

Howard League for Penal Reform's response to the Sentencing Council's consultation on public order offences

8 August 2018

The Sentencing Council is consulting on new guidelines for public order offences.

Key points

1. The proposed guideline affects tens of thousands of people each year and could result in a significant increase in the use and duration of custody.
2. There is no evidence that harsher sentences are an effective deterrent for public order offences.
3. The most vulnerable in the criminal justice system are likely to be disproportionately affected.
4. The proposed guideline does not take into account the views of people who have experience of being sentenced.
5. The assessment of the potential impact of the proposed guideline is not sufficiently robust or evidence based to justify the potential resource implications at a time of austerity.

1. About us

- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and 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.
- 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We 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 parliamentary work, research, legal and participation work as well as its projects.
- 1.3 Our legal team works directly with children and young adults in prison.
- 1.4 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. Reach and risk of excessive increase in use and length of custody

- 2.1 The proposed guideline affects tens of thousands of people each year and could result in a significant increase in the use and duration of custody. The consultation document states that "Public Order offences are high volume offences both in the magistrates' courts and crown court. In 2016 there were 22,500 adults sentenced for these offences" (page five) and that "Public Order offences are some of the highest volume offences seen by courts" (page six).
- 2.2 Evidence from Transform Justice (2016) highlights that previous guidelines may have served to increase the use of imprisonment as a result of more upward adjustments to sentences than downward ones.¹
- 2.3 The Howard League notes and endorses the concerns set out by both the Criminal Bar Association and the Law Society in their responses about the risk of double counting and the selection of higher starting points within ranges (rounding up, rather than down).
- 2.4 The Howard League is especially concerned about the lengthy sentences that are envisaged for riot offences. It is of particular concern that these ranges have been calculated based on sentences handed down in the period which includes 2011 riots, in respect of which the Court of Appeal acknowledged that sentences that were longer than usual were justified due to the serious nature of the that particular incident (Blackshaw and others, 2011). In that case, the Court of Appeal noted that it was permissible depart from sentencing guidelines. This will have inevitably resulted in an increase in the starting points from which sentencers may then feel justified in departing from should a further serious incident arise. As set out below, the deterrent effect of sentencing for rioting is questionable.

¹ <http://www.transformjustice.org.uk/wp-content/uploads/2016/12/TJ-DEC-8.12.16-1.pdf>

- 2.5 The Howard League is concerned that the starting points and category ranges for some offences will lead to an increase in the use of short term custodial sentences and a ratcheting up of sentencing. Short sentences have been proven to be less effective and lead to poorer outcomes for individuals, for society and for the taxpayer.
- 2.6 In regard to sentencing levels and category ranges for public order offences, the guidelines ask sentencers to consider the following short sentences:
- A starting point of 26 weeks custody for affray
 - A starting point of 12 weeks custody for threatening behaviour
 - A starting point of 6 weeks custody for racially and religiously aggravated offences
 - A category range of fine to 12 weeks custody for threatening behaviour
 - A category range from a fine to 6 weeks custody for racial religiously aggravated offences
- 2.7 Prison sentences of six to twelve weeks are so short that people convicted of threatening behaviour or racial or religiously aggravated offences will not receive any meaningful programme to address their behaviour or rehabilitate them during their very limited time inside. For some prisoners this will be as short as three weeks. Whereas a focussed community programme can be tailored to address exactly these issues.
- 2.8 A short prison sentence is more likely to make communities less safe in the longer term as it fails to tackle the underlying causes of racial or religiously aggravated offences. Given the dire state of prisons, which are overcrowded, understaffed and have high levels of violence, it is highly likely that a short prison sentence could exacerbate problems including threatening or violent behaviour.
- 2.9 A short prison sentence will impact on a person's life for a greater length of time compared to a community sentence. A person sentenced to six weeks imprisonment will be subject to a 12 month supervision period followed by a 24 month rehabilitation period (double the period for a community sentence). It is well established that the additional periods of supervision introduced under Transforming Rehabilitation are unlikely to involve effective supervision in the community but will increase the risk of a return to prison during the supervision period for yet another short stay.
- 2.10 Short prison sentences are likely to have a disproportionate effect on women, particularly following the introduction of a compulsory 12 month supervision period following a short prison sentence as a result of the Transforming Rehabilitation reforms. The latest statistics from the Ministry of Justice show that between April 2017 and March 2018, there were 994 licence recalls of women who had served prison sentences of less than 12 months². A report by the APPG on Women in the Penal System, published by the Howard League for Penal Reform³, found that the vast majority of the recalls of women released from short sentences were recalls to prison for 14 days.
- 2.11 In May 2018, the justice secretary David Gauke stated that short prison sentences of less than 12 months do not rehabilitate prisoners and should be a last resort. He noted

² Offender management statistics quarterly: January to March 2018 available at <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2018>

³ The Howard League (2016) Is this the end of women's centres available at <https://howardleague.org/wp-content/uploads/2016/11/Is-it-the-end-of-womens-centres.pdf>

that prisoners held for less than a year have a recidivism rate of about 66%, higher than the reoffending rate of those handed non-custodial sentences.⁴

- 2.12 In the same month, the prisons minister, Rory Stewart called for a "massive reduction" in the number of people sent to prison for a short sentence, saying incarceration of under 12 months makes offenders more likely to commit crime⁵.
- 2.13 Research published by the Ministry of Justice showed that short prison sentences have significantly worse outcomes than community sentences.
- 2.14 The Sentencing Council guidelines will have an impact on sentencing practice. The guidelines should be encouraging the use of effective community programmes, rather than expensive and ineffective short term prison sentences.
- 2.15 The Sentencing Council appears to be out of step with government thinking, research and evidence.

3. Questionable deterrent effect of harsher sentencing for public order offences

- 3.1 There is no evidence that harsher sentences are an effective deterrent for public order offences.
- 3.2 Page six of the consultation document states that "Public order is essential for the safe functioning of society, and the law seeks to protect the public from behaviour which undermines this. This issue came into prominence in the 2011 riots which started in London and spread throughout the country, causing widespread disorder and criminal activity. In a case dealing with riot related offending, the then Lord Chief Justice stated that "there is an overwhelming obligation on sentencing courts to do what they can to ensure the protection of the public." Thankfully incidents of riot are rare, but the Council considers that these principles apply equally to other Public Order offences which threaten to undermine the safe and lawful functioning of society."
- 3.3 The Howard League agrees that the criminal justice system ought to ensure the protection of the public and reduce the risk of public disorder but does not believe that increasing the use of prison will achieve that end. In fact, the Howard League was told by senior police in Wales that significant disorder was prevented in Wales 2011 not by punitive sentencing but by the prompt and visible presence of youth workers and local police on the streets. Senior police rejected the prospect of increasingly punitive sentences as irrelevant and count-productive.

4. Disproportionate effect on vulnerable defendants

- 4.1 The most vulnerable people in the criminal justice system are likely to be disproportionately affected. The disproportionate impact of the increase in short sentences on women is outlined above.
- 4.2 However, it is also likely that public order offences will disproportionately affect children and young adults given the impulsive nature of such behaviour. We note that page eight of the consultation on the applicability of guidelines states that the definitive guideline will apply to all offenders aged 18 and older, who are sentenced on or after

⁴ <https://www.thetimes.co.uk/article/under-a-year-in-jail-must-be-last-resort-says-justice-chief-david-gauke-msdbmfmbb>

⁵ <https://www.bbc.co.uk/news/uk-politics-44272297>

the implementation date, regardless of the date of the offence. This raises two important concerns. First, it is likely that these adult guidelines will sweep up public order offences committed by children. The Howard League has had sight of data from the Youth Justice Board confirming that approximately 2500 offences in 2016/17 were committed by children who were convicted after they turned 18 because of the dilatory nature of the justice system. Second, although “age and/or lack of maturity” is included as a mitigating factor, there is nothing in this guidance that will encourage sentencers to reflect the residual lack of maturity of young adults aged 18 to 25 as recognised by the Justice Committee (2016, 2018). The Howard League is concerned that at present sentencers take insufficient account of the distinct needs and characteristics of young adults in the criminal justice system (Howard League, 2017).⁶

- 4.3 People from BAME backgrounds face discrimination across the justice system and are likely to be disproportionately subjected to punitive sentencing for public order offences. It is disappointing, and surprising, that the Sentencing Council has not considered the implications for BAME people.

5. Failure to consult people with experience of being sentenced

- 5.1 The proposed guideline does not take into account the views of people who have experience of being sentenced.
- 5.2 The consultation is a missed opportunity to consult with people who have had direct experience of the criminal justice system. The small scale research study has only gathered the views of sentencers. Further research with people in the criminal justice system could shine a light on unintended consequences, for example on particular groups in the criminal justice system such as young adults, women or BAME men and women.

6. Assessment of the impact of the guideline is not sufficiently robust or evidenced based to justify the risk and resource implications

- 6.1 The assessment of the potential impact of the proposed guideline is not sufficiently robust or evidence based to justify the potential resource implications at a time of austerity.
- 6.2 The resource assessment for the guideline states that *“the draft public order guideline intends to improve consistency in sentencing and not to cause a change in average sentencing practice. Overall, the guideline is not expected to have any impact on prison or probation resources.”* Yet at the same time the assessment refers to the lack of evidence about the potential impact:

“Any estimates of the impact of the new guidelines are therefore subject to uncertainty due to the limitations of the data, and uncertainty around how they will be implemented in practice.”

- 6.3 The Howard League is concerned that sentencers will be more likely to opt for a short prison sentences for certain offences when the range and starting points specify a prison sentence. The resource impact of a short prison sentence is far greater than a community sentence. The Prisons Minister Rory Stewart referred to the economic

⁶ <https://howardleague.org/publications/judging-maturity/>

benefits of community sentences as opposed to a prison sentence of 12 months or less⁷.

- 6.4 In light of the concerns we have raised, the Sentencing Council should collect robust evidence to determine the resource impact of the new guidelines given its statutory duty under s120 (11) (e) of the Coroners and Justice Act 2009 to have regard to the cost of different sentences and their relative effectiveness in preventing re-offending.

Howard League for Penal Reform
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⁷ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/prison-population-2022/oral/86114.html>

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