

Howard League for Penal Reform's response to the Sentencing Council's consultation on its burglary offences guideline

September 2021

Summary

1. The Howard League welcomes the opportunity to respond to the Sentencing Council's consultation on its burglary offences guideline.
2. More emphasis should be placed on the Sentencing Council's statutory duty to monitor the impact of its guidelines in the widest sense including the impact on re-offending as well as sentence length.
3. Sentencing practice has become more punitive since the Sentencing Council was established and the Ministry of Justice predicts that the prison population will reach nearly 100,000 by 2026.
4. The Council's work has led to unanticipated sentence inflation and its efforts to evaluate the impact of this guideline with a view to correcting sentence inflation is welcome.
5. The Howard League agrees that the threshold for high culpability should be increased and that the wording added in response to the 2011 riots should be removed. The harm factors should be reworded and amended, so that actual or threatened violence is no longer in the same harm category as the presence of the victim.
6. As the consultation paper recognises, burglary offences often take place in the context of addiction. In the Howard League's experience, burglary can also be linked to financial need, debt and exploitation. Sentencers should be reminded about community sentences which can address these issues and are a better outcome for the public, victims and the public purse.
7. The Sentencing Council must ensure that the revised guideline counters discrimination. The Howard League accepts that the prevalence of Black people sentenced for burglary offences reflects racial disparities at the arrest and prosecution stage. However, the guideline should seek to redress these disparities at the point of sentencing.
8. Nearly a quarter of adults sentenced for aggravated burglary and 14 per cent of adults sentenced for domestic burglary are aged 18 to 21. Sentencers should be reminded that young adults have a significant capacity for change in a short space of time and that any previous convictions should be given less weight than in the case of older adults.

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 The Howard League welcomes the Sentencing Council's efforts to evaluate its guidelines and correct those which have led to unanticipated sentence inflation: this honours the Council's statutory duty to monitor the impact of its guidelines. The Howard League agrees that the burglary guidelines should be amended so that fewer offences fall into the highest categories of harm and culpability and that sentencers should be reminded about alternatives to custody. The revised guideline should also seek to redress the racial disparities in punishment for burglary and should recognise the distinct characteristics of young adults who commit burglary offences.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. More emphasis should be placed on the Sentencing Council's statutory duty to monitor the impact of its guidelines, in the widest sense

- 2.1 In 2007, Lord Carter's Review of Prisons recommended a structured sentencing framework which could bring sentencing practice in line with prison capacity (Carter, 2007).¹ The following year, the Sentencing Commission Working Group dropped the idea that sentencing guidelines could be linked to prison places. However, it noted that an increase in the prison population was "undesirable for a number of reasons", including cost and the fact that people are less likely to be rehabilitated in overcrowded prisons (Sentencing Commission Working Group, 2008, p. 8).² The working group recommended that the impact of sentencing guidelines on the prison population should be closely monitored.
- 2.2 The Sentencing Council was subsequently established by the Coroners and Justice Act 2009. Section 120(11) of the Act requires the Council to have regard to "the cost of different sentences and their relative effectiveness in preventing re-offending".³ The

¹ http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05_12_07_prisons.pdf

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https://webarchive.nationalarchives.gov.uk/ukgwa/20110414085012mp_/http://www.justice.gov.uk/publications/docs/sentencing-guidelines-evolutionary-approach.pdf

³ <https://www.legislation.gov.uk/ukpga/2009/25/section/120>

Council also has a statutory duty to “monitor the operation and effect of its sentencing guidelines”, including “the factors which influence the sentences imposed by courts” (Coroners and Criminal Justice Act 2009 (s128)).⁴

2.3 More emphasis should be placed on the Sentencing Council’s duty to monitor the impact of its guidelines on sentence length and severity. This impact must be considered alongside the Council’s duty to consider the cost of sentences and their effectiveness in preventing re-offending. For example, Ministry of Justice analysis shows that short prison sentences (less than 12 months) are associated with higher proven re-offending rates than community orders or suspended sentences (Ministry of Justice, 2019).⁵ If sentencing guidelines increase the number of people who are given short prison sentences rather than community orders, they are likely to also increase re-offending.

3. Sentencing practice has become more punitive since the Sentencing Council was established

3.1 As the Howard League has previously argued, the Council has so far failed to curb the use of imprisonment or improve the cost-effectiveness of sentencing (Howard League, 2020).⁶ Instead, sentencing practice has become more punitive. In the decade from 2010 to 2020, the average length of a prison sentence increased by 30 per cent (Ministry of Justice, 2021).⁷

3.2 Harsher sentencing decisions have already increased the number of people in prison. Punitive sentencing will have an even greater impact over the next five years, as more police officers are recruited: the most recent Ministry of Justice analysis predicts that 98,700 people will be in prison by 2026, the highest the prison population has ever been (Ministry of Justice, 2020).⁸ This is nearly twenty thousand more people than in 2007, when the Carter Review described unsustainable pressures on prisons and recommended measures to reduce the use of custody (House of Commons Library, 2020; Carter, 2007).⁹

4. The Howard League welcomes the Council’s efforts to evaluate its guidelines and correct those which have led to unanticipated sentence inflation

4.1 Given this context, the Howard League welcomes the Council’s efforts to evaluate the impact of its guidelines and to correct guidelines which have led to unanticipated sentence inflation.

4.2 The Council must continue to evaluate the impact of revised guidelines. For example, the resource assessment predicts that the revised assault guidelines will reduce the number of people sent to prison for actual bodily harm (ABH), inflicting grievous bodily

⁴ <https://www.legislation.gov.uk/ukpga/2009/25/section/128>

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814177/impact-short-custodial-sentences.pdf

⁶ <https://howardleague.org/wp-content/uploads/2020/09/Howard-League-Response-What-Next-for-the-Sentencing-Council.pdf>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987744/overview-tables-dec-2020.ods

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938571/Prison_Population_Projections_2020_to_2026.pdf

⁹ http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05_12_07_prisons.pdf;

<https://researchbriefings.files.parliament.uk/documents/SN04334/CBP-04334-PUBLIC.xlsx>

harm/unlawful wounding (GBH s20) and causing grievous bodily harm with intent (GBH s18) by 500 each year. If the Council’s analysis of Ministry of Justice data suggests that this is not happening, the Council should investigate why this is and publish its findings (Sentencing Council, 2021).¹⁰

5. The Howard League agrees that the guidelines should be amended so that fewer offences fall into the highest culpability and harm categories

5.1 The Sentencing Council is right to revise its burglary guidelines, given the concerning evidence that they have likely contributed to sentence inflation. The Howard League agrees that the guidelines should be amended so that fewer offences fall into the highest culpability and harm categories.

5.2 The Howard League agrees that “deliberate targeting” should no longer be included as a high culpability factor: it creates too low a threshold for high culpability and is already accounted for by “a significant degree of planning or organisation”. The Howard League also agrees that “equipped for burglary” and “member of group or gang” should no longer be high culpability factors. Sentencers should bear in mind that children and young adults are more likely to offend when they are with their peers and are less able to resist peer pressure (Scott et al, 2018).¹¹ The use of the word “gang” in guidelines is also highly problematic given the risk of it feeding into discriminatory narratives and perceptions (Howard League, 2021).¹²

5.3 The Howard League agrees that the existing wording about adjusting upwards from the starting point for cases of particular gravity, which was inspired by the 2011 riots, should be removed. However, the consultation paper proposes including a similar point – “For cases of particular gravity, sentences above the top of the range may be appropriate” – for domestic burglary, on the grounds that two per cent of sentences passed in 2019 were higher than the top of the category range. As courts can already depart from the category range, this is unnecessary and could lead to sentence inflation.

5.4 The Sentencing Council’s evaluation of the burglary guidelines found that the most common step one factor for domestic burglary was “Occupier at home (or returns home) while offender present” (Sentencing Council, 2016).¹³ This factor remains in the highest harm category for all burglary offences in the revised guideline, alongside “Violence used or threatened against the victim”. While it is obviously very frightening to be present during such an incident, the presence of the occupier should not be in the same harm category as actual or threatened violence.

5.5 The Howard League agrees with the proposed rewording of the harm factors about loss to the victim and the emotional impact of the burglary.

6. Sentencers should be reminded about alternatives to custody

6.1 The Howard League agrees that sentencers should be reminded about alternatives to custody. Sentencers should be reminded about community sentences which are better for the public, victims and the public purse as they can address the underlying needs of people convicted of burglary. Effective community sentences are better for victims and the public as they will reduce the likelihood of future burglaries. They are also good for

¹⁰ <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-final-resource-assessment.pdf>

¹¹ https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2051&context=law_journal_law_policy

¹² <https://howardleague.org/wp-content/uploads/2021/06/A-guide-for-antiracist-lawyers.pdf>

¹³ <https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary-further-assessment.pdf>

the public purse. In contrast, prison sentences are costly both in themselves and because they are associated with higher re-offending rates than community interventions (Marsh and Fox, 2008).¹⁴

- 6.2 People who have previously experienced insecure accommodation, unemployment and substance abuse are more likely to reoffend after a prison sentence (Ministry of Justice, 2013).¹⁵ These issues cannot be resolved while someone is in prison but can be addressed during a community sentence.
- 6.3 As the consultation paper recognises, burglary offences often take place in the context of drug and alcohol addiction. Research evidence and the Howard League’s own legal work suggest that burglary offences are also linked to financial need and can be a by-product of criminal exploitation. These wider factors can be more effectively addressed through community sentences.
- 6.4 For example, in a qualitative study with thirty men in a northern English city who had been convicted of burglary, participants described the life trajectories which had led to their offences. Many participants had grown up in unstable home environments and attended school infrequently, if at all. As adults, they had experienced long periods of unemployment or – in fewer cases – low-paid and routine work. Few of the men had stable accommodation and most had used drugs since they were teenagers. Emmeline Taylor, the author of the study, argues that probation practice based on the Good Lives Model is best placed to recognise these men’s needs and develop their capacity to live a fulfilling and law-abiding life (Taylor, 2016).¹⁶
- 6.5 The Howard League has worked with children and young adults who have been charged with burglary offences in the context of criminal exploitation, including to pay back their debts to exploiters. Young people in this situation may not have been directly coerced into the offence and, as a result, may not come under the lower culpability factor “Involved through coercion, intimidation and exploitation”. Even if they do, the category range for people coerced into committing aggravated burglary starts at 1–4 years’ custody. Aggravated burglary is excluded from the statutory defence for people who have been trafficked or exploited, as are other burglary offences where the offence was committed with the intent of inflicting grievous bodily harm or doing unlawful damage (Modern Slavery Act 2015, schedule 4).¹⁷ A community order could allow a young person to receive support which addresses and helps them to escape their experiences of exploitation.

7. The revised guideline should seek to redress racial disparities at the point of sentencing

- 7.1 The consultation paper recognises that Black people are disproportionately charged with burglary offences, and that this is starkest for aggravated burglary. Table 3.6 of the statistical bulletin shows that 15 per cent of the people who were sentenced for aggravated burglary in 2019 were Black (excluding those with no recorded ethnicity), compared to only three per cent of the general population (Ethnicity Facts and Figures, 2018).¹⁸

¹⁴ <https://link.springer.com/article/10.1007/s11292-008-9063-3>

¹⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/491119/re-offending-release-waves-1-3-spcr-findings.pdf

¹⁶ <https://journals.sagepub.com/doi/full/10.1177/1477370816661743>

¹⁷ <https://www.legislation.gov.uk/ukpga/2015/30/schedule/4/enacted>

¹⁸ <https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/national-and-regional-populations/population-of-england-and-wales/latest>

- 7.2 The consultation paper notes that this reflects the overrepresentation of Black people “upstream” from sentencing, in arrest and prosecution. However, this overrepresentation is not being remedied at the point of sentencing and is potentially compounded by the decisions of the court. The statistical bulletin shows that 95 per cent of Black people sentenced for aggravated burglary in 2019 were given immediate custodial sentences (20 out of 21) compared to 90 per cent of white people (101 out of 112), though the sample size is too small to tell whether this is a significant difference.
- 7.3 The revised guideline should expressly remind sentencers that Black people are disproportionately charged with aggravated burglary offences and that sentencers should take this into account. The Sentencing Council should also analyse sentencing outcomes for aggravated burglary over a longer period, to assess whether Black people are also more likely to be sentenced to immediate custody.
- 7.4 The guideline also might remind sentencers of the accumulated disadvantage that Black defendants may have faced which should be explored and factored in as a mitigating factor in sentencing (Howard League, 2021).¹⁹

8. The distinct characteristics of young adults should be taken into account in sentencing

- 8.1 The Howard League is a founding member of the Transition 2 Adulthood (T2A) Alliance, a broad coalition of leading charities working to evidence and promote the need for a distinct and effective approach to young adults in the transition to adulthood, throughout the criminal justice process. The work of the Howard League and T2A has highlighted the overwhelming scientific evidence that young adults are still developing into their mid-twenties: for example, young adults are still developing their decision-making and impulse control skills and remain very susceptible to peer pressure. This has clear implications for sentencing (Howard League, 2020).²⁰ The lesser culpability of young adults is recognised in the case law and reflected in the Sentencing Council’s expanded explanation for “age and/or lack of maturity” (Emanuel et al, 2021; Sentencing Council, 2019).²¹
- 8.2 Young adults under the age of 21 make up a significant proportion of those sentenced for burglary offences. Table 3.6 of the statistical bulletin shows that in 2019, seven per cent of adults sentenced for non-domestic burglary, 14 per cent of adults sentenced for domestic burglary and 24 per cent of adults sentenced for aggravated burglary were aged 18 to 21. An even greater proportion will have been young adults under the age of 25, though this data is not included in the bulletin. Ninety-six per cent of 18 to 21 year olds sentenced for aggravated burglary were given an immediate custodial sentence.
- 8.3 The expanded explanation for age and/or lack of maturity instructs courts to consider young adults’ developmental stage in assessing their culpability for offences and the impact of a sentence. It notes that young adults have a greater capacity for change in a short space of time and that, as a result, “a young adult’s previous convictions may not be indicative of a tendency for further offending” (Sentencing Council, 2019).²²

¹⁹ <https://howardleague.org/wp-content/uploads/2021/06/A-guide-for-antiracist-lawyers.pdf>

²⁰ <https://t2a.org.uk/wp-content/uploads/2020/12/JudgingMaturity2020.pdf>

²¹ https://howardleague.org/wp-content/uploads/2021/03/CLR_Sentencing_young_adults.pdf;

<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>

²² <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>

Sentencers should be expressly reminded to refer to the expanded explanation in the case of young adults to increase the effectiveness of that extremely helpful guidance.

- 8.4 As the consultation paper recognises, people who are sentenced for burglary offences are extremely likely to have previous convictions for the same offence. The revised guideline should note that this is the case and that these convictions should be viewed differently in the case of young adults.

9. Conclusion

- 9.1 The Howard League welcomes the intention behind the Sentencing Council's revised guideline for burglary offences and agrees that fewer offences should fall into the highest culpability and harm categories. The revised guideline is a significant improvement, though there is still a risk that too many offences will be placed in the highest harm category and that victims of exploitation and other people in financial need will be imprisoned rather than given support.
- 9.2 The statistical bulletin shows that Black people and young adults under the age of 21 are disproportionately charged with aggravated burglary, which almost always leads to an immediate custodial sentence. The revised guideline be amended to seek to remedy the racial disparities in burglary prosecutions and should expressly remind sentencers to take a different approach to young adults.

**The Howard League for Penal Reform
1 September 2021**