

FINAL RESOURCE ASSESSMENT – GUIDELINE ON DRUGS

1 INTRODUCTION

1.1 The Sentencing Council was set up on 6 April 2010 as the new, independent body responsible for developing sentencing guidelines and promoting greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary. The Sentencing Council also has a key role to play in promoting public awareness and confidence in sentencing.

1.2 This document fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services¹.

2 RATIONALE AND OBJECTIVES FOR THE NEW GUIDELINE

2.1 Drugs offences account for a large number of cases per year – around 55,500 adult offenders were sentenced for offences involving controlled drugs in 2010. There is currently no Crown Court guideline for sentencing drug offences, so the Council has produced a guideline that will promote consistency of sentencing for these offences. In order to ensure coherence across the jurisdictions, this guideline will apply to both the Crown Court and to magistrates' courts.

2.2 The Council has considered both case law and current sentencing practice during the development of this draft guideline. For most offences and offenders, the guideline aims to increase the consistency of sentencing whilst leaving the aggregate severity of sentencing unchanged. It considers that it is important to ensure that sentencing is as fair, consistent and proportionate as possible within each offence and across all the offences covered by the draft guideline, and the sentencing ranges and starting points have been set with this in mind throughout. There is one group of offenders, however, for whom in some cases the Council considers current sentencing to be disproportionate to the levels of culpability and harm caused. These are the so-called drug 'mules'. An increased focus on role in the development of the sentencing ranges is expected to result in a downward shift in sentences for these

¹ Coroners and Justice Act 2009 section 127

types of offenders, to bring them in line with the overall sentencing framework and ensure that these offenders are sentenced fairly and consistently according to the severity of their offence.

2.3 A second group of offenders who may be affected by the new guideline are those who are sentenced for Class B production/cultivation offences. Data on sentencing practice revealed possible inconsistencies between how cases are treated in the magistrates' courts and the Crown Court. The proposed new guideline aims to increase the proportionality of sentencing between the two courts, with the goal of increasing consistency. It is thought that this may result in upward shifts in some sentences, but the effects will depend on the characteristics of the caseload appearing before magistrates' courts.

3 KEY ASSUMPTIONS

3.1 A description and evaluation of the analytical model which has been used to derive the results presented below can be found at the following URL: <http://sentencingcouncil.judiciary.gov.uk/facts/data-and-analysis.htm>.

3.2 This section gives a brief description of the key assumptions made.

Statutory requirements

3.3 As stipulated by section 127 of the Coroners and Justice Act 2009, this resource assessment considers the resource impact of the guideline on the prison service, probation service, and the youth justice services. Any resource impacts which may fall elsewhere are therefore not included in this assessment. For example, there is a resource cost to enforcing fine payments and administering receipts from fines which is not measured in this document.

Other assumptions

3.4 To estimate the resource effect of a new guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is founded on the objectives of the new guideline. However, strong assumptions must be made, in part due to the inherent unpredictability of human behaviour. Any estimates of the impact of the new guideline are therefore subject to a large degree of uncertainty. A range of estimates is presented that reflects the sensitivity of the estimates to the assumptions made.

3.5 Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different,

there is no strong evidence base on which to ground assumptions about behavioural change. The assumptions thus have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the proposed new guideline, and an assessment of the effects of changes to the structure and wording of the guideline. The assumptions which have been made about behavioural change of sentencers are described in full in the annex.

3.6 An area of particular complexity with the drugs guideline has been ensuring that the guideline ranges associated with different quantities of drugs are appropriate, and cause changes to the severity of sentencing only where desired. This has been challenging for two main reasons. First, data on the quantity of drugs involved in cases is not systematically recorded alongside data on sentence lengths. This means the composition of sentences in terms of the quantity of drugs involved is not known with a high degree of precision. Second, the roles of quantity and purity in the decision making process set out in the new guideline differ from how they are currently treated by the courts. This means that, even where the guideline aims to cause no change to the aggregate severity of sentences, there is not necessarily a direct link between current sentencing practice and the ranges that are set out in the proposed guideline.

3.7 Cost data has been provided by the Analytical Services Directorate at the Ministry of Justice. All costs are expressed in 2010/11 prices. No attempt has been made to make adjustments for possible future changes in the efficiency of the criminal justice system. It is therefore assumed that the real cost of prison and probation services remain at current levels. The costs quoted in this document refer to the resource impact per annum in the steady state (after a transition period), and exclude capital build costs and overheads.

3.8 On this basis, a year in custody is assumed to cost an average of around £30,000, including local maintenance, but excluding capital build expenditure and overheads. The average cost of a community order is assumed to be around £2,800.

3.9 The final key assumption which had to be made regards the 'counterfactual' – that is, what sentencing practice would be in the absence of a new guideline. This is necessary because to assess the change in resources required as a result of a new guideline, a baseline must be established for comparison in which the sentencing guideline does not change. The assumption which has been made is that, in the

absence of the new guideline, sentencing practice in the future would be similar to sentencing practice in 2010².

4 CHANGES TO THE RESOURCE ASSESSMENT SINCE THE CONSULTATION STAGE DRAFT WAS PUBLISHED

4.1 During the consultation period, the Council has conducted a number of pieces of work to increase its understanding of current sentencing practice in order to gain increased confidence that the guideline will achieve its desired effects. This work has included several rounds of research with Crown Court judges to obtain their views on the guideline, and understand how it may affect their sentencing behaviour³. This research highlighted a number of areas in which there was scope for misinterpretation. As a result, a number of changes have been made to the draft guideline which was consulted upon (see the consultation response paper for further details).

4.2 Although the guideline has been revised, the changes to the resource assessment are limited. This is because the consultation stage resource assessment envisaged that the aims of the guideline would be realised. Where changes have been made to the guideline, these have been made because evidence gathered during the consultation period suggested the draft guideline may have unintended effects. These changes therefore did not need to be reflected in changes to the methodology of the resource assessment.

4.3 Nonetheless, some changes to the methodology for the resource assessment have been made to reflect the information the Council has received during the consultation period. In particular, the uncertainty surrounding the impact of the guideline on production/cultivation of Class B drugs has reduced, and this is reflected in updated modelling assumptions. At the consultation stage, at the high end of estimates, the model assumed there would be a substantial increase in the severity of sentencing for these offences, due to difficulties in interpreting sentencing data for this offence. However, none of the respondents to the consultation indicated that they thought the guideline would significantly increase the severity of sentencing for these offences, nor did any of the judges who took part in the research exercises that were conducted during the consultation period. As a result, the assumptions for the high end of the estimates have been moderated downwards.

² At the time of writing, 2010 is the most recent year for which comprehensive published data is available from the Ministry of Justice Court Proceedings Database on sentencing practice.

³ Further details of this work can be found in a forthcoming analysis and research bulletin, which will be available on the Sentencing Council website.

4.4 In addition to these methodological changes, the cost model has been updated to incorporate the latest year's sentencing data. This means that the model now assumes that sentencing volumes for drugs offences in future will be similar to sentencing volumes for drugs offences in 2010 rather than 2009, which was the latest data available when the consultation stage resource assessment was produced. Data from the most recent year is used because, in the absence of foresight of future sentencing patterns, the latest year of data is assumed to give the best indication of likely future sentencing patterns.

4.5 Between 2009 and 2010, there were significant changes in sentencing volumes for the two offences for which resource effects have been modelled – importation offences and production/cultivation of Class B drugs. At the consultation stage, resource savings were anticipated for importation offences, and it was thought there may be cost increases for production/cultivation offences. Overall, the savings outweighed the cost increases. The changes in sentencing volumes tend to reduce the savings which may occur because between 2009 and 2010 there was a decrease in the volume of importation offences and an increase in the volume of production/cultivation offences. As a result, the overall resource effects of the guideline are now expected to be roughly neutral. The specific resource estimates from the cost model are reported in the next section.

5 ASSESSMENT OF THE RESOURCE IMPLICATIONS OF THE NEW GUIDELINE

5.1 The first part of this section considers the resource implications for the prison and probation services and so relates to sentencing for offenders aged 18 or over. The second part then considers the effects of the new guideline on the resources required for the provision of youth justice services.

5.2 The estimates presented in this section refer to the 'steady state' effects of the proposed new guideline, after a transition period. The effects of the new guideline on resources are not instantaneous. For example, if the guideline caused an offender to spend four years in prison rather than three, then the resource effects of this longer sentence would only begin to be felt by the prison service three years after the sentence was passed.

5.3 Analysis has shown that this 'steady state' would be reached around three to four years after the introduction of the guideline.

Impact of the new guideline on the resources required for the provision of prison places and probation provision (for offenders aged over 18)

Exportation, Permitting Premises, Supply, Possession with Intent to Supply, and Possession

5.4 Guideline sentencing ranges for these offences have been set with reference to data on current sentencing practice with the aim of having no effect on the average severity of sentencing. As a result, no detailed modelling work has been done on these offences to estimate how average sentence lengths or the use of the various disposal types may change. The central estimate is that the guideline will have a negligible effect on the resources required to enact sentences for these offences.

5.5 As with all the estimates presented in this document, this estimate is subject to the two overarching risks described in section 6.

Importation

5.6 The new guideline is expected to cause a reduction in the severity of sentencing for drug 'mules' that would fall into the 'lesser role' category of the guideline. The true proportion of these offenders is not known, but it is thought that between 10% and 30% of those sentenced would be categorized as drug 'mules' under the new guideline. Overall, around 590 adults are sentenced each year for importing drugs.

5.7 Almost all sentences for importation are custodial, and no change is expected in the use of the various types of disposal for cases of importation.

5.8 It is expected that the decrease in custodial sentence lengths amongst drug 'mules' would result in a requirement for between 30 and 150 fewer prison places per annum.

5.9 This change is expected to result in an annual cost saving to the prison service of between £1m and £5m per annum and a small (<£0.1m) saving to the probation service per annum, due to changes in the length of time offenders spend on licence.

Production/Cultivation Class B

5.10 Overall, around 4,160 adults were sentenced for the production/cultivation of Class B drugs in 2010. The new guideline may cause an upward shift in the severity of sentencing for offenders being sentenced for Class B production/cultivation offences. However, there is significant uncertainty over the size of the potential resource effects.

5.11 The size of the effect is heavily dependent on the composition of cases coming before the courts in terms of the quantity of drugs involved. The uncertainty arises because these quantities are not systematically recorded, and are thus not known with a high degree of precision.

5.12 Various scenarios have been explored. The most important factor in terms of the estimated resource effect is the percentage of cases which fall within categories three and four of the new Class B production/cultivation guideline.

5.13 If a high percentage of Class B cases – around 70% - fall in these categories, then the new guideline would be consistent with current sentencing practice, and therefore it would not be expected to have a significant resource effect. This assumption forms the basis of the lower bound of the resource estimates described below, in which the guideline causes a negligible resource effect for these offences.

5.14 However, if a lower percentage – around 60% - would fall into these categories, the resource effect of the guideline could be substantial. This assumption forms the basis of the higher bound of the resource estimates described below, in which the guideline causes increases in costs.

5.15 It is expected that, as a result of the new guideline, there would be between 0 and 100 fewer fines per annum. Instead, these would be community orders.

5.16 Some sentences that would have been Community Orders or Suspended Sentence Orders in the absence of a new guideline are expected to become immediate custodial sentences. This is expected to affect between 0 and 360 sentences per annum.

5.17 These changes are expected to result in an increased requirement for prison places. It is estimated that 0 to 170 additional places would be required per year.

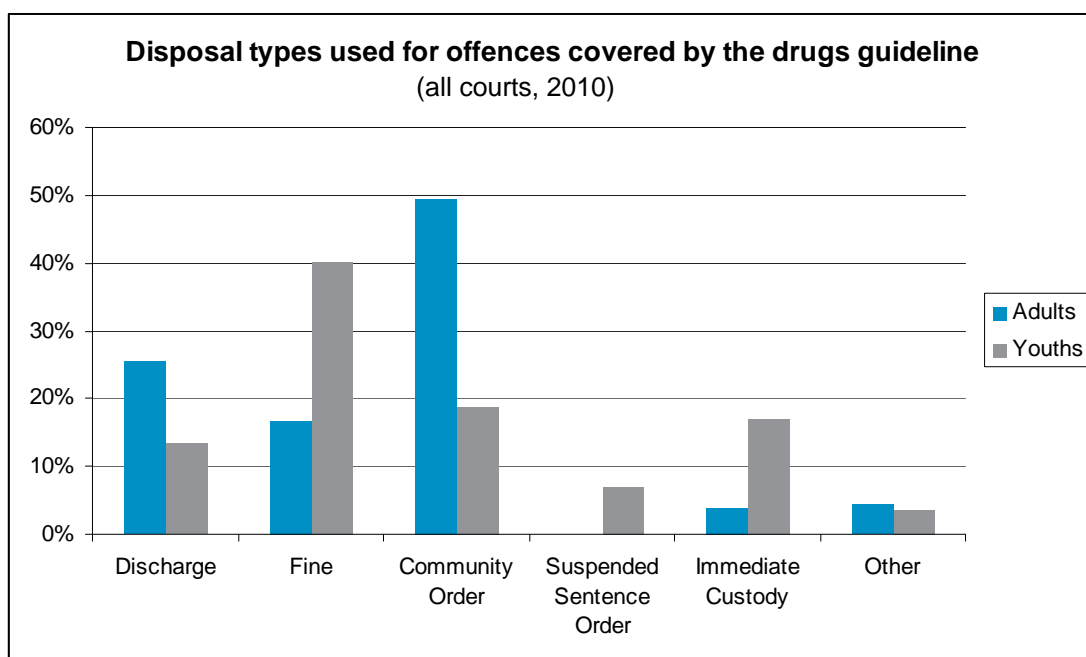
5.18 It is expected that the changes outlined above would result in an increase in costs to the prison service of between £0m and £5m per annum, and a decrease in costs to the probation service of between £0 and £1m per annum.

Impact of the new guideline on the resources required for the provision of youth justice services (offenders aged under 18)

5.19 The proposed new drugs guideline applies to sentences for adults only. Nevertheless, in the absence of a drugs guideline for youths, it is possible that sentencers may consult the adult guideline when sentencing a youth to remind themselves of some of the key considerations of sentencing for drugs offences. This could lead them to come to a different view of harm and culpability, and could

potentially influence their sentence. Any changes are likely to be small because the sentencer should always refer to the 'Overarching Principles – Sentencing for Youths' guidance.

5.20 There are also statistical reasons to believe that the effect on youth sentences may be small. In 2010, a total of around 5,900 youths were sentenced for the drugs offences covered under the proposed new sentencing guideline, relative to around 55,500 adults. Sentencing practice for youths is considerably different to that for adults, with much less use of custody, and much greater use of community orders (youth rehabilitation orders). This is shown in the following chart.



5.21 For adults, the main changes in sentencing which are expected to occur are reductions in custodial sentences for drug 'mules', and possible increases in sentences for those convicted of production/cultivation of Class B drugs. In 2010, only 2 youths were sentenced for importation offences, and only 98 youths were sentenced for Class B production/cultivation offences. This suggests that even if similar changes to sentencing did occur amongst youths as those which are expected to occur amongst adults, the resource effects on the youth justice service would be small.

5.22 In addition, due to the non-applicability of the guideline to youths, very strong assumptions would be needed to quantify the small potential resource impact on the youth justice services. No attempt has been made to do so.

6 RISKS

6.1 There are two further sources of uncertainty which have not been quantified in the estimates presented in this resource assessment.

Consistency

6.2 One of the aims of the new guideline is to increase consistency of sentencing. The Council has considered the possible resource effects of increases in consistency in a separate analytical note⁴. This note concludes that, as a central estimate, an increase in the consistency of sentencing would have no resource effect. However, the note also finds that under certain assumptions about the nature of inconsistency, there may be positive or negative resource effects.

Unintended consequences

6.3 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. The Council has several expert advisors from various disciplines who scrutinise the guidelines. Guidelines are also road-tested with Crown Court judges. Finally, consultees can feed back their views on the likely effect of the guidelines, and whether they would envisage different effects from those set out in the consultation stage resource assessment.

6.4 Nevertheless, the possibility of unintended consequences of the new guidelines cannot be ruled out. No attempt has been made to quantify this risk due to its inherent unpredictability.

6.5 The Council has identified one area of the guideline where the resource effects are particularly uncertain, and therefore where the risk of unintended consequences is significant. This is the guideline's treatment of quantity in cases where purity analysis is available.

6.6 The approach recommended in the new guideline is to treat the quantity of the drug as a step 1 factor. At this stage, no adjustment is made for purity. Purity is only then considered at step 2.

6.7 This differs from current practice, in which, where purity analysis is available, a greater focus is placed on the purity-adjusted quantity of drugs. Where purity

⁴ This note can be found here: <http://sentencingcouncil.judiciary.gov.uk/facts/data-and-analysis.htm>

analysis is not available, the sentence is based on the quantity of product recovered, without any adjustment for purity.

6.8 This change in approach will mean that in cases in which purity analysis is conducted there may be a movement in category bands – but the final sentence would be considered in combination with the other facts of the case.

6.9 During the consultation period, the Council has conducted research with Crown Court judges to better understand the possible impacts of the guideline. This research has not pointed to any significant shifts in sentences as a result of the new approach to purity. Nevertheless, until the guideline is put into use across the full spectrum of cases of drugs offending, there remains a risk of unintended consequences.

7 ANNEX – TRANSFORMATION RULES

7.1 This annex lists the main assumptions which have been used in this resource assessment about the behavioural change of sentencers in response to the proposed new guideline, which is expected to affect the average severity of sentencing only for the offences of importation and production/cultivation. These assumptions are described in the form of mathematical rules which define how sentences may change as a result of the proposed new guideline. These ‘transformation rules’ form part of the Sentencing Council resource model, which has been used to derive the estimates presented in this resource assessment. The working of the model is explained in much more detail in a separate document, which can be found at the following URL: <http://sentencingcouncil.judiciary.gov.uk/facts/data-and-analysis.htm>

7.2 In the rules below, the variable x refers to the sentence length in years in the ‘baseline’ (counterfactual) scenario in which a new guideline is not issued. The changes in sentences are defined relative to this scenario.

Importation

7.3 It is thought that around 10%-30% of offenders sentenced for importation of drugs are drug ‘mules’, who will be categorized under the new guideline as having a ‘lesser role’ and will receive lower sentences than they currently get. The following rules for importation offences therefore apply to 10% of cases in the low scenario and 30% of cases in the high scenario.

7.4 A weighting system has been applied to ensure that the 10-30% of cases which are affected by the transformation rules are within the range of sentences that drug ‘mules’ may currently receive. The cases which are affected therefore do not

include the longest sentences for importation within each drugs class, which would be reserved for offenders in a more significant role.

Range to which rule applies	Importation, Class A, B and C - Transformation rules	
	Low scenario	High scenario
Custodial sentences	$\frac{2}{3}x$	$\frac{1}{2}x$

Production/Cultivation

7.5 The following transformation rules applied to all Class B sentences:

Range to which rule applies	Production/Cultivation Class B - Transformation rules	
	Low scenario	High scenario
Fine	No change	One sixth: Community order Five sixths: No change
Community orders	No change	Two thirds: No change One sixth: Suspended sentence One sixth: Nine months' custody*
Suspended sentence orders	No change	One sixth: No change Five sixths: 1.5 years' custody*

*In reality, those getting custodial sentences would get a range of sentence lengths. The lengths stated are intended to represent an average.