



CBA Response to Drug Offences consultation

12th May 2020

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Question one: Do you agree with the scope of the draft revised guideline and the offences which it covers?

4. Response: It is understood that the Council does not intend to make changes to overall sentencing practice for drug offences. Rather, the intention is to revise elements of the guidelines where there is deemed a particular need to do so. To this end, the CBA agrees with the Council's scope for revising these guidelines.

Question two: Do you have any comments on the changes to the culpability factors?

5. Response: The proposal is to add to the "Leading Role" category for supply offences the following factor "Exercising control over the home of another person for drug-related activity". This is no doubt intended to deal with the practice of "cuckooing". Might the Council consider drafting this factor in a way to ensure that the control exerted must be by either violence, threat or exploitation, and not permitted control? For instance, if a low-level drug dealer were to stay with a friend or partner, and deal drugs from his/her house, this may be seen as exercising control and thus being an offence demonstrating a leading role.
6. The approach to financial gain (significant financial gain vs limited financial gain) is a positive move and is encouraged.

Question three: Are there any additional difference between the three types of offence, in terms of culpability, which you feel the guidelines should take into account?

7. Has the council considered stipulating what the position is with defendants who are couriers within the guidelines?

Question four: Do you agree that the current approach to assessing harm, based on quantity, should be retained? Do you have any suggestions for other factors/approaches?

8. It is agreed that in the main, the quantity of drug is a proper way to assess harm. The current guidelines indicate that for those who are “street dealers” (ie: those you sell directly to users) they can expect to find themselves within significant role, category three. There is no mention of this in the consultation, presumably because it will remain the same. If so, should there be some delineation within the guidelines to the difference between a dealer who sells to users not known to them, and dealers who sell to friends?

Question five: Do you agree with the list of drugs included in the harm table? Are there any other drugs which should be added, or any which should be removed?

9. No observations on this question.

Question six: Do you have any views on the proposed indicative quantities for those drugs listed?

10. No observations

Question seven: Do you agree with the approach taken to Synthetic Cannabinoid Receptor Agonists? Do you have any evidence on specific quantities, or would you prefer these drugs not to be listed, but to be approached on a case-by-case basis as per the text on “drugs not listed”?

11. No evidence on specific quantities, but it would of course be preferable to have specific quantities to allow consistency of sentencing. However, it is appreciated

that this headline covers a large number of different compounds and so is difficult to provide specific amounts.

12. Would it be possible to identify some of these types of drugs (particularly SPICE) and provide some quantity guidance for it, bearing in mind it tends to be the same drugs which appear in cases the vast majority of the time?

Question eight: Do you have any views on how the guidelines should deal with drugs not listed, including the text set out in the draft guidelines?

13. No views

Question nine: Do you have any comments on proposed sentence levels, particularly for the category 4 harm importation offences?

14. It is noted that the current guidelines ask the sentencing court to consider the category four starting points and ranges in the guidelines for supplying drugs. The consultation guidelines are roughly the same though a little lower. In that way, it does not seem that there has been a material change and so we have no observations.

Question ten: Do you have any comments on proposed changes to the aggravating or mitigating factors?

15. No comments

Question eleven: Do you have any comments on the proposed guidance for minimum term sentences?

16. No comments, other than that this guidance is welcomed.

Question twelve: Do you agree with the proposed changes to culpability factors?

17. It is potentially difficult to make allowance for cuckooing type offending within the guidelines for permitting premises to be used for drug-related activity, as is intended by the addition of these factors within culpability. It is agreed that within lower culpability there should be some consideration for an offender's vulnerability being exploited, but if D allows another to use their premises to be used, but not deal drugs directly, will there ever be a case where D is also participating in the exploitation of a child.
18. The concern is that if D is exploited by another (D2) to allow the use of D's premises for drug activity, but that exploitation falls short of a defence to the charge and D2 exploits a child/vulnerable person, is it envisaged that D will then be a leading role due to their "participation" in that exploitation?

Question thirteen: Do you agree with the way in which harm is assessed within this guideline?

19. Yes, agreed.

Question fourteen: Do you have any concerns about sentence levels for this offence, or evidence that the sentence levels in the guideline need to be revised?

20. No concerns or comments.

Question fifteen: Do you have any comments on the changes to the aggravating and/or mitigating factors?

21. No comments

Question sixteen: Do you have any comments on the changes proposed to the Possession guideline?

22. No comments

Question seventeen: Do you have any comment on addition culpability, aggravating and/or mitigating factors which are needed for the PSA offences but are not in the MDA offence guidelines?

23. No additional factors suggested

Question eighteen: Do you have any comments on the proposed approach to the assessment of harm?

24. No comments

Question nineteen: Do you agree with the proposed sentence levels for these PSA offences

25. Bearing in mind that the statutory maximum for these offences is one of seven years, there is no comment on the starting points or sentencing ranges in these proposed guidelines.

Question twenty: Do you have any comments on the structure of this guidelines? Are there other culpability and harm factors which should be taken into account at step 1?

26. Why is the seriousness of the offence so much greater if the offender was in a position of trust within the prison? I note that this is said to intend to address, for example, where the prisoner is a member of a prison council, but I am concerned that this approach will lead to prisoners who are, for instance, an enhanced regime prisoners being categorised as in a position of trust. Similarly, if a prisoner had a

job in the kitchen, or another trusted position, is it intended that their possession of a psychoactive substance is twice as serious as a prisoner without such a job or regime? This, in my view, would be wrong.

Question twenty-one: Do you have any comments on the proposed sentence levels or additional guidance set out above

27. Please see response to question twenty above.

Question twenty-two: Do you have any comments on the proposed aggravating or mitigating factors?

28. No comments

Question twenty-three: Do you have any further comments on any of the draft guidelines?

29. No

Question twenty-four: Do you consider that any of the factors in the draft guidelines, or the ways in which they are expressed could risk being interpreted in ways which could lead to discrimination against particular groups?

30. Beyond the responses given to certain questions above, no.

Question twenty-five: Are there any other equality and diversity issues the guidelines should consider?

31. No

Question twenty-six: Do you have any views on reasons behind the disparities in sentencing highlighted by our published research? Do you consider that these reasons may be different for the disparities between white and ethnic minority offenders and those between men and women?

32. Whilst it is obvious that the stated disparities exist, it is not obvious that is as a result of the drug offences sentencing guidelines. I am afraid I cannot think of any reason associated with these guidelines for these disparities.

Consultation Question 27: Are there any aspects of the Drugs Guidelines that you consider might be contributing to unintended disparities in sentencing? Are there any ways in which the guidelines could be amended to guard further against any unintended disparities in sentencing?

33. Not in my view. I cannot think of any amendment within these guidelines which would guard against disparities.

Consultation Question 28: Do you have any comments on the steps the Council is intending to take in light of this research?

34. No comments

Consultation Question 29: Do you have any suggestions for other areas of work the Council could undertake in the future?

35. No suggestions