

## Howard League for Penal Reform's response to the Sentencing Council's consultation on expanded explanations in sentencing guidelines June 2019

### Summary

1. The Howard League welcomes the notion of expanded explanations and the encouragement they will be able provide to judges and magistrates to turn their minds to the detail of people's lives and experiences as part of the sentencing process.
2. In particular, the Howard League considers the expanded explanation on age and/or lack of maturity to be exceptionally important in encouraging more nuanced sentencing decisions that acknowledge the specific needs and experiences of young adults in line with wider developments in this area. This factor will be relevant in any instance where a young adult is sentenced and ought to be actively flagged wherever it may be relevant to other mitigating factors.
3. This response highlights two areas for further improvement and one major omission in the expanded explanations.
4. There is nothing in the proposed expanded definitions to show how they will be made accessible to people without computer access and literacy. It is essential that sentencing guidelines are transparent and accessible, especially for remand prisoners. The definitions must be made available in a format that will enable all people to access it regardless of their computer access and literacy.
5. The expanded definition in relation to offences committed in custody should acknowledge the connection between the stress and strain caused by the prison environment.
6. The Howard League welcomes the expanded explanation on sole or primary carers but considers that a different approach to sentencing all women is required. There is extensive evidence that women in the criminal justice system are different and respond differently from men in the system: women are disproportionately negatively affected by custodial sentences, the crimes they tend to commit are different and their response to support and interventions are different. All of this is clearly relevant to the sentencing; we know that prison makes things worse, not better, for women.

## **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 welcomes the notion of expanded explanations and the encouragement they will be able to provide to judges and magistrates to turn their minds to the detail of people's lives and experiences as part of the sentencing process. We particularly welcome the expanded explanation on age and/or lack of maturity. This response deals with particular areas of concern or omissions that we hope the Sentencing Council will consider for the final version. The Howard League would welcome the opportunity to provide further information about any of the points below.

## **2. Age and/or lack of maturity**

- 2.1 The Howard League welcomes the expanded explanation dealing with age and/or lack of maturity and considers this development to be exceptionally important in encouraging sentencing that acknowledges the specific needs and experiences of young adults.
- 2.2 This development is in line with current understanding of young people in the criminal justice system, which recognises that young adults have distinct characteristics and needs.<sup>1</sup> While reaching the age of 18 has many legal consequences, it should not present a cliff edge for the purposes of sentencing given that full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays.<sup>2</sup> Neurological and psychological evidence that the development of the frontal lobes of the brain does not cease until around 25 years old is

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1 Justice Committee, 2016; <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf>

2 R. v. Clarke [2018] EWCA Crim 185.

particularly important in addressing sentencing in relation to young adults.<sup>3</sup>

- 2.3 We note that the proposed guideline flags this particular issue in respect of a number of other mitigating factors. It may be appropriate for the Council to do an audit of all the factors, including the statutory factors to ensure that this issue is fully considered in all appropriate instances.
- 2.4 For example, the statutory factor, “previous convictions” may need to be considered differently where the person being sentenced is a young adult. There is significant research to show that young adults are at a time of desistance and change, often preceded by extensive criminal activity as a child.<sup>4 5</sup> The law recognises that young adults have a greater capacity for change in a shorter period of time than other.<sup>6</sup> Therefore, given that the time that has lapsed since the last offence is a relevant factor under this heading, the age of the person may be highly relevant. If a 19 year old has offended within the last six months or a year, it is still entirely plausible that he or she is in the process of desisting and has turned a corner in line with normal maturation. This is less likely to be the case in respect of a 40 year old in that position. The presence of previous convictions should not frustrate the process of desistance by leading to the imposition of a prison sentence or a sentence that is longer than necessary.
- 2.5 Given the relevance of the pattern of desistance in line with age and the extensive research supporting it, we urge the Council to briefly refer to this in the age and/or lack of maturity expanded explanation.

### **3. The accessibility of the expanded explanations**

- 3.1 The expanded explanations as presented for consultation are not currently in a format accessible to people without computer access and literacy, rendering sentencing guidelines non-transparent for remand prisoners. The format of the guidelines must be amended to enable all people, regardless of their computer access and literacy, to understand the principles by which they would be sentenced.
- 3.2 The proposed format of the guidelines as web pages makes them inaccessible to people in prison without computer access rendering it impossible for them to understand the principles by which they are sentenced. Given that the guidelines are not available in PDF format and that it is not possible to print the guidelines in full, it would not be possible

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3 Blakemore et al 2006, T2AA, 2012; [https://www.barrowcadbury.org.uk/wp-content/uploads/2012/11/Repairing-Shattered-Lives\\_Report.pdf](https://www.barrowcadbury.org.uk/wp-content/uploads/2012/11/Repairing-Shattered-Lives_Report.pdf)

4 Loeber, R. and Farrington, D. (eds) (2012). ‘From Juvenile Delinquency to Adult Crime’. Oxford: Oxford University Press.

5 McAra, L. and McVie, S. (2007). ‘Youth Justice?: The Impact of System Contact on patterns of desistance from Offending’. *European Journal of Criminology*.

<sup>6</sup> (R v Lang [2005] EWCA Crim 2864, paragraph 17(vi))

for a lawyer to send a copy of the expanded explanations to a prisoner on remand who may be sentenced under them.

- 3.3 In addition to being available to people without computer access, the guidelines must be available to people who are not computer literate. The expanded explanations should be made available in full in PDF format for hard copy printing.
- 3.4 Further, the current format of the guidelines online is not easy to navigate. Given that it is not possible to read the guidelines as a whole, there is a risk that it will not be obvious to sentencers that the complete information can only be accessed by clicking to expand. The expanded explanations are hidden from view and it is not clear how sentencers will be made aware that the offence specific guidelines have expanded explanations, so sentencers may read the guidelines without clicking on the link, giving rise to a risk that positive progress may be undermined by formatting.
- 3.5 The Howard League considers it essential that all people, regardless of their computer access or literacy, are able to access the full guideline and expanded definitions. The format of the definitions should be adapted to ensure this.
- 3.6 The Howard League also stresses the importance of consulting people who are likely to be subjected to the expanded explanations to ensure that they are as relevant and useful as possible.

#### **4. Offences committed in custody need to be considered in context**

- 4.1 The proposed expanded explanation describes offences committed in custody as more serious, reasoning that they undermine the need for control and order which is necessary for running prisons and maintaining safety. This explanation ought to be revised to acknowledge the current state of prisons in England and Wales and prompt the sentencer to consider the specific context in which the offence was committed. Custody is a volatile environment of extreme stress and strain which affects people's behaviour.
- 4.2 The volatile prison environment is a product of the continuing state of crisis of our prisons. Prisons are overcrowded and have high rates of violence, self-injury and suicide. In his annual report in 2017, the Chief inspector of Prisons reported that the situation in prisons had worsened and there had been 'startling increases in all types of violence'.<sup>7</sup> Self-injury incidents reached a record high of 55,598 incidents in 2018, a rate of one every nine-and-a-half minutes, representing a 25% increase from

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<sup>7</sup> HMIPP (2017) HM Chief Inspector of Prisons for England and Wales: Annual Report 2016-17. Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/629719/hmip-annual-report-2016-17.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629719/hmip-annual-report-2016-17.pdf)

2017 and annual assault incidents reached a record high of 34,223 incidents in 2018, a 16% increase from 2017.<sup>8</sup>

- 4.3 The recent Independent Monitoring Boards National Annual Report 2017/18 reported that nearly all independent monitoring boards had raised heightened concerns about safety and noted that a lack of safety and stability can lead to increased self-injury.<sup>9</sup> The report also noted that violence increased in every part of the closed prison estate and there was an increase in the use of force on prisoners. All prisons in the England and Wales are full or overcrowded, which has led to an increase in violence, assaults, disorder and self-injury.<sup>10</sup> The state of English prisons is so concerning that a Dutch court recently refused to grant extradition on the basis of a real risk that the individual would be subject to degrading or inhumane treatment in an English prison.<sup>11</sup>
- 4.4 The expanded definition of ‘offence committed in custody’ as it stands fails to take into consideration the dire state of prisons today and how that may adversely impact on people’s behaviour. The expanded definition ought to recognise that offences committed in custody may be a product of a stressful environment that causes some people, especially those who are young and vulnerable, to be hypervigilant.

## **5. Recognising women as a distinct group**

- 5.1 The Howard League welcomes the expanded explanation on sole or primary carers for dependent relatives and pregnant women but shares the concern of Dr Minson about the sufficiency of information in the proposed expanded explanation as set out in her response to the consultation.<sup>12</sup>
- 5.2 However, the expanded explanation on sole or primary carers for dependent relatives and pregnant women further highlights the current absence of a specific guideline dealing with the particular considerations that apply when women are sentenced.
- 5.3 Women who become tangled up in the criminal justice system are among the most disadvantaged and vulnerable people in society, and prison makes things worse not better for them. The absence of a distinct approach to women in the form of a specific guideline is out of touch with

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<sup>8</sup> Ministry of Justice (2019) Safety in Custody Statistics, England and Wales: Deaths in Prison Custody to March 2019 Assaults and Self-harm to December 2018. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/797074/safety-custody-bulletin-q4-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/797074/safety-custody-bulletin-q4-2018.pdf)

<sup>9</sup> Available at: <https://www.imb.org.uk/reports/>

<sup>10</sup> The Howard League Submission to the Committee Against Torture. Available at: <https://howardleague.org/wp-content/uploads/2019/01/Howard-League-submission-to-the-UN-Committee-against-Torture-January-2019.pdf>

<sup>11</sup> Reported: [https://www.theguardian.com/commentisfree/2019/may/16/uk-prisons-dutch-court-refused-extradite-inhumane-degrading-violent?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/commentisfree/2019/may/16/uk-prisons-dutch-court-refused-extradite-inhumane-degrading-violent?CMP=Share_iOSApp_Other)

<sup>12</sup> <https://shonaminson.com/2019/05/20/response-to-the-sentencing-council-consultation-on-proposals-to-provide-expanded-explanations-in-existing-sentencing-guidelines/>

both the reality of the criminal justice system and current case law that women should be treated differently from men.<sup>13</sup>

- 5.4 The crimes women tend to commit are different. The majority of offences committed by women are not violent and therefore most women in the criminal justice system present little risk to the public. Almost all women who commit offences have been a victim of crime, often in the context of long term abuse.<sup>14</sup> Magistrates and judges often lack knowledge about the circumstances of women's lives and the likely impact of prison, as well as about what specialist provision for women is available in their local area. A sentencing guideline for women could provide a framework to enable magistrates and judges to take the specific circumstances of women into account.
- 5.5 Women respond differently to the experience of arrest and incarceration, which they tend to find more traumatic than men. The tendency of women to internalise the trauma, fear and frustration created by their incarceration leads to a high rate of self-injury. Outside prison, men are more likely to commit suicide than women but the position is reversed inside prison and self-injury is more prevalent among women in prison than men in prison.<sup>15</sup>
- 5.6 There is also evidence that women respond positively to support: women's centres have been one of the few real success stories in the criminal justice system in recent years and have been effective at reducing offending and supporting women to change their lives.<sup>16</sup>

## **6. Concluding observations**

- 6.1 The expanded explanations provide an opportunity to reduce the risk that sentences fail to reflect the full suite of mitigating factors that so often need to be drawn out in an under-resourced and fast moving criminal justice system to ensure better, fairer sentences. We acknowledge the progress made, particularly with the age and/or lack of maturity explanation and hope that the Council will further develop the explanations as we suggest.
- 6.2 We would be happy to meet with you to discuss this further.

**The Howard League for Penal Reform**

**6 June 2019**

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<sup>13</sup> (*R (Coll) v Secretary of State for Justice* [2017] UKSC 40)

<sup>14</sup> Jane Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System, Chapter 2. Available at: <http://criminaljusticealliance.org/wpcontent/uploads/2017/07/Corston-report-2007.pdf>

<sup>15</sup> Jane Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System, Chapter 2. Available at: <http://criminaljusticealliance.org/wpcontent/uploads/2017/07/Corston-report-2007.pdf>

<sup>16</sup> <https://howardleague.org/wp-content/uploads/2016/11/Is-it-the-end-of-womens-centres.pdf>