Release's Response to the Sentencing Council's January 2020 Drug Offences Consultation

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Release is the national centre of expertise on drugs and drugs law in the UK. The organisation, founded in 1967, is an independent and registered charity. Release provides free non-judgmental, specialist advice and information to the public and professionals on issues related to drug use and to drug laws. The organisation campaigns directly on issues that impact on its clients - it is their experiences that drive the policy work that Release does and why Release advocates for evidence-based drug policies that are founded on principles of public health rather than criminal justice. Release believes in a just and fair society where drug policies should reduce the harms associated with drugs, and where those who use drugs are treated based on principles of human rights, dignity and equality. Release is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

Release welcomes the opportunity to respond to this Consultation process. Release provided a detailed submission to the previous consultation carried out by the Sentencing Council ('SC') in 2011, as well as participating in stakeholder meeting. That submission had a significant impact on the final Guideline as outlined here.

We have a number of concerns related to the current draft proposals, the main ones being:

- The introduction of new characteristics to determine "leading role", in our opinion the proposed activities are not indicative of this role but can occur in any part of the supply chain and so should be introduced as aggravating factors;
- The proposal to change the sentencing powers for Category 4 Importation Offences – this seems wholly disproportionate and a significant departure from what is accepted practice in this area, even before the introduction of the 2012 Guideline;
- The changes in thresholds for Ecstasy tablets appears to be a reaction to the emergence of high quality MDMA tablets in the last few years, however there is still a range of purity with some tablets containing little of the active ingredient or at least much lower quantities than are presumed here;

- One of the major changes since the 2012 Guideline has been the scheduling of cannabis based medicinal products as Schedule 2 controlled drugs. However, access to these medications are severely limited due to lack of availability on the NHS and private prescriptions being financially prohibitive, meaning people have to turn to the black market. This inequity should be addressed in the Guideline.

We address the proposals raised in detail below:

Consultation Question 1 – Do you agree with the scope of the draft revised guideline and the offences it covers?

Release is concerned that some of the drivers for revising certain aspects of the Guideline are based on perception and narratives created by law enforcement rather than significant changes to the market. As such, we would question whether the proposed changes are necessary or whether they are responding to a perceived problem. For example, the narrative around 'county lines' has largely been driven by the media, politicians, and law enforcement. So called 'county lines' refers to the establishment of specific telephone lines used to facilitate the supply of drugs from urban centres, to smaller towns and rural areas, and the relocation of urban suppliers to less metropolitan areas. However, the reference to children and young people being used to 'run' drugs is not a new phenomenon and has always been a feature of this market. We would counter that this narrative is largely linked to the introduction of the Modern Slavery Act 2015, which recognised how children and adults can be exploited in criminal markets, whereas previously they would be treated as criminals they are now to be treated as victims. In reality, the use of the National Referral Mechanism is unclear and data from the Ministry of Justice suggests that young people are instead being prosecuted for the involvement in the supply of drugs. In 2015, 494 young people aged 17 and under were prosecuted for production, supply or possession with intent to supply a Class A drug ('county lines' are largely associated with the heroin and crack markets), by 2017 this number had risen to 628 young people and children, and

in 2019 it was 536 cases.[1] This would suggest that despite the narrative of young people being exploited and being perceived as victims, in reality they continue to be treated as criminals.

In addition, the concept of 'cuckooing' of the property of vulnerable adults has, in practice, been around for decades. Again, this is treated as if it is something new and explicitly linked to the 'county lines' narrative, it neither new nor unique to 'county lines'.

The drugs market exists in the UK because of demand for these substances. The last eight years have seen increased prevalence of crack cocaine[2] and, arguably, this is linked to increased deprivation. Social and economic factors are also far more likely to lead people, both adults and children, to become involved in drug supply, and, undoubtedly, ten years of austerity is more likely to be the driver for involvement in the market and increased consumption, rather than the emergence of so-called 'County Lines'.[3]

Release welcomes the Sentencing Council's commitment to reducing racial disparities in sentencing as part of this consultation, but there is a real risk that the focus on factors linked to 'county lines', which is a highly racialised narrative, will lead to greater sentencing disparities. As one academic put it in a paper published in the International Drug Policy Journal:

"With regard to novelty, similar to the 'discovery' of gangs in the previous decade, it is striking how County Lines has been presented as wholly unprecedented. Frequently referred to in the media as being a "new type of organised crime" (ITV News, 2016), interpretations of official National Crime Agency reports (e.g. NCA 2016) have also contributed to a wider framing of it having suddenly emerged out of nowhere…Relatedly, notions of gang 'penetration' abound within the discourse, with these itinerant supply networks presented as aggressively colonising new settings and 'creating' drug markets in previously peaceful idylls…these groups are presented as 'matter out of place', reinforced by the frequent promotion of police mugshots of

[1] Ministry of Justice, 2020, Criminal justice system statistics quarterly: December 2019, Outcomes By Offence Tool, https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019

[2] Home Office & Public Health England, 2019, Increase in crack cocaine use inquiry: summary of findings, https://www.gov.uk/government/publications/crack-cocaine-increase-inquiry-findings/increase-in-crack-cocaine-use-inquiry-summary-of-findings

[3] Spicer J. Between gang talk and prohibition: The transfer of blame for County Lines [published online ahead of print, 2020 Jan 16]. *Int J Drug Policy*. 2020;102667. doi:10.1016/j.drugpo.2020.102667

*drug suppliers of predominantly **BME backgrounds**. In reality, heroin and crack markets in these areas have of course long existed."*[4]

We would therefore suggest that the Council is cautious in its approach to the 'county lines' phenomenon. It is arguable that in reality the situation is being overstated by law enforcement, media and politicians; the market has definitely adapted but much of the associated features are not necessarily new. As highlighted above, there is a real danger that this line of reasoning will do more to fuel the injustice of racial disparities in the sentencing of these offences.

In addition, we would also caution the reference to 'strong opioids such as fentanyl and carfentanyl', whilst Release is very concerned about these drugs entering the market in a significant way, the evidence to date is that this has not happened. In fact, the vast majority of Fentanyl-related deaths in England in 2017 were traced to production at a single rogue laboratory mixing fentanyl and other analogues, which was rapidly shut down: 'Most of the deaths were concentrated in urban areas of Yorkshire and the Humber (around where the lab was based), with 18 deaths recorded (a rate of 6.8 per million population aged 15-64, and 6.5 % of all drug misuse deaths in the region). There were five cases in the North East (a rate of 3.0 per million population aged 15-64, and 2.4 % of all drug misuse deaths). In the other regions put together, three cases were recorded.'[5]

Consultation Question 2 – Do you have any comments on the changes proposed to the culpability factors?

Leading Role

The initial professional consultation undertaken by the SC in respect of the draft drug offences guideline in 2011[6], recognised that offenders in a "leading role" were those who had significant control over drug-related activities. For example, in respect of importation of a controlled drug,

[4] Ibid
[5] p10, Drug-related deaths and mortality in Europe, Update from the EMCDDA expert network, July 2019
[6] Sentencing Council, 2011, Drug Offences Guideline Professional Consultation, https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_Offences_Guideline_Professional_Consultation.pdf

the consultation paper stated a "leading role" would be categorised as: *"those involved in the funding or management of large scale drug importation operations, those high up in the organisational structure of such operations or those offenders operating in expectation of significant financial gain."*[7] The recognition that a "leading role" has significant control over the market, with significant financial gain, was reinforced in the SC's analysis of the responses to the 2011 consultation process[8] - the original consultation of the draft guideline had included "street dealers" within the characteristics of a "leading role", but a number of organisations, including Release, highlighted that street dealers were at the lower end of the supply chain, with little control over the market and limited financial benefit. Street dealers were not included within this role. The additional culpability factors proposed in the current draft raise similar issues to the definition of a "leading role" as categorised in the 2011 consultation paper, and the rejection of "street dealing" as a factor determining a "leading role".

Whilst we support the need to recognise where exploitation has occurred, whether in relation to young people or vulnerable people, we would submit that this should be achieved through aggravating factors considered at Step Two of the guidelines, rather than in determining the role of the offender. The main reason for this is that those involved in the supply of drugs and who have used exploitative methods may not actually have significant, or indeed any, control over the market. Many of those involved in the supply of controlled drugs from urban areas to rural areas are not considered to be high up the supply chain. Instead, they are often socially excluded and deprived and are participating in the market due to economic desperation. It may be that a supplier in these circumstances is reporting to people who have greater control over the market, but are not making significant sums of money and they are themselves dependent on drugs. It would seem that the proposed culpability factor of "exploitation of a child or a vulnerable adult" could take place in respect of any of the roles – "leading"; "significant" or "lesser" – unlike the existing factors that are listed in the current guideline for "leading role", which clearly indicate involvement in the market at a much higher level. For that reason we would strongly recommend that instead of this being a culpability factor that it is an aggravating factor, as highlighted above.

[7] Ibid p32

[8] Sentencing Council, 2012, Drug Offences: Response to Consultation https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_Offences_Response-web2.pdf

It is also important to note, that for some young people, they will not be involved in the drugs market as a result of exploitation, but rather choose to engage in the supply of drugs because of limited life choices.[9] In such circumstances the mere presence of young people in the market should not be taken as automatic exploitation. We would therefore recommend that exploitation is actually established, for the purposes of 'factors increasing seriousness', where a young person has been subject to a national referral mechanism as required under the Modern Slavery Act 2015.

The point that we have submitted in respect of exploitation applies equally to the other proposed culpability factors. "Involving an innocent agent in the commission of an offence for the purpose of importation" could again be employed by anyone involved in the drugs market, including those who fall within "significant" and "lesser" roles. This is also the case in respect of "someone exercising control over the home of another for drug-related activity". Release recognises the harmful nature of these practices, we regularly represent people who are cuckooed and see the significant damage it can cause where they have been coerced and threatened, but the reality is that in most cases those who are responsible for such actions are themselves reporting to someone higher up the drug supply chain. It is for these reasons we would also recommend that the factors proposed are not factors in determining culpability, as these behaviours exist at all levels of the drugs trade, and so should be added to the list of "factors increasing seriousness".

In *R v Ajaji & Another*[10], the Court of Appeal considered the issue of culpability and the practice of cuckooing by those involved in the supply of drugs. Lord Justice Tracey in his judgement highlighted the complexities of determining the role of an offender for the purpose of the guidelines, where cuckooing was present, addressing the issue of "leading role" he stated that neither of the defendants in the case were involved in the operation of supply of drugs from a metropolitan area, which would indicate higher culpability. That being said, the judgement did identify that a "leading role" could be established against those working in rural areas, dependent on the activities they were involved in, for example a 'local manager' or an 'enforcer

[9] Spicer J. Between gang talk and prohibition: The transfer of blame for County Lines [published online ahead of print, 2020 Jan 16]. *Int J Drug Policy*. 2020;102667. doi:10.1016/j.drugpo.2020.102667
[10] [2017] EWCA Crim 1011

of a drug supply operation of that sort'. The Lord Justice reinforces the point that we have made above, that a "leading role" would be associated with "expectation of substantial financial gain, substantial links to, and influence on, others in the chain, and directing or organising buying and selling on a commercial scale."[11]

In respect of cuckooing the judgement stated that this activity should be reflected *"in the assessment of role or by treating it as an aggravating feature at step 2 of the guideline."* As highlighted above, Release would recommend that this is treated as an aggravating factor rather than a determination in culpability, due to the fact that this activity can occur regardless of the role of the offender. As the case of *Ajayi* demonstrates, there is a risk of that the offender who has been involved in cuckooing is in fact a vulnerable participant, the co-defendant in the case, Prior, was a 17 year old boy who was involved in the supply of drugs due to coercion. In the first instance Prior was placed in a "significant role", yet the Court of Appeal determined that this was wrong and that a "lesser role" was appropriate. In addition, the Court also determined that Ajayi should be placed in a "significant role", as stated in the judgement, "those who do not fall within a leading role, but who are involved in the process of cuckooing will ordinarily fall into a significant role".

Further to the case of Ajayi, research has highlighted that those who are involved in cuckooing, often referred to as "sitters", are "widely agreed to be low-ranking group members, who in most cases, were still under the direction of top boys".[12]

The case of Ajayi and the research highlighted shows the complexity and different roles that can be engaged when cuckooing is involved, and, in our view, supports the position that this should be treated as an aggravating factor.

<u>Significant Role</u>

Release very much welcomes the proposal to amend the current factor of "motivated by financial or other advantage" by replacing "motivated" with "expectation". Through Release's

[11] Ibid

[12] https://academic-oup-com.ezproxy.mdx.ac.uk/bjc/article/58/6/1323/4668676

expert witness work we have seen numerous cases where people have been placed in the "significant role", due to the fact the activity they were involved in resulted in them not having to pay for their drugs, or where there was very limited financial gain. We would suggest that where this factor is outlined in the "lesser role" that it also includes a reference to "social supply" as well as "meeting the offender's own habit". Such cases involve little to no financial gain and in no way indicate that the person involved is part of the formal drugs market.

Lesser Role

Release welcomes the addition of 'expectation of limited, if any, financial or other advantage (including meeting the offender's own habit)' [13] as a reflection of the realities of the drug market. Particularly, as highlighted above, Release have witnessed those whose activity resulted in limited gain being placed in the leading roll group. In order to reflect a full picture of the market, as suggested under our significant role response, Release suggests that reference to social supply is included here.

Release would also like to highlight the importance of considering the Modern Slavery Act 2015 (MSA 2015) in the context of the lesser role culpability factors of 'engaged by pressure, coercion, intimidation' and 'involvement through naivety/exploitation'. The MSA 2015 provides several definitions of who is to be considered a victim of exploitation. The definitions include being a victim of behaviour which involves slavery, servitude and forced or compulsory labour; a person who is subjected to force, threats or deception designed to induce him or her to provide services of any kind; securing services from vulnerable person having chosen him or her to provide these services on the grounds of their vulnerability[14]. The parallel between these definitions and the SC's acknowledgment that engagement in the relevant offences can happen through pressure, coercion, intimidation or exploitation are clear. These are all circumstances that often present in so-called "county-lines" activity which the revised guidelines state they seek to address. Release suggests that when these circumstances apply this could be exonerating. It is suggested that in place of sentencing a referral should be made to the National Referral Mechanism (NRM).

[13] Sentencing Council, Drug Offences Consultation, January 2020: page 15.
[14] Modern Slavery Act 2015 s3(1)&(2); 3(5) and 3(6) respectively.

The Sentencing Council may consider that the statutory section 45 defence[15] is available to victims of modern slavery and a NRM referral would therefore not be necessary by the time the defendant has reached sentencing, particularly in light of the addition to the PTPH form to consider if the defence is available. However, this assumes access to adequate legal representation, in particular legal aid. The fact that the defence is available does not necessitate that it will be used. Issues with accessing legal aid are widespread, and vulnerable individuals are increasingly left with less than satisfactory representation or no representation at all. Furthermore, victims are often 'extremely wary of authorities and communicate little about their experience or their captors'[16]. Victims often fear repercussions against their families if they tell the truth about their traffickers due to the "debts" they have been required to pay back. As is widely documented, traffickers often use threats against victim's families in order to ensure compliance. There is also manipulation to be fearful of UK law enforcement to ensure their silence. In 2017 585 foreign female prisoners were assessed by the Prison Reform Trust. Of these prisoners 45 were identified as victims or potential victims of trafficking[17].

In 2018 there was recognition that the MSA 2015 was not functioning to protect victims as it had intended and an independent review was ordered, the results of which were published in May 2019. The report recognised that "a lack of awareness of the statutory defence itself persists amongst participants in the criminal justice system" and recommend that "government should work closely with relevant organisations to review the available training and guidance to ensure it includes clear and consistent information on the statutory defence"[18].

These recommendations are positive, however, as this report is just over a year old it is likely that the roll-out of these recommendations will not be complete yet or have made their way

[15] *Ibid* s45.

[16] Guilbert, K., 'Female trafficking victims wrongly jailed due to UK government 'failings', Reuters, 2018 - https://www.reuters.com/article/us-britain-slavery-women-prison/female-trafficking-victims-wrongly-jailed-due-to-uk-government-failings-idUSKCN1LX23Z

[17] *Ibid.*

[18] Secretary of State for the Home Department, 'Independent Review of the Modern Slavery Act 2015: Final Report', May 2019: page 71, paragraph 5.1.2,

into all the corners of the criminal justice system. In the meantime, it is therefore important that wherever possible opportunities to create mechanisms that protect victims are utilised.

Therefore, in order for NRM referrals to be implemented effectively into the new guidelines Release suggest that it would be necessary to extend first responder status to HM Courts & Tribunals Service. The victim will, inevitably, come in to contact with first responder organisations (namely the police) before they reach the court room. However, the opportunity to make a referral will not always be utilised and Release submit that it is important that this referral power is extended through the judicial process. This will create as much opportunity as possible for victims to be protected not criminalised. Simply returning the case to the police for a referral risks re-traumatising victims whose circumstances may have already been overlooked by the police.

Consultation Question 3 – Are there any additional differences between the three types of offence, in terms of culpability, which you feel the guidelines should take into account?

In respect of the culpability factors for production and for cultivation of cannabis, we would propose that an additional characteristic is added to "lesser role", that is, the "production or cultivation of cannabis is for medical purposes, either for the individual or for others where there is limited financial gain". A significant change that has occurred since the Guidelines were implemented in 2012 is the rescheduling of cannabis-based medicinal products to Schedule 2 of the Misuse of Drugs Regulations[19], meaning that people who need cannabis to relieve the symptoms of certain conditions may access it legally. However, in practice access to medicinal cannabis on the NHS is almost impossible; a recent Freedom of Information request shows that there have been no new prescriptions for cannabis oil in the last eighteen months, and only two children were prescribed the medication to treat Dravet's Syndrome (a severe form of epilepsy).[20] Patients can access cannabis-based medicinal products through a private prescription, but this can cost up to £2,000 per month[21]. This creates a wholly inequitable

[19] The Misuse of Drugs (Amendments) (Cannabis and Licence Fees) (England, Wales and Scotland) Regulations 2018

[20] Busby M., July 2020, No new NHS patients prescribed cannabis oil since legalisation, The Guardian, https://www.theguardian.com/politics/2020/jul/01/anger-at-nhs-failure-to-prescribe-cannabis-oil-medicines

[21] Ibid

situation where those who can afford private health care can legally obtain this medication, but those who cannot continue to be dependent on the unregulated market. In many cases, people who are involved in the cultivation of cannabis for medicinal purposes will be producing the substance for their own needs as well as others within their community, and this may be facilitated by a cannabis social club (CSC). A CSC is a not for profit organisation that seeks to ensure that people have access to high quality cannabis and that they minimise their exposure to the illicit market and its risks of criminalisation. These clubs undermine the black market and are focused on providing access to cannabis for those who find that cannabis relieves their pain and other symptoms of their health conditions. Considering the fact that the UK Government has legalised cannabis for medicinal purposes, but that barriers exist in terms of access via the NHS or because of lack of financial means to obtain a private prescription, it would be wholly disproportionate to place these people in "significant" or "leading" roles. Ideally, people in this position would not be prosecuted at all, in recognition that it is not in the public interest to do so. However, in the absence of CPS guidance to this effect, it is left to the discretion of prosecutorial decision-makers, so court proceedings continue. Release would therefore recommend that an additional characteristic is added to "lesser role" to capture this activity, and to address the inequity of the law.

Consultation Question 4 – Do you agree that the current approach to assessing harm, based on quantity, should be retained? Do you have any suggestions for other factors/ approaches?

Quantity is probably the most satisfactory way to assess harm, that being said it is not without problems in respect of disproportionate sentencing[22]. One aim of the 2012 Guidelines was to reduce the sentences for 'drug couriers', in recognition these were often individuals with no criminal record and who were often coerced into trafficking drugs, either through direct threats of violence against them or their families, or because of economic desperation. Whilst there would appear to have been a slight reduction in sentences for this group, as a result of being categorised as someone in a "lesser role", there is evidence to indicate that the harm criteria is resulting in increased and disproportionate sentences. Analysis of sentencing of this type of

[22] Fleetwood J., 2015, Sentencing reform for drug trafficking in England and Wales, IDPC, http://research.gold.ac.uk/20780/1/IDPC-briefing-paper_Sentencing-reform-for-drug-trafficking-in-the-UK.pdf

activity found that 13% of drug couriers were categorised as being in the "lesser role", but received 5 years or more imprisonment, with the quantity of drugs involved leading to increased sentences[23]. Considering the limited role, control and knowledge these types of offenders have in the drugs trade, this level of sentencing is arguably disproportionate. We would therefore recommend that whilst quantity continues to be a determinant of harm, that more explicit guidance is provided of how role interacts with the quantity drugs, and that the latter may be less relevant when considering an offender with little control over the importation or supply of drugs. In essence, encouraging the exercise of judicial discretion in such circumstances to avoid arbitrary and disproportionate sentences.

Consultation Question 5 – Do you agree with the list of drugs included in the Harm table? Are there any drugs which should be added, or any which should be removed?

Firstly, Release supports the advice to sentencers on drugs that are not listed in the 'Harm Table', and that expert evidence should be sought to determine equivalency of harm.

Release agrees with the list of drugs included in the Harm Table, however for accuracy and consistency we would propose that instead of using 'ecstasy' that the Guidelines refer to 'MDMA tablets' and 'MDMA powder' separately - Ecstasy is not a pharmacological term.

Consultation Question 6 – Do you have any views on the proposed indicative quantities for those drugs listed?

Release has the following comments on the proposed changes to indicative quantities:

<u>Ecstasy/MDMA tablets</u>

We would exercise caution in reducing the number of MDMA tablets for each category based on the purity. Whilst it is correct to say purity has increased, this factor is taken into account already at Step 2 of 'factors increasing seriousness'. Furthermore, in relation to Category 3 and 4 quantities, those involved in supply of these tablets are unlikely to know the purity of the

[23] Ibid

substance, due to lack of knowledge and control in the market. We would also highlight that purity can fluctuate, and so it could be a case that lack of precursors in the production of MDMA tablets could result in a fall in quantity of the active ingredient.

It is also worth noting that the Advisory Council on the Misuse of Drugs has twice recommended that MDMA be reclassified as a Class B controlled drug, as the harms associated with the substance are consistent with that classification. Whilst these recommendations have been rejected by Government, it does beg the question why the number of tablets are being reduced to a baseline quantity which is well below the equivalent thresholds for other Class A controlled drugs. For example, the Category 4 quantity of 13 MDMA tablets is the equivalent of 1.95g of MDMA, yet the threshold for Cocaine and Heroin is 5g. The disparity is even more pronounced in Categories 1 & 2, for example, Category 2 categorises cocaine and heroin at a threshold of 1kg, however 1300 MDMA tablets would be the equivalent of 195g of the active ingredient. The existing thresholds for MDMA tablets are at least closer in quantity to the other substances listed and the threshold amounts.

Cannabis

In relation to cannabis cultivation, the SC propose to increase the projected yield of female flowering heads (where no actual weight is forensically available) per plant from 40g to 55g, an increase of almost 30%. Whilst this may be a fair reflection of the general improvement in grower ability leading to an overall increase in average yields over the past decade[24], small scale growers (particularly first timers) will often have no idea what yield they're likely to produce. Average yield alone does not take into account the range of other key considerations (lighting, temperature, space between plants, nutrients, to name but a few) that are integral to the productivity of the plants in any cultivation. It is now widely recognised by experts on cannabis cultivation[25] that of these key consideration the available light to the plants is the single most important factor in ensuring maximum female flowering head potential. We would therefore urge the Council to seriously consider an additional caveat that any projected yield from

[24] SOCOTEC/ESG Forensics average laboratory yield for analysed plants 2017-2019 was 52g

[25] The Effect of Electrical Lighting Power and Irradiance on Indoor-Grown Cannabis Potency and Yield, Potter, D. and Duncombe, P., J Forensic Sci, May 2012, Vol. 57, No. 3

immature plants is subject to a minimum lighting requirement of 600W per square metre of growing area in any cultivation set-up.

Another notable development in recent years in relation to cannabis production and use has been the exponential rise in refined cannabis products, which includes niche substances such as shatter and wax, but for these purposes we shall refer to broadly as 'cannabis oils'. These are highly concentrated extracts that are gaining ever growing interest, in no small part due to their high efficacy and ease of administration in relation to medicinal uses of cannabis (see response to Question 3 above), and by their very refined nature require considerable quantities of raw cannabis material to produce (current evidence suggests ratios of between 8:1 and 20:1 in weight of cannabis herbal material to end product). It therefore clearly requires a vastly greater number of plants to produce an oil than would be necessary if the grower was only seeking the herbal material (for smoking, etc.), but weight-for-weight the end products are broadly analogous in terms of effect, so an oil containing 1g/1ml of highly concentrated cannabis will produce similar effects when taken orally to around 5-10g of female flowering head material taken by inhalation. In our view, where there is reasonable supporting evidence that the grower intended to solely or primarily produce an oil product, particularly where there is also a medical argument to their defence, this should be a separate sub-consideration when determining the significance of the number of plants seized and their likely yield.

<u>MDMA Powder</u>

Although we welcome the attempt to clarify the previous uncertainties over comparative quantities of MDMA (as powder or crystal) and Ecstasy (as tablets), we are concerned by the suggestion that 'MDMA has been included in the harm table as a separate drug from ecstasy'; it is a different formulation, but certainly not a different drug.

Despite stating that 'Advice from the NCA suggested that MDMA in non-tablet form is dealt similarly to other drugs commonly dealt as powders, such as cocaine, so quantities should be as those for cocaine, heroin etc.', there appears to be a discrepancy between the proposed weights for MDMA and Ecstasy in the harm tables; for instance, at Category 4, Ecstasy is proposed at 13 tablets with an assumed weight of 150mg of MDMA content (totalling 1.95 grams), whereas

MDMA is proposed at 5g. Even allowing for the additional material ubiquitous in Ecstasy tablets (which in any case would not amount to 235mg per tablet), this is a very significant gap that should be revisited. It must be borne in mind that whilst the current trend is for higher MDMA content in Ecstasy tablets, this is a relatively recent development; as little as five years ago, the primary concern with Ecstasy was in fact the low purity and presence of other, often highly dangerous, adulterants and by-products of the manufacturing process. As with all trends in drug purity, this current high potency is likely to be cyclical in nature, and we believe there is a real danger of the guidelines becoming obsolete when the next change occurs, if an overly rigid approach is applied to this issue.

Our view is that the 5g for MDMA powder is a reasonable and sensible staring point as it deals with the drug in its 'pure' form, and the basic chemistry and human biological ability to consume the substance will not change before the next review is due. We would therefore submit that the number of tablets should be calculated from this position, rather than being framed as two separate drugs with different use potentials.

Consultation Question 7 – Do you agree with the approach taken to Synthetic Cannabinoid Receptor Agonists? Do you have evidence on specific quantities, or would you prefer these drugs not to be listed, but to be approached on a case-by-case basis as per the text on 'drugs not listed'?

Synthetic Cannabinoid Receptor Agonists (SCRAs) are a wide range of substances often with very little chemical similarity apart from their propensity to act on the cannabinoid receptors in the brain (primarily CB1). Additionally, largely in order to circumvent specific named substance legislation, many SCRAs are now entering a fourth generation of variants on their original chemical structures, with often increasing potency, meaning it is almost impossible to produce sufficiently all-embracing guidance around their potential harm profiles without the need for constant revising. We would therefore support the approach to take these substances on a case-by-case basis, utilising expert knowledge in assessing their market penetration, risks, and appropriate positioning within the sentencing structure as they arise.

Consultation Question 8 - Do you have any views on how the guidelines should deal with drugs not listed, including on the text set out in the draft guidelines?

Please see our response to Q5.

Consultation Question 9 – Do you have any comments on proposed sentence levels, particularly for the Category 4 harm Importation offences?

Release is fundamentally opposed to the proposal to change the practice of sentencing importation of small quantities of controlled drugs in the same way as possession offences, by bringing them within Category 4 levels, thereby increasing the sentences for these offences.

The application of a different practice in relation to importation of small quantities was in accordance with the view taken by the Courts where it was explicitly stated that "*importation of very small amounts for personal use can be dealt with as if it were simple possession"* [26]. Release sees no reason why that practice should not continue. The stated reason for the proposed change is that sentencers were confused – if that is the case, then an additional explanation (whether included in the Guideline or by way of a separate circular) and/or training would be sufficient to address the issue.

The effect of the proposal represents a significant increase in sentences for people who simply step across a border whilst in possession of a drug. It also fails to recognise they may even be returning from a country where that drug is in fact entirely legal or at least where possession is not criminalised. By way of example, for Class A drugs the new category 4 combined with a lesser role – the least serious option - provides a starting point of low-level community order and a range of Band A fine – 18 months in custody. In comparison, a Category 1 possession offence (Class A) provides a starting point of a Band C fine, and a range of Band A fine up to a maximum of 51 weeks in custody. There is no need for these increases if no issues with the sentences themselves have been identified.

[26] R v Aramah (1982) 4 Cr App R (S) 407 at 409

Consultation Question 10 – Do you have any comments on proposed changes to aggravating or mitigating factors?

Proposal to clarify "exposure of others to more than usual danger, for example, drugs cut with harmful substances"

The proposal to separate this aggravating factor into three separate categories for clarification raises some issues. For example, the "*exposure of third parties to the risk of harm, for example, through the location of the drug related activity*" speaks to the issue of cuckooing, and for this reason and the arguments set out above in relation to culpability we would recommend that this factor specifically refers to that activity.

On the exposure of drug users to the risk of serious harm, for example through the method of production/mixing of the drug, there are unlikely to be many instances where the "*method of production*" of a substance will include elements that will fall with the scope of this sentencing guidance. The majority of synthetic substances consumed in the UK by both type and quantity (cocaine, heroin, MDMA) are manufactured abroad and imported, with only varying degrees of adulteration taking place subsequently. 'Mixing of the drug' is not a construct we would favour, but in terms of the potential harms to the end user, the adulteration of drugs increases the risk of harm and increases the profit margins. We strongly suggest these are the areas the legislation is designed to counter; users coming to harm and to dissuade people from becoming involved in trafficking. If we take cocaine as an example, two of the main cutting agents most commonly encountered (and typically added outside the UK) are phenacetin, which has been banned for human use in the USA as it is carcinogenic, and Boric acid, which is listed in Medline medical encyclopaedia as a "*dangerous poison*"[27]. By contrast, benzocaine, an adulterant commonly added to cocaine once in the UK, is a mild anaesthetic which is regularly used in dentistry with a

[27] https://medlineplus.gov/ency/article/002485.htm

very low associated harm profile. It seems inconsistent with the ethos of the guidelines to penalise high purity and ignore the fact that adulterants can range from benign to highly toxic, and we would welcome a recognition that not all 'cutting agents' are of equal harm potential, or indeed should necessarily be treated as either aggravating or mitigating per se.

In relation to the exposure of those involved in drug dealing to the risk of serious harm, for example through method of transporting drugs, with the exception of a few instances where volatile chemicals are utilised or a highly toxic substance is improperly packaged, the greatest risks in transporting drugs are interception by rival suppliers or law enforcement, neither of which would appear to be the aim of this revision of the guideline. It is a not uncommon practice for controlled substances to be transported internally (within a person's body), either through ingestion (swallowing a package) or 'plugging' (inserting into a lower body orifice, such as the anus or vagina). However, in the overwhelming majority of instances of the former, this involves individuals attempting to cross international borders with considerable (usually kilogram) quantities of a substance, and the parties responsible for instigating this method of transportation will usually be based in the drug producer country. 'Plugging', whilst not without a risk element, typically involves very small (sub-ounce) quantities of controlled substances and is a method designed to facilitate relatively quick access to the item, such as for smuggling into a prison, travelling across unfamiliar territory, or when being taken into custody, and is typically done by the transporter themselves under their own volition. Where an individual is carrying a substance on behalf of another, it is in the (usually financial) interests of the owner of the item to ensure it arrives safely and intact, and the mode of transport and type of packaging utilised usually reflects this. Unfortunately, the majority of harm experienced by transporters of controlled drugs is done when they ingest items suddenly as a result of an encounter with law enforcement, such as in the case of Edson Da Costa.[28]

We would refer to our comments on the 'county lines' phenomenon, and believe the wording of this potential risk element would benefit from revisiting to more accurately reflect the Council's intent.

[28] 'Edson Da Costa: Young father restrained by police died by 'misadventure' after putting drugs in mouth, inquest finds', The Independent, 7 June 2019, https://www.independent.co.uk/news/uk/crime/edson-da-costa-death-inquest-police-restraint-drugs-black-men-a8948366.html

"Deliberate use of sophisticated methods, including encrypted communications or similar technologies, to facilitate the commission of the offence and/or avoid or impede detection"

The use of ever more sophisticated communication and marketplace technology by those involved in the supply of controlled substances brings greater challenges for law enforcement in identifying and apprehending consignments and those sending them, and this opacity can bring with it considerable risk to the end user. However, it is important not to overlook the potentially positive influence that has arisen from online communities in taking advantage of this same technology to advise and warn one another around the consumption of potentially dangerous substances, providing a form of harm reduction in the purchasing of controlled substances.

Despite the impression portrayed in certain branches of the tabloid press, the use of the dark web for the trade in psychoactive substances is not without a harm reduction element. Although there are of course disreputable sellers who offer products that are not what they purport to be, in the knowledge that their customers (particularly if they are international) are unlikely to have much course to redress, many traders actively warn their users about their products' characteristics and potential associated risks. The dark web harm reduction pioneer Dr Fernando Caudevilla (a.k.a. 'Dr.X') has long promoted the practise of users, buyers, and sellers providing one another with advice, recommendations and warnings on the products available via third-party hosting sites such as Silk Road, AlphaBay and Empire Market.[29]

Release's drugs researcher, Dan Williams, attended and presented at a conference in Liverpool in 2015 on the theme of Novel Psychoactive Substances (NPS), often referred to at the time as 'legal highs', prior to them being controlled under the Psychoactive Substances Act 2016, where one of the main topics for discussion was the prevalence of harm reduction advice on the dark web. The following is from a policy briefing by two Swansea University academics on the subject:

- For vendors and purchasers who use the sophisticated, user friendly, and increasingly secure Dark Net sites, hidden markets present a safer environment

[29] https://energycontrol-international.org/doctor-x-files-page/https://darkwebnews.com/darknet-markets/empire-market-alphabay-clone/

for drug transactions and they reduce the multiple risks (coercion, violence, arrest, exposure to other drugs) associated with 'street' sales.

- Research demonstrates that anonymised user forums and online chat rooms encourage and facilitate information sharing about drug purchases and drug effects, representing a novel form of harm reduction for drug users and an entry point for drug support services.[30]

Therefore, it is overly simplistic to regard the use of these technologies as aggravating features in determining the seriousness of a supply case, as there is a reasonable argument that they can sometimes be mitigating. The practice is also reflective of the significant shift to online purchases that we have witnessed in the 21st century.

It seems perverse to suggest that buying better quality drugs quietly online has more negative consequences than on street corners or in stairwells of flats, with the potential for disputes and violence with ordinary people passing by or children playing.

Additionally, whilst the guideline states that this additional aggravating factor is designed to '*capture the additional seriousness of offences using very sophisticated methods of offending and methods of avoiding detection*'[31] Release submit that the phrasing used by the Sentencing Council leaves it open to misapplication. Encrypted communications are a significant part of everyday communication, particularly between young people. The messaging service WhatsApp was the leading chat app in the UK in 2018[32] and uses a particular encryption called 'end-to-end encryption' (E2E). This encryption prevents any person other than the persons sending and receiving the messages from accessing the communication[33]. The apps Snapchat and Facebook Messenger also incorporate end-to-end encryption technologies[34]. Given the popularity of these apps it is highly probable that people engaging in drug-taking activity will be using them to communicate. Furthermore, when communicating between Apple devices the default

[30] Buxton, J. and Bingham, T., 'The Rise and Challenge of Dark Net Drug Markets', Global Drug Policy Observatory, January 2015
[31] Sentencing Council, Drug Offences Consultation, January 2020, page 24.
[32] https://www.messengerpeople.com/whatsapp-user-base-uk/
[33] https://faq.whatsapp.com/general/security-and-privacy/end-to-end-encryption
[34] https://www.digitalinformationworld.com/2019/01/snapchat-end-to-end-encryption-users-media-messages.html

messaging service 'imessage' is also an encrypted service. Use of the default service is clearly not 'sophisticated', and if E2E in that case isn't sophisticated then using an alternative service which also offers E2E should also not be treated as such. This is particularly the case with social supply between friends, who may be using a technology such as WhatsApp simply because it is their normal method of communicating. The provision suggested could unnecessarily penalise this.

Equally, encrypted does not necessarily mean 'sophisticated'. Release regularly receive enquiries through our helpline from individuals who have their phones seized whilst under investigation. When a mobile device is in the hands of the police these 'encrypted messages' become easily accessible once the police have unlocked the device, often following voluntary provision of the unlock code, without the need for additional powers to be used. The people concerned may have used these "sophisticated methods" to evade detection because they are aware about the encrypted technologies in WhatsApp, Snapchat or Facebook, but it is submitted that this is no more sophisticated than other basic detection-evading methods used by those involved in drug-related activity.

<u>So called "County Lines" related activities</u>

Please see our comments at Q1 and Q2 on the proposed inclusion of: exploitation of children and or/vulnerable persons; involving an innocent agent in the commission of an offence; and exercising control over the home of another person for drug-related activity. As stated above, it is our view these should be added to aggravating factors rather than as characteristics of a "leading" role due to the fact these activities can occur within any aspect of the drugs market regardless of the role of the offender.

<u>Mitigating Factors</u>

Whilst the SC does not propose any changes to mitigating factors Release would like to reiterate some of the points raised in our initial response to the original guidelines in 2011, and raise some additional points. We would recommend that the following points are taken into consideration in respect of the current guidelines and "factors reducing seriousness":

Controlled drug used for medical reasons

We have highlighted above that cultivation and production of cannabis should include a characteristic of producing/cultivating for medical purposes in determining the role of the offender as a "lesser" one. If this is not accepted then, at the very least and for the reasons we have outlined above, it should be treated as a mitigating factor at Step 2 for these offences. In addition, there is an increasing prevalence of people importing pharmaceutical medications, which are controlled, to relieve pain and other conditions. This is often due to the fact they have difficulty in persuading their GPs that they need the medication, or the prescriber is reluctant to prescribe the medication because of wider concerns about potential abuse. In any event, this is also a group of people who are purchasing illicit pharmaceutical drugs to relieve pain, and this mitigating factor should also apply to importation offences.

Economic Disadvantage

There is little doubt that economic disadvantage plays a role in many low-level actors participating in the drugs trade. Where there are limited other economic opportunities the decision to participate in the market is a rational one. We have highlighted at Q1. and Q2. how increased numbers of people are involved in the market due to years of austerity. It is the economic and social policy decisions of successive Governments that have created disadvantage, and little has been done in recent years to level-up communities that have been most affected by austerity. In fact, the current economic crises are likely to worsen the situation for those living in deprivation. Yet, these communities often feel the brunt of law enforcement because they are socially and economically deprived, and the intersection with racial disparities in the criminal justice system is part of this experience, leading to the overrepresentation of Black people and other minority groups in the carceral state. In Australia, the case of *Bugmy v The Queen*[35], recognised economic disadvantage as a driver for criminality due to a lack of life chances and held that this should be treated as a mitigating factor. We would recommend that this is adopted by the SC as part of the revision of the current guidelines, not only does it reflect the lived experience of many defendants but it may go some way to redress racial disproportionality in the sentencing of drug offences.

[35] [2013] HCA 37 12.

Purity - both in respect of high purity being an aggravating factor and low purity being a mitigating factor

Whilst we support the principle of purity being considered at Step 2, we would highlight that low purity substances can have a greater level of harm to the individual than those at a higher purity because of the adulterants used (although the level of potential distribution would be reduced). As such, it is proposed that if an offender who possesses a significant level of control over the market ("leading role") is supplying a substance that has already been adulterated to a very low purity this should be considered as an aggravating factor. Purity levels should not be relevant to those caught within the definition of a "significant" or "lesser" role - due to the lack of control and knowledge that they would have over the product and its contents. Particularly, in respect of the "lesser" role it is highly unlikely that they would know the purity of the drug and so high purity should not be treated as an aggravating factor due to lack of knowledge.

Consultation Question 11 – Do you have any comments on the proposed guidance for minimum terms sentences?

Release welcomes the additional explanation of 'unjust in all the circumstances', however this does not go far enough. We suggest that examples are provided of unjust circumstances – perhaps a non-exhaustive list as with mitigating and aggravating factors – to provide sentencers with confidence to depart from the minimum term.

This is especially important in the context of racial disparity which we have highlighted throughout this response. In particular, we refer you to our comments at Q26., in relation to the increased rates of custodial sentencing for black people. As black people are more likely than white people to be prosecuted, and more likely to receive a custodial sentence, there is an increased risk that they will be in a position where the minimum term considerations apply. Any use of that sentencing power in these instances would have the effect of compounding the disproportionality that already exists.

Consultation Question 12 – Do you agree with the proposed changes to culpability factors?

Release welcomes the recognition that vulnerable adults can be victims of activity that leads to them being prosecuted under MDA section 8 and the subsequent changes to the guidelines 'to reflect the seriousness of cuckooing type offending, and to recognise the vulnerability of those who come under pressure to permit drug-related activity on their premises'[36]. Moving the mitigation factor of 'involvement due to pressure, intimidation or coercion falling short of duress' to become the culpability factors 'involved due to intimidation or coercion' and 'offender's vulnerability has been exploited' in order to reflective the seriousness of these issues is a welcome reflection of this[37]. However, further recognition that defendants to whom these culpability factors relate are often victims, rather than people to be criminalised, would be welcomed.

The government advice webpage on recognising adult exploitation defines exploitation as 'the deliberate maltreatment, manipulation or abuse or power and control over another person' the website continues 'exploitation can come in many forms, including slavery … forced labour, domestic violence and abuse [and] sexual violence and abuse'[38]. Release strongly believes that wherever these circumstances exist a victim has been created, not a criminal and it would be beneficial for the Sentencing Guideline to reflect this. It is also probable that Modern Slavery may be present in such circumstances. As such, our response to question two and the subsequent analysis in regards to the NRM is also applicable here.

It is arguable that this is not necessary due to the defence of duress is available for such extreme circumstances (the phrasing in the current guideline being 'pressure, intimidation or coercion falling short of duress' reflects the Sentencing Council's anticipation that the defence may be used in these circumstances), however there are limitations to the defence of duress that can make it unavailable to the defendants to whom these provisions relate.

[36] Sentencing Council, 'Drug Offences Consultation', January 2020, page 28.
[37] *Ibid,* page 29.
[38] https://www.nidirect.gov.uk/articles/recognising-adult-abuse-exploitation-and-neglect - accessed 25th June 2020.

The five elements for the defence of duress by threats are established in *Hasan*[39]. However, there are two elements of the defence which could make it unavailable to defendants who are charged under Section 8 MDA due to cuckooing and/or domestic abuse.

The first is that in order for the defence of duress to be satisfied the Defendant must have reasonably believed that threats of death or serious injury had been made against him or herself – **false imprisonment** or threat of serious psychological injury is insufficient[40]. In order for this element to be satisfied, the threat must be immediate.[41] This has the potential to be an overly simplistic model for the complexities of cuckooing, the exploitation of vulnerable persons, and domestic abuse. The exploitation of vulnerable adults exists in a complex nexus and being taken prisoner in one's own home may be sufficient for victims to become subservient as a result of their vulnerabilities. The National Crime Agency have detailed:

> *"… groups will target new premises by pursuing vulnerable individuals … Once they gain control over the victim, whether through drug dependency, debt or as part of their relationship, groups move in. Once this happens the risk of domestic abuse, sexual exploitation and violence increases. In some instances, drug users may appear to be complicit in allowing their home to be used, however the issue of true consent is questionable, as many drugs users will not necessarily see themselves as being vulnerable."*[42]

It was noted that there is likely to be an element of forced labour (drug running to pay off debts) or forced imprisonment with reports that some victims were prevented accessing some areas of their own home.[43] In such a situation, an application of the *Hasan* criteria would determine that no duress was present[44]. However, Release maintain that such situations create victims not someone who should be criminalised.

[39] R v Hasan [2005] UKHL 22
[40] *Ibid* (emphasis added).
[41] *Ibid.*
[42] National Crime Agency (2017) 'County lines violence, exploitation and drug supply', page 12.
[43] *Ibid*, page 13.
[44] R v Hasan, [2005] UKHL 22.

The other criteria for duress that may make it unavailable to victims is the test that a sober person of reasonable firmness of the defendant's age, sex, and character would have been driven to act as the defendant did. The reasonable person will not share any vulnerability the defendant may have to pressure, nor any timidity, nor emotional instability[45].

The case of *Bowen* sets out the conditions for what should be considered in regard to the defendant's character within the *Hasan* criteria. "Recognised mental illness or psychiatric condition may be allowed, however psychiatric evidence ***may be admissible*** to show that the accused is suffering from some mental illness, mental impairment or recognised psychiatric condition ***provided persons generally suffering from such condition may be more susceptible to pressure and threats***, and thus to assist the jury in deciding whether a reasonable person suffering from such a condition might have been impelled to act as the defendant did". [46] Unfortunately, this does not allow for the nuance of mental illness, mental impairment, or psychiatric conditions, and the many varying effects they can have on individuals. The effect of this is that the defence is often unavailable for victims of domestic violence[47], and those who are vulnerable as a result of a condition that does have a general characteristic of making those who suffer it 'suggestable or vulnerable to pressure and threats'[48]. To take the issue one step further, in 2017 Mrs Justice McGowan stated that a strict application of the principles in *Bowen* mean that only the defendant's age and sex should be considered[49]. Therefore, as these vulnerability factors may not be available to be taken into consideration at the trial stage. Release submit that it is important that they are given sufficient weight and mitigation at the sentencing stage too.

In the current guideline Step Two gives Judges the discretion to hand down community orders with a drug rehabilitation requirement under 209 of the Criminal and Justice Act 2003 as a

[45] *Ibid.*
[46] R v Bowen [1996] EWCA Crim 1792: 36 (emphasis added)
[47] The Criminal Bar Association of England & Wales, Briefing note prepared for the summit held by the Prison Reform Trust in London on Tuesday 17th October 2017, 'Defences available for women defendants who are victims/survivors of domestic abuse'.
[48] R v Bowen [1996] EWCA Crim 1792
[49] R v YS [2017] EWHC 2839 quoted in The Criminal Bar Association of England & Wales, Briefing note prepared for the summit held by the Prison Reform Trust in London on Tuesday 17th October 2017, 'Defences available for women defendants who are victims/survivors of domestic abuse'.

'proper alternative to a short or moderate length custodial sentence'[50] – this is reflective of an understanding of the vulnerabilities that exist in these environments. Release would encourage a similar mechanism for victims of abuse, pressure, intimidation, or coercion who do not use drugs, whereby a relevant intervention is available to address the underlying issues as a requirement of the community order.

Consultation Question 13 - Do you agree with the way in which harm is assessed within the guideline?

Release welcomes the criteria of 'substantially higher than the quantities given for Category 2' in the way harm is assessed for Category 1. Flexibility provides the framework for more proportionate outcomes, for example a defendant where 12 ecstasy pills are present not receiving a significantly lower sentence than a defendant where 18 ecstasy pills are present because they have crossed the Category 1/Category 2 threshold. However, the word 'substantially' is open to interpretation and what is considered a substantial amount may vary greatly between Judges. It is therefore suggested that when section 8 offences are being dealt with, an independent expert witness should be appointed at sentencing to offer guidance to counsel and sentencers on what constitutes 'substantially higher'.

Release also questions whether regular drug-related activity and/or premises used for drug related activity over a long period, in its current phrasing, is an appropriate indicator of harm. Overall, we would be supportive of the factors on duration being moved to Step 1, but we would caution that separating the element of 'premises used for drug activity over a long period' in Category 1 from the indicative quantities of Category 2 could lead to unintentionally unbalanced approaches to certain circumstances, for instance where an address is used for consumption over a relatively long period of time but with only small amounts being used on any given occasion.

[50] Sentencing Council Drug Offences Definitive Guideline, page 25

In addition to this, the indicator has the potential to place those who are long-term victims of cuckooing or have long-standing problems with substance use in a higher sentencing category. For example, a defendant who is charged under section 8 of the Act with Class A substances present, due to their property being cuckooed would, under the revised guidelines, be placed in Category 2 for sentencing. This is because they would fall under low culpability due to their exploitation, however harm would be determined as greater due to the activity taking place over a prolonged period of time. Depending on the victim's circumstances it is possible that no further mitigation would be available to them. A victim of exploitation and abuse could therefore be facing a starting point sentence of 36 weeks custody. In order to prevent this Release suggests prefacing this harm indicator with terminology similar to "Where the defendant has exploited a child or vulnerable person by undertaking drug-related activity in the vulnerable person's property".

Equally, whilst we welcome the expansion to include other substances beyond heroin and cannabis for the indicative quantities, and particularly the increase of cannabis to 100g within Category 2, we have some concerns (as reflected in our previous responses) about some of the equivalences used, in particular in relation to the disparity between quantities of MDMA and Ecstasy.

Consultation Question 14 – Do you have any concerns about the sentence levels for this offence, or evidence that the sentence levels in the guideline need to be revised?

We make no comment in relation to this question.

Consultation Question 15 – Do you have any comments on the changes to the aggravating and/ or mitigating factors?

As the only change here is moving the mitigating factor of 'involvement due to intimidation coercion etc.' to Step 2, which we discussed at Q 12, please refer to our previous comments.

Consultation Question 16 – Do you have any comments on the changes proposed to the Possession guideline?

Please see our response at Q9. – Release is fundamentally opposed to the proposal to increase the sentences for importation of small quantities of controlled drugs, falling within Category 4 levels.

More broadly, whilst we understand that the SC does not intend to reform the sentencing guidelines for possession offences, bar the issue of importation, we would recommend that some specific guidance be provided to Judges and Magistrates dealing with such cases. As the SC has highlighted, offences for possession of a controlled drug are the most common of the drug offences - 24,747 people were sentenced for this offence in 2019, of which 54 per cent cases involved cannabis. Possession offences make up 12 per cent of all indictable/ triable either way cases brought before the courts, and this offence is one of the major drivers for racial disparity in the criminal justice system.

Research undertaken by Release, StopWatch and LSE in 2018 found that black people were nearly 12 times more likely than white people to be sentenced for cannabis possession, despite the fact that white people are more likely to use the drug[51]. Moreover, when white people are caught in possession of drugs they are more likely to receive an out of court disposal, such as community resolutions or cautions, when compared to black people who are much more likely to be proceeded against[52]. Previous research by Release and others analysed Metropolitan Police data on outcomes for people caught in possession of cocaine broken down by ethnicity. For white people - 44 per cent were charged with possession of a cocaine, and 56 per cent received a caution[53]. Compare this to black people arrested for the exact same offence, where 78 per cent were charged and only 22 per cent cautioned[54]. This pattern of policing and charging

[51] Shiner et al, 2018, The Colour of Injustice: 'Race', drugs and law enforcement in England and Wales, Release, https://www.release.org.uk/publications/ColourOfInjustice
[52] Ibid
[53] Eastwood et al., 2014, The Numbers in Black And White: Ethnic Disparities In The Policing And Prosecution Of Drug Offences In England And Wales, Release, https://www.release.org.uk/publications/numbers-black-and-white-ethnic-disparities-policing-and-prosecution-drug-offences
[54] Ibid

is repeated in respect of the possession of all drugs, and it is clear that this is contributing to the racial disparity in sentencing which the SC is concerned about. We would therefore recommend that the guidelines include a paragraph for Magistrates and the Crown Court to ask the CPS whether the case had been considered for an out of court disposal, as per the CPS' own charging standards for drug offences.

That CPS guidance[55] on charging for possession of drugs clearly states that prosecutors should consider whether it is in the 'public interest' to bring a prosecution for possession of a controlled drug, particularly in respect of Class B and Class C drugs. The guidance states that if a person is caught with 'more than a minimal quantity of Class B or C drugs', then they should be prosecuted, but clearly this infers that when a person has a small quantity in their possession then an out of court disposal would be more appropriate. In addition, there is specific guidance on cannabis and khat possession which outlines where it is appropriate not to prosecute as it would not be in the public interest. However, it is clear from the statistics above that black people are not benefitting from out of court disposals, and are being criminalised at much higher rates than white people, including for Class A drugs as highlighted above. We would therefore recommend that Magistrates and Judges are required to ask the CPS if they have applied their own guidelines in the decision to bring the case before the court, and that if they have not, then the guidelines should be reviewed as part of the proceedings. If it is determined that it is not in the public interest to proceed, the case should be referred back to the police for an out of court disposal.

It would be also of use to the SC to regularly review how possession of drugs of all Classes are being treated by police and the CPS to determine the differential treatment based on ethnicity to redress the inequity.

This is just one example of how the SC could meaningfully address some of the racial disparities that exist within the criminal justice system.

[55] Crown Prosecution Service, 2019, Legal Guidance, Drug offences, https://www.cps.gov.uk/legal-guidance/drug-offences

Before responding to the specific questions in the PSA section, Release has to question the necessity of this specific Guideline being developed, given the limited scale of the issue. The Council recognises there is a "relatively low volume offences, certainly when compared with the offences under the MDA"[56], and certainly the Home Office Review of the PSA in late 2018 stated that "there were 215 prosecutions in England and Wales under the PSA in 2017, compared with approximately 42,000 prosecutions under the MDA over the same period."[57] The Council adds that "in 2018, 100 offenders were sentenced for these four offences"[58].

In relation to other new/amended provisions the Council cites the need to remedy problems with sentences, or to clarify where there is confusion. Neither of these reasons given here, and sentencers do not appear to be having difficulty with the sentencing exercise – the Home Office noted that "a range of different sentences have been used for the PSA in England and Wales, with 40% of sentences resulting in immediate custody, 28% resulting in a suspended sentence"[59].

Consultation Question 17 – Do you have any comments on additional culpability, aggravating and/or mitigating factors which are needed for the PSA offences but are not in the MDA offence guidelines?

We have provided comments in relation to aggravating and mitigating factors in response to other questions throughout this response – as the factors for PSA offences are the same as for MDA offences, we ask that our other comments be considered as equally applicable in this context.

[56] Sentencing Council, 'Drug Offences Consultation', January 2020, page 33
[57] Home Office, Review of the Psychoactive Substances Act 2016, November 2018, Page 24 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756896/Review_of_the_Psychoactive_Substances_Act__2016___web_.pdf
[58] Sentencing Council, 'Drug Offences Consultation', January 2020, page 33
[59] Home Office, Review of the Psychoactive Substances Act 2016, November 2018, Page 25

Our submissions in relation to purity and knowledge of the defendant are of particular relevance here, where the complex chemistry of many of the substances means that very few people will have sufficient experience to have control over the potency.

Consultation Question 18 – Do you have any comments on the proposed approach to the assessment of harm?

The Council recognises the difficulty in specifying an approach for assessing harm of such a broad range of substances, in particular that it is not possible to determine harm by reference to volume or weight. The proposal to assess harm by reference to a narrative description of quantity is equally problematic. What is a 'large quantity' or 'very small quantity' of a particular substance will either have to be subjectively decided by the sentence, or determined objectively by reference to expert evidence.

This would be the case for any undetermined related harm as Judges will be unfamiliar with many of the drugs, particularly where the case centres on the difference between an amount for personal possession (here, no offence) compared to an intent to supply. Judges will have at least some experience of these matters in relation to 'traditional' drugs and MDA offences. The need for expert intervention in such a substantial way here renders the Guideline redundant.

Similarly, the ability to move categories "where evidence is available as to the potential effects of the substance and harm likely to be caused by those effects"[60] simply replicates judicial discretion. A sentencer can do this, including departing from a Guideline substantively (with justification), without the need for this specific Guideline suggesting or permitting the practice. With both prosecution and defence able to put forward opposing expert evidence, proceedings may be longer and more costly. Whilst this may be determined with written statements only, where it is not possible for a single expert to be appointed, or for multiple experts to agree, it is possible that there will be an increased need for Newton Hearings to determine the facts.

[60] Sentencing Council, 'Drug Offences Consultation', January 2020, page 37

Consultation Question 19 – Do you agree with the proposed sentence levels for these PSA offences?

The Council asserts that "a common approach to MDA and PSA offences should lead to consistency in sentencing between offences under the different legislation, which will be particularly important in the many cases in which an offender is sentenced for, for example, an MDA offence and PSA offence at the same time"[61]. In reality, given the principle of totality of sentencing – considered at Step Five of all Guidelines – a separate regime will have no bearing on those cases. Generally, where multiple offences stem from the same facts concurrent sentences will be passed, with the total sentence served being the longest for the most serious offence. As the proposed PSA sentences appear to be pitched at a level below those for offences related to Class C drugs, any sentencing for an MDA plus PSA offence, will be determined by the MDA offence.

Whilst it is positive that the sentences are largely below those for class C offences, we would question whether they are still unnecessarily high. Sentencers do not appear to need anywhere close to the proposed sentences, with the Home Office recording that "the PSA offence with the longest average sentence length is 'possessing a psychoactive substance with intent to supply' at 10 months…and 4 months for 'possessing a psychoactive substance in a custodial institution"[62]. They also found that "the average sentence lengths for possession and supply offences under the PSA are considerably shorter than the average sentence lengths for the MDA offences of 'production, supply and possession with intent to supply' (between 15 to 45 months from Class C to Class A respectively), but are greater than that for 'possession of a controlled drug' (1 to 2 months)"[63].

Consultation Question 20 – Do you have any comments on the structure of this guideline? Are there other culpability and harm factors which should be taken into account?

[61] Ibid, page 36
[62] Home Office, Review of the Psychoactive Substances Act 2016, November 2018, Page 26
[63] Ibid

Release were opposed to the introduction of this offence, by way of an amendment, on the basis that there was no justification to criminalise prisoners more harshly simply because of their already vulnerable position. Whilst there has been some concern expressed around the use of psychoactive substances, particularly synthetic cannabinoids, in prisons the creation of this offence will not deter use in these settings. As evidenced by numerous reports, including the government's own[64], a policy based on punitive user level sanctions has little impact on levels of use.

Encouraging new behaviour by reward or reinforcement is usually more effective than punishing bad behaviour - use of reward (more frequently than punishment) may be effective in reducing the use of substances in prison.[65]

Consultation Question 21 – Do you have any comments on the proposed sentence levels or additional guidance set out above?

Because of the nature of the offence, the default position for most prisoners sentenced for the offence will be a prison sentence. The only possibility of a community order is if, due to timing, they had already been released from prison for the previous offence by the time the PSA case comes to court.

Further punishment is not the way to address use of substances in prison – instead the use of evidence based prevention, treatment and harm reduction interventions in prisons is preferred, in line with established best practice, and technical guidance provided by the WHO, UNAIDS, UNODC technical guidance[66].

[64] Home Office, 'Drugs: International Comparators,' October, 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf at Page 51

[65] https://www.gov.uk/guidance/psychoactive-substances-in-prisons#how-can-we-reduce-use-of-psychoactive-substances-in-prison

[66] UNAIDS, WHO, UNODC 'Services for people in prisons and other closed settings' 2014 https://www.unodc.org/documents/hivaids/publications/Prisons_and_other_closed_settings/2014_guidance_servicesforpeopleinprisons_en_1.pdf

The distinction between someone in a position of trust or responsibility and other people committing this offence is welcome, however the difference does not appear significant. The starting points represent just a 50% reduction for those who have not abused their position.

Consultation Question 22 – Do you have any comments on the proposed aggravating or mitigating factors?

Release submit that the proper arena for these offences to be dealt with, at least in the first instance, is the prison adjudication process. Sentencers should be encouraged to remit these cases back to the prison authorities to administer adjudication, in a similar way that we have proposed MDA possession cases be referred back to police for an out of court disposal to be given. This should particularly be the case where there have not been any adjudications for similar matters – it is insufficient for this to be simply a mitigating factor.

Whilst we always welcome the inclusion of "determination and/or demonstration of steps having been taken to address addiction or offending behaviour" as a mitigating factor, in the context of prisons the ability to do this is at best variable, at worst impossible. The authorities are routinely failing to fulfil their obligations in relation to equivalence of healthcare, with regard to needle and syringe programmes (NSP) and access to opiate substitution treatment (OST), although they acknowledge that drug use is "prevalent" in the prison system[67]

In relation to "evidence that offence was committed under pressure falling short of duress", please see our comments on this at Q 12.

With regard to quantity, the inclusion of a reminder that "*The court should bear in mind that different types of psychoactive substance have different levels of potency and therefore the

[67] HM Prison & Probation Service. (2019) UK Drug Prison Strategy https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792125/prison-drugs-strategy.pdf

relevance of high or low quantity will depend on the substance concerned", is insufficient. Potency is not the only factor affecting quantity, delivery method or duration of effect are also relevant. For example, the 'high' from nitrous oxide is short-lived, therefore a quantity supplied may appear to be large at first glance, especially given the size of the gas canisters, but is in fact small when considered in the specific context.

Consultation Question 23 – Do you have any further comments on any of the draft guidelines?

One area of concern that is not addressed by the current Guidelines is the issue of people being charged with production of cannabis[68] rather than cultivation[69]. Police often charge people with production rather than cultivation, as the former is a "lifestyle offence" as defined by the Proceeds of Crime Act 2002[70]. This allows the CPS to make an application for confiscation of proceeds of a crime, where it is shown that the defendant has benefitted from their criminal conduct. Often cases where there is no evidence that the cultivation of cannabis was for profit, and where it is clear it is either for the defendant's own use or for the purposes of social supply, it will still be charged as production. The problem with this approach is twofold: a) it creates a risk that a defendant will be subject to a Proceeds of Crime application even in the absence of any real benefit to the individual; and b) a conviction for 'Production of a Class B controlled drug' on a criminal record will often appear to be more serious than 'Cultivation of cannabis', therefore negatively impacting a person's employability prospects. We would recommend that, in the interests of justice, consideration is given to whether the charge of production is the most appropriate based on the circumstances of the case when it is brought before the court. Where there is a clear absence of financial benefit then the charge should be cultivation of cannabis. In light of the discussion above on the situation with medical cannabis in the UK, we would argue that this is a just and proportionate approach.

[68] S4(2) Misuse of Drugs Act 1971
[69] S6 Misuse of Drugs Act 1971
[70] Schedule 2 (1), Proceed of Crime ACT 2002.

Proportionality of sentencing is another concern, and is something Release highlighted in our 2011 Consultation Response. This was not reflected in the 2012 Guideline, and we therefore raise those concerns again.

When comparing current sentencing levels for importation of drugs against other offences disproportionate sentencing occurs. The table below clearly demonstrates this:

OFFENCE	STARTING POINT	RANGE
Importation Class A – large quantity; leading role	14 years	12 – 16 years
Rape – Medium harm (e.g Severe psychological or physical harm, high culpability (e.g. planning)	10 years[71]	9 – 13 years[72]
GBH (s.20) – Category 1; greatest level of harm; high culpability	3 years[73]	2.5 – 4 years[74]
Robbery – street robbery; serious physical injury; significant force and/or weapon used	8 years[75]	7 – 12 years[76]

In line with the concept of offence seriousness being one of the overarching principles of sentencing[77], seriousness should be assessed in relation to culpability and harm. In drawing comparisons with the starting points and ranges of other serious offences it is clear that the

[71] Sentencing Council, Sexual Offences Definitive Guideline, April 2014, page 12.
[72] Ibid
[73] Sentencing Council, Assault Definitive Guideline, 2011, page 9
[74] Ibid
[75] Sentencing Guidelines Council, Robbery Definitive Guideline, April 2016, page 6
[76] Ibid
[77] Sentencing Guidelines Council's Guideline 'Overarching Principles: Seriousness', December 2004

proposed guidelines will result in disparate sentencing, which surely cannot be the Council's intention. Whilst we accept that an offender in a leading role involved in importation of a Class A drug will of course have a high level of culpability, the same cannot be said when considering harm. Each of the comparative offences above involves direct harm to an individual victim, including both physical and mental harm, but all result in much lower sentence starting points and ranges. It is outrageous that someone who subjects their victim to the horrifying experience of rape will receive a shorter sentence than someone who imports just 150g of heroin or cocaine (leading role). Whilst it can be argued that there is a risk of harm to the wider public in importation cases, this is a presumed and theoretical 'social harm' in each instance rather than the direct and personal harm in rape, GBH and robbery. The issue is even more concerning, when the harsh sentencing for drugs offences does not even achieve its stated aims of reducing supply, with the government recognising that "illicit drug markets are resilient and can adapt to even significant drug and asset seizures"[78]

Release proposes that the propose starting points for importation offences (and other drugs offences where there would be disproportionate sentencing in comparison to other offences) be revisited and amended to reflect the comparative harm in relation to other offences.

Consultation Question 24 – Do you consider that any of the factors in the draft guidelines, or ways in which they could be expressed could risk being interpreted in ways which could lead to discrimination against particular groups?

As highlighted at Q1. and Q2. the SC focus on so-called "county lines" has the risk of feeding into what has become a very racialised narrative. Research undertaken by Moyle & Coomber, found that in the case of "runners", those responsible for supplying drugs to users in local settings, interviews that they had undertaken with their sample population across six settings found that they were "locally recruited adult runners".[79] They go on to say that media reports do highlight

[78] HM Government, An evaluation of the Government's Drug Strategy 2010, July 2017, Page 10 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628100/Drug_Strategy_Evaluation.PDF

[79] Ross Coomber, Leah Moyle, The Changing Shape of Street-Level Heroin and Crack Supply in England: Commuting, Holidaying and Cuckooing Drug Dealers Across 'County Lines', *The British Journal of Criminology*, Volume 58, Issue 6, November 2018, Pages 1323–1342, https://doi-org.ezproxy.mdx.ac.uk/10.1093/bjc/azx068

that prosecutions for these activities tend to represent young people of colour from urban areas who are operating in local out of city areas. The question this raises is one of law enforcement and who are the targets of drug arrests. Evidence would suggest that the police tend to focus on stereotypes and who they perceive as gang members, leading to racially skewed data on who is involved in such activities.[80] It is therefore the case that police activity, including arrests and charging practices, can create a false impression of drug markets where the involvement of Black and Asian people are overrepresented.

Furthermore, evidence of black people being targeted for drug offences was detailed in our research with StopWatch and LSE, where we found that significant falls in stop and searches for drugs (a reduction of 32 per cent) between 2011 and 2017 resulted in the number of arrests for white people falling by almost a half. However, for black people the arrest rate remained static.[81] As highlighted above, black people are also less likely than white people to receive out of court disposals, and are also much more likely to be prosecuted. This results in greater racial disparity in the court system.

Consultation Question 25 - Are there any other equality and diversity issues the guidelines should consider?

Release would highlight two other equality issues that the guidelines raise:

<u>Gender</u>

Whilst the analysis for sentencing of drug offences by sex and ethnicity shows that men are more likely to be imprisoned than women, women have specific characteristics that should be considered. The Ministry of Justice states that the proportion of women entering prison with a drug problem is much higher than it is for men, 39 per cent compared to 28 per cent.[82] In addition, women are more likely to be imprisoned for non-violent offences compared to men,

[80] Esbensen, F. and Lynskey, D., (2001). 'Young gang members in a school survey'. In The Eurogang Paradox, Springer Netherlands. pp 93-114

[81] Shiner et al, 2018, The Colour of Injustice: 'Race', drugs and law enforcement in England and Wales, Release, https://www.release.org.uk/publications/ColourOfInjustice

[82] Ministry of Justice, 2017, Statistics on Women and the Criminal Justice System 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759770/women-criminal-justice-system-2017..pdf

84 per cent compared to 76 per cent, of which drug offences is included.[83] Fifty seven per cent report suffering from domestic violence, though this is likely to be under reported.[84] It is estimated that over 17,000 children a year are separated from their mothers due to imprisonment, creating a cycle of harm and damage as most will be the primary carer.[85] We are particularly concerned about the high rates of imprisonment for Black women for drug offences - as highlighted in the Lammy review, they are 2.3 times more likely to receive a custodial sentence compared to white women.[86] All of these factors need to be considered when sentencing a female offender, and considering the high level of non-violent offences (including drug offences) a community order should be considered in all cases.

Disabilities

We have highlighted at Q3 the inequity in respect of medicinal cannabis, and there is little doubt that prosecutions related to cannabis have the potential to disproportionately impact on people who have disabilities. For that reason, we would ask that the recommendations made in respect of this issue be considered.

Consultation Question 26 – Do you have any views on reasons behind the disparities in sentencing highlighted by our published research? Do you consider that these reasons may be different for the disparities between white and ethnic minorities and those between men and women?

As highlighted in a number of sections above, the decisions made by police and by the CPS result in higher rates of Black and Asian people coming before the courts. That being said, whilst this is one of the drivers there is clear racial disparity occurring in respect of judicial sentencing. The

[83] Prison Reform Trust, 2017, Why focus on reducing women's imprisonment, http://www.prisonreformtrust.org.uk/Portals/0/Documents/Women/why%20women_final.pdf
[84] Ibid
[85] Ibid
[86] Ministry of Justice, 2016, Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales, https://www.gov.uk/government/publications/black-asian-and-minority-ethnic-disproportionality-in-the-criminal-justice-system-in-england-and-wales

research carried out by Release, StopWatch, and LSE on racial disparity in the policing and prosecution of drug offences in England and Wales found[87]:

- A significantly higher number of black people are prosecuted for cannabis possession than supply of Class A or B substances combined. In 2017, 3,229 black people were proceeded against for cannabis possession, whilst 2,453 were prosecuted for supply of Class A and B drugs. This situation is reversed for white people, with 6,892 prosecuted for cannabis possession as compared to 7,955 for supply of Class A and B drugs. Our recommendation for dealing with possession offences as outlined at Q16. would go some way to redress this element of racial disparity in the system.
- In relation to conviction rates, the racial disparity that occurs upstream in the criminal justice system appears to be mitigated to some degree. For all indictable offences, the conviction rate for white people was 85 per cent and for drug offences was 93 per cent, compared to 79 per cent for Black people for all offences and 88 per cent for drug offences. This would suggest that there is a wider role for the CPS to play in reviewing cases before they are brought to court, as it would indicate that those brought in relation to Black people have weaker grounds.

- Sentencing outcomes reflect findings in the Lammy Review, where a higher rate of Black defendants were sentenced to immediate custody for drug offences compared to white people, with Black people receiving this disposal at 9 times the rate of the white population. They were also almost twice as likely to receive a custodial sentence compared to a suspended sentence. As highlighted by the Lammy Review this could not be explained away by previous convictions. In respect of previous convictions, caution must be exercised due to the over-representation of Black and Asian people in the criminal justice system. It is important to recognise that those who come before a court are representative of police enforcement actions, not necessarily a fair breakdown of the ethnicity profile of offenders, meaning those from Black and other ethnic backgrounds are more likely to have previous convictions.

[87] Shiner et al, 2018, The Colour of Injustice: 'Race', drugs and law enforcement in England and Wales, Release, https://www.release.org.uk/publications/ColourOfInjustice

Consultation Question 27 – Are there any aspects of the Drugs Guidelines that you consider might be contributing to unintended disparities in sentencing? Are there ways in which the guidelines could be amended to guard further against any unintended disparities in sentencing?

Please see our comments at Q16. and Q24.

Consultation Question 28 - Do you have any comments on the steps the Council is intending to take in light of this research?

We have no comments on the intended steps, but Release would recommend further steps are taken (we recognise that some of these proposals go beyond the remit of the Council) including:

- Race awareness training being a mandatory requirement for all Magistrates and Judges as part of their training, which is regularly revisited;
- Ongoing equality assessments of courts – we would recommend that this is done at a granular level, to examine whether there are patterns of disproportionality occurring in certain localities or even by individual Judges/Magistrates. Action must then be taken if it is shown that there are certain Judges or Magistrates who are routinely sentencing Black and other ethnic groups more harshly.
- As repeatedly highlighted, Release would recommend referring cases back for a caution or community resolution in possession cases - this is one of the drivers for disparities in the system and, in fact, an incredibly easy solution to tackling this issue within the court system albeit not the wider criminal justice framework.

Consultation Question 29 – Do you have any suggestions for other areas of work the Council could undertake in the future?

Release has raised a number of points in respect of racial disparities, medicinal cannabis, and possession offences that we would welcome being made part of this process. Future work should

focus on the ongoing equality assessments, and we would be delighted to discuss this in further detail.