

Sentencing reform for drug trafficking in England and Wales

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Introduction

Internationally, laws and sentencing practices tend to treat drug supply offences very harshly, often with the stated aim of deterrence. International drug trafficking is subject to the longest penalties, from 8-30 years, and up to the death penalty.¹ Long sentences are often applied under inflexible legislation with little or no attention to individual mitigating circumstances, or the offenders' role or gains, resulting in disproportionately heavy penalties for minor offenders, such as drug couriers.²

This paper discusses recent changes to sentencing in England and Wales, which aim to recognise drug couriers as a distinct category, and so attribute lesser, more proportionate punishment. This innovation did not involve substantive change to drug laws, and reform has been achieved through revising sentencing practice by issuing guidelines for sentencers. This minor reform impacts on one specific group of beneficiaries only: drug couriers. International readers should note that sentencing in England and Wales operates according to a complex categorisation of activities and separates possession, different types of selling and production activities, and international trafficking. This sentencing innovation is broadly a step in the right direction in that it will reduce punishments for many, but not all, drug couriers. It suggests that taking role into account offers the possibility of more proportionate sentences for drug couriers.

International approaches to sentencing drug traffickers, especially couriers

Drug couriers and/or mules

A 'drug mule' or courier is someone who carries drugs across international borders.³ They typically undertake this specific role only, working under the instructions of others. Mules carry drugs concealed in luggage, on their body or clothes, or swallowed in latex-wrapped capsules in order to avoid detection. The term 'courier' is sometimes used, given that the term 'mule' may be considered derogatory and both terms are used interchangeably here.⁴

There is no such thing as a typical drug courier: they may be teenagers, pensioners, graduates and/or mothers. Some mules are involved due to violent coercion or threats but most are involved due to poverty and financial pressure.⁵ The hidden nature of international drug trafficking makes it difficult to calculate accurately, but women represent around 20-30% of those arrested for drug selling and trafficking offences worldwide.⁶ Women are typically involved due to poverty, compounded by caring responsibilities for children and parents.⁷ Despite the stereotype of the vulnerable female mule, couriers may also be people with employment, visas and legitimate reasons for international travel.⁸ Since drug trafficking is by nature international, many imprisoned drug traffickers are foreign nationals.⁹ Drug mules typically have no criminal record,

and few use drugs.¹⁰ Most have never belonged to a criminal organisation.¹¹ Researchers have documented the devastating effects of harsh punishments for drug mules, especially poor women serving sentences far from home. Children may find themselves homeless, or even in some circumstances in prison themselves.¹²

Disproportionate punishments for mules

Internationally, punishments for drug trafficking are very harsh, including the death penalty, which is mandatory in some nations.¹³ Sentencing practices and laws rarely take into account the specific, minor role undertaken by mules, their situation of socio-economic vulnerability, or any level of coercion into getting involved in the drug trade. Mandatory minimum sentences rule out judicial discretion with regards to individual mitigation and the defendants' usually minor role in the trafficking enterprise.¹⁴ Judges have sometimes reported frustration about the heavy sentences they must give to minor offenders, but may be accused of corruption if they divert from recommended penalties.¹⁵

Long sentences for drug offences directly contribute to prison overcrowding.¹⁶ In drug producing/exporting nations, up to 50% of the prison population is accused, or sentenced for drug offences.¹⁷ Drug offences are a particularly major driver of women's incarceration: one in four women imprisoned in Europe and central Asia is convicted of a drug offence.¹⁸ Giacomello's recent report documents the effects of disproportionate punishment on the women's prison population in Latin America.¹⁹ Between 2006 and 2011, the population of women in prison in Latin America doubled.²⁰ Drug offences are the main reason for the incarceration of women in many nations. Argentina is a particularly extreme case in which drug offenders represent 80% of women in federal prisons.²¹

Move towards proportionate punishments for couriers

Proportionality is high on the drug policy agenda. It was the special focus of the International Narcotics Control Board Report in 2007.²² In 2010, the United Nations Office on Drugs and Crime called for more proportionate punishment for drug offences.²³ Both UN agencies recognise

that extreme and mandatory punishments for drug offences run contrary to principles of justice and proportionality. A broad range of approaches is necessary to ensure proportionality, reflecting diminishing responsibility further down the supply chain.²⁴ Drug mules have been identified as a special group meriting lesser punishment proportional with their distinct, minor role in the drug trade by the United Nations, and by several nations around the world.²⁵ Furthermore, there is widespread recognition that harsh punishments have disproportionately affected women, whose involvement in the drug trade as mules is often the outcome of gendered inequalities, poverty and caring responsibilities.²⁶

Sentence reform is at the heart of policy reform. In 2012, Singapore changed their drug law to recognise drug couriers as a special group, which is now exempt from the mandatory death penalty.²⁷ In 2014, Ecuador introduced a new penal code that defines 'micro-traffickers' – including drug mules – as distinct lesser roles, meriting reduced punishments – 5-7 years, for 2-5 kilos of cocaine, and just 1-3 years for instances involving less than 2 kilos.²⁸ This penal code also applies retrospectively, and it is estimated that it will result in as many as 2,000 people being released from custody.²⁹ A gender specific example of reform can be found in Costa Rica where, in 2012, the drug law was amended to reduce penalties imposed on women who traffic drugs into prison from 8-20 years to 3-8 years. This included non-custodial alternatives.³⁰ Finally, change is also under way in the USA – arguably the architect of harsh punishments for drug offences. In 2013, the United States Attorney General announced plans for reform of the criminal justice response to drug offences, with a special focus on ensuring proportionate punishment for low-level, non-violent offences by exempting them from mandatory minimum sentences.³¹ Nonetheless, is not clear whether drug mules will fall into this category, and so perhaps only minor changes can be achieved without the abolition of mandatory minimum sentences.³²

Penalties for trafficking cocaine and heroin in England and Wales

The UK has a clear, explicit drug strategy with three related aims: 'reducing demand', 'restricting supply' and 'aiding recovery'.³³ Since 1998, the UK has sought to divert people who use drugs and drug-dependent offenders from custody into voluntary drug treatment. Possession of small quantities of drugs remains illegal; however it is recognised as a distinct offence meriting a lesser penalty (mostly cautions and fines, see Table 2 below). Seizing drugs at the border is an important element of the UK Drug Strategy, in addition to disrupting markets through policing, as well as international partnerships in order to seize drugs and disrupt international trafficking organisations in drug producing nations.³⁴

The Misuse of Drugs Act (1971) establishes three classes of drugs according to harmfulness (Class A, the most serious, includes cocaine and heroin). It also distinguishes between different types of drug offences: possession, production and supply, and importation and exportation.³⁵ For brevity, drug importation and exportation offences are referred to as 'trafficking' in this document.

Until February 2012, sentencing practice in England and Wales followed guideline judgements (in other words, precedent).³⁶ The approach to sentencing in trafficking cases involving a Class A drug was as follows:

1. Longer sentences were given in cases involving **larger quantities** of drugs (after 1992, prior to that, street value was used).
2. The **defendant's role** was given only minor consideration. Whilst considerable attention was given to establishing tariffs according to drug weight, there was little discussion of role in guideline judgements.
3. Sentencing was led by **deterrence**. Personal mitigation (such as ill health, or caring responsibilities) was severely limited, and explicitly excluded in some circumstances.³⁷

From the early 1980s onwards, drug trafficking was punished by very long custodial sentences. For importing less than 5 kilos, the average sentence was 7 years 11 months, and 11 years

6 months for more than 5 kilos (5 kilos was an important threshold for seriousness).³⁸ Data from 1991-1997 showed that personal mitigation had little impact on sentencing, and that offenders' role, was not a statistically significant predictors of sentence length; nor was gender, or having children.³⁹ Researchers and journalists commonly found drug mules serving very long sentences, sometimes up to 13 years, including women involved under circumstances of coercion who had unsuccessfully pled not guilty (and received the maximum penalty).⁴⁰ Long sentences especially impacted on the women's prison. Between 1995-2003, the number of women in prison in England and Wales for drug offences tripled.⁴¹ In 2005, women drug offenders represented 35% of the women's prison population.⁴²

The exclusion of mitigating circumstances was widely criticised, especially by campaigners highlighting women's exploitation by drug traffickers.⁴³ Researchers also challenged the assumption that greater drug quantities merit greater punishment, arguing that mules are effectively held responsible for 'decisions, circumstances and issues outside their knowledge, experience and control'.⁴⁴ Recent research shows that drug weight is not a useful proxy for culpability or harm since drug mules tend to carry the largest quantities.⁴⁵

Sentencing guidelines in England and Wales

In February 2012, new sentencing guidelines for drug offences became effective in England and Wales. The guidelines change the way in which all drug offenders are sentenced; however there has been no change in the drug law. They represent a small but significant reform within the current legal framework, which already incorporates a certain degree of proportionality by distinguishing between possession, selling and trafficking (as stated above). Overall, the guidelines reflect previous sentencing practice described above and continuities can be found. In this system, deterrence continues to be the primary aim: harsh punishments remain, albeit reserved for the most serious offenders. Drug weight remains as a proxy for culpability (harm caused). But two major changes are evident: the

guidelines now recognise the **offenders' role** and **mitigating factors**.

Sentencing guidelines are published by the Sentencing Guidelines Council of England and Wales. Their statutory power is enshrined in law. The Coroners and Justice Act 2009 states 'Every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case [...] unless the court is satisfied that it would be contrary to the interests of justice to do so'.⁴⁶ Thus, guidelines rely upon judicial discretion, and are not intended to calculate a sentence 'by numbers'. This criticism is an important one, which is often applied to sentencing guidelines in the USA.⁴⁷

The guidelines were finalised following widespread consultation.⁴⁸ The consultation proposed:

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 for importation offences may result in a downward shift in sentences for these 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.

The proposal for reduced punishments for drug mules received widespread support from the public, legal actors, and expert groups.⁴⁹ There was very little press or political criticism of the new guidelines, even though they represented a general 'softening' of sentencing for drug trafficking offences. If such proposals were included in a government proposal for drug law reform, it is likely to have attracted much more debate, and possible resistance.

Summary of the definitive guideline for importing/exporting a Class A drug

Provisional sentence

A provisional sentence is determined with reference to drug quantity and the offenders'

role. Note that these are rarely the sentences actually served (see Table 1).

Drug quantities are merely indicative. For example, if a defendant were arrested with three kilos of cocaine, the provisional sentence would fall somewhere in the middle of the starting point outlined above. Role is also broadly indicative: offenders may not clearly fit into one role and judicial discretion is required to interpret their role. According to the guidelines Council, the 'lesser' role is designed to describe a drug mule. Nonetheless, some drug mules may be classified as 'significant', where they are 'motivated by financial advantage'.⁵¹ Indeed, whilst the category of 'lesser' is likely to describe only mules, some couriers can also be categorised as being in a 'significant' role.

Next, sentencers consider mitigating and aggravating factors and increase or decrease the sentence within the category range (see Table 1). These are newly allowable in drug trafficking trials, include personal mitigation (i.e. good character; being the sole or primary carer of others; isolated incident; remorse; no relevant, recent convictions) and a non-exhaustive list of offence-specific mitigating factors, including:

- Involvement due to pressure, intimidation or coercion falling short of duress
- Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances
- Offender's vulnerability was exploited
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

Judicial discretion is therefore also required to assess whether these mitigating factors ought to be considered, and their impact on the sentence. Since this list of mitigating factors is non exhaustive, offenders could potentially

Table 1. Sentencing guidelines for importing/exporting a Class A drug (i.e. cocaine or heroin)⁵⁰

	Leading role Directing or organising buying and selling on a commercial scale; substantial links to, and influence on, others in a chain; close links to original source; expectation of substantial financial gain; uses business as cover; abuses a position of trust or responsibility.	Significant role Operational or management function within a chain; involves others in the operation whether by pressure, influence, intimidation or reward; motivated by financial or other advantage, whether or not operating alone; some awareness and understanding of scale of operation.	Lesser role Performs a limited function under direction; engaged by pressure, coercion, intimidation; involvement through naivety/exploitation; no influence on those above in a chain; very little, if any, awareness or understanding of the scale of operation; if own operation, solely for own use (considering reasonableness of account in all the circumstances).
Category 1 (~5 kilos)	Starting point 14 years' custody Category range 12-16 years' custody	Starting point 10 years' custody Category range 9-12 years' custody	Starting point 8 years' custody Category range 6-9 years' custody
Category 2 (~1 kilo)	Starting point 11 years' custody Category range 9-13 years' custody	Starting point 8 years' custody Category range 6 years, 6 months – 10 years' custody	Starting point 6 years' custody Category range 5-7 years' custody
Category 3 (~150g)	Starting point 8 years, 6 months years' custody Category range 6 years, 6 months – 10 years' custody	Starting point 6 years' custody Category range 5-7 years' custody	Starting point Four years, six months custody Category range 3 years, 6 months' – 5 years' custody

take into account economic vulnerability and economic status, although it is impossible to tell if this occurs, on the basis of available data. Finally, sentencers take into account other relevant factors, such as giving assistance to the prosecution and other generic factors. The most important is whether they offered a guilty plea as this can merit a discount of up to one third.⁵²

Evaluating the impact of the guidelines

As part of on-going monitoring activities, the Sentencing Council of England and Wales asks judges to complete a survey for every sentence, which comprise the Crown Court Sentencing Survey database. The form records demographic

factors (gender, age, offending history), facts relating to the offence (drug weight, role), and sentence (aggravating and mitigating factors, and guilty plea). These data refer to the period *after* the introduction of the guidelines. Since surveys are completed for only 55% of sentences for international drug trafficking, analysis also draws on the Court Proceedings database. This is a complete, reliable record of all sentences in all courts in England and Wales, but the data collected is basic (demographics about the defendant, offence, and sentence length only). Data is drawn from the Court Proceedings database from before and after February 2012 to examine change over time. Crown Court sentencing survey data explores how the new guidelines function in practice. Since this data

is not representative, tendencies are explored, rather than correlations.

Analysis is focussed on sentences for importing/exporting Class A drugs (this category mainly concerns cocaine and heroin). In 2013, 448 people were sentenced for trafficking drugs, in England and Wales; 70% related to a Class A drug. Data echo previous research into the general profile of people convicted for drug trafficking offences: women comprised 15% of all those sentenced for drug importation in 2012 and 2013, and 80% of those convicted for drug trafficking offences had no prior convictions. Most are aged between 25 and 45, although a small number are aged 18-21, or over 54.

The impact of the sentencing guidelines

Overview

Analysis shows that:

- Sentencing for many types of drug offences remained mainly unchanged following the introduction of the sentencing guidelines, but the most significant changes have been observed with sentences for importation offences.
- Drug trafficking almost always results in a custodial sentence, although instances of non-custodial sentences are very occasionally used. This is not a new trend, however.
- Reference to the offenders' 'lesser role' had the biggest impact on reducing sentences:
 - 50% of defendants were identified as being in a lesser role. Most (72%) received sentences of up to four years' custody.
 - Sentences of ten years or more were reserved for those in a leading or significant role only.
 - Long sentences did not decrease, suggesting that serious offenders continue to receive severe sentences.
- The use of drug weight in sentences can produce disproportionate outcomes, i.e. around 10% of those in a 'lesser' role received longer sentences: all were carrying large amounts.

Sentences for Class A drug offences in England and Wales (2009-2013)

Different kinds of drug offences are distinguished in law, and attract distinct punishments proportionate to their seriousness. Around half of all offences involving possession of a Class A drug are dealt with through cautions (out of court) (see table 2), and most of those sentenced for drug possession alone receive a non-custodial sentence (94%). In contrast, production and supply offences receive more serious punishments: cautions are not common, and non-custodial sentences are used in only around a third of cases. 'Production and supply' includes a wide range of selling activities from social to commercial supply. The average sentence (3 years, 4 months) remained steady from 2009-2013. Drug importation and exportation offences are treated the most seriously: almost all defendants receive a long custodial sentence. Note that before and after the introduction of the guidelines, a small number of cautions and non-custodial sentences were given.

The sentencing guidelines have had a very limited impact on either the type of disposal (i.e. cautions, non-custodial), or sentence length for domestic drug possession and supply offences. However, the average sentence for drug importation offences decreased slightly. During 2009-2011, the average sentence was seven and a half years. In 2012, it fell to six years. In 2013, it increased to around seven years. The case is much clearer in cases of drug exportation (although these represent a very small number of cases annually) (see Table 2).

Variation in sentence length for drug importation offences

Following the introduction of the sentencing guidelines, shorter sentences were more commonly used for drug importation. During 2009-2011, around 60-65% of sentences were for 7 years, or less; however in 2012 and 2013, this rose to around 75%. This may be a long-term trend preceding the guidelines, however (see Figure 1).

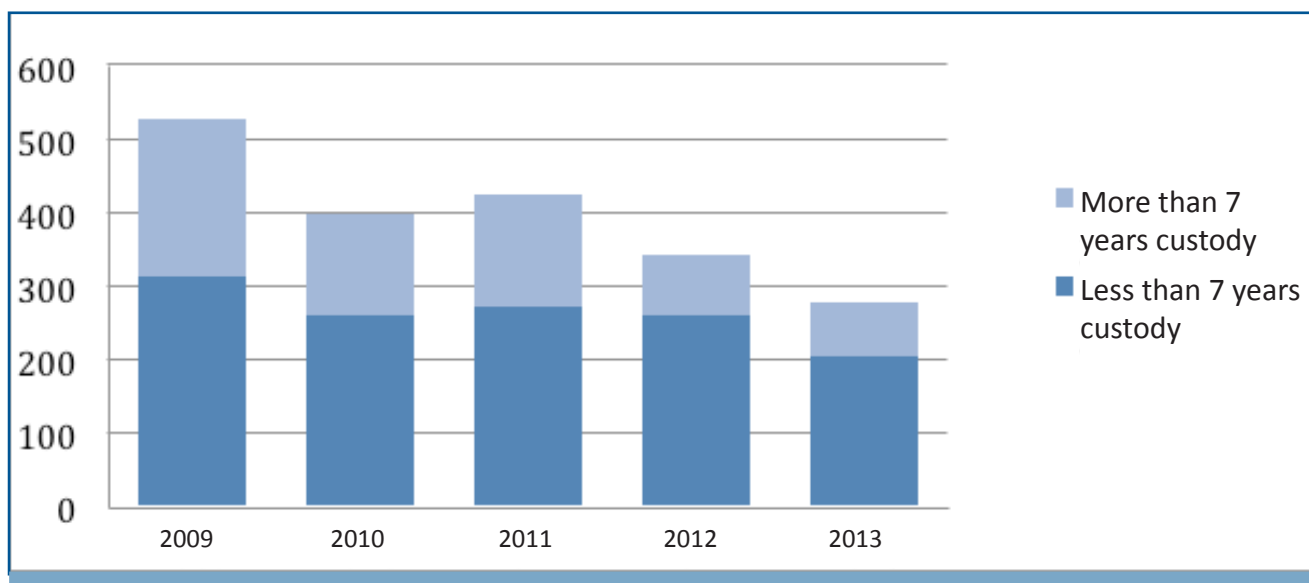
Furthermore, the portion of sentences of less than 4 years also increased (see Table 3). In 2013, 36% of sentences for drug offences were up to 4 years. Release from prison is automatic at the halfway

Table 2. Sentences for drug offences in England and Wales (2009-2013), data from the Court Proceedings Database						
	Class A drugs	2009	2010	2011	2012	2013
Importation	Total (sentences and cautions)	543	408	440	346	297
	Cautions Issued (as percentage of total)	4 0.7%	2 0.5%	4 0.9%	1 0.3%	10 3.4%
	Total Sentenced	539	406	436	345	287
	Custodial sentences	528	397	426	340	278
	Non-custodial sentences (as % of total sentences)	11 2%	9 2%	10 2%	5 1%	9 3%
	Average Custodial Sentence Length (months)	90.7	86.2	90.5	72.3	85.2
Exportation	Total (sentences and cautions)	31	18	15	12	18
	Cautions Issued (as percentage of total)	3 10%	4 22%	0	0	0
	Total Sentenced	28	14	15	12	18
	Custodial sentences	25	14	15	12	17
	Non-custodial sentences (as % of total sentences)	3 (11%)	0	0	0	1 (6%)
	Average Custodial Sentence Length (months)	92.5	89.4	100.4	58.8	55.2
Production, supply and possession with intent to supply a controlled drug	Total (sentences and cautions)	6737	6392	5702	5441	5861
	Cautions Issued (as percentage of total)	202 3%	134 2%	147 3%	146 3%	142 2%
	Total Sentenced	6535	6258	5555	5295	5719
	Custodial sentences	4826	4550	4222	4135	4362
	Non-custodial sentences (as % of total sentences)	1709 35%	1708 38%	1333 32%	1160 28%	1357 31%
	Average Custodial Sentence Length (months)	37.9	39.1	40.6	39	41.9
Possession of a controlled drug	Total (sentences and cautions)	27178	23569	22600	20858	20108
	Cautions Issued (as percentage of total)	13508 50%	11394 48%	12001 53%	11151 53%	10682 53%
	Total Sentenced	13670	12175	10599	9707	9426
	Custodial sentences	776	779	630	573	545
	Non-custodial sentences (as % of total sentences)	12894 (94%)	11396 (94%)	9969 (94%)	9134 (94%)	8881 (94%)
	Average Custodial Sentence Length (months)	5.6	4	5	5.4	4.4

point for custodial sentences of 4 years or less, in England and Wales. Thus, sentences of 4 years can be read as a reality of 2 years of custody.⁵³ For

sentences over 4 years, prisoners can apply for early release at the halfway point, and the vast majority are released before their full term.⁵⁴

Figure 1. Increase in sentences of less than seven years



The use of very long sentences (ten years to life) did not decrease overall following the introduction of the guidelines. In 2013, nearly 1 in 5 drug traffickers received a sentence of ten years to life. Whilst there appears to be an increase in short sentences, this has not been accompanied by a clear decrease in long sentences. Post 2012, sentences appear to evidence some bifurcation between traffickers meriting very long sentences, and couriers meriting a shorter sentence.

Defendants' role

Data from the Crown Court Sentencing Survey show that taking 'role' into account results in

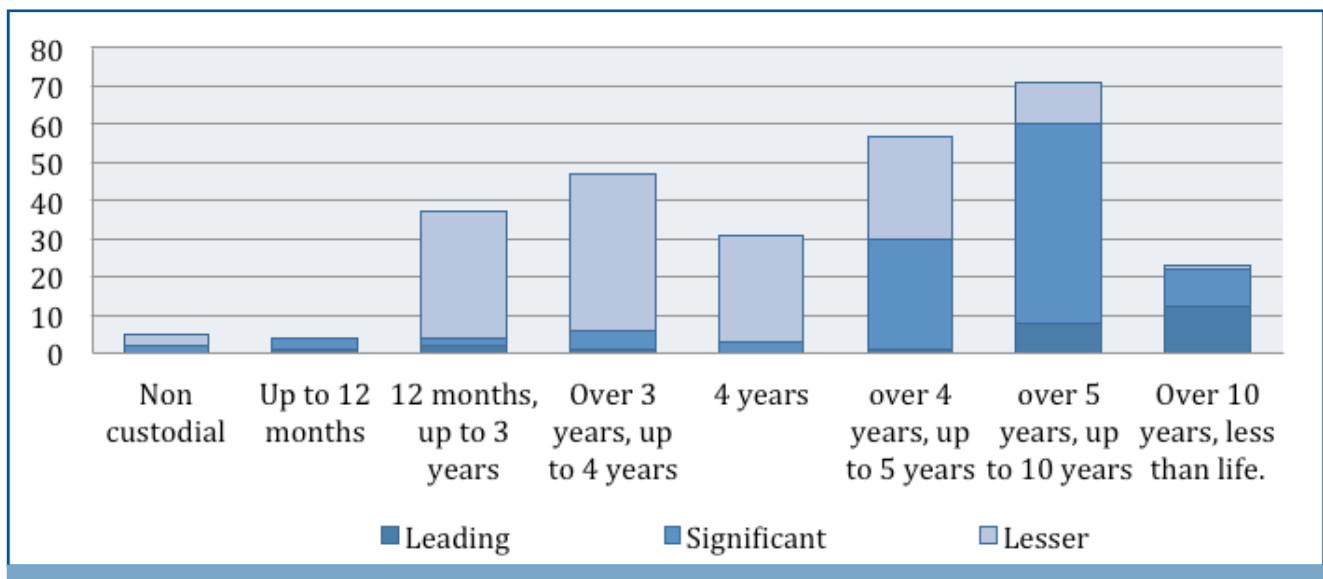
more proportionate outcomes. Although the Sentencing Council originally estimated that around 10-30% would be drug couriers,⁵⁵ in fact around 50% were noted as being in a 'lesser' role (congruent with that of a mule or courier). Less than 10% of defendants were considered to be in a leading role, and around a third were thought to be in a significant role.

There is a strong relationship between the defendant's role and the sentence received. Sentences of over ten years were reserved for those in a leading or significant role only. 86% of those who received a sentence of 4 years or less were in a lesser role.

Table 3. Variation in sentences for drug offences (2009-2013, Court Proceedings database)

	2009	2010	2011	2012	2013
Less than 4 years (percentage of year)	79 15%	73 18%	96 23%	143 42%	100 36%
Over 4 years, less than 7 years (percentage of year)	234 44%	187 47%	175 41%	117 34%	104 37%
More than 7 years, less than 10 years (percentage of year)	122 23%	80 20%	65 15%	43 13%	22 8%
More than 10 years and less than life (percentage of year)	91 17%	56 14%	89 21%	37 11%	52 19%
Total immediate custody	526	396	425	340	278

Figure 2. Length of sentence by defendant's role (Q2-4 of 2012 and 2013, Crown Court Sentencing Survey)



However, even when judges acknowledge the minor role of couriers' involvement, they may still receive a significant sentence. Of those receiving sentences of 5 years or more, 13% (12) were recorded as being in a lesser role.

The explanation for this disproportionality appears to be that defendants were carrying large drug quantities. In three quarters of instances (9), an indicative quantity of 5 kilos is recorded.⁵⁶ Most had no previous convictions; mitigating factors are recorded in 7 cases (including being of good character; that this was an isolated incident, and in two cases that the offender's vulnerability had been exploited). Interestingly, these same kinds of mitigating factors were also noted in cases where the defendant received less than four years' custody. This suggests that the mitigating factors have a limited impact, and that drug weight continues to be important in sentencing drug couriers. Thus, over-reliance on the issue of drug quantities undermines the intention of lowering sentences for drug couriers.

A further possible explanation for long sentences is a lack of guilty plea. Most of those in a lesser role who received sentences of 5 years or more, did not plead guilty at the earliest opportunity. In general, those in a lesser role were the most likely to plead guilty at the earliest opportunity (56%, compared to just 16% of those in a leading role), and three quarters of those in a lesser role received the maximum discount for guilty plea

(33% discount). In comparison, only 12% of those in a leading role received the maximum discount for guilty plea. Thus it also seems that judges are sympathetic to drug couriers who plead guilty and award the maximum discount.

Concluding remarks

Taking the defendant's role into account is a novel development in sentencing for drug trafficking offences, even though sentencing guidelines have a long precedent in the USA. Analysis finds that consideration of role in England and Wales led to shorter sentences for those in a 'lesser' role. The number of short sentences has increased reflecting the large portion of offenders in a lesser role, whilst a small number of serious offenders received long sentences. Sentencing therefore better distinguishes between drug mules/couriers and more serious offenders after the introduction of the guidelines.

Nonetheless, this is arguably a very limited degree of 'proportionality', established only in relationship to *other* roles in drug trafficking. Sentences for trafficking cocaine and heroin are still high, both in comparison to non-violent crimes in England and Wales, and in relation to sentences for drug mules internationally. Recent reforms in Ecuador arguably go much further and will ensure that no drug courier would receive a sentence longer than 7 years, and many will receive lower sentences of 1-3

years (in cases involving less than 2 kilos).⁵⁷ An interesting finding is that in fact around 10 drug traffickers a year receive non-custodial sentences (representing a very small percentage of the total). Given that drug couriers generally have no prior criminal record, and have committed a non-violent offence, non-custodial sentences may be significantly more appropriate. Unfortunately

the sentencing guidelines in England and Wales did not consider these as a viable option.

While consideration of role supports proportionality, the continued use of drug weights as a proxy for harm undermines proportionality. After the introduction of the guidelines, 13% of those in a 'lesser' role received sentences of 5

Box 1: Impact of the sentencing guidelines on women drug couriers

The impact of the sentencing guidelines is more profound for women, mainly since they are more likely to be recorded as being in a 'lesser' role than men (see Figure 3). This reflects the picture from research, which concludes that most women involved in drug trafficking do so as drug mules.⁵⁷ The average sentence length given to women took a clear downward trend after the introduction of the sentencing guidelines, (see Figure 4). A before/after comparison shows that after the introduction of the guidelines, 90% of women received

sentences of 7 years or less, compared to 70% before (see figure 5). This is a more significant change than for men (see Figure 5). Whilst 10% of women received sentences of over 10 years in 2009-2011; after the introduction of the guidelines this dropped to just 2%. Note that analysis according to nationality or ethnicity is not possible, as these data are not routinely recorded. Thus these effects may not apply equally to all women. Nor is it possible to understand if caring responsibilities had a clear impact on sentence length.

Figure 3. The relationship between women and role in drug trafficking (Q2-4 of 2012 and 2013, Crown Court Sentencing Survey)

	Lesser	Significant	Leading	Total answered
Women	36 (72%)	12 (24%)	2 (4%)	50 (100%)
Men	109 (48%)	94 (42%)	23 (10%)	226 (100%)

Figure 4. Average sentence for drug importation offences (by gender) (2009-2013, Court Proceedings database)

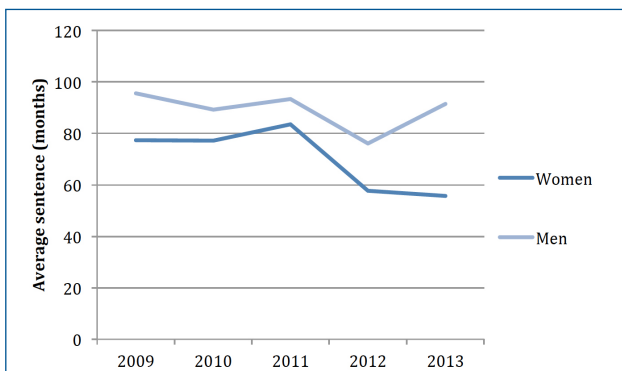
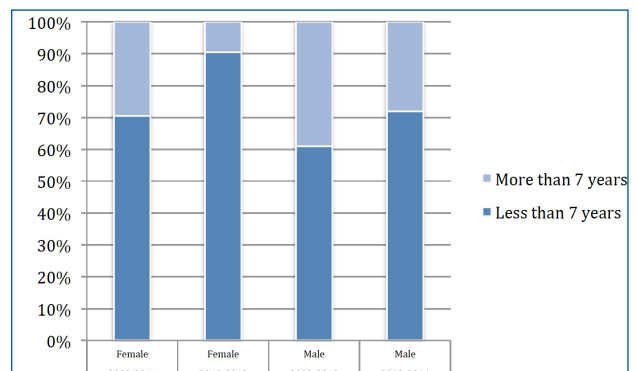


Figure 5. Before and after comparison, percentage of sentences of less than 7 years' custody (2009-2013, Court Proceedings database)



years or more, due to being caught in possession of large drug quantities. Given that drug mules have no say over what they carry, additional custody for greater quantities seems arbitrary. The use of drug weights as a proxy for harm is not unique to England and Wales, and can also be found in most countries in Europe, the USA⁵⁸ and the new Ecuadorian penal code.⁵⁹

Nonetheless, the use of role is novel, and represents an important instance of sentencing innovation, which may serve as a useful example for other nations reviewing their punishments for drug trafficking with the aim of achieving greater proportionality. Interestingly it suggests that, in some cases, it may be possible to reduce penalties for drug mules without amending existing laws or core legislation. Nonetheless, this kind of reform makes sense in England and Wales, where there exists a long tradition of distinguishing between different drug trade roles, and cannot simply be transported to other legal systems, without due attention to the distinct logics upon which these operate. Nonetheless, analysis suggests that formalising role, and in particular recognising drug couriers as a distinct and minor role, enables judges to make more emphatic, clearer distinctions between categories of drug trafficker.

Recommendations

On the basis of the analysis above, recommendations can be made for developing sentencing guidelines that support the principle of proportionality, in the case of drug couriers, or mules.

- 1. Accounting for offenders' role** – Taking of offenders' role and motivation into account during sentencing is practically feasible and seems to lead to more fair and proportionate outcomes. This may be a fairly high portion: the Sentencing Council anticipated that mules comprise 10-30% of sentenced drug traffickers, but judges recorded around half as being in the 'lesser' role, which is meant to describe drug mules.
- 2. Drug quantities** – The use of drug quantities is the most widespread criteria for establishing proportionality in sentencing, but it is a blunt, and often misleading, guide to seriousness of offence. Quantity

should not be the only or the main basis for sentencing. Focusing on drug weight can be arbitrary, and can punish minor offenders more heavily.

- 3. Ensuring a balance in judicial discretion** – Sentencing guidelines must be open to judicial discretion and interpretation. The guidelines are not exhaustive, and are intended to guide decisions, rather than strongly predict them. Note for example, that a small number of non-custodial sentences are given for drug trafficking each year, representing a significant departure from the sentencing guidelines in the interest of justice.
- 4. Deterrence** – Sentencing reform is often resisted on the basis that long sentences deter offenders. The guidelines demonstrate that sentences for drug mules can be lessened, proportionate with their role, whilst maintaining longer sentences for the most serious and violent offenders.
- 5. Sentencing reform without legal change** – The sentencing guidelines show that improvements in proportionality of sentencing can be achieved without necessarily amending drug laws, at least in some cases. Readers should note that the UK drug law makes clear distinctions between possession, production and trafficking, thereby ensuring a degree of proportionality for drug offences. Other countries facing large numbers of 'mules' cases may find it fruitful to identify drug couriers as a distinct role in the drug trade meriting distinct, lesser punishment. Nonetheless, this may have little impact without greater legislative reform.
- 6. Monitoring and evaluation** – Analysis in the UK is possible due to on-going monitoring of sentencing. The Crown Court Sentencing Survey is not a complete dataset, however it does enable analysis of contemporary sentencing developments and offers data around each person's offence, personal characteristics (including gender and personal circumstances) and sentence imposed.

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Endnotes

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About this briefing paper

'Drug mules' are now recognised as a distinct category of drug offender. It is widely agreed that they play a minor role in the international drug trade, and are sometimes coerced or tricked into carrying drugs across borders, and so merit lesser punishment proportionate with their lesser role. In 2010, the United Nations upon nations to ensure that punishment for drug offences is proportionate.

This briefing paper examines a sentencing innovation introduced in England and Wales in 2012, with the stated aim of achieving greater proportionality in the sentencing of drug mules. Analysis shows that greater proportionality has been achieved, although some caveats must be made. Addressing disproportionality especially benefits women drug couriers. Critics have previously noted that excluding mitigation, including caring responsibilities, has produced a double disproportionality.

Sentencing reform in England and Wales is an important example of reform with potential international relevance to nations currently reviewing sentencing for drug trafficking offences, that can usefully inform the development of more proportionate punishments for drug couriers.

About IDPC

The International Drug Policy Consortium is a global network of non-government organisations that specialise in issues related to illegal drug production and use. The Consortium aims to promote objective and open debate on the effectiveness, direction and content of drug policies at national and international level, and supports evidence-based policies that are effective in reducing drug-related harm. It produces briefing papers, disseminates the reports of its member organisations, and offers expert advice to policy makers and officials around the world.

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