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Committee                           **Sentencing Committee**

Response to                         **Drug Offences Guideline Consultation**

Issued by                           **Sentencing Council**

Link to consultation                <http://tinyurl.com/6albq82>

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**Q1    Do you agree with the proposed groupings of offences into five guidelines?**

Yes.

**Q2    Do you agree with the Council's approach to the issue of purity? If you do not agree, it would be helpful to the Council if you would explain your reasoning.**

We agree with the Council's approach to purity. If evidence is given that drugs of high purity would normally be cut to produce say four times the quantity then that end amount could have been utilized. Without evidence of this kind however, magistrates would have to refer to the actual quantity found. The bench should not be guessing the degree of potential harm in terms of quantity – the actual harm would depend so much on what it was cut with as well as how much it produced.

Purity is however, a nebulous idea. It might not be unreasonable to assume that the greater the purity, the potentially the nearer to source/wholesaler.

Should purity be treated as an aggravating feature in the same way that drugs found to have been mixed with other harmful substances is? Given the potential for serious injury and/or death from such imperfections/imperfections, then some consideration as to how to treat the seriousness of this scenario should be given.

It should be noted that unless it is made mandatory that all drugs are checked for purity prior to any court hearing, it would add complexity and delay if purity had to be considered in the magistrates' court.

One issue that appears not to have been mentioned is the impurities used in 'cutting' heroin or cocaine. If it is just talcum powder then that is not, we understand, particularly toxic but sometimes the dealers 'cut' with dangerous substances and evidence of doing this should be an aggravating feature. Similarly cannabis growers sometimes sprinkle ground glass or sand on the growing buds and the plant grows round and encloses these thereby adding to the weight – this can be very damaging to the lungs if smoked and should also be an aggravating feature.

A minority view felt that factoring in purity in this respect, would be too complex and unwieldy. There is also the question as to whether the dealer was aware of the purity in the first place.

**Q3. Do you agree with the Council's approach of separating Classes B and C?**

Yes, it is correct to deal with each class of drug separately as this is in line with the primary legislation. Prosecutions for Class C are rare now that cannabis has been reclassified to Class B.

**Q4. Do you agree that the court should be referred to the guideline for supply or possession (according to intent) when the quantity of drug involved in the offence is very small?**

Yes, we agree that this is a logical and flexible approach allowing the court to take a decision based on the facts of the individual case. We believe it is likely to be the incoming or returning tourist from abroad and not even a drug mule when quantities are so small, ie the carrying of drugs is not the purpose of the journey and the value of the drugs is less than the cost of the ticket.

Some members agreed that it is appropriate to sentence as for supply or possession but said that the guideline should be repeated if it is charged as importation as magistrates would expect to find the guidance under that heading.

A small minority of members believe that the treatment of importation of a very small quantity of drug consistent with personal use is worrying. Importation is the beginning of a process that can lead to other minor, although significant numbers, of other crimes. It is virtually impossible to distinguish between a social drug user and a small time dealer. Therefore the minimising of the seriousness of importation of even small quantities is sending out the wrong message.

**Q5. Do you think that supplying to an undercover police officer should be included in the guideline? If yes, please state at which stage.**

No, we do not consider that supplying to an undercover police officer should be treated any differently. As the officer would be undercover then the supply is no different to supplying anyone else and does not affect seriousness. There are safeguards in place in law to protect against people being 'set up' by the police and magistrates are aware of the issues.

**Q6. Do you agree that possession of a drug in a prison should put an offender into the most serious offence category for possession offences?**

Yes, possession of an illegal drug within a prison should be in the most serious category. Drug dealing in prison is regarded as very serious as there is a potential for serious harm that can occur in many ways - intimidation, undermining drug treatment, profit, control etc. In addition, it should be an aggravating feature if the offender is a prison officer or other member of prison staff.

It is acknowledged that the CPS might decide that it is not in the public interest to prosecute a serving prisoner. However, we would hope that if loss of parole or early release credit has been used, the CPS would consider prosecution to be in the public interest.

A small minority of members felt that possession of a small amount for personal use in prison might not be more serious than the same offence on licence. Drugs are a potent currency on the street too and fuel corruption etc.

**Q7. Should 'medical evidence that a drug is used to help with a medical condition' be included as a mitigating factor for possession offences?**

The majority of our members felt that it should be included as a mitigating factor but that it must be supported by medical evidence and dealt with on a case by case basis. Medicinal cannabis is available on prescription for certain recognised illnesses in some areas - but not all. If the defendant can bring evidence to court that they have been attempting to obtain the drug by legal means and they bring written evidence from their medical practitioner that the use of the drug can alleviate the symptoms of their illness, then this should be a convincing mitigating factor.

An example of medicinal cannabis being subscribed in some areas but not all is the drug Sativex, a cannabis-based oral spray which was approved in 2010 for treatment of spasticity in people with MS. Sativex will not be undergoing consideration by the National Institutes for Health and Clinical Excellence which means that decisions to fund Sativex are made at a local level so whilst some local health authorities routinely prescribe the drug, others do not and people with MS in those latter authority areas may be tempted instead to try cannabis in its illegal form. These people are using the drug in an attempt to alleviate medical symptoms and as such should not be treated in the same way as recreational users. If they can provide evidence that a cannabis based drug exists for their medical condition but which is not available to them then that should be a strong mitigating factor. If obtaining the evidence delays the judicial process then that has to be accepted in the interest of justice and fairness. The number of people to which it will apply will be very small.

A significant minority of members however, felt that any mitigation surrounding the claim that cannabis is taken to alleviate a medical condition would cause unjustifiable delays by requests for adjournments to seek medical evidence which in most cases would be inconclusive in any case. It was felt that consideration of medical benefits was an unnecessary complication.

**Q8. Do you agree with the quantities set out for each of the drug guidelines?**

We suggest that the quantity of what is regarded as a very small amount for personal consumption should be defined as what might be deemed 'reasonable' for immediate use by one person or a maximum street value.

Magistrates need to be able to adapt these quantity guidelines to other substances which are not listed. It might be worth looking at a system whereby the number of ecstasy tablets represents the number of "doses" and to find an equivalence that way for another substance. This assumes that (in the case of possession quantities) that because category 4 covers up to 2 ecstasy tablets, 9.9g of cannabis makes two reefer. This may be a false assumption. Another way would be to enquire about the current street values and translate from one drug in the same class to another through value. Magistrates are capable of working out a way of doing this for themselves whilst in court, depending on what information is presented to them if no other guidance is available. The key element here though is that the quantities are guidelines only, and that each case must be treated according to all the factors involved.

**Q9. Do you agree with the roles as proposed for each of the offences covered by the draft guideline?**

Most members agree with the roles as proposed for each of the offences covered by the draft guideline, bearing in mind that these are guidelines and magistrates will be

able to use the examples to decide the appropriate category in real cases. Again, the key element is that each case must be treated according to all the factors involved.

Some members felt that the hierarchical model of roles provided for importation offences (and for production/cultivation offences) consisting of Mr Big/middle operatives/pawns is less applicable to supply/possession with intent to supply offences.

The possession of scales/equipment/unexplained bundles of cash does not mean a leading role in a hierarchical operation but sometimes a small "sole trader" who buys from a bigger "sole trader" so he may have a leading role but in a one-man band. We question whether that is comparable with a Mr Big in a hierarchical operation, and if such small traders are classified as having a leading role, we question whether a starting point of 5.5 years for a very small quantity of Class A will not lead to heavier sentencing.

The street dealer, operating on his own account and for profit, and thereby classified as having a leading role in the draft guideline, could in reality be at the lowest level of the organization, if there is in fact an organization at all, and be more properly classified as significant, because he 'acts as a link in the chain'.

Although the roles described in the guideline are clear and easy to understand, there may be difficulties in court when there is limited information available. In the case of an offender in the magistrates' court, pleading guilty to a supply or possession with intent to supply offence, the court may only know some details of the circumstances of the arrest and any previous convictions. That may be sufficient to decide that the offender had a subordinate role because it was a non commercial supply to friends, but it is unlikely to help distinguish between a leading and a significant role. Possession of equipment such as scales is the kind of information which is likely to be mentioned in an arresting officer's statement and our concern is that it will lead to all such offenders being classed as leading. This is important because the starting points for a significant role are one third or one quarter of those for a leading role.

The roles in the supply of drugs in prisons should be developed in more detail. It would seem that there are three types of supply offence in decreasing order of seriousness:

- Supply by prison officer to prisoner. This is the most serious because of the breach of a high level of trust and the opportunity for regular supplies to be smuggled into prison. This is correctly made a leading role offence. We believe that not just prison officers but any (eg civilian) employee of the Prison Service or NOMS should come into this category.
- Supply by visitor or similar bringing into prison. Less serious because the offender cannot do it very often (not daily) and usually no breach of trust but it is the route by which most drugs get into prison. This is a significant role offence.
- Supply by prisoner to prisoner inside prison. This is arguably the least serious of the three because once drugs are inside prison it is inevitable that they will be traded and it is the offence least likely to be prosecuted by the CPS as not being in the public interest to prosecute a serving prisoner. However it is not clear which category it falls in. Some prisoners will supply because they are being bullied and intimidated inside prison and therefore the prisoner to whom they supply should be regarded as having a leading or more culpable role. In other cases the prisoner making the supply will be doing the bullying and intimidation to acquire the drugs.

**Q10. Do you agree with the aggravating and mitigating factors outlined for each of the offences covered by the draft guideline?**

We welcome the fact that the tables clearly state that the list given is non-exhaustive as this allows judicial discretion.

The approach to 'sole or primary carer for dependant relatives' is a concern. If such a person had a drug conviction then they would be deemed unsuitable to work with / care for vulnerable people. It is more likely that harm will occur under the influence of drugs than not, therefore we believe that this fact should not be treated as mitigating.

A minority view however, felt that caring for a dependent should count as personal mitigation in drug offences as it does for other offences. It's true that certain offenders will clearly demonstrate by their offence that they are not fit carers but for others it is unlikely that the offence by itself will disqualify them. The court should be able to take a view from the evidence presented. It is noted that the same mitigation factor is included in the recently published Assault Guidelines. The same arguments apply to both sets of guidelines and if included for assault, there would seem no logical reason to exclude it here.

We would like to ensure that the tariff is raised to its highest where suppliers are attempting to deal to a minor.

For production and cultivation offences an additional aggravating factor is the offender who rents private domestic premises, but then carries out unauthorized internal alterations, not just bypassing the electricity meter, but also for example, interfering with and adding to electrical cables and water pipes, fortifying the premises against intruders and booby-trapping the points of access such as windows and doors to frustrate entry by law enforcement officers, and generally leaves the premises uninhabitable and/or requiring substantial remedial expenses falling to the owner.

**Q11. Do you think that there are any other factors that should be taken into account at these two steps?**

Age is correctly identified as a factor. These are adult guidelines but there are no separate youth guidelines so magistrates rely on them to provide a basis and the reduction to account for youth or immaturity would sensibly come at this stage.

A minority of members do believe that it is appropriate to take into account a role as sole or primary carer before deciding on a custodial sentence, along with other factors, but it would make more sense to group them under another heading because they do not reduce seriousness and they are not offender mitigation – they are factors which may make a particular sentence unsuitable or undesirable for a particular offender - maybe under 'additional factors' and on the mitigation side should be listed serious medical conditions, carer responsibilities, and vulnerability of offender (ie likelihood of self harm or suicide while in custody). But if reasons not to send someone to prison are going to be listed, shouldn't other lists be included of reasons not to sentence in other ways, eg erratic shift patterns, no stable address etc – which can have just as great a bearing on viability of curfew. It is suggested that all these factors, which certainly need considering, should be put in a new Step 3 - Practicality.

**Q12. Do you agree with the proposed offence ranges, category ranges and starting points for all of the offences in the draft guideline?**

Yes subject to comments under Q9.

**Q13. Are there any ways in which you think victims can and/or should be considered in the proposed draft guideline?**

Community impact statements are desirable to assess the harm to communities. In family proceedings, the court often hears of the harm to children caused by drug addicts regularly coming to the house to obtain supplies but this information is less often available to the criminal court. Every effort should be made by the prosecution to see that impacts statements are brought to the attention of the court.

Society in general is the victim of drug use and abuse and the positive effect of putting a dealer away should be taken into account when sentencing, even if, as is probably the case, the trade in drugs is disrupted rather than stopped.

**Q14. Is there any other way in which equality and diversity should be considered as part of this draft guideline?**

The guideline is quite complex but fairly clear to follow and should hopefully convince the public that the courts give full consideration to these offences and do not sentence arbitrarily.

**Q15. Are there any further comments that you wish to make?**

Typical cannabis cultivation cases heard in magistrates' courts

The Association does not have any evidence or information about the quantities involved in offences sentenced by magistrates' courts. Based on current MCSG advice it assumes that those cases sentenced in the magistrates' courts have taken place in domestic premises used as a normal residence and so possibly just one room has been used for cannabis production. It assumes that all those cases where the whole house has been taken over and adapted for cannabis production have been committed to the Crown Court.

Early intervention

If first time offenders are given more productive intervention this could reduce the likelihood of their re-offending, thus bringing a long term benefit overall. Although this is at a financial cost, the long term benefit should be considered as it could ultimately outweigh the short term deficit.

Training

When drugs have been 'cut' with potentially dangerous substances such as powdered bleach and rat poison this should also bring the offence to a higher tariff, the only problem here is to identify who has carried out the cut as the dealer at the end of the supply chain is less likely to have than those higher up and nearer the original importer/manufacturer. In the case of manufacture this could be more easily identified, or where a supplier/dealer/ has the facilities and equipment for cutting the drug and there is sufficient evidence that the substance found in the drug is found at the premises. This requires the drugs purity to be tested before coming to a hearing.

This does require better knowledge and understanding for those dealing with these offences both in the Crown and magistrates' courts. Training for **all** judiciary could be implemented as a joint scheme, which would be very cost effective.

### Quantities

The level of detail in the draft guideline is helpful. However, in reality how should the court consider, for example, number of cannabis plants – 2 large plants and 20 seedlings – should it be assumed that the offender is a second Alan Titchmarsh and all the seedlings will grow or is s/he more inept than that and hoping for, say, a 25% success rate? According to the guidelines, such a production could result in anything from a very small amount to a medium quantity - a difference between a Band C fine and 26 weeks custodial sentence!

### Skunk

There should be some differentiation between skunk and other cannabis as skunk is so much stronger and can therefore cause much greater harm. We would therefore suggest that the aggravating factor in tables 3 and 6 “exposure of others to more than usual danger, for example drugs cut with harmful substances” could explicitly add “or supply of a strong strain of drug such as skunk cannabis”.

### Confiscation orders

The consultation paper proposes that research into the effectiveness of confiscation orders should be carried out and the Association welcomes this initiative. We also feel more vigorous use of confiscation orders in relation to motor vehicles should also be investigated. The use of cars is often central to drug dealing and dealers are often seen in very superior motors – a recent example put forward by a member was a Bentley being driven by an individual on benefit with no other visible source of income.

### Co-ordination between agencies

As sentencers we recognise that a sentence should have purpose and also have the potential to succeed. We believe that there could be greater co-ordination between agencies in the management of offenders including the sharing of information. Many of those who are constantly before magistrates’ courts need some support, in addition to punishment, and more support than can currently be given by the probation service alone. In order to deal with offenders there needs to be greater ‘support’, including that offered by specific Drug Review Courts where magistrates work one to one with offenders. This management of offenders should include the local authority on behalf of all residents who are the silent ‘victims’ of the repeat behaviour resultant on drug abuse.