Response to: Immigration Offences, Proposed Sentencing Guidelines

About Border Criminologies

1. Border Criminologies is a research network at the University of Oxford's Centre for Criminology. Founded in 2013 by Professor Mary Bosworth, Border Crimonologies's international network includes researchers, practitioners, and individuals who have experienced border control first-hand. Border Criminologies represents the interests and experiences of individuals writing, researching, and practising at the intersection of Criminal and Immigration Law in the UK and around the world. This uniquely global approach enables our unique insight into local concerns about unduly harsh border regimes.

Summary

2. It is our view that the six new proposed guidelines proposed by the Sentencing Council for immigration offences place undue penalties on individuals who emigrate to the UK. These guidelines will also increase the reliance on immigration detention, a practice that has been shown to have extensive adverse mental health impacts on individuals (Shaw, 2016). In particular, we are concerned about the impact of such guidelines on crimes of duress, vulnerable people, and access to justice, as outlined below. Accordingly, we encourage the Sentencing Council to amend the guidelines to accommodate a broader range of sentences, with the lower thresholds for all crimes being set below the proposal.

3. There are currently six legal routes to the UK for those seeking asylum. Four of these are bespoke policies only applicable to specific nationalities (Ukraine, Afghanistan, and Hong Kong schemes). The two remaining routes require either sponsorship from the UNHCR or a naturalised refugee-status sponsor. There are no legal routes for those who seek asylum and fall outside the ambit of these schemes. The proposed sentencing guidelines advance the criminalising approach set out in the Nationality and Borders Act (2022) and Illegal Migration Act (2023) and will compound the unnecessary and cruel criminalisation and detention of individuals in search of asylum.

4. The vast majority of these sentences will be greater than 1 year, and will, therefore, trigger mandatory deportation. Many will serve a criminal sentence and then be held under immigration powers for an indefinite period in advance of their deportation. This second form of custody, elsewhere, in Australia, for example, has been recognised as an additional punishment that needs to be justified as such (see: NZYQ).

Analysis of Guidelines

5. The guidelines for crimes require a two-step analysis: 1) first of culpability and then 2) of the resulting harm. We are generally concerned about the vagueness of the

medium culpability and high harm thresholds, which may enable sentencing to be unduly influenced by subjective personal opinion regarding migration. The highly politicised nature of migration into the United Kingdom has led to widespread misapprehensions about harm, culpability, and danger which we are concerned may result in individual instances of substantial injustice.

6. Culpability: Culpability guidelines in the proposed sentencing regime habitually encompass all actions that do not fit neatly within the "lower culpability" range. Accordingly, we are concerned that the vast majority of cases will be categorised as medium culpability. We are concerned the vagueness of this direction will produce irregularity in sentences and will unfairly lead those who have been involved in incidents of minor culpability to be swept up in the mid-range regime. Further detail (with examples) as to what would constitute a medium culpability role will be helpful and necessary in ensuring there is no irregularity in this sentencing regime. We have further concerns about the impact that these guidelines will have on those falling within the ambit of the Modern Slavery Act, especially those who have yet to be identified. It is our submission that culpability guidelines include more specific reference to individuals who fall within the Act could serve a key role, assist judges in identifying those who should fall within the Act and have yet to be identified. In so doing, a clearer direction will ensure those individuals do not face further undue harm.

Facilitation, Knowingly enters the United Kingdom without leave/ Knowingly arrives in the United Kingdom without valid entry clearance, Deception

7. Harm: Further direction should be offered regarding what constitutes an act with a high risk of injury or death; judicial perceptions of what meets this threshold may been unduly impacted by media coverage of, for example, Channel Crossings, and would benefit from clear metrics to ensure that political perception does not unfairly inflect sentencing decisions.

Breach of Deportation Order

8. Harm: We are in particularly concerned about the creation of a category including individuals who have "committed new offences," and those who return to the UK "with the intention of committing further offence(s)". Placing these groups together risks conflating them. We encourage the Council to separate out these guidelines so these distinct groups are categorised and sentenced separately. Written together, these descriptions reinforce one another, despite the fact that many individuals who breach their deportation orders may commit new offences unknowingly given the unprecedented fast-paced evolution of Immigration law. Further direction is also recommended regarding: 1) what constitutes 'intention' in the latter category, 2) what qualifies as 'intention', and 3) the relationship between the defendant's knowledge and the fact that they have committed new offences under new statutory regimes.

Possession of False Identity Documents etc with Improper Intention

9. Culpability: Further guidance distinguishing between 'commercial' and mere 'group activity' will be necessary to assist judges when distinguishing between High and Medium culpability. This, alongside clarification as to what constitutes 'substantial' financial gain will prove critical. We recommend that such an assessment be dictated on the basis of a proportionality assessment.

10. Harm: We are concerned that Category 1 unduly conflates using documents to evade immigration control and doing so knowingly. The defendant's intention is key in this regard and should be treated as such: an individual who knowingly obtains documents seeking to evade immigration control is bound to be less vulnerable than one who has done so unknowingly for reasons that will warrant a lesser sentence.

All Offences Therein

11. Sentences: We have broad concerns about the disproportionately punitive nature of these sentences, in addition to extant concerns about the knock-on effects these will have for the state of immigration detention in the United Kingdom.

Impacts of Duress

12. The sentencing package places emphasis on facilitation crimes, crimes of deception and general entry crimes. In all cases, the sentencing provision makes minor adjustments for the impacts of duress. This is distinguished from general distress at sea, for which a suitable exception already exists per Section 25A(3) of the 1971 Immigration Act. Under these proposed sentencing provisions, individuals who face existential threats to their safety–whether regarding the manner in which they enter the country, the form of their deception, or their alleged "assistance" to facilitation crimes– that are not evidently and immediately mortal will not be afforded any lesser sentences within this provision; they will face a minimum of 1-2 years. In establishing this guideline, the UK ignores the experiences of many people who have been forced into assisting in such crimes, who require psychological and welfare support. Judges will exceptionally have to justify going outside the standard range, which will put the onus on them to engage in moral assessments of worthiness when it comes to the question of who will be subject to the penalisation of detention. It is our recommendation that the lower range of these facilitation crimes be dropped accordingly, as we are concerned that the regime is unduly punitive in this regard.

Vulnerable People

13. Approximately 75% of all trafficking survivors in the UK are not British nationals, many without Leave to Remain, making them subject to the crimes for which this

sentencing guideline applies. These guidelines will lead to the extended and unnecessary detention of a disproportionately vulnerable population without clear provisions set in place to provide for such individuals.

14. The key provision available for trafficked individuals in custody is the Adults at Risk policy (AAR), which recognises identified survivors of trafficking as potentially being more vulnerable to harm in detention. This policy neither prompts release nor does it require the Home Office or relevant prison authority to respond to the vulnerability identification. To be released, individuals falling within the policy need to adduce further evidence to be released in advance of deportation or else be released on bail ("Abuse by the System" [2022]). The standard of release has increased over the years

15. The AAR only works to the extent that individuals in detention are able to disclose their experiences. However, the punitive conditions of prisons and immigration removal centres make such disclosures unlikely ("Trafficked Into Detention" [2017]). Individuals who have experiences with traumatic migration who are summarily detained under the proposed provisions will not be given adequate opportunity to safely share their experiences, which may play a key role in mitigating their sentence or lead to their release.

16. The Helen Bamber Foundation have established structural failures in the UK's detention and prison system when it comes to identifying survivors of trafficking ("Abuse by the System" [2022]). This is best-embodied by the finding of the Brook House Inquiry. Such structural failures lend themselves to the extensive and inappropriate detention of vulnerable adults ("Adults at Risk" [2018]), who are disproportionately represented among individuals making illegal crossings into the UK.

17. Prisons are ill-equipped to handle the needs of vulnerable individuals; there is no equivalent to the Rule 35 assessment in prisons to trigger an AAR assessment. Individuals who have had such experiences will either be identified and not provided with the necessary resources or else not identified at all. Such concerns are aggravated by existing structural problems regarding access to justice for individuals held for foreign nationals serving criminal sentences and held under immigration powers.

18. The Home Office has failed to take action to provide for detainees who have other mental vulnerabilities, most recently not having agreed to make any measures of reasonable adjustments for those in immigration detention, per *WHH* (AC-2023-LON-001861). Such failures point to a larger inability to address problems inherent to the detention system, which will necessarily impact those brought unnecessarily within the ambit of the UK's detention system due to the extent of the proposed sentencing guidelines. It is not within the Sentencing Council's remit to address these inherent structural issues. However, in our submission such factors

should surely be considered when developing a sentencing regime that is cooperative with existing statute and case law.

Access to Justice

19. Organisations that provide critical immigration advice for detainees in prisons have long cited the dispersion of individuals in the prison system as deeply problematic for these individuals' access to justice ("Mind the Gap: Immigration Advice for Detainees in Prisons" [2014]). In particular, the act of detaining such individuals is bound to have detrimental effects on their ability to seek out proper immigration advice.

20. Individuals subject to deportation have been particularly negatively impacted by the removal of legal aid for immigration cases. The Law Commission has reported that immigration law in this area is "overly complex and unworkable," making the timely need for a practitioner in such areas absolutely critical ("Simplification of the Immigration Rules" [2020]). The Joint Committee on Human Rights has noted detention poses further problems for individuals seeking to deal with imminent deportation and immigration law matters, significantly impeding their access to justice (JCHR Immigration Detention Report [Jan. 2019]).

21. Such advice is especially important since appeals are often necessary, with half of all immigration appeals in 2019 being met with success ("Detention, Deportation" [2019]). Individuals who are sentenced under the regime will thus be robbed of key legal advice needed to address either immigration claims or deportation proceedings brought on by their sentence. Although there is no data on the significance of legal representation for the latter proceedings, data provided by Bail for Immigration Detainees suggests such legal advice may lead to a more than 20% increase in successful appeal rate.

22. The exceptions in the sentencing package, which allows for lower sentences where it would be "contrary to the interest of justice to do so in all the circumstances," sets an inordinately high threshold. There is insufficient evidence that this discretionary provision will be adequately deployed to ensure those that have been subject to especially harrowing experiences will not be further punished by the very justice system that insists its main interest is in punishing those that hurt them.

Conclusion

23. We recommend further clarity in sentencing provisions to ensure there is undue variation in sentences handed down. Such changes should be made considering the state of immigration processing, prisons and immigration detention centres in the UK, all of which are in dire straits.

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