

Drug Offences Response Document

January 2021

Drug Offences Guideline

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Foreword



On behalf of the Sentencing Council I would like to thank all those who responded to the consultation and to those who took part in our roundtable event. I also extend my thanks to the members of the judiciary who gave their time to participate in the research exercise undertaken to test and inform the development of the guidelines.

The 2012 drugs guidelines were one of the first sets of guidelines produced by the Sentencing Council. They are familiar to sentencers and practitioners alike and our evaluation shows that, in general terms, they work effectively. For this reason, large parts of the new guidelines, the structure and approach, and some of the factors, remain the same. However, changes have been made to reflect the changing nature of offending, reflecting the concerns raised by some about the exploitation of young or vulnerable people in the commission of drug offending; the increase in county lines offending; and, for some drugs, the increase in purity or yield of the drugs. In addition, new offences now exist under the Psychoactive Substances Act, requiring us to produce a whole new set of guidelines to cover these new offences. I am confident that this new package of guidelines will assist sentencers to pass just and proportionate sentences for all types of drug offending that come before them.

You may have been aware that in order to support the revision of the drug offences guidelines, the Council commissioned research that looked at the sentencing of three supply-related drug offences in the Crown Court between 2012 and 2015 to consider the association between an offender's sex and ethnicity and the type and length of sentence they received. That analysis found disparities in sentencing outcomes associated with sex and ethnicity. Having considered the analysis the Council was concerned that the sentencing guidelines should not contain anything which might contribute to or exacerbate disparities and so we have taken some measures to address those issues.

This is an area that the Council is committed to continue to investigate and so two steps have so far been taken; firstly we have set up a working group of Council members to explore what further action we can take across all guidelines, and secondly we have commissioned a review of the guidelines and our wider work to help inform us of any aspects of our work that may need reconsideration.

Lord Justice Holroyde

Chairman, Sentencing Council

Introduction

In January 2020 the Sentencing Council published a consultation on a package of draft guidelines for drug offences. The package included revised draft guidelines for offences under the Misuse of Drugs Act 1971 (MDA) and new guidelines for offences under the Psychoactive Substances Act 2016 (PSA).

The guidelines included were:

- Importation of controlled drugs (section 3 MDA);
- Supply/ possession with intent to supply controlled drugs (PWITS) (section 4(3) and section 5(3) MDA);
- Production of a controlled drug/ cultivation of a cannabis plant (4(2)(a) or (b) MDA and 6(2) MDA);
- Permitting premises to be used for drug related activity (section 8 MDA);
- Possession of a controlled drug (section 5(2) MDA);
- Importation of a psychoactive substance (section 8 PSA);
- Supply/ possession with intent to supply a psychoactive substance (PWITS) (section 5 and section 7 PSA);
- Production of a psychoactive substance (section 4 PSA); and
- Possession of a psychoactive substance in a custodial institution (section 9 PSA).

Prior to the publication of this new package of guidelines there were guidelines which came into force in February 2012, covering just the offences under the MDA. The Council evaluated the 2012 drugs guidelines and published its [assessment](#) in June 2018. The evaluation found that the 2012 guidelines had led to some small unanticipated changes in sentencing severity, but their overall effect was not considered to be a cause for concern.

However, since the publication of the 2012 guidelines, there have been changes which affect sentencing in this area, for example the nature of drug offending has changed to some extent with an increase in the use of county lines offending (criminal gangs receive orders for drugs using dedicated phone lines and transport those drugs from city hubs to smaller towns and rural areas), an increase in the use or exploitation of vulnerable people; the emergence of new drugs; and the increased strength of some drugs. In addition, in May 2016 the Psychoactive Substances Act came into force, creating new offences similar to those covered by the MDA but in relation to psychoactive substances.

The Council therefore decided to revisit the existing guidelines and produce new guidelines for the offences under the PSA.

In developing these new guidelines, the Council has considered 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. The findings of the review included reference to research on disparities in the sentencing of White and Minority Ethnic 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 guidelines, the Council decided to carry out its own research into

disparities in sentencing for drug supply offences between offenders of different ethnic groups and genders. The findings of our research, as well as consideration of the Lammy Review findings and other work on revising this guideline, prompted the Council to consider what more it could do, within its narrow remit, to understand what contribution guidelines may or may not have had in relation to disparities in sentencing drug offences and to explore whether there were ways that guidelines may be able to limit or reduce such disparities.

The resource implications of these guidelines are explored in detail in a [resource assessment](#) published by the Council.

Summary of analysis and research

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,¹ 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 following guidelines were 'road tested' whilst in draft form, to gain a sense of what the effect of the draft guideline might be, in practice, and to identify any issues or problems with the draft, as well as judges' and magistrates' responses to the guidelines.

- Production of a controlled drug – *Misuse of Drugs Act 1971*
- Possession of a psychoactive substance with intent to supply (s.7) – *Psychoactive Substances Act 2016*
- Supplying or offering to supply a controlled drug – *Misuse of Drugs Act 1971*
- Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug – *Misuse of Drugs Act 1971*

Since this work included a revision of the original suite of Sentencing Council Drug Offences Guidelines, emphasis was placed on exploring the changes to the guidelines, the possible effects of these, and judges' and magistrates' reactions to them.

The fieldwork consisted of semi-structured interviews with 26 judges;² providing them with five hypothetical scenarios and asking them to sentence the offenders in those cases with both the draft and current guidelines.

In a separate exercise, the supply guideline was researched at a consultation event with approximately 50 magistrates, who sentenced a scenario in groups of three or four. Again,

¹ Sources included the Ministry of Justice's Court Proceedings Database, the Crown Court Sentencing Survey, and a bespoke survey conducted in magistrates' courts.

² As with all our qualitative work, the sample size was small and self-selecting, which means the findings cannot be considered representative of all judges and magistrates. However, they provide an insight into how these groups may use and respond to the guideline.

the aim was to explore the effects of the draft guideline, any problems or unintended consequences and their reaction to the draft.

Summary of responses

The consultation sought views from respondents on the nine separate guidelines. In total 43 responses were received.

Breakdown of respondents

TYPE OF RESPONDENT	NUMBER
Charity/ not for profit organisation	5
Legal professionals	3
Judiciary (both representative body responses)	2
Magistrate (including 4 representative body responses)	19
Other	1
Academics	3
Government	5
Members of the public	2
Prosecutors	1
Parliament	1
Victim	1
TOTAL	43

Feedback received from the Council's consultation events and interviews with sentencers during the consultation period is reflected in the discussion in the text below.

There was a broadly positive response to the majority of the proposals. However, the Council was also grateful for any constructive criticism that was received and considered all suggestions for amendment to the guidelines.

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

These three guidelines were grouped together at consultation as they share the same structure, most of the same culpability, aggravating and mitigating factors, and all of the same harm factors.

Culpability Factors

County Lines and ‘cuckooing’ factors

The evaluation of the 2012 guidelines showed that the structure worked well, but research conducted more recently showed that some factors needed to be amended or added to reflect changes in offending since the original guidelines were produced.

The guidelines determine culpability by reference to the role that an offender played during the commission of the offence. The categories are leading role, significant role and lesser role.

The Council proposed additional culpability factors to seek to address concerns about increases in county line offending, cuckooing (occupying the home of a vulnerable individual to use as a base for selling drugs), and the exploitation of young and/ or vulnerable individuals to facilitate the offence. These additional factors were added to the leading role category in the proposed guidelines:

- Exploitation of children and/or vulnerable persons to assist in drug related activity
- Involving an innocent agent in the commission of the offence (importation only)
- Exercising control over the home of another person for drug related activity (supply and production)

A number of respondents were concerned that these factors were not indicative of an offender’s role and could be behaviours that are exhibited by any offender.

We agree with the inclusion of three new factors to be considered as contributing to a “Leading role” category, but we also believe that they should equally be included in the “Significant role” category. In the cases that we see in the magistrates’ court, particularly

*for the purposes of the issuing of warrants or allocation, there are many “middle men” in a drug supply chain that would probably not satisfy the other factors of a “Leading role” but who nevertheless still use children or young persons in the transportation and distribution of drugs, or use the home of a vulnerable person from which to sell or manufacture drugs, or as storage for their main drug supply. Consequently, we believe these factors are still important for the Significant role category. Perhaps the SC would then prefer to somehow distinguish these factors between the two categories (if our suggestion is adopted), and how this is done we leave to the SC. **West London Bench***

In addition, some respondents were concerned that the focus on county lines offending would lead to greater racial disparities in sentences. This is referred to in the Equality and Diversity section.

*The revisions of the guidelines place a heavy emphasis on ‘county lines’. The ways that this phenomenon is reported in the press is extremely racialised. It is highly likely that those convicted as ‘county lines’ offenders will be black and minority ethnic young men. As such, this revision is likely to worsen racial disparities in sentencing, rather than ameliorate these differences. **Jennifer Fleetwood (Academic)***

The Council agreed that whilst these factors make the offending more serious, they are not limited to offenders who act in a leading role. It was therefore agreed to move these factors to step 2, aggravating factors. This means that the offender’s role is decided separately but that the sentence can then be aggravated from the starting point on the basis of the presence of one or more of these new factors.

Financial or Other Advantage

The Council also proposed amending the factors relating to financial gain. The factor in the 2012 guidelines, appearing at significant role, was ‘motivated by financial or other advantage, whether or not operating alone’. There was no factor within the lesser role category. The Council considered that almost all drug offences are driven to some extent by financial motive, whether to obtain money or drugs or to pay off a drug debt. For this reason, the Council decided to revise the significant role factor and add a factor to the lesser role category:

Significant:

- 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:

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

The majority of respondents agreed with the inclusion of these factors. However, a couple of respondents were concerned that the factors do not seem to provide for cases where offenders supply drugs only to a small social group:

Release very much welcomes the proposal to amend the current factor of “motivated by financial or other advantage” by replacing “motivated” with “expectation”. Through Release’s expert witness work we have seen numerous cases where people have been

placed in the “significant role”, due to the fact the activity they were involved in resulted in them not having to pay for their drugs, or where there was very limited financial gain. We would suggest that where this factor is outlined in the “lesser role” that it also includes a reference to “social supply” as well as “meeting the offender’s own habit”. Such cases involve little to no financial gain and in no way indicate that the person involved is part of the formal drugs market. Release

The Council considered this point but concluded that such cases would fall within the lesser role category due to the fact that there would be an expectation of limited, if any financial or other advantage, and none of the higher role factors are likely to exist. If, however, an offender is supplying to their friends or a small group but does so in such a way that they gain a significant financial or other advantage then it is only right that they fall into significant role.

Lesser Role Factors

The Council also proposed the following additional culpability factors to the lesser role category:

- Engaged by pressure, coercion, intimidation
- Involvement through naivety/ exploitation

The majority of respondents agreed with these additional factors. One respondent proposed the addition of the word ‘immaturity’ to the second factor to read: Involvement through naivety, immaturity and/ or exploitation. The Council agreed with this proposal and has made the change.

One respondent proposed an additional lesser role factor for the production/ cultivation of cannabis guideline: ‘production or cultivation of cannabis is for medical purposes, either for the individual or for others where there is limited financial gain’. The Council considered this but concluded that any case where an offender was genuinely producing cannabis for medicinal reasons would almost certainly fall into lesser role as the offender would have no expectation of financial or other advantage, and none of the significant or leading role factors would apply.

The consultation version of the guidelines included the following lesser role factors which were aimed at capturing those offenders who have themselves been exploited or pressured into offending (though not to the extent that they could avail themselves of the modern slavery defence):

- Engaged by pressure, coercion, intimidation
- Involvement through naivety, immaturity or exploitation

One respondent proposed that the first factor should be expanded:

We recommend that the Council consider adding “or other forms of grooming and/or control” to the first factor, so that it reads, “Engaged by pressure, coercion, intimidation or other form of grooming and/or control”. This would reflect the latest research and understanding of the multitude of sophisticated grooming and control mechanisms employed by people who exploit children and vulnerable adults, which include: threats, coercion and violence; peer grooming; emotional abuse; use of social media; promises of money, status and glamour; protection and sense of belonging; sexual exploitation; tricks and debt bondage. This would assist in cases where there are genuine concerns about exploitation. **Howard League**

The Council agreed with this proposal and changed the factor to “Engaged by pressure, coercion, intimidation, grooming and/or control”.

Additional Culpability Factors

The Council asked if there should be any other factors within culpability. One suggestion raised by a couple of respondents was to add the factor ‘threat or use of violence’. The Council considered this factor but concluded that the use of violence would not necessarily indicate what specific role the offender played, i.e. it is not in itself an indicator that the offender was in a leading role. In addition, if violence was used in the commission of the offence a separate charge is likely to have been brought. The Council concluded that this factor could be added to step 2 as an aggravating factor, and so has included a new aggravating factor; ‘use of violence (where not charged as separate offence or taken into account at step one)’.

Harm

The Council decided to keep the existing approach to assessing harm within these guidelines. This approach is based on the quantity of the drug in question.

Drug Mules

The majority of respondents agreed that this was the best approach however one respondent expressed concern about drug couriers (drug mules).

Where a person is carrying drugs for others, they cannot have control over what, or how much of a drug they are carrying. Drugs arrive pre-packaged, and drug mules are routinely misled about what they are carrying. In the case of those in a lesser role, drug weight is not appropriate as an indicator of harm. Jennifer Fleetwood (academic)

The Council considered this point but concluded that the assessment of harm is a consideration of the amount of harm either caused or likely to be caused to a victim or society at large. The fact remains that the importation of a large amount of class A drugs is more harmful to society than the importation of a small amount of class C drugs. The role that the offender played in the operation, including their knowledge and control over the drugs imported, is a matter relevant to culpability not harm. For this reason, the Council chose to retain the existing approach to harm.

Drug couriers are likely to fall into the lesser role at culpability and may be entitled to further mitigation of their sentence at step 2, but there should be some differentiation between couriers based upon the amount and type of drugs imported.

Drugs Covered by the Guidelines

The Council also consulted on the list of drugs covered by the new MDA guidelines:

- Heroin
- Cocaine
- Ecstasy
- MDMA
- LSD
- Amphetamine
- Cannabis
- Ketamine
- Synthetic Cannabinoid Receptor Agonists

This list had been expanded to additionally include MDMA and Synthetic Cannabinoid Receptor Agonists (SCRAs). The drugs available on the market change over time and many substances can vary hugely in strength. For these reasons not all substances were included in the list. Fentanyl and its variants are an example of this. To assist courts to sentence offences involving drugs not listed, the Council included the following text into the new guidelines:

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.

Some respondents did not realise that fentanyl was intended to be covered by the additional wording above. To ensure that sentencers understand that fentanyl is covered by the wording the Council has decided to amend the wording to give fentanyl as a specific example:

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 (such as fentanyl or its agonists e.g. carfentanyl) is not listed in the table below ...

The Council also decided to “future proof” the guideline by agreeing to review the Harm table every three years, looking at both the list of drugs which are included, and the quantities given.

The Council asked respondents if they agreed with the current list of drugs and the text which covers those drugs not listed. Almost all respondents agreed with the new list. There was one suggestion that cocaine could be separated to include crack cocaine and cocaine in the powder form. This will be explored when the Council next reviews the list.

Quantity of Drugs

As a result of evidence received from the Metropolitan Police and National Crime Agency, changes were made to the quantity of ecstasy tablets and cannabis plants within the harm table to reflect the fact that the average purity of ecstasy has increased, and the average yield of cannabis plants has increased. The majority of respondents were content with the new quantities listed within the harm step.

Due to the great variety of ways that SCRA's can be prepared (for example diluted by a variety of solvents, sprayed onto leaves or paper) with varying weights it became impossible to include indicative quantities of these drugs within the harm table. For this reason, the Council proposed narrative factors:

Category 1 – Very large quantity indicative of an industrial scale operation

Category 2 - Large quantity indicative of a commercial operation

Category 3 – Smaller quantity between categories 2 and 4

Category 4 – Very small quantity

Whilst some respondents felt that this model might be difficult to apply almost all agreed that it was the best option in the circumstances. A number of respondents asked that 'spice' be specifically referred to in the guideline as this is commonly seen in court. The Council have, therefore included 'spice' as an example of an SCRA within the text of the guideline.

Sentence Levels

The only changes made to the sentence levels were in the importation guideline. The main change was to category 4 which had previously included the following narrative, rather than specific figures:

Where the quantity falls below the indicative amount set out for category 4 on the list above, first identify the role for the importation offence, then refer to the starting point and ranges for possession or supply offences, depending on intent. Where the quantity is significantly larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges above.

Some sentencers had indicated that they found this approach confusing and not very transparent and welcomed the inclusion of specific figures. The majority of respondents to the consultation were in agreement with the figures within category 4:

The MA welcomes the introduction of specific sentencing guidelines for Importation offences, which currently do not have their own guidelines, and the increase in transparency this is predicted to achieve. While the ranges within each category are very broad, we accept this is probably necessary to cover all the variations the court may see. We particularly welcome this change as the Sentencing Council noted that the current sentencing guidelines are particularly confusing to magistrates, who rarely see importation cases. **Magistrates' Association**

However, one respondent was concerned that the figures represented an increase to the sentence that would have been received previously using the narrative, in particular in relation to lesser role offenders. In deciding upon the figures, the Council had considered both the possession and supply sentences. For 'lesser role' offenders the figures used were the possession guideline figures with a small uplift which reflects the small increase that would have been applied due to the aggravating factor 'charged as importation of a very small amount' within that guideline. The Council does not consider that there would be any increase to the sentences received by lesser role offenders importing drugs.

The Council has decided to keep the figures within category 4.

One further change has been made to the importation guideline sentencing table for Class B, category 3, lesser role sentences. This change was necessary due to an error in the consultation version whereby the upper sentence range was lower than the starting point. The Council reflected on the sentences for this category of offender and chose to amend the sentence so that the starting point is now 9 months with a range of 12 weeks- 18 months.

Aggravating and Mitigating Factors

The aggravating and mitigating factors remained largely the same as those within the 2012 drugs guidelines. However, a small number of changes were made including separating out one factor; 'exposure of others to more than usual danger, for example, drugs cut with harmful substances', into three separate 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

Two respondents thought that the wording of the first bullet point might cause some confusion and proposed some small changes. Looking across those comments the Council has decided to amend the first factor to:

- Exposure of drug user to the risk of serious harm over and above that expected by the user, for example, through the method of production or subsequent adulteration of the drug.

At consultation the Council proposed an additional aggravating factor:

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

However, a number of respondents were concerned about the use of the term 'encrypted communications' on the basis that many commonly used messaging services use encryption. The Council agreed and changed the factor to:

- Use of sophisticated methods or technologies in order to avoid or impede detection

Drugs in Prison

The Council asked consultees whether any additional aggravating factors should be included. A couple of respondents raised concerns about drug offending in prison:

The CPS welcomes the wording "Exposure of third parties to the risk of serious harm, for example, through the location of the drug-related activity". There is concern about the supply of drugs at events such as music festivals and this aggravating factor would allow sentencers to take into account the risk of serious harm which is caused in this context. This aggravating factor would also apply to the supply of drugs into prison. However, due to the additional harm caused by this particular offending the CPS is of the view that this may merit a specific aggravating factor. CPS

The supply of drugs in prison is, to some extent, addressed at step one harm which provides that supply of drugs in a custodial institution is always at least category 3 harm (irrespective of the quantity). In addition, if the supply of drugs is coming from a prison employee this would be covered at culpability too with the leading role factor, Abuses a position of trust or responsibility. However, the Council agreed with the concerns raised and considered that there should be a specific factor to address such offending. The following aggravating factor was, therefore, added to all guidelines:

- Offending took place in prison (unless already taken into consideration at step 1)

The following additional aggravating factor was added to the supply guideline:

- Offender was supplying or involved in the supply of drugs into prison

Drug Purity

The revised guidelines include a number of aggravating and mitigating factors that have remained from the 2012 guidelines. Included is the aggravating factor, high purity and the mitigating factor, low purity. A number of respondents raised concerns about these factors:

*Whilst we support the principle of purity being considered at Step 2, we would highlight that low purity substances can have a greater level of harm to the individual than those at a higher purity because of the adulterants used (although the level of potential distribution would be reduced). As such, it is proposed that if an offender who possesses a significant level of control over the market ("leading role") is supplying a substance that has already been adulterated to a very low purity this should be considered as an aggravating factor. Purity levels should not be relevant to those caught within the definition of a "significant" or "lesser" role - due to the lack of control and knowledge that they would have over the product and its contents. Particularly, in respect of the "lesser" role it is highly unlikely that they would know the purity of the drug and so high purity should not be treated as an aggravating factor due to lack of knowledge. **Release***

*We question the inclusion of low purity as a factor reducing seriousness or reflecting personal mitigation, as this is not something that would be known within the offence. For example, if they thought they were importing something with high purity but it turned out to be low purity, should this be a mitigation? It is also important to note that low purity may be due to a drug being cut with other substances, which may actually increase the potential harm of the drug. **Magistrates' Association***

As a result of the concerns raised the Council chose to remove both the aggravating and mitigating factors from the guidelines. As the list of aggravating and mitigating factors is non exhaustive the Court can, in an appropriate case, still use these factors.

Minimum Terms Guidance

The MDA offences of importation/ exportation, supply/ PWITS, production/ cultivation and permitting premises to be used for drug related activity are all subject to a minimum term of 7 years imprisonment, under section 313 of the Sentencing Code, 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.

In the 2012 guidelines limited guidance was provided on this area. However, the Council has previously provided guidance in its Bladed Article and Offensive Weapons guidelines, on mandatory terms and so decided to replicate that guidance within these drugs guidelines.

The majority of respondents agreed with this wording and so the Council has decided to keep it within these definitive guidelines.

Misuse of Drugs Act 1971 offences – permitting premises to be used for drug related activity

Very few comments were received in relation to this guideline. Those that did comment were broadly positive. Some made comments that have been reflected elsewhere in discussion, for example concerns with the inclusion of the step 2 factors low/ high purity, these factors have now been removed from this guideline. In addition (as discussed above), the Council has now included a specific reference to 'spice' as an example of a SCRA.

All other aspects of the guideline remain as they were at consultation.

Misuse of Drugs Act 1971 offences – possession of a controlled drug

Following the evaluation of the 2012 guideline the Council concluded that the possession guideline was working as intended and that no changes were needed. The only exception was to remove reference to importation as an aggravating factor as the changes made to the importation guideline meant that this was no longer required.

Almost all respondents to the consultation agreed with this decision and so no changes are proposed.

Psychoactive Substances Act 2016 offences – importation/exportation, supply/PWITS and production/cultivation

In producing these new draft PSA guidelines, the Council replicated the approach used for the MDA guidelines. The benefits of doing so were that many offenders appear before the court facing sentencing for both types of offence or have previous convictions for MDA offences whilst being sentenced for PSA offences. It therefore enables a consistent approach to be taken. In addition, sentencers are familiar with this approach and the evaluation of the 2012 MDA guidelines indicate that this approach is effective.

For the new PSA guidelines, the culpability, aggravating and mitigating factors are the same (or largely the same) as the equivalent MDA guideline factors. The Council has, therefore, chosen to make the same changes to the PSA guidelines as already discussed above in relation to the equivalent MDA guidelines:

- Moved the following **leading role culpability factors** to step 2 (aggravating factors)
 - Exploitation of children and/or vulnerable persons to assist in the offending.
 - Involving an innocent agent in the commission of the offence. [Importation only]
 - Exercising control over the home of another person for the purposes of offending. [Production and supply only]
- Amended the **lesser role culpability factor** to include the word ‘immaturity’; Involvement through naivety, immaturity or exploitation.
- Amended the **aggravating factor** ‘Exposure of psychoactive substance user to the risk of serious harm, for example, through the method of production/mixing of the substance’ to ‘Exposure of psychoactive substance user to the risk of serious harm over and above that expected by the user, for example, through the method of production or subsequent adulteration of the substance’.
- Added the **aggravating factor**, ‘Use of violence (where not charged as a separate offence or taken into account at step one)’.
- Added the **aggravating factor** ‘Offending took place in prison (unless already taken into consideration at step 1). [Production and supply only].’

- Added the aggravating factor 'Offender was supplying or involved in the supply of psychoactive substances into prison'. [Supply only]
- Removed the **aggravating factor** 'High purity'.
- Removed the **mitigating factor** 'Low purity'.

Aside from these changes the Council has made no further changes to these guidelines.

Psychoactive Substances Act 2016 offences – possession of a psychoactive substance in a custodial institution

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.

This is an extremely low volume offence, with just seven adult offenders sentenced in 2018 and 2 in 2019.

The range of ways in which this offence can be committed are extremely limited. In addition, as this is an offence of possession, the quantity of the substance involved is usually very small. For these reasons the Council found it particularly challenging to develop a guideline that differentiates meaningfully between different levels of seriousness.

It was proposed that the guideline should only separate the offence by culpability, with two levels; offences in which the offender is in a position of trust or responsibility in the custodial institution and all other cases.

However, a couple of respondents raised doubts about this approach:

Why is the seriousness of the offence so much greater if the offender was in a position of trust within the prison? I note that this intended to address, for example, where the prisoner is a member of a prison council, but I am concerned that this approach will lead to prisoners who are, for instance, enhanced regime prisoners being categorised as in a position of trust. Similarly, if a prisoner had a job in the kitchen, or another trusted position, is it intended that their possession of a psychoactive substance is twice as serious as a prisoner without such a job or regime? This, in my view, would be wrong. **Criminal Bar Association**

We believe the proposed approach to the assessment of culpability is incorrect and will have unintended and perverse consequences. It may be appropriate to assume a higher level of culpability where the offender has a higher level of 'responsibility' as a result of being in a paid position of employment as a prison officer, or a civilian in a volunteer position in the prison. In these circumstances, the offence could be seen as representing a significant breach of the trust that was placed in the individual and deserving of more severe punishment. However, the same criteria cannot be easily applied when the person in the position of 'responsibility' is a prisoner, for instance, a Samaritan Listener or a

member of a prison council. First, unlike a paid position of employment, a prisoner does not gain any material benefit from performing these roles. Furthermore, unlike a volunteer in the community, neither do they necessarily enjoy any significant benefit in terms of greater public standing or social status. These roles do, however, contribute immeasurably to improving the quality of prison life for prisoners and prison staff. **Prison Reform Trust**

The Council agreed with the points raised and has concluded that, given the extremely low volume of offences, and the limited way in which the offence can be committed, there is no benefit to producing a guideline at this time. The Council will, however, continue to monitor the situation. Should there be a significant increase in the volume of these cases, which allows the Council to gather greater evidence upon which to base a guideline, then a new draft will be prepared.

Equality and diversity

As a public body the Council is subject to the Public Sector Equality Duty (PSED) which means it has a legal duty to have due regard to:

- the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010;
- the need to advance equality of opportunity between those who share a “protected characteristic” and those who do not;
- the need to foster good relations between those who share a “protected characteristic” and those who do not;

Under the PSED the relevant protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

Alongside the draft guidelines the Council published a report which contained findings from a statistical analysis of data from the Crown Court Sentencing Survey, investigating the association between a range of sentencing factors and offender demographics and the sentence imposed, in England and Wales. This analysis focused on adults sentenced for the offences of supply, possession with intent to supply and conspiracy to supply a controlled drug of classes A or B, at the Crown Court, between April 2012 and March 2015.

The analysis showed that, when taking into account the main sentencing factors for the three offences, the sex and ethnicity of offenders were associated with different sentencing outcomes;

- The odds of a male offender receiving an immediate custodial sentence for the three supply related drug offences were 2.4 times the size of the odds for a female offender, and male offenders received sentences on average 14 per cent longer than women.
- For Asian offenders and those in the “Other” ethnic group (which included offenders who were not Asian, Black or White), the odds of receiving an immediate custodial sentence for the three drug offences were 1.5 times the size of the odds for White offenders. The odds of a Black offender receiving an immediate custodial sentence were 1.4 times the size of the odds for a White offender.
- Asian offenders received custodial sentences that were on average 4 per cent longer than the sentences imposed for White offenders. No differences were found when comparing custodial sentence lengths between other ethnic groups.

Since the consultation the Council has undertaken a further review of sentence outcomes for the other offences covered by the guidelines. The analysis was based on sentence outcomes taken from the Ministry of Justice Court Proceedings Database and does not take account of the features of individual cases. In this further analysis the Council found evidence of sentencing disparities within the Misuse of Drugs Act Importation and Production offences.

The full data tables are published on the Council’s website [\[link\]](#).

The revised drug offences guidelines are intended to apply fairly 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 guidelines could be interpreted in different ways. The Council therefore asked additional questions at consultation to ascertain whether consultees considered any areas of the guideline needed revision. In addition, the Council held a roundtable discussion with a wide variety of stakeholders with particular interests in the area of racial and gender disparities within the Criminal Justice System. This meeting proved invaluable and the Council is grateful to all of those who took part.

Changes made to the guidelines

The majority of respondents who commented on the disparities in sentence outcomes focused on those associated with ethnicity. Very few commented on the gender disparities, and those that did felt that the disparities were often understandable.

It is well understood that the drivers of women's offending—including for drug offences—are often different from those for men, and this should be taken into account in sentencing.

Prison Reform Trust

Whilst the analysis for sentencing of drug offences by sex and ethnicity shows that men are more likely to be imprisoned than women, women have specific characteristics that should be considered. The Ministry of Justice states that the proportion of women entering prison with a drug problem is much higher than it is for men, 39 per cent compared to 28 per cent. In addition, women are more likely to be imprisoned for non-violent offences compared to men, 84 per cent compared to 76 per cent, of which drug offences is included. Fifty seven per cent report suffering from domestic violence, though this is likely to be under reported. It is estimated that over 17,000 children a year are separated from their mothers due to imprisonment, creating a cycle of harm and damage as most will be the primary carer. We are particularly concerned about the high rates of imprisonment for Black women for drug offences - as highlighted in the Lammy review, they are 2.3 times more likely to receive a custodial sentence compared to white women.⁸⁶ All of these factors need to be considered when sentencing a female offender, and considering the high level of non-violent offences (including drug offences) a community order should be considered in all cases. **Release**

The Council has, therefore, focussed its changes on addressing the disparities that exist associated with ethnicity.

Culpability Factor

County Lines and 'cuckooing' factors

As discussed above, to seek to address concerns about increases in county line offending; cuckooing (occupying the home of a vulnerable individual to use as a base for selling drugs); and the exploitation of young and/ or vulnerable individuals to facilitate offending, the following factors were added to the 'leading role' level within the assessment of culpability:

- Exploitation of children and/or vulnerable persons to assist in drug related activity
- Involving an innocent agent in the commission of the offence (importation only)
- Exercising control over the home of another person for drug related activity (supply and production)

A number of concerns were raised about the addition of these factors within leading role (as discussed earlier), but in addition to the concerns already raised, some respondents were concerned that the Council's focus on county line offending might lead to greater racial disparities in sentences.

The revisions of the guidelines place a heavy emphasis on 'county lines'. The ways that this phenomenon is reported in the press is extremely racialised. It is highly likely that those convicted as 'county lines' offenders will be black and minority ethnic young men. As such, this revision is likely to worsen racial disparities in sentencing, rather than ameliorate these differences. Jennifer Fleetwood (Academic)

The Council agreed that whilst the presence of these factors is very serious and should result in a higher sentence, the factors are not indications that the offender was a leading role and so including them at the culpability stage may risk some offenders receiving a disproportionate sentence. The Council, therefore decided that the correct way to address these factors would be to treat them as aggravating factors to ensure disproportionate sentences are not imposed.

Mitigating Factors

The Council has made changes to the expanded explanation for the mitigating factor 'remorse' to address a concern raised by a number of respondents:

Currently, the mitigating factors listed in the guidelines refer to 'remorse' as a factor reducing seriousness or reflecting personal mitigation. This type of mitigation is usually asserted by Counsel and witnessed through the conduct of the defendant throughout the proceedings. However, this is a subjective factor and is often different depending on the individual's cultural norms. Different cultures display and view remorse differently. For example, young black men involved in gang/street culture are often taught that public displays of emotion show weakness, making it difficult to display it in a legal setting. The Judiciary will need to develop cultural understanding of the different ways remorse presents itself in various cultures. We would recommend that the Sentencing Council provide cultural context/guidance around any subjective mitigation paying particular attention to remorse and how these manifests itself in different cultures. **Equal**

The Council has now amended the factor to:

The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction). Lack of remorse should never be treated as an aggravating factor.

Remorse can present itself in many different ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to nervousness, a lack of understanding of the system, a belief that they have been or will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity etc. If a PSR has been prepared it may provide valuable assistance in this regard.

The Council has also made a change to the mitigating factor 'mental disorder or learning disability' as a result of a concern raised at the roundtable event that some offenders from BAME communities may be unlikely to raise this in mitigation due to a perceived stigma. The Council has already addressed such issues within our [Overarching Principles for Sentencing Offenders with Mental Disorders](#) guideline. The Council has, therefore, included a link from this mitigating factor to the Overarching Principles guideline and highlighted this particular section:

It is important that courts are aware of relevant cultural, ethnicity and gender considerations of offenders within a mental health context. This is because a range of evidence suggests that people from BAME communities may be more likely to experience stigma attached to being labelled as having a mental health concern, may be more likely to have experienced difficulty in accessing mental health services and in acknowledging a disorder and seeking help, may be more likely to enter the mental health services via the courts or the police rather than primary care and are more likely to be treated under a section of the MHA. In addition, female offenders are more likely to have underlying mental health needs and the impact therefore on females from BAME communities in particular is likely to be higher, given the intersection between gender and race. Moreover, refugees and asylum seekers may be more likely to experience mental health problems than the general population. Further information can be found at Chapters six and eight of the Equal Treatment Bench Book.

Additional Text

All Sentencing Council guidelines contain the following reference to the Equal Treatment Bench Book (ETBB):

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

The Council agreed with the suggestion by many respondents that a more specific reference to the relevant sections of the Bench Book would be helpful. At the time of publication, it is not possible to hyperlink directly to particular sections of the ETBB, but the Council will endeavour to find a way to do so in the future.

The Council noted that for the offences where disparities in sentence outcomes existed the nature of the disparity varied. It was therefore considered that a tailored reference to the evidence of disparities in sentencing and to the ETBB should be added to those guidelines where there was sufficient evidence of disparity in sentence outcomes. The general reference is retained in the header to the guideline and a second more specific reference has been added above the sentence table to draw attention to it as an integral part of the sentencing process. These new sections are listed below.

Misuse of Drugs Act Importation Guideline

Sentencers should be aware that there is [evidence](#) of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black, Asian and Other ethnicity offenders receive an immediate custodial sentence than White offenders.

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the [Equal Treatment Bench Book](#).

Misuse of Drugs Act Supply Guideline

Sentencers should be aware that there is [evidence](#) of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Asian and Other ethnicity offenders receive an immediate custodial sentence than White offenders and that for Asian offenders custodial sentence lengths have on average been longer than for White offenders.

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the [Equal Treatment Bench Book](#).

Misuse of Drugs Act Production/ Cultivation Guideline

Sentencers should be aware that there is [evidence](#) of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Asian and Other ethnicity offenders receive an immediate custodial sentence than Black and White offenders.

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the [Equal Treatment Bench Book](#).

Further Work

The Council received a number of other useful recommendations including those raised at the roundtable event. Some of these recommendations have not been actioned because they are considered to be of wider relevance to many or all of our guidelines and should, therefore be subject to wider consideration and consultation.

The Council has recently come across similar issues of sentencing disparity when producing the Firearms definitive guidelines (published in December 2020). This was the first set of guidelines where the Council included additional wording within some of the guidelines to highlight that sentencing disparities exist.

The Council has also recently concluded its consultation, "What next for the Sentencing Council", and many of the comments received were on the subject of equality and diversity issues. The Council has therefore concluded that more work needs to be done in this area. Two steps have so far been taken which include the commissioning of a review of the sentencing guidelines. It is intended that the review will inform the Council of any aspects of the guidelines or our surrounding work that may need reconsideration to ensure that any disparity in sentencing across different demographic groups is prevented. The Council has also set up a working group of Council members to explore this specific issue across all guidelines.

