

Howard League for Penal Reform's response to the Sentencing Council's consultation on modern day slavery offences

January 2021

Summary

1. The Howard League for Penal Reform welcomes the opportunity to comment on the draft sentencing guideline for modern slavery offences.
2. Modern slavery is an horrific and growing problem in England and Wales: the Howard League has seen the ramifications of this through its policy work on residential care and its specialist legal work. Though prosecutions under modern slavery legislation remain rare, growing awareness about modern slavery and county lines will likely lead to an increase in charges and convictions. As a result, the guideline is important and timely.
3. There is a risk that prosecutions will be brought against the most visible members of county lines groups – who are also the youngest and most vulnerable. Exploited children and young adults are themselves liable to prosecution for modern slavery offences. In 2018/19, four per cent of modern slavery prosecutions concerned children and 17 per cent concerned young adults (aged 18 to 24).
4. Convictions are too low to draw any conclusions about bias in sentencing. However, as more people are prosecuted for county lines exploitation, racial bias in gang intelligence and drug sentencing may be imported into modern slavery offences. The Sentencing Council should take steps to prevent this.
5. Victims should not be prosecuted in the first place. If victims of exploitation are prosecuted, convicted and sentenced, the approach to sentencing should be completely different. The draft guideline lists exploitation as relevant to both culpability and mitigation. Courts should be encouraged to seek information about defendants' vulnerability to exploitation to make sure the sentences take full account of the reality of victim's lives.
6. In the guideline as currently drafted, a victim of exploitation who is coerced into exploiting someone else is likely to receive a custodial sentence – even if they have caused the lowest level of harm. This fails to reflect cycles of criminal exploitation, and leaves open the possibility that victims of exploitation will be unduly punished.

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 Our legal team works directly with children and young adults in prison.
- 1.4 We have drawn on our legal and policy work in responding to this consultation. We welcome the opportunity to comment on the draft sentencing guideline for modern slavery offences. However, we are concerned that victims of exploitation may themselves be harshly punished under the proposed guideline.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. Modern slavery is a growing problem and prosecutions are likely to increase

- 2.1 Modern slavery is an horrific and growing problem in England and Wales. The Howard League has seen the ramifications of this through its policy work on residential care and its specialist legal work.
- 2.2 The Howard League has developed a programme of work on the criminalisation of children in residential care, which included a briefing on the criminal exploitation of looked-after children published last year.¹ For several years now the charity has collected annual data from police forces with a view towards reducing child arrests and has worked closely with forces to monitor and understand trends in the criminalisation of children.² Through these projects, the Howard League has spoken extensively to practitioners, police forces and children about the troubling scale and nature of child criminal exploitation (CCE).
- 2.3 The Howard League's legal team regularly works with children and young adults who have been criminally exploited. The legal work reveals the pain and damage caused by this form of exploitation, and the significant vulnerabilities of the young people involved.
- 2.4 The most common form of CCE is exploitation within 'county lines' drug supplies, where children and vulnerable adults are groomed and/or coerced into selling drugs via a dedicated mobile phone line. They may be exploited in the area which the line runs from, or in the area where drugs are sold. Children with additional needs, mental

¹ Howard League for Penal Reform (2020a), *Victims not criminals: protecting children living in residential care from criminal exploitation*, at <https://howardleague.org/wp-content/uploads/2020/03/Victims-not-criminals.pdf>.

² Howard League for Penal Reform (2020c), *Child arrests in England and Wales 2019: Research briefing*, at <https://howardleague.org/wp-content/uploads/2020/12/Child-Arrests-2019-FINAL-online.pdf>.

health problems and/or difficult home lives – including care experience – are especially vulnerable to this form of exploitation.³

- 2.5 The growing significance of CCE is reflected in the increase in referrals to the National Referral Mechanism (NRM), which is aimed at all victims of modern slavery. Criminal exploitation was only introduced as an NRM category in the last quarter of 2019, but is now the most common reason for referrals. Between July and September 2020, the NRM received 897 referrals for criminal exploitation. Fifty-five per cent of these referrals were of children (636 referrals), and over four hundred were specifically flagged for county lines.⁴
- 2.6 Over the past two years, police forces have begun to bring modern slavery charges against county lines defendants.⁵ For example, a recent operation to tackle county lines brought charges of conspiracy to supply and section two of the Modern Slavery Act against all those prosecuted, including a 16-year-old boy.⁶ The British Transport Police, the National Crime Agency and the National County Lines Co-ordination Centre have stated that they plan to make greater use of modern slavery legislation to tackle county lines.⁷
- 2.7 Although prosecutions under modern slavery legislation remain rare at present, in light of this changing landscape, growing awareness about modern slavery and county lines will likely lead to an increase in charges and convictions. As a result, the proposed guideline is important and timely.

3. Children and vulnerable young adults are likely to be affected

- 3.1 Children can be prosecuted under the Modern Slavery Act. In 2018/19, 4.3 per cent of modern slavery prosecutions concerned children and a further 17.7 per cent concerned young adults under the age of 25.⁸ A recent study notes the ‘very young age’ of some perpetrators of county lines exploitation, as recorded in police data. As the authors argue, this data ‘underlines the importance of working with young people in order to identify their needs’ and provide effective support, rather than leaving them to become caught up in cycles of exploitation.⁹
- 3.2 The Crown Prosecution Service should not be prosecuting exploited children and young adults in the first place. However, where this happens, great care and attention should be taken to ensure that victims are not unduly punished.

³ Howard League for Penal Reform (2020a), *Victims not criminals: protecting children living in residential care from criminal exploitation*.

⁴ Home Office (2020), *National Referral Mechanism Statistics, Quarter 4 2019*; Home Office (2020), *Modern Slavery: National Referral Mechanism and Duty to Notify Statistics, Quarter 3 2020*.

⁵ BBC (15 May 2019), *County lines dealers jailed in “landmark” slavery case*, at <https://www.bbc.co.uk/news/uk-england-london-48267349>; BBC (4 August 2020), *County lines and modern slavery arrests in West Yorkshire and Humbershire*, at <https://www.bbc.co.uk/news/uk-england-leeds-53654312>.

⁶ Manchester Evening News (1 October 2020), *Police storm 8 homes in Greater Manchester in major county lines and modern slavery raids – a teen is among 13 arrested*, at: <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/police-storm-8-homes-greater-19029781>.

⁷ National Crime Agency (17 October 2019), *Record numbers arrested and hundreds of children protected as County Lines drug networks targeted*, at: <https://www.nationalcrimeagency.gov.uk/news/record-numbers-arrested-and-hundreds-of-children-protected-as-county-lines-drug-networks-targeted>; The Guardian (16 September 2019), *Reports of county lines child exploitation likely to increase, say police*, at: <https://www.theguardian.com/uk-news/2019/sep/16/county-lines-child-exploitation-police>.

⁸ Office for National Statistics (2020), *Modern Slavery in the UK: March 2020 – Appendix Tables*. Table 29.

⁹ Lightowlers, C. et al (2020), ‘Victims and suspects of modern slavery: Identifying subgroups using latent class analysis’, *Policing: A Journal of Policy and Practice*, paaa072.

- 3.3 The Howard League’s policy work on child arrests shows that although some police forces effectively support victims of CCE, others inappropriately criminalise victims and/or arrest them because they do not know what else to do. The charity found that inexperience among police officers was a contributing factor, one which will likely be compounded by the increase in new officers over the next two years (and the fact that they will be responsible for meeting Home Office targets for tackling county lines activity).¹⁰ This lack of understanding may also affect prosecutions for modern slavery offences.
- 3.4 The proposed guideline will not apply to those convicted as children as the Sentencing Council’s Guideline for children will apply in those cases. However, exploited children may become exploited and vulnerable young adults. It is important that, as in the case of Balogun [2018] EWCA Crim 2933, courts are urged to import the particular considerations that apply to children to young adults. The children’s guideline recognises the inherent and specific vulnerabilities of children, many of which will continue to apply in young adulthood. Paragraph 1.5 of the children’s Guideline explains that children are more susceptible to peer pressure and may not fully understand or appreciate the impact of their behaviour.¹¹ This is relevant to peer exploitation within county lines groups and may equally apply to young adults. Modern slavery prosecutions should be considered in relation to a young adult defendant’s emotional and developmental age, as well as their own history of exploitation. The modern slavery guideline should flag that the child guideline may be of relevance in sentencing young adults.
- 3.5 Even in cases where the principles from the children’s guideline are not directly applied, a different approach should be proposed in the case of young adults. The Howard League is a founding member of the Transition to Adulthood (T2A) Alliance, a broad coalition of criminal justice, health and youth charities working to evidence and promote the need for a distinct and effective approach to young adults in the criminal justice system. Neuroscientific and psychological research shows that 18-to-24-year olds experience many of the same vulnerabilities as children: for example, they are more likely to struggle with decision-making, impulsivity and susceptibility to peer pressure than adults over the age of 25.¹² The Sentencing Council reflects this body of research in its expanded explanation of age and/or lack of maturity as a mitigating factor, and in the expanded explanation about gratuitous degradation as an aggravating factor. However, this understanding of young adults’ vulnerabilities should be embedded throughout the guidance as a whole.
- 3.6 The most easily identified members of county lines groups are children and young adults. Within the county lines business model, the children and young adults who are coerced into becoming drug runners are highly visible but the people who profit from their exploitation are not. If prosecutions for county lines exploitation increase significantly, there is a risk that a growing number of charges will be brought against

¹⁰ Howard League for Penal Reform (2020c), *Child arrests in England and Wales 2019: Research briefing*; The Guardian (11 January 2021), *Police in England and Wales face crime targets in return for 20,000 new officers*. Available at: <https://www.theguardian.com/uk-news/2021/jan/11/police-in-england-and-wales-face-targets-in-return-for-20000-new-officers>.

¹¹ Sentencing Council (2017), *Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery – Definitive Guideline*, at: <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/>.

¹² Howard League for Penal Reform (2019a), *Sentencing Young Adults: Making the case for sentencing principles for young adults*, at <https://howardleague.org/wp-content/uploads/2019/01/Sentencing-Young-Adults.pdf>; Howard League for Penal Reform (2019b), *Sentencing principles for young adults*, at https://t2a.org.uk/wp-content/uploads/2019/01/Sentencing-principles-for-young-adults_v06_LOW-1.pdf.

the most visible and vulnerable people involved, rather than those who are most culpable. The need to avoid unduly punishing victims of exploitation should be emphasised as strongly as possible in the guideline.

4. Risk of importing racial bias from gang intelligence and drug sentencing

- 4.1 The consultation document states “The modern slavery offence guidelines are intended to apply equally to all demographics of offenders, and in drafting the guidelines the Council has taken care to guard against any unintended impact.” However, it is not clear what steps have been taken to achieve this. The proposed guideline does not appear to include any particular warnings about the need to avoid bias, such as that at paragraph 1.18 of the children’s guideline or paragraph five of the mental health guideline. A general warning will support practitioners to draw the risk of discrimination to the court’s attention where appropriate.
- 4.2 While convictions are currently too low to draw firm conclusions about bias in sentencing, if more prosecutions for county lines exploitation are brought under the Modern Slavery Act, there is a risk of sentences under the Modern Slavery Act importing racial bias that exists in the use gang intelligence and drug sentencing. The Sentencing Council should take steps to prevent this.
- 4.3 As the Howard League outlined in a previous consultation response, there are also stark racial disparities in sentencing for drug offences. The Sentencing Council’s own research has shown that Black and ethnic minority defendants are more likely to receive immediate custodial sentences for drug offences at the Crown Court.¹³ The Council should clarify which past offences are considered relevant: a past conviction for drug possession is only likely to be relevant if there is reason to think that it involved exploitation.
- 4.4 County lines prosecutions are likely to draw on police intelligence about gangs, such as the Metropolitan Police’s Gangs Matrix. However, the quality of gang intelligence is questionable: it is conceptually vague and disproportionately targets Black young people. In 2018, Black people made up just over a quarter of police-identified perpetrators of serious youth violence in London, but 72 per cent of those flagged for gang-related violence.¹⁴ The guideline should caution against the risk that intelligence concerning gang membership will be given undue weight given the known risk of bias.

5. A completely different approach to sentencing is required in respect of victims of exploitation

- 5.1 Victims of exploitation should not be prosecuted. In cases where this has already happened, there should be a completely different approach to sentencing.
- 5.2 Section 45 of the Modern Slavery Act protects victims of exploitation from prosecution for some offences which they have been compelled to commit. However, a list of specified offences are excluded from this defence, including offences under sections one and two of the Modern Slavery Act itself. As a result, children and vulnerable

¹³ Howard League for Penal Reform (2020b), *Response to the Sentencing Council’s Drug Offences Consultation*, at https://howardleague.org/wp-content/uploads/2020/09/Sentencing-Council-Drug-Offences_2020_08_28-WEBSITE-COPY.pdf.

¹⁴ Amnesty International (2018), *Trapped in the Matrix: Secrecy, stigma, and bias in the Met’s Gangs Database*, at <https://www.amnesty.org.uk/files/reports/Trapped%20in%20the%20Matrix%20Amnesty%20report.pdf>.

adults who are themselves victims of exploitation can be prosecuted for modern slavery offences.

- 5.3 The draft guidelines list exploitation as both a mitigating factor and as a factor that reduces culpability. As a result, courts must be able to identify defendants who are engaged by coercion, pressure or intimidation, especially if this has previously gone unrecognised.
- 5.4 Within county lines networks, children may be exploited by peers who have themselves been victims of exploitation. The Howard League’s work on the criminal exploitation of children in residential care found that children who ‘become more entrenched in the group and rise up the criminal hierarchy ... are more likely to be involved in peer-to-peer grooming, violence and the abuse of other children. It is essential to understand the sophisticated nature of grooming and control processes in order to appreciate why these children are victims of exploitation’.¹⁵
- 5.5 To make sure that these processes are understood by courts and reflected in sentencing, courts should be required to seek out information about defendants’ vulnerability to exploitation – especially where they are young. Courts should also be required to look into any past NRM referrals and seek information from the probation service as to why referrals have not been made where there are indications of trafficking.
- 5.6 Courts should not assume that young people who have themselves experienced victimisation will become perpetrators. One young adult who is being supported by the Howard League’s legal team received a conclusive grounds NRM decision as a child, but is now under investigation for (as a young adult) associating with a child found to be in possession of Class A drugs. His parole dossier includes the suggestion that he has himself become a perpetrator of exploitation, though it is unclear what evidence there is to support this. We have seen similar reasoning in the case of another young adult.
- 5.7 Where there is clear evidence that exploitation has taken place, a defendant’s own history of victimisation should be understood as essential context for sentencing decisions, and as a significant mitigating factor. However, past victimisation does not mean that a young person will themselves exploit others. A history of exploitation should never be used against a defendant.

6. A defendant who has been engaged by coercion, pressure or intimidation should not receive a custodial sentence

- 6.1 As the consultation document notes, the intention of the Modern Slavery Act 2015 was to “ensure that the worst perpetrators can receive the lengthy custodial sentences that they deserve”. In Parliament, former Home Secretary Theresa May gave the example of a human trafficker who forced more than a hundred women into sexual slavery.¹⁶ The proposed guidelines try to reflect this intention through culpability and harm factors. However, the starting point for even the lowest level of culpability and harm is a custodial sentence. This is an unduly harsh punishment for someone who has been forced to commit an offence – especially in the context of county lines exploitation, where victims (including young women) may be coerced into grooming peers.

¹⁵ Howard League for Penal Reform (2020a), *Victims not criminals: protecting children living in residential care from criminal exploitation*.

¹⁶ House of Commons Debate 8 July 2014, Column 166. Available at:

<https://publications.parliament.uk/pa/cm201415/cmhansrd/cm140708/debtext/140708-0001.htm>.

- 6.2 The proposed starting point for a defendant who has been engaged by coercion, pressure or intimidation and who has inflicted limited harm is a 26-week custodial sentence. As a result, victims potentially face harsh punishments for their own exploitation. This sentence level is also unlikely to be effective: research by the Ministry of Justice has shown that custodial sentences of under a year are associated with a higher risk of reoffending than sentences served in the community.¹⁷
- 6.3 The proposed starting point for a defendant who has been engaged by coercion, pressure or intimidation and has inflicted some harm, along with significant financial loss, is four years' custody. A child sentenced under these guidelines would be likely to receive a sentence of two to three years in custody. This is an inappropriately severe sentence for a victim of exploitation.

7. Conclusion

- 7.1 Given the troubling nature and scale of modern slavery in England and Wales, the proposed guideline is important and timely. However, in its current form, the guideline does not adequately distinguish between victims of modern slavery and those who profit from their exploitation. Where a defendant has been coerced into exploiting others, a different approach to sentencing is required.
- 7.2 The Howard League would be happy to discuss this with you further.

Howard League for Penal Reform
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¹⁷ Ministry of Justice (2019), *The impact of short custodial sentences, community orders and suspended sentence orders on reoffending*, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814177/impact-short-custodial-sentences.pdf.

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