

**Response to the Sentencing Council's
professional consultation on the draft
guideline on drug offences**

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About the Criminal Justice Alliance

The Criminal Justice Alliance (CJA) is a coalition of 57 organisations - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions - involved in policy and practice across the criminal justice system. The CJA's current member organisations are: Action for Prisoners' Families; Adullam Homes Housing Association; the Apex Charitable Trust; the Association of Black Probation Officers; the Association of Members of Independent Monitoring Boards; Birth Companions; Carers Federation; Catch22; the Centre for Crime and Justice Studies; the Centre for Mental Health; Chance UK; the Children's Society; the Churches' Criminal Justice Forum; Circles UK; Clean Break; Clinks; DrugScope; the Fawcett Society; the Griffins Society; Gwalia Care and Support; Hafal; INQUEST; the Institute for Criminal Policy Research; JUSTICE; Leap; Nacro; the National Appropriate Adult Network; the New Bridge Foundation; Pact; Partners of Prisoners and Families Support Group; Penal Reform International; the Police Foundation; the Prison Officers' Association; the Prison Reform Trust; Prisoners Abroad; Prisoners' Advice Service; the Prisoners Education Trust; the Prisoners Families and Friends Service; the Public and Commercial Services Union; the Quaker Crime, Community and Justice Group; RAPT; Release; the Restorative Justice Council; Rethink; Revolving Doors Agency; the RSA Prison Learning Network; Safe Ground; SOVA; the St Giles Trust; Transform Drug Policy Foundation; UNLOCK; User Voice; Women in Prison; Women's Breakout; Working Chance; the Young Foundation; and Young Minds.¹ The Criminal Justice Alliance works to establish a fairer and more effective criminal justice system.

Introduction

The CJA is pleased to have the opportunity to participate in the Sentencing Council's consultation on the draft drug offences guideline. The CJA welcomes the creation of the Sentencing Council and the approach that it has taken in conducting its work to date. We supported the establishment of a new Sentencing Council and believe that the Council can promote stability and consistency in sentencing and improve the availability of data and other information about sentencing, while also playing a role in reviving public confidence in the sentencing process and maintaining judicial confidence.

The CJA strongly endorses the proposals in this guideline to significantly reduce the length of sentences given to so-called drug 'mules'. However, we are disappointed that the Sentencing Council has not proposed shorter sentences for some further drug offences, and in particular for possession offences, and lower level supply and production offences. In order to satisfy the demands of both proportionality and effectiveness, we believe that custody should never be available for possession offences, and we would also recommend against imprisonment for lower level supply and production offences. We are, additionally, concerned that that issue of culpability is not properly addressed by the structure of this guideline. The CJA also has concerns about proposals contained in this draft guideline on sentencing for the supply of drugs to prisoners and possession offences in prison, and about the issue of social supply.

Response to the consultation questions

We have responded to the consultation questions on which we have a view below.

Question 1

Do you agree with the proposed groupings of offences into five guidelines?

Yes. The CJA believes that the proposed groupings will ensure that the guideline is clear

¹ Although the CJA works closely with its members, this consultation response should not be seen to represent the views or policy positions of each individual member organisation.

and comprehensible to sentencers, and will also help to promote consistency in sentencing across the offences the guideline covers.

Question 2

Do you agree with the Council's approach to the issue of purity? If you do not agree, it would be helpful to the Council if you would explain your reasoning.

The CJA broadly agrees with the approach proposed by the Sentencing Council. However, we are concerned that where an offender is fairly low in the supply chain but the purity is high, for example in cases involving drug 'mules', high purity should not be seen as an aggravating factor. We hope that the flexibility afforded by the Sentencing Council's approach should allow this factor to be taken into account only where it is relevant.

Question 3

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

Yes. The CJA believes that this a sensible approach that will allow for proportionate sentencing across the offences covered by the guideline.

Question 4

Do you agree that the court should be referred to the guideline for supply or possession (according to intent) when the quantity of drug involved in the offence is very small?

Yes. We agree with the Council that this will allow sentencers to take a more measured approach to such offences, and fully support this proposal.

Question 5

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

No. The CJA believes that supply to an undercover police officer is irrelevant for the purposes of seriousness, and as such, agrees with the Council that 'Supply to undercover police officers' should not be included at either step 1 or step 2 of the guideline.

Question 6

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

No. While we believe that the effects of drugs in prisons are extremely harmful and strongly support efforts to reduce the use of drugs by prisoners, we are not convinced that this approach would be effective or appropriate. Many of those in prison are drug dependent, and for these individuals there is limited access to appropriate treatment within the prison estate. As we set out below (see Question 10) prison is, by-and-large, an inappropriate setting in which to deliver drug treatment programmes² and while work to provide equivalence of care in prisons with that provided in the community is welcome, the UK Drug Policy Commission has argued that prison drug services frequently fall short of even minimum standards.³ As such, giving these individuals a further custodial sentence is unlikely to have any beneficial effect, and there is no evidence that these would act as a deterrent. Moreover, given that instances of possession of drugs in prison are usually dealt

² This is not to say that there are not some excellent programmes within the prison system. For example, RAPT's abstinence-based model, developed along 12-Step lines in nine English prisons, has been shown to achieve significant and sustained reductions in drug use and offending. Recent analysis demonstrated that RAPT's programme achieved a 29% reduction in the number of ex-prisoners reoffending and that for every 100 individuals the RAPT programme saves £6.3 million on re-sentencing and re-incarceration.

³ UK Drug Policy Commission (2008) *Reducing drug use, reducing reoffending: Are programmes for problem drug-using offenders in the UK supported by the evidence?* London: UK Drug Policy Commission.

with through the prison disciplinary process and are infrequently prosecuted, we would question the need for this category. We would, therefore, recommend that this special category should be removed, and that the same factors should be used in establishing offence seriousness as are taken into account for non-prisoners.

Question 7

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

We strongly support the inclusion of 'Medical evidence that a drug is used to help with a medical condition' as a mitigating factor for possession offences. As Release, a member of the CJA, has previously highlighted, there is extensive evidence to support the use of cannabis and other controlled drugs for medicinal purposes.⁴ This was recognised by the Sentencing Advisory Panel's advice to the Sentencing Guidelines Council, which included 'drugs used to help with a medical condition' as a mitigating factor.⁵ We would also argue that it should be included as a mitigating factor for other offences included in this guideline, specifically production offences and offences of 'permitting premises to be used'. Where production is for personal use, it would be logical to include it as a potential mitigating factor, if it is also included for possession offences. Allowing a friend or relative to use premises for drug use related to a medical condition should also be recognised as a factor reflecting personal mitigation. Additionally, the Council should consider whether 'Medical evidence that a drug is used to help with a medical condition' should be included as a mitigating factor for supply offences, to apply in cases where the supplier was knowingly supplying the drug for use related to a medical condition.

Question 9

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

The CJA supports, in general, the approach taken in setting out the roles for the offences covered by the guideline. However, we are concerned that the model set out does not sufficiently address some issues related to culpability, and would urge consideration of these.

Whilst we recognise that the descriptions outlined in the guideline are not intended to be exhaustive and that other factors relating to the role that the offender played in the offence may be taken into consideration, we are, nevertheless, concerned that the emphasis on what might be termed 'external factors' in the characteristics determining an offender's role could mean that sentencers do not recognise the ways in which mental disorder or learning disability can affect an individual's culpability. It is perfectly feasible, for instance, that an offender with a mental disorder or learning disability whose vulnerability has been exploited could be coerced into a level of involvement which, on the basis of the factors set out in the guideline, would place him into the 'significant' role category. However, in our view, the absence of any clear reference to mental disorder or learning disability as a factor affecting an offender's role means that sentencers may not, in such circumstances, recognise an individual's reduced culpability; since many of the characteristics listed relate to an individual's 'ranking' within an operation, there is likely to be a focus on such 'external' factors in determining an offender's role, with more 'internally' focused factors overlooked. We acknowledge that 'Involvement through naivety' and 'Engaged by pressure, influence, intimidation or relatively small reward' are listed as factors that may indicate a subordinate role; however, we do not think that these

⁴ Release (2009) *Response to the Sentencing Advisory Panel's consultation paper on sentencing for drug offences*.

⁵ Sentencing Advisory Panel (2009) *Advice to the Sentencing Guidelines Council: Sentencing for drug offences*, London: Sentencing Advisory Panel.

adequately recognise the role that mental disorder or learning disability may play in affecting an individual's culpability. We are, therefore, concerned that if 'mental disorder or learning disability' is not clearly flagged up at step 1, inappropriately harsh sentences may be imposed on offenders with reduced culpability.

To address this, 'Mental disorder or learning disability where it relates to the offender's role' should be inserted at step 1 to indicate a subordinate role in relevant offences, and to prevent 'double counting', the factor reflecting personal mitigation should become 'Mental disorder or learning disability, where it does not relate to the offender's role'. With offences of 'permitting premises to be used', where seriousness is determined by reference to harm and culpability, 'Mental disorder or learning disability, where linked to the commission of the offence' should be included at step 1 as a factor indicating lower culpability, and 'Mental disorder or learning disability, where not linked to the commission of the offence' should be included at step 2 as a factor reflecting personal mitigation. This approach would be in line with the final guideline on assault.

We also believe that lack of maturity can play a significant role in determining an offender's culpability, and we would echo the recommendation of the Transition to Adulthood (T2A) Alliance - the work of which the CJA has contributed to and whose submission to this consultation the CJA endorses - that lack of maturity should be included as a characteristic determining an offender's role at step 1. A recent review of research and other literature relating to the issue of the maturity of young adult offenders, commissioned by the Barrow Cadbury Trust (which convenes the T2A Alliance) and conducted by the University of Birmingham, has found that "development of those areas of the brain concerned with higher order cognitive processes and executive functions, including control of impulses and regulation and interpretation of emotions, continues into early adulthood; the human brain is not 'mature' until the early to mid-twenties."⁶

As such, young adults potentially face greater difficulties in controlling behaviour, are more prone to risky behaviour and are less able to plan for the future. As the T2A Alliance sets out in their submission to this consultation, "this suggests that young adults' levels of maturity may affect their culpability, and this should therefore be considered in determining their role." We therefore support their recommendation that 'Involvement through lack of maturity where it relates to the offender's role' should be a factor that indicates a subordinate role in relevant offences. If this change is made, the factor reflecting personal mitigation would then need to become 'Age/lack of maturity where it does not relate to the offender's role', to prevent 'double counting'. With offences of 'permitting premises to be used', where seriousness is determined by reference to harm and culpability, 'Age/lack of maturity where linked to the commission of the offence' should be included at step 1 as a factor indicating lower culpability, and 'Age/lack of maturity, where not linked to the commission of the offence' should be included at step 2 as a factor reflecting personal mitigation.

The CJA is also concerned that, for supply offences, 'Supply to a prisoner (other than by a prison officer)' is automatically seen as putting the offender into a 'significant' role. Whilst we fully recognise the harmful effects of drugs in prisons, we are concerned that this could result in severe sanctions for the families of prisoners who bring drugs into prison. Given the enormous pressures that prisoners' families are under, and the levels of coercion that they may face, this would, in our view, be wholly inappropriate. As was recognised by David Blakey in his Ministry of Justice-sponsored review of measures to disrupt the supply of drugs into prison, families may come under pressure to provide drugs

⁶ p.8: Prior, D. et al (2011) *Maturity, young adults and criminal justice: A literature review* - available at <http://www.t2a.org.uk/publication-download.php?id=42>

to family members in custody.⁷ In this context, circumstances would not merit family members being seen as conducting a ‘significant’ role, and a ‘subordinate’ role would be more appropriate.

We would, in addition, like to highlight the issue of ‘social supply’, where individuals, often young people, purchase drugs for friends, sometimes making a small profit as a way of covering costs or to compensate them for time spent. A number of relevant organisations - including DrugScope, the UK’s leading independent centre of expertise on drugs and drug use and a member of the CJA - have argued for a review of the law of social supply for many years. In the meantime, we believe that more should be done to ensure that in cases that relate to social supply, the offender does not receive a sentence that would be more appropriate for a genuinely commercial supplier. We therefore believe that the definition of somebody in a ‘subordinate’ role for a supply offence - “absence of any financial gain” - should be changed to allow an individual whose primary motivation was not financial gain, and where the financial gain was minimal, to be deemed as playing a ‘subordinate’ role. A specific mitigating factor, inserted at step 2, would be an alternative way of addressing this issue.

We would question the inclusion of ‘Direct supply to drug users for gain, for example street dealer’ as indicating a leading role for supply offences. As Release has highlighted, “individuals who are addicted to drugs may become street dealers to earn money to buy drugs, or in response to pressure or coercion from their own dealers”;⁸ it would, therefore, be inappropriate to place them in the same category in terms of role as those who have a top tier organisational role. Whilst we acknowledge that the supply of drugs in order to fund an individual’s drug dependency is recognised, to some extent, as a mitigating factor at step 2, the narrow wording of this - ‘Supply only of drug to which offender addicted’ - excludes those who are drug dependent and supplying drugs other than those to which they are addicted in order to support their dependency. Moreover, even if supply to fund an individual’s dependency is recognised as a mitigating factor at step 2, a street dealer convicted of supplying a very small quantity of a Class A drug, for instance, would be placed in an offence category where the category range starts at 4 years 6 months’ custody. As such, we believe that including this factor to indicate a leading role could result in the imposition of disproportionately severe sentences. In their advice to the Sentencing Guidelines Council, the Sentencing Advisory Panel recognised the factors highlighted by Release, and, consequently, acknowledged that street level dealers may often play a subordinate role,⁹ and we would recommend that the Council adopts a similar approach.

Finally, for offences of ‘possession of a controlled drug’, the culpability of the offender and the harm caused are determined solely by the quantity of the substance(s) in their possession. However, the CJA does not believe that possession of a larger quantity of a drug necessarily implies greater culpability or harm than possession of a smaller amount. As Release has pointed out, an individual might buy large quantities at one time with the intention of using it over a long period to limit their contact with the criminal markets, or because they are using drugs for medical purposes (see Question 7, above) and are limited in their ability to access a supplier regularly as a result of their disability; they might be addicted to the relevant substance and therefore have a higher tolerance and require

⁷ Blakey, D. (2008) *Blakey Review: Disrupting the supply of illegal drugs into prisons* - available at <http://www.justice.gov.uk/publications/docs/blakey-report-disrupting.pdf>

⁸ p.17: Release (2009) *Response to the Sentencing Advisory Panel’s consultation paper on sentencing for drug offences*.

⁹ Sentencing Advisory Panel (2009) *Advice to the Sentencing Guidelines Council: Sentencing for drug offences*, London: Sentencing Advisory Panel.

higher quantities; or they might simply want to save money by buying a larger quantity on a less regular basis.¹⁰ In our opinion, it would be wrongheaded to attribute additional harm or higher culpability in such circumstances, compared with an individual who buys, and therefore possesses, smaller amounts more frequently. The CJA therefore believes that the Council should consider determining the seriousness of a possession offence solely by reference to class of drug. As such, for each class of drug, there would be a single offence category, and so a single starting point and category range; aggravating and mitigating factors would then lead to upward or downward movement within this category. We would also emphasise, as we set out in answer to Question 12, below, that we believe that the sentences available for possession offences should be reduced; in particular, we do not believe that custody can ever be an appropriate sentence for an offence of possession.

Question 10

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

Overall, the CJA supports the approach taken to aggravating and mitigating factors in the draft guideline. We are particularly pleased that ‘Mental disorder or learning disability’, ‘Age/lack of maturity’ and ‘Sole or primary carer for dependent relatives’ have been included.

As we highlighted in our response the Sentencing Council’s consultation on the draft assault guideline, for those with mental health problems or those with learning disabilities or difficulties, the experience of the criminal justice system, and in particular custody, can be especially difficult. For those with mental health problems, the impact of custody can be extremely damaging. Prisoners with mental health problems are often disconnected from the support services they were linked in with in the community as a result of imprisonment; unfortunately, the mental health care provided in prisons is often, quite simply, unable to meet the needs of prisoners.¹¹ As the Centre for Mental Health, a member of the CJA, has identified, in addition to the difficulty of accessing appropriate healthcare services, a number of other factors within the custodial environment may exacerbate an individual’s mental health problems, including separation from family and friends, bullying, and having limited access to meaningful activity, including physical exercise.¹² Current levels of overcrowding - at present, over 60% of the prisons in England and Wales are officially overcrowded¹³ - and the subsequent pressure on prison places means that there is significant movement of prisoners (‘churn’) within the prison estate, and such disruption can also have a harmful effect on prisoners’ mental well being.¹⁴ The criminal justice green paper, ‘Breaking the Cycle’, has recognised that custody is not always an appropriate environment for those with mental health problems, as set out in the Bradley Report.¹⁵ Additionally, as the Prison Reform Trust, also a member of the CJA, has documented, individuals with learning disabilities or difficulties may also find custody particularly difficult: they are likely to find it hard to understand and adjust to the rules and regimes of custody; they are vulnerable to targeting by other prisoners; and they may

¹⁰ Release (2009) *Response to the Sentencing Advisory Panel’s consultation paper on sentencing for drug offences*.

¹¹ Her Majesty’s Inspectorate of Prisons (2007) *The mental health of prisoners: A thematic review of the care and support of prisoners with mental health needs*, London: HM Inspectorate of Prisons.

¹² Durcan, G. (2008) *From the inside: Experiences of prison mental health care*, London: Centre for Mental Health.

¹³ <http://www.justice.gov.uk/downloads/publications/statistics-and-data/hmps/prison-population-bulletin-may-2011.doc>

¹⁴ Durcan, G. (2008) *From the inside: Experiences of prison mental health care*, London: Centre for Mental Health.

¹⁵ Bradley, K. (2009) *The Bradley Report: Lord Bradley’s review of people with mental health problems or learning disabilities in the criminal justice system*, London: Department of Health.

respond to their distress by lashing out at others or by isolating themselves, or being isolated by prison staff for their own protection, which in turn increases their vulnerability to problems such as mental distress and suicide.¹⁶

We are, therefore, very pleased that the Sentencing Council continues to recognise ‘Mental disorder or learning disability’ as a factor reflecting personal mitigation. However, as we have set out above, we would argue that it should also be recognised at step 1, when determining an offender’s role, as well as at step 2, reflecting personal mitigation. As such, we believe that ‘Mental disorder or learning disability where it relates to the offender’s role’ should be inserted at step 1, to indicate a subordinate role in relevant offences; to prevent ‘double counting’, the factor reflecting personal mitigation should become ‘Mental disorder or learning disability, where it does not relate to the offender’s role’. With offences of ‘permitting premises to be used’, where seriousness is determined by reference to harm and culpability, ‘Mental disorder or learning disability, where linked to the commission of the offence’ should be included at step 1 as a factor indicating lower culpability, and ‘Mental disorder or learning disability, where not linked to the commission of the offence’ should be included at step 2 as a factor reflecting personal mitigation. This would, as we have stated earlier, be in line with the approach taken by the final guideline on assault.

Additionally, we welcome the inclusion of ‘Age/lack of maturity’ as a mitigating factor at step 2. There is, as the T2A Alliance has argued, extensive evidence, both developmental and demographic, that ‘young adulthood’ is a particular stage in life and that young adults require distinct treatment because of their levels of maturity and the economic, social and structural factors that specifically impact upon them. As such, it is appropriate that the maturity of young adults should be recognised within the criminal justice system, including in sentencing. However, as we have set out above, we believe that lack of maturity may also affect the culpability of a young adult offender, and this should therefore be considered in determining their role. In line with the T2A Alliance’s recommendations, we therefore believe that ‘Involvement through lack of maturity where it relates to the offender’s role’ should be a factor that indicates a subordinate role in relevant offences at step 1; if this change is made, the factor reflecting personal mitigation would then need to become ‘Age/lack of maturity where it does not relate to the offender’s role’, to prevent ‘double counting’. With offences of ‘permitting premises to be used’, where seriousness is determined by reference to harm and culpability, ‘Age/lack of maturity where linked to the commission of the offence’ should be included at step 1 as a factor indicating lower culpability, and ‘Age/lack of maturity where not linked to the commission of the offence’ should be included at step 2 as a factor reflecting personal mitigation.

We also support the continued inclusion of ‘Sole or primary carer for dependent relatives’ as a mitigating factor. As we set out in our response to the consultation on the draft assault guideline, the imprisonment of a parent is particularly damaging, with children of prisoners having about three times the risk of developing mental health problems compared to their peers and experiencing higher levels of social disadvantage, yet about 160,000 children a year have a parent sent to custody and 7% of all children will see a parent imprisoned during their school years.¹⁷ The recognition of caring responsibilities as a mitigating factor is of particular relevance to female offenders. 66% of women prisoners

¹⁶ Loucks, N. (2007) *No one knows: Offenders with learning difficulties and learning disabilities - Review of prevalence and associated needs*, London: Prison Reform Trust.

¹⁷ Action for Prisoners’ Families, CLINKS, pact and the Prison Reform Trust (2007) *The children and families of prisoners: Recommendations for Government* - Parliamentary briefing

are mothers with dependent children under 18.¹⁸ At least one third of women offenders are lone parents prior to being imprisoned, and it is estimated that up to 17,700 children each year are separated from their mothers due to imprisonment. Just 5% of the children of women offenders remain in their own home once their mother has been sentenced.¹⁹ The effect of a custodial sentence on a female offender who is the sole carer for her children can, therefore, be severe, not only for her but also for her children.

The CJA also welcomes the inclusion of ‘Determination and/or demonstration of steps taken to address addiction or offending behaviour’ as a mitigating factor: this may be of particular benefit if it leads to a community order or suspended sentence order being imposed instead of a custodial sentence. Prison is, in general, a problematic environment for those convicted of drug offences who are also drug dependent. Firstly, drugs are widely available in prisons. In his review of measures to disrupt the supply of drugs into prison, David Blakey observed that: “Anecdotally, and in the press, one hears of prisons being ‘awash’ with drugs and research and interviews with prisoners conducted outside of this review would seem to indicate a ready availability. Certainly substantial amounts of all types of drugs do get into prisons.”²⁰ Secondly, as we have already argued, prison is an inappropriate setting in which to deliver drug treatment programmes. As a result of prison overcrowding, prisoners are frequently moved from one prison to another which disrupts the delivery of programmes; short sentences may not allow enough time for programmes to be completed; and there is currently insufficient capacity for the numbers of prisoners that need access to programmes. While work to provide equivalence of care in prisons with that provided in the community is welcome, the UK Drug Policy Commission has argued that prison drug services frequently fall short of even minimum standards.²¹ In addition, many prisoners with drug addictions also have mental health problems and prisons have very limited provision for dual diagnosis. The Centre for Mental Health has argued that “there is a big gap in dual diagnosis services in prisons and a lack of co-ordination between different teams”.²² A later study reported that mental health and substance misuse services recognised the need to work closely together, but largely failed to do so.²³

Overall, as the UK Drug Policy Commission concluded, “custodial sentences may frequently do more harm than good. By creating or exacerbating problems such as housing, employment and family relationships and increasing health risks such as infection from blood-borne viruses, the chances of successful long-term outcomes are further reduced. Enforced detoxification without adequate follow-up support also increases the risk of relapse, overdose and death, particularly on release.”²⁴ Unsurprisingly, in the light of this

¹⁸ The Fawcett Society (2009) ‘Women and the criminal justice system - the facts’ - available at <http://www.fawcettsociety.org.uk/index.asp?PageID=432>

¹⁹ Smee, S. (2009) *Engendering justice - From policy to practice*, London: The Fawcett Society.

²⁰ p.7: Blakey, D. (2008) *Blakey Review: Disrupting the supply of illegal drugs into prisons* - available at <http://www.justice.gov.uk/publications/docs/blakey-report-disrupting.pdf>

²¹ UK Drug Policy Commission (2008) *Reducing drug use, reducing reoffending: Are programmes for problem drug-using offenders in the UK supported by the evidence?* London: UK Drug Policy Commission.

²² p.5: Centre for Mental Health (2007) *Mental health care in prisons*, London: Centre for Mental Health.

²³ Durcan, G. (2008) *From the Inside: Experiences of prison mental health care*, London: Centre for Mental Health.

²⁴ p.14: UK Drug Policy Commission (2008) *Reducing drug use, reducing reoffending: Are programmes for problem drug-using offenders in the UK supported by the evidence?* London: UK Drug Policy Commission.

analysis, 75% of prisoners saying they had a drug problem before custody go on to reoffend within a year of release.²⁵

The CJA would question the inclusion of 'Failure to respond to warnings or concerns expressed by others about the offender's behaviour' as an aggravating factor. This is of particular concern in relation to those who are drug dependent and who may, for instance, be sentenced for possession and supply offences. Including this as an aggravating factor does not, in our opinion, recognise the nature of drug dependency - that addressing an addiction can be a long process, and that relapses can be common - and we would therefore recommend that it is removed from step 2.

Finally, we would also question the inclusion of 'Established evidence of community impact' as an aggravating factor, particularly in relation to supply offences. Release has highlighted that, since open markets tend to be in areas of social exclusion, and as it is widely acknowledged that members of BME groups may often be subjected to greater levels of poverty, social deprivation, discrimination and exclusion, there is a real danger that such a factor would have a disproportionate impact on BME groups.²⁶ Moreover, as Release has also pointed out, although the impact of open markets may involve greater harm to individual communities, an open market is never the fault of a specific defendant.²⁷ As such, we would argue that the inclusion of 'Established evidence of community impact' as an aggravating factor imposes a disproportionate burden of responsibility on an individual for wider societal circumstances: this is also true in relation to its inclusion in the final guideline on assault. Additionally, it is questionable how widely community impact statements are used, which could lead to inconsistent application of this as an aggravating factor, or indeed, how representative of a community's views such a statement might or can be.

Question 12

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

The CJA believes that there should be lower starting points and category ranges for possession offences, as well as for lower-level supply and production offences. In 2010, 9,693 people were sentenced to immediate custody for a drug offence, compared with 8,186 just three years previously, in 2007, representing an increase of almost 20%.²⁸ It is well known that prison is ineffective at rehabilitating offenders and reducing reoffending - in 2009, 48.5% of ex-prisoners, and 59.4% of those serving sentences of twelve months or less were convicted of a further offence within a year of release²⁹ - and, as we have highlighted above, this is particularly the case for those who are drug dependent, many of whom will be sentenced for drug offences. The increase in recent years in the number of those sentenced to custody for drug offences should, therefore, be a real cause for concern.

We believe that, in the case of many low level drug offences, prosecution is not appropriate. Though we recognise that it is beyond the Sentencing Council's remit to

²⁵ May, C. Sharma, N. and Stewart, D. (2008) *Factors linked to reoffending: a one-year follow-up of prisoners who took part in the Resettlement Surveys 2001, 2003 and 2004*, London: Ministry of Justice.

²⁶ Release (2009) *Response to the Sentencing Advisory Panel's consultation paper on sentencing for drug offences*.

²⁷ *Ibid.*

²⁸ Ministry of Justice (2011) *Criminal justice statistics: Quarterly update to December 2010*, London: Ministry of Justice.

²⁹ Ministry of Justice (2011) *Adult reconvictions: Results from the 2009 cohort*, London: Ministry of Justice.

address this issue, we would urge the Council to set out lower starting points and category ranges for these offences, in order to minimise the use of custody in such circumstances. This is particularly pertinent in relation to possession: in 2010, just under 1,200 people were sentenced to immediate custody for possession offences.³⁰ We do not believe that custody can ever be justified in such cases, either in terms of proportionality or effectiveness, and we would recommend, therefore, that custodial sentences are not offered as an option for any offence of possession. For lower level supply and production offences, the starting points and category ranges should be also reduced; again, we would recommend against custody as a sentencing option for these offences.

Moreover, whilst we welcome the guideline's proposals to significantly reduce the severity of sentencing for drug 'mules', and recognise the efforts of the Sentencing Council in this area, we would, nevertheless, urge the Council to go further. As the draft guideline acknowledges, drug 'mules' are often involved in the offence as a result of naivety or undue pressure; they are, in the Council's words, often "poor, disadvantaged and motivated primarily by need rather than by financial gain". As such, we firmly believe that custodial sentences are entirely disproportionate and wholly inappropriate. Additionally, retaining custody as a disposal for such individuals is unlikely to have any deterrent effect. Most drug 'mules' are very unlikely to be aware of the scale of punishment in the UK - Hibiscus, an organisation that works with female foreign national prisoners, has reported that potential couriers are often informed that, if caught, they will simply be deported.³¹ There is also no empirical evidence to support the efficacy of deterrence in sentencing.³² The last major review of sentencing, the Halliday Report, examined this issue in 2001, concluding that: "The evidence, though limited in this area, provides no basis for making a causal connection between variations in sentence severity, and differences in deterrent effects."³³

Question 14

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

As we have set out above, we are concerned that since open markets tend to be in areas of social exclusion, and as it is widely acknowledged that members of BME groups may often be subjected to greater levels of poverty, social deprivation, discrimination and exclusion, there is a real danger that the inclusion of 'Established evidence of community impact' as an aggravating factor at step 2 for supply offences would have a disproportionate impact on BME groups. We therefore believe that this should be reconsidered.

It is well established that those from ethnic minority communities are overrepresented throughout the criminal justice system: for instance, on average, five times more black people than white people in England and Wales are imprisoned.³⁴ Although the proposals

³⁰ Ministry of Justice (2011) *Criminal justice statistics in England and Wales*, supplementary tables (volume 5, all courts) - available at <http://www.justice.gov.uk/publications/statistics-and-data/criminal-justice/criminal-justice-statistics.htm>

³¹ Heaven, O. (2009) 'Long sentences for drug mules were never going to act as a deterrent' in *Guardian*, 14 May (<http://www.guardian.co.uk/commentisfree/2009/may/14/crime-drugs-smuggling-mules>).

³² Ashworth, A. (2010) *Sentencing and criminal justice*, Cambridge: Cambridge University Press.

³³ p.128: Halliday, J. (2001) *Making Punishments Work: A Review of the Sentencing Framework for England and Wales*, London: Home Office.

³⁴ Equality and Human Rights Commission (2010) *How fair is Britain? Equality, human rights and good relations in 2010*, London: Equality and Human Rights Commission.

contained in this guideline will do nothing to address this directly, shorter custodial sentences would at least be equally beneficial for all offenders, and clear guidance should help to reduce disproportion at the sentencing stage. To ensure that it is having this effect, the Sentencing Council, in measuring the impact of this guideline, should ensure that it measures the experiences of those from black and minority ethnic communities.

Question 15

Are there any further comments that you wish to make?

The CJA believes that a separate step should be inserted after step 5, once the appropriate sentence has been determined, where sentencers should consider whether a custodial sentence should be suspended in any case where the court has decided that the appropriate sentence is not more than 12 months' imprisonment (in accordance with the criteria for suspended sentences as set out under section 189 of the Criminal Justice Act 2003). One reason why we believe it may be appropriate to suspend a custodial sentence is that the offender is the sole or primary carer for dependent relatives. As we have set out above in response to Question 10, the effect of the imprisonment of a sole or primary carer can be extremely damaging for children and, indeed, for other dependent family members. We believe that this consideration should, therefore, be specifically mentioned in the new step in order to allow full recognition of this.

**Criminal Justice Alliance
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