

**Sentencing Council meeting:**  
**Paper:**  
**Lead official:**

**16 November 2018**  
**SC(18)NOV05 – Drugs guideline**  
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## **1 ISSUE**

1.1 This paper considers revisions to the guideline for the offence of permitting premises to be used, under section 8 of the Misuse of Drugs Act 1971. It also covers some aspects of the assessment of harm and harm-related aggravating factors which Council agreed in October to discuss at the later meeting when we had the benefit of input from the police, CPS and NCA.

## **2 RECOMMENDATION**

2.1 That the Council agrees the proposed changes to the guideline for the permitting premises to be used offence, and harm and other factors for the importation, supply and production offences.

## **3 CONSIDERATION**

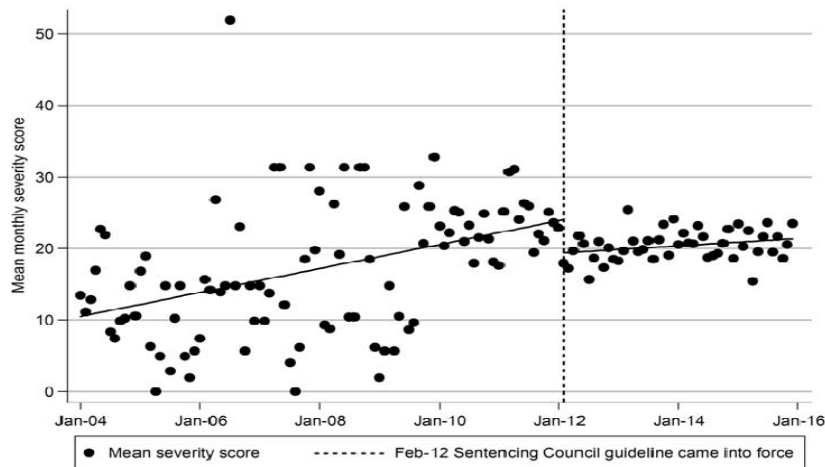
### *Permitting premises to be used*

3.1 Permitting premises<sup>1</sup> to be used is a low volume offence which is mostly sentenced in the Crown Court (the Crown Court accounting for 75 per cent of a total 256 offenders sentenced in 2017). Only 13 per cent of offenders sentenced for this offence received an immediate custodial sentence in 2017, with a majority receiving either a suspended sentence or community order (38 per cent and 29 per cent respectively). Our assessment, published earlier this year, showed that sentencing severity for this offence shifted down a little and stabilised following the introduction of the guideline in 2012 (see below). The guideline appeared to narrow the

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<sup>1</sup> This includes both residential and commercial premises e.g. a cafe where cannabis is smoked, or a pub or club in which drugs are supplied.

sentencing range for a relatively uncommon offence that was previously very dispersed.



3.2 Given this positive outcome, we suggest that the guideline should be revised as little as possible, in order to maintain the current trend rather than disrupt it. We are only suggesting small changes to capture more effectively some of the characteristics of offending that have changed since 2012, particularly those relating to county lines and the practice of cuckooing.

3.3 We are suggesting the inclusion of several new culpability factors, the first under higher culpability, the other two under lower. These are:

- *'Participation in the exploitation of vulnerable adult or person under 18 who is also involved in the drugs operation'*. This is intended to capture the situation described in one sentencing remarks transcript where the offender was a drug addict who had allowed storage and dealing to happen in his home, but knew that the dealer staying with him was a 15 year old who had been trafficked, with drugs in his rectum. The judge noted this as a "grave" aggravating factor, and the offender received an immediate custodial sentence which was above the guideline range.
- *'Involvement due to pressure, intimidation or coercion falling short of duress'*. This is a mitigating factor in the current guideline which was more common in the transcripts examined than the current low culpability factor, *'Involvement through naivety'* (now repositioned under mitigation). We think the 'coercion' factor better typifies an offender who is also the victim of cuckooing, as exemplified in this excerpt from a recent interview with a judge:

*It's [Permitting Premises] coming up as the alternative [to possession] for those who've been cuckooed, and it [the guideline] doesn't really deal with...[judge reads from the guideline], 'Involvement through naivety'- well they're not involved through naivety, they're involved because they're basically forced to do it.*

It also captures the situation described in research into gangs, whereby a local business (e.g. a fast food outlet frequented by the gang) is coerced into becoming the hub of drug dealing activity. In this instance, we would expect the judge to balance this factor against the higher culpability factor, *'Uses legitimate business premises to aid/or conceal illegal activity'* to arrive at what they deem to be the right level of culpability for the offender before them. We suggest an explicit reference to the balancing of factors should also be included in the guideline.

- *'Offender's vulnerability has been exploited'*. This similarly is intended to capture the offender who is also vulnerable and has been the victim of cuckooing, in situations where there is exploitation but not clearly-evidenced pressure.

3.4 In addition, we are suggesting small changes to the current culpability factors as set out in annex A, the main one being removal of examples. This is because the Council has moved away from giving examples in guidelines in recent years because they may encourage an unduly literal and restricted interpretation of a guideline. Also, the examples used in the guideline do not feel particularly current.

***Question 1: Does the Council agree with the proposed changes to culpability in the 'Permitting' guideline?***

3.5 On harm, we are suggesting only small changes: Firstly we suggest bringing the quantities in lesser harm fully in line with those in category 4 in 'Supply' and 'Importation' because at the moment the quantity of class A is in line with this guideline, but class B is lower. We do not expect this to have a notable effect on sentencing, because the quantities are used as examples (rather than hard and fast thresholds), and because the information on quantity in the transcripts tends to be quite scant unless the quantities are very high.

3.6 Secondly, we would like to hear the Council's view on *'Regular'* and *'Infrequent drug related activity'*. Few of the transcripts examined had information on frequency so we suspect these factors are not often used. More commonly, the Court heard details of the time period over which dealing or producing was carried out on the premises. Council may therefore wish to re-position *'Regular'* and *'Infrequent drug related activity'* as aggravating/mitigating factors, and place the re-worded aggravating and mitigating factors which deal with duration in harm. Because this change may affect sentence levels, our preliminary advice is to keep frequency in harm, even though it may be little used. Its inclusion could be probed at consultation.

**Question 2: Does the Council agree with the small change to the example quantities under harm?**

**Question 3: Does the Council agree to retain the harm factors relating to regularity of activity at step one, keeping the factors relating to frequency of activity as aggravating/mitigating factors at step two?**

3.7 The other changes proposed are all cosmetic, to bring the guideline into line with the Council's more recent ones. For example, the current sentencing starting points and ranges are merely translated into the four-box grid. Two other small changes are the step two are the removal of, '*Volume of drug activity permitted*' and '*Isolated incident*' from aggravating and mitigating factors respectively, since we think that quantity combined with duration of activity obviate the need for these.

**Question 4: Does the Council agree with these other small changes to the guideline?**

*Importation/supply/production offences – “supply directly to users”*

3.8 At the October meeting we considered the approach to the assessment of harm and whether any additional factors should enable sentencers to move the offence into another category of harm, or to a starting point higher up within the category. Council members agreed not to change the model, but to consider again the question of how to approach “supply directly to users”. The current approach and wording is based on the agreement post-consultation for the original guideline that supply directly to users (which was seen as synonymous with “street dealing”) usually involves, by its nature, very small quantities of drugs, but the harm caused is likely to be greater than indicated by the quantity.

3.9 Some Council members were concerned about the way in which this approach reduces judicial discretion to consider an offence as being of a lower category of harm in cases of supply directly to users where there is a very small quantity of drugs, in particular because for Class A supply offences the range of category 3/lesser role offences only just goes down to 2 years so few custodial sentences can be suspended. Where the role is considered significant, the starting point is 4 years 6 months' custody, and the range goes down to only 3 years 6 months' custody. Of course, sentencers can go outside the range where they feel that it is in the interests of justice to do so, but the current approach with the clear instruction for all “supply directly to users” offences may make this unlikely and members have themselves mentioned this difficulty.

3.10 In considering how do cover supply directly to users, we need to consider the current nature of offending and how offences of supplying directly to users currently take place. For example, offences committed online are often those of supplying directly to users. After some discussion at the last meeting, Council members agreed to discuss this again, having heard from the NCA about trends in current offending, and with the police and CPS representatives present at this meeting.

3.11 If Council members wish to retain the current approach in broad terms, some additional discretion could be added by amending the wording around supply to users which is currently “not based on quantity”. This currently means that, unlike for other cases in which the indicative quantity is that on which the starting point is based so that a lesser quantity would have a starting point somewhat lower within the category range, in “supply directly to users” cases the quantity is irrelevant, and the starting point is that given in the table. This wording could be amended so that all “supply to users” cases are automatically placed in category 3, but the sentencer can then set a starting point within the category depending on the quantity in the case. This would mean, for example, that in a supply case involving 20g of heroin, this would (by quantity) be likely to fall within category 4, though with a higher starting point than given in the guideline because it is higher than the indicative quantity. If it was a “supply directly to users” case, however, then it would be placed in category 3, but with a lower starting point than that indicated, because the quantity was lower than the indicative quantity. This would allow the sentencer to set an appropriate starting point and, importantly, would allow aggravating factors to increase the sentence up to the top of the category 3 range to take account of the seriousness of supply directly to users where there was aggravation.

3.12 Alternative wording for this (replacing that which appears on p10 of the current guideline) would be as follows:

Where the offence is supply directly to users ~~street dealing~~, the quantity of product is less indicative of the harm caused and therefore the starting point is not solely based on quantity. The court should consider all offences involving supplying directly to users as category 3 harm, and set an appropriate starting point within that category considering the quantity of drugs in the particular case.

***Question 5: Does the Council continue to feel that “supply directly to users” should still be considered as a category 3 level harm even when the quantities are very small?***

**Question 6: Does the Council agree to changing the wording on assessing harm as proposed?**

*Importation/supply/production offences – “more than usual danger”*

3.13 At the October meeting, the Council agreed revisions to most of the aggravating factors for these offences. One factor outstanding was that currently worded:

Exposure of others to more than usual danger, for example, drugs cut with harmful substances.

I had proposed moving this factor to step one, and making some changes to wording to include additional examples. Council members wanted to retain this as a step two factor, and consider wording further at this meeting in light of information from the NCA, police and CPS on current drug offending and types of “danger” that they are seeing.

3.14 In October, Council members discussed two distinct types of danger covered here, one relating to dangers to the end user of the drugs (by methods of production or cutting of the drug, or changes in purity), the other relating to danger caused to others involved in the drug (including dangers to couriers by methods of transportation such as plugging, and dangers to innocent bystanders). As we are retaining a model of harm based on quantity, it is important to capture other aspects of harm fully at step two as aggravating factors. Danger to drug users can be covered by a slightly expanded version of the current factor. Dangers to others are potentially wide ranging and some are covered by existing aggravating factors such as presence of a weapon or presence of others, especially children and/or non-users. I therefore do not propose a “catch-all” factor to cover all these dangers; rather I am proposing to add one new aggravating factor to capture the concerns about dangers to couriers caused by methods of transporting drugs but which could be used for other similar circumstances. I am therefore proposing the following two factors to replace the factor above:

Exposure of drug user to more than usual danger, for example, through the method of production/mixing of the drug.

Involving others in the operation in a way which exposes them to more than usual danger, for example, through the method of transporting drugs.

**Question 7: Is the Council content with the wording of these two proposed aggravating factors for the importation, supply and production offences?**

*Importation/supply/production offences - changes to other factors*

3.15 At the last meeting the Council agreed some changes to culpability and harm factors as well as aggravating and mitigating factors. These are set out in Annex B. The revisions include the changes to the culpability factors relating to financial or other advantage, which members agreed in October. They also include the new “Leading role” culpability factor relating to exploitation of children and vulnerable persons, whose inclusion the Council agreed but which I have redrafted based on the drafting of the Modern Slavery Act 2015.

***Question 7: is the Council content with the revisions set out in Annex B, in particular with the drafting of the factor relating to exploitation of children and vulnerable persons?***

#### **4. RISKS AND IMPACT**

4.1 Impact of the proposed changes will be considered alongside changes in sentence levels at a future meeting, and will be tested through road testing prior to and during consultation.

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**STEP ONE**  
**Determining the offence category**

The court should determine the offender's culpability and the harm caused (extent of the activity or the quantity of drugs) with reference to the table below.

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account as step 1 but is dealt with at step 2.

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

**Culpability**

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

**A - Higher culpability:**

- Participates in the exploitation of a child or vulnerable person who is also involved in the drugs operation
- Permits premises to be used primarily for drug activity ~~for example crack house~~
- Permits use in expectation of substantial financial gain
- Uses legitimate business premises to aid and/or conceal illegal activity, ~~for example public house or club~~

**B – Lower culpability**

- Permits use for limited or no financial gain
- No active role in supply drug activity taking place
- ~~Involvement through naivety~~
- Involvement due to pressure, intimidation or coercion falling just short of duress
- Offender's vulnerability has been exploited

**Harm**

Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm caused or likely to be caused

**Category 1**

- Regular drug-related activity
- Higher quantity of drugs, for example:
  - Heroin, cocaine – more than 5g
  - Cannabis – more than 50g/100g or 9 plants

**Category 2**

- Infrequent drug-related activity
- Lower quantity of drugs, for example:
  - Heroin, cocaine – up to 5g
  - Cannabis – up to 50g/100g or 9 plants

**STEP TWO**

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence.

For class A offences, section 110 of the Powers of Criminal Courts (Sentencing) Act 2000 provides that a court should impose a minimum sentence of at least seven years' imprisonment for a third class A trafficking offence except where the court is of the opinion that there are particular circumstances which (a) relate to any of the offences or to the offender; and (b) would make it unjust to do so in all the circumstances.

## Class A

<b>HARM</b>	<b>CULPABILITY</b>	
	<b>A</b>	<b>B</b>
Harm 1	<p><b>Starting point</b> 2 years 6 months' custody</p> <p><b>Category range</b> 18 months' – 4 years' custody</p>	<p><b>Starting point</b> 36 weeks' custody</p> <p><b>Category range</b> High level community order - 18 months' custody</p>
Harm 2	<p><b>Starting point</b> 36 weeks' custody</p> <p><b>Category range</b> High level community order - 18 months' custody</p>	<p><b>Starting point</b> Medium level community order</p> <p><b>Category range</b> Low level community order - High level community order</p>

## Class B

<b>HARM</b>	<b>CULPABILITY</b>	
	<b>A</b>	<b>B</b>
Harm 1	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> 26 weeks' – 18 months' custody</p>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Low level community order - 26 weeks' custody</p>
Harm 2	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Low level community order - 26 weeks' custody</p>	<p><b>Starting point</b> Band C fine</p> <p><b>Category range</b> Band A fine - low level community order</p>

## Class C

HARM	CULPABILITY	
	A	B
Harm 1	<p><b>Starting point</b> 12 weeks' custody</p> <p><b>Category range</b> High level community order – 26 weeks' custody*</p>	<p><b>Starting point</b> Low level community order</p> <p><b>Category range</b> Band C fine - high level community order</p>
Harm 2	<p><b>Starting point</b> Low level community order</p> <p><b>Category range</b> Band C fine - high level community order</p>	<p><b>Starting point</b> Band A fine</p> <p><b>Category range</b> Discharge - low level community order</p>

\*When tried summarily, the maximum penalty is 12 weeks' custody.

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

### Factors increasing seriousness

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

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

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

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

~~Length of time over which premises used for drug activity~~ Premises used for drug activity over a long period of time

~~Volume of drug activity permitted~~

Premises adapted to facilitate drug activity

Location of premises, for example proximity to school

Attempts to conceal or dispose of evidence, where not charged separately

Presence of others, especially children and/or non-users

High purity

Presence of weapons, where not charged separately

Failure to comply with current court orders

Other offences taken into consideration (TICs)

Offence committed whilst on licence or subject to post sentence supervision

Established evidence of community impact

**Factors reducing seriousness or reflecting personal mitigation**

No previous convictions or no relevant/recent convictions

Remorse

Good character and/or exemplary conduct

Premises used for drug activity over a short period of time

Involved due to naivety

~~Isolated incident~~

Low purity

Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

Serious medical conditions requiring urgent, intensive or long-term treatment

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability, where not linked to the commission of the offence

Sole or primary carer for dependent relative(s)

## Revision of Drug Offences Guideline – proposed sections for new guideline October 2018

Changes from current guideline indicated by struck through/underlined text

### **Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug**

Misuse of Drugs Act 1971 (section 3)

Customs and Excise Management Act 1979 (section 170(2))

#### Step one – determining the offence category

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

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

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account at step one but is dealt with at step two.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

#### *Culpability demonstrated by the offender's role*

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

##### **Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage-gain
- Uses business as cover
- Abuses a position of trust or responsibility
- Systematic exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

##### **Significant** role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward

- Motivated by Expectation of significant financial or other advantage, whether or not operating alone
- Some awareness and understanding of scale of operation

**Lesser role:**

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

*Category of harm*

Indicative quantities of the most common drugs, upon which the starting point is to be based) are as follows:

[TABLE OF QUANTITIES]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

For appropriate class C ranges, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

*Factors increasing seriousness*

*Statutory aggravating factors:*

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.
- Offence committed on bail

*Other aggravating factors include:*

- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of drug user to more than usual danger, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to more than usual danger, for example through method of transporting drugs
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

*Factors reducing seriousness or reflecting personal mitigation*

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

Supplying or offering to supply a controlled drug  
**Misuse of Drugs Act 1971 (section 4(3))**

Possession of a controlled drug with intent to supply it to another  
**Misuse of Drugs Act 1971 (section 4(3))**

Step one – determining the offence category

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

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

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account at step one but is dealt with at step two. Where the offence is supply directly to users street-dealing, the quantity of product is less indicative of the harm caused and therefore the starting point is not solely based on quantity. The court should consider all offences involving supplying directly to users as category 3 harm, and set an appropriate starting point within that category considering the quantity of drugs in the particular case.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

*Culpability demonstrated by the offender's role*

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

**Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage-gain
- Uses business as cover
- Abuses a position of trust or responsibility, for example, prison employee, medical professional
- Systematic exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

**Significant** role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage, whether or not operating alone
- Some awareness and understanding of scale of operation



**Lesser role:**

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial or other advantage
- ~~If own operation, absence of any financial gain, for example joint purchase for no profit, or sharing minimal quantity between peers on non-commercial basis~~

*Category of harm*

Indicative quantities of the most common drugs, upon which the starting point is to be based) are as follows:

[TABLE OF QUANTITIES]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

For appropriate class B and C ranges, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

For appropriate class B and C ranges, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

*Factors increasing seriousness*

*Statutory aggravating factors:*

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.

- Offence committed on bail

*Other aggravating factors include:*

- ~~Targeting of any premises intended to locate vulnerable individuals or supply to such individuals and/or supply to those under 18~~
- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of drug user to more than usual danger, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to more than usual danger, for example through method of transporting drugs
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection
- ~~Prevalence~~

There may be exceptional local circumstances that arise which may lead a court to decide that prevalence of drug offending should influence sentencing levels. The pivotal issue in such cases will be the harm caused to the community.

It is essential that the court before taking account of prevalence:

- has supporting evidence from an external source, for example, Community Impact Statements, to justify claims that drug offending is prevalent in their area, and is causing particular harm in that community; and
- is satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

*Factors reducing seriousness or reflecting personal mitigation*

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

## **Production of a controlled drug**

Misuse of Drugs Act 1971 (section 4(2)(a) or (b))

## **Cultivation of cannabis plant**

Misuse of Drugs Act 1971 (section 6(2))

### Step one – determining the offence category

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

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

In assessing harm, output or potential output are determined by the output or the potential output (the weight of the product or number of plants/scale of operation). For production offences purity is not taken into account at step one but is dealt with at step two.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

#### *Culpability demonstrated by the offender's role*

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

#### **Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage gain
- Uses business as cover
- Abuses a position of trust or responsibility
- Systematic exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

#### **Significant** role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage, whether or not operating alone  
Some awareness and understanding of scale of operation

#### **Lesser** role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation

- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial advantage
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)

*Category of harm*

Indicative output or potential output, upon which the starting point is to be based:

[TABLE OF QUANTITIES]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

*Factors increasing seriousness*

*Statutory aggravating factors:*

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

*Other aggravating factors include:*

- Nature of any likely supply
- Level of any profit element
- Use of premises accompanied by unlawful access to electricity/other utility supply of others, where not charged separately
- Ongoing/large scale operation as evidenced by presence and nature of specialist equipment
- Exposure of drug user to more than usual danger, for example, through the method of production/mixing of the drug
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately

- High purity or high potential yield
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

*Factors reducing seriousness or reflecting personal mitigation*

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Offender's vulnerability was exploited
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

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