



RESPONSE OF THE LAW REFORM COMMITTEE OF THE BAR COUNCIL AND THE CRIMINAL BAR ASSOCIATION TO THE SENTENCING ADVISORY PANEL'S CONSULTATION PAPER ON SENTENCING FOR DRUG OFFENCES

Introduction

1. The Law Reform Committee of the Bar Council of England and Wales ('LRC') and the Criminal Bar Association, (CBA), welcomes the opportunity to comment on the Sentencing Advisory Panel's Consultation Paper on Sentencing for Drug Offences.
2. We recognise the importance of achieving the correct balance in the exercise of sentencing those convicted of serious drugs offences. The importation and supply of drugs have far reaching consequences for all society. The need to find funds to purchase drugs at street level up to internecine gang warfare has a massive bearing on the quality of life of large sections of the public. There is manifestly a public interest in the just, proportionate and consistent punishment of such offenders.
3. We have received the assistance of practitioners in the criminal law. They have experience of both prosecuting and defending in such cases; at trial, at sentence and in confiscation proceedings. However such views are based largely on personal empirical experience. They do not and cannot purport to have the same frame of reference as scientific study, based as it must be on a collation of a much greater volume of information.
4. The overwhelming response was that given the insatiable demand and the potentially enormous rewards at the higher level that sentencing can only provide a palliative remedy. Any measures that could reduce the demand for the supply of such drugs, ranging from more effective detection to the legalisation of certain categories were worthy of serious consideration.

Question 1

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

We were not aware of any such research or evidence. It is a general consensus of personal experience that increased sentence lengths do not act as such a deterrent. There is a widely

held belief that the potential rewards are so great at the higher level of offending that likely sentence does not deter. Whether the risk of detection contributes to the lack of deterrent quality is a moot point. At the “addict” level it is not believed that the risk of detection or sentence can outweigh the overwhelming need to “feed the habit”.

Question 2

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

We felt that confiscation orders, when effective, may add to the deterrent effect of sentence but only in combination with a custodial sentence. We are of the view that such a custodial sentence should not be reduced on the basis that there is a significant confiscation order, s. 13(4) POCA. Such an order can add to the deterrent value of the total sentence. We felt that a confiscation order is only truly effective for those offenders with substantial assets. A large amount of public resources may be wasted in the pursuit of funds for lower level offenders. Any sentence regime should take account, though not be determined by, the regime in other jurisdictions. It is important that the UK should not be seen to provide any form of safer haven for offenders.

We felt that there had not been long enough since the introduction of Serious Crime Prevention Orders properly to determine their deterrent effect.

Question 3

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

We felt that no list of roles can ever be exhaustive. The sentencing court must always have an unfettered discretion. A role is not necessarily, without more, determinative of criminality. Individuals may become involved, or more deeply involved, due to pressure, sometimes amounting to duress and any sentencing court must have the discretion to take all factors into account.

We raise the question of the role of participating informants as being a necessary separate category of role.

Question 4

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

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

We considered that the offender’s role and the extent of the operation are the proper starting place in determining seriousness. Often, but not always, the quantity of drugs may determine, or greatly influence, a determination of the scale of the operation. It must be open to the sentencing court to determine the true basis for the imposition of any sentence. Accordingly it may be helpful, in certain cases, that the court makes its determination, and the grounds for it, a public part of the sentencing process. We did not feel that any form of precise scale; length of sentence as against weight/purity/value of drugs, would assist. Rather that the court should formulate and express the general view of the offender and his role.

We do not advocate any extension in the role of “expert” witnesses in this field. It is not a matter of scientific fact and sentencing courts must be able to take account of local circumstance, for example the sudden prevalence of the supply of a particular drug in an area or to a particular market.

Question 5

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

We agree that purity and strength must be significant factors in passing sentence. They are amongst a numbers of factors of influence. The knowledge of an offender as to purity or strength must also be significant. There was a minority view that weight should be determinative. It may be that a formula which takes all such measurements into account can be achieved.

Question 6

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

We do not believe that it is possible consistently to achieve reliable estimates of street value. It is a relevant factor and should be taken into account but should not be determinative. It may however play a more important role in the considerations live in any confiscation hearing.

Question 7

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

We do not consider that the location of supply should necessarily be a factor determining seriousness within any guidelines. It may be a factor which has an influence on sentence to be determined by the sentencing court within its discretion. If location does have an influential effect on sentence, it should be identified and expressed as such in the reasons given for assessing the level of sentence.

Question 8

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

The majority view is that such offences are ones of dishonesty and should be sentenced accordingly. In so far as such conduct represents the cynical exploitation of the particularly vulnerable, that should be an aggravating feature of the dishonesty offence.

Question 9

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

The majority view is that such features are capable of amounting to mitigating circumstances. It does not seem helpful, even if possible, accurately to identify a closed list of such features. As always the view was that such matters remain a matter for the discretion of the sentencing court. If such factors do play an influential role in determining sentence, they should be identified as such in the sentencing process.

Question 10

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

We could not identify any other features.

Question 11

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

We agree that, if properly established, drugs are used to alleviate a genuine medical condition it should be an influential piece of personal mitigation.

Question 12

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

We agree that, if established, an offender's vulnerability to exploitation should be an influential factor in personal mitigation.

Question 13

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

The majority view is that the list accurately outlines the relevant factors. The need to maintain judicial discretion to allow the inclusion of any other relevant factors is stressed. There was a minority view that the supply to prisoners should not be an aggravating factor unless committed by a person in a position of trust, such as prison staff or visiting lawyer.

Question 14

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

We feel that the overall effect is bound to achieve a reduction in the sentences imposed on couriers. In general terms such a reduction is to be welcomed.

Question 15

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

We do not believe the proposals would have any adverse disproportionate impact on any minority group. It may be that a reduction in the sentences imposed on couriers might benefit offenders coming from economically disadvantaged backgrounds in poorer countries.

Question 16

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

The majority view was that a likely reduction in sentences for less serious offences was a welcome change. There was a view that expressed the fear that if sentences are lower in the UK than equivalent jurisdictions more offenders might be attracted to the UK. We welcome any further research into the efficacy of all ancillary orders.

Question 17

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

We have no comments on the above.

Question 18

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

We have no comments on the above.

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For and on behalf of the Law Reform Committee
July 2009