

Response from IDPC to the Sentencing Council for England and Wales Consultation on the Drug Offences Guideline

This consultation response has been compiled following an expert seminar on 'Proportionality of Sentencing in Drug Offences' which was hosted by the International Drug Policy Consortium (IDPC) in partnership with the Sentencing Council and the Transnational Institute (an IDPC member organisation) in London on 20th May 2011. Please find attached the report from that seminar, the agenda and list of participants.

The decision of the Council to follow up on the previous work of the Sentencing Advisory Panel and the Sentencing Guidelines Council, on drug law sentencing is very welcome. This area of sentencing within the UK has long suffered from inconsistency, technical difficulty, and concerns around proportionality and effectiveness. Our members broadly support the wealth of discussion and proposals included in the consultation document, but this response concentrates on three areas where we consider that significant changes should be made before the final guideline is published.

1. Determinants of sentencing

The consultation paper proposes a framework for sentencing that attempts to draw a distinction between different actors within the drug market. This is a welcome proposal that fits well with IDPC's advice on this subject¹. Drug law sentencing around the world has been poor at distinguishing between minor and major actors in the drug market and has resulted in the misplaced use of harsh punishments primarily on the subordinate actors in the supply chain – for example, drug 'mules'.

The Council proposes to base the sentencing decision around 'role' and 'quantity' as primary determinants, while a range of other factors such as involvement of children, or the offenders' vulnerability, would be considered as aggravating or mitigating factors.

IDPC recommends that a third primary factor be added – that of 'motivation'. Although there is some reference to motivation in the proposed guidelines, it is insufficient to reflect the impact this has on culpability and therefore seriousness.

Indeed, distinguishing the 'role' of offenders according to a leading, significant, and subordinate function is a good way forward, but it does not take sufficient account of the motivation for the offence. With drug offences, this crucial element will not be given sufficient weight if relegated to consideration of aggravation or mitigation.

Specifically, three elements of motivation should have a significant impact on level of sentence:

- I. *Degree of coercion.* Many people involved in drug importation and supply are to some degree subject to coercion and intimidation to engage in the offence – for example, threats of violence should they not co-operate. While this does not remove their culpability, it does affect its degree. Considering their role as subordinate does not do justice to the position that many drug 'mules' and retail suppliers are put in by those in control of the market.

¹ International Drug Policy Consortium (2009), 'Drug law reform', chapter 2.1, In IDPC Drug Policy Guide. pp. 17 -27, <http://www.idpc.net/sites/default/files/misc/2.1.pdf> [last accessed: 13/06/2011]

- II. *Degree of profit.* Cultivation and supply offences are committed for a wide range of reasons, ranging from a pure profit motive to collective sharing of substances. The level to which an individual is attempting to make a financial gain from the transaction is therefore crucial. Many people caught supplying, or in possession of quantities beyond personal use thresholds, are engaged in a form of retail distribution amongst identifiable groups of consenting customers, while accruing little or no financial gain. These types of offences, where the defendant can demonstrate that financial gain was not the motive, should be considered as less severe.
- III. *Drug dependence.* The consultation paper recognises the relevance of a person's own drug dependence, but we feel it is not given enough prominence. Dependence should be considered under the proposed determining factor of 'motivation'. Where a defendant is able to demonstrate that the offence was motivated in part by the need to maintain their own addiction (once again this does not remove culpability, but it does affect its degree) this should open up the option of sentencing to integrate drug dependence treatment (whether in prison or in the community).

If the Council feels that re-working the guideline to a three point matrix is not considered practical, at the very least more emphasis and clarity should be given within the existing guideline to the 'degree of coercion, degree of profit, and drug dependence within role'. In addition, where there is evidence of drug dependence as motivation, this should be an overriding factor (mitigating or otherwise) and trigger a presumption against custody.

2. Proportionality of penalties

The introduction to the consultation document refers to the Council's aim to 'ensure that all sentences are proportionate to the offence committed'. Annex B also refers to the expectation that the Council must have in regard to the production of a guideline to (inter alia) 'the cost of different sentences, and their relative effectiveness in preventing re-offending'. Towards this end, the decision of the Council to leave 'the average severity of sentencing unchanged' is inconsistent. This decision appears to leave discussion of the overall level, effectiveness, and proportionality of drug sentencing in the UK outside of the consultation.

It is crucial that these issues are addressed by the Council. We are aware that they raise highly sensitive issues in the media and policy debate, but that is no reason to inhibit a technical review of the effectiveness and proportionality of sentencing in this complex field. The current average severity of sentences for drug offences in the UK cannot remain unquestioned as:

- The international evidence²³ increasingly calls into question the effectiveness of long prison sentences for medium and low level supply offences. The 1988 UN Convention states that drug law punishments should be 'desirable or necessary for the prevention or suppression of illicit traffic'. Therefore effectiveness is seen in terms of the extent to which sentences deter or prevent continued trafficking. However, there is no evidence suggesting that long prison sentences have any impact on the aggregate scale of the market, or indeed that they have a significant deterrent effect on individuals.
- Meanwhile, average sentences have been increasing in recent years in the UK. The Sentencing Council Analysis & Research Bulletins – Drug Offences (March 2011)⁴ recorded that between 2002 and 2006,

² Genevieve Horwood (July 2009), *Response to the Sentencing Advisory Panel's Consultation paper on sentencing for drug offences* (London: Release), http://www.exchangesupplies.org/conferences/NCIDU/2009_NCIDU/resources/SGC_submission.pdf [last accessed: 13/06/2011]

³ Sentencing Advisory Panel, *Advice to the Sentencing Guidelines Council - Sentencing for drug offences*, <http://www.drugscope.org.uk/OneStopCMS/Core/CrawlerResourceServer.aspx?resource=C20F6BE6-4F43-469B-B294-CACAAAD3D6CC&mode=link&guid=c03a022d79f642c4b87d4dad4acad3db> [last accessed: 13/06/2011]

⁴ Sentencing Council (March 2011), *Analysis and research bulletins - Drugs offences*, http://sentencingcouncil.judiciary.gov.uk/docs/Analysis_and_Research_Bulletins_-_Drugs_Offences.pdf [last accessed: 13/06/2011]

the average length of custodial sentences saw an increase across all classes of drug, rising by 27% over this time from 4 years 11 months to 6 years 3 months. The Ministry of Justice in its impact assessment of the Sentencing Council referred in this regard to *“historical trends in upward sentencing drift”*.⁵

- The UK judiciary has tended to pass higher sentences for these offences than other countries – all countries have high maximum sentences for drug offences, but the UK sits significantly above what seem to be the average actual sentences awarded. A few examples are given here from information supplied by our network of experts:
 - Importation of 800g of cocaine, where the defendant is considered to be a drug ‘mule’: Average sentences range from – Argentina 4 to 5 years imprisonment; Australia 4 years imprisonment; Italy 4 to 6 years imprisonment; the Netherlands 3 to 12 months imprisonment; Switzerland 6 to 12 months imprisonment. Consultation ‘starting point’ – 6 years and 6 months imprisonment.
 - Cultivation of 100 cannabis plants: Australia 1 to 2 years imprisonment; the Netherlands 6 weeks imprisonment; Switzerland, a short term of imprisonment or a community penalty. Consultation ‘starting point’ for leading role – 4 to 6 years imprisonment.
 - Street dealing of small amounts of Class A drugs: Australia 2 years imprisonment; Italy 6 to 9 months imprisonment; the Netherlands 3 to 12 months imprisonment; Switzerland non-custodial sentence. India 6 months imprisonment and/or a fine. Consultation ‘starting point’ – 5 to 8 years custody. There is also a contradiction in the draft guideline, in that all street dealers are assumed to be in leading roles, when many will act as subordinates, under coercion, or not for financial gain – the same division of roles should be applied to this offending group as to other groups.

While this is in no way a scientific study, it demonstrates that our sentencing practice is harsher than many other countries. The European Monitoring Centre on Drugs and Drug Addiction (EMCDDA), in the process of collecting data on sentencing levels across the EU, in a preliminary report also places the UK in the far upper range for prison sentences for supply offences with an average twice as high compared to France, Denmark or Poland.⁶ It is clear that the UK has not been more effective than these countries in suppressing drug trafficking, so it is difficult to justify these higher sentences on the basis of effectiveness through deterrence.

- In terms of cultivation and supply offences, the attempt to stifle drug markets through the award of heavy sentences for these offences has led to the award of disproportionate penalties compared to the tariff of punishments for other types of offence. A review of sentencing guidelines should acknowledge these discrepancies, and seek to resolve them. For example, the proposed ‘starting point’ in the consultation document for an offender in a subordinate role who supplies a medium quantity of a class A drug would be 5 to 8 years imprisonment. This is higher than the average sentence for GBH, or wounding with intent. We are sure that such disproportionate sentences are not the intention of the Council, but they are the inevitable result of taking current average sentences as an appropriate starting point.
- Finally, it is important to note that many of these same issues apply to possession for personal use offences. Looking at the starting points provided in the consultation document, we welcome the Council’s presumption against custody for those in possession of controlled substances as more proportionate. However, we are concerned that the elevation of sentencing range to include custodial options on the basis of quantity is wrong and disproportionate. In cases of possession for personal use there is no heightened culpability or potential harm to third parties on the basis of quantity.

⁵ Ministry of Justice, Impact Assessment of Sentencing Council for England and Wales, signed off 13 January 2009, p.4. See: <http://www.justice.gov.uk/publications/docs/coroners-justice-bill-ia-sentencing-council.pdf>

⁶ EMCDDA Selected Issues 2009, Drug Offences: Sentencing and Other Outcomes, p. 15.

Recognising the limits of the Council's mandate, we nevertheless urge the Council to use its influence to begin a discussion regarding decriminalisation of possession for personal use offences.

We therefore call on the Council to adjust all of the tables in the consultation document to reflect levels of punishment that take account of the effectiveness of sentences in achieving their aim, and of their proportionality in comparison with other offence categories.

3. Medicinal use of cannabis

The potential for impact on sentence of medical use in cultivation, supply or possession offences is not discussed in adequate detail in the consultation document. We consider that this issue needs to be given careful attention in the next stages of the refinement of the guideline.

The current state of the research and medicines development process, in relation to medicines derived from the cannabis plant, leaves sentencers with a real dilemma. It is now clear from studies around the world that the active ingredients of cannabis do have proven medical benefits in the treatment of conditions associated with Multiple Sclerosis and some forms of cancer, and it is likely that this evidence will become stronger on these conditions and many others in the coming years. However, the necessary processes for research and development of cannabis based medicines, and approval through the Medicines Control Agency, are by their nature long and complex. In the meantime, sufferers are aware of the potential benefits of cannabis for their conditions. Being unable to obtain them through prescription, they will be tempted to turn to the illegal market.

It seems to us, therefore, that the issue of mitigation for medical use is a crucial one. We have seen in other administrations a large number of miscarriages of justice where severe punishments are applied to individuals whose main motivation has clearly been the treatment of their own medical condition. It is crucial, therefore, to devise a suitable guideline on this issue that protects the genuinely ill from untoward punishment, while ensuring that a loophole is not created for others. We suggest a presumption against custody in all cases where it is established that a person is motivated by reasons of medical use.

To a large degree, the draft guideline is very helpful and is supported by the broad membership and international expertise within IDPC, but we feel strongly that the above mentioned issues must be addressed in the next stage of development if the guideline is going to lead to a just, proportionate and effective sentencing practice under the UK drug laws.



Mike Trace
Chair
International Drug Policy Consortium

June 2011

IDPC is a global network of NGOs and professional networks that aims to promote objective and open debate on the effectiveness, direction and content of drug policies at national and international level, and supports evidence-based policies that are effective in reducing drug-related harm. We currently have 80 member organisations worldwide, and extensive communication and contacts with a range of experts in the field. We produce a series of reports, training materials and briefing papers; we disseminate the reports of our member organisations about particular drug-related matters; and we offer expert consultancy services to policy makers and officials around the world.

The following international experts who have been involved in the seminar are co-signatories of this letter:

Anand Grover, UN Special Rapporteur on the Right to Health and Head of HIV/AIDS Unit at the Lawyers Collective, India

João Moraes Rocha, Judge at the Court of Appeal in Lisbon, Portugal

Jorge Vicente Paladines Rodríguez, Professor of law at the Universidad Andina Simón Bolívar and the Instituto de Altos Estudios Nacionales, Ecuador

Luciana Boiteux, Associate Professor and Coordinator of the Research Group on Drug Policy and Human Rights, Federal University of Rio de Janeiro, Brazil

M Puravalen, Human Rights Lawyer, Malaysia

Marc Mauer, Executive Director of the Sentencing Project, USA

Martin Jelsma, Drugs and Democracy Programme Coordinator at the Transnational Institute, The Netherlands

Martin Vazquez Acuña, Judge in Buenos Aires, Argentina

Pedro Abramovay, Former National Secretary on Drug Policy (SENAD), Brazil

Richard Elliott, Executive Director of the Canadian HIV/AIDS Legal Network, Canada

Tripti Tandon, Lawyer, Lawyers' Collective, India

Warren Young, Deputy President of the New Zealand Law Commission, New Zealand