

# Drug Offences Consultation

January 2020



# **Drug Offences**

## **Consultation**

# About this consultation

- To:** This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.
- Duration:** From 15 January to 7 April 2020
- Enquiries (including requests for the paper in an alternative format) to:** Office of the Sentencing Council  
Royal Courts of Justice  
(full address as below)  
Tel: 020 7071 5793  
Email: [info@sentencingcouncil.gsi.gov.uk](mailto:info@sentencingcouncil.gsi.gov.uk)
- How to respond:** Please send your response by 7 April to:  
Vicky Hunt  
Office of the Sentencing Council  
Room EB20  
Royal Courts of Justice  
Strand  
London WC2A 2LL  
DX: 44450 RCJ/Strand  
Email: [consultation@sentencingcouncil.gov.uk](mailto:consultation@sentencingcouncil.gov.uk)
- Additional ways to feed in your views:** This consultation exercise is accompanied by a resource assessment, and an online questionnaire which can be found at:  
[www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)  
A series of consultation meetings is also taking place. For more information, please use the “Enquiries” contact details above.
- Response paper:** Following the conclusion of this consultation exercise, a response will be published at: [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)
- Freedom of information:** We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents’ names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.  
In addition, responses may be shared with the Justice Committee of the House of Commons.  
Our [privacy notice](#) sets out the standards that you can expect from the Sentencing Council whescale of scalen we request or hold personal information (personal data) about you; how you can get access to a copy of your personal data; and what you can do if you think the standards are not being met.

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# Introduction

## What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines for the courts to use when passing a sentence. The Council consults on its proposed guidelines before they come into force and makes changes to the guidelines as a result of consultations.

## Why Drug offences?

The Sentencing Council's Drug Offences Definitive guideline came into force in February 2012. It includes guidelines for sentencing offences of importation/exportation, supply, possession with intent to supply, production, permitting premises to be used, and possession, all relating to drugs controlled under the Misuse of Drugs Act 1971 (the MDA).

The Council evaluated the guideline and published its [assessment](#) in June 2018. The evaluation found that the guideline had led to some small unanticipated changes in sentencing severity but its overall effect was not considered to be a cause for concern. However, drug offending has changed over time as, for example, new drugs emerge and the nature of offending changes. The evaluation also gave some indications that drug offending was becoming more serious. In addition, the Psychoactive Substances Act 2016 (the PSA) created new offences of importation/exportation, supply, possession with intent to supply, production and possession in a custodial institution in relation to psychoactive substances not controlled under the MDA.

The Council has therefore decided to review the current Drug offences guidelines and revise them to ensure that they reflect the type of offending coming before the courts today, and to include the new legislation on psychoactive substances for the first time.

Drug offences are high volume offences both in the magistrates' courts and Crown Court. In 2018 there were around 31,900 adult offenders sentenced for offences under the MDA and PSA, 64 per cent were dealt with in the magistrates' courts, and 36 per cent in the Crown Court.<sup>1</sup>

The revised drug offences guideline will provide sentencers across the Crown Court and magistrates' courts with guidance for all of the offences listed below, which will assist in achieving the Council's objective of consistent sentencing, and provide transparency for the public regarding the penalties for these offences.

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<sup>1</sup> The statistics in this document are sourced from the Court Proceedings Database, Ministry of Justice.

## **Which offences are covered by the guideline?**

Misuse of Drugs Act 1971:

- section 3 (and Customs and Excise Management Act 1979 (section 170(2)) – fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug
- section 4(3) – supplying or offering to supply a controlled drug
- section 5(3) – possession of a controlled drug with intent to supply it to another
- section 4(2)(a) or (b) – production of a controlled drug
- section 6(2) – cultivation of a cannabis plant
- section 8 – permitting premises to be used for drug-related activity
- section 5(2) – possession of a controlled drug

Psychoactive Substances Act 2016:

- section 4 – producing a psychoactive substance
- section 5 – supplying, or offering to supply, a psychoactive substance
- section 7 – possession of a psychoactive substance with intent to supply
- section 8 – importing or exporting a psychoactive substance
- section 9 – possession of a psychoactive substance in a custodial institution

## **What is the Council consulting about?**

The Council has produced this consultation paper in order to seek views from as many people as possible interested in the sentencing of drug offences.

However, it is important to clarify that the Council is consulting on sentencing guidelines for these offences and not the legislation upon which such offences are based. The relevant legislation is a matter for Parliament and is, therefore, outside the scope of this exercise.

Through this consultation process, the Council is seeking views on:

- the principal factors that make any of the offences included within the draft guideline more or less serious;
- the additional factors that should influence the sentence;

- the approach taken to structuring the draft guidelines;
- the types and lengths of sentence that should be passed;
- differences between the current guidelines and these new, revised guidelines; and
- anything else you think should be considered.

A summary of the consultation questions can be found at **Annex B**.

## **What else is happening as part of the consultation process?**

This is a 12-week public consultation. During the consultation period, the Council will host a number of consultation meetings to seek views from groups with an interest in this area as well as “road testing” the draft guidelines with sentencers. Once the consultation exercise is over and the results considered, a final guideline will be published and used by all courts.

Alongside this consultation paper, the Council has produced an online questionnaire. The Council has also produced a resource assessment for the guideline, along with a statistical bulletin and data tables showing current sentencing practice for these offences. The online questionnaire, resource assessment, statistical bulletin and data tables can be found on the Sentencing Council’s website: [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)

In the following sections each of the proposed guidelines is outlined in detail and you will be asked to give your views. You can give your views by answering some or all of the questions below either by email to [consultation@sentencingcouncil.gov.uk](mailto:consultation@sentencingcouncil.gov.uk) or by using the online [questionnaire](#).

# Section One: Overarching issues and the context of the guidelines

This consultation seeks views on five revised sentencing guidelines for offences under the Misuse of Drugs Act 1971 (the “MDA”) and four new guidelines for offences under the Psychoactive Substances Act 2016 (the “PSA”).

The current guidelines for offences under the MDA came into force in February 2012, and cover offences of importation/exportation; supply, possession with intent to supply; production/cultivation; permitting premises to be used; and possession of a controlled drug. The Council carried out an evaluation of the guidelines in 2017-18, which found that the guidelines had led to some small unanticipated changes in sentencing severity but that their overall effect was not considered to be a cause for concern. In developing these revised guidelines for consultation, we have held initial discussions with Crown Court judges and with magistrates, and these discussions have suggested that the guidelines are, overall, well understood and well-liked by sentencers. However, there were suggestions for potential improvements, which we will discuss further below.

MDA offences are among the most common offences sentenced in both the magistrates’ and Crown Courts. In 2018, 31,800 offenders were sentenced for these offences.

The evaluation also found some evidence for an increase in the seriousness of the offences coming before the courts, and evidence of changes in the nature of the drug market and drug offending. Since 2012, there have been new drugs coming onto the market, including in particular new types of synthetic cannabinoids and strong opioids such as fentanyl and carfentanil. There have also been changes in the way in which drug offences are committed. This includes the continued rise in “county lines” dealing in which criminal gangs receive orders for drugs using dedicated phone lines and transport those drugs from city hubs to smaller towns and rural areas. Such offending is often accompanied by increased violence and exploitation of children and vulnerable adults. The other significant change is the use of the internet to enable these offences, including using the so-called “dark web” to sell drugs, which can be delivered by mail.

Further information on the numbers of offenders sentenced, and trends in sentencing, can be found in our statistical bulletin:

<https://www.sentencingcouncil.org.uk/publications?s&cat=statistical-bulletin>.

There has also been a significant legislative change since the current guidelines were introduced, when the PSA came into effect in May 2016. This created new offences which are similar to several offences in the MDA, covering importation/exportation; supply, possession with intent to supply; production; and possession in a custodial institution (simple possession is not an offence). The main difference between the PSA offences and their MDA counterparts is that there is no list of “psychoactive substances” mirroring the list of controlled drugs under the MDA. Instead a psychoactive substance is defined in legislation by the effect it has on the user. This means that a broad range of substances

can be covered, with a similarly broad range of types of harm. The other key difference in legislation, in terms of the impact on sentencing guidelines, is that the statutory maximum penalties for the PSA offences are lower than those for their MDA counterparts.

There have been comparatively few prosecutions for PSA offences since the Act came into force, and few offenders sentenced. In 2018, 110 offenders were sentenced for offences under the PSA.

## Applicability of guidelines

When issued as definitive guidelines these guidelines will apply only to offenders aged 18 and older. General principles to be considered in the sentencing of children and young people are in the Sentencing Council's definitive guideline, [Overarching Principles – Sentencing Children and Young People](#).

## The guideline in relation to current practice and existing guidelines

In preparing the revised guidelines, the Council has had regard to the purposes of sentencing and to its statutory duties. The Council's aim throughout has been to ensure that all sentences are proportionate to the offence committed and in relation to other offences.

As a first step, the Council considered the evaluation of the existing guideline, published in June 2018, which was based on analysis of statistical data,<sup>2</sup> and a content analysis of Crown Court judges' sentencing remarks.

The Council also considered more recent statistical data from the Ministry of Justice's Court Proceedings Database for the offences covered in the guideline to get a picture of current sentencing levels. In addition, an analysis of transcripts of judges' sentencing remarks was carried out, covering the sentencing of around 120 offenders, in order to better understand how judges are using the existing guideline and any potential areas where change is needed, as well as how any changes we make to the guideline might affect sentencing practice.

When analysing these different data sources, the Council has considered how the current guideline is being used, including which factors are currently being used as expected, and whether any factors are causing problems for sentencers given the nature of drug offending that comes before them in the courts today.

The Council is grateful to the Home Office for sharing data on drugs seized as part of various law enforcement operations, which is comparable with the data used in the development of the current guidelines and has provided useful comparisons. The Council would also like to thank the Metropolitan Police for sharing data on drug purity and yield, which has assisted the Council in considering levels of harm and quantities.

Finally, a small-scale research exercise was carried out to gather sentencers' views on the current drug offences guidelines and their attitudes to sentencing in this area. Further

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<sup>2</sup> Sources included the Ministry of Justice's Court Proceedings Database, the Crown Court Sentencing Survey, and a bespoke survey conducted in magistrates' courts.

qualitative research will be carried out with sentencers during the consultation period to help assess whether the proposed new guidelines will work as intended, whether there may be unintended consequences and to obtain sentencers' views on the content of the guidelines.

## **Approach to revising the guidelines**

The Council has considered what changes might be needed in light of the evaluation and changes to drug offending noted above. However, as many aspects of the guidelines are working well, the Council does not intend to make changes unless there is a particular need, either suggested by sentencers or based on evidence of changes in offending behaviour, including evidence from other agencies within the criminal justice system.

The Council has reviewed all elements of the current guidelines, including harm and culpability factors, sentence levels, aggravating and mitigating factors and other elements of guidance to sentencers, and has considered both the overall approach taken and the detail of factors and sentence levels.

Where the approach taken by the current guidelines is common across several guidelines (for example, for the MDA importation; supply; and production offences), the Council does not intend to change this, save where it appears that a new factor is required in one guideline but not the others.

The Council has also agreed that, based on the evaluation and evidence from sentencers thus far, there is no evidence to suggest that a change in sentencing practice is required. The Council does not therefore intend the revised guidelines to change sentencing practice overall.

***Consultation question 1 – Do you agree with the scope of the draft revised guideline and the offences which it covers?***

# Section Two: Misuse of Drugs Act 1971 offences – importation/exportation, supply/PWITS and production/cultivation

This section covers the most serious offences under the MDA

- section 3 (and Customs and Excise Management Act 1979 (section 170(2)) – fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug
- section 4(3) – supplying or offering to supply a controlled drug
- section 5(3) – possession of a controlled drug with intent to supply it to another (“PWITS”)
- section 4(2)(a) or (b) – production of a controlled drug
- section 6(2) – cultivation of a cannabis plant.

These offences, particularly the supply/PWITS offences, make up a large number of the drug offences sentenced in both the magistrates’ courts and the Crown Court, with a wide variation of sentence types and average custodial sentence lengths across the offences.

Around 260 offenders were sentenced in 2018 for importation. Of these, 57 per cent were sentenced in relation to Class A drugs, and 27 per cent in relation to Class B. The vast majority of those sentenced for Class A offences received an immediate custodial sentence (96 per cent).

Around 8,600 offenders were sentenced in 2018 for supply/ PWITS offences. Of these, 71 per cent were sentenced in relation to Class A drugs, and 28 per cent in relation to Class B. The vast majority of those sentenced for Class A offences received an immediate custodial sentence (83 per cent).

Around 2,000 offenders were sentenced in 2018 for production/cultivation. Of these, over 99 per cent were sentenced in relation to Class B drugs. 52 per cent of those sentenced for Class B offences received a custodial sentence (23 per cent

suspended and 29 per cent immediate), and 21 per cent received a community order.

The current guidelines for these offences take the approach of assessing culpability with reference to the offender's role, and assessing harm using the quantity of the drug in question.

The Importation offence guideline was the only one of the current drug offences guidelines which the Council intended would change sentencing practice; the aim was for the guideline to reduce the sentences for so-called "drug mules". The evaluation found that this appeared to have had the intended effect, and that the guideline had not had other unintended consequences.

The Council does not now wish to change sentencing practice for this offence. However, the Council wishes to ensure that the guideline now reflects some specific changes in offence types coming before the courts, including cyber-enabled crime and county-lines type activity.

The current guideline approaches the assessment of culpability and harm in a similar way across the three offence types. The Council has seen no evidence so far that suggests a need to differentiate the approach between offences, so proposes to continue using the same approach to culpability and harm across all three guidelines.

## **STEP ONE**

The first step of the guidelines is to consider the culpability level of the offender and the harm caused by the offence by the assessment of a series of factors.

### **Culpability factors**

The current guidelines' approach to culpability, based on the role of the offender rather than other factors, seems to be working well in general, and the Council has decided to retain this overall approach. However, the Council has decided to make some changes to culpability factors to reflect current offending and to make the guideline easier to use.

#### **"Leading role" culpability factors**

The current factors remain for the most part unchanged. The Council has decided to add new factors to "leading role" to address some particularly serious offending prevalent in county lines supply cases, and other cases, including some of cannabis cultivation. These factors relate to the systematic exploitation of young and



vulnerable people, and to the practice known as “cuckooing”: occupying the home of a vulnerable individual to use as a base for selling drugs. In Importation cases, there is a similar type of factor in which the offender has used a vehicle belonging to an otherwise innocent third party to transport drugs. The Council regards these factors as very serious aspects of offending, so has decided to place these in the “Leading role” category, but is seeking views on how these factors might work in practice. These new factors are as follows:

Exploitation of children and/or vulnerable persons to assist in drug-related activity

Involving an innocent agent in the commission of the offence (importation guideline only)

Exercising control over the home of another person for drug-related activity (supply and production guidelines)

### **“Significant role” culpability factors**

The current factor “Motivated by financial or other advantage, whether or not operating alone” applies to nearly all cases, as very nearly all drug offending is driven by some level of financial motive, whether that be to obtain money, free drugs or to pay off a drug debt. Evidence from magistrates and the experience of members of the Council suggested that in some low culpability cases where there is a financial motive, sentencers were disregarding this factor, or trying to work around it, often in inconsistent ways. The prevalence of this factor, and risk of inconsistent workarounds, suggested that the factor should be changed to reflect what is happening in practice; namely, that offenders who have a very small, limited financial motive should explicitly be placed in the “Lesser role” category, whilst to be placed in the “Significant role” category, the level of financial or other advantage needs to be higher.

The factor at all levels has also been redrafted so that what is considered is the “expectation” of financial advantage, rather than the offender’s being “motivated” by this. This fits better with evidence presented to sentencers, as there is often clearer evidence of an expectation of a level of financial advantage rather than evidence of the offender’s being clearly *motivated by* it. The revised factor for “Significant role” is as follows:

Expectation of significant financial or other advantage, (save where this advantage is limited to meeting the offender’s own habit) whether or not operating alone.

### **“Lesser role” culpability factors**

Following the changes to “Financial advantage” factors set out above, the Council has added a factor in the “Lesser” role category for those offenders who expected limited or no financial gain, which is drafted as follows:

Expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)

Having added factors to the "Leading role" category to cover those who exploit children and vulnerable people, the Council also considered whether the lesser role factors covering offenders who had themselves been exploited were sufficient to cover all types of exploitation, including county lines type activity. The current factors are as follows:

Engaged by pressure, coercion, intimidation

Involvement through naivety/exploitation

The Council concluded that they were sufficient, but would be interested in views of consultation respondents on additional factors, or how these factors could be drafted differently.

To illustrate the proposed revisions to culpability for these three guidelines, a section of the guidelines is given below:

The court should determine the offender's culpability (role) and the harm caused (quantity) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories, or where the level of the offender's role is affected by the scale of the operation, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

### Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive

#### Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Exploitation of children and/or vulnerable persons to assist in drug-related activity
- Involving an innocent agent in the commission of the offence – importation guideline

- Exercising control over the home of another person for drug-related activity – supply guideline

#### **Significant role:**

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage, (save where this advantage is limited to meeting the offender's own habit) whether or not operating alone
- Some awareness and understanding of scale of operation

#### **Lesser role:**

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- If own operation, solely for own use (considering reasonableness of account in all the circumstances) - importation and supply guidelines
- Expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)

***Consultation question 2 – Do you have any comments on the changes proposed to the culpability factors?***

***Consultation question 3 – Are there any additional differences between the three types of offence, in terms of culpability, which you feel the guidelines should take into account?***

## **Harm factors**

Once the court has determined the level of culpability the next step is to consider the harm caused or intended to be caused by the offence. For these three offences, the harm is based on the quantity of the drug in question. The harm table in the current guideline sets out a list of the most commonly sentenced drugs and, for each category, gives an indicative quantity on which the starting point is to be based. Where the actual quantity in the case is higher or lower than the indicative quantity, the sentencer can fix a starting point higher or lower than that given in the sentence table, as appropriate, before considering aggravating and mitigating factors.

The Council considered how well the approach based on quantity was working and considered revising it to take into account a broader range of concerns. However, the Council felt that the current approach is well understood and works well, particularly for an offence where very often the individual end user of the drugs involved is not known, so the harm to any individual victim cannot be assessed. Additionally, the Council felt that other concerns are adequately reflected at step 1 in culpability factors, or at step 2 in aggravating and mitigating factors and therefore proposes to retain the approach based on quantity.

This has led, however, to several further questions. Firstly, which drugs should be included with specific quantities in the harm tables? The current guideline covers the following:

- Heroin, cocaine
- Ecstasy
- LSD
- Amphetamine
- Cannabis
- Ketamine

These drugs were the most common when the current guidelines were published in 2012, although some (heroin, cocaine, cannabis, ecstasy) were much more common than others. The Council has reviewed information from the Home Office on seizures of drugs and quantities seized, and there have not been many significant changes since 2012. The rarer drugs listed (LSD, amphetamine and ketamine) are no more common than some other very rare drugs, and the Council did consider removing them altogether, however, as the guidance is already there, providing assistance to sentencers in those rare cases involving these drugs, the Council agreed to retain all those in the current list.

However, the Council did consider whether any additional types of drug should be added to the table, with appropriate quantities. Discussions with the National Crime Agency (NCA) and police suggested that it would be useful to include quantities for ecstasy tablets and MDMA separately, since the latter is often dealt in other forms (such as powders) so giving separate quantities would assist the courts. Information on drug seizures also suggested that including synthetic cannabinoid receptor agonists (SCRAs) would be useful, as these drugs (more commonly known as “Spice”) are becoming more common. The Council decided to include both MDMA and SCRAs in the table separately.

As the drugs involved in these offences do change, the Council has agreed to take two steps to ensure that the guidelines continue to be useful as the drug market changes in the future. The first step is to include some text above the “Harm” table to guide sentencers in how to assess harm where the drug in a particular case is not included in the table. Guidance on this is absent from the current guideline, and this

has been a matter of concern to sentencers, the NCA and Parliament. The proposed text on this is as follows:

Indicative quantities of the most common drugs, upon which the starting point is to be based) are given in the table below. Where a drug is not listed in the table below, sentencers should expect to be provided with expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused. There will often be no precise calculation possible, but courts are reminded that in cases of particularly potent drugs, even very small quantities may be held to be equivalent to large quantities of the drugs listed.

The second step to “future proof” the guideline is that the Council intends to review the Harm table every three years, looking at both the list of drugs which are included and the quantities given. The Council will consider evidence from drug seizures and evidence from police and other specialists on drug purity and quantities, and will make changes to the Harm table accordingly, based on that evidence. This will ensure that, without needing to revise the whole guideline, the guideline will keep up with changes in the way in which drugs are dealt and these offences committed.

The second main question on the Harm table, once the list of drugs is agreed, is whether the quantities given in the current guideline are still correct. The Council has reviewed quantities, using similar evidence to that used in developing the current guideline. Those quantities were based on Court of Appeal guideline judgments and on Home Office data from 2008 on volumes of drugs seized. The Council has reviewed similar data from 2017, and has spoken to forensic experts at the Metropolitan Police to discover whether there have been significant changes in purity which need to be taken into account. The Council has not found evidence of significant changes which suggest a need to revise the quantities given in the current guideline, for most drugs.

However, some evidence from the Metropolitan Police and NCA on changes in average purity has led to the proposal in these draft revised guidelines to change the quantities given for certain drugs, as follows:

- Ecstasy – the current guidelines give numbers of tablets based on an average purity of 100mg of MDMA per ecstasy tablet. Forensic evidence suggests that average purity has increased to 150mg per tablet, and the quantities have been revised accordingly.
- Cannabis plants (for the offence of cultivation under s6(2) of the MDA – in this guideline, the numbers of plants given in harm categories 3 and 4 have been changed to reflect an increase in average yield per plant, on which the number of plants is based, from 28 plants to 20 plants in Category 3, and from 9 to 7 plants in Category 4.

- MDMA – as set out above, this is the first time MDMA has been included in the harm table as a separate drug from ecstasy. Advice from the NCA suggested that MDMA in non-tablet form is dealt similarly to other drugs commonly dealt as powders, such as cocaine, so quantities should be as those for cocaine, heroin etc.
- SCRAAs – the Council considered several possible indicative quantities for these drugs but agreed that, owing to the great variety in the ways in which these drugs can be prepared (diluted by a variety of solvents, sprayed onto leaves or paper, with varying weights), and in the absence of specialist evidence, it would be misleading to give specific quantities. Instead, the Council proposes narrative factors to describe the quantities in each category. The Council seeks views in this consultation as to whether this is the best approach, and if any respondents have evidence for any specific quantities which could meaningfully be given for these drugs.

The approach to harm and changes discussed above is illustrated by the Importation and production offences harm tables below:

#### Importation offences-

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 5kg</li> <li>• Ecstasy – 7,000 tablets*</li> <li>• MDMA – 5kg</li> <li>• LSD – 250,000 squares</li> <li>• Amphetamine – 20kg</li> <li>• Cannabis – 200kg</li> <li>• Ketamine – 5kg</li> <li>• Synthetic cannabinoid receptor agonists –very large quantity indicative of an industrial scale operation</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 1kg</li> <li>• Ecstasy – 1,300 tablets*</li> <li>• MDMA – 1kg</li> <li>• LSD – 25,000 squares</li> <li>• Amphetamine – 4kg</li> <li>• Cannabis – 40kg</li> <li>• Ketamine – 1kg</li> <li>• Synthetic cannabinoid receptor agonists – large quantity indicative of a commercial operation</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 150g</li> <li>• Ecstasy –200 tablets*</li> <li>• MDMA – 150g</li> <li>• LSD – 2,500 squares</li> </ul>

	<ul style="list-style-type: none"> <li>• Amphetamine – 750g</li> <li>• Cannabis – 6kg</li> <li>• Ketamine – 150g</li> <li>• Synthetic cannabinoid receptor agonists – smaller quantity between categories 2 and 4</li> </ul>
<b>Category 4</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 5g</li> <li>• Ecstasy – 13 tablets*</li> <li>• MDMA – 5g</li> <li>• LSD – 170 squares</li> <li>• Amphetamine – 20g</li> <li>• Cannabis – 100g</li> <li>• Ketamine – 5g</li> <li>• Synthetic cannabinoid receptor agonists – very small quantity</li> </ul>

\*Ecstasy tablet quantities based on a typical quantity of 150mg MDMA per tablet

#### Production/cultivation offences –

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 5kg</li> <li>• Ecstasy – 7,000 tablets (see note below)</li> <li>• MDMA – 5kg</li> <li>• LSD – 250,000 squares</li> <li>• Amphetamine – 20kg</li> <li>• Cannabis – operation capable of producing industrial quantities for commercial use</li> <li>• Ketamine – 5kg</li> <li>• Synthetic cannabinoid receptor agonists – very large quantity indicative of an industrial scale operation</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 1kg</li> <li>• Ecstasy – 1,300 tablets (see note below)</li> <li>• MDMA – 1kg</li> <li>• LSD – 25,000 squares</li> <li>• Amphetamine – 4kg</li> <li>• Cannabis – operation capable of producing significant quantities for commercial use</li> <li>• Ketamine – 1kg</li> <li>• Synthetic cannabinoid receptor agonists – large quantity indicative of a commercial operation</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 150g</li> <li>• Ecstasy – 200 tablets (see note below)</li> <li>• MDMA – 150g</li> <li>• LSD – 2,500 squares</li> <li>• Amphetamine – 750g</li> <li>• Cannabis – 20 plants*</li> <li>• Ketamine – 150g</li> </ul>

	<ul style="list-style-type: none"> <li>• Synthetic cannabinoid receptor agonists – smaller quantity between categories 2 and 4</li> </ul>
<b>Category 4</b>	<ul style="list-style-type: none"> <li>• Heroin, cocaine – 5g</li> <li>• Ecstasy – 13 tablets (see note below)</li> <li>• MDMA – 5g</li> <li>• LSD – 170 squares</li> <li>• Amphetamine – 20g</li> <li>• Cannabis – 7 plants*</li> <li>• Ketamine – 5g</li> <li>• Synthetic cannabinoid receptor agonists – very small quantity</li> </ul>

Note: ecstasy tablet quantities based on a typical quantity of 150mg MDMA per tablet

\*with an assumed yield of 55g per plant

***Consultation question 4 - Do you agree that the current approach to assessing harm, based on quantity, should be retained? Do you have any suggestions for other factors/approaches?***

***Consultation question 5 - Do you agree with the list of drugs included in the Harm table? Are there any other drugs which should be added, or any which should be removed?***

***Consultation question 6 - Do you have any views on the proposed indicative quantities for those drugs listed?***

***Consultation question 7 - Do you agree with the approach taken to Synthetic Cannabinoid Receptor Agonists? Do you have any evidence on specific quantities, or would you prefer these drugs not to be listed, but to be approached on a case-by-case basis as per the text on “drugs not listed”?***

***Consultation question 8 - Do you have any views on how the guidelines should deal with drugs not listed, including on the text set out in the draft guidelines?***

## **STEP TWO**

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point of the sentence.

### **Sentence levels**

The evaluation of the drug offences guidelines, and further analysis of statistical data from the Court Proceedings Database, analysis of first instance transcripts and analysis of Court of Appeal sentencing remarks, did not raise any concerns about the sentence levels given in the current guidelines. As per the overall approach, outlined above, the Council therefore decided to make minimal changes to the current sentence levels for these offences.



The area where the Council does propose change is in the sentence levels given in the Importation offences guideline for Category 4 harm (i.e. very small quantity of drugs). The current guideline does not give sentence levels, but refers sentencers to other guidelines (those for Supply and Possession), and gives an aggravating factor in the Supply guideline to indicate that the sentencers should treat this as more serious. This approach was not transparent, and was confusing to sentencers, particularly to magistrates who rarely see importation cases, but see many supply cases involving very small quantities, which meant it was unclear when the aggravating factor should apply.

The Council has therefore decided to set out the relevant sentence levels, taken from the Supply and Possession guidelines, within the Importation guideline. As the range of sentence levels in Supply and Possession cases is very broad, there is a risk of a change in sentencing practice by bringing these levels directly into the Importation guideline. However, this approach will be much more transparent, and as sentence levels are broadly similar to the Supply and Possession guidelines, the overall impact is expected to be minimal.

The draft revised sentence levels tables for Importation offences are as follows:

Class A	Leading Role	Significant Role	Lesser Role
<b>Category 1</b>	<p><b>Starting point</b></p> <p>14 years' custody</p> <p><b>Category range</b></p> <p>12 – 16 years' custody</p>	<p><b>Starting point</b></p> <p>10 years' custody</p> <p><b>Category range</b></p> <p>9 – 12 years' custody</p>	<p><b>Starting point</b></p> <p>8 years' custody</p> <p><b>Category range</b></p> <p>6 – 9 years' custody</p>
<b>Category 2</b>	<p><b>Starting point</b></p> <p>11 years' custody</p> <p><b>Category range</b></p> <p>9 – 13 years' custody</p>	<p><b>Starting point</b></p> <p>8 years' custody</p> <p><b>Category range</b></p> <p>6 years 6 months' – 10 years' custody</p>	<p><b>Starting point</b></p> <p>6 years' custody</p> <p><b>Category range</b></p> <p>5 – 7 years' custody</p>
<b>Category 3</b>	<p><b>Starting point</b></p> <p>8 years 6 months' custody</p> <p><b>Category range</b></p> <p>6 years 6 months' – 10 years' custody</p>	<p><b>Starting point</b></p> <p>6 years' custody</p> <p><b>Category range</b></p> <p>5 – 7 years' custody</p>	<p><b>Starting point</b></p> <p>3 years' custody</p> <p><b>Category range</b></p> <p>18 months' – 5 years' custody</p>

<b>Category 4</b>	<b>Starting point</b> 5 years' custody	<b>Starting point</b> 3 years' custody	<b>Starting point</b> Low level community order
	<b>Category range</b> 4 years 6 months' – 7 years 6 months' custody	<b>Category range</b> 18 months' – 5 years' custody	<b>Category range</b> Band A fine – 18 months' custody

<b>Class B</b>	<b>Leading Role</b>	<b>Significant Role</b>	<b>Lesser Role</b>
<b>Category 1</b>	<b>Starting point</b> 8 years' custody	<b>Starting point</b> 5 years 6 months' custody	<b>Starting point</b> 4 years' custody
	<b>Category range</b> 7 – 10 years' custody	<b>Category range</b> 5 – 7 years' custody	<b>Category range</b> 2 years 6 months' – 5 years' custody
<b>Category 2</b>	<b>Starting point</b> 6 years' custody	<b>Starting point</b> 4 years' custody	<b>Starting point</b> 2 years' custody
	<b>Category range</b> 4 years 6 months' – 8 years' custody	<b>Category range</b> 2 years 6 months' – 5 years' custody	<b>Category range</b> 18 months' – 3 years' custody
<b>Category 3</b>	<b>Starting point</b> 4 years' custody	<b>Starting point</b> 2 years' custody	<b>Starting point</b> 1 year's custody
	<b>Category range</b> 2 years 6 months' – 5 years' custody	<b>Category range</b> 18 months' – 3 years' custody	<b>Category range</b> 12 weeks' – 9 months' custody
<b>Category 4</b>	<b>Starting point</b> 18 months' custody	<b>Starting point</b> High level community order	<b>Starting point</b> Band C fine
	<b>Category range</b> 26 weeks' – 3 years' custody	<b>Category range</b> Medium level community order – 9 months' custody	<b>Category range</b> Discharge – 26 weeks' custody

<b>Class C</b>	<b>Leading Role</b>	<b>Significant Role</b>	<b>Lesser Role</b>
<b>Category 1</b>	<p><b>Starting point</b> 5 years' custody</p> <p><b>Category range</b> 4 - 8 years' custody</p>	<p><b>Starting point</b> 3 years' custody</p> <p><b>Category range</b> 2 – 5 years' custody</p>	<p><b>Starting point</b> 18 months' custody</p> <p><b>Category range</b> 1 – 3 years' custody</p>
<b>Category 2</b>	<p><b>Starting point</b> 3 years 6 months' custody</p> <p><b>Category range</b> 2 - 5 years' custody</p>	<p><b>Starting point</b> 18 months' custody</p> <p><b>Category range</b> 1 – 3 years' custody</p>	<p><b>Starting point</b> 26 weeks' custody</p> <p><b>Category range</b> 12 weeks' – 18 months' custody</p>
<b>Category 3</b>	<p><b>Starting point</b> 18 months' custody</p> <p><b>Category range</b> 1 – 3 years' custody</p>	<p><b>Starting point</b> 26 weeks' custody</p> <p><b>Category range</b> 12 weeks' – 18 months' custody</p>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Medium level community order - 26 weeks' custody</p>
<b>Category 4</b>	<p><b>Starting point</b> 9 months' custody</p> <p><b>Category range</b> High level community order – 2 years' custody</p>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Medium level community order – 12 weeks' custody</p>	<p><b>Starting point</b> Band B fine</p> <p><b>Category range</b> Discharge – high level community order</p>

***Consultation question 9 - Do you have any comments on proposed sentence levels, particularly for the Category 4 harm Importation offences?***

## **Aggravating and Mitigating Factors**

The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence.

The Council has considered the aggravating and mitigating factors for these three offences (which are for the most part common across the offences) and has decided to make only minimal changes, usually to ensure they are clear and consistent with how these factors are presented across guidelines.

One more significant change is proposed in response to concerns raised by sentencers, the police and Home Office about how to take into account some particular features of offending which occur in some cases but do not fit within culpability at step one. These are aggravating features relating to exposing others to serious risks, whether these “others” are the end users of the drugs, other people involved in the drug dealing activity, or third parties. These features could be captured by the factor currently drafted as “Exposure of others to more than usual danger, for example, drugs cut with harmful substances”, however, it was felt that the current drafting, and the single rather specific example, does not provide sufficient guidance to allow sentencers to apply the factor in all relevant situations. The Council therefore decided to split this into three separate factors, one for each type of “other” exposed to these risks;

- Exposure of drug user to the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example, through the location of the drug-related activity

The Council has also added a further aggravating factor to capture the additional seriousness of offences involving very sophisticated methods of offending, and methods of avoiding detection, including (for example) cyber-enabled crime;

- Deliberate use of sophisticated methods, including encrypted communications or similar technologies, to facilitate the commission of the offence and/or avoid or impede detection

By way of illustration, the revised aggravating and mitigating factors for the Importation guideline are set out below.

### **Factors increasing seriousness**

#### **Statutory aggravating factors:**

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offence committed on bail

**Other aggravating factors:**

- Exposure of drug user to the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example, through the location of the drug-related activity
- Deliberate use of sophisticated methods, including encrypted communications or similar technologies, to facilitate the commission of the offence and/or avoid or impede detection
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision

**Factors reducing seriousness or reflecting personal mitigation**

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Importation only of drug to which offender addicted and quantity consistent with personal use
- Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions or no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

***Consultation question 10 – Do you have any comments on proposed changes to the aggravating or mitigating factors?***

## Minimum Terms Guidance

The MDA offences of importation/ exportation, supply/ PWITS, production/ cultivation and permitting premises to be used for drug related activity (discussed at section three) are all subject to a minimum term of 7 years imprisonment, under section 110 Powers of Criminal Courts (Sentencing) Act 2000, where a third-class A drug offence is committed. The court can choose not to impose such a sentence where they are of the opinion that there are particular circumstances which relate to any of the offences or to the offender that would make it unjust to do so in all the circumstances.

The current guidelines simply contain the following text above the Sentence Level tables:

For class A cases, 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.

The Council felt that more detailed guidance was necessary to ensure a consistent approach was being taken. The Council has previously provided guidance in its Bladed Article and Offensive Weapons guidelines, specifically in relation to possession of a bladed article. It is therefore proposed that similar guidance is provided for these offences. The proposed guidance is shown below:

### STEP THREE

#### MINIMUM TERMS

For class A cases, section 110 of the Powers of Criminal Courts (Sentencing) Act 2000 provides that a court should impose an appropriate custodial sentence of at least seven years 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.

#### **Unjust in all the circumstances**

In considering whether a statutory minimum sentence would be ‘unjust in all of the circumstances’ the court must have regard to the particular circumstances of the offence and the offender. If the circumstances of the offence, the previous offences or the offender make it unjust to impose the statutory minimum sentence then the court must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence.

**The Offence**

Having reached this stage of the guideline the court should have made a provisional assessment of the seriousness of the current offence. In addition, the court must consider the seriousness of the previous offences and the period of time that has elapsed between offences. Where the seriousness of the combined offences is such that it falls below the custody threshold, or where there has been a significant period of time between the offences. Where the seriousness of the combined offences is such that it falls below the custody threshold, or where there has been a significant period of time between the offences, the court may consider it unjust to impose the statutory minimum sentence.

**The Offender**

The court should consider the following factors to determine whether it would be unjust to impose the statutory minimum sentence;

- Any strong personal mitigation;
- Whether there is a realistic prospect of rehabilitation;
- Whether custody will result in significant impact on others.

***Consultation question 11 – Do you have any comments on the proposed guidance for minimum term sentences?***

# Section Three: Misuse of Drugs Act 1971 offences – permitting premises to be used for drug-related activity

This section covers the offence of permitting premises to be used for drug-related activity, contrary to section 8 of the MDA. This is among the lower volume drug offences, with 220 offenders sentenced in 2018. Of these, 61 per cent were sentenced in relation to Class B drugs, and 38 per cent in relation to Class A. Most of those sentenced for Class A offences received a custodial sentence (33 per cent immediate and 39 per cent suspended).

The guideline assessment did not suggest any significant problems with sentencing this offence, and the Council does not intend to make any changes to sentencing practice. However, the Council has reviewed the approach and proposes some changes, to make the guideline easier to use and to ensure that it fits with the types of cases currently coming before the courts, including county lines type cases involving cuckooing.

## Culpability

In the draft revised guideline, the Council proposes several changes to culpability factors to reflect the seriousness of cuckooing type offending, and to recognise the vulnerability of those who come under pressure to permit drug-related activity on their premises. The main change is to bring the current step 3 mitigating factor “Offender involvement due to pressure, intimidation or coercion falling short of duress” into step 1, which will enable sentencers to give this factor greater weight. A related factor on naivety, which Council believe is of lesser importance than this one, has been moved to step 2.

The Council has also decided to include an additional high culpability factor aimed at situations where a child or vulnerable person is being used to deal drugs from the premises. The revised culpability factors are as follows:

### Culpability

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender’s culpability.



<b>A</b> <b>Higher Culpability</b>	<ul style="list-style-type: none"> <li>• Participates in the exploitation of a child or vulnerable person including one who is also involved in the drugs operation</li> <li>• Permits premises to be used primarily for drug activity</li> <li>• Permits use in expectation of substantial financial gain</li> <li>• Uses legitimate business premises to aid and/or conceal illegal activity</li> </ul>
<b>B</b> <b>Lower Culpability</b>	<ul style="list-style-type: none"> <li>• Permits use for limited or no financial gain</li> <li>• No active role in drug activity taking place</li> <li>• Involved due to intimidation or coercion</li> <li>• Offender's vulnerability has been exploited</li> </ul>

**Consultation question 12 – Do you agree with the proposed changes to culpability factors?**

## Harm

The current guideline approaches the assessment of harm by using factors relating to both frequency of dealing, and quantity, though only gives quantities of two drugs, heroin and cannabis. The proposed revised guideline retains this dual approach, but makes some changes. Firstly, the factors on duration, currently at step 2, are brought into step 1 to allow sentencers to place sufficient weight on these factors. Secondly, the list of quantities has been expanded to include all the other drugs listed in the main three offence guidelines discussed above. The quantities in category 2 are given as indicative quantities rather than an upper limit. In category one, the guideline requires sentencers to consider any quantity substantially higher than those given in category 2 as suitable for inclusion in category 1.

<b>Harm</b> Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm caused or likely to be caused.	
<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Regular drug-related activity and/or premises used for drug activity over a long period</li> <li>• Higher quantity of drugs (<u>substantially higher than the quantities given for Category 2</u>)</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Infrequent drug-related activity and/or premises used for drug activity over a short period</li> <li>• Lower quantity of drugs</li> </ul> <p>Indicative quantities:</p> <ul style="list-style-type: none"> <li>○ Heroin, cocaine – 5g</li> <li>○ Ecstasy – 13 tablets</li> </ul>

- MDMA – 5g
- LSD – 170 squares
- Amphetamine – 20g
- Cannabis – 100g
- Ketamine – 5g
- Synthetic cannabinoid receptor agonists – very small quantity

***Consultation question 13 – Do you agree with the way in which harm is assessed within this guideline?***

## **Sentence levels**

The guideline assessment, and our other evidence, have not suggested any concerns with the current sentence levels. Accordingly, the Council has decided to retain the levels in the current guideline.

***Consultation question 14 – Do you have any concerns about sentence levels for this offence, or evidence that the sentence levels in the guideline need to be revised?***

## **Aggravating and mitigating factors**

The only changes proposed to these factors are as set out above, moving some factors between step 1 and step 2. The revised lists of these factors are therefore as follows:

### **Factors increasing seriousness**

#### ***Statutory aggravating factors:***

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

#### ***Other aggravating factors:***

- Premises adapted to facilitate drug activity
- Location of premises, for example proximity to school
- Attempts to conceal or dispose of evidence, where not charged separately

- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- Failure to comply with current court orders
- Other offences taken into consideration (TICs)
- Offence committed whilst on licence or subject to post sentence supervision
- Established evidence of community impact

### Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Involved due to naivety
- Isolated incident
- Low purity
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability, where not linked to the commission of the offence
- Sole or primary carer for dependent relative(s)

***Consultation question 15 – Do you have any comments on the changes to the aggravating and/or mitigating factors?***

### Minimum Terms Guidance

As discussed under section two above, the offence of permitting premises to be used for drug related activity is subject to minimum terms of sentence in certain circumstances. Additional guidance has been included to assist sentencers in this area.

## Section Four: Misuse of Drugs Act 1971 offences – possession of a controlled drug

This section covers the offence of possession of a controlled drug under s8 of the MDA.

This is one of the most common offences, with 20,700 offenders sentenced in 2018. The majority of offenders (92 per cent) were sentenced in magistrates' courts. Sixty-four per cent of offenders in 2018 were sentenced for Class B, and 34 per cent for Class A. Sentence levels for this offence are lower than for most other drug offences: in 2018, the mean average custodial sentence length (ACSL) for Class A offences was four months, for Class B it was one month, and for Class C it was three months.

The Council concluded, following evaluation and considering information from sentencers, that this guideline is working as intended and does not intend to make changes to the culpability and harm factors or sentence levels for this guideline.

### **Aggravating and mitigating factors**

The one area of this guideline which the Council does propose to change is the section on aggravating and mitigating factors. As discussed above, there was previously a reference to importation within the aggravating factors in the Possession guideline, linked with the approach to sentence levels taken in the current Importation guideline. There was evidence that this reference was confusing and changes to the importation guideline now mean that the reference to importation has been removed from the possession guideline.

***Consultation question 16 – Do you have any comments on the changes proposed to the Possession guideline?***

# Section Five: Psychoactive Substances Act 2016 offences – Importation/Exportation, Supply/PWITS and Production

This section covers the guidelines for offences under sections 4 to 8 of the PSA. The Act was introduced in order to make provision for substances with harmful psychoactive effects which are dealt similarly to controlled drugs, and often by the same offenders, but which are not drugs controlled under the MDA. The PSA contains offences of Importation/Exportation, Supply/PWITS and Production which largely mirror the same offences under the MDA, but with a lower statutory maximum penalty of 7 years' imprisonment. These are as yet relatively low volume offences, certainly when compared with the offences under the MDA. In 2018, 100 offenders were sentenced for these four offences.

## **Approach to culpability, aggravating and mitigating factors**

The similarities between the offences, and information from cases transcripts and discussions with the police and CPS about how these offences are carried out, suggests that the substances are imported/exported, supplied and produced in very similar ways to controlled drugs. In some cases, the PSA offence is sentenced alongside a MDA offence, or the offender committing the offence has a record of dealing in controlled drugs alongside the psychoactive substances. Because of the similarities between the offences and how they are committed, the Council proposes to use the same approach to assessing culpability proposed for MDA offences in the equivalent PSA offence guidelines, with some small changes of wording for the different substances. As an example, the culpability table for the Importation/Exportation offence is set out below:

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories, or where the level of the offender's role is affected by the scale of the operation, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

## Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

### Leading role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Exploitation of children and/or vulnerable persons to assist in the offending
- Involving an innocent agent in the commission of the offence

### Significant role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage, (save where this advantage is limited to meeting the offender's own habit) whether or not operating alone
- Some awareness and understanding of scale of operation

### Lesser role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)
- Expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)

Given the similarities, the Council also proposes to use the aggravating and mitigating factors used in the MDA offences for the equivalent PSA offences, allowing for some small differences caused by different statutory aggravating factors. Aggravating and mitigating factors for the PSA importation offences are set out below:

## Factors increasing seriousness

### *Statutory aggravating factors:*

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

### *Other aggravating factors include:*

- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of psychoactive substance user to the risk of serious harm, for example, through the method of production/mixing of the substance
- Exposure of those involved in dealing in the psychoactive substance to the risk of serious harm, for example through method of transporting the substance
- Exposure of third parties to the risk of serious harm
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Deliberate use of sophisticated methods, including encrypted communications or similar technologies, to facilitate the commission of the offence and/or avoid or impede detection

## Factors reducing seriousness or reflecting personal mitigation

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Importation only of psychoactive substance to which offender addicted and of quantity consistent with personal use
- Mistaken belief of the offender regarding the type of substance, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions or no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

A common approach to MDA and PSA offences should lead to consistency in sentencing between offences under the different legislation, which will be particularly important in the many cases in which an offender is sentenced for, for example, an MDA offence and PSA offence at the same time. The Council is interested in hearing any evidence of differences between how these offences are committed which would mean that additional factors are needed for the guidelines for the PSA offences.

***Consultation question 17 – Do you have any comments on additional culpability, aggravating and/or mitigating factors which are needed for the PSA offences but are not in the MDA offence guidelines?***

## **Harm**

The main difference between the MDA and PSA guidelines for these offences is the approach to the assessment of harm. Unlike the MDA offences, there is no list in the PSA of psychoactive substances controlled under the Act. Rather, a psychoactive substance is defined by its effect on the user, and the intention of the offender in supplying, importing or producing it that the substance should be taken to have that effect. Because there is no list of substances, divided into classes as in the MDA, there is a vast potential range of substances which can be covered. This has meant that approaching the assessment of harm by developing a list of substances and particular quantities by weight or volume is not possible.

However, the Council has proposed to continue to base the assessment of harm on the quantity of the substance, but sets out a narrative description of the quantities in each category, rather than a weight. Recognising that the strength of the psychoactive substances is very varied, and there are no classes as there are under the MDA to assist a sentencer in distinguishing between substances, the Council also proposes some guidance on how to deal with the range of harms caused by the different substances. This enables sentencers to move up or down a category if there is evidence that a substance is particularly harmful, in a similar way to that used in the Health and Safety guidelines. The assessment of harm section for the Importation offence, for example, is therefore as follows:



**Harm** in assessing harm, the sentencer should consider the factors below. Where there are characteristics present which fall under different harm categories the court should balance these characteristics to reach a fair assessment of harm.

Where evidence is available as to the potential effects of the substance and harm likely to be caused by those effects, the court should consider whether this affects the category of harm. Where the harm is very great, or very small, this may lead the court to move the starting point for the offence up or down within the category, or to place the offence in a higher or lower category than that indicated by the other factors listed.

<b>Category 1</b>	<ul style="list-style-type: none"> <li>Large quantity indicative of commercial-scale operation</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>Quantity indicative of smaller- scale commercial operation</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>Very small quantity</li> </ul>

**Consultation question 18 – Do you have any comments on the proposed approach to the assessment of harm?**

## Sentence levels

With only a small number of cases on which to base sentence levels, and a wide range of substances and concomitant harms covered by these offences, setting sentence levels is challenging. Sentence levels for the MDA offences are based on class of drug, but with the breadth of substances under the PSA, this is not possible. The sentence levels proposed have been based on existing sentencing practice and in consideration of the fact that Parliament set the statutory maximum penalty for these offences at 7 years (rather than life or 14 years for MDA offences). The sentence levels for all three of these draft guidelines are the same, and are as follows:

	<b>Leading Role</b>	<b>Significant Role</b>	<b>Lesser Role</b>
<b>Category 1</b>	<p><b>Starting point</b> 4 years' custody</p> <p><b>Category range</b> 3 – 6 years' custody</p>	<p><b>Starting point</b> 2 years' custody</p> <p><b>Category range</b> 12 months' – 3 years' 6 months' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> 26 weeks' – 2 years' custody</p>
<b>Category 2</b>	<p><b>Starting point</b> 2 years' custody</p> <p><b>Category range</b> 12 months' – 3 years' 6 months' custody</p>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> 26 weeks' – 2 years' custody</p>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Low level community order – 26 weeks' custody</p>

<b>Category 3</b>	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> 26 weeks' – 2 years' custody</p>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Low level community order – 26 weeks' custody</p>	<p><b>Starting point</b> Band B fine</p> <p><b>Category range</b> Discharge – High level community order</p>
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***Consultation question 19 – Do you agree with the proposed sentence levels for these PSA offences?***

# Section Six: Psychoactive Substances Act 2016

## offences – possession of a psychoactive substance in a custodial institution

This section covers the final offence included within these guidelines: possession of a psychoactive substance in a custodial institution, under section 9 of the PSA. Unlike in the MDA there is no separate offence of possessing a psychoactive substance in any other setting, but Parliament has legislated for an offence of possessing these substances in custodial institutions (including prisons, young offender institutions and immigration removal centres) because of the particular problems which these substances cause in these settings. Evidence from cases which the Council has reviewed, in which judges expressed strong views on the harm caused by this offence, as well as discussions with judges and with Her Majesty's Prison and Probation Service, has shown how harmful these substances can be to users and staff in a custodial environment. There have so far been few offenders sentenced for this offence; in 2018 fewer than 10 offenders were sentenced.

### **Approach to the assessment of culpability and harm**

The range of ways in which the offence can be carried out is more limited than that of the other offences, and as the substances involved are usually found in very small quantities, the harm cannot easily be measured by quantity. This has made it unusually challenging to develop a guideline which differentiates meaningfully between categories of seriousness. There was little variation between levels of culpability and harm, which has led the Council to propose a simple structure for this guideline.

The offence has therefore been separated into two levels, offences in which the offender is in a position of trust or responsibility in the custodial institution, and all other cases. Such a position could be that of a prison officer, or someone working in a paid or voluntary capacity at a custodial institution, such as a teacher or volunteer who delivers a workshop in a prison. The term is also intended to include a prisoner who has a responsible position, such as being a member of a prison council.

The court should identify the offence category based on the culpability factors set out below.

Category 1	Offender was in a position of trust/ responsibility in the custodial institution
Category 2	All other cases

***Consultation question 20 – Do you have any comments on the structure of this guideline? Are there other culpability and harm factors which should be taken into account at step 1?***

## **Sentence levels**

The sentence levels for this offence have been developed in consideration of current sentencing practice, taking into account the maximum penalty of 2 years' imprisonment for this offence, and the serious harm caused. As the majority of offenders committing this offence will already be serving a custodial sentence for another offence, the scope for using non-custodial disposals is limited, and the guideline provides additional guidance for sentencers on the use of non-custodial sentences. The sentence level table and guidance is as follows:

Where the defendant is not in custody at the point of sentence, but is dependent on or has a propensity to misuse controlled drugs or psychoactive substances and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 may be a proper alternative to a custodial sentence.

Where the offender is serving a custodial sentence at the point of sentence for this offence a community order will not be available and a short custodial sentence should be substituted. Generally the sentence for the new offence will be consecutive to the sentence being served as it will have arisen out of an unrelated incident. The court must have regard to the totality of the offender's criminality when passing the second sentence, to ensure that the total sentence to be served is just and proportionate. Refer to the [Totality guideline](#) for detailed guidance.

Offence Category	Starting Point (applicable to all offenders)	Category range (applicable to all offenders)
Category 1	12 months' custody	9 months' custody – 24 months' custody
Category 2	6 months' custody	High Level Community Order – 12 months' custody

**Consultation question 21- Do you have any comments on the proposed sentence levels or additional guidance set out above?**

## Aggravating and mitigating factors

Several of the aggravating and mitigating factors proposed for this offence are standard factors common to many offences, including the MDA and other PSA offences. Others have been included because they are particularly important to this offence, particularly the mitigating factor for cases where the offence has been committed under pressure, intimidation or coercion short of duress, which is a common feature of these offences and is currently often taken into account as mitigation.

### Factors increasing seriousness

#### *Statutory aggravating factors*

- Previous convictions, having regard to a) nature of the offence to which conviction relates and relevance to current offence; and b) time elapsed since conviction

#### *Other aggravating factors*

- Previous prison adjudications for similar matters
- Presence of others, especially non-users
- Large quantity\*
- Failure to comply with current court orders
- Established evidence of impact in the custodial institution concerned
- Sophisticated attempts to evade detection or conceal evidence

### Factors reducing seriousness or reflecting personal mitigation

- No previous convictions / no relevant, recent convictions or adjudications
- Remorse
- Good character and/or exemplary conduct
- Small quantity\*
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Evidence that offence was committed under pressure falling short of duress
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Isolated incident
- Age and/or lack of maturity
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

\*The court should bear in mind that different types of psychoactive substance have different levels of potency and therefore the relevance of high or low quantity will depend on the substance concerned.

***Consultation question 22 – Do you have any comments on the proposed aggravating or mitigating factors?***

***Consultation question 23 - Do you have any further comments on any of the draft guidelines?***

# Section Seven: Public Sector Equality Duty

The Public Sector Equality Duty is a duty set out in section 149 of the Equality Act 2010 (the 2010 Act) which came into force on 5 April 2011. It is a legal duty which requires public authorities (and those carrying out public functions on their behalf) to have “due regard” to three “needs” or “limbs” when considering a new policy or operational proposal. Complying with the duty involves having due regard to each of the three limbs:

The first is the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the 2010 Act.

The second is the need to advance equality of opportunity between those who share a “protected characteristic” and those who do not.

The third is to foster good relations between those who share a “protected characteristic” and those who do not.

Under the PSED the protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment. The protected characteristic of marriage and civil partnership is also relevant to the consideration of the first limb of the duty.

Section 149 of the Equality Act 2010 contains further detail about what is meant by advancing equality of opportunity and fostering good relations.

The Council has considered data available in relation to offenders sentenced for drug and psychoactive substance offences. This data includes volumes of offenders sentenced grouped by gender, ethnicity and age and is available at **Annex A**.

There are many and varied reasons for the distribution of offender types and prevalence towards a particular type of offending, including wider social issues such as education, poverty and addiction. The revised drug offences guidelines are intended to apply equally to all demographics of offenders, and in drafting the guidelines the Council has taken care to guard against any unintended impact.

The Council recognises, however, that the draft guidelines could be interpreted in different ways. We are therefore seeking views on whether any of the factors in the draft guidelines, or the ways in which they are expressed, could risk being interpreted in ways which could lead to discrimination against particular groups.

We are also seeking views as to whether there are any other equality or diversity issues the guideline has not considered, so that we may consider these post-consultation.

***Consultation Question 24: Do you consider that any of the factors in the draft guidelines, or the ways in which they are expressed could risk being interpreted in ways which could lead to discrimination against particular groups?***

***Consultation Question 25: Are there are any other equality and diversity issues the guidelines should consider?***



## Section Eight: PSED – further research

In developing these draft revised drug offences guidelines, the PSED has been particularly considered in light of the findings of the Lammy review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System, published in 2017 <https://www.gov.uk/government/publications/lammy-review-final-report>. The findings of the review included reference to research on disparities in sentencing of white and ethnic minority offenders for drug offences, in particular in terms of the likelihood of receiving an immediate custodial sentence. In light of these findings, and to assist in developing a revised drug offences guideline which fulfils our obligations under the PSED, the Council decided to carry out some further research into disparities in sentencing for drug supply offences between offenders of different ethnic groups and genders. This research is published in a paper alongside this consultation: <https://www.sentencingcouncil.org.uk/publications/?type=publications&s&cat=research-report>

The findings of our research, as well as consideration of the Lammy Review findings and other work on revising this guideline, has prompted the Council to consider what more it can do, within its narrow remit, to reduce disparities and to promote equality of opportunity within the criminal justice system. Prior to the launch of this consultation, the Council has held some initial discussions with other organisations within the criminal justice system to discuss potential next steps, and find out what other organisations are doing to address disparities.

Whilst our research, and other evidence, shows disparities in sentencing outcomes between offenders of different ethnicities and genders, we have no clear evidence as to reasons for these disparities. It may be that the disparities between sentencing for white and ethnic minority offenders are caused by different reasons from those between male and female offenders.

The guidelines are intended to apply equally to all offenders across all groups, and disparities in sentencing for any group are a cause for concern. We have looked hard at the current guidelines and have not identified any ways in which they might be contributing to any disparities. Lack of information on reasons behind the disparities does not mean that there is nothing which can be done within the Council's remit to tackle them or investigate them further, and we have considered what steps we can take in the revised drug offences guideline, or whether there may be factors within the guidelines which are having an unintended impact.

Firstly, we have updated all guidelines to include a reference to the Equal Treatment Bench Book, and an active link in our digital guidelines to the latest version of the ETBB, which is updated frequently. By putting this information before sentencers at the beginning of each guideline, we are both reminding sentencers of the need to consider equal treatment, and directing them to the information they need to help

them do this. This has now been included in all sentencing guidelines published on our website.

Secondly, we intend to look more closely at the language used in guidelines to determine whether any changes are needed to help reduce disparities. This will be part of the consultation process for this draft drug offences guideline. In the past, we have sometimes received information from consultation respondents about potential areas where we need to change language in a draft guideline to avoid unjustified discrimination in sentencing decisions. Where this has been brought to our attention in consultation responses in the past, we have changed the language of guidelines, but we are now changing the consultation questions we ask (see questions 25 and 26 above) to prompt respondents to consider the language used and any potential unintended impacts on equality and diversity. We are also checking our publications with the Race Disparity Unit and Government Equalities Office guidance on use of language to ensure compliance. We are also seeking views as to whether there are any factors within the guidelines that may be having an unintended impact in terms of disparities in sentencing.

Thirdly, we will be consulting more directly with a wider variety of groups. As part of the consultation process on this revised drug offences guideline we will set up some discussion groups in conjunction with the Race Disparity Unit and Government Equalities Office. We will evaluate this approach, along with the use of new consultation questions, to determine our approach to consultations on future guidelines.

Fourthly, we are continuing to work with other agencies in the Criminal Justice System to understand disparities in sentencing outcomes. Throughout the summer we have been in communication with the police, HMPPS (probation), HMCTS, the CPS and the judiciary and discussing areas where we can work together. This work is at an early stage, but by sharing information we should all be able to improve on how our organisations tackle disparities within the criminal justice system.

We would welcome comments on our next steps set out above and suggestions for other areas of research and further work. When we publish our response to consultation and definitive guideline, we will set out the results of work we have done during this consultation, any changes to the guidelines arising from that, as well as plans for future work in this area.

***Consultation Question 26: Do you have any views on reasons behind the disparities in sentencing highlighted by our published research? Do you consider that these reasons may be different for the disparities between white and ethnic minority offenders and those between men and women?***

***Consultation Question 27: Are there any aspects of the Drugs Guidelines that you consider might be contributing to unintended disparities in sentencing? Are there any ways in which the guidelines could be amended to guard further against any unintended disparities in sentencing?***

***Consultation Question 28: Do you have any comments on the steps the Council is intending to take in light of this research?***

***Consultation Question 29: Do you have any suggestions for other areas of work the Council could undertake in the future?***

# Annex A

For further details on these statistics please see the accompanying statistical bulletin published at <https://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics.

**Table 1: Demographics of adult offenders sentenced for importation offences covered by the draft revised guideline, by gender, age and perceived ethnicity, 2018<sup>1</sup>**

Importation class A			Importation class B			Importation class C		
Gender	Number of adults sentenced	Percentage of all adults sentenced	Gender	Number of adults sentenced	Percentage of all adults sentenced	Gender	Number of adults sentenced	Percentage of all adults sentenced
Male	124	84%	Male	61	88%	Male	36	88%
Female	24	16%	Female	8	12%	Female	5	12%
<b>Total</b>	<b>148</b>	<b>100%</b>	<b>Total</b>	<b>69</b>	<b>100%</b>	<b>Total</b>	<b>41</b>	<b>100%</b>

  

Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced	Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced	Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced
18 to 21 years	7	5%	18 to 21 years	2	3%	18 to 21 years	3	7%
22 to 29 years	32	22%	22 to 29 years	18	26%	22 to 29 years	9	22%
30 to 39 years	43	29%	30 to 39 years	19	28%	30 to 39 years	10	24%
40 to 49 years	36	24%	40 to 49 years	11	16%	40 to 49 years	13	32%
50 to 59 years	23	16%	50 to 59 years	11	16%	50 to 59 years	4	10%
60 years or older	7	5%	60 years or older	8	12%	60 years or older	2	5%
<b>Total</b>	<b>148</b>	<b>100%</b>	<b>Total</b>	<b>69</b>	<b>100%</b>	<b>Total</b>	<b>41</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	16	42%
Black	6	16%
Asian	5	13%
Other	11	29%
Not recorded/not known	110	
<b>Total</b>	<b>148</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	22	61%
Black	2	6%
Asian	2	6%
Other	10	28%
Not recorded/not known	33	
<b>Total</b>	<b>69</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	7	58%
Black	2	17%
Asian	1	8%
Other	2	17%
Not recorded/not known	29	
<b>Total</b>	<b>41</b>	<b>100%</b>

Source: Court Proceedings Database, Ministry of Justice

Notes:

- 1) The figures provided for importation offences include other sections of legislation not specifically covered by the draft revised guideline, but for which the guideline could still be applied.
- 2) In some cases where the age of the adult was unknown, the age has been set to 25 in the source data for this table.
- 3) The "perceived ethnicity" is the ethnicity of the offender as perceived by the police officer handling the case.
- 4) For a large proportion of adults sentenced (74% for class A, 48% for class B, 71% for class C), their perceived ethnicity was either not recorded or it was not known. Therefore the proportions amongst those for whom data was provided may not reflect the demographics of the full population, and these figures should be treated with caution.
- 5) Percentage calculations do not include cases where the perceived ethnicity was unknown.

**Table 2: Demographics of adult offenders sentenced for supply/possession with intent to supply offences covered by the draft revised guideline, by gender, age and perceived ethnicity, 2018**

Supply/possession with intent to supply class A			Supply/possession with intent to supply class B			Supply/possession with intent to supply class C		
Gender	Number of adults sentenced	Percentage of all adults sentenced <sup>1</sup>	Gender	Number of adults sentenced	Percentage of all adults sentenced <sup>1</sup>	Gender	Number of adults sentenced	Percentage of all adults sentenced
Male	5,692	93%	Male	2,278	94%	Male	68	85%
Female	426	7%	Female	154	6%	Female	12	15%
Not recorded/not known	2		Not recorded/not known	4		Not recorded/not known	0	
<b>Total</b>	<b>6,120</b>	<b>100%</b>	<b>Total</b>	<b>2,436</b>	<b>100%</b>	<b>Total</b>	<b>80</b>	<b>100%</b>

  

Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced	Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced	Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced
18 to 21 years	1,536	25%	18 to 21 years	636	26%	18 to 21 years	13	16%
22 to 29 years	2,362	39%	22 to 29 years	1,039	43%	22 to 29 years	15	19%
30 to 39 years	1,374	22%	30 to 39 years	463	19%	30 to 39 years	34	43%
40 to 49 years	592	10%	40 to 49 years	188	8%	40 to 49 years	14	18%
50 to 59 years	216	4%	50 to 59 years	85	3%	50 to 59 years	3	4%
60 years or older	40	1%	60 years or older	25	1%	60 years or older	1	1%
<b>Total</b>	<b>6,120</b>	<b>100%</b>	<b>Total</b>	<b>2,436</b>	<b>100%</b>	<b>Total</b>	<b>80</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	2,704	57%
Black	1,293	27%
Asian	504	11%
Other	205	4%
Not recorded/not known	1,414	
<b>Total</b>	<b>6,120</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	1,287	70%
Black	319	17%
Asian	167	9%
Other	74	4%
Not recorded/not known	589	
<b>Total</b>	<b>2,436</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	48	86%
Black	1	2%
Asian	7	13%
Other	0	0%
Not recorded/not known	24	
<b>Total</b>	<b>80</b>	<b>100%</b>

Source: Court Proceedings Database, Ministry of Justice

Notes:

- 1) Percentage calculations do not include cases where the gender was unknown.
- 2) In some cases where the age of the adult was unknown, the age has been set to 25 in the source data for this table.
- 3) The "perceived ethnicity" is the ethnicity of the offender as perceived by the police officer handling the case.
- 4) For a proportion of adults sentenced (23% for class A, 24% for class B, 30% for class C), their perceived ethnicity was either not recorded or it was not known. Therefore the proportions amongst those for whom data was provided may not reflect the demographics of the full population, and these figures should be treated with caution.
- 5) Percentage calculations do not include cases where the perceived ethnicity was unknown.

**Table 3: Demographics of adult offenders sentenced for production offences covered by the draft revised guideline, by gender, age and perceived ethnicity, various years**

Production class A, 2014-2018 <sup>1</sup>			Production class B, 2018			Production class C, 2014-2018 <sup>1,7</sup>		
Gender	Number of adults sentenced	Percentage of all adults sentenced	Gender	Number of adults sentenced	Percentage of all adults sentenced <sup>6</sup>	Gender	Number of adults sentenced	Percentage of all adults sentenced
Male	74	90%	Male	1,837	93%	Male	26	96%
Female	8	10%	Female	130	7%	Female	1	4%
Not recorded/not known	0		Not recorded/not known	8		Not recorded/not known	0	
<b>Total</b>	<b>82</b>	<b>100%</b>	<b>Total</b>	<b>1,975</b>	<b>100%</b>	<b>Total</b>	<b>27</b>	<b>100%</b>

  

Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced	Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced	Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced
18 to 21 years	5	6%	18 to 21 years	97	5%	18 to 21 years	0	0%
22 to 29 years	26	32%	22 to 29 years	561	28%	22 to 29 years	11	41%
30 to 39 years	37	45%	30 to 39 years	658	33%	30 to 39 years	10	37%
40 to 49 years	10	12%	40 to 49 years	404	20%	40 to 49 years	2	7%
50 to 59 years	3	4%	50 to 59 years	205	10%	50 to 59 years	3	11%
60 years or older	1	1%	60 years or older	50	3%	60 years or older	1	4%
<b>Total</b>	<b>82</b>	<b>100%</b>	<b>Total</b>	<b>1,975</b>	<b>100%</b>	<b>Total</b>	<b>27</b>	<b>100%</b>



Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	57	78%
Black	14	19%
Asian	1	1%
Other	1	1%
Not recorded/not known	9	
<b>Total</b>	<b>82</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	1,276	83%
Black	109	7%
Asian	75	5%
Other	70	5%
Not recorded/not known	445	
<b>Total</b>	<b>1,975</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	14	78%
Black	0	0%
Asian	4	22%
Other	0	0%
Not recorded/not known	9	
<b>Total</b>	<b>27</b>	<b>100%</b>

Source: Court Proceedings Database, Ministry of Justice

Notes:

- 1) For production classes A and C, statistics are provided for the period 2014-2018, rather than for a single year, due to the small number of offenders sentenced for these offences each year.
- 2) In some cases where the age of the adult was unknown, the age has been set to 25 in the source data for this table.
- 3) The "perceived ethnicity" is the ethnicity of the offender as perceived by the police officer handling the case.
- 4) For a proportion of adults sentenced (11% for class A, 23% for class B, 33% for class C), their perceived ethnicity was either not recorded or it was not known. Therefore the proportions amongst those for whom data was provided may not reflect the demographics of the full population, and these figures should be treated with caution.
- 5) Percentage calculations do not include cases where the perceived ethnicity was unknown.
- 6) Percentage calculations do not include cases where the gender was unknown.
- 7) Ketamine was reclassified from class C to class B in June 2014.

**Table 4: Demographics of adult offenders sentenced for possession offences covered by the draft revised guideline, by gender, age and perceived ethnicity, 2018**

Possession class A			Possession class B			Possession class C		
Gender	Number of adults sentenced	Percentage of all adults sentenced <sup>1</sup>	Gender	Number of adults sentenced	Percentage of all adults sentenced <sup>1</sup>	Gender	Number of adults sentenced	Percentage of all adults sentenced <sup>1</sup>
Male	6,293	90%	Male	12,269	94%	Male	379	86%
Female	733	10%	Female	757	6%	Female	64	14%
Not recorded/not known	83		Not recorded/not known	166		Not recorded/not known	4	
<b>Total</b>	<b>7,109</b>	<b>100%</b>	<b>Total</b>	<b>13,192</b>	<b>100%</b>	<b>Total</b>	<b>447</b>	<b>100%</b>

  

Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced	Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced	Age Group <sup>2</sup>	Number of adults sentenced	Percentage of all adults sentenced
18 to 21 years	945	13%	18 to 21 years	2,899	22%	18 to 21 years	42	9%
22 to 29 years	2,133	30%	22 to 29 years	5,327	40%	22 to 29 years	109	24%
30 to 39 years	2,280	32%	30 to 39 years	3,158	24%	30 to 39 years	177	40%
40 to 49 years	1,292	18%	40 to 49 years	1,317	10%	40 to 49 years	93	21%
50 to 59 years	400	6%	50 to 59 years	415	3%	50 to 59 years	25	6%
60 years or older	59	1%	60 years or older	76	1%	60 years or older	1	<0.5%
<b>Total</b>	<b>7,109</b>	<b>100%</b>	<b>Total</b>	<b>13,192</b>	<b>100%</b>	<b>Total</b>	<b>447</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	4,298	70%
Black	1,203	19%
Asian	567	9%
Other	111	2%
Not recorded/not known	930	
<b>Total</b>	<b>7,109</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	6,757	61%
Black	2,878	26%
Asian	1,177	11%
Other	216	2%
Not recorded/not known	2,164	
<b>Total</b>	<b>13,192</b>	<b>100%</b>

Perceived Ethnicity <sup>3,4</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>
White	347	90%
Black	31	8%
Asian	8	2%
Other	1	<0.5%
Not recorded/not known	60	
<b>Total</b>	<b>447</b>	<b>100%</b>

Source: Court Proceedings Database, Ministry of Justice

Notes:

- 1) Percentage calculations do not include cases where the gender was unknown.
- 2) In some cases where the age of the adult was unknown, the age has been set to 25 in the source data for this table.
- 3) The "perceived ethnicity" is the ethnicity of the offender as perceived by the police officer handling the case.
- 4) For a proportion of adults sentenced (13% for class A, 16% for class B, 13% for class C), their perceived ethnicity was either not recorded or it was not known. Therefore the proportions amongst those for whom data was provided may not reflect the demographics of the full population, and these figures should be treated with caution.
- 5) Percentage calculations do not include cases where the perceived ethnicity was unknown.

**Table 5: Demographics of adult offenders sentenced for permitting premises, by gender, age and perceived ethnicity, various years**

Permitting premises class A, 2018			Permitting premises class B, 2018			Permitting premises class C, 2009-2018 <sup>6,7</sup>		
Gender	Number of adults sentenced	Percentage of all adults sentenced	Gender	Number of adults sentenced	Percentage of all adults sentenced <sup>5</sup>	Gender	Number of adults sentenced	Percentage of all adults sentenced
Male	46	56%	Male	70	53%	Male	60	59%
Female	36	44%	Female	61	47%	Female	42	41%
Not recorded/not known	0		Not recorded/not known	1		Not recorded/not known	0	
<b>Total</b>	<b>82</b>	<b>100%</b>	<b>Total</b>	<b>132</b>	<b>100%</b>	<b>Total</b>	<b>102</b>	<b>100%</b>

  

Age Group <sup>1</sup>	Number of adults sentenced	Percentage of all adults sentenced	Age Group <sup>1</sup>	Number of adults sentenced	Percentage of all adults sentenced	Age Group <sup>1</sup>	Number of adults sentenced	Percentage of all adults sentenced
18 to 21 years	0	0%	18 to 21 years	4	3%	18 to 21 years	11	11%
22 to 29 years	13	16%	22 to 29 years	29	22%	22 to 29 years	23	23%
30 to 39 years	26	32%	30 to 39 years	35	27%	30 to 39 years	30	29%
40 to 49 years	22	27%	40 to 49 years	33	25%	40 to 49 years	26	25%
50 to 59 years	17	21%	50 to 59 years	24	18%	50 to 59 years	8	8%
60 years or older	4	5%	60 years or older	7	5%	60 years or older	4	4%
<b>Total</b>	<b>82</b>	<b>100%</b>	<b>Total</b>	<b>132</b>	<b>100%</b>	<b>Total</b>	<b>102</b>	<b>100%</b>

Perceived Ethnicity <sup>2,3</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>4</sup>
White	56	93%
Black	1	2%
Asian	2	3%
Other	1	2%
Not recorded/not known	22	
<b>Total</b>	<b>82</b>	<b>100%</b>

Perceived Ethnicity <sup>2,3</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>4</sup>
White	88	87%
Black	11	11%
Asian	1	1%
Other	1	1%
Not recorded/not known	31	
<b>Total</b>	<b>132</b>	<b>100%</b>

Perceived Ethnicity <sup>2,3</sup>	Number of adults sentenced	Percentage of all adults sentenced <sup>4</sup>
White	77	92%
Black	1	1%
Asian	3	4%
Other	3	4%
Not recorded/not known	18	
<b>Total</b>	<b>102</b>	<b>100%</b>

Source: Court Proceedings Database, Ministry of Justice

Notes:

- 1) In some cases where the age of the adult was unknown, the age has been set to 25 in the source data for this table.
- 2) The "perceived ethnicity" is the ethnicity of the offender as perceived by the police officer handling the case.
- 3) For a proportion of adults sentenced (27% for class A, 23% for class B, 18% for class C), their perceived ethnicity was either not recorded or it was not known. Therefore the proportions amongst those for whom data was provided may not reflect the demographics of the full population, and these figures should be treated with caution.
- 4) Percentage calculations do not include cases where the perceived ethnicity was unknown.
- 5) Percentage calculations do not include cases where the gender was unknown.
- 6) Cannabis was reclassified from class C to class B in January 2009, and ketamine was reclassified from class C to class B in June 2014.
- 7) For permitting premises class C, statistics are provided for the period 2009-2018, rather than for a single year, due to the very small number of offenders sentenced for these offences each year.

**Table 6: Demographics of adult offenders sentenced for offences under the Psychoactive Substances Act 2016 covered by the draft revised guideline, by gender, age and perceived ethnicity, 2018<sup>1</sup>**

<b>Gender</b>	<b>Number of adults sentenced</b>	<b>Percentage of all adults sentenced</b>
Male	97	91%
Female	10	9%
<b>Total</b>	<b>107</b>	<b>100%</b>

<b>Age Group<sup>2</sup></b>	<b>Number of adults sentenced</b>	<b>Percentage of all adults sentenced</b>
18 to 21 years	22	21%
22 to 29 years	44	41%
30 to 39 years	32	30%
40 to 49 years	7	7%
50 to 59 years	2	2%
60 years or older	0	0%
<b>Total</b>	<b>107</b>	<b>100%</b>

<b>Perceived Ethnicity<sup>3,4</sup></b>	<b>Number of adults sentenced</b>	<b>Percentage of all adults sentenced<sup>5</sup></b>
White	42	57%
Black	23	31%
Asian	8	11%
Other	1	1%
Not recorded/not known	33	
<b>Total</b>	<b>107</b>	<b>100%</b>

Source: Court Proceedings Database, Ministry of Justice

Notes:

- 1) Demographics data for these offences have been grouped together, due to the low number of offenders sentenced for these offences each year.
- 2) In some cases where the age of the adult was unknown, the age has been set to 25 in the source data for this table.
- 3) The "perceived ethnicity" is the ethnicity of the offender as perceived by the police officer handling the case.
- 4) For a proportion of adults sentenced (31%), their perceived ethnicity was either not recorded or it was not known. Therefore the proportions amongst those for whom data was provided may not reflect the demographics of the full population, and these figures should be treated with caution.
- 5) Percentage calculations do not include cases where the perceived ethnicity was unknown.

# Annex B

## Consultation Questions

1. *Do you agree with the scope of the draft revised guideline and the offences which it covers?*
2. *Do you have any comments on the changes proposed to the culpability factors?*
3. *Are there any additional differences between the three types of offence, in terms of culpability, which you feel the guidelines should take into account?*
4. *Do you agree that the current approach to assessing harm, based on quantity, should be retained? Do you have any suggestions for other factors/approaches?*
5. *Do you agree with the list of drugs included in the Harm table? Are there any other drugs which should be added, or any which should be removed?*
6. *Do you have any views on the proposed indicative quantities for those drugs listed?*
7. *Do you agree with the approach taken to Synthetic Cannabinoid Receptor Agonists? Do you have any evidence on specific quantities, or would you prefer these drugs not to be listed, but to be approached on a case-by-case basis as per the text on “drugs not listed”?*
8. *Do you have any views on how the guidelines should deal with drugs not listed, including on the text set out in the draft guidelines?*
9. *Do you have any comments on proposed sentence levels, particularly for the Category 4 harm Importation offences?*
10. *Do you have any comments on proposed changes to the aggravating or mitigating factors?*
11. *Do you have any comments on the proposed guidance for minimum term sentences?*
12. *Do you agree with the proposed changes to culpability factors?*
13. *Do you agree with the way in which harm is assessed within this guideline?*
14. *Do you have any concerns about sentence levels for this offence, or evidence that the sentence levels in the guideline need to be revised?*
15. *Do you have any comments on the changes to the aggravating and/or mitigating factors?*

- 16. Do you have any comments on the changes proposed to the Possession guideline?**
- 17. Do you have any comments on additional culpability, aggravating and/or mitigating factors which are needed for the PSA offences but are not in the MDA offence guidelines?**
- 18. Do you have any comments on the proposed approach to the assessment of harm?**
- 19. Do you agree with the proposed sentence levels for these PSA offences?**
- 20. Do you have any comments on the structure of this guideline? Are there other culpability and harm factors which should be taken into account at step 1?**
- 21. Do you have any comments on the proposed sentence levels or additional guidance set out above?**
- 22. Do you have any comments on the proposed aggravating or mitigating factors?**
- 23. Do you have any further comments on any of the draft guidelines?**
- 24. Do you consider that there are any ways in which the factors in the draft guidelines, or the ways in which they are expressed could risk being interpreted in ways which could lead to discrimination against particular groups?**
- 25. Are there any other equality and diversity issues the guidelines should consider?**
- 26. Do you have any views on reasons behind the disparities in sentencing highlighted by our published research? Do you consider that these reasons may be different for the disparities between white and ethnic minority offenders and those between men and women?**
- 27. Are there any aspects of the Drugs Guideline that you consider might be contributing to unintended disparities in sentencing? Are there any ways in which the guidelines could be amended to guard further against any unintended disparities in sentencing?**
- 28. Do you have any comments on the steps the Council is intending to take in light of this research?**
- 29. Do you have any suggestions for other areas of work the Council could undertake in the future?**



