Sentencing Youths – Overarching Principles and Offence-Specific Guidelines for Sexual Offences and Robbery Consultation

Representations and Observations on the Consultation on behalf of the Criminal Bar Association, and the South Eastern Circuit of the Bar of England and Wales

1. Do you agree with the general principles for sentencing youths? Are there any additional principles that should be included?

We welcome the general principles as rehearsed within the draft guidelines which clearly emphasise an offender and not offence led assessment by the sentencing Court. However, we note that offender specific mitigation is considered formally only at "stage three" in the process; it should be stressed that its appearance at this later stage does not diminish the importance or the focus of the guideline which is offender led and not offence led.

We note however that the guidelines no longer refer to obligations arising from international conventions; we form the view that unless there are compelling arguments to the contrary that such a reference should remain as it emphasises the importance of obligations upon Courts sentencing young defendants.

It is important, as an additional principle, to consider and acknowledge that many youths have mental heath, learning disability and/or behavioural concerns, despite not being subject to any formal assessment or diagnosis. The Court should be alive to such issues and thus we would welcome and propose reference to the same at para 1.4 of the guidelines notwithstanding the clear reference to welfare at para 1.11.

Finally, in resect of general principles, we note that unlike the current guideline, there is no mention or guidance that a sentence need not be more severe simply because it follows reoffending. We form the view that the same should be reinforced in similar terms in the new guidelines. Anecdotal evidence from Junior Members of the Bar is that repeat offenders simply get their sentences increased without any formal assessment and thus explanation from the Court for the same. These are the

defendants most at risk of the court overlooking the principle that custody is the last resort.

2. Do you agree with the factors that should be taken into account when considering the welfare of a young person? Are there any additional factors that should be included?

We welcome the very comprehensive analysis of the welfare of young people within the Guidelines. However, there should be explicit reference to both diagnosed and undiagnosed mental health and learning disabilities. There have been routine cuts in public funding meaning that Statements of Educational Needs and the like are not always undertaken despite parental or teaching concerns. The Court should be alive to such issues when considering the welfare of youths.

3. Are you content that the guidance on grave crimes clearly and accurately reflects the relevant legislation and case law? If you disagree please state why.

We have reviewed the relevant case law including most notably those Judicial Review cases concerning the decision to commit youths to the Crown Court for Grave Crimes. We are content that the Guidelines accurately reflect the legislation and case law, save in two respects:

First, we form the view that cases should be only committed where the sentence would be substantially more than a two year Detention and Training Order. We note the Guidelines refers only to in excess of two years. Considering there remains a power to commit for sentence, we would encourage that the Guidelines suggest a sentence realistically in excess of two years by some margin if not using the current phrasing (see para 12.11 of current guidelines) of "substantially beyond the two year maximum".

Second, we have concerns in respect of the phrasing of part of paragraph 2.9,

"In most cases it is likely to be impossible to decide whether there is a real prospect that a sentence in excess of two years' detention will be imposed without knowing more about the facts of the case and the offender. In those circumstances the youth court should retain jurisdiction and commit for sentence if it is of the view, having heard more about the facts and the offender, that its powers of sentence are insufficient"

The same does not appear to faithfully reflect the authorities. To that end, it should only be where something material has changed in either learning more of the facts (through trial) or the defendant, that the Court considers it no longer has sufficient sentencing powers, should it commit to the Crown Court.

We do not consider that it is "likely to be impossible to decide" as to venue; the Court should make a formal determination on the facts that it has before it at the material time or request for further and better particulars from both the Crown and the Defence before making its determination. The same criticism extends to paragraph 2.7 and the assessment of dangerousness in that the Court should not be inviting a decision to be made cautiously on the lack of information, but rather should be seeking the material required to make the determination.

4. Does the allocation section include all the necessary considerations? Do you have any general observations on this section?

Yes. We have no observations save where otherwise commented herein.

5. Flow Charts

We are concerned that there are a number of issues with the flow charts in terms of correctly reflecting the legal position in relation to allocation. There is for example, a problem with dealing with youths and adults together as these provisions are not properly reflected in each step.

Further, see our answer in respect of question 4 above; for youths charged alongside another youth: if you follow the flow chart on p.18, one would necessarily be kept down in the YC for trial, the other committed up to CC for trial.

We raise an issue of the approach to be undertaken where there is a potential grave crime but that the youth is also charged with an adult? Which issue (or rather route for committal to the Crown Court) should be considered first by the Bench, and irrespective of their ruling on the first, do they nonetheless need to consider the second?

Further, whilst we consider that it would be unlikely for many Advocates to make use of the Flow Charts in court, they will no doubt prove useful to Magistrates as a checklist and aid-memoire. Moreover we are mindful that having such a complex area of law in pictorial form will positively facilitate conferences with young people and their families. We encourage the incorporation of Flow Charts within the Guidelines; we are of the opinion that in their present form, the Flow Charts have been over simplified, and would benefit from further refinement.

By way of example, we consider that the phrase within the flowchart *"should a sentence beyond two years be available (if found guilty)?"* does not reflect sufficiently the principle behind this question. We suggest alternatively *"Is it necessary and realistic that a sentence beyond two years be available (if found guilty)?"*

The guidelines should make plain that the Flow Charts are not a substitute for the guidance; they merely supplement the same.

6. Do you agree with the approach taken to the assessment of seriousness? Is the approach useful and does it provide you with greater structure when assessing seriousness?

We find favour with the approach, however consider that *"the principal aims of the youth justice system"* should appear first in the list of elements to consider at para 4.1. so that the Court firmly has the same in mind before considering more generally the seriousness of the offence.

We note that at para 4.7 the guideline states *"committal of the offence";* this might be confusing considering committal for sentence. As an alternative, we suggest it should read *"commission of the offence"*.

7. Do you agree with the aggravating and mitigating factors included? Please state which, if any, should be removed or added.

We do agree with the current list in principle and propose no deletions. We do however observe that *"restraint of the victim"* is too broad. Additionally, *"failure to comply with previous orders"* appears at odds with the wider principles of youth sentencing, including not least the change in emotional, physical and academic age since the date of the previous non-compliance of an order. Furthermore, it is widely

acknowledged that youths are less likely to comply with orders than adult defendants.

However, we would propose that *"isolated incident"* and *"lack of premeditation"* are included in the list of *"factors reducing seriousness"* together with *"lapse of time between offence and sentence"*, *"voluntary repatriation"*, *"limited/subordinate role in group or gang"*, *"involvement due to pressure or coercion"*, *"unsophisticated offence"*. These are routinely accepted in other guidelines.

We would further propose consideration as to including collateral impact of *"school exclusion / disciplinary"* arising from the same facts as the index offence being sentenced.

8. **Do you agree with the Council's approach to 'persistent offenders'? If you disagree, please give your reasons why.**

We criticise the approach encouraged/ permitted at paragraph 5.8:

""When a young offender is being sentenced in a single appearance for a series of separate, comparable offences committed over a short space of time then the court could justifiably consider the offender to be a 'persistent offender', despite the fact that there may be no previous findings of guilt"

We find such a conclusion unattractive because the youth in such a situation would have had no engagement with the Youth Offending Team, and therefore, would have received no assistance with addressing the root of his/her offending. To categorise him or her as persistent would be to depart from the sprit and aims of youth sentencing.

Further, we would propose that the word *"certainly"* is deleted from paragraph 5.8, and that custody as a last resort is given greater emphasis within the guidelines.

9. **Should there be any other considerations taken into account when assessing whether a young offender should be categorised as a 'persistent offender'**

We propose that at paragraph 5.7 the Court is invited to consider full or partial compliance with previous sentences in addition to the age of the defendant before

the Court as of the date of sentence, the date of the offence, and the date of any other matter being considered.

10. **Is the table helpful? Are you likely to use it as a quick reference tool?**

Yes. However, it is suggested that a further column setting out the long-term effects of the different sentences, as set out in the paragraph above the table in the consultation, should be incorporated, thereby providing an equally quick reference when considering the long-term effect of a particular sentence.

We would welcome within the table or elsewhere within the guidelines a summary as to when different offence/sentences becoming spent for young offenders. That would be most helpful to practitioners.

11. **Do you agree that the varying long-term effects of different sentences should be taken into consideration when determining the sentence?**

Yes. It is right that it is a consideration for the Sentencer within the overarching principles. We are of the view that it should be a material consideration given the International obligations and sentencing aims with regard to children and young people, compared to adult offenders.

12. **Is there sufficient guidance offered on the suitability of discretionary referral orders, in particular when they may no longer be the most suitable disposal for preventing re-offending?**

Yes, although we have concern that paragraph 5.20 may lead to confusion by reference to *"on a connected offence"*. This may lead to the conclusion/assumption that the offences should be connected to the first plea of guilty, whereas the guidelines refer to mixed pleas. We would propose that mixed pleas are addressed in clear terms by the guidelines in relation to referral orders.

13. **Is the additional detail regarding the requirements of a YRO helpful? If you are a Sentencer do you feel that this will make you better informed when considering the requirements proposed in youth sentencing reports?**

Yes, the additional detail is helpful. Although we question why unpaid work features only in a standard level order? Presumably it is still an option for enhanced

and intensive? Also, it would be helpful to include the more intensive orders next in line: ISSR, ISS with fostering.

We note that in the recent Community Sentencing Guidelines which were subject to recent consultation there was reference to ensuring that the requirements attached to an order "fit together" and are not too onerous. We would encourage similar wording/guidance being mirrored within these guidelines.

14. **Do you agree that, in light of current sentencing practice, the provisional starting point for 15-17 year olds compared to the appropriate adult sentence should be changed, to between one half and two thirds?**

We would strongly encourage that one-half is the adopted starting point with a continued reminder that custody is the last resort for young defendants, regardless of the seriousness of the offence. Moreover, it is of paramount importance that the ages indicated in the guidelines are not prescriptive, and the court is encouraged to consider the offender's emotional maturity as dictating the starting point.

The guidelines should emphasise in the table that the age indicated is not prescriptive, because the emotional age is key (eg. an emotionally immature 15 year old should have a starting point for under 15/14 years of age). Often judges have to be persuaded on the maturity vs chronological age point and the delays in bringing cases to conclusion often leads to crossing of a significant age threshold. Where a significant age threshold is crossed, our view is that the relevant age for sentencing purposes is the age as at the commission of the offence, with Court paying significant regard to the sentencing options available at the commission age.

15. **Is it helpful to have guidance on breach of all orders, rather than just guidance on breach of a YRO?**

Yes.

16. **Do you agree that this information is best placed as an appendix, rather than incorporated into the main body of the text?**

Yes.

17. **Reviewing the draft Overarching Principles guideline as a whole (Annex C) do you have any observations or comments about any parts of the guidelines?**

Para.2.16: Referral orders are not available in the Crown Court, and thus if a youth (having been committed up due to Homicide or other such grave crime being on the indictment) pleads guilty to a lesser offence on the indictment, and they have no previous findings of guilt against them, it is mandatory for them to receive a referral order, and this means they necessarily will be remitted back to the youth court. However, if a youth co-defendant is found guilty after trial of that lesser offence in the Crown Court, they can be sentenced there. This leads to a real potential of disparity in sentence. There is nothing in the flow charts to show what happens when youths are jointly charged with other youths but with differing crimes, causing one to go up to the Crown Court and the other to remain in the Youth Court.

We are not satisfied that paragraph 5.53 is clear in its current formulation. The length of a DTO should be reduced to reflect the time spent on remand (including curfew) or a non custodial sentence should be imposed after trial if prior to trial a sentence akin to the length of a DTO has already been served. To that end, it may be prudent to require a reduction as to time spent on remand as a formal Stage in the sentencing process.

Further at paragraph 5.3, we would propose the following paragraph is added: *"Where an offender convicted of an offence before the age of 18, but turns 18 before sentence, the offender is to be sentenced as if he were a youth and under 18"*.

18. **Do you find the short narrative on sentencing youths for sexual offences is helpful? If not please specify what you would add or remove and why.**

Yes, it is vital to promote the reasons for inappropriate sexual behaviour in youths.

It is suggested that the guideline should make clear that the *"Background factors"* listed are non-exhaustive and are simply examples of what factors should be considered.

19. **Do you agree with the harm and culpability factors proposed at step one which indicate a non-custodial sentence? If not, please specify which you would add or remove and why.**

We consider that again, Sentencers should be reminded in this section that a custodial sentence is the last resort and sentencing youths requires an individual-based approach. We see no reason why sexual offences should be treated any differently in this regard. To the contrary, community based sentences incorporating offence specific of a rehabilitative and therapeutic nature, is in our experience, more effective in meeting the aims of the Youth Sentencing regime.

We approve that the factors suggesting non-custodial disposal are framed in the alternative, not cumulative. We suggest the guideline should state *"or"* after the word pressure. We also suggest that the word *"should"* ought to replace the word *"may"* in indicating when a non-custodial sentence is appropriate.

In addition, we think these factors should include and refer to issues relevant to the offender and not simply to the offence. We are concerned that a culpability assessment must necessarily include factors relevant to the offender, such as their own vulnerability, dysfunctional background and previous sexual abuse.

20. **Do you agree with the harm and culpability factors proposed at step one which indicate that the starting point should be a custodial sentence? If not, please specify which you would add or remove and why.**

With the exception of the gravest offences, and in circumstances where the highest culpability attaches, we are of the view that custody should not be the starting point for children and young people. We are concerned that the Council should consider such a high default starting point.

We have concerns in relation to inclusion of a *"sustained incident"*. Our collective experience indicates that Sentencers often find an incident to be sustained if it is more than momentary or more than a very quick incident. Given the stated overlap between a sustained incident and psychological or physical harm to a victim we consider that inclusion of this factor may cause problems.

We also consider that further assistance with the meaning of *"significant"* physical or psychological harm may be justified. In our collective experience, Sentencers vary greatly in what they assess to be significant psychological harm. *"Significant injuries"* may not be sufficient in assisting a Sentencer as to this meaning.

We repeat our concerns that the harm and culpability sections do not make reference to any factors specific to the offender. That is inherent in a culpability assessment. We consider insufficient weight is given to that in this section.

21. **Do you agree with the aggravating factors for this offence? Please state which, if any, should be removed or added.**

We question whether the aggravating features detract from the individual based approach to sentencing of children and support a more general approach to sentencing.

We question whether it is appropriate to include *"grooming"* in this section. Should children be considered to be capable of grooming other children?

We question whether *"pregnancy or an STI"* as a consequence of the offence is something which should be an aggravating feature alone. The factual circumstances of the case may mean that this is something without the offender's knowledge or control. Therefore aggravating the offence on the basis of something for which there is no culpability is arguably unfair.

We note that as compared to the adult guideline, *"use of a weapon"* is not included here.

We question whether the factor *"a significant disparity of age between offender and victim"* is too stark. Maturity and cognitive development can vary vastly as amongst children and an age assessment alone is often too blunt a tool. We question whether a more individual focused approach should be incorporated here and elsewhere in this section.

We again raise that what *"significant"* means in the context of planning is often treated differently by sentences and further guidance on what constitutes *"significant"* planning would be of assistance.

22. **Should any of the factors be considered at step one? If so, why?**

We consider that there is no hard line between a number of the features in stage one and stage two. However, that the Council must find a helpful way of assisting Sentencers in assessing the initial harm and culpability of an offence. As discussed

above, we consider that more individual-based factors should be incorporated into stage one.

We consider that the factors at stage one of penetrative activity, coercion, exploitation and pressure and physical and psychological impact on the victim are perhaps the most obvious to be included in stage one, and not stage two.

23. **Are there any offence-specific mitigating factors that should be added?**

This is a difficult exercise. The Council makes clear the factors are non-exhaustive.

We do, however, see no reason why the same mitigating factors should not be included as for the general youth guideline. Please see our response above. This is particularly the case for factors such as serious medical condition affecting the offender or a significant time since the commission of the offence where this is not the fault of the offender.

24. **Are there any offender-specific mitigating factors that should be added?**

We consider that a factor linked to the offender's comprehension of the seriousness of his conduct should be included here. Further, other impacts on the offender for instance school exclusion.

We ask whether the mitigating feature *"strong prospect of rehabilitation"* should be included. We consider that the empirical and statistical studies in relation to children suggest that referral orders are the most effective orders for reducing reoffending and in addition, that a youth is more likely to reoffend once they have served a custodial sentence. Further, we ask whether it is appropriate for a Sentencer to assess whether there is a strong prospect of rehabilitation. Children are much more capable of change. We therefore consider this factor may not be necessary and may in fact suggest that where there isn't such a strong prospect, other, more severe sentences may be appropriate.

25. **Do you agree with the inclusion of this step? Please state what, if anything, should be removed or added?**

We wholeheartedly agree that it is vital that this step be included however, we disagree with its position in the structure of the sentencing exercise.

We have concerns that the offender-specific mitigating factors are considered at step three. We think this does not promote the purposes of youth sentencing adequately. In our collective experience, the most significant stage when a Sentencer assesses the appropriate disposal is stage one, namely the harm and culpability assessment. Once a Sentencer proceeds to aggravating and mitigating features, it appears to us that it is rare that *the nature of the disposal* will change albeit that the length of sentence may slightly alter.

In our collective experience, therefore, the offender-specific mitigating factors should be considered far earlier in the process as these factors are the most likely to have a bearing on whether the Sentencer considers a custodial or non-custodial sentence to be appropriate. We express concern that to place this at stage three is wrong and this assessment should go to the assessment of culpability and the relevant starting point.

26. **Do you consider that the sentence passed in case study A is proportionate? If you do not agree, please tell us what sentence should be passed and why.**

Yes. We agree. Although we consider that a lengthy conditional discharge given the remorse, previous good character and immediate apology to the victim should not be ruled out and this could be highlighted in the guidelines. The Sentencer should be reminded of the future impact on a child's future of convictions. This case indicates the type of isolated mistake that could have a disproportionate effect on a child's future.

27. **Do you consider that the sentence passed in case study B is proportionate? If you do not agree, please tell us what sentence should be passed and why.**

We believe that this case study highlights the problem with the stages in separating out stages one and three, and having a default starting point of custody. In our collective experience, once a Sentencer thinks that a custodial sentence is appropriate, we consider that persuading them to do otherwise is very difficult. We therefore have grave concerns that the first stage is to conclude a custodial sentence is appropriate and only later would this sentence be found to be inappropriate.

We think that the case study is too stark in this regard.

We do however, agree that a YRO would be the correct disposal.

We also consider that the case study does not prioritise sufficiently the impact on the offender's education given that in the past he has been convicted of relatively minor offences and he has only so far been subject to a referral order.

We again repeat our concerns that the stages should include time spent on remand and/or on electronically monitored curfew as assessing the appropriate sentence.

28. **Do you agree with the harm and culpability factors proposed at step one which indicate a non-custodial sentence? If not, please specify which you would add or remove and why.**

We consider that again, Sentencers should be reminded in this section that a custodial sentence is the last resort and sentencing youths requires an individual-based approach. We see no reason why sexual offences should be treated any differently in this regard.

We consider that the Council initially says that a non-custodial sentence *"may"* be appropriate but then later says *"should"*. We consider that the word *"should"* ought to replace the word *"may"*.

We consider that there is a significant gap between *"use of minimal force"* and *"use of very significant force"* and that anything short of very significant force, can and should tend towards the use of a non—custodial disposal. We therefore consider that the factors at stage one may be too narrow. The same applies for physical and psychological harm that is not significant.

In addition, we consider that voluntary reparation or resolution via other mechanisms that have taken place, (for instance school mediation or disciplinary proceedings), should be considered before assessing the seriousness of the offence. We consider that the factors indicating a non-custodial disposal may be too narrow at this stage although we recognise the difficulty for the Council in this regard.

We also consider that children often get into situations which have their origin as childish or school-yard disputes; an initial argument between children escalates to a threat, or the use of force, or the stealing of small items, such as wallets, mobile phones or other belongings. These offences often lead to a charge of robbery as the offence is often made out in law. We consider that these offences of robbery are ones which justify non-custodial sentences. The child offenders involved often need assistance in learning how to deal with consequential thinking in the context of

arguments between themselves and their child peers. We do not consider that the factors at stage one currently incorporate such a scenario.

The adult guidelines include factors such as performed limited function under direction, involvement through coercion, exploitation and pressure and mental disorder linked to the commission of the offence. We repeat our concern at questions 19 and 20 above which deal with incorporating issues relevant to the specific offender at an early stage of the sentencing process rather than at stage 3.

29. **Do you agree with the harm and culpability factors proposed at step one which indicate a custodial sentence? If not, please specify which you would add or remove and why.**

We express concern that the guideline may look as though it is in effect encouraging a custodial disposal in its phrasing of the stage one factors, particularly given how limited the non-custodial factors are.

We also repeat that we consider that further assistance with the meaning of *"significant"* physical or psychological harm may be justified. In our collective experience, Sentencers vary greatly in what they assess to be significant psychological harm. *"Significant injuries"* may not be sufficient in assisting a Sentencer as to this meaning.

We repeat our concerns that the harm and culpability sections do not make reference to any factors specific to the offender. That is inherent in a culpability assessment. We consider insufficient weight is given to that in this section.

Finally we note that the Council equates possession of a weapon with a level of planning that places the offender at the highest level of culpability. This is an overly simplistic analysis, and disregards the reality, for example, that many young BME groups routinely carry weapons in their particular peer environment without due consideration of the planning envisaged.

30. **Do you agree with the aggravating factors for this offence? Please state which, if any, should be removed or added.**

We repeat our request for further guidance regarding *"significant"* planning and its meaning.

31. **Should any of the factors be considered at step one? If so, why?**

We repeat the first paragraph of our response at question 22.

We consider that the Council has approached the aggravating factors in the robbery guideline proportionately in terms of separating stage one and stage two.

32. **Are there any mitigating factors that should be added?**

We highlight that the adult guidelines includes factors such as *"demonstration of steps having been taken to address addiction or offending behaviour", "mental disorder or learning disability", "serious medical condition"*. We recognise these are specific to an offender and come at stage 3 of the current guideline

We highlight again that we consider that stage 3 comes too late in the process.

33. **Do you consider that the sentence passed in case study C is proportionate? If you do not agree, please tell us what sentence should be passed and why.**

We consider that a second referral order may also be appropriate and this should be included. This is due to the offender based mitigation, particularly the motivation for the offence. Further, that the Council has indicated that previous convictions should not necessarily merit an increase in the disposal on their own. We therefore consider that a referral order should be presented as an alternative option. We would not want the case study to appear too rigid or punitive.

34. **Do you consider that the sentence passed in case study D is proportionate? If you do not agree, please tell us what sentence should be passed and why.**

There is a mistake in this case study. It says at stage 2 the offender has a previous conviction for robbery. We consider this would make a difference to the disposal.

We do not consider that the victims are particularly vulnerable. We consider that particular vulnerability should be reserved for a narrower category of victims. We recognise the vulnerability should be considered.

We consider the Council should express this as a borderline case, where the court may consider either the most intensive YRO with ISS or intensive fostering available or a DTO. We also consider the Council should incorporate an additional stage

namely – has any time been spent on remand or on electronically monitored curfew – as this could tip the balance between custody and a sentence in the community.

Our collective experience is that there is often confusion in relation to time spent on remand and time spent on electronically monitored curfew with practitioners and Sentencers assuming incorrectly or not being aware that such time does not count towards a custodial sentence. As such, we ask the Council to consider promoting this issue more in the guidelines and including a stage to reflect this.

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