the Howard League for Penal Reform

Sentencing children

A summary of the Howard League Lawyers' Network Group seminar held on 16 June 2016
Doughty Street Chambers, 53-54 Doughty Street, London, WC1N 2LS

Panel

- Edward Fitzgerald QC, Doughty Street Chambers (panel chair)
- Emeritus Professor Andrew Ashworth, All Souls College, Oxford
- The Honourable Mr Justice Holroyde, Sentencing Council member
- Dr Laura Janes, Legal Director, Howard League for Penal Reform
- Dale Simon CBE, Advocate Consultant to Phase II of the Young Review

Edward Fitzgerald QC introduced the Panel.

Mr Justice Holroyde

Mr Justice Holroyde opened the event by outlining the key aims of the Sentencing Council and highlighting the importance of achieving consistency in sentencing. In reminding the audience that the sentencing of those under 18 is often a more troubling and complex process, he emphasised the need to consider young people's backgrounds as a key part of their sentencing. He explained the consultation process and affirmed that it really is a genuine consultation process.

Professor Andrew Ashworth

Professor Andrew Ashworth introduced himself as a critical supporter of the Council. He welcomed the draft guidelines in many respects, admiring the provisions in respect of breach, allocation and the use of flow charts. He drew particular attention to the following key paragraphs in the consultation:

- Paragraph 1.4, on the diminished culpability of children;
- Paragraph 1.5, on the importance of children being able to learn from mistakes;
- Paragraph 1.11, which sets out a number of mitigating factors that go to the Welfare Principle;
- Paragraph 1.13, which highlights the particular needs of looked after children; and
- Paragraph 5.46, which suggests the general approach of applying sentences to children aged 15 to 17 that lie within the one half to two thirds region of the corresponding adult term.

Professor Ashworth highlighted a number of provisions that he felt were inconsistent with some of the key principles outlined above. For example, paragraph 5.9 deals with persistent offenders. He noted this provision would see a child being labelled a "persistent offender" when making a single appearance for a series of separate offences committed over a short space of time, even where there are no previous findings of guilt or formal contact with authority.

Professor Ashworth also highlighted the lack of integration of paragraph 4.4 into paragraph 4.6 of the consultation. Paragraph 4.4 sets out the Council's expectation that a child will be dealt with less severely than an adult, because of the factors that reduce a child's culpability. However, paragraph 4.6 proceeds as if the culpability of an

adult is being assessed, rather than integrating the material in 4.4 into the processes in 4.6. The two paragraphs should be brought together as part of the initial assessment.

Finally, Professor Ashworth drew attention to case study D on page 52 of the consultation. The mitigation set out at step three is simply that D has had an "unstable upbringing". This description does not sufficiently reflect the facts in the case study which show that D was living in a care home and had been in the care system for six years, during which time several fostering placements had broken down (i.e. she is a 'looked after' child). Step three and the final decision on sentence, to impose a Detention and Training Order, therefore fails to link back sufficiently to the guidance on 'looked after' children at paragraph 1.13, which emphasises the need to consider the additional vulnerabilities often present in such children. Professor Ashworth considered decision to impose a Detention and Training Order in this context ought to be looked at very carefully and the overarching principles integrated into the decision-making process.

Dale Simon

Dale Simon briefly introduced her work with the Young Review, providing the following figures:

- 13.1% of adult prisoners self-identify as black, compared with approximately 2.9% of the over 18 population recorded in the 2011 Census;
- Muslim prisoners account for 13.4% of the prison population compared with 4.2% in the 2011 Census;
- There are proportionately many more young black, Asian and minority ethnic (BAME) male prisoners than older ones, with BAME representation in the 15 to 17 age group the highest at 43.7%.

Ms Simon highlighted that this disparity in figures in UK system is more disproportionate than the present system in the USA.

Ms Simon highlighted that many BAME young people also suffer from negative experiences in the care and education system.

Turning to the guidelines, Ms Simon, while commenting positively on some elements of the draft, concluded it does not contain anything that will help to reduce the problems of disproportionality within the prison system. She cited the sole reference to discrimination in the entire consultation on page 59. The draft guidelines give "a belief that they will be discriminated against" as an example of why a young person may conduct themselves inappropriately in court.

Ms Simon concluded by clarifying that deterrent sentences are simply not effective for BAME communities.

Dr Laura Janes

Dr Laura Janes provided a short summary of the Howard League's work with children, advising them on appeals against sentence and through participation work.

A panel discussion followed:

Mary Hennessy raised the important point that welfare professionals sometimes encourage custodial sentence as it reduces the burden on their services. It was agreed

that it can be very problematic to have such professionals involved in the sentencing process if they are required to give a recommendation.

Greg Foxsmith commented on the lack of any progress in the disproportionality in sentencing and noted that the youth court has the power to transfer matters back for out-of-court disposals. He sometimes cited the over-representation of BAME people in the prison before the Courts, with varying reactions.

Mr Justice Holroyde was asked to comment on what might be done to reduce the disproportionality. He responded saying that if the proposed guidelines were followed faithfully then equality of treatment would be achieved.

Ms Simon thought a lot more work needed to be done in order to make a difference to disproportionality; she said the cultural context of the disparity in numbers could not be ignored.

Professor Ashworth noted there is extensive research to suggest that disproportionality does not occur at the sentencing stage, rather the evidence suggests disproportionality stems from prosecution policy, the fact that BME people are much less likely to put in an early guilty plea than white people, and the difference in treatment at remand stage.

There was a discussion around lack of maturity and how this might be best assessed.

There was a discussion about concerns that general overarching guidelines are not sufficiently looked at by judges as judges are so used to looking at offence specific guidelines. A case in point was the lack of knowledge about the principle (contained in both the 2009 guidelines and the new draft guidelines) that judges ought to reduce the term for children when compared to an adult.

Frances Crook raised the concern that identity is very important and that the consultation talks about “young offenders”, rather than children. She said that what you call people matters. She explained that a key part of reducing re-offending in the longer term is to stop labelling children as offenders, thereby removing the negative self-held cultural associations children have with as a result of their past offending behaviour. Mr Justice Holroyde responded pointing out that sentencing only occurs when someone has been convicted of an offence. He added that the Sentencing Council is empowered to make guidelines in line with existing legislation, that legislation uses the term ‘young offender’ and so the guidelines also use the term ‘young offender’. Dr Janes noted that the terminology referred to dates from the Children and Young Persons Act 1933 and since then both the Children Act 1989 and, as Professor Ashworth, pointed out UN Convention on the Rights of the Child have come into force. Both refer to those under the age of 18 as children.

Edward Fitzgerald asked about the approach taken to the Welfare Principle and how it functions within the draft guidelines. Mr Justice Holroyde agreed that if the Welfare Principle is to mean anything, then the relevant issues (including any practical issues facing the child) should be looked at the point of sentencing. He gave an example, citing the sharp reduction in the number of secure and appropriate beds for particular categories of prisoners while he was the presiding judge of the northern circuit. This lead to prisoners being placed in institutions far from home and family. He understood that a child from Cornwall would most likely be sent to a prison in Kent.