

Criminal Justice Alliance submission to the Justice Committee's inquiry on the draft sentencing guideline on drug offences

Executive summary

The Criminal Justice Alliance (CJA) is pleased to have the opportunity to submit evidence to this inquiry. In general, the CJA welcomes the work of the new Sentencing Council to date and supports its approach to the development of guidelines. With regards to this draft guideline, we strongly endorse the proposal to significantly reduce the length of sentences given to so-called drug 'mules'. However, we are disappointed that the Sentencing Council has not proposed shorter sentence lengths for some further drug offences, and are concerned that the issue of culpability is not properly addressed by the structure of this guideline. The CJA is also concerned about proposals contained in this draft guideline on sentencing for the supply of drugs to prisoners and possession offences in prison and about the issue of social supply.

About the Criminal Justice Alliance

The CJA is a coalition of 56 organisations - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions - involved in policy and practice across the criminal justice system. The CJA's current member organisations are: Action for Prisoners' Families; Adullam Homes Housing Association; the Apex Charitable Trust; the Association of Black Probation Officers; the Association of Members of Independent Monitoring Boards; Birth Companions; Carers Federation; Catch22; the Centre for Crime and Justice Studies; the Centre for Mental Health; Chance UK; the Children's Society; the Churches' Criminal Justice Forum; Circles UK; Clean Break; Clinks; DrugScope; the Fawcett Society; the Griffins Society; Gwalia Care and Support; Hafal; INQUEST; the Institute for Criminal Policy Research; JUSTICE; Leap; Nacro; the National Appropriate Adult Network; the New Bridge Foundation; Pact; Partners of Prisoners and Families Support Group; Penal Reform International; the Police Foundation; the Prison Officers' Association; the Prison Reform Trust; Prisoners Abroad; Prisoners' Advice Service; the Prisoners Education Trust; the Prisoners Families and Friends Service; the Public and Commercial Services Union; the Quaker Crime, Community and Justice Group; RAPt; Release; the Restorative Justice Council; Rethink; Revolving Doors Agency; the RSA Prison Learning Network; Safe Ground; SOVA; the St Giles Trust; Transform Drug Policy Foundation; UNLOCK; Women in Prison; Women's Breakout; Working Chance; the Young Foundation; and Young Minds.¹ The CJA works to establish a fairer and more effective criminal justice system.

Submission of evidence

Introduction

1. The CJA welcomes the work of the Sentencing Council and the approach that it has taken in conducting its work to date. The CJA supported the establishment of a new Sentencing Council and believes that it can promote stability and consistency in sentencing and improve the availability of data and other information about sentencing, while also playing a role in reviving public confidence in sentencing.
2. We are pleased that the Sentencing Council has chosen to develop a guideline on drug offences at this early stage in its work programme. A significant amount of work was carried out in producing the Sentencing Advisory Panel's advice to the Sentencing Guidelines Council on this topic, and the CJA was among many organisations that responded to their consultation. We therefore welcome the decision to take this work forward, given that the Sentencing Guidelines Council was not able to produce a

¹ Although the CJA works closely with its members, this consultation response should not be seen to represent the views or policy positions of each individual member organisation.

guideline before it was wound up.

3. Sentencing for drug offences, however, presents some challenges that are distinct from most other offences, not least the absence in many cases of a direct, individual victim. This has caused some issues with the model developed by the Sentencing Council, which we discuss below. This submission considers those questions posed by the Justice Committee on which we have a view, and then raises further points about prison-related issues - sentencing for the supply of drugs to prisoners and for possession offences in prison - and the issue of social supply.

Is the movement from an offender-based to an offence-based starting point helpful?

4. The CJA supports the model developed by the Sentencing Council to underpin its guidelines, and we strongly endorsed the structure and much of the content of the recently published sentencing guideline on assault. However, it is important that the guidelines retain sufficient flexibility to accommodate the circumstances of individual offenders and we are concerned, as set out in paragraphs 5-11 below, that this guideline does not sufficiently take into account the individual characteristics of the offender in determining their culpability.

Does the guideline strike the right balance between harm and culpability?

5. The CJA supports, in general, the approach taken by the Sentencing Council in determining harm and culpability and incorporating these issues into the sentencing process. However, we are concerned that the model developed for sentencing for drug offences does not pay sufficient attention to issues related to culpability.
6. In this draft guideline (except in offences of 'permitting premises to be used' and 'possession of a controlled drug'), culpability is determined by assessing the role of the offender, which can be judged to be 'leading', 'significant' or 'subordinate'. However, in the determination of role, two specific factors that we believe relate significantly to an offender's culpability are not highlighted: mental disorder or learning disability, and maturity. We are concerned that the emphasis on what might be termed 'external factors' in the characteristics determining an offender's role could mean that sentencers do not recognise the ways in which mental disorder or learning disability and maturity can affect an individual's culpability, and believe that these should be clearly flagged up here.
7. As such, 'Mental disorder or learning disability' should be a characteristic that is considered in establishing an offender's role at Step 1 of the sentencing process, as well as a factor reflecting personal mitigation at Step 2. This would reflect the contents of the final sentencing guideline on assault, published recently by the Sentencing Council, where 'Mental disorder or learning disability, where linked to the commission of the offence' is identified as a factor indicating lower culpability and 'Mental disorder or learning disability, where not linked to the commission of the offence' is identified as a factor reflecting personal mitigation. Taking the same approach here would ensure consistency.
8. The CJA supports the evidence of the Transition to Adulthood Alliance - the work of which the CJA has contributed to and whose submission to this consultation the CJA endorses - which argues, based on the latest evidence, that "young adults' levels of maturity may affect their culpability, and this should therefore be considered in determining their role". To achieve this, 'Involvement through lack of maturity where it relates to the offender's role' should be introduced as a factor that indicates a subordinate role in relevant offences. The factor reflecting personal mitigation would then need to be changed to 'Age/lack of maturity where it does not relate to the offender's role', to prevent double counting.

9. With offences of ‘permitting premises to be used’, where the way in which culpability is measured differs from other offences in this guideline and more closely matches the structure of the guideline on assault, ‘Mental disorder or learning disability, where linked to the commission of the offence’ and ‘Age/lack of maturity where linked to the commission of the offence’ should be factors indicating lower culpability, taken into account at Step 1, and ‘Mental disorder or learning disability, where not linked to the commission of the offence’ and ‘Age/lack of maturity where not linked to the commission of the offence’ should be factors reflecting personal mitigation, taken into account at Step 2. This would be consistent with the recently published final guideline on assault.
10. In addition, for offences of ‘possession of a controlled drug’ the culpability of the offender and the harm caused are determined solely by the quantity of the substance(s) in their possession. However, the CJA does not believe that possession of a larger quantity of a drug necessarily implies greater culpability or harm than possession of a smaller amount. For example, an individual might buy large quantities at one time, with the intention of using it over a long period to limit their contact with the criminal markets, or might be addicted to the relevant substance and therefore have a higher tolerance and require higher quantities. In these circumstances, it is not clear that they are necessarily causing additional harm or are more culpable than an individual who buys (and therefore possesses) smaller amounts more frequently.
11. We therefore believe that the Sentencing Council should develop a more flexible approach to establishing the harm caused and the culpability of offenders in possession offences. This should be designed to ensure that possession of a large quantity of a substance does not automatically lead to a long sentence. Additionally, we do not support the creation of a distinct category, carrying the longest sentences, for those caught in possession of drugs in prison (see paragraph 23, below).

What should be the approach to the issue of purity in sentencing?

12. The CJA broadly agrees with the approach proposed by the Sentencing Council. However, we are concerned that where an offender is fairly low in the supply chain but the purity is high, for example in cases involving drug ‘mules’, high purity should not be seen as an aggravating factor. We hope that the flexibility accorded by the Sentencing Council’s approach should allow this factor to only be taken into account where it is relevant.

What is the likely impact of the guidelines on victims and the reduction of reoffending?

13. The proposals set out in this guideline will not have a significant impact on the sentences given to the vast majority of people sentenced for drug offences. The only proposal that will have a real impact on the use of prison and probation resources, according to the resource assessment provided by the Sentencing Council, is the change to the sentencing of drug mules. As this group is likely to have low rates of reoffending anyway, the proposed guideline will most probably have a negligible effect on the reoffending rates of those sentenced for drug offences.
14. The CJA believes that the Sentencing Council could have a more significant impact on reoffending rates by reducing the number of prison sentences given annually for lower-level drug offences. The latest research from the Ministry of Justice shows that community sentences are more effective (by between 5 and 9 percentage points in 2008) at reducing one-year proven reoffending rates than custodial sentences of less than twelve months for similar offenders.² If proposals were developed that resulted in

² Ministry of Justice (2011) *2011 Compendium of reoffending statistics and analysis* - <http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/2011-compendium-reoffending-stats-analysis.pdf>

people who would now receive a short custodial sentence instead receiving a community sentence, we would expect fewer to reoffend.

15. In particular, we do not believe that custody should ever be used for possession offences, yet this guideline proposes that possession of even a Class B drug (in the community) should result in a sentence of up to 12 weeks in custody, the sort of short sentence that is particularly ineffective and damaging. Addressing this should be part of a general reduction in the sentences given for all drug offences, to counteract the effects of sentence inflation in recent years.
16. Although the harshness of sentences currently given for drug offences seems to be justified primarily by their supposed deterrent value, there is no empirical evidence to support the efficacy of deterrence in sentencing.³ The Halliday Report examined this issue, concluding that: 'The evidence, though limited in this area, provides no basis for making a causal connection between variations in sentence severity, and differences in deterrent effects.'⁴ This is supported by an overwhelming body of evidence, including an international review of the evidence which showed that sentencing has no significant deterrent effect and concluded that 'variation in sentence severity does not affect the levels of crime in society'.⁵ For this reason, there should not be an expectation that if this guideline proposed minor reductions in sentence severity, the number of drug offences would increase. Some of the current pressures on the prison system would, however, be reduced, freeing up space and resources to focus on rehabilitation.

What is the likely impact of the proposed approach to sentences for 'drug mules'?

17. We agree with the Sentencing Council that the proposals made in this draft guideline would be likely to result in less severe sentences for drug 'mules', which is entirely welcome. This area of sentencing is long overdue for substantial reform, and we welcome the attention given to it here.
18. Sentences given to drug 'mules' are currently draconian, with entirely disproportionate punishments given to individuals who are frequently from disadvantaged backgrounds and coerced or pressured into committing the offence. While these individuals have committed a crime, they are the smallest link in the network of drug importation, and it is precisely because they are disposable that they are used by those who are running significant drug operations. In these circumstances the sentences currently given are unjust; additionally, they put unnecessary pressure on the prison system.
19. If the primary aim of the harsh sentences currently given is deterrence, then they are inevitably going to be ineffective, since most drug 'mules' are very unlikely to be aware of the scale of punishment in the UK. Hibiscus, an organisation that works with female foreign national prisoners, has reported that potential couriers are often informed that, if caught, they will simply be deported.⁶

³ p.76: Ashworth, A. (2005) *Sentencing and criminal justice*, Cambridge: Cambridge University Press.

⁴ p.128: Halliday, J. (2001) *Making Punishments Work: A Review of the Sentencing Framework for England and Wales*, London: Home Office.

⁵ Doob, A. and Webster, C. (2003) 'Sentence Severity and Crime: Accepting the Null Hypothesis' in M. Tonry (ed.) *Crime and Justice: A Review of Research*, 30: 143-195.

⁶ Heaven, O. (2009) 'Long sentences for drug mules were never going to act as a deterrent' in *Guardian*, 14 May (<http://www.guardian.co.uk/commentisfree/2009/may/14/crime-drugs-smuggling-mules>).

20. Many are also in such difficult circumstances that even if they were aware of the risks, deterrence would be unlikely to be effective. Many are coerced into complying and are themselves victims, selected due to their vulnerability and powerlessness. This is in addition to the more general concerns about the extent to which severe sentencing can act as a deterrent (see paragraph 16, above). For these reasons the CJA urges the Justice Committee in the strongest possible terms to support the Sentencing Council in its efforts to shorten the sentences given to drug ‘mules’, and indeed to encourage them to go further in addressing this issue.
21. We would also encourage the Justice Committee to use its influence with the Government to encourage them to review the sentences currently being served by drug ‘mules’ in England and Wales. There is a strong case, in our view, for commuting these sentences and deporting the individuals.

Further comments

22. The CJA would also like to draw attention to two proposals in the draft guideline that relate to drug use in prison and the supply of drugs to prisoners.
23. Firstly, the draft guideline proposes that possession of a drug in a prison should put an offender into the most serious offence category for possession offences. While we believe that the effects of drugs in prisons are extremely harmful and strongly support efforts to reduce the use of drugs by prisoners, we are not convinced that this approach would be effective or appropriate. Giving these individuals a further custodial sentence (the starting point for possession of a Class A drug in prison is 1 year’s custody and the top of the range is 3 years’ custody; even for a Class C drug the starting point is 12 weeks’ custody) is unlikely to have any beneficial effect, and there is no evidence that these would act as a deterrent. We therefore urge the Justice Committee to recommend that this special category should be removed, and that the same factors should be used in establishing offence seriousness as are taken into account for non-prisoners.
24. We are also concerned that, for supply offences, ‘Supply to a prisoner (other than by a prison officer)’ automatically puts the offender into a ‘significant’ role. This could be used to penalise the families of prisoners who bring drugs into prison, which would, we believe, be inappropriate. In his Ministry of Justice-sponsored review of measures to disrupt the supply of drugs into prison, David Blakey recognised that “some prisoners put pressure on families and friends to bring drugs in”.⁷ Given the pressures prisoners’ families are under and the levels of coercion they may face, a ‘subordinate’ role would be more appropriate.
25. Finally, we would like to draw attention to the issue of ‘social supply’, where individuals, often young people, purchase drugs for friends, sometimes making a small profit to cover costs or compensate them for time spent. A number of relevant organisations - including DrugScope, the UK’s leading independent centre of expertise on drugs and drug use and a member of the CJA - have argued for a review of the law of social supply for many years. In the meantime, we believe that more should be done to ensure that in cases that relate to social supply, the offender does not receive a sentence that would be more appropriate for a genuinely commercial supplier. For this purpose the definition of somebody in a ‘subordinate’ role for a supply offence - “absence of *any* financial gain” (emphasis added) - should be changed to allow an individual whose *primary* motivation was not financial gain, and where the financial gain was minimal, to be determined as playing a ‘subordinate’ role. Alternatively, a specific mitigating factor could be created to address this issue.

⁷ p.9: Blakey, D. (2008) *Blakey Review: Disrupting the supply of illegal drugs into prisons* - available at <http://www.justice.gov.uk/publications/docs/blakey-report-disrupting.pdf>

Conclusion

26. The Criminal Justice Alliance welcomes this inquiry. Parliamentary scrutiny of new sentencing guidelines is an important step in developing sentencing that has widespread political support and legitimacy. We also believe that clear guidance like this can promote consistency in sentencing, helping to make sure that offenders receive the sentence that they deserve.
27. We welcome the proposals contained in this draft guideline to significantly reduce the length of sentences given to drug 'mules', a reform that is long overdue. However, we are disappointed that the Sentencing Council has not gone further in reforming sentencing for other drug offences. Reducing sentence lengths for some minor drug offences would protect scarce resources in the prison and probation services and reduce the unnecessary overuse of prison. The Justice Committee should encourage the Sentencing Council to examine whether it could do more to address this.

Criminal Justice Alliance
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