

22 April 2009

Dear Colleague

CONSULTATION PAPER ON SENTENCING FOR DRUG OFFENCES

The Sentencing Guidelines Council has asked the Sentencing Advisory Panel to produce advice on sentencing for drug offences. In line with its usual practice, the Panel has elected to produce advice for those offences which appear before the courts in large numbers and which either involve a significant use of custodial sentences or tend to result in custodial sentences of significant length. These offences are: importation and exportation; supply or offering to supply; possession with intent to supply; production; and possession. However, we have also decided to produce advice for the offence of permitting premises to be used for a drug related activity which, although it is sentenced less often, is closely related to offences involving supply or possession.

This paper relates to the sentencing of adult offenders only. Following a recent consultation, the Panel plans to produce advice to the Council on sentencing principles for youths, built around the very different sentencing framework that applies to young offenders; these will be available to guide the courts when sentencing a youth for drug-related offences.

The Panel is aware that there has been a considerable amount of media coverage in recent months concerning the comparative harmfulness of different drugs, the physical harms risked by users and the wider social harms associated with drug use and drug-related offending. All of these topical issues are discussed in our consultation paper and we hope that as many people as possible will take the time to respond to the questions we raise.

One of the most fundamental issues we are asking respondents to consider is the relative seriousness of drug offences compared with other forms of offending behaviour, in particular with offences of violence (including sexual offences) and dishonesty.

Another issue is to consider what is likely to be the most effective sanction for different types of offence and offender. Historically, lengthy sentences have been imposed (particularly for importation offences) with a view to deterring other offenders; questions are asked about the effectiveness of this approach and the extent to which there is a

greater deterrent effect in the use of the power to confiscate an offender's assets, possibly in conjunction with a serious crime prevention order. We also ask questions about the role in the supply chain played by so-called 'drug couriers' and the appropriate sanction for these offenders. The responses to these and our other questions will help to inform the Panel's approach in the advice that it submits to the Council.

Please send your response to Mrs. Lesley Dix, Secretary to the Panel, at the Sentencing Guidelines Secretariat, either by post to 4th floor, 8-10 Great George Street, London, SW1P 3AE, or by email to info@sentencing-guidelines.gsi.gov.uk. **Responses should be received by 15 July 2009.**

The names of those who respond to Panel consultation papers are listed in the published advice to the Sentencing Guidelines Council. **If you do not want your name to appear on the list, please state this clearly and your response will be recorded only as one of a given number of confidential responses; please note that an automatic confidentiality disclaimer generated by your IT system will not suffice.** Anonymous responses are also welcomed, although these are less helpful in allowing the Panel to understand the background to the views submitted.

Responses to consultation papers are not routinely published but the Freedom of Information Act 2000 (FOIA) places an obligation on the Panel to release all responses upon request, **including those submitted 'in confidence' or anonymously.** Under the Act there is a statutory Code of Practice on confidentiality with which public bodies must comply and, whilst we would take full account of any reasons given for regarding information as confidential, absolute confidentiality cannot be guaranteed.

Where a response from a private individual is to be released, the name, contact details and anything else that would obviously reveal the identity of the sender will be removed in accordance with the requirements of the Data Protection Act 1998.

Where a response submitted on behalf of a group, organization or public body is to be released, the name of the individual submitting the response will be removed but the identity and contact details of the group, organization or public body will remain.

Yours sincerely

Professor Andrew Ashworth

Chairman, Sentencing Advisory Panel

SENTENCING FOR DRUG OFFENCES

CONSULTATION PAPER

INTRODUCTION

1. The Sentencing Advisory Panel has been asked by the Sentencing Guidelines Council to produce advice on sentencing for drug offences. The Misuse of Drugs Act 1971 (MDA 1971) is the main piece of legislation creating offences relating to controlled drugs; this paper considers those drug offences which are sentenced frequently or result in either a significant number of custodial sentences or lengthy custodial sentences, namely production, importation and exportation, supply or offering to supply, possession with intent to supply and possession. Although not falling within those criteria, the Panel is also consulting in relation to the offence of permitting premises to be used for a drug related activity because it is so closely associated with offences of supply and use.

2. The Panel's normal approach is to propose guidelines for the sentencing of adult offenders only except for those offences in relation to which the proportion of offences committed by youths is particularly high. With the exception of possession of cannabis, the vast majority of drug offences are committed by adult offenders.¹ In addition, the sentencing framework for youths (offenders aged 10 to 17) is very different from that for adults and the Panel has recently² published a consultation paper with a view to establishing principles for sentencing young offenders. Accordingly, this consultation relates to the sentencing of adult offenders only.

3. The Council and Panel have considered sentencing for drug offences previously. In May 2000, the Panel produced advice on sentencing for the possession and importation of opium, which was adopted by the Court of Appeal in its judgment in *Mashaollahi*³ and, in May 2008, the Council published revised Magistrates' Court Sentencing Guidelines

¹ The number of adults sentenced in all courts in 2007 for drug offences (excluding possession of cannabis) was 29,550 (95%) compared with 1,705 youths (5%); OCJR, Nov 2008, Criminal Statistics, England and Wales, supplementary tables 2007, volume 5

² *Sentencing Principles: Youths*; 18 December 2008; see www.sentencing-guidelines.gov.uk

³ [2001] 1 Cr App R (S) 300, [2000] EWCA Crim 52

(MCSG) which include guidelines for the more common drug offences sentenced in a magistrates' court; these have been incorporated into the Panel's proposals.⁴

4. Section One of the consultation paper provides background information about the offences, Section Two describes the sentencing framework, and Section Three sets out the Panel's proposals.

⁴ The Court of Appeal asked the Panel in 2000 to produce advice on sentencing offences involving opium; existing guidelines based on weight and intended primarily for cocaine and heroin offences were thought inappropriate as opium had a lower street value (*Importation and Possession of Opium – Advice to the Court of Appeal*: 3, May 2000, page 1, www.sentencing-guidelines.gov.uk.) The resulting judgment in *Mashaollahi* maintained comparisons based on weight equivalencies, but with street value and purity being secondary factors. The number of opium offences sentenced each year continues to be small (opium offences are recorded within the wider category 'other class A' for which there were only 319 sentences recorded in 2007. Home Office data records 36 seizures of opium in 2006/7 and the FSS is aware of 23 seizures in 2008; in both cases, most quantities are small). However, opium has been included in this consultation on the basis that the judgment in *Mashaollahi* will be superseded by the Council's definitive guideline.

SECTION ONE: BACKGROUND INFORMATION

THE OFFENCES

5. A controlled drug is defined by section 2 of the MDA 1971 as any substance specified in Parts I, II or III of schedule 2 to the Act. The drugs are classified according to assessments of the harm they cause to individual users and to society as a whole. The classifications are class A, class B and class C. Class A drugs are considered to be the most harmful, classes B and C respectively less harmful. The classification system does not distinguish between the harm caused by individual drugs within a class. Statutory maximum penalties vary depending on the nature of the illegal activity and the class of drug. The maximum penalties are set out in annex A and a summary is provided below.

Table 1: Classification of drugs and maximum penalties (length of custody)

Offence type	Classification, examples of type of drug Maximum penalties		
	Class A	Class B	Class C
	Heroin, cocaine, crack cocaine, LSD, Ecstasy, ⁵ opium, magic mushrooms, amphetamines (for injection), methylamphetamine,	Amphetamines, barbiturates, cannabis, ⁶ codeine	Temazepam, anabolic steroids, valium, ketamine, gamma-hydroxy butyrate (GHB)
Importation/ Exportation	Life*	14 years	14 years
Supply/possession with intent to supply	Life	14 years	14 years
Production	Life	14 years	14 years
Permitting premises to be used	14 years	14 years	14 years
Possession	7 years	5 years	2 years

* Section 110 of the Powers of Criminal Courts (Sentencing) Act 2000 provides that a court should impose a minimum sentence of at least seven years imprisonment for a third class A trafficking offence except where the court is of the opinion that there are particular circumstances which (a) relate to any of the offences or to the offender; and (b) would make it unjust to do so in all the circumstances.

IMPORTATION, EXPORTATION AND SUPPLY

Importation and exportation

6. Under the combined effect of section 3 of the MDA 1971 and section 170(2) of the Customs and Excise Management Act 1979, an offence of *importing or exporting* a controlled drug is committed where an offender knowingly is engaged in fraudulent

⁵ This is the more commonly used street name for the drug Methylendioxyamphetamine (MDMA).

⁶ Moved from class C to class B with effect from 26 January 2009 by The Misuse of Drugs Act 1971 (Amendment) Order 2008 (SI 2008/3130)

evasion of a prohibition by bringing into or taking out of the UK a controlled drug.⁷ This offence covers a wide range of behaviour and includes individuals at all levels of the supply chain, from the serious criminals who mastermind the operation to those who carry the drugs. In 2007, 824 offenders were sentenced for the importation and exportation of drugs. Reflecting the seriousness of this type of offending, the courts imposed a custodial sentence in the majority of cases (see table 2 below and annex B).⁸

Table 2: Importation and exportation of a controlled drug (2007), adults only.#

Sentence type	Class A		Class B		Class C	
	No.	%	No.	%	No.	%
Total sentenced	548	100	23	100	253	100
Abs/cond discharge	4	1	3	13	4	2
Fine	9	2	2	9	7	3
Community	9	2	3	13	5	2
Suspended sentence	7	1	3	13	18	7
Custody	518	95	12	52	219	87
Other	1	-	0	-	0	-
<i>Average custodial sentence (months)</i>	<i>88.0</i>	<i>-</i>	<i>59.7</i>	<i>-</i>	<i>27.2</i>	<i>-</i>

The statistics record an additional 43 offenders sentenced for this offence where the class of drug was unknown

Supply or offering to supply a controlled drug

7. Under section 4(3) of the MDA 1971, an offence of *supply* of a controlled drug is committed when an offender provides the drug to another person. This includes the return of controlled drugs by a ‘custodian’ to the original supplier. No financial payment needs to have been made and the offence can be committed regardless of whether or not the offender was willingly in possession of the drugs supplied.⁹ Where an offender makes an offer to supply a controlled drug, there is no need to prove that the offender intended to produce the drugs or had drugs in his/her possession. The offence may be charged where an offender was dishonestly intending to supply a fake in place of the genuine drug. As can be seen in table 3, of the 3,097 offenders sentenced for this offence in 2007, the majority (2,486 (75%)) were sentenced for supplying or offering to supply a class A drug (most commonly heroin, cocaine, crack and ecstasy). Fewer offenders were sentenced for supply or offering to supply a class B (85) or a class C drug (526). An immediate custodial sentence was imposed for the majority of offences relating to class A drugs. There was

⁷ Only a small number of offences sentenced are for the exportation of a controlled drug. However since the activities involved in the importation and exportation of a controlled drug are not significantly different in nature, guidelines are proposed for both offences.

⁸ Annex B is not available in hard copy because of the volume of data presented; it may be viewed in the electronic version on our website at www.sentencing-guidelines.gov.uk

⁹ In *Panton* [2001] EWCA Crim 611, the Court of Appeal held that the phrase ‘supply’ includes the retention and return of controlled drugs deposited with a “custodian” by another person and applied notwithstanding the custodian’s lack of consent to the arrangement.

greater use of suspended sentences and community orders for those offences relating to a class B or C drug.

Table 3: Supply or offering to supply a controlled drug (2007), adults only. #

Sentence type	Class A		Class B		Class C	
	No.	%	No.	%	No.	%
Total sentenced	2,486	100	85	100	526	100
Abs/cond discharge	19	1	2	2	30	6
Fine	13	1	6	7	35	7
Community	293	12	24	28	129	25
Suspended sentence	377	15	26	31	158	30
Custody	1,762	71	26	31	164	31
Other	22	1	1	1	10	2
<i>Average custodial sentence (months)</i>	39.5	-	24.2	-	13.8	-

The statistics record an additional 228 offenders sentenced for this offence where the class of drug was unknown

Possession with intent to supply

8. Under section 5(3) of the MDA 1971, an offence of *possession with intent to supply* a controlled drug is committed where an offender has been found in possession of a controlled drug and is intending to supply it to another at some future point. As can be seen in table 4, of the 5,058 offenders sentenced for this offence in 2007, the majority (3243 (63%)) were sentenced for possession with intent to supply a class A drug (most commonly heroin, cocaine, crack and ecstasy). Almost a third of offenders (1,518 (30%)) were sentenced for possession with intent to supply a class C drug (cannabis and other class C drugs) and far fewer (297 (8%)) for a class B drug (amphetamines). Overall, an immediate custodial sentence was imposed for the majority of these offences; a suspended sentence order was imposed for a significant proportion of cases involving a class B drug and slightly more often than an immediate custodial sentence for a class C drug. Whilst the proportionate use of custodial sentences was higher in relation to class B drugs than for the offence of supply, the number of cases is small and the Panel does not consider that this indicates any significant difference in approach.

Table 4: Possession with intent to supply a controlled drug (2007), adults only. #

Sentence type	Class A		Class B		Class C	
	No.	%	No.	%	No.	%
Total sentenced	3243	100	297	100	1,518	100
Abs/cond discharge	26	1	8	3	22	1
Fine	35	1	6	2	52	3
Community	316	10	44	15	381	25
Suspended sentence	473	15	101	34	515	34
Custody	2363	73	137	46	509	34
Other	30	1	1	-	39	3
<i>Average custodial sentence (months)</i>	<i>37.0</i>		<i>19.5</i>		<i>15.3</i>	

The statistics record an additional 68 offenders sentenced for this offence where the class of drug was unknown

PRODUCTION

9. Under section 4(2)(a) and 4(2)(b) of the MDA 1971 an offence of *production* is committed when an offender has participated in the process of producing a controlled drug by manufacture, cultivation or any other method. An offender may have participated directly in the production or only been aware of production and thus indirectly participated in it.¹⁰ As can be seen in table 5, of the 2,469 offenders sentenced for this offence in 2007, the majority, 2,413 (97%) were sentenced for the production of a class C drug and predominantly for the production or cultivation of cannabis¹¹ (1,928 (78%)). The Panel has noted an increase in the number of media reports in the first few months of 2009 relating to arrests for cannabis cultivation in residential properties. Whether this indicates an increase in cultivation is difficult to say, but the reported offending often amounts to production on a significant scale¹² and some of the profits are said to be used to finance organised crime.¹³

10. Offenders were rarely sentenced for production of a class A (47) or class B (9) drug in 2007. This is likely to be because the more common drugs used in England and Wales (such as heroin and cocaine) are largely produced in other countries. Slightly more than half (57%) of all offences relating to production were sentenced in a magistrates' court. For production of a class C drug, the average custodial sentence length was 20.1 months in the Crown Court and 3.1 months in a magistrates' court. A detailed breakdown of the figures by type of court can be found in annex B.

¹⁰ CPS: *Drug Offences, incorporating the Charging Standard*:

www.cps.gov.uk/legal/d_to_g/drug_offences/#_Charging_Standard_Production

¹¹ Even though there is a separate offence of cultivation of cannabis (under section 6 of the MDA 1971), it has been usual for the offence to be charged as the production of a class C drug (under section 4).

¹² Examples of reported arrests range from a single offender growing just a few cannabis plants through to an organised gang involved in cultivating 500 plants with the use of hydroponic equipment

¹³ See, for example, *Targeting Cannabis Cultivation*, www.merseyside.police.uk/html/news/news/october/kh11-10b-cannabis.htm.

Table 5: Production of a controlled drug by class of drug (2007), adults only. #

Sentence type	Class A		Class B		Class C	
	No.	%	No.	%	No.	%
Total sentenced	47	100	9	100	2,413	100
Abs/cond discharge	6	13	6	67	279	12
Fine	14	30	2	22	408	17
Community	14	30	0	-	662	27
Suspended sentence	3	6	1	11	327	14
Custody	10	21	0	-	672	28
Other	0	-	0	-	65	3
<i>Average custodial sentence (months)</i>	34.5		-		18.9	

The statistics record an additional 10 offenders sentenced for this offence where the class of drug was unknown

POSSESSION

11. Under section 5(2) of the MDA 1971, an offence of possession of a controlled drug is committed where an offender is in physical possession of the drug, even if the offender does not know it is a controlled substance. This offence can also be charged where a person is in control of an illegal drug which is in the custody of another. Possession of a controlled drug is the most commonly sentenced drug offence. The CPS charging standard states that prosecution is usual when a case involves possession of any quantity of a class A drug or “more than a minimum quantity of class B or class C drugs”.¹⁴ As can be seen in table 6, of the 26,938 offenders sentenced for this offence in 2007, 12,797 (47%) were sentenced for a class A drug (most commonly heroin, cocaine, crack and ecstasy), 11,778 (44%) for a class C drug (mainly cannabis) and 2,363 (9%) for a class B drug (mainly amphetamines). Very few custodial sentences were imposed for this offence with a fine being the most commonly imposed sentence.

Table 6: Possession of a controlled drug (2007), adults only. #

Sentence type	Class A		Class B		Class C	
	No.	%	No.	%	No.	%
Total sentenced	12,797	100	2,363	100	11,778	100
Abs/cond discharge	2,745	21	723	31	3,057	26
Fine	4,904	38	953	40	6,586	56
Community	3,581	28	452	19	1,459	12
Suspended sentence	413	3	57	2	115	1
Custody	888	7	102	4	214	2
Other	266	2	76	3	347	3
<i>Average custodial sentence (months)</i>	4.6		1.9		2.6	

The statistics record an additional 46 offenders sentenced for this offence where the class of drug was unknown

¹⁴ CPS: *Drug Offences, incorporating the Charging Standard*

PERMITTING PREMISES TO BE USED FOR A DRUG RELATED ACTIVITY

12. Under section 8 of the MDA 1971, an offence of permitting premises to be used for a drug related activity is committed where someone who occupies or manages premises permits them to be used for the production, supply, administering or use of controlled drugs. This offence may be committed, for example, by a landlord of a public house or residential property or the manager of a club who allows the use or supply of drugs to take place. Occupants, managers or landlords who were aware of, or participated indirectly in, the production of a controlled drug on their premises also may be prosecuted for that offence. In 2007, only 170 offenders were sentenced for this offence; this may be explained by use of the power to close down premises where it is suspected that class A drugs are involved instead of seeking prosecution.¹⁵ As can be seen in table 7 below, a community order or custodial sentence (immediate or suspended) were most commonly imposed for offences involving a class A drug and a discharge or community order were the most common sentences for offences involving a class C drug. The numbers sentenced, however, are small and care needs to be taken in drawing conclusions.

Table 7: Permitting premises to be used for a drug related activity (2007), adults only. #

Sentence type	Class A		Class B		Class C	
	No.	%	No.	%	No.	%
Total sentenced	49	100	5	100	116	100
Abs/cond discharge	2	-	0	-	35	30
Fine	0	-	1	20	19	16
Community	21	43	1	20	31	27
Suspended sentence	15	31	3	60	16	14
Custody	11	22	0	-	14	12
Other	0	-	0	-	1	1
<i>Average custodial sentence (months)</i>	22.7		-		14.5	

The statistics record an additional 21 offenders sentenced for this offence where the class of drug was unknown

TRENDS IN SENTENCING

13. Table 8 below shows sentencing trend data for those offences covered in the consultation. Between 1999 and 2007, there has been a decline in the number sentenced. Whilst the total fluctuated between (approximately) 41,000 and 46,000 from 1999-2003, it reduced to around 34,000 in 2004-2006. However, numbers have increased in recent years, from 34,102 in 2005 to 38,987 in 2007, primarily because of an increase in the number sentenced for production or possession.

¹⁵ Anti-Social Behaviour Act 2003, s.1

14. A particularly sharp drop in 2004 (decrease of 11,367 offenders from 2003) can be attributed largely to changes resulting from the reclassification of cannabis from class B to class C and from the introduction of conditional cautions,¹⁶ which resulted in a reduced number of prosecutions. However, in 2007, 22,643 offenders were cautioned for possession of a class C drug and, in addition, 98,300 warnings were issued for cannabis possession¹⁷ revealing that overall offending levels remain high. Although cannabis has been reclassified as a Class B drug,¹⁸ (partly following concerns that ‘skunk’ - a form of cannabis that is reportedly two to three times stronger than other types – was dominating the U.K. market),¹⁹ first time offenders convicted of possession are still likely to receive a warning and provision has also been made to retain the power to impose a PND (£80 for an adult offender).²⁰

Table 8: Sentencing data for offences covered in the paper

YEAR	1999	2000	2001	2002	2003	2004	2005	2006	2007
Number of sentences	45550	41017	41135	43860	45825	34458	34102	34810	38987
% Discharge	14	15	17	19	19	18	17	17	18
% Fine	48	47	44	46	46	38	37	35	34
% Community order	17	17	17	15	16	20	21	19	19
% Suspended sentence order	1	1	1	1	1	1	1	5	7
% Custody	19	19	20	18	17	22	22	21	20
% Other	1	1	1	1	1	2	2	2	2

15. Since 2003, there has been a reduction in the proportion of fines and a general increase in both community orders and custodial sentences. This has been particularly marked in relation to suspended sentence orders which have increased from 1% to 7% following changes in the circumstances in which an order can be imposed. In 2007, 27% of sentences were custodial sentences (either immediate or suspended) compared with 18% in 2003 – an increase of over 2,200 custodial sentences.

¹⁶ used as an alternative to bringing charges for certain either way and summary only offences - Criminal Justice Act 2003, s.22,

¹⁷ Criminal Statistics: England and Wales 2007, statistics bulletin, Office for Criminal Justice Reform, table 3.18 and page 40; published November 2008; www.justice.gov.uk/docs/crim-stats-2007-tag.pdf

¹⁸ 26 January 2009, The Misuse of Drugs Act 1971 (Amendment) Order 2008 (SI 2008/3130)

¹⁹ As reported, for example, by the Department of Health in February 2009 - http://www.dh.gov.uk/en/News/Recentstories/DH_094443

²⁰ The Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment) Order 2009 (SI 2009/83)

SECTION TWO: THE SENTENCING FRAMEWORK

PURPOSES OF SENTENCING

16. In determining sentence, a sentencer must have regard to the five purposes of sentencing set out in section 142(1) of the Criminal Justice Act 2003:

- (i) punishment of offenders,
- (ii) reduction of crime (including its reduction by deterrence),
- (iii) reform and rehabilitation,
- (iv) protection of the public, and
- (v) making of reparation by offenders to persons affected by their offences.

17. The Act does not prescribe the relative importance of these purposes and a court will determine which purposes are most relevant in any individual case by reference to the particular facts of the case and the circumstances of the offender. In relation to drug offenders, as with other offences, one key outcome the court might wish to achieve is punishment for involvement in an offence that has been committed intentionally and which causes social harm. The court will wish to take into account whether an offender was motivated by the potential for (sometimes significant) financial gain or whether the offending behaviour was triggered by an addiction (particularly likely in relation to offenders working at street level). In the latter type of case, the court may decide on a sentence aimed at the reform and rehabilitation of the offender, with a view to reducing the risk of reoffending.

Effectiveness of interventions

18. The 2008 UK drugs strategy²¹ includes a wide range of custodial and community-based adult drug interventions that are built around mandatory testing and assessment and voluntary treatment programmes. Detoxification, treatment, therapy and counselling in custody is supported by drug-free prison wings and voluntary testing programmes to help prisoners abstain from drug use in custody. In the community, drug treatment may be included within a conditional caution, where failure to comply may result in prosecution for the original offence; failure to comply with drug rehabilitation requirements or treatment programmes within a community order will also result in a sanction.

²¹ *Drugs: protecting families and communities - 2008-2018 strategy*; www.drugs.homeoffice.gov.uk/drug-strategy

19. A recent study by the UK Drug Policy Commission²² noted that there is no evidence available that allows reliable comparisons of the effectiveness of different interventions or identifies those offenders who would benefit most from different programmes and suggested that a coordinated research and analysis programme is needed. However, it concluded that there is good evidence available to support the use of some criminal justice based interventions that encourage engagement with treatment and that these can reduce drug use and offending.

20. It also found “that community punishments are likely to be more appropriate than imprisonment for most problem drug-using offenders”, noting that imprisonment can have unintended negative consequences and that there are many practical issues that can frustrate the delivery of successful drug treatment programmes in prison, particularly for short-term prisoners. It concluded that maximising the use and effectiveness of community sentences is likely to be more beneficial than imprisonment for drug dependent offenders who are convicted of less serious acquisitive crimes or drug possession offences.²³

Deterrence

21. For many years, deterrence has been considered to be one of the main purposes in sentencing drug offences. The more serious offences such as importation have attracted lengthy custodial sentences on the grounds that these were necessary to discourage the widespread trade in illicit drugs and, in 2007, the average custodial sentence length for importation and exportation of a class A drug was 88.0 months. In *Aramah*,²⁴ in response to concerns about the large profits to be made from the importation of class A drugs and the enormous harm caused to individual victims and to society as a whole, and with reference to the severity of sentences imposed in other countries, the Court said: “..anything which the courts in this country can do by way of deterrent sentences on those found guilty of crimes involving class A drugs should be done”. This thinking appears to have guided sentencing ever since. A key question is whether that approach has been effective.²⁵

²² *Reducing Drug Use, Reducing Reoffending: Are programmes for problem drug-using offenders in the UK supported by the evidence?* UKDPC, March 2008, ISBN 978-1-906246-05-1; www.ukdpc.org.uk

²³ A separate study – *The Drug interventions programme(DIP): addressing drug use and offending through 'Tough Choices'*, Skodbo et al (2007) (www.homeoffice.gov.uk/rds) found that the overall volume of offending by a cohort of 7,727 individuals was 26% lower following DIP identification

²⁴ (1982) 4 Cr App R (S) 407

²⁵ See the further discussion in relation to drug couriers later in this paper at paragraph 96

22. In assessing the length of a custodial sentence for drug offences, particularly for those involving importation or exportation, the purpose of “the reduction of crime (including its reduction by deterrence)” has been given greater priority over other purposes of sentencing; this is perhaps most clearly demonstrated in relation to the sentencing of some drug couriers where guideline cases indicate that strong personal mitigation has had little or no impact on sentence. Comparing sentencing levels with those for sexual or violent offences is not straightforward because of the potentially wide range of culpability and harm within each offence definition. In addition, since 2004, those committing specified violent or sexual offences who fell within the “dangerous offender” criteria would have received a sentence of imprisonment for public protection or an extended sentence, neither of which is included in the data showing average sentence length; this is likely to lead to average sentence lengths being lower.

23. Accordingly, for the purpose of comparison, the Panel has identified the average sentence lengths for 2004,²⁶ when the average custodial sentence imposed for rape of an adult was 79.7 months, for section 18 (Grievous Bodily Harm or Wounding with intent) 50.1 months and for causing death by dangerous driving²⁷ 44.4 months; for importation and exportation offences, the average was 84.0 months.

24. Deterrent sentencing has the potential to influence the behaviour both of the individual(s) sentenced and of others who may be considering committing similar offences. The degree to which sentences have the capacity to deter either group will depend as much on the motivation for the offending as on experience or awareness of sanctions.

25. It is not clear that lengthy custodial sentences contribute to crime reduction to a greater degree than other available sanctions, such as confiscation and asset recovery, which are discussed in more detail below, and the Panel is seeking views on whether sustaining long custodial sentences for drug offences solely for the purposes of deterrence can be justified.

Question 1

Are you aware of any research or other evidence that demonstrates the effectiveness or otherwise of increased sentence lengths for drug offences either in deterring individual sentenced offenders from committing further drug offences or in deterring others from committing similar crimes?

²⁶ Between 2004 and 2006, overall average sentence lengths in the Crown Court have remained fairly constant: *The Sentence* page 5, Sentencing Guidelines Council, January 2008 http://www.sentencing-guidelines.gov.uk/docs/News08_TheSentence.pdf

²⁷ The maximum penalty was increased for offences committed on or after 27 February 2004 from 10 years imprisonment to 14 years imprisonment; Criminal Justice Act 2003, s.285

26. Different considerations may apply in relation to offenders involved lower down the supply chain, where financial gain is not the main motivation for offending. Those involved in possession generally fall into one of two broad groups – recreational users and offenders with an addiction. Recreational users (whose only involvement in supply, if at all, is likely to be to secure and share drugs with friends) tend to be heavily influenced by peer pressure and by a lack of awareness of the associated health risks; the unlawfulness of their actions and the possible sanctions on conviction tend not to be a significant consideration. Where offenders have developed an addiction, this will drive their offending behaviour and may trigger acquisitive offending; the response to this is discussed in the definitive guideline *Theft and Burglary from a Building other than a Dwelling*²⁸ and the Panel's consultation *Overarching Principles of Sentencing*.²⁹

27. In relation to offences involving supply, the Panel understands that a significant proportion of those who are sentenced for supplying class A drugs are dealing in small quantities. Typically they will have been arrested as a result of an undercover operation where they will have supplied one, or two or three wraps of heroin or cocaine to a decoy police officer. Alternatively they are spotted supplying by patrolling police officers and again found in possession of very small quantities. As with acquisitive crime, many, but by no means all, such defendants are addicted to drugs and are dealing in order to feed their own habit. The Panel's proposals in relation to sentencing these offences can be found at paragraphs 117 onwards and in the draft guideline on page 51.

28. Research shows that offenders are more likely to be deterred by the perceived risk of being apprehended and convicted than by the sentence that is likely to be imposed. A recent study³⁰ of 222 offenders convicted of serious drug-related offences found that the risk of prison was viewed as an occupational hazard and was not considered a serious deterrent to involvement in the illegal drugs trade. For those at the top of the supply chain, the considerable financial gains that can be made through importation and exportation offences are likely to far outweigh concerns about the scale of penalties in the unlikely event of conviction.

29. Furthermore, an analysis of the UK drugs policy in general has found no evidence to show that penalties for drug offences have deterred people from using and selling drugs

²⁸ Published December 2008, page 5, www.sentencing-guidelines.gov.uk

²⁹ Published July 2008, page 42, www.sentencing-guidelines.gov.uk

³⁰ Matrix consultancy (2007) *The illicit drug trade in the United Kingdom*. Home Office Online Report 20/7; www.homeoffice.gov.uk

and concludes that imprisoning drug offenders for relatively substantial periods does not appear to represent a cost effective response.³¹ The drug trade is a highly resilient market and even where enforcement activity has led to arrests and convictions of high-level dealers, supply is likely to be affected only temporarily; given the lucrative nature of the market, the void will soon be filled.³²

30. For offenders involved in the possession of illegal drugs, drug use is likely to be heavily influenced by peer pressure, by a lack of awareness of the associated health risks and by the perception that possession and supply offences are not particularly serious; those involved in relatively low levels of supply often also are motivated by their own addiction. The likely sanction for an offence is most unlikely to influence the behaviour of drug-dependent offenders.

31. In contrast, asset recovery measures have been found to be of much greater concern to dealers.³³ The profits that can be made from drug offences are enormous and, where such large sums of money are involved, it would appear that the fear of financial reprisal is of more concern to offenders than the potential loss of liberty, especially as confiscation orders can target not only the proceeds of crime but also any legitimate assets. The relatively recent “serious crime prevention order”³⁴ is also likely to be viewed as a severe sanction by those on whom it is imposed.

32. In comparison with the sanctions available when guideline cases were decided, ancillary orders such as the confiscation order play a much more significant role in the sentencing of drug offences. Under the Proceeds of Crime Act 2002, the Crown Court must consider making a confiscation order in all cases where there is evidence to show that an offender has benefited financially from a crime; a magistrates’ court may commit an offender to the Crown Court for sentence with a view to such an order being made.³⁵ Although a confiscation order is not made at the time sentence is imposed, failure to pay an amount subsequently ordered to be confiscated will result in a separate period in custody.

³¹ Reuter R., & Stevens A., (2007) *An Analysis of the UK Drug Policy - A monograph prepared for the UK Drug Policy Commission*: www.ukpdc.org.uk

³² Sweeney et al., (2008) *Tackling Drug Markets and Distribution Networks in the UK – a review of recent literature for the UK Drug Policy Commission*.

³³ *ibid.*

³⁴ See paragraph 114 below for a description of the effect of such an order and the circumstances in which it can be made.

³⁵ See the further discussion later in this paper at paragraph 109

33. 1,128 confiscation orders were made in relation to drug trafficking offences in 2007; this represents only 15% of the offences in respect of which the statute provides for an order to be able to be made.³⁶ Although the average amount seized through confiscation orders was £7,853, the largest number of orders (728) was made for sums of less than £1,000. At the other end of the scale, 49 orders were made for sums in excess of £30,000 (up to and including one seizure of more than £1 million). Recognising that there will be cases in which the financial resources of the offender are such that a significant order cannot realistically be made, the Panel supports the current approach of making confiscation orders whether the sums involved are large or small and invites respondents to consider whether a confiscation order might be a more effective deterrent than increasing the length of custodial sentence *beyond that which is justified to meet any other purposes of sentencing*.

34. The Panel is not in any way suggesting that such offences have become less serious or that the sentencing response should be less robust. However, it is seeking views on whether, given the potential for a confiscation order, a custodial sentence in which the length is determined primarily by purposes other than deterrence and, where suitable, a fine, might not be a more appropriate and, potentially, a more effective disposal. The power to close down premises used for drug related activities may also act as a powerful deterrent for offences of that type; this power can now be exercised by local authorities as well as by the police. See also the discussion on ancillary orders below at paragraph 106.

35. The Panel's provisional sentencing proposals are based on an assessment of offence seriousness that recognises the wider social harms resulting from this form of offending behaviour but does not increase sentence lengths on the grounds of deterrence, relying instead on the prospect of confiscation (and other similar orders) to have the desired additional deterrent effect. This approach will be reviewed in light of the responses we receive. As the outcome of confiscation proceedings will not be known at the point of sentence (and consequently the court cannot know how extensive such confiscation will be) it will not be possible to anticipate the effect on the offender; this might suggest that it will be difficult to approach sentencing by balancing sentence length against confiscation

³⁶ Ministry of Justice, Sentencing Statistics 2007 in England and Wales, statistical bulletin published November 2008; www.Justice.gov.uk/docs/sentencing-statistics-2007-pdf

powers in the way we are suggesting and we are anxious to receive the views of respondents.

Question 2

Do you agree that, in serious cases, powers such as those available under a confiscation order or a serious crime prevention order are now likely to be a more effective deterrent than increasing the length of a custodial sentence beyond that necessary to meet any other purposes of sentencing? Please give your reasons.

ASSESSING SERIOUSNESS

36. In accordance with the Criminal Justice Act 2003 (the Act) the starting point for sentencing is an assessment of the seriousness of an offence. A community order can be imposed only if the court considers the offence 'serious enough' to warrant it. A custodial sentence can be imposed only if the court considers that the offence was 'so serious that neither a fine alone nor a community sentence can be justified'. When assessing offence seriousness, the Act provides that the court must consider the offender's **culpability** in committing the offence and any **harm** which the offence caused, was intended to cause, or might foreseeably have caused.

37. The Sentencing Guidelines Council has published a guideline on the general concept of seriousness that guides sentencers on how to determine whether the respective sentencing thresholds have been crossed.³⁷ The guideline states that "harm must always be judged in the light of culpability. The precise level of culpability will be determined by factors such as motivation, whether the offence was deliberately planned or spontaneous, (or) whether the offender was in a position of trust".³⁸

Culpability

38. Culpability is a particularly pertinent issue when sentencing for drug offences. Although the primary motivation for most offenders will be economic, individuals involved in the illicit drugs market almost always know that they are committing an illegal activity and, invariably, offences are committed in the knowledge that drugs have harmful effects. Those most culpable will be involved in bringing illegal drugs into the market place; these are the producers, traffickers and suppliers of drugs who are primarily motivated by financial gain.

³⁷ *Overarching Principles: Seriousness*, published on 16 December 2004; www.sentencing-guidelines.gov.uk

³⁸ *ibid.*, paragraph 1.17

39. Even within this group there may be varying levels of culpability depending on factors such as the amount of drugs involved, the extent to which the offender understood the true nature of the drugs involved, the motivation for committing the offence and the offender's exact role in the supply chain. It is recognised that some offenders – mostly those lower down the supply chain selling at the street level – will be committing an offence to feed a personal drug habit. This may suggest to a court that one type of sentence may be more effective in reducing the risk of re-offending than another (see the Panel's proposals in section 3). In its suggested sentencing proposals the Panel has taken the approach that the role of the offender is a key element in determining the seriousness of drug offences (see paragraphs 47 - 59).

Harm

40. There are three factors that determine the potential harm associated with drugs: the physical harm caused to individual users by the drug itself; the tendency of the drug to induce dependency; and the effect of drug use on families, communities and society.³⁹ The trade in unlawful drugs is a significant factor in stimulating the commission of other offences, particularly violent and acquisitive offences. Enormous resources have to be dedicated to tackling drug offending and the consequences of drug dependency, not only for individual offenders, who may suffer mental or physical health problems of varying degrees up to and including the risk of death, but also for the wider community, which may be affected by levels of harassment, alarm or distress.

41. Through the establishment of the classification system, Parliament has indicated the relative harm caused by drugs included within it (see paragraph 5). Those within the same class are considered to be of similar levels of harmfulness; those placed in class A are considered to be more harmful than those in class B and those in class B are considered to be more harmful than those in class C.

42. The Panel has considered whether guidelines should be produced for *individual drugs* (which would allow for a distinction to be made between drugs in the same class) or for a *class of drug* (where no such distinction would be made).

43. The classification of drugs has been the subject of wide public and social debate. A recent study has argued that there is a poor relationship between the classification system

³⁹ Nutt, D. et al. *Development of a rational scale to assess the harm of drugs of potential misuse*, The Lancet, vol 369 March 24 2007; www.thelancet.com

and the overall harm caused by drugs within each class.⁴⁰ When considering the most commonly used illicit drugs in the UK, the greatest discrepancies are found in relation to psychedelic-type drugs. In the context of a wider review of the classification of some of these drugs, which aims to ensure a stronger correlation between the harm caused by each drug and its classification, the Advisory Council on the Misuse of Drugs (ACMD) has recently published a report recommending that Ecstasy should be downgraded from Class A to Class B.⁴¹ However, the Home Office has made it clear that the government firmly believes that Ecstasy should remain a Class A drug.⁴²

44. Since Parliament has created a system of classifying drugs according to an assessment of differing degrees of harm and has set up an advisory body to provide expert advice on the allocation of drugs to each class, the Panel has concluded that it would be inappropriate for sentencing guidelines to seek to distinguish between drugs within each class in terms of the level of harm. Accordingly, the Panel has decided to link its proposed starting points and sentencing ranges to the three classes. This approach has the additional practical benefit of producing guidelines that will automatically cover any new drugs or reclassified drugs placed within a class, thus reducing the frequency with which new guidelines are required. Most prosecutions for offences involving drugs in class C have been in relation to cannabis; following its reclassification as a Class B drug, the number of prosecutions involving Class C drugs will be very small. The Panel, has, therefore, decided to provide starting points and ranges for Class A and B drugs only; where a Class C drug was involved, the starting point and ranges for class B should be used but the fact that the drug is in class C will be a mitigating factor for sentencing purposes.

KEY DETERMINANTS OF SERIOUSNESS

45. Guideline judgments from the Court of Appeal and guidelines already issued by the Sentencing Guidelines Council have identified the most important characteristics of drug-related offences; these are discussed below in order to seek views on the degree to which they should influence the assessment of offence seriousness.

46. For the reasons described below, the Panel's conclusion is that, for most offences, it will be the role of the offender and the quantity of drug or the scale or extent of the

⁴⁰ *ibid.*

⁴¹ *MDMA ('ecstasy'): a review of its harms and classification under the Misuse of Drugs Act 1971(2009)*, published 11 February 2009

⁴² www.press.homeoffice.gov.uk/Speeches/Alan-Campbell-statement-ecstasy

operation that are likely to be the most significant factors. Other factors that have been used to determine the relative seriousness of drug offences include the purity or strength of the drug involved and the value of the drug at street level. Issues arising from those factors are also considered below. As always, sentence ranges will allow for varying levels of culpability and harm arising from an individual offence.

(i) The offender's role

47. The role played by the offender is a common determinant of seriousness cited in Court of Appeal cases. Four categories have been identified by independent research - importers, wholesalers, middle market drug brokers and retail level dealers.⁴³

48. Whilst it would be possible for sentencing guidelines to incorporate this categorisation, much of the research around the illicit drugs market shows that it can be very difficult to generalise roles. The market is very fragmented and individuals may occupy dual roles (e.g. importer and wholesaler); also, middle market drug brokers are sometimes known to collect and import drugs from wholesale storage systems in continental Europe.⁴⁴

49. In addition, each category can encompass different levels of seriousness. For example, even among those who import drugs, there will be very different levels of involvement. At the top end will be the individual with close links to the original source of the drugs who manages the buying and selling in bulk quantities and arranges the transportation of drugs overseas. At the lower end will be the drug courier who may have accepted money to carry the drugs with little awareness of (or other involvement in) the drugs trade.

50. The problems associated with categorising roles in terms of market level has led the Panel to prefer an approach which focuses on the extent of the offender's involvement (which allows for the offending behaviour to cross market levels). In devising the proposed guidelines, the Panel has identified three categories: a leading role, a significant role and a subordinate role. The type of activity falling into each of these categories is described below:

⁴³ Pearson et al., (2001) *Middle Market Drug Distribution* Home Office Research Study 227; www.homeoffice.gov.uk

⁴⁴ Sweeney et al., (2008) *Tackling Drug Markets and Distribution Networks in the UK* – a review of recent literature for the UK Drug Policy Commission; www.ukdpc.org.uk

Leading role

51. Offenders playing a 'leading role' would be those responsible for organising and masterminding the buying and selling of drugs on a large scale; they may be instrumental in the importation of controlled drugs, with close links to the original source, or may be key players in the distribution of drugs in the UK. They are the offenders most likely to make significant profits, they may deal in substantial quantities and may sell to only a few customers. It is generally accepted that, although these are the most serious offenders, they are the least likely to be caught and convicted and may use legitimate businesses to aid and conceal their operations.

52. Others likely to be included in this category are those typically identified as 'wholesalers'. They will have responsibility for managing and organising operations at a high level in the supply chain, may deal in bulk or on a smaller scale, and are likely to deal in more than one type of drug.⁴⁵

Significant role

53. Offenders playing a 'significant role' will include a wide group of individuals with different and overlapping roles but, normally, they will be involved at middle market level. A Home Office study has examined the role of middle market brokers. They have been identified as those who typically sit two levels below importation and one or two levels above retail.⁴⁶ They normally supply to a regular customer base that largely involves retail dealers, or intermediaries sitting just above the retail level. They purchase drugs in large quantities where heroin, cocaine, amphetamine and cannabis are concerned, and in terms of synthetics, will purchase upwards of 20,000 pills on a regular basis.

54. Some of these brokers will trade in all drug commodities; others operate within a more limited range. Middle market drug networks are described as being small in size and consist typically of a main person who has links to suppliers and also handles money, and a 'runner' or series of runners who deliver drugs to customers, collect drugs from suppliers and their agents or deliver and collect money (see paragraph 57 below for a discussion concerning the role of the runner). Other offenders deemed to have a significant role will

⁴⁵ *The supply of drugs in the UK*, RSA Commission on Illegal Drugs, Communities and Public Policy, May 2005, www.rsadrugscommission.org.uk

⁴⁶ Pearson et al., (2001) *Middle Market Drug Distribution* Home Office Research Study 227; www.homeoffice.gov.uk

include those who arrange the transportation of the drugs and those who produce company accounts in a way that disguises the illegal activity.⁴⁷

55. Reports investigating the drug trade stress the fragmented nature of the drugs market and the difficulty with defining the many roles involved.⁴⁸ Thus, there are likely also be other groups of offenders who are less easily defined by the roles described above but who act in some way to broker between the networks of supply and demand at the middle market level.⁴⁹

Subordinate role

56. Those in a 'subordinate role' normally will be individuals who have been employed to carry out a function within a support activity that is required to transport or supply drugs. They are likely also to be closest to the drug users – supplying more frequently in smaller quantities. The extent to which their involvement can be defined as 'subordinate' as opposed to 'significant' will depend on a number of factors such as their knowledge and awareness of the network in which they are working and the quantities of the drugs involved and the duration and pattern of their offending. The offenders in this category are likely to have very little understanding of the overall scale of the operation, with their knowledge limited to their immediate environment.

57. Two groups of offender falling into this category are retailers and street level dealers, both of whom may be described as brokers and are involved in relatively small scale offending. Retailers may supply direct to users but often choose to divert the supply through street dealers, the group of offenders most likely to be motivated by their own drug addiction, especially for drugs such as heroin and crack cocaine.⁵⁰ Those with an addiction often act under serious pressure or coercion from brokers who supply them with drugs only on condition that they act as dealers. Many street dealers will supply the drugs direct to users, often being trusted to hold a cache of 50 or 60 deals' worth of drugs from which to sell drugs on behalf of someone higher up the supply chain; other dealers may use 'runners' who are trusted only to act as go-betweens, collecting individual quantities of drugs from the broker for each customer and returning with payment for each purchase.

⁴⁷ *ibid.*

⁴⁸ See for example: Pearson et al., (2001) *Middle Market Drug Distribution* Home Office Research Study 227 & Matrix Knowledge Group (2007) *The illicit drug trade in the UK*, Home Office Online Report 20/07

⁴⁹ Pearson et al (2001) *Middle Market Drug Distribution* Home Office Research Study 227 & Matrix Knowledge Group (2007) *The illicit drug trade in the UK*, Home Office Online Report 20/07; www.homeoffice.gov.uk

⁵⁰ Matrix Knowledge Group (2007) *The illicit drug trade in the UK*, Home Office Online Report 20/07; www.homeoffice.gov.uk

Runners might receive a regular wage for this 'employment' or be paid for each transaction. In some circumstances, the relationship between the broker and the runner might appear to be more like a partnership, although it has been recognised that these affiliations tend to be essentially exploitative.⁵¹ The relative culpability of street dealers, their role in the supply chain and the comparative seriousness of an offence may thus be evidenced by the amount of drugs that they are entrusted to hold.

58. Another type of offender falling within the subordinate category is the 'minder,' a term used to describe someone who agrees to store or look after drugs on behalf of another, whether or not for payment. Such offenders would be likely to be charged with *possession with intent to supply*. In addition, delivery drivers, who are in charge of large quantities of drug but are in a relatively subordinate role within the organisation and 'gardeners' (those who tend cannabis plants, for example) would be likely to fall within this category.

59. Those that come within this category may be involved at any of the different market levels. For example, drug couriers, who carry relatively small quantities of drugs on or inside their person, are likely to fall within this category because, overall, they will have limited involvement in the supply chain.

The Panel proposes that, where there is evidence of an employee relationship, the starting point for sentence should fall within this subordinate category, with the assessment of culpability being influenced by the degree of trust placed in the employee. Where there is evidence of a partnership, the role of the runner or minder should be deemed more significant and should fall into a higher category (usually a significant role).

60. Consumers - individuals who buy drugs for personal use – are at the end of the supply chain and are likely to be convicted of possession of a controlled drug; this type of offending is dealt with separately and would not come within these roles.

Question 3

Have the various roles been properly identified and described? What other roles, if any, might need to be considered?

⁵¹ Pearson et al., (2001) *Middle Market Drug Distribution* Home Office Research Study 227; www.homeoffice.gov.uk

(ii) Quantity

61. In *Aranguren and others*⁵² the Court of Appeal identified the quantity of drugs with which an offender is caught or involved as a key factor in determining starting points and sentencing levels for drug importation offences. The larger the quantity for which an offender has been directly responsible, the more serious the offence. The approach taken has been to identify the amount of a drug that justifies a particular starting point for sentence. Sentencers have then moved above or below the starting point depending on any aggravating and mitigating factors present. Annex C provides a summary of the guideline judgments.

62. Where an offender is apprehended in possession of drugs, the quantity is likely to be influential in determining whether a charge of supply or possession is preferred. Other factors likely to indicate that an offender has some wider involvement in the trade in illicit drugs (as opposed to possession for personal use) include where significant sums of money or substances or equipment to 'cut' the drugs are also found.

63. Quantity has also been linked to the role that an offender has in the supply chain. Larger quantities may indicate greater criminal involvement in terms of greater responsibility and planning or involvement in a wider enterprise. Smaller quantities may indicate involvement at a lower level such as by a retailer or for personal use. However, as noted above, those acting in a subordinate role (perhaps driving a van or a lorry or acting as a gardener for large quantities of cannabis plants) may be in possession of very large quantities.

64. The quantity of drugs involved may thus influence both the selection of the offence to be charged and the determination of the role that the offender has played. However, the Panel takes the view that the quantity of drugs involved is sufficiently significant to justify inclusion as a further determinant of seriousness. Where appropriate to the offence, quantity has been incorporated into the Panel's proposals as a second factor that determines the sentence starting point and range. Where it is less appropriate, the second factor relates to the scale or extent of the operation.

65. For example, in relation to the offence of production of a controlled drug, the Panel has used the scale or extent of the operation rather than the quantity of drug seized since

⁵² (1995) 16 Cr App R (S) 211

this both reflects the level of culpability involved and avoids the risk that the time at which the enterprise is discovered may affect the quantity of drug seized.

66. In order for quantity levels to be meaningful where used, specific quantities of the most commonly prosecuted types of drug have been identified for each starting point and range. The way in which quantity levels for the different types of drug have been identified is discussed later in paragraphs 132 to 135.

OTHER FACTORS

67. There are two other factors that are commonly referred to when considering how to assess the seriousness of drug offences, the purity or strength of the drug and the street value. Whilst information on these two aspects may be of assistance to a court in some circumstances, for the reasons given below the Panel considers that they should not be determinants of the seriousness of an offence for the purpose of establishing the sentencing range within which an offence will fall.

(i) Purity or strength of drug

68. In *Aranguren*⁵³ the Court of Appeal stated that, when considering the weight of drugs, it would not be fair to disregard purity. The primary relevance of purity to the assessment of seriousness appears to be the extent to which it indicates an offender's proximity to the primary source of supply (i.e. the purer the drug the closer the offender to the source)⁵⁴ and, therefore, the offender's role in the supply chain. For example, it may be asserted that the offender intended to cut pure drugs with other substances to create greater quantities and to supply as a wholesaler, which would affect both the role of the offender and the quantity of drugs supplied. Often, the purity of drugs seized by HMRC (particularly when being imported) will be higher than where seizure is by the police (which will more often be at a later stage in the supply chain).

69. The purity or strength of a drug can depend on many factors and is unlikely to be known with any degree of certainty by the majority of offenders. Levels may decrease if demand increases or may reflect the availability of particular substances or materials. The way in which a drug is supplied may also change as has been seen in relation to Ecstasy where there has been a steady increase in seizures of powder compared with tablets.

⁵³ (1995) 16 Cr App R (S) 211

⁵⁴ *Morris* (2001) 1 Cr App R (S) 4

70. Analysis is expensive and tends to be undertaken only for the more serious offences. Thus, information on the purity or strength of the drugs involved will often not be available to the sentencing court, especially for the vast majority of cases which involve small scale offending and class B and C drugs.

71. Where the Court of Appeal has issued guidelines on specific drug offences, it has made assumptions, based on any given amount, about the purity levels of the type of drug involved. If quantity is to be used as a determinant of seriousness and since (as noted above) the offending is related to the drug (and not to other lawful substances packaged with the drug), it can be argued that the exact amount of controlled drug that is present should be a critical factor. However, the purity of the drug has little relevance to the culpability of the offender or to the harm caused by the offence (but see the further discussion about the dangers of 'cutting' drugs at paragraph 83). Insofar as it reflects the closeness of the offender to the source of the drug, it is provided for within the proposed guidelines through the distinction in the role of the offender. ***Accordingly, it seems to the Panel inappropriate for purity to be a significant factor in determining seriousness in most cases.***

72. However, given that it is the illicit substance that is the cause for the offence, it appears sensible to the Panel to provide that purity or strength might affect sentence within the range identified by the role of the offender and the quantity of the drug where the prosecution or the defence is able to satisfy the court that it is substantially different from the normal range of purity level or of strength; care will need to be taken to avoid double counting since it is this factor which may have been significant in determining the role of the offender.

(ii) Street value

73. Until the judgment in *Aranguren*,⁵⁵ street value was routinely used in determining the seriousness of an offence. However, prices vary from place to place and over time and are dependent on factors such as purity, supply and demand; as supply increases, prices can fall. In *Aranguren* the Court recognised that "it did not serve any purpose for a greater supply of drugs to lead to lower prices and consequently lower sentencing levels" and so weight, rather than street value, was adopted as the relevant measure. Nonetheless,

⁵⁵ (1995) 16 Cr App R (S) 211

street value has remained a factor that is often brought to the court's attention.⁵⁶ Whilst there may be an argument for using it as a measure of offence seriousness for offences which occur at the local or street level on the grounds that it is an indication of the potential financial gain that could have been made by the offender, the potential for financial gain is one of the factors that has led to the fixing of the general sentencing levels for the offences considered in this paper.

74. Using street value as a determinant of seriousness would import the shortcomings described above but it may continue to provide useful information especially where the offender has a subordinate role. The Panel seeks the views of consultees on the extent to which street value should be relevant to assessing offence seriousness

Question 4

Do you consider that the Panel has taken the correct approach in identifying the role of the offender and either the quantity of drugs involved or the scale or extent of the operation as the key determinants of seriousness?

Do you have any reason to believe that this approach would create any difficulties in practice?

Question 5

What relevance, if any, should the purity or strength of a drug have to sentencing? To what extent do you agree or disagree with the approach taken by the Panel?

Question 6

Is it possible to make a reliable estimate of the street value of drugs seized and to what extent should value be relevant to the assessment of offence seriousness?

AGGRAVATING AND MITIGATING FACTORS

75. As well as factors that are determinants of the seriousness of a drug offence (and, therefore, will affect the selection of both starting point and sentencing range), there will be aggravating and mitigating factors that influence the position of the offence within the range. A Council guideline⁵⁷ sets out a generic list of aggravating and mitigating factors that may apply to an offence (see Annex D). The Panel has also identified some additional factors that are specific to drug offences.

⁵⁶ Information from an experienced police officer is generally sufficient: *Bryan*, unreported, November 1984, CA; *Ibrahim* [2005] Crim. L.R. 887, [2005] EWCA Crim 1436

⁵⁷ *Overarching Principles: Seriousness*, published on 16 December 2004; www.sentencing-guidelines.gov.uk

AGGRAVATING FACTORS

(i) Deliberately targeting premises where there are vulnerable people

76. In some circumstances, those seeking to supply drugs target particularly vulnerable groups; these are likely to include young people in any type of educational institution, patients in psychiatric hospitals or attending community psychiatric health services, addicts undergoing treatment at drug treatment centres or visiting a chemist or dispensary and those living in bail hostels, all of whom who may be especially susceptible targets.

77. Currently, under section 4A of the Drugs Act 2005, it is a statutory aggravating factor where a person aged 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises at a time between one hour before and one hour after they are to be used by those under 18. The Panel considers that this approach needs to be widened so that the deliberate targeting of *any premises*, intending to locate people who are susceptible to persuasion or coercion, is regarded as an aggravating factor. Although certain institutions have been suggested above, the Panel does not intend to produce an exhaustive list of suggested premises; the important factors will be the vulnerability of the persons using the premises and the fact that the offender has deliberately targeted the premises to reach those people, as opposed to the precise nature of the premises themselves.

(ii) Offender used a courier who was a young person

78. Also under section 4A of the Drugs Act 2005, it is a statutory aggravating factor for an offender to have used or permitted a person under the age of 18 to deliver a controlled drug to a third person.⁵⁸ There may be circumstances where offenders use young people as couriers to get greater access to other young people or to avoid detection themselves.

(iii) Supply to prisoners

79. While the prison service makes significant attempts to prevent drugs entering prisons, drug testing among prisoners shows that drug use continues. This can be particularly damaging as the availability of drugs may hinder attempts by prisoners to fight addiction; also, drug circulation may impact on good order and result in strict security measures that can threaten visiting arrangements for all prisoners. Furthermore, coercing others into smuggling drugs into prison often involves third parties – family (even children),

⁵⁸ or a “drug related consideration” to himself or to a third person: Drugs Act 2005, s.4A (4), (6) and (7).

friends, volunteers and staff – in criminal activity. The Panel proposes that supplying drugs to a prisoner should aggravate the seriousness of an offence.

(iv) Supplying a controlled drug in a locality associated with an open drugs market

80. Some individuals and neighbourhoods suffer more from drug related harm than others; this tends to be in areas of general deprivation and social exclusion.⁵⁹ Communities in which drug dealing and drug use is prevalent may be damaged through the disorder and crime that is generated around drug markets. In particular, greater fear among communities may be created at a time when violent offences start to occur more frequently among dealers as part of the regulation of an illicit drug market – it is not uncommon for drug distributors to use violence to deter and punish those who break agreements or threaten market share. In such circumstances, it could be argued that the situation in that particular area at that time indicates that commission of these offences causes greater harm and thus makes the offence more serious; the Panel accepts that it may be difficult to prove that such a situation exists but, where proven, an issue arises as to the extent to which it should aggravate the seriousness of the offence. Since this is an aspect of differential sentencing resulting from prevalence, the criteria set out by the Sentencing Guidelines Council should be followed and “supporting evidence obtained from an external source”.⁶⁰

Question 7

Do you consider that it would be appropriate to regard an offence as more serious if an offender supplies controlled drugs in a locality associated with an open drugs market? Please give your reasons.

(v) Possession of a knife or other weapon

81. It is possible that an offender found in possession of both illegal drugs and a knife will seek to run the defence that the knife was merely to be used in order to cut the drugs. Nevertheless, possession of a bladed instrument is a criminal offence in its own right. It is more likely that a supplier or dealer will be in possession of a knife, gun or other weapon because of the levels of violence associated with drug-related offences; for example, friction and territorial disputes between suppliers may result in threats and violence and weapons such as a firearm or a knife are likely to be carried and/or used. The expectation is that possession of a knife, firearm or any other weapon would be charged separately

⁵⁹ Reuter, P. and Stevens, A. (2007) *An analysis of UK Drug Policy – A monograph prepared for the UK Drug Policy Commission*: www.ukpdc.org.uk

⁶⁰ *Overarching Principles: Seriousness* Sentencing Guidelines Council, December 2004 at 1.38-1.39: www.sentencing-guidelines.gov.uk

under the relevant statutory provisions.⁶¹ However, where a separate charge has not been made (perhaps because it was a knife that it is not illegal to possess), carrying or using a weapon will aggravate the seriousness of the drug offence.

(vi) Exposure of others to danger

82. Cannabis and chemical drugs such as crack cocaine and crystal meth or methamphetamine are likely to be produced in a laboratory, residential home or garage, or industrial warehouse. The processes used to produce some of these drugs involve chemicals which are highly dangerous and may be flammable, corrosive, explosive or toxic. As well as being dangerous in isolation, their combined effect can be hazardous, leading to risks of explosion, chemical burns or poisoning. Offenders may also engage in the illegal abstraction of electricity in such a way that it poses a danger of electrocution or fire. In order to avoid detection, production of drugs may take place in residential areas and this exposes others to significant danger. Whenever an offender is producing drugs and exposing others to danger, this increases the seriousness of the offence.

83. A different type of danger may arise where suppliers cut drugs with other substances and produce mixtures of variable strength. A user who has become accustomed to using drugs that are routinely diluted by cutting may have a severe and/or unpredictable reaction when taking a drug that has been cut less and is, therefore, more pure; any user will be placed in danger if a drug is cut with an unusual substance that is dangerous to health in its own right. Although the Panel understands that neither dealers nor users generally have the ability to assess the purity of drugs, there may be cases where an offender has knowingly, and without providing adequate warning, supplied drugs that are stronger than those normally in circulation or that have been cut with other unusual substances and this has caused an adverse reaction in one or more users. In such circumstances, this should be regarded as an aggravating factor.

MITIGATING FACTORS

(i) Offering to supply fake drugs

84. One issue arises from the intentional supply of fake drugs (as opposed to 'cutting' drugs with other substances in order to make them cheaper to supply). In some cases, an

⁶¹ for example, Criminal Justice Act 1988, s.139 (bladed article), Prevention of Crime Act 1953, s.1 (offensive weapon) and 51 Firearms Act 1968, s.51 (firearms)

offender may dishonestly offer to supply a drug with the knowledge that what will be supplied is not, in reality, the drug offered - for example, supplying talcum powder as cocaine or pills that contain a non-illicit substance instead of ecstasy. While this type of behaviour is more characteristic of a fraud offence, the Panel recognises that some cases will be charged as offering to supply a controlled drug. Under these circumstances, an offender's culpability remains high as there is an intention to supply a substance which the buyer believes to be a genuine, illegal, substance.

85. However, unless it can be shown that the substance offered was, or had the potential to be, harmful, it could be argued that, because no illicit drug is being made available, the approach to sentence should follow that for a fraud offence rather than for a drug offence.⁶² The offence could be prosecuted under section 1 of the Fraud Act 2006 where a dishonest representation has been made with intent to bring about gain and is likely to be sentenced as a "confidence fraud". Annex E contains a comparison between sentence starting points and ranges set out in this paper and those in the recently published draft guidelines in relation to fraud offences. Depending on the circumstances, this is likely to reduce the starting point for sentence.

Question 8

Do you agree that, where an offender has knowingly supplied a fake drug, the offence should be sentenced as if it were an offence of dishonesty? If you do not agree, in what circumstances (if at all) should it mitigate the seriousness of an offence that the items offered for supply were not, in fact, illegal substances?

(ii) The knowledge of the offender

86. A person's mistaken belief as to the type of drug possessed or intended to be supplied may be relevant to sentence. In *Bilinski*⁶³ the court stated that an offender who was involved in importing heroin believing he was importing cannabis was less culpable than one who knew it to be heroin. While that case involved the importation of a controlled drug by a drug courier, this principle could be applied to other offenders at different levels of the supply chain. The level of mitigation attaching to the belief would depend on factors such as the "degree of care" so that, where only a small degree of curiosity could have revealed the true nature of a drug, the mitigating effect of the belief would be small.

⁶² *Sentencing for Fraud – statutory offences* Draft Guideline, Sentencing Guidelines Council published 25 February 2009
www.sentencing-guidelines.gov.uk

⁶³ (1987) 9 Cr App R (S) 360

(iii) Offence not commercially motivated

87. The extent to which commercial motivation plays a role in offending will vary across drug offences. In the majority of cases commercial motivation will be the main reason for offending. However, some offenders will seek to import, supply or possess drugs for their own personal use or to supply to a small circle of friends or associates without any commercial motivation. With the exception of the guideline relating to production, where the commerciality of the enterprise is a key determinant of seriousness, the Panel's proposals assume commercial motivation and its absence is treated as a mitigating factor.

Question 9

In what circumstances (if at all) should the seriousness of an offence be mitigated by an offender's mistaken belief about the drug involved or by the fact that the offence was not commercially motivated?

Question 10

What other factors, if any, might make an offence less serious and why?

Offender mitigation

(i) Drugs used to help with a medical condition

88. There may be circumstances in which an offender has been convicted of a drug offence (particularly possession of cannabis) and it is argued that use of the drug was intended for medical purposes. Cannabis is used illegally sometimes as pain relief for illnesses such as arthritis or multiple sclerosis. Whilst there is little evidence that supports the link between drug use and pain relief, some users argue that the effects of cannabis can dull the level of pain normally felt.

89. In *Noon*⁶⁴ the defendant was convicted of cultivating cannabis after pleading guilty. It was accepted that the cannabis was for personal use and had been used for many years as a release from pain for an injury. The defendant was aged 33 and had been convicted on 14 previous occasions; in 1998 he had been convicted for cultivating and possessing cannabis and, in 2002, for possessing cannabis. He had been fined on both occasions. On this occasion, he had been sentenced to 6 months imprisonment in the Crown Court; by the time his appeal was heard he had served 1 month of that sentence and the Court of Appeal quashed the sentence of imprisonment and imposed a community order with an unpaid work requirement of 200 hours (reduced from 300 hours on account of the time spent in custody) and a programme requirement.

⁶⁴ [2008] EWCA Crim 1928

90. Where there is evidence that an offender has a medical condition for which pain relieving drugs are normally prescribed, it could be argued that a court should take a compassionate approach and that this should influence the choice or severity of sentence.

Question 11

Do you agree or disagree that the fact that drugs are used to help with a medical condition should be considered as offender mitigation for drug offences?

(ii) An offender's vulnerability was exploited

91. Those who manage operations will often recruit individuals to carry out some of the support activities involved in trading illegal drugs; sometimes they target individuals with a vulnerability which can be easily exploited. There have been cases in which illegal immigrants have been encouraged to work in cannabis factories as 'gardeners', tending the plants, who were paid either nothing but provided with board and lodging, or just enough for subsistence.

92. In *Xiong Xu*⁶⁵ (a case of large scale cultivation of cannabis), it was recognised that certain individuals are likely to be targeted and encouraged to participate in drug offences because their vulnerability can be exploited and that their more subordinate role justifies starting points at a lower level. Another example of an offender being exploited is the drug addict who is specifically targeted and persuaded to supply drugs as a way to feed a drug habit.

93. The degree to which the vulnerability of the offender to exploitation should influence the assessment of offender culpability (and hence the seriousness of an offence) is questionable bearing in mind that most offences are committed in the knowledge of what is being done (and that it is illegal). However, the selection of sentence may well be influenced by the degree to which an offender was targeted by others because of his or her vulnerability. Where the offender has imported drugs to this country and is ordinarily resident overseas, there may be practical difficulties in establishing the accuracy of information put forward.

⁶⁵ [2007] EWCA Crim 3129

94. The Panel seeks views on whether the fact that an offender's involvement in a drug offence has resulted from his or her vulnerability being exploited by others should be regarded as offender mitigation.

Question 12

Do you agree or disagree that the fact that an offender's vulnerability was exploited by others should be treated as offender mitigation?

95. In summary, in addition to the statutory aggravating factors and to the Sentencing Guidelines Council's standard list of aggravating and mitigating factors (see Annex D), the Panel is consulting on the following additional factors which may aggravate or mitigate the seriousness of a drug offence:

Aggravating factors

Factors indicating higher culpability

- Deliberately targeting premises where there are vulnerable people
- Supply to prisoners

Factors indicating a more than usually serious degree of harm

- Supplying a controlled drug in a locality associated with an open drugs market
- Possession of a knife or other weapon
- (in relation to the production of a drug) Exposure of others to danger

Mitigating factors

Offence mitigation

- Offering to supply a fake drug
- Mistaken belief of the offender regarding the type of drug
- Offence not commercially motivated

Offender mitigation

- Drugs used to help with a medical condition
- An offender's vulnerability was exploited

Question 13

Do you agree or disagree with the aggravating, mitigating and offender mitigation factors that have been identified for drug offences? What other factors, if any, (not covered here or in Annex D) ought to affect the seriousness of an offence or influence the sentence imposed?

DRUG COURIERS

96. The Panel has explored issues relating to the sentencing of “drug couriers” by which we mean people who carry illegal drugs from one country to another either on or inside their person or in their luggage. HMRC Drug Seizure figures for 2007⁶⁶ show that 36% of drug seizures involved drugs from Class A, 1% from Class B and 63% from Class C. The most common means of carrying Class A drugs was in the passenger’s accompanied baggage (55%); 20% were swallowed; 11% were carried on the person and only 1% were ‘stuffed’.⁶⁷ The picture was rather different for Class C drugs, with 73% being transported in accompanied baggage and 7% being secreted about the person. There was only 1 incident of ‘stuffing’ recorded and no drugs were seized having been swallowed. This reflects the vastly different quantities required to achieve similar levels of profit from drugs within the different classes.

97. The statistics also indicate the profile of individuals caught for transporting drugs. Of the total of 1,475 offenders, 77% (1141) were male. Overall, 36% (534) were from the UK and 14% (204) were from the European Economic Area; across both groups, 79% (583) were male. 25% (361) of offenders (of whom 70% (253) were male) were from other nationalities and nationality was not known for a further 25% (305) (of whom 81% were male). Those from outside the UK and EEA and those whose nationalities are unknown are most likely to be from third world countries. The ethnicity data relating to offenders from the UK shows that the large majority of males were white European (60%), with 16% being of African Caribbean origin and 7% Asian, whereas 53% of females were white European and 37% were African Caribbean. Women may be more likely to become involved in drugs importation as a result of ties with friends and relatives overseas (see also the later discussion at paragraphs 100 and 101).

⁶⁶ supplied by the Science and Research Group, Home Office (data obtained from an HMRC database used to record all seizures made by HMRC/UKBA (United Kingdom Borders Agency); this is a live system which is updated on a regular basis)

⁶⁷ ‘stuffing’ is the colloquial term used to describe inserting drugs within a bodily orifice

98. These figures cannot be broken down to separate out the offenders normally classed as drug couriers (see definition in paragraph 96 above) so it is not possible to say whether these relativities remain true for that group. However, concerns are often raised about foreign national drug couriers who may be living in poverty and keen to raise money for a better life for their families and therefore easily persuaded to transport drugs. These offenders may have little idea of the seriousness with which the crime is regarded in the country to which they are going, the risk of being caught, the potential harm of swallowing the drugs, or the severity of the punishment that is likely to be imposed if convicted. Following some extensive research, the typical profile of drugs couriers was summarised in 1996 as being "...of Third World poverty, of men and women who are generally naive about drugs, of men and women whose offence was not motivated by greed but by familial concerns and financial despair."⁶⁸

99. The 2008 annual report of the International Narcotics Board⁶⁹ highlighted the fact that the most common route into Europe from West Africa for illegal substances is by air. The report noted the recent development of a 'shotgun approach' with large numbers of 'air couriers' being dispatched on the same flight, making it difficult for law enforcement agencies to identify and arrest them all and ensuring that a proportion of the consignments get through. The report also cites some distressing case studies of women who have died as a result of swallowing narcotic substances for the purpose of concealment. This evidence demonstrates the naivety of the couriers and a total disregard by those at the top of the supply chain for their fate.

100. Recent newspaper coverage⁷⁰ suggests that little has changed; women from Africa are still being coerced into acting as couriers to repay debts incurred in relation to health care and school fees. That coverage attributes to Hibiscus,⁷¹ a view that there has been "a dramatic rise – as much as 40% - in women in their late 60s and 70s being conned into carrying or swallowing cocaine."⁷² The director of the charity is quoted as saying that the older women are more naive and less educated about the consequences than young people but also suggests that some of them are motivated by the prospect that, if they are caught, they will be given free health care for their many ailments.

⁶⁸ *Drug couriers: A New Perspective* Volume II, Howard League Handbooks, edited by Penny Green

⁶⁹ INCB Annual report 2008, page 52, ISBN 978-92-1-148232-4; www.incb.org/incb/annual-report-2008

⁷⁰ The Independent, 4 December 2008

⁷¹ a London-based charity which campaigns on behalf of foreign national women prisoners raising the needs and vulnerabilities of female drug couriers as a particular concern

⁷² *ibid.*

101. The proportion of sentenced foreign national female offenders⁷³ has been highlighted by welfare groups and concerns expressed about the impact of imprisonment on children left to fend for themselves overseas. In addition, reports from the Prison Inspectorate⁷⁴ have drawn attention to particular difficulties experienced by foreign national prisoners including language difficulties and the consequences of a lack of visitors during lengthy sentences. However, the majority of drug couriers are men and the approach to sentencing of drug couriers will apply as much to male offenders as to female offenders.

102. The negative impact of imprisonment on women in general has been considered in the Panel's consultation paper *Overarching Principles of Sentencing*.⁷⁵ This proposes a number of sentencing principles that the courts should follow when sentencing women offenders and, if agreed after consultation, these would apply equally to women sentenced for drug offences. Among these principles is encouragement for the court to give careful consideration to the particular vulnerabilities of a woman offender before concluding that a custodial sentence is essential and to seek a pre-sentence report if custody is being considered.

103. The Court of Appeal has taken a firm stance in response to claims of personal mitigation when dealing with drug offences, taking the view that the vulnerability and personal circumstances of the offender can play only a very small part in the sentencing process since the primary purpose of sentencing for this type of offence is deterrence.⁷⁶ In addition, as mentioned earlier, where the offender has come into the UK from another country and is resident there, there may be practical difficulties in establishing the accuracy of information put forward in mitigation. However, the doubts about the effectiveness of deterrent sentences described earlier (see paragraphs 21 to 25 above) may be thought to be particularly relevant in relation to offenders who are found in possession of a relatively small amount of drugs and who have no other significant involvement in the trade in controlled drugs.

104. Current sentencing levels for drug couriers are driven by those imposed for all importers and exporters of controlled drugs but the Panel recognises that there are

⁷³ At the end of June 2007, there were 3,345 sentenced adult women in prison. Of those, 687 were foreign nationals of whom 398(58%) had been sentenced for drug offences: Offender Management Caseload Statistics 2007, Ministry of Justice, published 30 October 2008, table 7.23 *The stats on the Women in Prison website appear to be from 2004!!Will check with the MOJ*

⁷⁴ See, for example, *Annual Report 2007-08* pp.39-41, 28 January 2009; *Foreign National Prisoners: a thematic review* July 2006; HM Chief Inspector of Prisons for England and Wales, <http://inspectors.homeoffice.gov.uk/hmiprison>

⁷⁵ Available at www.sentencing-guidelines.gsi.gov.uk Consultation closed on 28th October 2008.

⁷⁶ *Attorney General's reference No 14 of 2001 (Maria Das Flores)* [2003] 1 Cr App R (S) 17, [2002] EWCA Crim 1163

concerns over the long custodial sentences imposed.⁷⁷ The main criticisms are that sentences are disproportionate to the culpability of the individual offender and the harm that results from the particular offence. Although couriers are involved in importation, the amount of money they can expect to be paid is generally insignificant in relation to the profits made by people with other roles in the supply chain. The couriers also tend to be carriers only, with no knowledge of the wider organisation.

105. If the approach to sentencing of drug offences proposed in this paper is adopted, it is likely that many couriers would come within the “subordinate role” category and there are likely to be a number of other factors present that will mitigate sentence. In relation to the second determinant of seriousness (quantity), it is likely that the quantity of drugs involved will be relatively small. In addition, there may be offender mitigation such as exploitation of the offender’s vulnerability (see above), evidence of threats or coercion or the caring responsibilities of the offender. This would be likely to result in sentences for drug couriers being less severe than in the past.

Question 14

Do you agree that the combination of factors that the Panel is proposing should be taken into account by the courts will result in less severe sentences for drug couriers? Are you satisfied that this is the correct approach?

ANCILLARY ORDERS

106. There are a number of ancillary orders that may be imposed alongside a sentence for a drug offence; the extent to which an order will impact on the type or length of sentence will depend on the primary intention of the order. In the consultation paper *Overarching Principles of Seriousness*⁷⁸ the Panel has placed ancillary orders into three categories: those that are intended to have a punitive effect on an offender, those that are designed to protect the public from the risk of further harm or those that form part of reparation to the victim. The Panel has concluded that ancillary orders which are primarily intended to have a punitive effect on an offender *should* be taken into account when assessing whether the provisional sentence is commensurate to the seriousness of the offence.⁷⁹ Orders that are intended for public protection or reparation *should not* influence choice of sentence.

⁷⁷ Esmée Fairbairn Foundation, (2004) *Rethinking Crime and Punishment*; www.esmeefairbairn.org.uk

⁷⁸ published 8 July 2008, <http://www.sentencing-guidelines.gov.uk/consultations/closed/index.html>

⁷⁹ though see paragraph 101 concerning the statutory restrictions relating to confiscation orders

107. As a court will be required to follow the guidance in the definitive guideline which follows that consultation, it is not necessary to explore all of the ancillary orders that might be imposed on drug offenders. However, since confiscation orders, travel restriction orders and the serious crime prevention order are particularly relevant to this offence they are outlined below.

108. Until recently, a recommendation for deportation would also be considered relevant for drug-related offences. Section 32 of the UK Borders Act 2007 now stipulates that the Secretary of State must make a deportation order in respect of a foreign offender who has been sentenced to at least 12 months imprisonment.⁸⁰ Courts continue to have the power to recommend that a deportation order should be made in respect of any foreign national convicted of a drug-related offence⁸¹ but the likely effect of the Act is to make such recommendations superfluous.

Confiscation order

109. Under the Proceeds of Crime Act 2002, the Crown Court must consider whether to make a confiscation order where there is evidence that a defendant has a criminal lifestyle and has benefited from his or her general criminal conduct. A magistrates' court may commit the offender to the Crown Court for sentence with a view to such an order being made.⁸² "Lifestyle offences" are listed at schedule 2 of the Act and include offences of production, importation, exportation, supply, offering to supply, possession with intent to supply and permitting premises to be used for a drug related activity. If the court makes a confiscation order for a drug offence, it must take account of the order before it imposes: (a) a fine; (b) an order that requires the defendant to make a payment, unless that payment is under a compensation order; or (c) a deprivation order.⁸³ The Act states that, except in these circumstances, the court must not take account of the confiscation order in deciding the appropriate sentence, that is, the sentence cannot be reduced because a confiscation order has been made.⁸⁴

110. Mandatory procedures for the confiscation of the proceeds of drug trafficking have existed for many years. Prior to the Proceeds of Crime Act 2002, they were contained in

⁸⁰ With effect from 1 August 2008

⁸¹ Immigration Act 1971 section 3(6)

⁸² The Secretary of State may permit magistrates' courts to make orders confiscating amounts up to £10,000, but has not exercised this power.

⁸³ Proceeds of Crime Act 2002, s. 13(2) and (3)

⁸⁴ *ibid.*, s. 13(4)

the Drug Trafficking Act 1994. While confiscation orders are classified as protective orders because they can potentially deprive the offender of the means to commit further offences, it is fair to conclude that they are likely to have a punitive effect. The European Court of Human Rights has held that a confiscation order does amount to a penalty and that the effect is punitive even if that is not the primary purpose.⁸⁵ This view is echoed in the research mentioned earlier (see paragraph 28 and footnote 29) which found that offenders perceive confiscation of their assets as a greater punishment than a custodial sentence.

111. As mentioned in paragraph 33, over 1,100 confiscation orders were made for drug trafficking offences in 2007. This was a rise from the 960 orders made in 2006 and represented 15% of the offences in respect of which an order was legally possible, a small rise from 14% in 2005 and 2006.⁸⁶ The Panel considers that confiscation orders, through which assets may be recovered from within England and Wales or, with the cooperation of the relevant authorities, from overseas,⁸⁷ are an important part of the sentence for a drug-related offence in serious cases and may be the most effective element in deterring future offending.

Travel Restriction Order

112. Sections 33 to 37 of the Criminal Justice and Police Act 2001 enable the sentencing court to impose a travel restriction order (TRO) on an offender convicted of a drug trafficking offence who is sentenced to custody for four years or more. A TRO prevents an offender from leaving the UK for a minimum period of 2 years from the point of release from custody and for such period as the court considers suitable in all the circumstances.⁸⁸ The imposition of a TRO is not automatic but, where a court decides not to impose one, it must state the reasons for its decision.

113. Where an offender's sentence falls within a category that could trigger the making of a deportation order, the court should still consider imposing a TRO to cover the eventuality that deportation might not be ordered or effected; where an offender is not deported, the TRO will apply.⁸⁹ A court can grant revocation or temporary suspension of a TRO only in exceptional and compelling compassionate circumstances and provided that the application is made after the end of a minimum period as specified in statute. The TRO

⁸⁵ *Welch v United Kingdom* (1995) 20 EHRR 247

⁸⁶ From information supplied by OMS Analytical Services. Ministry of Justice, December 2008

⁸⁷ Proceeds of Crime Act 2002, s.74

⁸⁸ there is no maximum period

⁸⁹ Home Office circular 009/2007ref: DPRD-6Z4M7B, appendix A; www.knowledgenetwork.gov.uk/HO/circular.nsf

is categorised as a protective order and as such should not influence the sentence imposed for the offence (see paragraph 106). By the end of 2007, 355 orders had been made; 76 orders were made in 2005, 56 orders in 2006 and, 71 orders in 2007.⁹⁰

Serious Crime Prevention Order

114. The Serious Crime Prevention Order was introduced by the Serious Crime Act 2007. It may be made as a civil order by the High Court or on sentence in the Crown Court following conviction either in the Crown Court or in a magistrates' court. It may be made where the High Court is satisfied that a person has been involved in serious crime (not necessarily within England and Wales) or the Crown Court is dealing with a person convicted of a serious crime. In either situation, the court must have reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime in England and Wales.⁹¹ Involvement in serious crime includes commission of a "serious offence", facilitating the commission of such an offence by another person or conduct likely to facilitate the commission of such an offence.⁹² For these purposes, a "serious offence" includes the unlawful production or supply of a controlled drug, possession of a controlled drug with intent to supply and permitting premises to be used for a drug related activity.

115. The Act sets out examples of the types of provision that may be made by an order.⁹³ These include prohibitions, restrictions or requirements relating to an individual's financial, property or business dealings, working arrangements, means of communication access to or use of premises or travel. Requirements can include obligations to answer questions, or provide information or documents as directed. An order may not continue for more than 5 years. Failure to comply with an order is an offence with a maximum penalty of 5 years imprisonment and/or an unlimited fine; it is triable either way.⁹⁴ In accordance with the principles summarised in the Panel's consultation *Overarching Principles of Sentencing*,⁹⁵ an order made under these provisions with a view to protecting the public from further serious crime should not influence the choice of sentence imposed by the court.

⁹⁰ Data supplied by Offender Management Services, Ministry of Justice.

⁹¹ Serious Crime Act 2007, s.1

⁹² *ibid.*, s.2

⁹³ *ibid.*, s.5

⁹⁴ *ibid.*, s.25

⁹⁵ Page 120, published 8 July 2008, www.sentencing-guidelines.gov.uk

DIVERSITY ISSUES

116. The Panel has consulted key stakeholders to identify any factors relevant to sentencing that might result in outcomes that impact unfairly on grounds of race, disability, religion, ethnicity, gender, sexual orientation or age. The Panel is grateful to all those who responded; as can be seen above, the Panel is consulting on the specific issues around the treatment of drug couriers and the use of drugs for medical conditions. The high proportion of adult females in custody for drug offences was also raised as an issue by respondents (see also the earlier discussion at paragraph 101 in relation to drug couriers). The Panel's consultation *Overarching Principles of Sentencing*⁹⁶ discusses the disproportionate impact of sentencing on women. The Panel would like to hear from consultees whether there are any other reasons to believe that its proposals for sentencing drug offenders might potentially impact unfairly on any individual group.

Question 15

Is there any reason to believe that the Panel's proposals will impact disproportionately on some offenders by reason of their gender, age, disability, race or ethnic background?

⁹⁶ Published 8 July 2008, www.sentencing-guidelines.gov.uk

SECTION THREE: THE PANEL'S PROPOSALS

117. The Panel's proposed starting points and sentencing ranges have been formulated on the premise that requiring courts to impose particularly long custodial sentences for the purpose of deterrence is not the most effective sanction in view of the availability and potential impact of confiscation orders; **the proposed guidelines are based on an expectation that a confiscation order will be made in all cases where there are recoverable assets.**

118. In developing these proposals, the Panel has sought to assess the seriousness of each offence in comparison with other forms of offending (see Annex F and the discussion below); the Panel has also benefitted from the experience of a number of sentencers who deal with offences of this nature as a matter of routine. **As always, the Panel is interested to know whether consultees agree with the approach it is proposing.**

119. When proposing starting points and ranges for sentencing guidelines, the Panel compares sentencing levels across a wide range of offences to check that the proposals are consistent with the relative severity of the offending behaviour. Annex F sets out the starting points for other serious offences as contained in definitive guidelines of the Sentencing Guidelines Council and compares them with the Panel's proposals for importation, supply and production offences.⁹⁷

120. In assessing seriousness in comparison with serious sexual and violent offences, it could be argued that such offences are inherently more serious than the importation of a class A drug because they involve direct contact between the offender and victim and an intention to cause harm to an individual victim or victims. An alternative view might be that such offences are less serious where they involve harm to one victim, often on one occasion only, because drug offences, particularly importation, cause harm to a large number of people and can have a much more enduring impact on whole communities.

121. Under current sentencing practice the starting point for importing very large quantities of a class A drug is 14 years. As will be seen from the proposals on page 49, the highest proposed starting point is 12 years custody, within a range of 10 to 14 years, for the reasons set out in paragraphs 34-35 above. It could be argued (see the earlier

⁹⁷ these need to be considered in the light of the separate sentencing provisions for those convicted of specified violent or sexual offences who are identified as "dangerous offenders"; Criminal Justice Act 2003, Chapter 5

discussion at paragraph 40) that the current starting point of 14 years for importation is justified because of the particularly serious nature of drug offences. Reasons given might include the corrupting effect on communities, the enormous drain on enforcement resources to tackle both the drug-related offending itself and the consequences of use (including the serious and sometimes violent crimes generated, which place consequential demands on the National Health Service, and the alarm and concern provoked among the public) and the risk of fatalities among users. If it is felt that these characteristics of the offence of importation of a class A drug are of equivalent (or greater) seriousness when compared with those present in other serious offences, it could be argued that a Council guideline should maintain current starting points. The Panel recognises that all of these factors are relevant to the perceived level of offence seriousness in general terms but still takes the view that current sentencing levels often go beyond that which is justified by the seriousness of individual offences. We consider that the lower starting points and ranges we are proposing are more proportionate in light of the expectation of asset recovery in a large number of cases and almost certainly in relation to the most serious offences.

122. It is nevertheless the case that the Panel still considers any offence involving the supply etc. of a class A drug to be serious criminal behaviour and this is reflected in our proposals. Whilst there may be very rare cases (typically involving non-commercial supply (e.g. between equals) of a very small amount (e.g. one small wrap or tablet)) in which a custodial sentence within the jurisdiction of a magistrates' court may be appropriate, generally offences of supply etc. of a class A drug should be tried in the Crown Court since the starting points proposed are no less than 12 months imprisonment; this is the same starting point as for a premeditated assault occasioning actual bodily harm which results in relatively serious injury or for a street robbery involving the use or threat of minimal force. Even where the likely sentence is a community order in order to deal with an offender's underlying addiction, sentence should be imposed in the Crown Court so that an appropriate sentence can be imposed if the order is breached.

123. Broadly speaking, the Panel takes the view that offences of importation and exportation, production and supply are equally serious in as much as they all introduce drugs to the market-place, albeit in different ways; they share the same maximum penalties and, at their most serious, they are likely to attract similar sentences. The Panel has decided to produce one guideline (for each class of drug) that covers the offences of importation and exportation, supply, offering to supply and possession with intent to

supply. Recognising that the majority of prosecutions for possession with intent to supply involve relatively small quantities of drugs compared with those involved in offences of importation or exportation, the Panel has proposed four levels of seriousness to accommodate the wide range of offending behaviour.

124. Separate guidelines have been proposed for the offence of production only because the Panel has concluded that different determinants of seriousness are appropriate for that offence. The fact that the majority of illegal drugs imported into this country are in class A, with the result that most of the illegal drugs produced in England and Wales are in class B or C (mostly cannabis, see paragraph 9), may impact on sentencing profiles and outcomes, but the proposals are intended to result in similar sentences for offences across all three groups (importation, production and supply) where they involve similar scales of offending and the same class of drug.

125. As with existing guidelines, the Panel's proposals are based on a first-time offender convicted after trial. Each guideline provides a *starting point* and a *range* within which sentence will normally fall. A list of aggravating and mitigating factors most likely to arise is provided and these, along with other more general factors, will determine where in the range the sentence will fall. An explanation of the meaning of the terms starting point and range can be found in Annex G.

126. As noted earlier,⁹⁸ a classification system grades drugs by the relative harm caused and the Panel has reflected this approach in the starting points and ranges proposed; accordingly, they are higher for drugs in class A than in class B.

127. The Council has already produced guidelines on drug offences at the lower end of the seriousness scale in the Magistrates' Court Sentencing Guidelines (MCSG).⁹⁹ The Panel is now proposing sentences for the whole range of offence seriousness, where appropriate using the MCSG as a benchmark.

128. With the exception of the guidelines on permitting premises to be used for a drug related activity and on possession, the starting points are determined by two key factors, the role of the offender and either the quantity of the drug for which the offender has been

⁹⁸ paragraph 5

⁹⁹ Published May 2008; www.sentencing-guidelines.gov.uk

found responsible or the scale of the operation of which the offender was a part. Taken together, the two elements will enable a court to identify a provisional sentence which will then be adjusted to take into account aggravating and mitigating factors (including any previous convictions that the court considers it reasonable to take into account) and any guilty plea.

129. Some recent Court of Appeal decisions in relation to the production of cannabis illustrate the significance to sentence of the role of the offender. In *Pham*¹⁰⁰ the defendant was identified as being between a “gardener” and an “organiser” in a large scale operation. The court identified 2 years as an appropriate starting point for a “gardener” and 4 years for an “organiser”; a 3 year sentence was justified in the circumstances of the offence. In *Wong*,¹⁰¹ the defendant was at a major level in a large scale operation; a starting point of 8 years was appropriate following a Not Guilty plea.

130. Since an offender convicted of importation or supply of a class A drug who has two previous similar convictions is subject to a minimum sentence of seven years imprisonment, where the offender has a previous qualifying conviction, a court may need to consider a substantial increase from the starting point provided for a first time offender who has been found to be operating in a “subordinate role” (importation or a “significant” or “subordinate” role (Supply etc.)).

Question 16

Do you have any comments about the Panel’s approach to sentencing for drug offences? In particular, do you agree that starting points should be reduced from current levels for the reasons given?

Impact assessment

131. As acknowledged by the Sentencing Commission Working Group,¹⁰² it is extremely difficult to assess what impact the Panel’s proposals are likely to have on prison and probation resources without more detailed and more reliable sentencing data. The Panel’s ability to produce an impact assessment is limited by the availability of sufficient data to carry out a projection analysis; whilst it was possible to produce an impact assessment in relation to earlier proposals for sentencing in relation to theft from a shop and certain

¹⁰⁰ [2007] EWCA Crim 1451

¹⁰¹ [2008] EWCA Crim 687

¹⁰² *Sentencing Guidelines in England and Wales: an evolutionary approach*; www.justice.gov.uk/docs 5.1 p.16

causing death by driving offences, there is not enough data available to inform a detailed impact assessment on this occasion. Insofar as any general conclusions may be drawn, these are made clear at the appropriate point in the text.

IDENTIFYING A WAY TO QUANTIFY DIFFERENT TYPES OF DRUG

132. In order to determine a justifiable relationship between different drugs within the same class, the Panel has considered the Home Office seizure statistics for 2007 (which give an indication of the quantities of each type of drug most commonly found in the possession or control of offenders).¹⁰³ Drawn from information from the Police and HMRC, the statistics identify the amounts of drug seized in connection with intended charges of importation, exportation, supply, possession with intent to supply and possession. Although this data may not reflect the offences finally charged (especially where a decision has to be made as to whether the amount seized justifies a supply charge or is indicative merely of possession), the Panel considers that it has been able to extrapolate sufficient information from these statistics to make sensible proposals.

133. The Panel has also considered Court of Appeal guideline judgments which have established equivalencies when providing guidance on how quantities of different controlled drugs should relate to sentencing levels (for example, 5kg of heroin or cocaine has been equated with 50kg of opium, 50,000 tablets of ecstasy and 250,000 wraps of LSD). Many of these guideline judgments were given some time ago and, as the nature of illegal activities and the average purity or strength levels can change over time, the Panel is interested to know whether the equivalences identified in these guidelines are the most appropriate and whether any concerns or difficulties arise.

134. The Panel is aware that section 2 of the Drugs Act 2005 created an evidential presumption of intent to supply where the defendant is found in possession of an amount of a controlled drug over a prescribed amount.¹⁰⁴ In December 2005, the government consulted on what the prescribed amounts should be for the various drugs and, in 2006, following consultation with the ACMD, it laid a draft statutory instrument Parliament in this respect. However, respondents to the consultation raised a number of concerns, including the risk that defining amounts in this way might lead dealers to modify their behaviour to

¹⁰³ supplied by the Science and Research Group, Home Office

¹⁰⁴ by creating a new s.5(4A) in the MDA 1971

avoid being charged for anything other than possession. The difficulties in establishing prescribed amounts that are universally applicable and appropriate were also noted. As a result, the government decided to keep the matter under review and not to commence the relevant statutory provision at that time.

135. The Panel realises that creating guidelines linked to specified quantities of drugs might trigger similar criticisms but takes the view that guidelines that do not specify actual amounts could only ever be of limited assistance to the courts and could result in inconsistency.

Summary

136. The proposed guidelines:

- (i) are for an adult offender convicted after a trial
- (ii) are based on an expectation that a confiscation order will be made in all cases where there are recoverable assets and, accordingly, that the length of custodial sentences should not be calculated solely for the purpose of deterrence
- (iii) use two determinants of offence seriousness - the role of the offender and either the quantity of drugs involved or the scale of the operation
- (iv) include relative weights for the drugs most commonly involved in sentenced offences
- (v) are based on an assumption that, in terms of seriousness, the offences of importation/exportation, production and supply are inherently the same
- (vi) separately cover offences involving drugs in classes A and B (the class B guideline should be used for offences involving drugs in class C but the fact that the drugs were from class C will be a mitigating factor)

Question 17

Do you have any comments about the way in which the Panel has calculated relative drug quantities and aligned them with the proposed starting points and ranges?

Importation and Exportation, Supply or offering to supply and possession with intent to supply

Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug.
CEMA 1979, s.170(2) & MDA 1971, s.3

Supplying or offering to supply a controlled drug: **MDA 1971, s.4(3)**
Having possession of a controlled drug with the intent to supply it to another:
MDA 1971, s.5(3)

Mode of trial: Either way (all offences)

Maximum penalties:

Class A

Indictment: custody for life; Summary: Level 5 fine and/or 6 months custody

Class B

Indictment: 14 years custody and/or unlimited fine; Summary: Level 5 fine and/or 6 months custody

Class C

Indictment: 14 years custody and/or unlimited fine; Summary: Level 4 fine and/or 3 months custody

-
1. The starting points within these guidelines are for a first time offender convicted after a trial.
 2. They are based on an expectation that a confiscation order will be made in all cases where there are recoverable assets.
 3. The starting points and ranges are derived from the role of the offender and the quantity of drugs involved. Where appropriate, “dry weight” has been used rather than “wet weight”.
 4. Once the *Level* has been determined by reference to *quantity*, the appropriate sentencing range will be identified by reference to the *role of the offender*. The characteristics likely to place an offender within each role include:
 - (i) *Leading role* – close links to original source; instrumental in importation or responsible for organising buying and selling on a large scale; deals in substantial quantities; likely to make significant financial gain
 - (ii) *Significant role* – purchases drugs in large quantities; has links to suppliers and handles money; supplies to a regular customer base; employs runners or minders; arranges transportation; disguises illegal activity in company accounts
 - (iii) *Subordinate role* – usually in an employment relationship, for example runners or minders; drug couriers; delivery drivers; gardeners

These lists are illustrative, not exhaustive.

5. Within each range, the sentencing starting point has been based on the quantity set out in the left column; significant differences in quantity will be a factor in increasing or decreasing the starting point alongside other aggravating and mitigating factors.

6. In Level 1, where the quantity is at least 4 times greater than the lower amount provided as the basis for the sentencing range, a sentence outside the sentencing range is likely to need to be considered.
7. Quantities have been provided for the drugs most commonly prosecuted; where a different drug is the subject of the prosecution, the court will have to determine whether that quantity should be treated as very high (and so within Level 1), substantial (and so within Level 2) moderate (Level 3) or small (and so within Level 4).
8. In the guideline covering drugs in Classes B and C, a sentencing starting point and range have not been indicated for the lowest quantity of drugs for offenders who are identified as having a leading role because it is unlikely that this level of involvement could be proved without evidence of responsibility for a more significant quantity of drugs.
9. When using the guideline for classes B and C, the fact that the drugs involved were from class C is a mitigating factor that will reduce the starting point for an offence.

ADDITIONAL AGGRAVATING AND MITIGATING FACTORS

10. A full list of aggravating and mitigating factors is set out in the Council guideline *Overarching Principles: Seriousness*.¹⁰⁵ The additional factors listed below are likely to be particularly relevant to this type of offending behaviour:

Additional aggravating factors

Factors indicating higher culpability

1. Offender used a courier who was a young person
2. Targeting institutions with vulnerable people such as schools, further and higher education institutions, psychiatric health institutions and hospitals

Factors indicating more than a usually serious degree of harm

3. Supply to prisoners
4. Supplying in a locality associated with an open drugs market

Additional mitigating factors

1. Drug was from Class C
2. Supply of fake drugs

Offender mitigation

3. Offender's vulnerability was exploited
4. Offender believed the drug to be of a lower class
5. Relatively small quantities were carried on or in the person
6. Relatively small quantity carried for personal use
7. Offender played a very minor role and had no previous ties with the enterprise
8. Financial gain was smaller than that expected for others in the chain

¹⁰⁵ published 16 December 2004, www.sentencing-guidelines.gov.uk; see Annex D

Importation and Exportation, Supply or offering to supply and possession with intent to supply: CLASS A

Quantities of drug	Offender's role in the supply chain		
	Sentencing level		
	Leading role	Significant role	Subordinate role
<p>LEVEL 1 – Very High (indicative of an international commercial operation)</p> <p>a) The starting point is based on: Heroin, cocaine/crack cocaine – 5kg Ecstasy - 5kg /50,000 tablets LSD - 250,000 squares/dosage units Opium – 50 kg</p> <p>b) The ranges for this level are for offences where the amount exceeds: Heroin, cocaine/crack cocaine – 2.5kg Ecstasy - 2.5kg/25,000 tablets LSD - 125,000 squares/dosage units Opium – 25kg <i>(where the quantity of drug is 4 times or more the amount given, a sentence outside the range should be considered)</i></p>	<p>Starting point: 12 years custody</p> <p>Range: 10 - 14 years custody</p>	<p>Starting point: 8 years custody</p> <p>Range: 6 - 10 years custody</p>	<p>Starting point: 4 years custody</p> <p>Range: 2 - 6 years custody</p>
<p>LEVEL 2 – Substantial (indicative of a large scale commercial operation)</p> <p>a) The starting point is based on: Heroin, cocaine/crack cocaine – 1kg Ecstasy - 1kg/10,000 tablets LSD - 50,000 squares/dosage units Opium – 10 kg</p> <p>b) The ranges for this level are: Heroin, cocaine/crack cocaine - more than 500g up to 2.5kg Ecstasy – more than 500g/5,000 tablets up to 2.5kg/25,000 tablets LSD – more than 10,000 up to 125,000 squares/dosage units Opium - more than 5 kg up to 25 kg</p>	<p>Starting point: 8 years custody</p> <p>Range: 6 - 10 years custody</p>	<p>Starting point: 6 years custody</p> <p>Range: 4 - 8 years custody</p>	<p>Starting point: 3 years custody</p> <p>Range: 1 - 5 years custody</p>
<p>LEVEL 3 – Moderate (indicative of a smaller scale but still significant operation)</p> <p>a) The starting point is based on: Heroin, cocaine/crack cocaine – 150g Ecstasy - 150g/1,500 tablets LSD – 7,500 squares/dosage units Opium - 1.5 kg</p> <p>b) The ranges for this level are: Heroin, cocaine/crack cocaine – more than 50g up to 500g Ecstasy – more than 50g/500 tablets up to 500g/5,000 tablets LSD – more than 2,500 up to 10,000 squares/ dosage units Opium – more than 500g up to 5 kg</p>	<p>Starting point: 5 years custody</p> <p>Range: 3 - 7 years custody</p>	<p>Starting point: 3 years custody</p> <p>Range: 2 – 5 years custody</p>	<p>Starting point: 18 months custody</p> <p>Range: Community order (High level) - 2 years custody</p>
<p>LEVEL 4 – Small (indicative of much smaller street dealing or importation/exportation for personal use)</p> <p>a) The starting point is based on: Heroin, cocaine/crack cocaine – 25g Ecstasy -25g/ 250tablets LSD – 1,250 squares/dosage units Opium - 250g</p> <p>b) The ranges for this level are: Heroin, cocaine/crack cocaine – up to 50g Ecstasy - up to 50g/ 500tablets LSD - up to 2,500 squares/ dosage units Opium – up to 500g</p>	<p>Starting point: 3 ½ years custody</p> <p>Range: 2 – 5 years custody</p>	<p>Starting point: 2 years custody</p> <p>Range: 12 months - 3 years custody</p>	<p>Starting point: 12 months custody</p> <p>Range: Community order (Medium level) – 18 months custody</p>

Importation and Exportation, Supply or offering to supply and possession with intent to supply: CLASSES B and C (see point 9 on page 49)

Quantities of drug	Offender's role in the supply chain		
	Sentencing level		
	<u>Leading role</u>	<u>Significant role</u>	<u>Subordinate role</u>
<p>LEVEL 1 – Very High (indicative of an international commercial operation)</p> <p>a) The starting point is based on: Amphetamine – 25kg Cannabis (herbal or resin) - 250kg</p> <p>b) The ranges for this level are for offences where the amount exceeds: Amphetamine – more than 15kg Cannabis (herbal or resin) – more than 150kg (<i>where the quantity of drug is 4 times or more the amount given, a sentence outside the range should be considered.</i>)</p>	<p><u>Starting point:</u> 8 years custody</p> <p><u>Range:</u> 6 - 10 years custody</p>	<p><u>Starting point:</u> 4 years custody</p> <p><u>Range:</u> 3 - 6 years custody</p>	<p><u>Starting point:</u> 2 years custody</p> <p><u>Range:</u> 12 months- 4 years custody</p>
<p>LEVEL 2 – Substantial (indicative of a large scale commercial operation)</p> <p>a) The starting point is based on: Amphetamine – 10kg Cannabis (herbal or resin) – 100kg</p> <p>b) The ranges for this level are: Amphetamine - more than 7.5kg and up to 15kg Cannabis (herbal or resin) – more than 25kg up to 150kg</p>	<p><u>Starting point:</u> 4 years custody</p> <p><u>Range:</u> 3 - 7 years custody</p>	<p><u>Starting point:</u> 2 years custody</p> <p><u>Range:</u> 12 months - 3 years custody</p>	<p><u>Starting point:</u> 12 months custody</p> <p><u>Range:</u> Community order (High level) - 2 years custody</p>
<p>LEVEL 3 – Moderate (indicative of a smaller scale but still significant operation)</p> <p>a) The starting point is based on: Amphetamine – 1kg Cannabis (herbal or resin) – 10kg</p> <p>b) The ranges for this level are: Amphetamine – more than 50g up to 7.5kg Cannabis (herbal or resin)- more than 500g up to 25kg</p>	<p><u>Starting point:</u> 2 years custody</p> <p><u>Range:</u> 12 months – 4 years custody</p>	<p><u>Starting point:</u> 12 months custody</p> <p><u>Range:</u> Community order (High level) – 2 years custody</p>	<p><u>Starting point:</u> 26 weeks custody</p> <p><u>Range:</u> Community order (Medium level) – 12 months custody</p>
<p>LEVEL 4 – Small (indicative of much smaller street dealing or importation/exportation for personal use)</p> <p>a) The starting point is based on: Amphetamine – 10g Cannabis (herbal or resin) – 100g</p> <p>b) The ranges for this level are: Amphetamine – up to 50g Cannabis (herbal or resin)- up to 500 g</p>	<p><u>N/A</u></p> <p>[unlikely to prove leading role if quantity is small]</p>	<p><u>Starting point:</u> 26 weeks custody</p> <p><u>Range:</u> Community order (High level) – 12 months custody</p>	<p><u>Starting point:</u> Community order (High level)</p> <p><u>Range:</u> Fine – 6 weeks custody</p>

Production of a controlled drug (including cultivation of cannabis)

Offence	Definition of offence/ Maximum penalty
<p><u>Production</u> MDA 1971, s. 4(2)</p>	<p>Producing or being concerned in the production of a controlled drug</p> <p><u>Class A</u> Custody for life; Summary: Level 5 fine and/or 6 months custody</p> <p><u>Class B</u> 14 years custody; Summary: Level 5 fine and/or 6 months custody</p> <p><u>Class C</u> 14 years custody; Summary: Level 5 fine and/or 3 months custody</p>
<p><u>Cultivation of cannabis</u> MDA 1971, s. 6(2)</p>	<p>Cultivation of cannabis plant(s)</p> <p>14 years custody; Summary: Level 5 fine and/or 6 months custody</p>

1. The starting points within these guidelines are for a first time offender convicted after a trial.
2. They are based on an expectation that a confiscation order will be made in all cases where there are recoverable assets.
3. In this guideline, the assessment of seriousness is based on the scale of the operation and the offender's role within it. The quantity of drugs seized may be relevant to the assessment of the scale of the operation.
4. Identifying the scale of the operation will enable the level of seriousness to be determined. The next stage will be to identify the role of the offender within that operation. For an explanation of the factors likely to be significant in identifying role, see paragraphs 39 to 51 above.
5. Once the *Level* has been determined by reference to *the scale of the operation*, the appropriate sentencing range will be identified by reference to the *role of the offender*. The characteristics likely to place an offender within each role include:
 - (i) *Leading role* – close links to original source; instrumental in importation or responsible for organising buying and selling on a large scale; deals in substantial quantities; likely to make significant financial gain
 - (ii) *Significant role* – purchases drugs in large quantities; has links to suppliers and handles money; supplies to a regular customer base; employs runners or minders; arranges transportation; disguises illegal activity in company accounts
 - (iii) *Subordinate role* – runners or minders; drug couriers; delivery drivers; gardeners

These lists are illustrative, not exhaustive.

6. The unlawful abstraction of electricity or other source of power is an aggravating factor where it is not charged as a separate offence. Where that exposes those not involved in the offence to significant danger, it may be appropriate to impose a sentence beyond the range into which the offence would otherwise fall.

7. A sentencing starting point and range have not been indicated for the lowest scale of operation for offenders who are identified as having a leading role because it is unlikely that this level of involvement could be proved without evidence of responsibility for a more significant operation.

8. When using the guideline for classes B and C, the fact that the drugs involved were from class C is a mitigating factor that will reduce the starting point for an offence.

ADDITIONAL AGGRAVATING AND MITIGATING FACTORS

9. A full list of aggravating and mitigating factors is set out in the Council guideline *Overarching Principles: Seriousness*.¹⁰⁶ The additional factors listed in the guideline are likely to be particularly relevant to this type of offending behaviour.

¹⁰⁶ published 16 December 2004, www.sentencing-guidelines.gov.uk; see Annex D

Production of a controlled drug: CLASS A

<u>Scale of operation</u>	Offender's role		
	<u>Leading role</u>	<u>Significant role</u>	<u>Subordinate role</u>
Level 1 Substantial enterprise capable of producing significant quantities for widespread distribution generating high income	<u>Starting point:</u> 12 years custody <u>Range:</u> 10-14 years custody	<u>Starting point:</u> 8 years custody <u>Range:</u> 6 –10 years custody	<u>Starting point:</u> 4 years custody <u>Range:</u> 2 - 6 years custody
Level 2 Moderate scale of enterprise capable of supplying extensive but more limited distribution network	<u>Starting point:</u> 8 years custody <u>Range:</u> 6 -10 years custody	<u>Starting point:</u> 6 years custody <u>Range:</u> 4 - 8 years custody	<u>Starting point:</u> 3 years custody <u>Range:</u> 1 – 5 years custody
Level 3 Limited enterprise likely to produce only in small quantities for very limited distribution or personal use	N/A [unlikely to equate to the definition of a leading role if enterprise is small]	<u>Starting point:</u> 3 years custody <u>Range:</u> 12 months - 4 years custody	<u>Starting point:</u> 18 months custody <u>Range:</u> Community order (High level) – 2 years custody

Additional aggravating factors	Additional mitigating factors
<u>Factors indicating higher culpability</u> <ol style="list-style-type: none"> 1. Use of sophisticated production system 2. Use of sophisticated system of concealment 3. Persistent production of drug 4. Exposure of others to danger 5. An attempt to conceal or dispose of evidence 	<u>Factors indicating lower culpability</u> <ol style="list-style-type: none"> 1. Drug was from Class C
<u>Factors indicating greater degree of harm</u> <ol style="list-style-type: none"> 6. Involvement of vulnerable persons 	<u>Offender mitigation</u> <ol style="list-style-type: none"> 2. Evidence drug used to help with a medical condition 3. Offender exploited because of vulnerability

**Production of a controlled drug (including cultivation of cannabis):
CLASSES B and C (see point 8 on page 53)**

<u>Scale of operation</u>	Offender's role Sentencing level		
	<u>Leading role</u>	<u>Significant role</u>	<u>Subordinate role</u>
Level 1 Substantial enterprise capable of producing significant quantities for widespread distribution generating high income	<u>Starting point:</u> 8 years custody <u>Range:</u> 6 -10 years custody	<u>Starting point:</u> 4 years custody <u>Range:</u> 3 – 6 years custody	<u>Starting point:</u> 2 years custody <u>Range:</u> 12 months - 4 years custody
Level 2 Moderate scale of enterprise capable of supplying extensive but more limited distribution network	<u>Starting point:</u> 4 years custody <u>Range:</u> 3 -7 years custody	<u>Starting point:</u> 2 years custody <u>Range:</u> 12 months - 3 years custody	<u>Starting point:</u> 12 months custody <u>Range:</u> Community order (Medium level) – 2 years custody
Level 3 Limited enterprise likely to produce only in small quantities for very limited distribution or personal use	N/A [unlikely to equate to the definition of a leading role if enterprise is small]	<u>Starting point:</u> 12 months custody <u>Range:</u> 26 weeks – 2 years custody	<u>Starting point:</u> 26 weeks custody <u>Range:</u> Community order (Medium level) – 12 months custody

Additional aggravating factors	Additional mitigating factors
<u>Factors indicating higher culpability</u> <ol style="list-style-type: none"> 1. Use of sophisticated production system 2. Use of sophisticated system of concealment 3. Persistent production of drug 4. Exposure of others to danger 5. An attempt to conceal or dispose of evidence <u>Factors indicating greater degree of harm</u> <ol style="list-style-type: none"> 6. Involvement of vulnerable persons 	<u>Factors indicating lower culpability</u> <ol style="list-style-type: none"> 1. Drug was from class C <u>Offender mitigation</u> <ol style="list-style-type: none"> 2. Evidence drug used to help with a medical condition 3. Offender exploited because of vulnerability

Permitting premises to be used

Offence	Maximum sentence
Permitting premises to be used for the production, supply, administering or use of controlled drugs MDA 1971, s. 8	14 years custody; summary Class A/B 6 months/Level 5; Class C 3 months/Level 4

1. The starting points within this guideline are for a first time offender convicted after a trial.
2. The starting points and ranges are based on the assumption that the more serious offences will be charged either as production of a controlled drug or as a conspiracy.
3. They are based also on an expectation that a confiscation order will be made in all cases where there are recoverable assets.
4. When using the guideline for classes B and C, the fact that the drugs involved were from class C is a mitigating factor that will reduce the starting point for an offence.

ADDITIONAL AGGRAVATING AND MITIGATING FACTORS

5. A full list of aggravating and mitigating factors is set out in the Council guideline *Overarching Principles: Seriousness*.¹⁰⁷ The additional factors listed in the guideline are likely to be particularly relevant to this type of offending behaviour.

¹⁰⁷ published 16 December 2004, www.sentencing-guidelines.gov.uk; see Annex D

Permitting premises to be used

Type/nature of activity	Sentencing level	
	Class A	Classes B and C (see point 4 on page 56)
<p>Level 1</p> <p>A drug related activity is the primary purpose for which the premises are used e.g. crack house or cannabis 'factory'.</p>	<p><u>Starting point:</u></p> <p>3 years custody</p> <p><u>Range:</u></p> <p>2 - 4 years custody</p>	<p><u>Starting point:</u></p> <p>2 years</p> <p><u>Range:</u></p> <p>1 – 3 years</p>
<p>Level 2</p> <p>Drug related activity in public premises is not the main purpose for which the premises are used e.g. public house, clubs etc</p>	<p><u>Starting point:</u></p> <p>36 weeks custody</p> <p><u>Range:</u></p> <p>Community order (Medium level) - 12 months custody</p>	<p><u>Starting point:</u></p> <p>26 weeks custody</p> <p><u>Range:</u></p> <p>Community order (Low level) - 36 weeks custody</p>
<p>Level 3</p> <p>Drug related activity in domestic premises is not the main purpose for which the premises are used e.g. a room let in a house</p>	<p><u>Starting point:</u></p> <p>Community order (High level)</p> <p><u>Range:</u></p> <p>Community order (Medium level) - 26 weeks custody</p>	<p><u>Starting point:</u></p> <p>Community order (Medium level)</p> <p><u>Range:</u></p> <p>Community order (Low level) - Community order (High level)</p>
Additional aggravating factors		Additional mitigating factors
<ol style="list-style-type: none"> 1. Attempt to conceal or dispose of evidence 2. The offender stood to gain additional profit from the drug related activity 3. Very high scale of use 		<ol style="list-style-type: none"> 1. Drug was from class C

Possession of a controlled drug

Offence	Maximum sentence
Having possession of a controlled drug MDA 1971 Section 5(2)	Class A: Custody 7 years; summary 6 months/Level 5 fine Class B: Custody 5 years; summary 3 months/Level 4 fine Class C: Custody 2 years; summary 3 months/Level 3 fine

1. The starting points within this guideline are for a first time offender convicted after a trial.
2. This guideline is derived from the guidelines in the Magistrates' Court Sentencing Guidelines with additional provision for those offences requiring sentence in the Crown Court.
3. Where an offence is sentenced in the Crown Court, there is an expectation that a confiscation order will be made in all cases where there are recoverable assets.
4. The top of the range for **Level 1** offences is substantially below the maximum penalty reflecting both current sentencing practice and the likelihood that possession of larger quantities would be charged as possession with intent to supply.
5. When using the guideline for classes B and C, the fact that the drugs involved were from class C is a mitigating factor that will reduce the starting point for an offence.

ADDITIONAL AGGRAVATING AND MITIGATING FACTORS

6. A full list of aggravating and mitigating factors is set out in the Council guideline *Overarching Principles: Seriousness*.¹⁰⁸ The additional factors listed in the guideline are likely to be particularly relevant to this type of offending behaviour.

¹⁰⁸ published 16 December 2004, www.sentencing-guidelines.gov.uk; see Annex D

Possession of a controlled drug: CLASS A

Type/Nature of activity/Quantity	Sentencing level
<p>Level 1 Possession of drug in prison – whether by prisoner or another person</p>	<p><u>Starting point:</u> 12 months custody</p> <p><u>Range:</u> 9 months custody - 3 years custody</p>
<p>Level 2 Amount larger than the range in Level 3</p>	<p><u>Starting point:</u> Community order (High level)</p> <p><u>Range:</u> Community order (Medium level) - 12 months custody</p>
<p>Level 3 More than a very small quantity e.g. Up to six wraps or tablets</p>	<p><u>Starting point:</u> Community order (Medium level)</p> <p><u>Range:</u> Community order (Low level) to Community order (High level)</p>
<p>Level 4 Very small quantity e.g. One small wrap or tablet</p>	<p><u>Starting point:</u> Band C fine</p> <p><u>Range:</u> Band B fine to Community order (Medium level)</p>
<p>Additional aggravating factors</p>	<p>Additional mitigating factors</p>
<p><u>Factors indicating higher culpability</u></p> <ol style="list-style-type: none"> 1. Offender exercising or acting in position of special responsibility 2. Possession of drug in a public place or school 	

Possession of a controlled drug: CLASSES B and C (See point 5 on page 58)

Quantity	Sentencing level
<p>Level 1 Larger amount</p>	<p><u>Starting point:</u> Band B fine</p> <p><u>Range:</u> Band B fine to 12 weeks custody</p>
<p>Level 2 Small amount for personal use</p>	<p><u>Starting point:</u> Band B fine</p> <p><u>Range:</u> Band A fine to Community order (Low level)</p>

Additional aggravating factors	Additional mitigating factors
<p><u>Factors indicating higher culpability</u></p> <ol style="list-style-type: none"> Offender exercising or acting in position of special responsibility Possession of drug in a public place, school or prison 	<p><u>Factors indicating lower culpability</u></p> <ol style="list-style-type: none"> Drug was from class C <p><u>Offender mitigation</u></p> <ol style="list-style-type: none"> Evidence that use was to help cope with a medical purpose

Question 18

Do you have any specific comments on the sentencing guidelines proposed above for each of the offences covered in this consultation paper?

SUMMARY OF QUESTIONS

Question 1

Are you aware of any research or other evidence that demonstrates the effectiveness or otherwise of increased sentence lengths for drug offences either in deterring individual sentenced offenders from committing further drug offences or in deterring others from committing similar crimes?

Question 2

Do you agree that, in serious cases, powers such as those available under a confiscation order or a serious crime prevention order are now likely to be a more effective deterrent than increasing the length of a custodial sentence beyond that necessary to meet any other purposes of sentencing? Please give your reasons.

Question 3

Have the various roles been properly identified and described? What other roles, if any, might need to be considered?

Question 4

Do you consider that the Panel has taken the correct approach in identifying the role of the offender and either the quantity of drugs involved or the scale or extent of the operation as the key determinants of seriousness?

Do you have any reason to believe that this approach would create any difficulties in practice?

Question 5

What relevance, if any, should the purity or strength of a drug have to sentencing? To what extent do you agree or disagree with the approach taken by the Panel?

Question 6

Is it possible to make a reliable estimate of the street value of drugs seized and to what extent should value be relevant to the assessment of offence seriousness?

Question 7

Do you consider that it would be appropriate to regard an offence as more serious if an offender supplies controlled drugs in a locality associated with an open drugs market? Please give your reasons.

Question 8

Do you agree that, where an offender has knowingly supplied a fake drug, the offence should be sentenced as if it were an offence of dishonesty? If you do not agree, in what circumstances (if at all) should it mitigate the seriousness of an offence that the items offered for supply were not, in fact, illegal substances?

Question 9

In what circumstances (if at all) should the seriousness of an offence be mitigated by an offender's mistaken belief about the drug involved or by the fact that the offence was not commercially motivated?

Question 10

What other factors, if any, might make an offence less serious and why?

Question 11

Do you agree or disagree that the fact that drugs are used to help with a medical condition should be considered as offender mitigation for drug offences?

Question 12

Do you agree or disagree that the fact that an offender's vulnerability was exploited by others should be treated as offender mitigation?

Question 13

Do you agree or disagree with the aggravating, mitigating and offender mitigation factors that have been identified for drug offences? What other factors, if any, (not covered here or in Annex D) ought to affect the seriousness of an offence or influence the sentence imposed?

Question 14

Do you agree that the combination of factors that the Panel is proposing should be taken into account by the courts will result in less severe sentences for drug couriers? Are you satisfied that this is the correct approach?

Question 15

Is there any reason to believe that the Panel's proposals will impact disproportionately on some offenders by reason of their gender, age, disability, race or ethnic background?

Question 16

Do you have any comments about the Panel's approach to sentencing for drug offences? In particular, do you agree that starting points should be reduced from current levels for the reasons given?

Question 17

Do you have any comments about the way in which the Panel has calculated relative drug quantities and aligned them with the proposed starting points and ranges?

Question 18

Do you have any specific comments on the sentencing guidelines proposed above for each of the offences covered in this consultation paper?

LIST OF CONSULTEES

Copies of the consultation paper have been sent to the people and organisations listed below. They include the organisations that the Panel is required to consult by the direction of the Sentencing Guidelines Council. In addition, copies have been sent to the Resident Judge at each Crown Court Centre in England and Wales.

Addaction

Advisory Council on the Misuse of Drugs

All Party Parliamentary Drug Misuse Group

Association of Chief Police Officers

Association of Directors of Social Services

Association of Women Judges

Centre for Crime and Justice Studies

Compass

Council of HM District Judges (Magistrates' Courts)

Council of HM Circuit Judges

CRI

Criminal Justice Alliance

Crown Prosecution Service

DrugScope

Equality and Human Rights Commission

Drug Intelligence Unit, Forensic Science Service Ltd

General Council of the Bar

Hibiscus

H M Prison Service

HMRC Drugs Strategy Team

Home Office, Organised and Financial Crime Unit

Howard League for Penal Reform

House of Commons Innovation, Universities, Science and Skills Committee

Justice

Justices' Clerks' Society
Dr. Les King (former member of ACMD)
Law Commission
Law Society
Liberty
Lifeline Projects Ltd
Magistrates' Association
Metropolitan Police
National Association for the Care and Resettlement of Offenders
National Association of Probation Officers
National Bench Chairmen's Forum
National Offender Management Service
National Probation Service
National Treatment Agency
Parole Board
Phoenix Futures
Police Federation of England and Wales
The Police Foundation
Police Superintendents' Association
Prison Governors' Association
Prison Officers' Association
Prison Reform Trust
Probation Managers' Association
Society of Legal Scholars
TicTac Communications
Transform
Turning Point
UK Drug Policy Commission

Victims Advisory Panel

Victim Support

Victims of Crime Trust

Women in Prison

YJB

MISUSE OF DRUGS ACT 1971

Section creating offence	General nature of offence	Mode of trial	Punishment
s. 4(2)	Production or being concerned in the production of a controlled drug	a) Summary	<u>Class A</u> 6 months or the prescribed sum, or both <u>Class B</u> 6 months or the prescribed sum, or both <u>Class C</u> 3 months or £2,500 or both
		b) On indictment	<u>Class A</u> Life or a fine or both <u>Class B</u> 14 years or a fine, or both <u>Class C</u> 14 years or a fine, or both
s.4(3)	Supplying or offering to supply a controlled drug or being concerned in the doing of either activity by another	a) Summary	<u>Class A</u> 6 months or the prescribed sum or both <u>Class B</u> 6 months or the prescribed sum or both <u>Class C</u> 3 months or £2,500 or both
		b) On indictment	<u>Class A</u> Life or a fine or both <u>Class B</u> 14 years or a fine, or both <u>Class C</u> 14 years or a fine, or both
s.5(2)	Having possession of a controlled drug	a) Summary	<u>Class A</u> 6 months or the prescribed sum or both <u>Class B</u> 3 months or £2,500 or both <u>Class C</u> 3 months or £1,000 or both
		b) On indictment	<u>Class A</u> 7 years or a fine, or both <u>Class B</u> 5 years or a fine, or both <u>Class C</u> 2 years or a fine, or both

s.5(3)	Having possession of a controlled drug with intent to supply it to another	a) Summary	<u>Class A</u> 6 months or the prescribed sum or both <u>Class B</u> 6 months or the prescribed sum or both <u>Class C</u> 3 months or £2,500 or both
		b) On indictment	<u>Class A</u> Life or a fine or both <u>Class B</u> 14 years or a fine, or both <u>Class C</u> 14 years or a fine, or both
s.6(2)	Cultivation of cannabis plant	a) Summary	6 months or the prescribed sum, or both
		b) On indictment	14 years or a fine, or both
s.8	Being the occupier, or concerned in the management, of premises and permitting or suffering certain activities to take place there	a) Summary	<u>Class A & B</u> 6 months or the prescribed sum or both <u>Class C</u> 3 months or £2,500 or both
		b) On indictment	<u>Class A-C</u> 14 years or a fine, or both

The statistical information in Annex B is available electronically on the Panel / Council website: www.sentencing-guidelines.gov.uk , using the link to Public Consultations

Current sentencing guidelines

Class or type of drug	Offence	Guideline case/guidance	Basis of starting point	Quantity	Sentencing guidelines (years in custody unless otherwise stated)
CLASS A					
Heroin and cocaine	Importation	R v Aranguren and others (1995) <i>Updating Aramah</i>	Weight at 100% purity	5kg+ 500g+	14 years+ 10 years+
Heroin	Importation	R v Aramah (1982)	Weight	Appreciable amount	Seldom less than 4 years
Heroin	Supply & possession with intent to supply	R v Satvir Singh (1988) <i>Updating Aramah</i>	Weight	Limited relevance	SP: 5 years
Ecstasy	Importation	R v Warren and Beeley (1996)	Number of tablets.	50,000+	14 years+
			Purity average at 100mg per tablet.	5,000+	10 years+
LSD	Possession with intent to supply	R v Hurley (1998)	Squares or dosages (one-quarter inch). Average dosage 50mg purity	250,000+	14 years+
				25,000+	10 years+
Class A	Possession	Magistrates' Court Sentencing Guidelines (2008)	Quantity	Large amounts More than a very small quantity e.g. up to six wraps or tablets	SP: High level community order R: Medium level community order to Crown Court SP: Medium level community order R: Low level community order to high level community order

CLASS B		Magistrates' Court Sentencing Guidelines (2008)		A very small quantity e.g. one small wrap or tablet	SP: Band C fine R: Band B fine to medium level community order
Amphetamine	Importation Intent to supply	R v Wijs and others (1998)	Weight at 100% pure base	>15 kilos >10 but <15 kilos >2.5 kilos but <10 kilos >500g but <2.5 kilos Up to 500g	10 years+ 7-10 years 4-7 years 2-4 years Up to 2 years
Class B and C (<i>class C mitigating factor</i>)	Possession	MCSG	Amount	Small amount for personal use	SP: Band B fine R: Band A fine to low level community order
Class B and C	Possession with intent to supply	MCSG	Amount	Minimal quantity between equals Small scale retail supply to consumer Minimal quantity between equals on a non-commercial basis e.g. a reefer	SP: Band C fine R: Band B fine to low level community order SP: High level community order (if class C) & 6 weeks custody (if class B) R: Low level community order to 6 weeks custody (if class C) & medium level community order to 26 weeks custody (if class B) SP: Band C fine R: Band B fine to low level community order

Cannabis and cannabis resin (under old classification)	Importation	R v Ronchetti (1998)		500kg or more 100kg or more <i>By persons playing more than a subordinate role</i>	10 years 7-8 years
Cannabis and cannabis resin (under old classification)	Importation	R v Aramah (1982)	Weight	Small amounts Up to 20kg >20kg large scale or wholesale	Deal with as personal use. 18 mths – 3 years 3-6 years 10 years
Cannabis and cannabis resin (under old classification)	Supply	R v Aramah (1982)	Weight	Massive quantities & more than subordinate role. Otherwise Wholesaling (to a small number of sellers at top of range and retailing small amount to a consumer at the bottom.	10 years 1 – 4 years
Cannabis and cannabis resin (under old classification)	Possession	R v Aramah (1982)	Weight	Small amount for personal use	Fine

Class C					
Cannabis	Cultivation and production of cannabis	R v Xiong Xu <i>(not considered a guideline)</i>	Role of the offender. Commercial involvement only.	Lowest level The organisers: those who set up and control individual operations Managers (depending on involvement the value of cannabis being produced).	SP: 3 years custody SP: 6-7 years custody SP: 3-7 years custody
Cannabis	Cultivation of cannabis	MCSG	Weight and commerciality	Commercial cultivation Small scale for personal use and non-commercial supply to small circle of friends Very small scale for personal use only i.e. one or two plants.	Crown Court SP: High level community order R: medium level community order to 12 weeks custody SP: High level community order R: medium level community order to 12 weeks custody

AGGRAVATING AND MITIGATING FACTORS IDENTIFIED IN THE SENTENCING GUIDELINES COUNCIL GUIDELINE 'OVERARCHING PRINCIPLES: SERIOUSNESS'

Aggravating factors

Factors indicating higher culpability:

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

Factors indicating a more than usually serious degree of harm:

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable
- Location of the offence (for example, in an isolated place)
- Offence is committed against those working in the public sector or providing a service to the public
- Presence of others e.g. relatives, especially children or partner of the victim
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

Mitigating factors

Factors indicating significantly lower culpability:

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

Personal mitigation

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

Comparison between proposed starting points and ranges for offering to supply a controlled drug and confidence fraud

* It has been assumed that fake drugs are likely to be supplied only in small quantities, falling within Level 4 of the supply guideline (see pages 50-51). It is anticipated that the level of fraud would either be Level 2 or, for less serious offences, Level 4 (in which case any planning (if any) would move the sentence towards the top of the range)

Offer to supply* Maximum penalty: 14 years	Starting Points and Ranges	Fraud* Maximum Penalty: 10 years	Starting Points and Ranges
Level 4	[SP = Starting Point]	Level 2	Value/loss less than £20,000
Class A - up to 50g heroin/cocaine/crack cocaine - up to 500 Ecstasy tablets - up to 2500 units LSD - up to 500g opium	Significant role SP: 3 ½ years Range: 2 – 5 years Subordinate role SP: 12 months Range: Community order (medium) – 18 months	Confidence fraud characterised by a degree of planning and/or multiple transactions	SP: 18 months Range: 26 weeks – 3 years
		Level 4	
Class B - up to 50g Amphetamine - up to 500g Cannabis	Significant role SP: 26 weeks Range: Community order (high) – 12 months Subordinate role SP: Community order (high) Range: Fine – 6 weeks	Single confidence fraud not targeted at a vulnerable victim and involving no or little planning	SP: Community order (medium) Range: Fine – 6 weeks

ANNEX F

Comparison of proposed starting points – for importation, supply and production of controlled drugs with offences of violence and dishonesty

Drug Offences	Starting Point	Other offences	Nature/type of activity
Importation and supply (pp.48-51)	Level 1 – Leading Role		
Class A	12 years	a) Rape - Level 2 (SP:13 years) b) Paying for sexual services of a child – Level 2 (SP:12 years) c) GBH with intent (s.18) – Level 1 (SP: 13 years)	a) Child under 13 – aggravating factors present; b) Child under 13 and penetration takes place; c) Life threatening or particularly grave injury, premeditated, involving use of weapon carried to the scene with the intent to injure.
Class B	8 years	a) GBH with intent (s.18) – Level 2 (SP: 8 years) b) Robbery – Level 3 ¹⁰⁹ SP: 8 years) c) Causing death by dangerous driving – Level 1 (SP: 8 years)	a) Life threatening or particularly grave injury, not premeditated or premeditated and involving use of weapon carried to the scene with specific intent to injure but not resulting in so serious injury; b) Victim caused serious physical injury by use of significant force and/or use of a weapon; c) Driving involving a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger caused to others.
Importation and supply (pp.48-51)	Level 2 – Significant role		
Class A	6 years	a) Causing death by careless driving under the influence of alcohol or drugs – Level 1 (SP: 6 years) b) Cruelty to a child – Level 1 (SP: 6 years)	a) 71µg or above of alcohol / high quantity of drugs or deliberate non-provision of specimen where evidence of serious impairment b) Serious cruelty over a period of time / serious long-term neglect / failure to protect a child from either of the aforementioned

¹⁰⁹ When the Robbery guideline was published, the levels of seriousness ranged from the least serious to the most serious. The approach was reversed in all subsequent guidelines. Accordingly, for Robbery, Level 3 is the most serious, for all other offences, Level 1 is the most serious.

Class B	2 years	a) Theft in breach of trust (s.1) – Level 2 (SP: 2 years) b) Sexual activity with a child under 16 Level 2 (SP: 2 years)	a) (Theft of £20k or more but less than £125k OR Theft of £20k or more in breach of a high degree of trust b) Contact between naked genitalia
Importation and supply (pp.48-51)	Level 3 – Leading Role		
Class A	5 years	a) GBH (s.18) – Level 3 (SP: 5 years) b) Familial child sex offences – Level 1 (SP: 5 years)	a) Victim suffered very serious injury of permanent disfigurement OR premeditated wounding/GBH OR other wounding/GBH involving a weapon that came to hand at the scene b) Penetration
Class B	2 years	a) Theft in breach of trust – Level 2 (SP: 2 years) b) Sexual activity with a child under 16 – Level 2 (SP: 2 years)	a) (Theft of £20k or more but less than £125k OR Theft of £20k or more in breach of a high degree of trust b) Contact between naked genitalia
Production (pp.52-55)	Level 3 – Significant role		
Class A	3 years	Causing death by careless driving under the influence of alcohol or drugs – Level 3 (SP: 3 years)	Other cases of careless/inconsiderate driving: 35-50µg of alcohol / minimum quantity of drugs OR test refused because of honestly held but unreasonable belief
Class B	12 months	a) Theft from a shop – Level 1 (SP:12 months) b) Robbery – Level 1 ¹¹⁰ (SP:12 months) c) Causing death by driving: unlicensed, disqualified, uninsured – Level 1 (SP:12 months)	a) Organised group/gang and intimidation or use of threat of force (short of robbery) b) Offence includes threat or use of minimal force and removal of property c) Offender was disqualified OR was uninsured plus 2 or more aggravating factors

¹¹⁰ See footnote 109 above

Production (pp.52-55)	Level 3 – Subordinate role		
Class A	18 months	a) GBH (s.20) – Level 2 (SP:18 months) b) Causing death by careless driving Level 1 (SP:15 months) c) Theft in a dwelling – Level 1 (SP:18 months)	a) Pre-meditated assault where a weapon has been used b) Careless or inconsiderate driving falling not far short of dangerous driving c) Theft from a vulnerable victim involving intimidation or the use or threat of force (falling short of robbery) or the use of deception
Class B	26 weeks	a) GBH (s.20) Level 4 (SP:24 weeks) b) Abuse of trust: sexual activity with a person under 18 – Level 2 (SP:26 weeks) c) Theft in a dwelling – Level 2 (SP:18 weeks)	a) Other assault where no weapon has been used b) Other forms of non- penetrative activity c) Theft from a vulnerable victim

MEANING OF “RANGE”, “STARTING POINT” AND “FIRST TIME OFFENDER” WITHIN SENTENCING GUIDELINES COUNCIL GUIDELINES

A Council guideline is generally for a *first time offender* convicted after a trial. It commonly provides a *starting point* based on an assessment of the seriousness of the offence and a *range* within which sentence will normally fall.

A clear, consistent understanding of each of these terms is essential and the Council and the Sentencing Advisory Panel have agreed the following definitions.

They are set out in a format that follows the structure of a sentencing decision which identifies first those aspects that affect the assessment of the seriousness of the offence, then those aspects that form part of personal mitigation and, finally, any reduction for a guilty plea.

In practice, the boundaries between these stages will not always be as clear cut but the underlying principles will remain the same.

In accordance with section 174 of the Criminal Justice Act 2003, a court is obliged to “*state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed*”.

In particular, “*where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate and the sentence is of a different kind, or is outside that range*” the court must give its reasons for imposing a sentence of a different kind or outside the range.

Assessing the seriousness of the offence

1.
 - a) A typical Council guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a **first time offender** who has been convicted after a trial. Within the guidelines, a **first time offender** is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.
 - b) As an aid to consistency of approach, a guideline will describe a number of types of activity falling within the broad definition of the offence. These will be set out in a column generally headed “type/nature of activity”.
 - c) The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the *offence* (beyond those contained in the description itself) to reach a **provisional sentence**.

- d) The range is the bracket into which the **provisional sentence** will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the **provisional sentence** falls outside the **range**.
2. Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the **provisional sentence** beyond the **range** given particularly where there are significant other aggravating factors present.

Personal Mitigation

3. Once the **provisional sentence** has been identified (by reference to the factors affecting the seriousness of the **offence**), the court will take into account any relevant factors of **personal** mitigation. Again, this may take the provisional sentence outside the range.

Reduction for guilty plea

4. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the **range** provided.

Sentencing Guidelines Council
Sentencing Advisory Panel
May 2007