

## Howard League for Penal Reform's response to the Law Commission's 14<sup>th</sup> Programme of Law Reform

July 2021

### Summary

1. The Howard League welcomes the opportunity to respond to the Law Commission's 14<sup>th</sup> Programme of Law Reform. This short response focuses on two areas of law which should be reviewed: the defence of duress and the single justice procedure.

### Duress

2. The current defence of duress fails the most vulnerable defendants, including people with mental health problems and survivors of abuse.
3. The interplay between the defence of duress, section 45 of the Modern Slavery Act and the National Referral Mechanism is confused and prevents many victims of trafficking or exploitation from bringing an effective legal defence. Defendants who are recognised as victims of trafficking or exploitation by the Home Office may not be treated as victims by the Crown Prosecution Service or the courts, as the recent case of *V.C.L. and A.N. v. the United Kingdom* highlights.
4. Home Office guidance on coercive and controlling behaviour is also at odds with the case law on duress, which requires an imminent threat of serious injury or death rather than a persistent pattern of intimidation and abuse.

### The single justice procedure

5. The single justice procedure for summary, non-imprisonable offences is unfair and undermines due process. Many people do not even know that they have been charged and there are no protections in place for vulnerable people. The Howard League has spoken to young adults who were charged under the single justice procedure and did not understand what was happening.

### Review of Appeal Powers in the Criminal Courts

6. The Howard League agrees that there is significant merit in reviewing the approach of the Courts and the Criminal Cases Review Commission in considering appeals and reviews to ensure that miscarriages of justice are effectively remedied.

## **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. We have drawn on our legal work in responding to this consultation.
- 1.4 This response focuses on three areas which should be reviewed:
  - The defence of duress is far too narrow in scope: it fails the most vulnerable defendants and is at odds with government policy on trafficking, exploitation and domestic abuse.
  - The single justice procedure, which provides that cases concerning summary, non-imprisonable offences can be heard by a single magistrate, erodes due process and natural justice.
  - The appellate and review system is too constrained to ensure justice is done.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

## **2. The current defence of duress fails the most vulnerable defendants**

- 2.1 The common law of duress includes two types of duress: duress arising from threats and duress of circumstances. The scope of both defences is extremely narrow.
- 2.2 Duress arising from threats applies in cases where a defendant had good cause to fear imminent death or serious injury if they did not commit the offence. The court must agree that the offence would have been committed by a reasonable person in the same circumstances and with the same relevant characteristics.
- 2.3 Duress of circumstances applies where a defendant committed an offence "to avoid consequences which could not otherwise be avoided and which if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil".<sup>1</sup> As with duress by threats, the reasonable person test applies.
- 2.4 Duress does not apply where a defendant subjectively believed that they were under threat but where this was not objectively reasonable. Duress also does not apply where the defendant was subject to threats which did not involve death or serious injury. This has concerning implications for people who experience psychological, sexual or economic abuse and whose offending behaviour is related to that abuse.

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<sup>1</sup> <https://www.cps.gov.uk/legal-guidance/defences-duress-and-necessity>

- 2.5 In *R v Bowen* [1996] EWCA Crim 1792, Stuart-Smith LJ found that psychiatric evidence might be admissible to demonstrate that a defendant had a recognised mental health condition which led to increased susceptibility to threats. However, the example which he gave – “post traumatic stress disorder leading to learned helplessness” – suggests that the threshold remains very high.<sup>2</sup>
- 2.6 The potential relevance of learned helplessness to a defence of duress was also raised in *Coats* [2013] EWCA Crim 1472.<sup>3</sup> Here, Hallet LJ held that “Battered Woman’s Syndrome” could be significant in considering duress, but only if it left the defendant in a state of learned helplessness. This did not apply in *Coats*, as:
- “the contemporaneous records of this woman, of her complaints of her dealings with the police and social workers simply do not paint a picture of an abused woman who is passive and suppressing her suffering and her fears. They reveal a woman with her own anger management problems, a woman prepared to stand up for herself with Walters and the authorities and who far from being isolated was in regular contact with friends and relations.” (§59)
- 2.7 As the Prison Reform Trust and the Centre for Women’s Justice have argued, this is based on outdated and pathologising assumptions about the impact of domestic abuse.<sup>4</sup>
- 2.8 The defence of duress does not prevent the prosecution of victims of trafficking, even where they have committed offences as a direct result of that trafficking. The more recent statutory defence provided by s45 of the Modern Slavery Act 2015 has a wider definition of compulsion than the defence of duress. However, s45 does not apply retrospectively and excludes a vast number of offences.
- 2.9 The United Kingdom is a signatory to the Council of Europe Convention on Action against Trafficking in Human Beings. Article 26 of the Convention, the non-punishment provision, provides that each party “shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”.<sup>5</sup> However, the domestic courts have repeatedly declined to bring duress in line with Article 26. In *Dao & Ors v R* [2012] EWCA Crim 1717, Gross LJ maintained that “the Trafficking Convention sheds no light on the true scope of duress”.<sup>6</sup>
- 2.10 Until 2015, victims of trafficking could only resort to the defence of duress. However, s45 of the Modern Slavery Act 2015 provides a statutory defence for victims of trafficking or exploitation whose offending is a direct result of their trafficking/exploitation. An extensive list of violent, sexual, terrorist, trafficking, immigration, child abuse and neglect offences are excluded from the s45 defence.<sup>7</sup>
- 2.11 The Modern Slavery Act does not apply retrospectively. In *R v Joseph & Ors* [2017] EWCA Crim 36, the Court of Appeal declined to develop the law of duress to address

<sup>2</sup> <https://www.bailii.org/ew/cases/EWCA/Crim/1996/1792.html>

<sup>3</sup> <https://www.bailii.org/ew/cases/EWCA/Crim/2013/1472.html>

<sup>4</sup>

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Women/PRT%20statutory%20defence%20summary%20WJ%20LINKS%20AND%20END%20NOTES.pdf>;

<https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/5fdc843c9d30181faffbb1f5/1608287293168/CWJ+DA+Bill+short+briefing+Dec+2020.pdf>

<sup>5</sup> <https://rm.coe.int/168008371d>

<sup>6</sup> <https://www.bailii.org/ew/cases/EWCA/Crim/2012/1717.html>

<sup>7</sup> <https://www.legislation.gov.uk/ukpga/2015/30/schedule/4/enacted>

the position of victims of trafficking who were not able to take advantage of the 2015 Act.<sup>8</sup>

- 2.12 In February 2021, the United Kingdom lost the case of *V.C.L. and A.N. v. the United Kingdom* in the European Court. The case concerned two Vietnamese children who had been found at cannabis factories and arrested by police in 2009. In both cases, the Crown Prosecution Service decided to prosecute. It did not drop the prosecutions when the United Kingdom Border Agency (UKBA) concluded that they were victims of trafficking, and the appellants' defence counsel did not believe that it would be possible to prove a defence of duress. The European Court found that the UK authorities had violated Article 4 of the Convention on Human Rights by failing to protect both children as potential and, once a decision had been reached by the Competent Authority, actual victims of trafficking.<sup>9</sup>
- 2.13 As *V.C.L. and A.N.* demonstrate, the defence of duress does not protect victims of trafficking. This continues to affect people who are not able to bring a defence under s45 of the Modern Slavery Act, including children and young adults who have committed excluded offences as a direct result of trafficking or exploitation.
- 2.14 In its present form, the law on duress fails to protect people who commit offences because they are being subjected to coercive control, even though the relationship between offending and this type of abuse has been recognised by the Home Office.
- 2.15 Section 76 of the Serious Crime Act 2015 introduced the offence of "controlling or coercive behaviour in an intimate or family relationship". This applies to behaviour which causes the victim to fear that violence will be used against them and/or causes serious harm or distress.<sup>10</sup> The statutory guidance published by the Home Office that year noted that coercive and controlling behaviour sometimes included "forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities".<sup>11</sup> Yet there is no statutory defence for defendants who find themselves in this situation.
- 2.16 By definition, coercive control describes a pattern of persistent abuse rather than a single immediate threat. This pattern may include humiliation, threats, isolation and/or constant monitoring. In contrast, to prove a defence of duress, a defendant must demonstrate that they committed the offence under threat of imminent physical injury.
- 2.17 Those in the criminal justice system are typically some of the most vulnerable and exploited in our communities. If justice is to be done, the law on duress needs to be revised so it is fit for purpose and affords those who have felt compelled to act a meaningful opportunity to avoid being criminalised.

### **3. The single justice procedure is unfair and undermines due process**

- 3.1 Section 48 of the Criminal Justice and Courts Act 2015 provides that summary offences which are not punishable with imprisonment may be tried by a single magistrate. The court cannot hear oral evidence and can only consider the written charge and single justice procedure notice, along with any written submission from the accused.<sup>12</sup> If

<sup>8</sup> <https://www.bailii.org/ew/cases/EWCA/Crim/2017/36.html>

<sup>9</sup> [https://hudoc.echr.coe.int/fre#%7B%22itemid%22:\[%22001-207927%22%7D](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-207927%22%7D)

<sup>10</sup> <https://www.legislation.gov.uk/ukpga/2015/9/section/76/enacted>

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482528/Controlling\\_or\\_coercive\\_behaviour\\_-\\_statutory\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf)

<sup>12</sup> <https://www.legislation.gov.uk/ukpga/2015/2/section/48/enacted>

someone receives a single justice procedure (SJP) charge and does not respond, or if they respond and plead guilty, the magistrate sentences them on the papers in a closed court.<sup>13</sup>

3.2 The Howard League shares the grave concerns about the SJP which have been voiced by Transform Justice and APPEAL. Most people who receive an SJP charge in the post do not reply and there is no evidence of receipt.<sup>14</sup> In its work on TV licensing prosecutions, which are nearly all pursued through the SJP, APPEAL found that people were being prosecuted without their knowledge. The impact of these prosecutions is overwhelmingly felt by women who are struggling with their finances: in 2018, women made up more than seven in ten prosecutions for TV licence evasion.<sup>15</sup>

3.3 Howard League lawyers recently supported a young adult who received a single justice procedure notice for fare evasion. He did not understand the process, felt that the paperwork misrepresented what had happened and was unable to afford the fine without emergency financial support. The Howard League is concerned about young people in the same situation who are not already in contact with lawyers, as it is not possible to access publicly funded legal advice or representation for low-level summary offences. This system urgently needs to be reviewed to avoid justice in absentia.

#### **4. Review of Appeal Powers in the Criminal Courts**

4.1 The Howard League agrees that there is significant merit in reviewing the approach of the Courts and the Criminal Cases Review Commission (CCRC) in considering appeals and reviews to ensure that miscarriages of justice are effectively remedied.

4.2 It cannot be right that where a Defendant pleads guilty to a matter in the youth or magistrates' court effectively has no right of appeal even where subsequent information emerges that would have had a significant impact on the decision to plead guilty, such as a positive trafficking decision.

4.3 Further, the tests applied by the Court of Appeal and the CCRC both in respect of the admission of fresh evidence and the ultimate safety of the decision are too narrow to ensure justice. In particular the "substantial injustice" test for out of time cases applied by the Court of Appeal and "real possibility" test applied by the CCRC filters out potentially meritorious cases.

4.4 The law should empower appellate and reviewing courts and bodies to ensure justice is done.

#### **5. Conclusion**

5.1 The 14<sup>th</sup> Programme of Law Reform is an opportunity to review key areas of law which are currently flawed: the overly narrow defence of duress, the unfair single justice procedure and the system of appeals and reviews. Reform in these areas is crucial to ensure a justice system that is fit for purpose.

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<sup>13</sup> <https://committees.parliament.uk/writtenevidence/35335/pdf/#:~:text=single%20justice%20procedure-,Written%20submission%20from%20the%20charity%20Transform%20Justice,valid%20ticket%20on%20public%20transport.>

<sup>14</sup> <https://committees.parliament.uk/writtenevidence/35335/pdf/#:~:text=single%20justice%20procedure-,Written%20submission%20from%20the%20charity%20Transform%20Justice,valid%20ticket%20on%20public%20transport.>

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[https://static1.squarespace.com/static/5537d8c5e4b095f8b43098ff/t/5e837385b3225608b872d70d/1585673094610/2020\\_03\\_31+TVL+Consultation+Response+%28final%29+.pdf](https://static1.squarespace.com/static/5537d8c5e4b095f8b43098ff/t/5e837385b3225608b872d70d/1585673094610/2020_03_31+TVL+Consultation+Response+%28final%29+.pdf)

