

The Howard League for Penal Reform’s Response to the Sentencing Council’s Consultation on Changes to the Magistrates Court Sentencing Guidance and Explanatory Materials, April 2020

Summary

1. This response focuses solely on the proposal to include a reference to the Equal Treatment Bench Book (ETBB) in relevant pages of the explanatory materials (Consultation Question 10).
2. The Howard League applauds the Sentencing Council’s concern to achieve consistent and fair treatment at sentence through increasing Judges’ and Magistrates’ understanding of the different circumstances and needs of those who come before the courts.
3. However, if the Sentencing Council is committed to non-discrimination at sentence, the core information contained within the ETBB must be incorporated more comprehensively within the guidelines. The Howard League is doubtful that the proposal in question 10 – to include in relevant explanatory materials a three-line reference to the 427 page ETBB – is likely to be particularly effective in fostering equal treatment.
4. The Howard League proposes that a more fundamental review is required of the way that the sentencing guidelines encourage the use of material contained within the ETBB at sentence.
5. We set out for consideration two ways in which this could be achieved more effectively: by more focused references to the ETBB material within the existing sentencing guidelines and by creating further overarching guidelines in relation to certain groups. Either one of these approaches could be pursued separately, although they are likely to be most effective pursued together.

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.

Question 10: Do you agree to adding a reference to the Equal Treatment Bench Book to relevant pages in the explanatory materials? If not, please provide any alternative suggestions.

2. Likely effectiveness of the proposed changes

2.1 The Howard League is fully in favour of increasing awareness amongst the judiciary of the important information included in the Equal Treatment Bench Book (ETBB), and their use of that information at sentence.

2.2 However, whilst the Howard League in principle welcomes any efforts to increase usage of the ETBB, we are concerned that the proposal to include more widely the reference which currently appears in the sentence specific guidelines is unlikely to be particularly effective in ensuring equal treatment in the magistrates' courts.

2.3 Although the evidence is anecdotal, our engagement with court users suggests that the current references to the ETBB do not prompt significant consideration of the materials it contains at sentence and general awareness of its content is variable. In round-table discussions with legal representatives practising in the magistrates' courts, legal representatives suggested that, whilst aware of the current references to the ETBB in the guidelines, they do not in their submissions make reference to the material it contains, or draw magistrates' attention to the current references to the ETBB in the guidelines. Enquiring as to why a legal representative might not make use of such material in mitigation, we gather that there is some scepticism that magistrates would consider the information contained within the ETBB to be relevant or be willing to amend their approach in light of it. As one representative candidly put it, the reference to the ETBB, as it currently appears in the guidelines, is the bit 'I scroll down through'.

2.4 Informal discussions with magistrates and district judges tend to confirm that legal representatives are not drawing their attention to the ETBB in submissions. It has proved difficult to obtain information about magistrates' training, but anecdotally we understand that although magistrates receive frequent emails concerning updates to the ETBB, training in relation to how that material may be deployed in decision-making is more limited.

3. The formulation of the reference

3.1 The apparent ineffectiveness of the current reference may in part be explained by its format. The link contained within it takes the sentencer to a 427 page document. A bench handling a busy list in the magistrates' court, if previously

unaware of the ETBB, is unlikely to be able to derive much guidance from the document during the sentencing process itself.

3.2 There is also no indication within the proposed reference of the circumstances, or particular groups, in respect of which the guidance might be particularly relevant. The wording might be improved by adding page references to passages that are relevant to the sentencing of different key groups, for example: young people (p39, esp p44ff), individuals with a physical disability (p78ff), those experiencing mental health issues (p93ff esp p111ff), veterans (p113ff esp p114), women (p134ff esp p148ff), BAME individuals (p163ff esp p167ff), migrants, refugees and asylum seekers (p173ff and p222ff), LGB individuals (p216ff), transgender individuals (p250ff) and those who are socially excluded and experience financial hardship (p228ff, esp p240). However, if amended in this way, the reference inevitably becomes rather unwieldy.

4. The need for a more fundamental consideration of how the ETBB material should be reflected in the guidelines

4.1 The Howard League takes the view that, however formulated, a reference to the ETBB without further detail or guidance is unlikely to ensure consistent consideration of the materials in the ETBB or significantly improve equality of outcome for defendants.

4.2 We consider that a more fundamental review should be conducted of how to achieve more consistent use at sentence of the material contained within the ETBB, and how Sentencing Guidelines more generally can be used to achieve equal treatment.

4.3 We review two possible approaches that could be taken: the use of more focused references to the ETBB throughout the guidelines and the production of further overarching guidelines in relation to certain groups. Either one of these approaches could be pursued, although we consider that they are likely to be most effective pursued together. In this way, the overarching guideline would provide fuller information in relation to the particular group and collate relevant material referred to across the guidelines.

5. Potential options for reform: the inclusion of more focused references to the ETBB in the guidelines

5.1 One approach to achieving more consistent consideration of the guidance contained within the ETBB would be to provide more focused references to the material it contains throughout the sentencing guidelines.

5.2 To take an example within the MCSG explanatory materials (to which question 10 refers), the '*Deferred Sentences*' guidance could include a reference to the use of the power to enable an individual to undergo addiction or mental health treatment prior to sentencing, with specific reference to vulnerable groups for whom that might be particularly relevant. This approach is explicitly referred to in the ETBB in relation to women at p151 para 93, but the material in relation to those experiencing mental health difficulties more generally (p111 para 106) or particular groups such as

veterans (p113, para117) or migrants, refugees and asylum seekers (p174 para 53) may also be of assistance for sentencers considering deferring sentence.

5.3 To take an example from the overarching guidelines, the '*Imposition of community and custodial sentences*' guideline could include a more tailored reference to the ETBB (either with its own overarching header or within the introductory '*General principles*' section), for example:

'The Equal Treatment Bench Book contains guidance in relation to specific groups which sentencers are encouraged to take into account where applicable in considering whether to impose a community or custodial sentence: p44ff (young people), p111ff (those with mental health conditions), p113ff (veterans), p149ff (women), and p244ff (those experiencing social exclusion and financial hardship).'

5.4 Alternatively, or in addition, references to the material, or the specific sections of the ETBB, could be included in a more granular way throughout the guideline. For example:

- Under the heading '*Is it unavoidable that a sentence of imprisonment be imposed?*' where the guidance deals with those 'on the cusp of custody', reference could be made to the relevant sections of the ETBB dealing with dependents and primary carers (p151 para 94ff).
- Under the heading '*Requirements*', where reference is made to Mental Health Treatment Requirements reference to the relevant sections of the ETBB (p111 para 106ff) could be made.
- Under the heading '*Pre-sentence report*' reference could be made to the particular need to obtain a PSR for certain vulnerable groups, for example transgender individuals (p251, 33ff).
- Under the heading '*Can the Sentence be suspended?*' reference could be made to the potential appropriateness of considering suspending the sentence for certain vulnerable groups, for example women (p149, para 87ff).

6. Potential options for reform: overarching guidelines

6.1 The substantial evidence contained within the ETBB in relation to certain groups suggests that there is a case to be made for more overarching guidelines to be produced to support fair and consistent sentencing practice. The case for an overarching guideline is particularly persuasive in relation to two groups: young adults and women.

6.2 The Howard League and T2A (Transition to Adulthood) have previously made the case for a distinct approach to be taken in the sentencing of young adults (<https://howardleague.org/wp-content/uploads/2019/01/Sentencing-Young-Adults.pdf>). Working with a panel of experts, the Howard League and T2A have produced a set of sentencing principles that should be applied to young adults, typically aged 18 to 25, in line with developments in case law, science and social studies (<https://howardleague.org/wp-content/uploads/2019/01/Sentencing-principles-for-young-adults.pdf>).

6.3 A similar case can be made for separate principles for the sentencing of women. There is a growing consensus that women in the criminal justice system need to be approached as a distinct group with particular needs and vulnerabilities. The issue was brought to the fore by the Corston Report (2007), but continues to be acknowledged and pursued through more recent policy initiatives, such as the Female Offender Strategy (June 2018) (MOJ 2018) and the National Probation Service Women’s Policy Framework (December 2018) (MOJ/HMPPS 2018).

6.4 The need for a distinct approach has also been recognised by the Justice Committee, whose findings were cited with approval by the Supreme Court in 2017 (*R (on the application of Coll) (Appellant) v Secretary of State for Justice (Respondent)* [2017] UKSC 40, para 16):

“In 2013, the House of Commons Justice Committee published its report, *Women offenders: after the Corston Report* Session 2012-13, HC 92. This began with the comment that:

“Now, six years after her report, we found that it is well recognised that women face very different hurdles from men in their journey towards a law abiding life, and that responding appropriately and effectively to the problems that women bring into the criminal justice system requires a distinct approach.” (p 3)”

6.5 The ETBB explicitly recognises that women tend to have different routes into and out of offending, and experience sentences differently to men. In particular, as the ETBB notes, women’s pathways into offending are more commonly linked to underlying mental health needs, drug and alcohol misuse, coercive relationships, financial difficulties and debt than is the case for men.¹ The ETBB also sets out some of the compelling evidence of women’s differential responses to sentencing, particularly the disproportionately severe impact of imprisonment on women and the better prospects for desistance offered by community sentences tailored to the specific needs of women.² The particular stigma and isolation experienced by BAME women in custody is also identified.³

6.6 However, despite the inclusion of this information in the ETBB, the gender neutral formulation of the sentencing guidelines appears at present to be failing to ensure equality of outcome for women at sentence. The disproportionate use of short-term custodial sentences for women continues – sentences that the government acknowledges do not work, and indeed are particularly damaging for women and their families (MOJ 2018). In 2018 68% of women receiving immediate custody received a sentence of less than 6 months, and 45% of all sentences of immediate custody imposed on women were for theft offences (in comparison to 24% for men) (MOJ 2019). In 2017 94% of women in custody serving sentences under 12 months were low/medium public protection risk (MOJ 2018). There is also significant regional inconsistency. In some areas over 60 women per 100,000

¹ ETBB p149 para 86-93.

² ETBB p149 para 87ff.

³ ETBB p152 paras 103ff.

receive immediate custody (eg South Wales and Cumbria) whilst the rate in other areas is under 20 women per 100,000 (PRT 2019).

6.7 There appear to be conceptual challenges in achieving a distinct approach for women which also indicate the potential benefits of an overarching guideline. Research has identified an unease amongst sentencers in relation to the principle of differential treatment (Hedderman and Barnes 2015), and that the need to treat difference differently is not widely understood (PRT/Soroptimist UKPAC 2014). As Baroness Hale DBE noted in her Longford Trust Lecture (2005):

“It is now well recognised that a misplaced conception of equality has resulted in some very unequal treatment for the women and girls who appear before the criminal justice system. Simply put, a male-ordered world has applied to them its perceptions of the appropriate treatment for male offenders.... The criminal justice system could ... ask itself whether it is indeed unjust to women.”⁴

6.8 There are, in addition, compelling practical reasons for an overarching guideline for women. In particular, women infrequently appear before the courts, and sentencers may not have in the forefront of their minds those factors likely to be particularly relevant to female defendants. The sensitivity of some of those factors, such as domestic violence or coercion, makes awareness particularly important since the pace and pressure of sentencing processes may not always enable women to disclose the relevant information to probation officers, legal representatives, or the court. Not all sentencers fully appreciate the challenges encountered by women that may lead to offending, or challenge desistance. An overarching guideline would provide a framework to enable magistrates and judges to take the distinct needs and vulnerabilities of women into account at sentence.

7. Conclusion re Question 10

7.1 The Howard League is in favour of the increased use of the excellent material contained within the ETBB at sentence. Whilst the Howard League welcomes the Sentencing Council's desire to increase that usage by amendment to the sentencing guidelines, it doubts that the proposal in question 10 will achieve that end.

7.2 The Howard League proposes that a more fundamental review should be conducted of how to make use of the material contained within the ETBB in the guidelines to achieve equal treatment at sentence. Two possible approaches are suggested for consideration: more focused references to the ETBB throughout the sentencing guidelines and the creation of further overarching guidelines, particularly in relation to young adults and women.

⁴ See ETBB p148 para 80.

References:

Corston, J. (2007) A Review of Women with Particular Vulnerabilities in the Criminal Justice System. London: Home Office.

Hedderman C and Barnes R (2015) Sentencing women: An analysis of recent trends. In: Roberts J (ed.) Exploring Sentencing Practice in England and Wales. Basingstoke: Palgrave Macmillan

Ministry of Justice (MOJ) (2018) Female Offender Strategy. London: Ministry of Justice. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719819/female-offender-strategy.pdf

Ministry of Justice/HM Prison and Probation Service (MOJ/HMPPS) (2018) Women's Policy Framework, December 2018. Available at:

<https://www.gov.uk/government/publications/womens-policy-framework>

Ministry of Justice (2019) Court Outcomes by Police Force Area Data Tool, Criminal Justice System statistics quarterly: December 2018, London: MOJ

Prison Reform Trust (PRT) (2019) Rates of immediate imprisonment for women in each police force area in England and Wales. Available at:

<http://www.prisonreformtrust.org.uk/Portals/0/4.%20v2%20Rates%20of%20immediate%20custody%20in%20England%20and%20Wales%202018.pdf>

Prison Reform Trust/Soroptimist UKPAC (2014) Transforming lives: reducing women's imprisonment London: PRT. Available at:

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Transforming%20Lives.pdf>