

*Law Reform without Legislative Reform***Sentencing for Drug Offences in England and Wales**By Genevieve Harris¹

Sentencing for drug offences in England and Wales has recently undergone a wide-sweeping review and public consultation. Fundamental issues of principle were brought forward for a constructive public discussion for the first time and an Advice has been issued which, if adopted, will radically change sentencing in the courts for many drug offences, and particularly in the case of drug-couriers. The purpose of this report is to examine and evaluate this mechanism for law reform, without the need for legislative reform, and to consider the specific discussion around sentencing for drug offences which it has led to.

THE MECHANISM

Historically Parliament would lay down a maximum sentence and beneath that cap the judge would determine the appropriate disposal based on the circumstances of the offence and the offender and proportionate to the seriousness of the crime as determined by the culpability of the offender and the harm associated with the offence (the 'just deserts' doctrine)²; custody was a last resort.³ Some judgments issued by the highest courts⁴ became precedents for cases with similar facts (this process was criticised for not consulting with interested third parties)⁵ but, predominantly, the sentence remained at the discretion of the judge.

On the one hand, this judicial discretion enabled a proportionate and offence/offender-specific response as well as tailor-

**CONCLUSIONS & RECOMMENDATIONS**

- Through the Sentencing Advisory Panel (SAP) we have learnt that deterrence as the basis of drug sentencing is, in fact, without evidence-base and ineffective.
- In the UK, current levels of sentencing for drugs couriers are disproportionate to their culpability and to the harm associated with their offence.
- SAP's advice has attempted to give a delicate balance between the consistency, transparency, and separation of powers necessary for the rule of law, the predictability which allows better resource allocation, and the overriding commitment to do justice in the individual case.

ing to the desired outcome, whether that was rehabilitation or deterrence. Also, this judicial autonomy was said to be a rule of law safeguard as it ensured the separation of powers, protecting against the risk of inappropriate political influence over sen-

tencing. On the other hand, criticisms were levied⁶ that sentencing was arbitrary, inconsistent in approach and outcome, opaque, and rife with improper discrimination all of which undermined public confidence in the criminal justice system and was itself contrary to the rule of law.

In 2008 the Sentencing Advisory Panel ('SAP') was established.⁷ SAP was a statutory but non-executive public body comprised of: members of the judiciary; police, prison and probation workers; academics; and lay members. SAP's role was to propose and frame sentencing guidelines, incorporating responses from open public consultations and in particular from those with direct experience of the offence under review. SAP sought to provide an empirical basis for its work and so commissioned several pieces of research and maintained a comparative seriousness chart between types of offences. SAP's role was initially, in effect, to ensure that when formulating guidelines, the courts had the full picture of third party interests.

SAP advices were therefore tendered to the Court of Appeal which had a statutory duty to take them into account when considering whether to frame or revise sentencing guidelines in a precedent judgment. The Court also had to bear in mind: '*the need to promote consistency in sentencing; the sentences imposed by the courts; and the cost of different sentences and their relative effectiveness in preventing re-offending*'.⁸ The Court of Appeal, (acting within its powers) rebuffed the very first advice of SAP, however, and it became clear that closer involvement of the judiciary in the process would be required to overcome their resistance to the idea of sentencing guidelines. It was also felt that the mechanism needed to be fortified so that definitive sentencing guidelines could be assured.⁹

To remedy these issues, the Sentencing Guidelines Council ('SGC') was created¹⁰ as were a number of statutory 'minimum'

sentences.¹¹ Under the new scheme, SAP would continue to consult and advise on sentencing guidelines but it would fall to the SGC (comprised, amongst others, of senior judiciary) to render a definitive sentencing guideline having also taken into account the views of Government and the Legislature. The SGC has sought to underpin this work with empirical evidence and particularly as regards statistical data. Legislation was also brought in that made it a legal requirement for a sentencing judge to have regard¹² to the relevant SGC definitive guideline and to justify¹³ cases where a sentence fell outside the recommended range. The same law required that a judge also had regard to the following purposes of sentencing: punishment; reduction of crime, including by deterrence; reform and rehabilitation; protection of the public; and, reparation.¹⁴

Having established the framework in which SAP and SGC work, parliamentary consent was not required to give their guidelines immediate legal force and so parliamentary time could be focused on other matters with the detail of sentencing hammered out separately by dedicated experts. Whether this created a democratic deficit is questionable but as all interested parties (including the relevant Government ministries) could consult on the development of guidelines, and as there is a legitimate need for separation of powers with regard to sentencing, perhaps not. Definitive guidelines have now been issued on offences from robbery¹⁵ to fraud¹⁶ as well as on overarching principles of sentencing, such as how to determine the seriousness of a crime.¹⁷ The theoretical impact of these guidelines has been profound but, other than data on sentence length, little data to evidence the impact has been collected.¹⁸

As of 6th April 2010 the functions of SAP and SGC are combined in a single Sentencing Council ('SC').¹⁹ Under this framework, the requirement is to '*follow any sentencing guidelines which are relevant*

to the offender's case ... unless the court is satisfied that it would be contrary to the interests of justice to do so.²⁰ This new presumptive threshold was intended to be 'more robust'²¹ than that under the SGC but it has been criticised as the opposite by the outgoing chair of SAP.²²

The SC also has the following new mandate: to monitor the use of guidelines by the courts and their impact on consistency and public confidence; to assess the impact of sentencing practice on the resources required for prison places, probation, and youth justice services as compared to non-sentencing related factors such as patterns of re-offending; and, to assess the impact of policy and legislation proposals.²³ The driver for this change appears to have been the need to predict future changes in prison population numbers so as to allocate resources more effectively.²⁴

It is notable that throughout these developments, the courts have maintained their power to create guideline judgments. However, they have generally reserved themselves to issues not yet considered by the statutory bodies or which need updating.²⁵

Definitive SGC guidelines will remain in force as will precedent judgments of the highest courts that SAP/SGC have not superseded. However, it is not yet clear, how, or in what time-frame, SC will proceed with advices of SAP which have not yet been made into definitive guidelines such as that on sentencing for drug offences.

REVIEW OF SENTENCING FOR DRUG OFFENCES

Parliament has set the parameters of sentencing for drug offences.²⁶ Drugs are divided into three classes – A²⁷, B²⁸, C²⁹, - with those considered most harmful at A and subject to the most severe penalties (max. life imprisonment for trafficking) and those considered least harmful at C and subject to lesser penalties (max. 14yrs imprisonment for trafficking). Parliament

has also prescribed that a court should impose a minimum sentence of 7yrs for a third class A trafficking offence unless it would be unjust to do so³⁰ and that a court should consider it aggravating where drug supply takes place within the vicinity of a school or where couriers under 18yrs old are used.³¹ Community-based and custodial interventions³² comprising mandatory drug testing and assessment with referrals into treatment,³³ have also been created.

Where to place a particular case within these parameters (subject to the statutory purposes of sentencing detailed above) has been left to the particular sentencing judge who should exercise his discretion in accordance with the guideline cases, where such have been handed down.

In fact, the courts have produced many guideline cases on sentencing for drug offences and consequently (for example) the role of the offender,³⁴ the amount of the drug,³⁵ its purity³⁶ and street-value,³⁷ and whether or not the defendant's motive was to finance his own addiction³⁸ have all become relevant to sentence. In particular the courts have elevated 'deterrence' to the main purpose of sentencing for drug trafficking.³⁹ The result is that those convicted of importation or exportation offences are sentenced more severely (average 84 months custody) than rapists (av. 79.7 months) or those guilty of grievous bodily harm or wounding with intent (av. 50.1 months).⁴⁰

Drug offending levels in the UK have nevertheless been increasing in recent years and in 2007 just fewer than 40,000 drug offences were sentenced in court whilst over 110,000 were dealt with outside of court by way of police warnings and cautions.⁴¹ Whether a case is to be prosecuted at court or not is determined with reference to The Crown Prosecution Service Charging Standards⁴² which state that a prosecution is usual when the case involves the possession of a Class A drug or the possession of more than a minimal quantity of a

Drug Couriers

(Those who carry illegal drugs from one country to another either on or inside their person or in their luggage)

It is widely accepted that the majority of drug mules come from a poor background and are vulnerable⁴³ or exploited.⁴⁴ It is also true that internal couriership of drugs (drug-swallowing) carries a real risk of fatality,⁴⁵ a high risk of other health complications,⁴⁶ and certain indignity.

Nevertheless, unlike when sentencing for other offences, *'the vulnerability and personal characteristics of the offender can play only a very small part'*⁴⁷ in the sentencing of drug mules. Likewise, credit in sentence for previous good character⁴⁸ or for a guilty plea,⁴⁹ widely available otherwise, is generally withheld. To compound matters the courts hold that, in drug mule cases, *'the necessity for deterrent sentences is even more keenly felt'*.⁵⁰ The upshot is very long custodial sentences for drug mules usually in the region of 5 – 10 years.

Having consulted with respondents, SAP's advice acknowledges criticism that such sentences are *'likely to be disproportionate to the culpability of the individual offender and the harm that results from the particular offence'*⁵¹ and it finds that *'the amount of money a courier can expect to receive is generally insignificant in relation to the profits made by those with other roles in the supply chain. A courier also tends to be a carrier with no knowledge of the wider organisation.'*⁵² On the other hand, SAP acknowledged some respondents' concern that the role of drug mule was *'critical'* to the illegal drug trade and that *'not all couriers fit the same definition'*.⁵³

SAP attempted to accommodate both these perspectives by recommending that where a drug mule:

- Became involved through naivety and comes within the general category of being poor and disadvantaged;
- Was motivated primarily by need rather than greed;
- Carried drugs on or in their person or in their luggage; and,
- Had not engaged in this type of activity before

They should be treated as being in a 'sub-ordinate' role and therefore subject to the least severe penalties. In the consultation proposals, no such qualifications had been required to fit drug mules within the sub-ordinate role category.

There is a danger that, through the required cross-referencing with drug-quantity (which arguably SAP has placed at unrealistically low levels) drug mules may be lifted into a higher range of sentencing. For example, the lowest tier of sentencing with a starting point of 3 ½ yrs custody is restricted to a maximum of 50g cocaine whereas the average amount of cocaine internal drug couriers carry, is, according to one study,⁵⁴ 400g within a range of 15g – 1900g; this would place most defendants in the Level 3 tier (capped at 500g) with a starting point of 5yrs custody and some in the Level 2 tier (capped at 2.5kg) with a starting point of 8yrs. Saying this, it appears on balance that sentences for drug mules could be reduced, in any event, by up to 40% in some cases, if the Advice becomes law.

Class B or C drug. The decision turns on issues of public interest and seriousness. The number of those reporting class A drug use in the UK has risen from 9.6% in 1996 to 13.8% for 2007/2008.⁵⁵

Accordingly, drug use touches the lives of many UK citizens in some way or another. Against this background considerable controversy⁵⁶ has arisen about the link between the classification of a drug and its actual

harm as the government has rejected⁵⁷ the evidence based recommendations of the expert advisory body in this area. The implication is that if classifications, upon which sentence guidelines are based, are wrong, current sentencing is disproportionate.

Against this maelstrom SGC requested that SAP produce an advice on sentencing for drug offences. SAP thus collected the relevant statistics and academic work and put forward a draft advice with sentencing guideline for consultation. SAP focussed only on those offences which appear before the courts in large numbers and either involve a significant use of custodial sentences or tend to result in custodial sentences of significant length.⁵⁸ These offences are: importation; exportation; supply; offering to supply; possession with intent to supply; production; possession; and, permitting premises to be used for a drug related activity. The consultation sought opinions on the following:

- The relative seriousness of drug offences compared with other forms of offending behaviour, in particular with offences of violence (including sexual offences) and dishonesty;
- The evidence base for the effectiveness of deterrent sentencing and the potential for the confiscation of offenders' assets to have a deterrent effect;
- The relevance of an offender's role and how to define various roles and the relevance of the scale or extent of the operation and the quantity of drugs involved as well as how best to calculate relative drug quantities;
- The practicalities of determining seriousness by reference to role and quantity;
- The relevance of: drug purity; supply occurring within an open drug market; and, drug street-value. Also, to what extent it is possible to make a reliable estimate of street-value;
- The relevance of: commercial motivation; mistaken belief about the drug involved;

knowing supply of a fake drug; the fact that drugs are used to help with a medical condition; and, that an offender's vulnerability was exploited. Respondents were also asked to provide details of other factors which ought to affect the seriousness of the offence and the sentence imposed;

- The role in the supply chain played by 'drug-couriers' and the appropriate sanction for these offenders; and,
- What is likely to be the most effective sanction for different types of offence and offender.

SAP received 51 responses to its consultation from respondents as varied as the Crown Prosecution Service, Parents against Lethal Addictive Drugs, the Drug Strategy Unit of the Home Office, the charity Release, the Criminal Bar Association, specialist drug-law practitioners such as Rudi Fortson QC, and also, from individuals currently imprisoned for drug offences. Some, though not all, responses have been made publicly available at this stage, but references have been made in SAP's advice.

It must be said that there are few differences between the proposals in SAP's consultation paper and the proposals in its final Advice to the SGC. The differences are as follows:

- The explicit expectation that a confiscation order will be made in all cases where there are recoverable assets has been removed from all sentencing guidelines except for that on possession of a controlled drug. SAP has recommended that further research into the effectiveness of such orders and their enforcement be undertaken;
- The watering down of the drug mule sentencing guideline (see box);
- The inclusion of various new mitigating factors: e.g. inducement to supply falling short of entrapment; and, pressure, intimidation or coercion falling short of duress;

- The removal of various aggravating factors: e.g. supply occurring within an open drugs market; and,
- Small amendments to the sentencing range for production of class B and C drugs.

On deterrence, SAP concluded that there is an *'absence of evidence to substantiate the effectiveness of the current approach'*⁵⁹ whereas *'research suggests that potential offenders are more likely to be deterred by the perceived risk of being apprehended and convicted than by the sentence that is likely to be imposed'*.⁶⁰ There was, amongst respondents, therefore, *'general agreement with the sentencing levels proposed by the Panel'* which move away from the deterrent approach of lengthy custodial sentences and looks rather to what works. For example, SAP states *'Where the offending behaviour was triggered by an addiction, the court may decide on a sentence aimed primarily at the reform and rehabilitation of the offender, with a view to reducing the risk of reoffending... there is evidence that interventions that encourage engagement with treatment can help reduce drug use and offending.'*⁶¹

On sentencing principle, SAP reaffirms the importance of proportionality whereby *'the primary consideration when sentencing is the seriousness of the offending behaviour'*.⁶² Seriousness, as before, is to be determined in accordance with the offender's culpability and the harm associated with the offence. To gauge culpability a court will look to the offender's role, level of understanding, and motivation as well as the amount of drugs; street value and purity will no longer be considered significant.

Harm, recognised as made up of primary harm to drug users and secondary harm to their families and the wider community is to be gauged, in the most part, by the class of drug. Acknowledging the concerns of a number of respondents about the association between actual harm and class of drug, SAP concluded that *'given the statutory framework... it would be inappropriate for*

sentencing guidelines to distinguish between drugs within each class'.⁶³

Notable disappointments with SAP's Advice are the lack of a presumption against custody for cases of social supply, and that the drug quantities given, against which seriousness is cross-referenced, are unrealistically low.

Were it not for the creation of SC, the Advice would doubtless have become a definitive guideline by now.⁶⁴ Under the new framework, however, before this is possible, SC would need to at least assess the cost of the different sentences proposed⁶⁵ (seemingly not yet done) and also, potentially, the impact of its new guidelines on the resources required for prison places, probation, and youth justice services⁶⁶ – no small job. Indeed, on inquiry, SC has been able to give no time-line or action plan for next steps as regards its advice.

CONCLUSION

A delicate balance has been attempted between the consistency, transparency, and separation of powers necessary for the rule of law, the predictability which allows better resource allocation, and the overriding commitment to do justice in the individual case.

England and Wales has a common law system, not a penal code, and therefore our offences can cover a wide breadth of seriousness. Moreover it would not be possible, within one guideline, to foresee and prescribe all the myriad computations of factors to do with an offender and an offence that could arise. Accordingly the UK has chosen a presumptive, rather than mandatory guideline system, but even so the judiciary have been wary.

Whether or not the balance has been struck correctly - and whatever respondents' disappointment about the mechanism's inability to go behind the flawed statutory drug classification system - progress has certainly been made towards evidence-based

guidelines. This progress has been achieved via the consultation process because it takes into account the latest academic and statistical research and the views from interested third parties as opposed to the old-style process of a closed court which heard only from parties in the guideline case itself.

In terms of drug policy, it is here where the value of the mechanism has lain. Through the consultation and advice process we have learnt that the basis of drug sentencing in England and Wales – deterrence – is, in fact, without evidence-base and ineffective. The mechanism has also driven forward the debate on drug mules with the decisive finding that current levels of sentencing are disproportionate to their culpability and to the harm associated with their offence. Indeed, many groups had campaigned on these issues for years⁶⁷ but prior to SAP's consultation there had been no real prospect of reform.

For these reasons alone, we must hope that the Advice becomes law.

NOTES

1. Associate for the International Drug Policy Consortium & In House Counsel for Release.
2. S2(2)(a) Criminal Justice Act 1991 (CJA 91)
3. S1(2)(a) Ibid
4. Court of Appeal or House of Lords (now the Supreme Court)
5. Hurley [1997] Crim L R 840
6. Halliday 2001 'Making Punishments Work; Report of a Review of the Sentencing Framework for England and Wales'
7. S80-81 Crime & Disorder Act 1998 (CDA 98)
8. S80(3) Ibid
9. Halliday 2001 (see above)
10. S167-73 Criminal Justice Act 2003 (CJA 03)
11. E.g. s110 Power of Criminal Courts (Sentencing) Act 2000 (PCC(S)A 00)
12. S172 CJA 03
13. S174 Ibid
14. S142 Ibid
15. SGC 2006 'Robbery: Definitive Guideline'
16. SGC 2009 'Sentencing for Fraud – Statutory Offences; Definitive Guideline'
17. SGC 2004 'Overarching Principles – Seriousness; Guideline'
18. Sentencing Commission Working Group 2008 'Crown Court Sentencing Survey'
19. S118 Coroners and Justice Act 2009 (CJA 09)
20. S125(1) Ibid
21. Sentencing Commission Working Group 2008 (see above) at para 9.12
22. 'Judges given free rein by 'pitifully loose' sentencing law' A Hill, The Guardian, Monday 5th April 2010
23. Part 4, CJA 09
24. Sentencing Commission Working Group 2008 (see above)
25. R v Alfonso [2005] 1 Cr App R (S) 99
26. Misuse of Drugs Act 1971 (MDA 71)
27. E.g. heroin, cocaine, crack, LSD, opium
28. E.g. amphetamines, cannabis
29. E.g. anabolic steroids, valium, GHB
30. S110 PCC(S)A 00
31. S4A MDA 71 inserted by s1 Drugs Act 2005
32. E.g. s209 CJA 03
33. 'Drugs: Protecting Families and Communities – 2008-2018 strategy; www.homeoffice.gov.uk/drug-strategy
34. R v Aranguren (1994) 99 Cr App R 347
35. R v Aramah (1982) 4 Cr App R (S) 407
36. R v Aranguren
37. Patel [1987] Crim L R 838
38. R v Alfonso [2005] 1 Cr App R (S) 99
39. R v Aramah per Lord Lane. C.J at 407: '*anything which the courts of this country can do by way of deterrent sentences on those found guilty of crimes involving these class 'A' drugs should be done.*'
40. Statistics taken from SAP 09 'Sentencing for Drug Offences: Consultation Paper' p. 12
41. Ibid p.8-9
42. Crown Prosecution Service 2010 'Incorporating the Charging Standard'. http://www.cps.gov.uk/legal/d_to_g/drug_offences/#General_Charging_Practice
43. See: Republic of Ecuador Constitutional Assembly, April 3rd 2008, Majority Report; Informe sobre el sistema de rehabilitación social, Montecristi - '*persons called 'mules, mostly women, the majority of whom have no control over narco-trafficking but are persons who rent their bodies...*'; 'Drug Couriers: A New Perspective Volume II, Howard League Handbooks, 1996 Ed. P. Green - '*of Third World Poverty, of men and women who are generally naive about drugs, of men and women whose offence was not motivated by greed but by familial concerns and financial despair*'; and UNODC and Latin America and the Caribbean Region of the World Bank, March 2007, Crime, Violence and Development: Trends, Costs, and Policy Options in the Caribbean, pg. 97, para 7.14: '*this form of couriering appeals most to people who are reckless, desperate, or ignorant.*'
44. R v Patrick Raymond Baxter [1998] EWCA Crim 1652 per Lord Justice Swinton Thomas at p. 8 of 10

45. Schaper A. et al (2003) Kokain-body packing. Seltene indication zur laparotomie. *Chirurg* 74: pp.626-631 – describes a mortality rate of 68% when severe cocaine intoxication occurs
46. See Traub. S. et al 25/12/2003 Body Packing-The Internal Concealment of Illicit Drugs, *The New England Journal of Medicine* 349:26 & *Surg. W.* (2008) Value of a Systematic Operative Protocol for Cocaine Body Packers, *Societe Internationale de Chirurgie*, 32: pp.1432-1437
47. Attorney General's Reference No.14 of 2001 (Maria Das Dores Fietosa) [2003] 1 Cr App R (S) 17 per Lord Justice Rose
48. R v John Babalola [1997] EWCA Crim 1641
49. SGC 2004 'Reduction in Sentence for a Guilty Plea' para 5.2-5.5 proposes reduced credit when the prosecution case is overwhelming
50. R v Kouadio, *The Times*, February 21, 1991 per Write J
51. SAP 2010 *Advice to the Sentencing Guidelines Council: Sentencing for Drug Offences* (SAP Advice 2010) at para. 99
52. Ibid at para. 100
53. Ibid at para 95
54. Algra et al 2007 'Role of Radiology in a National Initiative to Interdict Drug Smuggling: The Dutch Experience', *AJR* 2007; 189: pp 331-336
55. Hoare & Flatley 2008, 'Drug Misuse Declared: Findings from the British Crime Survey 2007/2008, Home Office Statistical Bulletin', – it is worth noting that this figure has remained stable since 2002
56. Nutt, D. et al. 'Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse' *The Lancet*, vol. 369 March 24, 2007
57. ACMD, 2008, 'Cannabis Classification and Public Health' para 13.5.1 classification recommendation rejected by the Government on 13/10/08 and ACMD, 2009, 'MDMA (ecstasy) A Review of its Harms and Classification Under the Misuse of Drugs Act' para 11.6-11.9 classification and harm reduction recommendations rejected by the Government on 11/2/09.
58. Open Letter of Professor Ashworth, Chairman SAP introducing consultation on sentencing for drug offences 22nd April 2009
59. Ibid at para 21
60. Ibid at para 20 & see Halliday 2001, appendix 6
61. SAP Advice 2010 at para 18
62. Ibid at para 6
63. Ibid at para 14
64. Annual Report 2009/2010 SGC & SAP p. 9: 'virtually all the Panel's proposals have found their way into law'
65. S120(11)(e) CJA 09
66. S127 Ibid
67. See e.g. Esmée Fairbairn Foundation 2004 'Rethinking Crime and Punishment'

Drug Law Reform Project

The project aims to promote more humane, balanced, and effective drug laws. Decades of repressive drug policies have not reduced the scale of drug markets and have led instead to human rights violations, a crisis in the judicial and penitentiary systems, the consolidation of organized crime, and the marginalization of vulnerable drug users, drug couriers and growers of illicit crops. It is time for an honest discussion on effective drug policy that considers changes in both legislation and implementation.

This project aims to stimulate the debate around legislative reforms by highlighting good practices and lessons learned in areas such as decriminalization, proportionality of sentences, specific harm reduction measures, alternatives to incarceration, and scheduling criteria for different substances. It also aims to encourage a constructive dialogue amongst policy makers, multi-lateral agencies and civil society in order to shape policies that are grounded in the principles of human rights, public health and harm reduction.

The International Drug Policy Consortium (IDPC) is a global network of NGOs and professionals that specialise in drug policy issues. The Transnational Institute (TNI) has gained a reputation as one of the leading drug policy research institutes and is widely recognised as a critical watchdog on UN drug control institutions and policies.



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