

**SUMMARY OF RESPONSES TO THE
HOME OFFICE CONSULTATION
LETTER ON SECTION 2 OF THE
DRUGS ACT 2005**

OCTOBER 2006

BACKGROUND

Section 2 of the Drugs Act 2005 created an evidential presumption of intent to supply where the defendant is found to be in possession of an amount of a controlled drug over a prescribed amount. Where the presumption applied, a court or jury would have to assume that the accused had the drug in his possession with the intention to supply it. The presumption would not apply if evidence was adduced that was sufficient to raise the issue that the accused may not have had the drug in his possession with intent to supply it. The prescribed amount is to be set in regulations.

THE CONSULTATION PROCESS

In December 2005 the Home Office published a consultation paper seeking views on what prescribed amounts should be set for heroin, cocaine, ecstasy, amphetamines and cannabis. A range of bodies with expertise in the field of drugs were actively consulted on provisional amounts for these prescribed levels. The provisional amounts were based on an existing informal agreement between an English police force and the local Crown Prosecution Service. The consultation period closed on 3 March 2006 and, of the organisations listed in the consultation letter, the following provided a written response¹:

- ACPO England, Wales and Northern Ireland
- ACPO Scotland
- The Bar Council
- Crown Prosecution Service
- Forensic Science Service
- Members of the Advisory Council of the Misuse of Drugs
- The Police Federation
- Police Superintendents' Association
- Police Superintendents' Association of Northern Ireland
- Procurator Fiscal
- Scottish Drugs Forum
- Turning Point

This paper provides a summary of the 66 responses received and outlines the Government's response to the consultation exercise.

¹ A full list of the organisations that responded is attached at the end of this summary.

OVERVIEW OF RESPONSES

The provision

36 respondents commented on the provision itself rather than confining themselves to the prescribed levels, taking the opportunity to either demonstrate their support or raise concerns about the potential impact of the commencement of Section 2. In total, 22 respondents criticised the principle of the provision. The key concerns that were raised are covered in more detail here.

The reverse burden of proof

Some respondents suggested the reverse burden of proof introduced by section 2 is an unacceptable evidential device and might ultimately be examined by the European Court of Human Rights. Others felt it was an unnecessary complication of the law that could ultimately impact on court discretion.

Other respondents were concerned that defendants could easily rebut the presumption. ACPO felt that 'because of this element of proving the offence, any advantages of having these provisions could be negated by defence solicitors producing 'other evidence'. For this reason, (they suggest) this provision may prove to be less effective.

A number of respondents questioned how Section 2 would apply in cases where the defendant denied possession and accordingly provided no evidence on the issue of intent to supply. The Bar Council noted that 'testimony along the lines of "I know nothing about the drugs found in my car. They must have been left by a passenger, but if they were mine they would be for personal consumption" is self evidently absurd. Whereas presently a tribunal satisfied as to possession would still be obliged to consider whether the drug was intended for supply or not, once Section 2 is in force, a jury will be bound so to conclude even if not satisfied of such intent'.

The Bar Council's Law Reform Committee could 'also foresee difficulty and confusion for a jury which, depending upon the defence or the evidence adduced, might be asked to apply the ordinary burden of proof in respect of one defendant or one count but not another defendant or another count'.

Considering the individual circumstances of each case

A significant number of respondents argued for the need for each case to continue to be considered on its own merits, providing the opportunity for the introduction and consideration of evidence other than just the total quantity of drug found. Some respondents expressed concern that cases involving smaller amounts would not be prosecuted as a matter of course, despite the existence of other evidence indicating supply rather than simple possession. Similarly, there was some concern that the practical effect of the presumption could be to prevent prosecutors considering all the circumstances of a case when deciding on charge.

A number of individual police officers welcomed the 'guidance' offered by prescribed levels, but they all, along with others, stressed the point that there could be no hard and fast rule for what constituted possession with intent to supply as opposed to simple possession.

The Forensic Science Service, and others, emphasised the importance of considering the circumstances and other forensic evidence available in each case. 'The FSS is often requested to look for evidence to support a charge of intent to supply or supply. This evidence may be a comparison of drugs and/or packaging. Packaging is particularly useful as the packaging recovered from drugs can be compared to unused packaging or remnants recovered from a defendant's home. These types of links provide strong evidence that drugs have been packaged for distribution and hence support a supply charge even when the quantity of drugs recovered is small'.

Prosecutors also questioned the practical impact of section 2 on their ability to consider all the relevant circumstances of a case when deciding whether a person should be charged with possession or possession with intent to supply. 'A prosecutor will look for the various facts when determining whether a suspect should be charged with possession or possession with intent to supply. The possession of a certain amount of drug will be important, but not necessarily the deciding factor'.

Police expert witnesses.

Linked to the need to consider the circumstances of each individual case, many responses from police forces expressed concern that setting prescribed levels would undermine the role of expert witnesses in court. Some were even worried that the existence of prescribed levels might undermine the evidence they provide in cases involving smaller amounts.

Expert witnesses are regularly called to court to provide information about drug trends and consumption methods. The evidence they provide is particularly useful in cases where a defendant charged with possession with intent to supply attempts to explain large quantities of controlled drugs as for their own personal use.

Respondents pointed to the variations in drug trends and consumption patterns over time and from one city to another. They are influenced by a number of factors, including price, purity, availability and current fashion. The use of expert witnesses can account for disparities over time and geographical location. Many respondents were concerned that setting prescribed levels in regulations would introduce a level of inflexibility that would make it difficult to take account of differences or changes in local drug trends and consumption patterns.

Respondents also expressed some concern that the existence of a prescribed level would have 'the unforeseen effect of adding credibility to the defence in cases where intent to supply is alleged in relation to quantities below the prescribed level'.

Changes to dealing practice

Respondents expressed concern that Section 2 would encourage dealers to carry just below the prescribed level (whatever the level might be) in order to evade a charge of possession with intent to supply.

The CPS 'reasonably anticipate that when levels are finalised and published, many dealers will believe that if they carry just below the prescribed amount they will escape being charged with supply'. Like many other respondents, the CPS called for steps to be taken to 'prevent any public misunderstanding of the legislation' and guidance to assert 'the flexibility that prosecutors have when deciding the charges in these cases'.

Many respondents discussed the importance of ensuring local areas were able to respond to changes in dealing practices resulting from the setting of any prescribed levels. In their response, Turning Point note that without specific prescribed levels 'the police (have) greater flexibility to respond to local issues and (can) prioritise activity and focus on those dealing in the drugs that cause the most harm, in particular heroin and cocaine'. As far as possible, respondents wanted this flexibility to continue.

Misunderstanding the provision

A range of stakeholders were particularly concerned that the prescribed levels would be misinterpreted as levels for personal use. This was certainly the story reported in certain sections of the media and we received a number of responses from individuals who had misinterpreted the clause as legalising possession of small amounts of drugs for personal use.

In their response, Turning Point note that 'coverage in the media of this proposal indicates a clear lack of understanding as to what impact the new legislation will have on current police practice with regards to prosecution for possession for personal use. The implication is that when the quantity is below the prescribed level it is 'reasonable' to argue that the drugs are for personal use'.

Setting levels for personal use was certainly not the intention of Section 2. The police would still be required to act in cases involving amounts below the prescribed level level set and, in conjunction with the Crown Prosecution Service, would need to consider the most appropriate charge given the individual circumstances of each case. However, we accept the call for a clear and consistent message on our approach to both possession and supply cases.

The need for the provision

Some respondents were sceptical about the overall need for the provision. They argued that the number of cases that would rely on the presumption (ie. where there was no evidence other than the drug itself) would be negligible.

The proposed prescribed levels

The consultation letter proposed prescribed levels for heroin, crack, cocaine hydrochloride, ecstasy, amphetamine and cannabis based on an existing informal agreement between an English police force and the local CPS. Respondents were asked to comment on bulk quantities and numbers of individual wraps. Table 1 sets out the levels consulted on.

Controlled substance	Bulk quantity	Individual wraps
Heroin (diamorphine)	7 grams	10 wraps of 0.1g
Cocaine hydrochloride	7 grams	10 wraps of 1g
Crack	7 grams	10 wraps of 0.1g
Ecstasy	5 tablets	-
Amphetamine	14 grams	10 wraps of 1g
Cannabis	113 grams (resin) 500g (leaf)	10 individual pieces/blocks (resin) 20 individual 2" x 2" bags

Table 1 –Prescribed levels in the consultation letter

Of the 29 respondents who provided general comments on the appropriateness of the suggested prescribed levels, four respondents agreed with the proposed prescribed levels, 23 thought they were too high and two felt they were too low. Many respondents provided specific feedback for each of the controlled drugs. A summary of this is provided below.

Individual wraps

Respondents highlighted a number of difficulties with specifying the weights or size of individual wraps. The Forensic Science Service noted that 'whilst there is a common understanding of the term 'wrap', (their) experience shows that it is also a cause of confusion. The packaging of drugs at street level (the level at which a wrap is designed for use) is very varied'.

Other respondents noted the frequency of instances whereby underweight deals are supplied, and suggested that including specific weights would create a loophole that dealers could easily exploit by changing the size of deals to avoid going above the prescribed level. The Forensic Science Service also note that the data they collect 'demonstrates that the weight ranges for street-level packages varies widely and the proposed wrap sizes (in the Home Office consultation paper) are not typical or representative...The wide ranges (of wrap size) make the concept of an absolute wrap size inappropriate'.

Respondents also felt that setting the prescribed levels at 10 wraps or deals was excessive. Many argued that possession of multiple deals is in itself indicative of dealing, whilst others were inclined to accept that users might reasonably carry a small number of deals for personal use.

Bulk quantities

Respondents also made a number of comments in relation to setting prescribed levels for bulk quantities of controlled drugs.

The Crown Prosecution service noted that a number of prosecutors had 'queried whether a flat amount would be sufficiently subtle to reflect the true nature of drug taking and dealing. (They noted that) amounts may vary depending on whether the person is a heavy user, the financial resources of the user, or where/when the person intends to deal'. Other respondents had similar concerns about setting a fixed level for bulk quantities.

A number of police forces stressed the high frequency of underweight deals and commented that this alone could significantly reduce the impact of setting prescribed level levels. The Scottish STOP Unit noted that 'drug deals are never an exact weight and it stands that a 7gram (or quarter of an ounce) deal will normally weigh somewhere in the region of 6 and 6.9 grams. It stands that the proposed 7gram level would cater for the possession of a quarter ounce weighted deal with no impact'. Others commented that setting a bulk quantity would simply encourage dealers to operate below that amount to avoid being caught by the evidential presumption.

In addition to this, the FSS noted that the number of cases referred to them involving large quantities of drugs was minimal. They stated that 'whilst supply cases submitted to the FSS may contain large quantities of drugs, many do not...(and) there is considerable overlap in the weights seen in possession and supply cases'. This, once again, suggests that although the total quantity of drug found in a person's possession is an important consideration, it is not an absolute measure of intent to supply.

Respondents stated that combinations of drugs are frequently sold (for example, heroin and crack). The respondents questioned the application of Section 2 in cases involving the possession of more than one controlled drug, none of which exceed the specific prescribed level. Some respondents suggested there should be a formula for accruing quantities, proposing single prescribed level weights for each class of drug. Others suggested that possession of different drugs in itself was indicative of trafficking rather than personal use.

Purity

The consultation paper did not specifically consider the issue of drug purity; however it was raised as an issue by a number of respondents.

The response was evenly split between those who thought it should be factor and those who didn't. Whilst some noted the considerable difference between, for example, 7grams of 1% amphetamine and 7 grams of 100% pure amphetamine, others suggested the prescribed level levels should only apply to the quantity of drug preparation. 'If the weights were interpreted as pure drug, additional purity analyses would be required (particularly if the prescribed level is set low) and additional expense would be incurred'. Other responses noted the problems of undertaking purity analysis prior to charge and the uncertainty often associated with purity analysis as reasons for setting the prescribed levels in terms of drug preparation as opposed to pure drug.

Comments on the specific prescribed level levels

Table 2 summarises the number of respondents that commented specifically on the prescribed levels for bulk amounts of each of the controlled drugs and whether they thought the levels were correct, too high or too low.

Controlled drug and proposed prescribed level (bulk)	No of respondents commented	% agreed with proposed prescribed level	% disagreed – too high	% disagreed – too low
Heroin	28	14%	82%	4%
Crack	25	24%	68%	8%
Cocaine	24	29%	67%	4%
Ecstasy	24	58%	17%	25%
Amphetamine	24	38%	58%	4%
Cannabis: Resin: 113g Leaf: 500g	34	9%	85%	6%

Table 2: Respondents comments on prescribed level levels in consultation paper

Heroin

The majority of respondents who commented specifically on the heroin prescribed level felt 7 grams was too high. Respondents commented that users rarely stockpile, but buy what they can afford and are limited in the amount they can 'safely' use in a day. 7grams represents more than this amount and would not have a significant impact of dealers.

Respondents who disagreed with the proposal of 7grams suggested alternative amounts ranging from 1 gram to 14 grams.

Cocaine hydrochloride and Crack cocaine

Respondents questioned the inclusion of both cocaine hydrochloride and crack cocaine. The Forensic Science Service noted that setting separate prescribed level levels for both forms would require additional forensic tests to confirm the form of the drug, resulting in additional work for laboratories and additional cost for the police. Including a single weight for cocaine would capture both forms.

The majority of respondents who commented specifically on the cocaine and crack prescribed levels felt 7 grams was too high. Respondents noted that the majority of crack users are dependent and do not buy in bulk. Users tend to binge on crack and money is the factor that limits consumption, rather than the level of drug that can 'safely' be consumed.

Respondents who disagreed with the proposal of 7g suggested alternative amounts ranging from 1 gram to 14 grams for both cocaine hydrochloride and crack cocaine.

Ecstasy

The majority of respondents who commented specifically on the ecstasy prescribed level were in agreement with the proposal of ten tablets, although many respondents reported users regularly consuming ten tablets in a single session. Respondents highlighted the particular need to consider the individual circumstances of supply cases involving ecstasy, such as the location of seizures.

Amphetamine

58% of respondents who commented on the levels for amphetamine (24 in total) felt the proposed levels were too high. Many expressed concern about purity levels, suggesting that the prescribed level for base speed should be much lower than that for street amphetamine. Some respondents suggested that purity levels could be set on the amount of pure drug, requiring purity analysis in each individual case. This would not only be an additional expense, but would require purity analysis. For these reasons, a number of respondents suggested the prescribed levels should refer to drug preparation and not the amount of pure drug.

Respondents who disagreed with the proposed prescribed level of 14g suggested alternative amounts ranging from 2 grams to 28 grams.

Cannabis

85% of respondents who commented on the proposed levels for cannabis (34 in total) felt that 113 grams (cannabis resin) and 500g (cannabis leaf) were too high. Many respondents were concerned that setting the prescribed levels too high would cause confusion about the legality and safety of cannabis, and were keen to see a much lower prescribed level set.

Respondents suggested that one weight could be set for cannabis in all its forms, although many noted the increasing availability of higher-strength cannabis (skunk) and the need to take this into consideration. Other respondents suggested the inclusion of a prescribed level for cannabis plants.

Respondents who disagreed with the proposed prescribed levels for cannabis suggested alternative amounts ranging from 1 gram to 1 kilo.

NEXT STEPS

The Government has carefully considered the responses received to the public consultation, both on the provision in broad terms and on prescribed levels. It has also received and considered advice from the Advisory Council on the Misuse of Drugs on prescribed levels.

It does not accept that the reverse evidential burden contained in the provision is unnecessary or contrary to Human Rights legislation. Such provisions may be appropriate in certain circumstances and they have been upheld by the House of Lords.

It notes, however, that respondents are concerned, among other things, that

The provision may have the unintended consequence of

- providing dealers with a defence, in that they may claim that being found in possession of less than the proscribed amount demonstrated that they were not dealing.
- leading to the misconception that possession amounts below the prescribed amount are lawful or consumption is not harmful
- leading to some cases not being assiduously pursued where the amount of drug was not above the prescribed limit, even though other evidence supported the contention that it was held with intention to supply it.

It may be ineffective because of

- the number of cases in which evidence is adduced which is sufficient to raise the issue that the accused may not have had the drug in his possession with intent to supply it,
- dealers will modify their behaviour to avoid being found in possession of amounts above the prescribed amounts
- the small number of cases where the only evidence of dealing is the amount of drug in a person's possession

There are difficulties in establishing prescribed amounts which are universally applicable and appropriate. This was reflected in the lack of consensus among respondents as to the level at which prescribed levels should be set. This arises because of variations in the amounts purchased by a user for personal use. This might depend, among other things upon

- variations in the weight of individual "deals"
- the purity of the drug in the form it is sold.
- variations in the tolerance of individuals to a particular drug
- financial considerations, such as the price of a drug locally at a given time, the amount the user can afford or the availability of discounts for bulk purchases
- other circumstances, such as the frequency with which a dealer can be accessed, the period over which it is intended to consume the drug and the occurrences of purchases of small quantities of two or more drugs.

In the light of these considerations the Government has decided therefore not to commence this provision of the Drugs Act 2005 at the present time. It will keep the matter under review however and may bring forward regulations to establish prescribed amounts should the need arise.

LIST OF RESPONDENTS

The following is a list of the organisations that responded to the consultation letter. We also received a number of personal responses from members of the public and individual police officers. We have not listed all their names, but we are grateful for their contributions.

ACPO Drugs Committee (on behalf of ACPO England, Wales and Northern Ireland)
ACPO Scotland
The Bar Council
Campaign to Legalise Cannabis Association
Cheshire Constabulary
Coventry Community Safety Team
Crown Office and Procurator Fiscal Office
Crown Prosecution Service
Derbyshire Constabulary
Drug Education Forum
Dyfed-Powys Police
Fife Drug and Alcohol Action Team
Focus 12
Forensic Science Service
HM Revenue & Customs
KFx
Lancashire Constabulary
Leicestershire Constabulary
Legalise Cannabis Alliance
London Drugs Policy Forum
Merseyside Police
National Health Education Group
Network Ayrshire
Norfolk Police
North Wales Police
North Yorkshire Police
Northamptonshire Police
Nottinghamshire Police
Opportunity Youth
Oxford City Detached Work Project
Police Federation
Police Federation of Northern Ireland
Police Service of Northern Ireland
Release
Scottish Drugs Forum
Scottish STOP Unit
South Wales Police
South Yorkshire Police
Stewartary Alcohol & Drugs Forum
Suffolk Constabulary
Superintendents' Association
Superintendents' Association of Northern Ireland

Surrey Police
Sussex Police
Thames Valley Police
Transform Drug Policy Foundation
Turning Point
West Midlands Police