

**Independent Anti-Slavery Commissioner's (IASC) Response to Sentencing Council Consultation on
Modern Slavery Offences**

Written by Detective Inspector Richard Marsh, Law Enforcement Policy Lead, and reviewed and endorsed by Dame Sara Thornton, the Independent Anti-Slavery Commissioner.

Question 1: Do you have any comments on the proposed culpability factors?

1.1 – Culpability factors need more flexibility to address the range of methods to control a victim.

The draft guidelines succeed in avoiding unhelpful stereotypes of locks and chains by the removal of 'physical restraint' from the culpability factors. However, the current draft describes culpability category A as involving "Use or threat of a substantial degree of physical/sexual violence or abuse". As a consequence, other equally damaging methods of control are unlikely to be sentenced in this highest culpability category regardless of the degree of control over victims, which can be considerable.

One benefit of publishing new sentencing guidelines is to increase awareness of the broad range of methods of control available and acknowledge that an apparent absence of physical restraint or violence does not indicate a lack of control (as is also the case in domestic abuse). Research completed in European criminal businesses has found evidence of exploiters deliberately avoiding violence and threats because they attract the attention of authorities and lead to increased sentences¹. It is important that the culpability scoring is flexible enough to reflect the variety of methods available to offenders.

I see two possible solutions to resolve this issue. One is to include other methods of control in the culpability factors, at the levels the Council feels appropriate. A second might be to exclude specific methods entirely and instead address the degree or extent of control of the victim(s) achieved. The use of physical and sexual assault/threat could then be addressed specifically in the harm section or the aggravating factors.

Examples of other methods which could be included are:

- Deception, fraud and misinformation
- Coercion
- Isolation physical, digital, cultural and linguistic
- Degradation, indignity and antilocution
- Fatigue
- Debt bondage
- Financial ruination such as taking out loans in their name
- Spiritual/religious manipulation

¹ Simone Eelmaa, in "Shady Business: Uncovering the Business Model of Labour Exploitation", The European Institute for Crime Prevention and Control, affiliated with the United Nations, 2020, Pg 14, and in correspondence with IASC office, unpublished.

- Deprivation of food and poor nutrition
- Addiction to drugs and alcohol
- Removal of documents
- False interpreters
- Identity theft
- Close supervision and incentivising informing on other victims
- Instilling fear of state authority
- Intimidation by the reputation of the OCG even where direct threat is absent
- Engaging victims in criminality

These involve the calculated control of the victim by the offender, the subjugation of their dignity and will, and the suppression of their ability to leave servitude or ask for help. Where deployed in combination they should attract a high degree of culpability as they represent the mischief which the Modern Slavery Act was intended to address – the control and exploitation of human beings.

I have considered the sentencing guidelines for related and precursor offences to determine how the Council addressed the offender's method of control. The sentencing guidelines for the offence under s.59A Sexual Offences Act, trafficking for sexual exploitation, included references to psychological abuse, coercion, deception and trick in the category 1 harm factors, and no reference to specific method in culpability factors. If the specific offence for trafficking for sexual exploitation does not require a substantial degree of sexual abuse to reach the highest culpability category, it does not seem consistent to require this for the generic trafficking offence.

1.2 Reference to 'substantial financial advantage' should be removed from culpability factors

Modern slavery and human trafficking are normally motivated by financial advantage, but proving this is not a requirement of the offences as it is in, for example, s.1-4 Fraud Act 2006. 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. Even robbery does not require a view to substantial financial advantage for the highest culpability category. 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.

1.3 Targeting of particularly vulnerable individuals is correctly placed in the aggravating factors

It is noted that "Deliberate targeting of particularly vulnerable victims" is included in the guidelines as an aggravating factor. I have considered whether this should be included in the culpability factors and therefore more directly influence the starting point for sentencing. This is a factor that is included in culpability factors for some offences which can take advantage of vulnerability (such as theft and fraud), but in the aggravating factors for others (such as rape and robbery). Modern slavery offending targets vulnerability almost by definition. It is important to acknowledge where particularly susceptible people have been targeted (e.g. children or substance dependant adults), but on balance I believe the guidance has correctly done so at the aggravating factors phase. Including it as a culpability factor might imply that the abuses exacted on less traditionally 'vulnerable' individuals indicate a lesser degree of criminal responsibility when in fact the methods used to control them may be more intense or harmful.

1.4 Multiple victim/large scale offending is correctly placed in the aggravating factors

I have followed with interest the discussion throughout the drafting process of the fact that the culpability stage does not distinguish between single and multiple victim cases, or the scale and scope of the criminal business model employed. In most organised crime, such as drug supply, you would expect to consider culpability at least partly by this method. There is understandable concern that including language to this effect in the higher culpability category would mean that the most inhumane of abuses of individuals in unsophisticated setups would not reach the higher sentencing categories by virtue only of their lack of scale. While many offenders target multiple victims, some typologies such as domestic servitude may not. I am reminded of the case in South Wales² where a family held a single individual on a scrapyard and caused him a great deal of physical and psychological harm, while forcing him to work 16 hour days with minimal food and only a squalid caravan for shelter. An unsophisticated MO, a single victim held in a single place and working directly for the offender, but the culpability of the offenders was not diminished by this. In light of this, I agree with the Sentencing Council's decision to exclude this factor from determining culpability and note that it is included in aggravating factors to prompt sentencing judges to consider this element at that stage.

1.5 It is appropriate that “pressure, coercion or intimidation” is included in the lowest culpability category

International efforts to combat trafficking have established the ‘non punishment principle’ for persons who have been victims of slavery and trafficking and have been compelled to commit crime as a result.³ The Modern Slavery Act creates a statutory defence under s.45 which is intended to enshrine this protection in domestic law. Combined with the general defence of duress and the consideration of the Public Interest test in the Code for Crown Prosecutors, the courts have held recently (R v A 2020) that the UK has met its international obligations in this area. Offences under the Modern Slavery Act itself are excluded from the statutory defence as per Schedule 4 of the Act. The result of this position is that circumstances may arise where the court must sentence someone for a s.1 or s.2 offence who has themselves been a victim of exploitation. Inclusion in the draft culpability factors of “pressure, coercion or intimidation” is a good reminder that these offenders should be assigned the lowest category of culpability.

Question 2: Do you have any comments on the proposed harm factors?

2.1 Impact of the offending while it is continuing should be included in the harm factors

Modern slavery offences can result in significant and long-term impacts on victims and, while the offending continues, lost freedom and the deprivation of basic necessities. It is laudable therefore that the harm factors in this draft guideline take account of the wide range of impact of offending - physical, psychological, and social. I do not think, however, that the harm factor “Substantial and long-term adverse impact on the victim’s daily life” should include the caveat “after the offending has ceased”. Modern slavery offences continue over a long period of time and deprive the victim of their liberty, free expression, and private and family life, while they are ongoing. In this they resemble the ‘coercive and controlling behaviour’ offence in domestic abuse cases. As the preamble to the harm factors states, “loss of personal autonomy is an inherent feature of this offending”. It is my belief that the harms present *during* the offending are as important to recognise as those that remain after it is over, and this would also be consistent with the sentencing guideline for Coercive and Controlling Behaviour. In the same manner that someone who is wrongly imprisoned by the state can claim compensation for that loss of liberty regardless of any long term or lasting effects, a

² “Pair jailed for holding man as slave at scrapyard in south Wales”, *The Guardian*, 14 June 2019.

³ Issue Brief: Non Punishment of Victims of Trafficking, ICAT (Inter-Agency Coordination Group against Trafficking in Persons) Bulletin 08/2020 page 1.

person who is held in servitude is harmed solely by virtue of being so held, and having their life and autonomy interrupted by the offender.

2.2 Substantial financial loss to victims should be included in the higher harm factors

Having discussed in my answer to question 1 why I believe offender financial advantage should not dictate culpability, I believe that the opportunity to address financial *harm* exists in this section. Categories 3 and 4 reference financial loss but categories 1 and 2 do not. I would like to see reference to substantial financial loss to the victim included in these higher categories, as cases may involve many years of withheld wages and widespread financial damage by means of defaulted credit and loans, benefit fraud, etc. There are also additional categories of harm which the Council may consider mentioning specifically, including sexual, where victims may have been subjected to rapes by multiple persons, and the detrimental consequences which result from being drawn into criminality. For example, the potential criminal justice consequences a victim may face from being forced to beg are significantly less than those of stabbing another person over a drug debt. This disparity in criminal exploitation could be reflected in the harm factors.

2.3 The guidelines should take account of the wider harm and costs of modern slavery

Currently, the harm factors in the draft guidelines focus only on harm to the individual victim. Modern slavery is a criminal business model and wider harm to society results from the operation of businesses using slave labour and poor working conditions.⁴ They undercut legitimate businesses which are complying with the law, and encourage other societal harms such as immigration offending, health and safety breaches, and public health risks (such as those highlighted in the Labour Behind the Label report of June 2020 regarding the Covid-19 pandemic⁵). They engage in economic harms such as tax evasion, benefit fraud, corruption and fraudulent bookkeeping. Where the labour they are controlling is, in itself, criminal, these offences undermine public safety and encourage the proliferation of theft, drug offending, weapons and violence. The rise of the 'County Lines' business model for drug dealers in recent years has brought addiction, anti-social behaviour and violence to rural communities and is fuelled by the trafficking of large numbers of (primarily) children. I believe that the sentencing judge should consider this wider societal harm at this stage in the decision making.

Question 3: Do you have any comments on the additional wording at the head of the table?

3.1 The additional wording is appropriate and necessary

I strongly support the inclusion of this paragraph to direct sentencing judges to wider evidence of harm, in addition to that included in the victim's personal statement, highlighting that the nature of slavery and trafficking is that the victim may not identify as such. It should not be taken as lessening the impact of the offence that the victim has not engaged with the court process, and indeed may indicate a particularly closely controlled victim.

3.2 Additional wording is suggested regarding apparent 'consent' to exploitation

I would suggest the inclusion of additional wording regarding apparent victim 'consent' to the nature of the work or the movement, which has been a factor previously identified as mitigation of harm. Where modern slavery offences have been proven in respect of a victim, the sentencing judge should take a deeply critical view of whether the victim was able to give consent to anything which took place at the direction of the offender, be it physical labour, sexual activity, or criminal activity. If we consider the definition of consent used for sexual offences, the victim must "agree by choice, and

⁴ Home Office, The Economic and Social Costs of Modern Slavery, 2018

<https://www.gov.uk/government/publications/the-economic-and-social-costs-of-modern-slavery>

⁵ Boohoo & COVID-19: The people behind the profit, <https://labourbehindthelabel.org/report-boohoo-covid-19-the-people-behind-the-profit/>

[have] the freedom and capacity to make that choice”⁶. Consent is positive and active and differs from submission⁷. A victim subjected to slavery, servitude or exploitation is very unlikely to be able to have the freedom and capacity to make a free choice without adverse consequence. The rebuttable presumption in sexual offending that consent is not present where the victim is, at the time of the act, unlawfully detained or was caused to fear violence would be used against them appears very relevant to modern slavery cases.⁸ It is also notable that a specific caution against assuming consent negated criminal harm was inserted into the Modern Slavery Bill by the House of Lords.⁹ The methods of control that were relevant to the offender’s culpability should be considered carefully when deciding what activity the victim of a modern slavery offence chose to undertake and what can be attributed to the offender’s actions.

Question 4: Do you have any comments on the proposed sentence levels?

4.1 It is submitted that the Act *was* intended to raise sentences for slavery offences but has not done so

A year after the Modern Slavery Act was enacted, the then Prime Minister Theresa May wrote in the Sunday Telegraph that modern slavery was a “barbaric evil” that was “the human rights issue of our time”. She wrote that the Act “delivered tough new penalties to put slave masters behind bars where they belong, with life sentences for the worst offenders.”¹⁰ It is apparent that her intent in presenting this bill before Parliament was to strengthen the United Kingdoms’ response to modern slavery by deterring offenders and making this country a hostile place for their exploitative business models. The severity with which she viewed the offences is apparent from the decision to pass a maximum penalty of life imprisonment. I therefore disagree with the Council’s interpretation of Mrs. May’s comment about the “worst offenders” as indicating a lack of appetite for an overall uplift in sentencing.

The Independent Anti-Slavery Commissioner’s office has examined a range of sentences passed both under the 2015 Act, and under the legislation in force prior to it. Comparing sentence lengths between cases is clearly difficult as the nuance of circumstance is lost, but it is consistently observed that the sentences are very low for such serious offences, and that the passing of the Act has not resulted in a noticeable increase in sentences despite the increase of the maximum penalty to life. In a sample of 45 cases we have ready access to, the median sentence passed was 5 years 6 months (in line with the Council’s own observations) and the lowest was 13 months. Although the sample does contain recent sentences that are longer, these are exceptional. Many sentencing remarks from after the passing of the Act reference authorities based directly or indirectly on the previous legislation, which is likely why little increase is seen after 2015. The decision of Parliament to significantly increase the penalty does not appear to have been widely translated into practice.

4.2 Sentences currently passed often fail to reflect the severity of the offence and the draft guidelines insufficiently address this

It has been noted by correspondents with the Commissioner that sentences being passed for modern slavery offending are often of the scale that would be expected for burglars or drug

⁶ S.74 Sexual Offences Act 2003

⁷ R v Olugboja [1982] QB 320, Court of Appeal

⁸ S.75 Sexual Offences Act 2003

⁹ Lords Amendments to The Modern Slavery Bill, 5 March 2015, <https://publications.parliament.uk/pa/bills/cbill/2014-2015/0184/150184.pdf> enacted as Modern Slavery Act 2015, S.1(5),

¹⁰ Defeating modern slavery: article by Theresa May, 30 July 2016, quoted on gov.uk, <https://www.gov.uk/government/speeches/defeating-modern-slavery-theresa-may-article>

offenders, rather than organised traffickers in human beings. Thames Valley Police, for example, identified a case where a man was sentenced to 5 years for two counts of s.1 and two of s.2 offences under the 2015 Act. His offending involved the exploitation of two mentally vulnerable victims using drug addiction and debt bondage for over a year. Yet his son, who was caught serendipitously during the investigation with an amount of class A and B drugs sufficient to convince a jury of intent to supply, received a very similar sentence. The officer in the case found this difficult to reconcile with the demonstrable human impact of the slavery offending.¹¹

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.

In considering the matrix of sentences in the draft guidelines, I remain concerned that, with the culpability and harm factors as they currently are, sentences are unlikely to increase significantly following their implementation, especially in the area of labour abuse.

Where the IASC office is aware of long sentences being given (10+ years), almost invariably this is linked to sexual exploitation – forcing women into prostitution. This is consistent with the draft guidelines as it is likely to attract the highest culpability category but illustrates the point that I raised when discussing culpability about underestimating the severity of other forms of the offence. When labour exploitation cases are separated out from our examples, the average sentence passed drops to 4 years, compared to 8 years 7 months for sexual exploitation. Under the draft guidelines as they stand, such cases are very unlikely to ever achieve culpability category A or harm category 1 unless there is serious violence involved, limiting the starting point to 8 years at most. It is accepted that the purpose of sentencing guidelines is to set out a spectrum of severity for an offence type, and that in making one aspect more serious it cannot be avoided that other aspects are consequently less serious. But by focusing on sexual abuse and serious violence (already criminalised by other legislation), the effect is that the specific mischief addressed by the Modern Slavery Act is minimised.

Question 5: Do you have any comments on the proposed aggravating and mitigating factors?

Some of my commentary on the aggravating factors is reflected in my answers to questions 1 and 2 which I will not repeat except to reiterate the point that the methods of control (for example, the factors 'deliberate isolation' and 'passport or identity documents removed') reflect in my view the offender's culpability and should feature at step 1.

5.1 The word 'restrain' should be replaced with 'control'

The final aggravating factor, "substantial measures taken to restrain the victim" appears to reawaken the unhelpful stereotype of physical restraint which the Council has carefully exorcised from the culpability section. I would suggest the wording "substantial measures taken to *control* the victim" would direct the sentencing judge to the same point without implying a physical barrier (while allowing one to be considered if present). The aggravating factors should rightly reflect those

¹¹ Thames Valley Police, Op Marathon

circumstances where the offender has taken multiple or drastic steps to achieve the victim's submission and where the cruelty exacted has gone beyond that which is necessary to commit the offence. I therefore agree with the inclusion of the factor "gratuitous degradation of victim" to capture the more extreme actions of perpetrators.

5.2 Additional elements of offending may be considered aggravating

It is positive that some specific behaviours of traffickers are included in the aggravating factors, such as removing passports and other documents. Consideration should be given to including other aspects of offending as 'aggravating' such as:

- Other crimes committed as a result of the modern slavery offending (e.g. theft, drug supply)
- Significant financial advantage (if moved from 'culpability' as suggested)
- Aspects of identity theft – such as obtaining benefits or loans in the name of victims
- Risks to public health or safety as a result of offending (e.g. County Lines drug dealing, or work conditions which spread disease)
- Conditions (accommodation, food) of victim particularly squalid or of inadequate quality
- Removing or keeping a child from their legal guardian
- Legitimate companies undercut/out-competed by use of slave labour

5.3 Mitigating factors appear appropriate for the new guidelines

The mitigating factors appear appropriate and, again, fittingly include the situation of an offender who themselves has been trafficked in the past, as this is relevant to the 'alpha victim' scenario where prior victims of slavery progress into being recruiters and enforcers themselves. I have no further comments on the mitigating factors.

Question 6: Do you have any comments on the reference to the ancillary orders at step 7?

As well as achieving deterrent sentences for offenders, it is important that victims get the best chance of receiving reparations for the injustices they have suffered. I am pleased to see that guidelines include an explanation of Reparation Orders under the Modern Slavery Act and hope that this will increase their use.

Drawing attention to Slavery and Trafficking Prevention Orders is also appropriate as these provide long term control measures to prevent reoffending both while serving a sentence and after release. It may be appropriate to remind the sentencing judge of the Home Office Guidance on these orders which suggests a pre-sentencing report could be of great value for determining proportionate and effective conditions.¹²

Question 7: Do you have any other comments on the guideline for section 1 and section 2 offences?

No further comment.

Question 8: Do you have any comments on the approach to section 4 guidance?

The approach to sentencing section 4 offences, taken from the guidance for the analogous sexual offence, appears appropriate and the severity of the principle offence committed should naturally determine the starting point and range for this offence. 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.

¹² "Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders under Part 2 of the Modern Slavery Act 2015", Home Office Statutory Guidance, April 2017.

Question 9: Do you have any comments on the approach to section 30 guidance?

The guidance appears to be appropriately and succinctly worded and the analogy drawn with other breach offences appears sound. I have no further comment on this section.

Question 10: Is there anything else you wish to say about the proposed sentencing guidelines, which has not been covered elsewhere in this document?

The Commissioner believes that there is significant value in including the voices of survivors in the drafting of policy and guidelines in the field of modern slavery and human trafficking. Their perspective may identify factors which professionals who have never been subjected to these offences would not. If it has not done so already, I would encourage the Council through this consultation or other means, to actively seek the views of MSHT survivors.

Question 11: Do you consider that any of the factors in the draft guidelines, or the ways in which they are expressed could risk being interpreted in ways which could lead to discrimination against particular groups?

I have not identified any such issues in the draft guidance.

Question 12: Are there any other equality and diversity issues the guidelines should consider?

No further comments.