

THE MAGISTRATES' ASSOCIATION

SENTENCING POLICY & PRACTICE COMMITTEE

Response to Consultation Paper on Sentencing for Drug Offences

Thank you for giving the Magistrates' Association the opportunity of commenting on this consultation paper. We found the background information to be very useful and felt that it could be used in a training package for all magistrates.

Q1

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

No, we are not aware of any research or other evidence that demonstrates the effectiveness or otherwise of increased sentence lengths for drug offences either in deterring individual sentenced offenders from committing further drug offences or in deterring others from committing similar crimes.

Q2

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

We agree that the most effective deterrents would be:

- The knowledge that any offence would carry a high likelihood of being detected and prosecuted *and*
- The knowledge that if prosecuted any profits made would be confiscated under POCA.

The power of making a confiscation order under POCA is reserved to the Crown courts and magistrates are unlikely to be sentencing any but the most minor offences listed on pp 54-60, however there may well be cases where offenders appearing at the magistrates' courts might have made relatively substantial profits. We would therefore suggest that eventually it may be sensible for Government to consider extending POCA to the magistrates' courts.

We believe that the use of closure orders have limited effect and tend to result in other nearby premises, perhaps in the next street or road, opening very shortly after a closure order is made.

Q3

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

We would agree that all roles would appear to have been properly identified and described. We feel that the categorization of the role of the offender based on the extent of the offender's involvement is well thought through and would provide a good framework for sentencing.

Q4

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

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

We agree that the Panel has taken the correct approach to calculating the key determinant of seriousness.

Care has to be taken when using the quantity of drugs involved as a key determinant of seriousness only because of the danger of double counting. The quantity of drugs seized is likely to determine whether the charge is possession or supply, so guidelines would need to make clear, for example, that within the amounts of drugs that would constitute supply this particular amount is small, medium or large.

Q5

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

We agree with the approach of the Panel to this aspect of assessing seriousness. As noted by the Panel it is difficult to determine the purity of many drugs especially classes B and C. We agree with the Panel's approach that purity should not be a significant factor in determining seriousness in most cases but where it is known and available to the sentencing court it should be considered - care being taken not to double count. This final point needs to be clearly noted by sentencers.

Q6

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

The value of any commodity is a function of its rareness/availability, cost of production and lastly whatever level of profit the vendor thinks that the market will stand. These will all vary; therefore street value does not appear to us to be relevant in assessing seriousness.

Q7

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

Although we understand the points made in paragraph 80, we feel that this aspect of dealing may be hard to quantify in court. If for example the locality chosen is a park, would that include the streets bounding that park and if so, how far out from the park itself would the locality be said to extend? Furthermore the corollary to this proposal would seem to be that it would be less serious if dealing were to take place in an area which has hitherto been relatively drugs-free – and we do not consider that argument to be acceptable at all.

A minority of our members felt that an offence carried out in areas of general deprivation and social exclusion should be regarded as more serious. The reason being is that all too often drug dealing is seen as an easy option for economic gain, and anything which labels such places as drug markets has a negative impact on any social improvement enterprise which may be contemplated or initiated.

Q8

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

Members had mixed views on this issue.

A small majority felt that as less harm had been caused by the supply of a fake drug, the offence should be sentenced as if it were an offence of dishonesty.

A minority view was that it seems extremely odd that the courts should ever seem to take on a sort of Trading Standards role by prosecuting people for dishonesty when they have been selling as illegal drugs substances which are completely innocuous. Those who held this view considered that it would be more logical instead to take this as a mitigating factor.

Another minority view believed that an offender supplying fake drugs should be charged with both supplying a controlled substance and dishonesty, because the culpability and the harm can arguably be greater, depending on what substance is actually supplied – there is no reason at all for any mitigation.

Q9

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

With regards to the first point we would consider that there would be mitigation but that this might only be slight. There should be strong evidence that ‘mistaken belief’ was indeed the case. The point raised in paragraph 87 would appear to us to be covered by charging the offence at level 4.

Q10

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

If the person involved believed that the substance he was importing was, for example, tobacco products and that he was actually involved in defrauding HM Customs & Excise, then we would consider that that could constitute mitigation as he would have been under the impression that he was importing goods that were legally available – once the duty had been paid.

Q11

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

We are concerned that, according to paragraph 88, ‘...there is little evidence that supports the link between drug use and pain relief’. As that evidence is apparently lacking, to what extent should the courts take a compassionate approach? We would consider that the degree of compassion should be limited unless or until there is proper scientific evidence. When considering mitigation the particular offender’s personal circumstances and how the drug was administered might be taken into account but each case must be considered separately.

Q12

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

We would agree, but this aspect needs to be proved. Deliberate targeting of vulnerable victim(s) is a factor indicating higher culpability (Annex D) but each case must be considered separately.

Q13

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

This is agreed but there could be some reference to a more serious offence if an offender is encouraging a person to try drugs for the first time.

Q14

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

We agree to a certain extent, but this then raises the question of how otherwise couriers can be deterred? If it becomes accepted that the courts consider that drugs couriers are vulnerable individuals who merit lower sentences then such individuals might feel that the risks involved are sufficiently low to encourage them to undertake this role. Currently offenders who are foreign nationals can only be deported if they have committed an offence which has resulted in at least 12 months custody, maybe this should be reconsidered for offences involving drugs.

Some members felt that if ‘vulnerability’ can be used in mitigation, then this factor may be increasingly used. It is the use of vulnerable people, and it would seem increasingly vulnerable women, that enables drug dealers to operate and get away with it. The consequences of acting as a courier should be advertised more widely.

Q15

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

Is there any evidence that the production, importation or supply of drugs is associated with any particular group? If so then that group will feature particularly highly in the number prosecuted for this range of offences, but we would argue that that would not constitute a valid reason for altering the Panel’s proposals. Otherwise we do not envisage any such disproportionate impact.

Q16

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

We are concerned that these changes could be made, based on an assumption that Confiscation Orders will be an effective deterrent when no research appears to have been carried out to justify this assumption. The toll on the Nation in social, health and economic grounds alone emphasises the need to maintain the most severe punishments for leading and significant role participants in the drug trade.

We are unclear whether confiscation orders should or should not be taken into account when assessing whether the provisional sentence is commensurate to the seriousness of the offence. Paragraph 106 says 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 offence. Paragraph 110 states that confiscation orders ‘are punitive even if that is not the primary purpose’. That would suggest that they should be taken into account. However paragraph 109 states that (except for the exceptions given’, ‘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’.

Q17

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

No.

Q18

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

Permitting Premises to be used – p.57. We disagree most strongly with the wording of the nature of activity cited in Level 2 as it would seem to contradict the comments made in paragraph 77, ‘*The Panel considers that...the deliberate targeting of any premises, intending to locate people who are susceptible to persuasion...is an aggravating factor*’. People who are visiting clubs or public houses and who are likely to be more or less under the influence of alcohol will certainly be susceptible to persuasion.

Apart from that, if the word ‘clubs’ is meant to include sports clubs, where there will be large numbers of young people present, then allowing those premises to be used to supply or consume drugs would be a serious aggravating factor.

Further comment

The Magistrates' Association welcomes the opportunity to respond to this consultation as a great deal of offending is related to drug abuse. For some time now magistrates have been involved in the running of Dedicated Drugs Courts, which have been operating in two pilot areas with considerable initial success, and we are glad that this consultation is taking the business of tackling the link between crime and the misuse of drugs a step further.

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