

ACMD

Advisory Council on the Misuse of Drugs

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Miss Rosalind Campion
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Dear Ms Campion,

The Advisory Council on the Misuse of Drugs (ACMD) is pleased to contribute to the Sentencing Guidelines consultation on Drug Offences Guideline.

Please see our attached response.

Yours sincerely,

Professor Les Iversen

The Advisory Council on the Misuse of Drugs

The Advisory Council on the Misuse of Drugs (ACMD) makes recommendations to Government on the control of dangerous or otherwise harmful drugs, including classification and scheduling under the Misuse of Drugs Act 1971 and its Regulations. It considers any substance which is being or appears to be misused and of which is having or appears to be capable of having harmful effects sufficient to cause a social problem.

The ACMD also carries out in-depth inquiries into aspects of drug use that are causing particular concern in the UK, with the aim of producing considered reports that will be helpful to policy makers and practitioners.

Consultation questions

The ACMD has responded to each of the questions below in turn.

1) Do you agree with the proposed groupings of offences into five guidelines?

Yes, the distinctions are clear and relevant

2) 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 issue of purity is particularly complex in the context of a sentencing guideline. The ACMD consider that purity should only be considered where 'intent' is in question i.e. supply offences. Whilst purity may be an indicator of where people are in the supply chain, it is not necessarily a strong indicator of whether the offender is a higher or lower level supplier but will also reflect a multitude of other factors influencing purity. This is particularly pertinent at the current time when even higher level (multiple kilogram) dealers are found to be selling kilogram blocks of very low purity Class A drugs. Conversely, some experienced drug users might have the financial resources and contacts to access small amounts of very high purity drugs for personal use. Purity levels also vary considerably between different drugs e.g. ketamine purity is presently relatively high, but cocaine purity is low. If the average purity of cocaine stays as low as it is, purity levels alone might be seen to indicate that no-one is very high up the supply chain other than those at the very top of the chain.

Although the approach proposed is logical, it means that purity can only be an aggravating factor, never a mitigating one and so purity will always increase sentences from the starting point.

The ACMD consider that there is some merit in elements of option 3. If prosecution is considering any offence of intent / supply / importation, then it would be best practice to establish purity for amounts under a certain quantity. A quantity of 500g is a recognized deal size and therefore not the best threshold figure. A lower figure of say 400-450 grams would ensure that those operating with "recognized deal sizes" would not be separated by the factor of a few grams either way. If there is to be an assumption of purity for lower amounts, then it should be realistic (and therefore much lower than 100%).

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

The ACMD provide advice on the harms of drugs that is considered as part of the knowledge input to classification by ministers and ultimately parliament. Under the current definitions of the Misuse of Drugs Act 1971 it is appropriate that the classes are separated.

4) 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?

Quantity in itself is not necessarily a strong indicator of position within a supply chain.

The ACMD would suggest that the sentencing guideline should stress other evidence (scales, address books, snap bags, etc, etc) rather than put such emphasis on purity and quantity which seem deceptively simple and quantifiable measures but mask the complexities of the drug trade.

People with more financial resources may buy in bulk for economies of scale, whether they are buying drugs, bananas or toilet rolls. In a recent high profile case it was accepted that the individuals involved had over 50g of cocaine for personal use because they could afford to buy in bulk and also presumably have less contact with suppliers and therefore reduce their risk of apprehension. Whereas someone caught with 2g, a pair of scales and an address book full of debtors might well be dealing but they can't afford to carry much stock. So quantity can be as much an indicator of income as of position in the supply chain, although obviously the two are not unrelated.

The specific thresholds that have been set are very low, particularly given the current low purity of drugs available. The last Mixmag survey suggested that average ecstasy pill consumption was 4-5 pills per session. If thresholds must be set (the ACMD note that after the Drugs Act 2005 the general consensus was that it was not productive given all the different variables to take into account) it might be better to calculate them in relation to an 'average use per day' or per week e.g. 2 weeks supply for an average regular user. This would allow for periodic fluctuations in purity levels and other factors.

In addition, quantities under 500g are unlikely to ever be 100% pure; the actual purity of the amounts under 500g may be lower than 20%. Therefore, as recognized, there is potential for perverse sentencing outcomes in that, an individual with 490g heroin (assumed 100% pure) may receive a longer sentence than someone with 510g at 40% pure.

The ACMD understand that the Serious Organised Crime Agency has provided illustrative scenarios that demonstrate how factors - that could influence sentencing - may not be known unless the purity of amounts of drugs under 500grams is known.

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

The ACMD have no comment to make on this question.

6) 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 would generate a distinction from possession in other treatment environments. Unless there is evidence that the majority of offences of possession in prison are prosecuted then escalating the penalty would

potentially increase the risk of unfairness and differential treatment when prisoners are only dealt with internally. It would be more helpful to consider the environment – e.g. prison or hospital to be an aggravating factor.

7) Should ‘medical evidence that a drug is used to help with a medical condition’ be included as a mitigating factor for possession offences?

The Sentencing Council, in its consultation, notes that, using cannabis as an example, the evidence as to whether it relieves medical conditions is mixed – in some instances suggesting that the benefits may be offset by potential harms and undesirable effects. In addition, there were considered to be difficulties in the practical implication of this factor and also the mixed views in the public focus group research.

In its last response to the Sentencing Guidelines Council the ACMD considered that for drugs that are used for a medical condition that it should be considered as offender mitigation for a drugs offence. Clarification is needed on the current research on this. Given that the efficacy of a treatment is often linked to the belief of a patient in its efficacy the ACMD would support the inclusion of the use of a drug to alleviate a medical condition as a mitigating factor.

8) Do you agree with the quantities set out for each of the drug guidelines?

Setting quantities for each of the drug guidelines is, like purity, a complex issue. The ACMD recognise that there is a requirement to set some quantity threshold for each drug, however, it will always be difficult to correlate this with harm i.e. seriousness of the offence. For instance, the inclusion of harmful cutting agents would affect the absolute quantity (but would affect purity and could be an aggravating factor).

In considering possession offences of a controlled drug a paper by Newcombe (2006) considers the drug quantity thresholds in different countries and provides recommended thresholds based on a review of relevant evidence. Although Newcombe’s (2006) paper is limited in the drugs it considers it approximately concurs with that in the proposed guideline. As is noted in the review, there are a number of general problems with setting thresholds, but some of these have been, to a certain extent addressed in the guideline: Issues to do with purity and standard weight of drug deals purchased by consumers have been attempted to be considered in the guideline. However, the guideline does not suggest a threshold for drugs in non-standard forms, but this may ultimately confuse the issue. The thresholds will still discriminate against heavier users and do not attempt to distinguish between drug group sub-types. The key point is that there should be proper consideration of separating those people in possession with those cases of possession with intent to supply.

The ACMD do not believe that there is any quantity that could be considered ‘correct’, however, there is good reason to suggest that what is proposed is appropriate.

The ACMD are conscious of the significant number of new psychoactive substances ('legal highs') that are being sold. The ACMD would suggest that there should be some guidance as to how to consider drugs that are not on this list.

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

Yes.

10) Do you agree with the aggravating, and mitigating factors outlined for each of the offences covered by the draft guideline?

The ACMD agree with the aggravating factors listed in table 13 of the drug offences guideline – professional consultation document (also see 11 below).

In addition, the ACMD consider that in instances where a cutting agent could be considered to be more harmful than the drug as which it was sold that this should be considered an aggravating factor.

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

In 2008 the ACMD provided advice on cannabis (*Cannabis: Classification and Public Health*, 2008). One of the recommendations in the report was:

Recommendation 12: Additional aggravating factors should be introduced into legislation concerning the seriousness of the offences involving the supply of controlled drugs.

The advice to change the legislation has not, as yet, been taken up. However, the ACMD considers that those who are vulnerable (as defined in paragraph 13.8.3 of the report above) should have protection from suppliers' i.e. greater penalties for those that supply in the vicinity of, for example, further and higher educational establishments, psychiatric health institutions and prisons.

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

The ACMD has not commented on this question.

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

The proposed approach appears sound.

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

The ACMD has noted that a recent publication by Demos said that ‘in the UK black people are 6 times more likely to be arrested for drug offences and 11 times more likely to be imprisoned despite there being no evidence that black people are more likely to use or deal drugs than white people’, (Taking Drugs Seriously-Demos & UKDPC 2011), and accordingly the ACMD would ask the Sentencing Council to note its suggestions in answer to Q15, which it considers would go some way in addressing this issue.

15) Are there any further comments that you wish to make?

The Drugs Intervention Programme (DIP) was successful – the highlighting of drug use by testing in custody suites and then subsequent arrest referral onto treatment has been a success, with evidence of a fall in offending behaviour. The ACMD believe that there could be merit in considering extending drug testing in custody suites as it makes referral to treatment far more likely.

The ACMD also believe that there is an opportunity to be more creative in dealing with those who have committed an offence by possession of drugs. For people found to be in possession of drugs (any) for personal use (and involved in no other criminal offences), they should not be processed through the criminal justice system but instead be diverted into drug education / awareness courses (as can happen now with speeding motor car offenders) with concomitant assessment for treatment needs (if the person consents), or possibly other, more creative civil punishments (e.g. loss of driving licence or passport). If, however, there were other trigger offences (e.g. theft, burglary etc) then the usual test and treatment procedures would occur. Such approaches may be more effective in reducing repeat offending and reducing costs to the criminal justice system. There should be “drugs awareness” courses to which those found in possession can be referred as a diversion – this would be the equivalent of the apparently successful “speed awareness” courses to which drivers can be referred as a diversion. These could also be available to those being conditionally cautioned where there is evidence of drug use.

Given that part of the ACMD’s Statutory remit is to advise Ministers on measures which ought to be taken for the rehabilitation of persons affected by the misuse of drugs (MDA 1971 S1), the Advisory Council was surprised that a Drug Rehabilitation Requirement (DRR) as a sentence only gets one mention (P.19) in the consultation paper. The reproduction of the Magistrates’ Court Guideline at Page 8 makes the position worse as DRRs are not mentioned in any way of the three categories of Community Penalties. The ACMD notes that by S.142 (1) (C) of the CJA 2003 one of the purposes of sentencing is the rehabilitation of offenders. “Given that it is only drugs and alcohol that have specific Court Orders tailored to their misuse and resulting crime, the ACMD believes that the DRR should have a more prominent position in the definitive guidelines and that all sentencers should be trained not only in the use of Guidelines but also at the same time in drug awareness, drug law, drug rehabilitation and the position of Criminal Courts in relation to DRRs.