Annex A

Extracts of responses on the approach where no activity takes place/no child exists

"…to prescribe a small, and undefined, reduction at Step 2 is both unhelpful to sentencers and insufficient to recognise the absence of actual harm. It places almost all the emphasis on the harm intended. It is also inconsistent with sentencing in other contexts where the intended outcome was impossible. Consider solicitation to murder, another incitement offence. If the person incited to commit murder is an undercover police officer, the intended victim's death cannot result from the incitement. The offender intends to kill through the intermediary, yet sentences for such incitement fall well short of the minimum term that would be imposed in the event that the intended victim had died." – Sentencing Academy

… as a basic principle of ethics and fairness, most people would I suggest agree that harm caused is more important than harm intended (especially if the question is taken away from the particularly emotionally evocative context of sexual abuse). Ask for example which of the following should receive a higher sentence: a defendant who intends a battery, but by misfortune causes a death and is convicted of manslaughter; or a defendant who intended a death but, by good fortune, only caused battery-level injuries? The former is far more serious, because of the real consequences of the defendant's actions.

Second, the approach advocated by Privett, and by this consultation, devalues the harm caused to real children who have been abused. If a real victim of a s10 offence is caused to engage in penetrative activity by a much older defendant, the starting point will be 5 years. If a similar defendant attempts to cause a "decoy" child to engage in such activity, and does not desist from doing so early in the case, the approach of Privett would lead to only a modest reduction within the range (which is 4-10 years) - i.e. a sentence of perhaps 4 1/2 years. If they became aware of this, the real victim in the first case would justifiably feel that the pain and suffering they had endured, with the often life-changing impact that it may carry, counted for almost nothing. – Giles Fleming, Barrister

"It is … in respect of harm, not coherent to use the concept of 'intention' to replace 'incitement, arrangement or encouragement'. Making arrangements to meet a child for sexual gratification is undoubtedly more than merely preparatory to making that arrangement, but the intention in the attempted offence (i.e. to do the impossible because the 'child' is in fact a police officer), is the intention to make the arrangements, not to commit the contact offence. Is it suggested that merely arranging by telephone to meet somebody

whom D mistakenly believes is rich whereas they are in fact a pauper with a view to robbing them, amounts to attempted robbery? It is not, in short, appropriate to use the terminology of s.63 (b)(ii) to such inchoate circumstances when it comes to assessing harm.

I would also point out, in any event, that there is no order of priority as between s.63 (b) (i), (ii) and (iii) [of the Sentencing Code]*. Thus, whilst no doubt the CACD in Baker and Cook may arguably not have given sufficient weight to (ii) (harm 'intended'- although see above), the effect of Fulford LJ's judgment- that only a modest reduction should be given in some cases to reflect the impossibility of harm- is to give (ii) a completely unwarranted precedence over (i) (the ACTUAL harm caused) The two should be, at the very least, equally weighted."* HHJ Colin Burn

"The proposed amendments do not clearly or sufficiently set out the reduction or 'downward adjustment' in sentence where there is no actual child so no harm to anyone could possibly result from the defendant's actions. These are pure "thought crimes".

In the case of Vasile and others [2021] EWCA Crim 572 Fulford LJ (at para. 20) refers to s63 of the Sentencing Act 2020 and says its terms are critical. He then however chooses one of the tests ('any harm which the offence was intended to cause') and disregards the other two (any harm which the offence caused' and 'any harm which the offence might foreseeably have caused'). In the case of a fictional child the answer to both those tests is "none". In those circumstances the reduction or downward adjustment where there is no actual child should be considerable, I would suggest two thirds from the starting point that would apply where actual activity has taken place.

The suggestion that it would be acceptable for a more severe sentence to be imposed where there was a fictional child as opposed to where sexual activity has taken place with an actual child strikes me as perverse." – HHJ Ian Graham

"There is a huge difference in harm but not culpability in inciting children to participate in sexual activity. It is the incitement which the Criminal Law Solicitors Association say is the Graver of the offences. There can be no harm on the basis that no victim existed.

Perhaps what is required is a separate section to deal with the issue of potential harm were there to be a genuine victim. There can be no harm if there is no victim but if the intended harm was to be substantial then this should be taken into account and there should be an adjustment in sentencing.

It is right that there always should be an adjustment for both aggravating and mitigating features and of course the list is not finite or comprehensive.

However, any sentence that is imposed. Should take into account that the child is not real.

The subjective issue of harm causes the Criminal Law Solicitors Association concerns, it is not an assessment which can properly be undertaken and should not be left to the Judge who sentences to ascribe an arbitrary harm to an offence which did not occur." -- Criminal Law Solicitors Association

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