

Sentencing Council meeting:
Paper:
Lead officials:
Lead Council members

5 April 2019
SC(19)APR06 – Drug Offences
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1 ISSUE

1.1 This paper covers the approach to assessing harm (including proposed quantities) for the offences of importation, supply (including PWITS) and production of drugs/cultivation of cannabis under the Misuse of Drugs Act 1971 (the MDA). This will include the approach to assessing harm for new and uncommon drugs such as fentanyl. It also covers the approach to assessment of harm for the comparable offences under the Psychoactive Substances Act 2016 (the PSA). This builds on your agreement of culpability, aggravating and mitigating factors for the draft revised guidelines for these offences. This paper also discusses a further question about the approach to assessment of culpability following early road testing of the guidelines with magistrates.

2 RECOMMENDATION

2.1 That the Council agrees:

- the proposed approach to the assessment of harm for the main MDA offences;
- the proposed approach to the assessment of harm for the PSA offences;
- the proposed addition to the text on assessment of culpability for importation and supply offences.

3 CONSIDERATION

MDA Importation, Supply and Production offences – Assessment of Harm

3.1 At your meeting in October you agreed not to make major changes to the approach to the assessment of harm, retaining the current one-stage assessment

at Step One, based on quantity of the drug concerned, with other factors considered either as part of culpability or as aggravating/mitigating factors at Step Two. We have now received data on quantities of drugs seized by police and the Border Force, which has allowed us to see whether there have been any changes since the data on which the quantities in the current guideline were based. We have also reviewed Crown Court Sentencing Survey (CCSS) data and transcripts, and spoken to the NCA to find out more about how some of these offences are currently committed. Revised draft guidelines for these offences, including changes already agreed and those proposed below, are set out at Annex A.

Drugs to include in the Harm table

3.2 The current harm tables include the following drugs:

- heroin/cocaine
- ecstasy (tablets)
- LSD
- amphetamine
- cannabis
- ketamine

Analysis of law enforcement seizures data suggests that inclusion of LSD and ketamine may no longer be required. Police seizures of both of these drugs combined account for less than one percent of all seizures. There are several other drugs (for example, benzodiazepines) with higher volumes which are not explicitly listed within the guidelines. Ketamine and LSD would still be covered by the wording on newer and less common drugs (see below). I therefore propose to remove ketamine and LSD from the list of drugs, to shorten and simplify the table.

Question 1: Does the Council agree to removing ketamine and LSD from the harm table?

3.3 Discussions with the NCA, and analysis of the police and border force data have indicated that it may be necessary to add to the entry in the table for ecstasy. Ecstasy is a street name for tablets containing the Class A drug 3,4-Methylenedioxymethamphetamine (MDMA). An increasing number of seizures of MDMA by the police are seizures not of ecstasy in tablet form but of MDMA in other forms (powder or liquid, for example). These now make up over half of police seizures and the NCA report difficulties in having to convert the weight of

the MDMA in another form into a number of tablets, particularly when considering variable purity. They have asked us to consider including MDMA separately within the list, or including MDMA by weight rather than giving a number of tablets for ecstasy.

3.4 If we choose to include MDMA by weight, careful consideration must be given to the quantities and the conversion rate between tablets and other forms of the drug. The numbers of tablets given in the current guidelines are based on the 1996 guideline case of *R v Warren and Beeley*, in which an average of 100mg of MDMA per tablet was given as a reference point. It may be, however, that in the past 20 years the average purity of a tablet has changed; the Border Force appears to use a different conversion rate. Whichever rate we use, a note below the table should give information about an appropriate conversion rate for equating ecstasy tablets with MDMA in other forms, recognising that it can only be an average. Explicitly giving this information would allow courts to be consistent in linking the quantities in their case with the guideline amounts, for example, if our conversion guidance suggests an average of 100mg per tablet, but the tablets in a particular case contain 300mg per tablet, this would be a case where “high purity” as an aggravating factor would come into play. We are awaiting further information from the NCA, police and ACMD about conversion rates currently in use, and if Council agrees to giving weights of MDMA we will set out weights for each category at the May meeting.

Question 2: Does the Council wish to replace ecstasy tablets with weights of MDMA in the harm table for the imposition, supply and production offences?

3.5 Reviewing drug seizures data and offences data suggests another drug for inclusion in the harm table – synthetic cannabinoid receptor agonists (SCRAs). These Class B drugs, which include many forms of “Spice”, are synthetic drugs designed to mimic the effects of tetrahydrocannabinol (THC, the most potent psychoactive constituent of cannabis).

3.6 Seizures and cases involving these drugs have increased considerably since the current guideline was developed. For example, police seizures have increased from 4 in 2010 to 796 in 2017, and seizures are likely to increase as more drugs of this type become controlled under the MDA. There are now more seizures of these drugs than there are of either ketamine or LSD. There is therefore a strong case for including specific indicative quantities of SCRAs in the harm table. Setting appropriate quantities is challenging as there is considerable variation, and they

are seized in a variety of types (as powders/liquids containing the SCRA in a relatively pure form, and as herbal preparations in which the SCRA is sprayed onto leaves for smoking). My initial approach was to suggest using the same quantities as for cannabis. However, whilst seizures data show similar trends to cannabis in that the vast majority of seizures are very low weights (under 5g), the data show proportionally fewer of the very high weights found with cannabis seizures, perhaps owing to the nature of the drugs and their markets. The distribution of seizures of different weights is more similar to that of cocaine or heroin. Furthermore, although synthetic cannabinoids are also Class B drugs, many of them are more potent than cannabis. I therefore propose that we consult on including SCRA in the harm table using weights used for cocaine and heroin, and invite consultation respondents to suggest any difficulties with this approach, and alternative quantities. I have asked the NCA and ACMD for their views on these quantities and will provide an update at the meeting if new information becomes available.

Question 3: Does the Council agree to including SCRA drugs within the harm table? Does the Council agree to consult on using the weights given for cocaine and heroin for SCRA's?

Number of harm categories and approach to assessment of harm

3.7 The current harm tables give four categories of harm, but the text above the table makes it clear that for operations on the most serious and commercial scale, with quantities substantially higher than those given in the top category, higher sentences may be appropriate, depending on the role of the offender. To see how this is working in practice, we have reviewed the CCSS data from the most recent full year (2014) on the proportion of cases falling into each category, for offences involving each class of drug, and I wanted to draw this to the Council's attention:

Importation offences

	Class A	Class B	Class C
Category 1	31%	17%	14%
Category 2	42%	23%	14%
Category 3	22%	47%	64%
Category 4	5%	13%	7%

Supply/PWITS offences

	Class A	Class B	Class C
Category 1	2%	0%	2%
Category 2	5%	3%	10%
Category 3 – based on quantity	29%	34%	39%
Category 3 – direct to users	53%	50%	42%
Category 4	11%	13%	8%

Note – percentage calculations do not include cases where the harm category was not indicated by the judge. Percentages shown may not add up to 100% due to rounding.

3.8 As this only covers the Crown Court, and cases sentenced by magistrates are likely to fall into Categories 3 and 4, it appears as though for the supply and PWITS offences, the great majority of cases overall will fall into categories 3 and 4, with categories 1 and 2 only being used in tiny numbers of cases. I had therefore considered simplifying the guideline by merging the two top categories for supply/PWITS into one, setting quantities (and sentence levels) between those currently given for categories 1 and 2.

3.9 If these categories were merged, there would be a risk of sentence inflation for cases which currently fall into category 2, in which sentencers would now have the option of much higher sentences, up to the top of the current category 1 range. However, this may be offset by reductions in sentences for cases which are currently at the lower end of category 2, but which (with a higher indicative quantity in this category) would now be placed in the range of the current category 3. Given the uncertainty of changing the approach (particularly the uncertainty of any impact on cases currently categorised as upper end of category 2), the fact that we have heard nothing so far suggesting that having two upper categories is problematic, and the fact that the Council decided in September last year that it did not want to change sentence levels for these offences, I am not proposing to merge the top two levels. I am suggesting, however, that we include a question at consultation asking whether respondents currently find any difficulties with the four-level structure.

Question 4: Does the Council agree to retaining the current four-level structure of the harm table for supply/PWITS offences, and to asking for views about the structure at consultation?

Quantities given in harm tables

3.10 We have also considered whether the quantities themselves set out in the tables are still appropriate, given the changing nature of drug offending. Analysis of police and Border Force seizure data and sentencing practice suggests that there have been no significant changes in proportions of seizures falling into the different categories which would suggest a need to change the quantities. I therefore propose to consult on retaining the current quantities, and ask respondents for any evidence suggesting a change in quantities is necessary.

Question 5: Does the Council agree to retaining the current quantities of drugs in the harm tables for the importation, supply and production offences?

Assessment of harm – very large quantities of drugs

3.11 Consideration of the number of levels of harm relates to a concern raised by some Crown Court judges and the NCA, namely how to assess harm where the quantities of drug in the case far exceed the indicative quantity of category 1. These judges felt that they are more frequently seeing cases of importation and supply with very high quantities (for example, 20kg of heroin or cocaine), which are far in excess of the quantity indicated in category 1 of the current guidelines. They felt that additional guidance on appropriate levels of sentence would be helpful. The current wording on very large quantities states, “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”. These sentences are very rarely used. In 2017, out of around 5,300 adult offenders receiving sentences of immediate custody for Supply/PWITS Class A in the Crown Court, only 1% (around 50 offenders) received an estimated pre-guilty plea sentence above the top of the category range for Class A drugs (16 years). Of those offenders, around 30 received sentences of 20 years or more (estimated pre-guilty plea).

3.12 The small numbers of cases involved suggest that the benefits of an additional category of harm would not outweigh the risk of complicating the guideline unnecessarily, and of harming the interests of justice since these cases are likely to be exceptional and contain many features which make them different

from other cases. It would also appear disproportionate, especially when the categories into which most cases fit, categories 3 and 4 are broad, and adding an extra category above may prompt calls for additional categories at the lower end. The text on large quantities already provides guidance by containing reference to a suggested sentence length for these cases. However, the text could be placed in a different place in the digital guideline, above the sentence levels table at step two, so that the court's attention is drawn to it at the relevant point.

Question 6: Is the Council content not to add an "extra large" category above the existing category 1, but to move the above statement from step one to step two?

3.13 In June last year we published a statement on sentencing offences involving newer or less common drugs (see Annex B). This is intended to assist sentencers in sentencing offences involving drugs which are not included in the harm table, particularly those whose prevalence is increasing, such as fentanyl and some synthetic cannabinoid receptor agonists. The statement asked sentencers to seek expert evidence to assist them in considering the equivalence of the drug before them with one of those listed in the harm table, for example, if the quantity of the particular drug was thought to be equivalent to 1kg of cocaine in terms of harm which it might cause, the sentencer should consider the starting point and range for offences involving 1kg of cocaine (category 2). This common sense approach mirrors that in the similar CPS guidance.

3.14 Now that we are revising the guidelines, I have considered in more detail the question of how to include these newer and/or less common drugs. The newer drugs which are now seen in a larger volume of cases I propose to include in the harm table (see above paragraphs 3.5-3.6 on SCRA's). The question of how to assess harm of drugs not listed in the table applies not just to newer drugs, but to all sorts of drugs which are not listed, for example, benzodiazepines or khat. The current guideline is silent on how to approach all other drugs, including those whose particular potency is currently causing public concern, so I propose to include the following above the harm table (text adapted from the guidance published in June last year):

<p>Where a drug is not listed in the table below, sentencers should consider expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused. There will often be no precise calculation possible, but</p>

courts are reminded that in cases of particularly potent drugs, even very small quantities may be held to be equivalent to large quantities of the drugs listed.

3.15 This follows the approach taken in the recent case of *R v Levene, Lowther and Childs*, a case sentenced in January involving importation and supply of fentanyl and its even more dangerous variant, carfentanyl. In this case, the total quantity of both drugs was 5kg, and expert evidence could not exactly equate the harm caused by these particular drugs with a certain amount of heroin. The judge rejected the approach of multiplying the quantity by a fixed factor, which he felt would not be in the overall interests of justice, but he also rejected the defence's suggestion that he should base the starting point on 5kg of heroin and simply move up within the range; he felt the evidence that the drugs cause harm "many times" that of heroin meant that, whilst no arithmetical calculation could be made, he was justified in setting a starting point above the category range.

Question 7: Is the Council content to include the proposed wording to cover the sentencing of drugs not listed in the harm table?

Psychoactive Substances Act 2016 offences – assessment of harm

3.16 At the meeting in January, you discussed and agreed the approach to the assessment of culpability, and aggravating and mitigating factors, for offences under the PSA, which for the most part resemble closely the approaches and factors in the equivalent MDA offences. The approach to the assessment of harm for PSA offences needs to be different because, unlike in the MDA, under the PSA there is no list of controlled substances and no classifications by potential harm, so the offences cover a very wide range of substances, from nitrous oxide which the courts have deemed to be only just within the definition of a psychoactive substance at all, to a strong (but as yet uncontrolled) SCRA which causes paranoia and serious mental distress.

3.17 I have discussed potential harm models, including relating the harm of the substance to a class A, B or C drug, with the Council leads on this guideline (Rebecca Crane and Sarah Munro). We decided not to pursue a model involving relating the harm to that of a class A, B or C drug, since, firstly, the nature of substances within each class is very different, so drawing comparisons between a psychoactive substance and a whole class of drugs is difficult, and secondly because, particularly in the magistrates' courts, there is likely to be limited or no expert evidence available. Sarah and Rebecca agreed with my proposal to test (at consultation) a model based on the quantity of the substance (broadly defined),

but also including reference to how to deal with cases in which there is evidence of particularly harmful or particularly benign substances. The harm table would therefore read as follows:

Category of harm	
Where evidence is available as to the potential effects of the substance and harm likely to be caused by those effects, the court should consider whether this affects the category of harm. Where the harm is very great, or very small, this may lead the court to move the starting point for the offence up or down within the category, or to place the offence in a higher or lower category than that indicated by the other factors listed.	
Category 1	<ul style="list-style-type: none"> • Large quantity indicative of commercial-scale operation • Supply in a custodial institution
Category 2	<ul style="list-style-type: none"> • Supply directly to users
Category 3	<ul style="list-style-type: none"> • Very small quantity

3.18 The harm table is set out in the draft Supply/PWITS guideline at Annex C (the same approach would be replicated for the Importation and Production offences). I tested this approach with a small group of magistrates at the AGM of the Wiltshire Magistrates' Association on 13 March. They were unfamiliar with the legislation, though very familiar with sentencing MDA offences. We tested the approach using a scenario based on a real case of PWITS of a type of synthetic cannabinoid not yet controlled under the MDA. The Magistrates used the categories consistently, and also said that expert evidence that the substance was particularly harmful would have changed their approach. Further testing would of course take place during consultation.

Question 8: Does the Council wish to adopt the proposed model for the assessment of harm for the PSA offences and the text of the harm table set out above?

3.19 The road testing with magistrates also revealed some concerns they had relating to the culpability factors in the current and proposed draft guidelines for MDA offences (which we are proposing to carry forward to the PSA offences). Many of the magistrates felt that references to "involving others" or position in a "chain" did not sufficiently take account of an offender in a supply or importation offence acting as a "sole trader" who was not consciously part of any larger scale operation. The current and revised draft guidelines do take account of this, and

sole traders may fall into significant or lesser role categories though are more likely to fall into the “lesser” category; someone who supplies or imports controlled drugs will be part of a larger operation, whether or not they are aware of it, in that they will buy their drugs from someone/somewhere and sell them on.

3.20 To make this clearer, we could remove or amend references to activities carried out “in a chain”. This is difficult to do without changing the intention of these factors, and it may be better to include additional text in the note above the table as follows:

One or more of these characteristics may demonstrate the offender’s role, <u>whether or not the offender is operating alone or consciously taking part in a wider operation</u> . These lists are not exhaustive.

Question 9: Does the Council wish to include the proposed text relating to offenders operating alone? If not, does the Council wish to amend the culpability factors to give more prominence to those operating as “sole traders”?

4. IMPACT AND RISKS

4.1 Some of the changes proposed above may have resource impacts and risks. A resource assessment will be carried out prior to consultation, and further information will be available to the Council when these guidelines are signed off for consultation.

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

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.

~~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, whether or not the offender is operating alone or consciously taking part in a wider operation. 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
- Uses business as cover
- Abuses a position of trust or responsibility
- 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, (save where this advantage is limited to meeting the offender's own habit) 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 (including meeting the offender’s own habit)

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.

Category of harm

Indicative quantities of the most common drugs, upon which the starting point is to be based, are as follows given in the table below. Where a drug is not listed in the table below, sentencers should expect to be provided with expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused. There will often be no precise calculation possible, but courts are reminded that in cases of particularly potent drugs, even very small quantities may be held to be equivalent to large quantities of the drugs listed.

Category 1	<ul style="list-style-type: none"> • Heroin, cocaine – 5kg • Ecstasy – 10,000 tablets • <u>MDMA – TBC</u> • LSD – 250,000 squares • Amphetamine – 20kg • Cannabis – 200kg • Ketamine – 5kg • <u>Synthetic cannabinoid receptor agonists – 5kg</u>
Category 2	<ul style="list-style-type: none"> • Heroin, cocaine – 1kg • Ecstasy – 2,000 tablets • <u>MDMA – TBC</u> • LSD – 25,000 squares • Amphetamine – 4kg • Cannabis – 40kg • Ketamine – 1kg • <u>Synthetic cannabinoid receptor agonists – 1kg</u>
Category 3	<ul style="list-style-type: none"> • Heroin, cocaine – 150g • Ecstasy – 300 tablets • <u>MDMA – TBC</u> • LSD – 2,500 squares • Amphetamine – 750g

	<ul style="list-style-type: none"> • Cannabis – 6kg • Ketamine – 150g • <u>Synthetic cannabinoid receptor agonists – 150g</u>
Category 4	<ul style="list-style-type: none"> • Heroin, cocaine – 5g • Ecstasy – 20 tablets • <u>MDMA – TBC</u> • LSD – 170 squares • Amphetamine – 20g • Cannabis – 100g • Ketamine – 5g • <u>Synthetic cannabinoid receptor agonists – 5g</u>

Step two – starting point and category range

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?

<u>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 offender's role.</u>			
CLASS A	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 14 years' custody Category range 12 – 16 years' custody	Starting point 10 years' custody Category range 9 – 12 years' custody	Starting point 8 years' custody Category range 6 – 9 years' custody
Category 2	Starting point 11 years' custody Category range 9 – 13 years' custody	Starting point 8 years' custody Category range 6 years 6 months' – 10 years' custody	Starting point 6 years' custody Category range 5 – 7 years' custody
Category 3	Starting point 8 years 6 months' custody Category range 6 years 6 months' – 10 years' custody	Starting point 6 years' custody Category range 5 – 7 years' custody	Starting point 4 years 6 months' custody Category range 3 years 6 months' – 5 years' custody
Category 4	<p>Where the quantity falls below the indicative amount set out for category 4 on the previous page, first identify the role for the importation offence, then refer to the starting point and ranges for possession or supply offences, depending on intent.</p> <p>Where the quantity is significantly larger than the indicative amounts for category 4 but below category 3 amounts, refer to the category 3 ranges above.</p>		

[Note – the above table with additional text is given as an example showing position of text above the table. Detail of sentence levels will be considered in May.]

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 the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example, through the location of the drug-related activity
- 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.

~~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, whether or not the offender is operating alone or consciously taking part in a wider operation. 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
- Uses business as cover
- Abuses a position of trust or responsibility, for example, prison employee, medical professional
- 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 (save where this advantage is limited to meeting the offender's own habit), 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 (including meeting the offender’s own habit)

Category of harm

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 (including 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 at least category 3 harm, and make an adjustment from the starting point within that category considering the quantity of drugs in the particular case.

Indicative quantities of the most common drugs, upon which the starting point is to be based) are as follows given in the table below. Where a drug is not listed in the table below, sentencers should expect to be provided with expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused. There will often be no precise calculation possible, but courts are reminded that in cases of particularly potent drugs, even very small quantities may be held to be equivalent to large quantities of the drugs listed.

Category 1	<ul style="list-style-type: none"> • Heroin, cocaine – 5kg • Ecstasy – 10,000 tablets • <u>MDMA – TBC</u> • LSD – 250,000 squares • Amphetamine – 20kg • Cannabis – 200kg • Ketamine – 5kg • <u>Synthetic cannabinoid receptor agonists – 5kg</u>
Category 2	<ul style="list-style-type: none"> • Heroin, cocaine – 1kg • Ecstasy – 2,000 tablets • <u>MDMA – TBC</u> • LSD – 25,000 squares • Amphetamine – 4kg • Cannabis – 40kg • Ketamine – 1kg • <u>Synthetic cannabinoid receptor agonists – 1kg</u>
Category 3	<p>Where the offence is sSelling directly to users (“street dealing”) the starting point is not based on a quantity OR Where the offence is sSupply of drugs in prison by a prison employee the starting point is not based on quantity – see shaded box on page 10, OR</p> <ul style="list-style-type: none"> • Heroin, cocaine – 150g • Ecstasy – 300 tablets • <u>MDMA – TBC</u> • LSD – 2,500 squares • Amphetamine – 750g

	<ul style="list-style-type: none"> • Cannabis – 6kg • Ketamine – 150g • <u>Synthetic cannabinoid receptor agonists – 150g</u>
Category 4	<ul style="list-style-type: none"> • Heroin, cocaine – 5g • Ecstasy – 20 tablets • <u>MDMA – TBC</u> • LSD – 170 squares • Amphetamine – 20g • Cannabis – 100g • Ketamine – 5g • <u>Synthetic cannabinoid receptor agonists – 5g</u> <p>OR</p> <p>Note – where the offence is selling directly to users <u>or supply in prison</u> (street dealing) the starting point is not based on quantity – go to category 3</p>

Step two – starting point and category range

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?

<u>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 offender's role.</u>			
CLASS A	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 14 years' custody Category range 12 – 16 years' custody	Starting point 10 years' custody Category range 9 – 12 years' custody	Starting point 7 years' custody Category range 6 – 9 years' custody
Category 2	Starting point 11 years' custody Category range 9 – 13 years' custody	Starting point 8 years' custody Category range 6 years 6 months' – 10 years' custody	Starting point 5 years' custody Category range 3 years 6 months' – 7 years' custody

Category 3	<p>Starting point 8 years 6 months' custody</p> <p>Category range 6 years 6 months' – 10 years' custody</p>	<p>Starting point 4 years 6 months' custody</p> <p>Category range 3 years 6 months' – 7 years' custody</p>	<p>Starting point 3 years' custody</p> <p>Category range 2 – 4 years 6 months' custody</p>
Category 4	<p>Starting point 5 years 6 months' custody</p> <p>Category range 4 years 6 months' – 7 years 6 months' custody</p>	<p>Starting point 3 years 6 months' custody</p> <p>Category range 2 – 5 years' custody</p>	<p>Starting point 18 months' custody</p> <p>Category range High level community order – 3 years' custody</p>

[Note – the above table with additional text is given as an example showing position of text above the table. Detail of sentence levels will be considered in May.]

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 the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example, through the location of the drug-related activity
- 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

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.

~~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, whether or not the offender is operating alone or consciously taking part in a wider operation. 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
- Uses business as cover
- Abuses a position of trust or responsibility
- 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 (save where this advantage is limited to meeting the offender’s own habit), 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, (including meeting the offender’s own habit)
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)

Category of harm

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.

Indicative output or potential output, upon which the starting point is to be based, is given in the table below. Where a drug is not listed in the table below, sentencers should expect to be provided with expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused. There will often be no precise calculation possible, but courts are reminded that in cases of particularly potent drugs, even very small quantities may be held to be equivalent to large quantities of the drugs listed.

<p>Category 1</p>	<ul style="list-style-type: none"> • Heroin, cocaine – 5kg • Ecstasy – 10,000 tablets • <u>MDMA – TBC</u> • LSD – 250,000 squares • Amphetamine – 20kg • Cannabis – operation capable of producing industrial quantities for commercial use • Ketamine – 5kg • <u>Synthetic cannabinoid receptor agonists – 5kg</u>
<p>Category 2</p>	<ul style="list-style-type: none"> • Heroin, cocaine – 1kg • Ecstasy – 2,000 tablets • <u>MDMA – TBC</u> • LSD – 25,000 squares • Amphetamine – 4kg • Cannabis – operation capable of producing significant quantities for commercial use • Ketamine – 1kg • <u>Synthetic cannabinoid receptor agonists – 1kg</u>
<p>Category 3</p>	<ul style="list-style-type: none"> • Heroin, cocaine – 150g • Ecstasy – 300 tablets • <u>MDMA – TBC</u> • LSD – 2,500 squares • Amphetamine – 750g • Cannabis – 28 plants • Ketamine – 150g • <u>Synthetic cannabinoid receptor agonists – 150g</u>

Category 4	<ul style="list-style-type: none"> • Heroin, cocaine – 5g • Ecstasy – 20 tablets • <u>MDMA – TBC</u> • LSD – 170 squares • Amphetamine – 20g • Cannabis – 9g (domestic operation) • Ketamine – 5g • <u>Synthetic cannabinoid receptor agonists – 5g</u>
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Step two – starting point and category range

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?

<u>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 offender's role.</u>			
CLASS A	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	<p>Starting point 14 years' custody</p> <p>Category range 12 – 16 years' custody</p>	<p>Starting point 10 years' custody</p> <p>Category range 9 – 12 years' custody</p>	<p>Starting point 7 years' custody</p> <p>Category range 6 – 9 years' custody</p>
Category 2	<p>Starting point 11 years' custody</p> <p>Category range 9 – 13 years' custody</p>	<p>Starting point 8 years' custody</p> <p>Category range 6 years 6 months' – 10 years' custody</p>	<p>Starting point 5 years' custody</p> <p>Category range 3 years 6 months' – 7 years' custody</p>
Category 3	<p>Starting point 8 years 6 months' custody</p> <p>Category range 6 years 6 months' – 10 years' custody</p>	<p>Starting point 5 years' custody</p> <p>Category range 3 years 6 months' – 7 years' custody</p>	<p>Starting point 3 years 6 months' custody</p> <p>Category range 2 – 5 years' custody</p>
Category 4	<p>Starting point 5 years 6 months' custody</p> <p>Category range 4 years 6 months' – 7 years 6 months' custody</p>	<p>Starting point 3 years 6 months' custody</p> <p>Category range 2 – 5 years' custody</p>	<p>Starting point 18 months' custody</p> <p>Category range High level community order – 3 years' custody</p>

[Note – the above table with additional text is given as an example showing position of text above the table. Detail of sentence levels will be considered in May.]

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 the risk of serious harm, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs
- Exposure of third parties to the risk of serious harm, for example, through the location of the drug-related activity
- 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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Do not retain this copy. Only the online version of a guideline is guaranteed to be up to date.

Drug offences involving newer and less common drugs

Effective from: for guidance only

The Drug Offences Guideline came into force in 2012 and covers the main possession, supply, importation and production offences in the Misuse of Drugs Act 1971. By virtue of s125 (1) (b) of the Coroners and Justice Act 2009, sentencers may also refer to this guideline when sentencing other relevant offences, for example, offences under the Psychoactive Substances Act 2016.

Drug offences – assessing harm

For most offences, the drug offences guidelines use class and quantity of the drug as the key element of assessing the harm caused by the offence, with higher quantities indicating higher harm. The current guideline covers all drugs included in the Misuse of Drugs Act 1971. However, as indicators of the level of harm, the guideline gives the indicative quantities of only the most common drugs: heroin, cocaine, ecstasy, LSD, amphetamine, cannabis and ketamine.

Example – [supplying or offering to supply a controlled drug](#)

To put the offence of supplying or offering to supply a controlled drug in the most serious category, the quantity of drug required would be:

- for amphetamine, 20kg
- for heroin or cocaine, only 5kg

The Council intended, and case law has clearly shown, that where the drug in question is not listed in the guideline, the assessment of harm will be based on the equivalent level of harm caused by the relevant quantity of that drug.

Newer drugs – assessing harm

Since publication of the drug offences guidelines, there has been an increase in the number of cases before the courts involving newer drugs, such as synthetic opioids, which may have much higher potency and potential to cause harm than more common drugs.

Where these newer drugs are covered by the guideline but not specifically listed in the section on assessment of harm, the approach to assessing harm in these cases should be as with all cases of controlled drugs not explicitly mentioned in the guidelines. Sentencers should expect to be provided with expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused.

Example – [supplying or offering to supply a controlled drug](#)

If the quantity of the drug would cause as much harm as 5kg of heroin, the offence would be in the most serious category.

Where the offence is not covered by the guideline (such as offences under the Psychoactive Substances Act 2016) the approach should be the same, but the court must also take into account any difference in the statutory maximum penalty.

Annex B

Expert evidence

In line with [CPS guidance](#), prosecutors will be providing courts with this information and expert evidence to ensure that the court can make a correct assessment of harm in cases involving drugs not explicitly listed in the guidelines. This is likely to include evidence on the potency of the drug in question, and the value of sales, along with evidence on the wider harm caused to the community as well as to the drug users and others immediately affected in the case.

The Council published an [evaluation of the Drug Offences guideline](#) on 1 June 2018, and has now started work to revise the guideline. We will consult on a revised draft guideline in due course, and consultation documents will be available on the website.

It is important to note that this guidance does not carry the same authority as a sentencing guideline, and sentencers are not obliged to follow it. However, it is hoped that the majority of sentencers will find it useful in assisting them to deal with these cases.

Supplying, or offering to supply, a psychoactive substance
Psychoactive Substances Act 2016 (sections 5(1) or 5(2))

Possession of psychoactive substance with intent to supply
Psychoactive Substances Act 2016 (section 7(1))

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused 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.

Culpability demonstrated by the offender's role

One or more of these characteristics may demonstrate the offender's role, whether or not the offender is operating alone or consciously taking part in a wider operation. 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
- Uses business as cover
- Abuses a position of trust or responsibility, for example, prison employee, medical professional
- Exploitation of children and/or vulnerable persons to assist in the offending
- Exercising control over the home of another person for the purposes of the offending

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 (save where this advantage is limited to meeting the offender's own habit), 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 (including meeting the offender's own habit)

In assessing harm, the sentencer should consider the factors below. Where there are characteristics present which fall under different harm categories the court should balance these characteristics to reach a fair assessment of harm.

<i>Category of harm</i>	
<u>Where evidence is available as to the potential effects of the substance and harm likely to be caused by those effects, the court should consider whether this affects the category of harm. Where the harm is very great, or very small, this may lead the court to move the starting point for the offence up or down within the category, or to place the offence in a higher or lower category than that indicated by the other factors listed.</u>	
Category 1	<ul style="list-style-type: none"> • Large quantity indicative of commercial-scale operation • Supply in a custodial institution
Category 2	<ul style="list-style-type: none"> • Supply directly to users
Category 3	<ul style="list-style-type: none"> • Very small quantity

Step two – starting point and category range

	Leading Role	Significant Role	Lesser Role
Category 1	Starting point 3 years 6 months' custody Category range 2 – 5 years' custody	Starting point 18 months' custody Category range 1 – 3 years' custody	Starting point 26 weeks' custody Category range 12 weeks' – 18 months' custody
Category 2	Starting point 18 months' custody Category range 1 – 3 years' custody	Starting point 26 weeks' custody Category range 12 weeks' – 18 months' custody	Starting point High level community order Category range Low level community order – 12 weeks' custody
Category 3	Starting point 26 weeks' custody Category range High level community order – 18 months' custody	Starting point High level community order Category range Low level community order – 12 weeks' custody	Starting point Low level community order Category range Band A fine – medium level community order

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
- In connection with the offence, the offender used a courier who, at the time of the commission of the offence, was aged under 18 (except where taken into account at Step 1)
- The offence was committed on or in the vicinity of school premises at a relevant time
- The offence was committed in a custodial institution
- 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 psychoactive substance user to the risk of serious harm, for example, through the method of production/mixing of the substance
- Exposure of those involved in dealing in the psychoactive substance to the risk of serious harm, for example through method of transporting the substance

- Exposure of third parties to the risk of serious harm
- 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

There may be exceptional local circumstances that arise which may lead a court to decide that prevalence of psychoactive substance 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 psychoactive substance 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 psychoactive substance to which offender addicted
- Mistaken belief of the offender regarding the type of substance, 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