



THE BECKLEY FOUNDATION

BECKLEY FOUNDATION SUBMISSION TO THE SENTENCING ADVISORY PANEL
ON SENTENCING FOR DRUG OFFENCES

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QUESTION ONE

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?

Evidence of either an individual or a general deterrent effect being generated by increased sentence lengths appears to be negligible, both more broadly and specifically in relation to drug offences. In their over-arching review of the body of evidence for a deterrent effect from sentence severity in general, internationally renowned sentencing experts, Von Hirsch and Roberts, comment: "Over the last six years, three major new analyses of statistical studies of general deterrence have been published. All three reviews conclude that variations in sentence severity have only marginally discernible impacts, if any, on the incidence of crime¹ ... Thus there is scant empirical basis for assigning deterrence an enhanced role in the determination of sentence"². Further, as they point out, the absence of empirical evidence to

¹ Their footnote: "This was the conclusion reached in A. von Hirsch et al. , *Criminal Deterrence and Sentence Severity* (1999); A. Doob and C. Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" in M. Tonry (ed.), (2003) 30 *Crime and Justice* ; D. Nagin, "Criminal Deterrence Research at the Beginning of the Twenty-first century" in M. Tonry (ed.), (1998) *Crime and Justice*".

² Von Hirsch & Roberts, "Legislating Sentencing Principles: the provisions of the Criminal Justice Act 2003 relating to sentencing purposes and the role of previous convictions" [2004] *Criminal Law Review*, August, 639-652.

support the claim that longer sentences have an enhanced deterrent effect was fully acknowledged in the Home Office-sponsored Halliday Report on sentencing³. Von Hirsch and Roberts highlight the paramount danger in pursuing the elusive deterrent effect; namely, the loss of horizontal equity in sentencing. This is exactly what has occurred in the realm of sentences for drug offences, leading to a situation whereby consensual drug transactions are penalised more harshly than, for example, rape.

The question of whether or not a deterrent effect emerges from increased custodial sanctions was considered specifically in relation to drug penalties by the House of Commons Science and Technology Committee in their 2005/2006 review of the evidence base supporting drug classification⁴. They concluded: "The stated purpose of the classification system is to classify harmfulness so that the penalties for possession and trafficking are proportionate to the harm associated with a particular drug. Although it is implicit in this policy that placing drugs in a higher Class has some kind of deterrent effect, we found little evidence to support this"⁵. In spite of this absence of evidence to support a deterrent corollary arising from enhanced penalties for drug offences, the Misuse of Drugs Act 1971 (MDA) allows for steep sentences, such as a potential life sentence for any activities involving Class A drugs that go beyond mere possession⁶.

Recognition of the failure of long custodial sentences to deter drug offenders is implicit in the creation of alternative measures, such as those that aim to confiscate monies or assets, operational in this field since the passing of the Drug Trafficking Act 1986 and now embodied within the Proceeds of Crime Act 2002: "the fact that these powers have most often been developed for offences such as ... drug trafficking lends support to our contention that

³ Halliday, *Making Punishments Work: report of a review of the sentencing framework for England and Wales*, Home Office, 2001.

⁴ House of Commons Science and Technology Committee, *Drug Classification: making a hash of it?* House of Commons, 2006.

⁵ *Ibid*, para. 78.

⁶ Misuse of Drugs Act 1971, Schedule 4.

more traditional sanctions have failed most conspicuously in areas of crime which tend to be repeated and 'victimless'⁷. These auxiliary sanctions are discussed further below in response to Question 2.

QUESTION TWO

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.

It is agreed that using the powers targeted at the profits engendered by unlawful commerce in "controlled" drugs is a preferable strategy to one that revolves around deterrent custodial sentencing. Such a switch in approach is supported by the investigation of the Matrix Knowledge Group into this trade in the United Kingdom: "The findings suggested that the majority of dealers considered the risk of arrest was low, but that they devoted significant efforts to avoiding being caught. Despite the efforts to avoid being caught, attitudes to prison varied; some dealers viewed it as an occupational hazard and a small number had exploited it as an opportunity to grow their enterprises ... In contrast, confiscation orders caused frustration and difficulties to all dealers discussing the issue"⁸. However, the potentiality of such orders to deter should not be exaggerated: "Despite some important successes, and the apparent deterrent effect among some dealers, the overall impact of asset recovery ... is also considered to be marginal"⁹. This is hardly surprising, given that these measures are trying to suppress a trade with an estimated value of over £5 billion per annum in the UK alone¹⁰.

⁷ Bowles, Foure & Garoupa, "Forfeiture of Illegal Gain: an economic perspective" (2005) Oxford Journal of Legal Studies 25(2): 275-295.

⁸ Matrix Knowledge Group, *The Illicit Drug Trade in the United Kingdom*, Home Office, 2007, p. 53.

⁹ Sweeney, Turnbull & Hough, *Tackling Drug Markets and Distribution Networks in the UK: a review of the recent literature*, UK Drug Policy Commission, 2008, p. 11.

¹⁰ Reuter & Stevens, *An Analysis of UK Drug Policy: a monograph prepared for the UK Drug Policy Commission*, UKDPC, 2007, p. 8.

As with so many of the law enforcement efforts directed at the "controlled" drugs trade, the purported deterrent effect of such measures as confiscation orders and serious crime prevention orders lacks a firm evidence base: there needs to be considerably more research in this area before any firm conclusions can be drawn. The necessity of further scrutiny has been flagged up by researchers for the UK Drug Policy Commission, who noted that such an analysis "should include a more detailed assessment of the impact of anti-money laundering measures, financial investigation, proceeds of crime and other 'lifestyle incapacitation'"¹¹.

QUESTION THREE

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

One concern with the way in which the various roles in the unauthorised drugs trade have been identified and described here is that the Panel's whole schema is premised on the model of a business network, making little provision for "controlled" drug activities rooted in friendship networks, or for the concept of social supply. Social supply models have been found to be particularly prevalent in relation to the supply of cannabis. A recent study by the Joseph Rowntree Foundation that investigated how young people obtain cannabis reported: "The supply of drugs to young people is an emotive subject with discussion rarely referring to actual evidence (which is itself scarce). What evidence exists shows that many young people gain access to drugs through older brothers and sisters, through friends and friends of friends, so-called 'social supply networks'"¹². Taking these observations further: "Our findings suggest that cannabis supply to young people ... had little to do with commercial concerns. Young people's patterns of cannabis acquisition had little or nothing

¹¹ Sweeney, Turnbull & Hough, *Tackling Drug Markets and Distribution Networks in the UK: a review of the recent literature*, UK Drug Policy Commission, 2008, p. 14.

¹² Duffy, Schaefer, Coomber, O'Connell and Turnbull, *Cannabis Supply and Young People: 'It's a social thing'*, Joseph Rowntree Foundation, 2008, p vii.

to do with 'drug markets' as they have been conventionally described, and were primarily based around friendship and social networks. Young people were introduced to cannabis by friends, accessed and maintained supplies via friends, as well as passed on and sold cannabis to friends. Importantly, the cannabis supply mechanisms used by our respondents served to insulate or distance them from more overtly criminal drug markets¹³.

These findings have been reproduced in detail to illustrate how uncomfortably social supply sits within the formula produced by the Sentencing Advisory Panel (SAP), seeming to fall into the cracks between commercial supply and simple possession. Such an ill fit is by no means limited to the cannabis market: social supply also prevails, for example, in relation to psychedelic-type drugs¹⁴. The identified roles - "leading", "significant" and "subordinate" - simply do not equate with the reality of friendship networks. Although the Panel propose that social supply be treated as a potential mitigating factor in sentencing, it is suggested that, given the frequency with which such cases come before the courts - as evidenced by the SAP's own statistics¹⁵ - recognition of its existence should be more fundamentally built into the sentencing guidelines for drug offences. It is recommended that the proposed framework is adapted to more adequately accommodate the very different behaviours that underpin the dissemination of drugs through social supply: this might be done by adding a Level 5 to the sentencing guidelines, and dispensing with roles - other than 'non-commercial supplier' or 'possessor' - at this low level. These ideas are developed further in response to Question 16.

QUESTION FOUR

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?

¹³ *Ibid*, p viii.

¹⁴ Parker, "How young Britons obtain their drugs: Drugs transactions at the point of consumption" in Natarajan & Hough (eds) *Illegal Drug Markets: From Research to Prevention Policy*, Criminal Justice Press, 2000.

¹⁵ Sentencing Advisory Panel, *Drugs Consultation Paper - Annex B*, SAP, 2009.

The SAP's focus on roles - "leading", "significant" or "subordinate" - is welcomed in relation to commercial supply, as the available evidence supports that this is a preferable approach to the current focus on market levels, given the fluidity that exists within these in practice¹⁶. Ascribing culpability primarily in relation to power, as has been done here, could help to deftly avoid situations whereby individuals who are low down in the "food chain" - but who are nonetheless caught in control of a relatively large quantity of drugs - attract disproportionate sentences.

QUESTION FIVE

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?

The Panel explain that the paramount relevance ascribed to purity in the courts relates to their assessment of seriousness, with levels of purity being used on a sliding scale as an indicator of the offender's proximity to the primary source of supply: given that this in an unreliable formula, they recommend dispensing with purity as a significant factor in determining seriousness in most cases. Whilst it is agreed that the assumptions made on the basis of purity can be tenuous, an alternative conceptualization of its relevance is that the level of purity tells the court the extent to which the individual concerned has actually breached the MDA. Indeed, avoiding considerations of purity will lead to situations whereby individuals are being sentenced to imprisonment- whether by weight, by tablet number, etc. - for a product a high percentage of which may simply be "filler". Thus, for the Panel to argue that the purity of a drug has little relevance to the culpability of the offender or to the harm caused by the offence is questionable: if penalties are premised on the basis

¹⁶ Sweeney, Turnbull & Hough, *Tackling Drug Markets and Distribution Networks in the UK: a review of the recent literature*, UK Drug Policy Commission, 2008.

that dissemination of the "controlled" drug in question risks harm, then it logically flows that the more of the actual substance that is distributed, the more harm is potentially risked.

What must also be of relevance here is what material the "controlled" drug has been cut with. One needs to avoid a situation whereby someone who has cut their drugs with a noxious chemical is less culpable than someone who is dealing in a purer substance. Whilst drugs are most often cut with benign elements - such as low levels of paracetamol - the recent Serious and Organised Crime Agency's (SOCA) annual report found that this is not always the case, revealing that crack is frequently cut with phenacetin, a known carcinogen¹⁷. Bizarrely, SOCA trumpeted the fall in purity levels in the cocaine being used in this country as a victory, explaining that: "Our view after consulting medical experts is that cocaine cut with these chemicals is not as harmful as cocaine that is of a high purity level"¹⁸. Most harm reductionists would disagree with this approach; indeed, the intentional or reckless use of noxious substances as cutting agents is a likely candidate as an aggravating factor when sentencing for drug offences.

QUESTION SIX

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

It is possible to make a reliable estimate of the street value of drugs seized: indeed, operations such as the Independent Drug Monitoring Unit are experienced in such calculations, basing their approximations on large-scale buyer surveys¹⁹. However, there is always the risk that people will use less informed sources and that the the street value of drugs could be over-estimated in court, thus potentially having an unjustified inflationary

¹⁷ SOCA, *Annual Report 2008-09*, SOCA, 2009.

¹⁸ As quoted in Hughes, "We're Winning the War Against the Cocaine Industry, Police Declare" *The Independent*, 13th May, 2009.

¹⁹ <http://www.idmu.co.uk/>

effect on sentence length. Regardless, it is contended that street value is not relevant to an assessment of offence seriousness. The street value of drugs can fluctuate in accordance with numerous variables that are extraneous to those who are dealing in them, with such changes affecting neither offender culpability nor potential risk of harm.

Further, no one individual actually earns the estimated street values given for drugs: "Most of the price of a drug is accounted for by transactions after it enters the UK. For example, the effective price of a kilogram of heroin increases by a factor of 20 in its journey from the fields of Afghanistan to Heathrow airport or Felixstowe port. It then increases approximately 100-200 times the original price in its passage from the drug importer to the consumer"²⁰. It is only where seizures are made at the very end of the supply chain - for example from street level dealers - that the estimated street value will bear any relationship to the sum the offender could potentially earn.

QUESTION SEVEN

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.

It seems wholly inappropriate to penalise more harshly those who are dealing in localities associated with an open drugs market. Whilst it is true that violence can erupt around such markets - largely due to the fact that the policy of prohibition ensures that those who trade in illicit drugs cannot enforce issues such as breach of contract through the courts - such violence should be dealt with as the separate criminal offending that it is, rather than estimations of its prevalence being built into penalties for drug offences. To do otherwise conflicts with the basic tenets of criminal law²¹.

²⁰ Reuter & Stevens, *An Analysis of UK Drug Policy: a monograph prepared for the UK Drug Policy Commission*, UKDPC, 2007, p. 54.

²¹ See further, Ashworth, *Principles of Criminal Law*, 5th edition, Oxford University Press, 2006.

As the Panel's report acknowledges, such markets normally exist in areas suffering from general deprivation and social exclusion. Those dealing in them will normally have come from these self same environments; so, in effect, to adopt such an approach would be to treat social disadvantage as an aggravating factor when, if it is to be taken into account at all, it should more conceivably serve as a mitigating factor. The MDA is already wielded disproportionately against those from lower socio-economic groups, despite the fact that drug offences take place across the social spectrum, as borne out repeatedly by self-report studies, such as are contained within the British Crime Survey: whilst "affluent urbanites" have been found to have the highest levels of drug use in the UK, this is certainly not reflected in the profile of drug offenders filling our prisons²². This proposal would further compound inequalities of treatment. As it is already the case - under guidelines previously produced by this Panel - prevalence of an offence can enhance a sentence in circumstances involving exceptional harm to a community - it seems unnecessary to create a version of this provision specific to drug offences²³.

QUESTION EIGHT

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?

It is agreed that, where an offender has knowingly supplied a fake drug, the offence should be sentenced as an offence of dishonesty, as opposed to under the drugs legislation, (if such an offender is to be sentenced at all). The MDA is designed to "make ... provision with

²² Chivite-Matthews, et al, *Drug Misuse Declared: findings from the 2003/04 British Crime Survey*, Home Office, 2005, p. 31.

²³ Sentencing Guidelines Council, *Overarching Principles: Seriousness*, SGC, 2004, p. 9.

respect to dangerous or otherwise harmful drugs"²⁴ and so should not be employed in those circumstances where such materials are not present. Indeed, those who are supplying substances that do not fall within the purview of the MDA to people who want to take "controlled" drugs could be conceptualised as helping to further the Act's aims, as opposed to breaching them: as the Panel notes, legal highs are often sold in nightclubs under the pretense that they are, for example, Ecstasy. It is worth noting as a side point that - given the arbitrariness surrounding which drugs are scheduled under the Act and which are not - there is no necessary correlation between legal status and the risk of harm from ingesting a substance²⁵.

QUESTION NINE

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?

The principle applied in *Bilinski*²⁶, whereby an offender who was involved in importing heroin - allegedly under the mistaken belief that he was importing cannabis - was less culpable than one who knew it to be heroin, should be applied to offenders at different levels of the supply chain. Assessing seriousness for the purpose of sentencing is premised primarily on the twin principles of culpability and harm: mistaken belief certainly impacts upon the former of these. The Panel's proposal that the "degree of care" taken by the offender in identifying the substance they were dealing should effect the extent of the mitigation appears sensible. However, it needs to be acknowledged that - as with many licit commercial transactions - drug couriers often take on trust that the product that they are delivering is what they have been instructed that it is (if, indeed, they have been told at all).

²⁴ Misuse of Drug Act 1971, preamble.

²⁵ Nutt, Saulsbury & Blakemore, "Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse" (2007) *The Lancet* 369:1047-1053.

²⁶ (1987) 9 Cr App R (S) 360.

This dearth of information is inherent within an unregulated market where quantitative and qualitative control are not the norm. Taking what may be perceived of as an overly inquisitive approach - by, for example, tampering with packaging - could lead to suspicion from higher up the chain that they have been involved in trying to "skim off" the product, plausibly putting them in physical danger.

As suggested above, it is recommended that the fact that an offence is not for commercial supply should affect the role that the offender is described as having taken, along with the ascribed level of offending. Failing that, it is strongly agreed that it should be a mitigating factor where offences such as importation and production are for personal use, or where supply is social rather than commercial. Many of those who end up being convicted of such offences would never consider themselves to be "dealers", and it is often "luck of the draw" as regards which one out of a coterie of friends bulk buys drugs to share out amongst their group and hence runs the risk of a conviction for supply. As Hope Humphrey's - whose son was imprisoned for supplying Ecstasy to his friends - told the Home Affairs Select Committee during their investigation of this issue in 2002: "Virtually everybody who has taken drugs has been a supplier. By passing a joint, you are a supplier; by getting the E for your friend for that night, you are a supplier. It is social supply, it is not a wicked, horrible person corrupting our youth. It is like buying a round of drinks for them"²⁷.

Whilst the Committee rejected the mooted suggestion that social supply in the absence of profit should be treated as akin to possession, they did recommend that the law should differentiate between "social suppliers" and "large scale commercial suppliers"²⁸. Although the Government declined to legislate to effect such a change²⁹, this distinction can be usefully enshrined in sentencing guidelines. This approach would help to maintain proportionality

²⁷ Select Committee on Home Affairs, *The Government's Drugs Policy: is it working?* House of Commons, 2002, para. 78.

²⁸ *Ibid*, para. 83.

²⁹ Home Department, *The Government Reply to the Third Report from the Home Affairs Committee The Government's Drug Policy: is it working?*, House of Commons, 2002.

in sentencing, making it clear that social supply is at the bottom end of the spectrum of seriousness. It is already the case that the courts mitigate sentence where the offence was one of social supply³⁰; including this in guidelines as a distinct mitigating factor would aid in this practice being applied more consistently. However, to reiterate the points raised in response to Question 3, it is recommended that a separate lower level of the sentencing framework is created to more justly accommodate such offenders.

QUESTION TEN

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

Calibrating the seriousness of an offence *should* be adequately covered by due weight being given to: the class of drug involved; which provision of the MDA the individual is being sentenced under (with simple possession offences being far less serious and, arguably, *never* warranting custody); the role of the offender; the quantity and purity of the drug involved; presence of any of the generic mitigating factors contained within the Sentencing Guidelines Council's *Overarching Principles: Seriousness* guideline³¹; and finally, any factors of personal mitigation.

However, the current classification system reflects neither scientific evidence³² nor the advice of the Government's own Advisory Council on the Misuse of Drugs³³; thus, it does not restrict inclusion in Class A to those drugs that research has shown to be the most harmful when misused, alongside of which Class B is utilised in an overly expansive manner³⁴. In view of this, it is recommended that, where knowledge-based analysis has revealed that activities involving the drug in question pose a low risk of harm - both in relation to the

³⁰ *R v Rumble* [2002] EWCA Crim 2649.

³¹ Sentencing Guidelines Council, *Overarching Principles: Seriousness*, SGC, 2004.

³² Nutt, Saulsbury & Blakemore, "Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse" (2007) *The Lancet* 369:1047-1053.

³³ See, for example, Advisory Council on the Misuse of Drugs, *MDMA ('ecstasy'): A Review of its Harms and Classification under the Misuse of Drug Act 1971*, ACMD, 2009.

³⁴ Advisory Council on the Misuse of Drugs, *Cannabis: Classification and Public Health*, ACMD, 2008.

individual and to society - in comparison with other substances in its class, this would mitigate sentence. Thus, offences involving the psychedelic-type drugs might be treated more leniently than those associated with dependency and social problems, such as heroin and crack; sentences for cannabis offences would feasibly be mitigated in comparison with those involving amphetamines³⁵. Whilst it could be countered that it is not the Panel's place to distinguish between drugs within a given class, it *is* the Panel's responsibility to use all of the evidence available to them to ensure that the recommended guidelines reflect the reality of offence seriousness.

QUESTION ELEVEN

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?

It is strongly agreed that where "controlled" drugs are used to help with a medical condition this should be considered as a mitigating factor: this should apply to all related drug offences, including cultivation, production, supply, and possession. The SAP's contention that "there is little evidence that supports the link between drug use and pain relief" is respectfully challenged. As any doctor will attest, drug use is the main form of pain relief; further, specific to cannabis, this plant has been used therapeutically around the globe for thousands of years³⁶. It seems unlikely that this practice would have persisted over both time and space if it lacked therapeutic value. Recently, GW Pharmaceutical's Sativex has been approved in Canada and is currently undergoing late stage clinical development in Europe and the US, due to research finding that it helps with pain relief for a range of different conditions, most significantly, Multiple Sclerosis³⁷. Given that Sativex's active ingredients - a mixture of tetrahydrocannabinol and cannabidiol - are derived from the

³⁵ See further, Hammersley, *Drugs and Crime*, Polity Press, 2008.

³⁶ Science & Technology, Cannabis, the Scientific and Medical Evidence, 9th Report, House of Lords, 1998.

³⁷ <http://www.gwpharm.com/sativex.asp>

cannabis plant, this would seem to support claims of its therapeutic usefulness. Such contentions are further buttressed by the fact that a number of US states, including California³⁸, allow for therapeutic use of cannabis.

It has been cogently argued that cannabis offences could be exempted from the prohibitive framework altogether³⁹; in acknowledgment that this goes beyond the bounds of the powers of the SAP, that they utilise their influence to list therapeutic use of cannabis as a powerfully mitigating factor is urged. This position is supported by the fact that juries have increasingly been unwilling to convict in cases where defendants have not contested the facts of the case but have explained that their dealings in cannabis were for therapeutic reasons: this is a strong indicator that the law has fallen out of step with public sensibilities. To illustrate, Attorney General's Reference (No. 2 of 2004) involved the Attorney General contesting an acquittal in such a case⁴⁰: the defendant, Mr Ditchfield, had been acquitted by a jury despite his acknowledged involvement in supply offences. The jury was clearly swayed by the fact that he had been supplying cannabis as a palliative to people suffering from debilitating diseases on a non-profit basis. Given that juries are not consistent in exercising their power to return a "perverse verdict", building mitigation in to the sentencing guidelines would help to alleviate potential injustices in this area.

³⁸ California Proposition 215, 1996.

³⁹ Room, Fischer, Hall, Lenton & Reuter, *Cannabis Policy: moving beyond stalemate*, Global Cannabis Commission Report, Beckley Foundation, 2008.

⁴⁰ [2005] EWCA Crim 1415.

QUESTION TWELVE

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

It is agreed that, where an offender's vulnerability has been exploited by others, this should be treated as a mitigating factor. The fact that an offender is vulnerable - for example, a sex worker with a pimp⁴¹ - will have clear relevance when assessing their role in the offence and in personal mitigation. Sentences could be lowered still further by adopting this proposal of a separate mitigating factor of the offender's vulnerability having been targeted: it is inappropriate - both ethically and pragmatically - to pass lengthy sentences in response to drug offences that are committed in desperate circumstances by individuals often viewed as eminently replaceable by those who are exploiting them. Such issues go to the heart of culpability and so are an appropriate focus for mitigation.

QUESTION THIRTEEN

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?

With regards to the proposed aggravating factors, the suggestion that deliberately targeting premises where there are vulnerable people indicates higher culpability is accepted, with reservations both in relation to who the label "vulnerable" would encompass and who has the capacity to exploit such people. Whilst few would argue against the fact that children are vulnerable, beyond this, the issue becomes more nuanced: even, for instance, suggesting incorporating all those with mental health issues would create a minefield, as who falls

⁴¹ Cusick, Martin & May, *Vulnerability and Involvement in Drug Use and Sex Work*, Home Office, 2003.

under this umbrella is a matter of great controversy⁴². It is important not to become overly enamoured with the stereotypical notion of the predatory drug-dealer: whilst such people do exist, most individuals who are involved in the illicit drug trade are selling to people who want to buy their wares⁴³. It is submitted that, in order to be capable of exploiting the vulnerable, the offender must be in a position of (relative) power: evidence of this should be adduced in court before a sentence can justifiably be enhanced on this basis.

Treating supply to prisoners as an aggravating factor would potentially involve longer sentences for the three main groups of people involved in this practice: other prisoners; their family and friends; and prison staff, be they officers or civilians⁴⁴. In practice, drug offences committed by prisoners tend to be treated as disciplinary (administrative) offences rather than prosecuted separately. This leaves us with their family and friends, along with prison staff. The family and friends of prisoners mirror them in the sense they are often from the most socially disadvantaged groups in society: penalising them more for supply than other groups would only serve to compound social injustice. This is exacerbated by the fact that - whilst people are ultimately responsible for their own actions - some of those affected may have had a great deal of pressure put on them by prisoners to bring in drugs⁴⁵. With regards to prison staff - in particular prison officers - for them to supply drugs to prisoners is in flagrant breach of the position of trust that they have been put in. However, given that this is already covered by the generic aggravating factors - abuse of power / abuse of a position of trust⁴⁶ - it seems unnecessary to create a separate aggravating factor of supply to prisoners.

⁴² See, for example, Szasz, *The Manufacture of Madness: a comparative study of the inquisition and the mental health movement*, Syracuse University Press, 1997.

⁴³ See further, Coomber, *Pusher Myths: Re-Situating the Drug Dealer*, Free Association Books, 2006.

⁴⁴ See further Crewe, "Prison Drug Dealing and the Ethnographic Lens" (2006) *Howard Journal of Criminal Justice* 45(4): 347-368.

⁴⁵ Leech, "Drugs and Alcohol in Prisons" in Leech (ed) *The Prisons Handbook 2009*, Prisons.Org.Uk Ltd., 2009.

⁴⁶ Sentencing Guidelines Council, *Overarching Principles: Seriousness*, SGC, 2004.

The contention that supply of "controlled" drugs in a locality associated with an open drugs market should be an aggravating factor is contested, for the reasons given when discussing this issue in answer to question 7. The suggestion that possession of a knife or other weapon should be treated as an aggravating factor is equally rejected. Whilst possessing a weapon potentially affects both culpability and harm, it is submitted that it is more appropriately dealt with as a separate offence⁴⁷. If this is not possible - for example, because the knife in question is of a type that can lawfully be carried and evidence of intent to use it in an unlawful way is absent - then this means that the dual requirements for criminal liability of *actus reus* and *mens rea* have not been satisfied: thus, the individual should not be punished. To treat suspicion of a criminal offence that cannot be proven as an aggravating factor in relation to another charge is to unjustifiably skirt around the requirements of the criminal law.

The suggestion that exposure of others to danger in the course of producing a drug should operate as an aggravating factor is supported as it goes to both culpability and potential harm. Comparative research reveals that clandestine methamphetamine laboratories, for instance, are often discovered as a result of fires breaking out; the toxic waste produced by them can often be damaging to the environment⁴⁸. However, in order for this proposed aggravating factor to operate fairly, the importance of there being evidence that the set-up in question and the way that it was managed *actually* presented such a danger needs to be stressed; this should not simply be automatically assumed in all cases involving the production of synthetic drugs. It is important that aggravating factors do not become routinized routes to sentence extension.

All of the mitigating factors put forward by the SAP are supported for the reasons articulated in response to questions 8 - 12.

⁴⁷ Prevention of Crime Act 1953, s. 1.

⁴⁸ Office of Community Oriented Policing Services, *Methamphetamine Initiative: Final Environmental Assessment*, US Dept. of Justice, 2003.

QUESTION FOURTEEN

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?

The combination of factors that the Panel is proposing should be taken into account by the courts - namely, the shift of focus from deterrence to role, combined with other potentially mitigating factors - should result in less severe sentences for drug couriers. Given that sentence lengths in these cases are so markedly high at present - with the average sentence for drug "mules" between 2002-2007, most of whom are first offenders, being between 6 and 8 years⁴⁹ - there will need to be a significant downward shift for punishment to approach proportionality. Culpability in these cases is often low, with the conditions in which the decision is taken to smuggle drugs frequently involving poverty and desperation⁵⁰. Research carried out by the Rethinking Crime and Punishment Initiative - who focused on female couriers from Jamaica but whose findings can be extrapolated more broadly - concluded: "There is no question that Jamaican women who smuggle drugs are breaking the law. But they themselves are almost always pawns in a much bigger game. Long spells of imprisonment cause hardship for them and their families"⁵¹.

Simply lowering custodial sentences may not be enough. Some of the main harms that have been caused by imposing long deterrent sentences on drug couriers in the past have been borne by their families, often left uncared for and vulnerable to abuse, thousands of miles away, in countries that frequently lack a welfare state support system. Whilst reducing sentences would lessen the time that dependent children are potentially left unprotected, the basic problem would remain. In recognition of this, the Rethinking Crime and Punishment

⁴⁹ Heaven, "The Inconvenient Truth About Drug Smuggling" Perrie Lectures 2008. Available via: http://www.hmprisonservice.gov.uk/assets/documents/10004232Perrie_lecture_Olga_Heaven.pdf.

⁵⁰ *Ibid.*

⁵¹ Allen, Levinson & Garside, *A Bitter Pill to Swallow: the sentencing of foreign national drug couriers*, Esmee Fairbairn Foundation, 2003.

Initiative propose that, where appropriate, foreign national drug couriers should be repatriated to serve their sentence in their home country. Such a sentence could either be custodial, or, an auxiliary suggestion put forward is that local NGOs could be resourced to run community-based alternatives⁵². Whilst these options are beyond the purview of the SAP, it may take the instigation of more radical and creative approaches for proportionality to be approached in this difficult area.

QUESTION FIFTEEN

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?

The proposal to treat supply in areas with open drug markets as an aggravating factor will most certainly have implications for discrimination related to socio-economic status (not mentioned above) and is likely also to have a disproportionate impact on ethnic minorities, owing to the concentration of certain racial groups in those deprived urban areas where such markets are more likely to flourish⁵³. The same can be said for the proposal to treat drug offences as more serious if they take place in the prison environment, given the socio-economic and racial composition of the England's custodial institutions⁵⁴.

QUESTION SIXTEEN

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

⁵² *Ibid.*

⁵³ See further, Phillips & Bowling, "Ethnicities, Race, Crime and Criminal Justice" in Maguire (et al) (eds) *The Oxford Handbook of Criminology*, Oxford University Press, 2007.

⁵⁴ Edgar, "Black and Minority Ethnic Prisoners" in Jewkes (ed) *Handbook on Prisons*, Willan Publishing, 2007.

The stated move away from a focus on deterrence and the reduction of the starting points for drug offences is welcomed. However, it is submitted that these proposals fall far short of the radical hacking back of sentence lengths that is necessitated if penalties for drug offences are to even approach ordinal proportionality. The Panel's technique of comparing sentences meted out for drug offences to those handed down for violent and sexual offending is commended. Exposing so starkly that consensual transactions are being treated as either akin to - or, at present, often as worse than - the aggravated rape of a child, will hopefully bring some much needed perspective to this debate. Yet, the changes being suggested are limited, and even they have been reported in the press in a sensationalist fashion⁵⁵.

The Panel acknowledges that some people might want to retain the current starting points due to the "particularly serious nature of drug offences". The proposed guidelines, whilst marginally lower than present-day practice, are still extremely high, so it is worth considering in detail the explanations put forward by the Panel in support of these lengthy sentences: "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 crime 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".

What is immediately striking about this list is its failure to disentangle the harms inherent within drug offences themselves from those created or exacerbated by the policy of prohibition. Further, any one of these accusations could be leveled at activities involving alcohol, the consequences of which dwarf problems related to drug misuse: "Deaths related to alcohol in Britain are rising fast. Each year there are 800,000 hospital admissions, thousands of road injuries and hundreds of thousands of violent crimes that are partly

⁵⁵ Ford, "Drugs Barons 'Should Face Shorter Sentences' Report Says" *The Times*, April 22nd, 2009.

attributable to drink⁵⁶. The fact that trade activities involving this psychoactive substance are legally regulated undermines the validity of the Panel's arguments as rendering activities involving "controlled" drugs as "particularly serious". Whilst all drug offences carry a *risk* of harm, only a tiny percentage of them actually result in harm: indeed, legal philosopher Husak has argued that the probability of a drug offence resulting in harm is so low that their criminalisation is morally unjustifiable⁵⁷.

The greater risk of harm from licit activities involving alcohol - and tobacco - in comparison with "controlled" drugs was highlighted by a paper published in *The Lancet* that disseminated the results of a scientific assessment carried out by a group of drug experts, led by David Nutt, Chair of the Advisory Council on the Misuse of Drugs⁵⁸. The key indicators of harm were taken to be: physical harm to the individual user caused by the drug; the tendency of the drug to induce dependence; and the effect of such drug use on families, communities, and society. In relation to physical harm, tobacco and alcohol outstripped all illicit drugs: indeed, at the highest end of the scale, they together accounted for about 90% of all drug-related deaths in the UK. As for inducing dependency, the sharp distinction between non-dependency associated drugs, such as LSD, was elicited, as against those accepted as frequently associated with powerful dependency, such as crack cocaine and tobacco. With regard to social harm, alcohol scored highly, with its strong connection to both violence and accidents.

The Panel anchors its sentencing proposals to the classification system, noting that "a classification system grades drugs by the relative harms caused": it is interesting that they were non-specific here, perhaps all too well aware of the fact that the classification system enshrined within the MDA falls far short of this goal. The recent Science and Technology

⁵⁶ Bagehot, "The Tiny Minority: the uses and danger of a favourite political euphemism" *The Economist* March 19th, 2009.

⁵⁷ Husak, *Drugs and Rights*, Cambridge University Press, 1992.

⁵⁸ Nutt, Saulsbury & Blakemore, "Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse" (2007) *The Lancet* 369:1047-1053.

Committee's review of the relationship between scientific advice, evidence and the MDA's classification of drugs concluded that the current system of drug classification in the UK is arbitrary, unscientific and "not fit for purpose"⁵⁹. To give just one illustrative example, when asked by the Committee why psilocin - and later magic mushrooms - had been placed in Class A, the (then) Chair of the Advisory Council on the Misuse of Drugs responded that he had "no idea what was going through the minds of the group who put it [psilocin] in Class A in 1970 and 1971 ... It is there because it is there"⁶⁰. Given that Class A drug offences can potentially attract a life sentence, this is a wholly inadequate state of affairs.

Returning to the paper in *The Lancet*, its authors were equally highly critical of the system of drug classification: "Our findings raise questions about the validity of the current MDA classification, despite the fact that this is nominally based on an assessment of risks to users and society. The discrepancies between our findings and current classifications are especially striking in relation to psychedelic-type drugs"⁶¹. Yet, activities involving psychedelic-type drugs attract some of the lengthiest sentences imposed by the courts⁶²; such disproportionality in sentencing can be conceptualised as constituting a human rights violation⁶³.

These arguments are not new and no doubt the Panel has heard them before; however, they bear repeating. The flaws within the system are not of the Panel's making - and their rectification goes a long way beyond the remit here - nevertheless, if responsibility is derived from culpability and potential harm caused, the Panel *should* take some ownership of the

⁵⁹ Science and Technology Committee, *Drug Classification: Making a Hash of it?* House of Commons, 2006, para. 107.

⁶⁰ *Ibid*, para. 54.

⁶¹ Nutt, Saulsbury & Blakemore, "Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse" (2007) *The Lancet* 369:1047-1053, p. 1052.

⁶² See, for example, *R v Hardison* [2007] 1 Cr App R (S) 37 where the Court of Appeal rejected a submission for leave to appeal against a twenty year sentence handed down for producing psychedelic drugs.

⁶³ See further Van Zyl Smit and Ashworth, "Disproportionate Sentences as Human Rights Violations" (2004) *Modern Law Review* 67(4): 541-560.

problems that will inevitably be created by mooring their guidelines to what all the evidence shows is a fundamentally flawed system of classification. Real harm will result from this, involving certain drug offenders losing their liberty far beyond the dictates of a proportionate response. Whilst adopting the mitigating factor suggested in response to Question 10 may go some small way towards addressing this issue, it represents little more than tinkering at the margins.

QUESTION SEVENTEEN

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

Treating importation/exportation, production and supply as inherently the same is a radical departure from traditional sentencing in this area. It is of some concern that such potentially diverse activities are being "lumped" together; the more nuanced a sentencing stratagem, the fairer it is likely to be. Supply, for example, involves intent to supply, often assumed from a small amount of drugs, barely distinguishable from possession; it is an offence of a different order of magnitude to production. Sticking with the example of intent to supply, and relating it to Ecstasy - though subject to geographical and other variations - intent to supply will typically be assumed once the level of pills an individual is caught with exceeds five⁶⁴. Given that non-commercial supply has been virtually defined out of existence by the Panel - one wrap, one tablet - and that the Panel explicitly states that commercial supply should be sentenced in the higher court, an individual with six Ecstasy tablets will be liable for sentencing in the Crown Court for a Level 4 Class A supply offence, the starting point for which is set at 250 tablets. Building upon the suggestion put forward in relation to question 3, it is recommended that a fifth level is created, to deal with social supply and the smaller

⁶⁴ See further, Walsh, "On the Threshold: how relevant should quantity be in determining intent to supply?" (2008) *International Journal of Drug Policy* 479-485.

quantities that, in fact, the courts will frequently have to deal with and that are inadequately reflected in the model as it stands.

In relation to the truncation of Class C into an adjunct of Class B - with reductions in sentence for this class being treated simply as a mitigating factor rather than via a separate framework - it is assumed that this is yet another unwelcome side-effect of the cannabis re-classification debacle which resulted in the maximum penalty for all offences other than possession being 14 years for both Class B and Class C⁶⁵. It is submitted that the MDA would benefit from a greater number of categorisations to more adequately reflect the contrastive risks posed by different drugs: collapsing even further the distinctions that prevail between the three classes that do exist appears to be a move in the wrong direction. Separate guidelines should be produced for Class C drug offences.

QUESTION EIGHTEEN

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

The basic approach of dividing offences up into levels using quantities of drugs, then determining the position within a sentencing range based on the perceived role of the offender, seems rational and an improvement on the current system. However, as suggested above, the lowest level actually begins from a high starting point: it is recommended that a new Level 5 is created, to more accurately reflect the common practice of social supply of small quantities of drugs.

In relation to the guidelines for production of a Class A drug, it is unclear why having a sophisticated system of production and concealment and attempting to conceal or dispose of

⁶⁵ See further, Acevedo, "Creating the Cannabis User: a post-structuralist analysis of the re-classification of cannabis in the United Kingdom (2004-2005)" (2007) *International Journal of Drug Policy* 18: 177-186.

evidence are aggravating factors that render an offender more culpable. It is inherent in the fact that such offenders are involved in an illicit operation that they are going to try and conceal it: that they are good at secretion seems irrelevant to culpability. (Indeed, it is inherently the case that none of the individuals who the courts will have in front of them for sentencing have been that good at hiding their activities or they would not be there). The only relevance the sophistication of the operation seems to have to seriousness is the amount of a drug that could potentially be produced: this will already have been accounted for through the focus on quantity in determining the appropriate level. (The same points can be made in relation to the guidelines for producing Class B and Class C drugs). The fact that the drug produced was Class C is listed as a mitigating factor to producing a Class A drug: given that this would destroy the *actus reus* of the higher charge, it is assumed that this has been included here in error.

In relation to the guidelines for possession of a "controlled" drug, the rationale for the inclusion of a higher level offence for those possessing a Class A drug in prison is questioned. It is also questionable why it is aggravating to an offence of possession to be in a position of special responsibility, or to be in a public place or school: if the offence is one of possession, not of supply, both who and where you are seems largely irrelevant. In relation to mitigating factors, therapeutic use is included for Class B and C possession but not for Class A: there is growing evidence that substances contained within Class A - such as MDMA - may have therapeutic benefit⁶⁶, so an equivalent mitigating factor should also be included here. The value of using custody at all for victimless crimes is challenged.

⁶⁶ See further MAPS, *Phoenix Rising: a review of MAPS research*, Bulletin XVIII(2): Summer, MAPS, 2008. Available via: <http://www.maps.org/>

CONCLUSIONS AND RECOMMENDATIONS

The Sentencing Advisory Panel propose a welcome shift away from the unsubstantiated practice of imposing lengthy sentences on those convicted of drug offences in order to deter future offending. The lowering of the starting points for sentences, combined with a focus on the offender's role, should prove beneficial in bringing some semblance of justice to an area where sentencing proportionality is markedly lacking. This is also true of the following of the Panel's proposals: that the courts should no longer focus on street value of drugs when sentencing; that offences involving fake drugs should be sentenced as offences of dishonesty (if at all); and, that mistaken belief as regards which drug is involved in an offence might mitigate sentence, as might the vulnerability of an offender. Further, the SAP advance that, where drug offences are being committed in the context of a desire to ease a medical condition, this should lead to a lesser sentence. This suggestion is strongly supported, and it is urged that this principle be applied across the classes, rather than restricted to therapeutic use of cannabis.

Conversely, the ensuing proposals tabled by the Panel are rejected on the grounds that they seem likely to unjustifiably increase sentence lengths for certain drug offences, along with potentially compounding social injustice: the move away from a focus on the purity of a drug; rendering it an aggravating factor to supply drugs within an open drugs market or to supply to prisoners; and, the suggestion that the fact that an offender is carrying a knife or other weapon should serve to increase sentence length for a drug offence. The proposition that possession offences are more serious if they occur in a prison setting, a public place, or a school is similarly rejected; indeed, it is recommended that the Panel consider the possibility that custody is never an appropriate response to a victimless crime.

A major concern with the sentencing framework put forward by the Panel is that it is structured around a commercial model of drug transactions. The practice of supply of drugs through friendship networks does not fit comfortably within a schema thus conceptualised: this is true both in terms of the described roles, and given the high starting points in terms of the quantities of drugs discussed for even the lowest level of offending, Level 4. It is suggested that a separate level - Level 5 - is devised to more suitably accommodate the reality of the social supply of small quantities that is prevalent in the distribution of "controlled" drugs. In the absence of this recommendation being adopted, the Panel's suggestion that social supply should serve as a mitigating factor is strongly endorsed, with an entreaty that sentences should be greatly reduced in this context. A further problem identified in relation to the proposed framework is that it conflates what are potentially extremely divergent activities: production; supply; and, intent to supply. This is compounded by the Panel collapsing the distinction between Class B and Class C for sentencing purposes, with the fact that an offender was involved with Class C drugs becoming nothing more than a mitigating factor. Both of these moves would conflict with parliament's sentencing distinctions, as enshrined within s. 25 and Schedule 4 of the MDA. It is recommended that these divisions be reinstated, in the interests of establishing a more elegant system, with a stronger relationship with commensurability.

Finally, the severe inadequacies of the classification system under the MDA, as it currently operates, have been underlined here: it has been rigorously demonstrated that, from a scientific perspective, the distinctions it embodies are "arbitrary"⁶⁷, with parliament's own Science and Technology Committee describing it as "not fit for purpose"⁶⁸. As such, the Panel's sentencing guidelines build upon fatally flawed foundations. Thus, any hope that they will result in the punishment dispensed by the courts matching the crime committed is

⁶⁷ Nutt, Saulsbury & Blakemore, "Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse" (2007) *The Lancet* 369:1047-1053, p. 1052.

⁶⁸ Science and Technology Committee, *Drug Classification: Making a Hash of it?* House of Commons, 2006, para. 107.

sadly misguided. In an attempt to attenuate the worst symptoms of this critical problem, it is recommended that it should serve as mitigation when sentencing if convincing scientific evidence can be produced supporting the claim that the drug involved carries less potential risk of harm than is typical for its class. Whilst falling short of ensuring a proportionate response, this recommendation would help achieve a greater correlation between the offence committed, the harm risked, and the sentence served.

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