

25 January 2017

Lisa Frost
Office of the Sentencing Council
Royal Courts of Justice
Strand
London
WC2A 2LL

The Howard League for Penal Reform's response to the Sentencing Council's consultation on breach guidelines

We welcome the opportunity to respond to the Sentencing Council's consultation on breach guidelines.

1. About us

Founded in 1866, the Howard League is the oldest penal reform charity in the world. We have some 12,000 members, including lawyers, politicians, business leaders, practitioners, prisoners and their families and top academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.

The Howard League works for less crime, safer communities and fewer people in prison. We aim to achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's work.

Since 2002 the Howard League has provided the only legal service dedicated to representing children and young people in custody. The Howard League provides administrative support to the All Party Parliamentary Group on women in the penal system.

We have drawn upon our lawyers' experience in practice, our direct work with children and young adults, and our policy expertise in this response.

The guidelines are punitive

From the outset the whole tenor of the guidelines is punitive. The focus is on the level of sanctions imposed. It is not until page 10 of the guideline that it states that 'the primary objective of the court is to achieve compliance with a community order'.

Throughout the guidelines, there is no consideration at all of the reasons why people are failing to comply with orders. People in the criminal justice system often have multiple and complex problems, including disabilities, mental health problems, homelessness, drug and alcohol issues and debt. Some will be the primary carers of children. Sentencers must enquire about an individual's circumstances when assessing compliance. They should consider whether barriers to engagement with an order have been recognised by supervising officers and what steps have been taken to address any potential issues prior to the issue of breach proceedings.

In Case Study A (p19) there appears to be no detailed investigation into D's lack of compliance, when initial compliance with the order was good. It is not known whether D is the primary carer of his child or whether the best interests of the child have been considered. It is not known whether his childcare issues or his debt problems had been recognised or addressed by his supervisor. It is therefore disappointing that the penalty of custody in this instance is deemed appropriate.

The guidelines do not consider external factors, such as the role of supervisory services including Community Rehabilitation Companies and the National Probation Service. There is a general duty upon probation and supervising services to understand the reasons for a lack of compliance and work with the person to achieve compliance. Yet the guidelines do not encourage sentencers to enquire about the actions that may or may not have been taken by supervisors to problem solve and encourage compliance.

There is evidence to show that CRSs and the National Probation Service are failing in their duty to support people on orders and enable them to comply. Her Majesty's Inspectorate of Probation found that since Transforming Rehabilitation was introduced, over two-thirds of prisoners had not received enough help pre-release in relation to accommodation, employment and finances. A report published by Her Majesty's Inspectorate of Probation on the effectiveness of probation work in North London found poor levels of contact with too many service users and a lack of monitoring systems. Sentencers must consider the level of support that has been put in place to ensure compliance before determining the level of compliance.

A lack of evidence

The Sentencing Council states that it has consulted with professionals. There is no reference to consultation with people serving sentences in the criminal justice system.

The Sentencing Council states it is issuing guidelines on breach to 'ensure a consistent approach to sentencing breach of orders'. Yet on page seven of the draft consultation it states that 'data was unavailable to ensure a thorough examination of sentencing practice for some of the breaches included'. The draft guidelines are being issued for consultation when the data is unavailable to show whether inconsistency is an issue.

The Sentencing Council's own resource assessment of the potential impact of breach guidelines for community orders, suspended sentence orders and post sentence supervision is limited. The Sentencing Council states 'it is not known exactly how many breaches of these orders lead to a custodial sentence being activated, and if so, the length of the custodial sentence imposed'.

The Sentencing Council has not published an equality impact assessment of the breach guidelines.

Applicability of the guidelines

There is a lack of clarity about the scope of the guidelines which ‘will apply to all offenders aged over 18, who are sentenced on or after the date that the guideline comes into force’. The Sentencing Council must clarify the position in respect of those aged 18 and over who have been re-sentenced for a conviction received whilst under the age of 18. In our opinion young people in this category should only be dealt with in accordance with the principles for children.

Breach and the prison population

The draft guidelines, with the emphasis on compliance rather than proportionality, are likely to encourage greater use of imprisonment when it is disproportionate and unnecessary.

Data from the Ministry of Justice shows that in the last 20 years the numbers of people in prison due to recall has increased by 4,300 per cent. The increased use of recall to prison for breach has been one of the main drivers to the prison population. Most recalls to prison are for technical breaches of licence conditions, not the commission of new crimes.

The draft guidelines set a dangerous precedent as they state that sentencers should impose a custodial sentence ‘**even when the original offence seriousness did not originally merit custody**’. This contradicts one of the stated aims of the Sentencing Council to ensure that ‘all sentences are proportionate to the offence committed’. Use of prison should be a last resort, used for the most serious offences. The proposed guidelines are likely to lead to up-tariffing.

If someone has committed a further crime then it should be investigated and prosecuted. A technical breach of a sentence should result in a swift but proportionate community response which considers the level of harm caused and the circumstances behind a lack of compliance.

Disproportionality

The guidelines, in failing to consider the factors relating to compliance, are likely to have a disproportionate impact on women, resulting in an increase in the use of custody for breach. Women are more likely to be convicted of non-violent offences. They are also more likely to be primary carers of children.

The Corston Report emphasised that an excessive proportion of women were in custody for breaches. Baroness Corston recommended: Custodial sentences for women must be reserved for serious and violent offenders who pose a threat to the public; Community solutions for non-violent women offenders should be the norm; Community sentences must be designed to take account of women’s particular vulnerabilities and domestic and childcare commitments; The restrictions placed on sentencers around breaches of community orders must be made more flexible as a matter of urgency. The draft guidelines discourage sentencers to be flexible when considering breach and to only consider compliance.

A report by the APPG on Women in the Penal System, published by the Howard League for Penal Reform, found that since TR was implemented in February 2015 there have been 797 recalls of women released from short sentences (Ministry of Justice 2016b). The vast majority will have been recalled to prison for 14 days.

The penalty level for ‘wilful and persistent’ non-compliance, namely the imposition of a custodial sentence for an offence which is not serious enough to merit custody, is in direct contradiction of the UN Rules for the treatment of women and non – custodial sentence for women offenders (the Bangkok Rules). Rule 64 states that custodial sentences are *extrema ratio* and should only be used when “*the offence is serious or violent or the woman represents a continuing danger*”.

Conclusions

The guidelines should be re-drafted to ensure sentencers adopt a critical approach when sentencing for breach. Consistency should be achieved through a process that promotes the use of community sentences. Sentencers must consider the reasons for a lack of compliance, including an individual's personal circumstances and external factors. They must also consider what steps have been taken prior to breach proceedings to encourage compliance.

I would be happy to meet with you to discuss any of these points further.

Yours sincerely,

Dr. Laura Janes
Legal Director