



## **CBA Response to the Sentencing Council's Consultation entitled**

### **Modern Slavery Offences**

**12<sup>th</sup> January 2021**

#### **Introduction**

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

## Response to questions posed in the Consultation

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

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

It is easier to supply a single response to questions 1 and 2.

There is one startling omission in the proposed Culpability and Harm factors. Both fail to have regard to the different types of exploitation set out within section 3 of the Act. There must be some relationship between the nature of the service obtained as a result of exploitation. Most people would consider exploitation which involves sexual exploitation or the removal of organs to be considerably more serious than exploitation in which a victim provides Domestic Service to the offender. This is not intended to minimise domestic servitude, it is serious, but the guidelines fail to express the natural fact that the culpability of a person exploiting another for an organ, or for sexual abuse is a particularly grave form of exploitation and should be reflected in the sentence passed. At present the guidelines speak of degrees of "financial gain" but are silent to other types of non-pecuniary gain. This is a weakness which needs to be cured by concentrating on the statutory gains from exploitation set out in section 3.

Furthermore, as practitioners we see more and more accused claiming that they have been the victim of relevant exploitation and it is increasingly common in drugs cases in particular for the Single Competent authority to find conclusive grounds that a person committing a drug supply offence (typically in a "county lines" setting) has been the victim of relevant exploitation. This brings home to us the reality of Modern Slavery. It causes many vulnerable people to commit criminal offences. Where a victim has been arrested and, potentially prosecuted for an offence, the impact of that prosecution on the victim should be acknowledged in assessing sentencing. The fact that a person is a victim of relevant exploitation does not, in practice, spare them from Criminalisation. They may be arrested, charged and remanded in custody. Many months may pass before they disclose

that they are the victim of Modern Slavery and the desire on the part of the prosecution authorities to scrutinise such claims carefully may mean that very considerable loss of liberty is suffered by the victim of Modern Slavery once they are identified by the prosecuting authorities. The Court should be expressly permitted to take this into account in sentence. If it is reasonably foreseeable that victim would be in a lot of trouble with the authorities if apprehended (for example, because they were forced to supply class “A” drugs) then Culpability would be high). If a victim was arrested and detained in custody, then this would be a feature that is relevant to “harm”.

Additional difficulty is presented to practitioners by the use of relative terms in assessing “Culpability” and “Harm”. Terms such as significant, substantial, serious (and in relation to “Harm” – extreme) import a value judgement into the process. We feel that the use of the word “extreme” is particularly problematic. It suggests a level of harm which will be very rare, so rare that it gives us the impression very few, if any cases will fall within the scope of category one “harm”. Would it not be more valuable to state that in cases of “extreme harm” a starting point above the level identified in these guidelines may be appropriate? This would allow “category one” to be re-calibrated to reflect the range of harm caused by these offences whilst decanting “extreme harm” to a sentencing range above the suggested guidelines to be determined on a fact specific way by the sentencer

Previous iterations of guidelines, be they CACD guidelines or early sentencing guidelines issued by the Sentencing Council used variations on the phrase “serious/ substantial when viewed alongside offences of this type”. This was a way of reflecting the simple fact that there is a range of harm and culpability for even the most grave offences. Victims of crime, and many members of the public, instinctively recoil from any description of their ordeal as being anything less than “significant, substantial, serious, etc”, yet the language of the draft guideline obscures the fact that these terms designed to assess the relative seriousness of an offence which is, by definition, serious. We appreciate that the approach in this draft guideline is common to other guidelines, and the difficulty we have identified is a consequence of a systematic approach taken by the Council across many offence specific guidelines. We will not be able to cure this problem in a single consultation response, but

we suggest that the Sentencing Council considers launching an exercise on the subject of assessing the harm and culpability relative to offences of the same type.

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

No

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

No

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

Sometimes the victims of Modern Slavery are able to escape the influence of those who are exploiting them. For example, returning to the “county-lines” model, a young teenager may be found very far from home and returned by the authorities to their home. Experience shows that, sadly, such victims are frequently “re-trafficked”. Evidence that a person has renewed her or his abuse of a victim who have managed to escape from exploitation should be an aggravating factor.

We agree that the fact that an offender has been the victim of trafficking can be a relevant mitigating factor. In assessing that mitigating factor, the age at which the offender was first trafficked, and the duration of any exploitation should be expressly stated to be relevant. A person exploited as a child for a considerable period of time may have been conditioned to this set of offending in a way that enhances the extent to which this feature should mitigate sentence.

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

No

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

No

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

No

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

No

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

Offences under part one of the Modern Slavery Act are very often committed alongside other criminal offences. The totality guidelines will therefore be engaged alongside offence specific guidelines. However, given that we can easily foresee the situation in which a Modern Slavery Offence will be committed alongside other offences, most commonly (but by no means exclusively) under the Misuse of Drugs Act, the value of the guidelines would be enhanced if they addressed the approach to totality expressly. We suggest that the guideline should expressly invite the court to consider imposing a consecutive sentence for the Modern Slavery Offence. Sentencers should be informed that committing an offence under the Modern Slavery Act in order to force another person into Criminality is always a serious aggravating feature. Sentencers should be warned to the need to avoid double accounting. For example, the definitive guidelines for drug offences attributes a “leading role” to offenders who involve others through coercion, etc. An offender with a “leading role” in a drug supply offence because they have involved others through coercion, etc, should receive a consecutive sentence for the Modern Slavery Offence, but the offences imposed for the Modern Slavery Offence should be adjusted downwards to reflect that fact that they played a “leading role” in the drugs offence in part because they committed the Modern Slavery Offence. The “downward” adjustment to the “Modern Slavery” sentence need not be significant, but it should be discernible and (ideally) expressly acknowledged in the sentencing remarks.