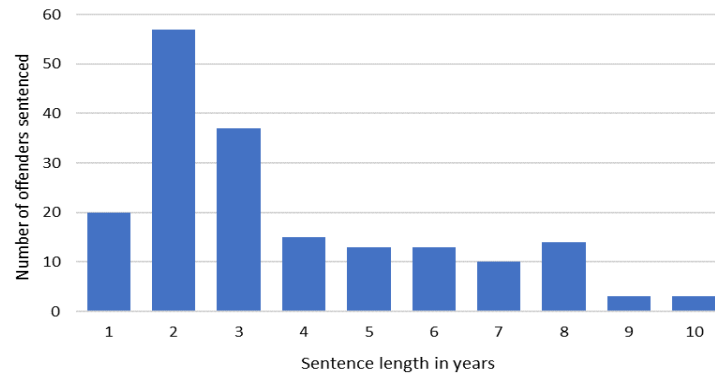


Group 5

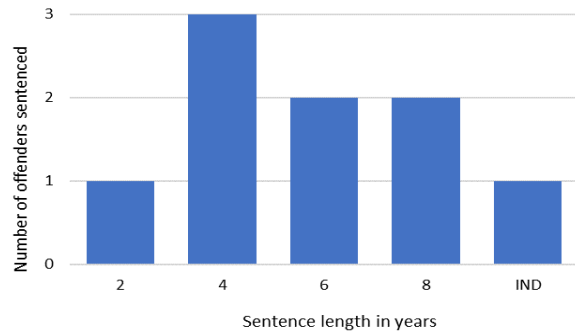
16 - Possess a firearm/ ammunition/shotgun/air weapon with intent to endanger life / enable an other to do so, 2017



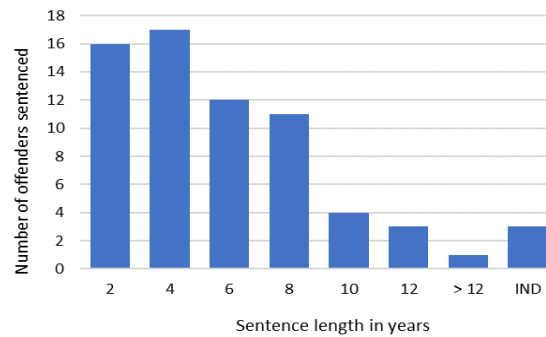
16A - Possess a firearm/ imitation firearm/ shotgun/ air weapon with intent to cause fear of violence, 2017



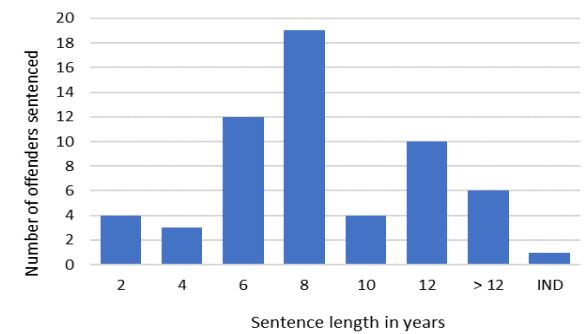
17(1) - Use of firearms to resist arrest, 2013-2017¹



17(2) - Possess firearm while committing a Schedule 1 offence, 2013-2017¹



18(1) - Carry firearm or imitation firearm with intent to commit indictable offence, 2013-2017¹

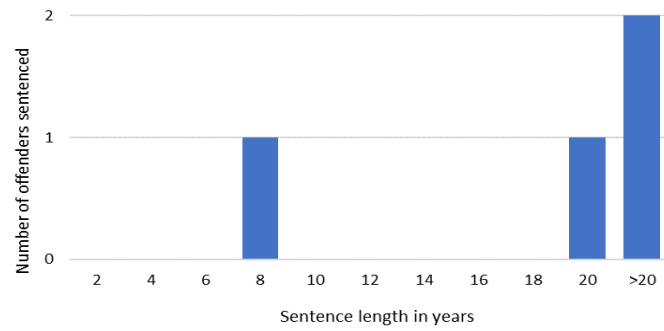


Note:

1) The data shown for sections 17(1), 17(2) and 18(1) covers the period 2013-2017, due to the low number of offenders sentenced for these offences.

Group 6

5(2A)(a) - Manufacture weapon / ammunition in section 5(1), 2016²



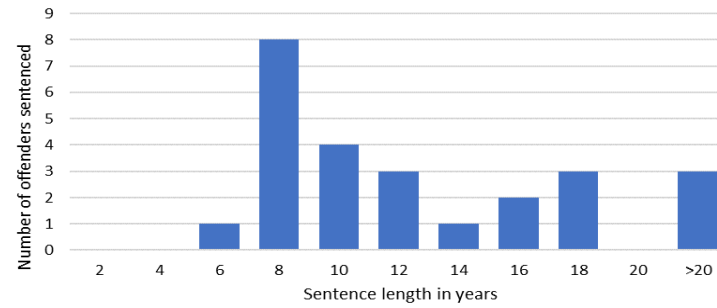
Note:

2) The data shown for section 5(2A)(a) covers the year 2016, as no offenders were sentenced for this offence in 2017.

Source: Court Proceedings Database, Ministry of Justice

Group 7 (combined)

5(2A)(b)-(d) - Sell / transfer prohibited weapon, Possess prohibited weapon for sale / transfer, Purchase / acquire for sale / transfer, 2017



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Firearms – Possession of prohibited weapon

Possession, purchase or acquisition of a prohibited weapon or ammunition

Firearms Act 1968 (section 5(1), 5(1A))

Indictable only:

Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), (c)
Section 5(1A)(a)

Triable either way:

Section 5(1)(b)
Section 5(1A)(b), (c), (d), (e), (f), (g)

Maximum: 10 years' custody

Offence range: [To come]

This offence is subject to statutory minimum sentencing provisions. See STEP THREE for further details.

STEP ONE
Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:

A - High culpability:

- Firearm or ammunition at the highest end of dangerousness,* for prohibited weapon/ammunition, whether loaded or not
- Firearm at higher end of dangerousness for prohibited weapon – loaded or with compatible ammunition
- Firearm discharged
- Firearm used to threaten or cause fear
- Firearm used for other criminal purpose
- Firearm or ammunition intended for use in criminal activity or to transfer to possession of criminal associate

B - Medium culpability:

- Firearm at higher end of dangerousness for prohibited weapon – unloaded and without compatible ammunition
- Ammunition (where not at culpability A or C)
- Firearm at lower end of dangerousness for prohibited weapon – loaded or with compatible ammunition
- Firearm produced (where not at culpability A)
- Held on behalf of another without coercion, intimidation or exploitation
- Intended for use including for self-protection (where not at culpability A)

C - Lower culpability:

- Firearm at lower end of dangerousness for prohibited weapon (examples may include a stun gun under section 5(1)(b) Firearms Act 1968) – unloaded and without ammunition
- Component part of firearm
- Very small quantity of prohibited ammunition
- Firearm not produced
- No intention to use
- Held on behalf of another as a result of pressure, coercion, intimidation
- Held on behalf of another as a result of naivety/exploitation

* NB a firearm or ammunition at the highest end of dangerousness is one that is capable of causing serious injury or death to a large number of people at once or in quick succession, over and above the harm posed by other prohibited weapons. For example, an automatic firearm under section 5(1)(a) or a rocket launcher under section 5(1)(ae) are likely to fall into this category.

<p>Harm The court should consider the factors set out below to determine the level of harm that has been caused or was risked.</p> <p>Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.</p>	
<p>Category 1</p>	<ul style="list-style-type: none"> • Offence committed at a school or other place where vulnerable people are likely to be present • Offence committed in circumstances where there is a risk of serious disorder • Serious alarm/distress • Presence of children
<p>Category 2</p>	<ul style="list-style-type: none"> • Offence committed in public place not falling into category 1 • Firearm or ammunition in open view • Presence of others • Some alarm/distress
<p>Category 3</p>	<ul style="list-style-type: none"> • Firearm or ammunition not in view • Firearm or ammunition stored securely • Possession of very short duration • No/minimal alarm/distress

STEP TWO			
Starting point and category range			
Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.			
This offence is subject to statutory minimum sentencing provisions. See STEP THREE for further details.			
Harm	Culpability		
	A	B	C
Category 1	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 2	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 3	Starting point	Starting point	Starting point
	Category range	Category range	Category range

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors:

1. Offender prohibited from possessing weapon because of previous conviction (where not charged separately)
2. Offence was committed as part of a group
3. Offender has contact with criminal associates, including through the purchase or supply of drugs

4. Commission of offence whilst under the influence of alcohol or drugs
5. Attempts to conceal/dispose of evidence
6. Failure to comply with current court orders
7. Offence committed on licence or post sentence supervision
8. Offences taken into consideration
9. Significant degree of planning/premeditation
10. Registered firearms dealer
11. Attempt to involve or implicate others in possession
12. Firearm/ammunition kept as part of a stockpile of weapons

Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Good character and/or exemplary conduct
3. Serious medical condition requiring urgent, intensive or long-term treatment
4. Age and/or lack of maturity where it affects the responsibility of the offender
5. Mental disorder or learning disability
6. Sole or primary carer for dependent relatives
7. Co-operation with the police
8. Firearm incomplete (except where component part taken into account at step 1) or incapable of being discharged
9. Little or no planning or came into possession involuntarily
10. Voluntary surrender of firearm/ammunition
11. No knowledge or suspicion of presence of firearm/ammunition
12. Unaware firearm/ammunition is prohibited
13. Genuine mistake about whether covered by lawful authorisation

STEP THREE **Minimum Terms** [To come]

STEP FOUR
Consider any factors which indicate a reduction for assistance to the prosecution
The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FIVE **Reduction for guilty pleas**

The court should take account of any reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Where a **mandatory minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the mandatory minimum.

STEP SIX

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SEVEN

Ancillary orders

In all cases the court should consider whether to make ancillary orders.

Forfeiture and destruction of firearms and cancellation of certificate

The court should consider ordering forfeiture or disposal of any firearm or ammunition and the cancellation of any firearms certificate. Section 52 Firearms Act 1968 provides for the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of one or more offence under the Firearms Act 1968 (other than an offence relating to an air weapon) and is given a custodial sentence or a community order containing a requirement not to possess, use or carry a firearm. The court may order the forfeiture or disposal of air weapons under paragraphs 7 and 8 Part II to Schedule Six Firearms Act 1968.

Serious Crime Prevention Order

The court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

STEP EIGHT

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Firearms Act 1968

5.— Weapons subject to general prohibition.

(1) A person commits an offence if, [without authority] ¹, he has in his possession, or purchases or acquires [...] ² —

[(a) any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger;

(ab) any self-loading or pump-action [rifled gun] ⁴ other than one which is chambered for .22 rim-fire cartridges;

[(aba) any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon, [...] ⁶ a muzzle-loading gun or a firearm designed as signalling apparatus;] ⁵

(ac) any self-loading or pump-action smooth-bore gun which is not [an air weapon or] ⁷ chambered for .22 rim-fire cartridges and either has a barrel less than 24 inches in length or [...] ⁸ is less than 40 inches in length overall;

(ad) any smooth-bore revolver gun other than one which is chambered for 9mm. rim-fire cartridges or [a muzzle-loading gun] ⁹ ;

(ae) any rocket launcher, or any mortar, for projecting a stabilised missile, other than a launcher or mortar designed for line-throwing or pyrotechnic purposes or as signalling apparatus;] ³

[(af) any air rifle, air gun or air pistol which uses, or is designed or adapted for use with, a self-contained gas cartridge system;] ¹⁰

(b) any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing; and

[(c) any cartridge with a bullet designed to explode on or immediately before impact, any ammunition containing or designed or adapted to contain any such noxious thing as is mentioned in paragraph (b) above and, if capable of being used with a firearm of any description, any grenade, bomb (or other like missile), or rocket or shell designed to explode as aforesaid.] ¹¹

[(1A) Subject to section 5A of this Act, a person commits an offence if, [without authority] ¹, he has in his possession, or purchases or acquires [...] ¹³ -

(a) any firearm which is disguised as another object;

(b) any rocket or ammunition not falling within paragraph (c) of subsection (1) of this section which consists in or incorporates a missile designed to explode on or immediately before impact and is for military use;

(c) any launcher or other projecting apparatus not falling within paragraph (ae) of that subsection which is designed to be used with any rocket or ammunition falling within paragraph (b) above or with ammunition which would fall within that paragraph but for its being ammunition falling within paragraph (c) of that subsection;

(d) any ammunition for military use which consists in or incorporates a missile designed so that a substance contained in the missile will ignite on or immediately before impact;

(e) any ammunition for military use which consists in or incorporates a missile designed, on account of its having a jacket and hard-core, to penetrate armour plating, armour screening or body armour;

[(f) any ammunition which is designed to be used with a pistol and incorporates a missile designed or adapted to expand on impact;] ¹⁴

(g) anything which is designed to be projected as a missile from any weapon and is designed to be, or has been, incorporated in-

(i) any ammunition falling within any of the preceding paragraphs; or

(ii) any ammunition which would fall within any of those paragraphs but for its being specified in subsection (1) of this section.] ¹²

(2) The weapons and ammunition specified in [subsections (1) and (1A) of this section (including, in the case of ammunition, any missiles falling within subsection (1A)(g) of this section)] ¹⁵ are referred to in this Act as "*prohibited weapons*" and "*prohibited ammunition*" respectively.

[(2A) A person commits an offence if without authority—

(a) he manufactures any weapon or ammunition specified in subsection (1) of this section,

(b) he sells or transfers any prohibited weapon or prohibited ammunition,

(c) he has in his possession for sale or transfer any prohibited weapon or prohibited ammunition, or

(d) he purchases or acquires for sale or transfer any prohibited weapon or prohibited ammunition.] ¹⁶

[(3) In this section "*authority*" means an authority given in writing by—

(a) the Secretary of State (in or as regards England and Wales), or

(b) the Scottish Ministers (in or as regards Scotland).] ¹⁷

(4) [An authority shall be subject to conditions specified in it, including such as the Secretary of State or the Scottish Ministers (as appropriate)] ¹⁸ having regard to the circumstances of each particular case, [thinks] ¹⁹ fit to impose for the purpose of securing that the prohibited weapon or ammunition to which the authority relates will not endanger the public safety or the peace.

(5) It is an offence for a person to whom an authority is given under this section to fail to comply with any condition of the authority.

(6) [The Secretary of State or the Scottish Ministers (as appropriate) may at any time, if they think fit,] ²⁰ revoke an authority given to a person under this section

by notice in writing requiring him to deliver up the authority to such person as may be specified in the notice within twenty-one days from the date of the notice; and it is an offence for him to fail to comply with that requirement.

[(7) For the purposes of this section and section 5A of this Act-

(a) any rocket or ammunition which is designed to be capable of being used with a military weapon shall be taken to be for military use;

(b) references to a missile designed so that a substance contained in the missile will ignite on or immediately before impact include references to any missile containing a substance that ignites on exposure to air; and

(c) references to a missile's expanding on impact include references to its deforming in any predictable manner on or immediately after impact.] ²¹

[(8) For the purposes of subsection (1)(aba) and (ac) above, any detachable, folding, retractable or other movable butt-stock shall be disregarded in measuring the length of any firearm.

(9) Any reference in this section to a muzzle-loading gun is a reference to a gun which is designed to be loaded at the muzzle end of the barrel or chamber with a loose charge and a separate ball (or other missile).] ²²

Notes

- [1](#) . Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.109(1)(a) (July 14, 2014)
- [2](#) . Words repealed by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(2)(a) (July 14, 2014)
- [3](#) . S. 5(1)(a)-(ae) substituted for s. 5(1)(a) by Firearms (Amendment) Act 1988 (c.45), s. 1(2)
- [4](#) . Words substituted subject to savings specified in SI 1997/1535 art.5 by Firearms (Amendment) Act 1997 c. 5 Pt I s.1(3) (July 1, 1997: substitution has effect subject to savings specified in SI 1997/1535 art.5)
- [5](#) . Added by Firearms (Amendment) Act 1997 c. 5 Pt I s.1(2) (July 1, 1997: insertion has effect from July 1, 1997 for purposes specified in SI 1997/1535 art.4; October 1, 1997 otherwise)
- [6](#) . Words repealed by Firearms (Amendment) (No. 2) Act 1997 c. 64 Sch.1 para.1 (February 1, 1998 as SI 1997/3114)
- [7](#) . Words added by Firearms (Amendment) Act 1997 c. 5 Pt I s.1(4) (July 1, 1997)
- [8](#) . Words repealed by Firearms (Amendment) Act 1997 c. 5 Sch.3 para.1 (July 1, 1997 as SI 1997/1535)
- [9](#) . Words substituted by Firearms (Amendment) Act 1997 c. 5 Pt I s.1(5) (July 1, 1997)
- [10](#) . Inserted subject to transitional provisions specified in SI 2003/3300 art.5 by Anti-social Behaviour Act 2003 c. 38 Pt 5 s.39(3) (January 20, 2004: insertion has effect from January 20, 2004 for purposes specified in SI 2003/3300 art.2(c)(iii); April 30, 2004 subject to transitional provisions specified in SI 2003/3300 art.5 otherwise)
- [11](#) . S. 5(1)(c) substituted by Firearms (Amendment) Act 1988 (c.45), s. 1(3)
- [12](#) . Added by Firearms Acts (Amendment) Regulations 1992/2823 reg.3(1) (January 1, 1993)
- [13](#) . Words repealed by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(2)(b) (July 14, 2014)
- [14](#) . Substituted by Policing and Crime Act 2017 c. 3 Pt 6 s.129(2) (May 2, 2017)
- [15](#) . Words substituted by Firearms Acts (Amendment) Regulations 1992/2823 reg.3(2) (January 1, 1993)
- [16](#) . Added by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(3) (July 14, 2014)
- [17](#) . Substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(4) (July 14, 2014)
- [18](#) . Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.109(1)(b) (July 14, 2014)
- [19](#) . Words substituted by virtue of S.I. 1968/1200, arts. 2, 3
- [20](#) . Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.109(1)(c) (July 14, 2014)
- [21](#) . Added by Firearms Acts (Amendment) Regulations 1992/2823 reg.3(3) (January 1, 1993)
- [22](#) . Added by Firearms (Amendment) Act 1997 c. 5 Pt I s.1(6) (July 1, 1997)

[5A.— Exemptions from requirement of authority under s.5.

(1) Subject to subsection (2) below, the authority of the Secretary of State [or the Scottish Ministers] ² shall not be required by virtue of [section 5] ³ of this Act for any person to have in his possession, or to purchase, acquire, sell or transfer, [any weapon, ammunition or missile specified in subsection (1A) of that section] ⁴ if he is authorised by a certificate under this Act to possess, purchase or acquire that weapon or ammunition subject to a condition that he does so only for the purpose of its being kept or exhibited as part of a collection.

(2) No sale or transfer may be made under subsection (1) above except to a person who-

(a) produces the authority of the Secretary of State [or the Scottish Ministers] ² under section 5 of this Act for his purchase or acquisition; or

(b) shows that he is, under this section or a licence under the Schedule to the Firearms (Amendment) Act 1988 (museums etc.), entitled to make the purchase or acquisition without the authority of the Secretary of State [or the Scottish Ministers] ².

(3) The authority of the Secretary of State [or the Scottish Ministers] ² shall not be required by virtue of [section 5] ³ of this Act for any person to have in his possession, or to purchase or acquire, [any weapon, ammunition or missile specified in subsection (1A) of that section] ⁴ if his possession, purchase or acquisition is exclusively in connection with the carrying on of activities in respect of which-

(a) that person; or

(b) the person on whose behalf he has possession, or makes the purchase or acquisition,

is recognised, for the purposes of the law of another member State relating to firearms, as a collector of firearms or a body concerned in the cultural or historical aspects of weapons.

(4) The authority of the Secretary of State [or the Scottish Ministers] ² shall not be required by virtue of [section 5] ³ of this Act for any person to have in his possession, or to purchase or acquire [, or to sell or transfer] ⁵, any expanding ammunition or the missile for any such ammunition if-

[(a) he is authorised by a firearm certificate or visitor's firearm permit to possess, or purchase or acquire, any expanding ammunition; and

(b) the certificate or permit is subject to a condition restricting the use of any expanding ammunition to use in connection with any one or more of the following, namely—

(i) the lawful shooting of deer;

(ii) the shooting of vermin or, in the course of carrying on activities in connection with the management of any estate, other wildlife;

(iii) the humane killing of animals;

(iv) the shooting of animals for the protection of other animals or humans.]⁶

(5) The authority of the Secretary of State [or the Scottish Ministers]² shall not be required by virtue of [section 5]³ of this Act for any person to have in his possession any expanding ammunition or the missile for any such ammunition if-

(a) he is entitled, under section 10 of this Act, to have a slaughtering instrument and the ammunition for it in his possession; and

(b) the ammunition or missile in question is designed to be capable of being used with a slaughtering instrument.

(6) The authority of the Secretary of State [or the Scottish Ministers]² shall not be required by virtue of [section 5]³ of this Act for the sale or transfer of any expanding ammunition or the missile for any such ammunition to any person who produces a certificate by virtue of which he is authorised under subsection (4) above to purchase or acquire it without the authority of the Secretary of State [or the Scottish Ministers (as appropriate)]⁷.

[(7) The authority of the Secretary of State [or the Scottish Ministers]² shall not be required by virtue of [section 5]³ of this Act for a person carrying on the business of a firearms dealer, or any servant of his, to have in his possession, or to purchase, acquire, sell or transfer, any expanding ammunition or the missile for any such ammunition in the ordinary course of that business.]⁸

(8) In this section-

(a) references to expanding ammunition are references to any ammunition which [is designed to be used with a pistol and] ⁹[...] ¹⁰ incorporates a missile which is designed to expand on impact; and

(b) references to the missile for any such ammunition are references to anything which, in relation to any such ammunition, falls within section 5(1A)(g) of this Act.]¹

Notes

- ¹. Added by Firearms Acts (Amendment) Regulations 1992/2823 reg.3(4) (January 1, 1993)
- ². Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.109(2)(a) (July 14, 2014)
- ³. Words repealed by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(5)(a) (July 14, 2014)
- ⁴. Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.108(5)(b) (July 14, 2014)
- ⁵. Words added by Firearms (Amendment) Act 1997 c. 5 Pt I s.10(2)(a) (July 1, 1997)
- ⁶. Substituted by Firearms (Amendment) Act 1997 c. 5 Pt I s.10(2)(b) (July 1, 1997)
- ⁷. Words substituted by Anti-social Behaviour, Crime and Policing Act 2014 c. 12 Pt 8 s.109(2)(b) (July 14, 2014)
- ⁸. Substituted by Firearms (Amendment) Act 1997 c. 5 Pt I s.10(3) (July 1, 1997)
- ⁹. Words inserted by Policing and Crime Act 2017 c. 3 Pt 6 s.129(3) (May 2, 2017)

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Firearms – Possession without certificate

Possession, purchase or acquisition of a firearm without a certificate

Firearms Act 1968 (section 1(1)(a))

Possession, purchase or acquisition of ammunition without a certificate

Firearms Act 1968 (section 1(1)(b))

Possession, purchase or acquisition of a shotgun without a certificate

Firearms Act 1968 (section 2(1))

Triable either way

Maximum: 5 years' custody, or 7 years for the section 1(1) offence where it is aggravated within the meaning of section 4(4) of the Act (shortened shotgun or converted firearm)

Offence range: [To come]

STEP ONE
Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:

A - High culpability:

- Shotgun which has been shortened within the meaning of section 4(4)
- Firearm which has been converted within the meaning of section 4(4)
- Firearm – loaded
- Firearm discharged, other than for lawful purpose
- Firearm used to threaten or cause fear
- Firearm used for other criminal purpose
- Firearm intended for use in criminal activity or to transfer to possession of criminal associate

B - Medium culpability:

- Firearm – unloaded with compatible ammunition
- Ammunition (where not at culpability C)
- Firearm produced (where not at culpability A)
- Held on behalf of another without coercion, intimidation or exploitation
- Intended for use including for self-protection (where not at culpability B)

C - Lower culpability:

- Firearm – unloaded and without ammunition
- Component part of firearm
- Very small quantity of ammunition
- Firearm not used or used for lawful purpose only
- No intention to use or intention to use for lawful purpose only
- Firearm/ammunition held on behalf of another as a result of pressure, coercion, intimidation
- Firearm/ammunition held on behalf of another as a result of naivety/exploitation

<p>Harm</p> <p>The court should consider the factors set out below to determine the level of harm that has been caused or was risked.</p> <p>Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.</p>	
<p>Category 1</p>	<ul style="list-style-type: none"> • Offence committed at a school or other place where vulnerable people are likely to be present • Offence committed in circumstances where there is a risk of serious disorder • Serious alarm/distress • Presence of children
<p>Category 2</p>	<ul style="list-style-type: none"> • Offence committed in public place not falling into category 1 • Firearm in open view • Presence of others • Some alarm/distress
<p>Category 3</p>	<ul style="list-style-type: none"> • Firearm or ammunition not in view • Firearm or ammunition stored securely • Possession of very short duration • No/minimal alarm/distress

STEP TWO			
Starting point and category range			
Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.			
Where the offence is aggravated under section 4(4) (i.e. the weapon is a converted firearm or shortened shotgun), the maximum penalty is seven years and it may be appropriate to go above the top of the category range.			
Harm	Culpability		
	A	B	C
Category 1	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 2	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 3	Starting point	Starting point	Starting point
	Category range	Category range	Category range

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors:

1. Offender prohibited from possessing weapon because of previous conviction (where not charged separately)
2. Offence was committed as part of a group

3. Offender has contact with criminal associates, including through the purchase or supply of drugs
4. Commission of offence whilst under the influence of alcohol or drugs
5. Attempts to conceal/dispose of evidence
6. Failure to comply with current court orders
7. Offence committed on licence or post sentence supervision
8. Offences taken into consideration
9. Significant degree of planning/premeditation
10. Registered firearms dealer
11. Attempt to involve or implicate others in possession
12. Firearm/ammunition kept as part of a stockpile of weapons
13. Possession continued after certificate refused or revoked
14. Poor record of firearms licensing compliance

Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Good character and/or exemplary conduct
3. Serious medical condition requiring urgent, intensive or long-term treatment
4. Age and/or lack of maturity where it affects the responsibility of the offender
5. Mental disorder or learning disability
6. Sole or primary carer for dependent relatives
7. Co-operation with the police
8. Firearm incomplete (except where component part taken into account at step 1) or incapable of being discharged
9. Little or no planning or came into possession involuntarily
10. Voluntary surrender of firearm/ammunition
11. No knowledge or suspicion of presence of firearm/ammunition
12. Genuine misunderstanding about terms or validity of certificate
13. Steps taken to obtain certificate
14. Certificate not obtained/renewed due to genuine oversight
15. Good record of firearms licensing compliance

STEP THREE

Consider any factors which indicate a reduction for assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a

discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR

Reduction for guilty pleas

The court should take account of any reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Where a **mandatory minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the mandatory minimum.

STEP FIVE

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SIX

Ancillary orders

In all cases the court should consider whether to make ancillary orders.

Forfeiture and destruction of firearms and cancellation of certificate

The court should consider ordering forfeiture or disposal of any firearm or ammunition and the cancellation of any firearms certificate. Section 52 Firearms Act 1968 provides for the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of one or more offence under the Firearms Act 1968 (other than an offence relating to an air weapon) and is given a custodial sentence or a community order containing a requirement not to possess, use or carry a firearm. The court may order the forfeiture or disposal of air weapons under paragraphs 7 and 8 Part II to Schedule Six Firearms Act 1968.

Serious Crime Prevention Order

The court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

STEP SEVEN

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP EIGHT

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Firearms – Possession by person previously convicted

Possession of a firearm or ammunition by person with previous convictions prohibited from possessing a firearm or ammunition

Firearms Act 1968 (section 21(4))

Triable either way

Maximum: 5 years' custody

Offence range: [To come]

STEP ONE
Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:

A - High culpability:

- Firearm or ammunition prohibited under section 5, whether loaded or not
- Other firearm – loaded
- Firearm discharged, other than for lawful purpose
- Firearm used to threaten or cause fear
- Firearm used for other criminal purpose
- Firearm intended for use in criminal activity or to transfer to possession of criminal associate

B - Medium culpability:

- Other firearm – unloaded with compatible ammunition
- Ammunition (where not at culpability A or C)
- Firearm produced (where not at culpability A)
- Held on behalf of another without coercion, intimidation or exploitation
- Intended for use including for self-protection (where not at culpability A)

C - Lower culpability:

- Other firearm – unloaded and without ammunition
- Component part of firearm
- Very small quantity of ammunition
- Firearm not produced
- No intention to use or intention to use for lawful purpose only
- Held on behalf of another as a result of pressure, coercion, intimidation
- Held on behalf of another as a result of naivety/exploitation

<p>Harm</p> <p>The court should consider the factors set out below to determine the level of harm that has been caused or was risked.</p> <p>Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.</p>	
Category 1	<ul style="list-style-type: none"> • Offence committed at a school or other place where vulnerable people are likely to be present • Offence committed in circumstances where there is a risk of serious disorder • Serious alarm/distress • Presence of children
Category 2	<ul style="list-style-type: none"> • Offence committed in public place not falling into category 1 • Firearm or ammunition in open view • Presence of others • Some alarm/distress
Category 3	<ul style="list-style-type: none"> • Firearm or ammunition not in view • Firearm or ammunition stored securely • Possession of very short duration • No/minimal alarm/distress

STEP TWO			
Starting point and category range			
Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.			
Harm	Culpability		
	A	B	C
Category 1	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 2	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 3	Starting point	Starting point	Starting point
	Category range	Category range	Category range

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors:

1. Offender prohibited from possessing weapon because of previous conviction (where not charged separately)
2. Offence was committed as part of a group
3. Offender has contact with criminal associates, including through the purchase or supply of drugs
4. Commission of offence whilst under the influence of alcohol or drugs
5. Attempts to conceal/dispose of evidence

6. Failure to comply with current court orders
7. Offence committed on licence or post sentence supervision
8. Offences taken into consideration
9. Significant degree of planning/premeditation
10. Registered firearms dealer
11. Attempt to involve or implicate others in possession
12. Firearm/ammunition kept as part of a stockpile of weapons

Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Good character and/or exemplary conduct
3. Serious medical condition requiring urgent, intensive or long-term treatment
4. Age and/or lack of maturity where it affects the responsibility of the offender
5. Mental disorder or learning disability
6. Sole or primary carer for dependent relatives
7. Co-operation with the police
8. Firearm incomplete (except where component part taken into account at step 1)
or incapable of being discharged
9. Little or no planning or came into possession involuntarily
10. Voluntary surrender of firearm/ammunition
11. Genuine misunderstanding about terms of prohibition

STEP THREE

Consider any factors which indicate a reduction for assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR

Reduction for guilty pleas

The court should take account of any reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Where a **mandatory minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the mandatory minimum.

STEP FIVE

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SIX

Ancillary orders

In all cases the court should consider whether to make ancillary orders.

Forfeiture and destruction of firearms and cancellation of certificate

The court should consider ordering forfeiture or disposal of any firearm or ammunition and the cancellation of any firearms certificate. Section 52 Firearms Act 1968 provides for the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of one or more offence under the Firearms Act 1968 (other than an offence relating to an air weapon) and is given a custodial sentence or a community order containing a requirement not to possess, use or carry a firearm. The court may order the forfeiture or disposal of air weapons under paragraphs 7 and 8 Part II to Schedule Six Firearms Act 1968.

Serious Crime Prevention Order

The court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

STEP SEVEN

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP EIGHT

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Firearms – Carrying in a public place

Carrying a firearm in a public place

Firearms Act 1968 (section 19)

- (a) a loaded shot gun
- (b) an air weapon (whether loaded or not)
- (c) any other firearm (whether loaded or not) together with ammunition suitable for use in that firearm
- (d) an imitation firearm

Triable either way:

Indictable only if the firearm is a firearm specified in section 5(1)(a), (ab), (aba), (ac), (ad), (ae) or (af) or section 5(1A)(a) of the Firearms Act 1968

Summary only if the firearm is an air weapon

Maximum: 7 years' custody (12 months' custody for imitation firearms)

Offence range: [To come]

This offence is subject to statutory minimum sentencing provisions. See STEP THREE for further details.

STEP ONE
Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:

A - High culpability:

- Firearm or shotgun prohibited under section 5, whether loaded or not
- Firearm discharged, other than for lawful purpose
- Firearm used to threaten or cause fear
- Firearm used for other criminal purpose
- Firearm intended for use in criminal activity or to transfer to possession of criminal associate

B - Medium culpability:

- Other shotgun – loaded (where not at culpability A)
- Other firearm – loaded or with compatible ammunition (where not at culpability A)
- Firearm produced (where not at culpability A)
- Held on behalf of another without coercion, intimidation or exploitation
- Intended for use including for self-protection (where not at culpability A)

C - Lower culpability:

- Air weapon that is not prohibited and for which no certificate is required
- Imitation firearm
- Other firearm or shotgun – unloaded and without ammunition
- Component part of firearm
- Firearm not produced
- No intention to use or intention to use for lawful purpose only (not amounting to a defence)
- Held on behalf of another as a result of pressure, coercion, intimidation
- Held on behalf of another as a result of naivety/exploitation
- Possession falls just short of reasonable excuse

<p>Harm</p> <p>The court should consider the factors set out below to determine the level of harm that has been caused or was risked.</p> <p>Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm.</p>	
Category 1	<ul style="list-style-type: none"> • Offence committed at a school or other place where vulnerable people are likely to be present • Offence committed in circumstances where there is a risk of serious disorder • Serious alarm/distress • Presence of children
Category 2	<ul style="list-style-type: none"> • Presence of others • Firearm or ammunition in open view • Some alarm/distress
Category 3	<ul style="list-style-type: none"> • Offence committed in isolated place • Firearm or ammunition not in view • In public place for very short duration • No/minimal alarm/distress

STEP TWO			
Starting point and category range			
Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.			
This offence is subject to statutory minimum sentencing provisions. See STEP THREE for further details.			
Harm	Culpability		
	A	B	C
Category 1	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 2	Starting point	Starting point	Starting point
	Category range	Category range	Category range
Category 3	Starting point	Starting point	Starting point
	Category range	Category range	Category range

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors:

1. Offender prohibited from possessing weapon because of previous conviction (where not charged separately)
2. Offence was committed as part of a group
3. Offender has contact with criminal associates, including through the purchase or supply of drugs

4. Commission of offence whilst under the influence of alcohol or drugs
5. Attempts to conceal/dispose of evidence
6. Failure to comply with current court orders
7. Offence committed on licence or post sentence supervision
8. Offences taken into consideration
9. Significant degree of planning/premeditation
10. Registered firearms dealer
11. Attempt to involve or implicate others in possession
12. Firearm/ammunition carried as part of a stockpile of weapons

Factors reducing seriousness or reflecting personal mitigation

1. No previous convictions **or** no relevant/recent convictions
2. Good character and/or exemplary conduct
3. Serious medical condition requiring urgent, intensive or long-term treatment
4. Age and/or lack of maturity where it affects the responsibility of the offender
5. Mental disorder or learning disability
6. Sole or primary carer for dependent relatives
7. Co-operation with the police
8. Firearm incomplete (except where component part or taken into account at step 1) or incapable of being discharged (except where imitation firearm taken into account at step one)
9. Little or no planning or came into possession involuntarily
10. Voluntary surrender of firearm/ammunition
11. Genuine mistake about whether covered by lawful authorisation

STEP THREE **Minimum Terms** [To come]

STEP FOUR **Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FIVE **Reduction for guilty pleas**

The court should take account of any reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Where a **mandatory minimum sentence** has been imposed under section 51A of the Firearms Act 1968, the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than the mandatory minimum.

STEP SIX

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SEVEN

Ancillary orders

In all cases the court should consider whether to make ancillary orders.

Forfeiture and destruction of firearms and cancellation of certificate

The court should consider ordering forfeiture or disposal of any firearm or ammunition and the cancellation of any firearms certificate. Section 52 Firearms Act 1968 provides for the forfeiture and disposal of firearms and the cancellation of firearms and shotgun certificates where a person is convicted of one or more offence under the Firearms Act 1968 (other than an offence relating to an air weapon) and is given a custodial sentence or a community order containing a requirement not to possess, use or carry a firearm. The court may order the forfeiture or disposal of air weapons under paragraphs 7 and 8 Part II to Schedule Six Firearms Act 1968.

Serious Crime Prevention Order

The court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

STEP EIGHT

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Sentencing Council meeting: 28 September 2018
Paper: SC(18)SEP08 – Update to
Evidence Review of Sentencing
Effectiveness
Lead official: Sarah Poppleton

1 ISSUE

This paper accompanies an updated review of the evidence on the effectiveness of different types of sentence in respect of reoffending. Council will recall the approach to this which was agreed last year: to circulate this information on an annual basis, as a proportionate way of ensuring that the Council has regard to the relative effectiveness of different sentences in preventing reoffending; also, to circulate relevant papers on an ad hoc basis throughout the year if they are sufficiently important to warrant attention in between updates.

2 RECOMMENDATION

- 2.1 Council members are asked to note the findings from the updated review.
- 2.2 Council members are also invited to ask questions and/or comment on the update.

3 BACKGROUND

3.1 The Council is required by statute to have regard to the cost of different sentences and their relative effectiveness in preventing reoffending when developing guidelines. This requirement was highlighted in the report of last year's review of the Council (*The Sentencing Council in 2017*, by Professor Bottoms).

3.2 A review of this literature was put together by the A&R team and discussed at last September's Council meeting. It was agreed that the review would be an internal document only and that an update would be produced and circulated annually.

4 CONSIDERATION

4.1 Last year it was recommended that a proportionate approach for the Council to fulfil this statutory responsibility to have regard to the cost and effectiveness of sentencing is by maintaining an awareness and knowledge of current research in this area. This is intended to supplement Council members' expertise and experience in

sentencing matters, which is brought to bear in Council discussions when considering the development of guidelines.

4.2 The 2018 update is included with this paper (see annex) as the first annual update of the review which was carried out in 2017.

4.3 As discussed last year, a key conclusion of this work is that reoffending (or recidivism) by offenders following a sentence served in the community is no higher, and generally found to be a little lower, than reoffending by comparable offenders given immediate custodial sentences, the inference being that the more expensive sentencing option may be less effective than the less expensive one. This year, there seems to be increasing consensus on this issue.

4.4 In an extension of an earlier analysis, one new paper from MoJ suggests that the higher reoffending rate of those who have served short-term custody is driven by the behaviour of repeat offenders, with those who have 11 or more previous convictions being significantly more likely to reoffend following a sentence of short-term custody compared to a court order.

4.5 Other articles this year have augmented the evidence to suggest that the following elements of a sentence can have a beneficial impact on reoffending: intensive supervision; sex offender treatment programmes delivered in the community; drug treatment; alcohol treatment; the mental health treatment requirement; and restorative justice conferencing.

4.6 We will continue to produce a summary of this literature each year, to be circulated to all Council members on an annual basis.

4.7 The A&R team will also continue to keep in touch with MoJ sentencing analysts to ensure our work links in effectively with its own in this area.

Question 1: does the Council have any questions or comments on the current paper on effectiveness?

5 RISK

5.1 We consider that there are no risks to reviewing this work internally and having a knowledge of it as background context to the Council's work.

Annex A: Current evidence on the effectiveness of sentencing with regard to reoffending: a 2018 update on the 2017 review

1. Summary

- In 2017, we reviewed the literature since 2006 on the effectiveness of sentencing with regard to reoffending. This is the first annual update to this work, which includes only high-quality studies.
- Firstly, concerning the **effects of non-custodial and short custodial sentences**, the **international literature** suggests that reoffending rates are the same or slightly higher following short-term custody compared to sentences served in the community. In late 2017, the Campbell Collaboration¹ concluded, “Overall the evidence shows that recidivism by offenders given non-custodial sentences is no higher, if not lower, than those given custodial sentences”.
- In our review in 2017 it was concluded that **UK studies** produced by the Ministry of Justice (MoJ) presented **high quality evidence** that court orders (i.e. community orders and suspended sentence orders) are associated with **lower reoffending** compared to custodial sentences of less than a year. A 2018 follow up to this work has suggested this effect is driven by the behaviour of repeat offenders, the odds² of reoffending increasing significantly for offenders with 11 or more previous convictions.
- As at 2017, high quality studies into the effects of **duration of custody** on reoffending tended to show **short-term custody** as associated with a **negative** effect on reoffending compared to longer periods of custody. Two Dutch studies now suggest that length of incarceration is unrelated to recidivism when sentences are *very short* i.e. up to around a year; and US studies have suggested that relatively long sentences could be shortened without impacting on recidivism.
- Last year we also concluded that there is high-quality evidence to suggest that some requirements and combinations of requirements in **community orders** can reduce

¹ The Campbell Collaboration produces comprehensive syntheses of high-quality research for the benefit of policy makers and practitioners, so promoting evidence-based policy and practice. Its work is highly regarded in social science.

² Broadly speaking, a measure of the likelihood of reoffending within a designated follow up period, in most cases, one year.

reoffending (specifically, **curfew orders, supervision orders and programme requirements**) and no further evidence has been published to support or cast doubt on that conclusion. However, one US study has since bolstered support for **intensive supervision** as an alternative to custody, finding significantly lower recidivism amongst offenders supervised intensively compared to those receiving normal supervision.

- Lastly, a handful of studies have added weight to the evidence that certain programmes (that may be incorporated into sentences in England and Wales) can ‘work’ in the sense of reducing reoffending, specifically: **sex offender, drug, alcohol and mental health treatment programmes and restorative justice conferencing**. Taken together with earlier work, we conclude there is particularly good evidence for **drug misuse treatments and restorative justice conferencing**; good evidence for **anger management programmes for violent offenders and offending behaviour programmes** (although no new work has augmented the evidence base on these); mixed evidence for **drink driver requirements and mentoring programmes** (again, no changes from 2017); and **improving** evidence for **sex offending behaviour programmes, alcohol treatment programmes and mental health interventions**.

2. A reminder of the scope of this review

The original review encompassed UK and international studies on adult offenders reported in peer reviewed journals, government reports and other publications (e.g. Campbell Collaboration reviews) from 2006 to August 2017. This update covers high quality research³ published since then, to August 2018.

Whilst sentences serve multiple purposes (e.g. punishment, deterrence, rehabilitation) and have multiple effects (e.g. incapacitation, changes to social relationships), in this review we look only at reoffending, as this outcome is measurable, and relates to both deterrence and rehabilitation.

In the original review, we drew conclusions based on both the extent and quality of the available evidence, and what this evidence says about the effect of the sentence on

³ High quality research will have an adequately large and representative sample for the method used, will examine behaviour before and after the sentence, and will ensure that as many additional factors as possible (aside from the sentence) which might influence sentencing behaviour are controlled for, so that we can confidently infer that the results are due to the sentence rather than extraneous factors.

recidivism or reoffending. Evidence was characterised as either **high or good quality, mixed quality, or weak/insufficient**. In this update, for each group of studies reviewed, we first summarise the position in the 2017 review, and then summarise the up-to-date, additional evidence, highlighting any changes to our overall assessment of the strength of the evidence and the conclusions we can draw from it.

3. Comparative studies of custodial versus non-custodial sentences

In 2017 we noted that there appears to be a growing consensus amongst criminologists internationally that the effect of short-term custody is neutral or slightly criminogenic compared to sentences served in the community. The position has been since summarised by the Campbell Collaboration in a 2017 policy brief, “Overall the evidence shows that recidivism by offenders given non-custodial sentences is no higher, if not lower, than those given custodial sentences” (p.1).

We found only one additional, high quality international study to add to the evidence base (Caudy et al., 2018). This examined the relative impact of jail versus probation on the recidivism of adult offenders sentenced in a large urban county in the USA (sample or ‘n’ = 15,727). The study design controlled for most of the factors which have been shown to effect recidivism (age, criminal history, current offence type and risk of future offending), enabling us to be relatively confident that any differences found between those receiving a jail sentence and those receiving probation are most likely attributable to the difference in sentence. The authors found that jail incarceration increased the odds of recidivism by men by 140 per cent, and women by 117 per cent. The criminogenic effect of jail was exacerbated for offenders assessed as having a high risk of recidivism and those with particular needs (e.g. drug abuse and ‘family stress’, defined as marital or family relationships that presented major disorganisation or stress for the individual). Whilst a limitation of the study is that the data did not contain information on the length of incarceration – without this, and a measure of offence severity, it is possible that those sentenced to probation were simply less serious or entrenched offenders than those sentenced to jail – in the US, those incarcerated in jails (as opposed to prisons) are usually serving short sentences of less than a year for low seriousness crimes.⁴ This means the jail and probation groups are in practice likely to be fairly comparable, making the study valid and reliable.

⁴ <https://www.hg.org/legal-articles/what-is-the-difference-between-jail-and-prison-31513>

The 2017 review also concluded that there is **good evidence from UK studies** that non-custodial sanctions are associated with lower reoffending than short-term custody. The conclusion was largely based on two high quality studies from the MoJ (MoJ, 2013; Mews et al., 2015). The 2015 analysis found that court orders⁵ were associated with significantly lower proven reoffending compared to short-term custody, the one-year reoffending rate being around **four** percentage points⁶ lower for the former group compared to the latter, averaging the difference across cohorts. As per the earlier study (MoJ, 2013), the difference was greater for suspended sentence orders than community orders, at around -7 and -3 percentage points respectively. Note that whilst these percentage point differences were statistically significant and replicated across several large cohorts of offenders,⁷ the size of the effects are not particularly large: the difference of five percentage points found for the 2008 cohort after one year equates to an eight per cent reduction in the number reoffending amongst the court order group. That said, reoffending rates are high (at around 60 per cent after one year in this sample) and they are also stable, so a difference of this size may still be worth taking notice of when thinking about sentencing policy.

Building on this work, a more recent MoJ paper re-analysing the same data (Hillier and Mews, 2018) examined whether the headline finding favouring court orders over short custodial sentences differed according to offender characteristics. Most interestingly for our purposes, the study found that **court orders held greater benefits for those with a high number of previous convictions**. Specifically, for those offenders with between zero and ten previous convictions, the odds of reoffending did not differ significantly between those who had served the short custodial sentence compared to those who were starting a court order.⁸ However, for those with 11-15 previous convictions, the odds of reoffending were 14

⁵ Community order or suspended sentence order.

⁶ When we are looking at differences in percentages, we usually measure this in percentage points i.e. the number of points between the first and second percentage. This is different from percentage difference, which is the percentage increase or decrease across two different values.

⁷ Those beginning their community or suspended sentence, or being released from prison on a sentence of under 12 months, in 2008, 2009, 2010 and 2011.

⁸ This study and its predecessor compared adult offenders released from a custodial sentence of under 12 months with those commencing a court order. This is a limitation of the method, since the latter group would most likely be under probation supervision in the follow up period, whereas the custodial group would not – hence the comparison is not quite ‘like for like’. If this study was repeated using more recent data, the authors note that the supervision of offenders released from short-term custody and court orders for certain types of offender’ (p.4), post-sentence supervision being intended to reduce the likelihood of reconviction. However, a recent, high quality study from the USA (Harding et al., 2017) suggests the opposite might be true: this study found that offenders released from prison (and supervised) were indeed more likely to reoffend in the years post-release compared to those sentenced to probation, but that this was driven by technical violations of the terms of their parole rather than new substantive crimes. Because supervision makes breach offences more likely and perhaps new crimes more detectable, post-sentence supervision for those leaving prison might mean

per cent higher for the custodial group compared to the non-custodial group, rising to over a third higher for those with 16 or more previous convictions.⁹ Suspended sentence orders were associated with lower levels of reoffending than community orders in general, and were most effective for those with no previous offences.

The study also showed that, after controlling for number of previous offences, the use of court orders had a greater benefit for young (18-20 years) and older (over 50 years) offenders. However, the odds of reoffending under the various conditions (short term custody, suspended sentence and community orders) did not differ by gender or ethnicity, so both male and female, Black, White and Asian offenders showed the patterns discussed above.

4. Duration of custody

The 2017 position on duration of custody was that there is a small amount of high quality evidence from the UK and USA to suggest that **short prison terms, mostly of less one year, may be criminogenic relative to longer terms** (MoJ, 2013; Meade et al., 2012; Mears et al., 2016). One of these (Mears et al., 2016) found a curvilinear relationship between length of custody and recidivism, such that greater time served initially increased recidivism, but then after one year decreased it and after approximately two years exerted no effects. These authors suggest that the criminogenic effects of prison may accumulate rapidly in the first year as, for example, prosocial ties to employment and family are broken, anti-social ties accumulate and social capital is lost. Then inmates may adjust, social bonds may slowly be restored or the effects of rehabilitation programmes in prison may kick in. The effects of these positive factors may then level off. Meade et al. (2012) found that time served was associated with decreasing recidivism, but this effect only reached statistical significance after five years, which may be when inmates 'aged out' of the peak years of offending (it is well known that offending decreases with age).

A few high-quality US studies published in the last year or so have aimed to assess whether prison lengths could be shortened without impacting negatively on reoffending. Two of these studies (Rhodes et al., 2018; Hunt et al., 2018) concluded that **prison stays could be shortened without incurring an increase in recidivism**. For example, in a natural

more reconstructions, widening, rather than narrowing, the reconviction gap between short-term custody and court orders.

⁹ In 2017, of all offenders sentenced for indictable offences (indictable only and triable either way, combined), 39% had 11 or more previous cautions or convictions. Of all offenders sentenced for summary offences, 22% had 11 or more previous cautions or convictions.

experiment,¹⁰ one group of crack cocaine offenders who had had their sentences commuted by an average of 30 months because of a retroactively-applied change in sentencing policy were found to have exactly the same three-year recidivism rates as a 'control' group of offenders who had served their full sentence, at 38 per cent in each case (Hunt et al., 2018). Another US study using a smaller sample of male sex offenders (n = 671) found that controlling for age, prior offending and risk of offending, the odds of reoffending decreased by around 9 per cent for every year spent in prison, although for high risk offenders the length of the prison term had the opposite effect, increasing the odds of returning to prison by about 20 per cent with every year spent inside (Hsieh et al., 2018).

Another study has added to a small amount of research from the Netherlands that suggests **that length of incarceration is unrelated to recidivism when sentences are short** i.e. sentences ranging from less than one month to around one year don't really vary in their effects on reoffending (Snodgrass et al., 2011; Wermink et al., 2018). However, it is not clear the extent to which these results would generalise to the UK, where the prison context may be quite different (typically the Dutch prison regime is seen as less oppressive than that of other countries; see Raaijmakers et al., 2017) and the average length of stay is much longer than the Dutch average prison term of four months.¹¹

Two further recent studies on the experience of short-term custody warrant mentioning. These relate to the debate in criminology around the extent to which custody deters offenders from reoffending (because it is recalled as an adverse experience) or the extent to which countervailing processes (such as loss of pro-social ties and gain of anti-social ties, or the labelling effect of being an ex-prisoner) may outweigh any such deterrent effect. Casting doubt on the deterrent effect, one new study of short-term prisoners supports previous work (Drago et al., 2011; Nagin and Snodgrass, 2013) in failing to show that recall of the prison experience as harsh is associated with lower reoffending (Raaijmakers et al., 2017). The second study, a qualitative examination of eight UK offenders serving sentences of less than 12 months, supports the view that short sentences are detrimental in key ways (Llievesley et al., 2018). Participants felt that offending was needs-driven, was a way of life and part of

¹⁰ In a natural experiment, groups do not have to be rigorously matched or matched using statistical methods because it can be assumed that the external event (in this case, the retrospectively applied change to sentencing policy), will be the only systematic difference between the group of interest and the control group. Natural experiments are a rare event in social science, but are considered to be of very high validity.

¹¹ At March 2018, 46% of the prison population in England and Wales were serving a determinate prison sentence of more than four years and less than 10% were serving a sentence of less than a year. See: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04334#fullreport>

their identity, and the system failed to provide rehabilitation or post release support. Released back into the same circumstances that shaped to their offending in the first place, compounded by the consequences of being labelled an ex-prisoner, their return to prison felt inevitable, such that, 'they are essentially serving a life sentence in instalments' (p.414). Whilst the authors note that post-sentence supervision is a change in policy that may help address the problem, evidence so far suggests that many prisoners are still being released without their needs being met (Her Majesty's Inspectorate of Probation, 2016). The same inspectorate report suggests that prison staff share the view that short-sentenced prisoners are likely to fail, and the authors suggest this makes it likely that the views of both prisoners and staff, 'feed into and worsen an already hopeless attitude for the future of these participants' (p.422). Although of course we cannot generalise from one study of eight participants, it does add detail and credibility to the view that short-term sentences might make reoffending more, rather than less likely.

5. Requirements of community sentences

We found two new studies relating to community sentences for this period. In 2017, based largely on a high-quality MoJ study (Mews and Coxon, 2014), we concluded that there is good evidence that intensive supervision as an alternative to custody can lessen *frequency* of reoffending, but insufficient evidence that it can have a beneficial effect on the overall proportion of offenders reoffending. A recent US evaluation of Michigan's Swift and Sure Sanctions Probation Programme¹² found that the reoffending rate of the programme participants was nine percentage points lower than that of a statistically matched control group sentenced to probation as usual, and that the odds of reoffending were 36 per cent lower (DeVall et al., 2017). Another US study found positive results for an intensive supervision programme for drink driving offenders, although the quality of this study is less clear, but they also note positive findings on intensive supervision from a 2015 meta-analysis¹³ of four published reports on intensive supervision, all of which found a reduction in recidivism (Barta et al., 2017). Taken together, it seems that these studies provide **good evidence that intensive supervision can be associated with lower reoffending**, although the US evidence is more supportive than that from the UK.

¹² This is an 'alternative to incarceration' programme; these target high risk offenders and provide intensive supervision combined with swift and certain sanctions for violations.

¹³ Meta-analyses use statistical methods to combine the results from multiple studies, in so doing overcoming many of the limitations of each study in isolation.

6. Treatments and interventions

A clutch of recent studies have provided good evidence that certain treatments can have a beneficial effect on reoffending. On mental health interventions, whilst a high-quality Canadian study failed to find any effect on recidivism for a cognitive skills programme (Kingston et al., 2018), the aforementioned UK analysis by Hillier and Mews (2018) was more positive with regard to the mental health treatment requirement (MTHR). For those with identified mental health issues, the MTHR was associated with significant reductions in reoffending where it was used compared to similar cases where it was not. Specifically, the reoffending rate was around 3.5 percentage points lower in the follow up year when it was included as part of a community order, and 5 percentage points lower when it was part of a suspended sentence order. Whilst last year we concluded that there was insufficient evidence to judge the efficacy of **mental health interventions**, this year we can therefore conclude that there is at least some **good evidence** that they can be associated with lower reoffending.

In 2017, we concluded that there was good evidence for a beneficial effect of drug treatment programmes on reoffending, and mixed evidence on alcohol treatments. A recent longitudinal study (MoJ, 2017) has increased the weight of support for both. The study looked at reoffending following community based treatments for substance misuse, using data matching techniques linking data from the MoJ with data from Public Health England to examine the same offenders (all those commencing a structured drug and alcohol treatment in 2012, n = 133,000) in the two years before and after starting treatment. It found a reduction of 44 per cent in the offending rate of participants from pre- to post, with opiate clients showing the lowest decrease (of 31 per cent) and alcohol only clients, the largest decrease (of 59 per cent). Whilst these figures seem very promising, we cannot fully infer causality because without a matched control group we cannot be confident that the reduction was due to the programme as opposed to other, unrelated factors. Note also that participation in these programmes was not necessarily as part of a sentence – most of the sample had not been recorded as committing a crime in the two years prior to treatment. Hillier and Mews' study (2018) also found that for those with an identified alcohol misuse issue, the alcohol treatment requirement was associated with lower reoffending where it was used compared to where it was not. Taken together we can conclude that there remains **good evidence for the positive effects of drug treatment**, and there is now also **some good evidence for a positive effect of alcohol treatment**.

We also concluded in 2017 that there was insufficient evidence for the efficacy of sex offender treatment programmes, a conclusion that was influenced by disappointing results

from an evaluation of the UK's core sex offender treatment programme, delivered in a custodial setting (Mews et al., 2017). However, a recent systematic review and meta-analysis from the Campbell Collaboration (Schmucker and Losel, 2017) suggests cognitive-behavioural programmes for sex offenders can significantly reduce reoffending, the mean recidivism rate across programmes being 10 per cent for treated offenders compared to 14 per cent without treatment. This review encompassed 27 studies across seven countries, but did not include the most recent MoJ work. Interestingly, the results of individual studies were very heterogenous, and the results for community-based interventions were more positive than prison-based - indeed the authors conclude that there is still insufficient evidence that in-prison interventions work, supporting the MoJ study. The review also suggests that more individually-tailored treatment with some individual content work better than group-based programmes, which again supports the conclusion of the authors of the MoJ study, who suggest that group treatment may normalise individuals' behaviour, making it seem less wrong or different. Overall, we can now conclude that there is **good evidence that sex offender treatments can work in some settings**, although the international evidence is stronger than the UK evidence for this.

Last year we noted another recent review by the Campbell Collaboration (Strang et al., 2013) showed **strong support for restorative justice conferencing in reducing reoffending**, particularly in relation to violent crime. Likewise, a recent high-quality study compared a group of drunk driving offenders who had attended a victim impact panel¹⁴ (n = 410) with offenders from the same court system who had not done so (n = 373) (Joyce and Thompson, 2017). Controlling for some key variables (age, gender, previous drink driving offences and previous convictions) it found that the odds of being reconvicted for another drink driving offence after one year were 2.6 times as high for the comparison group compared to those who had attended the panel, suggesting good support for the effectiveness of restorative justice conferencing in this particular type of offending.

Finally, a 'review of reviews' takes a different slant to ask what doesn't work in interventions aimed at reducing recidivism (Barnett and Fitzalan Howard, 2018). Cutting across types of intervention, they identify that neither punitive nor deterrence-based interventions, nor discipline approaches (e.g. boot camps), nor community-based surveillance programmes appear to work in isolation, *without* rehabilitative support. The problems that these

¹⁴ According to this paper, a typical victim impact panel solicits four or five victims to speak to drunk driving offenders about how drunk driving changed their lives. The idea is to inculcate the personal side of loss so that offenders can see the sorrow that victims have experienced as a result of alcohol-related driving tragedies.

approaches share are: a failure to build skills which help people to behave differently in the future; a failure to help offenders build a prosocial, non-criminal identity; a reliance on only extrinsic motivation to desist (e.g. fear of getting caught); poor implementation; and a failure to act on the eight key factors that research has shown are linked to reoffending (attitudes and social networks that support crime; self-management and impulse control issues; lack of pro-social relationships;¹⁵ homelessness and living in a criminal neighbourhood; substance misuse; lack of positive recreation activities; and lack of or unstable employment) – many of which are factors that a short prison term may most likely worsen.

7. Conclusion to the 2018 update

This year's update of last year's review has added a further, high-quality study to the growing body of work which suggests that short-term custody is associated with slightly higher reoffending than sentences served in the community (Caudy et al., 2018). A further analysis of the data used in MoJ's important 2015 study of short-term custody compared with court orders suggests that the criminogenic effect of the former 'kicks in' when offenders have 11 or more previous convictions (Hillier and Mews, 2018). Evidence from the Netherlands suggests recidivism rates do not vary appreciably when we compare very short sentence lengths with one another (Wermink et al., 2018). Meanwhile other studies, focusing on the offenders' subjective experience, have cast doubt on the idea that the worse the prison experience, the less likely you are to reoffend (Raaijmakers et al., 2017), and added more granular detail to the reasons why short prison terms may be criminogenic (Llievesley et al., 2018). Interestingly, a couple of US studies have also suggested that sentences could be shortened appreciably without having a negative effect on recidivism (Hunt et al., 2018; Rhodes et al., 2017).

A handful of studies have bolstered the evidence that certain policies and programmes can 'work' in the sense of reducing reoffending, these being: intensive supervision (DeVall et al., 2017); sex offender, drug, alcohol and mental health treatment programmes (Schmucker and Losel, 2017; MoJ 2017 and 2018); and restorative justice conferencing (Joyce and Thompson, 2017). And finally, an interesting paper by two psychologists has summarised what interventions don't seem to work in reducing reoffending, and why (Barnett and Fitzalan Howard, 2018).

¹⁵ Several studies published this year have suggested the importance of quality of relationships in determining reoffending and desistance from reoffending (Atkin-Plunk and Armstrong, 2018; Brunton-Smith and McCarthy, 2017).

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Sentencing Council Meeting Dates 2020

The meetings will start at 9:45 and end at 16:30, these times may change depending on workload etc.

Friday 31 January 2020 – RCJ Queen's Conference Room

Friday 6 March 2020 – RCJ Queen's Conference Room

Friday 3 April 2020 – RCJ Queen's Conference Room

Friday 15 May 2020 – RCJ Queen's Conference Room

Friday 19 June 2020 – RCJ Queen's Conference Room

Friday 24 July 2020 – RCJ Queen's Conference Room

Friday 25 September 2020 – RCJ Queen's Conference Room

Friday 23 October 2020 – RCJ Queen's Conference Room

Friday 20 November 2020 – RCJ Queen's Conference Room

Friday 18 December 2020 – RCJ Queen's Conference Room

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