

Sentencing Council meeting: 14 June 2019
Paper number: SC(19)JUN07 – Drug Offences
Resource Impact
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1 ISSUE

1.1 This paper details the expected impact of the revised drug offences guideline on prison and probation resources, using the guidelines agreed at the January and May Council meetings.

2 RECOMMENDATION

2.1 That the Council:

- considers the resource impact for these offences; and
- confirms it is content to sign off these guidelines bearing in mind the expected resource impact.

3 CONSIDERATION

3.1 In September 2018, you agreed that you did not wish to make any significant changes to sentencing practice overall.

Importation/Exportation, Supply/PWITS and Production/cultivation offences (Misuse of Drugs Act 1971)

3.2 In May, you agreed to retain the majority of sentence levels given in the current guideline for importation, supply/PWITS and production offences.

3.3 It was, however, agreed that actual sentence levels should be included within category 4 harm for importation offences (rather than the wording used in the existing guideline). Sentence levels are being signed off at the June Council meeting,

therefore the expected resource impact of this aspect of the importation guideline will be circulated to Council members at a later date (outside of Council meetings).

Culpability factors

3.4 A number of changes have been made to the culpability factors in these guidelines, which might potentially result in changes to the way in which current cases are categorised. These changes are summarised in the table below:

Culpability factor	Change	Potential impact
“Exploitation of children and/or vulnerable persons to assist in drug-related activity”	New factor added to “Leading” role	Could potentially cause more cases to be placed in this category than currently
“Exercising control over the home of another person for drug-related activity”	New factor added to “Leading” role	Could potentially cause more cases to be placed in this category than currently
“Expectation of substantial financial or other advantage”	Existing “Leading” role factor has been broadened (to now cover ‘other advantage’); it was previously worded “Expectation of substantial financial gain”	Could potentially cause more cases to be placed in this category than currently
“Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender’s own habit), whether or not operating alone”	Existing “Significant” role factor has been broadened (to now cover ‘other advantage’) but also narrowed (excluding cases where offender is meeting own habit); it was previously worded “Motivated by financial or other advantage, whether or not operating alone”	‘Other advantage’ could potentially cause more cases to be placed in this category than currently, as could ‘Expectation’ as opposed to ‘Motivated by’, whereas ‘meeting the offender’s own habit’ might cause fewer cases to be placed here

“Supply, other than by a person in a position of responsibility, to a prisoner for gain without coercion”	Existing factor has been removed from “Significant” role in the supply/PWITS guideline	Could potentially result in fewer cases being placed in this category
“Expectation of limited, if any, financial or other advantage (including meeting the offender’s own habit)”	New “Lesser” role factor added which now covers ‘limited, if any, financial or other advantage’; previous similar factor stipulated the absence of any financial gain; “If own operation, absence of any financial gain, for example joint purchase for no profit, or sharing minimal quantity between peers on non-commercial basis”	Could potentially cause more cases to be placed in this category than currently

3.5 An analysis of transcripts of Crown Court judges’ sentencing remarks for supply/PWITS and production offences¹ was undertaken to assess whether there might be any potential resource impact related to the above changes. This analysis did not suggest that any cases would necessarily result in a different categorisation under the revised guideline, however the specific circumstances being investigated were quite rare in the sample analysed (i.e. cases involving exploitation of children, exercising control over the home of another, or a non-financial advantage), and it should be noted that this analysis is only based on the information explicitly mentioned in the transcripts.

3.6 Based on this analysis of a sample of cases, the above changes to culpability factors are not expected to result in an impact on prison and probation resources.

Sentences over 20 years

3.7 In the current guideline for importation, supply/PWITS and production, the following text is included above the culpability and harm tables:

¹ Importation offences were not analysed as this offence is much lower in volume than supply/PWITS and production.

“Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the offender’s role.”

3.8 In the revised guideline for these offences, this text has been moved to a more prominent position; above the Class A sentencing table, creating a risk that higher sentences might be given in more cases than currently, where perhaps the sentencer had missed (or forgotten about) the text and subsequently remained within the offence range (up to 16 years’ custody). Analysis of transcripts was undertaken to assess whether there were any cases which might result in a higher sentence under the revised guideline, given the more noticeable position of the wording. This analysis did not find any evidence of an impact, although the sample size was small so this finding is tentative.²

Quantities

Ecstasy tablets

3.9 Following May’s Council meeting, the quantities given in the importation and supply/PWITS guidelines have been amended for ecstasy, to reflect the fact that average purity has increased from 100mg to 150mg.

3.10 Transcript analysis showed that on occasion sentencers adjusted the starting point due to the actual quantity of drugs in the case being slightly different to the indicative quantity in the guideline. This is corroborated by the findings from early research undertaken with a small number of Crown Court judges (in Canterbury and Birmingham), which also found that sentencers use the indicative quantities and then adjust the starting point according to the quantities in the case. Overall, therefore, it seems likely that changing the quantities of ecstasy tablets given in the guideline may result in an increase in sentences in some cases.

3.11 However, there was also evidence in the transcript analysis that often, sentencers either used the starting point given in the guideline for the relevant harm category (irrespective of the actual quantity of drugs in the case) or categorised the offence as street dealing (harm category 3). This suggests that in many cases, changes to the quantities will not affect sentences, and so the impact mentioned above will only apply in a small proportion of cases.

² The sample included four transcripts covering 10 offenders for whom this issue was relevant.

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

MDMA

3.13 The revised guideline for importation, supply/PWITS and production/cultivation offences also includes quantities in kilograms for MDMA. Analysis of transcripts found that MDMA is often described as being in tablet form, or in both tablet and crystalline form within the same case, and the sentencer uses the relevant ecstasy tablet quantities to sentence the offender. It is expected that for these offenders, it is unlikely that there will be any impact.

3.14 In a very small number of cases where MDMA was described in terms of the weight (in grams), the amount in rocks/pieces or the monetary value of the drugs, the sentencer either seemed to be able to convert the amount of the drug to an equivalent estimated number of tablets and sentence using the ecstasy quantities, sentence the offender on the basis of street dealing, or sentence the offender based on a perception that the amount of the drug was substantial and that therefore they would fall into the highest harm category. It is unclear in these cases how the sentencer converted the amount of the drug, so it is not possible to understand how the new MDMA weights will affect sentence levels. However, most of these cases either seem to involve street dealing (which will still fall within category 3), a substantial quantity of drugs (which will still fall into category 1) or a very small quantity of drugs (which will still fall into category 4), and as the sentence starting points are not changing, it is likely that most offenders would continue to receive the same sentence under the new guideline. In a small proportion of cases, the new MDMA weights may cause different categorisations or adjustments from the new indicative quantity starting points, but it is expected that any impact would be small.

Cannabis plants

3.15 The numbers of cannabis plants indicated in the production/cultivation guideline have also been amended, to reflect the fact that the average yield of a plant has increased from 40g to 55g.

3.16 Analysis of transcripts suggests that in some cases, sentencers adjust the starting point according to the actual number of plants in the case. It therefore seems

likely that, as with ecstasy tablets, changing the number of plants in the guideline may result in an increase in sentences in some cases (although it is not possible to accurately quantify this).

Question 1: Is the Council content to amend these quantities in the revised guideline, given that there may be a resource impact? Does the Council have any comments on these findings?

Synthetic cannabinoid receptor agonists

3.17 Following May's Council meeting, it is now proposed that descriptive factors (rather than specific quantities) are used to categorise offence seriousness for synthetic cannabinoid receptor agonists (SCRAs).

3.18 Analysis of a small number of transcripts relating to SCRA offences has been carried out, to identify whether there are likely to be any changes to sentences under the new guideline for these offences.³ The analysis found that information relating to weights or quantities was rarely mentioned in SCRA transcripts, although some referred to street dealing. It is therefore difficult to estimate whether the guideline will result in any changes to sentencing practice for these offences.

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

Question 2: Is the Council content to sign off the guidelines including SCRA offences, given that the lack of data available means it is not possible to say whether there will be a resource impact?

Possession of a controlled drug

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

3.21 The wording above the sentence table has been amended slightly (see below), which has broadened the scope of cases where the sentencer might consider imposing a community order rather than a custodial sentence. This could potentially encourage more sentencers to give a community order than previously (i.e. in cases

³ Eight transcripts relating to SCRA offences were analysed. Of these only one gave any indication of the quantity of drug being taken into account, described by the judge in terms of the street value of the drug.

where the custodial sentence length is more than moderate). However, there is no evidence to suggest that sentencers are not already considering the option of a community order, irrespective of the custodial sentence length.

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~~ may be a proper alternative to a ~~short or moderate length~~ custodial sentence.

3.22 There have been some minor changes to aggravating and mitigating factors at step two: “Large quantity” has been added as an aggravating factor; “Charged as importation of a very small amount” has been removed from the list of aggravating factors; and “Small quantity” has been added as a mitigating factor. Given that sentence levels are largely driven by the offence category determined at step one, as opposed to aggravating and mitigating factors at step two, these changes to factors are not expected to result in any resource impact.

3.23 Overall therefore it is not anticipated that the revised possession guideline will have any impact on prison and probation resources.

Question 3: Does the Council have any comments on these findings?

Permitting premises to be used for drug-related activity

3.24 The permitting premises guideline is being signed off at the June Council meeting, therefore the expected resource impact of this guideline will be circulated to Council members at a later date (outside of Council meetings).

Psychoactive Substances Act 2016 (PSA) offences

3.25 The supply/PWITS NPS guideline is being signed off at the June Council meeting, therefore the expected resource impact of this guideline will be circulated to Council members at a later date (outside of Council meetings).

4 RISKS

4.1 Two main risks have been identified:

Risk 1: The Council’s assessment of current sentencing practice is inaccurate

4.2 Inaccuracies in the Council’s assessment of the impact of the guideline could cause unintended changes in sentencing practice when the new guideline comes into effect.

4.3 This risk is mitigated by testing the guideline with sentencers during the consultation phase, inviting views on the guideline, and the collection and analysis of sentencing information. By comparing sentence outcomes to those that may result from the draft guideline, it is possible to detect and amend problematic areas of the draft guideline. However, there are limitations on the extent of the testing and analysis, so the risk cannot be fully eliminated.

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

4.4 If sentencers do not interpret the guidelines as intended, this could cause a change in the average (mean) severity of sentencing, with associated resource effects.

4.5 The Council takes a number of precautions in issuing new guidelines to try to ensure that judges interpret them as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Transcripts of Crown Court sentencing remarks for drug cases have also been studied to ensure that the guidelines are developed with current sentencing practice in mind. Research with sentencers carried out during the consultation period will also enable issues with implementation to be identified and addressed prior to the publication of the definitive guideline.

4.6 The Council also uses data from the Ministry of Justice to monitor the effects of its guidelines to ensure any divergence from its aims is identified as quickly as possible.