

SUBMISSION

To the Sentencing Advisory Panel
July 2009



CONSULTATION PAPER ON SENTENCING FOR DRUG OFFENCES

The UK Drug Policy Commission (UKDPC) is an independent body set up to improve public and professional understanding of the evidence about the effectiveness of drug policies across the UK. More information about our Commissioners and our work can be found at: www.ukdpc.org.uk

Our aim is to ensure that drug policy and practice generally is based on evidence and high quality analysis. The proposals laid out in the Panel's consultation paper are therefore relevant to our interest and we appreciate the Panel, in developing its plans, has utilized the Commission's evidence reviews.

Overall we commend the thoughtful analysis and proposals laid out in the consultation paper. Taken in conjunction with the SGC revised Magistrates Court Sentencing Guidelines of May 2008, they represent a more proportionate response to the problems posed by breaches of the controlled drug legislation. In particular, we welcome the analysis contrasting the seriousness of drug offences with other forms of offending behavior and the recognition that there is little evidence of the deterrent effect of many custodial sentences.

The Commission believes it important that considerations of proportionality should not only apply between drug offences and other offences but also to international comparisons. In a recent international review of the incarceration of drug offenders carried out by the Beckley Foundation, it is clear that a number of countries across Europe do not consider possession of drugs for personal use a crime as such (e.g. Spain, Italy and more recently Portugal and Luxembourg). Other countries such as The Netherlands, Germany and the Czech Republic (and Britain) maintain guidelines for the police, public prosecution or courts to avoid imposing punishment, or limit this to small fines, if the amount is insignificant or for personal consumption.¹ In the recent annual report of the United Nations Office on Drugs and Crime, the Executive Director observes, *"people who take drugs need medical help, not criminal retribution...Drug courts and medical assistance are more likely to build healthier and safer societies than incarceration"*. With regards to drug traffickers he also observes, *"even when it comes to notorious and dangerous dealers, there may be alternatives to incarceration"*.² It is in the context of such international experiences and the relatively limited domestic

¹ D. Bewley-Taylor et al, (2009), "The Incarceration of Drug Offenders: An Overview", The Beckley Foundation

² UNODC (2009), World Drug Report, United Nations

research evidence about the effectiveness of criminal justice interventions that the UKDPC draws the following conclusions in response to the SAP's proposals and questions.

Question 1 - evidence to support the deterrence effect of sentence lengths.

The Commission is not aware of any reliable international or domestic evidence to support claims that increased sentence lengths for drug offences acts as a deterrent. The Campbell Collaboration initiative has highlighted the paucity of research evidence in support of the cost-effectiveness of sentencing generally and there is nothing specific we have found relating to drug offences.³ The UN describes what is likely to be the reality: "*Those willing to risk death by ingesting a kilogram of condom-wrapped bullets are unlikely to be put off by the possibility of a jail sentence. Drug addicts and sex workers are equally hard to scare into good behaviour.*"⁴

Question 2 - use of confiscation powers as deterrence.

The Matrix research cited by the Panel does tend to lend support to the view that dealers and traffickers see the use of asset recovery procedures as a threat to their 'business' operations. However we have heard from legal experts that the costs involved in tracing assets and enforcing the realisation of assets are high. There are also concerns about the proportion of identified assets that are actually recovered (the level of attrition), which are supported by recently published research that also suggests improvements that might be made to current processes⁵. This research and our discussions with enforcement personnel also suggest that the cost-effectiveness and impact of confiscation orders will vary depending on the amount of assets involved. On balance we conclude the Panel is probably correct to suggest that confiscation orders or a serious crime prevention order may prove to be more of a deterrent, although there is currently no substantive evidence to demonstrate this. Again, for those with 'nothing to lose' the deterrent effect is likely to be weak and so it makes sense for confiscation orders to focus on those who are participating in the market to make a significant profit.

Question 3 – the various roles of drug offenders.

With regard to the three principal roles identified (leading; significant and subordinate) we find this categorisation useful. We are aware however that some legal experts have suggested that a more useful categorisation might be: 'organisers or prime movers, intermediaries and subordinates. However there is one group of usually small scale suppliers overlooked in the analysis which is those who purchase drugs and then supply them to friends or a close social network. This group was identified in the 2000 Independent Inquiry into the Misuse of Drugs Act (the 'Runciman' report) which recommended "*It should be a defence for a person accused of supply or possession with intent to supply to prove that he was a member of a small social group who supplied or intended to supply a controlled drug (other than a drug of Class A) to another member*

³ C. McDougall et al, "Benefit-Cost Analyses of Sentencing", (2008), Campbell Systematic Reviews

⁴ UNODC (2009), World Drug Report, United Nations

⁵ K. Bullock et al. (2009) "Examining attrition in confiscating the proceeds of crime" Home Office Research Report 17.

or other members of that group believing that he was acting, or had acted, on behalf of the group, which shared a common intention to use the drug for personal consumption”.

⁶ We hope that, in its final advice, the SAP will consider the culpability of this group as being proportionately much lower than for others involved in supply offences. Similarly, it is perhaps perverse that growing cannabis for personal use is considered a more serious offence than purchasing the same material from organised crime. The Runciman report recommended “The cultivation of small numbers of cannabis plants for personal use should be a separate offence from production and should be treated in the same way as possession of cannabis...”

Question 4- the role of the offender and quantity of drugs/scale of operation.

Question 5- impact of purity or strength on sentencing.

Question 6- estimates of street values and their relevance.

We have considered these questions together. The Panel’s conclusion that, for most offences, the role of the offender and the quantity of drug or scale or extent of the operation are likely to be the most significant factors is one echoed in other countries. As of 2003, as the European Monitoring Centre for Drugs and Drug Addiction observed, *“The great majority (of countries) choose to mention some sort of “small” quantity in the law or guidelines, but leave it to prosecutorial or judicial discretion, with knowledge of all of the surrounding circumstances, to determine the true intention behind the offence. No country definitively uses the quantity to determine who is a user or a trafficker”.*⁷

In arriving at your final view about assessing the seriousness of various offences (re Para 44), the Commission draws to the Panel’s attention the fact that, while it is now likely that the number of prosecutions for simple cannabis possession may be “very small”, we do not as yet know what the subsequent impact will be for those who do not pay penalty notice fines or who run up a series of penalty notices. As with ASBO’s, some minor offenders may enter the criminal justice system through breach of a “lower order” sanction. We would urge the SAP and SGC to draw the Government’s attention to the need to carry out research into the implementation and impact of the new penalty notices for cannabis possession offences.

Overall, the international trend has been to use quantity (along with intent) to indicate seriousness and culpability. We concur with the Panel’s view that purity or strength and/or the street value should not be considered when establishing the sentence range. As the consultation paper indicates, these are too ‘rough and ready’ indicators to be reliable and consistently applied. As legal experts have advised us, the historical reliance on street values for sentencing was always a contentious issue and largely unsatisfactory. In the complex mix of quantity, value and purity we believe the Panel has adopted a reasonable balance, bearing in mind there is no reliable single indicator of seriousness and/or intent. In essence, seriousness is contingent on either the harm (or potential harm) caused by the offence, or the role of the offender, or the motives and personal circumstances of the offender.

⁶ “Independent Inquiry into the Misuse of Drugs Act 1971, (2000). The Police Foundation, London

⁷ European Legal Database on Drugs, “The role of the quantity in the prosecution of drug offences-an ELDD comparative study”. (2003), EMCDDA, Lisbon

Question 7- aggravating factors for sentencing purposes.

While we understand the Panel's desire to address the deliberate targeting of particular vulnerable groups or localities by drug suppliers, we have some concern about the practical application of the proposals. In reality, proving specific intent to "locate people who are susceptible to persuasion or coercion" may be somewhat difficult. Probably most purchasers and consumers of illegal drugs, whether so called casual users or those dependent, will not necessarily need any persuasion or coercion. In general though, we support earlier recommendations (cf the 'Runciman' report) which essentially recognised the increased harms from firearms, use of violence, supply to young people, supply within certain types of institutions such as schools, psychiatric facilities, prisons etc.⁸ However, with reference to supply to prisoners we are concerned that a prisoner supplying illegal drugs to another prisoner may in reality, through the aggravating circumstances proposal, receive a disproportionate sentence than if he or she had supplied drugs in the community. A more general point is that for use of enhanced sentencing for aggravating factors to have an impact, it is probably necessary for the main sentence to be quite low. For example, adding 5 years to an otherwise 1 year sentence might make a proportionately big impact, but adding 5 years to a 20 year sentence most probably does not.

With reference to the proposals for responding to drug supply in an open market (most usually a disadvantaged locality), we are uncertain as to whether sentencing is the most effective way of responding to such markets. An open market can cause harm wherever it is located. A more effective way than sentencing to address such harms is likely to be achieved through targeted 'enforcement' activity. A Campbell Systematic Review of street drug law enforcement illustrates the different enforcement techniques the police and other authorities can adopt to lessen drug-related harms in some hard-pressed localities.⁹ The reviewers concluded, "*Our results suggest that rather than simply increasing police presence or intervention (e.g. arrests) at drug hotspots, street-level drug law enforcement should (1) focus on forging productive partnerships with third parties, (2) target drug hotspots rather than spreading intervention efforts across neighborhoods, and (3) make efforts to alter the underlying criminogenic conditions that exist in places with street-level drug market problems*". In light of these findings we wonder whether there could be a place for some form of impact assessment 'statement' to accompany any prosecution and sentencing considerations.

Question 8- suppliers of 'fake' drugs.

The Commission has no comment to make on this proposal.

⁸ "Independent Inquiry into the Misuse of Drugs Act 1971, (2000). The Police Foundation, London

⁹ L.Mazerolle et al, "Street-Level Drug Law Enforcement: A Meta-Analytic Review", (2007), The Campbell Collaboration

Questions 9-13- Mitigating factors.

We have already referred to the position of those who supply drugs to friends and/or social networks. We suggest this should be considered as a mitigating factor as discussed in para 87 (Question 9).

Additionally we believe the Panel has omitted to make reference to those small-scale suppliers who may also have a corresponding and diagnosed drug dependency as a potential mitigating factor. There is a growing body of international evidence which points to the complex nature of drug dependency and addiction. For example the World Health Organisation has observed:

"Substance dependence is a complex disorder with biological mechanisms affecting the brain and its capacity to control substance use. It is not only determined by biological and genetic factors, but psychological, social, cultural and environmental factors as well. Currently, there are no means of identifying those who will become dependent - either before or after they start using drugs.

Substance dependence is not a failure of will or of strength of character but a medical disorder that could affect any human being. Dependence is a chronic and relapsing disorder, often co-occurring with other physical and mental conditions".¹⁰ In essence therefore, where a supplier has a medical condition including drug dependency and/or where their vulnerability to addiction or dependency has led to them being exploited, the Commission believes these should be considered as mitigating factors and, as may already be the case, an indicator for consideration of community sentence provisions that address the offender's underlying drug problem.

Question 14 - drug couriers.

We support the proposals outlined for responding to those who are drug couriers.

Question 15 - diversity impacts.

In essence we see no specific reason in principle as to why the Panel's proposals should impact disproportionately on those from diverse backgrounds. However, as the evidence from across the criminal justice sector and other public policy areas exposes, implementation of policy and guidance is bedeviled with problems of discrimination. If the proposals outlined in para 80 are adopted (supplying a controlled drug in a locality associated with an open drugs market) it could be argued that because of enduring socio-economic disadvantage, certain ethnic groups concentrated in such localities may well be disproportionately affected, by virtue of their subordinate roles. We appreciate this possible outcome will be not only be a result of sentencing but also enforcement and prosecution practices.

Question 16 - the Panel's approach to sentencing.

¹⁰ World Health Organisation, "Neuroscience of psychoactive substance use & dependence", (2004), WHO: Geneva.

Broadly speaking, the UKDPC supports the overall SAP analysis and thrust of its proposals for sentencing drug supply offences. In particular, we are of the view that if we wish to differentiate between individuals on the basis of role or aggravating factors then the difference between the base and the 'enhanced' sentence needs to be enough to make a difference.

However, we have one reservation concerning the expectation that a confiscation order will be made in all cases where there may be recoverable assets. We have mentioned earlier doubts about the costs involved in recovering assets and whether in fact the full amount is ever recovered. While we strongly support the use of POCA and confiscation orders to reduce the impact of drug markets, we are concerned that criminal justice agencies may resort to "picking low hanging fruit" in order to meet various performance targets. For those in 'subordinate roles', confiscation of assets such as family homes may create other undesirable harms and cost ineffective impacts which should be taken into consideration by the courts when making a confiscation order.

Question 17- relative drug quantities.

We share the Panel's view that guidance without reference to quantity of drugs would be of little use to the courts. Whether the principle of equivalence can ever be satisfactorily resolved is clearly a challenging matter. The Commission has not undertaken any research into this matter nor has it canvassed the views of others. We are of the view that the ACMD and the SAP will be in a better position to consider appropriate guidance on this matter.

Conclusion

We welcome the overall proposals made by the SAP and in particular the recognition that sentence lengths and imprisonment do not necessarily have a deterrent effect. We have reservations about three main areas:

- The automatic presumption that a confiscation order be made in those cases of 'subordinate' roles, and,
- A mitigating factor for those offenders convicted of supply offences should also include where there is a corresponding drug dependency or addiction problem.
- It is also important to note that the range of ancillary orders and community sentences and their impacts have not been properly evaluated and, in order to provide a firm basis for reviewing and developing the sentencing guidelines in the future, it is vital that this occurs.

UK Drug Policy Commission July 2009