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The Howard League for Penal Reform's response to the consultation on the sentencing guidelines specifically relating to children

We welcome the opportunity to respond to the Sentencing Council's consultation paper: Sentencing Youths – Overarching Principles and Offence-Specific Guidelines for Sexual Offences and Robbery.

About us

Founded in 1866, the Howard League is the oldest penal reform charity in the world. We have some 13,000 members, including lawyers, politicians, business leaders, practitioners, prisoners and their families and top academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.

The Howard League works for less crime, safer communities and fewer people in prison. We aim to achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.

Since 2002 the Howard League for Penal Reform has provided the only legal service dedicated to representing children and young people in custody.

We also work with children and young adults in the criminal justice system through our Big Lottery funded participation programme. Participation has been an integral part of our work since 2009. It has allowed us to expand our legal work and to take forward issues raised by children and young adults to inform our research and policy work.

We have drawn upon our lawyers' experience in practice, our direct participation work with young people, and our expertise in this policy area in this response. In particular, we have delivered interactive group work sessions on the topic of sentencing with 38 children, both in prison and in the community (through a Youth Offending Team). We have received 33 responses to our sentencing questionnaire sent to over 100 young people in custody. We also convened a seminar in June 2016 to discuss the consultation and enclose a note of the event, which is also available at <http://howardleague.org/wp-content/uploads/2016/06/Sentencing-of-children-event-summary.pdf>.

Overview

The Howard League welcomes the Sentencing Council's vision that the approach to sentencing children must be different from that of adults. Therefore, the Howard League supports this stand-alone review to produce more up-to-date and consolidated guidance for sentencers.

However, we have several concerns about the guideline in its current form.

1. The language used throughout the guideline is inconsistent with the overarching principles. What you call people matters. The guideline refers to children as "youths" and "young offenders". The welfare principle requires us to see children who commit offences as children first and offenders second. The language in the guideline does not facilitate this. Labelling children "young offenders" entrenches their identity as offenders, which undermines the aim of preventing reoffending.
2. The guideline is not sufficiently child focused. There are many principles and phrases within the guideline that apply equally to adults. Specific guidance is required as to how these principles and phrases should be applied differently in the case of children.
3. There is too much emphasis on aggravating factors and too little emphasis on mitigating factors. The inherent and specific vulnerability of children should give rise to more emphasis on mitigation.
4. The guideline makes no substantive reference to racial and cultural considerations, which are hugely important to the experiences of children in the criminal justice system.

The Howard League believes the draft guideline requires significant revision before implementation.

The language in the guideline is inconsistent with the overarching principles

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The Howard League has advocated for some years that referring to young people as "youths", "young offenders" and/or "persistent offenders" serves only to encourage the otherness and criminalisation of children. For instance, the average parent collecting their child from school would not refer to collecting their "youth". Labelling children as "offenders" reinforces a feeling of exclusion and discourages positive re-integration into society (McAra L and McVie S, 2007). The

majority of children in conflict with the law will grow away from the criminal justice system (Smith D et al, 2001). Defining a child whose main objective is to refrain from offending as an 'offender' is unnecessary and unhelpful. Negative labelling neither promotes the welfare of the child nor discourages re-offending. The Howard League proposes children be referred to as children throughout the guideline.

One young adult told the Howard League how he felt his identity was subsumed by the offence during the sentencing process:

"They think that it [the offence] is what we are, but it's not, it's something we did"

Another young adult told us that he felt judges *"only think about us as the offender"*. It is clear from our legal and participation work that children do not routinely identify themselves as offenders.

The Howard League strongly disagrees with the definition of a persistent offender at page 25 of the draft guideline. Children make mistakes and they often make them in a short space of time. The ability for children to change and develop in a shorter period of time than adults (as recognised in *R v Lang*) makes the classification of a child who commits a cluster of offences as a persistent offender counterproductive, given that the overarching aim of the system is to prevent offending.

The guideline is insufficiently child focussed

There are many principles and phrases within the guideline that apply equally to adults. Specific guidance is required as to how these principles and phrases should be applied differently in the case of children.

The most obvious example where the guideline appears to treat children as mini adults is at paragraph 5.46 on page 77 which provides guidance on the term of custodial sentences as follows: *"when considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of **half to two thirds** of the adult sentence **for those aged 15 – 17 and allow a greater reduction for those aged under 15.**"* Although, we welcome the reduction in the suggested time range from the current guidance and the guideline then urges this "rough" guide not to be used "mechanistically", this approach endorses the practice of looking to the adult guideline for assistance as to the appropriate custodial term as a starting point. A truly welfare based approach would start with a focus on the impact of a custodial term on a child's life and only then ensure that the term chosen was significantly less than an adult would get. While paragraph 5.49 on page 77 notes that a custodial term can have a "significant effect on the prospects and opportunities" of a child, it does not spell out what these might be and how they should be taken into account. While there is further detail on what this might mean at page 26 by the reference to the fact that some sentences have longer rehabilitation periods than others, it is not clear how the guideline will actively assist sentencers in considering these issues.

The Howard League has experience of many cases where children's life chances have been significantly affected by the custodial term and believes the impact of the sentence ought to be actively considered in every case. The guideline should provide a checklist of consequences for sentences to consider. Examples of the impact include:

- Disproportionately long or unfair rehabilitation periods: for example
 - A fine has a rehabilitation period of six months. Such a punishment is purely punitive and it is hard to see how the rehabilitation period is consistent with the overarching principles.

- A four month Detention and Training Order has a rehabilitation period of 18 months. Therefore a 17 year old child who has received the lowest possible custodial sentence a child can get will enter adulthood with an unspent conviction.
- Depriving children of accruing leaving care rights by virtue of them being detained at a time when they would otherwise be “looked after” for a period in the community which would make them eligible for long term social care support until the age of 21. This issue was considered in the case of *R (M) v the Chief Magistrate* [2010] EWHC 433 (Admin) where Mr Justice Collins quashed a sentence imposed by a district judge as it deprived the child of a chance to accrue his leaving care rights and was therefore contrary to the welfare principle.
- Disproportionately long notification periods (sex offenders’ register): There is a growing body of literature that suggests that the administrative and legal consequences that flow from the fact of a conviction for a sexual offence make it difficult for children to make a fresh start in life (Hargreaves and Francis, 2013; Nacro, 2003).
- Preventing children from being able to start community educational provision at the start of an academic year so that children remain out of education in the community for significant periods following a spell in custody.

Further, some of the mitigating factors are similar to the adult guidelines but fail to take child and adolescent development into account. For example, the mitigating factor *‘Remorse, particularly where evidenced by voluntary reparation to the victim’* at page 69 of the draft guideline is something that might equally apply to adults. However, children within the criminal justice system, who are some of the most vulnerable and marginalised children in our society, may well feel remorse but not yet have developed the ability to articulate it. Furthermore, the child may lack the adult support to encourage a practice such as reparation. Another mitigating factor that applies equally to adults is *‘Good character and/or exemplary conduct’* at page 69 of the draft guideline. This is a high threshold for a child to meet in the absence of guidance as to what it would mean for a child. Childhood is a transitional period and the majority of children learn by making mistakes. As one child told us, *“Young people are still learning”*.

The very low age of criminal responsibility in England and Wales means that children may not be of good character based on their behaviour as very young children. They will also have had limited time to develop their own positive profile or build sufficiently strong relationships to testify to it. As the Sentencing Council asserts, the approach to sentencing children must be different from the approach adopted in sentencing adults. The guidelines should encourage sentencers to judge children by the standards of a child and not an adult.

The list of mitigating factors does not use language that encourages sentencers to take full account of a child’s wide-ranging vulnerabilities. For example, the definition of the potential vulnerabilities a victim may have in the list of aggravating factors is sufficiently broad to take into account almost any vulnerability the victim has. Thus, the sentence is aggravated where the *‘victim is particularly vulnerable due to factors including but not limited to age, mental or physical disability’* at page 68 of the draft guideline. This non-exhaustive definition is an example of good practice within the guideline. A similar approach could be used to describe the vulnerability of the child being sentenced in a list of mitigating factors. As it stands, the list of mitigating factors for children being sentenced does not even include the word ‘vulnerable’.

Too much emphasis on aggravating factors and too little emphasis on mitigating factors

There is too much emphasis on aggravating factors and too little on mitigating factors. The inherent and specific vulnerability of children should give rise to more emphasis on mitigation.

The other (non-statutory) aggravating and mitigating factors are set out at page 68 of the draft guideline. There are 12 aggravating factors and just 9 mitigating factors. This gives the impression that aggravating factors are given more emphasis than mitigating factors. This is certainly the perception amongst the young people we have consulted. For example, one young person told us that he felt that even where the pre-sentence report (PSR) provides detail about mitigating factors, little account is taken of it: *“Probation come and do your PSR, ask questions and hand it over to the Judge who doesn’t even care. Flicks through it and says ‘yeah, yeah you’re getting slammed’”*. It is certainly not the experience of the Howard League that judges routinely ignore pre-sentence reports. However, we can understand why young people may feel that way, especially as sentencing hearings can often be brief and overwhelming. We are also concerned that pre-sentence reports may not always adequately capture the full extent of mitigating factors that the court ought to be aware of. One young person told us *“they are playing with someone’s life and don’t know enough about you.”*

The Howard League is concerned that the key mitigating factor that will affect most children in the criminal justice system is *“unstable upbringing including but not limited to time spent ‘looked after’, exposure to drug and alcohol abuse, lack of attendance at school, lack of familial presence or support, victim of neglect and/or abuse, exposure to familial criminal behaviour”*. It is odd that this collection of experiences is gathered under the umbrella of “unstable upbringing” rather than a wider category that relates to how the children are. In the Howard League case, Mr Justice Munby described provided a powerful description of the children in our prisons:

“They are, on any view, vulnerable and needy children. Disproportionately they come from chaotic backgrounds. Many have suffered abuse or neglect. The view of the Howard League is that they need help, protection and support if future offending is to be prevented.

Statistics gathered by the Howard League from a variety of governmental and non-governmental sources in the period 1997-2000 paint a deeply disturbing picture of the YOI population. Over half of the children in YOIs have been in care. Significant percentages report having suffered or experienced abuse of a violent, sexual or emotional nature. A very large percentage have run away from home at some time or another. Very significant percentages were not living with either parent prior to coming into custody and were either homeless or living in insecure accommodation. Over half were not attending school, either because they had been permanently excluded or because of long-term non-attendance. Over three-quarters had no educational qualifications. Two-thirds of those who could be employed were in fact unemployed. Many reported problems relating to drug or alcohol use. Many had a history of treatment for mental health problems. Disturbingly high percentages had considered or even attempted suicide.” [The Queen (on the Application of the Howard League) v Secretary of State for the Home Department and the Department of Health [2003] 1 FLR 484, paragraphs 10 – 11]

This description still rings true today. If we are to change the profile of the children in our prisons, these factors need to be taken into account at the sentencing stage. One young person told us prison sentences don’t provide enough help and support to deal with the difficulties a child has faced: *“I truly believe in some cases people just need a bit of help and support. Like, no-one looks at why a person is doing crime or what their life’s been like”*.

Although the current list of mitigating factors is not exhaustive, it leaves out obvious vulnerabilities such as physical illness, experience of bereavement, experience of discrimination and experience of self-harm and even attempted suicide.

The difficulty that sentencers might have in taking full account of the mitigating factors as currently presented is reflected in the analysis of Case Study D (page 52 of the draft guideline).

Very little emphasis is placed on the risk to that child: the mitigation set out at step three is simply that D has had an “unstable upbringing”. As Professor Ashworth has pointed out, 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). The heavy emphasis on the aggravating factors suggests punishment is the priority in sentencing this child, not the prevention of long-term re-offending or the welfare of the vulnerable child. Step three and the final decision to impose a Detention and Training Order 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. The 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 usual step-by-step decision-making process.

Absence of racial and cultural considerations

The guideline makes no substantive reference to racial and cultural considerations, which are hugely important to the experiences of children in the criminal justice system.

There is only one reference in the draft guidelines to discrimination. It is stated that “*a young person may conduct themselves inappropriately in court... due to ...a belief that they will be discriminated against*” (page 59, paragraph 1.11 of the draft guideline). There is a real risk that this statement could be perceived as implying that BAME children are more likely to conduct themselves inappropriately in court. Further, it is widely acknowledged that BAME children are disproportionately represented in the prison system. Around 43 per cent of children in prison are BAME. Yet only 23 per cent of children arrested are BAME. This would suggest that great care needs to be taken at the sentencing stage to ensure that BAME children are not being sentenced more harshly than white children. There is nothing in the current draft guideline that would ensure this. It was striking that in the Howard League’s direct work with children on this topic, almost every group perceived that BAME children were more likely to end up in prison than white children for doing the same crime.

Conclusion

The Howard League welcomes the proposal to revise the guideline. Yet further work is needed to ensure this is not a missed opportunity. The latest statistics released by the Ministry of Justice show that deaths, injury and self-harm in prison are at an all-time high. Keeping children away from the corrosive environment of prison is more critical than ever to protect their welfare and long term chances of not re-offending. The draft guideline could go much further to assist in our obligation under Article 37 of the United Nations Convention on the Rights of the Child to ensure custody is used only as a last resort and for the shortest possible period of time.

I would be happy to meet with you to discuss any of these points further.

Yours sincerely

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