

**Howard League for Penal Reform's response to the Sentencing Council's consultation on the draft general guidelines for sentencing offences for which there is no specific guideline**

**11 September 2018**

**Summary**

1. Over a million people were sentenced in criminal courts in 2017. The proposed guideline is a "catch all" and is estimated to affect 15 per cent of cases. The impact statement is inconclusive, whereas in the absence of new legislation, any new guideline ought to have a positive impact on alleviating pressure on resources.
2. There is no evidence of consultation with those who are likely to be most affected by it.
3. The proposed digital format of the guide may render it inaccessible to many who need it most, including those in prison and those who are not computer literate. It may also undermine the positive progress of aspects of the guideline.
4. The applicability of the guideline ought to be clarified to ensure consistency and adherence to existing principled guidelines, especially in respect of young adults who offended as children and the application of the community and custodial sentences guideline. It is essential that the guideline reflects the key principles that apply.
5. Young adults: the inclusion of detailed guidance as to the meaning of "age and/or lack of maturity" is welcomed but this could be strengthened.
6. Women: the guideline is a missed opportunity to encourage a more proportionate and effective approach to sentencing women.
7. Ethnic minorities: the guideline is a missed opportunity to encourage sentencers to reduce the risk of discrimination.

## **1. About the Howard League for Penal Reform**

- 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. Impact of guideline**

- 2.1 The resource assessment states that 1,177,814 people were sentenced in criminal courts in 2017. The proposed guideline is a "catch all" and is estimated to affect 15 per cent of cases. It will therefore affect tens of thousands of people each year. The Sentencing Council has a duty to consider the impact of its guidance on already overstretched resources. In theory, given the principle of the least restrictive sanction, any guidance should reduce the risk of custody. Yet there is nothing in the proposed guideline to indicate this will do this. The assessment states that no change is expected on the basis that the guideline contains no sentence length indicators (paragraph 5.1) but "it is not possible to anticipate fully how sentencing behaviour will change as a result of the proposed guideline, and hence there is uncertainty surrounding the central estimate that the guideline will have no resource impact" (paragraph 6.3).
- 2.2 In the absence of new legislation requiring greater use of custodial sentences or increasing the severity of sentences, any new guideline ought to have a positive impact on alleviating pressure on resources. The guideline presents an opportunity to remind sentencers of the principles that militate against the use of unduly harsh sentences. Yet the current guideline misses the opportunity to do this other than by flagging the community and custody threshold guideline and providing a more comprehensive list of mitigating factors (both of which are welcomed). Some suggestions are made below in respect of ways that this guideline may be enhanced to achieve more appropriate outcomes.

## **3. Failure to consult people with experience of being sentenced**

- 3.1 The proposed guideline does not take into account the views of people who have experience of being sentenced.
- 3.2 The consultation is a missed opportunity to consult with people who have had direct experience of the criminal justice system. 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 who find the experience confusing and inappropriate and may often come out feeling that justice has not been done.

#### **4. Accessibility of the proposed digital guideline**

- 4.1 The guideline is entirely digital and is not available in a PDF format so that it can be read as a whole. This has made it difficult to respond to the consultation as it requires the reader to be online at all times and to click backwards and forwards. The proposed format of the guide may render it inaccessible to many who need it most, including people in prison who do not have access to computers. For example, how would a lawyer send a copy of the guideline to a prisoner on remand who may be sentenced under it? In its current format, it is not possible to print out the guideline in full. There are many people who are still not computer literate and who will also therefore struggle to benefit from being able to read it in full. Justice must be seen to be done with informed consent in a democracy.
- 4.2 The guideline makes significant progress in some areas, for example, in an expanded definition of “age and/or lack of maturity”. However, one has to click on the definition to benefit from this. Many sentencers will not know that the term has an expanded definition and may assume that such a simple term is self-explanatory and therefore not think to click on the link and benefit from the progress made by the expanded guidance. The helpful explanations and examples throughout the guideline are hidden from view. Therefore, there is a real risk that the format may undermine the positive progress of aspects of the guideline. A PDF should also be available.

#### **5. Applicability of the guideline and other relevant guidelines/principles**

- 5.1 The applicability of the guideline ought to be clarified to ensure consistency and adherence to existing principled guidelines, especially in respect of young adults who offended as children and the application of the community and custodial sentences guideline.
- 5.2 The draft guideline states it applies to all those aged 18 or over at the point of sentence once the guideline is in force. However, this fails to recognise the particular considerations that apply to young adults who committed offences as 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. In such cases the paragraph 6.2 of the overarching principles for children applies and sentencers should be reminded of this to ensure consistency. Paragraph 6.2 of the overarching guideline for children deals with “crossing a significant age threshold between commission of offence and sentence”. It provides that “In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence.” Sentencers should be cross referred to these provisions in the new guideline.
- 5.3 Given that the guideline sets out principles rather than suggesting types and lengths of sentence, it is concerning that some the most important parts of the “Imposition of community and custodial sentences” guideline do not appear to be incorporated. For

example, the following points from the general principles section of that guideline in respect of community sentences are particularly important but may be missed if sentencers are not alerted specifically to them and consider the new guideline to be comprehensive:<sup>1</sup>

- Community orders can fulfil all of the purposes of sentencing.
- A community order must not be imposed unless the offence is ‘serious enough to warrant such a sentence’.
- Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty.
- The court must ensure that the restriction on the offender’s liberty is commensurate with the seriousness of the offence and that the requirements imposed are the most suitable for the offender.
- Sentences should not necessarily escalate from one community order range to the next on each sentencing occasion.

5.4 The proposed guideline states that ‘the court should consider which of the five purpose of sentencing it is seeking to achieve through the sentence that is imposed’ with reference to the five statutory aims of offending. While it is accepted that the Sentencing Council has no power to change the statutory purposes of sentencing, it does have a duty to provide sentencers with relevant information that will assist sentencers in applying them. We note that with regard to “the reduction of crime (including its reduction by deterrence)” the courts should be provided with information about the effectiveness of different sentences in reducing crime, namely that there is no such evidence.<sup>2</sup> Research by the Howard League and others has shown that community sentences can be more effective than short prison sentences at reducing crime<sup>3</sup>. Recent research on short sentences published by the Ministry of Justice<sup>4</sup> showed that custodial sentences of under 12 months were associated with higher levels of reoffending than sentences served in the community and that reductions in reoffending associated with community orders were greater for people with larger numbers of previous offences.

## **6. Young adults: the inclusion of detailed guidance as to the meaning of “age and/or lack of maturity” is welcomed but this could be strengthened.**

6.1 In 2017 the Howard League published a report, Judging Maturity: exploring the role of maturity in the sentencing of young adults<sup>5</sup>. The Howard League’s analysis of Court of Appeal judgments found that the inclusion of age and/or lack of maturity had not made a significant difference as to whether or not maturity was considered. However, where the relevant sentencing guideline including age and/or lack of maturity, and the court considered that factor, it was more likely to result in a reduction in the sentence on appeal.

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<sup>1</sup> It is accepted that the proposed guideline contains a link to the community and custody guideline but it is likely that sentences will not go to it if the tables they require are incorporated into the new guideline

<sup>2</sup> [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12114534](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12114534)

<sup>3</sup> Howard League (2015) submission to the government spending review <https://howardleague.org/wp-content/uploads/2016/04/Submission-to-the-Spending-Review-2015.pdf>

<sup>4</sup> Ministry of Justice (2018), ‘Do offender characteristics affect the impact of short custodial sentences and court orders on reoffending?’, <https://www.gov.uk/government/publications/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences-and-court-orders-on-reoffending>

<sup>5</sup> Howard League (2017) Judging maturity: exploring the role of maturity in the sentencing of young adults . London: the Howard League <https://howardleague.org/wp-content/uploads/2017/07/Judging-maturity.pdf>

- 6.2 The Howard League’s research suggests that professionals need to be encouraged to bring these factors to the court’s attention and sentencers need to be encouraged to consider these factors of their own free will. It also indicates that guidelines can make a positive difference and empower sentencers to reduce sentences on account of age and/ or lack of maturity. The new definition is therefore welcomed. However, there is a risk that both sentencers and advocates will not benefit from the new definition for the reasons outlined above.
- 6.3 In addition to “age and/or lack of maturity”, being a young adult should be a mitigating factor in itself. The Howard League supports the submission by T2A which states that ‘in line with the recommendations of the Justice Committee, we recommend that the guideline includes a presumption that “up to the age of 25 young adults are typically still maturing”’.<sup>6</sup> The Howard League is currently developing sentencing principles for young adults and looks forward to discussing these with the Council in due course.
- 7. Women: the guideline is a missed opportunity to encourage a more proportionate and effective approach to sentencing women.**
- 7.1 Around 70 per cent of women entering prison are sentenced for six months or less. One in four women sent to prison last year were sentenced to 30 days or less and almost 300 women were sentenced to under two weeks.
- 7.2 The vast majority of women in the criminal justice system commit non-violent offences while only a tiny proportion (three per cent) of the female prison population is assessed as “representing a high or very high risk of harm to other people”, according a Justice Committee report.<sup>7</sup> The imprisonment of the vast majority of women by magistrates therefore cannot be justified as being required due to the seriousness of their offences and is costly to the taxpayer whilst providing no enhanced public safety.
- 7.3 The magistracy needs to be encouraged to respect the threshold test and educate themselves about the alternatives to custody that exist in their local area. We know that community sentences have better outcomes than prison, and recent Ministry of Justice research has emphasised this.<sup>8</sup> However, magistrates sometimes claim not to know what is available in their local area.<sup>9</sup>
- 7.4 The proposed guideline therefore ought to be extremely clear about the sanctity of the threshold test. When the nature of an offence does not warrant a custodial sentence, sentencers must actively look for alternatives to custody. The patchiness of local provision or services does not justify sentence inflation. This is particularly pertinent for women given the potential for implicit gender bias: as the Corston Report warned eleven years ago, women should never be sentence to prison to access services or for their own protection.

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<sup>6</sup> Justice Committee (2016a) The treatment of young adults in the criminal justice system [online], p. 58. Available at: [http://data.parliament.uk/writtenevidence/committee\\_evidence.svc/evidencedocument/justicecommittee/the-treatment-of-young-adults-in-the-criminal-justice-system/oral/27782.html](http://data.parliament.uk/writtenevidence/committee_evidence.svc/evidencedocument/justicecommittee/the-treatment-of-young-adults-in-the-criminal-justice-system/oral/27782.html)

<sup>7</sup> Justice Committee (2013). ‘Women offenders: after the Corston Report’, London: House of Commons, <https://www.parliament.uk/documents/commons-committees/Justice/Women-offenders.pdf>

<sup>8</sup> Ministry of Justice (2018), ‘Do offender characteristics affect the impact of short custodial sentences and court orders on reoffending?’, <https://www.gov.uk/government/publications/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences-and-court-orders-on-reoffending>

<sup>9</sup> APPG on Women in the Penal System Oral Evidence Session (2018) <https://howardleague.org/wp-content/uploads/2018/06/Evidence-session-with-John-Bache-Chair-of-the-Magistrates-Association-Tuesday-13-March-2018.pdf>

**8. Ethnic minorities: the guideline is a missed opportunity to encourage sentencers reduce the risk of discrimination.**

8.1 The Howard League welcomes the inclusion of statements in the online consultation response document “*give your views*, steps three to nine: public sector equality duty”, which recognises potential for discrimination during the sentencing process (Question 26) which states:

*‘the Council is aware that the factor ‘offence was committed as part of a group or gang’ has the potential to be applied disproportionately to young males from minority ethnic backgrounds. The explanation in the draft guideline aims to eliminate the potential for the unfair application of this factor and refers sentencers to the mitigation that may apply to immature offenders’.*

8.2 However, this specific example, referring to BAME young males, is not included in the draft guidelines. The example in the guideline refers to mitigating factors in relation to age/lack of maturity.

8.3 The Lammy review<sup>10</sup> found evidence of discrimination in the courts. For example, of women tried in the magistrates courts, ‘Black women, Asian women, Mixed ethnic women and Chinese/Other women were all more likely to be convicted than White women.’ The Lammy review also found that ‘BAME defendants are consistently more likely to plead not guilty than White defendants. This means that, if found guilty, they are likely to face more punitive sentences than if they had admitted guilt.’

8.4 There is little information during the difference steps of the guidelines, for example at Step 2: aggravating and mitigating factors or at Step 4: reduction for guilty pleas as to how sentencers should take into account and consider issues relating to equality and diversity as part of the decision making process.

8.5 The guideline is a missed opportunity to encourage sentencers to reduce the risk of discrimination. Examples illustrating the potential for discrimination, such as the one included in the online response document, would raise awareness among sentencers about the potential for disproportionality at each step.

**9. Conclusion**

9.1 The Sentencing Council has a leadership role to play in reminding sentencers of the underlying principles and justification of the sentences they hand down. Part of this role involves reinforcing the expectation that custody is a last resort – an expectation that has gradually been eroded by the failures of Transforming Rehabilitation.

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<sup>10</sup> The Lammy review

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