

# Swift. Certain. Tough. New Consequences for drug possession white paper CONSULTATION RESPONSE



**10 October 2022**

## About StopWatch

StopWatch is a coalition of legal experts, academics, citizens and civil liberties campaigners. We aim to address excess and disproportionate stop and search, promote best practice and ensure fair, effective policing for all.

Since forming in 2010, StopWatch has led a wide-ranging campaign against the disproportionate use of stop and search, the use of exceptional stop and search powers, and the weakening of associated accountability mechanisms. The campaign includes research, legal and policy analysis, media commentary, political advocacy, litigation, submissions to national and international organisations, and community organising.

StopWatch welcomes the opportunity to respond to the Home Office's consultation on the 'Swift. Certain. Tough. New Consequences for drug possession' white paper. The white paper outlines a demand reduction strategy to tackle current levels of recreational drug use across the United Kingdom, setting out an escalatory three-tier framework for the criminal justice response to possession offences, including alternatives to prosecution.

However, the white paper still establishes a punitive model that anticipates the intensification of policing and prosecutorial approaches to the possession of illicit substances, despite best practice recommendations from the government's expert advisers and international actors. The enforcement of fixed penalty notices on individuals facing 'Tier 1' sanctions, and the threat of additional penalties for non-compliance, risks making the avoidance of criminal prosecution dependent on financial means. The implementation of 'Tier 2' mandatory drug testing requirements would also necessitate the expansion of stop and search powers, despite overwhelming evidence that such powers are disproportionately used against certain groups in society, such as individuals from minority ethnic backgrounds, and Black British communities in particular, as well as young people and men.

## Consultation web page:

[Swift, Certain, Tough: New Consequences for Drug Possession \(accessible version\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/swift-certain-tough-new-consequences-for-drug-possession)

## Our response

### Section 2 – Tier 1

13. Do you agree with our proposals that for a first offence of possession of a controlled drug an individual should be required to attend a drug awareness course designed to make them consider their behaviour? Please select one option.

- Strongly agree
- Agree
- **Neither agree nor disagree**
- Disagree
- Strongly disagree
- Don't know

Please provide any additional comments

The white paper notes that 'drug awareness courses are effective in reducing short-term drug use and reoffending and are a positive use of resource to deal with lower-level offending', which recognises the importance of preventing first-time offenders from being unnecessarily drawn into the criminal justice system.

Indeed, research undertaken by StopWatch with the charity Release and the London School of Economics and Political Sciences has found that ethnic disparities in the enforcement of drugs laws have a knock-on effect across criminal justice processes. Black and Asian people were convicted of drug possession at 11.8 and 2.8 times the rate of white people in 2017, despite lower rates of self-reported use; cannabis and khat warnings were issued to Black and Asian people due to stop and searches at 7.6 and 2.6 times the rate of white people.

International guidelines endorsed by organisations such as the United Nations Development Programme and the World Health Organization stress that states should 'prioritise diversion from prosecution for persons arrested for drug offences or drug-related offences of a minor nature'. The combination of harm reduction approaches, where emphasis is placed on health and social care interventions and treatment, with the decriminalisation of simple drug possession has also been recommended by the Advisory Council on the Misuse of Drugs (*Interactions and Relationships between the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016*, unpublished) and the Health and Social Care Committee.

The problem is, despite prior admission from the Home Office that 'there is no apparent correlation between the "toughness" of a country's approach and the prevalence of adult drug use', the white paper diverts from well-established best practice recommendations and instead situates a 'Tier 1' response within an unduly punitive, criminal justice-oriented framework. Delivering drug awareness courses through a new fixed penalty notice ('FPN') programme rather than through the existing out of court disposal regime would mean that sanctions risk being 'disproportionately issued to certain groups in society': young people; people from certain racial or ethnic minority groups; and men'.

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The apparent lack of distinction between Class A and Class B drugs during the enforcement of 'Tier 1' sanctions suggests that this form of an alternative to prosecution would neither be an adequate nor purposeful use of resources. Though attendance of a drug awareness course may be beneficial for individuals caught in possession of Class A substances such as heroin or cocaine, such a measure may not be effective in deterring possession of relatively less serious drugs such as cannabis. Given the scale of recreational drug use amongst adults in the England and Wales, with an estimated 3.2 million users in the 2019/2020 year according to the Office for National Statistics, ([\*Drug misuse in England and Wales: year ending March 2020\*](#), p.2), it is unlikely that those stopped for possession of Class B substances such as cannabis would have less awareness of the effects of the drug than the stakeholders responsible for delivering the 'Tier 1' course.

Bringing individuals with possession of small quantities of illicit substances into the proposed three-tiered framework would therefore most likely entrench existing biases in the criminal justice system, and result in the failure of the government's stated aims to tackle serious crimes facilitated by the supply of controlled drugs.

14. Do you agree that the individual should pay for the cost of the drug awareness course? Please select one option.

(Please see our answer to question 15).

15. Do you agree that there should be a consequence in the form of a financial penalty for those who refuse to attend the drug awareness course? Please select one option.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- **Strongly disagree**
- Don't know

Please provide any additional comments

StopWatch fundamentally disagrees with the [proposals that individuals should pay](#) for the cost of drug awareness courses listed under the 'Tier 1' regime, and that a 'larger financial penalty than the cost of the awareness course' be issued upon 'failure to engage with this requirement'.

The Advisory Council on the Misuse of Drugs has [previously recognised](#) the 'strong association between socioeconomic position, social exclusion and substance-related harm, with greater harm recorded in people living in more deprived areas and with lower economic resources and socioeconomic capital'. The use of financial penalties against individuals subjected to 'Tier 1' sanctions, as well as the risk of further payment due to non-compliance with this requirement, would be unnecessarily punitive and introduce an inherent unfairness to the three-tiered system: making the avoidance of prosecution dependant on financial means.

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The white paper itself recognises the fact that the misuse of drugs affects ‘both physical and mental health, relationships, career prospects, and wider society’. Yet in seeking to impose financial requirements in the context of the ‘Tier 1’ regime, the government’s proposals would exacerbate the very harms associated with the use of illicit substances by undermining the economic security of affected individuals.

Considering that Black and minority ethnic households in the United Kingdom are over twice as likely to live in poverty than their white counterparts, with approximately 46% of Black households falling under the poverty threshold, the negative impacts of financial penalties on impoverished persons would likely also disproportionately affect individuals from already marginalised ethnic and racial groups.

### Section 3 – Tier 2

23. Do you agree that those who are caught in possession of drugs for a second time should be offered a caution with rehabilitative conditions, (where their alternative option is to face arrest and charge)? Please select one option.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- **Strongly disagree**
- Don’t know

Please provide any additional comments

Like the previous proposals, the use of ‘diversionary cautions’ against those found to be in possession of controlled drugs for a second time would serve as an unduly punitive approach to recreational users – most of whom will not have criminal records – and would only entrench the problem of ethnic disproportionality in the criminal justice system. The white paper notes that the ‘Tier 2’ regime would serve as an addendum to the existing out of court disposals framework set out under the Police, Crime, Sentencing and Courts Act 2022, and cites proposals in the Inclusive Britain Action Plan which recognise the use of such measures as ‘an important part of the government’s response to tackling disparities within the criminal justice system’.

However, as evidence collated by StopWatch in collaboration with the charity Release and the London School of Economics demonstrates, ‘the balance between arrests and out of court disposals differs between ethnic groups, exacerbating disparities’ arising from stop and search encounters. Whilst ‘Black people were subject to higher arrests rates than white people in 2016/17 (22% compared with 16%), they were given out of court disposals at a lower rate (9% compared with 11%).’ Moreover, ‘stop and searches of Black people resulted in arrest at almost two-and-half times the rate they resulted in an out of court disposal, whereas stop-searches of white people resulted in arrest at fewer than one-and-a-half times the rate they resulted in an out of court disposal’.

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In the absence of an updated out of court disposals strategy by the National Police Chiefs' Council, with the latest available plan only covering the period between 2017 and 2021 (as of this response's writing), it is impossible to determine how the 'Tier 2' regime would operate in practice. Nonetheless, it can be reasonably surmised that – like the existing balance between arrests and out of court disposals – cautions would be disproportionately enforced against individuals from minority ethnic backgrounds and draw already overpoliced and under-protected communities further into the criminal justice system by placing them within the attention of the police.

24. Do you agree that, where proportionate, the Tier 2 conditions should include: (i) a mandatory drug testing requirement; (ii) attendance at a further drug awareness course;

Please provide any additional comments

(Please see the answer to question 29).

29. Do you know of available evidence on mandatory drug testing and its ability to reduce illicit drug use or re-offending? If yes, please share any evidence.

StopWatch disagrees with the suggestion that the 'Tier 2' cautions regime should include mandatory drug testing requirements and is alarmed at [proposals seeking to introduce](#) 'new police powers enabling individuals to undergo drug testing'. The single provision in the white paper relating to the expansion of police powers and procedures are vague and ill-defined in scope. There is no clear framework setting out what sort of tactics officers can reasonably be expected to use during the enforcement of the three-tiered regime, the situations where these 'new' powers should be used, as well as any associated accountability mechanisms to protect against their misuse.

At the most basic level, the identification of recreational drug users will rely on an expansion of police stop and search powers, despite long-standing concerns about the discriminatory and disproportionate effects of such tactics on poor and minoritized communities. According to [the most recent figures published by the Home Office](#), the annual number of stop and searches carried out by the police increased by 24% in the year ending March 2021; 'individuals from a Black or Black British background were searched at a rate 7.0 times higher than that of those from a white ethnic group'. No further action was taken in 77% of recorded cases and 'the most common reason for carrying out a PACE stop and search was on suspicion of drug possession', accounting for 69% 'of all stop and searches in the latest year'. The lack of clarity surrounding the proposals for new police powers not only suggests that additional tactics would be applied disproportionately, but that officers would be spoilt for choice in terms of available powers and be at risk of acting beyond their lawful authority whilst enforcing 'Tier 2' drug testing requirements.

## Section 6 – Operational best practice and new reforms for Drug Testing on Arrest

42. Do you agree with our proposal to expand the range of illicit drugs which can be tested for under Drug Testing on Arrest legislation? Please select one option.

- Strongly agree

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- Agree
- Neither agree nor disagree
- Disagree
- **Strongly disagree**
- Don't know

Please provide any additional comments

The proposed inclusion of cannabis as one of the substances liable for detection under Drug Testing on Arrest ('DtoA') legislation would serve as an unnecessary expansion of police powers and would only exacerbate existing inequalities throughout the criminal justice system.

As [the white paper itself recognises](#), DtoA 'is a means to identify heroin, cocaine, and crack cocaine users from those arrested for a range of largely acquisitive crimes (such as theft or robbery)'. [Sections 63B and 63C of the Police and Criminal Evidence Act 1984](#) ('PACE') explicitly limit DtoA to offences that may involve the presence of Class A drugs, recognising a nexus between the use of substances deemed most dangerous by the Misuses of Drugs Act 1971 and the commission of serious crimes.

Given [the scale of recreational cannabis use](#) in England and Wales – 'the most used drug' among 'the over three million people in England and Wales reported using drugs' in the 2019/2020 year – it is highly unlikely that most users of this substance would have any prior criminal history, let alone involvement in the 'largely acquisitive crimes' described by the white paper.

StopWatch has long sought to address how '[police policy and practice play a key role](#) in determining who is available for prosecution and may be pushed into the criminal justice system'. Our research has shown that 'stop and search is... responsible for a substantial proportion of arrests for drug offences (39% in 2016/17), particularly those involving Black people (57%) and create ethnic disparities that are maintained through to every form of sentencing outcome, including immediate custody'.

Issues surrounding what constitutes reasonable grounds for suspicion within the meaning of Section 1(3) of PACE, and the impact of drug-related stop and searches on ethnic minority groups, have recently led the Independent Office on Police Conduct to reaffirm that '[it is not good practice for an officer to base their grounds for search on a single factor](#), such as the smell of cannabis alone'.

The inclusion of Class B drugs such as cannabis within the expanded range of substances liable for DtoA would only compound upon the ethnic disparities arising from initial stop and search encounters and lead to further overrepresentation of minoritized communities across the criminal justice system.

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