



Sentencing Council: Drug Offences Guidelines Consultation

Response from DrugScope (June 2011)

About DrugScope

DrugScope is the UK's leading independent centre of expertise on drugs and drug use and the national membership organisation for the drugs field. DrugScope is a registered charity (charity number: 255030).

DrugScope's objectives are:

- To provide a national voice for the drug sector
- To inform policy development drawing on the experience and expertise of our members
- To work with others to develop 'joined up' responses to drug and alcohol problems
- To support drug services and promote good practice
- To improve public understanding of drugs and drug policy.

DrugScope believes in drug policy that:

- minimises drug-related harms
- promotes recovery, including health, well-being, inclusion and integration
- recognises and protects individual rights
- recognises and respects diversity.

DrugScope is committed to:

- promoting rational drug policy debate that is informed by evidence
- involving our membership in all our policy work
- ensuring our policy interventions are informed by front-line experience
- speaking independently, and free from any sectoral interests
- highlighting the unique contribution of the voluntary and community sector.

DrugScope incorporates the London Drug and Alcohol Network (LDAN), which works in London

- to provide independent and expert advice to member agencies, commissioners and other stakeholders
- to support member agencies in providing cost-effective, high quality services that are user focussed
- to engage with policy and decision-makers on behalf of its membership.

1. Introduction

DrugScope welcomes the opportunity to respond to the Sentencing Council's consultation on the draft Drug Offences Guidelines. We appreciate the opportunities that we have had to contribute to the consultation, including a meeting with the Head of the Office of the Sentencing Council on 24 March and a roundtable event chaired by the Director of Public Prosecutions, Keir Starmer QC, on 9 June. DrugScope is responding as an independent centre of expertise on drugs and drug use and the national membership body for the drugs field. This is not, however, an area of policy on which there is necessarily a consensus among DrugScope members.

General comment

DrugScope recognises that the role of the Sentencing Council is the development of appropriate guidelines to enable the judiciary to administer the legislative framework for drug offences in a fair, consistent and effective way, having reference to the purposes of sentencing in section 142(1) of the Criminal Justice Act 2003. DrugScope has therefore restricted its comments to those pertinent to sentencing within the existing legal framework.

This does not mean that we are uncritical of the current legal framework. We have consistently supported a cautious and incremental approach to drug law reform and have supported calls for a review of the Misuse of Drugs Act 1971 (MDA). We do not believe it is necessary or cost effective to deal with all low-level drug offences through the criminal justice system (particularly, possession of small amounts of any drug for personal use). We do support criminal penalties for people who produce and supply harmful drugs.

Key messages

1. DrugScope supports the Council's approach of determining offence category by considering the quantity of drugs involved and the role of the offender at Step 1 of the court's decision-making process and proceeding to aggravating and mitigating factors at Step 2.
2. We agree that purity of drug products should not be a consideration in determining quantity of drug at Step 1 of the decision-making process, which should be based on 'quantities of the entire product recovered'. Purity will often be unknown to the offender, it will reflect a range of extraneous factors and will often have no bearing on the question of culpability.
3. DrugScope agrees that high purity of product can be relevant when determining an offender's role in a supply chain. However, the guidelines should make clear that this does not apply to all drugs (e.g., the purity of pills will not change as they move through the supply chain) and people in 'subordinate' roles may be involved with high purity products (for example, drug mules).
4. DrugScope does not support a special category 1 offence to cover possession of drugs by a prisoner. We share the Sentencing Council's concerns about drugs in prison. However, a high proportion of prisoners enter prison with serious and entrenched drug problems, access to treatment and support is improving but uneven, and drugs are widely available. We would suggest possession in prison is identified as an aggravating factor to allow these other considerations to be given due weight in sentencing.

5. DrugScope believes that possession or cultivation of drugs for personal use for the purposes of alleviating a serious medical condition should be a mitigating factor, as suggested by the Sentencing Advisory Panel. The principal considerations should be whether or not the offender has a serious medical condition and a reasonable and sincere belief that the drug would help to alleviate it, and this is the reason for possession or cultivation.
6. DrugScope urges the Sentencing Council to rethink the principle of the division of drugs by quantity for the purposes of determining the seriousness of offences of possession for personal use. We do not feel that quantity is an appropriate guide to harm or culpability for possession. It depends on a range of factors that are not relevant to harm or culpability, including: how soon after a drug purchase an arrest is made, the nature and frequency of the offender's access to drug markets, tolerance to the drug and the purity of drug products on the market at that time.
7. DrugScope is concerned that the draft guideline on permitting premises to be used does not consider the possibility of future cases like the Wintercomfort prosecution in 1999. Some staff in services working with highly marginalised groups (such as the homeless) may fail to intervene to address a suspected issue of drug use or supply on their premises (for example, a residential treatment facility) because they believe it may lead to clients disengaging with services. While we would not endorse this behaviour, it should be a mitigating factor in sentencing. Similar considerations may arise with respect to families or carers who fail to intervene in the home.
8. DrugScope applauds the clear recognition in the draft guidelines of the extent to which 'drug mules' are pressured, intimidated and exploited to import drugs, and their subordinate role in drug importation. We are concerned, however, that even after the guidelines have allowed for their reduced culpability, a drug mule carrying 50 grams of cocaine into the UK could expect a 'starting point' custodial sentence of five years.
9. DrugScope supports most of the aggravating and mitigating factors identified in the draft guidelines, although we suggest that some of them could be reconsidered and/or reworded. We would like to see the guidelines include 'drug dependency or addiction' as a mitigating factor in its own right, as this will affect vulnerability and culpability. The World Health Organisation identifies drug and alcohol dependence as a 'mental and behavioural disorder'.
10. DrugScope broadly supports the proposed sentences for offenders who have key roles in the criminal organisations involved in producing, trafficking and distributing illegal drugs. However, we feel that the sentence ranges proposed for low level offences – including possession and cultivation for personal use and social supply – are too punitive. To take one example, the starting point for sentencing a young recreational user who buys 20 ecstasy tablets on behalf of a group of friends with no expectation of benefit of any kind is a two and a half year custodial sentence. This is not fair or proportionate.

2. Response to consultation questions

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

DrugScope recognises that producing five guidelines to group together drug offences with common factors will contribute to a consistent sentencing framework.

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

2.1 The Sentencing Advisory Panel concluded in its advice to the Sentencing Guidelines Council in March 2010 that 'the purity of the drug has little relevance to the culpability of the offender or to the harm caused by the offence (although dangers are associated with "cutting" of drugs)'.

2.2 DrugScope supports the Sentencing Council's conclusion that purity should not be a relevant factor in determining offence category (and therefore seriousness), and that assessment of the quantity of drug for sentencing purposes should be based on the 'quantities of the entire product recovered'.¹

2.3 As the Council argues, the principal consideration is the lack of relationship between the culpability of the offender and the purity of the product:

- Offenders may have limited knowledge of the purity of the product;
- It is counter-intuitive to suggest that an offenders' culpability falls in proportion to the level to which a drug product is adulterated (particularly with harmful substances, see below);
- It is counter-intuitive that offenders' culpability is either increased or reduced as a result of external factors that will impact on the purity of drug products, but over which the offender has had little or no influence or control (for example, the impact of police or customs activity at higher levels of the supply chain);
- The Guidelines propose that culpability is increased where the motivation for production and supply offences is for economic and financial gain, and this kind of motivation would tend to be associated with lower purity of product – e.g., the drug is intentionally adulterated or 'bulked up' to maximise volume and profit.

2.4 DrugScope is aware that drugs are sometimes cut with other substances that may be harmful and potentially more harmful than the drug itself (for example, where heroin cut with brick dust is injected or different psychoactive substances are mixed in a drug producing distressing and unexpected effects for the user²). This should be considered as a factor that increases rather than reduces culpability. We welcome the identification in the draft guidelines of 'exposure of others to more than usual danger, for example drugs cut with harmful substances' as an aggravating factor for offences of importation, supply, possession with intent to supply and production and cultivation offences.³

¹ This means, for example, that, all else being equal, the 'offence category' would be identical for a supplier of 1 gram of cocaine whether the product being sold was in reality 10 per cent, 50 per cent or 100 per cent pure.

² In reality, the use of more harmful adulterants is less widespread than is some times suggested as drug suppliers will want to maintain their markets, and will not do so if they are known to be selling drugs with dangerous contaminants.

³ The Sentencing Advisory Panel (2010) concluded that 'the supply of drugs may ... involve danger to others where drugs are cut with other substances so that the mixtures produced are of variable strengths. 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

2.5 DrugScope notes that the ‘Resource assessment – Guidelines on drugs’ considers the potential impact of issues of quantity and purity on sentencing severity, and therefore on the criminal justice resources to administer those sentences. A further point is that the *total* quantity of drug product in circulation *for the purposes of sentencing* is greater if the relevant measure is weight of total product without adjustment for purity.⁴ The resource impact of this, if any, is difficult to assess and will depend on other sentencing factors, but it is an issue that the Sentencing Council may wish to consider in its Resource Assessment.

2.6 DrugScope also agrees with the Sentencing Council that high purity could subsequently be considered an ‘aggravating factor’ in so far as it may be an indicator of the offender’s *role* in a supply chain. Research evidence demonstrates that the purity of some drug products tends to fall significantly as they move down the supply chain. Higher purity will tend to indicate that the offender is closer to the source given other kinds of contextual information. This will not apply to all drugs and supply chains. In particular, drugs produced and supplied in pill or tablet form – such as ecstasy or LSD – will have the same purity from the point of production through to consumption.

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

DrugScope accepts the rationale for separating Class B and C drugs. DrugScope would welcome a review of the current classification system and has concerns about the classification of some individual drugs within the current MDA framework. We recognise, however, that these issues lie outside of the remit of the Sentencing Council.

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

The intent of identifying ‘importation offences’ is to deal with drugs imported into the UK to be sold on wholesale or retail drug markets. A significant number of people are intercepted at customs points with small quantities of drugs who are clearly not involved in drug importation in this sense. DrugScope agrees that it is more appropriate that they are dealt with under the guidelines for supply or possession.

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

DrugScope accepts the Sentencing Council’s view that the fact a drug is supplied to an undercover police officer does not necessarily make the offence less serious. We note, however, that the Sentencing Advisory Panel included ‘Inducement to supply falling short of entrapment’ as a mitigating factor for drug offences, we would welcome further clarification of the Sentencing Council’s decision to reject this proposal. For example, a situation could arise in which someone in possession of drugs intended for personal use could be induced to supply them to an undercover police office. This should be a mitigating consideration.

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

6.1 DrugScope recognises the rationale behind treating possession of drugs in a prison as the most serious category for possession offences. However, we do not agree that a special category should be created to reflect the seriousness of possession by a prisoner. We propose instead that this should be dealt with as an aggravating factor, giving sentencers more flexibility to take account of other relevant issues.

substances and this has caused an adverse reaction in one or more users, this should be regarded as an aggravating factor’.

⁴ Under these guidelines if the use of adulterants is increased without a corresponding fall in the availability of the pure drug this will have the effect of moving offenders up to higher offence categories, and therefore more intensive sentences, including more use of custodial sentences and longer custodial sentences.

6.2 DrugScope would highlight the high numbers of people coming into prisons with serious and entrenched drug problems:

- Between a third and a half of new receptions into prison each year have been estimated to be problem drug users⁵;
- In some inner city local prisons as many as eight out of 10 men were found to have tested positive for Class A drugs on reception⁶;
- While there have been significant improvements in the availability and quality of drug treatment in prisons, the UK Drug Policy Commission's report *Reducing drug use, reducing reoffending* (2008) concluded that the quality of drug services in the criminal justice system was uneven, and 'that there appears to be considerable variation in provision between areas' with 'prison drug services frequently fall[ing] short of even minimum standards';
- The Blakey report on 'disrupting the supply of illicit drugs into prison' (2009) commented that 'Prisoners going into prison have been taken from a world where the use of illicit drugs is endemic. Many, probably a majority, will be problem drug users. Drugs may well be the reason, or one of the reasons why they are incarcerated. They will view the use of drugs to "relieve boredom" or "cope with stress" as normal. It would be remarkable indeed if they did not attempt to bring their 'normality' into prison'.

It does not seem fair or appropriate that prisoners in such circumstances should automatically be subject to sentences of exceptional severity.

6.3 DrugScope also notes and supports the point made by the Criminal Justice Alliance in their submission to the drug guidelines consultation that the need for this category is also questionable 'given that instances of possession of drugs in prison are usually dealt with through the prison disciplinary process and are infrequently prosecuted' .

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

7.1 We support the recommendation of the Sentencing Advisory Panel that 'where there is evidence from a medically qualified practitioner that an offender has a medical condition for which pain relieving drugs are normally prescribed, and the use of illegal drugs is to supplement that relief, a court should be able to take a compassionate approach and this should influence the choice or severity of sentence'.

7.2 The Sentencing Guidelines Council argues that 'evidence as to whether cannabis relieves medical conditions is mixed, in some instances suggesting that the benefits may well be offset by potential harms and undesirable effects'. DrugScope would refer the Sentencing Council to Release's 'Response to the Sentencing Advisory Panel's Consultation Paper on Sentencing for Drug Offences' (2009) for discussion of evidence for the benefits of cannabis for some medicinal purposes. We also note that the Medicines and Healthcare Products Regulatory Agency licenced Sativex – a cannaboid based mouth spray – as a prescription-only medicine for the treatment of problems associated with Multiple Sclerosis in the UK in 2010. Anecdotal evidence suggests that there may be variations in the ability of patients to access Sativex depending on the policy of their local Primary Care Trust. If so, people with serious health problems will have more incentive to resort to illegal markets or cultivation to access cannabis for medicinal use in areas where access to Sativex is more restricted, and this is something that the local courts could take into account.

⁵ Figures from Prison Reform Trust, Bromley Briefing 2010, p. 45 at <http://www.prisonreformtrust.org.uk/uploads/documents/FactFileJuly2010.pdf>

⁶ Ibid

7.3 The precise extent and strength of the medical evidence for the medicinal benefits of a drug need not be directly relevant to the issues of culpability. The principal questions are whether the defendant:

- (a) has a serious medical condition (which is identified in the draft guidelines as a mitigating factor for all drug offences for separate reasons);
- (b) has a reasonable and sincere belief that the drug will help to relieve it; and
- (c) is using the drug to treat the medical condition given that belief.

Taking this approach, it need not be necessary for the courts to obtain expert medical evidence to establish that a defendant's sincere and reasonable belief that the drug was beneficial for a serious medical condition was in fact correct.

7.4 In view of the seriousness of some of the conditions where palliative benefits are claimed for cannabis – including cancer, AIDS and MS – it is unsurprising that people suffering from these conditions may experiment with cannabis even if the medical evidence for its efficacy is inconclusive.

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

8.1 The quantities are generally plausible, given that there is inevitably a degree of arbitrariness in any division of this kind.

8.2 However, DrugScope does *not* support the division of drugs by quantity for determining the offence category for *possession* for personal use. There are four main reasons for this.

1. *Time of arrest.* The quantity of drugs that are found in a defendant's possession at the point of arrest may depend *on the timing of their arrest*. For example, somebody could begin an evening in possession of a 'large quantity' of drugs (say, 10 ecstasy tablets), end the evening with a 'small quantity' (say, 8 ecstasy tablets) and by the end of a weekend have a 'very small quantity' (say, 2 ecstasy tablets).
2. *Access to markets and purchasing behaviour.* The quantity of drugs at the point of arrest will depend on the way someone accesses drug markets. For example, two people who purchase the *same* overall quantity of a drug over a given time period (say 5 grams of cocaine over 1 week) could either purchase the total amount in a single transaction (placing them in category 2 – 'large quantity') or small amounts over a series of transactions (which could mean they are never above category 4 – 'very small quantity'). This could depend, for example, on whether they have regular and reliable access to a drug supplier.
3. *Adapting behaviour depending on purity of products.* A drug user may adjust their drug use and behaviour depending on the purity of the products that are available in a particular market at a given time (for example, reducing their use when only more potent strains of cannabis are available locally).
4. *Tolerance.* The quantity of drugs in a defendant's possession may reflect their tolerance, with more frequent or longer term drug users having a higher tolerance and therefore purchasing greater quantities. A focus on quantity in determining offence category for possession for personal use may result in people with more chronic and entrenched drug problems receiving the most severe sentences for possession.

8.3 An alternative is for the sentencing guidelines to determine the seriousness of possession offences on the basis of the drugs classification (Class A, B or C). A concern is that this approach will mean that those who experience the most harm from drug use and are the most vulnerable to exploitation by criminal organisations responsible for drug

production and supply will tend to receive the most severe sentences for possession offences. This is why DrugScope believes an entirely new approach to possession offences may be required, with the principal focus on referring offenders for appropriate education, treatment and support in the light of the nature of their drug use.

8.4 DrugScope notes that the issue of 'poly-drug' use is not discussed in the guidelines. It would be helpful to provide clear and explicit guidelines for the courts in dealing with defendants who are arrested in possession of more than one substance (similar issues may apply to drug production, importation and supply). The European Monitoring Centre for Drugs and Drug Addiction's annual report on the state of drug problems in Europe (2009) concluded that 'in Europe today, polydrug patterns are the norm, and the combined use of different substances is responsible for, or complicates, most of the problems we face'. In September 2009, Druglink, DrugScope's bi-monthly magazine, published its annual 'street drug trends survey', concluding that 'younger, recreational users are now swapping or combining cocaine, ketamine, GHB, ecstasy, cannabis and alcohol on a night out'.

8.5 DrugScope notes that the courts are likely to require further guidance on determining quantity for the offences of 'production of a controlled drug and cultivation of cannabis', with the draft guidelines proposing that 'the quantity is measured in terms of actual or potential yield in order to be able to take into account the harm that could be caused by quantities of drugs that could potentially be produced or cultivated'. Determining potential yield may be problematic, particularly for the production of synthetic drugs, and further guidance will be needed to ensure this is done consistently. For example, the potential 'yield' of a synthetic drug manufacturing operation could be calculated by estimating its capacity over a period of time or given the volume of chemicals used in drug manufacture that are on the premises at the point of arrest. In addition, the 'yield' from those chemicals will depend on the purity of the final product.

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

9.1 DrugScope agrees with the principle that the offender's role should be a critical factor in determining offence category, and that the severity of sentence should reflect whether the offender has played a 'leading', 'significant' or 'subordinate' role in the importation, production or supply of illegal drugs. In general, the characteristics that are identified in the draft guidelines appear to us to be the appropriate one's for determination of culpability. We also note that the Guidelines are clear that the lists of roles is not exhaustive.

9.2 We would raise 4 specific points for further consideration by the Sentencing Council.

1. Permitting premises to be used: higher culpability and lower culpability.

Dealing with the offence of 'permitting premises to be used' the draft drug guideline identifies 'factors indicating culpability' rather than offender roles.

We agree that this is a sensible approach. We also recognise that the list of culpability factors is 'non-exhaustive'. DrugScope notes, however, that the descriptions of these culpability factors all seem to envisage circumstances in which the defendant(s) knowingly and expressly permit their premises to be used for drug activity ('crack houses' providing an obvious example). They do not address the potential legal issues that can arise for services working with vulnerable and marginalised people if they fail to intervene to prevent drug activity in or around their premises (nor are these considered in the lists of mitigating and aggravating factors). This could include, for example, homelessness services and residential drug services.

We would welcome clearer guidance from the Sentencing Council on what considerations should guide the courts in sentencing people providing residential and other support to

vulnerable and marginalised people, where drug activity is found to have occurred on the premises. This should address the issues raised by the Wintercomfort trial in November 1999. Wintercomfort was a voluntary organisation providing a range of services to homeless people in Cambridge. The organisation's Director and the manager of the Bus Day Service were found guilty of 'knowingly permitting or suffering their premises to be used for the supply of heroin' under section 8 of the MDA, and were sentenced to 5 years and 4 years respectively (subsequently reduced to 18 months on appeal). These sentences were widely viewed as excessive and unjust, and resulted in confusion and concern about the legal position and sentencing approach among many service providers, including DrugScope members.

The guideline does not appear to consider those situations in which families and carers may knowingly permit a family member to use, acquire or cultivate drugs at home, perhaps because they are concerned that they will otherwise be exposed to greater risk, or that challenging this behaviour will mean turning a relative out of the home, with possible loss of contact. These are factors that could be considered by courts as mitigation.

2. Exploitation of vulnerable people by 'cuckooing'. DrugScope is aware of concerns that criminal organisations may target vulnerable individuals living in social housing as a way of taking over their homes for drug use and supply. This practice has been termed 'cuckooing' (see, for example, 'Vulnerable tenants targeted by drug gang "cuckoos"' in The Observer for Sunday 3 October 2010). Initially criminals may befriend these tenants, subsequently resorting to threats and intimidation.

We note that this kind of situation is partially covered by the 'lower culpability' category of 'involvement through naivety', and that a number of the mitigating factors identified in the draft guideline are also relevant, notably 'offender's vulnerability exploited', 'age and/or lack of maturity where it affects the responsibility of the offender' and 'mental disorder or learning disability'. We would, however, ask the Sentencing Council to give further consideration to the issues raised by 'cuckooing', and the appropriate sentencing of victims and perpetrators of this form of exploitation of often extremely vulnerable people.

3. Supply by prisoner and supply to prisoner. As discussed in our response to Q6 above, we do not believe that possession of drugs by a prisoner should necessarily be treated more seriously than all other possession offences, as is proposed in the guideline on possession.

'Supply by prisoner' is listed as constituting a 'leading role' for supply offences ('supplying or offering to supply a controlled drug' and 'possession of a controlled drug with the intent to supply it to another'). 'Supply to prisoner' (other than by a prison officer) is listed as constituting a 'significant role'. We would prefer supply by and to prisoners (other than by prison officers and others in positions of trust and responsibility) to be treated as potential aggravating factors for consideration at step 2 of the sentencing process. This would better enable the court to consider the different roles and degrees of culpability of prisoners involved in drug supply and people (other than prison officers, etc) supplying drugs to prisoners. For example, someone may be supplying drugs to prisoners as part of a organised criminal organisation working for substantial financial gain or as a result of intimidation with no expectation of gain (for example, where a family member is subject to threats and intimidation). The Blakey review highlighted the pressures that families could be placed under to bring drugs into prison.

4 Drug mules. DrugScope welcomes the clear statement in the guidelines that people engaged in the importation of drugs by 'pressure, influence, intimidation or relatively small reward' should be treated as having a 'subordinate role' (and limited culpability), and the identification of 'drug mules' as falling within this subordinate category. DrugScope has a

long-standing concern about what we believe have been excessive sentences for drug mules.

In 2004, the Fawcett Society's 'Commission on Women and the Criminal Justice System' concluded: 'such women come from a background of extreme poverty and are rarely high up in criminal gangs involved in the drugs trade. Most are single parents and first time offenders and there is evidence to suggest that coercion plays a part in their decision to become a drug courier against a background of violent, abusive and exploitative relationships'. We support the statement in the Criminal Justice Alliance's submission to the Sentencing Council consultation encouraging 'the Justice Committee to use its influence with the Government to encourage them to review the sentences currently being served by drug 'mules' in England and Wales. There is a strong case, in our view, for commuting these sentences and deporting the individuals'.

9.3 We would also note the similar situation of many female sex workers who become involved in the supply of drugs, often in the context of violent and abusive relationships including with the same men who are exploiting them as sex workers.

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

DrugScope broadly welcomes the aggravating and mitigating factors outlined in the draft guideline. We would make the following points:

1. For all offences, the draft guideline identifies 'determination and/or demonstration of steps taken to address addiction or offending behaviour' as a mitigating factor. DrugScope welcomes this. We would like to see a stronger and clearer statement in the guidelines that where offenders demonstrate to the court a willingness to engage with drug treatment programmes, this will be a key determinant for sentencing, given that the purposes of sentencing include 'the reduction of crime' and 'reform and rehabilitation of offenders'. In particular, we would support a general presumption that sentencers will place offenders on appropriate community orders (such as Drug Rehabilitation Requirements) in all cases where this is proportionate to the nature and severity of the drug offence, unless there are exceptional reasons not to do so.
2. DrugScope believes that 'drug dependency or addiction' should be identified as a mitigating factor in its own right. The arguments for this are particularly strong with respect to offences of drug possession. Drug dependency and addiction can have a similar bearing on culpability as other 'personal mitigation' factors identified in the draft guidelines, notably 'offenders vulnerability was exploited', 'serious medical condition requiring urgent, intensive or long-term treatment' and 'mental disorder'. (The World Health Organisation's diagnostic manual ICD-10 identified drug and alcohol dependence as a 'mental and behavioural disorder').
3. It is unclear why the draft guidelines identify 'supply only of drug to which offender is addicted' as a mitigating factor for supply offences. Our assumption is that this is because the Sentencing Council believes that where an offender commits a supply offence to support their own drug dependency or addiction this should be considered in personal mitigation. We welcome this approach, but it would be equally relevant where the offender is supplying *other* drugs as a means of accessing the drug to which he or she is addicted. We would therefore prefer the guidelines to identify 'drug dependency or addiction' as a mitigating factor for supply offences in its own right (as proposed in 2 above).
4. The draft guidelines identify 'high purity' as an aggravating factor for importation, supply and production and cultivation offences. As discussed in our response to Q2, we support the Sentencing Council's view that high purity may be considered as an aggravating factor

where this provides a reliable indication of the offender's position or role in the supply chain. However, in many cases the purity of the drug product will not be relevant to culpability (for example, because it is not known to the offender). In some cases, an offender may be relatively high in the supply chain while having a subordinate role within a criminal organisation (drug mules, in particular, may import comparatively high purity products). Purity will not be a reliable guide to location within a supply chain for many drug products – in particular, pills and tablets cannot be adulterated in the same way as drugs that are available in powdered, crystallised or liquid form. We suggest the aggravating factor could be – for example - 'purity of product in circumstances where this indicates the offender's role in the supply chain'.

5. The draft guidelines state that it is a statutory aggravating factor where an 'offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used', which is a provision of the Drugs Act 2005. While this is a statutory factor, it does allow for a degree of court discretion, notably in determining what is meant by 'in the vicinity of the school premises'. It would be helpful if the guidelines could direct the courts to interpret the statutory provision in a way that ensures it is genuinely about protecting children and young people. For example, a drug offence that is committed in a house that happens to be relatively close to a school should not be treated more severely unless it is demonstrated that it has placed children and young people attending that school at particular risk. DrugScope would note that the sorts of scenarios that would be encompassed by this aggravating factor would include a pupil who has recently left the school and is 'socially supplying' to older students. In our view this is a much more likely scenario than schools being targeted by 'professional' drug suppliers, for which there is little evidence. We note that the draft Guidelines also include 'location of premises, for example proximity to a school' as an aggravating factor for the offence of 'permitting premises to be used', which is not a statutory factor. We do not believe that mere 'proximity to a school' should be an aggravating factor unless there is credible evidence of increased risk to school students.

6. The guideline identifies 'presence of others, especially children and/or non-users' as an aggravating factor for supply, production/cultivation, permitting premises to be used and possession (while also identifying 'sole or primary carer for dependent relatives' as a mitigating factor). We share the Council's concern about the often appalling impact on children's welfare where they are exposed to drug use, supply and trafficking, and agree that this should be an aggravating factor for sentencing. However, the courts will need to be careful in their interpretation of 'presence of' to ensure that 'sole or primary carers' are not routinely covered by this aggravating factor, even where they are protecting children or other non-users from any direct exposure to drug-related activities. For example, where someone is convicted of possession of a small amount of cannabis for personal use in a house where they live with their children or an elderly relative this should not be treated more severely if there is evidence that they have ensured that there is no exposure to drug use or potential harm associated with the drug use. Sentencing policy should reflect the child protection issues and concerns that were discussed in the Advisory Council on the Misuse of Drugs 2003 report 'Hidden Harm: Responding to the needs of children of problem drug users'. Where parents and carers are problem drug users it is important that they should have access to appropriate support, and that the courts should consider the interests of children in sentencing. In this context, Drugscope would draw the Sentencing Council's attention to the recently published evaluation of the Family Drug and Alcohol Court (serving the London Boroughs of Westminster, Islington and Camden), which was conducted by academics at Brunel University and is available at <http://www.brunel.ac.uk/research/centres/iccfyr/fdac>

7. As discussed above, the aggravating and mitigating factors for 'permitting premises to be used' do not cover circumstances such as those raised by the Wintercomfort case in 1999. There may be circumstances in which people responsible for services (including residential

services) for marginalised groups who are difficult to engage and retain in programmes (for example, homeless people with multiple needs) may fail to intervene proactively where drugs are being used or supplied (or ‘turn a blind eye’) because they believe that action would drive people away from the service. While DrugScope would not endorse this approach, it should be considered in mitigation.

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

In view of the commitment in the Ministry of Justice (MoJ) Green Paper ‘Breaking the Cycle’ that the MoJ will ‘work with the Department of Health to divert more of the less serious offenders with mental illness and drug dependency into treatment rather than prison’, DrugScope would like to see a greater focus in the Guidelines on the role of sentencing practice in challenging and supporting offenders to address their drug problems and engage with treatment as a key part of the court’s deliberations. We would like to see these considerations given more prominence in the ‘decision-making process’ for sentencers that is set out in the draft guidelines, and would ask the Council to consider if it could be given additional weight within steps one and two – over and above being considered as a ‘mitigating factor’ in step 2.

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

12.1 DrugScope supports the prison sentences proposed by the Sentencing Council for offenders with leading and significant roles in criminal organisations involved in the production, importation and supply of drugs, which cause substantial harm to individuals, families and communities. Drug trafficking and drug markets are closely associated with intimidation, violence, corruption and the exploitation of vulnerable and marginalised people. It is our view, however, that many people committing lower level drug offences (and particularly, people with serious drug problems convicted of possession of drugs or low level supply to support a drug dependency) are as much victims as perpetrators (although drug consumers do play a role in sustaining serious criminal activity and the violence and exploitation that is associated with it).

12.2 DrugScope does not believe it is appropriate to prosecute many low level drug offences. Generally, we feel that the sentencing starting points and ranges for these offences are too high. In particular, we do not support the use of custodial sentences for possession or production for personal use, and would only support custodial sentences for social supply in exceptional circumstances (for example, involving substantial quantities and/or supply over a significant period of time or where the supply is to young people or people with a mental disorder or learning difficulty). Nor do we think that custodial sentences are generally appropriate for ‘drug mules’, and certainly not sentences of the lengths proposed in the guidelines.

12.3 There are a number of particular areas where the proposed sentences are much too high.

1. The ‘starting point’ for sentencing a drug mule who has been pressured and intimidated into importing 50 grams of cocaine (for example) is 5 years custody, and the category range is between 4 years 6 months and 6 year’s custody. A drug mule involved in importing 5 grams of cocaine would expect a sentence between 3 years and 4 years 6 months custody, with a starting point of 3 years 6 months custody. We also note – for example – that someone who imports 20 ecstasy tablets in the expectation of some benefit in kind (maybe covering the cost of personal consumption of 5 tablets by supplying the other 15 to friends) would receive a sentence of between 4 years 6 months and 6 years in custody, with a starting point of 5 years.

2. The starting point is 4 years in custody for someone convicted of 'social supply' of – for example – 20 ecstasy tablets, where there was expectation of some benefit in kind, with the category range from 3 years 6 months to 5 years in custody. Even with no expectation of benefit in kind the starting point would be 2 years 6 months in custody, and the offence range from a high level community order to 3 years 6 months. The starting point is 26 weeks in custody for someone involved in social supply of a relatively small amount of cocaine or two ecstasy tablets (for example), with the offence ranging between a high level community order and 2 years in custody.
3. A prisoner with a history of problem drug use found in possession of a small quantity of heroin for personal use could expect a custodial sentence of between 26 weeks and 3 years custody, with a starting point of 1 years custody. The starting point for a prisoner in possession of cannabis for personal use is 26 weeks custody with an offence range of 12 to 51 weeks. We welcome the fact that the starting points for possession offences for non-prisoners are community orders or fines, but are concerned that someone with a drug problem found in possession of heroin or cocaine could receive a sentence of 51 weeks in custody. Nor do we think it's appropriate that non-prisoners could receive up to 12 weeks in custody for possession for personal use of Class B drugs, including cannabis.

12.4 We note that our concerns about the sentencing for 'social supply' could be partly addressed if 'expectation of some gain, either financial or benefit in kind' was not a sufficient criteria to move someone up from a 'subordinate' to a 'significant' role for the purposes of culpability. Someone who is purchasing drugs on behalf of a group of friends would often gain from some 'benefit in kind' to compensate for the risk involved (for example, covering the costs of his or her own drugs), but this is significantly different from the financial gains of people involved in supplying drugs for profit. We would ask the council to redraft the role description to take account of this distinction – perhaps 'expectation of some gain, either significant financial gain or substantial benefit in kind'.

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

13.1 The distinction between victims and offenders is not straightforward for drug offences. For example, drug mules are committing a criminal offence, but there is also a sense in which they are the 'victims' of those who play 'leading' and 'significant' roles in drug importation. People with drug dependencies or young recreational users who purchase drugs are committing an offence, but could also be viewed as victims of drug producers and suppliers. This is one of the reasons why DrugScope argues that lower level drug offences require a different, and less punitive approach.

13.2 The victims of the criminal activities that are involved in the production, trafficking and supply of drugs include families, neighbourhoods and communities affected by drug markets, and by the crime and anti-social behaviour associated with them.

13.3 DrugScope notes that some of the conclusions of a recent UK Drug Policy Commission report on enforcement of drug laws could have relevance for sentencing practice, and this could help to take account of the impact of drug offences on communities.

13.4 The UK Drug Policy Commission report 'Moving Towards Real Impact Drug Enforcement' (2009) concluded that there were opportunities for approaches to enforcement to impact on reducing drug-related harms where drug markets were entrenched and it was difficult to have an impact on drug availability. It explained that 'This is because not all drug markets are equally harmful, and the very adaptability of drug markets that frustrates efforts to eradicate supply can provide enforcement with the potential to reshape the market into less "noxious" forms', suggesting there should be a particular focus on:

- Drug markets associated with particularly harmful behaviours such as gun violence, sexual exploitation or use of children;
- Focusing on flagrant drug markets that erode community confidence;
- Pushing markets out from particularly damaging places, such as residential areas; and
- Ensuring addicted users and dealers get treatment and support.

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

14.1 DrugScope believes that a new sentencing framework that is successful in ensuring sentencing reflects harm and culpability is particularly relevant for women offenders, and fairer and more effective sentencing of women who commit drug offences will be a test of its effectiveness.

14.2 HM Prison Service's website states that in 2006, a third of sentenced women offenders were in prison for drug offences. The Corston Report on 'women with particular vulnerabilities in the criminal justice system' cited evidence from the Department of Health that 58 per cent of women in custody had used drugs daily in the six months before prison. According to the Prison Reform Trust's Bromley Briefing 2010 most of these prisoners have been in violent and abusive relationships, with a half reporting experience of domestic violence and a third having experienced sexual violence. The Release website explains that 8 out of 10 foreign national female prisoners have committed drug offences, mainly drug trafficking, and are almost always first time offenders from the poorest countries in the world. Many women in prison are separated from their children.

14.3 In 2005 DrugScope's report 'Using Women' argued that sentencing of women for drug offences was disproportionate, particularly given that

- many women get involved in hard drugs and crime only after entering into violent and exploitative relationships with men;
- women often supply drugs to fund their own dependency and may use drugs to 'self-medicate' for mental health and emotional problems or to cope with abuse (including prostitution);
- Female dealers and traffickers generally operate at the lowest rungs of the supply pyramid;
- women prisoners with drug problems suffer from high levels of poverty, marginalisation and social exclusion;
- women with drug problems often have a history of physical, sexual and emotional abuse.

14.4 The focus on role in criminal operations and the specification of mitigating factors in the draft guidelines has the potential to improve the approach to women who commit drug offences. It remains a concern that often abused and vulnerable women operating at the lowest levels of supply chains appear to be disproportionately represented among those serving sentences for drug offences.

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

DrugScope welcomes the opportunity to contribute to the consultation on the Drug Offences Guideline. We would welcome opportunities for further discussion of any of the points raised in our consultation response, and are happy to provide further information on request.

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