



Criminal Law Solicitors' Association
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**CLSA RESPONSE TO THE CONSULTATION ON PROPOSED CHANGES TO
THE SENTENCING GUIDELINES FOR SEXUAL OFFENCES**

The Criminal Law Solicitors' Association consists of solicitors who specialise in practising criminal law.

Many members of the Criminal Law Solicitors' Association are higher courts advocates and have extensive experience in dealing with matters of this type both in Crown and Magistrates Court and in the Youth Court.

The proposals within the consultation for cases where no sexual activity has taken place are long overdue for review but should be dealt with by exercising some caution.

The relevant caselaw on sentencing is found in the case of *Privet* [2020] and deals with cases where there are no genuine child victims. It is not proposed to reiterate the contents of those guidelines, the case is well known.

There is a huge difference in harm but not culpability in inciting children to participate in sexual activity. It is the incitement which the Criminal Law Solicitors Association say is the Graver of the offences. There can be no harm on the basis that no victim existed.

Perhaps what is required is a separate section to deal with the issue of potential harm were there to be a genuine victim. There can be no harm if there is no victim but if the intended harm was to be substantial then this should be taken into account and there should be an adjustment in sentencing.

It is right that there always should be an adjustment for both aggravating and mitigating features and of course the list is not finite or comprehensive.

However, any sentence that is imposed. Should take into account that the child is not real.

The subjective issue of harm causes the Criminal Law Solicitors Association concerns, it is not an assessment which can properly be undertaken and should not be left to the Judge who sentences to ascribe an arbitrary harm to an offence which did not occur.

The issue of causing or inciting offences and the proposed amendments to the Section 10 guidelines are again in the view of the Criminal Law Solicitors Association long overdue. However, if no real sexual activity has taken place, often because the victim is non-existent, a guideline should exist where the offence is committed by the attempted incitement, and should be amended to reflect the principles set out in section 14 cases. In the case of *Reed* [2021] EWCA Crim 572, the procedure and protocol are adequately set out and should be adopted.

There must be a pragmatic and realistic approach to offences which could not ever have taken place. That should always allow for a downward assessment in any sentence.

We make the following specific comments in relation to specific questions asked in the consultation.

Question 4

The Criminal Law Solicitors' Association are concerned about the broad based construction as to what is harm and that there is no consistent approach. The sentencing judge is not able as either a psychologist or a psychiatrist to assess harm on the basis of evidence including the evidence of a victim personal statement or his or her observation of the victim.

Harm is a subjective issue which in the view of the criminal law solicitors Association should be objective as opposed to being a subjective and therefore the above text contained in the drop-down box should not be adopted.

Abuse of trust is a complex situation and the review of the definition of abuse of trust is long overdue. Trust can exist in many situations, but the situation must be factual in that there must be a connected trust as opposed to an arbitrary assumed trust for such an abuse of trust to take place. Consequently, where abuse of trust is raised then there should be appropriate guidelines and the text contained in the drop-down box seems proportionate and appropriate

The Criminal Law Solicitors Association are aware of the guidelines contained in the sentencing guidelines and principles for children and young persons which came into effect on the 1st of October 2019. It is right that those who are vulnerable for a number of factors have the vulnerabilities considered and taken into consideration when it comes to sentencing. Many young people on who commit sexual offences are themselves developing and for several reasons are immature have developmental issues that are not appropriate in adults. The contents contained in the drop-down box are therefore proportionate and appropriate.

Question 7

The Criminal Law Solicitors Association note the recommended amendment. If there is an offence committed within the jurisdiction of these courts then it should not matter where the victim is in the world. There should be no distinction drawn where the activity caused or incited involves remote abuse.

Question 8

Any sexual harm prevention order is necessary to prevent offences taking place or the risk of offences taking place, however, they must be proportionate, reasonable, and workable.

Sexual harm prevention orders have been in existence for a period of six years and if the offence is a specified offence the court can if it is proportionate and that the court is satisfied that it is proportionate to have such an order to prevent further offences taking place be imposed. In response to question 8, as long as the court in sentencing, is considering a sexual harm prevention order then the contents of the drop down box is appropriate and proportionate.

Question 9.

This is one of the most difficult issues to deal with. When sentencing takes place for a historic sexual offence the person is sentenced at the age of the plea, not the age of the offence, consequently, it must be right that this is reviewed and the age of the offender relevant. Therefore, the proposal outlined in the drop-down box is in the view of the Criminal Law Solicitors Association long overdue and this measure is welcomed.

Question 14

The Criminal Law Solicitors' Association are always concerned as to how harm can be positively identified. Categories one and two are sensible as far as the harm factors are concerned. However, some more appropriate guidance could and should be given where the offending is an attempt. Whilst there is a small difference between an attempt and the significant main offence there should be a distinction for the purposes of sentencing. Perhaps this is best dealt with in the issue of culpability.

However proposed culpability factors are proportionate in this day and age. It is proposed by the Criminal Law Solicitors' Association that culpability should also include the attempt as opposed to the substantive affect.

The sentencing of any offence is by no means an easy topic and the view upon society of offences at different times indicate a need to constantly review the sentence to be passed.