

5 January 2017

Vicky Hunt
Office of the Sentencing Council
Room EB20
Royal Courts of Justice
Strand
London
WC2A 2LL

Dear Vicky Hunt,

The Howard League for Penal Reform's response to the consultation on sentencing guidelines: bladed articles and offensive weapons

We welcome the opportunity to respond to the Sentencing Council's consultation on the bladed articles and offensive weapons guidelines.

1. 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 work.

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

We have drawn upon our lawyers' experience in practice, our direct work with children and young adults, and our expertise in this policy area in this response.

2. General points on the sentencing guidelines

The Howard League is concerned that Sentencing Council guidelines have coincided with a greater use of custodial sentences and an increase in the average sentence length. A report published by Transform Justice¹ found that sentences had increased for violent, sexual, theft

¹ Allen, R (2016) The Sentencing Council for England and Wales: brake or accelerator on the use of prison. London: Transform Justice

and drug offences, on all of which the Sentencing Council had produced guidelines for the relevant period. The Sentencing Council's² own assessment of the impact of guidelines on assault and burglary showed that sentence levels rose more than anticipated.

Sentencing Council guidelines have significant consequences on people's lives, especially where they encourage the use of custody with all its potential risks. Prisons are in crisis. It is disappointing that it appears the Sentencing Council is contributing to sentence inflation at a time when the prison estate is grossly overcrowded and understaffed³. In addition, prison is a dangerous place: Over 100 people took their own lives in prison in 2016, the highest number since records began⁴. The Prison Service⁵ has recorded high levels of self-harm, assaults and violence.

The vast majority of people in prison are there because they have been sentenced in court. There was a 16 per cent drop in the remand population in prison between September 2015 and September 2016. The Sentencing Council has a real opportunity to make a difference to the numbers of people sentenced to custody by ensuring that all guidelines;

- highlight the risks associated with incarceration generally, including the risk of suicide, self-harm and reoffending
- highlight the specific risks of incarceration for particularly vulnerable groups such as children, young adults, old people and mentally or physically impaired adults.

Where possible, Sentencing Council guidelines should take the opportunity to reinforce the appropriate and consistent use of judicial discretion. The guidelines should encourage sentencers to reflect on an individual's circumstances and assess the impact of imprisonment on each individual, with full knowledge of the current state of prisons.

We are encouraged by the draft consultation on the overarching principles for sentencing children which highlights the need for sentencers to have regard to the outcome of a sentence (see paragraph 5.11 of the consultation at page 26). The consequences of all sentencing decisions need to be taken into account in all guidelines to ensure the sentence is commensurate with the offence and affords the best opportunity for personal change. This will better serve public safety and the needs of victims.

a) Mandatory minimum sentences

The Howard League is opposed to mandatory minimum sentencing. Mandatory minimum sentencing takes away judicial discretion to consider an individual's circumstances and it has fuelled sentence inflation. It has resulted in a high prison population and greater numbers of people serving short sentences, which are expensive and counter-productive.

b) Disproportionality in sentencing

The Sentencing Council guidelines fail to address the issue of disproportionality in sentencing. The guidelines do not provide any guidance to sentencers to help them avoid disproportionality in sentencing.

² Sentencing Council (2015) Assessing the impact and implementation of the Sentencing Council's Assault definitive guidelines. London: Sentencing Council

³ Howard League (2015) Breaking Point: understaffing and overcrowding in prisons. London: Howard League

⁴ Howard League (2016) press release: 2016 becomes worse year ever recorded for suicides in prison. London: Howard League

⁵ Ministry of Justice (2016) Safety in custody quarterly update to June 2016. London: MoJ

Emerging findings from the Lammy review⁶ show that there is disproportionality in the criminal justice system. BAME males were more likely to be arrested. BAME boys, men and BAME women were all more likely to be tried at the Crown Court compared to the white group. BAME adults, both male and female, were more likely to receive custodial sentences at the Crown Court compared to the white group.

Sentencers must consider the potential for disproportionality at every stage of the decision making process. Consideration of factors such as aggravating and mitigating circumstances and previous convictions can lead to discrimination in sentencing if disproportionality is not taken into account.

A consistent approach to sentencing will not be fair when there is inherent bias in the criminal justice system.

Individuals from BAME backgrounds may have mitigating factors, including mental disorders or learning disabilities but may not have evidence to show the factors apply. BAME individuals are more likely to have unreported or untreated mental health problems and are less likely to receive professional support. BAME individuals may have been excluded from school and have no educational statement of learning needs. The guidelines should remind sentencers that BAME individuals may have less evidence of mitigating factors even when they apply.

We are concerned that there is little consideration as to how the aggravating factors listed below could result in discriminatory sentencing of BAME young men.

Previous convictions

Sentencers must be aware that BAME men are three times more likely than white males to be arrested and young black or mixed race men are more likely to be charged than white young men.

The offender is in a group or gang

There is no definitive test to determine whether a person is in a gang and, in many cases, sentencers will be relying on opinion rather than factual evidence.

The Young Review highlighted research that showed the gang agenda focused disproportionately on BAME young people and there were indications that the focus on risk had 'led to more young BAME people entering the criminal justice system'. Evidence from the London Assembly⁷ on serious youth violence showed children and young people felt the police and other services unhelpfully labelled young people as gang members when this was not the case.

Sentencers must critically assess the evidence that a young person is believed to be in a group or gang, rather than take assertions of gang membership at face value.

3. Different guidelines for adults and children

Guidelines for sentencing children, namely the *Overarching Principles – Sentencing youths*, have been in force since 2009. In 2016, the Sentencing Council consulted on new draft guidelines for sentencing children.

⁶ Ministry of Justice (2016) Black, Asian and minority ethnic disproportionality in the criminal justice system in England and Wales. London: MoJ

⁷ London Assembly Police and Crime Committee (2016) Serious youth violence available at https://www.london.gov.uk/sites/default/files/serious_youth_violence_report_-_london_assembly.pdf

The Howard League is concerned there is very little difference in the current consultation between the adult and child sentencing guidelines for bladed articles and offensive weapons.

It is essential that offence specific guidelines for children build on the principles set out in the draft overarching guidelines for children published in May 2016 and reinforce them by explicitly referring to them. In particular, the following key principles should be reaffirmed in all offence specific child guidelines:

- 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.

We appreciate that the draft overarching principles for children have not yet been published but hope the final guideline will take on board points raised in our response to the Sentencing Council's consultation on sentencing guidelines for children. In our consultation response we made the following key points:

- 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.
- 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.
- 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.
- 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. Emerging findings from the Lammy review found 41% of children in prison are from minorities backgrounds, compared with 25% ten years ago, despite prisoner numbers falling by some 66% in that time.

In respect of the guidelines for children, referred to as 'youth' guidelines, in the current consultation on bladed articles, we make the following key points:

a) Consideration of whether mandatory minimum sentences apply.

The child guidelines for bladed articles and offensive weapons state that '*a court must impose a sentence of at least four months detention and training order when it is a second offence for possession **unless the court is of the opinion that there are particular circumstances relating to the offence or the offender which make it unjust to do so in all the circumstances***'.

We are concerned that the proposed guidelines for children seem to gloss over the preliminary decision as to whether mandatory sentencing applies. Statutory provision in section 28 of the Criminal Justice and Courts Act 2015 provides very little guidance as to how the ‘unjust in all circumstances’ test should be applied. The very same welfare principles for children that apply to sentences will be highly pertinent to deciding whether the mandatory scheme should bite at all. Therefore, sentencers should be guided to consider the welfare principles from the outset, including in the decision as to whether or not a mandatory minimum should apply at all.

b) Mandatory minimum sentences for children aged 16 and 17

The Howard League is opposed to the use of mandatory sentencing for children. In this case, we appreciate that statutory minimum sentences for 16 and 17 year olds are outside the discretion of the Sentencing Council. We think it is highly problematic that the statutory regime dictates that a child subject to a mandatory sentence must get two thirds (four month DTO) of what an adult would receive (six months), even though the overarching principles for children suggest that children should get between one half and two thirds of what an adult should receive (see above). Therefore the statutory minimum sentence schemes sets the minimum sentence at the top end of the spectrum, undermining the aim of consistency in sentencing generally promoted by the Sentencing Council.

c) Aggravating factors for children

The aggravating factors for children mirror the aggravating factors for adults.

The Sentencing Council⁸ draft overarching principles for children state children are ‘*unlikely to have the same experience and capacity as an adult to understand the effect of their actions on other people, or to appreciate the pain and distress caused and because a young person may be less able to resist temptation, especially where peer pressure is exerted*’. Therefore the aggravating factors for children, compared with adults, should be totally different.

In the bladed articles consultation the following aggravating factors are listed in respect of children. These factors should not necessarily be considered as aggravating but be neutral and considered through the lens of welfare principle.

A ‘failure to respond to warnings about behaviour’

This factor does not take into account normal adolescent developmental factors. Ignoring adult warnings is a part of normal adolescent development and this must be taken into account by sentencers. Warnings take many forms, from informal warnings from parents and carers to formal warnings by youth justice agencies. Informal warnings by parents and carers are less likely to be recorded than formal warnings. Therefore, this factor is likely to lead to disproportionality in sentencing of children in care who are far more likely to come into police contact for minor matters⁹.

Offender in a group or gang

Evidence published by the Office of the Children’s Commissioner¹⁰ found that girls and boys became involved in illegal activity, including carrying weapons, as a result of exploitation by gangs. Children are vulnerable to exploitation and peer pressure as evidenced in the

⁸ Sentencing Council (2016) Draft guidelines Overarching Principles –sentencing youths. London: available at <https://www.sentencingcouncil.org.uk/wp-content/uploads/Draft-guideline-Sentencing-youths-consultation.pdf>

⁹ Howard League (2016) Criminal Care: children’s homes and criminalising children. London: Howard League

¹⁰ Office of the Children’s Commissioner (2013) If only someone had listened. London: Office of the Children’s Commissioner.

overarching principles, para 1.11 and para 1.12. Looked after children may be heavily exposed to peers who have committed crime (para 1.13 overarching principles).

Drugs and alcohol

The overarching principles refer to factors regularly present in the background of children in the criminal justice system including the misuse of drugs and alcohol (para 1.12).

'Deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intent of causing additional distress or circulating details/photos/videos etc of the offence on social media or within peer groups'. The reference to the filming of an offence on social media as an aggravating factor is referred to in the youth guidelines but not in the adult guidelines. Social media use is part of a common culture among children and its prevalence should be seen in the context of children's everyday lives.

Similarly, the inclusion in Step One of the youth guideline of "offence committed at a school" to justify the imposition of a more intense sentence, including a custodial sentence, is discriminatory. Children are legally required to attend school.

Established evidence of community/wider impact

It is highly unlikely that children will be able to predict in advance the effect a crime will have on the local community or the wider world as this is dependent on their consequential thinking skills which are generally still developing until the age of 25¹¹.

d. Mitigating factors for children

Vulnerability is not mentioned as a mitigating factor in relation to the offence. Children are inherently vulnerable. Children who come into contact with the criminal justice system are likely to have even greater vulnerabilities. All offences committed by children should be seen in this context.

The guidelines should include examples of the specific vulnerabilities of children in contact with the criminal justice system, as stated in the Sentencing council's draft overarching principles (2016). This includes (para 1.11):

- *the high incidence of mental health problems amongst young people in the criminal justice system;*
- *the high incidence of those with learning difficulties or learning disabilities amongst young people in the criminal justice system;*
- *the effect that speech and language difficulties might have on the ability of the young person (or any accompanying adult) to communicate with the court, to understand the sanction imposed or to fulfil the obligations resulting from that sanction;*
- *the reasons why a young person may conduct themselves inappropriately in court, e.g. due to nerves, a lack of understanding of the system, a belief that they will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity, etc;*
- *the vulnerability of young people to self harm, particularly within a custodial environment;*
- *the extent to which changes taking place during adolescence can lead to experimentation; and*
- *the effect on young people of experiences of loss and neglect and/or abuse*

¹¹ Justice Committee (2016) 7th report: the treatment of young adults in the criminal justice system available at <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/16902.htm>

Para 1.12 of the overarching principles for children lists additional factors including deprived homes, poor employment records, low educational attainment, early experience of offending by other family members, experience of abuse and/or neglect, negative influences from peer associates and the misuse of drugs and/or alcohol.

Good character and exemplary conduct

The expectations that children will be able to evidence that they are 'of good character' is unrealistic. Childhood is a transitional period and the majority of children learn by making mistakes.

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.

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

Yours sincerely,

Dr. Laura Janes
Legal Director