



Justice Committee

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Draft Sentencing Council Guideline on Child Cruelty

The Justice Committee thanks the Sentencing Council for giving it the opportunity of responding to the draft guideline on child cruelty, and in particular for permitting this response to be made after the thirteen-week consultation period has ended. Once again, we are grateful to the Council for agreeing to share with us the responses that it received to its consultation on this guideline, and for providing a helpful summary of its proposals and analysis of the consultation responses.

In the light of the resources available to us and the Council's own timetable for finalising the guidelines, our letter does not aim to provide a comprehensive response to each of the consultation questions. We have instead focused on particular themes where we felt that our observations could contribute most usefully to the discussion.

Failure to protect (Q1)

In its consultation document, the Council questioned whether, as in the current definitive guideline, a "failure to protect" a child (absent other factors) should carry the same level of culpability as actually inflicting cruelty. We note that respondents' views were divided. While some agreed that culpability should be the same, others argued that there was a moral distinction between inflicting cruelty and a failure to protect; or at least that active encouragement should be distinguished from a failure to act.

It was argued by some that a vulnerable person who fails to protect the victim might be less culpable; the draft guideline for these offences already lists vulnerability factors that indicate lesser culpability: mental disorder, learning disability, lack of maturity, or being a victim of domestic abuse. Respondents also emphasised the potential complexity of family dynamics and possible overlap between mental illness,

domestic abuse and substance abuse.

We believe that a change is needed in this area of the guideline. We acknowledge that the guideline already contains a number of mitigating factors which might be thought sufficiently to account for the lower culpability in the case of a person who fails to protect a child from cruelty, rather than inflicting it. However, we believe that in cases where these apply, they do not fully capture the extent of the moral distinction between inflicting cruelty and allowing it to occur. Further, in cases where none of these mitigating factors apply, we consider that there is still an important moral difference between inflicting cruelty on a child and failing to prevent it taking place, even where that is for no other reason than indifference.

For these reasons, we consider that the definitive guideline ought to set a lower starting point for offenders who have failed to protect a child from cruelty, as opposed to inflicting it.

Definition of serious harm (Q3)

The consultation proposes an approach to the assessment of harm in which Category 1 (the most severe) includes "Serious psychological and/or developmental harm." We note that several respondents to the Council's consultation thought this level needed further explanation or guidance; and/or considered that emphasis should be placed on the need for expert evidence, particularly on psychological harm/developmental harm. We felt this assessment should be left to sentencers, as it depends so closely on the facts of the case. However, we agree with those respondents who argued that sentencers should be asked to consider obtaining expert evidence on the psychological/ developmental harm inflicted on a child. This is an area in which expert advice may be essential.

Aggravating factors (Q6)

The consultation proposes a range of aggravating factors. We agree with those respondents who felt that where an offender is a person in authority, for example a teacher or priest, this should be an aggravating factor.

Mitigating factors (Q7)

The consultation proposes a number of mitigating factors, including remorse and good character. We agree with those who argued that if remorse is taken into consideration as a mitigating factor, it is essential that it must be genuine. We note that good character is a mitigating factor, and that the consultation proposed that "the more serious the offence, the less weight which should normally be attributed to this factor". We do not believe good character is always relevant in such cases, because a person of apparent good character can make use of it to inflict harm without being detected. We made a similar point in our response to your earlier

consultation on the guideline on domestic abuse, where we made reference to the definitive guideline on Sexual Offences. This states, "Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor". We think the same, or a similar qualification should be made in this guideline.

Causing or allowing a child to die or suffer serious physical harm (Q12)

As with the cruelty to a child guideline, the consultation explains that "a person failing to protect a child from certain actions is treated at the same level of culpability as the person who actually commits the action". The document goes on to explain that this lack of distinction is "particularly important for this guideline" because a primary purpose of the legislation was "to close the loophole created if there is not enough evidence to determine who, when more than one person is present in the household, caused the harm or death". Prosecutors do not have to show which of the people present caused the harm and which allowed it, and both are sentenced at the same level. The consultation says that in cases where the court does not know which of the people involved caused the harm, the result of a distinction between the sentences given for causing harm and for allowing it would be that both offenders "would have to be sentenced on the basis of allowing harm, rather than causing it". We acknowledge the importance of avoiding this difficulty in cases where it is not known to the court who has caused the harm.

However, the consultation document then acknowledges that "there will be some cases where the court is aware which offender caused the harm, and which one allowed it". It suggests that in such cases there will often be circumstances which prevented the person who only allowed the harm from being able to intervene, which "may on balance reduce their culpability or mitigate the seriousness" of the offence. Absent such circumstances, though, the offender who allowed the harm will be treated as having the same culpability as their co-defendant who caused the harm. We do not agree with this approach. As noted above in our response to Q1, we consider that there is an important moral distinction between causing and allowing harm which is not sufficiently captured by the possible presence of other circumstances.

In some jurisdictions, a "Good Samaritan" law applies, but this is not a feature of English law. We recognise that a person who is a member of a victim's household has a close connection to the victim and a greater responsibility to protect them from harm. However, we do not feel this responsibility is enough to erase the distinction between causing and allowing harm.

We are of the opinion that this distinction should be reflected in a lower starting point in sentencing for offenders who have allowed harm. This will of course only be

relevant in cases where it is known to the court which offender caused the harm.

Sentence ranges and starting points for the offence of failing to protect a girl from the risk of FGM (Q23)

This guideline related to Section 3A of the FGM Act 2003. The guidelines note that there have been no convictions for any of the offences under the Act. We note that some respondents to the consultation, including the National Crime Agency and the NSPCC, thought that sentencing for this offence should take into account the complex cultural and social context which leads parents to mistakenly believe that FGM is in a girl's best interests; they argue that, rather than lengthy sentences, it would be better to challenge communities' attitudes and beliefs through education. This would be broadly consistent with the approach advocated by the World Health Organisation (WHO). In contrast, other respondents felt that sentencing ranges for this offence should be as high as for other child cruelty offences, if not higher, and that proposed mitigating factors were too lenient. The Council is proposing a custodial starting point for all but the least serious cases.

We note that a Home Affairs Committee report on this topic, published in 2016, referred to FGM as a "national scandal" and lamented the lack of prosecutions for the "failure to protect" offence. The Committee called for an increase in the number of prosecutions, in line with other countries in Europe.

We support the Sentencing Council's approach. We believe that a custodial starting point is appropriate for sentencing for all but the least serious cases. Challenging communities' attitudes and beliefs, while welcome, should in our view go alongside offering support to people in affected communities who are trying to combat the practice of FGM; both are, of course, outside the scope of the consultation. We believe that it is appropriate to confirm our opposition to this practice as a society by taking a firm line on sentencing, and would hope to see progress in prosecuting cases under this Act.

Inconsistency between sentencing decisions

As part of the consultation process, respondents were asked to use the draft guideline to consider three case scenarios, one for each of the offences, and to indicate their final sentences – detailing the culpability, harm, aggravating and mitigating factors. We note that the respondents' assessments vary widely. Although many respondents would not in practice be involved in sentencing, this divergence of views might be thought to suggest that the guideline gives too much scope for discretion, potentially undermining consistency in sentencing; on the other hand,

discretion may be considered desirable.

We were doubtful of the value of this exercise. The cases described, and the sentencing decisions they give rise to, are by their nature very fact sensitive. It is therefore hard in an exercise like this to capture the subtleties of case scenarios in a meaningful way, without giving rise to red herrings. This means the varied responses will do little to help assess the clarity and consistency of the guideline. The Council should in its final definitive guideline acknowledge the broad range of circumstances that may arise in offences of these kinds. But we are unconvinced that the Council should continue to produce scenarios of this type for future consultations.

Equality impact

The consultation paper contains a brief paragraph acknowledging that more women than men are sentenced for these offences, but concludes that no equality impacts are anticipated (because the guidelines should promote consistency in sentencing); however, the Council 'would welcome views or any evidence on this issue'.

A minority of respondents considered that the Council should conduct a more detailed assessment of equality impact in relation to gender. It was also suggested that the race equality impact of sentencing for FGM offences should be better understood. We consider that, in relation to all guidelines, the Commission should keep equality issues under review, especially around race in relation to FGM offences.

We hope you will be able to take our observations into account in preparing your definitive guideline, and look forward to your reply.

Bob Neill MP
Chairman
Justice Committee

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