SENTENCING ACADEMY

Sentencing Academy Response to Consultation: Sexual Offences Guidelines

10 August 2021

The Sentencing Academy welcomes this opportunity to respond to the sexual offences guideline consultation. This document contains our response to specific questions; for the remaining questions we agree with the Council's proposals.

The key issue arising in respect of this consultation is the magnitude of any sentence reduction which should be awarded in cases where there is no child victim – for example, when the offender has been interacting with an undercover police officer. One line of cases had suggested that the absence of a victim should have an important impact on the category placement of cases. On this approach, cases without victims would normally be assigned to a lower category at Step 1 of the guidelines' methodology.[1] This position was overturned in 2020 by the Court of Appeal in *Privett*, which rejects the view that this factor should result in assignment of all such cases to the lowest category of harm. The Council has translated Privett's position into a direction to disregard the absence of a victim at Step 1, and recommends a small adjustment to the provisional sentence at Step 2.

The Sentencing Academy has two broad reservations about this approach. First, we respectfully disagree that it is the Council's function 'to reflect Court of Appeal case law' (p. 4). It is true that 'the case of *Privett* [2]… provided the courts with guidance about how to approach the assessment of harm in cases where there is no actual child victim' (p. 4). The Council's proper role is to set out the arguments, to gather the opinions of consultees, and to produce guidance that deals with the issues in a convincing and proportionate manner. Producing guidance aimed at simply reflecting the latest Court of Appeal decisions is insufficient, particularly when the Consultation Document opens (p. 4) by stating that 'the Sentencing Council is the independent body responsible for developing sentencing guidelines for the courts to use.' Second, the Sentencing Council should produce guidelines that steer the courts towards a proportionate sentence, rather than simply giving the courts a discretion to make whatever reduction they consider appropriate.

[1] E.g. *R v Baker* [2014] EWCA Crim 2752; *R v Cook* [2018] EWCA Crim 530.

[2] [2020] EWCA Crim 557, [2020] 2 Cr App R (S) 315; see [79], where the Court invites the Sentencing Council 'to consider whether any and, if so, what clarification of the relevant sentencing guideline is necessary, and whether further guidance can be given to sentencers.'

Question 1: Do you have any comments on the proposed amendments to the section 14 guideline?

The proposed amendment contains additional text dealing with this issue. The text directs courts to 'apply a downward adjustment at step two to reflect the fact that no or lesser harm actually resulted' (p. 10); '*a small reduction*' will normally be appropriate. (emphasis added)

Our response may be summarised as follows*:*

(1) The proposed guidance is insufficient to promote a more consistent approach to sentencing in these cases;

(2) The approach fails to reflect the significance of the absence of an actual victim by consigning this factor to Step 2 when it should play a role at Step 1.

The proposed guidance is very limited. There are two categories of case in which no harm arises: (A) because there was never a child victim but rather the police, and (B) because the offender desisted voluntarily before an actual victim was engaged.

Dealing first with (A), 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.

Consistency at sentencing – a key purpose of the guidelines – would be promoted if a more uniform reduction were applied to cases to reflect the absence of an actual victim. In *Bayliss*,[3] for example, the court reduced the starting point sentence by a full year, a reduction of 25%. This seems more than 'a small reduction'. Unfortunately, *Privett* is of little assistance in determining the appropriate magnitude of reduction. The judgment notes the specific reduction awarded in only one of the sentences appealed: The offender's sentence was reduced from six to five years. Reading across to sexual offences without a victim suggests that this circumstance cannot be satisfactorily addressed by a small reduction at Step 2.

Finally, the minimal reduction suggested in the proposed guideline seems at odds with some of the reductions awarded post-*Privett*. In *Reed*, the court noted that the trial Judge had moved from a starting point of five years down to three years 'to reflect the lack of harm and the fact that the child was fictional'.[4] This is a 40% reduction. The trial judge in *Bennett* had 'decided that six years would be the correct sentence if there had been a real victim and reduced it to four years because [the victim] was a fiction'.[5] Surely a reduction as large as one-third is inconsistent with the

[3] [2012] EWCA Crim 269.
[4] [2021] EWCA Crim 572, para 22.
[5] [2021] EWCA Crim 572

proposed guideline's recommendation for 'a small reduction'. If the Council is indeed attempting to 'reflect Court of Appeal case-law', then its proposed 'small reduction' in these cases fails to reflect some of the substantial reductions approved in recent cases. However, the Council ought surely to be seeking a structured and independent approach.

The Council's solution of deferring consideration of the absence of actual harm to Step 2 fails to reflect the significance of this factor, which should be considered at Step 1. It will be recalled that Council defined Step 1 factors as those which 'comprise the principal factual elements of the offence'.[6] The absence of a victim, the absence of any actual harm, is an important factual element.

Desisting Offenders

The second group (B) of 'no actual harm' contains cases where, for a variety of reasons, the offender voluntarily desisted before an actual victim was engaged. We make two proposals here.

First, we agree that these cases should attract a significantly greater reduction than the previous form of 'no actual harm' case (involving an undercover police officer or vigilante group). The offender's decision not to proceed with the offending behaviour demonstrates a significantly lower level of culpability which should be recognised by the guideline.

Second, the appropriate reduction in such cases will be fact-specific, but two factors must be taken into account – how late the change of mind was (how close the offender came to the full offence), and how voluntary the decision to desist was. The reduction should be greater if the change of mind was early and entirely self-willed.

In practice, most cases will fall into the category (A) where the offender has unwittingly been communicating with a police officer. The consultation document acknowledges that 'to a large degree the extent of the reduction … is left to the sentencer's discretion (p. 10). The whole point of the guidelines is to structure that discretion and not to leave individual sentencers to decide on the level of reduction. The consultation document states that 'the Council's aim is to ensure that all sentences are proportionate' (p. 6); simply leaving an issue to the sentencer's discretion, without more, cannot fulfil the Council's aim.

Finally, if the minimal reduction approach (at Step 2) for no victim cases is retained, Council will create a significant uplift resulting in longer custodial terms, as noted in the Council's resource assessment. An offender sentenced for a s. 10 offence and placed at Culpability A would see a five year starting point sentence reduced by a few months to reflect the Council's direction for courts to make a modest reduction at Step 2 of the guidelines methodology.

Question 2: Do you have any comments on the proposed amendments to the section 10 guideline?

Our response to Q1 applies equally to Q2 and beyond.

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[6] As noted by the Sentencing Council in its Burglary offences guideline. Council has dispensed with the definition in its more recent guidelines.

Question 3: Do you agree that these changes should be made to the guidelines for all the "causing or inciting" offences in the 2003 Act?

If these changes are made, they should be made to all 'causing or inciting' offences.

Question 4: Do you agree that the above text should be added as a drop-down in sex offence guidelines where the harm factor "severe psychological or physical harm" appears?

We have a reservation about the proposed drop-down. While the text states that the assessment of psychological harm 'may be assisted by expert evidence', we are not sure that the sentencer's 'observation of the victim whilst giving evidence' should be said to be sufficient for a judgment of psychological harm, severe or not. Perhaps there may be clear cases where such observation may be sufficient, but surely there should also be some cautionary words.

Question 9: Do you agree that the above amendments should be made to the guidance on historic sex offences to reflect better the principles set out by the Court of Appeal?

We do not agree with this element of the proposed guideline:

> Where there is an absence of further offending over a long period of time, especially combined with evidence of good character, this may be treated by the court as a mitigating factor. However, as with offences dealt with under the Sexual Offences Act 2003, previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less the weight which should normally be attributed to this factor. Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor.

We note – but lay aside – the position that sentencing an offender in 2022 for an offence committed, say in 1992, by applying current sentencing levels is retrofitting culpability inappropriately.[7] The statement noted above downplays the mitigation due to the passage of time. Courts should be encouraged to recognise that the imposition of a sentence on an offender sentenced decades after the crime will likely have disproportionate impact. In addition, if the offender has maintained a good character over decades, the usual limiting caveat about this source of mitigation should be less relevant.

Finally, as a matter of general principle, the role of good character should not be artificially circumscribed for particular offences. Previous good character is not limited in this way for more

[7] Assuming that a crime is considered more serious today (and the offender more culpable), applying contemporary sentencing levels over-punishes the offender. The harm of the offence for which the offender is liable is that recognised when the offence was committed – *as reflected in sentencing patterns at that time*. Applying current sentencing levels therefore should be subject to a 'correction' of some degree to reflect the disjuncture between sentencing at the time of the offence and sentencing levels at the time of conviction.

serious offences than sexual crimes, and so it is unprincipled to insert it into the sexual offences guidelines. For example, previous good character is not limited in the context of sentencing unlawful act manslaughter,[8] and nothing in Schedule 21 to the Sentencing Act 2020 restricts good character when a court determines the appropriate minimum term for murder. We agree that where previous good character has been used to facilitate the offence it should not mitigate and may well aggravate sentence.

We also advocate strengthening the language of para 9 of the guidance. The Council's proposal states:

"If the offender was very young and immature at the time of the offence, depending on the circumstances of the offence, this may significantly reduce the offender's culpability."

This language could be strengthened. We propose the following alternative wording:

"If the offender was young and immature at the time of the offence this would normally be regarded as personal mitigation which significantly reduces the offender's culpability. This is particularly true when many years have passed between the commission of the offence and the passing of sentence."

Question 10: Do you have any comments on the proposed harm factors?

The guideline proposes two harm levels, defined effectively as category 1 and *NOT* category 1. We suggest that some additional factors be included in the lower tier.

Question 11: Do you have any comments on the proposed culpability factors?

The same logic applies to culpability levels where we find culpability A and *NOT* culpability A. The combined effect of this structure, just two levels and multiple factors appearing in Level 1 harm and culpability is that most cases will be assigned to the higher category.

Question 12: Do you have any comments on the proposed sentence levels?

We do not agree that all forms of offending for an offence with a two year maximum should carry a starting point sentence of six months custody. The consequence is likely that all convictions will result in a sentence of imprisonment. We propose a three month starting point. This is much more realistic, given that around one-third of cases currently receive an suspended sentence order. There should be a link to the Council's *Imposition* guideline, thereby increasing the likelihood that courts may impose an suspended sentence order or a high-level community order where appropriate.

[8] Sentencing Council, *Manslaughter: Definitive Guideline* (2018), p. 7.

Question 13: Do you have comments on the proposed aggravating and mitigating factors?

We have no comments on the aggravating factors but propose an additional mitigating factor:

Single or transitory communication with the victim. The proposed guideline makes no reference to the duration or frequency of communications with the victim, yet this is a key factor relevant to both harm and culpability.

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