

Prison Reform Trust response to the

Sentencing Council's Drug Offences Guideline – Professional Consultation

The Prison Reform Trust is an independent UK charity working to create a just, humane and effective prison system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform.

The large part of the Prison Reform Trust's submission is a new report (draft attached) to be published in July, jointly with FPWP Hibiscus, on the experiences of foreign national women imprisoned in the UK, many for the unlawful importation of drugs. The report's findings complement the Sentencing Council's bulletin *Drug 'mules': twelve case studies*. This body of evidence supports the case for more moderate and proportionate treatment of drug couriers, many of whom are themselves victims of trafficking or coercion. It also argues that where a prosecution proceeds to conviction, mitigation should be taken into account.

As our response to the Green Paper *Breaking the Cycle* maintains:

“People found to be coerced or trafficked into criminal behaviour should be dealt with more humanely and appropriately. For the majority, this would mean being recognised as victims and being afforded support and protection. Those who are shown to be culpable, with little mitigation should usually be repatriated to a prison in their own country.

Many foreign nationals currently sentenced to imprisonment in the UK are serving disproportionate terms and they should have their sentences reviewed for conditional early release and deportation. These reviews and sentence reforms should allow mitigating factors to play a full part, together with considerations for the welfare of dependent children and any evidence of coercion in compliance with CEDAW. Care should be taken to identify those who should not be deported, such as: those who came to the UK as children and have no links with the country they were born in; those who have previously been given indefinite leave to stay; and those who have been trafficked.”

The United Nations' guidance to States to protect people who have been trafficked holds that trafficked persons should not be prosecuted for violations of immigration laws or activities which are a direct consequence of their being trafficked; and that anti-trafficking legislation should protect victims from summary deportation “where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family.”¹

The Prison Reform Trust's responses to most of the questions in the Professional Consultation paper are brief. It is hoped that the accompanying report will also receive full consideration by the Sentencing Council. As an annex to the consultation response, we have included a brief digest of facts and figures drawn from the June 2011 Bromley Briefing Prison Factfile. This indicates the prevalence of drug, and drug-related, offending and endorses the importance of new sentencing guidelines.

Consultation questions:

Q1. Do you agree with the proposed groupings of offences into five guidelines?

Yes. The Prison Reform Trust welcomes the Sentencing Council's emphasis on clarity, consistency and proportionality in sentencing reflected in these groupings.

Q2. Do you agree with the Council's approach to the issue of purity? If you do not agree, it would be helpful to the Council if you would explain your reasoning.

The case is argued clearly and logically. PRT will defer on this matter to those with greater knowledge and expertise such as the UKDPC.

Q3. Do you agree with the Council's approach of separating Classes B and C?

Yes.

Q4. Do you agree that the court should be referred to the guideline for supply or possession (according to intent) when the quantity of drug involved in the offence is very small?

Yes. This enables a sensible distinction to be made between those intending to supply drugs to, for example, a small number of friends and those setting out to deal drugs for large profit.

Q5. Do you think that supplying to an undercover police officer should be included in the guideline? If yes, please state at what stage.

No - it is immaterial whether or not the recipient of the drug is an undercover police officer or an ordinary member of the public.

Q6. Do you agree that possession of a drug in a prison should put an offender into the most serious offence category for possession offences?

No – this proposal would unduly punish people in some poorly managed prison regimes, where security is lax and where treatment of those with drug habits is absent or ineffective. Drug possession presents a problem even in well-managed prisons demonstrating an underlying injustice in increasing the severity of the offence.

Q7. Should "medical evidence that a drug is used to help with a medical condition" be included as a mitigating factor for possession offences?

Yes – medical evidence as to the relief of pain in chronic conditions should be a mitigating factor. This is currently listed as a mitigating factor in the Magistrates' Courts Sentencing Guidelines and if it were omitted, this would therefore lead to more severe sentencing in some cases than current practice. This would be contrary to the Sentencing Council's stated intention of maintaining sentencing levels for drug offences broadly at current levels.

Q8. Do you agree with the quantities set out for each of the drug guidelines?

Yes, although again we would defer to experts in this field

Q9. Do you agree with the roles as proposed for each of the offences covered by the draft guideline?

Yes – the Prison Reform Trust welcomes the inclusion of the role of drug courier or ‘mule’ in the subordinate category of importation offences.

Q10. Do you agree with the aggravating and mitigating factors outlined for each of the offences covered by the draft guideline?

Yes, with one qualification – the Prison Reform Trust is pleased to see the identification of ‘factors reducing seriousness or reflecting personal mitigation’ for each offence. We particularly welcome the inclusion of: ‘mental disorder or learning disability’; ‘offender’s vulnerability was exploited’; ‘sole or primary carer for dependent relatives’; and ‘age and / or lack of maturity where it affects the responsibility of the offender’, in the factors identified for each offence.

In relation to maturity, there is now a growing body of evidence revealing its impact on offending. As research commissioned by the Barrow Cadbury Trust for the *Transition to Adulthood* alliance² has shown, while physical and intellectual maturity is usually reached during adolescence, emotional and social development is often not completed by the age of 18. Neuroscientific studies suggest that the “*higher executive functions of the brain – such as planning, verbal memory and impulse control are among the last areas of the brain to mature; they may not be fully developed until half way through the third decade of life.*” Research literature also indicates that levels of both psychosocial maturity in decision-making and moral reasoning vary significantly between individuals during adolescence and early adulthood.

The Prison Reform Trust understands that some sentencers claim to take maturity into consideration already. Clearly, however, this factor is not taken into account consistently. This reinforces the sense in specifically identifying maturity as a personal mitigating factor in sentencing decisions. It does also raise a question about how the assessment of maturity will be undertaken. One option might be a formal assessment along the lines of the psychological report required for those with mental health problems. We hope the final version of these guidelines will provide additional clarity on the practical implementation of this very welcome measure.

Our one reservation in this section of the guidelines is that we are concerned at the inclusion of “established evidence of community impact” as an aggravating factor. We accept that illegal drugs have a significant negative community impact, but this is already factored into the reasons why they are regarded as serious offences which carry substantial penalties. If the guidelines included a reference to community impact as an additional aggravating factor, there is a risk of double counting this element of offence seriousness.

Q11. Do you think that there are any other factors that should be taken into account at these two steps?

The guideline does not provide for an alternative to the court process for minor or ‘subordinate’ offences where strong mitigation exists. The Prison Reform Trust would like to see the potential for diversion from either the court process or the criminal justice system to be clear within the guideline at each stage. While such diversion would ideally take place

from the police custody suite or by the Crown Prosecution Service, it is evident from the number of people in prison who are mentally ill, have severe learning disabilities, or other vulnerabilities, that assessment at the pre-court stage is far from perfect.

Q12. Do you agree with the proposed offence ranges, category ranges and starting points for all of the offences in the draft guideline?

We have noted the criticism which the draft guidelines have received in some quarters for making non-custodial sentences available for some less serious supply offences. The Prison Reform Trust considers this criticism to be misplaced. In our view non-custodial sentences are appropriate and proportionate for some less serious supply offences with no significant aggravating factors. As your bulletin on drug ‘mules’ demonstrates, current sentences for these offenders are often draconian. The Prison Reform Trust welcomes the fact that sentencing for drug couriers will be more proportionate to the extent of their intent and involvement in the overall crime. We note that the public views expressed in the Institute for Criminal Policy Research study, which was commissioned by the Sentencing Council, supported a scaling down of sentences for drug ‘mules’ to much lower levels than those proposed in the draft guidelines.

The Prison Reform Trust / FPWP Hibiscus report also highlights the vulnerability of many individual drug couriers and the extent to which they have been coerced and preyed upon to take on this role. Many can be regarded as victims in much the same way as women and children involved in sex trafficking are victims.

The United Nations’ Protocol for the Protection of Victims of Trafficking³ covers threats or other coercion to exploit people for the purposes of forced labour or services. The Protocol explicitly states: *The consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used.*

Research on women convicted of drug importation, recently published by the Sentencing Council⁴, found that:

A minority of the women reported either receiving threats from the organisers of the offence before travelling with the drugs or whilst they were in prison, or that family members had received threats after their arrest (sometimes meaning that they had had to move away). These threats related either to the return of the drugs (and a suspicion on the organiser’s behalf that the woman had absconded with the drugs) or were personal threats relating to safety (tied in with the organiser’s fears that they would be reported to the authorities).

These circumstances are completely consistent with the United Nations’ definition of human trafficking.

For many drug ‘mules’ the starting points and category ranges in the draft guideline would still constitute excessive punishment. We favour a much more significant scaling down of the level of sentences for drug couriers. As the Sentencing Council’s case studies show, the impact of sentences on these offenders is particularly severe because of the degree of distress caused by separation, lack of visits and lack of personal contact with their families and children. It would be proper to take this into account in setting the level of sentences for

these offenders. The case studies also show that length of sentence is not a significant factor in terms of deterrence for this group. The women interviewed had been given the impression that they would not be caught and they went ahead despite the risks due to their desperate situations or because of coercion.

It is perhaps worth noting that during most Prison Reform Trust visits to women's prisons, staff refer to foreign national women serving up to 15 years for drug importation offences as 'easy' or 'biddable' prisoners, focused on working in order to send money home for the care of their children. These prisoners are said to rarely, if ever, present discipline problems. Staff frequently express surprise and dismay at what they regard as disproportionate terms being served.

Q13. Are there any ways in which you think victims can and/or should be considered in the proposed draft guideline?

It is important that the impact of an offence is understood by the court. This can be achieved by victim statements or as part of the prosecution evidence.

It is also important that victims who express a wish to meet the offender should, provided the offender agrees, have the opportunity to do so. This can be at the pre or post court stage and through a properly administered restorative justice arrangement.

Q14. Is there any other way in which equality and diversity should be considered as part of this draft guideline?

The Home Office report *Making Punishments Work*, published in 2001, argued that sentencing guidelines should 'recognise justifiable disparity, for example in cases where the offender has young dependent children'. The Prison Reform Trust welcomes the fact that such responsibilities are included in the mitigating factors. Where foreign national drug 'mules' have been intimidated or coerced, this principle should be prominent.

Q15. Are there any further comments that you wish to make?

We are concerned that the proposed guidelines for cultivation of Class B drugs would apparently produce a significant increase in the use of custody for cultivating cannabis. We understand the wish to ensure that there are substantial sentences in cases of cultivation with a significant commercial element. However, a large number of cultivation cases are currently sentenced in magistrates' courts and many of these receive non-custodial sentences. These include cases of cultivation for the offender's own use and offences involving supply to a small number of friends.

We note that the Police Foundation Inquiry into the Misuse of Drugs Act "Drugs and the Law" made the following recommendation:

The cultivation of small numbers of cannabis plants for personal use should be a separate offence from production and should be treated in the same way as possession of cannabis, being neither arrestable nor imprisonable and attracting the same range of sanctions (p115).

The Prison Reform Trust does not consider that it is proportionate to impose custodial sentences for the cultivation of cannabis for personal use or for small scale sharing with friends unless there are significant aggravating factors.

A former trustee of the Prison Reform Trust, and past chair of the Home Affairs Committee, drew the board's attention to cases within his then constituency where there were mitigating factors associated with those involved, or pressed into, tending so-called cannabis farms. He cited Vietnamese nationals who had limited, or no, understanding of either English language or law and appeared to be very small cogs in an illegal, and highly profitable for others, trade.

The Prison Reform Trust and FPWP Hibiscus would welcome the opportunity to present and discuss our report with members and staff of the Sentencing Council.

¹ UNHCR (2002) Recommended Principles and Guidelines on Human Rights and Human Trafficking.

² University of Birmingham: Institute of Applied Social Studies School of Social Policy - Maturity, young adults and criminal justice: A literature review (March 2011)

³ United Nations (2000) The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime.

⁴ Drug 'Mules': 12 case studies:

http://sentencingcouncil.judiciary.gov.uk/docs/Drug_mules_bulletin.pdf