

Consultation Stage Resource Assessment

Modern Slavery Offences

Introduction

This document fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services.¹

Rationale and objectives for new guideline

There is currently no definitive guideline for sentencing offences under the Modern Slavery Act 2015. This Act covers the offences of holding someone in slavery, servitude, and forced or compulsory labour (section 1) and of trafficking for the purposes of exploitation (section 2). The Modern Slavery Act 2015 repealed and replaced several pre-existing trafficking and slavery offences, including:

- the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (section 4);
- the Coroners and Justice Act 2009 (section 71); and
- the Sexual Offences Act 2003 (section 59A)

It also increased the maximum penalty for these offences from 14 years' imprisonment to life imprisonment.

Since the provisions relating to these offences came into force in July 2015, the Act has been the subject of two reviews. The first made a specific recommendation about the development of guidelines for these offences.² More recently, the Independent Review of the Modern Slavery Act 2015 also made mention of the forthcoming sentencing guidelines in its recommendation pertaining to Reparation Orders.³

The Sentencing Council agrees that it will be important to provide courts with clear guidance about the factors to take into account when sentencing modern slavery cases, especially given they are relatively new, and bearing in mind the serious and often long-lasting impact that this offending has on victims.

¹ Coroners and Justice Act 2009 section 127: www.legislation.gov.uk/ukpga/2009/25/section/127

² Conducted by barrister Caroline Haughey in 2016
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/542047/2016_07_31_Haughey_Review_of_Modern_Slavery_Act_-_final_1.0.pdf

³ Led by Baroness Elizabeth Butler-Sloss, Maria Miller MP and Frank Field MP, published in 2019
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf

Scope

As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the guideline on the prison service, probation service and youth justice services. Any resource impacts which may fall elsewhere are therefore not included in this assessment.

This resource assessment covers the following offences under sections 1 and 2 of the Modern Slavery Act 2015:

- Slavery, servitude, and forced or compulsory labour (section 1 of the Act)
- Trafficking for the purposes of exploitation (section 2 of the Act)

Section 4 of the Act (committing an offence with the intention of committing a human trafficking offence) is being covered by an additional brief guideline. However, due to the low volumes so far for a section 4 offence, it has not been included in this resource assessment.

Offences under section 30 of the Act, breach of a slavery and trafficking risk order (STRO) or prevention order (STPO), are proposed to be added to the *Breach Offences* definitive guideline,⁴ to be treated as analogous with the offences of: *Breach of a sexual harm prevention order*, *Breach of a criminal behaviour order* and *Breach of disqualification from acting as a director* and so are also not included in this resource assessment.

The *Modern Slavery Offences* guideline applies to sentencing adults only; it will not directly apply to the sentencing of children and young people.

Current sentencing practice

To ensure that the objectives of the guideline are realised, and to understand better the potential resource impacts of the guideline, the Council has carried out analytical and research work in support of it.

The intention is that the new guideline will encourage consistency of sentencing in an area where no guideline currently exists. The Council has taken into consideration the higher statutory maximum sentence for offences under the Modern Slavery Act 2015 compared to its predecessor offences, and the serious and long-lasting impact that this offending has on victims.

Knowledge of recent sentencing was required to understand how the new guideline may impact sentences. Sources of evidence have included the analysis of transcripts of Crown Court judges' sentencing remarks for offenders sentenced for modern slavery offences and sentencing data from the Court Proceedings Database⁵. The principles informing the draft guidelines have also been set out in various pieces of

⁴ <https://www.sentencingcouncil.org.uk/publications/item/breach-offences-definitive-guideline/>

⁵ The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics. Data on average custodial sentence lengths presented in this resource assessment are those after any reduction for guilty plea. Further information about this sentencing data can be found in the accompanying statistical bulletin and tables published here: <http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

case law over the years, which have been reviewed and used to inform the draft guideline.⁶ Additionally, knowledge of the sentencing starting points, ranges and factors used in previous cases and the existing guideline for trafficking for the purpose of sexual exploitation under section 59A of the Sexual Offences Act 2003, currently part of the *Sexual Offences* guideline,⁷ have helped the Council when developing the guideline.

During the consultation stage, we intend to conduct some research with a group of sentencers, to explore whether the draft guideline will work as anticipated. This research should also provide some further understanding of the potential impact of the guideline on sentencing practice, and the subsequent effect on the prison population.

Detailed sentencing statistics for modern slavery offences covered by the draft guideline have been published on the Sentencing Council website at the following link:

<http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=statistical-bulletin&topic=&year.>

It is difficult accurately to estimate the prevalence of modern slavery in the UK. The increase in the numbers of offenders that come before the courts is likely to represent improvements in recording and greater awareness of the behaviour.⁸ The first offenders convicted under the 2015 Act were sentenced in 2017 so statistics have only been available for three full calendar years. We are also aware of some data issues which mean that the recorded volume of adult offenders sentenced for a section 1 or 2 modern slavery offence is likely to be an undercount.⁹

Slavery, servitude, and forced or compulsory labour (section 1)

Between 2017 and 2019, 26 adult offenders were sentenced for an offence under section 1 of the Modern Slavery Act 2015. The most frequent sentence outcome in 2019 was immediate custody, comprising 88 per cent of adult offenders sentenced, with the remainder receiving a suspended sentence. The average custodial sentence length (ACSL)¹⁰ for section 1 offences over the past three years has been 5 years and 4 months and the longest custodial sentence was 11 years.

⁶ *R v Khan [2010] EWCA Crim 2880* set out the factors to be taken into account in sentencing the offence of trafficking people for exploitation. Notable other cases are *R v Connors [2013] EWCA Crim 324* and, more recently, *R v Zielinski [2017] EWCA Crim 758*

⁷ <https://www.sentencingcouncil.org.uk/offences/crown-court/item/trafficking/>

⁸ 'Modern Slavery in the UK', Office for National Statistics, March 2020
<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/modernslaveryintheuk/march2020#the-criminal-justice-system>

⁹ Some modern slavery offences are being recorded with incorrect offence codes which have not yet been able to be corrected. Additionally, cases which span multiple years straddling the change in legislation in 2015 may be recorded under old offence codes predating the Modern Slavery Act, even if they were sentenced more recently. As a result, these volumes will not be included in the figures in this report and underlying data tables and may be contributing to the known underestimate.

¹⁰ The average custodial sentence lengths presented in this report are mean average custodial sentence length values for offenders sentenced to determinate custodial sentences, after any reduction for guilty plea. The ACSLs in this section relate to the estimates using Court Proceedings Database (CPD) data.

Human trafficking (section 2)

There were 34 adult offenders sentenced for a section 2 offence under the 2015 Act between 2017 and 2019. As with the section 1 offence, the majority received immediate custody (87 per cent in 2019). The remaining 13 per cent received a suspended sentence. The ACSL since 2017 has also been 5 years and 4 months, the same as the section 1 offence, although the longest custodial sentence for a section 2 offence is higher at 17 years.

Key assumptions

To estimate the resource effect of a new guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is based on the objectives of the new guideline and draws upon analytical and research work undertaken during guideline development. However, some assumptions must be made, in part because it is not possible precisely to foresee how sentencers' behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the new guideline are therefore subject to a substantial degree of uncertainty.

Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural change. The assumptions thus have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the proposed new guideline, and an assessment of the effects of changes to the structure and wording of the guideline where a previous guideline existed.

While data exist on the number of offenders and the sentences imposed, the low volume of offenders sentenced under the new legislation to date and the knowledge that the data may represent an undercount of offenders mean that it is hard to assess the accuracy of the evidence or how representative the sample of transcripts is that has been examined. As a consequence, the estimated impacts should be interpreted as being indicative of the direction and approximate magnitude of any change, rather than a strict prediction of how sentence levels will look under the new guideline.

It therefore remains difficult to estimate with any precision the impact the guideline may have on prison and probation resources. To support the development of the guideline and to mitigate the risk of the guideline having an unintended impact, research will be undertaken with sentencers during the consultation period, utilising different modern slavery scenarios. Along with consultation responses, this should hopefully provide more information on which to base the final resource assessment accompanying the definitive guideline.

The resource impact of the new guideline is measured in terms of the change in sentencing practice that is expected to occur as a result of it. The Council is also aware of some potential changes in release policy regarding legislation covered by the guideline. These proposed future changes in sentencing practice have not been included in the estimates as they have not yet been confirmed. Therefore, this may affect the impact on prison places in the future.

Resource impacts

This section should be read in conjunction with the draft guideline available at: <http://www.sentencingcouncil.org.uk/consultations/>.

Overall impacts

Transcripts of Crown Court judges' sentencing remarks for modern slavery cases have been used to assess how sentences might change under the draft revised guideline.¹¹ A subset of 28 transcripts were included for analysis, containing the sentence outcomes for 55 adult offenders sentenced for a modern slavery offence, from 2017 onwards. While issues with the data mean that it is not possible to know the true volume of offenders sentenced for these offences, it is expected that these transcripts comprise a large proportion of the offenders sentenced to date and therefore it has been assumed that these are broadly representative of all sentencing practice for these offences, although this cannot be verified.

The analysis of these 28 transcripts found that the average final custodial sentence increased on average by 1 year 4 months across both sections 1 and 2 of the Act combined, under the draft guideline (from 4 years 6 months to 5 years 10 months).¹² Based on this analysis, if the transcript sample can be deemed to be broadly representative, it is estimated that the draft guideline may result in a requirement for up to around 40 additional prison places.^{13,14} This is driven by longer custodial sentences under the draft guideline, and to a lesser extent, by a decreased use of suspended sentences and an associated increased use of immediate custody. It should be noted that this estimate is based on a sample weighted to 2019 volumes of offenders. In addition, given that we know the recorded figures are likely to be an underestimate due to data recording issues, the magnitude of this impact may also be an underestimate, and the actual impact on prison places may be higher.

It was sometimes difficult to accurately assess the level of harm from the details provided in the transcript alone, particularly with regards to the lasting impact on the victim/victims. Where relatively little detail on harm was given, these cases were often assessed at harm level 3. If the level of harm to the victim were to be greater than it has been possible to determine from the transcript, then it is possible the offender would be given a higher harm categorisation (of harm level 2). This would lead to a longer sentence, which has the impact of adding a further 8 months onto

¹¹ This analysis was based on a sample of modern slavery cases sentenced between 2017 and 2020. This sample included cases categorised at culpability levels A, B and C and harm levels 1, 2, 3 and 4. The exercise involved an analysis of the key features and outcomes in the case, as well as a "resentence" using the draft guideline.

¹² These ACSL calculations have been based on the transcript analysis undertaken. The ACSL calculated using the transcripts differs from the ACSLs presented in the 'Current sentencing practice' section, as these were calculated using CPD data. As the Council is aware that there are some issues with the CPD data, it was thought that the transcripts may provide a more useful estimate for the purposes of the resource impact calculations.

¹³ To calculate the expected resource impact, volumes of sentences have been adjusted in line with 2019 volumes. It has also been assumed that those serving a determinate sentence of less than seven years would be released half-way through their sentence and those serving a determinate sentence of seven years or more would be released after serving two thirds of their sentence. This two-thirds release point took effect for these offences in April 2020, under the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020.

¹⁴ Prison impact estimates have been rounded up to the nearest 10 prison places.

the estimated average custodial sentence length. Again, this estimate should be interpreted as an indication of the direction and approximate magnitude of the change. This higher harm categorisation, if realised in practice, would result in an estimated impact of up to around 50 total additional prison places; an increase of around 10 places on top of the lower harm estimate.

Slavery servitude, and forced or compulsory labour (section 1)

The impact of the draft guideline on sentencing for section 1 and section 2 offences was examined separately. Section 1 offences comprised 31 per cent of the total 55 cases included for analysis. Within the sample of transcripts, it was found that the impact of the draft guideline specifically on section 1 offences was greater than for section 2 offences; average custodial sentence lengths increased by 1 year and 7 months, from 4 years and 5 months to 6 years. It is estimated that if similar increases applied when the guideline came into force, this would result in the need for up to around 20 additional prison places. As above, this estimate is based on a small sample of transcripts and on 2019 volumes of offenders, which may be an underestimate due to data recording issues. Thus, it should be interpreted as an indication of the direction and approximate magnitude of any change and subsequent prison impact, rather than an exact prediction.

In almost half (45 per cent) of the section 1 transcripts the harm category could not be accurately determined due to the limited details contained in the transcript. In these cases of borderline harm, harm level 3 was usually assigned (e.g. with 'some psychological harm' taken into account). To estimate what the impact might be if harm caused to the victim was greater than has been assumed from the transcript, further analysis was conducted for these cases, assuming a categorisation of harm level 2 (e.g. with 'Serious psychological harm which has a substantial and/or long-term effect' taken into account). As a result of this, the average custodial sentence lengths were recalculated¹⁵ and it was found that this increased overall custodial sentences by a further 9 months, to 6 years 9 months; a total estimated increase within the transcripts of 2 years 4 months compared to the original sentence.

In several original sentence outcomes, the custodial sentence was suspended. Under the draft guideline this would only be possible for a very limited subsection of offenders falling into the lowest harm and culpability category. Instead, the offenders in the transcript sample received immediate custody using the draft guideline, as only prison sentences of two years or less can be suspended. This sentence outcome was first used in 2019¹⁶ and comprised 13 per cent of all outcomes. Given the limited data available to date, the draft guideline may have an additional increased impact on these types of cases than it has been possible to estimate.

Human trafficking (section 2)

Section 2 offences made up the majority (69 per cent) of the 55 cases in the transcript sample that were resentenced using the draft guideline. Within the transcript sample, the impact on sentences for these offences specifically was slightly less than for section 1 offences; average custodial sentence lengths increased by 1

¹⁵ To calculate this, two years (before any reduction for guilty plea) were added onto the final sentence in these cases.

¹⁶ Due to the issues with these data, it is possible that suspended sentences were given in previous years for this offence and that these records are missing.

year and 2 months (from 4 years 7 months to 5 years 9 months). It is estimated that if similar increases applied when the guideline came into force, this would result in the need for up to around 20 additional prison places. However, as with the section 1 estimate, since this is based on a small sample of transcripts and on 2019 volumes of offenders, and given that we know the recorded figures are likely to be an underestimate due to data recording issues, this prison impact may also be an underestimate.

In a similar way to the section 1 offences, in around a quarter of section 2 transcripts (4 out of 17) the harm level was assigned to level 3 but it was recognised that if more details had been provided around the effect on the victim, the harm could be level 2. Assuming a higher harm categorisation and recalculating the sentence increased average custodial sentence lengths under the draft guideline by an additional 8 months, to 6 years 5 months; an overall estimated increase within the transcript sample of 1 year and 10 months on the original custodial outcome.

As with the section 1 offence transcripts, for some offenders sentenced under section 2 of the Act, their original sentence was suspended but under the draft guideline their outcome was immediate custody instead. This change in outcome could have proportionately greater impact relative to the duration of the sentence length, given that the sentence now requires prison resource where it previously did not. However, given the small sample available, it cannot yet be estimated what the true scale of the impact of this change in sentence outcome might be.

Risks

Risk 1: The Council's assessment of current sentencing practice is inaccurate

An important input into developing sentencing guidelines is an assessment of current sentencing practice. The Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Inaccuracies in the Council's assessment could cause unintended changes in sentencing practice when the new guideline comes into effect.

This risk is mitigated by information that is gathered by the Council as part of the guideline development and consultation phase. This includes providing case scenarios as part of the consultation exercise which are intended to test whether the guideline has the intended effect and inviting views on the guideline. However, there are limitations on the number of factual scenarios which can be explored, so the risk cannot be fully eliminated. Transcripts of judges' sentencing remarks have provided a more detailed picture of current sentencing practice for these offences which has formed a large part of the evidence base on which the resource impacts have been estimated, however it should be noted that these are rough estimates which should be interpreted as indicative of the direction and approximate magnitude of any change only.

Risk 2: Sentencers do not interpret the new guideline as intended

If sentencers do not interpret the guideline as intended, this could cause a change in the average severity of sentencing, with associated resource effects.

The Council takes a number of precautions in issuing a new guideline to try to ensure that sentencers interpret it as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Transcripts of sentencing remarks for 28 cases covering 55 offenders have been studied to ensure that the guideline is developed with current sentencing practice in mind. Research with sentencers carried out during the consultation period should also enable issues with implementation to be identified and addressed prior to the publication of the definitive guideline.

Consultees can also feed back their views of the likely effect of the guideline, and whether this differs from the effects set out in the consultation stage resource assessment. The Council also uses data from the Ministry of Justice to monitor the effects of its guidelines.