

# **RIGHTS OF WOMEN RESPONSE TO THE SENTENCING ADVISORY PANEL CONSULTATION PAPER ON *DOMESTIC VIOLENCE AND SENTENCING***

Rights of Women welcomes the publication of the Sentencing Advisory Panel consultation paper on domestic violence and sentencing.

Rights of Women is an industrial and provident society founded in 1975 to promote the interests of women in relation to the law. We work to attain justice and equality by informing, educating and empowering women on their legal rights. We run a free national confidential telephone legal advice line for women, specialising in family law issues, including domestic violence, separation and children issues. In the last quarter, 17% of calls to our advice line related to domestic violence. Rights of Women is a membership organisation and our other activities include producing publications, organising conferences, delivering training and undertaking policy and research work.

We intend to respond generally to the issues raised in the consultation paper and have not confined ourselves to answering the questions posed.

In line with the terminology used in the paper we use the term “victim” throughout our response although we recognise that women may prefer to use the term “survivor”. As a general policy we believe that women should be able to define themselves and have a definition respected by professionals with whom they come into contact.

## **Introduction**

### **What is domestic violence?**

As an organisation, Rights of Women strongly believe that in order for the issue of domestic violence to be dealt with consistently by all statutory and other organisations there needs to be a definition set out in statute.

We welcome the suggestion by the Home Secretary that the Panel follow the definition used by the CPS which incorporates not only the physical aspects of abuse but also the psychological, emotional and financial aspects.

Rights of Women endorses the definition of domestic violence used by the United Nations Special Rapporteur on Violence Against Women who cites the United Nations Declaration on the Elimination of Violence Against Women which in Article 2 defines domestic violence as encompassing but not being limited to “**physical, sexual, and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence**

**related to exploitation”**. The Special Rapporteur has further adopted an expansive definition of violence in the family which is intended to impact, directly and negatively, on women in the domestic sphere.

Whilst we acknowledge that the sentencing guidelines will not form part of legislation and that this is therefore outside the remit of the Panel, we would argue that an agreed and satisfactorily wide definition of domestic violence is required to ensure that criminal offences arising from incidents of domestic violence are recognised as such by all statutory agencies in the criminal justice system.

We would also suggest that an integral part of the implementation of the sentencing guidelines must include a nationally coordinated and compulsory domestic violence awareness training programme for not only judges and magistrates but also Police, probation officers, solicitors and barristers including those employed or instructed by the CPS.

### **Nature of domestic violence**

We are pleased that the Panel acknowledge in the paper that domestic violence “occurs across society, regardless of age, gender, race, sexuality, wealth and geography”.

We argue that every element of the sentencing guidelines produces as a result of this paper be equality proofed – that is tested to ensure they do not discriminate on the basis of gender, race, disability, sexuality, age, social or religious status. In relation to gender, we are pleased that the paper recognises the gendered nature of domestic violence which is predominantly perpetrated by men against women. We welcome the inclusion of same sex relationships in the paper (para 41) and the acknowledgement that the impact of domestic violence within same sex relationships will be different for the victim. We also welcome the inclusion of factors such as culture and religion, including “honour” crimes (para 43) as important when considering the vulnerability of the victim. We strongly believe that all these issues need to be set out clearly in the resulting guidelines.

Again we would advocate the development of an equality proofed, national training programme including, in particular but not exclusively, awareness raising about domestic violence within same sex relationships and the impact of race and culture on victims.

In relation to the criminal offences arising out of domestic violence, we believe that there needs to be clear guidance given not only to sentencers but to those involved earlier in the process (Police, CPS, probation officers, solicitors and barristers) to recognise particular incidents of domestic violence as offences. We would suggest that the Panel set out clearly in the guidelines what offences could

result from incidents of domestic violence including those that fall within a wider definition and that the guidelines are made available to all professionals involved in the criminal justice process.

## **THE PRESENT LAW**

### **Criminal law**

Whilst as an organisation, Rights of Women welcomed the criminalisation of harassment by the Protection From Harassment Act 1997 the anecdotal evidence of women callers to our advice line is that the criminal provisions of the Act are underused by Police and the courts. This would appear to be reflected in the statistics quoted by the paper, where only 1,586 restraining orders were made under the Act in 2002 as opposed to 22,053 non-molestation orders and 10,310 occupation orders in the civil courts in 2002 under the Family Law Act 1996 Part IV. There are, we acknowledge, however very many reasons why women do not wish their perpetrator dealt with within the criminal justice system. But we believe that this apparent under use of the Act may be due to a lack of understanding of the wider definition of domestic violence, including its psychological nature, and that this gives rise to a further need for training within the criminal justice system.

We raise concerns about the provisions of the Domestic Violence Crime and Victims Bill which would make the breach of an order under the Act a criminal offence(para 15). There appears to be confusion about how this would work in practice and we believe there needs to be an effective and sustainable framework for maximising women's safety whilst ensuring that they have choice. A very real issue raised by many callers to our advice line is the positive prosecution policy taken by the CPS in pursuing criminal proceedings against a perpetrator of domestic violence when the victim has made a withdrawal statement. Women report they feel bullied and threatened by the Police and CPS into giving evidence against their perpetrator where for many different reasons they have decided not to. We strongly believe that in making any decision in the criminal justice system from arrest to sentence the victim's views and safety are considered.

### **Civil law**

The view of victims that they do not wish to see their perpetrator sent to prison and that they ask for protection and not punishment (para 22) is also frequently expressed by callers to our advice line. For this reason again we would be concerned about breaches of Family Law Act orders being dealt with in the criminal justice system without, firstly consultation with the victim and consideration of the impact on her of the matter proceeding in the criminal justice system and secondly, adequate training on domestic violence to all professionals involved in the process.

We would strongly agree that in order to maximise a woman's safety there needs to be an adequate mechanism for sharing of information between the civil and criminal courts coming into contact with a victim. We would argue that, although it does not form part of his criminal record, the criminal court is, as a matter of course, made aware of any civil court orders made under either the Family Law Act 1996 Part IV of the Protection From Harassment Act 1997 when considering a perpetrator's sentence for domestic violence related offences. From the evidence of callers to our advice line this is currently not the case, resulting in the courts able to consider only part of the whole history of domestic violence.

## **SENTENCING DOMESTIC VIOLENCE**

### **Sentencing patterns**

The results of the 2004 Lewis study (para 28) would support the views of many of our advice line callers that perpetrator programmes are presently failing to deal with recidivism in domestic violence cases. It is clear from the study's statistics that the programmes and current sentencing is neither breaking the cycle of violence nor acting as a deterrent.

We would urge the Panel to ensure that adequate investigation is carried out into the effectiveness of any proposed sentencing in domestic violence cases to ensure that adequate and ongoing protection is afforded to the victim.

### **Current sentencing approach**

We would agree that the current lower sentences for domestic assault reflect charge selection and negotiation and would urge the development of a national domestic violence training programme, enabling all involved in the criminal justice system to have a high level of awareness of domestic violence and its impact on victims. Again we would suggest that the resulting guidelines be made available to those making decisions earlier in the criminal justice process.

In cases where victims withdraw support for prosecution we would urge that before a decision is made about whether to proceed with the case, her views and her safety are considered alongside any public interest considerations. This will require an awareness of the impact of domestic violence on the victim in her own very individual circumstances.

## **Factors influencing sentencing**

### **Relationship between victim and offender**

- (I) Do you consider that where a victim and offender wish to continue their relationship this should influence the type of sentence passed? Why? Should the principle be the same in magistrates courts and the Crown Court?**

We firmly believe that a victim's wish to continue in a relationship with her perpetrator must be taken into account when sentence is passed. The magistrates or judge needs to consider the impact that the sentence will have on the victim as she continues her relationship with him. There needs to be a heightened awareness amongst sentencers of the impact of domestic violence on the victim, her reasons for reconciling and the possible repercussions on her of any sentence. Fear of possible repercussions is very often cited by callers to our advice line as reason for not embarking on criminal proceedings or withdrawing them once embarked upon.

We would ask how the Panel intends to assess the effectiveness of the Integrated Domestic Abuse Programme in light of the apparent inability of previous such programmes to tackle the recidivism and to ensure the safety of women whether or not they remain in the relationship? We would suggest that there needs to be clear performance indicators set as well as a process of regular monitoring and evaluation.

We believe that in order to ensure that sentencing in domestic violence cases is achieving its goals of reform and rehabilitation of offenders the principles set out in the resulting guidelines should be the same in all levels of courts.

### **Wishes of the victim**

- (II) Do you agree or disagree that a custodial sentence may be inappropriate in some cases where the burden of sentence may fall indirectly upon the victim (or other family members)? Why?**

The financial implications of any action taken against their perpetrator are something which callers to our advice line tell us concern them a great deal. However this should not be the court's primary consideration when making a decision about sentence. It is not the role of the criminal justice system to make

judgments of this nature. Again it is important that the courts have a unified process for gathering the views of the victim and that her very individual circumstances are considered in light of her need for ongoing protection.

**(III) How much weight do you think should be given to the views of the victim when passing sentence? Why?**

We would agree that it is right that sentence is a matter for the court and not the victim and that positive action is an important part of raising awareness amongst domestic violence perpetrators that such behaviour will not be tolerated. However, in cases involving domestic violence this needs to be carefully balanced against the ongoing safety of the victim. Research carried out by Women's Aid and published in "Routes to Safety" (Humphries C and Thiara R (2002) showed that 76% of women surveyed experienced post separation violence. The court should carefully consider the possible impact on the victim of any available sentence, in conjunction with her wishes and feelings, before passing sentence. Wherever possible the court should ensure that protective measures such as restraining orders are put in place to give the victim additional protection.

**Abuse of position**

- (IV) Do you agree or disagree that where it is clear that there is an abuse of power in the relationship between victim and offender the offence should be considered to be more serious? Why?**
- (V) Do you agree or disagree with the view that offences should be treated as more serious given the element of abuse of trust arising from the relationship between offender and victim? Why?**
- (VI) Do you agree or disagree that where victims are faced with cultural barriers and language barriers they are more vulnerable and this should make an offence more serious? Why?**

We believe that the overall impact of the domestic violence on the victim needs to be looked at in each individual case. Elements of abuse of power and/or abuse of trust will undoubtedly contribute to the vulnerability of the victim and should be dealt with as an aggravating feature as with other offences. Again there needs to be a greater awareness of the nature of domestic violence and we would encourage a training approach based on the power and control wheel of the Duluth Model (Education Groups for Men Who Batter, Ellen Pence and Michael Paymar (1993)). We would suggest that the resulting guidelines include directions to sentencers that a victim's vulnerability be dealt with as an aggravating feature in the same way as it would with an elderly, child, disabled or mentally ill victim. When considering the vulnerability of the victim it is crucial that the sentencer pay special regard to factors including cultural and language

barriers. It is important to remember however that there may be other factors in an individual victim's circumstances that make her vulnerable.

### **Impact on children**

**(VII) Do you agree that in cases where children are exposed to an offence (either directly or indirectly) this increases the seriousness of the offence? Why?**

It is clear from the research quoted in the paper and endorsed by the family courts that there is a significant impact on children of being aware of domestic violence. In recognition of this the definition of significant harm set out in the Children Act 1989 has been amended by the Adoption and Children Act 2002 to include harm suffered from seeing or hearing the ill treatment of another. It is important that the criminal justice system joins this unified approach and includes the presence of children in the household as an aggravating feature.

**(VIII) Do you agree that these aggravating factors make an offence more serious? Are there any additional factors that you think should be considered? If so, how might they make an offence more serious?**

We would agree that all the factors listed should be set out in the resulting guidelines. Where the court considers the proved history of violence or threats we believe that it is vital that the court includes consideration of civil orders made, previous reports to the Police (which may or may not have resulted in conviction) and the involvement of domestic violence or other support organisations. When considering the repetition of the violence or threats, again the court should be looking wider than criminal convictions including those factors set out above. We would also suggest that the guidelines set out that psychological injury may arise from the impact of historical domestic violence including persistent harassment, abuse of power and abuse of trust.

We propose that the guidelines include the vulnerability of the victim as an aggravating factor, including vulnerability as a result of cultural or language barriers, age, disability or mental illness (this list is not exhaustive).

**(IX) Do you agree or disagree that an offender's good character should not be seen as a mitigating feature in domestic violence cases? Why?**

From a human rights perspective we do not believe that cases involving domestic violence should be dealt with differently to other offences. Where good character is a mitigating factor for an offence carried out in a domestic environment, it should also be in a domestic violence case. However, the court should look not

only to previous convictions but also to the history of incidents that may not have been brought to the attention of the courts or the Police as outlined above in our response to (VIII).

**(X) Do you know of any reason why the guidelines for breach of non-molestation orders should not be the same as those for restraining orders? If so, what are these?**

Again, we believe that the civil and criminal courts need to send a unified message to perpetrators of domestic violence and that breaches are dealt with the same gravity. However, this will always need to be balanced against the views of the victim and the likely impact on her of any sentence.

**(XI) Do you agree or disagree that a breach of a protective order such as a restraining order and non-molestation order is more serious than a breach of a conditional discharge? Why?**

This would depend upon the circumstances of the breach of conditional discharge. The breach may be for another offence not related to domestic violence such as theft. A conditional discharge is, we understand, a warning to the offender as to his future behaviour. A restraining order or non-molestation order is intended to protect the safety of the victim. However, if the breach of conditional discharge is for a domestic violence related offence, it should be treated with the same weight, again to provide a unified approach by the courts against domestic violence.

**(XII) Do you agree or disagree that these are relevant factors when assessing the seriousness of a breach? Are there any other factors that should also be considered? Why?**

We would agree that all the factors set out in paragraph 57 should form part of the guidelines. Where that court considers the seriousness of the defendant's conduct we would suggest that the sentencer is asked to consider the psychological impact of the behaviour on the victim. It may be that in the light of the history of domestic violence seemingly less serious behaviour has a cumulative effect. We would also suggest that where protection is considered the court also addresses the issue of future protection. As in our answer to (VIII) we would propose that the guidelines also address the vulnerability of the victim.

**(XIII) Do you agree or disagree that the starting point for a breach of order should be custody if it involves actual violence? Why?**

**(XIV) Are there any other circumstances when you think custody should be considered?**

We would be concerned that such an approach may diminish the seriousness of acts of domestic violence which fall within the wider definition, such as

psychological and emotional abuse, and which can have as serious an impact on a victim's health as physical violence. We would hope that the Panel will address this in the resulting guidelines. We agree that custody should be the starting point for incidents of violence but that in any decision about appropriate sentence the victim's views and the likely impact on her would be considered for reasons we have already set out above.

**(XV) In what way (if at all) should the nature of the original conduct/offence influence the sentence given for a breach of order? Why?**

We believe that given the nature of domestic violence, any breach of an order needs to be considered in the context of its history before either the civil or criminal courts. In this way the court can more adequately assess the victim's views and the future implications for her safety.

**(XVI) What are the relevant factors in balancing the goal of future compliance with punishment for breach of an order of the court?**

**(XVII) Should this principle be applied generally to breaches of restraining order and non-molestation orders?**

We believe that there needs to be a very careful balance between the importance of sending out a clear message to perpetrators that domestic violence will not be tolerated and the importance of protecting a woman's safety. Presently callers to our advice line tell us that where the civil courts do not take tough enough action against their perpetrator for breach, the order is an empty threat. We firmly believe that breaches of civil or criminal orders should be dealt with in the same way for this reason.

**(XVIII) The Panel's tentative view is that these starting points in paragraph 65 should be adopted in cases of breach of restraining orders and non-molestation orders in domestic cases. Do you agree or disagree with this approach? Why?**

Again we would be concerned if the guidelines failed to acknowledge the significant impact on women of the non physical aspects of domestic violence and are therefore concerned about the inclusion of terms such as "no/minimal direct contact". We would also ask how the effect on the victim is to be assessed and would advocate the use of expert evidence from professionals in the area of domestic violence. These issues need to be properly addressed in the guidelines.

**(XIX) Do you agree that these features aggravate the seriousness of the offence? Are there any other factors that should be considered? Why?**

We believe that all the factors previously set out in paragraphs 46 and 57 should be considered aggravating features in the guidelines and that as set out in our responses to (VIII) and (XII) the vulnerability of the victim should be considered equally.

Rights of Women, October 2004

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