

Advice to the Sentencing Guidelines Council : sentencing for drug offences.

Contributors

Great Britain. Sentencing Advisory Panel.
Great Britain. Sentencing Guidelines Council.

Publication/Creation

London : SAP, 2010.

Persistent URL

<https://wellcomecollection.org/works/y2vztc9g>

License and attribution

You have permission to make copies of this work under an Open Government license.

This licence permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Image source should be attributed as specified in the full catalogue record. If no source is given the image should be attributed to Wellcome Collection.



Wellcome Collection
183 Euston Road
London NW1 2BE UK
T +44 (0)20 7611 8722
E library@wellcomecollection.org
<https://wellcomecollection.org>

ADVICE TO THE SENTENCING GUIDELINES COUNCIL

Sentencing for Drug Offences

M

7922

7922

The Panel's Advice to the Court of Appeal

Environmental Offences	March 2000
Offensive Weapons Offences	May 2000
Importation and Possession of Opium	June 2000
Racially Aggravated Offences	August 2000
Handling Stolen Goods	March 2001
Extended Sentences	November 2001
Minimum Terms in Murder Cases	April 2002
Domestic Burglary	May 2002
Rape	May 2002
Offences involving Child Pornography	August 2002
Causing Death by Dangerous Driving	February 2003
Alcohol and Tobacco Smuggling	July 2003

The Panel's published Advice to the Sentencing Guidelines Council

Robbery	May 2004
Reduction in Sentence for a Guilty Plea	September 2004
New Sentences: Criminal Justice Act 2003	September 2004
Manslaughter by Reason of Provocation	May 2005
Allocation Guidelines	February 2006
Custodial Sentences of less than 12 Months	March 2006
Domestic Violence	April 2006
Sexual Offences Act 2003	June 2006
Reduction in Sentence for a Guilty Plea	January 2007
Sentencing for Bail Act Offences	May 2007
Sentencing for Assault and Other Offences Against the Person	June 2007
Driving Offences - Causing Death by Driving	January 2008
Sentencing for Offences of Theft and Dishonesty	March 2008
Sentencing for Theft from a Shop	March 2008
Sentencing for Breach of an Anti-Social Behaviour Order	May 2008
Sentencing for Fraud Offences	February 2009
Sentencing Principles - Youths	June 2009
Sentencing for Corporate Manslaughter and Health and Safety Offences Involving Death	October 2009
Overarching Principles of Sentencing	March 2010
Offences Taken Into Consideration	March 2010
Sentencing for Domestic Burglary	March 2010

Copies of the above are available from the Sentencing Guidelines Secretariat
(see inside back cover for contact details)



FOREWORD BY THE CHAIRMAN

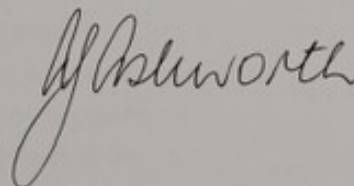
This advice to the Sentencing Guidelines Council makes proposals in relation to the sentencing of the most commonly sentenced drug offences. It considers those offences which derive from conduct intended to bring illicit drugs into circulation (including importation, production and supply) as well as those relating to possession and use.

The harm that is caused by the use of illicit drugs is well documented; it may result in harm to the individual users but it also harms society more widely, both through the consequential effects of dependency or use on those close to the user and through the effects of organised crime that are closely associated with the drug market.

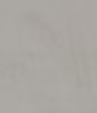
As is clear from the 2009 World Drug Report issued by the United Nations Office on Drugs and Crime (see the Appendix to this advice), the creation, distribution and use of illegal drugs is world wide in its reach; the harms that are caused cannot be minimised by sentencing of those convicted alone but requires a far more extensive response. Nonetheless, the sentencing of offenders is important both as a reflection of public concern and as a response to illegal acts that are knowingly committed. There was support for the approach that, where appropriate, use of the orders that remove assets from offenders was likely to be more effective than custodial sentences by themselves when dealing with those with a significant involvement in the creation or distribution of illicit drugs. The Panel has recommended that more research is required to demonstrate how such orders can most effectively be used; it will also be important to disseminate more extensively information concerning those effects.

In its Consultation Paper, the Panel sought to explore ways in which it is possible to distinguish between different types of offender based on the extent to which they are involved in the offending conduct, and then to examine the extent to which those differences are relevant to the determination of the appropriate sentence. In particular, the Panel was aware that especial concern was felt about those who were used to bring drugs into the country who came from situations of poverty or need and whose naivety had been exploited by those higher in the supply chain. A section of the Consultation Paper explored the proper approach in these circumstances and the advice recommends how a court should proceed when sentencing such an offender.

The Panel received a high number of responses to its consultation and, as always, has considered each response carefully. We are extremely grateful to all who have assisted in our deliberations.



Professor Andrew Ashworth
Chairman of the Sentencing Advisory Panel



The Board of Directors of the American Chemical Society has the honor to present to you the report of the Committee on the State of the Chemical Industry, which was organized in 1961 to study the problems of the chemical industry and to make recommendations to the Board and to the public.

The Committee was organized by the Board of Directors of the American Chemical Society, which is the largest and most influential of the chemical industry organizations in this country. The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public.

The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public. The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public.

The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public. The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public.

The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public. The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public.

The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public. The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public.

The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public. The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public.

The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public. The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public.

The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public. The Committee was organized to study the problems of the chemical industry and to make recommendations to the Board and to the public.

INTRODUCTION

1. Following a request from the Sentencing Guidelines Council, the Sentencing Advisory Panel has produced advice on a range of issues related to the sentencing of drug offences.
2. The Misuse of Drugs Act 1971 (MDA 1971) is the main piece of legislation creating offences relating to controlled drugs; this advice covers those drug offences which are sentenced frequently or result in either a significant number of custodial sentences or lengthy custodial sentences, namely production, importation and exportation, supply or offering to supply, possession with intent to supply and possession. The Panel also consulted in relation to the offence of permitting premises to be used for a drug-related activity, which, although not falling within those criteria, is closely associated with offences of supply and use.
3. The Council and Panel have considered sentencing for drug offences previously. In 2000, the Court of Appeal asked the Panel to produce advice on sentencing offences involving opium; existing guidelines based on weight and intended primarily for cocaine and heroin offences were thought inappropriate as opium had a lower street value. The Panel's advice¹ was adopted by the Court of Appeal in its judgment in *Mashaollahi*,² which maintained comparisons based on weight equivalencies, but with street value and purity being secondary factors. The number of opium offences sentenced each year continues to be small (opium offences are recorded within the wider category 'other class A' for which there were only 319 sentences recorded in 2007). Home Office data records 36 seizures of opium in 2006/07 and the FSS is aware of 23 seizures in 2008; in both cases, most quantities are small. However, opium has been included in this consultation on the basis that the judgment in *Mashaollahi* will be superseded by the Council's definitive guideline.
4. In May 2008, the Council published revised *Magistrates' Court Sentencing Guidelines* (MCSG) which include guidelines for the more common drug offences sentenced in a magistrates' court; these have been incorporated into the Panel's proposals.
5. The Panel's proposals apply to adult offenders only; separate legislative provisions and sentencing principles apply to young offenders, now set out in the definitive Council guideline *Overarching Principles: Sentencing Youths*.

¹ *Importation and Possession of Opium – Advice to the Court of Appeal*: 3 May 2000, p.1, www.sentencing-guidelines.gov.uk

² [2001] 1 Cr App R (S) 300, [2000] EWCA Crim 52

CONTENTS

The advice is structured as follows:

Section 1: The Sentencing Framework	p.3–10
Seriousness	p.3–6
Aggravating and mitigating factors	p.6–10
Aggravating factors	p.7–8
Mitigating factors	p.8–9
Offender mitigation	p.10
Section 2: The Offences	p.11–12
Section 3: Sentencing drug offences	p.13–16
Sentencing trends	p.13
Ancillary orders	p.14–16
Section 4: Key determinants of seriousness	p.17–23
Quantity/Scale or extent of operation	p.17–18
The offender's role	p.18–20
Drug couriers	p.20–22
Other factors	p.22–23
Section 5: The Panel's Proposals	p.24–37
Importation and Exportation, Supply or Offering to supply and Possession with intent to supply	p.26–29
Class A	p.28
Classes B and C	p.29
Production of a controlled drug (including Cultivation of cannabis)	p.31–33
Class A	p.32
Classes B and C	p.33
Permitting premises to be used	p.34–35
Possession of a controlled drug	p.36–37
Class A	p.37
Classes B and C	p.37
Annex A: Summary of Recommendations	p.38
Annex B: Extract from <i>Overarching Principles: Seriousness</i>	p.39–40
Annex C: Meaning of 'Range', 'Starting point' and 'First Time Offender'	p.41–42
Annex D: Community orders, Extract from <i>Magistrates' Court Sentencing Guidelines</i>	p.43
Annex E: Proposals for inclusion in the <i>Magistrates' Court Sentencing Guidelines</i>	p.44–52
Annex F: Details of the Consultation	p.53–54
Appendix: Approach of other jurisdictions to drug offending	p.55–56

SECTION 1: THE SENTENCING FRAMEWORK

Seriousness

6. The primary consideration when sentencing is the seriousness of the offending behaviour, in accordance with the Criminal Justice Act 2003 (the Act). When assessing offence seriousness, the court must consider the offender's culpability in committing the offence and any harm that the offence caused, was intended to cause, or might foreseeably have caused.³
7. The Sentencing Guidelines Council's guideline on the general concept of seriousness – *Overarching Principles: Seriousness* – guides sentencers on how to determine whether the respective sentencing thresholds have been crossed.⁴ The guideline provides that harm must always be judged in the light of culpability and that the precise level of culpability will be determined by factors such as motivation,⁵ which is a key feature in relation to the commission of drug offences.

Culpability

8. The Council guideline⁶ sets out four levels of culpability, the highest of which is an intention to do the act(s) necessary to commit the offence. Nonetheless, the guideline states that the precise level of culpability will vary according to factors such as the offender's motivation, whether the offence was planned or spontaneous and whether the offender

was in a position of trust.⁷ For drug offences, although the primary motivation for most offenders will be economic, individuals involved in the illicit drugs market almost always know that they are acting illegally. Those most culpable will be involved in bringing illegal drugs into the market, such as producers and traffickers and suppliers of drugs who are primarily motivated by financial gain. The level of culpability will be determined by factors such as the amount of drugs involved, the extent to which the offender understood the true nature of the drugs involved, the motivation for committing the offence and the offender's exact role in the supply chain.

9. Aggravating and mitigating factors relevant to the level of culpability are discussed more fully in paragraphs 26–35 and 36–40 below.

Harm

10. The harm associated with drug offences is different in nature and wider in dimension from that caused by other serious offences. Illegal drugs are generally supplied to individuals who choose to use them rather than as a result of being compelled to do so. Some users may suffer no ill effects; however, individual users risk actual physical harm (which might amount to illness or death), and/or dependency (which might lead to mental or physical illness). Secondary harm caused includes the impact on the families of users and on the wider community,⁸ not least through the commission of acquisitive offences in order to fund the use of illegal drugs.

³ Criminal Justice Act 2003, s.143(1)

⁴ published on 16 December 2004; the guideline has been reviewed by the Panel, a consultation paper published (July 2008) and the Panel's advice sent to the Council (published March 2010): all documents can be found at www.sentencing-guidelines.gov.uk

⁵ *ibid.*, para. 1.17

⁶ *ibid.*, para. 1.7

⁷ *ibid.*, para. 1.17

⁸ Nutt, D. et al., *Development of a rational scale to assess the harm of drugs of potential misuse*, *The Lancet*, vol. 369 24 March 2007; www.thelancet.com

-
11. A number of respondents commented on the complexity inherent in a comparison of sentencing levels for drug offences and other forms of serious offending behaviour given the different type and extent of harm attributed to drug offences. The Panel considers that those differences and the broader harms caused by drug offences are recognised and reflected in its proposals for sentencing which are consistent with the relative severity of the offending behaviour.
 12. Parliament has established a classification system with the intention that those drugs within the same class are considered to be of similar levels of harmfulness; those in class A are considered to be more harmful than those in class B, and those in class B more harmful than those in class C. An independent body, the Advisory Council on the Misuse of Drugs, provides expert advice on the allocation of drugs to each class; this advice is provided to Ministers who make the final decision and who take into account a wider range of factors than those on which the Council can advise.
 13. This classification has been the subject of extensive public debate. A number of respondents commented on the system and were critical of it, suggesting that it is flawed as the classification of a drug is not wholly associated with its harms and asserting that decisions have been made on the strength of factors unrelated to harm, including public opinion and political concerns.
 14. Given the statutory framework, the Panel has concluded that it would be inappropriate for sentencing guidelines to distinguish between drugs within each class. Accordingly, the Panel has affirmed that the proper approach is to link starting points and sentencing ranges to

the three classes. Any differentiation within a class will only arise where the quantity of drug is used as the basis for starting points (see the guideline for importation and exportation etc on pages 26–29).

Purposes of sentencing

15. In determining sentence, sentencers must have regard to the five purposes of sentencing set out in section 142(1) of the Criminal Justice Act 2003:
 - the punishment of offenders;
 - the reduction of crime (including its reduction by deterrence);
 - the reform and rehabilitation of offenders;
 - the protection of the public; and
 - the making of reparation by offenders to persons affected by their offence.
16. The Act does not prescribe the relative importance of these purposes, nor how the differing priorities should be balanced. The court will therefore determine which purposes are most relevant in any individual case by reference to the particular facts of the case and the circumstances of the offender.
17. In relation to drug offenders, as with other offences, one key outcome the court might wish to achieve is *punishment* for involvement in an offence that has been committed intentionally and which causes social harm. The court will wish to take into account whether an offender was motivated by the potential for (sometimes significant) financial gain.
18. Where the offending behaviour was triggered by an addiction, the court may decide on a sentence aimed primarily at the *reform*

and rehabilitation of the offender, with a view to reducing the risk of reoffending. A range of drug interventions is available in both custodial and community-based settings. Whilst there is no evidence available that allows reliable comparisons of the effectiveness of different interventions or identification of those offenders who would benefit most from different programmes, there is evidence that interventions that encourage engagement with treatment can help reduce drug use and offending. Maximising the use and effectiveness of community sentences is likely to be more appropriate than imprisonment for drug dependent offenders who are convicted of less serious acquisitive crimes or drug possession offences.⁹

19. Deterrence has for many years been considered one of the main purposes in sentencing drug offences, particularly the more serious offences such as importation and exportation, taking priority over other purposes of sentencing. One of the statutory purposes of sentencing¹⁰ is *the reduction of crime (including its reduction by deterrence)* and the Panel sought views as to whether, for serious drug offences where financial gain is the main motivation, the current approach is sustained by the belief that long custodial sentences are necessary solely for the purposes of deterrence.
20. Those who support that approach assert that deterrent sentencing has the potential to influence the behaviour both of the

individual(s) sentenced and of others who may be considering committing similar offences. The degree, however, to which sentences have the capacity to deter will depend both on the motivation for the offending and on the potential offender's awareness of the likely sanction. Research suggests that potential offenders are more likely to be deterred by the perceived risk of being apprehended and convicted than by the sentence that is likely to be imposed.¹¹

21. Responses on this point were complex and, in the absence of evidence to substantiate the effectiveness of the current approach and the additional deterrent effect of lengthy custodial sentences, the views expressed demonstrated a degree of uncertainty. Whilst there was general agreement that substantial sentences were needed for the more serious offences, there was also considerable support for the view that, overall, deterrence has been given too great a priority among the purposes of sentencing for drug offences and the approach of increasing the length of already long custodial sentences solely for the purpose of increasing deterrence was not supported.¹² Some respondents expressed concern that any lessening of severity of sentencing would risk increasing drug offending in England and Wales since the response to offending would be perceived as being more lenient than in other countries. The Panel found that available information, particularly that relating to

⁹ a separate study – *The Drug interventions programme (DIP): addressing drug use and offending through 'Tough Choices'*, Skodbo et al., (2007) (www.homeoffice.gov.uk/rds) – found that the overall volume of offending by a cohort of 7,727 individuals was 26% lower following DIP identification

¹⁰ Criminal Justice Act 2003, s.142

¹¹ *Making Punishments Work: A Review of the Sentencing Framework for England and Wales* (2001), Appendix 6

¹² in its report *Drugs and the law* (2000), the Police Foundation Independent Inquiry found that the maximum penalties for trafficking offences in UK legislation were among the most severe in Europe. It recommended a scaling down of penalties to ones that were credible and not disproportionate, which would still enable courts to pass severe sentences for offences at the top end of seriousness

European countries (see the Appendix at pages 55–56), indicated a wide variation in offence definition, maximum penalties and use of actions outside of the criminal justice system. Having reviewed the pattern of offending in England and Wales and the relationship of that pattern to the changes that have taken place in the severity of sentencing, the Panel has concluded that it is very unlikely that altering the approach in the way proposed in its Consultation Paper would lead to any significant change in the perception of the seriousness with which drug offences are sentenced in England and Wales.

22. The profits that can be made from drug offences are enormous and, where such large sums of money are involved, the Panel suggested that the fear of financial reprisal through asset recovery measures may be of more concern to offenders involved in the more serious forms of offending than the potential for a somewhat longer loss of liberty, especially as confiscation orders can target not only the proceeds of crime but also other assets. The relatively recent 'serious crime prevention order' may also come to be viewed as a severe sanction (see discussion at paragraph 70 below). In comparison with the sanctions available when guideline cases were decided, ancillary orders such as the confiscation order now play a much more significant role in the sentencing of drug offences. There is no evidence that adding to the length of already lengthy custodial sentences contributes to crime reduction to a greater degree than other available sanctions, such as confiscation and asset recovery.
23. Respondents were invited to consider whether a confiscation order might be a more effective deterrent than increasing the length

of a custodial sentence *beyond that which is justified to meet any other purposes of sentencing*. The Panel's provisional sentencing proposals were based on an assessment of offence seriousness that recognises the wider social harms resulting from this form of offending behaviour, but does not increase sentence lengths on the grounds of deterrence, relying instead on the prospect of confiscation (and other similar orders) to have the desired additional deterrent effect. See discussion concerning confiscation orders at paragraphs 64–67 below).

24. There was support for the Panel's emphasis on confiscation and other orders, although this was limited on the grounds that there are many offences for which no significant order could be made and, in some cases, there is a significant lapse of time between sentencing for the offence(s) and an order being made; there were also concerns that the orders available had not been used or enforced effectively and consistently. There was general agreement with the sentencing levels proposed by the Panel.

Aggravating and Mitigating Factors

25. As well as factors that are determinants of the seriousness of a drug offence (and, therefore, will affect the selection of both starting point and sentencing range), there will be aggravating and mitigating factors that influence the position of the offence within the range. The *Seriousness* guideline¹³ sets out a generic list of aggravating and mitigating factors that may apply to an offence (see Annex B). The Panel has also identified some additional factors that are specific to drug offences which are summarised below.

¹³ *Overarching Principles: Seriousness*, published on 16 December 2004; www.sentencing-guidelines.gov.uk

Aggravating Factors

Targeting of premises where there are vulnerable people who are susceptible to persuasion or coercion

26. Under section 4A of the Drugs Act 2005, it is a statutory aggravating factor if a person aged 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises at a time between one hour before and one hour after they are to be used by those under 18.
27. The Panel considers that this approach should be widened so that the targeting of *any premises*, intending to locate people who are vulnerable (in that they are susceptible to persuasion or coercion) is regarded as an aggravating factor. The important factors will be the vulnerability of the persons using the premises and the fact that the offender has targeted the premises to reach those people, as opposed to the precise nature of the premises themselves.

Offender used a courier who was a young person

28. Also under section 4A of the Drugs Act 2005, it is a statutory aggravating factor for an offender to have used or permitted a person under the age of 18 to deliver a controlled drug to a third person.¹⁴ There may be circumstances where offenders use young people as couriers to get greater access to other young people or to avoid detection themselves.

Supply to prisoners or detained persons

29. The availability of drugs in prisons is potentially harmful in a variety of ways. A high proportion of prisoners have a history of misuse of drugs and of offending linked to

drugs and attempts by individual prisoners to fight addiction may be hindered. It may also impact on good order, fuelling disputes between prisoners and raising the risk of corruption of staff. Security difficulties may increase, and the frequency and openness of visiting arrangements for all prisoners may be threatened. The Panel considers that taking drugs into prisons or other places of detention for the purposes of supplying them to a prisoner or person detained should aggravate the seriousness of the offence.

Possession of a knife or other weapon

30. Where an offender is found in possession of both illegal drugs and a knife or other weapon, in most cases possession of the weapon will be charged separately under the relevant statutory provisions.¹⁵ However, where a separate charge has not been made (perhaps because it was a knife that it is not illegal to possess), carrying or using a weapon will aggravate the seriousness of the drug offence because of the potential for aggressive use.

Exposure of others to danger

31. *Production* of drugs may expose others to danger arising from the premises, processes and chemicals used, or through the illegal abstraction of electricity. Where there is evidence that others were exposed to some form of danger, this will increase the seriousness of the offence.
32. The *supply* of drugs may also involve danger to others where drugs are cut with other substances so that the mixtures produced are of variable strength. Where an offender has knowingly, and without providing adequate

¹⁴ or a "drug related consideration" to himself or to a third person: Drugs Act 2005, s.4A (4), (6) and (7)

¹⁵ for example, Criminal Justice Act 1988, s.139 (bladed article), Prevention of Crime Act 1953, s.1 (offensive weapon) and Firearms Act 1968, s.51 (firearms)

warning, supplied drugs that are stronger than those normally in circulation or that have been cut with other unusual substances and this has caused an adverse reaction in one or more users, this should be regarded as an aggravating factor.

Pressure, influence or intimidation (violent or otherwise) exerted on another to commit an offence

33. It is a feature of the drugs trade that a number of people are involved in a chain of offending behaviour. Persons higher up the chain may actively encourage the participation of others through coercion or pressure; where this occurs it should aggravate the seriousness of the offence.

Supplying a controlled drug in a locality associated with an open drugs market

34. Communities in which drug dealing and drug use is prevalent may be damaged through the disorder and crime that is generated around drug markets. The Panel proposed that, in such circumstances, it could be argued that the situation in that particular area at that time indicates that commission of these offences causes greater harm and thus makes the offence more serious. Respondents argued that such an approach was both wrong in principle and difficult to apply in practice, given the need for proof that such a situation existed, and pointed out that a potential consequence would be the displacement of problems to other areas. Such issues may become relevant as a matter of local prevalence, as evidenced within a community impact statement, and the criteria set out by the Sentencing Guidelines Council should

be applied.¹⁶ The Panel accepts that it is at least equally harmful for a supplier to start operating in a new area as in an existing area, and has concluded that it is not appropriate to include operating in a particular locality as an aggravating factor in its own right.

Summary

35. The factors likely to aggravate a drug offence are:

Factors indicating higher culpability:

- Supply or offer to supply a drug on or in the vicinity of school premises (statutory)
- Targeting of premises where there are vulnerable people who are susceptible to persuasion or coercion
- Offender used or permitted a person under the age of 18 to deliver a controlled drug to a third person (statutory)
- Pressure, influence or intimidation (violent or otherwise) exerted on another to commit an offence

Factors indicating a more than usually serious degree of harm:

- Supply to prisoners or detained persons
- Possession of a knife or other weapon (where this is not charged separately)
- Exposure of others to danger (in relation to the production and supply of a drug)

Mitigating Factors

Mistaken belief of the offender concerning the type of drug

36. There is a defence where the offender neither knew nor suspected that he or she was in

¹⁶ *Overarching Principles: Seriousness*, published on 16 December 2004; www.sentencing-guidelines.gov.uk

possession of illegal drugs.¹⁷ A mistaken belief concerning the type of drug may mitigate culpability. The level of mitigation will depend on factors such as the 'degree of care' so that, where only a small degree of curiosity could have revealed the true nature of a drug, any effect would be small.

Offence not commercially motivated

37. The extent to which commercial motivation plays a role in offending will vary across drug offences. There will be some offenders who aspire to obtain significant profits and for whom the motivation is primarily commercial; others will be motivated by the need to fund a drug habit or raise funds to pay drug related debts, or be involved with 'social supply', such as supply to a specified group of friends without profit (see discussion at paragraph 89 below).
38. With the exception of the guideline relating to production, where the commercial nature of the enterprise is a key determinant of seriousness, the Panel's proposals assume the presence of commercial motivation; its absence should be treated as a mitigating factor.

Inducement to supply falling short of entrapment

39. The fact that an offence was committed following the entrapment of an offender by a police officer or agent provocateur is not a substantive defence in English law, although it may be sufficiently fundamental to justify staying the prosecution or excluding evidence.¹⁸ In cases where the commission of an offence was encouraged through a lesser degree of entrapment the culpability of the offender may be mitigated.

Summary

40. The factors likely to mitigate a drug offence are:

Factors indicating significantly lower culpability:

- Mistaken belief of the offender regarding the type of drug
- Offence not commercially motivated
- Inducement to supply falling short of entrapment

Other considerations: Offering to supply fake drugs

41. In some cases, an offender may dishonestly offer to supply a drug with the knowledge that what will be supplied is not, in reality, the drug offered – for example, supplying talcum powder as cocaine or pills that contain a non-illicit substance instead of ecstasy – which will be charged as offering to supply a controlled drug.¹⁹ Under these circumstances, an offender's culpability remains high as there is an intention to supply a substance which the buyer believes to be a genuine, illegal, substance.
42. However, if it can be shown that the substance offered was not harmful, it could be argued that, because no illicit drug is being made available, the level of harm caused, likely or risked is low.
43. The fact that an offer to supply was in respect of a fake drug should normally be neutral for the purposes of assessing seriousness; however, it may be an aggravating factor where the substance was especially potent or a mitigating factor where the fake drug could cause no harm.

¹⁷ Misuse of Drugs Act 1971, s.28

¹⁸ *Loosely* [2001] UKHL 53

¹⁹ in such circumstances, a charge of going equipped to cheat (contrary to Theft Act 1968, s.25) may be preferred

Offender Mitigation

Drugs used to help with a medical condition

44. There may be circumstances in which an offender has been convicted of a drug offence (particularly possession of cannabis) and it is argued that use of the drug was intended for medical purposes such as pain relief.
45. Where there is evidence from a medically qualified practitioner that an offender has a medical condition for which pain relieving drugs are normally prescribed, and the use of illegal drugs is to supplement that relief, a court should be able to take a compassionate approach and this should influence the choice or severity of sentence.

An offender's vulnerability was exploited

46. Offences may be committed by individuals recruited to carry out support activities in the drugs trade, such as 'gardeners' in cannabis factories, who are targeted for their vulnerability and receive little or no reward. In most such cases there will be knowledge on the part of the offender of what is being done and that it is illegal. However, the selection of sentence may well be influenced by the degree to which an offender's vulnerability was targeted by others.
47. Although there may be practical difficulties in establishing the accuracy of information put forward, it should be regarded as offender mitigation where an offender's involvement in a drug offence resulted from exploitation of the offender's vulnerability by others.

Pressure, intimidation or coercion falling short of duress

48. Where it falls short of the defence of duress, the fact that the offender acted under coercion or pressure may be offender mitigation; the degree to which it might mitigate the severity of a sentence will depend partly on the seriousness of the likely consequences to the offender or others of refusal to commit the offence.

Impact on sentence of offender's dependency

49. Offenders convicted of drug offences may be motivated solely or mainly by personal addiction. Consistent with the approach established by the Sentencing Guidelines Council in relation to offences of dishonesty, this does not mitigate the seriousness of the offence but may properly influence the type of sentence imposed.

Summary

50. The offender mitigation factors likely to be present in drug offences are:
 - Drugs used to help with a medical condition
 - An offender's vulnerability was exploited
 - Pressure, intimidation or coercion falling short of duress
 - Impact on sentence of offender's dependency

SECTION 2: THE OFFENCES

51. A controlled drug is defined by section 2 of the Misuse of Drugs Act 1971 as any substance specified in Parts I, II or III of schedule 2 to the Act. The drugs are classified according to assessments of the harm they cause to individual users and to society as a whole. The classifications are class A, class B and class C. Class A drugs are considered to be the most harmful, classes B and C respectively less harmful. Examples of drugs that come within the 3 classes are shown in Table 1 below. The classification system does not distinguish between the harm caused by individual drugs within a class.
52. Statutory maximum penalties vary depending on the nature of the illegal activity and the class of drug. The range and content of the offences covered by this advice are summarised briefly below.

IMPORTATION AND EXPORTATION

53. Under the combined effect of section 3 of the MDA 1971 and section 170(2) of the Customs and Excise Management Act 1979, an offence of *importing or exporting* a controlled drug is committed where an offender knowingly is engaged in fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug.²⁰ This offence covers a wide range of behaviour and includes individuals at all levels of the supply chain.

²⁰ only a small number of offences sentenced are for the exportation of a controlled drug; however, since the activities involved in the importation and exportation of a controlled drug are not significantly different in nature, guidelines are proposed for both offences

Table 1: Classification of drugs

Offence type	Classification, examples of type of drug		
	Class A	Class B	Class C
	Heroin, cocaine, crack cocaine, LSD, ecstasy,* opium, magic mushrooms, amphetamines (for injection), methylamphetamine	Amphetamines, barbiturates, cannabis,* codeine	Temazepam, anabolic steroids, valium, ketamine, gamma-hydroxy butyrate (GHB)

* this is the more commonly used street name for the drug Methylenedioxymethamphetamine (MDMA)

* moved from class C to class B with effect from 26 January 2009 by The Misuse of Drugs Act 1971 (Amendment) Order 2008 (SI 2008/3130)

SUPPLY, OFFERING TO SUPPLY AND POSSESSION WITH INTENT TO SUPPLY

Supply or offering to supply a controlled drug

54. Under section 4(3) of the MDA 1971, an offence of *supply* of a controlled drug is committed when an offender provides the drug to another person. This includes the return of controlled drugs by a 'custodian' to the original supplier. No financial payment needs to have been made and the offence can be committed regardless of whether or not the offender was willingly in possession of the drugs supplied.²¹ Where an offender makes an offer to supply a controlled drug, there is no need to prove that the offender intended to produce the drugs or had drugs in his/her possession. The offence may be charged where an offender was dishonestly intending to supply a fake in place of the genuine drug.

Possession with intent to supply

55. Under section 5(3) of the MDA 1971, an offence of *possession with intent to supply* a controlled drug is committed where an offender has been found in possession of a controlled drug and is intending to supply it to another at some future point.

PRODUCTION (INCLUDING CULTIVATION)

56. Under section 4(2)(a) and 4(2)(b) of the MDA 1971 an offence of *production* is committed when an offender has participated in the process of producing a controlled drug by manufacture, cultivation or any other method. An offender may have participated directly in the production or only been aware of

production and thus indirectly participated in it.²²

POSSESSION

57. Under section 5(2) of the MDA 1971, an offence of possession of a controlled drug is committed where an offender is in physical possession of the drug, even if the offender does not know it is a controlled substance. This offence can also be charged where a person is in control of an illegal drug which is in the custody of another. Possession of a controlled drug is the most commonly sentenced drug offence. The CPS charging standard states that prosecution is usual when a case involves possession of any quantity of a class A drug or "more than a minimal quantity of Class B or C drugs".²³

PERMITTING PREMISES TO BE USED FOR A DRUG RELATED ACTIVITY

58. Under section 8 of the MDA 1971, an offence of permitting premises to be used for a drug related activity is committed where someone who occupies or manages premises permits them to be used for the production, supply, administering or use of controlled drugs. This offence may be committed, for example, by a landlord of a public house or residential property or the manager of a club who allows the use or supply of drugs to take place. Occupants, managers or landlords who were aware of, or participated indirectly in, the production of a controlled drug on their premises also may be prosecuted for that offence.

²¹ in *Panton* [2001] EWCA Crim 611, the Court of Appeal held that 'supply' includes the retention and return of controlled drugs deposited with a 'custodian' by another person notwithstanding the custodian's lack of consent to the arrangement

²² CPS: *Drug Offences, incorporating the Charging Standard*; www.cps.gov.uk

²³ *ibid.*

SECTION 3: SENTENCING DRUG OFFENCES

Sentencing Trends

59. Between 1999 and 2003, the number of offenders sentenced for drug offences was relatively stable. A sharp drop in 2004 can be attributed largely to changes resulting from the reclassification of cannabis from class B to class C and from the introduction of conditional cautions,²⁴ which resulted in a reduced number of prosecutions. Since 2005, there has been a steady increase in numbers; although cannabis has been reclassified as a class B drug,²⁵ first time offenders convicted of possession are still likely to receive a warning and provision has also been made to retain the power to issue a penalty notice for disorder (PND) (£80 for an adult offender).²⁶

²⁴ used as an alternative to bringing charges for certain either way and summary only offences – Criminal Justice Act 2003, s.22

²⁵ 26 January 2009, The Misuse of Drugs Act 1971 (Amendment) Order 2008 (SI 2008/3130)

²⁶ The Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment) Order 2009 (SI 2009/83)

60. With the exception of possession of cannabis, the vast majority of drug offences are committed by adult offenders.²⁷ Table 2 below shows that, in the period since 2003 the sentencing trends for drug offences have changed generally. In relation to non-custodial disposals, there has been a reduction in the proportion of fines, whilst the use of community orders has remained stable. The pattern in relation to use of custodial sentences has been upward, with the proportion of immediate custodial sentences increasing to 20% in 2007 compared with 17% in 2003. However, there has been a particularly marked increase in relation to imposition of suspended sentence orders, which have increased from 1% to 7% in that period.

²⁷ the number of adults sentenced in all courts in 2007 for drug offences (excluding possession of cannabis) was 29,550 (95%) compared with 1,705 youths (5%); OCJR, Nov 2008, Criminal Statistics, England and Wales, supplementary tables 2007, volume 5

Table 2: Sentencing data for offences covered in the paper

YEAR	1999	2000	2001	2002	2003	2004	2005	2006	2007
Number of sentences	45550	41017	41135	43860	45825	34458	34102	34810	38987
% Discharge	14	15	17	19	19	18	17	17	18
% Fine	48	47	44	46	46	38	37	35	34
% Community order	17	17	17	15	16	20	21	19	19
% Suspended sentence order	1	1	1	1	1	1	1	5	7
% Custody	19	19	20	18	17	22	22	21	20
% Other	1	1	1	1	1	2	2	2	2

Ancillary Orders

61. A number of ancillary orders may be imposed alongside a sentence for a drug offence; the extent to which an order will impact on the type or length of sentence will depend on the primary intention of the order.
62. In the consultation paper *Overarching Principles of Seriousness*²⁸ the Panel placed ancillary orders into three categories: those that primarily have a punitive effect, those that are designed primarily to protect the public from the risk of further harm or those that provide primarily for reparation to the victim. The Panel concluded that ancillary orders which are primarily intended to have a punitive effect on an offender *should* be taken into account when assessing whether the provisional sentence is commensurate to the seriousness of the offence²⁹ whilst orders that are intended for public protection or reparation *should not* influence choice of sentence. As a court will be required to follow the guidance in the definitive guideline which follows that consultation, the Panel has not explored all of the ancillary orders that might be imposed and has limited its consideration to those particularly relevant to drug offences.
63. Until recently, a recommendation for deportation would also be considered relevant for drug-related offences. Section 32 of the UK Borders Act 2007 now stipulates that the Secretary of State must³⁰ make a deportation order in respect of a foreign offender who has been sentenced to at least 12 months

imprisonment. Courts continue to have the power to recommend that a deportation order should be made in respect of any foreign national convicted of a drug-related offence³¹ but the likely effect of the Act is to make such recommendations superfluous.

Confiscation order

64. Under the Proceeds of Crime Act 2002, the Crown Court must consider whether to make a confiscation order where there is evidence that a defendant has a criminal lifestyle and has benefited from his or her general criminal conduct. A magistrates' court may commit the offender to the Crown Court for sentence with a view to such an order being made.³² "Lifestyle offences" are listed at schedule 2 of the Act and include offences of production, importation, exportation, supply, offering to supply, possession with intent to supply and permitting premises to be used for a drug related activity. If the court makes a confiscation order for a drug offence, it must take account of the order before it imposes: (a) a fine; (b) an order that requires the defendant to make a payment, unless that payment is under a compensation order; or (c) a deprivation order.³³ The Act states that, except in these circumstances, the court must not take account of the confiscation order in deciding the appropriate sentence, that is, the sentence cannot be reduced because a confiscation order has been made.³⁴
65. While confiscation orders are classified as protective orders because they can potentially

²⁸ published 8 July 2008, <http://www.sentencing-guidelines.gov.uk/consultations/closed/index.html>

²⁹ though see paragraph 64 concerning the statutory restrictions relating to confiscation orders

³⁰ with effect from 1 August 2008 unless one of the exceptions in s.33 of the 2007 Act applies

³¹ Immigration Act 1971 section 3(6)

³² the Secretary of State may permit magistrates' courts to make orders confiscating amounts up to £10,000, but has not exercised this power

³³ Proceeds of Crime Act 2002, s.13(2) and (3)

³⁴ *ibid.*, s.13(4)

deprive the offender of the means to commit further offences, it is fair to conclude that they are likely to have a punitive effect. The European Court of Human Rights has held that a confiscation order does amount to a penalty and that the effect is punitive even if that is not the primary purpose.³⁵

66. The process for making confiscation orders is complex and acquiring the information needed in order for the court to explore the extent to which it is possible for an order to be made and determine the recoverable amount may take some time; as a result, the order is rarely made when sentence is imposed and respondents reported that there can be a significant lapse of time between the two events with some considering this to be unjust. There are also difficulties concerning the enforcement of orders given the size of some orders and nature of the assets that they may relate to, the fact that the order increases if not paid as ordered (interest is payable on the outstanding balance), and the offender may be in custody (potentially for a lengthy period) as a result of the sentence passed for the offence(s) and therefore inhibited in terms of compliance. The court imposing the order must direct terms of payment and set a (potentially lengthy) default sentence for non-payment; the debt remains payable even if a term of imprisonment in default is served, and the enforcing authority continues to have considerable powers to trace assets and recover the amount outstanding. The Panel considers that more information is required about the type and size of orders that are being made and the effectiveness of the procedures for enforcing them, including the timeliness of both aspects.

67. The Panel considers that confiscation orders, through which assets may be recovered from within England and Wales or, with the cooperation of the relevant authorities, from overseas,³⁶ are a very important part of the sentence for a drug-related offence in serious cases and may be the most effective element in deterring future offending (see discussion at paragraphs 22–24 above). There should be an expectation of asset recovery in all cases, and certainly in relation to the most serious cases. The confidence of sentencers will increase as the enforcement of orders becomes more effective and timely so that the full consequences of the offending behaviour and combined effect of the sentence and order have a greater impact on the offender.

Recommendation 1: For asset recovery to have the desired effect, it is important for courts to make full use of confiscation orders and have confidence that they will be rigorously and successfully enforced. The Panel recommends that research into the effectiveness of confiscation orders and improvements to the speed and effectiveness of enforcement would be beneficial in terms of increasing confidence in the orders and asset recovery process.

Travel Restriction Order

68. Sections 33 to 37 of the Criminal Justice and Police Act 2001 enable the sentencing court to impose a travel restriction order (TRO) on an offender convicted of a drug trafficking offence who is sentenced to custody for four years or more. A TRO prevents an offender from leaving the UK for a minimum period of two years from the point of release from custody and for such period as the court

³⁵ *Welch v United Kingdom* (1995) 20 EHRR 247

³⁶ Proceeds of Crime Act 2002, s.74

considers suitable in all the circumstances.³⁷ The imposition of a TRO is not automatic but, where a court decides not to impose one, it must state the reasons for its decision.

69. Where an offender is likely to be subject to deportation (see paragraph 63 above), a court should still consider imposing a TRO to cover the eventuality that deportation might not be ordered or effected; where an offender is not deported, the TRO will apply.³⁸ Where deportation is ordered, it will supersede the restrictions in the TRO.³⁹ A court can grant revocation or temporary suspension of a TRO only in exceptional and compelling compassionate circumstances and provided that the application is made after the end of a minimum period as specified in statute. *The TRO is categorised as a protective order and as such should not influence the sentence imposed for the offence.*

Serious Crime Prevention Order

70. The Serious Crime Prevention Order was introduced by the Serious Crime Act 2007. It may be made as a civil order by the High Court or on sentence in the Crown Court following conviction either in the Crown Court or in a magistrates' court. It may be made where the High Court is satisfied that a person has been involved in serious crime (not necessarily within England and Wales) or the Crown Court is dealing with a person convicted of a serious crime. In either situation, the court must have reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by

the subject of the order in serious crime in England and Wales.⁴⁰ Involvement in serious crime includes commission of a "serious offence", facilitating the commission of such an offence by another person or conduct likely to facilitate the commission of such an offence.⁴¹ For these purposes, a "serious offence" includes the unlawful production or supply of a controlled drug, possession of a controlled drug with intent to supply and permitting premises to be used for a drug related activity.

71. The Act sets out examples of the types of provision that may be made by an order.⁴² These include prohibitions, restrictions or requirements relating to an individual's financial, property or business dealings, working arrangements, means of communication access to or use of premises or travel. Requirements can include obligations to answer questions, or provide information or documents as directed. An order may not continue for more than 5 years. Failure to comply with an order is an offence with a maximum penalty of 5 years imprisonment and/or an unlimited fine; it is triable either way.⁴³ In accordance with the principles summarised in the Panel's consultation *Overarching Principles of Sentencing*,⁴⁴ *an order made under these provisions with a view to protecting the public from further serious crime should not influence the choice of sentence imposed by the court.*

³⁷ there is no maximum period

³⁸ Home Office circular 009/2007
<http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2007/009-2007/>

³⁹ Criminal Justice and Police Act 2001, s.37

⁴⁰ Serious Crime Act 2007, s.1

⁴¹ *ibid.*, s.2

⁴² *ibid.*, s.5

⁴³ *ibid.*, s.25

⁴⁴ p.120, published 8 July 2008, www.sentencing-guidelines.gov.uk

SECTION 4: KEY DETERMINANTS OF SERIOUSNESS

72. Guideline judgments from the Court of Appeal and guidelines already issued by the Sentencing Guidelines Council have identified the most important characteristics of drug-related offences.
73. The Panel's conclusion is that, for most offences, it will be the *quantity of drug or the scale or extent of the operation* and the *role of the offender* that are likely to be the most significant factors and therefore the determinants of seriousness. The relevance of other factors that have been used to determine the relative seriousness of drug offences, including the purity or strength of the drug involved and the value of the drug at street level, is considered at paragraphs 106–110 below.

(i) Quantity/Scale or extent of operation

74. In *Aranguren and others*⁴⁵ the Court of Appeal identified the quantity of drugs with which an offender is caught or involved as a key factor in determining starting points and sentencing levels for drug importation offences. The larger the quantity for which an offender has been directly responsible, the more serious the offence. The approach taken has been to identify the amount of a drug that justifies a particular starting point for sentence. Sentencers have then moved above or below the starting point depending on any aggravating and mitigating factors present.
75. Where an offender is apprehended in possession of drugs, the quantity is likely to be influential in determining whether a charge of

supply or possession is preferred. Other factors likely to indicate that an offender has some wider involvement in the trade in illicit drugs (as opposed to possession for personal use) include where significant sums of money or substances or equipment to 'cut' the drugs are also found.

76. Quantity has also been linked to the role that an offender has in the supply chain. Larger quantities may indicate greater criminal involvement in terms of greater responsibility and planning or involvement in a wider enterprise. Smaller quantities may indicate involvement at a lower level such as by a retailer or for personal use. However, as noted above, those acting in a subordinate role (perhaps driving a van or a lorry or acting as a gardener for large quantities of cannabis plants) may be in possession of very large quantities.
77. The quantity of drugs involved may thus influence both the selection of the offence to be charged and the determination of the role that the offender has played. However, the Panel takes the view that the quantity of drugs involved is sufficiently significant to justify inclusion as a determinant of seriousness. Where appropriate to the offence, quantity has been incorporated into the Panel's proposals as a factor that determines the sentence starting point and range. Where it is less appropriate, the factor relates to the scale or extent of the operation.
78. For example, in relation to the sentence ranges for the offence of production of a controlled drug, the Panel has used the scale or extent of the operation rather than the quantity of drug seized since this both reflects the level of culpability involved and avoids the risk that

⁴⁵ (1995) 16 Cr App R (S) 211

the time at which the enterprise is discovered may affect the quantity of drug seized.

79. In order for quantity levels to be meaningful where used, specific quantities of the most commonly prosecuted types of drug have been identified for each starting point and range.

(ii) The offender's role

80. The role played by the offender is a common determinant of seriousness cited in Court of Appeal cases. Four categories have been identified by independent research – importers, wholesalers, middle market drug brokers and retail level dealers.⁴⁶ However, the illicit drugs market is very fragmented and individuals may occupy dual roles (e.g. importer and wholesaler).⁴⁷
81. In addition, each category can encompass different levels of seriousness. For example, even among those who import drugs, there will be very different levels of involvement. At the top end will be the individual with close links to the original source of the drugs who manages the buying and selling in bulk quantities and arranges the transportation of drugs overseas. At the lower end will be the drug courier who may have accepted money to carry the drugs with little awareness of (or other involvement in) the drugs trade.
82. The problems associated with categorising roles in terms of market level led the Panel to propose an approach which focuses on the extent of the offender's involvement (which allows for the offending behaviour to cross market levels). The Panel identified

three categories: a leading role, a significant role and a subordinate role. The type of activity falling into each of these categories is described below:

Leading role

83. Offenders playing a 'leading role' would be those responsible for organising and masterminding the buying and selling of drugs on a large scale; they may be instrumental in the importation of controlled drugs, with close links to the original source, or may be key players in the distribution of drugs in the UK. They are the offenders most likely to make significant profits, they may deal in substantial quantities and may sell to only a few clients. It is generally accepted that, although these are the most serious offenders, they are the least likely to be caught and convicted and may use legitimate businesses to aid and conceal their operations.
84. Others likely to be included in this category are those typically identified as 'wholesalers'. They will have responsibility for managing and organising operations at a high level in the supply chain, may deal in bulk or on a smaller scale, and are likely to deal in more than one type of drug.⁴⁸

Significant role

85. Offenders playing a 'significant role' will include a wide group of individuals with different and overlapping roles but, normally, they will be involved at middle market level. A Home Office study has examined the role of middle market brokers. They have been identified as those who typically sit two levels below importation and one or two

⁴⁶ Pearson et al., (2001) *Middle Market Drug Distribution* Home Office Research Study 227; www.homeoffice.gov.uk

⁴⁷ Sweeney et al., (2008) *Tackling Drug Markets and Distribution Networks in the UK* – a review of recent literature for the UK Drug Policy Commission; www.ukdpc.org.uk

⁴⁸ *The supply of drugs in the UK*, RSA Commission on Illegal Drugs, Communities and Public Policy, May 2005, www.rsadrugscommission.org.uk

levels above retail.⁴⁹ They normally supply to a regular customer base that largely involves retail dealers, or intermediaries sitting just above the retail level. They purchase drugs in large quantities where heroin, cocaine, amphetamine and cannabis are concerned, and in terms of synthetics, will purchase upwards of 20,000 pills on a regular basis.

86. Some of these brokers will trade in all drug commodities; others operate within a more limited range. Middle market drug networks are described as being small in size and consist typically of a main person who has links to suppliers and also handles money, and a 'runner' or series of runners who deliver drugs to customers, collect drugs from suppliers and their agents or deliver and collect money (see paragraphs 88 and 91–92 below for a discussion concerning the role of the runner). Other offenders deemed to have a significant role will include those who arrange the transportation of the drugs and those who produce company accounts in a way that disguises the illegal activity.⁵⁰
87. Reports of investigations into the drug trade stress the fragmented nature of the drugs market and the difficulty with defining the many roles involved.⁵¹ Thus, there are likely also to be other groups of offenders who are less easily defined by the roles described above but who act in some way to broker between the networks of supply and demand at the middle market level.⁵²

⁴⁹ Pearson et al., (2001) *Middle Market Drug Distribution* Home Office Research Study 227; www.homeoffice.gov.uk

⁵⁰ *ibid.*

⁵¹ see for example: Pearson et al., (2001) *Middle Market Drug Distribution* Home Office Research Study 227; Matrix Knowledge Group (2007) *The illicit drug trade in the UK*, Home Office Online Report 20/07

⁵² *ibid.*

Subordinate role

88. Those in a 'subordinate role' normally will be individuals who have been employed to carry out a function within a support activity that is required to transport or supply drugs. They are likely also to be closest to the drug users – supplying more frequently in smaller quantities. The extent to which their involvement can be defined as 'subordinate' as opposed to 'significant' will depend on a number of factors such as their knowledge and awareness of the network in which they are working and the quantities of the drugs involved and the duration and pattern of their offending. The offenders in this category are likely to have very little understanding of the overall scale of the operation, with their knowledge limited to their immediate environment.
89. Groups of offender falling into this category are retailers, street level dealers, and those involved in 'social supply', who may be described as brokers and are involved in relatively small scale offending. Retailers may supply direct to users but often choose to divert the supply through street dealers, the group of offenders most likely to be motivated by their own drug addiction, especially for drugs such as heroin and crack cocaine.⁵³ Those with an addiction often act under serious pressure or coercion from brokers who supply them with drugs only on condition that they act as dealers. Many street dealers will supply the drugs direct to users, often being trusted to hold a cache of 50 or 60 deals' worth of drugs from which to sell on behalf of someone higher up the supply chain; other dealers may use 'runners' who are trusted only

⁵³ Matrix Knowledge Group (2007) *The illicit drug trade in the UK*, Home Office Online Report 20/07; www.homeoffice.gov.uk

to act as go-betweens, collecting individual quantities of drugs from the broker for each customer and returning with payment for each purchase. Runners might receive a regular wage for this 'employment' or be paid for each transaction. In some circumstances, the relationship between the broker and the runner might appear to be more like a partnership, although it has been recognised that these affiliations tend to be essentially exploitative.⁵⁴ The relative culpability of street dealers, their role in the supply chain and the comparative seriousness of an offence may thus be evidenced by the amount of drugs that they are entrusted to hold.

90. Respondents urged that 'social supply' be recognised as a distinct category beyond the business network of drug offending. The culpability of an offender who purchases sufficient drugs to share within a defined group of friends in private or public will be lower as there will be no profit or commercial motivation, and they should not be considered to have a 'leading' or 'significant' role as defined for the purposes of these guidelines.
91. Another type of offender falling within the subordinate category is the 'minder,' a term used to describe someone who agrees to store or look after drugs on behalf of another, whether or not for payment. Such offenders would be likely to be charged with *possession with intent to supply*. In addition, delivery drivers, who are in charge of large quantities of drug but are in a relatively subordinate role within the organisation and 'gardeners' (those who tend cannabis plants, for example) would be likely to fall within this category.

92. The Panel considers that, where there is evidence of an employee relationship, the starting point for sentence should fall within this subordinate category, with the assessment of culpability being influenced by the degree of trust placed in the employee. Where there is evidence of a partnership, the role of the runner or minder should be deemed more significant and should fall into a higher category (usually a significant role).
93. Consumers – individuals who buy drugs for personal use – are at the end of the supply chain and are likely to be convicted of possession of a controlled drug; this type of offending is dealt with separately.

Drug couriers

94. In its consultation paper, the Panel explored issues relating to the sentencing of 'drug couriers', that is, for these purposes, a person who carries illegal drugs from one country to another *either on or inside their person or in their luggage*.
95. Some respondents emphasised that the role of the courier is critical to the drug trafficking trade and cautioned against an approach that would lead to a systematic reduction in the severity of sentences for all couriers. Not all couriers fit the same definition and roles within organised crime groups can be fluid.
96. Many respondents supported an approach that would result in less severe sentences in circumstances where the offender's role was subordinate and the quantity of drugs being carried was relatively small, subject to clearer distinctions being made in relation to both aspects.

97. It was suggested that a basic distinction

⁵⁴ Pearson et al., (2001) *Middle Market Drug Distribution* Home Office Research Study 227; www.homeoffice.gov.uk

should be made between those who voluntarily and knowingly undertake the risks of being a courier within a 'professional' arrangement in return for reward or payment for service and those who become involved through naivety, which may stem from the fact that they are poor or disadvantaged and persuaded or motivated by factors related to need rather than greed.

98. The Panel has considered evidence and statistical information in relation to concerns raised about drug couriers who are foreign nationals. Amongst these offenders are those who have little idea of the seriousness with which the crime is regarded in the country to which they are going, the risk of being caught, the potential harm of swallowing the drugs, or the severity of the punishment that is likely to be imposed if convicted.
99. Current sentencing levels for drug couriers are assessed by reference to those imposed for all importers and exporters of controlled drugs; deterrence is a key factor in determining the type and length of sentence. The main criticism of this approach is that, for the drug courier with whom this part of the advice is concerned, the sentence is likely to be disproportionate to the culpability of the individual offender and the harm that results from the particular offence.
100. The amount of money a courier can expect to receive is generally insignificant in relation to the profits made by those with other roles in the supply chain. A courier also tends to be a carrier only with no knowledge of the wider organisation.
101. There may be practical difficulties in establishing the accuracy of information put forward. Given the limitations of the function of a courier and the associated lack of knowledge and understanding of the overall size and scale of the operation, it is the view of the Panel that, when determining the seriousness of the offence, the offender's role in most such cases should be regarded as 'subordinate' where a court is satisfied that:
 - the offender became involved through naivety and comes within the general category of a person who was poor or disadvantaged, and
 - the offender was motivated primarily by need rather than by greed, and
 - the quantity imported was carried on or in the person or in their luggage, and
 - there is no evidence that the offender had engaged in this type of activity on other occasions
102. Since the determinants of seriousness for drug offences are based both on the quantity involved, and on the role of the offender, the quantity will be relevant to sentence.
103. In addition, in some cases there will be aspects of offender mitigation (such as exploitation of the offender's vulnerability or pressure or coercion exerted on the offender) which are particular to drug offences, or more general aspects such as caring responsibilities. Where such factors are present, they are likely to mitigate sentence.
104. Despite the common perception, the majority of drug couriers are men (77% in 2007) and the approach to sentencing described will apply as much to male offenders as to female offenders.
105. The negative impact of imprisonment on women in general has been considered in

the Panel's advice *Overarching Principles of Sentencing*⁵⁵ which proposes a number of sentencing principles that a court should follow when sentencing a women offender.

Recommendation 2: The Panel recommends that, where it is established that an offender who has imported drugs on or in their person or in their luggage was involved as a result of naivety and comes within the general category of being a person who is poor or disadvantaged and motivated primarily by need rather than greed, in the absence of evidence of previous involvement in such activity their role should be regarded as subordinate. When combined with factors of offender mitigation that might be present, this will result in less severe sentences for some drug couriers than at present.

Other factors

106. There are two other factors that are commonly referred to when considering how to assess the seriousness of drug offences, the purity or strength of the drug and the street value. Whilst information on these two aspects may be of assistance to a court in some circumstances, for the reasons given below the Panel considers that they should not be determinants of the seriousness of an offence for the purpose of establishing the sentencing range within which an offence will fall.

(i) Purity or strength of drug

107. The purity or strength of a drug can depend on many factors and is unlikely to be known with any degree of certainty by the majority of offenders. Levels may decrease if demand increases or may reflect the availability of particular substances or materials. The way in which a drug is supplied may also change as has been seen in relation to ecstasy where

there has been a steady increase in seizures of powder compared with tablets.

108. Analysis is expensive and tends to be undertaken only for the more serious offences. Thus, information on the purity or strength of the drugs involved will often not be available to the sentencing court, especially for the vast majority of cases which involve small scale offending and class B and C drugs.

109. If quantity is to be used as a determinant of seriousness and since the offending is related to the drug (and not to other lawful substances packaged with the drug), it can be argued that the exact amount of controlled drug that is present should be a critical factor. However, the purity of the drug has little relevance to the culpability of the offender or to the harm caused by the offence (although dangers are associated with 'cutting' of drugs). Insofar as it reflects the closeness of the offender to the source of the drug (i.e. the purer the drug the closer the offender to the source),⁵⁶ it is provided for within the proposed guidelines through the distinction in the role of the offender. Accordingly, it seems to the Panel inappropriate for purity to be a significant factor in determining seriousness in most cases.

(ii) Street value

110. Prices of drugs vary from place to place and over time and are dependent on factors such as purity, supply and demand; as supply increases, prices can fall. Street value is a factor that is often brought to the court's attention.⁵⁷ Whilst there may be an

⁵⁵ March 2010; www.sentencing-guidelines.gov.uk

⁵⁶ *Morris* [2001] 1 Cr App R (S) 4

⁵⁷ information from an experienced police officer is generally sufficient: *Bryan*, unreported, November 1984, CA; *Ibrahim* [2005] Crim. LR. 887, [2005] EWCA Crim 1436

argument for using it as a measure of offence seriousness for offences which occur at the local or street level on the grounds that it is an indication of the scale of the financial gain that could have been made by the offender, the potential for financial gain is one of the factors that has led to the fixing of the general sentencing levels for the offences considered in this advice. It may continue to provide useful information relevant to determining the amount of any financial penalty that might be imposed (as it might indicate the extent of the funds to which the offender has access) especially where the offender has a subordinate role. Accordingly, the Panel considers that street value should not be a significant factor in determining seriousness.

Recommendation 3: The determinants of seriousness for drug offences should be the quantity of drug (or scale of operation) and the role of the offender. In most cases, purity or street value will not be determinants of seriousness but may assist a court in determining the scale of the operation or role of the offender.

SECTION 5: THE PANEL'S PROPOSALS

111. The Panel considers that offences of importation and exportation, production and supply are equally serious as they all introduce drugs to the market place, albeit in different ways. The offences share the same maximum penalties and, at their most serious, are likely to attract similar sentences.
112. A single guideline covers offences of importation, exportation, supply and possession with intent to supply which have common determinants of seriousness. Four categories of seriousness are proposed to accommodate the wide range of offending behaviour which may involve very large or relatively small quantities of drugs. The proposals are intended to result in similar sentences where they involve similar scales of offending and the same class of drug.
113. A separate guideline is proposed for the offence of production as different determinants of seriousness apply.
114. The reclassification of cannabis as a class B drug will reduce the number of prosecutions involving class C drugs. The Panel has therefore decided to provide starting points and ranges for class A and B drugs only; where a class C drug was involved, the starting point and ranges for class B should be used but the fact that the drug is in class C will be a mitigating factor for sentencing purposes.
115. Common aggravating and mitigating factors are set out in Annex B. The definitions of 'starting point', 'sentencing range' and 'first time offender' are set out in Annex C. Included at Annex D is an extract from the *Magistrates' Court Sentencing Guidelines* in relation to imposition of community orders, detailing the three sentencing ranges within the community order band based on offence seriousness. In all cases sentencers should consider whether to make ancillary orders particularly confiscation and/or deprivation.
116. The Panel's proposals for inclusion in the *Magistrates' Court Sentencing Guidelines* are provided at Annex E.

[BLANK PAGE]

Importation and Exportation, Supply or offering to supply and possession with intent to supply

Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug.

CEMA 1979, s.170(2) & MDA 1971, s.3

Supplying or offering to supply a controlled drug: MDA 1971, s.4(3)

Having possession of a controlled drug with the intent to supply it to another: MDA 1971, s.5(3)

All of the offences are triable **either way**

Maximum penalties:

- Class A Custody for life*
- Class B 14 years custody and/or unlimited fine
- Class C 14 years custody and/or unlimited fine

* Section 110 of the Powers of Criminal Courts (Sentencing) Act 2000 provides that a court should impose a minimum sentence of at least seven years imprisonment for a third class A trafficking offence except where the court is of the opinion that there are particular circumstances which (a) relate to any of the offences or to the offender; and (b) would make it unjust to do so in all the circumstances.

1. The starting points within these guidelines are for a 'first time offender' convicted after a trial.
2. The starting points and ranges are derived from the role of the offender and the quantity of drugs involved. Where appropriate, 'dry weight' has been used rather than 'wet weight'.
3. Once the *Level* has been determined by reference to *quantity*, the appropriate sentencing range will be identified by reference to the *role of the offender*. The characteristics likely to place an offender within each role include:
 - (i) Leading role – close links to original source; instrumental in importation or responsible for organising buying and selling on a large scale; deals in substantial quantities; likely to make significant financial gain
 - (ii) Significant role – purchases drugs in large quantities; has links to suppliers and handles money; supplies to a regular customer base; employs runners or minders; arranges transportation; disguises illegal activity in company accounts
 - (iii) Subordinate role – usually in an employment relationship, for example runners or minders; a limited category of drug couriers; delivery drivers; 'gardeners'

These lists are illustrative, not exhaustive.

4. Within each range, the sentencing starting point has been based on the quantity set out in the left column; significant differences in quantity will be a factor in increasing or decreasing the starting point alongside other aggravating and mitigating factors.

5. In Level 1, where the quantity is at least 4 times greater than the lower amount provided as the basis for the sentencing range, a sentence outside the sentencing range is likely to need to be considered.
6. Quantities have been provided for the drugs most commonly prosecuted; where a different drug is the subject of the prosecution, the court will have to determine whether that quantity should be treated as very high (and so within Level 1), substantial (and so within Level 2) moderate (Level 3) or small (and so within Level 4).
7. In the guideline covering drugs in classes B and C, a sentencing starting point and range have not been indicated for the lowest quantity of drugs for offenders who are identified as having a leading role because it is unlikely that this level of involvement could be proved without evidence of responsibility for a more significant quantity of drugs.
8. When using the guideline for classes B and C, the fact that the drugs involved are in class C is a mitigating factor that will reduce the starting point for an offence.
9. A full list of aggravating and mitigating factors is set out in the Council guideline *Overarching Principles: Seriousness*.⁵⁸ The additional factors listed below are likely to be particularly relevant to this type of offending behaviour:

Additional aggravating factors	Additional mitigating factors
<u>Factors indicating higher culpability</u> <ol style="list-style-type: none"> 1. Offender used a courier who was a young person (statutory) 2. Supply or offer to supply a drug on or in the vicinity of school premises (statutory) 3. Targeting of premises where there are vulnerable people who are susceptible to persuasion or coercion 4. Pressure, influence or intimidation exerted on another to commit an offence <u>Factors indicating more than a usually serious degree of harm</u> <ol style="list-style-type: none"> 5. Supply to prisoners or detained persons 6. Possession of a knife or other weapon (where not separately charged) 7. Exposure of others to danger (supply) 	<u>Factors indicating lower culpability</u> <ol style="list-style-type: none"> 1. Drug is in Class C 2. Mistaken belief regarding the type of drug 3. Offence not commercially motivated 4. Inducement to supply falling short of entrapment <u>Offender mitigation</u> <ol style="list-style-type: none"> 5. Offender's vulnerability was exploited 6. Pressure, intimidation or coercion falling short of duress 7. Impact on sentence of an offender's dependency 8. Relatively small quantities were carried on or in the person 9. Relatively small quantity carried for personal use 10. Offender played a very minor role and had no previous ties with the enterprise

⁵⁸ published 16 December 2004, www.sentencing-guidelines.gov.uk; see Annex B

Importation and Exportation, Supply or offering to supply and possession with intent to supply: CLASS A

Quantities of drug	Offender's role in the supply chain – Sentencing level		
	Leading role	Significant role	Subordinate role
<p>LEVEL 1 – Very High (indicative of an international commercial operation)</p> <p>a) The starting point is based on: Heroin, cocaine/crack cocaine – 5kg Ecstasy – 5kg/50,000 tablets LSD – 250,000 squares/dosage units Opium – 50kg</p> <p>b) The ranges for this level are for offences where the amount exceeds: Heroin, cocaine/crack cocaine – 2.5kg Ecstasy – 2.5kg/25,000 tablets LSD – 125,000 squares/dosage units Opium – 25kg <i>(where the quantity of drug is 4 times or more the amount given, a sentence outside the range should be considered)</i></p>	<p><u>Starting point:</u> 12 years custody</p> <p><u>Range:</u> 10–14 years custody</p>	<p><u>Starting point:</u> 8 years custody</p> <p><u>Range:</u> 6–10 years custody</p>	<p><u>Starting point:</u> 4 years custody</p> <p><u>Range:</u> 2–6 years custody</p>
<p>LEVEL 2 – Substantial (indicative of a large scale commercial operation)</p> <p>a) The starting point is based on: Heroin, cocaine/crack cocaine – 1kg Ecstasy – 1kg/10,000 tablets LSD – 50,000 squares/dosage units Opium – 10kg</p> <p>b) The ranges for this level are: Heroin, cocaine/crack cocaine – more than 500g up to 2.5kg Ecstasy – more than 500g/5,000 tablets up to 2.5kg/25,000 tablets LSD – more than 10,000 up to 125,000 squares/dosage units Opium – more than 5kg up to 25kg</p>	<p><u>Starting point:</u> 8 years custody</p> <p><u>Range:</u> 6–10 years custody</p>	<p><u>Starting point:</u> 6 years custody</p> <p><u>Range:</u> 4–8 years custody</p>	<p><u>Starting point:</u> 3 years custody</p> <p><u>Range:</u> 1–5 years custody</p>
<p>LEVEL 3 – Moderate (indicative of a smaller scale but still significant operation)</p> <p>a) The starting point is based on: Heroin, cocaine/crack cocaine – 150g Ecstasy – 150g/1,500 tablets LSD – 7,500 squares/dosage units Opium – 1.5kg</p> <p>b) The ranges for this level are: Heroin, cocaine/crack cocaine – more than 50g up to 500g Ecstasy – more than 50g/500 tablets up to 500g/5,000 LSD – more than 2,500 up to 10,000 squares/dosage units Opium – more than 500g up to 5kg</p>	<p><u>Starting point:</u> 5 years custody</p> <p><u>Range:</u> 3–7 years custody</p>	<p><u>Starting point:</u> 3 years custody</p> <p><u>Range:</u> 2–5 years custody</p>	<p><u>Starting point:</u> 18 months custody</p> <p><u>Range:</u> Community order (High level) – 3 years custody</p>
<p>LEVEL 4 – Small (indicative of much smaller street dealing or importation/exportation for personal use)</p> <p>a) The starting point is based on: Heroin, cocaine/crack cocaine – 25g Ecstasy – 25g/250 tablets LSD – 1,250 squares/dosage units Opium – 250g</p> <p>b) The ranges for this level are: Heroin, cocaine/crack cocaine – up to 50g Ecstasy – up to 50g/500 tablets LSD – up to 2,500 squares/dosage units Opium – up to 500g</p>	<p><u>Starting point:</u> 3½ years custody</p> <p><u>Range:</u> 2–5 years custody</p>	<p><u>Starting point:</u> 2 years custody</p> <p><u>Range:</u> 12 months – 3 years custody</p>	<p><u>Starting point:</u> 12 months custody</p> <p><u>Range:</u> Community order (Medium level) – 2 years custody</p>

Importation and Exportation, Supply or offering to supply and possession with intent to supply: CLASSES B and C

Quantities of drug	Offender's role in the supply chain – Sentencing level		
	Leading role	Significant role	Subordinate role
<p>LEVEL 1 – <i>Very High (indicative of an international commercial operation)</i></p> <p>a) The starting point is based on: Amphetamine – 25kg Cannabis (herbal or resin) – 250kg</p> <p>b) The ranges for this level are for offences where the amount exceeds: Amphetamine – more than 15kg Cannabis (herbal or resin) – more than 150kg <i>(where the quantity of drug is 4 times or more the amount given, a sentence outside the range should be considered)</i></p>	<p><u>Starting point:</u> 8 years custody</p> <p><u>Range:</u> 6–10 years custody</p>	<p><u>Starting point:</u> 4 years custody</p> <p><u>Range:</u> 3–6 years custody</p>	<p><u>Starting point:</u> 2 years custody</p> <p><u>Range:</u> 12 months – 4 years custody</p>
<p>LEVEL 2 – <i>Substantial (indicative of a large scale commercial operation)</i></p> <p>a) The starting point is based on: Amphetamine – 10kg Cannabis (herbal or resin) – 100kg</p> <p>b) The ranges for this level are: Amphetamine – more than 7.5kg and up to 15kg Cannabis (herbal or resin) – more than 25kg up to 150kg</p>	<p><u>Starting point:</u> 4 years custody</p> <p><u>Range:</u> 3–7 years custody</p>	<p><u>Starting point:</u> 2 years custody</p> <p><u>Range:</u> 12 months – 3 years custody</p>	<p><u>Starting point:</u> 12 months custody</p> <p><u>Range:</u> Community order (High level) – 2 years custody</p>
<p>LEVEL 3 – <i>Moderate (indicative of a smaller scale but still significant operation)</i></p> <p>a) The starting point is based on: Amphetamine – 1kg Cannabis (herbal or resin) – 10kg</p> <p>b) The ranges for this level are: Amphetamine – more than 50g up to 7.5kg Cannabis (herbal or resin) – more than 500g up to 25kg</p>	<p><u>Starting point:</u> 2 years custody</p> <p><u>Range:</u> 12 months – 4 years custody</p>	<p><u>Starting point:</u> 12 months custody</p> <p><u>Range:</u> Community order (High level) – 2 years custody</p>	<p><u>Starting point:</u> 26 weeks custody*</p> <p><u>Range:</u> Community order (Medium level) – 12 months custody</p>
<p>LEVEL 4 – <i>Small (indicative of much smaller street dealing or importation/exportation for personal use)</i></p> <p>a) The starting point is based on: Amphetamine – 10g Cannabis (herbal or resin) – 100g</p> <p>b) The ranges for this level are: Amphetamine – up to 50g Cannabis (herbal or resin) – up to 500g</p>	<p><u>N/A</u> (unlikely to prove leading role if quantity is small)</p>	<p><u>Starting point:</u> 26 weeks custody*</p> <p><u>Range:</u> Community order (High level) – 12 months custody</p>	<p><u>Starting point:</u> Community order (High level)</p> <p><u>Range:</u> Band C Fine – 6 weeks custody</p>

- * When tried summarily, the maximum penalty for an offence involving a class C drug is 3 months custody. Applying mitigating factor 1, a lower starting point is likely to be appropriate.

[BLANK PAGE]

Production of a controlled drug (including cultivation of cannabis)

Producing or being concerned in the production of a controlled drug: MDA 1971, s.4(2)

Cultivation of cannabis plant(s): MDA 1971, s.6(2)

Both offences are triable **either way**

Maximum penalties for production:

Class A Custody for life; Class B 14 years custody; Class C 14 years custody

Maximum penalty for cultivation: 14 years custody

1. The starting points within these guidelines are for a 'first time offender' convicted after a trial.
2. In this guideline, the assessment of seriousness is based on the scale of the operation and the offender's role within it. The quantity of drugs seized may be relevant to the assessment of the scale of the operation.
3. Identifying the scale of the operation will enable the level of seriousness to be determined. The next stage will be to identify the role of the offender within that operation.
4. Once the *Level* has been determined by reference to *the scale of the operation*, the appropriate sentencing range will be identified by reference to the *role of the offender*. The characteristics likely to place an offender within each role include:
 - (i) *Leading role* – close links to original source; responsible for organising buying and selling on a large scale; produces and deals in substantial quantities; likely to make significant financial gain
 - (ii) *Significant role* – produces drugs in large quantities; has links to suppliers and handles money; supplies to a regular customer base; employs runners or minders; arranges transportation; disguises illegal activity
 - (iii) *Subordinate role* – runners or minders; delivery drivers; 'gardeners'These lists are illustrative, not exhaustive.
5. The unlawful abstraction of electricity or other source of power is an aggravating factor where it is not charged as a separate offence. Where that exposes those not involved in the offence to significant danger, it may be appropriate to impose a sentence beyond the range into which the offence would otherwise fall.
6. A sentencing starting point and range have not been indicated for the lowest scale of operation for offenders who are identified as having a leading role because it is unlikely that this level of involvement could be proved without evidence of responsibility for a more significant operation.
7. When using the guideline for classes B and C, the fact that the drugs involved are in class C is a mitigating factor that will reduce the starting point for an offence.
8. A full list of aggravating and mitigating factors is set out in the Council guideline *Overarching Principles: Seriousness*.⁵⁹ The additional factors listed in the guideline are likely to be particularly relevant to this type of offending behaviour.

⁵⁹ published 16 December 2004, www.sentencing-guidelines.gov.uk; see Annex B

Production of a controlled drug: CLASS A

Scale of operation	Offender's role – Sentencing level		
	Leading role	Significant role	Subordinate role
Level 1 Substantial enterprise capable of producing significant quantities for widespread distribution generating high income	<u>Starting point:</u> 12 years custody <u>Range:</u> 10–14 years custody	<u>Starting point:</u> 8 years custody <u>Range:</u> 6–10 years custody	<u>Starting point:</u> 4 years custody <u>Range:</u> 2–6 years custody
Level 2 Moderate scale of enterprise capable of supplying extensive but more limited distribution network	<u>Starting point:</u> 8 years custody <u>Range:</u> 6–10 years custody	<u>Starting point:</u> 6 years custody <u>Range:</u> 4–8 years custody	<u>Starting point:</u> 3 years custody <u>Range:</u> 1–5 years custody
Level 3 Limited enterprise likely to produce only in small quantities for very limited distribution or personal use	<u>N/A</u> (unlikely to equate to the definition of a leading role if enterprise is small)	<u>Starting point:</u> 3 years custody <u>Range:</u> 12 months – 4 years custody	<u>Starting point:</u> 18 months custody <u>Range:</u> Community order (High level) – 2 years custody

Additional aggravating factors	Additional mitigating factors
<u>Factors indicating higher culpability</u> <ol style="list-style-type: none"> 1. Use of sophisticated production system 2. Use of sophisticated system of concealment 3. Prolonged production of drug 4. Exposure of others to danger <u>Factor indicating greater degree of harm</u> <ol style="list-style-type: none"> 5. Offender exploited vulnerability of other persons 	<u>Offender mitigation</u> <ol style="list-style-type: none"> 1. Evidence drug used to help with a medical condition 2. Offender's vulnerability was exploited 3. Pressure, intimidation or coercion falling short of duress 4. Impact on sentence of offender's dependency

**Production of a controlled drug (including cultivation of cannabis):
CLASSES B and C**

<u>Scale of operation</u>	<u>Offender's role – Sentencing level</u>		
	<u>Leading role</u>	<u>Significant role</u>	<u>Subordinate role</u>
Level 1 Substantial enterprise capable of producing significant quantities for widespread distribution generating high income	<u>Starting point:</u> 8 years custody <u>Range:</u> 6–10 years custody	<u>Starting point:</u> 4 years custody <u>Range:</u> 2–6 years custody	<u>Starting point:</u> 2 years custody <u>Range:</u> 12 months – 4 years custody
Level 2 Moderate scale of enterprise capable of supplying extensive but more limited distribution network	<u>Starting point:</u> 4 years custody <u>Range:</u> 2–6 years custody	<u>Starting point:</u> 2 years custody <u>Range:</u> 12 months – 3 years custody	<u>Starting point:</u> 12 months custody <u>Range:</u> Community order (Medium level) – 2 years custody
Level 3 Limited enterprise likely to produce only in small quantities for very limited distribution or personal use	<u>N/A</u> (unlikely to equate to the definition of a leading role if enterprise is small)	<u>Starting point:</u> 12 months custody <u>Range:</u> 26 weeks – 2 years custody	<u>Starting point:</u> 26 weeks custody <u>Range:</u> Community order (Medium level) – 12 months custody

<u>Additional aggravating factors</u>	<u>Additional mitigating factors</u>
<u>Factors indicating higher culpability</u> 1. Use of sophisticated production system 2. Use of sophisticated system of concealment 3. Prolonged production of drug 4. Exposure of others to danger <u>Factor indicating greater degree of harm</u> 5. Offender exploited vulnerability of other persons	<u>Factor indicating lower culpability</u> 1. Drug is in class C <u>Offender mitigation</u> 2. Evidence drug used to help with a medical condition 3. Offender's vulnerability was exploited 4. Pressure, intimidation or coercion falling short of duress 5. Impact on sentence of offender's dependency

Permitting premises to be used

Permitting premises to be used for the production, supply, administering or use of controlled drugs:

MDA 1971, s.8

Where the offence involves Class A or B drugs, the offence is triable **either way**

Where a Class C drug is involved, the offence is **summary only**

Maximum penalties:

<u>Class A</u>	14 years custody
<u>Class B</u>	14 years custody
<u>Class C</u>	3 months custody

1. The starting points within this guideline are for a 'first time offender' convicted after a trial.
2. The starting points and ranges are based on the assumption that the more serious offences will be charged either as production of a controlled drug or as a conspiracy.
3. When using the guideline for classes B and C, the fact that the drugs involved are in class C is a mitigating factor that will reduce the starting point for an offence.
4. A full list of aggravating and mitigating factors is set out in the Council guideline *Overarching Principles: Seriousness*.⁶⁰ The additional factors listed in the guideline are likely to be particularly relevant to this type of offending behaviour.

⁶⁰ published 16 December 2004, www.sentencing-guidelines.gov.uk; see Annex B

Permitting premises to be used

Type/nature of activity	Sentencing level	
	Class A	Classes B and C
Level 1 Drug related activity is the primary purpose for which the premises are used e.g. crack house or cannabis 'factory'	<u>Starting point:</u> 3 years custody <u>Range:</u> 2–4 years custody	<u>Starting point:</u> 2 years custody <u>Range:</u> 1–3 years custody
Level 2 Drug related activity in public premises is not the main purpose for which the premises are used e.g. public house, clubs etc	<u>Starting point:</u> 36 weeks custody <u>Range:</u> Community order (Medium level) – 12 months custody	<u>Starting point:</u> 26 weeks custody* <u>Range:</u> Community order (Low level) – 36 weeks custody
Level 3 Drug related activity in domestic premises is not the main purpose for which the premises are used e.g. a room let in a house	<u>Starting point:</u> Community order (High level) <u>Range:</u> Community order (Medium level) – 26 weeks custody	<u>Starting point:</u> Community order (Medium level) <u>Range:</u> Community order (Low level) – Community order (High level)

Additional aggravating factors	Additional mitigating factors
<u>Factors indicating higher culpability</u> 1. The offender stood to gain additional profit from the drug related activity 2. Very high scale of use	<u>Factors indicating lower culpability</u> 1. Drug is in class C 2. Offence not commercially motivated <u>Offender mitigation</u> 3. Offender's vulnerability was exploited 4. Pressure, intimidation or coercion falling short of duress

- * When tried summarily, the maximum penalty for an offence involving a class C drug is 3 months custody. Applying mitigating factor 1, a lower starting point is likely to be appropriate.

Possession of a controlled drug

Having possession of a controlled drug: MDA 1971 Section 5(2)

The offences are triable **either way**

Maximum penalties: Class A 7 years custody

Class B 5 years custody

Class C 2 years custody

1. The starting points within this guideline are for a 'first time offender' convicted after a trial.
2. This guideline is derived from the guidelines in the *Magistrates' Court Sentencing Guidelines* with additional provision for those offences requiring sentence in the Crown Court.
3. Where an offence is sentenced in the Crown Court, there is an expectation that a confiscation order will be made in all cases where there are recoverable assets.
4. The top of the range for **Level 1** offences is substantially below the maximum penalty reflecting both current sentencing practice and the likelihood that possession of larger quantities would be charged as possession with intent to supply.
5. When using the guideline for classes B and C, the fact that the drugs involved are in class C is a mitigating factor that will reduce the starting point for an offence.
6. A full list of aggravating and mitigating factors is set out in the Council guideline *Overarching Principles: Seriousness*.⁶¹ The additional factors listed in the guideline are likely to be particularly relevant to this type of offending behaviour.

⁶¹ published 16 December 2004, www.sentencing-guidelines.gov.uk; see Annex B

Possession of a controlled drug: CLASS A

Type/Nature of activity/Quantity	Sentencing level
Level 1 Possession of drug in prison – whether by prisoner or another person	<u>Starting point:</u> 12 months custody <u>Range:</u> 9 months – 3 years custody
Level 2 Amount larger than the range in Level 3	<u>Starting point:</u> Community order (High level) <u>Range:</u> Community order (Medium level) – 12 months custody
Level 3 More than a very small quantity e.g. up to six wraps or tablets	<u>Starting point:</u> Community order (Medium level) <u>Range:</u> Community order (Low level) – Community order (High level)
Level 4 Very small quantity e.g. one small wrap or tablet	<u>Starting point:</u> Band C fine <u>Range:</u> Band B fine – Community order (Medium level)

Additional aggravating factors	Additional mitigating factors
<u>Factor indicating higher culpability</u> 1. Offender exercising or acting in position of special responsibility <u>Factor indicating more than a usually serious degree of harm</u> 2. Possession of drug in a public place, school, or prison	

Possession of a controlled drug: CLASSES B and C

Quantity	Sentencing level
Level 1 Larger amount	<u>Starting point:</u> Band C fine <u>Range:</u> Band B fine – 12 weeks custody
Level 2 Small amount	<u>Starting point:</u> Band B fine <u>Range:</u> Band A fine – Community order (Low level)

Additional aggravating factors	Additional mitigating factors
<u>Factor indicating higher culpability</u> 1. Offender exercising or acting in position of special responsibility <u>Factor indicating more than a usually serious degree of harm</u> 2. Possession of drug in a public place, school or prison	<u>Factor indicating lower culpability</u> 1. Drug is in class C <u>Offender mitigation</u> 2. Evidence drug used to help with a medical condition

ANNEX A: SUMMARY OF RECOMMENDATIONS

Recommendation 1

For asset recovery to have the desired effect, it is important for courts to make full use of confiscation orders and have confidence that they will be rigorously and successfully enforced. The Panel recommends that research into the effectiveness of confiscation orders and improvements to the speed and effectiveness of enforcement would be beneficial in terms of increasing confidence in the orders and asset recovery process.

Recommendation 2

The Panel recommends that, where it is established that an offender who has imported drugs on or in their person or in their luggage was involved as a result of naivety and comes within the general category of being a person who is poor or disadvantaged and motivated primarily by need rather than greed, in the absence of evidence of previous involvement in such activity their role should be regarded as subordinate. When combined with factors of offender mitigation that might be present, this will result in less severe sentences for some drug couriers than at present.

Recommendation 3

The determinants of seriousness for drug offences should be the quantity of drug (or scale of operation) and the role of the offender. In most cases, purity or street value will not be determinants of seriousness but may assist a court in determining the scale of the operation or role of the offender.

ANNEX B: AGGRAVATING AND MITIGATING FACTORS IDENTIFIED IN THE SENTENCING GUIDELINES COUNCIL GUIDELINE 'OVERARCHING PRINCIPLES: SERIOUSNESS'

Aggravating factors

Factors indicating higher culpability:

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

Factors indicating a more than 'usually serious degree of harm:

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable

-
- Location of the offence (for example, in an isolated place)
 - Offence is committed against those working in the public sector or providing a service to the public
 - Presence of others e.g. relatives, especially children or partner of the victim
 - Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
 - In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

Mitigating factors

Factors indicating significantly lower culpability:

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

Personal mitigation

- Genuine remorse
- Admissions to police in interview
- Ready co-operation with authorities

ANNEX C: MEANING OF 'RANGE', 'STARTING POINT' AND 'FIRST TIME OFFENDER' WITHIN SENTENCING GUIDELINES COUNCIL GUIDELINES

A Council guideline is generally for a *first time offender* convicted after a trial. It commonly provides a *Starting point* based on an assessment of the seriousness of the offence and a *range* within which sentence will normally fall.

A clear, consistent understanding of each of these terms is essential and the Council and the Sentencing Advisory Panel have agreed the following definitions.

They are set out in a format that follows the structure of a sentencing decision which identifies first those aspects that affect the assessment of the seriousness of the offence, then those aspects that form part of personal mitigation and, finally, any reduction for a guilty plea.

In practice, the boundaries between these stages will not always be as clear cut but the underlying principles will remain the same.

In accordance with section 174 of the Criminal Justice Act 2003, a court is obliged to "*state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed*".

In particular, "*where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate and the sentence is of a different kind, or is outside that range*" the court must give its reasons for imposing a sentence of a different kind or outside the range.

Assessing the seriousness of the offence

A typical Council guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a **first time offender** who has been convicted after a trial. Within the guidelines, a **first time offender** is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.

As an aid to consistency of approach, a guideline will describe a number of types of activity falling within the broad definition of the offence. These will be set out in a column generally headed "type/nature of activity".

The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the offence (beyond those contained in the description itself) to reach a **provisional sentence**.

The range is the bracket into which the **provisional sentence** will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the **provisional sentence** falls outside the **range**.

Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the **provisional sentence** beyond the **range** given particularly where there are significant other aggravating factors present.

Personal Mitigation

Once the **provisional sentence** has been identified (by reference to the factors affecting the seriousness of the **offence**), the court will take into account any relevant factors of **personal** mitigation. Again, this may take the provisional sentence outside the range.

Reduction for guilty plea

Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the **range** provided.

ANNEX D: COMMUNITY ORDERS

Extract from *Magistrates' Court Sentencing Guidelines*, p.160–162
Sentencing Guidelines Council, May 2008

Community orders

5. The Council guideline provides that the seriousness of the offence should be the initial factor in determining which requirements to include in a community order. It establishes three sentencing ranges within the community order band based on offence seriousness (low, medium and high), and identifies non-exhaustive examples of requirements that might be appropriate in each. These are set out below. The examples focus on punishment in the community; other requirements of a rehabilitative nature may be more appropriate in some cases.

Low	Medium	High
Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender's record means that a discharge or fine is inappropriate	Offences that obviously fall within the community order band	Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances
In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary		More intensive sentences which combine two or more requirements may be appropriate
Suitable requirements might include: <ul style="list-style-type: none">• 40 – 80 hours unpaid work• Curfew requirement within the lowest range (e.g. up to 12 hours per day for a few weeks)• Exclusion requirement, without electronic monitoring, for a few months• Prohibited activity requirement• Attendance centre requirement (where available)	Suitable requirements might include: <ul style="list-style-type: none">• Greater number of hours of unpaid work (e.g. 80 – 150 hours)• Curfew requirement within the middle range (e.g. up to 12 hours for 2 – 3 months)• Exclusion requirement lasting in the region of 6 months• Prohibited activity requirement	Suitable requirements might include: <ul style="list-style-type: none">• 150 – 300 hours unpaid work• Activity requirement up to the maximum of 60 days• Curfew requirement up to 12 hours per day for 4 – 6 months• Exclusion order lasting in the region of 12 months

6. The particular requirements imposed within the range must be suitable for the individual offender and will be influenced by a wide range of factors including the stated purpose(s) of the sentence, the risk of re-offending, the ability of the offender to comply, and the availability of the requirements in the local area. Sentencers must ensure that the sentence strikes the right balance between proportionality and suitability. The resulting restriction on liberty must be a proportionate response to the offence that was committed.

ANNEX E: PROPOSALS FOR INCLUSION IN THE MAGISTRATES' COURT SENTENCING GUIDELINES

Customs and Excise Management Act 1979, s.170(2)

Misuse of Drugs Act 1971, ss.3, 4(3) and 5(3)

Drugs – Importation and exportation, supply or offering to supply, and possession with intent to supply – class A

All offences: Triable either way:

Maximum when tried summarily: Level 5 fine and/or 6 months

Maximum when tried on indictment: Life

In accordance with the Powers of Criminal Courts (Sentencing) Act 2000, s.110 a minimum sentence of at least 7 years should be imposed for a third class A trafficking offence.

Offence seriousness (culpability and harm)

A. Identify the appropriate starting point

Starting points based on first time offender pleading not guilty

Quantities of drug	Starting point	Range
Small (indicative of relatively small street dealing or importation/exportation for personal use)	<p><u>Based on quantities:</u> Heroin/cocaine/crack cocaine 25g* Ecstasy 25g/250tablets* LSD 1,250 squares/dosage units* Opium 250g*</p> <p>Leading role – Crown Court Significant role – Crown Court Subordinate role – Crown Court</p>	<p><u>Based on quantities:</u> Heroin/cocaine/crack cocaine up to 50g Ecstasy up to 50g/500tablets LSD up to 2,500 squares/dosage units Opium up to 500g</p> <p>Leading role – Crown Court Significant role – Crown Court Subordinate role – Medium level community order to Crown Court</p>
Moderate (indicative of a small scale but still significant operation)	<p><u>Based on quantities:</u> Heroin/cocaine/crack cocaine 150g* Ecstasy 150g/1,500 tablets* LSD 7,500 squares/dosage units* Opium 1.5kg*</p> <p>Leading role – Crown Court Significant role – Crown Court Subordinate role – Crown Court</p>	<p><u>Based on quantities:</u> Heroin/cocaine/crack cocaine more than 50g up to 500g Ecstasy more than 50g/500 tablets up to 500g/5,000 LSD more than 2,500 up to 10,000 squares/dosage units Opium more than 500g up to 5kg</p> <p>Leading role – Crown Court Significant role – Crown Court Subordinate role – High level community order to Crown Court</p>

Cases falling into the categories 'Substantial (indicative of a large scale commercial operation)' and 'Very High (indicative of an international commercial operation)' should be dealt with in the Crown Court

* Where the actual quantity is greater or smaller than that on which the starting point is based, that is likely to be one of the factors that will move the sentence within the indicated range.

Offence seriousness (culpability and harm)

**B. Consider the effect of aggravating and mitigating factors
(other than those within examples above)**

Common aggravating and mitigating factors are identified in the pullout card – the following may be particularly relevant but **these lists are not exhaustive**

Factors indicating higher culpability

1. Offender used a courier who was a young person (statutory)
2. Supply or offer to supply a drug on or in the vicinity of school premises (statutory)
3. Targeting of premises where there are vulnerable people who are susceptible to persuasion or coercion
4. Pressure, influence or intimidation exerted on another to commit an offence

Factors indicating greater degree of harm

1. Supply to prisoners or detained persons
2. Possession of a knife or other weapon (where not separately charged)
3. Exposure of others to danger (supply)

Factors indicating lower culpability

1. Mistaken belief regarding the type of drug
2. Offence not commercially motivated
3. Inducement to supply falling short of entrapment

**Form a preliminary view of the appropriate sentence,
then consider offender mitigation**

Common factors are identified in the pullout card

Consider a reduction for a guilty plea

Consider ancillary orders

Refer to pages 168–174 for guidance on available ancillary orders

**Decide sentence
Give reasons**

Customs and Excise Management Act 1979,
s.170(2)

Misuse of Drugs Act 1971, ss.3, 4(3) and 5(3)

Drugs – Importation and exportation, supply or offering to supply, and possession with intent to supply – classes B and C

All offences: Triable either way:

Maximum when tried summarily: Level 5 fine and/or 6 months (class B); level 4 fine and/or 3 months (class C)

Maximum when tried on indictment: 14 years (class B and C)

Offence seriousness (culpability and harm)

A. Identify the appropriate starting point

Starting points based on first time offender pleading not guilty

Quantities of drug	Starting point	Range
Small (indicative of relatively small street dealing or importation/exportation for personal use)	Based on quantities: Amphetamine 10g* Cannabis (herbal or resin) 100g* Significant role – 26 weeks custody* Subordinate role – High level community order	Based on quantities: Amphetamine up to 50g Cannabis (herbal or resin) up to 500g Significant role – High level community order to Crown Court Subordinate role – Band C fine to 6 weeks custody
Moderate (indicative of a small scale but still significant operation)	Based on quantities: Amphetamine 1kg* Cannabis (herbal or resin) 10kg* Leading role – Crown Court Significant role – Crown Court Subordinate role – 26 weeks custody*	Based on quantities: Amphetamine more than 50g up to 7.5kg Cannabis (herbal or resin) more than 500g up to 25kg Leading role – Crown Court Significant role – High level community order to Crown Court Subordinate role – Medium level community order to Crown Court
Substantial (indicative of a large scale commercial operation)	Based on quantities: Amphetamine 10kg* Cannabis (herbal or resin) 100kg* Leading role – Crown Court Significant role – Crown Court Subordinate role – Crown Court	Based on quantities: Amphetamine more than 7.5kg up to 15kg Cannabis (herbal or resin) more than 25kg up to 150kg Leading role – Crown Court Significant role – Crown Court Subordinate role – High level community order to Crown Court

Cases falling into the category 'Very High (indicative of an international commercial operation)' should be dealt with in the Crown Court

- * Where the actual quantity is greater or smaller than that on which the starting point is based, that is likely to be one of the factors that will move the sentence within the indicated range.
- * When tried summarily, the maximum penalty for an offence involving a class C drug is 3 months custody. Applying mitigating factor 1, a lower starting point is likely to be appropriate.

Offence seriousness (culpability and harm)

**B. Consider the effect of aggravating and mitigating factors
(other than those within examples above)**

Common aggravating and mitigating factors are identified in the pullout card – the following may be particularly relevant but **these lists are not exhaustive**

Factors indicating higher culpability

1. Offender used a courier who was a young person (statutory)
2. Supply or offer to supply a drug on or in the vicinity of school premises (statutory)
3. Targeting of premises where there are vulnerable people who are susceptible to persuasion or coercion
4. Pressure, influence or intimidation exerted on another to commit an offence

Factors indicating greater degree of harm

1. Supply to prisoners or detained persons
2. Possession of a knife or other weapon (where not separately charged)
3. Exposure of others to danger (supply)

Factors indicating lower culpability

1. Drug is in class C
2. Mistaken belief regarding the type of drug
3. Offence not commercially motivated
4. Inducement to supply falling short of entrapment

**Form a preliminary view of the appropriate sentence,
then consider offender mitigation**

Common factors are identified in the pullout card

Consider a reduction for a guilty plea

Consider ancillary orders

Refer to pages 168–174 for guidance on available ancillary orders

**Decide sentence
Give reasons**

Drugs – Production of a controlled drug – class A

Triable either way:

Maximum when tried summarily: Level 5 fine and/or 6 months

Maximum when tried on indictment: Life

Offence seriousness (culpability and harm)

A. Identify the appropriate starting point

Starting points based on first time offender pleading not guilty

Scale of operation	Starting point	Range
Limited enterprise likely to produce only small quantities for very limited distribution or personal use	Significant role – Crown Court Subordinate role – Crown Court	Significant role – Crown Court Subordinate role – High level community order to Crown Court
Cases falling into the categories 'Moderate scale of enterprise' and 'Substantial enterprise' should be dealt with in the Crown Court		

Offence seriousness (culpability and harm)

B. Consider the effect of aggravating and mitigating factors (other than those within examples above)

Common aggravating and mitigating factors are identified in the pullout card – the following may be particularly relevant but **these lists are not exhaustive**

Factors indicating higher culpability 1. Use of sophisticated production system 2. Use of sophisticated system of concealment 3. Prolonged production of drug 4. Exposure of others to danger Factor indicating greater degree of harm 1. Offender exploited vulnerability of other persons	
---	--

Form a preliminary view of the appropriate sentence, then consider offender mitigation

Common factors are identified in the pullout card

Consider a reduction for a guilty plea

Consider ancillary orders

Refer to pages 168–174 for guidance on available ancillary orders

Decide sentence Give reasons

Drugs – Production of a controlled drug – classes B and C (including cultivation of cannabis)

All offences: Triable either way:

Maximum when tried summarily: Level 5 fine and/or 6 months (class B production and cultivation); level 4 fine and/or 3 months (class C)

Maximum when tried on indictment: 14 years

Offence seriousness (culpability and harm)

A. Identify the appropriate starting point

Starting points based on first time offender pleading not guilty

Scale of operation	Starting point	Range
Limited enterprise likely to produce only small quantities for very limited distribution or personal use	Significant role – Crown Court Subordinate role – 26 weeks custody*	Significant role – 26 weeks custody to Crown Court Subordinate role – Medium level community order to Crown Court
Moderate scale of enterprise capable of supplying more extensive but still limited distribution network	Leading role – Crown Court Significant role – Crown Court Subordinate role – Crown Court	Leading role – Crown Court Significant role – Crown Court Subordinate role – Medium level community order to Crown Court

Cases falling into the category 'Substantial enterprise' should be dealt with in the Crown Court

Offence seriousness (culpability and harm)

B. Consider the effect of aggravating and mitigating factors (other than those within examples above)

Common aggravating and mitigating factors are identified in the pullout card – the following may be particularly relevant but **these lists are not exhaustive**

Factors indicating higher culpability <ol style="list-style-type: none"> 1. Use of sophisticated production system 2. Use of sophisticated system of concealment 3. Prolonged production of drug 4. Exposure of others to danger 	Factor indicating lower culpability <ol style="list-style-type: none"> 1. Drug is in class C
Factor indicating greater degree of harm <ol style="list-style-type: none"> 1. Offender exploited vulnerability of other persons 	

Form a preliminary view of the appropriate sentence, then consider offender mitigation

Common factors are identified in the pullout card

Consider a reduction for a guilty plea

Consider ancillary orders

Refer to pages 168–174 for guidance on available ancillary orders

Decide sentence Give reasons

* When tried summarily, the maximum penalty for an offence involving a class C drug is 3 months custody. Applying mitigating factor 1, a lower starting point is likely to be appropriate.

Drugs – Permitting premises to be used for production, supply, administering or use of controlled drugs

Class A and B: Triable either way **Class C:** Summary only

Maximum when tried summarily: Level 5 fine and/or 6 months (class A and B); level 4 fine and/or 3 months (class C)

Maximum when tried on indictment: 14 years

Offence seriousness (culpability and harm)

A. Identify the appropriate starting point

Starting points based on first time offender pleading not guilty

Examples of nature of activity	Starting point	Range
Drug related activity in domestic premises is not the main purpose for which the premises are used e.g. a room let in a house	Class A – High level community order Class B and C – Medium level community order	Class A – Medium level community order to 26 weeks custody Class B and C – Low level community order to High level community order
Drug related activity in public premises is not the main purpose for which the premises are used e.g. public house, clubs etc	Class A – Crown Court Class B and C – 26 weeks custody*	Class A – Medium level community order to Crown Court Class B and C – Low level community order to Crown Court

Cases falling into the category 'drug related activity is the primary purpose for which the premises are used' should be dealt with in the Crown Court

Offence seriousness (culpability and harm)

B. Consider the effect of aggravating and mitigating factors (other than those within examples above)

Common aggravating and mitigating factors are identified in the pullout card – the following may be particularly relevant but **these lists are not exhaustive**

Factors indicating higher culpability	Factors indicating lower culpability
1. The offender stood to gain additional profit from the drug related activity 2. Very high scale of use	1. Drug is in class C 2. Offence not commercially motivated

Form a preliminary view of the appropriate sentence, then consider offender mitigation

Common factors are identified in the pullout card

Consider a reduction for a guilty plea

Consider ancillary orders

Refer to pages 168–174 for guidance on available ancillary orders

Decide sentence

Give reasons

* When tried summarily, the maximum penalty for an offence involving a class C drug is 3 months custody. Applying mitigating factor 1, a lower starting point is likely to be appropriate.

Drugs – Possession of a controlled drug – class A

Triable either way:

Maximum when tried summarily: Level 5 fine and/or 6 months

Maximum when tried on indictment: 7 years

Offence seriousness (culpability and harm)

A. Identify the appropriate starting point

Starting points based on first time offender pleading not guilty

Examples of nature of activity	Starting point	Range
Very small quantity e.g. one small wrap or tablet	Band C fine	Band B fine to Medium level community order
More than a very small quantity e.g. up to six wraps or tablets	Medium level community order	Low level community order to High level community order
Amount larger than the range in level above	High level community order	Medium level community order to Crown Court
Possession of a drug in prison – whether by prisoner or another person	Crown Court	Crown Court

Offence seriousness (culpability and harm)

B. Consider the effect of aggravating and mitigating factors (other than those within examples above)

Common aggravating and mitigating factors are identified in the pullout card – the following may be particularly relevant but **these lists are not exhaustive**

Factor indicating higher culpability 1. Offender exercising or acting in position of special responsibility	
Factor indicating greater degree of harm 1. Possession of a drug in a public place, school or prison	

Form a preliminary view of the appropriate sentence, then consider offender mitigation

Common factors are identified in the pullout card

Consider a reduction for a guilty plea

Consider ancillary orders

Refer to pages 168–174 for guidance on available ancillary orders

Decide sentence Give reasons

Drugs – Possession of a controlled drug – classes B and C

Triable either way:

Maximum when tried summarily: Level 4 fine and/or 3 months (class B); level 3 fine and/or 3 months (class C)

Maximum when tried on indictment: 5 years (class B); 2 years (class C)

Offence seriousness (culpability and harm)

A. Identify the appropriate starting point

Starting points based on first time offender pleading not guilty

Examples of nature of activity	Starting point	Range
Small amount	Band B fine	Band A fine to low level community order
Larger amount	Band C fine	Band B fine to 12 weeks custody

Offence seriousness (culpability and harm)

B. Consider the effect of aggravating and mitigating factors (other than those within examples above)

Common aggravating and mitigating factors are identified in the pullout card – the following may be particularly relevant but **these lists are not exhaustive**

Factor indicating higher culpability 1. Offender exercising or acting in position of special responsibility Factor indicating greater degree of harm 1. Possession of a drug in a public place, school or prison	Additional mitigating factor 1. Drug is in class C
---	--

Form a preliminary view of the appropriate sentence, then consider offender mitigation

Common factors are identified in the pullout card

Consider a reduction for a guilty plea

Consider ancillary orders

Refer to pages 168–174 for guidance on available ancillary orders

Decide sentence Give reasons

ANNEX F: THE CONSULTATION

In accordance with the duty imposed by section 171(3) of the Criminal Justice Act 2003, the Panel issued a consultation paper on 22 April 2009. The Panel's provisional views on sentencing guidelines for drug offences were set out.

Copies of the consultation paper were sent to 126 individuals and organisations including the Panel's 33 regular consultees and Resident Judges at each Crown Court Centre in England and Wales. It was also published on the Panel's website and in the Justice of the Peace journal. 51 responses were received.

Responses were received from the following:

Advisory Council on the Misuse of Drugs (ACMD)
Association of Chief Police Officers
Council of District Judges (Magistrates' Courts) for England and Wales
Council of Her Majesty's Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Justices' Clerks' Society
Law Society
Magistrates' Association
Police Federation of England and Wales
Serious Organised Crime Agency (SOCA)
Victim Support

Responses were also received from:

Beckley Foundation
Daniel Benjamin, barrister
HH Judge Blacksell QC
Jasmin Bollinger
Criminal Justice Alliance
Criminal Justice Group, Ministry of Justice
Alured Darlington, Solicitor Advocate
HH Judge Darroch
Deputy Chairman, Ealing Magistrates' Court
Drug Strategy Unit, Home Office
Drugs Directorate, Metropolitan Police Service
Drugs Policy Team, HM Revenue and Customs
Fawcett Society
Jennifer Fleetwood, University of Edinburgh
Rudi Fortson
Casey Hardison
Nicole Harrison

Martin Hayes
Shireen Jagne
Gary Jones
Dr. Les King, member of the Advisory Council on the Misuse of Drugs
Dr. Axel Klein, University of Kent
Marlene Morris
Parents Against Lethal Addictive Drugs (PALAD)
Richard Parry, Solicitor Advocate
HH Judge Pearce-Higgins QC
Simon Price
Prison Reform Trust
Release
HH Judge Richardson
Solicitors' Association of Higher Court Advocates (SAHCA)
Jeanine Stucki
Superintendent Richard Fretwell, Nottinghamshire Police
Transform
George Tranter, solicitor and former Justices' Clerk
UK Drug Policy Commission
Tom Venour

Two anonymous responses were also received.

APPENDIX: APPROACH OF OTHER JURISDICTIONS TO DRUG OFFENDING

1. Further to responses to its consultation, the Panel sought information concerning views expressed that any lessening of reliance on very long prison sentences would risk increasing offending if England and Wales were seen as being more lenient than other countries.
2. There have been a number of United Nations Conventions regarding illegal drugs, particularly the Single Convention on Narcotic Drugs (1961, as amended), the Vienna Convention on Psychotropic Substances (1971) and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). The 1988 Convention focused on the criminalisation of both the supply of drugs (through production, sale or transportation) and the 'laundering' of the proceeds of drug-related activities.
3. As is shown in the 2009 report of the United Nations Office on Drugs and Crime (UNODC),⁶² international drug control is one of the oldest issues on which there has been international cooperation; the report argues that, although still extensive, the drug problem has been contained and reduced over the last one hundred years. Whilst it appears that drug trends in the United Kingdom have stabilised, it appears that the level of dependent use in the UK continues to be higher than elsewhere in Europe and that the level of recreational use is also high even though the sentencing regime has become increasingly severe.
4. In the Executive Summary of the Report, the Executive Director calls for a shift in focus from drug users to drug traffickers within the context of more controls on crime without fewer controls on drugs. He asserts that drug addiction is a health condition and that people who take drugs need medical help not criminal retribution stating that arresting individuals and seizing drugs for their personal use is unlikely to be as effective as more far reaching measures, particularly those against organised crime.⁶³
5. The Panel examined whether it was possible to obtain sufficiently detailed information regarding the approach of other jurisdictions when using the criminal law to respond to offences arising from the use of illegal drugs to enable it to consider whether the concerns recorded above (see paragraph 21 of the Advice) were justified.
6. The most comprehensive information related to other European countries. However, even with the degree of detail available, the Panel found that a number of issues hindered the ability to make comparisons, such as the range and definitions of offences (including in relation to reporting for data collection purposes) and maximum penalties. Sentencing regimes differ significantly as does the level of use of actions outside the criminal justice system.

⁶² *World Drug Report 2009*; www.unodc.org/unodc/en/data-and-analysis/WDR-2009.html

⁶³ *ibid.*, Executive Summary, p.2

7. The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) is the central source of information for Europe, collecting, analysing and disseminating on drugs and drug addiction. It maintains an online database (ELDD) of information on European drugs-related legislation, providing country profiles which set out in general terms the legislative frameworks, prosecutorial approaches, potential sentences and other penalties (such as confiscation) for some, but not all, forms of drug offending. This database provides an overview of approaches to drug related offending and identifies the key divergences, such as in relation to use of drug classification systems, criminalisation of drug related activity and definitions of offences, differentiation between cases where there is a commercial purpose and those linked to personal addiction, and maximum penalties which span a wide range, which make direct comparison complex.
8. In relation to offence definition, attempts have been made to establish commonality, particularly in relation to the more serious forms of drug offending including trafficking and supply. A Framework Decision of the European Council⁶⁴ adopted in 2004, set out to establish minimum rules relating to the constituent elements of offences of illicit trafficking in drugs to enable the problem to be tackled at European Union level. It also sought to achieve some alignment of national systems of penalties, as there were significant disparities. In a report on implementation of the Framework Decision published in December 2009⁶⁵ the Commission of the European Communities concluded that there has been little progress in the alignment of national measures in the fight against drug trafficking.
9. A selected issues paper published by the EMCDDA in 2009⁶⁶ describes and compares the outcomes of charges for personal use or supply of drugs by type and length of sentence across EU Member States. It discusses the scope of the Framework Decision definition and associated problems of separating sentencing of personal users (excluded from the Framework Decision if the conduct was exclusively for personal consumption) and suppliers/traffickers. It concludes that, despite the difficulties in relation to the reporting of sentencing results and outcomes, some meaningful distinctions between countries can be drawn.
10. The paper provides a limited examination of the proportional use of custodial and non-custodial disposals for personal use and supply offences, and of sentence size and the use of long sentences. However, these are insufficient for the purposes of comparing severity of sentencing in England and Wales with that in other European countries, and for assessing the potential of the risk identified by respondents.

⁶⁴ 2004/757/JHA: O.J. L. 335. 11 November 2004

⁶⁵ COM(2009)669; SEC(2009)1661: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0669:EN:HTML

⁶⁶ *Drug offences: sentencing and other outcomes*: www.emcdda.europa.eu/publications/selected-issues/sentencing-statistics

The Sentencing Advisory Panel is an independent advisory and consultative body originally constituted under sections 80 and 81 of the Crime and Disorder Act 1998 (which came into force on 1 July 1999) and now constituted under section 169 of the Criminal Justice Act 2003. Its function, prior to implementation of the relevant provisions in the Criminal Justice Act 2003, was to provide fully researched, objective advice to the Court of Appeal to assist the Court when it framed or revised sentencing guidelines.

The Criminal Justice Act 2003 established a Sentencing Guidelines Council with responsibility for issuing sentencing guidelines. With effect from 27 February 2004, the Sentencing Advisory Panel submits its advice to the Council rather than to the Court of Appeal.

The following were members of the Panel at the time this advice was delivered to the Sentencing Guidelines Council:

Professor Andrew Ashworth CBE, QC (Chairman)

His Honour Judge Anthony Ansell

John Crawford OBE

Amritlal Devani

Mrs Anne Fuller OBE JP

Professor Frances Heidensohn

David Mallen CBE

Michael Morgan

Judge Howard Riddle

John Staples

Ms Joan Webster QPM

Christopher Woolley

The Sentencing Advisory Panel can be contacted at: 4th floor, 8-10 Great George Street, London SW1P 3AE
(Telephone: 020 7084 8130; Fax: 020 7084 8114; e-mail: info@sentencing-guidelines.gsi.gov.uk)

Head of Sentencing Guidelines Secretariat: Kevin McCormac OBE

Secretary to the Panel: Mrs Lesley Dix

