Sentencing Council

Modern Slavery Offences Guidelines

Response to consultation

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August 2021

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Foreword

Since the provisions of the Modern Slavery Act 2015 came into force, increasing numbers of cases have come before the courts. These are often complex cases, involving a wide variety of activities, and different types of offenders, but at the heart of them all is the exploitation of victims, many of whom will be vulnerable. The Sentencing Council believes it is vital that the courts have clear and consistent guidelines when sentencing these cases.

Between October 2020 and January 2021 the Council consulted on a draft of the first ever guideline for offences under the Modern Slavery Act 2015. In particular, the consultation sought views on a guideline for two of the main offences under the Act: the offences of slavery, servitude and forced or compulsory labour, and of human trafficking. Importantly, the 2015 Act raised the maximum penalty for slavery and trafficking offences to life imprisonment and the draft guidelines put out for consultation reflect that increase. The sentencing levels we have proposed are high, reflecting the inherently serious harm that modern slavery causes, directly to victims and to society as a whole.

The definitive guidelines we are now publishing will help to promote consistency of approach in this area, and to consolidate information which will assist courts to pass appropriate sentences when dealing with offenders convicted of modern slavery offences. This consultation response document explains the changes that the Council has made to the draft guidelines, based on the various points raised by consultation respondents. On behalf of the Sentencing Council I would like to thank all those who responded to this consultation and also to the judges who took part in research during the development of the guidelines. As always, the responses we receive are considered very carefully and are absolutely vital in ensuring that the definitive guidelines provide the courts with the information they need to deal with these offences appropriately.

Lord Justice Holroyde

Chairman, Sentencing Council

Introduction

From 15 October 2020 to 15 January 2021 the Sentencing Council consulted on proposed new sentencing guidelines for modern slavery offences, the first of their kind.

To date there have been no definitive guidelines for offences committed under the Modern Slavery Act 2015. The Act covers offences of holding someone in slavery, servitude, and forced or compulsory labour (section 1) and of trafficking for the purposes of exploitation (section 2). It also makes it an offence to commit an offence with the intention of committing a human trafficking offence. In addition to these offences, it provides for various orders, including reparation orders, and risk and prevention orders, breach of which is a criminal offence.

The main guideline consulted on covers two of the principal offences under the Modern Slavery Act 2015: offences contrary to sections 1 and 2. These offences both have a maximum penalty of life imprisonment. In practice, the offences of trafficking and slavery or forced labour are frequently sentenced together, and judges often use the same factors for both offences, so the Council proposed one offence-specific guideline covering both the section 1 and section 2 offences, with the same culpability and harm factors, and the same aggravating and mitigating factors.

The Council also consulted on providing brief guidance on two further offences. Offences under section 4 of the Act (committing an offence with the intention of committing a human trafficking offence) have a maximum of ten years' imprisonment, or life imprisonment where the offence committed is kidnapping or false imprisonment. The Council consulted on providing the courts with a brief guideline setting out that the courts should impose sentences commensurate with the underlying offending but apply an uplift (an approach similar to an equivalent offence under section 62 of the Sexual Offences Act 2003).

Section 30 of the 2015 Act makes it an offence to breach a slavery and trafficking risk order (STRO) or slavery and trafficking prevention order (STPO). This breach offence has a maximum penalty of five years' imprisonment. The range of harms associated with breach of a STRO or STPO is very broad, covering economic harm as well as physical and psychological harm. The Council therefore consulted on an approach which would direct sentencers to analogous breach offence guidelines.

In the consultation process, the Council sought views on:

- the general approach to modern slavery guidelines, as outlined above;
- the principal factors that make any of the offences included within the draft guidelines more or less serious;
- the additional factors that should influence the sentence;
- the types and lengths of sentence that should be passed; and
- anything else consultees thought should be considered.

Summary of analysis and research

During the consultation period, 16 judges took part in qualitative research interviews. The participants were split into two groups to test different aspects of the guideline. Participants were asked to sentence two cases (one with one defendant, and one with two defendants) in each exercise, first as they would if the case came before them today, then with using the guideline. A slim majority of the judges interviewed had had previous experience of sentencing cases that would be considered modern slavery offences, although these had not been very frequent. Others had had experience of modern slavery-related cases (for example in situations where the defendant sought to rely on a modern slavery defence).

On the whole, the guideline was positively received, and participants commented specifically about the value in having offence-specific guidelines and a common structure across them. There were, however, specific suggestions for additions and amendments.

Some participants questioned the use of the terms ‘some’ and ‘serious’ psychological harm and ‘substantial’ and ‘significant’ financial gain, and said that it could be difficult to differentiate between these terms when assessing culpability and harm.

Some thought there should be more about sexual exploitation in the guideline. They felt this had been covered adequately in the previous guideline for section 59A of the Sexual Offences Act 2003 on trafficking people for sexual exploitation, and was missing in the new draft modern slavery guideline. Another aspect one judge thought was missing was inducement. This is where victims are induced into modern slavery rather than forced. Another thought that factors around deception and trickery should be included in the guideline to cover cases where people have been deceived about the situation they are getting into.

There were differing views about the extra guidance on assessing harm ahead of the harm table which was consulted on. This was intended to make sure that the harm caused is captured sufficiently in cases where the victim is unwilling or unable to give evidence, the prosecution is “evidence-led” without requiring the victim to provide evidence, or the loss of personal autonomy may not be obvious to the court. Some judges thought it helped to emphasise the point that levels of immediate harm may not be apparent. Others thought they had enough experience to assess the levels of harm themselves and some judges again thought sexual exploitation was a missing element from the harm model. A number of judges said they would want further evidence on harm, including from a Victim Personal Statement (VPS), which may suggest they could not assume the level of harm without further evidence, although it could also be an inevitable consequence of the circumstances of a theoretical sentencing exercise.

In terms of sentencing levels, in 23 of the 48 sentencing exercises relating to individual offenders the participants arrived at a more severe sentence using the draft guideline than they had without using the guideline. In 14 cases they imposed the same sentence and in nine cases they imposed a lower sentence. In two cases the participants had been unable to arrive at a final sentence on the information before them, without using the draft guideline. The tendency to impose a higher sentence when using the guideline was particularly pronounced in cases where the offender was assessed as low culpability.

Summary of responses

There were 44 responses to the consultation. A breakdown of responses is as follows:

Breakdown of respondents	
Charity / not for profit organisations	7
Government	3
Members of Parliament or Parliamentary bodies	3
Judiciary/Judicial bodies	1
Legal professional	4
Magistrate	18
Prosecutor	1
Public and private sector bodies	4
Academic	2
Other	1

Overview

Details of the responses to proposals for the draft guideline and suggestions made are detailed below.

General approach

One guideline covering sections 1 and 2

In its consultation, the Sentencing Council proposed having one guideline covering both the section 1 (slavery, servitude and forced or compulsory labour) and section 2 (human trafficking) offences, with the same culpability and harm factors, and the same aggravating and mitigating factors. All respondents to the consultation were content with this approach, which will therefore be adopted for the definitive guideline.

Guidance for section 4

All respondents agreed with the general approach of providing brief guidance on the approach to take in sentencing section 4 cases (committing an offence with the intention of committing a human trafficking offence). This entails sentencing being commensurate with that for the preliminary offence committed but with an enhancement (suggested as being up to 2 years' custody depending on the facts of the case) to reflect the intention to commit a human trafficking offence.

Virtually all respondents were content with the proposed wording. One response, from the Legal Committee of HM Council of District Judges (Magistrates' Courts), while agreeing the approach was sensible, made the following suggestion:

> We note the suggested suitable enhancement of 2 years, though "the enhancement will vary depending on the nature and seriousness of the intended trafficking offence and the seriousness of the preliminary offence". We wonder, however, whether the 2-year enhancement will become rather set in stone for all such offences. Should this suggested enhancement be explicitly tagged to a 'mid-level' human trafficking offence, such as a medium culpability/category 2 or 3 offence?

The Council believed that the wording proposed deliberately provides enough flexibility to allow for sentencers to cater for a range of different situations. The enhancement is simply "suggested" and two years' custody intended as an upper end of that suggestion. The courts will, in such situations, be focussed carefully on the whole course of offending and totality, so the proposed wording directs sentencers to the totality guideline. The Council therefore believed that the wording consulted on provides sufficiently broad guidance for the courts when sentencing this offence without being overly prescriptive. However, the Council did believe there was merit in a proposal from the Independent Anti-Slavery Commissioner, Dame Sara Thornton:

> Although no specific aggravating or mitigating factors are mentioned in this section as it is presumed those for the principle offence would apply, it may be of value to draw specific attention to the mitigation already discussed. This should be afforded to those who are themselves victims of slavery and trafficking offences, as the non-punishment principle and the analogous domestic law, unique to this offence type, may not be familiar to sentencing judges.

Given the need to ensure that victims of modern slavery, or other forms of coercion and intimidation are not punished overly severely, the Council agreed that a brief reference to

this mitigation could usefully be added to the text here. The definitive guidance will therefore read (with the addition in bold):

"The starting point and range should be commensurate with that for the preliminary offence actually committed but with an enhancement to reflect the intention to commit a human trafficking offence. The enhancement will vary depending on the nature and seriousness of the intended trafficking offence, the seriousness of the preliminary offence, ***and the extent to which the offender was themselves the victim of modern slavery, pressure, coercion or intimidation****, but up to 2 years' custody is suggested as a suitable enhancement. Sentencers should also take into account the totality of offending (see the Totality guideline in particular where the preliminary offence or other modern slavery offences are to be sentenced alongside the section 4 offence)."*

Analogous offences for section 30

Almost all of those who responded to the consultation agreed with the approach of providing brief guidance on section 30 offences by pointing sentencers to the guidelines for other comparable breach offences (namely, breach of a sexual harm prevention order, breach of a criminal behaviour order, and breach of a disqualification from acting as a director).

One magistrate respondent did, however, believe that a separate bespoke guideline for breach of a Slavery and Harm Prevention Order (SHPO) should be made, rather than relying on comparable breach offences given the potential seriousness of such a breach. The Prison Reform Trust also said:

> The draft guideline asks sentencers to select from a wide number of breach offence guidelines, and allows them a considerable degree of latitude in how they are applied. It might be helpful to provide additional guidance and examples to help sentencers determine which guidelines may be more relevant and appropriate for different types of section 30 offences.

The Council considered these points, but given the very low volumes for the breach offence, and the general weight in favour of the proposed approach, believed that the initial case for simply directing sentencers to analogous breach guidelines still stands. The Council would be willing to review this if presented with evidence of a problem.

Two responses (from HM Council of District Judges (Magistrates' Courts) and the Justice Legal Advisers' and Court Officers Service) questioned whether the guideline for breach of a disqualification from acting as a director was an apt comparator:

> We agree that the definitive guidelines for breaching sexual harm prevention orders and criminal behaviour orders are helpful guidelines to utilise in cases of section 30 breaches, not least because those offences carry the same sentencing maxima and, significantly, refer to harm/risk of harm. The guideline relating to breach of a disqualification from acting as a director appears to be of less relevance and assistance to the sentencing of section 30 offences. *(Justice Legal Advisers' and Court Officers Service)*

In favour of keeping this listed as an analogous breach offence, there may well be instances of modern slavery offending which represent something more akin to criminally bad business practice. However, the argument is made that not only is the disqualification breach offence only punishable by two years' imprisonment (whereas breach of an STPO

is five years), but most of the step one factors from that guideline do seem irrelevant in a modern slavery context – for example:

- Breach involves deceit/dishonesty in relation to actual role within company;
- Breach involves deliberate concealment of disqualified status;
- Breach results in significant risk of or actual serious financial loss

The Council agreed with the comments made that this is not necessarily helpful as an analogous breach offence, and has therefore agreed to remove it from the definitive guidance on sentencing section 30 offences.

On a point of detail, the Sentencing Code has come into force since the draft guideline was published for consultation, so the relevant statutory references will be updated in the definitive guideline, in line with other definitive guidelines.

Guideline for section 1 and 2 offences

Culpability factors

The proposed culpability factors were as follows;

Culpability demonstrated by one or more of the following In assessing culpability, the court should weigh up all the factors of the case, including the offender's role, to determine the appropriate level. Where there are characteristics present which fall under different categories, or where the level of the offender's role is affected by the very small scale of the operation, the court should balance these characteristics to reach a fair assessment of the offender's culpability.
A - High culpability • Leading role in the offending • Expectation of substantial financial advantage • High degree of planning/premeditation • Use or threat of a substantial degree of physical violence • Use or threat of a substantial degree of sexual violence or abuse

B – Medium culpability
 	
• Significant role in the offending
• Involves others in the offending whether by coercion, intimidation, exploitation or reward
• Expectation of significant financial advantage
• Some planning/premeditation
• Use or threat of some physical violence
• Use or threat of some sexual violence or abuse
• Other threats towards victim(s) or their families
• Other cases falling between A and C because:
  ○ factors in both high and lower categories are present which balance each other out and/or
  ○ the offender's culpability falls between the factors as described in A and C

C – Lower culpability • Engaged by pressure, coercion or intimidation • Performs limited function under direction • Limited understanding/knowledge of the offending • Expectation of limited financial advantage • Little or no planning/premeditation

Many respondents were content with the proposed culpability factors and thought they represented a sensible approach, but there were several specific suggestions for amendments. For both culpability and harm factors some respondents commented on the wording distinguishing levels of culpability and harm. For example, in our proposed culpability table they queried the terms "substantial" (Category A) and "significant" (Category B) financial advantage. They suggested that these terms may be subjective and difficult to interpret.

> We believe that the factors distinguishing the three levels of culpability may need further clarification. What is the difference, for example, between 'Expectation of substantial financial advantage' and 'Expectation of significant financial advantage'? Is this an objective or subjective term, or one encompassing both objective and subjective elements? Depending upon the level of harm, this can make the difference between a starting point of 12 years or 16 years. *(Sentencing Academy)*

As set out above, these concerns were reflected by some of the participants in road testing. Currently, in sexual trafficking and prostitution guidelines the highest culpability levels refer to expectation of "significant" financial or other gain, but it is not mentioned in other categories. Other sentencing guidelines follow a similar pattern to that proposed in the draft guideline. The bribery guidelines mention "substantial" financial gain at Culpability A, while the drugs offences guidelines, the revised versions of which came into effect in April 2021, follow the formula "substantial" (Category A), "significant" (Category B) and "Limited, if any" (Category C). The approach taken in the draft modern slavery guideline is therefore consistent with other guidelines and the Council believed that, whilst there is scope for interpretation, the terms are understood by sentencers and does not therefore propose to change them.

Various respondents wanted to see additional factors covered under culpability. In particular, some consultees thought that sexual exploitation should be recognised as being particularly culpable and others felt that offences where the victim was under 18 should be placed in a higher culpability category. The Council considered both points carefully and agreed that these aspects can be better reflected in the guideline. However, it considered that both issues can be best addressed at other places (harm for sexual exploitation and as an aggravating factor for child victims). These are discussed in more detail below.

Several consultees questioned whether the culpability factors should better reflect the psychological abuse which takes place in modern slavery offending. It could be argued that the guideline already does this by treating the threat of violence as seriously as its use, including "other threats" under category B culpability, and including psychological harm in the harm table. However, Hope for Justice set out the argument as follows:

> Whilst use or threat of a substantial degree of physical violence or sexual violence or abuse can be features of offences, psychological abuse needs to be taken into account as a key part of high culpability. Emotional/psychological abuse as a means of control is present in a significant number if not all cases Hope for Justice have dealt with. This includes as a method of control including the restriction of movement.
>
> The government's own typology does reflect the multiple other methods utilised to control including threats and occasional violence (including threats or indirect threats to the survivor and/or their families); use of substances such as alcohol to control; financial

abuse including debt bondage; emotional abuse such as grooming, ongoing deception and use of cultural controls such as religious oaths and social isolation.

We would therefore recommend that psychological abuse including control methods are taken into account in “high” and “medium” categories of culpability and take into account threat and/or actual use of these different forms of abuse and control i.e. use or threat of a substantial degree of psychological abuse and/or control for category A and some use of psychological abuse and/or control for category B.

In her response, Baroness Butler-Sloss said this:

Much of the way in which the perpetrators act is by coercive control rather than physical violence. Coercive control might usefully be added to A and to B. It is now in the Domestic Abuse Bill as an element of domestic abuse. It is equally to be found in almost as types of modern slavery. So with section 1 and section 2 cases in A high culpability should include coercive control.

The Justices’ Legal Advisors and Court Officers’ Service said:

We would suggest that the assessment of culpability should also take into account behaviour which does, or is designed to, control the victim in a non-physical but psychological way. As we know, many of the victims of this type of offending act out of fear which may not necessarily be in response to physical or sexual violence/abuse, but because of other behaviour or threats (e.g. threats relating to finances, the victim’s family, deprivation of food etc). This psychological fear can be as harmful as physical violence/threats of violence and should therefore be treated as a factor going to an offender’s culpability. We would suggest that ‘behaviour designed to cause significant (high culpability) or some (medium culpability) psychological fear’ should be included as a factor in the assessment of an offender’s culpability.

Other responses made related points, including some (like the Independent Anti-Slavery Commissioner) who wanted to see a broader range of coercive behaviours reflected under culpability. The strength of feeling on this is fully appreciated, and there are cogent arguments for reflecting psychological abuse explicitly at the culpability stage. However, the Council believed that a degree of psychological abuse is inherent in the offending, a point effectively acknowledged in various of the responses set out above. Where this is the case with any sort of offending, the Council needs to be careful to make sure that the differentiations between levels of seriousness are meaningful, and that certain types of offending will not automatically be placed in certain categories, creating an artificial “floor” for sentences. In this case, the Council did not want to see offenders categorised too highly because they have applied a certain level of pressure on their victims. Elements of psychological abuse or coercion can already be considered in various ways in the guideline, including the threats already mentioned in the culpability table, the psychological harm in the harm table, and various aggravating factors such as gratuitous degradation of the victim and targeting of particularly vulnerable victims. Following very careful consideration, the Council has therefore decided not to include a specific new factor related to psychological abuse.

Two respondents (both magistrates) asked whether threats made to families should place an offender in Culpability A. The prime intention in the draft was to capture the worst cases where victims are intimidated by violence into remaining in slavery or servitude to the offender. However, the Council agreed that it is quite possible that a victim could be intimidated into submission if they knew their family was being threatened and that this

could involve highly culpable behaviour. These factors at Culpability A and Culpability B will be changed specifically to include threats made against victims' families as follows (additions in **bold**):

Culpability A

- Use or threat of a substantial degree of physical violence **towards victim(s) or their families**
- Use or threat of a substantial degree of sexual violence or abuse **towards victim(s) or their families**

Culpability B

- Use or threat of some physical violence **towards victim(s) or their families**
- Use or threat of some sexual violence or abuse **towards victim(s) or their families**

Many respondents welcomed the draft guideline's treatment of offenders who had been engaged by pressure, coercion or intimidation as being low culpability, although there were some suggestions for refining this. One suggestion came from the Sentencing Academy (supported by the Prison Reform Trust):

> The consultation document recognises the significance of the offender's previous victimisation. The culpability factors include this: 'engaged by pressure, coercion or intimidation' – a slight variation on the 'involved through coercion, intimidation or exploitation' found in other guidelines such as Robbery. Then, at Step 2 we find the following factor: 'offender has been a victim of slavery/trafficking, whether or not in circumstances related to this offence (where not taken into account at Step 1)'. This factor – previously being subject to slavery or trafficking – is central to culpability, and this should be recognised at Step 1. We recommend 'offender has been a victim of slavery/ trafficking related to this offence' as a lower culpability bullet. In addition, the Council's proposed factor could remain at Step 2 as mitigation for unrelated previous victimisation. As a general approach, however, we caution against overlapping factors, or what we term 'factor splitting' – incorporating a factor at Step 1, then adding a variant of the factor at Step 2 along with the caveat 'where not taken into account at Step 1.

The Council agreed that this is a sensible change, provided the current coercive factors falling short of slavery and trafficking are also retained in low culpability. So the culpability factor will now read:

- "Offender engaged by pressure, coercion or intimidation, or has been a victim of slavery or trafficking related to this offence."

The related mitigating factor at step two will be:

- Offender has been a victim of slavery/trafficking in circumstances unrelated to this offence.

Several respondents picked up on points related to financial advantage:

> Modern slavery and trafficking may be intended to bring a gain to the offender, but they are primarily offences committed against the person rather than against property. It may be the case that other offences against the person are also committed for gain, but this

> does not feature in the sentencing guidelines … I am, therefore, concerned that the scale of the (intended) financial advantage should be such a prevalent part of these draft sentencing guidelines; the personal impact of modern slavery offending could be very substantial without the offender standing to gain much more than a modest gain. In contrast, relatively low-level exploitation could be more profitable. It would be my view that the depth of the deprivation, control and suffering exacted upon the victim(s) is much more relevant to culpability in slavery offences than the offender's intended gain. *(Independent Anti-Slavery Commissioner)*

The Council understands that there may well be motivations for modern slavery beyond financial advantage. However, it is important to note that the factor of financial gain is just one of several that would determine culpability in an individual case: others include the role of the offender in the offending, their behaviour towards the victim and the amount of planning involved. An assessment of culpability (or harm) will always involve a combination of different factors and it would be perfectly possible for an offender to be placed in the higher culpability categories, even if they expect little or no financial advantage, if other elements are present.

On a related note, the charity Hope for Justice pointed out the possibility of offenders receiving gains beyond purely financial ones, citing the United Nations Office on Drugs and Crime Anti-Human Trafficking Manual for Criminal Justice Practitioners 2009:

> [Financial or material gain is] likely to be present in virtually all trafficking cases to some degree and should be a significant factor for sentencing purposes. Financial gain should not simply be seen in terms of money; payment in kind, such as free accommodation, food, access to vehicles, and gifts all represents a financial or material gain for the offender'
>
> We would therefore recommend that culpability factors reflect an expectation of substantial financial and/or material gain for category A and significant financial and/or material gain for category B.

There are certainly examples that the Council is aware of, particularly in domestic servitude cases, where the offender receives non-pecuniary benefits from their victim. This point was echoed by the Criminal Bar Association (CBA) in its response. In addition, several respondents pointed out that some offenders expect or receive no financial gain whatsoever.

The Council has therefore decided to amend the wording of the relevant culpability factors as follows (additions in **bold**):

- Expectation of substantial financial **or other material** advantage (culpability A)
- Expectation of significant financial **or other material** advantage (culpability B)
- Expectation of limited **or no** financial **or other material** advantage (culpability C)

Harm

The proposed guideline included four harm categories, as well as an important piece of introductory text about the assessment of harm:

Harm

Use the factors given in the table below to identify the Harm category. If the offence involved multiple victims, sentencers may consider moving up a harm category or moving up substantially within a category range.

The assessment of harm may be assisted by available expert evidence, but may be made on the basis of factual evidence from the victim, including evidence contained in a Victim Personal Statement (VPS). Whether a VPS provides evidence which is sufficient for a finding of serious harm depends on the circumstances of the particular case and the contents of the VPS. **However, the absence of a VPS (or other impact statement) should not be taken to indicate the absence of harm**.

Loss of personal autonomy is an inherent feature of this offending and is reflected in sentencing levels. The nature of the relationship between offender and victim in modern slavery cases may mean that the victim does not recognise themselves as such, may minimise the seriousness of their treatment, may see the perpetrator as a friend or supporter, or may choose not to give evidence through shame, regret or fear.

Sentencers should therefore be careful not to assume that absence of evidence of harm from those trafficked or kept in slavery, servitude or in forced or compulsory labour indicates a lack of harm or seriousness. A close examination of all the particular circumstances will be necessary.

Category 1	A category 2 offence may be elevated to category 1 by – • The extreme nature of one or more factors • The extreme impact caused by a combination of factors
Category 2	• Exposure of victim(s) to high risk of death • Serious physical harm which has a substantial and/or long-term effect • Serious psychological harm which has a substantial and/or long-term effect • Substantial and long-term adverse impact on the victim's daily life after the offending has ceased

Category 3	• Some physical harm
	• Some psychological harm
	• Significant financial loss to the victim(s)
	• Exposure of victim(s) to additional risk of serious physical or psychological harm
	• Other cases falling between categories 2 and 4 because:
	  ○ Factors in both categories 2 and 4 are present which balance each other out and/or
	  ○ The level of harm falls between the factors as described in categories 2 and 4

Category 4	• Limited physical harm • Limited psychological harm • Limited financial loss to the victim(s)

The majority of respondents were broadly content with the harm table. Many welcomed the introductory text and the need to highlight situations where victims may be unable or unwilling to give evidence about the harm they have experienced. Some suggested amendments and additions:

> Add more which reflects that modern slavery offences by their nature relate to a 'continuous behaviour' and that a victim can suffer multiple injuries or sexual abuses during the period of their exploitation. Provides some guidance on how to assess the level of harm without a victim statement. We note from conversations with the CPS that there is precedent for medical records to be used as evidence. *(Home Office)*

> [We] would encourage the Council to further consider what guidance it could provide on how to assess the level of harm in the absence of a victim personal statement. *(Ministry of Justice)*

The London Criminal Courts Solicitors Association (LCCSA) were also concerned that the wording invites the Court to speculate on the level of harm rather than base it on evidence. However, the Council considered that the text is carefully worded to say that the court should not make assumptions about the level of harm and explicitly concludes by saying "A close examination of all the particular circumstances will be necessary." There is also a risk in making an already substantial preamble even longer by attempting to include full detail on the very broad issue of how the courts should assess harm from multiple sources.

The Council believed that the courts are used to assessing harm with differing degrees of evidence, and that the introductory text should remain focussed on the central point that victims, even if not obviously traumatised, may not recognise their own victimhood and may not be able themselves to offer positive evidence of it. The Council did agree, however, with a proposal from the Independent Anti-Slavery Commissioner that the court should be given a prompt to treat evidence about the victim's apparent consent with caution. The additional text (in bold) has therefore been added to the relevant paragraph in the preamble before the Harm table:

"Loss of personal autonomy is an inherent feature of this offending and is reflected in sentencing levels. The nature of the relationship between offender and victim in modern slavery cases may mean that the victim does not recognise themselves as such, may minimise the seriousness of their treatment, may see the perpetrator as a friend or supporter, or may choose not to give evidence through shame, regret or fear. ***A victim's apparent consent to their treatment should be treated with caution.****"*

As discussed above in the section on culpability, some respondents queried the wording of the distinctions between the categories. One response from a magistrate proposed different levels of harm categorised as 1. Serious; 2. Substantial; 3. Some; 4. Limited. Following this format would likely have the effect of bringing too many offenders into the top category. Existing sentencing guidelines do use a range of different descriptors in their harm tables. What is proposed for the modern slavery guideline follows the format of guidelines such as *causing or allowing a child to suffer serious physical harm* and *failing to protect a girl from risk of genital mutilation*. As with culpability, the Council believed that the

courts will be able to interpret these terms within the context of the cases before them, and they allow for a degree of flexibility based on the facts of individual cases.

Whilst some respondents welcomed the proposal for four categories of harm, others suggested that the harm table should be constructed of three categories. This question needs to be considered alongside sentencing levels. Simply amalgamating the top two harm categories would lead to a very broad range. With the levels being proposed in the consultation document, it is likely that a large number of offenders could be categorised as A1 or B1 and face sentences of over 10 years' imprisonment. In line with the intention to reflect an increase in penalties for the most serious cases, the Council believed that it should retain the four harm level model. However, it agreed with the West London Magistrates Bench which asked in its response how "Exposure of victim(s) to high risk of death" could be anything but Category 1. This factor will therefore be included as a Category 1 harm factor in the definitive guideline.

The Independent Anti-Slavery Commissioner pointed to the wider harms caused by modern slavery offending, including economic harms, public safety and wider criminality such as immigration offending and violence. The point was echoed by both the Home Office and the Ministry of Justice (MoJ), who helpfully drew the Council's attention to the 2018 Home Office report 'The Economic and Social Costs of Modern Slavery' in their responses.[1] The report highlights the high costs of modern slavery to victims and society. In addition to the costs to healthcare and criminal justice, and otherwise lost output, there are also the physical and emotional costs for modern slavery victims. The Government asked the Council to ensure these are taken into account in how the guidelines are used to assess harm.

The Council considered the 2018 report as part of the consultation and thanks the Home Office and MoJ for drawing it to its attention. Ultimately, sentencing guidelines are intended to be applied to individual cases before the courts. To some extent, most criminality has a wider impact than the direct harm caused to complainants or identified victims. Whilst the Council did not believe there was a specific way in which the guideline should draw sentencers' attention to the broad economic and social costs involved in this particular offending, it did consider that they are reflected in the high starting points and sentencing levels set out in the guideline. For example, the categories 1A to 3B in draft guideline for consultation compare roughly to the sentence levels for rape, whilst the proposed categories 2A to 3C roughly correspond to the sentencing levels 1A to 3C in the new GBH with intent guideline published in May 2021 (albeit category 1A in that guideline has a higher upper end to allow for the most serious instances of that offending). With that in mind, the Council believed that the 2018 report's findings confirm that these levels are justified.

As mentioned above, some respondents and road testers considered sexual exploitation to be a particularly culpable offence compared to other forms of modern slavery, arguably on a par with rape. Related to this, the Independent Anti-Slavery Commissioner and the Magistrates Association (MA) thought that there should be a specific harm factor of sexual harm.

This is not an easy point to resolve. The Council wanted to be careful not to elevate certain forms of exploitation inherently as more serious than others, given that Parliament has not legislated in this way. As the Independent Anti-Slavery Commissioner pointed out, there is a risk that the high sentences imposed for cases of sexual exploitation reflect an implicit

[1] https://www.gov.uk/government/publications/the-economic-and-social-costs-of-modern-slavery.

downgrading of other forms of exploitation. On the other hand, it was recognised that sexual exploitation is a particularly heinous form of modern slavery offending and it is likely that the courts will seek to reflect that harm in sentencing.

The Council concluded, therefore, that the most appropriate place to reflect the seriousness of this type of offending would be in the harm table. Drawing on the precedent of the existing section 59A guideline (which has the harm factors "Victim(s) forced or coerced to participate in unsafe/degrading sexual activity", "Victim(s) forced/coerced into prostitution", and "Victim(s) tricked/deceived as to purpose of visit") the following will be added as a harm category 2 factor:

- "Victim(s) deceived or coerced into sexual activity"

As with culpability, a number of responses suggested reflecting the particular harm done to child victims of modern slavery. This is discussed below under aggravating factors.

Various respondents suggested that the duration of offending should be counted as a step one factor, where currently it is listed as an aggravating factor in the draft guideline.

> The main point I should like to make is that many of the victims of modern slavery or human trafficking are enslaved for many years. Up to now the sentences imposed on the perpetrators have often not seemed to reflect the long period endured with the resultant harm to the victim. The increase of the sentence in the most serious cases needs to be reflected adequately in the sentences actually imposed. There might therefore be more emphasis upon both the length of the period of enslavement and the resultant harm. I am aware it is stated but it needs underlining. *(Baroness Butler-Sloss)*

> The very high physical and emotional harm associated with modern slavery offences is mainly because the average victim experiences a multitude of abuses during the period of their exploitation. As a victim's experience of harm is likely to be directly related to the duration of this harm, we also suggest that it might be appropriate for the duration of exploitation to be included within the harm factors rather than as a separate aggravating factor. *(Home Office)*

> We suggest adding duration to the factors relevant to harm in category 3 rather than or in addition to an aggravating factor, which may undermine the role that the duration of abuse can play in determining the harm inflicted upon victims. (*University of Manchester/University of Liverpool)*

The point was also raised by participants in road testing. The Council did not believe it was a simple matter to add duration of offending to a particular category of harm. For example, relatively low-level offending (within the context of this very serious offending) could take place over a period of years, and cause less harm overall than a particularly serious course of offending over a few weeks. This is similar to the difficulties in assessing harm caused to different numbers of people and makes it suitable as an aggravating factor. However, the Council accepted the points made about how harm can be exacerbated when it takes place over a long period of time. It believed the best way of taking this into account at step one was to add this to the factors which might raise an offender into a higher harm category (addition in **bold**):

*"If the offence involved multiple victims, **or took place over a significant period of time**, sentencers may consider moving up a harm category or moving up substantially within a category range"*

In its response, the Justice Select Committee suggested that the use of the word "loss" does not adequately capture the nuances of the financial harm caused to a victim of modern slavery and that a phrase other than "loss" may work better. This reflects the fact that, typically, victims of modern slavery may not have had money to lose, and the exploitation of their labour for very little gain on their part is not captured adequately by the word "loss". Similarly, a participant in road testing asked whether the guideline sufficiently covered the situation of "bonded labour" where living conditions are acceptable but all earnings are taken by the offender. Arguably this aspect of harm was not fully covered by the term "loss", so the Council agreed to change the category 3 harm factor "significant financial loss" to "significant financial loss/disadvantage", and the category 4 harm factor "limited financial loss" to "limited financial loss/disadvantage".

Sentence levels

Overall, respondents to the consultation thought that the sentencing levels were right. Reflecting this, although participants in the road testing exercise sometimes gave quite different sentences before using the guideline compared to after, they generally viewed the sentences arrived at using the guideline as about right, with some exceptions related to low culpability offenders (see below).

A few respondents questioned whether a community order could ever be appropriate for a modern slavery offence, even at the lower end of seriousness. Two respondents (Christian Action Research and Education (CARE) and Hope for Justice) proposed raising the Category 1A sentencing levels to place them on a par with rape: i.e. a 15 year starting point and a range of 13 to 19 years. The Independent Anti-Slavery Commissioner agreed, expressing concerns that sentencing levels were still too low:

> It is the Commissioner's view that these sentences are inadequate to achieve the goal of deterring modern slavery offences, and ending the impression that it is a 'low risk high reward' crime type which can be practiced with some impunity in the UK. Offenders who violate the liberty and dignity of victims by treating them as property, working them for their own financial benefit on a large scale and moving them around the country by force, threat and deception should receive sentences which are commensurate with this egregious criminality. It cannot be appropriate, or the expectation of the public, that being concerned in the trafficking of drugs poses a greater risk of a significant custodial sentence than being concerned in the trafficking and exploitation of people. It is strongly hoped that the result of the publication of this guidance will result in longer sentences being applied to modern slavery offenders.

As mentioned above, the Council considered the sentencing levels carefully and continued to believe that overall they represent high starting points and ranges, comparable with those for some of the most serious violent and sexual offending. This reflects the seriousness of modern slavery offending, the inherent harm and culpability involved in the control and degradation of another person and, as mentioned above, is intended to capture the wider societal harms caused. Based on an analysis of previous modern slavery cases, the Council does estimate that sentences will increase as a result of the

guideline coming into effect (see the resource assessment published alongside this response document).

Equally, however, whilst most other respondents were content with the sentencing levels, the Howard League questioned whether at the lower end of culpability the sentencing levels were too high:

> 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.
>
> 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.
>
> 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.

This point was echoed by CARE:

> Although we recognise the harm that may be caused to victims at that level, it is our view that the culpability of a victim who was involved in the offence because of coercion and threats is less than that of an offender who would otherwise fit the culpability level C criteria, and that a minimum of three years in prison is very significant for someone who is themselves a victim.

The Prison Reform Trust also questioned sentencing levels at the lower end of culpability:

> The consultation acknowledges that Parliament's intention to increase the maximum sentences available to courts for the most serious offences should not have an impact on sentence levels at the lower end of culpability and harm. It is unclear, therefore, why the draft guideline has only limited options for sentencers to pass non-custodial sentences at the lower level of seriousness. At this level, a full range of non-custodial options should be available to sentencers.

These arguments accord with some findings of the road testing, where the sentencing exercises involved lower culpability offenders alongside leading figures. This required participants to place a very large emphasis on mitigating factors and the coercion of the offender, even moving beyond the guideline, in order to arrive at what was felt to be a just and proportionate sentence. The Council agreed that the guidelines need to avoid the situation where an offender has been coerced, may be vulnerable, and/or has little idea about the nature and scale of the operation, but nonetheless receives a lengthy custodial sentence. Whilst it may be hard to conceive of a very high harm, low culpability modern slavery offender the guideline needs to provide for the possibility.

The definitive guideline will therefore have slightly reduced category C culpability starting points and ranges. By way of comparison, the starting point and range for the proposed category 4C consulted on is identical to that of the lowest category of the current section 59A guideline, and the definitive guideline will keep this the same (starting point: 26 weeks; range: high level community order to 18 months). The proposed categories 2C and 3C, however, were significantly higher than the section 59A category 2C (six and four year starting points with an overall range of three years to eight years, compared to an 18 month starting point and a range of 26 weeks to two years), with the proposed 1C range far above that.

With a reduction for the top three culpability C categories, in the definitive guideline the sentencing levels will be as follows:

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.			
	Culpability		
Harm	**A**	**B**	**C**
Category 1	**Starting Point** 14 years' custody **Category Range** 10 - 18 years' custody	**Starting Point** 12 years' custody **Category Range** 9 - 14 years' custody	**Starting Point** 8 years' custody **Category Range** 6 – 10 years' custody
Category 2	**Starting Point** 10 years' custody **Category Range** 8 - 12 years' custody	**Starting Point** 8 years' custody **Category Range** 6 - 10 years' custody	**Starting Point** 4 years' custody **Category Range** 3 - 7 years' custody
Category 3	**Starting Point** 8 years' custody **Category Range** 6 - 10 years' custody	**Starting Point** 6 years' custody **Category Range** 5 - 8 years' custody	**Starting Point** 2 years' custody **Category Range** 1 - 4 years' custody
Category 4	**Starting Point** 5 years' custody **Category Range** 4 - 7 years' custody	**Starting Point** 3 years' custody **Category Range** 1 - 5 years' custody	**Starting Point** 26 weeks' custody **Category Range** High level Community Order – 18 months' custody

Aggravating factors

Many respondents made specific proposals for new aggravating factors. In many cases, these sought to articulate examples of behaviour common in modern slavery offending. It should be remembered both that aggravating and mitigating factors by definition are not intended to be a definitive list of all the different types of activity typically caught by an offence, and that they are also not exhaustive. Where certain activity or behaviour is common to almost all examples of offending the Council will be reluctant to make this an aggravating factor in case too many sentences are aggravated in this way. Equally, the aggravating and mitigating factors listed are not intended to be exhaustive and the courts will have flexibility to aggravate or mitigate a sentence where it appears to them that the particular facts of the case merit it.

As mentioned above, various respondents considered whether trafficking and exploitation of children should be reflected as indicating raised harm in the guideline, whether under culpability or harm, or as an aggravating factor:

> The YJB welcome the addition of the 'deliberate targeting of vulnerable victims' as an aggravating factor, though as all children should be considered as vulnerable we feel the wording of this could be strengthened to explicitly view any child involved who is under the age of 18 as part of this group. *(Youth Justice Board)*

> Although there may be other specific offences applied where the victim is a child, we believe that this should be expressly added as an aggravating factor. *(CARE)*

> Age is only mentioned for the offender. I think the age of victims should be an aggravating factor if they are under 18 - I am thinking of County Lines exploitation. *(Magistrate)*

> Deliberate targeting of vulnerable victims: we would suggest including here a specific reference to 'children' *(Justices' Legal Advisers and Court Officers' Service)*

The Council recognised that it is particularly heinous to exploit children, a fact reflected in the requirement in Article 24 of the European Convention on Action against Trafficking in Human Beings that sentences in such cases be aggravated. Arguably, the seriousness of such offending is caught by the aggravating factor consulted on "Deliberate targeting of particularly vulnerable victims". The Council recognised some risks with flatly categorising any offending involving a victim under 18 in a higher harm or culpability category. From transcripts analysed, it appeared that a great many of the cases which involve child victims also involved offenders who themselves were very young adults. This is likely to be true in many county lines cases where those offenders may also have been the victims of exploitation. There is also the possibility that where a victim is just over 18 the courts will not reflect appropriately on their vulnerability if asked to make a stark categorisation based on the age of the offender.

To avoid those risks, whilst making sure the UK meets its obligations under the Convention, the Council believed that the best way to incorporate this into the guideline was to amend the proposed aggravating factor to say:

- Deliberate targeting of victim who is particularly vulnerable (due to age or other reason)

This will give the courts sufficient flexibility to deal with different situations without over- or under-penalising offenders.

The Independent Anti-Slavery Commissioner proposed a number of possible aggravating factors such as identity theft, risks to public health and safety, and the living conditions of victims. As mentioned above, some of the suggested factors are common to a lot of offending, and others are covered in other parts of the guideline: for example, poor living conditions, a striking aspect of many modern slavery cases, are common to a very large proportion of modern slavery offences, and particularly egregious examples are likely to be captured under the risk of harm at step one.

One of the Commissioner's proposals was a reference to the wider criminality that can be associated with modern slavery. The Council agreed that this deserved recognition as an aggravating feature, in particular where it leads to victims themselves being criminalised. As well as any consequences that could flow from the criminality, this would have the effect of increasing the victim's fear of the authorities and making them even less likely to seek assistance in escaping their situation. The Council have added a warning against double-counting, given the culpability factor "Involves others in the offending whether by coercion, intimidation, exploitation or reward". The guideline will therefore include the following additional aggravating factor:

- Victim forced to commit criminal offences (whether or not he/she would be able to raise a defence if charged with those offences) where not taken into account at step 1.

One magistrate respondent from the West London Bench said:

> "Some of the aggravating factors are almost inherent in the nature of the offence - victims will usually be isolated and prevented from obtaining assistance; equally the victims will almost certainly be vulnerable - this tends to be the nature of these offences. therefore, these factors will almost certainly be present and should be included as a given and only their absence should be considered as a mitigation."

On reviewing the aggravating factors in the draft guideline, the Council agreed that there is a risk that some of them may result in a large number of modern slavery offences being aggravated up from the starting point. In particular, the Council believed that "deliberate isolation of the victim" is so common in modern slavery cases as to make it almost an inherent aspect of the offending. That factor will therefore be amended as follows:

~~Deliberate isolation of the victim, including~~ steps taken to prevent the victim reporting the offence or obtaining assistance ~~(above that which is inherent in the offence)~~

This makes this factor more specifically about preventing victims obtaining help. Note that other commonly seen aspects of modern slavery offending remain as aggravating factors, including degradation, the targeting of vulnerability and removal of ID documents. The Council does not propose to go so far as to make the absence of any of these factors mitigating as suggested: an offender can ostensibly allow a victim apparent "free rein", but that should not be taken to imply that they are practically free to leave, which is rarely the case.

The Justice Legal Advisers' and Court Officers Service suggested removing the qualifier "significant" from "Abuse of a significant degree of trust/responsibility:

> Abuse of significant degree of trust/responsibility: we would suggest that the word 'significant' should be removed and would state that any abuse of trust/responsibility should, per se, be treated as an aggravating feature. Whether or not the degree of trust abused/breached is significant is a factor to consider in deciding how much to aggravate the sentence by. Sentencers should not be constrained to having find that there was a 'significant' degree of trust breached before being able to find this as an aggravating feature.

The Council agreed that the word "significant" was unnecessary, and notes the requirement of the European Convention on Action against Trafficking in Human Beings (Article 24) that offences should be aggravated if committed by a public official. The Council was of the view that the wording of this factor is broad enough to capture the situation where the offender is a public official.

Mitigating factors

As discussed above, the Council agreed with the Sentencing Academy to amend the wording of the mitigating factor "Offender has been a victim of slavery/trafficking" so that it only relates to being a victim in circumstances unrelated to the present offending. Where the offender is a victim of modern slavery related to the current offending, that should be taken into account under culpability in step one.

Academics from the University of Manchester and University of Liverpool made the following proposal:

> In our study there were several people convicted of labour exploitation offences who had notified the Home Office or GLAA about concerns relating to other employees' practices in attempts to adhere to complex and changeable frameworks for employing foreign nationals some time before the police investigation. When no further action was taken, they did not know what else to do. Notifying the authorities/whistle-blowing ought to be considered mitigation.

The West London Magistrates Bench also picked up on this idea, but expressed a reservation:

> We were going to suggest that cooperation with authorities to help apprehend other offenders and / or to close down a human trafficking or forced labour operation should also be a mitigating factor. However, we note that in Step 3 of the guideline this would be taken into consideration. Therefore we will not suggest that this is included as a mitigating factor at Step 2.

The Council considered this point and the possibility of double counting raised by the West London Bench. There is a distinction between the formal agreements between offenders and the authorities referred to at step three of this and other guidelines and in section 74 of the Sentencing Code, and the wider circumstances where an offender actively, and proactively, engages with the criminal justice process. The Council agreed that where someone has voluntarily assisted in investigations and thereby potentially prevented further offending, this is worthy of recognition in sentencing. A new mitigating factor of

"Offender co-operated with investigation, made early admissions and/or voluntarily reported offending" which is used in various existing guidelines, will therefore be included in the definitive guideline.

Further Steps

There were several suggestions for amendments and clarifications to step seven relating to ancillary orders. The Sentencing Academy agreed it was useful for the guideline to highlight Slavery and Trafficking Prevention Orders (STPOs). In its response it directed the Council to the judgment in *R. v Wabelua [2020] EWCA Crim 783* which set out various principles for making an STPO. CARE and Hope for Justice also thought that extra guidance for sentencers in the setting of the terms of an STPO may be useful here.

The Council agreed that providing an abridged version of the principles set out by the Court of Appeal in *Wabelua* would be a useful addition for sentencers, with the addition of a specific reference to the utility of pre-sentence reports, as suggested by the Independent Anti-Slavery Commissioner. In order to avoid making this step overlong, the following text will be added as a dropdown for sentencers to click on at the ancillary order stage:

- The effect of a slavery and trafficking prevention order is set out in section 17 of the Modern Slavery Act 2015, the power to make such an order on convictions is contained in section 14 of the Act.
- An order can only be made if the court is satisfied that (i) there is a risk that the offender may commit a slavery or human trafficking offence and (ii) the order is necessary (not merely desirable or helpful) for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the offender committed such an offence. The Act does not require the court to apply any particular standard of proof.
- The risk that the offender may commit a slavery or human trafficking offence must be real, not remote, and must be sufficient to justify the making of such an order. In considering whether such a risk is present in a particular case, the court is entitled to have regard to all the information before it, including the contents of a pre-sentence report, or information in relation to any previous convictions, or in relation to any previous failure to comply with court orders.
- In determining whether any order is necessary, the court must consider whether the risk is sufficiently addressed by the nature and length of the sentence imposed, and/or the presence of other controls on the offender. The court should consider the ability of a Chief Officer of Police to apply for an order if it becomes necessary to do so in the future.
- The criterion of necessity also applies to the individual terms of the order. The order may prohibit the defendant from doing things in any part of the United Kingdom, and anywhere outside the United Kingdom These prohibitions must be both reasonable and proportionate to the purpose for which it is made. The court should take into account any adverse effect of the order on the offender's rehabilitation, and the realities of life in an age of electronic means of communication.

- The terms of the order must be clear, so that the offender can readily understand what they are prohibited from doing and those responsible for enforcing the order can readily identify any breach.
- The order can be for a fixed period of at least 5 years or until further order. The order may specify that some of its prohibitions have effect until further order and some for a fixed period and may specify different periods for different prohibitions.
- A draft order must be provided to the court and to all defence advocates in good time to enable its terms to be considered before the sentencing hearing.

In relation to Slavery and Trafficking Reparation Orders (STROs), HM Council of District Judges (Magistrates' Courts) helpfully highlighted in its response that under the Proceeds of Crime Act 2002, confiscation orders can only be made in the Crown Court. Given that confiscation orders are a precondition of an STRO, the wording relating to STROs will be amended to be clearer:

"Where a confiscation order has been made **by the Crown Court** under section 6 of the Proceeds of Crime Act 2002 the court may make a slavery and trafficking reparation order under section 8 of the 2015 Act requiring the offender to pay compensation to the victim for any harm resulting from an offence under sections 1, 2 or 4 of that Act."

The Justice Legal Advisers' and Court Officers Service suggested that a further possible ancillary order that could be useful to mention in this context would be restraining orders. The Council agreed that for completeness they should be included here, as there may particularly be cases of domestic servitude where they could be relevant. The standard text from existing sentencing guidelines on restraining orders will therefore be included at step seven:

Restraining order

Where an offender is convicted of any offence, the court may make a restraining order (section 360 of the Sentencing Code). The order may prohibit the offender from doing anything for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which amounts to harassment or will cause a fear of violence.

The order may have effect for a specified period or until further order.

Impact

Resource impact

This is explored in more detail in a resource assessment published by the Council. As set out at the point of consultation, it is estimated that the guideline may result in a requirement for up to around 40 additional prison places per year, driven by longer custodial sentence lengths under the guideline and, to a lesser extent, by a decreased use of suspended sentences and an associated increased use of immediate custody. This overall position has not changed since the consultation draft stage resource assessment.

Following the changes set out in this document, it is possible that the amendments to sentencing levels in low culpability cases could reduce the scale of the impact of the guideline on the use of suspended sentences. However, this impact has not been able to be quantified at either the draft or final resource assessment stage. For further details of the data limitations, see the full resource assessment.

Equality and diversity

As a public body the Council is subject to the Public Sector Equality Duty (PSED) which means it has a legal duty to have due regard to:

- the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010;
- the need to advance equality of opportunity between those who share a “protected characteristic” and those who do not;
- the need to foster good relations between those who share a “protected characteristic” and those who do not;

Under the PSED the relevant protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

Alongside the draft guidelines the Council published information on the demographic makeup (specifically age, ethnicity and sex) of offenders for modern slavery offences, which has subsequently been updated for the definitive guideline. It is important to note that the data used at the consultation stage related to the ethnicity of the offender as perceived by a police officer and was presented as White, Black, Asian, Other and Not recorded/not known. The data relating to ethnicity published alongside the definitive guideline relates to the self-identified ethnicity of the offender, presented as White, Black, Asian, Mixed, Chinese or Other and Not recorded/not known.[2]

The consultation sought suggestions from respondents as to how issues of equality and diversity could be addressed by the guidelines.

[2] More information about this change can be found in the note published alongside the Sexual Offence consultation stage data tables and statistical bulletin.

There were few substantive responses based on matters covered by sentencing guidelines. However, the Howard League said this in its response:

> "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.
>
> 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.
>
> The guideline should caution against the risk that intelligence concerning gang membership will be given undue weight given the known risk of bias."

This is a matter that the Council is dedicating increasing attention to and will continue to do so across a range of areas. However, it is correct to say, as the Howard League acknowledge, that conviction and sentencing rates are too low at present for this offending to draw firm conclusions about sentencing trends with regard to different demographics of offenders. At present, the Council is notifying sentencers of sentencing outcome disparities in offence-specific guidelines where disparities are known to exist (for example in the recent revisions to the drugs and assault sentencing guidelines).

The Council does not, therefore, intend to add a warning to this guideline in the absence of evidence of any discrepancies. However, this sort of consideration will continue to be considered in the round as part of the Council's broader work on bias and apparent disparities in sentencing outcomes, an issue that the Council takes very seriously across all offences and where it is taking steps to obtain more evidence and explore possible causes and remedies. For example, as a reminder, all guidelines contain the following reference to the Equal Treatment Bench Book (ETBB):

> Guideline users should be aware that the Equal Treatment Bench Book covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

Conclusion and next steps

As a result of the consultation the Council has made the changes set out in the sections above. The amended versions of the guidelines and explanatory materials are published on the Council's website (https://www.sentencingcouncil.org.uk) on 12 August 2021 and come into force on 1 October 2021.

The final resource assessment is published on 12 August 2021 on the Council's website.

Following the implementation of the definitive guidelines, the Council will monitor their impact.

Consultation respondents

All Party Parliamentary Group for Human Trafficking and Modern Slavery

Black Country Magistrates Bench

Baroness Butler-Sloss

Central Kent Bench

Christian Action Research and Education (CARE)

Professor Ross Coomber (University of Liverpool)

Criminal Bar Association

Crown Prosecution Service

HM Council of District Judges (Magistrates' Courts)

The Home Office

Hope for Justice

The Howard League for Penal Reform

Independent Anti-Slavery Commissioner

International Justice Mission

The Justice Committee

Justice Legal Advisers' and Court Officers Service

The London Criminal Courts Solicitors Association

Magistrates Association

The Mayor's Office for Policing and Crime (MOPAC)

The Ministry of Justice

Norfolk Youth Offending Team

North East Wales Magistrates Bench

Prison Reform Trust

Rhys Rosser (2 Bedford Row)

Sentencing Academy

Suffolk Magistrates Bench

University of Manchester/University of Liverpool

Welsh Women's Aid

West London Magistrates Bench

West Sussex County Council

Youth Justice Board

12 individual magistrates

1 member of the public