

Prison Reform Trust response to the Sentencing Council consultation on drug offences – April 2020

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promote equality and human rights in the criminal justice system.

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1. Do you agree with the scope of the draft revised guideline and the offences which it covers?

Yes

2. Do you have any comments on the changes proposed to the culpability factors?

We welcome the proposed changes to “leading role” culpability factors, including to recognise “exploitation of children and/or vulnerable persons to assist in drug-related activity”.

For significant role culpability factors, it is important to recognise that apparent involvement at a higher level of culpability may be a result of coercion, pressure or intimidation. This can be seen in situations of ‘county lines’ operations with young people being used to transport large quantities of drugs or cash from one location to another. In many of these cases, a young person may give the impression that they are involved at a higher level in the operation than is actually the case. This is because they may be coerced into admitting a higher level of responsibility, in order to protect others higher up the chain of command. This highlights the importance of sentencers having a clear understanding of the complexities of modern slavery, and access to training and guidance on the subject.

We do not share the view of the Council that the corresponding factors indicating lesser role culpability (Engaged by pressure, coercion, intimidation; Involvement through naivety/exploitation) are “sufficient”. Individuals whose offending is a result of

coercion, intimidation or exploitation are afforded specific protection under provisions of the Modern Slavery Act. Furthermore, the UK has obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially to women and children (United Nations 2000).

Despite this, evidence from recent police and Crown Prosecution Service (CPS) inspectorate reports, as well as research by the Prison Reform Trust and Hibiscus Initiatives, suggest a continuing failure to ensure victims of trafficking are identified, protected and supported in a timely fashion as required under section 45 of the Modern Slavery Act and associated policies. PRT's joint report with Hibiscus *Still No Way Out (2017): foreign national and trafficked women in the criminal justice system*,¹ found that:

- There are no official data on the number or experiences of victims of trafficking who are wrongly prosecuted for offences carried out due to exploitation. This constrains any meaningful assessment of the extent to which criminal justice agencies are discharging their legal responsibilities towards victims of trafficking who present as offenders.
- Evidence collated by Hibiscus and from inspectorate reports suggests that, despite police and prosecution guidance, there is a disturbing failure to identify, protect and support victims of trafficking at an early stage and avoid prosecuting them for offences committed as a consequence of their exploitation by traffickers.
- College of Policing guidance is clear that where an individual raises the section 45 defence before a police interview, he or she should be offered a separate interview about their experience of trafficking and a NRM referral should be made. However the guidance fails to specify that where this is raised during a police interview the same steps should be taken.
- Defence lawyers often do not ask the right questions in order to establish whether their client may be a victim of trafficking and some fail to advise women where appropriate about the section 45 defence.
- It can be difficult for defence lawyers to apply successfully for proceedings to be moved to a different court in order to safeguard defendants going through the NRM process. Difficulties in obtaining suitable bail accommodation can lead to such defendants being remanded in custody.
- Some training is available for judges and magistrates in relation to trafficking and in relation to women's caring responsibilities but more is needed. The Equal Treatment Bench Book, which includes new sections on Modern Slavery, Intercultural communication for those speaking English as a second language and Effective Use of Interpreters, is a welcome resource.
- The National Probation Service (NPS), HM Prisons and Probation Service (HMPPS) and Community Rehabilitation Companies (CRCs) were not 'first responders' (with a duty to refer to the NRM). The NPS was starting to raise awareness of human trafficking and modern-day slavery at the time of publication and had established a working group.

¹ Prison Reform Trust and Hibiscus Initiatives (2018) [Still No Way Out: Foreign national women and trafficked women in the criminal justice system—Summary Report](#), London: Prison Reform Trust

Recommendations

In light of these findings, we propose that the following changes are made to the draft guideline:

- This section should include a clear link to the Equal Treatment Bench Book, flagging sections on Modern Slavery, Children, Young People and Vulnerable Adults, Physical Disability, Mental Disability, Intercultural communication for those speaking English as a second language and Effective Use of Interpreters.
- The guideline should make clear that when pressure, coercion, intimidation or exploitation are suspected as factors indicating greater or lesser role culpability, these issues should always be addressed in a PSR.
- Alongside the guideline, better training should be provided for judges and magistrates in relation to modern slavery and how to respond appropriately in cases where this has been identified as a factor.

3. Are there any additional differences between the three types of offence, in terms of culpability, which you feel the guidelines should take into account?

No

Questions 4–8

We have chosen not to answer questions 4-8 on harm and would defer to experts in this area of offending.

9. Do you have any comments on proposed sentence levels, particularly for the Category 4 harm Importation offences?

We are concerned by the broad range of sentence levels for category four offences, particularly for class A offences. This places undue weight on culpability factors in determining the level of sentence. As we highlight in our answer to question one, deciding on a person's degree of culpability is not always straightforward. Even someone involved at a significant level of the operation may still be subject to a degree of pressure, coercion, or intimidation, which may not be immediately apparent. A young person may be too scared or intimidated to admit their level of involvement in the operation, which in turn leads them to admit a higher role. For this reason, we recommend that the range of sentence levels for category 4 offences is narrowed.

For many drug 'mules', the starting points and category ranges in the draft guideline would still constitute excessive punishment. We favour a much more significant scaling down of the level of sentences for drug couriers, particularly when the quantities of drugs involved are small. As the Sentencing Council's case studies² produced for the 2011 consultation on drug offences show, the impact of sentences on these offenders is particularly severe because of the degree of distress caused by separation, lack of visits and lack of personal contact with their families and children. It would be proper to take this into account in setting the level of sentences for these

² Sentencing Council (2011) [Drug 'mules': twelve case studies](#), London: Sentencing Council

offenders. The case studies also show that length of sentence is not a significant factor in terms of deterrence for this group. The women interviewed had been given the impression that they would not be caught and they went ahead despite the risks due to their desperate situations or because of coercion.

10. Do you have any comments on proposed changes to the aggravating or mitigating factors?

We agree with the proposed aggravating mitigating factors. We recommend that this section includes a link to the Equal Treatment Benchmark highlighting sections relevant to mitigating factors.

11. Do you have any comments on the proposed guidance for minimum term sentences?

We object in principle to the imposition of statutory minimum terms. Therefore, we welcome the additional guidance to the extent that it seeks to mitigate the impact of the legislation by providing clearer direction to sentencers on circumstances where it would be inappropriate for the minimum term to be imposed.

12. Do you agree with the proposed changes to culpability factors?

We agree with the proposed culpability factors. As with our answer to question 1 we propose that the following changes are made to the draft guideline:

- This section should include a clear link to the Equal Treatment Bench Book, flagging sections on Modern Slavery, Children, Young People and Vulnerable Adults, Physical Disability, Mental Disability, Intercultural communication for those speaking English as a second language and Effective Use of Interpreters.
- The guideline should make clear that when pressure, coercion, intimidation or exploitation are suspected as factors indicating greater or lesser role culpability, these issues should always be addressed in a PSR.
- Alongside the guideline, better training should be provided for judges and magistrates in relation to modern slavery and how to respond appropriately in cases where this has been identified as a factor.

13. Do you agree with the way in which harm is assessed within this guideline?

We have chosen not to answer questions 13 on harm and would defer to experts in this area of offending.

14. Do you have any concerns about sentence levels for this offence, or evidence that the sentence levels in the guideline need to be revised?

No

15. Do you have any comments on the changes to the aggravating and/or mitigating factors?

We are concerned at the inclusion of “established evidence of community impact” as an aggravating factor. We accept that illegal drugs have a significant negative community impact, but this is already factored into the reasons why they are regarded as serious offences which carry substantial penalties. If the guidelines included a reference to community impact as an additional aggravating factor, there is a risk of double counting this element of offence seriousness.

We recommend that this section includes a link to the Equal Treatment Benchmark highlighting sections relevant to mitigating factors.

16. Do you have any comments on the changes proposed to the Possession guideline?

No

17. Do you have any comments on additional culpability, aggravating and/or mitigating factors which are needed for the PSA offences but are not in the MDA offence guidelines?

See answer to questions 1 and 10

18. Do you have any comments on the proposed approach to the assessment of harm?

No

19. Do you agree with the proposed sentence levels for these PSA offences?

For many drug ‘mules’, the starting points and category ranges in the draft guideline would still constitute excessive punishment. We favour a much more significant scaling down of the level of sentences for drug couriers, particularly when the quantities of drugs involved are small. As the Sentencing Council’s case studies produced for the 2011 consultation on drug offences show, the impact of sentences on these offenders is particularly severe because of the degree of distress caused by separation, lack of visits and lack of personal contact with their families and children. It would be proper to take this into account in setting the level of sentences for these offenders. The case studies also show that length of sentence is not a significant factor in terms of deterrence for this group. The women interviewed had been given the impression that they would not be caught and they went ahead despite the risks due to their desperate situations or because of coercion.

20. Do you have any comments on the structure of this guideline? Are there other culpability and harm factors which should be taken into account at step 1?

We believe the proposed approach to the assessment of culpability is incorrect and will have unintended and perverse consequences. It may be appropriate to assume a higher level of culpability where the offender has a higher level of ‘responsibility’ as a

result of being in a paid position of employment as a prison officer, or a civilian in a volunteer position in the prison. In these circumstances, the offence could be seen as representing a significant breach of the trust that was placed in the individual, and deserving of more severe punishment.

However, the same criteria cannot be easily applied when the person in the position of 'responsibility' is a prisoner, for instance, a Samaritan Listener or a member of a prison council. First, unlike a paid position of employment, a prisoner does not gain any material benefit from performing these roles. Furthermore, unlike a volunteer in the community, neither do they necessarily enjoy any significant benefit in terms of greater public standing or social status. These roles do, however, contribute immeasurably to improving the quality of prison life for prisoners and prison staff. Listeners, for instance, perform a vital role in responding to those in mental distress, and thereby reducing instances of self-harm and self-inflicted death. Members of prison councils help to ensure that the views of prisoners are properly represented, thereby reducing tension and contributing to the safe and effective running of prison establishments. It would seem perverse to punish these prisoners more severely than prisoners who did not take on these positions of responsibility. Indeed, it could act as a disincentive to prisoners taking on these vital roles. Furthermore, this approach is contradictory to the mitigating factor of 'good character or exemplary conduct' for the same offence. This could result in a position of responsibility counting for both a higher level of culpability and in personal mitigation.

Therefore, we suggest that the approach to culpability is revised, so that the higher level of culpability only applies to civilians in paid positions of employment or voluntary positions, and not prisoners.

21. Do you have any comments on the proposed sentence levels or additional guidance set out above?

We question why the guideline assumes that a custodial sentence will be the most appropriate form of disposal for individuals already in custody. The test for whether a custodial sentence is appropriate should be the same for all offenders, and made with reference to the relevant legislation, sentencing guidelines and custody threshold. The mitigating factors relevant to the prison environment also need to be considered. The individual may be using substances to cope with the harsh surroundings that they find themselves in, self-medicating due to poor healthcare facilities or unable to access appropriate substance support programs. Prisons have a responsibility to provide a safe, rehabilitative environment for people to address the issues that contribute to them being incarcerated. Prisoners should not be excessively punished for the failures of the establishments in which they are held.

22. Do you have any comments on the proposed aggravating or mitigating factors?

Whilst in custody, lack of access to appropriate addiction programs should be considered in mitigation, particularly when it can be shown that the offender has a longstanding addiction for which they are willing to seek help but have failed to receive adequate treatment. PRT hears from many prisoners in these circumstances who are trapped on long waiting lists for programmes or are held in prisons where there are no appropriate substance misuse programs available. For these prisoners, excessive punishment would not only be unjust but would also increase vulnerability which can contribute to further drug use.

23. Do you have any further comments on any of the draft guidelines?

No

24. Do you consider that any of the factors in the draft guidelines, or the ways in which they are expressed could risk being interpreted in ways which could lead to discrimination against particular groups?

Yes. In order to address disproportionate outcomes, it is necessary but not sufficient simply to ensure that the factors or ways they are expressed in the guideline are non-discriminatory. It is also vital for criminal justice agencies to take active steps to address the causes of any disparities between different groups. We remind the Council in particular of recommendation 4 of the Lammy review, which was accepted by the government:

Recommendation 4: If CJS agencies cannot provide an evidence-based explanation for apparent disparities between ethnic groups then reforms should be introduced to address those disparities. This principle of 'explain or reform' should apply to every CJS institution.

In relation to this draft guideline, we are particularly concerned that criminal justice agencies, including sentencers, are failing to take account of the circumstances of individuals whose offending is a result of coercion, intimidation or exploitation. These individuals are afforded specific protection under provisions of the Modern Slavery Act. Furthermore, the UK has obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially to women and children (United Nations 2000). Despite this, as we highlight in our submission, evidence from recent police and Crown Prosecution Service (CPS) inspectorate reports, as well as research by the Prison Reform Trust and Hibiscus Initiatives, suggest a continuing failure by criminal justice agencies to ensure victims of trafficking are identified, protected and supported in a timely fashion as required under section 45 of the Modern Slavery Act and associated policies. We suspect that this may be one of the factors behind the disproportionate outcomes between different ethnic groups in sentences for drug offences, particular for young BAME people involved in county lines operations or foreign nationals involved in drug trafficking.

Our submission has made the following recommendations to help ensure that the factors relevant to modern slavery are taken into account. We urge the Council not just to pay attention to individual factors or how they are expressed, but also to actively work with criminal justice partners such as the judicial college to ensure that the possible factors underlying disproportionate outcomes are properly addressed, for instance through the delivery of better training and guidance to sentencers.

Recommendations

- Culpability and mitigating factors relevant to modern slavery should include a clear link to the Equal Treatment Bench Book, flagging sections on Modern Slavery, Children, Young People and Vulnerable Adults, Physical Disability, Mental Disability, Intercultural communication for those speaking English as a second language and Effective Use of Interpreters.
- The guideline should make clear that when pressure, coercion, intimidation or exploitation are suspected as factors indicating greater or lesser role culpability, these issues should always be addressed in a PSR.

- Alongside the guideline, better training should be provided for judges and magistrates in relation to modern slavery and how to respond appropriately in cases where this has been identified as a factor.

25. Are there any other equality and diversity issues the guidelines should consider?

It is well understood that the drivers of women’s offending—including for drug offences—are often different from those for men, and this should be taken into account in sentencing.³

Ensuring sentencing is gender informed means taking account of the prevalence of domestic abuse, coercion and control as a driver of women’s offending⁴, as well as the much greater likelihood that women will be primary carers of children. The impact on children of their mother’s imprisonment is likely to be devastating⁵, and their best interests should be specifically considered as part of the sentencing process⁶.

Research makes clear that quantities of drugs imported or exported are not a good indicator of culpability, as couriers and mules are unlikely to know how much they are carrying, nor should it be assumed that quantity is a good indicator of harm.⁷

In addition to race (see our response to question 24) and gender, other equality and diversity issues it is particularly important for sentencers to have an understanding of in relation to this guideline are:

- Age, particularly the potential for young people to be exploited through lack of maturity
- Mental health and learning disability, and the potential for vulnerable defendants to have their naïveté to be exploited or to be coerced or intimidated into offending.

³ Prison Reform Trust (2019) [Why focus on reducing women’s imprisonment? England and Wales Fact Sheet – August 2019](#), London: PRT

⁴ Prison Reform Trust (2018) [There’s a reason we’re in trouble: Domestic abuse as a driver of women’s offending](#), London: PRT; Swaine Williams, K. (2020) [A Place To Go Like This: Breaking the cycle of harm for mothers involved in offending who are survivors of abuse, and their children](#), London: Advance; and Prison Reform Trust (2018) [Still No Way Out: Foreign National Women and Trafficked Women in the Criminal Justice System](#), London: PRT

⁵ Prison Reform Trust (2018) [What About Me? The impact on children when mothers are involved in the criminal justice system](#), London: PRT and Minson, S. (2017) ‘Who cares? Analysing the place of children in maternal sentencing decisions’, Centre for Criminology, University of Oxford

⁶ Minson, S. (2017) [Safeguarding children when sentencing parents: information for primary carers facing sentencing in a criminal court](#), Oxford: University of Oxford and Prison Reform Trust (2018) ‘New resources launched to highlight impact of maternal imprisonment on 17,000 children a year’, available at <http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/507>

⁷ Fleetwood, J. et al (2011) [Written evidence to the House of Commons Justice Committee](#), in House of Commons Justice Committee (2011) Draft sentencing guidelines: drugs and burglary, London: HMSO

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?

Our answer to question 24 highlights one possible explanation for the disparities observed in outcomes between different ethnic groups. We also refer the Council to the findings and recommendations of the Lammy Review.

We are unclear of reasons behind the disparities in sentencing between men and women, particularly if the research has properly accounted for culpability and aggravating and mitigating factors. We believe this issue merits further investigation.

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?

See our answer to question 24.

28. Do you have any comments on the steps the Council is intending to take in light of this research?

We welcome the steps the Council intends to take in light of the research. We particularly encourage it to focus on developing the fourth step of working with other agencies in the criminal justice system to understand disparities in sentencing outcomes. We believe it is only through different agencies working together that disparities in outcomes can be addressed. For instance, through ensuring the court is provided with information relevant to equality and diversity issues in PSRs, and ensuring that sentencers receive proper training and guidance.