

Howard League for Penal Reform's response to the Sentencing Council's *Drug Offences* consultation August 2020

Summary

1. The Howard League for Penal Reform welcomes the opportunity to comment on the consultation on *Drug Offences*.
2. Ministry of Justice research found that for drug offences, the odds of receiving a prison sentence are around 240 per cent higher for individuals from Black, Asian and minority ethnic backgrounds, compared to those from White backgrounds.
3. As presently drafted, the Guideline fails to address these gross disparities. The extent of the problem of racial inequality and discrimination requires explicit treatment in the Guideline if the Council is committed to tackling these issues as an urgent priority. Some suggestions are made as to how this might be achieved without the need for any further evidence as to why outcomes are discriminatory.
4. The Guideline should stress the extent to which all protected characteristics ought to be fully factored into sentences for drugs offences as mitigating factors.
5. Explanations in relation to aggravating or mitigating factors 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 will be sentenced.
6. The "lesser role" in the culpability section should be expanded to better reflect current research and knowledge about those likely to be coerced or exploited into committing drugs offences.

1. About the Howard League for Penal Reform and summary of response

- 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 The Howard League's legal team works directly with children and young adults in prison.
- 1.4 This submission draws on the charity's legal and policy work in responding to this consultation.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. The need to counter the risk of discrimination

- 2.1 The Howard League is concerned that, as presently drafted, the Guideline does not do anything to address the current position that people from Black, Asian and minority ethnic backgrounds are more than twice as likely to get prison sentences than White people. Tackling this inequality should be a priority for the Council.
- 2.2 Sections seven and eight of the consultation document consider the Public Sector Equality Duty (PSED) and the research done and proposed by the Council in relation to the disparity in sentencing of Black and ethnic minority individuals. It is clear that the Council is taking these matters extremely seriously, and the Howard League commends it for all the work it is doing in this regard. However, the current proposals for the Drug Offences Guideline will do little, if anything, to drive forwards the change that is urgently needed to tackle the current inequality and discrimination facing people from ethnic minorities in respect of sentencing for drugs offences. The Howard League strongly urges the Council to prioritise this issue and to include explicit wording throughout the Guideline to educate sentencers and remind them of their legal obligations in this regard.
- 2.3 The evidence shows that this is urgently needed. In his 2017 review of the treatment of and outcomes for Black and ethnic minority people in the criminal justice system, David Lammy MP highlighted sentencing as an area of concern. He cited analysis conducted by the Ministry of Justice in 2016, which he

described as “[o]ne of the most sophisticated pieces of analysis published in this country on ethnicity and sentencing”. The analysis demonstrated that for individuals convicted of recordable, indictable offences in the Crown Court in 2015, there was an association between ethnicity and being sentenced to prison (p.33).

- 2.4 The statistical link between ethnicity and drug offences was particularly high. The research showed that for drug offences, the odds of receiving a prison sentence were around 240 per cent higher for individuals from Black, Asian and minority ethnic backgrounds, compared to those from white backgrounds (Lammy Review, p.33).
- 2.5 In January 2020, the Sentencing Council published its own analysis of the association between ethnicity and the sentence imposed at the Crown Court for drug offences.¹ The research concluded that individuals from Black and ethnic minority backgrounds were more likely to receive immediate custodial sentences than those from White backgrounds and that individuals from Asian backgrounds received longer custodial sentences than White individuals. The report stated that: *“The Council has considered this analysis and has outlined in the accompanying Drug Offences: Consultation some actions that the Council intends to take as a result of the findings”* (page 2).
- 2.6 Section 8 of the *Drug Offences: Consultation* states (page 45):

“The guidelines are intended to apply equally to all offenders across all groups, and disparities in sentencing for any group are a cause for concern. We have looked hard at the current guidelines and have not identified any ways in which they might be contributing to any disparities. Lack of information on reasons behind the disparities does not mean that there is nothing which can be done within the Council’s remit to tackle them or investigate them further, and we have considered what steps we can take in the revised drug offences guideline, or whether there may be factors within the guidelines which are having an unintended impact.”

- 2.7 The steps taken by the Council are said to be as follows (page 45-6):

“Firstly, we have updated all guidelines to include a reference to the Equal Treatment Bench Book, and an active link in our digital guidelines to the latest version of the ETBB, which is updated frequently. By putting this information before sentencers at the beginning of each guideline, we are both reminding sentencers of the need to consider equal treatment, and directing them to the information they need to help them do this. This has now been included in all sentencing guidelines published on our website.”

- 2.8 The Howard League does not consider this proposal to be sufficient to fulfil the PSED or the Council’s other obligations to tackle discrimination and disparities in sentencing. We refer to the concerns we expressed about reliance on

¹ Sentencing Council (2020) *Investigating the association between an offender’s sex and ethnicity and the sentence imposed at the Crown Court for drug offences*. London: Sentencing Council

reference to the Equal Treatment Bench Book (ETBB) which were set out in our response to the Sentencing Council's Consultation on Changes to the Magistrates Court Sentencing Guidance and Explanatory Materials (April 2020).² As we said in this document, if the Sentencing Council is committed to non-discrimination at sentence, the core information contained within the ETBB must be incorporated more comprehensively within guidelines.

- 2.9 There is currently no mention of the word "Black", "ethnic minority", "disparity" or "discrimination" in the Drugs Sentencing Guideline and it seems that the absence of any specific references to the need to counter the risk of harsher sentences for Black and ethnic minorities will continue in the revised Guideline. The unintended outcome of this lack of specific reference on the face of the document will perpetuate the current factors contributing to racial disparities in sentencing. It also implies, wrongly given all the Council is doing in this regard, that the Sentencing Council does not recognise that racial disparity in sentencing is an issue. Silence sends a message that could exacerbate the problem and deprives representatives of an express basis within the Guideline to frame submissions to Courts to avoid discrimination.
- 2.10 The issue needs to be addressed explicitly in the Guideline. The charity has two suggestions as to how this might be achieved: (i) through an "Overarching Principles" section at the start of the Guideline and/ or (ii) in Step 1 as part of the assessment of culpability.
- 2.11 The Council's *Sentencing Children and Young People Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery Definitive Guideline* contains explicit reference to ethnicity in Section 1, under the heading "Sentencing Principles". At paragraph 1.18 the Guideline states:

"There is also evidence to suggest that black and minority ethnic children and young people are over-represented in the youth justice system. The factors contributing to this are complex. One factor is that a significant proportion of looked after children and young people are from a black and minority ethnic background. A further factor may be the experience of such children and young people in terms of discrimination and negative experiences of authority. When having regard to the welfare of the child or young person to be sentenced, the particular factors which arise in the case of black and minority ethnic children and young people need to be taken into account."

- 2.12 In the new Guideline for those with mental health issues, *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*, there is a similarly helpful message at paragraph 5:

"It is important that courts are aware of relevant cultural, ethnicity and gender considerations of offenders within a mental health context. This

² This document is available on-line at <https://howardleague.org/wp-content/uploads/2020/04/Howard-League-Response-to-consultation-MCSG-and-explanatory-materials.pdf> (Accessed on 27 August 2020).

is because a range of evidence suggests that people from BAME communities may be more likely to experience stigma attached to being labelled as having a mental health concern, may be more likely to have experienced difficulty in accessing mental health services and in acknowledging a disorder and seeking help, may be more likely to enter the mental health services via the courts or the police rather than primary care and are more likely to be treated under a section of the MHA. In addition, female offenders are more likely to have underlying mental health needs and the impact therefore on females from BAME communities in particular is likely to be higher, given the intersection between gender and race. Moreover, refugees and asylum seekers may be more likely to experience mental health problems than the general population. Further information can be found at Chapters six and eight of the Equal Treatment Bench Book.”

2.13 A similar “Overarching Principles” section at the start of the Drugs Sentencing Guideline would enable attention to be drawn at the start of the Guideline to issues related to ethnicity (and other factors), including:

- Sentencing Council research shows that defendants from Black and minority ethnic backgrounds are more likely to receive custodial sentences and/or be given longer terms and the need to avoid discrimination;
- Sentencers should take all possible steps to ensure that sentences are free from discrimination. This can be done in two ways:
 - By checking that they are not based on negative and aggravating assumptions that are typically associated with people from Black and ethnic minority backgrounds, such as a propensity to use and sell drugs.
 - By ensuring that they are aware of the full suite of mitigation affecting Black and ethnic minority defendants. This may involve unpicking the accumulated disadvantage that Black and ethnic minority people are more likely to experience and that is less likely to be before the Court without anyone in the process making an effort to get it. See, for example, the writer, journalist and broadcaster, Afua Hirsch’s summary of the accumulated disadvantage that many people from Black and ethnic minorities have experienced in the justice system: “*These experiences – getting stopped and harassed by the police, being perceived as a trouble maker in school or a low achiever, being told you won’t amount to anything – add up.*”³
- The risk that Black and minority ethnic women may be at a double disadvantage in respect of their roles in drugs offences which may fall short of meeting the requirements of duress or a modern slavery

³ Hirsch, A. (2018) *Brit(ish). On Race, Identity and Belonging*. London: Vintage, page 249.

defence but may nonetheless include considerable elements of coercion of one sort or another.

- 2.14 An alternative to the “Overarching Principles” approach could be to include reference to ethnicity into Step One of the Guideline as part of the assessment of culpability. The same factors outlined above would apply.
- 2.15 The consultation states that the second step to be taken by the Council will be as follows (page 46):

“Secondly, we intend to look more closely at the language used in guidelines to determine whether any changes are needed to help reduce disparities. This will be part of the consultation process for this draft drug offences guideline. In the past, we have sometimes received information from consultation respondents about potential areas where we need to change language in a draft guideline to avoid unjustified discrimination in sentencing decisions. Where this has been brought to our attention in consultation responses in the past, we have changed the language of guidelines, but we are now changing the consultation questions we ask (see questions 25 and 26 above) to prompt respondents to consider the language used and any potential unintended impacts on equality and diversity. We are also checking our publications with the Race Disparity Unit and Government Equalities Office guidance on use of language to ensure compliance. We are also seeking views as to whether there are any factors within the guidelines that may be having an unintended impact in terms of disparities in sentencing.”

These questions read as follows (page 47):

“Consultation Question 26: Do you have any views on reasons behind the disparities in sentencing highlighted by our published research? Do you consider that these reasons may be different for the disparities between white and ethnic minority offenders and those between men and women?”

“Consultation Question 27: Are there any aspects of the Drugs Guidelines that you consider might be contributing to unintended disparities in sentencing? Are there any ways in which the guidelines could be amended to guard further against any unintended disparities in sentencing?”

- 2.16 Language matters. This needs to be much more explicit and in the consultation document - and in the Guideline - rather than included as open questions that don't directly address language. It is not possible to tell what has been done so far to progress these intentions but it would be worth conducting a further consultation which incorporates these findings so that they can be consulted on widely.
- 2.17 As noted above, as the Guideline currently stands, none of the pertinent language is used at all and the document is completely silent with regards to ethnicity. This is an omission which requires urgent rectification.

2.18 The consultation paper states (page 46):

“Thirdly, we will be consulting more directly with a wider variety of groups. As part of the consultation process on this revised drug offences guideline we will set up some discussion groups in conjunction with the Race Disparity Unit and Government Equalities Office. We will evaluate this approach, along with the use of new consultation questions, to determine our approach to consultations on future guidelines.”

It would be helpful to have more information about this. Who is the Council consulting? Will it be consulting with, for example, grass roots organisations or defendants and others with lived experience?

2.19 Finally, the consultation paper says (page 46):

“Fourthly, we are continuing to work with other agencies in the Criminal Justice System to understand disparities in sentencing outcomes. Throughout the summer we have been in communication with the police, HMPPS (probation), HMCTS, the CPS and the judiciary and discussing areas where we can work together. This work is at an early stage, but by sharing information we should all be able to improve on how our organisations tackle disparities within the criminal justice system.”

The Howard League would be interested to hear how this work is progressing and to know how it will affect the Guideline. It is so important that we get approaches to tackling discrimination and sentencing disparities right and that there is consistency of approach and commitment throughout the Criminal Justice System. This work provides additional reason for the Council to produce a new draft Guideline for further consultation.

2.20 Overall, the proposed actions in Section 8 do not go far enough. It is vital that the issue of discrimination and sentencing disparity is explicitly dealt with in the text of the Guideline.

3. Ensuring all protected characteristics are stressed as mitigating factors for drugs offences

3.1 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.

3.2 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.⁴ While reaching the age of 18 has many legal consequences, it should not present a cliff edge for the purposes of sentencing

⁴ Justice Committee (2016) *The treatment of young adults in the criminal justice system. Seventh Report of Session 2016–17*. London: House of commons at <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> (Accessed 27 August 2020).

given that full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays.⁵ Neurological and psychological evidence that the development of the frontal lobes of the brain does not cease until around 25 years old is particularly important in addressing sentencing in relation to young adults.⁶

- 3.3 It would be helpful for the Guideline to draw particular attention to the expanded definition on age and/or lack of maturity in respect of drugs offences to ensure that sentencers are sighted on the particular relevance of this factor to drugs offences.
- 3.4 The expanded definition in respect of age and/or lack of maturity goes as far as to flag that “previous convictions” may need to be considered differently where the person being sentenced is a young adult. This is in line with research showing that young adults are at a time of desistance and change, often preceded by extensive criminal activity as a child.⁷ However, as the expanded explanations are generic, sentencers would benefit from a reminder that drug-taking is an offence that is typical of younger people and therefore this factor is particularly relevant to this offence.
- 3.5 Other key mitigating factors may also be particularly relevant to drugs offences. For example:
- “the offender was in a lesser or subordinate role if acting with others / performed limited role under direction” or
 - “involved through coercion, intimidation or exploitation”.
- 3.6 Both may be highly relevant in the context of drugs offences, and particularly in the case of vulnerable women or people who have been exploited but have not succeeded in a modern slavery defence. The expanded definitions do not highlight the particular susceptibility to these scenarios of people with protected characteristics (i.e. young people, people from ethnic minorities and women) and therefore the Guideline should expressly stress this.

4. The accessibility of explanations

- 4.1 Explanations in relation to aggravating or mitigating factors 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

⁵ *R. v. Clarke* [2018] EWCA Crim 185.

⁶ Blakemore, J. and Choudhury, S. (2006) Development of the adolescent brain: implications for executive function and social cognition. *Journal of Child Psychology and Psychiatry* 47:3/4 (2006), pp 296–312; Williams, H. (2012) *Repairing Shattered Lives: Brain Injury and its implications*. London: T2AA at https://www.barrowcadbury.org.uk/wp-content/uploads/2012/11/Repairing-Shattered-Lives_Report.pdf (Accessed on 27 August 2020)

⁷ McAra, L. and McVie, S., (2007), 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending'. *European Journal of Criminology* 4 (3) 315-345.

access and literacy, to understand the principles by which they would be sentenced.

- 4.2 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 for a lawyer to send a copy of the expanded explanations to a prisoner on remand who may be sentenced under them.
- 4.3 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.
- 4.4 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.
- 4.5 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.
- 4.6 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.

5. “Lesser role” culpability factors

- 5.1 At page 14 of the Consultation, it is stated,

“the Council also considered whether the lesser role factors covering offenders who had themselves been exploited were sufficient to cover all types of exploitation, including county lines type activity. The current factors are as follows:

Engaged by pressure, coercion, intimidation

Involvement through naivety/exploitation

The Council concluded that they were sufficient, but would be interested in views of consultation respondents on additional factors, or how these factors could be drafted differently.”

5.2 The Howard League recommends that the Council consider adding “*or other forms of grooming and/or control*” to the first factor, so that it reads, “*Engaged by pressure, coercion, intimidation or other form of grooming and/or control*”. This would reflect the latest research and understanding of the multitude of sophisticated grooming and control mechanisms employed by people who exploit children and vulnerable adults, which include: threats, coercion and violence; peer grooming; emotional abuse; use of social media; promises of money, status and glamour; protection and sense of belonging; sexual exploitation; tricks and debt bondage (see the Home Office’s recent practice guidance on County Lines Exploitation⁸ for a summary of the complex nature of grooming and control (page 4)). This would assist in cases where there are genuine concerns about exploitation, but for whatever reason a modern slavery defence has not been run or not succeeded but the issues remain relevant to mitigation.

6. Concluding observations

6.1 The revisions to the Drugs Offences Sentencing Guideline provides an opportunity to address the disparity in sentencing that has been found to exist in respect of drugs offences. Tackling discrimination should be an urgent priority of the Council and the matter should receive appropriate and explicit coverage in the Guideline if progress is to be made.

6.2 We would be happy to meet with you to discuss this further.

The Howard League for Penal Reform

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⁸ Home Office (2020) *County Lines Exploitation. Practice guidance for YOTs and frontline practitioners*. London: HM Government