



DRUG OFFENCES GUIDELINES
a response to the Sentencing Council Consultation Paper
by the Working Group of the Criminal Bar Association for England and Wales

1. This is the response of the Criminal Bar Association to the Sentencing Council's Consultation Paper on a new guideline for drug offences.
2. The working group consists of Rudi Fortson QC (chair), Monica Stevenson and Kate Lumsdon.
3. The Criminal Bar Association represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high 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 guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.
4. The Sentencing Council is proposing a draft guideline for sentencing drug related offences. The council proposes that, following the 12 week consultation period, the definitive guideline will become "the main point of reference" for sentencing in such cases.
5. The consultation process ends on **20 June** .

Contents

.....	1
Contents.....	2
INTRODUCTION.....	3
Introductory remarks.....	3
Stated aims of the Council.....	3
The existing sentencing framework.....	4
Will the Council’s proposals make for consistent sentencing?.....	6
Starting points, contested trials, the defendant’s character.....	7
Seriousness and culpability based on “the entire product recovered”.....	7
Distinguishing between roles.....	9
Relative seriousness of the MDA offences.....	10
Question 1: Do you agree with the proposed grouping of offences into five guidelines?.....	11
Question 2: Do you agree with the Council’s approach to the issue of purity?.....	13
Question 3: Do you agree with the Council’s approach of separating Classes B and C?.....	13
Question 4: 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?.....	14
Question 5: Do you think that supplying to an undercover police officer should be included in the guideline? If yes, please state at which stage.....	14
Question 6: Do you agree that possession of a drug in a prison should put an offender into the most serious offence category for possession offences?.....	15
Question 7: Should “medical evidence that a drug is used to help with a medical condition” be included as a mitigating factor for possession offences?.....	16
Question 8: Do you agree with the quantities set out for each of the drug guidelines?.....	17
Importation offences: quantities.....	17
Supply offences: quantities.....	19
Production offences: quantities.....	21
Question 9: Do you agree with the roles as proposed for each of the offences covered by the draft guideline?.....	23
Question 10: Do you agree with the aggravating and mitigating factors outlined for each of the offences covered by the draft guideline?.....	23
Mitigating and aggravating factors: Importation offences.....	23
Mitigating and aggravating factors: supply.....	24
Mitigating and aggravating factors: production and cultivation.....	26
Mitigating and aggravating factors: permitting premises for drug activities.....	27
Mitigating and aggravating factors: simple possession of a drug.....	28
Question 11: Do you think that there are any other factors that should be taken into account at these two steps?.....	30
Question 12: Do you agree with the proposed offence ranges, category ranges and starting points for all of the offences in the draft guideline?.....	30
Question 13: Are there any ways in which you think victims can and/or should be considered in the proposed draft guideline?.....	30
Question 14: Is there any other way in which equality and diversity should be considered as part of this draft guideline?.....	31
Question: 15 Are there any further comments that you wish to make?.....	31
APPENDIX A: Deterrent sentences.....	32
APPENDIX B: Measuring purity.....	35
APPENDIX C: Drug classification and penalties.....	37
APPENDIX D: drugs in prison; problems caused by trafficking therein.....	39

INTRODUCTION

Introductory remarks

1. The Criminal Bar Association, takes this opportunity to thank the Sentencing Council (“the Council”) for the transparent and careful manner in which it has sought views on the matters set out in its Consultation Paper (the “CP”)¹ concerning a complex and controversial subject, namely, the formulation of sentencing guidelines in respect of the commission of drug offences. Needless to say that we welcome the opportunity of responding to that Paper. The chair of the CBA Working Group - that was set up to respond to the CP - has attended two meetings in relation to the sentencing of drug offenders at which the Sentencing Council attended and actively participated.

Stated aims of the Council

2. The Council states that although it supports several of the proposals of the Sentencing Advisory Panel (SAP) it takes a different view on others [CP, p.4].²
3. We note that, *for most offences*, the Council’s aim is to “increase the consistency of sentencing while leaving the average severity of sentencing unchanged” [CP, p.4]. The Council “*especially seeks to uphold the current level of sentencing for those offenders playing a leading role in importation, supply and production offences (offences introducing drugs into the market) where large or very large quantities of drug are involved*” [emphasis added, CP, p.4]. The notable exception relates to so-called “drug mules”³ in respect of whom a downward shift in sentencing is considered to be appropriate (and we agree).
4. However, IF the intended purpose of the guidelines is largely to maintain the sentencing ‘*status quo*’ (albeit by applying a sentencing matrix) then - for the reasons which we set out in our response - there is a strong case for *not* issuing statutory guidelines at this time and to leave it to the Court of Appeal to revise the guidelines as circumstances require. This might include (and we suggest should include) revising downwards terms of imprisonment for vulnerable defendants (particularly couriers) of the kind referred to above. The Working Group believes that there is a significant risk that the proposed guidelines will not be consistently applied - or even consistently interpreted - by sentencers.⁴ Ambiguities in the guidelines might result in misunderstandings as to whether or not there has been a modification to pre-existing sentencing policy. Going by media reports, in response to the CP, such misunderstandings may already exist. Although there is an arguable case for modifying sentencing practice in drug cases, no such modification has been expressly proposed in the CP (save in relation to vulnerable

¹ Published in March 2011.

² It is evident that there are significant differences in the views expressed by the Council and by SAP.

³ We point out straight away that- like the Council - we do not use the expression [to] “drug mules” in a derogatory sense, but merely to denote the vulnerable, disadvantaged courier (often women with dependent children, who come from under-developed countries) and whose extenuating circumstances are exploited by those who recruit them to act as drug couriers.

⁴ We have provided examples in an attempt to explain why we are of this view.

and exploited drug couriers) and, accordingly, we have not sought to develop submissions about what that change of policy ought to be.

The existing sentencing framework

5. It is significant that it is in relation to drug offences, enacted under the Misuse of Drugs Act 1971, that the Court of Appeal has - over a 30-year period - provided the greatest degree of sentencing guidance, which has been reviewed from time to time.⁵
6. Guidelines were issued in order to promote consistency of sentencing given the high (and increasingly extensive) prevalence in the use and distribution of controlled drugs that shows no signs of abating.⁶
7. Unsurprisingly, the response of the courts towards the commission of drug offences has occasionally shifted, and the guidelines reflect those shifts. In *Aramah* (1982), the then Lord Chief Justice said, in relation to heroin:

“It is not difficult to understand why in some parts of the world traffickers in heroin in any substantial quantity are sentenced to death and executed. Consequently anything which the courts of this country can do by way of deterrent sentences on those found guilty of crimes involving these class A drugs should be done.”
8. Although the principle of deterrence has dominated sentencing practice in drug cases,⁷ the Courts have shown themselves willing to mitigate a sentence in relation to vulnerable and exploited couriers: see *Attuh-Benson*,⁸ where the Court of Appeal stated that there was sufficient flexibility in the *Aramah* guidelines to allow judges to assess the role of the offender, the extent of their culpability, their attitude to the offence and their personal circumstances.
9. A further shift can be detected in relation to defendants who are seriously ill. In the early 1990’s, the courts took a harsh line by declaring that it would not reduce what was a perfectly permissible sentence, and within the tariff, to allow an offender to be released on health grounds: see *Stark*,⁹ citing *Herasymenko* (unreported), and see *Aramah*. In *Stark*, a sentence of four years’ imprisonment

⁵ Subsequent to the decision in *R v Aramah* (1982) 4 Cr App R (S) 407, the courts of England and Wales have revised and extended guidelines in such cases. The Court of Appeal has recently given guidance in relation to the domestic cultivation (often charged as ‘production’, s.4, MDA) of cannabis: see *R v Xu* [2007] EWCA Crim 3129; [2008] 2 Crim App R (S) 50, and *R v Auton* [2011] EWCA Crim 76.

⁶ Drug legislation, prior to the enactment of the MDA 1971, had also created an array of offences (see, for example, the Dangerous Drugs Act 1965), but the MDA was the first enactment in this jurisdiction to categorise drugs into three Classes (A, B, and C). Each Class attracting its own set of statutory maximum penalties that have been amended by primary legislation from time to time. Some members of the Legislature mistakenly believed (when the MDA was being debated as a Bill) that the non-medicinal use of drugs was a “fashion” or a “craze” that would soon pass: “The present use and misuse of drugs is a fashion, a craze. It is a horrible craze in relation to the more serious drugs; but it is a craze, and no craze lasts for ever, especially those crazes which are favoured by the young only because they are different from what the previous generation did. I do not know what will take its place; it may be something equally nasty. But I feel reasonably confident that this is not something with which we are going to have to live for ever. (Baroness Wootton, Hansard, HL Deb 14 January 1971 vol 314 col.254).

⁷ See Appendix A to this response regarding the effectiveness of deterrent sentencing.

⁸ [2005] 2 Cr App R (S) 52

⁹ (1992) 13 Cr.App.R.(S.) 549, [1992] Crim.L.R. 384.

was upheld for the unlawful importation of heroin worth £2,500. The appellant, who had been HIV positive, developed AIDS. His life expectancy was said to be no better than 12 months. The appellant said he wished to die in dignity. The Court of Appeal dismissed the appeal. There was a risk that the appellant would resort again to drug trafficking but, in any event, the Court said "It is not for the Court to manipulate the sentence to achieve a desirable social end": per Jowitt J.

10. The courts now take a more compassionate view (and rightly so) of cases where a defendant is suffering from a terminal condition. The existing position was summarised in *Bernard*.¹⁰ See also *Appleby*,¹¹ *Marchesi*,¹² *Higgins*,¹³ and *Farrington*.¹⁴
11. The Courts have also taken a more compassionate stance than hitherto (arguably) in relation to offenders who were out-of-work drug addicts, whose motive was solely to finance the feeding of their own addiction, who held no stock of drugs and were shown to have made a few retail supplies of the drug to which they were addicted to undercover police officers (and *only* to undercover officers): see *Afonso* [2005] 1 Cr App R (S) 560. For reasons that we explain, the Court's reasoning in *Afonso*, has perhaps been misunderstood.
12. There have been occasions when the Courts have had regard to 'fair labelling' (e.g. treating a joint purchase for supply as an offence of possession). In *Denslow* [1998] EWCA Crim 432, where D purchased two bags of heroin for himself and his co-defendant, the Court of Appeal queried whether it was necessary to charge supply at all:

It was inevitable that the appellant would be dealt with at worst as though he were in possession of the drugs and, as turned out in this case, as though he were without any criminal responsibility for that particular part of the transaction. We are told that a plea had been offered to a charge of possession. It ought to have been accepted. We hope that those words will be borne in mind by prosecuting authorities in the future.
13. It is submitted that one factor that should count as a mitigating factor is where the defendant's primary motive for taking a controlled drug (notably cannabis) is to alleviate pain and suffering [relevant to *Question 7*]. Although the Council refers to the work of Campbell et al,¹⁵ (CP, 29), other eminent scientists and clinicians hold a very different viewpoint.¹⁶ Reports are not uncommon of persons (basically law-

¹⁰ [1997] 1 Cr.App.R.(S.) 135. The Court considered *Moore* (1990) 12 Cr.App.R.(S.) 384, *Stark* (1992) 13 Cr.App.R. (S.) 548, *Green* (1992) 13 Cr.App.R.(S.) 613, *Leatherbarrow* (1992) 13 Cr.App.R.(S.) 632, and *Moore* (1994) 15 Cr.App.R.(S.) 97).

¹¹ [1996] EWCA Crim 514.

¹² [1998] EWCA Crim 908

¹³ Unreported, December 10, 1998.

¹⁴ [1999] EWCA Crim 362

¹⁵ BMJ Vol.323, 7th July 2001; and PainMed, 2009, Nov.10(8): 1353-68, Epub 2009, 1st September 2009.

¹⁶ Some work in this area has been undertaken in Australia: see

<http://www.harmreductionjournal.com/content/pdf/1477-7517-2-18.pdf>. See also 'Cannabis use in palliative care - an examination of the evidence and the implications for nurses':

http://www.advancedholistichealth.org/PDF_Files/Palliative%20care.pdf; also, 'Medical Cannabis Programs: A Review of Selected Jurisdictions' (2004; Rowena Johns, NSW Parliamentary Library Research Service); see also, Harold Kalant, M.D., Ph.D. 'Medicinal Use of Cannabis: History and Current Status' (2001), Pain Res Manag. 2001, 6(2):80-91,

abiding) whose medical condition is so severe, or who find that the side-effects of prescribed drugs are so unpleasant or ineffective, that they have turned to cannabis for comfort. Even if the a substance has a placebo effect rather than a direct effect, the offenders' motive in taking the substance for a medicinal purpose must (it is submitted) be a relevant mitigating factor. Some sentencers plainly do treat such circumstances as mitigation. For example, in the conjoined appeals in *R v Quayle and others* [2005] EWCA Crim 1415:

a. Mr Quayle pleaded guilty to an offence of cultivating cannabis (s.6, MDA) and he was sentenced to 4 months' imprisonment *suspended* for six months.

b. The appellant Taylor (Tony's Holistic Clinic) imported 20.5 kgs of cannabis in his luggage. Ms Lee acted as courier for Taylor on a subsequent trip and she imported 5.03 kgs of cannabis for the clinic. Taylor claimed that the cannabis was "strictly for the purposes of alleviating the pain and suffering of established customers all of whom are sufferers from significant debilitating diseases and/or terminal illnesses and were fundamentally dependant on the use of a certain type of cannabis to maintain a basic quality of life". Both pleaded guilty to being knowingly concerned in the fraudulent evasion of the prohibition or restriction on the importation of a Class B controlled drug. Taylor was sentenced to 18 months' imprisonment for the first importation and 6 months consecutive for a second importation, making a total of two years imprisonment, *suspended* for two years. Ms Lee was sentenced to 100 hours *community service* for her part in the second importation.

Will the Council's proposals make for consistent sentencing?

14. If the proposed guidelines largely restate (albeit in matrix form) existing guidelines, then a few worked examples to demonstrate how this is to be achieved would be immensely useful.
15. Given that the quantities stated in the guidelines are based on the "entire amount recovered" (rather than purity) and, depending on the sentencer's interpretation of the expressions "leading role" and "significant role", it is inevitable that some offenders will be sentenced more heavily than hitherto while others will be treated less severely. We cite examples below.
16. But even greater potential for inconsistent sentencing stems from the fact that the starting points for each 'offence category' would appear to be generic, regardless of the precise quantity pertaining to the offence. Thus, irrespective of whether D imports 2.5 kgs or 10 kgs of heroin or cocaine, the starting point is the same.
17. The position in relation to LSD is baffling (but perhaps there has been a typographical error in the CP). The starting point is stated to be 14 years' imprisonment (leading role) for between 2,500 to 10,000 doses of LSD whereas the guidelines in *Hurley*,¹⁷ state that 250,000 dosage units (or more),¹⁸ would - depending on the defendant's role - attract 14 years' imprisonment or more. Again, on the basis of the proposed guidelines, where D imports 2500 tabs of LSD,

<http://www.parl.gc.ca/Content/SEN/Committee/371/ille/presentation/kalant-e.htm>.

¹⁷ [1998] 1 Cr App R (S) 299

¹⁸ Which assume quarter-inch squares of approximately 50 micrograms of pure LSD.

and plays a “significant role”,¹⁹ the starting point is 10 year’ imprisonment. However, applying *Hurley*, the 10-year threshold ordinarily starts if some 25,000 doses are involved.

CLASS A	Sent Council quantities Very Large	Leading role	<u>Judicial Guidelines</u>	<u>More than subordinate</u>	Signific ant role	Subordin ate role
LSD	2500 - 10,000	14	250,000 25,000	14+ 10+	10	8

Starting points, contested trials, the defendant’s character

18. The Council makes the point that the starting points apply to all offenders, in all cases, irrespective of plea or previous convictions. The Council stresses that the starting points “are no longer based upon a defendant with no previous convictions who has been convicted after trial” (CP, p.9, emphasis added). On an initial reading, this appeared to be a significant departure from existing guidelines but, in reality, it may be a distinction without a difference because a reduction for guilty pleas occurs at *step 4* (and an unsuccessful plea of ‘not guilty’ is not an aggravating factor). Accordingly, the starting points *do* assume an unsuccessful contested trial. Good character is a mitigating factor, whereas relevant previous convictions may constitute an aggravating factor. Similarly, existing guidelines are neutral on the question of whether the defendant has criminal convictions.

Seriousness and culpability based on “the entire product recovered”

19. As stated above, a significant aspect of the Council’s proposals is to make no assumption at *step 1* about purity and to base quantities *on the “entire product recovered”*. High purity would constitute an aggravating factor, while low purity could be “mitigated by an adjustment of the quantities that are proposed [in the CP]” (CP, p.13). We resolutely disagree with this approach. We are mindful of scarce resources and the changes that are taking place in the provision of forensic services.
20. The Council acknowledges that its proposals on this point constitute a departure from existing sentencing practice. However, we are of the view that a determination of the purity and quality of the drug in question is the most accurate benchmark by which an assessment can be made of the seriousness of the offence

¹⁹ Comparable to the expression “more than subordinate”, as that expression is used in some of the guideline cases.

and of the offender's culpability for the commission of that offence [but see **Appendix B** regarding calculating purity]

21. We suggest that two points of fundamental importance should be kept in mind when formulating sentencing policy in relation to drug offences. First, the object of the legislation is to control the distribution of substances "likely to be misused and of which the misuse is *capable of having harmful effects to constitute a social problem*" (see s.1(2), MDA 1971). The three Classes of controlled drugs are intended to say something about the relative harm of drugs within each Class (we return to this aspect of the legislation at several places in our response). Secondly, although the definition of a "controlled drug"²⁰ includes a "preparation or other product" that contains a scheduled substance (e.g. cocaine), the seriousness of the offence remains informed by the potential harmful effects of that substance.
22. Accordingly, we submit that there is a manifest difference in seriousness between the case of D1 who, for example, handles powder consisting of 20% cocaine and 80% glucose, and the case of D2 who handles powder containing 80% cocaine.²¹
23. The Council suggest that the purity of the drug can be taken into account (as a mitigating or aggravating factor) *at step 2*.²² However, this would only influence the 'category range' - and not the 'offence category'. Accordingly, without further adjustment, and if we disregard purity, the differences in outcomes (noting the proposed and existing guidelines) could look like this:

Example 1

D - who plays a "significant role", imports 3 kgs of a powder consisting of 10% cocaine and 90% glucose. Applying existing guidelines, D would fall to be sentenced on the basis of 300 grams of cocaine at 100% purity. D's case does not reach the 10 year+ sentencing benchmark (*Aranguren*).²³

But, on the basis of the proposed guidelines, D falls comfortably within the "very large quantity" category (2.5kgs to 10kgs) and the starting point will be 10 years' imprisonment. Because the judge would no longer be constrained by the purity criterion, it would be open to him or her to take a more generalised view of harm having regard to the quantity involved (e.g. 3 kilograms of a powder that consists largely of glucose). But adopting an 'holistic' approach to the notion of 'harm' is to permit sentencers to make value-judgements about the harmful effects of drugs (or the offence) that may or may not be well founded, but which are unlikely to be susceptible to an appeal to the Court of Appeal.

If, however, D is shrewd or fortunate enough to import 300 grams at 100% purity, he/she now falls within the "medium quantity" category. The starting point, given D's role, is now 6½ years' imprisonment.

²⁰ See s.2(1)(a), MDA 1971, together with (e.g.) para.5, Part 1 of Schedule 2 to the Act.

²¹ The point can be illustrated by way of a further example. D imports 2 kilograms of powder which he believes to be of high purity but which in fact contains 3% cocaine and 97% glucose. Unaware of the actual purity of the substance, D then 'cuts' the substance with another 2 kilograms of glucose. Although the purity is now reduced to 1.5% cocaine, the actual quantity of cocaine handled by D remains 60 grams. Furthermore, the evidence might reveal that the magnitude of the risk of harm (or the degree of potential harm) from the supply of 1.5% pure cocaine is not comparable to the supply of cocaine powder of higher purity. In short, there is a link between purity and the potential for harm caused (or caused).

²² See C. P, page 13.

²³ [1995] 16 Cr.App.R.(S.) 211

Example 2

D - playing a "significant role" - imports 5 kgs of powder (10% cocaine, and 90% glucose). This is a "very large quantity"; starting point, 10 years' imprisonment. But, if D had imported 500 grams of cocaine, at 100% purity, the starting point would be 8 years' imprisonment (lower than the *Aranguren* tariff).

24. The Council goes on to say that any "unintended impact could be mitigated" by adjusting the quantities provided in the tables. But, this goes further than mitigating within the 'category range': it now involves an adjustment to the 'offence category'. The fact that these adjustments may be required (perhaps in a significant number of cases) point firmly to the desirability of linking the 'seriousness' of the offence to the purity of the drug.
25. We are acutely mindful of the fact that the synergistic effect of a product that contains a cocktail of substances (e.g. lignocaine, benzocaine, and cocaine) may be more harmful than the controlled drug in question (e.g. the cocaine). Where there is evidence of such potential for harm, then this constitutes a significant - even serious - aggravating factor.²⁴
26. We note that drug purity is often relevant in confiscation proceedings for the purpose of determining the value of a defendant's benefit (if any) from "criminal conduct" (POCA 2002).
27. Apart from the sentencing process, the chemical composition of drugs is often powerful evidence in the trial (e.g. where batches of controlled drugs of the same kind are involved). Data obtained by laboratories in connection with drug cases has proved to be of considerable value to researchers working nationally and internationally, whether for government departments or NGO's.

Distinguishing between roles

28. Much will turn on whether the defendant's role is judged to be "leading", or "significant", or "subordinate". We suggest that distinguishing between a "leading" role and a "significant" one will often not be straightforward. There has long been a tendency for courts and practitioners to use metaphors such as "generals", "lieutenants", "foot soldiers", "directing mind", and so on. Most roles that are performed in pursuance of a joint venture could be said to be "significant" because, without any one role, the offence might not be capable of commission.
29. In a multi-handed case, the tendency of the court is to decide who, *of the defendants in the dock*, played a 'leading' or 'significant' role, whilst recognising that persons not before the court "may be higher in the chain than you". We recognise that it may be impossible to find entirely apt descriptors of roles and,

²⁴ We note that s.23 of the Offences Against the Person Act 1861 (administering poison or noxious thing, so as to endanger life) carries a maximum term of ten years' imprisonment. Drug trafficking offences under the MDA 1971 carry considerably higher maximum terms of imprisonment. Section 23 of the OAPA 1861 provides: "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of [an offence], and being convicted thereof shall be liable....to [imprisonment] for any term not exceeding 10 years."

accordingly, the way forward may be to provide in the guidelines sufficient examples of characteristics of conduct that would help sentencers to determine the offender's role. The Council has listed some examples in the CP, with the understandable caveat that the lists are "not exhaustive" (p.17, Table 1). However, although one cannot be prescriptive about characteristics that determine an offender's role, we believe that further examples would be of assistance.

Hypothetical

D1 is not the financier of drugs, but travelled abroad to buy them. D2 is a commercial haulier in the UK who sent a driver to collect the drugs and delivered them to a farm belonging to D3 who unloaded, stored, and divided the consignment into smaller quantities for onward distribution. Was the role played by each defendant "leading", or "significant"?

Relative seriousness of the MDA offences

30. Although not fully spelt out in the CP, it is evident that the Council has sought to set tariffs based, in part, on what it considers to be the relative seriousness of one forbidden action (e.g. supply) compared to another (e.g. importation). However, less evident is the reasoning for these distinctions. We recognise that this is a complex topic and, therefore, our comments are intended merely to probe the Council's reasoning is. To that end, we have tabulated the "starting points" as they appear in the CP. In some cases, the Council seems to have been influenced by the Class of drug involved, but it is not apparent why that was.
31. Thus, in the case of Class B drugs, the penalties for the same quantity of a drug are treated less severely for an offence of *supply* than *importing* the drug. But this tends not to be so in relation to a Class A drug.
32. The *production* of a Class A drug, is dealt with less severely than supplying it or importing it. However, in relation to Class B and C drugs, production is treated more severely than supplying it, but less severely than importing it.
33. Subject to one point (which relates to the definition of "production", discussed below) it is submitted that producing a controlled drug will often be more culpable than importing it. It is the producer who makes the drug available in the first place. The importer, supplier, and the user, take advantage of what has been brought into existence.

CLASS	Leading role			Significant role			Subordinate role		
	Import	Supply	Prod	Import	Supply	Prod	Import	Supply	Prod
Very large	14	14	8	10	10	6	8	8	4
Large	11	11	6	8	8	4	6.5	6.5	2.5
Medium	9	9	5	6.5	6.5	3	5	4	15 m
Small	7	7	3	5	4	15 m	3.5	2.5	26 wks
Very small	-	5.5	-	-	3	-	-	26 wks	-

CLASS B	Leading role			Significant role			Subordinate role		
	Import	Supply	Prod	Import	Supply	Prod	Import	Supply	Prod
Very large	8	6	6.6	5.5	3	4.5	4	1.5	3
Large	6	4	5	4	1.5	3	2.5	26 wks	1
Medium	4.5	2	3	2.5	26 wks	2	1.5	12 wks	26 wks
Small	3	36 wks	2	1.5	12 wks	26 wks	26 wks	Com Or	Com Or
Very small	-	12 wks	-	-	Com Or	Com Or	-	Fine	Fine

CLASS C	Leading role			Significant role			Subordinate role		
	Import	Supply	Prod	Import	Supply	Prod	Import	Supply	Prod
Very large	5	5	5	3	3	3.6	1.5	1.5	2
Large	3.5	3.5	4	1.5	1.5	2	36 wks	26 wks	36 wks
Medium	2	2	2	36 wks	26 wks	1	12 wks	12 wks	12 wks
Small	1	36 wks	1	12 wks	12 wks	12 wks	Com Or	Com Or	Com Or
Very small	-	12 wks	-	-	Com Or	Com Or	-	Fine	Fine

Question 1: Do you agree with the proposed grouping of offences into five guidelines?

34. The proposal that guidelines ought to be tailored into the five categories specified in the CP, has much to commend it.
- a. The offence of fraudulently evading a prohibition on the importation or exportation of a controlled drug arises by a *combination* of s.3, MDA and an offence under the Customs and Excise Management Act 1979. Section 3 of the MDA merely imposes the prohibition: it does not create a standalone offence. It therefore makes good sense to make this a discrete category of offending for the purposes of providing sentencing guidelines.
 - b. The offences of supply, possession with intent to supply, and being concerned in supplying, attract identical maximum penalties for a drug of a given Class. Arguably, the person who supplies a controlled drug is more culpable than the custodian of a drug who holds it intending that it should be restored to the depositor. If there is mitigation in the case of the custodian, then no doubt the sentencer would be entitled to take that fact into account.

c. It is appropriate that production, which is separately criminalised under the MDA, should have tailored guidelines. The cultivation of cannabis is often charged as an offence of production under s.4 MDA rather than under s.6 (cultivating cannabis). A drug can be produced by cultivating it. However, whereas an offence of production is a 'criminal lifestyle' offence for the purpose of the Proceeds of Crime Act 2002 (see schd.2 of that Act), the s.6 offence is not. This may be another reason why prosecutors prefer to charge the cultivation of cannabis under s.4 of the MDA.

Consideration may need to be given to the question of whether there is a difference in culpability between producing a drug by chemical means (e.g. chemical synthesis) and producing it by cultivating a plant such as cannabis or coca bush. Some substances can of course be cultivated in a laboratory, for example, penicillin (not controlled). If there is a material difference in culpability between those processes, it may rest in the degree of skill and professionalism required to produce a drug.

A further issue concerns the case of *R v Williams*.²⁵ Most cases of production involve bringing into existence the controlled chemical substance (e.g. MDMA, LSD, and heroin). But, in *Williams*, the Court of Appeal held that the process of blending bulking agents or non-controlled substances (such as paracetamol and caffeine) to a controlled drug was to produce a controlled drug. This is because s.2(1)(a) of the MDA states that "the expression 'controlled drug' means any substance *or product* for the time being specified in Part I, II, or III of Schedule 2 to this Act". Each of those Parts has a paragraph the effect of which is to bring under control, as a controlled drug, a "preparation or other product *containing* a substance or product for the time being specified [in the relevant Part]". Compared to the skill required to produce good quality heroin, cocaine, or amphetamine, there is relatively little skill in blending (e.g.) glucose with powdered cocaine. Presumably the person who now bakes cannabis cakes, or who rolls up 'spliffs' for personal use or distribution, has produced a controlled drug. It is therefore submitted that guidelines relating to production may need to take account of circumstances that would not ordinarily be regarded as amounting to the creation (production) of a substance listed in schedule 2 to the MDA.

d. Permitting premises: section 8 of the MDA 1971. There are many unsatisfactory aspects of this offence.

- i. First, it is arguable that different levels of culpability are involved depending on whether the occupier/manager knowingly permits or suffers the production or supply of a controlled drug, or whether what is permitted is the smoking of cannabis on premises. Furthermore, the use of drugs other than cannabis and opium does not fall within s.8.
- ii. Secondly, it is understood that there have been cases where persons have been prosecuted on the basis of permitting premises to be used in connection with drug supplying, i.e. where the actual act of supply takes place away from the premises albeit that the 'deals' were made on the premises. In the absence of a decision of the Court of Appeal that the reach of s.8 encompasses such conduct, it is submitted that s.8 of the MDA is concerned only with acts of supply or production that take place

²⁵ [2011] EWCA Crim 232.

on premises.²⁶ It is therefore submitted that guidelines must avoid implying a wider basis of liability under s.8. Where a person permits another to wrap up 'deals' on premises (for supply elsewhere), a charge may be available under Part 2 of the Serious Crime Act 2007 (assisting or encouraging the commission of a crime).

Question 2: Do you agree with the Council's approach to the issue of purity?

35. The answer is in the negative (save for the cultivation of plants as specified controlled drugs, notably cannabis, and street deals) for the reasons we have expressed above.

Question 3: Do you agree with the Council's approach of separating Classes B and C?

36. The answer is in the affirmative.
37. Apart from the role of the offender, it is submitted that a primary indicator of seriousness of a drug offence, is the level of harm associated with the drug in question.
38. It is evident that sentencing according to relative harm (or potential harm) cannot be achieved in the absence of reliable criteria for measuring harm. The purpose of the three Classes of controlled drugs²⁷ is to provide a general indication of relative harm, and to specify maximum penalties for offences created under the Act in relation to each Class of drugs.²⁸ It is therefore imperative that classification is appropriate, determined according to sound objective criteria, and not 'politicised': see **Appendix C**.
39. Concern has been expressed that the existing classification of drugs may not be 'fit for purpose'. The Law Commission of New Zealand has recently published a commendable review of the significant literature, and rival arguments, in relation to drug classification: see "*Controlling and Regulating Drugs*".²⁹ It is submitted that this issue needs to be resolved sooner rather than later if the sentencing of drug offenders is to be put on a credible and just basis.
40. We note that the government propose creating a "Temporary Class Drug" that, for practical purposes - including sentence - will be treated if they were Class B drugs pending an assessment of harm (see the Police Reform and Social Responsibility Bill). In the event that these proposals become law, the courts will therefore be required to sentence on the basis of a harm assumed rather than established.

²⁶ Section 8 MDA differs from its forerunner (s.5 of the Dangerous Drugs Act 1965) in that whereas the former relates to activities of persons on premises, the latter focussed on the purpose for which the premises were used for prohibited purposes (e.g. as a cannabis or opium "den"). Accordingly, the spectrum of culpability under s.8 of the MDA is wide.

²⁷ Classes A, B and C: schedule 2 to the MDA 1971.

²⁸ Section 25 and schedule 4 of the MDA 1971.

²⁹ February 2010, Wellington, New Zealand, Issues Paper 16, chapter 9; updated April 2011, Wellington, New Zealand, Report 122, Part 3, chapter 6.

Given the policy of the courts not to distinguish between drugs within a particular Class, it seems likely that sentencers will decline to treat Temporary Class Drugs differently (i.e. attracting lower starting points by reason of the substance being in the temporary class).

Question 4: 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?

41. The short answer is “yes”. This would be consistent with current sentencing practice: see *R v Denslow*,³⁰ where, in the view of the Court of Appeal, a joint purchase on the facts of that case ought to have been treated as an offence of possession rather than as an offence of supply.
42. In *Aramah*,³¹ it was said that the importation of very small amounts for personal use can be dealt with as if it were simple possession. In *R v De Brito*,³² it was said that the larger the amount of the drug handled, the greater the danger that the drug may pass into the hands of others. To what extent ‘drug leakage’ is a realistic risk will obviously depend on the facts of a given case.

Question 5: Do you think that supplying to an undercover police officer should be included in the guideline? If yes, please state at which stage.

43. Even if this is not a factor that needs to be included in statutory guidelines, we are not wholly persuaded that it this circumstance is irrelevant in all cases as a mitigating factor. In *Afonso*,³³ the Court of Appeal made the following observations [words underlined have been added]:

But there is a group of offenders who supply Class A drugs for whom we believe that the level of sentence indicated by *Djahit*^[34] and *Twisse*,^[35] namely in the region of six years following a trial, is disproportionately high and we think some review is called for. These are the offenders who are out-of-work drug addicts, whose motive is solely to finance the feeding of their own addiction, who hold no stock of drugs and who are shown to have made a few retail supplies of the drug to which they are addicted to undercover police officers only. An unemployed addict has, in practical terms, three means of financing his or her addiction - prostitution, theft or supplying others and sentencers should recognise that, in consequence, his or her culpability is likely to be less than that of many other suppliers. Furthermore, if they are shown only to have supplied undercover police officers and hold no stock for supplying others, the harm caused by their conduct is comparatively slight.

44. The CP states that there has been concern that the reference to “undercover officers” has been isolated from the other factors in a way that was not intended

³⁰ [1998] EWCA Crim 432
³¹ (1982) 4 Cr.App.R.(S.) 407
³² [2000] 2 Cr.App.R(S) 255
³³ [2004] EWCA Crim 2342
³⁴ [1999] 2 Cr App R (S) 142
³⁵ [2001] 2 Cr App R (S) 37

and may have led to inconsistencies in sentencing practice (p.21). However, no information is provided by the Council that this aspect of the decision, in *Afonso*, has in fact resulted in inconsistent sentencing *practice*. Nevertheless, the relevance and significance of evidence that supplies were made *only* to undercover police officers is that a court may conclude that no harm was actually occasioned by the acts of the offender - or at least (as the Court remarked in *Afonso*), “the harm caused by their conduct is comparatively slight” [4]. *Accordingly, supply only to an undercover officer is a mitigating factor that may be taken into account by the sentencer at Stage 2.* True it is that the circumstance was one of chance rather than occasioned by the judgement of the offender. However, given that the MDA is essentially regulatory in nature³⁶ (albeit rigorously enforced by coercive penal measures), and which aims to prevent or to minimise harmful effects of substances likely to give rise to a social problem, the *absence* of harm caused is a relevant factor when assessing an offender’s culpability.

Question 6: Do you agree that possession of a drug in a prison should put an offender into the most serious offence category for possession offences?

45. This question is posed in the CP under the heading “Possession of a controlled drug” and yet the question follows a paragraph that pertains to the *supply* of a drug within prison establishments [emphasis added, and see **Appendix D**]:

In line with the SAP’s advice, the Council proposes that possession of a drug in prison by any person (be this a prisoner, a prison officer or any other person in the prison estate) is a singular factor resulting in an offence being categorised in the most serious category (Category 1). The gravity of this offence is considered to be greater for a number of reasons. The *supply* of drugs within prison establishments is a long-standing problem, especially as it counteracts the work being done to tackle drug addiction and, given its status as a *potent currency* in prison, also fuels corruption and is a means by which *dangerous power is exercised*. In addition, in cases where the offender is already serving a custodial sentence, the deterrent effect of any subsequent sentence imposed must be taken into account.

46. The topic of ‘drugs in prison’ is a long-standing issue - not only in the UK but in many Member States of the EU. Measures to counteract the harmful *supply* of drugs to and within prison establishments are obviously needed but, there is ample evidence that demand and the availability of drugs are linked. We question whether it can be said that in all cases where an inmate³⁷ is in simple possession of a controlled drug (regardless of its type or actual potential for causing harm), that his or her conduct is so culpable that it must always be *category 1*. It is submitted that a more disciplined and principled assessment of harm and culpability needs to be undertaken by the sentencer. Our provisional view is that sentencing in these cases will be fact specific.

³⁶ Although the MDA imposes prohibitions, the extensive Regulations made thereunder are largely permissive.

³⁷ A prison officer found in possession of a controlled drug in prison, is in a different position.

47. In its 2002 Annual report on *'The state of the drugs problem in the European Union and Norway'*, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) stated (p.46):

The presence of drugs and drug use has fundamentally changed the prison reality over the past two decades and, nowadays, all countries in Europe experience major problems due to drugs and drug-related infectious diseases in prisons.

... National routine information on drug use, patterns and consequences amongst prisoners is rare. Most of the data available in the EU come from ad hoc studies carried out at local level amongst a small sample of prisoners. This makes extrapolations very difficult.

... The prison population can be considered as a high risk group in terms of drug use. Indeed, compared with the community, drug users are over-represented in prison.³⁸ The proportion of inmates in the EU reporting ever having used an illicit drug varies according to prisons and countries between 29 and 86 % (over 50 % in most studies)...As in the community, cannabis is the most frequently experienced substance, but several studies also show high levels of heroin experience (close to 50 % of the inmates or more in some cases).

48. The statement that drug users are "over-represented in prison" is significant on more than level. It may be that the Council believes that the benefit of putting the simple possession, in prison, of any controlled drug into category 1, is that it would have a deterrent effect (this is not something that is expressed in the CP). But, even if that is the thinking behind the proposal, it is unclear whether it would have that effect. It is conceivable that the loss or restriction of privileges may be a stronger deterrent. The EMCDDA details some of the sanctions imposed by Member States for drug use or possession in prison (p.48):

Prisoners caught in possession of illicit drugs are usually sanctioned and punished under prison regulation. The incident might be reported in the personal file of the prisoner. The common sanctions applied include restriction of rights (visits from friends or family, telephone calls), deprivation of prison leave, and expulsion from specialised treatment wings and/or punishment in an isolation cell. Possession can have consequences on the execution of the conviction. For example in Denmark, there is a risk not to be granted release on parole after having served two thirds of the sentence. In the United Kingdom, when a urine test is found to be positive, the sentence can be lengthened by at least a few extra days. Prisoners caught with drugs might also be charged and prosecuted for it out of the realm of the prison.

Question 7: Should "medical evidence that a drug is used to help with a medical condition" be included as a mitigating factor for possession offences?

49. This question has been answered in the affirmative earlier in our response.

³⁸ See also the EMCDDA Report for 2004, page 13, which is to the same effect.

Question 8: Do you agree with the quantities set out for each of the drug guidelines?

50. The answer depends on the approach that the Council is taking. If the answer is that the proposed guidelines largely maintain current sentencing practice and tariffs then there appear to be inconsistencies in the suggested quantities insofar as they relate to starting points. The words in bold italics represent current guideline quantities and starting points.

Importation offences: quantities

51. In the case of Class A powders, existing guideline quantities are based on 100% purity, whereas the Council quantities are based on *the entire quantity recovered*. We have focussed on Class A and B drugs. The numbers that appear in round brackets in the columns headed "leading role", "significant role" and "subordinate role", are the category ranges set out in the CP.

52. Arguably, when making comparisons between existing guidelines and the Council's proposed guidelines, the relevant comparison is between the tariffs that we have set out in the columns headed "*more than subordinate*" (the expression that tends to be used in the judicial guidelines) and "*significant role*". On that basis, it could be said that the majority of the Council's starting points are lower than the benchmark sentences provided under existing tariffs. However, regard must also be had to the fact that the Council's approach is to focus on the scale of the venture and to look to the total amount recovered (rather than purity). Much may turn on the interpretation and application of the description of roles.

IMPOR T CLASS A	Sent Cncl	Leadin g role	Judicial Guidelines	More than subordina te	Significan t role	Subordinate role
Very large						
Heroin	2.5ks - 10 kgs	14 (12-16)	5ks @ 100%	14	10 (9 - 12)	8 (7.5 - 9)
Ecstasy	5000 - 20,000	14 (12-16)	50,000	14	10 (9 - 12)	8 (7.5 - 9)
LSD	2500 - 10,000	14 (12-16)	250,000	14	10 (9 - 12)	8 (7.5 - 9)
Large						
Heroin	500g - 2.49 kgs	11 (9-13)	500g @ 100%	10	8 (7.5 - 9)	6.5 (6 - 7.5)
Ecstasy	1000 - 4999	11 (9-13)	5000	10	8 (7.5 - 9)	6.5 (6 - 7.5)
LSD	500 - 2499	11 (9-13)	25,000	10	8 (7.5 - 9)	6.5 (6 - 7.5)
Medium						
Heroin	50g - 499g	9 (7.5 - 11)	up to 500g @ 100%	10	6.5 (6 - 7.5)	5 (4.5 - 6)

IMPOR T CLASS A	Sent Cncl	Leadin g role	Judicial Guidelines	More than subordina te	Significan t role	Subordinate role
Ecstasy	100 - 999	9 (7.5 - 11)			6.5 (6 - 7.5)	5 (4.5 - 6)
LSD	50 - 499	9 (7.5 - 11)			6.5 (6 - 7.5)	5 (4.5 - 6)
Small						
Heroin		7 (6-9)	<i>Djahit [1999]2 Cr App R (S) 142</i>	6	5 (4.5 - 6)	3.5 (3 - 4.5)
Ecstasy		7 (6-9)			5 (4.5 - 6)	3.5 (3 - 4.5)
LSD		7 (6-9)			5 (4.5 - 6)	3.5 (3 - 4.5)
Very small		-			-	-

IMPOR T CLASS B	Sent Cncl	Leadin g role	Judicial Guidelines	More than subordina te	Significan t role	Subordinate role
Very large						
Amphet	10 kgs- 40 kgs	8 (7-10)	10 kgs - 15 kgs 15+ kgs	7-10 10 - 14	5.5	4
Cannabis	100 kg - 400 kgs	8 (7-10)	100+ kgs 500+ kgs	7 - 8 10	5.5	4
Large						
Amphet	2.5 kgs- 9.99 kgs	6 (5-8)	2.5 kgs - 10 kgs	4 - 7	4	2.5
Cannabis	25 kgs - 99.99 kgs	6 (5-8)	20 - 100 kgs	3 - 6	4	2.5
Medium						
Amphet	250g - 2.49 kgs	4.5 (3.5 - 6)	≤ 500 g 500 g - 2.5 kg	2 4	2.5	1.5
Cannabis	1 kg - 24.99	4.5 (3.5 - 6)	≤ 20 kgs 20 - 100 kgs	1.5 - 3 3 - 6	2.5	1.5
Small						
Amphet	20g - 249.9g	3 (2-4)			1.5	26 wks
Cannabis	100g - 999.9g	3 (2-4)			1.5	26 wks
Very		-			-	-

IMPOR T CLASS A	Sent Cncl	Leadin g role	<i>Judicial Guidelines</i>	<i>More than subordina te</i>	Significan t role	Subordinate role
small						
Amphet	≤ 19.9g					
Cannabis	≤ 99.9g					

Supply offences: quantities

53. We have carried out a similar exercise in relation to the “supply” offences, again focussing on Class A and Class B drugs:

SUPPL Y CLASS A	Sent Cncl	Leading role	<i>Judicial Guidelines</i>	<i>More than subordina te</i>	Significan t role	Subordinate role
Very large						
Heroin	2.5ks - 10 kgs	14 (12-16)	5ks @ 100%	14	10 (9-12)	8 (7.6-9)
Ecstasy	5000 - 20,000	14 (12-16)	50,000	14	10 (9-12)	8 (7.6-9)
LSD	2500 - 10,000	14 (12-16)	250,000	14	10 (9-12)	8 (7.6-9)
Large						
Heroin	500g - 2.49 kgs	11 (9-13)	500g @ 100%	10	8 (7.5-9)	6.5 (5-7.5)
Ecstasy	1000 - 4999	11 (9-13)	5000	10	8 (7.5-9)	6.5 (5-7.5)
LSD	500 - 2499	11 (9-13)	25,000	10	8 (7.5-9)	6.5 (5-7.5)
Medium						
Heroin	50g - 499g	9 (7.5 - 11)	up to 500g @ 100%	10	6.5 (5-7.5)	4 (3.5-5)
Ecstasy	100 - 999	9 (7.5 - 11)			6.5 (5-7.5)	4 (3.5-5)
LSD	50 - 499	9 (7.5 - 11)			6.5 (5-7.5)	4 (3.5-5)
Small		7 (5-8)	<i>Djahit [1999]2 Cr App R (S) 142</i>	6	4 (3.5-5)	2.5 (High Com Or - 3.5 yr)
Heroin	5g-49.9g					
Ecstasy	20 - 90					
LSD	10 - 49					
Very small						

SUPPLY CLASS A	Sent Cncl	Leading role	Judicial Guidelines	More than subordinate	Significant role	Subordinate role
Heroin	≤ 4.9g	5.5 (4.5 - 7)			3 (2- 4.5)	26 wks {High Com Or - 2yrs)
Ecstasy	≤ 19	5.5 (4.5 - 7)			3 (2- 4.5)	26 wks {High Com Or - 2yrs)
LSD	≤ 9	5.5 (4.5 - 7)			3 (2- 4.5)	26 wks {High Com Or - 2yrs)

SUPPLY CLASS B	Sent Cncl	Leading role	Judicial Guidelines	More than subordinate	Significant role	Subordinate role
Very large						
Amphet	10 kgs- 40 kgs	6 (5-8)	10 kgs - 15 kgs 15+ kgs	7-10 10 - 14	3 (2-5)	1.5 (1-2)
Cannabis	100 kg - 400 kgs	6 (5-8)	100+ kgs 500+ kgs	7 - 8 10	3 (2-5)	1.5 (1-2)
Large						
Amphet	2.5 kgs- 9.99 kgs	4 (3-5)	2.5 kgs - 10 kgs	4 - 7	1.5 (1-2)	26 wks (12wks- 51wks)
Cannabis	25 kgs - 99.99 kgs	4 (3-5)	20 - 100 kgs	3 - 6	1.5 (1-2)	26 wks (12wks- 51wks)
		4 (3-5)			1.5 (1-2)	26 wks (12wks- 51wks)
Medium						
Amphet	250g - 2.49 kgs	2 (1.5 - 3)	≤ 500 g 500 g - 2.5 kg	2 4	26 wks (12wks-18m)	12 wks (High Com Or - 26wks)
Cannabis	1 kg - 24.99	2 (1.5 - 3)	≤ 20 kgs 20 - 100 kgs	1.5 - 3 3 - 6	26 wks (12wks-18m)	12 wks (High Com Or - 26wks)
Small						
Amphet	20g - 249.9g	36 wks			12 wks (High Com Or - 26wks)	Com Or
Cannabis	100g - 999.9g	36 wks			12 wks (High Com Or - 26wks)	Com Or
Very small		12 wks			Com Or	Fine
Amphet	≤ 19.9g					
Cannabis	≤ 99.9g					

54. As we have stated elsewhere, we are of the view that *quality* and *purity* are the principal indicators of the risk of harm. It follows that adulterating a drug with a pernicious substance ought to be a significant aggravating factor.
55. We point out that the proposed guidelines are deficient in relation to large quantities of Class A powders. Cases of such powders in excess of 10 kgs at 100% purity have been before the Courts: see *R v Anderson* (29 kgs at 100%);³⁹ *R v Dimitrov* (unreported, 1999), 65 kgs of heroin; *R v K* (deliveries of 80kgs of heroin per week; 44 kgs recovered);⁴⁰ *R v Clough* (conspiracy to export 337 kgs of cocaine).⁴¹ For a more recent example of large scale drug trafficking, see *Att-Gen Ref. Nos.107-111 of 2009* [2010] EWCA Crim 2028, in *R v Ali (Farman) and 6 Oths* [2008] EWCA Crim 1855, at least 35 kilograms of heroin at 100% purity were involved.
56. Similarly, in relation to ecstasy: *R v Main and Johnson*, (attempting to import 1.2 million tablets),⁴² *R v Gill and Van der Leest* (170 kgs of ecstasy).⁴³
57. LSD is not a popular drug of choice. In any event, it is the understanding of this Working Group that LSD degrades quickly and that modern doses of LSD are comparatively mild to tabs available in the 1960's and 1970's.

Production offences: quantities

58. We make similar observations so far as the offence of production is concerned, noting that there have been cases of large scale amphetamine production: e.g. *R v King*,⁴⁴ and *R v Shaw*.⁴⁵ In *R v Koli and Mee* [2010] EWCA Crim 715, the backdrop to the case included 77 kilograms of processed amphetamine with a street value of £800,000, and equipment for the processing of amphetamine.

PRODUCT ION CLASS A	Sent Cncl	Leadin g role	Judicial Guidelines	More than subordina te	Significa nt role	Subordinate role
Very large						
Heroin	2.5ks - 10 kgs	8 (7-10)	5ks @ 100%	14	6 (5-8)	4 (3-6)
Ecstasy	5000 - 20,000	8 (7-10)	50,000	14	6 (5-8)	4 (3-6)
LSD	2500 - 10,000	8 (7-10)	250,000	14	6 (5-8)	4 (3-6)
Large						

³⁹ [2005] 2 Cr.App.R.(S) 323

⁴⁰ [2010] EWCA Crim 584

⁴¹ [2009] EWCA Crim 1669

⁴² (1997) 2 Cr.App.R(S) 63

⁴³ 16th June 1997

⁴⁴ (1993) 14 Cr. App. R.(S) 252

⁴⁵ (1986) 8 Cr. App. R. (S) 16

PRODUCT ION CLASS A	Sent Cncl	Leadin g role	Judicial Guidelines	More than subordina te	Significa nt role	Subordinate role
Heroin	500g - 2.49 kgs	6 (5-8)	500g @ 100%	10	4 (3-6)	2.5 (2-4)
Ecstasy	1000 - 4999	6 (5-8)	5000	10	4 (3-6)	2.5 (2-4)
LSD	500 - 2499	6 (5-8)	25,000	10	4 (3-6)	2.5 (2-4)
Medium						
Heroin	50g - 499g	5 (4-6)	up to 500g @ 100%	10	3 (2-4)	15mths (36wks - 2yrs)
Ecstasy	100 - 999	5 (4-6)			3 (2-4)	15mths (36wks - 2yrs)
LSD	50 - 499	5 (4-6)			3 (2-4)	15mths (36wks - 2yrs)
Small						
Heroin	5g-49.9g	3 (2-4)			15m (36wks - 2yrs)	26wks (High Com Or - 51wks)
Ecstasy	20 - 90	3 (2-4)			15m (36wks - 2yrs)	26wks (High Com Or - 51wks)
LSD	10 - 49	3 (2-4)			15m (36wks - 2yrs)	26wks (High Com Or - 51wks)
Very small						
Heroin	≤ 4.9g	-			26wks (High Com Or - 51wks)	Med Com Or
Ecstasy	≤ 19	-			26wks (High Com Or - 51wks)	Med Com Or
LSD	≤ 9	-			26wks (High Com Or - 51wks)	Med Com Or

PRODUCT ION CLASS B	Sent Cncl	Leadin g role	Judicial Guidelines	More than subordina te	Significa nt role	Subordinate role
Very large						
Amphet	10 kgs-40 kgs	6.6 (6-8)	10 kgs - 15 kgs 15+ kgs	7-10 10 - 14	4.5 (3-7)	3
Cannabis	industrial amount	6.6 (6-8)	100+ kgs 500+ kgs	7 - 8 10	4.5 (3-7)	1.5 (1-2)
Large						
Amphet	2.5 kgs- 9.99 kgs	5 (4-6)	2.5 kgs - 10 kgs	4 - 7	3 (2-4)	1
Cannabis	commercial amount	5 (4-6)	20 - 100 kgs	3 - 6	3 (2-4)	26 wks (12wks-51wks)
Medium						

PRODUCT ION CLASS B	Sent Cncl	Leadin g role	Judicial Guidelines	More than subordina te	Significa nt role	Subordinate role
Amphet	250g - 2.49 kgs	3 (2-4)	≤ 500 g 500 g - 2.5 kg	2 4	2 (1-3)	26wks
Cannabis	domestic (15+ plants)	3 (2-4)	≤ 20 kgs 20 - 100 kgs	1.5 - 3 3 - 6	2 (1-3)	12 wks (High Com Or - 26wks)
Small						
Amphet	20g - 249.9g	2 (1-3)			26wks (High Com Or - 51wks)	Com Or
Cannabis	domestic (9- 15 plants)	2 (1-3)			26wks (High Com Or - 51wks)	Com Or
Very small						
Amphet	≤ 19.9g				Com Or	Fine
Cannabis	domestic (< 8 plants)				Com Or	Fine

Question 9: Do you agree with the roles as proposed for each of the offences covered by the draft guideline?

59. We have already commented upon the practical difficulties that exist when seeking to differentiate between the roles of offenders. There clearly is a difference in the culpability of the offender who plays a minor/subordinate role, the manager, and the person for whom the operation is designed to benefit the most. Further examples of the characteristics of the three main roles identified by the Council, might be of assistance to practitioners and sentencers.

Question 10: Do you agree with the aggravating and mitigating factors outlined for each of the offences covered by the draft guideline?

60. We make the following observations based on the tables provided by the Council. We make an observation of general application, namely, that the personal circumstances of the offender should attract greater relevance and weight in the sentencing of drug offences than has tended to be the case.

Mitigating and aggravating factors: Importation offences

Factors increasing seriousness Statutory aggravating factors:	CBA Comment	Factors reducing seriousness or reflecting personal mitigation	CBA Comment
Previous convictions, having regard to a) nature of the offence to which conviction relates and relevance to current offence; and b) time elapsed since the	<i>Agreed</i>	Lack of sophistication as to nature of concealment	<i>Agreed</i>

Factors increasing seriousness Statutory aggravating factors:	CBA Comment	Factors reducing seriousness or reflecting personal mitigation	CBA Comment
conviction...			
Offender used or permitted a person under 18 to deliver a controlled drug to a third person	<i>Agreed - or other vulnerable person; e.g. mentally infirm</i>	Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step 1	<i>Agreed</i>
Offence committed on bail	<i>Agreed</i>	Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances	<i>Agreed</i>
Other aggravating factors include:		Isolated incident	<i>Agreed</i>
Sophisticated nature of concealment/attempts to avoid detection	<i>Agreed (subject to proof of D's awareness of those matters)</i>	No previous convictions or no relevant/recent convictions	<i>Agreed</i>
Attempts to conceal or dispose of evidence, where not separately charged	<i>Agreed</i>	Offender's vulnerability was exploited	<i>Agreed</i>
Exposure of others to more than usual danger, for example drugs cut with harmful substances	<i>Agreed</i>	Remorse	<i>Agreed</i>
Use of others, especially children	<i>Use of vulnerable persons and children</i>	Good character and/or exemplary conduct	<i>Agreed</i>
Presence of weapons, where not separately charged	<i>Agreed</i>	Determination and/or demonstration of steps taken to address addiction or offending behaviour	<i>Agreed</i>
High purity	<i>We prefer to treat purity as a determinant of seriousness/culpability</i>	Serious medical condition requiring urgent, intensive or long-term treatment	<i>Agreed</i>
Failure to comply with current court orders	<i>That might depend on the nature of the court order</i>	Age and/or lack of maturity where it affects the responsibility of the offender	<i>Agreed</i>
Offence committed on licence	<i>Agreed</i>	Mental disorder or learning disability	<i>Agreed</i>
Failure to respond to warnings or concerns expressed by others about the offender's behaviour	<i>No</i>	Sole or primary carer for dependent relatives	<i>Agreed</i>

Mitigating and aggravating factors: supply

61. We make the following observations:

Factors increasing seriousness Statutory aggravating factors:	CBA Comment	Factors reducing seriousness or reflecting personal mitigation	CBA comment
Previous convictions, having regard to a) nature of the offence to which conviction relates and relevance to current offence; and b) time elapsed since the conviction (see box at page 59 if third drug trafficking conviction)	<i>Agreed</i>	Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step 1	<i>Agreed</i>
Offender used or permitted a person under 18 to deliver a controlled drug to a third person	<i>Agreed - or other vulnerable person</i>	Supply only of drug to which offender addicted	<i>Agreed - we suggest, 'addicts' / problematic drug users.</i>
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	<i>Agreed - subject to a practical and sensible interpretation of what constitutes the "in the vicinity of" ...</i>	Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances	<i>Agreed</i>
Offence committed on bail	<i>Agreed</i>	Isolated incident	<i>Agreed</i>
Other aggravating factors include:		No previous convictions or no relevant/recent convictions	<i>Agreed</i>
Targeting of any premises intended to locate vulnerable individuals	<i>Agreed</i>	Offender's vulnerability was exploited	<i>Agreed</i>
Exposure of others to more than usual danger, for example drugs cut with harmful substances	<i>Agreed</i>	Remorse	<i>Agreed</i>
Attempts to conceal or dispose of evidence, where not separately charged	<i>Agreed</i>	Good character and/or exemplary conduct	<i>Agreed</i>
Presence of others, especially children and/or non-users	<i>Presence of children or other vulnerable persons</i>	Determination and/or demonstration of steps having been taken to address addiction or offending behaviour	<i>Agreed - but prefer "problematic drug use" to the word "addiction".</i>
Presence of weapons, where not separately charged	<i>Agreed</i>	Serious medical conditions requiring urgent, intensive or long-term treatment	<i>Agreed</i>
Charged as importation of a very small amount	<i>We are currently unpersuaded that importation is necessarily more serious than supply.</i>	Age and/or lack of maturity where it affects the responsibility of the offender	<i>Agreed</i>
High purity	<i>We prefer to treat purity as a determinant of seriousness/culpability</i>	Mental disorder or learning disability	<i>Agreed</i>

Factors increasing seriousness Statutory aggravating factors:	CBA Comment	Factors reducing seriousness or reflecting personal mitigation	CBA comment
Failure to comply with current court orders	<i>Depends on the nature of the court order.</i>	Sole or primary carer for dependent relatives	<i>Agreed</i>
Offence committed on licence	<i>Agreed</i>		
Failure to respond to warnings or concerns expressed by others about the offender's behaviour	<i>No</i>		
Established evidence of community impact	<i>There may be circumstances in which the defendant is himself or herself a 'victim' of that impact.</i>		

Mitigating and aggravating factors: production and cultivation

62. We make the following comments:

Factors increasing seriousness Statutory aggravating factors:	CBA Comment	Factors reducing seriousness or reflecting personal mitigation	CBA Comment
Previous convictions, having regard to a) nature of the offence to which the conviction relates and relevance to current offence; and b) time elapsed since the conviction (see box page 65 if third drug trafficking conviction)	<i>Agreed</i>	Involvement due to pressure, intimidation or coercion falling short of duress except where taken into account at step 1	<i>Agreed</i>
Offence committed on bail	<i>Agreed</i>	Isolated incident	<i>Agreed</i>
<i>Other aggravating factors include:</i>		No previous convictions or no relevant/recent convictions	<i>Agreed</i>
Nature of any likely supply	<i>Relevant to step 1</i>	Offender's vulnerability was exploited	<i>Agreed</i>
Level of any profit element	<i>Relevant to step 1</i>	Remorse	<i>Agreed</i>
Use of premises accompanied by unlawful access to electricity/other utility supply of others	<i>Relevant to step 1</i>	Good character and/or exemplary conduct	<i>Agreed</i>
Ongoing/large scale operation as evidenced by presence and nature of specialist equipment	<i>Relevant to step 1</i>	Determination and/or demonstration of steps taken to address addiction or offending behaviour	<i>Agreed - but prefer "problematic drug use" to the word "addiction".</i>
Exposure of others to more than usual danger, for example drugs cut with harmful substances	<i>Agreed</i>	Serious medical conditions requiring urgent, intensive or long-term treatment	<i>Agreed</i>

Factors increasing seriousness Statutory aggravating factors:	CBA Comment	Factors reducing seriousness or reflecting personal mitigation	CBA Comment
Attempts to conceal or dispose of evidence, where not separately charged	<i>Agreed</i>	Age and/or lack of maturity where it affects the responsibility of the offender	<i>Agreed</i>
Presence of others, especially children and/or non-users	<i>Agreed</i>	Mental disorder or learning disability	<i>Agreed</i>
Presence of weapons, where not separately charged	<i>Agreed</i>	Sole or primary carer for dependent relatives	<i>Agreed</i>
High purity	<i>We prefer to treat purity as a determinant of seriousness/culpability</i>		
Failure to comply with current court orders	<i>Depends on the court order</i>		
Offence committed on licence	<i>Agreed</i>		
Failure to respond to warnings or concerns expressed by others about the offender's behaviour	<i>No</i>		
Established evidence of community impact	<i>There may be circumstances in which the defendant is himself or herself a 'victim' of that impact.</i>		

Mitigating and aggravating factors: permitting premises for drug activities

63. Our observations are as follows:

Factors increasing seriousness Statutory aggravating factors:	CBA Comment	Factors reducing seriousness or reflecting personal mitigation	CBA Comment
Previous convictions, having regard to a) nature of the offence to which conviction relates and relevance to the current offence; and b) time elapsed since the conviction (see box page 71 if third drug trafficking conviction)	<i>Agreed</i>	Involvement due to pressure, intimidation or coercion falling short of duress	<i>Agreed</i>
Offence committed on bail	<i>Agreed</i>	Isolated incident	<i>Agreed</i>
<i>Other aggravating factors include:</i>		No previous convictions or no relevant/recent convictions	<i>Agreed</i>
Length of time over which premises used for drug activity	<i>Agreed</i>	Offender's vulnerability exploited	<i>Agreed</i>
Volume of drug activity permitted	<i>Agreed</i>	Remorse	<i>Agreed</i>

Factors increasing seriousness Statutory aggravating factors:	CBA Comment	Factors reducing seriousness or reflecting personal mitigation	CBA Comment
Premises adapted to facilitate drug activity	<i>Relevant to step 1</i>	Good character and/or exemplary conduct	<i>Agreed</i>
Location of premises, for example proximity to school	<i>Much will depend on the nature of the activity taking place on premises.</i>	Determination and/or demonstration of steps taken to address addiction or offending behaviour	<i>Agreed - prefer "problematic drug use".</i>
Attempts to conceal or dispose of evidence, where not separately charged	<i>Agreed</i>	Serious medical conditions requiring urgent, intensive or long-term treatment	<i>Agreed</i>
Presence of others, especially children and/or non-users	<i>Children and other vulnerable persons.</i>	Age and/or lack of maturity where it affects the responsibility of the offender	<i>Agreed</i>
Presence of weapons, where not separately charged	<i>Agreed</i>	Mental disorder or learning disability	<i>Agreed</i>
Failure to comply with current court orders	<i>Depends on the nature of the court order</i>	Sole or primary carer for dependent relatives	<i>Agreed</i>
Offence committed on licence	<i>Agreed</i>		
Failure to respond to warnings or concerns expressed by others about the offender's behaviour	<i>No</i>		
Established evidence of community impact	<i>There may be circumstances in which the defendant is himself or herself a 'victim' of that impact.</i>		

64. Steps taken by the offender to prevent the offending activity taking place on premises should also be taken into account (albeit that those steps did not go so far as to afford D a defence to the charge).
65. The nature of the occupancy or managerial role may also be material. For example, whether the occupier was a student in a shared bed-sit, or a parent or carer, in permanent residency.

Mitigating and aggravating factors: simple possession of a drug

66. We take cognisance of the fact that the MDA does not (by way of an offence of general application) prohibit or criminalise the *use* of a controlled drug. Furthermore, we see force in the argument that one of the harmful effects associated with the simple possession of a controlled drug *can be* in the fact of conviction, the acquisition of a criminal record for that offence, as well as the consequences that can flow from conviction (apart from the imposition of a penalty for the offence itself). There are powerful arguments in support of the proposition that the possession and use of a controlled drug (or any drug, including alcohol and

tobacco) are most effectively addressed through education and health care programs.

67. As to whether the possession of a drug in licensed premises constitutes an aggravating factor depends very much on the surrounding circumstances about which one cannot be too prescriptive. The Council's thinking may be that where a drug is carried onto licensed premises - and even if D did not intend to display the substance there - that there is a risk that he/she may do so, or be tempted to do so, or that D may be tempted to share the drug with another, or that others who witness drug-use might thereby be encouraged to unlawfully use a controlled drug.
68. Much has been written about the relationship between controlled drugs, alcohol and tobacco. However, there are several contentious issues concerning that relationship, including stigmatising and criminalising persons over the use of some drugs when both the use and distribution of alcohol and tobacco are relatively uncontrolled, yet pose (arguably) greater public and personal health risks.
69. There are also difficulties of perception concerning the credibility and purpose of some of our drug laws. For example, in seeking to treat the possession of *any* controlled drug on licensed premises as an "aggravating factor", does the underlying reason actually have more (or as much) to say about the harmful effects of alcohol (legal) as it does about the unlawful possession of the controlled drug in question?
70. There may be circumstances in which the possession of a controlled drug in a public place would be an aggravating factor but those circumstances cannot be conveniently distilled and specified in statutory sentencing guidelines.

Factors increasing seriousness Statutory aggravating factors:	CBA Comment	Factors reducing seriousness or reflecting personal mitigation	CBA Comment
Previous convictions, having regard to a) nature of the offence to which conviction relates and relevance to current offence; and b) time elapsed since the conviction	<i>Agreed</i>	No previous convictions or no relevant/recent convictions	<i>Agreed</i>
Offence committed on bail	<i>Agreed</i>	Remorse	<i>Agreed</i>
<i>Other aggravating factors include:</i>		Good character and/or exemplary conduct	<i>Agreed</i>
Presence of others, especially children and/or non-users	<i>Children and other vulnerable persons</i>	Determination and/or demonstration of steps taken to address addiction or offending behaviour	<i>Agreed - prefer "problematic drug use".</i>
Possession of drug in a school or licensed premises	<i>School</i>	Serious medical conditions requiring urgent, intensive or long-term treatment	<i>Agreed</i>
Failure to comply with current court orders	<i>Depends on the court order</i>	Isolated incident	<i>Agreed</i>

Factors increasing seriousness Statutory aggravating factors:	CBA Comment	Factors reducing seriousness or reflecting personal mitigation	CBA Comment
Offence committed on licence	<i>Agreed</i>	Age and/or lack of maturity where it affects the responsibility of the offender	<i>Agreed</i>
Attempts to conceal or dispose of evidence, where not separately charged	<i>Agreed</i>	Mental disorder or learning disability	<i>Agreed</i>
Failure to respond to warnings or concerns expressed by others about the offender's behaviour	<i>No</i>	Sole or primary carer for dependent relatives	<i>Agreed</i>
Charged as importation of a very small amount	<i>Agreed</i>		
Established evidence of community impact	<i>There may be circumstances in which the defendant is himself or herself a 'victim' of that impact.</i>		

Question 11: Do you think that there are any other factors that should be taken into account at these two steps?

71. There are no factors in addition to those that we have already mentioned in this response.

Question 12: Do you agree with the proposed offence ranges, category ranges and starting points for all of the offences in the draft guideline?

72. We believe that we have dealt with this question at various places in our response.

Question 13: Are there any ways in which you think victims can and/or should be considered in the proposed draft guideline?

73. There may be various circumstances in which a victim impact statement (or a statement of that kind) could be taken into account by the sentencer. One such case might be in relation to premises from which drugs are routinely prepared and sold to the extent that it has significantly impaired the quality of life of those who live in the vicinity.

74. However, defendants can be 'victims' too.

Question 14: Is there any other way in which equality and diversity should be considered as part of this draft guideline?

75. Distinguishing between (a) the person whose vulnerability or extenuating circumstances had been exploited in order to persuade him or her to commit an offence, and (b) the professional courier, is not always straightforward. Not infrequently, the only information relating to the offender's circumstances will come from the offender. Obtaining information in support of the defendant's account will often be difficult - if not impracticable or impossible. The resources of the probation service - even if it might be able to assist - are now tightly stretched. Information from NGOs such as HIBISCUS, that would assist practitioners when making enquiries overseas, or to better understand and to put into context the instructions or information that they receive, might usefully be incorporated in material that the Council publishes.

Question: 15 Are there any further comments that you wish to make?

76. None at this time.

Rudi Fortson QC, Monica Stevenson, Kate Lumsdon

APPENDIX A: Deterrent sentences ⁴⁶

In cases where the tariff would be higher than at present, that outcome needs to be justified. If the justification is said to be founded on the principle of deterrence then there is a need to demonstrate that deterrence works. ⁴⁷

Longitudinal results of drug prevalence, and offending patterns, are not encouraging that deterrent sentences have been successful in curbing offending. It is not proposed to dwell on this topic in this response but a few items of data may usefully be stated here.

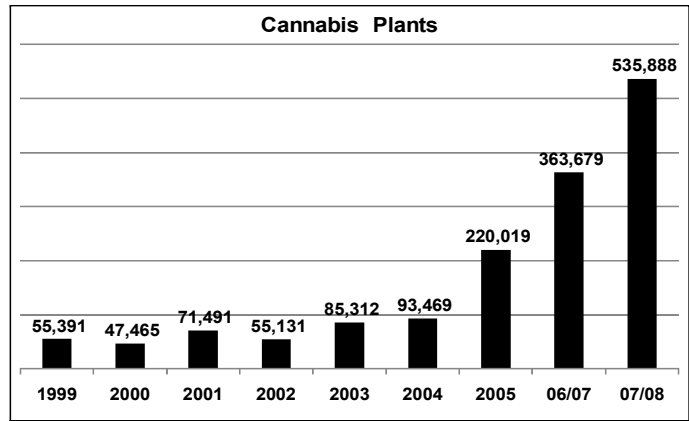
The United Kingdom Focal Point on Drugs, '*United Kingdom drug situation: annual report to the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) 2010*', provides a comprehensive table of *recorded* drug crimes in the United Kingdom by offence type and country, 2003/04 to 2009/10 (Table 9.1, p.137):

	2003/ 04	2004/ 05	2005/ 06	2006/ 07	2007/ 08	2008/ 09	2009/ 10
	England and Wales						
Trafficking	24,628	24,190	25,276	26,550	28,330	29,894	33,009
Possession	118,006	120,866	152,602	167,003	200,735	212,527	200,872
Other drug offences	877	781	601	680	816	1,123	1,117
Total offences	143,511	145,837	178,479	194,233	229,881	243,544	234,998
	Northern Ireland						
Trafficking	405	375	349	473	529	607	668
Possession	2,184	2,247	2,595	1,938	2,191	2,367	2,478
Total offences	2,589	2,622	2,944	2,411	2,720	2,974	3,146
	Scotland						
Trafficking	9,537	9,333	9,613	10,890	9,827	10,315	9,901
Possession	32,463	32,268	34,440	31,329	30,559	31,805	29,179
Other drug offences	275	222	194	203	360	389	328
Total offences	42,275	41,823	44,247	42,422	40,746	42,509	39,408
	United Kingdom						
Trafficking	34,570	33,898	35,238	37,913	38,686	40,816	43,578
Possession	152,653	155,381	189,637	200,270	233,485	246,699	232,529
Other drug offences	1,152	1,003	795	883	1,176	1,512	1,445
Total offences	188,375	190,282	225,670	239,066	273,347	289,027	277,552

The number of cannabis plants seized in the UK - presumably due to UK grown hydroponic cultivation - has dramatically increased in recent years:

⁴⁶ Tables prepared by the chair of the Working Group based on data supplied by the *Seizures of Drugs in England and Wales, 2009/10* (R.Mulchandani, T. Hand, and L. Kaur Panesar, National Statistics); and the British Crime Survey, 2009/2010. [Responsibility for reliance on the tables is ultimately that of the user]

⁴⁷ If the Council's proposals involve a shift in sentencing policy, then it is important to know what that policy is and whether the policy is based on the principle 'deterrence' or 'proportionality'? If 'proportionality', then proportionate to what consequence or threat? Is it harm caused, or the threat to personal or public health, and/or other adverse consequences of the offence? If 'deterrence', then what degree of intensity or severity of sanction is thought by the Council to be sufficient for that purpose?

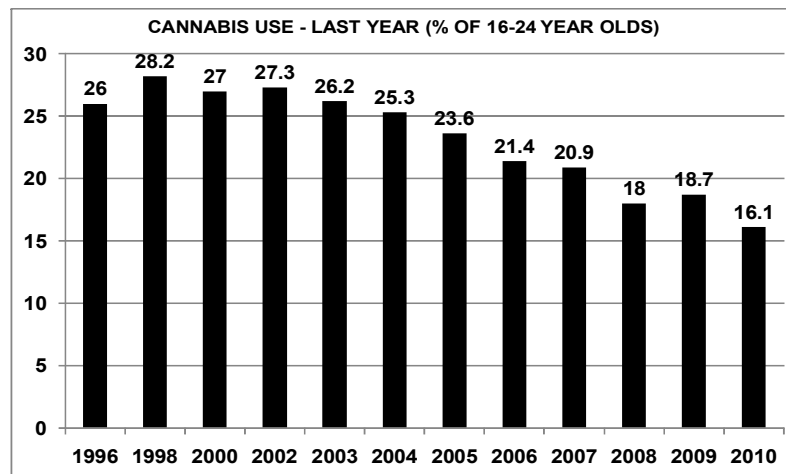


Prevalence: 16 to 24 year old persons

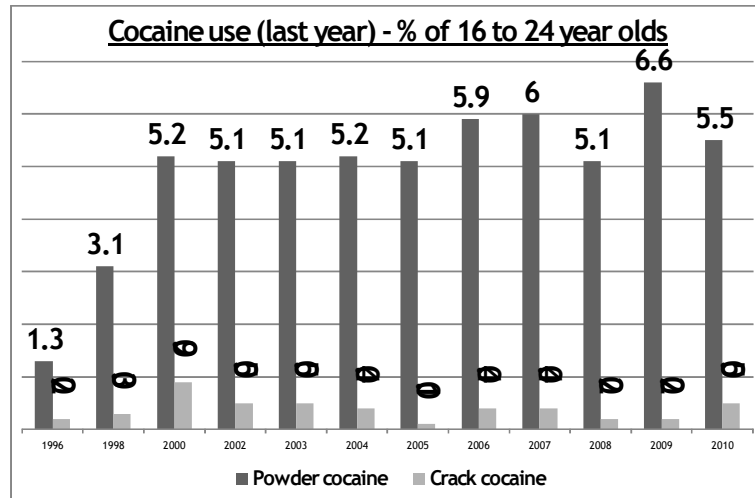
Of persons aged between 16 and 24:

- 40.7 per cent used one or more illicit drugs in their *lifetime* (2.7 million: see BCS 2009/10, p.11).
- 20 per cent used one or more illicit drugs in the *previous year*.
- 11.6 per cent had used one or more illicit drugs in the *past month* (0.8 million, BCS, 2009/10, p.11).
- 16.4 per cent used a Class A drug at least once in their *lifetime* (1.1 million, BCS, 2009/10, p.11).
- 7.3 per cent used at least one Class A drug *last year* (½ million, BCS, 2009/10, p.11).
- 3.7 per cent used at least one Class A drug *last month*.
- 16.1 per cent used cannabis in the *last year*; ecstasy (4.3 per cent), powder cocaine (5.5 per cent), amyl nitrite (3.2 per cent), and amphetamines (2.4 per cent); ketamine use fell to 1.7%, and magic mushrooms to 1.2% (see BCS 2009/10, Table 2.7).

The 2009/2010 BCS estimated that one in six young adults had used cannabis in the *last year* (16.9%), that is to say, about 1.1 million young adults had done so. The percentage of persons aged between 16-24 years who used cannabis *last year* has shown a declining trend.



However, the trend in the use of powdered cocaine has been upwards. It does not follow of course, that cocaine use within this age group is sustained or necessarily problematic.

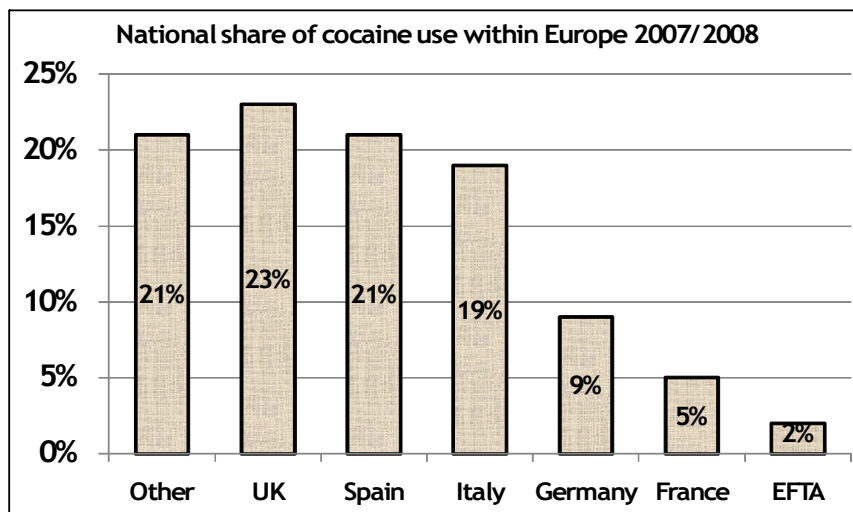


European and UK drug trends

1-004

Compared to other European states, drug use in the United Kingdom is high: see the *World Drug Report 2010* (United Nations, Office of Drugs and Crime); and see the *2004 Annual Report*, European Monitoring Centre for Drugs and Drug Addiction (EMCDDA).

According to the *World Drug Report 2010*, the UK has the largest national cocaine market in Europe [p.18].



APPENDIX B: Measuring purity

It is accepted that establishing purity is not always a straight-forward exercise. As Dr Les King has pointed out,⁴⁸ there is a difference between *base* purity and a drug's purity *as a salt*:

The analytical convenience of base purities is unfortunately marred by conceptual difficulties that can arise. Thus, under these circumstances, pure amphetamine sulfate has a (base) purity of only 73%, but a purity of 100% as amphetamine sulfate. The difference of 27% is accounted for by the sulfate part of the salt.

The distinction was not lost on the Court of Appeal in *Wijs*,⁴⁹ which made the same point and set the guidelines for amphetamine at 100% of amphetamine *base*:

We are quite satisfied, for reasons clearly given in *Aranguren*...that with amphetamine, levels of sentence should depend not on market value but, subject to all other considerations, on the quantity of the amphetamine in question calculated on the basis of 100 per cent pure amphetamine base (i.e. the maximum theoretical purity of 73 per cent amphetamine base in amphetamine sulphate, the remaining 27 per cent being the sulphate)

Dr King also highlights another potential problem when dealing with *batches* of a powdered controlled drug (e.g. cocaine):⁵⁰

Let the weights and purities be: 1kg of 20%, 500g of 18%, 5g of 12% and 1g of 10%. The mean purity (x) is simply the arithmetic average = $\{(20 + 18 + 12 + 10)/4\} = 15\%$.

The value of xm is that value which would be obtained if all four samples were thoroughly mixed and the purity re-measured. It is equal to the sum of the products of weight and purity divided by the total weight. For the four samples here, xm is then $\{(20 \times 1000) + (18 \times 500) + (12 \times 5) + (10 \times 1)\} / 1506 = 19.3\%$.

If $xm > x$, then it suggests that sequential cutting is occurring as the drug is passed down a distribution chain and fragmented into smaller aliquots.

The experience of the Working Group is that the courts tend to calculate quantity (assuming 100% purity) by reference to the (xm) value and not the mean purity (x). Thus, in the example given by Dr King, and if the drug in question was (say) cocaine hydrochloride, the total would be 290.7 grams at 100 % purity (1506 grams x 19.3% = 290.7). As stated above, this would be the purity of the drug as a salt - rather than base purity.

Dr King also points out that "the concept of purity can only be applied to substances that are capable of existing in a pure state, even if that state is not often realised in practice".⁵¹ The above illustrates the need for carefully drafted forensic reports when

⁴⁸ Dr Leslie A. King, "*The Forensic Chemistry of Substance Misuse: A Guide to Drug Control*" (RSC Publishing; 2009), page 139

⁴⁹ [1999] 1 Cr.App.R.(S.) 181.

⁵⁰ *Ibid*, p.140-141.

⁵¹ *Ibid*, p.141.

the purity of a controlled drug is in issue. Dr King suggests that *in some cases* - notably cannabis - drug potency would be "a more appropriate measure".⁵²

⁵² *Ibid*, p.141.

APPENDIX C: Drug classification and penalties

As originally enacted, the maximum terms of imprisonment imposed by s.5 and schedule 4 of the MDA 1971, *for the more serious drug offences* tried on indictment,⁵³ was 14 years' imprisonment in respect of drugs in Classes A and B, and 5 years' imprisonment in respect of Class C drugs. Identical maximum terms of imprisonment were stipulated by the Customs and Excise Act 1952 (for the purposes of offences arising under that enactment) and, since the latter's repeal, by the Customs and Excise Management Act 1979. The sentencing maxima in relation to a large number of Class C drug offences, triable *summarily*, was reduced by the Criminal Law Act 1977⁵⁴ from 6 months' imprisonment to 3 months'. However, the maximum term of imprisonment *on indictment* for trafficking in a Class A drug was increased to life imprisonment by the Controlled Drugs (Penalties) Act 1985.⁵⁵

Effective from the 29th January 2004,⁵⁶ the maximum penalty on indictment for trafficking in Class C drugs was increased from 5 years' imprisonment to 14 years' imprisonment.⁵⁷ The change coincided with the reclassification of cannabis (in all its forms) from Class B to Class C,⁵⁸ - presumably because it was foreseeable that the courts would continue to deal with cases involving the trafficking of substantial amounts of cannabis. However, in *Parekh*⁵⁹, the Court of Appeal held that "by making a maximum sentence of 14 years for all class C drugs, Parliament was not intending to distinguish between on the one hand cannabis and on the other hand a drug such as diazepam". In that case, an appeal against a sentence of 5 years' imprisonment for the importation of 993,000 diazepam tablets, which weighed 161½ kilos, was dismissed (P pleaded guilty). The offence was committed in August 2005. It is not apparent from the judgment whether P, who was not the ringleader, was aware of the increased maximum penalty. If P was aware of that fact then it clearly had not deterred him from committing the offence.

Cannabis in all its forms has, from the 26th January 2009, been reclassified as a Class B substance but the penalties remain unchanged.⁶⁰

Given the above, there is now no difference between a drug that is in Class B or C for the purposes of sentencing an offender in connection with a drug *trafficking* offence that is tried on indictment.

⁵³ Namely, sections 4(2), 4(3), 5(3).

⁵⁴ Words substituted by s.28, Schd.5 para.1(1)(b) of the Criminal Law Act 1977 [England and Wales]; Criminal Procedure (Scotland) Act 1975, Schd.7B para.1(1)(b) and (from 1.4.1996) by 1995 c. 40, s.3(1), s.6, Schd.1 para.11(1)(2) Schd.5 (with s.6(2), Schd.6) [Scotland]; and by S.I. 1984/703 (N.I. 3), art. 4, Sch. 1 para. 1(c), 2 (b)(i)(ii) [Northern Ireland]: see Statute Law Database.

⁵⁵ Section 1(1) and s.2(2).

⁵⁶ The Criminal Justice Act 2003 (Commencement No.2 and Saving Provisions) Order 2004, (SI 2004/81).

⁵⁷ Section 84(2) and schedule 28, para.1 of the CJA 2003 (in relation to ss.4(2), 4(3), 5(3), 8, 12(6), 13(3) of the MDA 1971); and schedule 28, para.1, CJA 2003 (amending schd.1 CEMA 1979); and schd.28, para.3, CJA 2003 (re s.19(4)(c)(ii), of the Criminal Justice (International Cooperation) Act 1990.

⁵⁸ In force, 29th January 2004: the Misuse of Drugs Act 1971 (Modification) (No. 2) Order 2003, S.I. 2003/3201.

⁵⁹ [2006] EWCA Crim 1268.

⁶⁰ The Misuse of Drugs Act 1971 (Amendment) Order 2008, SI 2008/3130.

It is submitted that there is a case for (a) reducing the classes of controlled drugs from three to two, and that each class attracts individually tailored maximum penalties; (b) establishing a 'harms index' based on expert advice [perhaps the Advisory Council on the Misuse of Drugs], and (c) formulating guidelines that have regard to the 'harms index'. However, given that such reforms are unlikely to come about, and that drugs will continue to be added to the three Classes on the basis that each Class says something about relative harm, it makes good sense that the sentencing guidelines are tailored accordingly.⁶¹

⁶¹ The creation of a 'harms index' was one of the recommendations of the report of the RSA Commission on *Illegal Drugs, Communities and Public Policy* (2007), p.15. See "*Development of a rational scale to assess the harm of drugs of potential misuse*" Professor David Nutt, Dr Leslie A King, Professor Colin Blakemore, and assisted by Mr William Saulsbury, *The Lancet*, www.thelancet.com Vol 369 March 24, 2007, p.1047; and see L.A. King "*The Forensic Chemistry of Substance Misuse*", p.133. It seems that an early version of the Lancet paper had been requested by the House of Commons Select Committee on Science and Technology to assist in its review on the evidence base of the drug laws, and appeared unacknowledged as Appendix 10 of their report: see House of Commons Science and Technology Committee: *Drug classification: making a hash of it?* Fifth Report, Session 2005-06: see the acknowledgements in the *Lancet* piece.

APPENDIX D: drugs in prison; problems caused by trafficking therein

The EMCDDA Report for 2004 states that drug trading within prison is reported to be far more distressing than in the community, leading to intimidation, bullying and criminality (p.49). However, in terms of protective and preventative measures, the Report details many initiatives and programs. An area of concern has to be the spread of disease:

The prevention of the transmission of blood-borne diseases during incarceration has become a priority target for several prison systems in Europe - also with regard to the notable increases in pharmaceutical expenditure due to the treatment of drug-related infections (e.g. HAART, interferon) that prisons have to cover. Many countries aim to follow the general principles and specific recommendations made by the WHO in their Guidelines on HIV infection and AIDS in prison (WHO, 1993). Several risk-reduction measures are difficult to implement, because they are politically loaded, meet resistance from staff and are perceived inadequate in prison settings. Selected prevention measures of the WHO guidelines and the extent to which EU countries and Norway implement them are presented in Table 2.⁶² Even though the coverage of these measures appears still to be insufficient in many countries, some progress has been made ⁽⁶⁵⁾.⁶³ Needle exchange programmes can be implemented now in all Spanish prisons ⁽⁶⁶⁾⁶⁴ and Luxembourg and Portugal are discussing their introduction. More countries recommend prisoners' access to diluted bleach and implementation of this measure has improved.

See also *"Prisons, Drugs and Society: A Consensus Statement on Principles, Policies and Practices WHO (Regional Office For Europe) Health in Prisons Project and the Pompidou Group of the Council of Europe"*: September 2001.

In its 2010 Report, the EMCDDA provides further useful information in relation to drugs in prison including programs for assisting drug users in prison (p.37).

⁶² See page 51 of the Report.

⁶³ Fn 65 reads: "For information on the situation up to 2000, see the web site (http://ar2001.emcdda.eu.int/en/chap2/specific_demand.html#table2)."

⁶⁴ Fn 66 reads; "Except prisons located in Ceuta and Melilla. The autonomous community of Cataluña has its own competence in management of prisons."