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Ruth Pope
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Room EB20
Royal Courts of Justice
Strand
London WC2A 2LL

By email

10 October 2017

Dear Ms Pope

The Howard League for Penal Reform's response to the Sentencing Council's consultation on manslaughter

We welcome the opportunity to respond to the Sentencing Council's consultation on proposed manslaughter guideline.

About us

Founded in 1866, the Howard League is the oldest penal reform charity in the world. We have some 12,000 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. The Howard League provides administrative support to the All Party Parliamentary Group on women in the penal system.

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

The risk of further sentence inflation

There are currently 86,260 people in prison. The sentenced prison population increased by one per cent in the year leading up to 30 June 2017 and this is, in part, due to an increase in the number of people serving long-term sentences. Data from the Ministry of Justice shows

that the number of prisoners serving sentences of 14 years or more increased by 9% (to 3,683) in the 12 months prior to the 30th June 2017¹.

Sentencing Council research found that the average length for custodial sentences for manslaughter had increased:²

'For those receiving a determinate sentence, the average (mean) custodial sentence length has generally been increasing over the past decade, from 6 years in 2006 to 10 years in 2016.'

The Sentencing Council's recent assessment of the impact of the proposed manslaughter guideline states that 'any estimates of the impact of the new guideline are therefore subject to a large degree of uncertainty' and 'it therefore remains difficult to estimate with any precision the impact the guideline may have on prison and probation resources'.

In light of the record high number of people in prison and the grave deterioration in prison conditions, it is of the utmost concern that the Sentencing Council cannot say with certainty that the proposed guideline will not lead to sentence inflation.

The Howard League believes that the manslaughter guideline is highly likely to lead to sentence inflation. The starting points are too high.

The proposed guideline represents a missed opportunity

The absence of comprehensive or statutory guidance to date on manslaughter provides the Sentencing Council with an opportunity to propose a framework for the sentencing of manslaughter offences, within which judges can use their discretion as appropriate to ensure a more proportionate approach. Free from the constraints of schedule 21 of the Criminal Justice Act 2003 that applies to offences of murder, the proposed guidance should be sufficiently flexible to enable the courts to justify not imposing immediate custody in appropriate cases.

However, in its current form the proposed guideline could have the effect of curbing the exercise of judicial discretion and increasing the average length of custodial sentences. It is hard to imagine circumstances in which a judge would not impose immediate custody based on the current draft. Yet, many juries may consider that case study 4 on page 21 of the consultation would inevitably result in excessive sentencing upon conviction. In that example the Council suggests a starting point of three years imprisonment on a woman suffering from mental disorder whose negligent care of her mother suffering from dementia led to her death. The case study describes her lack of previous convictions, positive good character, intense remorse, the history of significant abuse towards the offender by the victim and lack of premeditation. While her behaviour was serious and cannot be justified, it is not clear what would be the benefit of sentencing the woman to prison. It is unlikely to have a deterrent effect. Yet it is hard to see how a court could justify not sentencing her to immediate custody with reference to the proposed guidelines. There is a real risk that women, who tend to perform caring roles with very limited support, will be significantly disadvantaged in cases such as this.

Culpability

a) A 'high culpability' category is out of kilter with all other guidelines and is not necessary

¹ Ministry of Justice (2017) Offender Management statistics quarterly Jan-March 2017.

² Sentencing Council statistical bulletin: Manslaughter

The Howard League agrees with the submission by the Criminal Bar Association which questions 'the introduction of a new and unique category of culpability for a limited class of manslaughter offences'. We consider this will lead to sentence inflation and an overly mechanistic approach.

b) Culpability and mental illness

In response to question 19 of the consultation, it appears to be unjust to treat culpability as being elevated if the use of drugs or drink were ingested because of a person's mental illness and where the person was too unwell to be expected to make a judgement about using drugs or alcohol. Similarly it would be unjust to elevate culpability where failure to take medication is due to the illness itself. The same point can be made in respect of the extent to which factors attributable to mental illness can be seen to be aggravating.

The availability of hospital orders in cases where responsibility is diminished

While the proposed guideline directs the sentencer to consider the appropriateness of hybrid orders in the case of adults over the age of 21 first, in order to reflect the guidance in *R v Vowles*, the stages that follow may result in defendants that are suitable for restricted hospital orders not getting them - even when this is appropriate.

The guideline appears to extend beyond the nuanced consideration in *Vowles* and subsequent cases, such that it could be taken to rule out any case where the person could be deemed dangerous after treatment. The whole purpose of a restriction order under s41 of the Mental Health Act 1983 is to prevent release immediately upon treatment being successful so that an assessment may be made of dangerousness and enable recall if necessary. There is no reason given in this consultation paper for why people who are considered dangerous should not continue to be managed by a combination of mental health and criminal justice oversight, especially as a hospital order can only be imposed where there is a connection between the mental illness and the offence. A restricted hospital order enables a level of ongoing mental health oversight that simply cannot be guaranteed with a purely criminal justice disposal.

In those cases where the court is satisfied that a hybrid order is not appropriate and has moved on to consider a hospital order, it would surely be wrong to deprive a mentally ill person of guaranteed long-term treatment on the grounds that he or she may continue to be dangerous for other reasons.

We appreciate that the proposed guidance requires the sentencer to "step back" and consider the overall appropriateness of the order to be imposed in cases of diminished responsibility. However, there is insufficient guidance as to what this means and what ought to be taken into account to mitigate against the risk that people who require restricted hospital orders will not get them.

We trust that mental health specialists have been consulted in respect of this aspect of the guidance given the impact it may have on people with mental illness.

Sentencing of children for manslaughter

The consultation says that the guideline for manslaughter does not apply to children under 18. However, stage 4 of the definitive guidelines for the sentencing of children and young people outline the reductions that should be applied when sentencing young people that are 'within the region of half to two thirds of the adult sentence for those aged 15 – 17'. In our experience, judges routinely consider what the appropriate adult starting point would be in serious cases affecting children.

If the sentence lengths are increased for adults it is likely that this will lead to an increase in the length of sentence for children sentenced for manslaughter. Just as the HMP detention sentence has an inherent welfare aspect, so should a truly welfare based approach be taken to loss of life inflicted by a child that falls short of murder.

The guidance should be clear that all options must be open for children and young people who are convicted of manslaughter, including non-custodial options. The guidance should explicitly caution against taking a mechanistic approach to cases involving child defendants convicted of manslaughter.

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

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Laura Janes', written in a cursive style.

Dr. Laura Janes
Legal Director