House of Commons
Justice Committee

Draft sentencing guidelines: drugs and burglary

Seventh Report of Session 2010–12

Report, together with formal minutes, oral and written evidence

Ordered by the House of Commons
to be printed 5 July 2011
Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

Current membership
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The following Members were also members of the Committee during the Parliament:
Mrs Siân James (Labour, Swansea East); Jessica Lee (Conservative, Erewash); and Anna Soubry (Conservative, Broxtowe).

Powers
The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via www.parliament.uk.

Publication
The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/justicecttee. A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

Committee staff
The current staff of the Committee are Tom Goldsmith (Clerk), Emma Graham (Second Clerk), Hannah Stewart (Committee Legal Specialist), Gemma Buckland (Committee Specialist), Ana Ferreira (Senior Committee Assistant), Anna Browning (Committee Assistant), Henry Ayi-Hyde (Committee Support Assistant), and Nick Davies (Committee Media Officer).

Contacts
Correspondence should be addressed to the Clerk of the Justice Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 8196 and the email address is justicecom@parliament.uk
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Report

1. Under the provisions of the Coroners and Justice Act 2009, the Justice Select Committee must be consulted on proposed draft sentencing guidelines by the Sentencing Council for England and Wales. The draft drug offence and burglary guidelines are the second and third guidelines to be developed by the Sentencing Council since its establishment in April 2010.

2. We took oral evidence on both guidelines from the Chairman of the Council, Lord Justice Leveson. On the drug offences guideline we took oral evidence from Tamara Good of Hibiscus; Roger Howard from the UK Drug Policy Commission; and Mike Trace from the International Drug Policy Commission, in addition to receiving written evidence. On the burglary guideline we took oral evidence from Professor Mike Hough from the Institute for Criminal Policy Research; Javed Khan from Victim Support; and Dr James Treadwell, Lecturer in Criminology at the University of Leicester. We would like to thank all those who submitted written material or gave oral evidence.

3. Having published a short report to draw the attention of the House to our comments on the draft guideline for assault,¹ we have continued this practice for these guidelines. We intend the comments we have made, together with the evidence we have taken, to inform the wider public and political debate around sentencing.

¹ First Report of Session 2010–12, Revised Sentencing Guideline: Assault, HC 637
Annex A—Letter from the Chair of the Committee to Lord Justice Leveson on draft sentencing guideline for drug offences

The Justice Committee welcomes the opportunity to consider the draft guideline on drug offences. We note that you asked us to comment on specific matters within the draft guideline and we welcome this indication from the Sentencing Council as to the issues on which our opinion is particularly sought. We comment on some of the aspects of the guideline highlighted to us, as well as one other we see as significant.

The approach to purity in drug offences

We heard from our witnesses that the role of purity in drug offences is one in which there is no international consensus.

The evidence we received was mixed but some witnesses wanted a greater emphasis on motivation rather than quantity/purity. In general, motivation may be more relevant to choosing an appropriate sentence than purity, which raises issues about the level of knowledge on the part of the accused, but judicial discretion needs to be applied to the circumstances of the case.

Quantity in cannabis offences

We welcome the difference in approach to quantity for offences of cannabis cultivation. We believe looking at the scale of the operation resolves the difficulty identified by the Council, that relying on the weight of the plants can produce arbitrary results dependent on the maturity of the plans in question rather than the quantity of drug to be sold. We do not think a “scale of operation” approach to the production of other drugs is necessary. The approach to cannabis cultivation is required because the production technique is organic; quantity determined through weight seems appropriate for other offences.

Levels of sentencing

When considering the length and type of sentence for each offence we focused on the changes in sentencing handed down to so-called “drug mules” as this is the only significant change to sentencing levels the draft guideline would bring about. We are supportive of the decision explicitly to account for motivation and level of involvement in sentencing, allowing the longest sentences to be targeted at the ‘business-minded’ drug importers and dealers. In our view, this approach is appropriate because of the higher level of culpability of these offenders and public anger at the harm they cause to our society, even if the deterrent effect of long sentences is limited. Drug mules is the term usually used to refer to poor, foreign people, often women, who have imported drugs in circumstances falling short of the legal defence of duress but which have elements of coercion and in which personal profit is minimal. In our view, some reduction in the length of custodial sentence for drug mules may be appropriate given those circumstances, although we would also endorse the Council’s maintenance of a starting point of three years in custody for the
importation of even a small quantity of Class A or B illegal drugs. While we understand that public education is required in the countries from which drug mules are recruited, so as to ensure people who are the likely targets of drug gangs are aware of the penalties of drug smuggling, the seriousness of these offences, and the harm caused by drugs in our society, mean that such offences merit the starting point of a custodial sentence.

In this context, we also note there is public support for treating such offenders more leniently than is currently the case.

We were pleased that the Council has rejected the inclusion of deportation as a sentence. While the removal of foreign national offenders to their country of origin is appropriate and necessary, deportation in itself is no deterrent to those who are recruited to smuggle drugs.
Annex B—Letter from the Chair of the Committee to Lord Justice Leveson on draft sentencing guideline for burglary

In our consideration of the draft sentencing guideline on burglary, we have focused on the points raised in the letter you sent to us highlighting the issues on which you particularly sought our opinion.

**Factors within the draft guideline relating to the impact of the burglary on the victim**

We welcome the renewed emphasis on the impact of burglaries on victims, particularly the recognition that burglary is a crime against the person as well as a crime against property. We endorse the inclusion of factors relating to victims and their experience, in particular the use of a non-exhaustive list at step 2. In addition, an acknowledgment of the impact the theft of an item that has sentimental associations has on a victim, over and above any monetary value, is a welcome move.

**The category ranges and starting points within the guideline, with particular reference to domestic burglary**

We see no reason to change the category ranges and starting points, which reflect existing practice.

**The impact of previous convictions**

Victim Support told us that previous convictions are such a significant aggravating factor that they should constitute a separate step in the sentencing process. We would suggest the Council reviews the arguments in favour of this approach, although we also see merit in allowing sentencers discretion over how they treat previous convictions given the enormous variety of circumstances which they have to consider.

**Dependent offenders**

You asked us for our views on sentencing offenders who have an addiction that fuels or exacerbates their criminal behaviour. Sentencers will frequently be faced with dependent offenders for whom custody or an order requiring treatment for their addiction are the only options. Deciding whether an offender has the motivation to tackle his or her addiction is a difficult one. While breaking the cycle of persistent offending is one of the aims of the criminal justice system, limited resources must be targeted at those who may benefit from help. In addition, public confidence in the criminal justice system requires that the use of community orders with a treatment requirement rather than custodial sentences is focused on offenders who have the will to change. For all these reasons, we believe further guidance on the sentencing of dependent offenders, and the appropriate relationship between the custody threshold and community sentences with a treatment
requirement, would assist sentencers. We also believe that such guidance would assist victims, witnesses and the wider public in understanding the approach the court has taken.
Formal Minutes

Tuesday 5 July 2011

Members present:
Rt Hon Sir Alan Beith, in the Chair
Mr Robert Buckland  Rt Hon Elfyn Llwyd
Jeremy Corbyn

Draft Report (Draft sentencing guidelines: drugs and burglary), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 3 read and agreed to.

Annexes agreed to.

Resolved, That the Report be the Seventh Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

[Adjourned till Tuesday 12 July at 10.15am]
Witnesses

Wednesday 15 June 2011

Tamara Good, Hibiscus; Roger Howard, Chief Executive Officer, UK Drug Policy Commission; and Mike Trace, International Drug Policy Commission.

Dr James Treadwell, Lecturer in Criminology, University of Leicester; Javed Khan, Victim Support; and Professor Mike Hough, Institute for Criminal Policy Research.

Thursday 23 June 2011

Lord Justice Leveson, Chairman, Sentencing Council

List of printed written evidence

1 Lord Justice Leveson, Chairman, Sentencing Council  Ev 25
2 Transition to Adulthood Alliance  Ev 26
3 Dr Jennifer Fleetwood, Professor Alex Stevens, Dr Axel Klein and Dr Caroline Chatwin, School of Social Policy, Sociology and Social Research, University of Kent  Ev 30
4 The Magistrates’ Association Sentencing Committee  Ev 32
5 Criminal Justice Alliance  Ev 33
6 Dawn Gregory  Ev 37
7 Prison Reform Trust  Ev 37
List of Reports from the Committee during the current Parliament

The reference number of the Government’s response to each Report is printed in brackets after the HC printing number.

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Oral evidence

Taken before the Justice Committee on Wednesday 15 June 2011

Members present:
Sir Alan Beith (Chair)
Mr Robert Buckland
Christopher Evans
Mrs Helen Grant
Mr Elfyn Llwyd
Yasmin Qureshi
Elizabeth Truss

Examination of Witnesses

Witnesses: Tamara Good, Hibiscus, Roger Howard, CEO, UK Drug Policy Commission, and Mike Trace, International Drug Policy Commission, gave evidence.

Chair: Good morning and welcome to Mr Howard, who is Chief Executive of the UK Drug Policy Commission, and Ms Good from Hibiscus. Mr Trace, from the International Drug Policy Commission, is delayed, I think. If he is able to join us at some point during the proceedings, that would be fine.

We are very glad to have your help. As you know, we look at sentencing guidelines when they are brought forward from the Sentencing Council and this morning we are looking at drug offences and burglary. We are going to start with drug offences and Mr Buckland will put some questions.

Q1 Mr Buckland: Thank you, Chairman. I should make a declaration that I am a Crown court recorder, and I do so. Can I, first of all, deal with the question of weight of the drugs? I think we are all familiar with the framework as it currently operates and what the proposals are. As I understand it, in effect, a different approach is being proposed as to the quantity, for example, in cannabis cultivation. Instead of just looking at the weight of the drug, the scale of the operation is to be looked at. First of all, what strikes me is whether, in fact, is it a radical change of approach, bearing in mind that, in reality, sentencers would already look at the scale of the operation. What are your views as to the situation, also taking into account the fact that very often, with cannabis cultivation, it depends when police officers do “the knock” and very often it is an exercise of police officers having to estimate what the yield would be if, for example, they catch cannabis plants at the early stages of cultivation? I would welcome your views about that.

Chair: We have been joined by Mr Trace and I welcome him as well.

Mike Trace: Excuse me for being late.

Chair: Not at all.

Roger Howard: If I could make a general point first, the UK Drug Policy Commission broadly welcomes what the Sentencing Council has set out in the guidelines. It is a very complex algorithm, if you like, trying to bring together issues around quantity, purity, value, culpability and things like that. I do not think it is an easy task and there is no absolute scientific formula that gives you a clear indication. Having said that, the move towards factoring in such things as the culpability and the role, within not just the cannabis production but generally, is quite a reasonable approach, given the circumstances.

We have reservations about the methodology and the underpinning assumptions that are made about weights. As I understand it, we are asked to find it, we are asked to determine what the threshold quantities define what a possession offence is and then what goes into a supply offence and cultivation.

If I could say this now, we think there should be further work done between the Sentencing Council, the Advisory Council on the Misuse of Drugs, The Association of Chief Police Officers, the CPS and other groups to try and define quantity and the threshold about what is reasonable for everyday use—whether or not it is a week. Some countries—Portugal, for example—allow a week’s use. In other countries, like Norway, it is much less. There is no right or wrong answer. With cannabis, you are right in saying when police might intervene and things like that and quantity could vary. In terms of quantity of plants, again, other countries have different thresholds by which they regard the cut-off points to be reasonable.

Q2 Mr Buckland: Do you think the concept of thresholds is, itself, a bit arbitrary? For example, you could have offences that just go over the threshold but are not very different from offences that are just below the threshold?

Roger Howard: Indeed. As I say, other countries do it differently. One of the important things is what you want that threshold to do. Is it to help frame sentencing? Is it to help, perhaps by diverting offences through a pre-court disposal and things like that? It is very unclear what is being asked of setting the threshold. Again, there is a need for more clarity around why we have these thresholds, how they have developed and what the rationale is. Having said that, the basic principle, and using it for quantity and not particularly using it for purity or value, is very sound.
Q3 Mr Buckland: As you have quite rightly begged the question about international comparisons—and we are delighted to have you, Mr Trace, and thanks very much for coming—this question is really directed to Mr Trace about international comparisons. What is the approach internationally to the issue that we have been talking about? Do you have any comparisons for us?

Mike Trace: Yes. The short answer is that every administration struggles with it. Thank you for the question and the invitation. First of all, to give you the perspective from which I am speaking, quite rightly, I speak on behalf of the International Drug Policy Consortium. What we have tried to do with this consultation is gather information from other countries around the world, from our membership, to see how the UK-proposed approach to these issues relates to international experience. Roger has framed the issue that you raise around thresholds absolutely correctly.

First of all, the advice would be that there is no mathematically correct solution. That would then lead you, whatever the guideline finally says, to allow an element of discretion around thresholds because, if you try to set absolute amounts, you get into the problem you raise about the 1g below or 1g above. You also get into a very difficult mathematical problem because, as soon as you start talking about thresholds, you then have to talk about purity and volume and turning volume into what was the active ingredient of the drug. That is a big mathematical problem. The general advice is to allow flexibility to sentencers within guidelines of thresholds with due note, as we all know in sentencing areas, to not opening wide areas of inconsistency—different sentencers responding to that in different ways. This one is a very difficult area of the guideline, but our general advice would be, first of all, to avoid the temptation to set thresholds too low because one possible reaction to the difficult mathematics is to go very safe and then set thresholds very low. A lot of countries are struggling with that because they have created the conditions where there is no flexibility in sentencing and everybody gets the highest possible tariff—possession or possession with intent to supply—and those are challengeable under international human rights conventions.

The second one is to do what the Sentencing Council is trying to do. They talk about thresholds and amounts in terms of a proxy measure of the harm caused by the behaviour. The harm caused is a very imprecise concept, but it is the right starting point. Obviously, the harm potentially caused to UK citizens by 100 g of cocaine coming through Dover is different to the potential harm caused by 1 kg or 10 kg. That is the right way to think about amounts. Unfortunately, it is not a linear relationship. For example—and this is an extreme example—sometimes the harm to the UK citizens is caused by the cutting agent. It is not caused by the substance itself. If you go too far down the line of saying, “We need to identify the active ingredient and that is our basis of calculation,” that is not the best proxy measure of the harm caused. It is a very imprecise science and the mathematics around it are very difficult. At the same time, the Sentencing Council—I think quite rightly—is very conscious of not creating too wide a discretion because part of the important responsibility here is consistency. It is a very difficult tightrope to walk.

Q4 Chair: Is all this mathematics just designed to answer the simple question, “Are you a user or are you an importer?”

Mike Trace: And scale of involvement in supply or importation. The idea is that somebody who imports a larger amount is more culpable than somebody who imports a smaller amount. But how do you calculate the amount to work out whether they are a major importer or a minor importer? The thresholds apply at different levels of the consideration. The most important one for differences in sentencing is the one to make a decision between possession and intent to supply. That is where a lot of people under low thresholds get caught up in what, probably, is a possession offence—you can never be sure—and get dealt with as a supplier. Where sentencing guidelines are imprecise and inflexible, one of the problems is that people get four, five or six year sentences for what is probably a possession offence, whereas somebody else, a gram or microgram lower, will have been dealt with as a possession offence. It is a really difficult threshold to set.

Roger Howard: Could I add, I think also not just on supply but for production and cultivation with cannabis, particularly—and that obviously has been a growing public and political concern—again on that threshold of what is reasonable. In some countries it might be five plants and in other countries 15 to 20 plants. There is no international consensus on that, which is why I think perhaps a missing piece of this process is—and I am sure the Advisory Council will give a response to the Sentencing Council—that there could be an iterative or a consensus-forming process bringing people together. It does not only affect the guidelines for courts. It affects what the Crown Prosecution Service and the police do in terms of their actions, which I think is absolutely critical.

Q5 Mr Buckland: Yes, I will come on to that. There is an issue that brings that into stark focus. Dealing with the scale of operation approach, it seems to me to make a lot of sense, when it comes to cannabis cultivation, for the point that we agreed upon earlier about it being a question of timing of the police raid and luck in terms of the actual yield as opposed to the potential yield. Do you think the scale of operation approach should be applied across the piece?

Roger Howard: I think it is quite reasonable because it is a proxy, in a sense, for culpability and role in the market and things like that. I am not aware of any evidence that has examined and looked at the different implications of that. There may be some, but I am not aware of any evidence that has looked into that. Therefore, we are perhaps dealing with anecdotal evidence, which may be very relevant. I am sure you are quite right about that stage in the process, and particularly I am thinking around home-grown-type cannabis where people are doing it for themselves.
Are they intending to sell on or is it for their own personal use? Again, those thresholds are difficult.

Q6 Mr Buckland: But in cultivation of cannabis, the court will look at things like the sophistication of the devices.

Roger Howard: Indeed.

Q7 Mr Buckland: A huge hydroponic device in a purpose-converted shed or even house will tell you that this is a commercial operation—

Roger Howard: It is an aggravating factor, isn’t it?

Mr Buckland:—as opposed to a couple of pots in the window, for example. Are you saying this, in effect? Where we have hard and fast pieces of evidence—for example, the seizure of 1 kg of cocaine with a high purity of 45%—the approach that is being advocated in the cultivation of cannabis context will probably not be advisable because we have hard and fast evidence as opposed to anecdotal evidence when it comes to an actual seizure of an amount, say, of a class A drug.

Chair: We are going to turn to the purity issue in a moment.

Roger Howard: It is very difficult. As Mike says, that is where the court needs that discretion. One might infer—if I could touch on purity—that the greater the purity, the nearer the upstream you are to the origins of the market. I do not think that is always true, and that is where discretion is needed. There are different circumstances on that. Again, cannabis growing is a good example for domestic cultivation for small amounts. In terms of culpability, it is a reasonable approach that the Council has tried to set out. For all the reasons that we have talked about, trying to put all this together is a very complicated algorithm.

Q8 Mr Llwyd: Moving on to purity, I should perhaps mention that I have prosecuted and defended several drug cases involving the whole issue. For the record, should purity be taken into account when determining the sentence, and if so, why?

Roger Howard: It is very attractive to go for purity, because it is a proxy for culpability and closeness to the origin of the market, and a role that one could infer from that. There are a huge number of pitfalls in doing so, which is why, in a direct answer to you, on balance, it is probably better to go for the quantity—the mass—of the product, bearing in mind that a huge volume of drugs are cut and are not pure. The reason for doing that is that forensics is an expensive business.

By way of reference here, my organisation has done a joint survey with the Association of Chief Police Officers which seems to indicate that forensics is going to be one of those areas on which police forces are probably going to be reducing their expenditure. When you come to large seizures and things like that, you will inevitably have forensics involved, just by dint of nature of the scale of the operation and the volume. In a sense, it lends itself to that. When you come down different market levels, you are more unlikely to get a forensic base there. Therefore, quantity, as a reasonable proxy indicator, is probably a more useful construct to use than purity. That is not to say it should be ignored, of course.

Q9 Mr Llwyd: Is that the view of the whole panel?

Mike Trace: I would agree with the way Roger has framed it, but the direct answer to the question is that purity is a consideration. The danger is making purity too mechanical a consideration. This is one of the strengths of the draft guideline produced by the Sentencing Council where it has taken this approach of trying to understand primary, significant or leading, significant and subordinate roles within the operation. Purity sits as an element of the judgment of which bracket people should be treated under. The issue is—and once again this is in the draft guideline—what you consider as primary determinants of the sentence bracket and then what you consider as factors that affect the decision of whether somebody is treated with mitigation or aggravation. Purity, to me, falls more towards the secondary bracket than the primary, for all the reasons that Roger has suggested.

The general IDPC response to the consultation is going to say that the factors currently in the consultation talk about the role of the offender and the quantity. In a sense, it lends itself to that. When you come to large seizures and things like that, you are more likely to get a forensic base there. Therefore, quantity, as a reasonable proxy indicator, is probably a more useful construct to use than purity. That is not to say it should be ignored, of course.

Q10 Mr Llwyd: Ms Good, do you wish to say something?

Tamara Good: Thank you. The sentencing guidelines are welcomed by our organisation as a step in the right direction. However, I would say, from the point of view of drug mules, these are women—the women we represent—who are in an extremely vulnerable positions and have no concept of weight or purity.

Q11 Mr Llwyd: Has the Sentencing Council got the approach to purity right and—Mr Trace might help us on this—what about any international comparators?

Mike Trace: Yes, I would reiterate my comments from before but also preface them by saying that this is not an area of my personal expertise. I will go as far as I can within the brief and information I have been given. My general point, on the first half of the question, is that the references to purity and the argumentation in the draft guideline is a pretty good summary of the difficulty of the issue of purity.
However, the result and the recommendation in the guideline give too much prominence to purity to the detriment of other issues, for example, motivation, coercion and vulnerability of the offender. Generally, I would say that, from IDPC’s point of view, we would advise against taking too mechanistic an approach on the basis of purity and amount. The Sentencing Council is addressing that issue as well as it can.

As to the international experience, once again, I will be quite broad. I am afraid, but we can gather further information if it helps the Committee. We have pulled together seminars on these issues of people who grapple with these issues in a variety of countries and the international experience is that every country struggles with it. What most of us tend to do under the United Nations conventions is pass laws that have been quite specific on issues of amount and purity—so have set quite tight thresholds and mandatory sentencing based on those tight thresholds—and a lot of countries have struggled with the practicality of sentencing on the basis of those tight frameworks. It is not really an issue for the UK situation now but there are a number of countries—a small number of countries—that are trying to toughen up their drug laws and show how tough they are being by setting low thresholds and strict limits or strict criteria around purity. First of all, we see those as technically difficult, for the reasons we are talking about here, but, secondly, there is a human rights aspect.

Q12 Chair: What is the human rights aspect? I know this was mentioned before. What is this area of challenge?

Mike Trace: Once again, speaking as a lay person and not a lawyer, it is around the issue of the proportionality and the effectiveness of the punishment. This is not something that is likely to come up in terms of this consultation in the UK, but in some countries, for example, they will have a mandatory penalty for anybody possessing over 5 micrograms of heroin—five years in prison—and that is challengeable under human rights legislation for proportionality and effectiveness of sentencing.

Q13 Mr Llwyd: Surely, under this jurisdiction, it is a question of—

Mike Trace: Excuse me?

Mr Llwyd: It is a question of a straightforward appeal if the sentence is disproportionate.

Mike Trace: That is right. It depends what jurisdiction you are in. Obviously, there is a wide range of processes around the world. As I say, I do not think this is going to be an issue in the UK, but it has been challenged in some countries. I do not particularly want to go into examples now, but there are some countries struggling with this.

Roger Howard: If I could bring the quantity and the purity together, I think there is one other complicating factor—I will mention it so as not to forget it—and that is the whole equivalents: how much quantity of ecstasy—MDMA—might be equivalent in harms to X amount of cannabis or X amount of other. The international experience is that you are anywhere and anywhere on a particular spectrum. If you look at the Netherlands, 0.5 g of heroin is equivalent to 0.5 g of cocaine. My understanding is that now, in the draft guidelines, that would be broadly equivalent. But if you went to somewhere like Italy, 2.5 g of heroin is deemed to be the equivalent of 7.5 g of cocaine. Therefore, you have an equivalence factor of 1 in one country and 3 in another. As to how to frame that, the Sentencing Council has said it does not want to get into the business of looking at particular drugs within particular categories, which is, I think, a very expedient principle, but most people would probably argue—and it has been a politically scientifically contentious issue—that the harms from each of these drugs are not necessarily equivalent. One needs that subtlety and the nuanced in a process to begin to determine that.

Q14 Chair: I do not think the public expects judges to take any other view than that hard drugs, in particular, are very harmful and what you are actually judging is the culpability of the person who is trading in them.

Roger Howard: But harm is one of those factors and, in a sense, runs as a rich seam throughout the whole of the guidelines. Proportionality is another factor and I would argue that, when we look at proportionality, there are three different dimensions: proportionality between the different drugs, as I am saying; proportionality between drug offences and other criminal offences; and then proportionality between what we do in the UK and what is happening in other countries. My understanding is that, for certain offences—supply offences and things like that—we, in the UK, are in the upper levels of the average sentence length, much more so than other countries. There are a lot of different factors, I am sure, that play into that.

Chair: I am anxious that we get on to the subject of drug mules and a couple of other issues.

Mr Buckland: Can I very briefly ask about one aspect of this?

Chair: As long as you give yourself time for the others.

Q15 Mr Buckland: Street value is highly relevant. There does not seem to be any reference to street value of drugs in the guidelines. From all our experience, we know that purity and quantity would be the elements used by police officers to estimate street value of drugs. Street value of drugs is a very important determinant for sentences in, first of all, deciding length of sentence and also for confiscation proceedings following any conviction. Do you have any issues about the efficacy of those calculations? Do you think they are relevant? Do you think that these guidelines are in danger of downplaying or restricting the ability of police officers and experts to come to a view about street value of drugs?

Mike Trace: I would take the same approach on street value as Roger has just elucidated not to forget the general purity issue. If these calculations are going to make a very important impact on a very large number of sentences, then the process—the science we have—for making sure those base figures are correct, those denominators, needs to be very structured. I commend
the Sentencing Council for trying, in this guideline, to get that very structured approach. If you look at each of the determinants of that final calculation—purity, amount, street value, which class of drug it is and, therefore, how much harm it is likely to cause—all of those do not have a clear scientific basis. Roger is right that we should not obsess about finding a mechanistic, clear scientific basis, but we should take very seriously the calculation of those determinants. What, maybe, we are alluding to is, first of all, in terms of the classification system—whatever you may think of the ABC classification system—the science about the harm of the various drugs in those classes is moving faster than the classification of them. That is the first area of potential dislocation. The second area of potential dislocation we have just talked about in terms of purity and amount. The third area is allocating street value. There is a process through the police service, the forensic service, that allocates average street values to drugs, but we should make sure that that is a very robust and transparent process. I remember, Roger, when you were in charge of DrugScope that there was a very good process where the police service had been and what drug users fed in real-time information into that forensic process to say, “You say that cocaine sells on the streets of Newcastle for X pounds, but we can tell you that last week it was selling for Y pounds.”

There is no other way to deal with it in terms of the guideline than the Sentencing Council is trying to do, but we need to take the processes that lead to the calculations very seriously because they make the difference between a short sentence, a long sentence, “Are we dealing with possession?” or “Are we dealing with supply?” They are very important calculations.

Q16 Chair: There isn’t a tendency of law-enforcement agencies to inflate the values, is there, because it looks—

Mike Trace: They absolutely do in their public statements—there is no doubt about that—but when they are doing the prosecuting work and laying a file, there is a better process for making sure the figures are nearer to reality. This is the reason why I think that process should be taken very seriously because you have to guard against the up-tariffing, if you like, on the basis of, “This is a major offender and, therefore, we are inflating the prices.” That may be absolutely valid but there needs to be a very good framework within which those figures are calculated.

Roger Howard: I have one additional comment. In the consultation process for the Sentencing Advisory Panel consultation, which preceded this, there were a number of concerns expressed by the legal profession about the use of value. I don’t know the full basis of that, but there is a consensus, again, that it should not dominate and it should not be an undue factor in that. Again, it is that complicated mix of all these factors where you need that degree of judicial discretion, but where the guidance, for what goes in what box, could be a little more sophisticated and consensus-based process.

Mike Trace: Could I take a moment to expand on the point I have made about motivation? That is a key point which is not particularly picked up in the consultation that I would like the Committee to be aware of. It may take us into the issue around drug mules.

As to the idea of the level of harm to society being primarily calculated by the amount and the purity of the drugs, it is an element but, in the draft guideline, it is given too much prominence for all the reasons we have discussed. If we are trying to work out the culpability and the potential harm caused by a particular offender, just as important—if not more important—is their motivation in committing the offence. The draft guideline has gone some way to taking us a big step forward on that by allocating these leading role, significant role and subordinate role. That is a great distinction but it does not go far enough because it relegates motivation to a secondary element. Somebody importing cocaine to the UK who is in control of the operation—is motivated purely by financial gain, is totally impervious to the harm they are causing and is using violence and intimidation on other people to engage them in their operation—is in a very different situation to somebody who is the subject of that violence and intimidation, is under coercion, may not be aware of what they are doing and may be motivated by other reasons than financial profit.

To some extent, the Sentencing Council has got it right, distinguishing between the leading and subordinate actors, but it is judging leading, significant and subordinate on the basis of amount and purity and on the basis of a limited criteria about what puts one person in one category or the other. It could very much strengthen the consideration of motivation, and that is a general point about which I am very happy to go into more detail. We have a draft paper in response to the consultation, which I will submit to the Committee, but that is a crucial issue.

Q17 Mr Buckland: You have brought us on to drug mules, which I am happy to develop. I am grateful you have raised that. Let us challenge it for a moment. For people who are coerced into it, there is a defence called duress. They have to raise it and show, on balance, that there is evidence to put before a jury about duress. That is a defence to an offence of possession or possession with intent to supply. Let us say that the evidence does not amount to duress and they are, therefore, guilty of supply. Putting aside coercion for a moment, in a large number of cases there are two factors, are there not, about mules? One, without them the operation would not work because they are, in effect, the cogs that operate the machine. Two, the fact that they do not know about the purity, weight or the quantity of the drugs they carry is, frankly, part of the risk that they take, isn’t it? Right thinking members of the public would say, “They take their chances when they get involved in enterprises like this.” Should we really put all those personal factors of mitigation at the top of the list as opposed to the fact that they have involved themselves in an enterprise involving the supply of illegal drugs?

Tamara Good: Ultimately, you are punishing the wrong people. A lot more attention needs to be given to this, and I am quite glad that the sentencing guidelines have brought this attention. If you look at
some of the women that we represent in our organisation, you cannot separate the coercion. What typically may happen is that they are in a very desperate situation, may have dependants and have an extreme lack of knowledge about anything regarding, possibly, what they are about to do, and certainly, the consequences. You are probably aware that their organisers are usually people they know—possibly family members—and it may happen over quite a subtle and slow period of time. They may do them a favour, such as paying for someone’s education or for an operation, and gradually that favour is demanded to be returned. The women are in a position of feeling obliged to repay a debt, as it were. That is a really difficult issue when it comes to raising the defence of duress because they do not have the intent.

Q18 Mr Buckland: I accept that. Duress would be there if you are under threat of serious injury or death. I accept it is not an easy defence to mount, but the point I am making is that all these valid points you make are mitigation. They are not a defence to the charge.

Tamara Good: Yes.

Q19 Mr Buckland: The fundamental point, from members of the public’s point of view, is that those factors are relevant but do they take precedence over everything else?

Tamara Good: No, but think about the cost of keeping some of these people in prison. Compared to other sentences and other crimes, this is still quite a long period of time. To put a woman in prison for that long for something—and, okay, we are not talking about duress or mitigating circumstances—is a huge cost to the taxpayer.

Q20 Mr Buckland: But isn’t there a danger that, if we draw this line between custodial and non-custodial on mules, we will have a rush among defendants to start putting bases of plea in that they are only mules, and we will end up with far more litigation on an issue like this? Isn’t it better not to have that artificial distinction: to have more of a sliding scale to allow a court discretion to impose a non-custodial sentence where you have the sorts of circumstances you mention, but not to simply put mules in a wholly different category?

Tamara Good: We do see the difficulty there, and a different approach is needed; for example, much more extensive educational campaigns in the countries of origins of the majority of these mules. That is something our organisation has already undertaken with, arguably, great success in Jamaica, Ghana and Nigeria. The uptake has been fantastic too. We have seen a drop, temporarily or otherwise, in the number of drug mules from those regions as a result.

Q21 Mr Buckland: Are you getting any DFID funding for that?

Tamara Good: For the educational campaigns, no.

Q22 Mr Buckland: Have you asked?

Tamara Good: Have I asked?

Mr Buckland: Yes. I think you should, because that is the sort of thing we should be spending our money on, frankly.

Roger Howard: Could I make the point about mules and go back to the point about motivation? It is quite important because, again, it is very easy to talk about mules and couriers as a homogenised group, and they are not. There are those that clearly know the full risk and know exactly what they are doing; there are those who are coerced, for whatever reason; and there are those that are hapless and that are duped. If one begins to understand and allow that discretion within the court and to factor in motivation more, you are more likely not to get an abuse of the system and you will allow that nuancing, rather than a blanket sentence. In fact, understanding motivation and motivation much clearer would be quite important and go a long way to finessing some of the approach. That is what everyone would probably accept.

Q23 Mrs Grant: On the issue of duress and Robert’s point that he picked up with you, could I ask what proportion of drug mules are women and children? Do you know? When you were talking about it, each time you referred to the woman.

Tamara Good: I did, yes, because we are a women’s organisation. Out of all the foreign national women in prison, it is almost half.

Q24 Mrs Grant: Half are women. What about children?

Tamara Good: Children as drug mules, do you mean? We focus on the women as the drug mules and their children as part of the way that we support them. If their children are still in their home country, that is something that we would try and encourage and keep together the family ties. As to children as drug mules, obviously, we deal with women who are in prison so we do not come across children, per se, who have been couriers.

Q25 Mrs Grant: But children can be drug mules as well, of course.

Roger Howard: They can be involved, obviously, in production offences, in cannabis growing.

Q26 Mrs Grant: It is a very high proportion of maybe vulnerable women and children.

Roger Howard: As Tamara has said—and I did some work when it was DrugScope a few years ago around some of this—clearly a significant number in the prison system are there for that. I do not know what research there has been. I am not aware of any that has tried to unpick and look in more detail at who is involved at what chain. It would only be speculation.

Q27 Elizabeth Truss: You talked about the international approach to drug crime. Can you tell me about the cost of drug-related crime in Britain compared to other countries?

Roger Howard: The most “accurate”—if I could put it in inverted commas—estimate was undertaken by the Home Office a few years ago. They estimated the cost of class A drugs and the associated crime with that to be in the order of £15 billion. That has been
contested methodologically. Some people disagree with that and think it is overinflated, but these are estimates and that is the full economic cost—cost to victims, to insurance companies and things like that. I am not aware—I am sure we could find out and provide you with evidence—about the cost in other countries. It is generally seen that Britain has a more significant drug problem than many other countries, other than places like the US. I don’t know whether Mike knows.

**Mike Trace:** Yes. If the question is related to the general cost to society of “the drug problem” then Roger’s figures are correct. There is an international debate on the right methodology to use and which figures to include and what not to include. The UK does figure towards the top of the league table on the impact of drugs on society, partly because of high prevalence and partly because of high public expenditures on the key issues. The impact of drugs on a society tends to be in terms of impact on economic productivity, on health problems and on the level of crime in society. On all of those three fronts, the UK spends a lot of taxpayers’ money, first of all, on trying to solve those problems and, secondly, in responding to the problems as they occur. We are definitely talking £15 billion specifically on the crime cost which—as I say, subject to methodological figures to include and what not to include. The UK’s level of problem has been, over the last 10 years, the most acute. There is an argument for greater financial expenditures on the key issues. The impact of drugs—on the perpetrators. In general, we are talking about a market. We can try to disentangle that and see where the impact is. The Netherlands—obviously, the expediency and out-of-court disposals. We know the Netherlands—obviously, the expediency—and other countries have set these thresholds where no action is taken. If I was standing back and I was a Martian landing here, I would say those countries have not imploded. They have not seen a huge escalation in their drugs problem.

Q28 Elizabeth Truss: Can I ask about the trend in different countries, how it has changed over time and whether or not there is an example of a country whose public-policy approach has reduced, or at least ameliorated, the level of the problem? How has Britain been trending compared to, for example, other European countries, south-east Asian countries and the US?

**Mike Trace:** I will caveat this by saying that these are very broad statements about very complex global issues. Generally, the UK’s level of problem has been stable and the level of estimates of our cost of responding to that problem has stayed pretty stable in the last 10 years. I think that is fair to say. The general trend within Europe is that the western European countries have experienced that same process over the last 10 years. New Member States of the European Union, eastern European countries, are on an upward curve of the level of their problem and the level of cost of their problem. The other regions of the world where the impact on society of drug problems are particularly worrying are Africa, Asia and the former Soviet Union. Those are the countries where the trends are very worrying.

Q29 Elizabeth Truss: Is it a bit of a market saturation situation really, similar to tobacco and legal drugs?

**Mike Trace:** Yes. None of these have single determinants. This is complex social policy, but, yes, market saturation is a large factor in what is going on.

**Roger Howard:** When we started, about four years ago, we commissioned leading drug policy academics to look at some of the factors that underpin your question. The broad conclusion was, if I could read into your question a different interpretation, that the law, acting as a deterrent, had very little impact on people’s decision to use drugs and the level of prevalence in society. What seem to be much more important are the cultural, social and economic factors. If you are looking at other countries—we hear about the Netherlands, about Portugal and some of these things—it is very difficult to disentangle one thread. Where other countries have had a more—I was going to say “relaxed” but I do not think that is the right word—pragmatic response and have looked to deal with a lot more low level-type possession offences and keep those out of the criminal justice system, probably all you can say reliably is that the roof has not caved in on those countries.

Q30 Chair: When you say outside the criminal justice system, they are often dealt with by out-of-court disposals.

**Roger Howard:** Indeed, they are.

Q31 Chair: They are part of the criminal justice system.

**Roger Howard:** Indeed. In all countries—and I look at Mike here—under the UN conventions they are still “illegal”. But there are levels of discretion, expediency and out-of-court disposals. We know the Netherlands—obviously, the expediency—and other countries have set these thresholds where no action is taken. If I was standing back and I was a Martian landing here, I would say those countries have not imploded. They have not seen a huge escalation in their drugs problem.

Q32 Elizabeth Truss: One of the factors you mentioned was an economic factor. Presumably, going into the criminal justice system imposes quite a large economic cost—in terms of loss of liberty, etcetera, and inability to deal drugs—on the perpetrators. In fact, there is an argument for greater financial penalties to deal with those economic issues. Essentially, we are talking about a market. We can try and restrict it as much as possible, but it still exists. What about the experience of some of the more punitive regimes like the south-east Asian regimes? How has that impacted on policy?

**Mike Trace:** The overarching factor, which I think will bring us back to the issue with the Sentencing Council guideline, is Roger’s first point about the pretty clear evidence now—accepted technically, if not politically, around the world—that if you spend a lot of money on harsh punishments, particularly imprisonment, that fact alone is not enough to effectively reduce the scale of the market. It is much more the social, cultural and economic factors. It is a commodity market. How can we create the conditions where people do not want to be involved in that commodity market? You are probably right that, when we are talking about dealing, that is much more a financial and economic decision made by potential offenders than it is about, “Am I going to be caught?” “Am I going to be processed through court?” “Am I going to be in a prison for a long time?” It is a very remote part of the decision making. Money is what motivates the people who control the drug market, so money is probably the factor that is most likely to achieve deterrence.
Quite rightly, the UK Government and many other governments, therefore, are focusing on asset seizure and money-laundering aspects. In the UK—I do not know if Roger’s organisation would agree with this—we are not bad at recognising that on possession offences. We arrest a lot of people for possession but tend not to spend a lot of money on punishing them. On supply offences—and this brings us back again to drug mules—the objective of what we are trying to do is to create deterrence and effectiveness through the end position of harsh sentences. It has to be said that we are not achieving effectiveness in that harsh sentencing. Harsh sentencing—I think you are absolutely right—may be absolutely appropriate on public disapproval grounds or ethical grounds, but it is not working on a deterrence basis to change the commodity market.

My organisation would be very comfortable with that if those harsh penalties were being applied to people who are—I do not want to use tabloid language—consciously dealing in the harm of others, know they are doing it, consciously plan do it and take a big profit out of it. Unfortunately, most of the people who get drawn up in those harsh sentences do not fit that stereotype, and drug mules is one type. We have to be much smarter at targeting our harsh sentences where they may have a business-level impact. The vast majority of people we apply those harsh sentences to are not the people who make business decisions about their role in the dealing network. You mentioned south-east Asia. America is the country that has pursued this to the greatest degree, but the problem with constantly ramping-up sentences—and there are still 30 countries in the world that apply the death sentence—are the poor and subordinate. The length of sentence does not deter. It is the likeliness of sentence length. It goes back to the whole thing of sentence length. It has to be said that we have run out of time. Thank you very much for the help you have given us this morning. It has been very valuable indeed for our consideration of factors that go into that. If you look at personal use—personal possession offences—as Mike suggests, we are probably around the average in terms of sentence length. It goes back to the whole thing about, in a sense, again underpinning what has been tradition here, that long sentences act as a deterrent. My understanding, from the Campbell systematic evidence review on cost benefit of sentencing, is that sentence length does not deter. It is the risk of being detected and prosecuted and having action taken against you. There was some research undertaken by the Home Office a few years ago—qualitative research with drug dealers who were in prison. There were two things which were really going to affect them and deter them: were their assets going to be confiscated? Elizabeth Truss: Yes, confiscation.

Roger Howard: But the other thing—which I think was quite interesting—was the risk of informers. Having informers in your gang or your group increases the risk that you are going to be detected and have action taken against you. The sentence length, at one level, is fairly irrelevant, in broad terms. It raises questions whether we have got it right and proportionate.

Q35 Elizabeth Truss: Are you saying not enough is being done on confiscation then?

Roger Howard: We have had discussions with people around the Proceeds of Crime Act and I think there is a concern about the length of time between your arrest, the prosecution and sentence, and any confiscation order. Also, technically and legally, it is sometimes quite difficult.

Elizabeth Truss: I completely agree.

Roger Howard: Various Governments of all persuasions over the years have said they are going to ramp up. That is quite right and we would support that strongly, but, in practice, my suspicion is that it is a lot easier to say that and ask for it than it is to actually execute.

Q36 Elizabeth Truss: I hope the National Crime Agency will be involved. I think what Britain has lacked is a proper information system between police forces to deal with those serious organised criminals. Hopefully, that will—

Roger Howard: I would not want to make a political thing. We have had the Serious Organised Crime Agency and we have had its predecessors. Everyone has tried to focus on that.

Tamara Good: Can I make one extra point about the length of sentence? We need to remember that, from our point of view, a lot of the drug couriers are seen as dispensable and so the length of sentence is not a concern to the organisers.

Chair: We have run out of time. Thank you very much for the help you have given us this morning. It has been very valuable indeed for our consideration offences, the UK is at the upper end in the UK with, as it was then, about 30, 32 or 33 months, whereas if you look at places like France and Denmark, it was down at around 12 months for the average custodial sentencing for a supply offence. There will be all sorts of factors that go into that. If you look at personal use—personal possession offences—as Mike Trace: Absolutely.

Q34 Elizabeth Truss: Do you think the sentencing approach is cohesive enough to address what these gangs are actually doing, and which is operating in any illegal substance or activity that they can find?

Roger Howard: If I could answer that, the EU, through its European Monitoring Centre for Drugs and Drug Addiction, did an analysis of the sentencing outcomes a couple of years ago. If you look at supply
of this. We have some witnesses to listen to and question on the subject of burglary next.

Mike Trace: On a procedural point, Chairman, we have an IDPC draft response to this point. Can I submit it to the Committee?

Chair: We would be very glad to have that, yes. It would be very helpful. Thank you very much.

Examination of Witnesses

Witnesses: Dr James Treadwell, Lecturer in Criminology, University of Leicester, Javed Khan, Victim Support, and Professor Mike Hough, Institute for Criminal Policy Research, gave evidence.

Chair: Professor Hough, I don’t know whether there are severe transport problems in London, but you look like singing a solo for us for at least the beginning of our session, which is about the sentencing guidelines on burglary. If the others are able to join us in the course of proceedings, we will take them into the questioning process. It has been suggested to me that the question we would be best to start with you on, and rely on your expertise, is the one Mr Llwyd was going to deal with.

Q37 Mr Llwyd: Time was, of course, when domestic burglary was treated far more seriously than non-domestic burglary, and particularly if an individual was in the premises when it happened. That, very often, would attract a very heavy sentence, for understandable reasons. I wonder if you can assist us. Do you think that the starting point and categories in the guideline reflect the proportionate harm within burglaries in the overall sentencing scheme?

Professor Hough: Let me answer that in a second. Can I first say that I am not specifically a sentencing expert? I do a lot of research on public attitudes to sentencing. If I have a competence, that is where it is strongest, but I have done work with the Sentencing Guidelines Council and am fairly familiar with the system.

Looking at the draft guidance, it did not strike me that there were gross outliers and that there was a proportionality problem in the way that the three tiers are structured. Does that answer your question?

Q38 Mr Llwyd: Yes, I think it does. Therefore, you might be even more comfortable with the next question. What are the victims’ expectations of the sentencing of burglars? Are these being met? Are victims more punitive than those who have not been burgled?

Professor Hough: The research evidence is fairly clear that victims, perhaps surprisingly, are not especially punitive and do not seem to be more punitive than non-victims. The way to understand that is probably that, in the course of a lifetime, most people have some experience, direct or indirect, of crime and shape their attitudes in the light of that experience. If you then ask what the general public expect of the sentencing of burglary, again there is fairly clear evidence that, at a general level, people are extremely cynical about the courts—or certainly cynical. I do not know if they are extremely cynical. They think the courts are too soft and, at the same time, they are misinformed about what the courts actually do.

This is demonstrably true in the case of burglary because the British Crime Survey has carried several questions about the punishment of a burglar for the last 15 years, and it was striking, incidentally, that neither the Sentencing Advisory Panel paper nor the draft guidance made any reference to that. For a level 2 burglary—I think it would be a level 2 burglary—a vignette, only two-thirds of the public would like to see a prison sentence passed. People think the courts are too soft, but when they sentence a particular case, a middle-range burglary, they seem to be certainly in line with the proposed guidance.

Q39 Mr Llwyd: You will be aware of the British Crime Survey report in 2010 that only 2% of households were likely to be victims of burglary.

Professor Hough: Yes.

Q40 Mr Llwyd: In terms of that, the public perception is still a bit higher, isn’t it?

Professor Hough: They compare the percentage victimised to the proportion saying that they are likely to be the victim of burglary at some time. I think 15% of people said they might be victimised over the next year.

Q41 Mr Llwyd: That is correct. It is the same report. Professor Hough: It is quite difficult to stack up the actual demonstrable risk of being burgled against perceptions. Whatever the case, people are less worried about burglary now and see the risks as lower than they did 15 years ago. There have been big shifts in perception.

Q42 Mr Llwyd: In your opinion, how can the public be better informed about the complex nature of offences and, therefore, the fact that sentencing needs to have some flexibility?

Professor Hough: When you conduct focus groups with the public, they are quite sensitive to the complexities and understand that there are a range of different factors that have to be taken into account. They say things like, “Thank goodness I’m not a judge myself.” That considered view is very different from the top-of-the-head view that people express in a poll.

Q43 Mr Llwyd: In other words, we are still in the tabloid mentality here, aren’t we?

Professor Hough: There are two levels of public opinion, what you might call the tabloid level and the considered level. It is probably a mistake to listen only to the tabloid level, in my view.
Q44 Mr Llwyd: I am sure you are right. Looking at the focus groups you referred to and bearing in mind what you have just said, do you think there is a role for sentencing being made more explicit at the time of sentence—the reasons for a sentence being made more explicit—so that even the tabloids might understand?

Professor Hough: The more that can be done to make sentencing clear and transparent, the better, because people in court, I suspect, are quite muddled and confused by the process. Whether that is best done in court, which has very limited reach, or whether there are other ways of getting the realities of sentencing across to the public, is something worth asking. I would have thought, with things like the internet, that, in time, the Sentencing Council could make it clear what the going rate is for different sorts of offences, effectively.

Q45 Chair: We have been joined by Mr Khan, who is Chief Executive of Victim Support. The Sentencing Council intends to refocus sentencing on the victim to acknowledge that burglary is an offence against the person as well as a theft. What do you think about the aggravating factors set out in the guideline? Would you add any or remove any?

Javed Khan: Thank you, Chairman. First, on behalf of Victim Support we would like to welcome the approach taken by the Sentencing Council. It is absolutely right that burglary is recognised as a serious crime. You will be well versed, I am sure, in the research that supports the view that victims regard burglary as an extremely serious crime, and all of the various impacts that it has upon them.

In terms of the detail that is included around aggravating factors and the harm factors, we support the fact that the sentencing guidelines, for the first time, openly recognise the need to understand the level of harm inflicted on victims, but we would want it to go a little further. We think the best way for that harm to be understood is through victim personal statements and the broad use of victim personal statements as a guaranteed offer to all victims who choose to express their concern in that way. At the moment, the research we have available tells us that, at best, around the country, only 46% of victims of crime remember being offered the chance to complete a victim personal statement. Within that, only 16% of them recall the impact they expressed through that statement being considered by the court. It is a fundamental point that we would like to be expressed specifically and in much greater detail in the guidelines which we do not think is quite there yet.

In terms of previous convictions, which is one of the aggravating factors mentioned in the guidelines, we know from our work with victims and published research that victims and the public consider previous convictions indicating a pattern of offending should be a considerable aggravating factor. Given the significance which the public attaches to previous convictions, we believe the sentencing guidelines should consider adopting a more prescriptive approach, setting out the degree to which previous convictions should influence the sentence.

Q48 Mr Llwyd: Can I put another question? On the issue of restorative justice in relation to burglary might be and how far can it be developed in sentencing?

Javed Khan: There is a lot of evidence to suggest restorative justice works, but there are some conditions that we would suggest need to be in place. First, for good restorative justice you need trained practitioners implementing it. There also need to be national standards set in place, which do not exist at the moment. The Ministry of Justice has carried out research and we have supported that. The Restorative Justice Council has conducted considerable research and the evidence is fairly clear that good restorative justice, with those caveats that I mentioned in place, improves the victim’s confidence in the criminal justice system and helps the offender understand the impact of their crime. Therefore, it reduces reoffending as a result of that.

Chair: I was going to turn to Mr Buckland to ask some questions about the pattern of a burglar’s behaviour, but unless Dr Treadwell arrives—he has arrived exactly on cue.

Q46 Chair: Are the items taken in the burglary significant here? There is a suggestion that items that are very personal to the individual may have a more harmful impact on the victim than others. Is that a factor which is really measurable and could be considered?

Javed Khan: Most certainly. We especially consider that the victim being present, the property being ransacked and the theft of items of sentimental value indicate greater harm, and that needs to be considered. There are some things we do not agree with in the guidelines, in terms of not just aggravating factors but mitigating factors as well. For example, as to the issue of injuries caused recklessly, we do not think that this should count as a mitigating factor. When a victim is injured as a result of a burglary, what matters to them is the harm caused, not whether the offender intended it or not. We also do not agree that lapse of time since the offence should be a mitigating factor. We do not think this should be a factor because a crime is no less serious simply because it happened some time ago. I mentioned the issue of previous convictions. The guidelines say that previous convictions, as one of a number of aggravating factors, should be considered. In our view, previous convictions are so significant that they should not be lumped together with other aggravating factors and should be considered independently.

Q47 Chair: Can I take you to another issue on which I think you have a particular viewpoint that could be helpful to us? What do you think about the role of restorative justice in relation to burglary might be and how far can it be developed in sentencing?
his victim were sitting next to each other. This was within the confines of this place. The career burglar had been in and out of jail for roughly 18 years. He burgled this man’s house, the man was in at the time and the man was actually injured, albeit recklessly, in the whole process. The person has not reoffended seven years down the line and they are quite good friends. I do not know whether it is an extreme example, but it certainly does work, given the caveats that you put forward.

Javed Khan: Chairman, if I may, that is a really good example of where it has worked well. We have seen lots of examples where it has worked in exactly that way. There are also lots of examples where it has not worked. One of the key principles is that no victim should be forced to enter into restorative justice against their will. It should not be a compulsory position that should be taken. It has to be with the agreement of the victim and the offender.

One key principle within that is that the offender needs to recognise their guilt in the offence they have committed. There must be no confusion about whether there was a crime committed or not. Our experience would suggest that strongly. Also, to support the general principle of restorative justice, I would add that, from the research I mentioned earlier, our calculations suggest there would be significant cost savings to the criminal system if restorative justice were to be put in place in the way that we and the Restorative Justice Council suggest. Over a two-year period the research showed that there would be potentially a saving of £185 million to the criminal justice system, the knock-on effect of good restorative justice to all of the various agencies that would need to be involved otherwise. That equates to a £9 saving for every £1 potentially spent on implementing restorative justice.

Chair: That is the kind of figure we find very attractive.

Q49 Mr Buckland: We know that the statistics demonstrate that the incidence of burglary has declined in the last 15 years. My first question is: why? My second question is: what impact, if any, has sentencing had in that decline, would you say?

Dr Treadwell: There certainly has been a decline, and I think it is a real decline. There are numerous factors that underscore that. One of those, clearly, is improved household security, as more and more people have double glazing. Burglary tends to be an opportunistic crime and people find less easy opportunity to profit from burglary quickly when they have to go through, for example, double glazed secured patio doors.

That said, you can look, on a much higher level, at crime trends generally. The decline of burglary is somewhat borne out by the fact that it is quite a costly crime for the offender if they are convicted. In contrast, there are new opportunities that the young men that previously would have committed burglaries have been falling over recent years, the latest figures from 2010 found that levels of domestic burglary were up by 14%, so it is not a fall across all types of burglary. At Victim Support, we receive over 200,000 referrals from the police for domestic burglaries alone. In terms of the total volume that we deal with, the demand for our services around burglary comes fourth after threats, assault and vandalism.

Q50 Mr Buckland: That is an important point, isn’t it, Mr Khan? We should distinguish between different types of burglary.

Javed Khan: Yes.

Q51 Mr Buckland: There is no doubt that dwelling-house burglary, we agree, which is a crime against the person as much as against property, is a matter of real and continuing public concern. There is a continuing fear, is there not, of the invasion of one’s private life and home that a dwelling-house burglary obviously means?

Javed Khan: Yes, without doubt. I totally agree.

Q52 Chair: Perhaps I can ask Dr Treadwell about deterrence. There was an indication in something you said that the likelihood of a prison sentence did have some deterrent effect for the calculating person who decides that there are other crimes in which he is less likely to get caught and sentenced. Presumably, they
are also crimes which would attract a prison sentence, but when we are advising the Sentencing Council, we urge them to encourage them to be more sceptical about deterrence than me, you and the public seem to be?

Dr Treadwell: Yes. For some offenders—and it is with that caveat—the deterrent effect of sentencing is there. For example, I remember particularly interviewing a chap who had been imprisoned for a substantial period for importation of class A drugs and I said to him, “How did you get involved in the importation of class A drugs?” He said, “When I appeared on my last commercial burglary charge, the judge said to me, ‘If you appear in front of me again for this sort of offence, I will have no hesitation in giving you a sentence of at least double figures,’ and I thought, quite simply, ‘If I am going to get that sort of sentence, I might as well move into the drug market’.”

Q53 Chair: As a first offender?

Dr Treadwell: This was, to all intents and purposes, an established and professional criminal who had been offending from a very young age. The vast majority of those who would commit, for example, normal domestic dwelling-house burglary—if there is such a thing—do not fit that bracket. They fit the bracket, very often, of drug addiction, very heavy drug dependency and crimes committed spontaneously, opportunistically and quite impulsively. They give little consideration to the deterrent effect of sentencing before embarking on the offence.

That said, I would similarly agree with Professor Hough that, in actual fact, if you look at the targeting—particularly the policing of the most persistent of offenders—through schemes targeting persistent offenders, that category of offender has felt an intense light shone on them in some areas in recent months. It leads people to consider, “Can I get away with something?” “Is there something that attracts less of a sentence?” “Might it be better to steal two bottles of whisky from a shop that I can quickly sell off in the community supervision, the sort of community supervision that others, quite frankly, are less likely to get. They are heavily monitored on a day-to-day basis. That certainly limits their opportunity or means that, if they do reoffend, they are detected very quickly.

Chair: That brings me to Mr Evans’ point.

Q55 Chris Evans: I am very interested in what you said about dependency. We had the Minister in front of us yesterday and it seemed to be the same thing as well. How effective are community sentences in tackling addiction?

Dr Treadwell: The community sentence, it would seem to me, is not necessarily the effective part of it. The effective part of multi-agency working is where we get a group together to tackle all the underlying factors that lead to an individual’s offending. The addiction is but a part. These individuals are often the most socially excluded. They are on the bottom rung of the ladder. They do not only have problems with addiction. They have problems with low educational attainment; very often they have never worked and never experienced work; and they live in transient accommodation, very often going from hostel to short-term accommodation to prison. Of course, they lose accommodation when they are in custody. The offender management of addiction is part of that whole package. Some measures that can be incorporated into community sentences can be very effective. The first step is to ensure that someone is adequately detoxed and that they are no longer dependent on the substance. Through things like multi-agency working, that can be done, although there is still not enough provision of those sorts of add-on components, the community detox. People still find it difficult to access somewhere they can be carefully managed in their withdrawal from drugs. Very often it is poly-drug use. It is not just heroin but heroin and crack cocaine. There are also, when you take those away, often alcohol problems as well. That can be managed far better, in many ways, than it can in a prison environment.

Many offenders who go into prisons can easily get access to drugs and continue their addiction, but what they tend to do is use prison as a period of relative stability. They get to a point where they are hectic, where their life is rapidly spiralling out of all control, and prison acts to stabilise them. They do not withdraw from drugs, but they use less. They come out of prison with a small amount of money. They are channelled back into some form of accommodation and then the spiral goes downward once again. Community sentences can work to tackle addictions, but targeting addictions is only one part. It needs to come with a raft of measures.

Q56 Chris Evans: What I am very interested in, and I am probably getting boring about it now, having talked about it so much, is this. I talked to someone in my constituency who I know very well who works for a charity as a methadone dispenser. He said the major problem seems to be that they come into a detox and, part-way through, they completely disappear off the face of the earth. They live, as you say, a very hectic life, disorganised and everything, and he never sees them again until they have been arrested, picked up and put back in the programme. He has seen them six or seven times, and it might be six or seven...
burglaries, it might be six or seven assaults or, as you say, pinching from the supermarket. What can we specifically do to stop that cycle continuing over and over again? What I was quite shocked at—and it is anecdotal evidence—was that he said he had 50 clients and, of those 50 clients, every one of them, on average, has been through the system seven times. How can we stop that? Is there any research that you have done which backs up that anecdotal evidence? When he said that to me, it brought the whole drug sentencing home to me, in many respects.

**Dr Treadwell:** It is not my area of research so I have not done research on it. Mike might know some more. There is evidence of effective practice, but some of it is a world removed from what we do at the moment, for example. One of the things that has been suggested which has been retention for a drug conviction is prescription of heroin. There is some evidence that, where heroin is given on prescription, people are stabilised and they stop the offending part. It does not deal with all the underlying factors. Until you get someone who has a very heavy drug dependency stabilised, to work on anything else is almost impossible.

Q57 **Chris Evans:** When I spoke to him, he said the underlying issue is not drug dependency, substance abuse or alcoholism. It is mental health. But when you talk about mental health, you are not talking about it in the respect of “This is the primary cause.” Something has happened in somebody’s background that has made them become like this. You do not suddenly wake up one morning and decide, “I am going to be a drug addict.” Something has happened somewhere along the line. What he is saying is that we are not treating the real cause of that. I was wondering how sentencing—because people who commit crime have to be punished and that is the way of society—could address that issue and see the drug problem as a very serious problem or as a drug conviction of heroin. There is some evidence that, where heroin is given on prescription, people are stabilised and they stop the offending part. It does not deal with all the underlying factors. Until you get someone who has a very heavy drug dependency stabilised, to work on anything else is almost impossible.

Q58 **Chris Evans:** The other tension—and this is my final question—I see in it is that if we went down the route, as you say, of a lot more counselling and of, dare I say it, giving them a hug, what do you think, one, the public’s perception, and two, the victim’s perception of that would be as well?

**Dr Treadwell:** I have to say that trying to convince the public is very, very difficult. It is not only the public that you need to convince, but also the media that would largely be fiercely opposed. That said, at the same time, the trade-off for the public, if levels of burglary fall, is a good one. I do not think we should necessarily move ourselves away from having those difficult debates and trying to inform them a little bit more. When it comes to the reporting of crime, the public have very little insight into the everyday forms of volume crime because they tend not to hit the press. It is the rare and exceptional which do. The Tony Martin case would be an example. It is not your average domestic burglar that is featured in newspaper articles. The public, if given all the evidence, are much more willing to accept that some of these things can work. Again, this is Mike’s area much more than it is mine, and he may be able to say more.

**Professor Hough:** Shall I come in?

**Chair:** Yes, please do.

**Professor Hough:** I have two points. On public attitudes, people support the idea of treatment for people who are dependent on drugs and see it as a perfectly sensible and rational thing to do. On the question of treatment and how you improve outcomes, the key is retention. If you can retain people in treatment on programmes for three months or more, you are going to do much better than if you fail to. The important thing is that there are big variations between jurisdictions, so that the Scots, for example, retained drug-dependent offenders on DTTOSs much better than the English and there are big differences across areas within England. The thing to do is to find out who has the magic touch and who is very bad at retaining. Retention is the issue.

**Q59 Chair:** To develop Mr Evans’ line of questioning, the use of custody as a penalty and the length of custody is seen by the public and the media as a scale of values, as a way of asserting that a particular crime is much worse than another crime, or a particular level of persistence in crime is much worse than another crime. How far can the Sentencing Council and sentences address a different purpose in sentencing, which is actually to cut reoffending and make it less likely that there will be more victims in future, when it is being expected by the public and the media to maintain a value scale which says, “If you do this more times, you will go to prison even if it will not do you any good and you will come out likely to do it again.”?

**Professor Hough:** My take on that is that, in a system of sentencing, proportionality must be the overarching principle and within proportionate sentencing one should take a utilitarian view about trying to prevent reoffending. The public, like judges, would see...
fairness and proportionality as the anchoring principle
and then you should try and do good within that
structure. Does that make sense?

Q60 Chair: Yes, except that it may require you to use
a custodial sentence when you know it is not going to
work and that what the person really needs is the kind
of very continuous monitoring and supervision which
Dr Treadwell referred to. Therefore, you need people
to understand—and the media to accept—that this
may be more challenging and more uncomfortable for
the person who has committed the offence than an
easy time in prison for a few months while he takes a
rest before going back to the same life.

Dr Treadwell: Yes. That is a very important point. A
number of offenders who risk imprisonment regard
prison as a relatively easy option. Once they have first
been to prison, it has lost much of its deterrent effect.
They know what it is like and that it is a place to meet
their mates. I even know of individuals who have
reunited with their fathers in custody. It holds little
deterrent value while they are in there. They will sit
in their pad, smoke some cigarettes, kill time and see
it as dead time and then they will come out. Indeed, a
number of drug-dependent offenders will see prison
as something they can use to stabilise themselves.

That said, some forms of imprisonment are much
harder. For example, if we were to take a look at some
of the therapeutic community systems which do
indeed go about tackling those background factors—
the things that have happened to an individual that
have led them to have complex emotional problems—
prisoners will often describe those as the hardest
prison time they ever do. For example, if we were to
look at Her Majesty’s Prison Grendon, you will find
that prisoners sent to that establishment do not regard
it as easier time, although the regime, when held up
to the public and outside, would seem very relaxed
in comparison.

Javed Khan: I have two points, if I may, Chairman.
They are broader points on this issue of prisoners and
the experience that they are going through and
whether it contributes to their rehabilitation or not. A
while ago, I spent a bit of time with some long-term
prison inmates in Wandsworth. These were all
between the age of 21 and 30—relatively young—and
had another 15 or 20 years to look forward to in
prison. We talked about their experience to the point
where they got into this long-term prison sentence.
Without exception, out of the 10 people I met, every
one of them had a really complex childhood. Very
early on in their life they faced major trauma and they
were victims in many other ways themselves, whether
it was domestic abuse with violence all around them,
a drugs culture or the estate that they lived on. It was
all the sorts of things that Dr Treadwell is talking
about. They all talked about their experience of being
in and out of prison of one sort or another as a young
person. Each of them said that they learnt more about
crime while in custody than when they were out. They
were extremely critical about any attempt that had
been made to rehabilitate them. Usually they talked
about no attempt having been made at all because they
were on short-term prison sentences and therefore got
very little direct attention. Then they were out and
they were back in again until they committed a very
serious crime. That is where they were. It left a really
important thought in my mind about how the profile
between victims and offenders, in many ways, is not
that dissimilar and most serious offenders have been
victims in their earlier life. As society in general, we
need to think about that, about what we do upstream
to try and stop them from ending up where they are.
My second point is about how we give the public
more confidence in terms of sentencing being effective.
The Sentencing Council, in terms of the
guidelines we are talking about today, has probably
made the best effort yet in explaining something that
is quite complex in a way that the public can hopefully
understand. It is not quite there. It is not quite lawyers
still speaking to lawyers, but it is better and we need
to recognise that. We certainly applaud them for that
and we will work with them to help improve it. The
Sentencing Council could be far more clear in terms
of how sentencing is explained to the public, not only
in the guidelines but in court too, in the way the final
sentence is handed out to offenders, the point of
conviction, how it is explained not only to the
offender but also to the victim and the witnesses that
were involved as well. There is no current duty on the
judiciary to explain that in any real way. We have
many examples of victims walking away from very
serious court cases having understood that the person
got a 10 year prison sentence but not really
understanding that that 10 years could mean five years
in custody and five years on a community order.
Therefore, five years down the line, when that person
is released and walking the streets, shock horror. They
do not understand what happened. They feel let down,
they lose confidence in the criminal justice system,
their plight begins all over again and the
re-victimisation continues for them. Their confidence
in the system is lost.

Therefore, the suggestion we would make, very
strongly, is that, at the point of sentencing, absolute
and unequivocal explanation needs to be given on the
sentencing and all of the nuances that are around it
to the victim and the witnesses as much as it is to
the offender.

Chair: Thank you very much.

Q61 Mr Buckland: I have one final point. You think,
in essence, this is a very welcome move away from
phrases—that awful phrase, do you remember, that
was used a couple of years ago—"a standard
dwelling-house burglary"? That was used by the Court
of Appeal in a previous guideline case. That is an
awful phrase which does not seem to be repeated in
these guidelines. I think that is welcome, isn’t it?

Javed Khan: I fully agree with you. There are lots of
examples within this document where the Sentencing
Council has tried its best to use language that most
people could understand. It is not quite there, and it is
a really difficult issue. I have had this conversation
with the Sentencing Council representatives and we
are working with them, as I say, to help improve that.
Their issue, of course, is that they do not want to go
down the line where it becomes ambiguous. We
understand and appreciate that. But they could use
softer, more gentle ways—more customer-orientated
ways, if you like—to explain the law to people who are not well versed in the terminology used in these matters.

Chair: Mr Khan, Dr Treadwell and Professor Hough, thank you very much indeed for your help this morning. It really is much appreciated. Thank you.
Thursday 23 June 2011

Members present:

Sir Alan Beith (Chair)
Jeremy Corbyn
Chris Evans
Mrs Helen Grant
Mr Elfyn Llwyd
Claire Perry
Elizabeth Truss

Examination of Witness

Witness: Lord Justice Leveson, Chairman, Sentencing Council, gave evidence.

Q62 Chair: Good morning and welcome, Sir Brian. We are going to look at the guidelines on drugs and sentencing this morning. The Sentencing Council has decided not to engage in issues of harm arising from the use of drugs, beyond the A,B,C classification system. If there was better and more rigorous evidence available about the harm done by particular drugs and the kind of trafficking that the court was dealing with, would the Council revisit that approach?

Lord Justice Leveson: Thank you very much for inviting me. The Sentencing Council took a clear view that harm was really a matter for Parliament. They identified the degree of harm caused by different drugs by the classification system which Parliament adopted. We believe that those decisions, based on scientific evidence, must be taken by Parliament. We do not distinguish between drugs of the same class. In short, the approach of the guideline remains applicable should any drugs be reclassified or, indeed, if controlled drugs are added to the list. If there is more scientific evidence, then I would hope that Parliament will reconsider the classification of drugs within the guidelines. It is quite difficult for us to second-guess the parliamentary classification set out in the 1971 Act.

Q63 Chair: So you are saying it is our job really to sort that out.

Lord Justice Leveson: I think it is.

Q64 Chair: It is a job, of course, which is complicated by anxieties about reclassification. Even when there is scientific support for reclassification, there tend to be political anxieties, do there not? Perhaps I should not ask that question.

Lord Justice Leveson: Your question identifies why my answer must be what my answer is, because the one thing I cannot do is start to second-guess what Parliament has decided or, indeed, what the balance of opinion is in the scientific community.

Q65 Chair: What evidence have you had from the police on issues about quantity and purity?

Lord Justice Leveson: Purity is one of the real problems. You will have seen in our consultation paper that we have been very concerned about trying to get the question of how we address purity resolved. The street value of drugs hauls is often brought to the attention of the court at a trial, but we agreed with the Sentencing Advisory Panel’s advice that street value should not be a significant factor in determining seriousness. This view reflects that street value can depend on the price of drugs, which can vary enormously both over time and between different parts of the country. I also have a problem with the evidential basis for some of the assessments. We have talked to the police and to the Serious Organised Crime Agency. You are aware that the Deputy Commissioner of the Metropolitan Police is a member of the Council.

Q66 Chair: Is there a tendency to inflate street value on the part of law enforcement agencies who want to look good?

Lord Justice Leveson: Once again, your question justifies my previous answer. I say again that I have a problem with the evidential basis for assessments of street value. Indeed, value to some extent may be determined by how much a drug is cut. We get into some very difficult issues. Research has been done on street values. The last data comes from 2005 when DrugScope did some work on it. If you look at the drugs around the country and the different types of drugs, the values are dramatically different. I won’t identify the cities but it is there in the research if you want it. There is heroin from £25 to £100. It is quite difficult to see how one is going to relate that to sentence if, as I believe is very important, consistency of approach to sentences should be the same whether you are being sentenced in Basildon, Bolton, Bristol or Birmingham.

Q67 Chair: Is international comparison relevant, bearing in mind that we are talking about international trade? We are talking about people whose decisions might be affected and some deterrence might be involved in choosing where to carry out their activities according to sentences in different countries.

Lord Justice Leveson: It is a very interesting problem. There is no doubt that we have looked at international comparisons. Indeed, the Sentencing Council was recently co-host at a seminar which had many international speakers discussing the problems of drugs and the sentencing regimes for drugs in different parts of the world. There is no doubt that at all that in relation to supply offences we are among the most penal. But it is quite difficult to do a comparison because our systems are different, our sentencing regimes are different and our release provisions are different. To get a true comparison is problematic. The other thing is that our cultural approach in some cases is different. It is quite a difficult balance to say what the impact of sentencing regimes in different countries should be. As you are probably aware, in
Portugal they have tried a very different experiment in relation to drugs. That again would not be for the Sentencing Council. I pass that ball very firmly back to you.

Q68 Chair: In terms of sentencing, do you think there is any danger of a perception around the world that Britain, or England and Wales in the case of your responsibility, is a softer touch than other places and, whether that perception would be true or untrue, if it existed, it would affect people’s behaviour?

Lord Justice Leveson: I have not received any suggestion at all that we are thought to be a soft touch or a softer touch than other countries. We do review the practice in other jurisdictions, both in relation to drugs and indeed to other offences. We have thought about issues of totality, guidelines and the approach to it. Indeed, much to my wife’s irritation, I have used holidays to talk about sentencing in Australia, New Zealand and Israel over the last year or so to those that are responsible for the organisation of their systems. The office has also had contact with sentencers. We have recently been visited by sentencers from Nigeria, and on Friday I spent a very interesting afternoon with the Chinese Supreme Court. We look at it but it is quite a difficult issue.

Q69 Claire Perry: Good morning, Sir Brian. Could I move to the second area that has been considered, which is motivation? That is a very interesting topic. We have been led to believe that motivation should have greater prominence in drug offences considerations and guidelines. Could you talk a little bit about what the background was behind picking up motivation as one of the key factors that should be considered?

Lord Justice Leveson: We have tried to reflect motivation appropriately by reference to the roles of the offender in step 1. For example, in the importation guideline, an offender who is motivated by substantial financial gain will be regarded as having a leading role. An offender who becomes involved in expectation of some gain, either financial or benefit in kind, will be regarded as having a significant role, while the individual who is engaged by pressure, motivation and influence, or intimidation, will come within a subordinate role. Motivation is very much part of the picture, but to try and elevate it into a more fundamental test or template is quite difficult. It is certainly there. At least that is our intention.

Q70 Claire Perry: Why is it difficult to elevate that consideration more strongly?

Lord Justice Leveson: Because I think motivation goes along with many other features of the regime that we are trying to introduce. Those who are motivated by money will always be more significantly involved, but whether or not their motivation is money, if they are involved in a high-profile, large-scale operation, their culpability is greater. We have preferred to focus on culpability and harm, which are, after all, the two features to which we have to have regard in the statute. Motivation is there, but culpability and harm are the primary drivers.

Q71 Claire Perry: Presumably, it is quite difficult to prove motivation. Yes, there is the independent assessment of financial gain, but is proving that somebody has been pressured quite a difficult thing for the judiciary to unpick?

Lord Justice Leveson: It can be. It is certainly my experience that absolutely everybody is merely a courier. They are caught with large quantities of drugs in a big case and they thought it was cannabis. They were simply taking it from one part of London to another as a favour for no financial reward. It is sometimes extremely difficult to unpick that basis of plea. It requires a lot of other evidence which sometimes may not be available. It is relevant and significantly relevant—I am not underplaying it at all—but it is not one of the two axes that drive our approach at the moment.

Q72 Claire Perry: I turn to one of the specific outcomes, which is a potential reduction in sentencing for so-called “drug mules”, who of course are often women. We know that that is an issue for women in the prison system. Is there a danger, if the sentences are reduced, that an unintended or intended consequence will be that vulnerable people will be even more targeted by drug gangs to do those drop-offs?

Lord Justice Leveson: The guideline of course is intended to assist courts in the exercise of sentencing, not as a guide to criminal gangs on how best to commit offences and avoid jail terms. I do not believe the guideline will have that effect. The argument used by gangs, as I understand the evidence, is not that the sentence won’t be very great; it is that you won’t be caught. I do not believe there is evidence to suggest that gangs will analyse the potential sentences for offences they are planning, and, even if they were to do so, they are not likely to have the welfare of their mules in mind. There is a feature about our view in relation to drugs mules which is all to do with deterrence. There is no doubt that we have been concerned that those in the countries from which these mules come do not know how penal our approach to importation is. I know that some work has been done, particularly by the Hibiscus group, on seeking to publicise the sentence for importing drugs into this country. I would like to highlight, contrary to what has sometimes been reported, that the starting point that we are proposing for the average drugs mule is still a hefty custodial sentence. We are simply trying to reduce it to reflect some of the considerations of which I am sure you are aware. The starting point suggested in the consultation for an offender importing between 0.5 kg and 2.5 kg of heroin is still six and a half years. It is still a substantial sentence.

Q73 Claire Perry: I have one final question, please. Again, often we are talking about the same people. They are often foreign nationals and often women. I believe the Hibiscus group told us that 48% of all female foreign nationals in custody were jailed for drug offences, typically importation. Were there conversations about deportation in your consideration...
again, this is a slightly unfair question. Q74 Chair: impression we should be giving at all. had a pretty decent run.” I do not think that is an worry. If you get caught, you will only be sent back while they are in this country. I am not opining on that; I am merely saying that there are additional complexities. Jeremy Corbyn: I understand the point.

Q74 Chair: Again, this is a slightly unfair question. If it is the Government’s wish to reduce the number of foreign nationals in UK prisons, as was stated the day before yesterday, there must be an assumption that there will be quite a lot of transfers into the jails of other countries of people involved in international drug trafficking at any level, whether major criminals or women engaging as drug mules to feed their families. Lord Justice Leveson: I anticipate that that is absolutely right. Of course, the problem is that there has to be a bilateral agreement between the receiving country and the UK to allow that swap to take place. Again, that is a matter for the Government and not for me. To adjust our approach to encourage the belief that the only effect of bringing drugs into this country is that you will be sent out of this country sends a message which I certainly would not believe was the right one.

Chair: Mr Corbyn has a supplementary point.

Q75 Jeremy Corbyn: I am sorry I missed the first part of your contribution, Sir Brian. On the question of imprisoning drug mules, I can see your point about deterrence, but in reality what we are doing is punishing somebody who is frankly guilty of no more than trying to feed their family and support a very poor community. Putting them into substantial prison sentences in the UK costs us a great deal of money and is no deterrent whatsoever to the drug dealer that has persuaded them to carry the drugs in the first place. Personally, I would favour short sentences and a rapid removal back to their own jurisdiction if that can be achieved.

Lord Justice Leveson: I understand the perspective. Doubtless the Committee will consider it, and, either collectively or individually, the response will be considered. The trick is going to be the balance between ensuring that it is known to be penal so as not to encourage anybody to think that bringing drugs into this country is a ride that will only get them a ticket home—

Q76 Jeremy Corbyn: A greater deterrent would be immediate removal back to a prison in Colombia, because the prison system in Colombia is not wonderful. Lord Justice Leveson: I have no difficulty with that proposition at all, but there then has to be an agreement between this country and Colombia, and it has to work too, in the sense that it is not amenable to challenge that we are sending somebody back to a penal system which contravenes their potential rights.

Jeremy Corbyn: I understand the point.

Q77 Mr Llwyd: Good morning, Sir Brian. In your deliberations, have you considered addressing previous convictions as a specific step in sentencing, given the fact that previous convictions are viewed very seriously by victims and also by the general public?

Lord Justice Leveson: The statute makes it clear that relevant and/or recent convictions aggravate the offence, and any court determining an appropriate sentence needs, first, to form a view about the offence for which it must sentence. That must be the first consideration: what is the crime that has been committed and how serious is it? That is why we start with culpability and harm. The court does this at step 1 using the principal features to determine those elements. Then the court can aggravate and mitigate the sentence. What we said in relation to burglary is that previous convictions must be treated as an aggravating factor and that step 2 should incorporate the most common aggravating and mitigating features. The previous convictions are the first of the aggravating features. You may have noticed that, given the emphasis that the case law puts on previous convictions in relation to burglary, the Council has given greater emphasis in the text of the burglary draft guideline stating that, in particular, previous relevant convictions are likely to result in an upward adjustment from the starting point and indeed may justify moving out of the range. To elevate the first consideration as previous convictions may be to provide a lack of balance in relation to the gravity of the offence actually being committed on that occasion.

Q78 Mr Llwyd: Yes, I understand that; thank you. You mentioned burglary. How do you anticipate the aggravating factor regarding the personal value of an item? How will this operate? Is this in fact targeted at malicious theft, or would it encompass, for example, a laptop with family photographs on it or a piece of jewellery with huge sentimental value?

Lord Justice Leveson: It would most undeniably encompass the latter. Let me make it clear that I feel very strongly that burglary is as much a crime against the person as a crime against property. I do not need to make it a laptop or a piece of jewellery. A photograph of a deceased relative which is irreplaceable and which is destroyed in the course of a ransacking burglary, or a trivial trinket which has enormous sentimental value is, to my mind, of real
significance in the context of an offence of burglary. The court will have to make an assessment of value, whether financial, sentimental or personal, based on the evidence put to it by the Crown in court, which is likely of course to be the evidence of the victim. That will feed into the question of harm. My response to the point that has been made to me, “How could the burglar know?” is very simple. That is the risk he takes. If you commit the offence of burglary and you take something, not appreciating that it is of enormous value and will cause great emotional distress, that is the risk that you have run and you must take the consequences.

Q79 Mr Llwyd: Your answer and the description you gave is what happens in the courts, day in, day out now? Is it not? There is not going to be any real change here.

Lord Justice Leveson: I absolutely hope so. It certainly is in the Court of Appeal in which I preside.

Q80 Mr Llwyd: Indeed; yes, I have noticed. You carried out a certain amount of media work following the release of the draft guidelines. Have you had an opportunity to consider your view of what this produced and how useful it was?

Lord Justice Leveson: Could I cover the media generally?

Q81 Chair: Before you do that, could I slip in one other point you raised in answer to Mr Llwyd’s previous question? It is about repeat offences. Of course, repeat offences are particularly committed by those who have a drug or alcohol dependency and are paying for that dependency. You raised with us the issue of how that should relate to the custody threshold, and the balance between custody and ensuring that people get the kind of measures which might break that dependency and get them to lead an honest life. Do you feel that you are inhibited from attaching some importance to the sentence which is most likely to deal with a person’s dependency and therefore prevent further repeat offences, or are you content that the courts have, and will continue to have, a degree of freedom in deciding whether it is a prison sentence or a community sentence, but, either way, one in which there is a specific effort to deal with the dependency?

Lord Justice Leveson: I believe the court does retain sufficient discretion to be able to deal with that issue because a judge is always entitled, even in a case which does pass the custody threshold, to sentence the person in front of him and see whether there is a better way forward for that particular offender, whether it is drug treatment or, alternatively, mental health assistance. It is for that reason we have proposed in the draft burglary guideline, like the assault guideline, that a determination or demonstration of steps having been taken to address addiction or offending behaviour is a mitigating factor in the decision-making process. One of the things that judges have to do every single day of the week is to decide where the balance lies. Is this particular offender worth the risk of an additional chance, or has that chance finally been passed and one has to go for a custodial option, which one cannot be assured will lead to treatment or assistance?

Chair: We turn to the media now.

Q82 Mr Llwyd: On the point of the drug treatment orders, judges of my acquaintance very often hand them down with a heavy heart, feeling, “I am doing this now because I want to try it, knowing full well it is not going to work.” What is your opinion generally on those kinds of orders? How effective are they?

Lord Justice Leveson: There has been some real success with drug rehabilitation orders. One of the very good features of them has been the review, where an offender has been given a chance, takes it and then gets a positive review, and perhaps for one of the first times in his or her life somebody in authority says, “Well done. You have made a real effort. That is great progress.” That might reinforce continuation of the effort. I have heard it described in court that, for example, coming off an addiction to heroin is like climbing Everest. Occasionally there will be slips, but, provided that progress is generally positive, courts will support the offender.

Now I will answer your question. The great fear is setting people up to fail. You are persuaded to give somebody a chance, but you are concerned that actually you are just making the next sentence that much more serious. You want them to succeed, but setting somebody up to fail is really very depressing.

Q83 Chair: It is one failure versus another. It is a custodial sentence at the end of which you then go off to commit more crimes and cause more harm to more people.

Lord Justice Leveson: Yes; I agree. I did not say that either alternative had a light at the end of the tunnel; it does not necessarily. It is a question of trying to balance what will help and whether this is the right time to do it. The mindset of the offender has to be right. The offender has to be in the right place, him or herself, which is one of my concerns. Some of the research speaks about the success of community penalties as opposed to short custodial sentences. Community penalties can be successful, but one has to bear in mind that one of the reasons why we sometimes get a better outcome from non-custodial sentences is because the judge has seen two identical people and seen in one the spark that it is worth making a real effort with this person and will make a difference as opposed to just leading to an immediate breach and back in court. I am not citing research to support it, but I am citing from my experience of where I have looked and said, “Is this person in the right place?”

Q84 Chair: Thank you very much for that. Now I will allow you to get back to the media question.

Lord Justice Leveson: The last couple of guidelines have given me a fair amount of experience. There is an issue about the way in which some media areas have misunderstood and, as a consequence, misrepresented some of the proposals in the consultation papers that we have issued. Headlines are always going to be more compelling than a study of the detail. There is a real risk that public confidence
Press coverage was also more favourable, though particularly promoting our website, has led to a higher consultation response rate. On the burglary launch day, we achieved our highest ever number of unique visitors to the website. There were 8,010. Since then, the number of consultation downloads has continued to increase. Over 500 people have accessed our online consultation questionnaire in the burglary guideline, which is still running, which already exceeds the total number for our assault consultation. Responses generally appear, although I have not studied them, supportive as feedback from consultation events we have had with various different groups. We have had a number of comments welcoming our efforts to try and seek public views more actively. We are very keen to do that because it is only by explaining what we are doing that I believe we can increase public confidence in the level of sentencing that we seek to impose.

Q85 Mrs Grant: Are judges and courts still being a little bit resistant in relation to the completion of the 10-page Crown Court Survey form? I think you alluded to that matter the last time you appeared before us.

Lord Justice Leveson: It is absolutely not 10 pages.

Q86 Mrs Grant: How many is it then? I have 10 pages here.

Lord Justice Leveson: Let me make it clear. You are absolutely right that, after the Lord Carter proposals, the Sentencing Commission Working Group set up in 2008 under Lord Justice Gage did conduct a trial sentencing survey in 10 courts and that was 10 pages long. That survey was—how can I put this?—not well received by judges that took part. The response rate was low. The Working Group concluded that the only way to get reliable information on sentencing practice would be to conduct a national survey. In one way you could simply say, “We will transcribe all the sentencing remarks and have somebody analyse every case and all the sentencing remarks and do it.” That would be wonderful but, financially, incredibly expensive. In order to try to get support we have reduced the form. The Crown Court Sentencing Survey is simply one side of one piece of paper. Each offence group has a different form. If the Committee would like to see copies of the form, I would be happy to supply them. There is a limit to the amount of information therefore we obtain, but we believe very strongly that it will be able to provide a great deal of data. One of the reasons we have done it is because the Act creates a statutory duty for us to monitor the operation and effect of guidelines. Part of the focus has been on collecting this new evidence from judges on what factors influence sentencing. The average response rate to date is 70%.

Q87 Mrs Grant: Are you able to provide a breakdown by courts? Are there some good courts and some naughty courts or regions? How is it looking?

Lord Justice Leveson: Yes, we certainly do. I receive monthly feedback on which courts are responding extremely well and which courts are less enthusiastic in their response. Where I have had a concern about an individual court’s response rate I have been in touch with the resident judge to discuss the issue, and
in particular to identify whether there are any difficulties with which the Sentencing Council can assist. A copy goes to the court manager and to the senior presiding judge. I have had, I think, a response in every case from the resident judge providing some feedback. The general effect has been an improvement.

Mrs Grant: Good.

Lord Justice Leveson: It is something that we are constantly watching. I make it abundantly clear that the overall response rate in the six months from October 2010 to April 2011 has been estimated at 70%. I am pleased with that. I think that is good. What is more important is that it is statistically significant. Issues will arise because we are under a duty to publish regional and local statistics, and, where courts have not got up to a statistically valuable level, then the problem is that the local data may not be as good as we would like it to be. To be fair, some of the problem may be with recorders rather than full-time judges, who are not as aware of the form as they should be and whose attention is not drawn to the need to complete the form.

Q88 Mrs Grant: Thank you, Sir Brian. That is encouraging. Could you also explain the current rules on explaining sentences to victims, witnesses and offenders? Should judges outline the cost element of those sentences as well?

Lord Justice Leveson: We have a statutory duty to explain the effect of sentences, and we do in court. What concerns me, and has concerned me for a long time, is the answer to the question, “Who is listening?” Judges will articulate why they pass a sentence. The days when a local reporter was in every criminal court are long gone. The offender wants to know what the bottom line is. He wants to know the sentence that has been passed. The victim, in a large number of cases, is not in court. There may not be a police officer in court. There may not be anybody in court writing down what the judge is saying to then pass it through to the victim. I think this is a significant issue which I am keen to seek to try and address. It is not the responsibility of the judge to find the victim and explain. It is not the responsibility of the judge to do anything other than announce in public why they have reached the sentence that they have for the offence and how they have balanced the aggravating and mitigating factors to reach a sentence. That is critical for the public to understand, if they are there; for the Court of Appeal to understand, if the sentence is to be reviewed; obviously, for the offender to understand if he is listening; and for anybody else, including victims. How one breaches the gap between the judge’s pronouncement of sentence and getting that information to the right people is very difficult.

Q89 Mrs Grant: Why is it so difficult? Surely there would be a clerk in the court who records exactly what the judge says. You would have the address, of course, of the victim, the witnesses and everybody else relevant. From the victim’s point of view, is it not just a note of exactly what is said, in a Hansard sense, and a letter going off to the victim saying, “This is what was recorded in relation to the sentence”?

Lord Justice Leveson: There is a recording made of sentencing remarks. They are not written down by the clerk of the court, who has more jobs to do than I care to think about, but they are recorded and can be transcribed. Unlike Hansard, which I understand is automatically transcribed, sentencing remarks are not automatically transcribed. They are only transcribed if they are required for the Court of Appeal Criminal Division and in certain cases—for example, I think, in homicides—for the Parole Board. I would need to check on that.

It is really a matter for HMCTS, but I would see no problem, if the remarks are being transcribed, in a copy being sent to the victim or to anybody interested. But to incur the expense of transcribing in every case would be a very real expense. I have no problem with it but it would be a very substantial cost.

Q90 Mrs Grant: But in terms of good practice and the constant need to create confidence with the public, do you think this is something that should be looked at from a cost-benefit point of view?

Lord Justice Leveson: I would be very pleased if a far more balanced account of the reasons for sentences was made available than is presently available.

Q91 Mr Llwyd: Sir Brian, in a typical disposal of a fairly straightforward offence, many judges that I have seen operating would perhaps confine themselves to half a dozen sentences, explaining why they have arrived at that sentence. Following Ms Grant’s point, the court clerk might have a form in front of him or her, and I expect he or she could accommodate us by putting half a dozen sentences down which could then be forwarded to the victim. Is that not feasible?

Lord Justice Leveson: My experience of watching what the court clerk has to do is that there are many tasks. The court has to be kept going. In many courts I am afraid we cannot always guarantee the presence of a court clerk. There may be an usher and there may be somebody sitting in. But on a pleas day—the sort of occasion of which I know you have experience—there are all sorts of issues about documents being required and the court log being maintained to whom is doing what and when. I would anticipate that HMCTS would say that there is more than enough for a court clerk to do so as to deprive them of the time that it takes accurately to note down precisely what the judge is saying.

It is an issue that could be taken up with HMCTS. I am very comfortable with the idea of a wider publication of the judge’s remarks. However, I am not so sure whether it is quite as straightforward as you have just said because my experience is that the days of very short sentencing remarks are gone. When I was in practice it might be one sentence. I vividly remember one High Court judge saying to a defendant: “Congratulations. You have reached double figures, 10 years,” and that was it. But now the statute requires so much explanation and so many hoops to be jumped over. “I have thought about that. I have considered this. I have taken into account the guilty plea. I have dealt with confiscation.” All that has to
be said in order to demonstrate to the Court of Appeal that the judge has considered everything that the many statutory obligations placed upon them require them to have considered.

**Q92 Claire Perry:** I am burning to tell you about a technology that would solve this problem instantly. If the court is recording the judge’s remarks, it is completely possible to send an audio file by e-mail to the victim with none of this transcribing. We struggle as MPs with casework and reams of paper. It is exactly the same issue. We just have to get much smarter about using technology. This is part of the whole attempt to try and modernise the judiciary. Send the victim an audio file of the judge’s remarks and then nobody has to type out or copy a single thing. It is very simple and I think we should take it up with HMCTS.

**Lord Justice Leveson:** I know DARTs—digital audio recording—is being introduced into courts.

**Q93 Claire Perry:** Have you heard of dictaphones, Sir Brian? That is how we do our casework. You e-mail out the audio file and it is fantastic.

**Lord Justice Leveson:** I understand, and DARTs—digital audio recording—is being introduced into courts. It is certainly something for HMCTS and probably not for me, except that I am interested in improving public confidence. I would also be slightly concerned about what the judge had said being played on the radio, because once there is an audio file in the public domain it is there for ever.

**Claire Perry:** It is the same with a piece of paper, Sir Brian, respectfully.

**Q94 Chair:** We can discuss the detail of this on another occasion. You have raised a point of obvious interest to the Committee, interested as we are in ensuring that victims, potential future offenders and everybody else understands why sentences are passed.

**Lord Justice Leveson:** I entirely agree.

**Q95 Chair:** Can I ask you, in the present context, whether the Sentencing Council was consulted about the potential impact on sentencing of the 50% guilty plea discount or about whether it was likely to lead to a substantial number of people opting to plead earlier than they do now?

**Lord Justice Leveson:** The answer to your question is we were not consulted. The Secretary of State, as you know, has a statutory opportunity to ask us to look at any issue that he wishes. I received a letter from the Lord Chancellor last summer asking the Council to look at the discount for guilty pleas. We started to do work in that area, but, once it became clear that there was a political dynamic to the question, we felt that it was not appropriate for us to be working parallel to the Government considering its legislative proposals and so we adjourned consideration of the topic. We responded to the consultation paper issued by the Government and we also published some research which we had undertaken for the purposes of the work that we had done in relation to guilty pleas.

**Chair:** We have that.

**Lord Justice Leveson:** I am pleased. We have not done any more on that. I felt really quite strongly that, once it was entering the political domain, it was inappropriate for us to be seen to be seeking to influence the political debate unless and until we were formally and statutorily requested to do so.

**Q96 Chair:** Were you confident about the research that you commissioned, which cast doubt on the extent to which a 50% discount would reduce the number of people opting to plead guilty at the earliest point?

**Lord Justice Leveson:** The research has to be considered in context. This was a series of snapshots with different groups of people and was not intended to be any more. It was done by Ipsos MORI, as you will have seen, and was not intended to assess the temperature across the country or the piece but merely to discuss the issue with various potentially interested groups, including victims and offenders.

**Q97 Chair:** That was the point of the research. It was what it appeared to demonstrate about offenders’ likelihood of being influenced by 50% as against 33%.

**Lord Justice Leveson:** I think what the offenders said was that they would want to know whether they felt the case could be proved.

**Q98 Elizabeth Truss:** Doesn’t the rigidity of the framework that the Sentencing Council presides over contribute to the issue of having effective plea bargaining in the country? The whole issue of guilty pleas is that it could only be reduced from the sentences set out in a fairly rigid framework. Isn’t the whole structure of the Sentencing Council contributing to the difficulty of making the system more flexible in terms of giving lower sentences for guilty pleas?

**Lord Justice Leveson:** I understand. With respect, I do not agree with the premise. The guidelines create a framework for the approach to sentencing, which I think is valuable for judges to ensure consistency of approach to sentencing across the country wherever you are being sentenced. It is a point I have made to the Committee before. It is also valuable for the professionals to understand what the court’s response is likely to be to a particular set of circumstances and thereby the better to be able to advise their client as to the effect of pleading guilty or being convicted. I feel quite strongly that it is wrong to characterise our guidelines as a form of formal grid that drives a result. The fact is that we are not creating complexity. We are trying to create clarity. When I started at the Bar, Dr David Thomas’s book *Principles of Sentencing: The sentencing policy of the Court of Appeal Criminal Division* was a small book about an inch and a half thick. His book now is four large loose-leaf volumes that cover half a shelf. Sentencing is complex, and I believe it is important that those charged with crime should be able to understand the likely response of the court. But those that advise their clients should equally be able to explain the likely sentence and the impact of a guilty plea.

One of the features of the discount for a guilty plea has been that legal advisers can tell their clients...
Lord Justice Leveson: two things are compatible. Is going to be up to the judges. I cannot see how those lawyers can advise the client and at the same time it going to be completely predictable so that the defence to me that those two things are contradictory: it is complex that it costs such a lot to administer. It seems happen. That is what is making this system so decisions on each case. I think these rules are getting stopped the judges making more discretionary judges rather than having a rigid set of rules which be great if people directly heard what judges were thinking. Those two things are contradictory: it is going to be completely predictable so that the defence lawyers can advise the client and at the same time it is going to be up to the judges. I cannot see how those two things are compatible.

Lord Justice Leveson: I profoundly disagree. I do not think for a moment that it is completely predictable because what the guideline does is prescribe an approach. That approach is always subject to the interests of justice. The judge is entitled to put the whole thing to one side if he considers it is in the interests of justice to do so. When judges have said to me, “I think this is too prescriptive, and what has happened to my discretion?” I ask, “When did you last pass a sentence which was not in the interests of justice?” to which they respond, “All the sentences I pass are the sentences I believe to be in the interests of justice.” I say, “Well, there you are.”

As regards the dichotomy that you pose, no guideline prescribes a sentence. Every single guideline prescribes an approach with a starting point and then ranges. The ranges, in most cases, are quite broad. What a lawyer can do is use his or her experience to look at the approach of the court and then decide where this particular offence is likely to fit within the judge’s framework.

I do not believe that that is rigid in the sense that it drives an inevitable answer. It is not a grid as in Minnesota, where, as it were, you type in the criteria and the answer comes out. It identifies a range, allows for flexibility both within and outside the range—because the statute only requires a sentence from the top of the top range to the bottom of the bottom range—and tries to remove what would otherwise be a free-for-all. “Which judge is tough? Which judge is lenient? How do you advise me what the sentence is going to be?” It may be we just have different perceptions of what sentencing is about.

Q99 Elizabeth Truss: If I can pick you up on that comment, on the one hand, you say you do not want to see a rigid sentencing grid. On the other hand, you say you want things to be predictable for those who are advising their clients. It is either going to be more discretionary and more subject to the circumstances of the case, or it is going to be more predictable and more grid-like. Those two things are contradictory. If I could refer back to your earlier comments about judges’ statements being broadcast, I think it would be great if people directly heard what judges were saying and we had more direct accountability of judges rather than having a rigid set of rules which stopped the judges making more discretionary decisions on each case. I think these rules are getting in the way of that happening rather than helping it to happen. That is what is making this system so complex that it costs such a lot to administer. It seems to me that those two things are contradictory: it is going to be completely predictable so that the defence lawyers can advise the client and at the same time it is going to be up to the judges. I cannot see how those two things are compatible.

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Q100 Elizabeth Truss: I have a few questions about the Sentencing Council. What is the budget of the Sentencing Council for this year and the next two years?


Q101 Elizabeth Truss: What about the projected budgets?

Lord Justice Leveson: The budget for 2012–13 is £1.5 million. The budget for the following year is the same: £1.5 million.

Q102 Elizabeth Truss: How is that money spent?

Lord Justice Leveson: Approximately 68% of our budget is spent on staff. The staff have cover a wide range of expertise. We have lawyers, policy advisers, and experts in statistics, economics, social research and communications. We need each of these experts to fulfil the statutory remit that Parliament placed upon the Council. I ought to add that we are rather less expensive, as I understand it, than the combined cost of our predecessor bodies—the Sentencing Guidelines Council and the Sentencing Advisory Panel—and we have many functions that are additional to those which those bodies undertook. The research—the Crown Court Sentencing Survey—is down to us. The rest of the money is spent on the external research we do—for example, the Ipsos MORI research, communications work and the cost of administering the Crown Court Sentencing Survey—because we have to have that analysed.1

Q103 Elizabeth Truss: By how much did you reduce the budget following the CSR? Was it by this £0.1 million that we see in the projections?

Lord Justice Leveson: No. In our first year, our set-up budget was £1.66 million, but I am very keen to underline that that was not the original figure that was thought of as what we needed to do everything required. It was rather larger. We agreed this figure very conscious of the financial climate. This was February 2010. We were very conscious of what was coming up the ladder and, therefore, we did not start from a high base and come down. We started from

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1 Note from the witness: I ought to add that we are rather less expensive, as I understand it, than the combined cost of our predecessor bodies—the Sentencing Guidelines Council and the Sentencing Advisory Panel—and we have many functions that are additional to those which those bodies undertook. In fact, the combined cost of Sentencing Council’s predecessor bodies—the Sentencing Guidelines Council (SGC) and the Sentencing Advisory Panel (SAP)—in the years immediately prior to them being replaced was: 2007/08—£1 million; 2008/09—£1.2 million; and 2009/10—£0.7 million. The Sentencing Council budget is greater than that of its predecessor bodies primarily due to the breadth of professional expertise required, as well as the much larger volume of research and monitoring work being undertaken in order to carry out the statutory duties set out in the Coroners and Justice Act 2009.
what we believed was absolutely essential. We are trying to find, and looking for, ways of keeping the cost of the Council as lean as it can be.

Q104 Elizabeth Truss: What kinds of things are you looking at to achieve efficiency savings?

Lord Justice Leveson: Efficiency savings—

Elizabeth Truss: Delivering more for less.

Lord Justice Leveson: If we had been set up with an overabundance of staff, then we could reduce them. We were not. We are reducing the head count. For example, we are going to be reducing by one lawyer, which is an important resource for us. We will be doing less research. We cannot reduce the areas in which we have expertise because we need it to fulfil the statutory remit. We will be reducing our head count and we will be reducing the amount that we can spend on research.

Chair: Thank you very much indeed, Sir Brian, for your help this morning. We will be in touch with you, of course, because we will be responding on the two guidelines that we have been talking about today. We are very grateful for your help.
Written evidence

Written evidence from Lord Justice Leveson, Chairman, Sentencing Council (DB 06)

SENTENCING COUNCIL CONSULTATION ON SENTENCING FOR DRUG OFFENCES

Following our recent meeting, I thought it might be useful to outline the areas of the drugs consultation where the Council would particularly value the expertise and views of the Justice Committee. I will write separately on burglary offences highlighting matters specific to that consultation.

The first of these matters is the issue of whether and how the purity of a drug should be considered when sentencing for these offences. The problem has been set out in the consultation paper itself but is, in essence, the following: should a consideration of purity form part of determining the seriousness of an offence, and, if so, at which stage should it feature (and therefore how much bearing should it have on the final length of the sentence)? There are a number of issues that have been thrown up when considering this topic. These include the relationship that may or may not exist between purity and role, in particular the inference that can be drawn from the purity of the drug as to the proximity of the offender to the source of the substance. Also, should purity be treated differently for each guideline, given the difference in relevance to offences of importation (where cutting and the extent of further supply must be considered) and possession, where a consideration of purity may not be apparent? Consideration of cutting agents themselves is also of relevance: should this be taken into account only when the cutting agent is particularly harmful, as we have suggested? Or should this be something that is more intricately bound up with quantity and purity and should therefore be considered alongside these? We have set out our proposed approach to purity in the professional consultation paper, together with a number of other options for consideration, and would value the views of the Committee on what we have proposed, as well as on the different issues that I have outlined here.

In addition, I would welcome your comments on the levels of sentence that have been set out for the different offences. As the consultation paper explains, these have largely been based on current sentencing practice, except for the sentences for drug "mules", where the Council would like to see a decrease in the severity of sentences passed. Of course, Parliament has set the maximum penalty for each offence, and I would appreciate your steer as to whether we are pitching the levels of sentence in the right way. For example, would you agree with a sentencing range of four to six years’ custody for an offender growing a significant number of cannabis plants in order to sell the drug for profit, having invested in specialist equipment to do so? Or with the proposed range of six years’ to seven years six months’ custody for a drug “mule” importing 800g of cocaine? Further examples of the impacts of our proposals can be found on pages 17—19 of the public consultation paper.

I would also be interested to hear your views on the different consideration of quantity that has been used for the sentencing of cannabis cultivation, which sets out the scale of the operation rather than the quantity of drug in grams or kilograms. In particular, I would welcome your opinion on whether this should be used for other drugs and/or offences, or even throughout the guideline, to replace quantity as it is currently set out. This would then frame the consideration of purity in a slightly different way, as it would have to be considered separately, at a different stage of the sentencing process.

I am very grateful to the Committee for collecting evidence in this area; in addition, your collective views on these weighty issues informed by experience as Members of Parliament will also be very valuable.

June 2011

Written evidence from Lord Justice Leveson, Chairman, Sentencing Council (DB 07)

SENTENCING COUNCIL CONSULTATION ON SENTENCING FOR BURGLARY OFFENCES

Following our meeting earlier this month I thought it might be useful to outline the areas of the burglary consultation where the Council would particularly value the expertise and views of the Justice Committee. I will write separately on drug offences highlighting matters specific to that consultation.

Factors within the draft guideline relating to the impact of the burglary on the victim

Throughout the burglary offences guideline, the Council has sought to place renewed emphasis on the impact that burglary can have on victims. It has therefore included factors at both step one and step two of each of the guidelines (aggravated, domestic and non-domestic) relating to the victim and their experience.

The Council would value a steer regarding whether this is an appropriate direction for the Council to take. If it is, the Council would be keen to hear whether there are any factors relating to the victim that are missing and/or whether there are any factors that are included that may require review.

The category ranges and starting points within the guideline, with particular reference to domestic burglary

The Council’s intention has been to reflect existing sentencing practice in the burglary offences guideline and it does not expect that the guideline will result in any change in overall sentencing practice.
The Council would value the Committee’s views on whether the category ranges and starting points for the offences within the guideline are appropriate and proportionate. In particular, your steer on the starting points and category ranges for domestic burglary would be welcome as this is an area that the consultation document highlights has been contentious in the past and is also an area that has prompted significant debate through the consultation to date.

THE IMPACT OF PREVIOUS CONVICTIONS

Previous convictions have been given a particular emphasis in the sentencing of burglary offences by statute and in sentencing practice. Throughout the guideline the Council has sought to emphasise the importance of previous convictions in burglary cases and provide an “aide memoire” on the imposition of minimum sentences. The Council has sought to maintain judicial discretion, in line with its interpretation of the statute, by providing no specific guidance on the circumstances in which a minimum sentence should not be applied.

The Council would value the Committee’s views on whether the approach it has taken to previous convictions is appropriate.

DEPENDENT OFFENDERS

Many offenders who commit acquisitive crimes, including burglary, are motivated by an addiction, often to illegal drugs, alcohol or gambling. Considerations of dependency will, on occasion, influence the court’s selection of sentence particularly where cases are at the lower end of the seriousness spectrum and where there are good prospects that a sentence in the community, which includes a requirement such as drug rehabilitation or alcohol treatment, will reduce future offending.

The Council recognises that this is an issue that cuts across more offences than burglary and is not recommending that the burglary guideline specifically tackles the topic. The Council would, however, value the Committee’s views on this approach for burglary. It would also value the Committee’s wider views of the use of these requirements with offenders, how this should be considered in relation to the custody threshold, and whether future wider guidance on this matter might be appropriate.

I am very grateful to the Committee for collecting evidence in this area; in addition, your collective views on these weighty issues informed by experience as Members of Parliament will also be very valuable.

June 2011

Written evidence from the Transition to Adulthood Alliance (DB 01)

EXECUTIVE SUMMARY

The Transition to Adulthood (T2A) Alliance is pleased to have the opportunity to submit evidence to this Inquiry. This submission primarily considers three issues:

1. The T2A Alliance endorses the inclusion of “Age/lack of maturity” as a factor reflecting personal mitigation in sentencing for drug offences. We also endorse the inclusion of “Sole or primary carer for dependent relatives”, “Mental disorder or learning disability” and “Determination and/or demonstration of steps taken to address addiction or offending behaviour” as mitigating factors.
2. The T2A Alliance believes that “Lack of maturity” and “Mental disorder or learning disability” should also be considered as factors in determining the offender’s role.
3. The T2A Alliance believes that the Sentencing Council should propose reducing sentence lengths for some minor drug offences, including making specific provision for “social supply”.

ABOUT THE TRANSITION TO ADULTHOOD ALLIANCE

The T2A Alliance is a broad coalition of organisations and individuals which identifies and promotes more effective ways of working with young adults, aged 18–24, in the criminal justice system. Convened by the Barrow Cadbury Trust, its membership encompasses leading criminal justice, health and youth organisations Addaction, Catch22, the Centre for Crime and Justice Studies, Clinks, the Criminal Justice Alliance, the Howard League for Penal Reform, Nacro, the Prince’s Trust, the Prison Reform Trust, the Revolving Doors Agency, the Young Foundation, Young People in Focus and YoungMinds.

Building on the work of the Barrow Cadbury Commission on Young Adults and the Criminal Justice System, the T2A Alliance has developed a series of policy proposals that would create a more effective criminal justice system for the young adult age-group. In order to make our recommendations robust and achievable, our initial programme of work culminated in the publication of a consultation document that highlighted has been "Age/lack of maturity" as a factor reflecting personal mitigation in sentencing for drug offences. We also endorse the inclusion of “Sole or primary carer for dependent relatives”, “Mental disorder or learning disability” and “Determination and/or demonstration of steps taken to address addiction or offending behaviour” as mitigating factors. We also endorse the inclusion of “Lack of maturity” and “Mental disorder or learning disability” as factors in determining the offender’s role. The T2A Alliance believes that the Sentencing Council should propose reducing sentence lengths for some minor drug offences, including making specific provision for “social supply”.

1 For more information on the T2A Alliance, see http://www.t2a.org.uk/alliance
2 Although the work of the T2A Alliance reflects the views of its membership, this submission should not be seen to represent the policy positions of each individual member organisation.
3 For the final report of this Commission, see: Barrow Cadbury Commission on Young Adults and the Criminal Justice System (2005) Lost in Transition, London: Barrow Cadbury Trust.
contained a thorough analysis of the problems caused by and faced by young adult offenders and a series of draft recommendations. During a three month consultation period on this document, views were sought from politicians, policy-makers and practitioners. Over 300 individuals and organisations contributed to this process, helping us to refine our thinking and develop our recommendations. As a result of this work, in November 2009 the T2A Alliance published a “Young Adult Manifesto”, containing ten recommendations that would make the way in which we deal with young adult offenders more effective, fairer and less costly.4

In addition, the Barrow Cadbury Trust has established three pilot projects, running from 2009–2012, which are testing different approaches to improving services for young adults in the criminal justice system. The T2A pilots enable community interventions to be tailored to the needs of the individual, with the aim of reducing both the risk of reoffending and social exclusion. The three pilots are in Birmingham, Worcester and London, and are delivered by Staffordshire and West Midlands Probation Trust, YSS and the St Giles Trust respectively.5 The pilots are subject to a formative evaluation by the University of Oxford’s Centre for Criminology, an outcome-based evaluation by Catch22, and a cost-benefit analysis by Matrix Evidence. The University of Oxford’s evaluation already points to promising early results and highlights the pilots’ success in engaging young adults in actions which will help them towards better lives.

The programme of work, encompassing research, policy development and practical experience, forms the basis of the analysis contained in this evidence.

Submission of Evidence

1. The T2A Alliance welcomes the work of the Sentencing Council to promote consistency in sentencing. The T2A Alliance also welcomes their decision to examine sentencing for drug offences following the work of the Sentencing Advisory Panel, one of its predecessor bodies, on this issue in 2009–2010. The T2A Alliance welcomes the general approach taken by the Sentencing Council to developing sentencing guidelines, and supports the shift towards an offence-based starting point and the balance between harm and culpability.

2. The T2A Alliance does not take a view on the specific questions raised by the Justice Committee in the call for evidence for this inquiry. In this submission we instead want to make three points. Firstly, we endorse the inclusion of “Age/lack of maturity” as a factor reflecting personal mitigation in sentencing for drug offences. We also endorse the inclusion of “Sole or primary carer for dependent relatives”, “Mental disorder or learning disability” and “Determination and/or demonstration of steps taken to address addiction or offending behaviour” as mitigating factors. Secondly, the T2A Alliance believes that “Lack of maturity” and “Mental disorder or learning disability” should be considered as factors in determining the offender’s role (which they are not at present). Thirdly, we believe that the Sentencing Council should propose reducing sentence lengths for some minor drug offences, including making specific provision for “social supply”.

Existing mitigating factors

3. The T2A Alliance endorses the inclusion of “Age/lack of maturity” as a factor reflecting personal mitigation in sentencing for drug offences. The T2A Alliance supports this proposed mitigating factor because it believes that the maturity of young adults should be recognised within the criminal justice system, including in sentencing, because of the extensive evidence, both demographic and developmental, that “young adulthood” is a particular stage in life and that young adults require distinct treatment due to their levels of maturity and the economic, social and structural factors that specifically impact upon them.

4. In previous submissions to the House of Commons Justice Committee, and to the Sentencing Council and its predecessors the Sentencing Guidelines Council and the Sentencing Advisory Panel, the T2A Alliance has argued that there is the need for a distinct approach to the sentencing of young adults aged 18–24; an approach that is proportionate to their maturity and responsive to their specific needs. The House of Commons Justice Committee has previously argued that “it does not make financial sense to continue to ignore the needs of young adult offenders”,6 while a previous House of Commons Justice Committee report on the sentencing of young people has identified the issue of offenders aged 18–24 as in need of greater scrutiny.7 We were also pleased that in his letter to the Chairman of the Sentencing Council in response to the draft sentencing guideline on assault, the Chair of the Justice Committee recognised that “witnesses ... welcomed the recognition that there are differences in “maturity” which give rise to differences in capacity, capability and culpability between offenders of the same, or different ages”,8 while also warning that the application of this principle would need to be carefully monitored to ensure consistency.9

5. The T2A Alliance continues to argue for the need to recognise maturity in the sentencing process, and by including this mitigating factor in the proposed guideline the Sentencing Council is playing a part in ensuring

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4 The “Young Adult Manifesto” is available at http://www.t2a.org.uk/publication-download.php?id=27
5 For more information on the pilot projects, see http://www.t2a.org.uk/pilots
8 http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/637/63704.htm
that young adults are given effective and appropriate sentences that take account of their maturity, thereby reducing reoffending rates and cutting crime.

6. The T2A Alliance also endorses the inclusion of “Sole or primary carer for dependent relatives” as a mitigating factor. The work of the T2A Alliance has identified that many young adult offenders are parents. A quarter of men in Young Offender Institutions are, or are shortly to become, fathers and some 60% of women in custody are mothers, with 45% of those having parental responsibility at the time of the imprisonment. This has an inter-generational impact on the life chances of their children, with 65% of children who have a parent in custody going on to offend. The benefits of reducing the use of custody and keeping families together where appropriate are therefore significant, and the introduction of this mitigating factor could help to facilitate this.

7. In addition, the T2A Alliance endorses the inclusion of “Mental disorder or learning disability” as a mitigating factor. A high proportion of young adult offenders have mental health problems, and mental health issues are often particularly acute during someone’s transition to adulthood as child-focused support services—and in particular child and adolescent mental health services—fall away when they reach the age of 18 and it is often difficult to access mainstream adult mental health services. A study found that 18–21 year-olds in prison experienced higher levels of mental health problems and were more likely to attempt suicide than either younger or older ages, while young adult offenders are also three times more likely to have a mental health problem than someone of the same age who is not an offender.

8. Young adults in the criminal justice system are also very likely to have learning disabilities and difficulties, as well as high levels of speech, language and communication difficulties that affect their level of understanding, and those with learning disabilities may also have lower levels of developmental maturity. While many young adults with mental health problems should not be dealt with through the criminal justice system, where they have not been diverted before sentencing it is therefore important that mental ill health and learning disabilities are seen as mitigating factors.

9. In addition, the T2A Alliance supports the inclusion of “Determination and/or demonstration of steps taken to address addiction or offending behaviour” as a mitigating factor. Many young adults use multiple substances—primarily alcohol, cannabis, cocaine and ecstasy (the so-called “ACCE” user profile)—and young adult offenders are more likely to be engaged in problematic drinking behaviour than their older counterparts, with a higher proportion of young adult offenders exhibiting a criminogenic need relating to alcohol than in other age groups. This mitigating factor may be particularly beneficial if it enables a community sentence or suspended sentence to be passed, rather than a custodial sentence. In general prison is a poor setting in which to deliver drug and alcohol treatment programmes and as a result community sentences linked to appropriate, and where possible young adult-specific, treatment should be used wherever possible for young adult offenders with addictions. The introduction of this mitigating factor could help to achieve this.

“Lack of maturity” and “Mental disorder or learning disability” as factors in determining the offender’s role

10. In addition to acting as a factor reflecting personal mitigation, the T2A Alliance believes that “Lack of maturity” should be considered as a factor in determining the offender’s role. We believe that this is necessary because developmentally many young adults exhibit immaturity that may be related to their offending, with research into brain development identifying a range of changes that continue through the young adult age range. A recent a review of research and other literature relating to the issue of the maturity of young adult offenders, commissioned by the Barrow Cadbury Trust and conducted by the University of Birmingham, found that: “Development of those areas of the brain concerned with higher order cognitive processes and executive functions, including control of impulses and regulation and interpretation of emotions, continues into early adulthood; the human brain is not “mature” until the early to mid-twenties.”

11. This supports the conclusions of a report by the T2A Alliance, Universities of Crime: Young Adults, the Criminal Justice System and Social Policy, which demonstrated that it is widely recognised that brain development continues into young adulthood and that young adults potentially face greater difficulties in controlling behaviour, are more prone to risky behaviour and are less able to plan for the future. These conclusions were also supported by discussions at a T2A Alliance expert roundtable hosted by Lord Bradley in the House of Lords in February 2011 (which brought together key experts from the world of neurology, psychology and criminology to discuss the concept of maturity).

12. This suggests that young adults’ levels of maturity may affect their culpability, and this should therefore be considered in determining their role. We therefore believe that “Involvement through lack of maturity where it relates to the offender’s role” should be a factor that indicates a subordinate role in relevant offences. To prevent “double counting” (where the same factor is considered twice), if this change is made then the factor reflecting personal mitigation should become “Age/lack of maturity where it does not relate to the offender’s
role”. With offences of “permitting premises to be used”, where role is not taken into account, “Age/lack of maturity where linked to the commission of the offence” should be a factor indicating lower culpability, taken into account at Step 1, and “Age/lack of maturity where not linked to the commission of the offence” should be a factor reflecting personal mitigation, taken into account at Step 2. For offences of possession, the approach set out in the draft guideline is the most appropriate one.

13. Similarly, the T2A Alliance believes that “Mental disorder or learning disability” should be considered in establishing the offender’s role (as well as in personal mitigation), as it relates to culpability. This would be in line with the recently-published final guideline on assault, where “Mental disorder or learning disability, where linked to the commission of the offence” is identified as a factor indicating lower culpability and “Mental disorder or learning disability, where not linked to the commission of the offence” is identified as a factor reflecting personal mitigation. For the sake of consistency, the same approach should be taken here, with “Mental disorder or learning disability” appearing as a factor in both Step 1 (indicating a subordinate role) and Step 2 (as a factor reflecting personal mitigation) of the sentencing process. The same system used should be used to prevent double counting as for “Lack of maturity” (see Paragraph 12, above).

Reducing sentence lengths

14. In the T2A Alliance’s view, the Sentencing Council should have proposed reducing sentence lengths for some minor drug offences. The T2A Alliance does not believe it is necessary or appropriate to deal with the many low-level drug offences through the criminal justice system. Where low-level drug offences do come before the courts, the sentences given should therefore minimise the impact on criminal justice resources and on the individual. In this context, in our view shorter sentences for some possession and supply offences would be proportionate and fair, as well as protecting scarce resources in the prison and probation services. The starting points for possession offences should therefore be reduced (it is difficult to think of circumstances where a prison sentence would an appropriate response to a possession offence but as of 30 June 2009 there were 421 people, including 108 young adults aged 18—24, in custody for possession), while the starting points for lower-level production and supply offences should also be reconsidered.

15. The T2A Alliance also thinks that more should be done to ensure that young adults who purchase drugs for friends, sometimes making a small profit (often known as “social supply”), do not receive sentences that would be more appropriate for a genuinely commercial supplier. For this purpose the relevant part of the definition of somebody in a “subordinate” role for a supply offence—“absence of any financial gain” (emphasis added)—should be changed to allow an individual whose primary motivation was not financial gain, and where the financial gain was minimal, to be determined as playing a “subordinate” role. Alternatively, a specific mitigating factor could be created to address this issue.

Conclusions

16. Young adults aged 18—24, who constitute less than 10% of the population, are disproportionately involved in the criminal justice system, making up more than one-third of those commencing a community order or suspended sentence order, one-third of the probation service’s caseload and almost one-third of those sentenced to prison each year. This demonstrates the importance of recognising the needs and circumstance of young adults in developing effective sentencing.

17. The proposal to include “Age/lack of maturity” as a mitigating factor in sentencing for drugs offences is a positive step towards incorporating these issues into sentencing practice. However, the Sentencing Council could, and should, go further by also incorporating the maturity of the offender into the determination of the offender’s role in the offence. This would fully integrate the issue of maturity into the sentencing process.

Further Information

If you would like to discuss the contents of this submission further, please contact Max Rutherford, Criminal Justice Programme Officer at the Barrow Cadbury Trust, at m.rutherford@barrowcadbury.org.uk or on 020 7632 9066.

The members of the T2A Alliance are: Addaction, Catch22, the Centre for Crime and Justice Studies, Clinks, the Criminal Justice Alliance, the Howard League for Penal Reform, Nacro, the Prince’s Trust, the Prison Reform Trust, the Revolving Doors Agency, the Young Foundation, Young People in Focus and YoungMinds, and the T2A Alliance is supported by the Barrow Cadbury Trust.

May 2011
EXECUTIVE SUMMARY

Q2. The consultation does strike the right balance between harm and culpability. The way it measures harm and culpability are not correct since they assume that quantity is an accurate indicator of harm. Research shows that this is not the case in the case of import/export offences, or dealing/supply:

— We recommend that weight not be used in determining sentences for drug importation/exportation.
— We also recommend that for dealing and use, international use of quantity to determine sentences be draw on in order to establish a system of quantities which is based on best practice. Only in doing so, can sentences be deemed to be proportionate.

Q3. Whether or not purity should be taken into account will depend on what facilities there are to measure purity and whether this can be done consistently in all cases. Further thought needs to be given specifically to the issue of purity and crack cocaine.

Q5. The proposed sentences will not result in lesser sentences for drug mules. This is because of the emphasis on weight as an indicator of seriousness. Research has found that mules cannot know what they are carrying and that they carry much larger quantities of drugs than professional traffickers (those carrying their own drugs).

Q6. Confiscation orders are a useful tool in regards to mid to high level participants in the drugs trade.

Q2. Does the guideline strike the right balance between harm and culpability?

2.1 The proposed guidelines take the quantity of drug as a measure of harm and the offender’s role is taken as an indicator of culpability. The proposed guidelines will combine these in a matrix.

Whilst we agree that the balance between the two is accurate, we question the accuracy of these measures. As it stands they will result in disproportionate sentences.

Quantity/harm

2.2 The sentencing council claims that “the quantity of drug involved in the offence could be seen to be indicative of harm cause by the offence” (Sentencing Council, Public Consultation p 11). This is based on the premise that the weight of drugs seized will be an indication of harm caused. Whilst this is logical when comparing supply versus possession, this is not an appropriate measure of harm in import/export type offences. Research is emerging which questions the use of threshold quantities in the context of differentiating between drug supply and use. These will be discussed in turn.

2.3 Research has examined the relationship between quantity carried and seriousness of offending in import/export type offences. It shows that drug mules cannot possibly know what they are carrying. This is the case for both “mules” (who are subject to coercion/threat) and “couriers” (those who make a decision to traffic drugs). To summarise the research:

2.3.1 The technologies used to conceal the drugs ensures that mules cannot see what or how much they are carrying. This is particularly true for mules who are employed by large collectives who have access to sophisticated methods of concealment (is where chemical processing is used to conceal very large quantities of drug in plastic, soaked into cloth, etc).

2.3.2 Those who recruited mules said that they routinely mislead drug mules about what/how much of a drug they were carrying. Several mules reported carrying larger quantities than agreed. One man agreed to carry 2 kilos of cocaine (after being threatened); he was arrested with two kilos of cocaine and another three kilos of heroin.

2.3.3 “Professional” traffickers (who carry their own drugs) are aware of current sentencing guidelines and carry less than five kilos as a result (the current threshold between different sentencing guidelines). It is highly likely that they will choose to traffic less than two and a half kilos in the hope of receiving a lower sentence. This research found that many currently carried less than two kilos.

2.3.4 In contrast, mules were less likely to understand the implications of the weight of drug they were carrying. As a result, mules often carry greater quantities of drug than professional (often above 2 kilos, and sometimes greater than five kilos).

Recommendation

2.4 The quantity scale recommended by the Sentencing Council is the same one used for possession. We recommend that a separate scale be developed for import/export offences. An alternative would be to use a simplified scale of “role” and class of drug (but not quantity) to determine starting points and ranges for import/export offences exclusively. This would allow for mitigating factors to have a much greater impact on sentences, particularly where couriers are from vulnerable backgrounds etc as highlighted in the report.

2.5 For drug supply and use, recent research has examined the use of quantity (and specifically “threshold quantities” in sentencing for drug supply and use. There are a number of international examples of this. Research from Australia demonstrates comprehensively that there use of weights results in disproportionate outcomes.\(^{15}\)

2.5.1 By correlating a number of harms (such as potential profit, number of doses and others), the research demonstrated that the sentencing thresholds supposed to determine between users and dealers. They demonstrated that as a result users of MDMA were more likely to be sentenced as dealers compared to users of cannabis. In contrast, dealers of cannabis were more likely to be sentences as users.

2.6 An expert seminar held by the transnational institute has also examined the use of threshold quantities:\(^{16}\)

2.6.1 Threshold quantities are used widely internationally with mixed results. The Czech Republic has recently abandoned using weight to determine sentences as it proved to be too rigid. In Peru, the use of weight thresholds has resulted in more users being imprisoned than previously, although this was not the original intention.

2.6.2 The use of weight does not distinguish between user-suppliers and dealers. The intention behind theses offenders is acknowledged as an important one in the Consultation on Sentencing for Drugs Offences by the Sentencing Council.

2.6.3 There are a variety of international examples which can be usefully considered. For example in Portugal, “users” are those carrying up to a week’s supply of drug. In comparison, in Norway to be prosecuted as a “user”, the person must have only one dose of a drug.

**Recommendation**

2.7 The weights recommended in the report are not backed up by sufficient research to make them practical. Use must be made of international experiences of using weight to determine punishment. Ideally an expert seminar be convened to establish drug weights. This should ideally take into account a scale of harm caused by different drugs.

Q3. **What should be the approach to the issue of purity in sentencing?**

3.1 The issue of purity becomes particularly important where quantity is a key factor in determining sentencing. Policy needs to be developed to ensure that purity is measured consistently.

3.2 Purity in import/export

There is growing evidence that purity of cocaine is dropping, not only at the street level but also at the point of import. Using purity as a measure of seriousness could result in fluctuations in sentencing that actually have little to do with seriousness of offending.

**Purity and crack cocaine**

3.3 Measure purity could mean that sentences for crack cocaine would be lower than those for powder cocaine due to the much greater percentage of other substances present.

**Recommendations**

3.4 Not enough thought has been given to the importance of purity. We recommend that it should not be measured in cases of possession (which would result in parity of sentencing for crack cocaine and heroin despite lesser purity). The reflects the harmfulness of crack cocaine.

Q5. **What is the likely impact of the proposed approach to sentences for “drug mules”?**

5.1 Research with imprisoned drug traffickers demonstrates that the proposed sentencing guidelines will not result in lower sentences for drug mules.\(^{17}\) This is mainly due to the use of quantity as a measure for harm (discussed above at 2.1–2.4). Research has found that drug mules (carrying drugs for others) often carry larger quantities of drugs compared to “professional” traffickers (carrying drugs for themselves). Typically, mules carry quantities from one to six kilos but professionals carry around one to two kilos. Professionals knew what they were carrying and were aware of sentencing thresholds (and as a result never carried more than five kilos which would result in a higher sentence (according to current sentencing thresholds).

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\(^{16}\) Transnational Institute (2011) TNI-EMCDDA expert seminar on threshold quantities Lisbon: Transnational Institute.


\(^{17}\) Fleetwood (2011).
Impact of new sentences

5.2 At present, the average sentence for importing a Class A drug is seven years.\(^{18}\) The proposed sentence guidelines will almost certainly result in drug mules receiving sentences higher than the current average. In contrast, those who carry their own drugs could receive a lesser sentence:

5.2.1 Under the proposed guidelines, a mule carrying 2.7 kilos would be classed as a “subordinate” offender importing “very large” amount. They would receive a sentence in the range of seven years six months to nine years.

5.2.2 In contrast, a “professional” traffickers will probably carry less to result in a lower sentence. Under the proposed guidelines (and if they had no previous record), professional traffickers could expect a lower sentence (five years to seven years six months) than drug mules.

Recommendations

5.3 All people arrested with drugs should be assumed to be in subordinate roles unless there is firm evidence to prove otherwise. The quantity thresholds should also be reviewed by a panel of experts (including those who have done research on drug mules) to establish quantities that reflect the realities of practice in the international cocaine trade.

Q6. What is the impact on re-offending of confiscation orders for drug offences?

6.1 Research with drug traffickers imprisoned in the UK has found that confiscation orders are viewed by traffickers as a more serious deterrent than long prison sentences.\(^{19}\) This is only in relation to import/export scale offences and middle-market traffickers. Confiscation orders should be used sparingly on those further down the hierarchy (for example dealers, user-dealers).

May 2011

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**Written evidence from the Magistrates’ Association Sentencing Committee (DB 03)**

**EXECUTIVE SUMMARY**

1. The Magistrates’ Association (MA) has commented on the description of the roles of offenders. It accepts that importation and cultivation offences are likely to be committed by those who operate within a hierarchical organization, where someone plans and finances the operation, middle-ranking operatives follow delegated instructions and other people follow orders without knowing the full scale of what they are involved in.

2. It queries whether this model operates for supply and possession with intent to supply offences.

3. It also seeks more clarity on the various roles of those who bring drugs into prisons and those who trade them within prisons.

**SUPPLY AND POSSESSION WITH INTENT TO SUPPLY**

4. Most MA members agree with the roles as proposed for each of the offences covered by the draft guideline, bearing in mind that these are guidelines and magistrates will be able to use the examples to decide the appropriate category in real cases. Again, the key element is that each case must be treated according to all the factors involved.

5. Some members felt that the hierarchical model of roles provided for importation offences (and for production/cultivation offences) consisting of Mr Big/middle operatives/pawns is less applicable to supply and possession with intent to supply offences.

6. The possession of scales/equipment/unexplained bundles of cash does not mean a leading role in a hierarchical operation but sometimes a small “sole trader” who buys from a bigger “sole trader” so he may have a leading role but in a one-man band. We question whether that is comparable with a Mr Big in a hierarchical operation, and if such small traders are classified as having a leading role, we question whether a starting point of 5.5 years for a very small quantity of Class A will not lead to heavier sentencing.

7. The street dealer, operating on his own account and for profit, and thereby classified as having a leading role in the draft guideline, could in reality be at the lowest level of the supply organization, if there is in fact an organization at all, and be more properly classified as significant, because he “acts as a link in the chain” from importer to retailer or end user.

8. Although the roles described in the guideline are clear and easy to understand, there may be difficulties in court when there is limited information available. In the case of an offender in the magistrates' court, pleading guilty to a supply or possession with intent to supply offence, the court may only know some details.


of the circumstances of the arrest and any previous convictions. That may be sufficient to decide that the offender had a subordinate role because it was a non commercial supply to friends, but it is unlikely to help distinguish between a leading and a significant role.

9. Possession of equipment such as scales is the kind of information which is likely to be mentioned in an arresting officer’s statement and our concern is that it will lead to all such offenders being classed as leading role offenders. This is important because the starting points for a significant role are one third or one quarter of those for a leading role.

**PRISON ROLES**

10. The roles in the supply of drugs in prisons should be developed in more detail. It would seem that there are three types of supply offence in decreasing order of seriousness:

- Supply by prison officer to prisoner. This is the most serious because of the breach of a high level of trust and the opportunity for regular supplies to be smuggled into prison. This is correctly made a leading role offence. We believe that not just prison officers but any (eg civilian) employee of the Prison Service or NOMS should come into this category.

- Supply by visitor or similar bringing into prison. Less serious because the offender cannot do it very often (not daily) and usually no breach of trust but it is the route by which most drugs get into prison. If the visitor was making a legal visit (eg solicitor), or delivering catering supplies to the prison kitchen, breach of trust would be an aggravating factor. This is a significant role offence.

- Supply by prisoner to prisoner inside prison. This is arguably the least serious of the three because once drugs are inside prison it is inevitable that they will be traded and it is the offence least likely to be prosecuted by the CPS as not being in the public interest to prosecute a serving prisoner. However it is not clear which category it falls into. Some prisoners will supply because they are being bullied and intimidated inside prison and therefore the prisoner to whom they supply should be regarded as having a leading or more culpable role. In other cases the prisoner making the supply will be doing the bullying and intimidation to acquire the drugs.

May 2011

**Written evidence from the Criminal Justice Alliance (DB 04)**

**EXECUTIVE SUMMARY**

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

**ABOUT THE CRIMINAL JUSTICE ALLIANCE**

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

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

Introduction

1. The CJA welcomes the work of the Sentencing Council and the approach that it has taken in conducting its work to date. We supported the establishment of a new Sentencing Council and believe that it can promote stability and consistency in sentencing and improve the availability of data and other information about sentencing, while also playing a role in reviving public confidence in sentencing.

2. We are pleased that the Sentencing Council has chosen to develop a guideline on drug offences at this early stage in its work programme. A significant amount of work was carried out in producing the Sentencing Advisory Panel’s advice to the Sentencing Guidelines Council on this topic, and the CJA was among many organisations that responded to their consultation. We therefore welcome the decision to take this work forward, given that the Sentencing Guidelines Council was not able to produce a guideline before it was wound up.

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

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

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

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

5. The CJA supports, in general, the approach taken by the Sentencing Council in determining harm and culpability and incorporating these issues into the sentencing process. However, we are concerned that the model developed for sentencing for drug offences does not pay sufficient attention to issues related to culpability.

6. In this draft guideline (except in offences of “permitting premises to be used” and “possession of a controlled drug”), culpability is determined by assessing the role of the offender, which can be judged to be “leading”, “significant” or “subordinate”. However, in the determination of role, two specific factors that we believe relate significantly to an offender’s culpability are not highlighted: mental disorder or learning disability, and maturity. We are concerned that the emphasis on what might be termed “external factors” in the characteristics determining an offender’s role could mean that sentencers do not recognise the ways in which mental disorder or learning disability and maturity can affect an individual’s culpability, and believe that these should be clearly flagged up here.

7. As such, “Mental disorder or learning disability” should be a characteristic that is considered in establishing an offender’s role at Step 1 of the sentencing process, as well as a factor reflecting personal mitigation at Step 2. This would reflect the contents of the final sentencing guideline on assault, where “Mental disorder or learning disability, where linked to the commission of the offence” is identified as a factor indicating lower culpability and “Mental disorder or learning disability, where not linked to the commission of the offence” is identified as a factor reflecting personal mitigation. Taking the same approach here would ensure consistency.

8. The CJA supports the evidence of the Transition to Adulthood Alliance—the work of which the CJA has contributed to and whose submission to this consultation the CJA endorses—which argues, based on the latest evidence, that “young adults’ levels of maturity may affect their culpability, and this should therefore be considered in determining their role”. To achieve this, “Involvement through lack of maturity where it relates to the offender’s role” should be introduced as a factor that indicates a subordinate role in relevant offences. The factor reflecting personal mitigation would then need to be changed to “Age/lack of maturity where it does not relate to the offender’s role”, to prevent double counting.

9. With offences of “permitting premises to be used”, where the way in which culpability is measured differs from other offences in this guideline and more closely matches the structure of the guideline on assault, “Mental disorder or learning disability, where linked to the commission of the offence” and “Age/lack of maturity where linked to the commission of the offence” should be factors indicating lower culpability, taken into account at Step 1, and “Mental disorder or learning disability, where not linked to the commission of the offence” and “Age/lack of maturity where not linked to the commission of the offence” should be factors reflecting personal mitigation, taken into account at Step 2. This would be consistent with the final guideline on assault.

10. In addition, for offences of “possession of a controlled drug” the culpability of the offender and the harm caused are determined solely by the quantity of the substance(s) in their possession. However, the CJA does
not believe that possession of a larger quantity of a drug necessarily implies greater culpability or harm than possession of a smaller amount. For example, an individual might buy large quantities at one time, with the intention of using it over a long period to limit their contact with the criminal markets, or might be addicted to the relevant substance and therefore have a higher tolerance and require higher quantities. In these circumstances, it is not clear that they are necessarily causing additional harm or are more culpable than an individual who buys (and therefore possesses) smaller amounts more frequently.

11. We therefore believe that the Sentencing Council should develop a more flexible approach to sentencing. This should be designed to ensure that possession of a large quantity of a substance does not automatically lead to a long sentence. Additionally, we do not support the creation of a distinct category, carrying the longest sentences, for those caught in possession of drugs in prison (see paragraph 23, below).

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

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

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

13. The proposals set out in this guideline will not have a significant impact on the sentences given to the vast majority of people sentenced for drug offences. The only proposal that will have a real impact on the use of prison and probation resources, according to the resource assessment provided by the Sentencing Council, is the change to the sentencing of drug mules. As this group is likely to have low rates of reoffending anyway, the proposed guideline will most probably have a negligible effect on the reoffending rates of those sentenced for drug offences.

14. The CJA believes that the Sentencing Council could have a more significant impact on reoffending rates by reducing the number of prison sentences given annually for lower-level drug offences. The latest research from the Ministry of Justice shows that community sentences are more effective (by between 5 and 9 percentage points in 2008) at reducing one-year proven reoffending rates than custodial sentences of less than twelve months for similar offenders.22 If proposals were developed that resulted in people who would now receive a short custodial sentence instead receiving a community sentence, we would expect fewer to reoffend.

15. In particular, we do not believe that custody should ever be used for possession offences, yet this guideline proposes that possession of even a Class B drug (in the community) should result in a sentence of up to 12 weeks in custody, the sort of short sentence that is particularly ineffective and damaging. Addressing this should be part of a general reduction in the sentences given for all drug offences, to counteract the effects of sentence inflation in recent years.

16. Although the harshness of sentences currently given for drug offences seems to be justified primarily by their supposed deterrent value, there is no empirical evidence to support the efficacy of deterrence in sentencing.23 The Halliday Report examined this issue, concluding that: “The evidence, though limited in this area, provides no basis for making a causal connection between variations in sentence severity, and differences in deterrent effects.”24 This is supported by an overwhelming body of evidence, including an international review of the evidence which showed that sentencing has no significant deterrent effect and concluded that “variation in sentence severity does not affect the levels of crime in society”.25 For this reason, there should not be an expectation that if this guideline proposed minor reductions in sentence severity, the number of drug offences would increase. Some of the current pressures on the prison system would, however, be reduced, freeing up space and resources to focus on rehabilitation.

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

17. We agree with the Sentencing Council that the proposals made in this draft guideline would be likely to result in less severe sentences for drug “mules”, which is entirely welcome. This area of sentencing is long overdue for substantial reform, and we welcome the attention given to it here.

18. Sentences given to drug “mules” are currently draconian, with entirely disproportionate punishments given to individuals who are frequently from disadvantaged backgrounds and coerced or pressured into committing the offence. While these individuals have committed a crime, they are the smallest link in the network of drug importation, and it is precisely because they are disposable that they are used by those who

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are running significant drug operations. In these circumstances the sentences currently given are unjust; additionally, they put unnecessary pressure on the prison system.

19. If the primary aim of the harsh sentences currently given is deterrence, then they are inevitably going to be ineffective, since most drug “mules” are very unlikely to be aware of the scale of punishment in the UK. Hibiscus, an organisation that works with female foreign national prisoners, has reported that potential couriers are often informed that, if caught, they will simply be deported.25

20. Many are also in such difficult circumstances that even if they were aware of the risks, deterrence would be unlikely to be effective. Many are coerced into complying and are themselves victims, selected due to their vulnerability and powerlessness. This is in addition to the more general concerns about the extent to which severe sentencing can act as a deterrent (see paragraph 16, above). For these reasons we urge the Justice Committee in the strongest possible terms to support the Sentencing Council in its efforts to shorten the sentences given to drug “mules”, and indeed to encourage them to go further in addressing this issue.

21. We would also encourage the Justice Committee to use its influence with the Government to encourage them to review the sentences currently being served by drug “mules” in England and Wales. There is a strong case, in our view, for commuting these sentences and deporting the individuals.

FURTHER COMMENTS

22. The CIA would also like to draw attention to two proposals in the draft guideline that relate to drug use in the prison and the supply of drugs to prisoners.

23. Firstly, the draft guideline proposes that possession of a drug in prison should put an offender into the most serious offence category for possession offences. While we believe that the effects of drugs in prisons are extremely harmful and strongly support efforts to reduce the use of drugs by prisoners, we are not convinced that this approach would be effective or appropriate. Giving these individuals a further custodial sentence (the starting point for possession of a Class A drug in prison is 1 year’s custody and the top of the range is 3 years’ custody; even for a Class C drug the starting point is 12 weeks’ custody) is unlikely to have any beneficial effect, and there is no evidence that these would act as a deterrent. Moreover, given that instances of possession of drugs in prison are usually dealt with through an adjudication, and are infrequently prosecuted, we would question the need for this category. We therefore urge the Justice Committee to recommend that this special category should be removed, and that the same factors should be used in establishing offence seriousness as are taken into account for non-prisoners.

24. We are also concerned that, for supply offences, “Supply to a prisoner (other than by a prison officer)” automatically puts the offender into a “significant” role. This could be used to penalise the families of prisoners who bring drugs into prison, which would, we believe, be inappropriate. In his Ministry of Justice-sponsored review of measures to disrupt the supply of drugs into prison, David Blakey recognised that “some prisoners put pressure on families and friends to bring drugs in”.26 Given the pressures prisoners’ families are under and the levels of coercion they may face, a “subordinate” role would be more appropriate.

25. Finally, we would like to highlight the issue of “social supply”, where individuals, often young people, purchase drugs for friends, sometimes making a small profit to cover costs or compensate them for time spent. A number of relevant organisations—including DrugScope, the UK’s leading independent centre of expertise on drugs and drug use and a member of the CIA—have argued for a review of the law of social supply for many years. In the meantime, we believe that more should be done to ensure that in cases that relate to social supply, the offender does not receive a sentence that would be more appropriate for a genuinely commercial supplier. For this purpose the definition of somebody in a “subordinate” role for a supply offence—“absence of any financial gain” (emphasis added)—should be changed to allow an individual whose primary motivation was not financial gain, and where the financial gain was minimal, to be determined as playing a “subordinate” role. Alternatively, a specific mitigating factor could be created to address this issue.

CONCLUSION

26. The Criminal Justice Alliance welcomes this inquiry. Parliamentary scrutiny of new sentencing guidelines is an important step in developing sentencing that has widespread political support and legitimacy. We also believe that clear guidance like this can promote consistency in sentencing, helping to make sure that offenders receive the sentence that they deserve.

27. We welcome the proposals contained in this draft guideline to significantly reduce the length of sentences given to drug “mules”, a reform that is long overdue. However, we are disappointed that the Sentencing Council has not gone further in reforming sentencing for other drug offences. Reducing sentence lengths for some minor drug offences would protect scarce resources in the prison and probation services and reduce the

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27. We welcome the proposals contained in this draft guideline to significantly reduce the length of sentences given to drug “mules”, a reform that is long overdue. However, we are disappointed that the Sentencing Council has not gone further in reforming sentencing for other drug offences. Reducing sentence lengths for some minor drug offences would protect scarce resources in the prison and probation services and reduce the
unnecessary overdose of prison. The Justice Committee should encourage the Sentencing Council to examine whether it could do more to address this.

May 2011

Written evidence from Dawn Gregory (DB 05)

I understand you are asking for comments with regard to the sentencing on drug offences.

I feel compelled to write to the committee. I have previously worked on the Drug Treatment and Testing Orders as a Probation Service Officer.

At times I was horrified at the way Magistrates spoke to Offenders. Their approach could be particularly soft and almost embarrassing. If a person has offended, they have committed a crime. One person, who was on a DTTO, was found injecting heroin into his arm in a phone box and when approached by police officers he resisted arrest. When we attended Court for his monthly review he was asked if he could behave any better the next coming month?

Out on the streets the Offenders are laughing in the face of our sentencing and soft approach to committing crime. I have overheard people say "Oh if I commit a crime and go to prison I get a few weeks of free meals and a roof over my head, it costs me nothing". Or other terms I have heard is "Oh what are they going to do tell me I am a noohty boy again!" Until sentencing gets tougher in this country and sentences are longer and there is something for them to fear, this country will continue to go downhill. I am ashamed when I go abroad to say I am British now!

My son was attacked a couple of months ago by two highly intoxicated men, his Court case is in July. He was nearly kicked to death, kicked in the head, all over his body, his arms were black and his forehead bore boot prints. My son could have died. What will happen to the Offenders? Virtually nothing, they will be possibly given a Community Service Order? Is this enough when someone is nearly kicked to death? I believe my son's life was saved as he is a black belt in judo, he did not fight back but used blocking techniques to stop the kicks to his head, and his blackened arms were proof of the blows his head could have taken. Many kicks in his head got through and he was unable to sit down for days as they had kicked him severely up his backside. The country is getting violent and a frightening place to live. His Court case will be in Bath magistrates in July and I hope the sentencing fits the crime or I will be protesting with banners, something has to change in this country with regard to soft sentencing.

An offence is a crime no matter the circumstances, if someone commits a crime it is a crime and should be punished. If someone possess heroin it's a crime and it shouldn't matter how much they have on them, same as cannabis and cocaine. Getting drunk and virtually kicking someone to death is a terrible crime and should be punished appropriately not a Community Order. If the men who brutally attacked my son thought they would go to prison for 15 years they may think twice about going around trying to kick people to death? I am sorry but the word out there is that they are laughing at the sentencing there is no consequences, the consequences now are so soft it is a complete and utter joke for Offenders and a violent country for so many victims. I have worked as an addictions counsellor for about eight years and a domestic violence outreach worker, on the DTTO's and as a Parent Support Advisor. Since my son was attacked I have handed in my notice at work as it is a losing battle.

May 2011

Written evidence from the Prison Reform Trust (DB 08)

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

The most important part of PRT's submission is a new report (draft attached) to be published later in June, jointly with Hibiscus, on the experiences of foreign national women imprisoned in the UK, many for the unlawful importation of drugs. The report's findings complement the Sentencing Council's bulletin Drug "mules": twelve case studies. This powerful, authentic body of evidence supports the case for more lenient support and protection. Those who are shown to be culpable, with little mitigation should usually be repatriated to a prison in their own country.

As PRT's response to the Green Paper Breaking the Cycle argues:

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

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

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

PRT’s responses to most of the questions in the Professional Consultation paper are brief. It is hoped that the accompanying PRT/Hibiscus report will also receive full consideration by the Sentencing Council.

Consultation Questions:

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

Q2. Do you agree with the Council’s approach to the issue of purity? If you do not agree, it would be helpful to the Council if you would explain your reasoning?
   The case is argued clearly and logically. PRT will defer on this matter to those with greater knowledge and expertise.

Q3. Do you agree with the Council’s approach of separating Classes Band C?
   Yes.

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

Q5. Do you think that supplying to an undercover police officer should be included in the guideline? If yes, please state at what stage
   No—it is immaterial whether or not the recipient of the drug is an undercover police officer or an ordinary member of the public.

Q6. Do you agree that possession of a drug in a prison should put an offender into the most serious offence category for possession offences?
   No—this proposal would unduly punish people in some poorly managed prison regimes, where security is lax and where treatment of those with drug habits is absent or ineffective.

Q7. Should “medical evidence that a drug is used to help with a medical condition” be included as a mitigating factor for possession offences?
   Yes—medical evidence as to the relief of pain in chronic conditions should be a mitigating factor. This is currently listed as a mitigating factor in the Magistrates’ Courts Sentencing Guidelines and if it were omitted, this would therefore lead to more severe sentencing in some cases than current practice. This would be contrary to the Sentencing Council’s stated intention of maintaining sentencing levels for drug offences broadly at current levels.

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

Q9. Do you agree with the roles as proposed for each of the offences covered by the draft guideline?
   Yes—PRT welcomes the inclusion of the role of drug courier or “mule” in the subordinate category of importation offences.

Q10. Do you agree with the aggravating and mitigating factors outlined for each of the offences covered by the draft guideline?
   Yes, with one qualification—PRT is pleased to see the identification of “factors reducing seriousness or reflecting personal mitigation” for each offence. PRT particularly welcomes the inclusion of: “mental disorder or learning disability”; “offender’s vulnerability was exploited”; “sole or primary carer for dependent relatives”;
and “age and / or lack of maturity where it affects the responsibility of the offender”, in the factors identified for each offence.

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

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

The guideline does not provide for an alternative to the court process for minor or “subordinate” offences where strong mitigation exists. PRT would like to see the potential for diversion from either the court process or the criminal justice system to be clear within the guideline at each stage. While such diversion would ideally take place from the police custody suite or by the Crown Prosecution Service, it is evident from the number of people in prison who are mentally ill, have severe learning disabilities, or other vulnerabilities, that assessment at the pre-court stage is far from perfect.

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

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

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

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

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

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

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

For many drug “mules” the starting points and category ranges in the draft guideline would still constitute excessive punishment. We favour a much more significant scaling down of the level of sentences for drug couriers. As the Sentencing Council’s case studies show, the impact of sentences on these offenders is particularly severe because of the degree of distress caused by separation, lack of visits and lack of personal contact with their families and children. It would be proper to take this into account in setting the level of sentences for these offenders. The case studies also show that length of sentence is not a significant factor in terms of deterrence for this group. The women interviewed had been given the impression that they would not be caught and they went ahead despite the risks due to their desperate situations or because of coercion.

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

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

It is also important that victims who express a wish to meet the offender should, provided the offender agrees, have the opportunity to do so. This can be at the pre or post court stage and through a properly administered restorative justice arrangement.
Q14. Is there any other way in which equality and diversity should be considered as part of this draft guideline?

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

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

We are concerned that the proposed guidelines for cultivation of Class B drugs would apparently produce a significant increase in the use of custody for cultivating cannabis. We understand the wish to ensure that there are substantial sentences in cases of cultivation with a significant commercial element. However, a large number of cultivation cases are currently sentenced in magistrates’ courts and many of these receive non-custodial sentences. These include cases of cultivation for the offender’s own use and offences involving supply to a small number of friends. We do not consider that it is proportionate to impose custodial sentences for the cultivation of cannabis for personal use or for small scale sharing with friends unless there are significant aggravating factors.

PRT and Hibiscus would welcome the opportunity to present and discuss their report with members and staff of the Sentencing Council.

REFERENCES


May 2011