

### Introduction

As part of the consultation stage for the drug offences guideline, the Sentencing Council undertook a small exercise to examine the effects of key elements of the proposals on sentencing practice. This involved a three staged approach:

- interviewing 24 Crown Court judges about their views on the consultation guideline and discussing how the proposals may affect their sentencing of certain cases;
- following up some of the initial 24 judges to discuss subsequent changes to the guideline that had been made and the implications of these changes; and
- inviting a wider cross-section of judges to provide views on how they would currently sentence certain offences and the reasons for these sentences.

This report makes significant reference to the consultation document on sentencing drug offences<sup>1</sup>, which can be found at: [www.sentencingcouncil.judiciary.gov.uk/docs/Drug\\_Offences\\_Guideline\\_Professional\\_Consultation.pdf](http://www.sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Guideline_Professional_Consultation.pdf). It should also be read alongside the research materials presented in the accompanying appendices to this bulletin. (see [www.sentencingcouncil.judiciary.gov.uk/facts/research-and-analysis-publications.htm](http://www.sentencingcouncil.judiciary.gov.uk/facts/research-and-analysis-publications.htm)).

### Background

The development of the draft guideline involved a number of stages, including consideration of case law and current sentencing practice. Apart from sentencing drug 'mules', the 'guideline aims to increase the consistency of sentencing while leaving the average severity of sentencing unchanged'<sup>2</sup>. The guideline also takes into account the advice of the Sentencing Advisory Panel which recommended that 'quantity of drug' and 'role of the offender' should be key determinants in assessing seriousness, but not purity or street value (although these may assist in determining quantity and role).

To help assess whether the proposals contained within the draft guideline would facilitate the main aims of the guideline, this research exercise was designed to gain an insight into:

- judges' thinking and decision-making in sentencing drug offences under both current practice and the different versions of draft guidelines being considered;
- current sentencing practice and any potential unintended consequences or practical issues in the application of the new proposals;
- specific issues, such as the way in which purity of a drug should be taken into account in sentencing<sup>3</sup> and the categorisation of factors related to harm and culpability put forward in the proposals; and
- any other issues that judges felt were relevant to developing a sentencing guideline in this area.

<sup>1</sup> *Drug Offences Guideline Professional Consultation*, Office of the Sentencing Council, March 2011.

<sup>2</sup> *Drug Offences Guideline Professional Consultation*, Office of the Sentencing Council, March 2011: page 4.

<sup>3</sup> The new approach - categorising the offender by amount of product recovered, regardless of the purity, and only taking this into account at a later stage (Step 2) differs from current practice. Under current practice, where purity analysis is available, the offender is sentenced on the basis of the amount of drug recovered *after* adjusting for purity. As limited data is available on the prevalence of purity testing, or the relationship between current sentencing practice and the quantity of drugs involved in cases, this exercise was particularly important and has provided further information on which to refine the resource assessment for this guideline.

## Approach

The research involved a three staged approach.

### *Stage 1 (May and June 2011)*

The main focus of this research took place in stage 1, where qualitative interviews with 24 Crown Court judges were conducted to discuss in detail the proposals put forward in the draft guideline formally issued for consultation in March 2011.

In this stage, judges from nine courts took part, across five circuit areas: the London, North West, North East, Midlands and Western circuits. The courts were selected on the recommendation of the Criminal Sub-Committee of the Council of HM Circuit Judges, who kindly helped to facilitate this work, and provided a broad geographical spread as well as the inclusion of courts known to deal with large numbers of drug offenders. All interviews were conducted by members of the Sentencing Council's Analysis and Research Team who travelled to the different courts to undertake these face-to-face.

The proposed guideline was available to judges in advance of the interview to help familiarise them with the detail<sup>4</sup>. A semi-structured discussion guide was drafted for use in the interview – this covered a small number of more general questions, along with case study scenarios to discuss with judges. A set of five case studies (two of which were used in three slightly different variations in order to probe on purity and quantity) were designed.

The purpose of the case studies was to provide a more meaningful discussion point around which to examine how the guideline proposals might be applied in practice. Each judge was given two scenarios and asked to provide a sentence – and the reasons for deciding on this sentence – on the basis of both their current practice and using the proposed guideline. In doing this, it was made clear to judges that no formal comparison of sentences would be made and there were no right or wrong answers – the comparison was merely to provide an insight into how judges might apply the draft proposals and how they viewed any changes as a result of this. The case study scenarios used are contained in Appendix A (see the separate document of appendices at [www.sentencingcouncil.judiciary.gov.uk/facts/research-and-analysis-publications.htm](http://www.sentencingcouncil.judiciary.gov.uk/facts/research-and-analysis-publications.htm)). Judges were also free to offer any general comments about the guidelines at the end of the interviews.

### *Stage 2 (September 2011)*

In stage 2, the 24 Crown Court judges who had taken part in interviews at stage 1 were invited to discuss further changes that had been made to the guideline since these earlier discussions (as a result of the feedback obtained both during the consultation more generally and from the analysis of stage 1). The changes most notably related to the guideline's approach to descriptions of the offender's role, and how the guideline dealt with the quantity of drug involved in the case. Ten judges were able to take part in this stage of the research. Six judges returned their comments in writing, two undertook a telephone interview and two a face-to-face interview.

The judges were presented with a revised guideline for supply offences. As a result of issues arising in stage 1 in relation to quantity, two different versions were tested: 'Version A' linked starting points to quantity, whereas 'Version B' did not link directly to quantity (see Appendix B for more details). Other differences between the two were that Version A also included a subcategory of 'undermining of public office, irrespective of quantity involved' as part of a 'substantial operation' and 'retailing irrespective of quantity involved' as part of a 'medium scale' operation, in addition to stating the quantities of drugs that define that scale of operation. Version B, however, only included

<sup>4</sup> See [www.sentencingcouncil.judiciary.gov.uk/docs/Drug\\_Offences\\_Guideline\\_Professional\\_Consultation.pdf](http://www.sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Guideline_Professional_Consultation.pdf)

indicative quantities for an 'extensive' or 'substantial' operation; 'medium scale' or 'small scale' operations were defined as having 'significant adverse community impact of offender's behaviour' and 'lesser adverse community impact of offender's behaviour', respectively<sup>5</sup>.

Judges were then asked to consider two offence scenarios and to indicate both how they would currently sentence these offenders and how they would sentence using the two versions of the draft guideline. They were also asked for their general views on the guidelines and whether they had a preference for either.

### *Stage 3 (November 2011)*

As a final stage, a wider group of judges were invited to help assess whether the ranges and starting points put forward in the final version of the draft guideline would achieve its aim of retaining current sentencing practice. Crown Court judges (including Recorders) were asked how they would currently sentence certain offences and their reasons for the sentences provided, and these were compared to the sentences that would result from use of the new guideline.

The exercise was designed as a paper based exercise (although two courts requested a face-to-face group interview to discuss this), with a document being provided to judges containing four different offence scenarios from a possible 16. These covered:

- five scenarios of supply of a class A drug;
- three scenarios of supply of a class B drug;
- three scenarios of importation of a class A drug;
- three scenarios of importation of a class B drug; and
- two scenarios of production/cultivation of a class B drug.

Full details of each scenario are given in Appendix C.

Judges were recruited to take part in this exercise via a request from the Criminal Sub-Committee of the Council of HM Circuit Judges to a number of courts spread across the country and through the distribution of papers at the Criminal Continuation Course held at Warwick University between 31 October and 4 November 2011.

In total, 41 judges participated in this exercise. Taking account of 1 collective response covering 4 judges and 1 judge who completed all 16 scenarios, the total number of returns was also 41.

### **Limitations of the approach**

This exercise as a whole generated a large number of comments on various issues. However, in taking account of the comments and feedback, it should be noted that:

- the sample of courts and judges involved in this exercise was relatively small and not all judges considered all scenarios at each stage;
- although the courts taking part in stage 1 of the research were selected to represent a broad geographical spread, participation in subsequent stages was very much dependent on those judges that were willing and able to take part due to the fast turnaround required;
- the comments made by judges in some cases seemed to reflect their familiarity with the guideline (some appeared to be more familiar with the main details than others) and the type of cases they tended to see in

<sup>5</sup> The way in which the different categories denoting harm were described are not those adopted in the final definitive guideline, but labels being 'tested' as options at the time of the research.

their court (judges seeing a particular type of case tended to focus on different things within the interviews). Therefore, whilst all interviews followed the same format, the focus of the discussions varied; and

- some judges raised the fact that the case study scenarios did not provide enough information on which they could effectively decide on a sentence. This means that any sentences proposed, and the reasons for these sentences, were given to us on this basis and may have been slightly different had further detail been presented. Judges also sometimes imposed their own interpretations on the scenarios, based on what they felt would be applicable in a 'typical' case.

Therefore the comments of the judges participating in this research should not necessarily be regarded as representative of a wider group of judges discussing the guideline. For these reasons, the issues presented below provide an indication only of the key issues that may be relevant. They cannot be considered an exhaustive list, or shared by all judges – either those involved in this exercise or outside it.

### **Issues emerging**

The following information focuses primarily on the issues emerging from stage 1 (unless otherwise stated)<sup>6</sup>, as these were the issues that contributed towards important changes to the draft guideline; stage 2 and 3 were designed to help establish whether changes to the proposals were appropriate, and would help achieve the aim of the guideline (see page 1). Where relevant, the findings from stages 2 and 3 have been incorporated.

A number of issues emerged from the discussions with judges covering the factors they consider important in assessing seriousness, as well as their thoughts on the proposed guideline. These issues emerged through direct questions, responses to the different case study scenarios and through general discussion at the end of interviews.

It should be noted that as the interviews were qualitative in nature, no attempt to quantify views has been made. However, where possible, where there was a broad consensus or general agreement over issues, or the issue was raised by just one judge, this has been noted. For all other issues, it should be assumed that these were raised by just a few judges at most.

### ***Factors of current importance in assessing seriousness***

Judges were asked about the key factors they currently take into account in assessing seriousness. There was general consensus in their responses, with most citing the role of the offender, quantity and purity of the drug as significant (although views on the relative importance of these varied).

Other factors taken into consideration (although cited less often by judges) were:

- the class of the drug;
- the value of the drug/potential for profit;
- the scale of the operation;
- the previous convictions of the offender/frequency of offending;
- who the offender was supplying to (e.g. vulnerable groups, prisoners, professionals);
- personal factors such as the offender's state of health; and
- the potential harm caused by the drug.

The judges' responses in stage 3 of the research provided us with further information on the factors taken into account in assessing seriousness (some of which overlapped in practice):

<sup>6</sup> This means that the issues covered relate to the consultation guideline that was issued in March 2011 unless otherwise stated: see [www.sentencingcouncil.judiciary.gov.uk/docs/Drug\\_Offences\\_Guideline\\_Professional\\_Consultation.pdf](http://www.sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Guideline_Professional_Consultation.pdf)

- culpability/role: examples included the offender's position in a 'chain' of responsibility, whether they were an addict themselves, whether there was any commercial motive, the regularity of the dealing, whether the offence involved a breach of trust, the class of drug involved;
- harm/quantity: examples included the quantity of the drug involved, the class of drug, the purity of the drug, the recipients of the drug, whether the drug was addictive;
- aggravating factors: examples included the offence having been committed whilst on bail/in breach of an Order, relevant previous convictions, the purity of the drug;
- mitigating factors: examples included the offender being a drug addict, the vulnerability of the offender, an early guilty plea having been submitted, the offender being of good character; and
- Case Law.

### *Reflections on the detail of the proposed guideline<sup>7</sup>*

#### *Role*

Reflecting their responses to the issues they currently take into account when sentencing, judges generally agreed that role was a key factor to take into account in Step 1. What caused more debate and disagreement, however, was deciding which particular role – 'leading', 'significant' or 'subordinate' - to attribute offenders to when presented with different case study scenarios<sup>8</sup>.

Generally, apart from Case Study 1 where views were mixed, and Case Study 5 (see page 1 of the appendices for further details of the case studies) where there was agreement that the offender's role was subordinate, it was found that judges tended to place offenders one category lower than the Sentencing Council would anticipate using the consultation stage guideline (based on the same case studies); in a small number of instances, they placed them two categories lower<sup>9</sup>.

This meant that judges sentencing using the draft guideline generally sentenced at a lower level than anticipated based on the information provided in the scenarios. For many, this related to their interpretations of the three different roles and what type of offender they would, from their experience, place in these roles. Therefore when they did offer sentences more in line with what the Council expected using the new guideline, this was generally when they were strictly applying the bullet pointed definitions or examples within the categories of role, even if they did not agree with them. On one occasion a judge specifically said that under the guideline, X would be the outcome, but that this would not be their favoured sentence based on their own experience. For some, however, sentences using the draft guideline were more in line with their current practice.

Variation between the sentences judges offered using the draft guideline and that expected by the Sentencing Council seemed to be largely related to differing interpretations of role, rather than substantial disagreement with the starting points and ranges. However, there were a small number of judges who did feel that the individual starting points and ranges were too high for some of the categories - some commented that the proposals could lead to an increase in sentencing levels.

<sup>7</sup> These reflections relate to the consultation guideline that was issued in March 2011 unless otherwise stated: see [www.sentencingcouncil.judiciary.gov.uk/docs/Drug\\_Offences\\_Guideline\\_Professional\\_Consultation.pdf](http://www.sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Guideline_Professional_Consultation.pdf)

<sup>8</sup> It should, however, be noted here that any differences in categorisation and sentences could in part be due to the limited information given to judges in the case studies; indeed, some judges commented that it would be difficult to sentence on the basis of the information provided.

<sup>9</sup> It should be noted, however, that the range of case study scenarios was limited so this observation is only in relation to the offences tested by the case study scenarios.

The main issues associated with the categorisation of the offender's role are outlined below. However, it should be noted that many of these factors interact when classifying offenders, in particular quantity.

- **The interpretation of the overall label given to the culpability categories:** for some of the judges, this seemed to be problematic – particularly for those who predominantly appeared to be using their own interpretations of the label's meaning – e.g. what type of person would be 'leading', rather than making reference to the bullet pointed detail underneath these labels in the guideline. For example, for some judges, on face value, 'leading' implied only the very high level organisers, much higher up the chain of command – referred to sometimes as 'Mr Big', rather than the street dealer cited in the draft guideline.
- **Taking account of quantity:** despite quantity being classified separately in Step 1, judges' own interpretations of the type of person who fitted into each role sometimes seemed to be related to the quantity of drugs involved in the offence<sup>10</sup>. For example, in scenario 3 (see page 1 of appendices), the quantity of nine wraps of heroin led some to conclude that the offender was not at the top end of a hierarchy, despite the Sentencing Council classifying this offender in a 'leading' role; likewise one judge felt that for scenario 4, the quantity of 60g meant the offender was a dealer not a distributor, which did not warrant the classification of 'leading' role. One judge also questioned whether an offender would be in a 'leading' or 'significant' role with only 1kg of cannabis or fewer than 15 plants: *"No-one taking a leading role is going to be cultivating fewer than 15 plants"*. This suggests that some judges may have been using quantity to assist them in determining the role of the offender, for example a large quantity of drugs would likely suggest a more than subordinate role.
- **Street dealers:** some judges felt that street dealers should not be defined as being in a 'leading' role: *"Leading suggests the sort of person sending out street dealers"*, someone *"organising the street dealing"* or *"taking a big role in a commercial organisation"*. Again, for some judges, this was related to the quantities of drugs that, in their experience, are involved in these types of offences.

Consequently, the starting points for sentences were mentioned by some as being too high: *"Starting point of five and half years is staggering... I just can't see how a low level street dealer like this can be put into a leading role"*. It was also felt that the description of 'direct supply to drug users for gain' within this category should not be classified as 'leading'. One judge suggested that to be in a 'leading' role, this should be changed to 'direct supply to drug suppliers'.

- **Categorising very high level organisers:** related to the above point, some judges asked the question: if street dealers are leading, where do the high level organisers in very large scale operations go? They questioned whether the leading category was too broad, effectively taking in the very top tier as well as street dealers – *"According to this, everyone from Mr Big down to the street dealer is in the top – it's too broad. A street dealer is still towards the bottom end of the food chain"*. Accordingly, it was suggested by one judge that an additional category, splitting out this top category of offender, might be needed. Another judge suggested that a sliding scale might be more appropriate in order to avoid having a sharp division between the categories.

<sup>10</sup> It was also sometimes observed by the interviewers that judges reflected on the quantity involved in the case study scenarios before deciding on a role, rather than focusing on role first and then quantity, as laid out in the draft guideline.

- **Couriers:** couriers<sup>11</sup> tended to be classified as either ‘subordinate’ or ‘significant’, which resulted in some disagreement over whether the driver of the vehicle in scenario 1 should be placed in the significant role - “*he’s the runner*”, “*not mid-tier*”, and “*he is a courier taking the drugs from A to B*”. Where the offender was regarded as significant, this was because: “*he acts as a link in a chain*” or because £1000 of cash was involved<sup>12</sup>. It was felt that the guideline should be more specific about where a courier would be placed and there was a need for definitions of how ‘couriers’, ‘runners’ and ‘street dealers’ differ.
- **The relevance of evidence of drug dealing paraphernalia:** some judges felt that some of the detail within the ‘leading’ category should not necessarily place offenders in a ‘leading’ role. For example, several judges commented that most drug users had drug dealing paraphernalia and that this did not necessarily mean they were in a ‘leading’ role: “*most drug users have scales at home – they say they buy from suppliers and then weigh the product. Simply having scales does not make you a leader in the operation*”. Judges cited various other alternative things that they would be looking for as examples of dealing activity in order to place offenders in a leading role – these included mobile phones containing contact details, and text messages with coded messages within them.
- **The interpretation of ‘gain’:** it was also felt that the interpretation of other details within some of the categories could be problematic – in particular, the issue of ‘gain’. It was felt that this was relative and also different types/seriousness of gain may need consideration – the examples given included:
  - a drug addict dealing to feed their own habit is very different to dealing for pure financial gain;
  - the gain involved in transporting a drug as a courier is different to the gain involved in directly dealing the drug (the former was seen as less serious by one judge);
  - the definition of *some* gain in the ‘significant’ role; on strict application, this could lead to some judges placing drug mules in this role, despite the wide consensus that they should be placed in ‘subordinate’; and
  - mentioning gain in both the ‘significant’ and ‘leading’ categories effectively places all suppliers in these categories, and never in the ‘subordinate’ category.

Accordingly, it was felt there was not enough flexibility in the roles, as defined, to distinguish between different types of offenders. This was deemed to be particularly the case where a drug addict was concerned: “*there is a difference between a commercial drugs supplier (a non drug user) and a ... human being who is addicted to heroin and in order to supply his habit sells... Both are classified as drug dealers for gain, but one needs help and the other needs serious time away... not everyone is the same*”. It was felt that the mitigating factors at Step 2 did not sufficiently help to provide this distinction.

- **Overlapping definitions:** some of the definitions within the categories were said to overlap, making the assessment of a specific role difficult – for example, in the supply guideline – ‘performs a limited function under direction’ in the ‘subordinate’ role category was considered to overlap with ‘limited/no influence on those above them in the organisational chain’ in the ‘significant’ role category.

<sup>11</sup> Discussions around ‘couriers’ tended to be in relation to scenario 1 and then generalised to other couriers. There was no sense that drug ‘mules’ were included in these reflections; whenever drug mules were mentioned there did not seem to be any disagreement over the new proposals contained within the guideline.

<sup>12</sup> For some judges in particular areas, however, this £1000 of cash was not felt to be an overly high amount – this suggests that there will be variation in the extent to which this level of payment influences categorisation of role.

- **Drug ‘mules’:** in terms of role, there was general agreement that drug ‘mules’ should be placed in the ‘subordinate’ category, fitting with the aim of the guideline to reduce sentences for this group (although one judge also felt that deterrence was an important factor and should be taken into account for this offence to reflect its seriousness).

Other issues, less frequently cited, included:

- supply *to* a prisoner should be in the same category as supply *by* a prisoner (in ‘leading’) given how serious this is;
- the first two bullet points of the ‘significant’ role suggest a person at a higher level than a street dealer;
- taking purity into account in role is particularly problematic for drug mules or other couriers who are unlikely to know the purity of the drug;
- guidance is needed on how to use the guideline if an offender falls between several categories. One judge said this might be to take the most serious role as the starting point; and
- the definitions of role seemed to be much clearer for importation than supply.

In stage 2 (see appendix B which outlines the specific details of the different versions of the guideline the judges were considering at this stage), fewer issues were raised regarding role<sup>13</sup>, but the message that there are times when assigning a clear cut role is problematic was reiterated. The problem with distinguishing between offenders in terms of supply for gain (e.g. whether this was to make profit or to support their own drug addiction) was again raised. In stage 3, consideration of the reasons given for sentences and the more specific reasons for assigning a particular role to an offender again indicated that these vary considerably according to the specific details of the offences and the judges’ own views on the case.

### Quantity

Identifying the correct quantity was more straightforward for judges as the quantities within the case studies could be mapped directly onto the categories in the guideline. The approach to classifying quantities used in the draft guideline also largely aligned with the approach that the judges said they would take.

However, there were comments that:

- the ‘very large’ category does not seem to be very high in terms of quantity and it was not clear enough what should be done with larger quantities.
- the ‘very small’ and ‘small’ categories are not actually very small or small in reality – e.g. a ‘very small’ amount of up to 4.9g could be worth up to £500; 100-999g of cannabis is not ‘small’ and “19 ecstasy tablets is a bit generous”. Consequently, one judge felt that sentencing the defendant from Case Study 3 (see appendices) – who discarded nine foil wraps of heroin weighing a total of 1.46g in a garden – could be problematic: “The difficulty you have is that if you start talking about small quantities, you’re automatically pushing someone like this down a level, even though the reality of the situation is that he isn’t really [involved with] a small quantity at all<sup>14</sup>”. This was felt by some judges to be an issue of labelling, and not related to the sentence length attached to these quantities.

<sup>13</sup> This may be due to some of the earlier difficulties having been in part overcome due to revisions to the guideline and/or the differing approaches adopted in stage 1 and 2 (stage 1 including more in-depth face-to-face interviews with judges).

<sup>14</sup> In this case study, the actual category for quantity was ‘very small’.

- related to the above comments, in some cases an emphasis on quantity may lead to incorrect sentencing, especially in conspiracy cases – for example, if there was a low quantity recovered, but evidence that a lot of dealing of drugs had been taking place.
- when moving between the importation and possession guideline, the further breakdown of quantities at the lower levels – using different amounts, but with the same category names – was confusing. For example, under the importation guideline, up to 4.9g of heroin is classified as ‘very small’; on being instructed to refer to either the supply or possession guideline, any amount between 1g and 4.9g then becomes ‘small’.
- defining quantity by the number of plants in the cultivation guideline is problematic – this should be combined with information on the sophistication of the operation and the yield potential;
- as outlined above, quantity in relation to role is problematic – for example, can an offender take a leading role or significant role with only 1kg of cannabis or fewer than 15 plants? *“No-one taking a leading role is going to be cultivating fewer than 15 plants”*.
- some of the sentences for cultivation of cannabis needed further consideration – there was concern from one judge that there was a substantial increase in sentence length when moving between offences involving up to 8 plants and those involving 9 to 15 plants – from a starting point of a medium level Community Order to 26 weeks’ custody, respectively.

As mentioned above, some judges also used quantity to help them ascribe a role to the offender before moving onto specifically categorising the quantity, which may be considered double counting. There were also some concerns with how quantity related to purity and the way in which this was taken into account in the proposed guidelines, which are outlined below.

In stage 2, the judges’ views on the two different versions were fairly evenly split with five judges preferring Version B, four preferring Version A and one not specifying<sup>15</sup>. Version A linked starting points to quantity, whereas Version B did not (see Appendix B).

Version A was favoured by some judges because they felt that linking starting points to quantities provided greater clarity to classifying the type of operation involved and was more logical. One judge said it was therefore easier to use and to apply – but that *“it sacrifices flexibility for possible artificiality in sentencing”*. Another judge favoured Version A as they felt that Version B was problematic. Where they commented, views were mixed on the addition of ‘retailing irrespective of quantity involved’ in ‘medium scale operation’: one judge thought this was a helpful inclusion, but another questioned its relevance. It should also be noted that in a small number of face-to-face discussions, it was noted that the judges overlooked this addition, implying that, as drafted, its use in practice may have been minimal.

Conversely, Version B tended to be favoured by judges who felt that linking starting points to quantities was problematic: one felt this was particularly difficult with smaller amounts and that *“seeking to draw a line where an amount moves from one category to another is both difficult and artificial”*; another commented that in some cases the drugs may not be found which then makes it difficult to determine a type of operation. Another thought that it is useful to be able to reflect the wider impact of an operation where an offender is caught dealing just one deal. Views on the usefulness of the addition of ‘significant adverse community impact of offender’s behaviour’ and ‘lesser

<sup>15</sup> It should be noted that only 10 of the original 24 judges were able to take part in stage 2 and so the number of judges commenting on the revised versions of the guideline were fewer in number.

adverse community impact of offender's behaviour' were mixed; where it was felt not to be useful, reasons included the fact that it was too subjective and may lead to perceptions that judges are 'telling the community' what harm has been caused by the case.

### *Purity*

Judges commented that purity is a key factor which they take into account in sentencing cases. Although different judges had different views on its overall importance, it was linked for some to both establishing the actual quantity of the drug, and classifying role and position in a hierarchy: "*it is very important because purity gives you a very good feel as to how close the offender is to the source and therefore where they come in the hierarchy*". One judge, however, acknowledged that this was problematic in the case of drug 'mules' who were unlikely to know either the purity or quantity of the drug. Another judge felt it was problematic in relation to drug users: "*People taking drugs often don't know the purity. It's more important when dealing with the top end of the market; down the chain its not as important*".

Some judges said that they currently received a purity analysis in all or most cases, whereas others said they received this all/most of the time for particular types of cases – for some this was importation cases, others supply cases, cases involving Class A drugs or those involving larger quantities of drugs. Views were split on the importance of obtaining a purity analysis, particularly for street level offences, or on whether it was always worth taking this information into account in sentencing (some said discussions were often more around average street level purity): "*On the street, 10 wraps is 10 wraps regardless of purity*".

Only a small number indicated that analysis was given to them rarely or in only a small proportion of cases.

When working through the draft guideline, where people expressed a view, opinions varied on the proposal to deal with purity at Step 2 rather than Step 1.

Some judges felt this was the right approach – one felt it was logical dealing with it in this way, another that considering it early on would complicate matters, and another that the issue of purity is less important than other factors and plays a secondary role:

*Considering purity at Step 2 makes sense after you have the starting point/category range*

*Approach is to downgrade role of purity – bring [it] in at a later stage and that fits better than working out percentages etc*

*... better taken into account at Step 2 – plays a secondary role*

However, others were firmly of the opinion that purity should be taken into account in Step 1. They felt that it was vital they knew the purity of the drug concerned in order to sentence different quantities on a consistent basis, particularly for large scale importation offences:

*To have purity at Step 2 is illogical...sentencing on the actual weight...there'll be no consistency. The less pure could get a higher sentence technically than the one who brought in the purer stuff. You get an artificial figure if you don't look at purity*

*The present approach where you look at the purity of the drug at an earlier stage is better. Purity can tell you a lot about the people involved, what stage they're at and whether or not they're telling you the truth*

Regardless of the approach taken, it needs to be clear to judges on what basis they are categorising quantity. When working through the case study scenarios, some judges categorised the quantity without realising that purity was taken into account later. For one judge, the relevant table heading in the draft guideline of ‘quantity of drugs’, was interpreted literally as quantity of ‘drug’ rather than quantity of ‘substance’ or ‘powder’ – not only did they disagree with purity being taken into account at Step 2, they felt the wording of this table was potentially misleading: “*Surely Step 1 is looking at the quantity of powder? I understand it as that... Purity at Step 1 is needed... this is saying quantity of drugs which is completely different. Otherwise you are sentencing for quantities of talcum powder*”.

### Step 2 factors

Although the interviews were not designed to specifically examine the use of Step 2 factors, a few judges did comment on these. Those comments included<sup>16</sup>:

- vulnerability is included twice, appearing in both Step 1 in the subordinate category and then again as a factor reducing seriousness or reflecting personal mitigation;
- some of the factors are very rare – e.g. using a youth, supplying in the vicinity of a school;
- there are too many aggravating and mitigating factors – one judge felt that if these become exhaustive, an offender could “*get wise to the factors*” and another that “*a shorter list may be better because if it’s longer it may be thought to be exhaustive*”; and
- purity should not aggravate at lower levels – it’s more significant for people at wholesale and above. Another judge felt that low purity should be regarded as a mitigating factor.

### Conclusion

This research provided valuable feedback and insight into the draft guideline proposals at different stages of its development from judges who will be using them once they are implemented. It particularly helped establish potential unintended consequences of the proposals and whether they would lead to any unanticipated changes in sentencing practice. In conjunction with other responses received as part of the consultation phase, the research has helped refine the proposals that are now contained in the definitive guideline: see [www.sentencingcouncil.judiciary.gov.uk/guidelines/forthcoming-guidelines.htm](http://www.sentencingcouncil.judiciary.gov.uk/guidelines/forthcoming-guidelines.htm).

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### Emma Marshall

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<sup>16</sup> These issues were more commonly raised by just one judge.