

# TRANSFORM

DRUG POLICY FOUNDATION

## Submission to the Sentencing Advisory Panel Consultation on Sentencing For Drug Offences

July 2009

### About Transform Drug Policy Foundation

- Transform is a think-tank that campaigns for sustainable wellbeing, promoting the replacement of drugs prohibition with effective humane systems to regulate drugs.
- Transform has UN ECOSOC consultative status, is a registered charity (no.1100518) and company limited by guarantee (company no. 4882177).

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### Introduction

Transform welcomes this consultation and its commitment to reviewing the evidence regarding the enforcement of prohibition. However, we are concerned that the narrow parameters of the sentencing guidelines consultation do not allow it to go far enough. We will give comments regarding some of the specific questions raised in the consultation, but we also include additional comments on issues not raised in the consultation, but which need to be addressed.

### The Need for an Impact Assessment

Government policy requires that an impact assessment be undertaken for any policy going out to public consultation, yet none has been carried out for this consultation. Furthermore Government guidelines state that an impact assessment should be carried out when new policy challenges arise, or when major unintended consequences of legislation are identified, as they have been for drug enforcement policies - for example the creation of a huge criminal market.

This clearly applies not only to sentencing for drug offences, but also more broadly to the Misuse of Drugs Act 1971 (MDA 1971) and the three UN drug conventions, for which no impact assessment has ever been undertaken. Transform is calling for an impact assessment to consider the costs and benefits of punitive prohibition and model alternatives, from stepping up punitive prohibition, through decriminalisation to legal regulation and control of currently illegal drugs.

The key question that Transform wants to raise, but which has not been raised in the consultation, is why drugs are treated as a criminal justice issue at all. Low levels of

wellbeing underlie a number of issues that the criminal justice system attempts to control, but which, arguably, should not be criminal justice issues. Transform argues that drugs are a clear example of this.

The New Economics Forum (nef) argued that,

*“The state’s primary aim should be to promote those conditions that allow us to pursue wellbeing. Asking ‘what would this existing policy area look like if one of its primary aims was to promote wellbeing?’ is a useful exercise.”<sup>1</sup>*

If we ask this question of the policy of prohibition, we will see that the unregulated nature of illegal drug markets undermines wellbeing.

In the UK there has been policy displacement, from a public health led approach to an enforcement approach as drug policy becomes increasingly about criminalisation. Until the 1970s, doctors routinely prescribed heroin and cocaine to those who were addicted, this has since largely fallen out of favour. Since the 1970s, use and misuse of drugs has risen dramatically. The increase in drug use/misuse has occurred in parallel with rising levels of income inequality, consumerism and a reduction in wellbeing.

Wellbeing, or the lack of it, highlights the negative aspects of prohibition for both problematic and non-problematic drug users. For non-problematic drug users the biggest significant threat to their wellbeing is criminalisation. The Executive Director of the UN Office on Drugs and Crime (UNODC) has emphasised that only 5% of the adult population of the world use drugs and problematic users only comprise 10% of this.<sup>2</sup> Criminalisation also exacerbates the social exclusion of both problematic and non-problematic drug users both through social stigmatisation, and by creating hurdles to recovery and enhanced wellbeing in terms of increased difficulty in finding housing, employment and personal finance.<sup>3</sup>

A further consideration, which is explored in more detail below, is that many of the negative impacts on wellbeing that are attributed to drugs and to drug users are in fact attributable to their criminalisation and thus not only does prohibition undermine wellbeing directly, it also prevents the underlying causes of threats to wellbeing from being addressed.

Antonio Maria Costa, Executive Director of the United Nations Office on Drugs and Crime, has acknowledged that prohibition has had many “*unintended consequences*”, including “*what one might call policy displacement. Public health, which is clearly the first principle of drug control... was displaced into the background*”<sup>4</sup>

Drug use and misuse are health and social issues and it is bizarre and unjustifiable that they are not dealt with and regulated within the health system, but that instead the Government attempts to address them through criminal sanctions.

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<sup>1</sup> Marks, Nick, ‘The power and potential of well-being indicators’, nef, 2004

<sup>2</sup> ‘Making drug control ‘fit for purpose’: Building on the UNGASS decade’, Antonio Maria Costa, UNODC, March 2008; 3 [http://www.unodc.org/documents/commissions/CND-Session51/CND-UNGASS\\_CRPs/ECN72008CRP17.pdf](http://www.unodc.org/documents/commissions/CND-Session51/CND-UNGASS_CRPs/ECN72008CRP17.pdf)

<sup>3</sup> ‘Stigma, social inequality and alcohol and drug abuse’, Robin Room, Drug Alcohol Review, Mar;24(2):143-55, 2005

<sup>4</sup> ‘Making drug control ‘fit for purpose’: Building on the UNGASS decade’, Antonio Maria Costa, UNODC, March 2008; 10 [http://www.unodc.org/documents/commissions/CND-Session51/CND-UNGASS\\_CRPs/ECN72008CRP17.pdf](http://www.unodc.org/documents/commissions/CND-Session51/CND-UNGASS_CRPs/ECN72008CRP17.pdf)

The Government concedes that legally regulating the supply of currently illegal drugs and placing them within the health system would have benefits, but maintains that these do not outweigh the benefits of prohibition. The key reason given for treating drug offences within the criminal justice system is that criminal sanctions, particularly custodial sentences have a deterrent effect, reducing the likelihood of those caught re-offending and deterring others from committing similar offences. However, there is simply no evidence that this is the case.

### Question 1.

Are you aware of any research or other evidence that demonstrates the effectiveness or otherwise of increased sentence lengths for drug offences either in deterring individual sentenced offenders from committing further drug offences or in deterring others from committing similar crimes?

Not only does the available evidence suggest that *increased* sentences do not have a greater deterrent effect, it further suggests that the deterrence effect of imposing any criminal sanctions is negligible.

The Science and Technology Select Committee report in 2006 on the drug classification system '*Drug Classification: Making a Hash of it?*'<sup>5</sup> stated that:

*"We have found no solid evidence to support the existence of a deterrent effect, despite the fact that it appears to underpin the Government's policy on classification. In view of the importance of drugs policy and the amount spent in enforcing the penalties associated with the classification system, it is highly unsatisfactory that there is so little knowledge about the system's effectiveness".*

The Government rejected this finding and responded with:

*"The Government fundamentally believes that illegality is an important factor when people are considering engaging in risk-taking behaviour. The exposure to criminal sanction, in particular through sentencing, influences perceptions and behaviours. It believes that the illegality of certain drugs, and by association their classification, will impact on drug use choices, by informing the decisions of dealers and users. Imposing penalties on the offence of possession is intended to deter use, particularly experimentation by young people. Whilst the Government accepts that there is an absence of conclusive evidence in relation to the deterrent effect of the existing classification structure, there is some evidence from the Offending, Crime and Justice Survey that the deterrent effect of harsher sentencing was greater among those admitting to the supply of a Class A drug, compared with other offences. The Government will consider ways in which the evidence base in the context of the deterrent effect can be strengthened."*<sup>6</sup>

However, in the field of evidence-based policy making, the Government cannot rely on what it '*believes*', it must provide evidence to support its stance. When pressed by the Home Affairs Select Committee in 2001, they received only this response:

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<sup>5</sup> <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmsctech/1031/1031.pdf>

<sup>6</sup> The Government Reply to the House of Commons Science and Technology Committee's Report on Drug Classification. <http://drugs.homeoffice.gov.uk/publication-search/drug-strategy/drugclassification>

*“As some people would seem to be attracted to experiment with controlled drugs because of their illegality (e.g. “forbidden fruits”), the evidence suggests that a great many are deterred by the law. Nineteen per cent of children and 30 per cent of adults surveyed by MORI on behalf of the recent Police Foundation Inquiry, mentioned the law as the reason for not taking drugs. And the respective prevalence rates for controlled drugs and alcohol and tobacco are also illustrative.”<sup>7</sup>*

The relevant section of the Police Foundation Inquiry report<sup>8</sup> that the Home Office are quoting, actually says this:

*“The most frequent reasons given by both children and adults for people not taking drugs were ‘health reason’ (33% and 51%) and ‘just don’t want to take drugs’ (27% and 56%). By comparison only 19% of children and 30% of adults mentioned ‘illegality’ and 12% of children and 17% of adults cited ‘fear of being caught by the police’.”*

The report concluded that:

*“...such evidence as we have assembled about the current situation and the changes that have taken place in the last 30 years all point to the conclusion that the deterrent effect of the law has been very limited”.*

The Home Office has made no attempt to engage in any further analysis of this data, nor to replicate or refine the survey data relevant to a deterrent effect in the following six years (up to the Science and Technology Select Committee Classification inquiry in 2006 in which it was again highlighted). Nor have any relevant studies been commissioned or published subsequently despite the pledge made by the Government to ‘strengthen’ the (currently non-existent) evidence base<sup>9</sup> with regard to the deterrent effect of punitive law enforcement. As the Sci-Tech committee notes, this evidential void is particularly striking given the centrality of the deterrent effect to the entire prohibitionist paradigm.

There is no statistically significant correlation internationally between intensity or harshness of enforcement in different countries and their levels of use<sup>10</sup> - a relationship that might support a strong enforcement/deterrence link. Evidence of this marginal role for enforcement levels in drug taking decisions has recently come from an extensive World Health Organisation 2008 study comparing drug use and enforcement regimes across the world<sup>11</sup>. The study’s headline conclusion was:

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<sup>7</sup> <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmhaff/318/318m02.htm>

<sup>8</sup> Police Foundation (1999) *Drugs and the Law: Report of the Independent Inquiry into the Misuse of Drugs Act 1971*: <http://www.druglibrary.org/schaffer/library/studies/runciman>

<sup>9</sup> ‘the Government will consider ways in which the evidence base in the context of the deterrent effect can be strengthened’ is itself a troubling turn of phrase, suggesting that evidence will be sought to back up a pre-established ‘belief’ as part of a political program, rather than a scientific approach that would involve an independent evaluation of existing data, potentially supported by new un-biased research being undertaken, to objectively establish the extent of such an effect.

<sup>10</sup> It is easy to cherry pick individual examples that suggest there either is or is not such a link – the obvious examples being Sweden and the Netherlands, both with relatively low levels of use, but with very different approaches to enforcement.

<sup>11</sup> Degenhard et al, World Health Organisation, 2008 ‘Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys’ <http://medicine.plosjournals.org/perlserv/?request=getdocument&doi=10.1371/journal.pmed.0050141&ct=1&SESSID=09db244eachf99e2605122e6f7221f3d>

*“Globally, drug use is not distributed evenly and is not simply related to drug policy, since countries with stringent user-level illegal drug policies did not have lower levels of use than countries with liberal ones.”*

Similarly, studies in Australia and the US have compared levels of cannabis use between different states with different enforcement regimes for cannabis offences (from harsh penalties to effective decriminalisation) and found no significant correlation between penalties and incidence of use<sup>12</sup>.

The relatively small amount of independent research that has been done in this area suggests that the law and enforcement are, at best, marginal factors in drug taking decisions, as the panel recognises. This especially holds true for the socially excluded groups who are most vulnerable to problematic use, including young people, those with mental health problems, and those from socially deprived communities.

Furthermore, the Home Office has found that a prison sentence is sometimes viewed in a positive light by drug offenders:

*“Prison presented the opportunity to identify new suppliers. One interviewee described making new contacts whilst in prison abroad. Serving time in prison was important in establishing credibility and trustworthiness. One interviewee described the importance of a ‘criminal CV’.”<sup>13</sup>*

Given that the ‘*fundamental belief*’ in their deterrent effect is the key reason for placing drug use and misuse within the criminal justice system, this evidence should lead us not simply to question the length of custodial sentences given for drug offences, but to ask why they are criminalised at all when they would be better placed within the health system.

## **Question 2.**

Do you agree that, in serious cases, powers such as those available under a confiscation order or a serious crime prevention order are now likely to be a more effective deterrent than increasing the length of a custodial sentence beyond that necessary to meet any other purpose of sentencing? Please give your reasons.

If it were the case that confiscation orders or serious crime prevention orders would provide a stronger deterrent then this might go some way towards a justification of criminal sanctions for drug offences. However, Transform does not agree that confiscation of assets would produce a significant deterrent effect.

The only research that exists on this issue is the Matrix report ‘*The illicit drug trade in the United Kingdom*’, referred to in the consultation. Interviews with prisoners convicted of drug offences suggested that some prisoners saw prison as an occupational hazard, and that confiscation orders would cause more frustration and difficulty, the implication being that confiscation orders would have a greater deterrent effect.

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<sup>12</sup> Discussed in some detail in the recent Beckley Foundation Cannabis Commission report (2009): [http://www.beckleyfoundation.org/pdf/BF\\_Cannabis\\_Commission\\_Report.pdf](http://www.beckleyfoundation.org/pdf/BF_Cannabis_Commission_Report.pdf)

<sup>13</sup> Matrix consultancy (2007) ‘The illicit drug trade in the United Kingdom’ p43. Home Office Online Report 20/7 [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)

However, there are many problems with this study that cause us to question this conclusion. The first is the sampling method, which was purposive and thus is likely to give a skewed set of results. Although this may have allowed targeting of those prisoners who would give more useful information, the report concedes that

*“The purposive sampling approach means that it is not possible to infer beyond the sample to the wider population of drug suppliers”<sup>14</sup>*

In addition, the report notes that small sample size, gaps in the data set and the potential for false reporting by interviewees are all limitations of their methodology. Thus the study is of limited use in drawing conclusions about wider drug networks and the impact that a stronger focus on asset confiscation might have upon them.

A further problem is that of hidden assets. The panel concedes that those at the top of the supply chain are rarely caught, but these are the individuals making the most money out of the drugs trade. And even were such individuals to be caught, they would be able to hide their assets such that confiscation orders posed very little threat and thus had very little deterrent effect, as the panel itself notes:

*“It is generally accepted that, although these are the most serious offenders, they are the least likely to be caught and convicted and may use legitimate businesses to aid and conceal their operations.”<sup>15</sup>*

In addition, if those lower down the chain are caught and assets are recovered, the individuals prosecuted are likely to be looked after by those higher up, and so the punitive and deterrent effects may still be less than intended.

Furthermore, the possibility of criminals acquiring significant assets through the drugs trade is of course a direct result of its illegality. To then put money into recovering these assets when, even were asset recovery successful and able to cover its costs, only a tiny proportion of the assets accrued would ever be recovered, is not a helpful approach, nor an approach that is likely to deter criminal activity. Thus there is no reason to think that asset confiscation would do any more to deter drug crime than current criminal sanctions do.

In fact, the surest way to deprive organised criminals of assets earned from drugs and deter them from becoming involved in the trade is to deprive them of the bulk of their market in the first place, through the legal regulation and control of drugs by the Government.

Again, this underlines that the whole premise on which the policy of prohibition is based is flawed

### Disaggregating drug harms from drug policy harms

The other key reason often cited as a justification for the illegality of drugs is the harms that they cause. However, this premise of prohibition is also fundamentally flawed.

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<sup>14</sup> *ibid* p4

<sup>15</sup> Sentencing Advisory Panel Consultation Paper on Sentencing for Drug Offences p20

Both the current sentencing levels and the panel's proposed changes purport to base the severity of sanctions for drug offences on the level of harm associated with the drug in question by referring to the ABC classification system for drugs. But the current classification system is unscientific and arbitrary; the distinct designations of drugs, and indeed the question of whether a drug is subject to absolutist punitive prohibitions or is legally regulated, as is the case with alcohol, nicotine and caffeine, are demonstrably not based on the degree of harm associated with the use of a given drug, but are rather an artefact of (predominantly) Western cultural and political history over the past century.

Illustrating the point, a recent comparative study of 20 widely used psychoactive drugs published in *The Lancet* (2007)<sup>16</sup> concluded that alcohol was the fifth most harmful, and tobacco ninth, both ranked above cannabis, ecstasy and LSD. The authors noted that; *"the exclusion of alcohol and tobacco from the Misuse of Drugs Act is, from a scientific perspective, arbitrary"*<sup>17</sup> (and by inference also discriminatory). Interestingly, the panel refers to this paper, at paragraph 40, as showing the factors that determine the potential harm associated with drugs, and implies that the classification system concurs with this approach, which it does not. If the classification system does not in fact correlate with the levels of harm associated with different drugs, then nor will the sentencing levels based upon this system.

Further to these problems, there is a growing understanding and acceptance within the drugs field that a significant proportion of what are broadly termed *'drug-related harms'* stem directly from the policy of prohibition and the illicit markets it has inadvertently fostered, rather than from the drugs themselves. Costa's acknowledgement of the *'unintended consequences'* of prohibition's enforcement, included the creation of *'a huge criminal black market that thrives in order to get prohibited substances from producers to consumers'*.

A similar analysis was clearly spelt out to ministers in the Prime Minister's Strategy Unit drug report in 2003<sup>18</sup>, and the panel itself recognizes the unintended negative consequences of imprisonment, at paragraph 20 of the consultation. These costs may have been unintended but they can no longer be seen as unanticipated. Yet despite these issues being apparently understood and frequently acknowledged at the highest level, in the majority of political, media and public discourses no such distinction is made between the harms that result from drug use per se, and those that are either entirely or partially the result of policy, specifically the overarching policy paradigm of prohibition. The result is that both sets of harms are conflated and then simplistically blamed on *drugs* or, by default, *drug users*. The failure to disaggregate drug use harms from drug policy harms or, specifically, prohibition harms, is a major obstacle to meaningful evaluation of existing policy and consequently, to the rational development of potentially more effective policy responses.

An example of this type of error can be found at paragraph 121 of the consultation paper, where one suggested justification for long custodial sentences is that drug crime costs a lot in enforcement resources, is a significant cause of violent crime, and places large

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<sup>16</sup> Nutt et al, the Lancet 2007. 'Development of a rational scale to assess the harm of drugs of potential misuse'. Available in full here: <http://www.mapinc.org/drugnews/v07/n366/a01.html>

<sup>17</sup> This analysis has recently been supported by the Government's Advisory Council for the Misuse of Drugs - responsible for evaluating drug harms and advising government on policy changes - that concluded (in the 2006 'Pathways to Problems' report) that *"their [tobacco and alcohol] actions are similar and their harmfulness to individuals and society is no less than that of other psychoactive drugs"*.

<sup>18</sup> [http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/drugs\\_report.pdf](http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/drugs_report.pdf)

demands on the NHS. But these problems would not exist if drugs were not criminalised. So we end up using criminal sanctions to punish drug offenders for the costs of criminalising drugs, which is clearly unjustifiable.

As mentioned above, this failure has far-reaching impacts on levels of wellbeing. MacCoun and Reuter have established a taxonomy of drug-related harms in which they identify forty eight 'harms'. Of these a substantial majority are identified as being caused partially or predominantly by enforcement and their illegal status, including HIV/HCV transmission due to use of dirty needles and the need to commit crime in order to cover the high cost of drug misuse, as well as criminalisation and increased criminal justice costs.<sup>19</sup> The illegal and hence unregulated nature of the drug market means drugs are of unknown strength and purity – as the panel recognises at paragraph 83 – and fear of criminalisation diverts problem drug users away from treatment services.

The negative impacts of prohibition are not only on the wellbeing of those involved in the criminal market but also on the wider community. Enforcement of prohibition is extremely expensive, skewing resource allocation towards criminal justice or military expenditure rather than social development and public health based interventions. Counterproductive drug war expenditure on the criminal justice system alone decreases the amount of money governments have to improve the wellbeing of its citizens.

Urban degeneration has also been hastened in some areas due to the drugs trade. There are three different causes for the links between violence and illicit drug markets: the psycho-pharmacological link whereby violence is caused by the effects of the drug; the economic causality, where drug users must commit crime in order to fund their drug habits; and finally violence between drug dealers settling conflicts over territories, customers, cash and reputations. The panel discusses, at paragraph 80, the harms of drug use and drug dealing on communities, but fails to recognise that the latter two of these three causes are due to the illegality of the drugs, not to the drugs themselves. At paragraph 35, the panel claims to be taking account of wider social harms, but again mislabels them as resulting from offending behaviour and thus its attempt to take them into account is via criminal sanctions (in this case confiscation) when it should be to challenge the policy of prohibition.

The UK Home Office has acknowledged that drug markets bring violence and crime to local areas<sup>20</sup> and the Prime Minister's strategy unit has acknowledged that class A drug users create £16 billion of crime costs.<sup>21</sup> In the past few years there have been a number of high-profile murders in London that have been linked with the crack-cocaine trade although the total number of murders has fallen in London.<sup>22</sup> Where education and job opportunities are poor, research has suggested that young people sometimes turn to drug dealing in order to gain social standing within communities as well as improve their economic situation.<sup>23</sup> It is estimated that 95% of street prostitution arises from the need to

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<sup>19</sup> Reuter and MacCoun 2001 'Drug War Heresies' p112

<sup>20</sup> 'Drugs: Protecting families and communities', UK Home Office Drugs Strategy 2008 - <http://drugs.homeoffice.gov.uk/publication-search/drug-strategy/drug-strategy-2008?view=Binary>

<sup>21</sup> 'Strategy Unit Drugs Report: Phase one –Understanding the issues', May 2003 - [http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/drugs\\_report.pdf](http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/drugs_report.pdf)

<sup>22</sup> 'Drug Markets and Urban Violence: Can Tackling One Reduce the Other?', Alex Stevens, Dave Bewley Taylor and Pablo Dreyfus, The Beckley Foundation, Jan 2009; 7 - [http://www.idpc.info/php-bin/documents/BFDPP\\_UrbanViolence\\_EN.pdf](http://www.idpc.info/php-bin/documents/BFDPP_UrbanViolence_EN.pdf)

<sup>23</sup> Seddon 2009 'Drugs, the informal economy and globalization'

fund a drug habit,<sup>24</sup> which raises the risk of the spread of sexually transmitted diseases as well as sexual violence.

These impacts on wellbeing serve to highlight again that drugs and drug use should be a health and social issue, not a criminal justice issue. Whilst legally regulated markets do not directly address the underlying causes of lack of wellbeing; they can eliminate most of the negative impacts upon wellbeing caused by prohibition. If prohibition is abandoned, this will also remove some of the political and cultural obstacles to addressing the underlying causes: social deprivation, inequality, unemployment, homelessness and lack of opportunity, mental health problems and histories of abuse. Drug use can never be risk-free but opportunities to reduce its negative impacts on wellbeing can be created through regulation and control.

### Asking the wrong questions

Once we see that the fundamental premises underlying the criminal treatment of drugs is flawed, it becomes clear that the system for addressing the problems associated with drug use and misuse, which is based upon these premises, is also inherently flawed. This means that the questions raised in the consultation paper are not the questions that we ought to be asking.

For example, the panel decides not to consider the harms of specific drugs individually, but to base starting points and ranges for sentencing on the ABC system, and then asks whether these ranges are appropriate. But there is no value in questioning the propriety of different ranges for different classes of drug when the very classification system on which this question is premised is itself arbitrary and misguided.

Similarly, the panel compares the relative seriousness of drug offences with crimes of premeditated violence, sexual abuse and child cruelty, and asks us to use these as a measure of the propriety of the suggested sentences. But this is a false comparison because it is premised on the assumption that drug offences should be considered within the same framework as these issues, which they should not. Rather they should be in the same category as other potentially harmful substances, such as alcohol and tobacco, in which case a comparison with violent crime is nonsensical. If we were to consider the drug trade in this light we would see that it makes no sense that if one does well in business with these latter, legal, drugs one is congratulated, but if one does so with other drugs, one is subject to severe criminal sanctions.

### **Question 5.**

What relevance, if any, should the purity or strength of a drug have to sentencing? To what extent do you agree or disagree with the approach taken by the panel?

We support the panel's view that it is inappropriate for purity to be a significant factor in determining seriousness for the reasons highlighted, particularly given that levels of purity will fluctuate according to fluctuating supply and demand, and that the majority of offenders will not know the purity of the substances they are dealing with. However, it is

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<sup>24</sup> Home Office 2004 'Paying the price: a consultation paper on prostitution', p.10 - [www.homeoffice.gov.uk/docs3/paying\\_the\\_price.pdf](http://www.homeoffice.gov.uk/docs3/paying_the_price.pdf)

important to highlight the fact, which is not recognised by the panel, that it is the illegal nature of the drug market that makes it impossible for the strength and purity of drugs to be regulated or made known to users and suppliers.

#### **Question 11.**

Do you agree or disagree that the fact that drugs are used to help with a medical condition should be considered as offender mitigation for drug offences?

We support that courts should have compassion on those using drugs to help with a medical condition. However, it is unclear why we should focus on physical pain. Many people who use drugs do so because of emotional pain, as a form of escapism or in a state of desperation. It is not clear why these should not also be mitigating factors. Again, this problem arises from treating drug use as a criminal justice issue, whereas it is in fact a health issue and thus it is ridiculous to try to address it within the criminal justice framework. If it were instead placed within the health system, these issues could be properly addressed.

#### **Question 12.**

Do you agree or disagree that the fact that an offender's vulnerability was exploited by others should be treated as offender mitigation?

Again, we support that vulnerability is an important issue and that exploitation of vulnerability is a mitigating factor. But again, the scope is too narrow. There should be a broader consideration of what it is that makes someone vulnerable. Inequality is a relevant factor to vulnerability, and has been shown to have a substantial effect on involvement with illegal drugs; income inequality is a useful proxy measure for wellbeing and displays a significant correlation with levels of drug misuse in international comparative analysis.<sup>25</sup> The UK sits in the top 10 most unequal societies of thirty OECD countries measured.<sup>26</sup> If we take this into account we should again see that criminalisation is not an appropriate response to drug offenders.

#### **Question 15.**

Is there any reason to believe that the Panel's proposals will impact disproportionately on some offenders by reason of their gender, age, disability, race or ethnic background?

It is far too late to be asking this question. There are already sectors of society hugely overrepresented in the prison population for drug offences.

Alex Stevens has analysed Home Office statistics, released under section 95 of the criminal justice act, to show that there is an arrest rate of just over one percent for white people compared to an arrest rate of just over eight percent for black people. He also shows that black people are six times more likely to be arrested and eleven times more likely to be imprisoned for drug offences than white people. When arrested and sentenced,

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<sup>25</sup> Wilkinson and Pickett 'The Spirit Level: Why More Equal Societies Almost Always Do Better' 2009 p19

<sup>26</sup> 'Growing Unequal? : Income Distribution and Poverty in OECD Countries', OECD 2008

white offenders are more likely to be cautioned, discharged, or given a community sentence, and black offenders are more likely to be sentenced at a crown court and more likely to be imprisoned. This, he argues, is not because of higher levels of offending amongst black people – he cites British Crime Survey figures showing that white and black people have the same level of reported involvement with drugs, and that in the case of class A drugs there is a higher proportion of white involvement. He suggests the disproportionality of enforcement may rather be due to inequalities between racial groups. Police will tend to target areas of low socioeconomic standing, where there is often a higher concentration of ethnic minorities due to poverty. Also cited is a study from the University of Middlesex, which shows that people of ethnic minorities tend to be more available on the street and thus are more available to be stopped and searched.<sup>27</sup> Stevens also highlights an inequality of power, where black people are less likely than white people to have influential connections or be able to hire powerful lawyers. Stevens thus concludes that:

*“Drug law enforcement impacts disproportionately on people of African and Caribbean heritage”<sup>28</sup>*

Given that drug law enforcement already has a disproportionate impact on some offenders, and that the panel’s proposals do nothing to redress this problem, it is reasonable to assume that this disproportionality will continue despite any changes to sentencing for drug offences.

## Conclusion

Transform therefore argues that the parameters of the sentencing guidelines consultation are too narrow. They are based on the false premise that drug use and misuse should be a criminal justice issue when they are in fact a public health issue, and the questions the panel asks based upon this premise are consequently misguided. Only when drug use and misuse are placed within the appropriate framework of the public health system, and the harms of drugs are disaggregated from those of drug prohibition, will we be able to have an open and evidence-based discussion of how to properly address these problems – a discussion denied by both the current framework and the panel’s proposals.

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<sup>27</sup> Mooney and Young (1999) Social Exclusion and Criminal Justice: Ethnic communities and stop and search in North London. London: Middlesex University [http://www.malcolmread.co.uk/JockYoung/policing\\_ethnic\\_minorities.pdf](http://www.malcolmread.co.uk/JockYoung/policing_ethnic_minorities.pdf)

<sup>28</sup> Alex Stevens ‘The racial impact of UK drug law enforcement’ at Release Conference ‘Drugs, Race and Discrimination’ 2008 <http://blogs.myspace.com/index.cfm?fuseaction=blog.view&friendId=242895459&blogId=449438638>