



House of Commons
Justice Committee

Sentencing Council: Changes to the drugs offences definitive guideline

Thirteenth Report of Session 2019–21

*Report, together with formal minutes relating
to the report*

*Ordered by the House of Commons
to be printed 17 November 2020*

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

[Sir Robert Neill MP](#) (*Conservative, Bromley and Chislehurst*) (Chair)

[Paula Barker MP](#) (*Labour, Liverpool, Wavertree*)

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[John Howell MP](#) (*Conservative, Henley*)

[Kenny MacAskill MP](#) (*Scottish National Party, East Lothian*)

[Dr Kieran Mullan MP](#) (*Conservative, Crewe and Nantwich*)

[Andy Slaughter MP](#) (*Labour, Hammersmith*)

The following were also Members of the Committee during this session.

[Ellie Reeves MP](#) (*Labour, Lewisham West and Penge*) and [Ms Marie Rimmer MP](#) (*Labour, St Helens South and Whiston*).

Powers

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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

Committee reports are published on the Committee's website at www.parliament.uk/justicecttee and in print by Order of the House.

Committee staff

The current staff of the Committee are, Chloë Cockett (Senior Specialist), Mark Doyle (Committee Media Officer), Alison Hill (Assistant Counsel), Su Panchanathan (Committee Operations Officer), Tracey Payne (Committee Specialist), Christine Randall (Committee Operations Manager), Jack Simson Caird (Assistant Counsel), Holly Tremain (Committee Specialist), Ellen Watson (Second Clerk) and David Weir (Clerk).

Contacts

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You can follow the Committee on Twitter using [@CommonsJustice](https://twitter.com/CommonsJustice)

Contents

1	Changes to the drugs offences definitive guideline	3
	The Sentencing Council	3
	Our response to consultation on changes to the drugs offences definitive guideline	3
	Annex: Letter from the Chair of the Justice Committee to the Chairman of the Sentencing Council, dated 11 November 2020	5
	Drug Offences Consultation	5
	Section Two: MDA offences—importation/exportation, supply/PWITS and production/cultivation	5
	Section Three: MDA offences—permitting premises to be used for drug-related activity	6
	Section Five: PSA offences—importation/exportation, supply/possession with intent to supply and production	7
	Section Eight: PSED—further research	7
	Formal minutes	8
	List of Reports from the Committee during the current Parliament	9

1 Changes to the drugs offences definitive guideline

The Sentencing Council

1. The Sentencing Council for England and Wales is an independent non-departmental body of the Ministry of Justice, set up to promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary. The Council's primary role is to issue guidelines on sentencing, which the courts must follow unless it is in the interests of justice not to do so. The Council also assesses the effect of its guidelines on sentencing practice and promotes public awareness of sentencing in the magistrates' courts and the Crown Court.
2. Under Section 120 of the Coroners and Justice Act 2009, the Sentencing Council is required to publish new sentencing guidelines in draft before they are finalised. The Justice Committee is listed as a statutory consultee on draft guidelines under section 120(6) of the 2009 Act. The Council must also consult the Lord Chancellor and any person that the Lord Chancellor directs should be consulted, together with other persons considered appropriate by the Council. In setting guidelines, the Council is required to have regard to various factors, including the sentences imposed by courts in England and Wales for particular offences and the need to promote consistency in sentencing.

Our response to consultation on changes to the drugs offences definitive guideline

3. The Sentencing Council launched its consultation on the drugs offences definitive guideline in January 2020, initially aiming to conclude that consultation in April, but extending the period of consultation to May once the coronavirus pandemic had resulted in a period of lockdown. The proposed changes covered a number of offences under two Acts of Parliament: the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016.
4. The offences considered under the 1971 Act were:
 - section 3 (and Customs and Excise Management Act 1979 (section 170(2))—fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug
 - section 4(3)—supplying or offering to supply a controlled drug
 - section 5(3)—possession of a controlled drug with intent to supply it to another
 - section 4(2)(a) or (b)—production of a controlled drug
 - section 6(2)—cultivation of a cannabis plant
 - section 8—permitting premises to be used for drug-related activity
 - section 5(2)—possession of a controlled drug

5. The offences considered under the 2016 Act were:

- section 4—producing a psychoactive substance
- section 5—supplying, or offering to supply, a psychoactive substance
- section 7—possession of a psychoactive substance with intent to supply
- section 8—importing or exporting a psychoactive substance
- section 9—possession of a psychoactive substance in a custodial institution

6. The Committee welcomes the decision to update the guideline on those offences and broadly supports the changes set out in the Council’s consultation document. Our views on specific aspects of the proposals are set out in a letter of 11 November 2020 from our Chair to the Chairman of the Sentencing Council, Lord Justice Holroyd, which is contained in the Annex to this Report.

Annex: Letter from the Chair of the Justice Committee to the Chairman of the Sentencing Council, dated 11 November 2020

Drug Offences Consultation

The Justice Committee thanks the Sentencing Council for giving it the opportunity of responding to its consultation regarding the proposed changes to its Drug Offences Definitive Guideline (the Guideline). In particular, we would like to thank the Council for permitting our response to be submitted after the consultation period has ended. Once again, we are grateful to the Council for agreeing to share with us the responses that it received to the consultation.

We should start by saying that we welcome the Council's decision to update the Guideline by revising the existing guidelines for offences under the Misuse of Drugs Act 1971 (the MDA) and introducing new guidelines for offences under the Psychoactive Substances Act 2016 (the PSA).

For ease of reference, we have structured our response in line with the order of the consultation questions. Whilst we have not commented on every question raised in the consultation; we have considered with interest the issues discussed in the consultation.

Section Two: MDA offences—importation/exportation, supply/PWITS and production/cultivation

Culpability

We support the inclusion of additional culpability factors to address the nature of drug offending currently coming before the courts.

We note and share, several respondents' concerns, that some of the additional culpability factors relating to the exploitation of others might in practice indicate a 'significant' as opposed to a 'leading' role; and further that some of the culpability factors could result in drug mules receiving a disproportionately harsh sentence.

We note with interest several respondents' comments regarding the Modern Slavery Act. We feel that further training and resources on this subject matter would be beneficial for sentencers.

We agree with the assertion that involving an innocent agent in the commission of an offence (importation guideline) indicates a higher degree of culpability.

We note with interest several respondents' observations that the proposed additional culpability factor of "exploitation of children and/or vulnerable persons to assist in drug-related activity" is very similar to the statutory aggravating factor of an "offender used or

permitted a person under 18 to deliver a controlled drug to a third person”. We believe that if this proposed culpability factor is retained the Guideline would benefit from further clarification to avoid the risk of “double counting”.

The Guideline might benefit from providing examples of what would amount to an “other advantage” and also what would constitute a “substantial”, “significant” or a “limited” advantage. This will help make the Guideline more accessible to members of the public and provide greater transparency regarding sentencing. The examples could take into consideration the possibility that an offender might have a limited advantage in the specific transaction involved in the offence but that there was an understanding that they would receive a more substantial advantage at a later date. There will also be differences as to what would constitute a substantial financial advantage from a subjective and an objective viewpoint.

Harm

The Committee welcomes the Council’s two step approach to ensure that the harm section of the Guideline remains up to date; in particular the review of the listed quantities on a three-year basis.

The Committee is concerned that the quantity of drugs that an offender is caught with often only provides a snapshot of the scale of the operation. We are conscious that this might lead to offenders structuring their operations to avoid higher sentences; and that quantity alone might not accurately measure the harm caused by the offence. We propose that additional factors to consider could be the commercial nature and/or the sophistication of the offence. This could accommodate a broader range of circumstances. For example the level of harm caused by an offender obtaining drugs for a circle of associates, who obtains a high quantity of drugs in order to obtain a ‘bulk’ deal is very different to an offender who runs a sophisticated operation, facilitating numerous transactions across a wide geographic base but who would only have limited quantities on their person at any one time.

We also note the concern, raised by responses to the Consultation, that measuring harm by reference to quantity can disproportionately disadvantage drug mules who will often have no control over the type or quantity of drugs they are carrying.

We also believe that it might be beneficial for further guidance to be provided regarding assessing the harm caused by the drug “spice”.

Section Three: MDA offences—permitting premises to be used for drug-related activity

Harm

We welcome the addition of indicative quantities for a broader range of drugs provided when measuring the harm; it would be helpful if these, like the quantities for the MDA offences referred to in section two, were also reviewed on a three-year basis.

Aggravating and mitigating factors

We note the inclusion of the additional aggravating factor: “Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity”.

Please could the Council explain further about this statutory aggravating factor as it is not discussed in the consultation.

Section Five: PSA offences—importation/exportation, supply/possession with intent to supply and production

Culpability, aggravating / mitigating factors

The Committee agrees with the Council’s approach that the factors to be considered by a court when sentencing an offender of a PSA offence should be the same or very similar to those considered when sentencing a person convicted of a mirror offence under the MDA.

Harm

The Committee acknowledges that it is not possible to assess harm by reference to the quantity or weight of a specified list of substances, for offences under the PSA.

The Committee is supportive of the Council’s approach of considering the commercial scale of the operation when assessing the harm caused by the offence. The Committee considered whether the effect of the substance should also be an integral part of the categorisation of harm. For example supplying a modest quantity of a substance which has a very serious psychoactive effect should perhaps carry the same or even a heavier sentence than the supply of a larger quantity of a substance which has only a mild effect.

Section Eight: PSED—further research

The Committee welcomes the Council’s decision to consider what the Council can do within its remit to reduce disparities and promote equal opportunity within the justice system.

It might be helpful when doing this exercise for the Council to consider in addition to its guidelines how it engages on a broader basis with sentencers about sentencing decisions and the factors that can give rise to disproportionality.

The Committee is interested to know the result of the Council’s evaluation exercise regarding the language it uses in its guidelines and any plans for future work in this area.

I hope that you will find this comments and observations of some help to you in developing the definitive version of the guideline.

Formal minutes

Tuesday 17 November 2020

Members present:

Sir Robert Neill, in the Chair

Paula Barker	Maria Eagle
Richard Burgon	John Howell
Rob Butler	Dr Kieran Mullan
Miss Sarah Dines	Andy Slaughter

Draft Report (*Sentencing Council: Changes to the drugs offences definitive guideline*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 6 read and agreed to.

Annex agreed to.

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

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

[Adjourned till Tuesday 24 November at 1.45 pm]

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2019–21

First Report	Appointment of Chair of the Office for Legal Complaints	HC 224
Second Report	Sentencing Council consultation on changes to magistrates' court sentencing guidelines	HC 460
Third Report	Coronavirus (COVID-19): The impact on probation systems	HC 461 (HC 826)
Fourth Report	Coronavirus (COVID-19): The impact on prisons	HC 299
Fifth Report	Ageing prison population	HC 304 (HC 976)
Sixth Report	Coronavirus (COVID-19): The impact on courts	HC 519
Seventh Report	Coronavirus (COVID-19): the impact on the legal professions in England and Wales	HC 520 (HC 898)
Eighth Report	Appointment of HM Chief Inspector of Prisons	HC 750
Ninth Report	Private prosecutions: safeguards	HC 497
Tenth Report	Sentencing Council consultation on sentencing guidelines for firearms offences	HC 827
Eleventh Report	Sentencing Council consultation on the assault offences guideline	HC 921
Twelfth Report	Children and Young People in Custody (Part 1): Entry into the youth justice system	HC 306
First Special Report	Prison Governance: Government Response to the Committee's First Report of Session 2019	HC 150
Second Special Report	Court and Tribunal Reforms: Government Response to the Committee's Second Report of Session 2019	HC 151
Third Special Report	Transforming Rehabilitation: Follow-up: Government Response to the Committee's Nineteenth Report of Session 2017–19	HC 152
Fourth Special Report	Coronavirus (COVID-19): The impact on probation systems: Government Response to the Committee's Third Report of Session 2019–21	HC 826
Fifth Special Report	Coronavirus (Covid 19): The impact on the legal professions in England and Wales: Government Response to the Committee's Seventh Report of Session 2019–21	HC 898
Sixth Special Report	Ageing prison population: Government Response to the Committee's Fifth Report of Session 2019–21	HC 976