

**Sentencing Council meeting:** 25 January 2019  
**Paper:** SC(19)JAN07 – Drugs guideline  
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## **1 ISSUE**

1.1 This paper covers proposed revisions to the guideline for the offence of possession of a controlled drug under s5(2) of the Misuse of Drugs Act 1971 (the MDA). It is also the first consideration of guidelines for offences under the Psychoactive Substances Act 2016 (the PSA). The remaining elements of the revised drugs guideline, the approach to harm and quantities, and sentence levels, will be discussed in April and May, with sign-off for consultation planned for the May meeting.

## **2 RECOMMENDATION**

2.1 That the Council agree:

- the proposed changes to the guideline for possession of a controlled drug;
- the proposed culpability, aggravating and mitigating factors for the guidelines on importation, supply and production offences under the PSA; and
- the amendments to the aggravating factors previously discussed for importation, supply and production offences under the MDA.

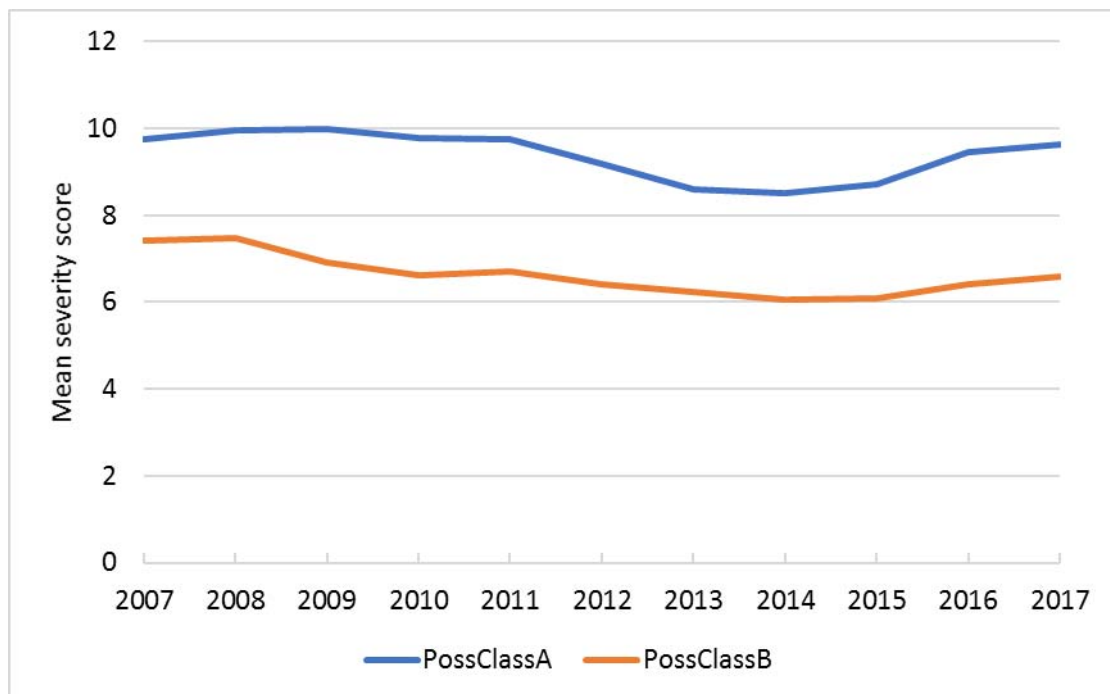
## **3 CONSIDERATION**

*Possession of a controlled drug (see draft guideline at Annex A)*

3.1 Possession of a controlled drug is a high-volume offence that is mostly sentenced in the magistrates' courts (which accounted for 92 per cent of a total of just over 22,000 offenders sentenced in 2017). Over half of all these offenders were sentenced for cannabis possession, and most offenders received a fine.

The assessment of the guideline’s impact showed that for class A, sentencing severity fell slightly at the point of guideline implementation and the trend line flattened thereafter. For class B, which far outweighs all other drug offences in terms of volume of offenders sentenced, sentencing severity did not change following guideline implementation, however a pre-existing downward trend which began around 2009 (when cannabis was re-classified) continued. Since 2015, however, there has been a change in trend for both offences, with sentencing severity rising upwards to match 2011 levels.

**Figure: Trends in sentencing severity for possession class A and possession class B (principal offence only)**



3.2 Given these trends, we suggest that the overall aim of the new guideline should be to keep sentencing practice the broadly the same. One small tweak to the sentencing table (covered below in 3.6 and 3.7) may result in a small change to sentencing severity, but we would argue that this is justified because it corrects an unintended consequence of the current guideline (see 3.6 and 3.7).

**Question 1: Is Council content with the aim generally of keeping sentencing severity constant for this offence?**

3.3 We have considered adopting a more sophisticated model of offence seriousness than that in the current guideline, in which the offence category is determined solely on the basis of class of drug. However, transcripts reveal relatively little about the detail of possession cases, even at the top end, so it is difficult to think how we might elaborate on the culpability of offenders committing crimes at differing levels of seriousness

3.4 The most obvious signifier of harm, quantity, was rejected when the current guideline was written: the consultation version broke down seriousness into four categories, the most serious being possession in prison and the lower three levels based on quantity (with different indicative ranges by class of drug in each category), but this model was dropped post-consultation. Council agreed with consultation responses suggesting that for these possession offences quantity is an arbitrary measure of seriousness which could lead to perverse outcomes and disproportionality in sentencing. It was felt that the quantity in the offender's possession at time of arrest depends on a number of factors that are unrelated to culpability and harm, such as the way the drug user accesses the market (e.g. buying in bulk to limit contact with the criminal market) and their level of tolerance (e.g. more dependent addicts are likely to have a higher tolerance and so buy more of it). We see no reason why these arguments will have changed, and indeed they may be bolstered by newer trends: for example, some drugs supply may have moved to more of a 'little and often' model (e.g. via the dark web and post), and new drugs like fentanyl and carfentanyl are used in tiny quantities, making low quantity less relevant to the harm caused. We therefore suggest that quantity of drug is not built into step one (whether or not to build it into step two is considered later, see 3.11).

***Question 2: Does Council agree that the seriousness model based on class only should remain the same?***

***Question 3: Does Council agree that quantity should not be incorporated into step one?***

3.5 Placing possession in prison at the highest level of seriousness was also rejected by consultees, on the basis that there is no evidence that a longer sentence would work as a deterrent, rather it may simply create an extra market for drugs in prisons by keeping drug users in prison for longer. Whilst this argument may still hold true, the Council may feel that the current problem of drugs in prison warrants reflecting the seriousness of the offence in the prison

context at step one of the guideline rather than step two, as current (possession in prison being an aggravating factor). On balance, we suggest retaining, 'Possession of drug in prison' at step two, since its inclusion at step one might inflate sentences across the board (particularly if the factor was a superordinate category above drug class) and the argument about fuelling the market (by prolonging the time an individual is buying drugs in prison) still remains persuasive, perhaps outweighing the symbolic importance of having 'prison' at step one.

***Question 4: Does Council agree with the retention of the factor, 'Possession of drug in prison' at step two, as opposed to placing it at step one?***

3.6 We are suggesting only a very small change to the sentencing table. Council might remember that in our presentation on overarching learnings, we highlighted a very marked fall in the proportion of offenders receiving a community order (CO) for possession class A in the month immediately after guideline implementation, and a corresponding increase in the use of fines. We think this may be because a CO is not mentioned explicitly in the sentencing range for category 1 (and category 2) of this offence.

3.7 To encourage the use of community orders, particularly those with a rehabilitative drug treatment requirement, we suggest incorporating the invitation to consider a community order into the higher categories in the sentencing table, so the upper ranges for category 1 and 2 would incorporate the additional text, 'even in cases where the custody threshold has been passed, a community order may be a suitable sentence' (and this would link to the asterisked text in the current guideline).

3.8 This may mean that the proportion of offenders receiving a community order increases at the expense of custody. However, we think any variation in sentencing severity is justified as the changes are hopefully addressing an unintended consequence of the current guideline.

***Question 5: Is Council content with this change to the sentencing table?***

3.9 There have been two quite recent Court of Appeal cases where an offender was charged with possession with intent to supply (PWITS) and possession, and pleaded guilty to possession but was acquitted or the jury could not agree on PWITS. In each case large quantities of drugs were specified and high sentences were given. In *R v Russell*, the Court held that if, as the guideline suggests, quantity should be disregarded, there was insufficient basis for the high sentence,

the court inferring that large quantity was the main reason why the judge had passed a high sentence. In *R v Lawrence* the judgment was a little different: quantity was accepted as an aggravating factor alongside purity and the location of the offence (a nightclub), although the sentence was reduced for other reasons.

3.10 It is apparent from these cases and several cases within the transcripts we reviewed that an offender is sometimes convicted of possession of a large quantity of drugs in cases where there is not enough evidence to convict on PWITS. In line with the judgment in *R v Lawrence*, we have considered including 'high quantity' as an aggravating factor to prompt its consideration at step two in these types of case. However, it might be argued that the same arguments that we invoked for not including quantity at step one (see above) apply at step two.

3.11 Additionally, Council generally takes the approach that guidelines should be designed with the offence that has been charged, and for which the offender has been convicted, in mind. We therefore suggest that high quantity should not be an aggravating factor at step two. The corollary of this is small quantity, which we have considered as a potential mitigating factor. The guideline assessment found that small quantity was often used as a mitigating factor for possession cases in the magistrates' courts, in spite of not being cited as a factor in the guideline: in our data collection, sentencers were asked an open-ended question at the end of the form, 'Taking all things into consideration, what would you say was the single most important factor affecting your sentence?' and 'small quantity' was the most popular response, given in 22 per cent of cases (which is very high for an open-ended question). Whilst the very clear importance afforded to small quantity might be seen as an argument for including it as a mitigating factor in the guideline, we suggest not doing so, on the basis that: (i) sentencers are already taking it into account in nearly a quarter of cases; (ii) that if we add in small quantity, then it follows that high quantity should be included; and (iii) because of the argument made earlier around new drugs and new methods of supply making low quantity less meaningful as an indication of sentencing seriousness.

***Question 6: does Council agree that high and low quantity should not be incorporated at step two?***

3.12 The aggravating factor, 'Charged as importation of a very small amount' is included in the current possession guideline because Council felt that if only a small amount is imported, sentencers should follow the possession guideline rather than the more punitive 'importation' one (category 4 of the importation guideline directs the

reader to the 'possession' guideline). However, we have evidence that this factor is sometimes misconstrued by magistrates, who are likely to be unfamiliar with the 'importation' guideline. Specifically, in the guideline assessment, this factor was found to decrease sentence severity, rather than increase it. Likewise, in a recent sentencing scenario-based exercise in which the offender was caught with 'one very small wrap of cocaine', several participants ticked this factor, even though this was not an importation case. Most likely, scanning the form quickly, sentencers only took notice of the words 'small amount' and hence ticked this erroneously thinking this is a mitigating factor. Because of this confusion, we are suggesting rewording the factor along the lines of: 'Importation offence where the quantity falls under Category 4 in the importation guideline'.

**Question 7: does Council agree with the rewording of this factor?**

*Offences under the Psychoactive Substances Act 2016 (PSA)*

3.13 At your meeting in September, you agreed that the revised Drug Offences guideline should include guidelines on the main offences under the Psychoactive Substances Act 2016. These offences, which are very similar to offences under the Misuse of Drugs Act 1971, are given in the table below, along with the numbers of offenders sentenced in 2017.

<b>Section</b>	<b>Offence</b>	<b>Statutory maximum penalty</b>	<b>No. sentenced in 2017</b>
4(1)	Producing a psychoactive substance	7 years' custody	1
5(1) 5(2)	Supplying, or offering to supply, a psychoactive substance		14
7(1)	Possession of a psychoactive substance with intent to supply		96
8(1) 8(2)	Importing or exporting a psychoactive substance		0
9(1)	Possession of a psychoactive substance in a custodial institution	12 months' custody	30

3.14 In 2017, 111 offenders were sentenced for these offences, compared with 12,446 offenders sentenced for comparable MDA offences (excluding the Possession offences, which are different under the two Acts). Information on

sentence types and average (mean and median) custodial sentence lengths is given at Annex B. With such low numbers, direct comparison between the PSA and MDA offences is difficult, but it is perhaps worth noting that, as we might expect given the lower statutory maximum penalties, the mean and median custodial sentence lengths are considerably lower for PSA supply and PWITS offences than those for the comparable MDA offences, even for Class C drugs, as can be seen from the examples in the following table:

<b>Mean custodial sentence length</b>	<b>PSA</b>	<b>Class A</b>	<b>Class B</b>	<b>Class C</b>
<b>Supply</b>	8 months	4yrs 6mths	2 yrs 1mth	1yr 1mth
<b>PWITS</b>	10 months	3yrs 5mths	1yr 2mths	1yr 3mths

3.15 I have spoken to the Home Office lead on the Psychoactive Substances Act and considered the post-legislative review of the Act which was published on 19<sup>th</sup> November last year. This review does make some comparisons of sentences for PSA offences with those for MDA offences but makes no reference to the lack of specific guidelines for this offence. As the review mainly concerns availability of these substances and other aspects of enforcement, sentencing is only a minor part, and the conclusions do not appear to have implications for our guideline development other than, perhaps, in relation to the offence of possession in a custodial institution.

3.16 We have also reviewed 29 transcripts of Crown Court sentencing remarks for all the offences above (other than importation) looking in particular at the key factors in the decision, differences between sentencing these and MDA offences, and whether or not sentencers have made use of the current Drug Offences guideline. For supply and PWITS offences, judges have explicitly referred to the current Drug Offences guideline in the majority of cases, and in some others have used factors which are taken from that guideline.

3.17 In this paper, I will consider the assessment of culpability and aggravating/mitigating factors for the offences listed above other than possession in a custodial institution. Quantities as assessment of harm will be dealt with at a future meeting, alongside quantities of controlled drugs in the MDA offence guidelines. Possession in a custodial institution will also be dealt with at a future meeting,

following further discussion with HMPPS and confirmation of your views on the draft possession of a controlled drug guideline discussed above.

*Supply/PWITS/Importation/Production offences - assessment of culpability*

3.18 These four offences closely mirror the offences in the MDA, and the aim of the legislation was to control these activities for new psychoactive substances in the same way as for controlled drugs under the MDA. It is therefore not surprising that many of the culpability factors relevant to the comparable MDA offences (such as involving others in the operation, having some awareness of the scale of the operation, and being involved through naivety) have been cited by judges in the transcripts we have reviewed. Given these similarities, I propose to use the same approach to assessment of culpability, and the same factors, as have been agreed for the comparable MDA offences. A draft of this section of the guidelines is set out at Annex C. At consultation, I intend to explain this approach and ask respondents whether there are any different/additional considerations for psychoactive substances which would require a departure from the MDA offences factors.

3.19 Initial discussion with the Home Office has raised a potential difference, in that they say that they are not currently seeing organised crime gang involvement in NPS supply in the same way as in the trade in controlled drugs. This might suggest that the factors particularly relevant to large scale organised crime offending, such as commercial scale operations, may not be so relevant to the PSA offences. However, the approach to culpability based on role, and the factors we have agreed, would apply equally to smaller scale operations. In addition, we must bear in mind that the PSA only came into effect in 2016, and it may only be a matter of time before the organised crime gangs become more involved in the trade in PSA and the full range of factors may become more relevant.

3.20 In the majority of Supply and PWITS transcripts we have reviewed, the offender is being sentenced not just for the PSA offence, but also for a comparable MDA offence, commonly supply of cannabis, suggesting a strong link between the dealing in newer psychoactive substances and controlled drugs. The simultaneous sentencing of the different offences also means that to keep the culpability approach and factors the same would be simpler for the courts.

***Question 8: Does the Council agree to replicating the approach to the assessment of culpability and culpability factors used in the MDA offences for the offences under the Psychoactive Substances Act?***



**Question 9: Does the Council agree to ask consultation respondents for views on additional culpability considerations relating to psychoactive substances which may not be covered by the existing factors?**

*Supply/PWITS/Importation/Production offences – assessment of harm*

3.21 The assessment of harm for these offences under the PSA presents more of a challenge since, as there is no list of substances, the range of potential harm is so wide. Some of the substances involved in existing cases, such as nitrous oxide, have very limited harmful impacts, while others, such as some forms of synthetic cannabinoid which are not yet controlled, could cause harm similar to those of a Class B or even Class A drug. It is therefore not possible to take the same approach to the assessment of harm as taken in the current Drug Offences guidelines, particularly given that the nature of the substances involved in this offending will change over time. I will set out a proposed approach to the assessment of harm at the next meeting, alongside the assessment of harm and quantities for the MDA offences.

*Supply/PWITS/Importation/Production offences – aggravating and mitigating factors*

3.22 In general, the same arguments apply to aggravating and mitigating factors as to culpability; that the offences are similar enough to the MDA offences that the aggravating and mitigating factors agreed for the MDA offences should also be used for the PSA offences. Transcripts of these PSA offences also suggest that judges are using similar factors, whether or not they are explicitly referring to the current Drug Offences guideline. The exception is the difference in statutory aggravating factors. Firstly, for the PSA offences, there is no aggravation for a “third strike” drug trafficking offence so this would be removed. Secondly, in addition to some small differences in wording for the factors relating to supply near a school premises, and using a courier aged under 18, there is a statutory aggravating factor for an PSA supply offence committed “in a custodial institution” under s6(9) and s6(10) of the PSA. The wording of statutory aggravating factors for the supply offence would therefore read (changes from the MDA offence version in italics):

- 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
- 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

**Question 10: Does the Council agree to retaining the aggravating and mitigating factors agreed for the equivalent MDA offence guidelines for the PSA offence guidelines, subject to the changes to statutory aggravating factors above?**

*Misuse of Drugs Act offences – supply/PWITS, importation/exportation and production/cultivation*

3.23 At the Council meeting in November, you agreed aggravating and mitigating factors for these offences and I have set out the agreed version at Annex D. You asked me to reconsider the wording of three separate aggravating factors relating to what, in the current guideline, is drafted as “exposure of others to more than usual danger”, to make it clear that the factors could apply to three distinct groups of people and take account of concerns expressed by judges, the Home Office and the NCA about new forms of offending. The revised factors are set out below. It is difficult to strike a balance between giving sufficient information and drafting too broadly, and the factors can be tested through a specific consultation question and in road testing. The drafting below is similar to that used in other guidelines (for example, Child Cruelty) to indicate situations where there is additional harm beyond that which is inherent in the offence.

- 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 site of the drug-related activity

**Question 11: Is the Council content with the redrafting of the aggravating factors above?**

**4. IMPACT AND RISKS**

4.1 Further information about the impact and risks of this revised guideline will be available prior to consultation. In particular, the Council agreed that further analytical work on the role of ethnicity and gender in the sentencing of drug offences will be carried out; discussion of this is currently scheduled for the April meeting.

# Possession of a controlled drug

## Misuse of Drugs Act 1971 (section 5(2))

Triable either way

Class A

Maximum: 7 years' custody

Offence range: Fine – 51 weeks' custody

Class B

Maximum: 5 years' custody

Offence range: Discharge – 26 weeks' custody

Class C

Maximum: 2 years' custody

Offence range: Discharge – Community order

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

The court should identify the offence category based on the class of drug involved.

Category 1	Class A drug
Category 2	Class B drug
Category 3	Class C drug

**STEP TWO**  
**Starting point and category range**

The court should use the table below to identify the corresponding starting point. The starting point applies to all offenders irrespective of plea or previous convictions. The court should then consider further adjustment within the category range for aggravating or mitigating features, set out below.

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

Offence category	Starting Point (applicable to all offenders)	Category Range (applicable to all offenders)
Category 1 (class A)	Band C fine	Band A fine – 51 weeks' custody <u>(or, even in cases where the custody threshold has been passed, a community order may be an appropriate sentence)*</u>
Category 2 (class B)	Band B fine	Discharge – 26 weeks' custody <u>(or, even in cases where the custody threshold has been passed, a community order may be an appropriate sentence)*</u>
Category 3 (class C)	Band A fine	Discharge – medium level community order

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

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 particular, possession of drugs in prison is likely to result in an upward adjustment.** 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 conviction relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

### Other aggravating factors include

- Possession of drug in prison
- Presence of others, especially children and/or non-users
- Possession of drug in a school or licensed premises
- Failure to comply with current court orders
- Offence committed on licence
- Attempts to conceal or dispose of evidence, where not charged separately
- ~~Charged as importation of a very small amount~~ Importation offence where the quantity falls under Category 4 in the Importation guideline because amount is too small for the importation guideline to be used
- Established evidence of community impact

## **Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Offender is using cannabis to help with a diagnosed medical condition
- 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
- Isolated incident
- 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

Table 1: Number of adult offenders sentenced for offences under the Psychoactive Substances Act 2016, 2007-2017<sup>1,2</sup>

Annex B

Legislation	Section	Offence	Court type	Number of adult offenders sentenced													
				2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017			
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	0	0	
			CC	-	-	-	-	-	-	-	-	-	-	-	1	1	
			<b>Total</b>	-	-	-	-	-	-	-	-	-	-	-	-	<b>1</b>	<b>1</b>
	5(1) & 10(1)	Supply a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	-	4	4
			CC	-	-	-	-	-	-	-	-	-	-	-	-	1	9
			<b>Total</b>	-	-	-	-	-	-	-	-	-	-	-	-	-	<b>5</b>
	5(2) & 10(1)	Offer to supply a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	-	0	0
			CC	-	-	-	-	-	-	-	-	-	-	-	-	0	1
			<b>Total</b>	-	-	-	-	-	-	-	-	-	-	-	-	-	<b>0</b>
	7 & 10(1)	Possess a psychoactive substance with intent to supply	MC	-	-	-	-	-	-	-	-	-	-	-	-	6	28
			CC	-	-	-	-	-	-	-	-	-	-	-	-	5	68
			<b>Total</b>	-	-	-	-	-	-	-	-	-	-	-	-	-	<b>11</b>
	8(1) & 10(1)	Import a psychoactive substance	MC	-	-	-	-	-	-	-	-	-	-	-	-	1	0
			CC	-	-	-	-	-	-	-	-	-	-	-	-	0	0
			<b>Total</b>	-	-	-	-	-	-	-	-	-	-	-	-	-	<b>1</b>
9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	MC	-	-	-	-	-	-	-	-	-	-	-	-	4	21	
		CC	-	-	-	-	-	-	-	-	-	-	-	-	2	9	
		<b>Total</b>	-	-	-	-	-	-	-	-	-	-	-	-	-	<b>6</b>	<b>30</b>
<b>Total psychoactive substances offences</b>		MC	-	-	-	-	-	-	-	-	-	-	-	-	15	53	
		CC	-	-	-	-	-	-	-	-	-	-	-	-	9	88	
		<b>Total</b>	-	-	-	-	-	-	-	-	-	-	-	-	-	<b>24</b>	<b>141</b>

Source: Court Proceedings Database, Ministry of Justice

## Notes:

1) No offenders were sentenced during this period for the following offences under the Psychoactive Substances Act 2016: Export a psychoactive substance, Fail to comply with a prohibition / premises order re psychoactive substances, Remain on / enter premises in contravention of access prohibition re psychoactive substances, Obstruct a person entering premises / securing premises against entry re psychoactive substances, Obstruct enforcement officer in performance of functions under Psychoactive Substances Act 2016, and Fail to comply / prevent compliance with requirement / direction under Psychoactive Substances Act 2016.

2) The Psychoactive Substances Act came into effect in 2016, and so no offenders were convicted or sentenced for these offences prior to 2016.

Table 2: Sentence outcomes for adult offenders sentenced for offences under the Psychoactive Substances Act 2016, 2017

Legislation	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with <sup>1</sup>	Total
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance	0	0	0	0	0	1	0	1
	5(1) & 10(1)	Supply a psychoactive substance	0	1	2	2	1	7	0	13
	5(2) & 10(1)	Offer to supply a psychoactive substance	0	0	0	0	1	0	0	1
	7 & 10(1)	Possess a psychoactive substance with intent to supply	0	2	4	22	36	30	2	96
	8(1) & 10(1)	Import a psychoactive substance	0	0	0	0	0	0	0	0
	9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	0	2	0	0	5	22	1	30

Offences under the Psychoactive Substances Act 2016

Legislation	Section	Offence	Absolute Discharge	Conditional Discharge	Fine	Community Order	Suspended Sentence	Immediate Custody	Otherwise dealt with <sup>1</sup>	Total
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance	0%	0%	0%	0%	0%	100%	0%	100%
	5(1) & 10(1)	Supply a psychoactive substance	0%	8%	15%	15%	8%	54%	0%	100%
	5(2) & 10(1)	Offer to supply a psychoactive substance	0%	0%	0%	0%	100%	0%	0%	100%
	7 & 10(1)	Possess a psychoactive substance with intent to supply	0%	2%	4%	23%	38%	31%	2%	100%
	8(1) & 10(1)	Import a psychoactive substance	0%	0%	0%	0%	0%	0%	0%	0%
	9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	0%	7%	0%	0%	17%	73%	3%	100%

Source: Court Proceedings Database, Ministry of Justice

Note:

1) Includes a number of orders, for example hospital orders, confiscation orders and compensation orders.

**Table 3: Average custodial sentence lengths for adult offenders sentenced to immediate custody for offences under the Psychoactive Substances Act 2016, after any reduction for guilty plea, 2017**

Legislation	Section	Offence	Mean sentence length <sup>1,3</sup>	Median sentence length <sup>2,3</sup>
Psychoactive Substances Act 2016	4(1) & 10(1)	Produce a psychoactive substance <sup>4</sup>	*	*
	5(1) & 10(1)	Supply a psychoactive substance <sup>5</sup>	8 months	8 months
	5(2) & 10(1)	Offer to supply a psychoactive substance <sup>6</sup>	-	-
	7 & 10(1)	Possess a psychoactive substance with intent to supply	10 months	7 months
	8(1) & 10(1)	Import a psychoactive substance <sup>6</sup>	-	-
	9(1) & 10(2)	Possess a psychoactive substance in a custodial institution	4 months	3 months

Source: Court Proceedings Database, Ministry of Justice

Notes:

- 1) The mean is calculated by taking the sum of all values and then dividing by the number of values.
- 2) The median is the value which lies in the middle of a set of numbers when those numbers are placed in ascending or descending order.
- 3) Excludes life and indeterminate sentences.
- 4) Figures have been excluded for this offence, due to the very low number of offenders sentenced to immediate custody in 2017 (less than five).
- 5) These figures should be treated with caution, due to the low number of offenders sentenced to immediate custody for this offence.
- 6) No offenders were sentenced to immediate custody for this offence in 2017.



**Revision of Drug Offences Guideline – proposed sections for guidelines for Psychoactive Substances Act 2016 offences of importation/exportation, supply/PWITS and production**

**Importing or exporting a psychoactive substance**

Psychoactive Substances Act 1971 (section 8)

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.

In assessing harm...[to be added]

*Culpability demonstrated by the offender’s role*

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

**Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Systematic 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
- 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)

*Category of harm...[to be considered at a future meeting]*

Step two – starting point and category range

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

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

Where appropriate, consider the custody threshold as follows:

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

*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
- 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

*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 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

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.

In assessing harm...[to be added]

*Culpability demonstrated by the offender's role*

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

**Leading** role:

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

*Category of harm.....[to be considered at a future meeting]*

### Step two – starting point and category range

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

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

Where appropriate, consider the custody threshold as follows:

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

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

- Has the community threshold been passed?

#### *Factors increasing seriousness*

##### *Statutory aggravating factors:*

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- In connection with the offence, the offender used a courier who, at the time of the commission of the offence, was aged under 18
- 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

## **Producing a psychoactive substance**

Psychoactive Substances Act 2016 (section 4(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.

In assessing harm...[to be added]

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

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

#### **Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover
- Abuses a position of trust or responsibility
- Systematic 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 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...[to be considered at a future meeting]*

Step two – starting point and category range

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

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

Where appropriate, consider the custody threshold as follows:

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

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

- Has the community threshold been passed?

*Factors increasing seriousness*

*Statutory aggravating factors:*

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- In connection with the offence, the offender used a courier who, at the time of the commission of the offence, was aged under 18
- 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:*

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

Changes from current guideline indicated by struck through/underlined text

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

Misuse of Drugs Act 1971 (section 3)

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

#### Step one – determining the offence category

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

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

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

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

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

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

#### **Leading** role:

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

#### **Significant** role:

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

- Expectation of significant financial or other advantage, (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)

*Category of harm*

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

[TABLE OF QUANTITIES]

Step two – starting point and category range

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

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

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?

*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 site 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.

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.

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

*Culpability demonstrated by the offender's role*

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

**Leading** role:

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

**Significant** role:

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

- Expectation of significant financial or other advantage (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*

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

[TABLE OF QUANTITIES]

Step two – starting point and category range

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

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

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
- 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 site 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.

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

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

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

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

#### **Leading** role:

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

#### **Significant** role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage (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*

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

[TABLE OF QUANTITIES]

Step two – starting point and category range

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

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

Where appropriate, consider the custody threshold as follows:

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

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

- Has the community threshold been passed?

*Factors increasing seriousness*

*Statutory aggravating factors:*

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

*Other aggravating factors include:*

- Nature of any likely supply
- Level of any profit element
- Use of premises accompanied by unlawful access to electricity/other utility supply of others, where not charged separately
- Ongoing/large scale operation as evidenced by presence and nature of specialist equipment
- Exposure of drug user to 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 site 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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