

**Rights of Women
Response to the Sentencing Guidelines Council
Consultation on Draft Guidelines
'Overarching Principles: Domestic Violence'**

BACKGROUND

Rights of Women is an Industrial and Provident Society, which was founded in 1975 to promote the interests of women in relation to the law. Rights of Women works to attain justice and equality by informing, educating and empowering women on their legal rights.

Rights of Women runs two national confidential advice lines for women (provided women lawyers) providing free legal advice on general issues specialising in family law issues, such as domestic violence, and a dedicated sexual violence advice line.¹

As a feminist organisation, providing services to women, Rights of Women welcomes the opportunity to respond to this consultation.

PART A: DEFINING DOMESTIC VIOLENCE

Research at the national and international level has consistently shown that domestic violence is a form of gender specific violence. We therefore believe that domestic violence should be considered as forming part of the continuum of violence against women.

Rights of Women is concerned that all violence against women is addressed appropriately and effectively. Violence against women is a violation of internationally guaranteed human rights, rights which the UK has signed up to (such as the UN Convention on the Elimination of All Forms of Discrimination Against Women and the Beijing Platform for Action), and which are included in UK law under the Human Rights Act 1998.

As the consultation notes, there is no statutory definition of domestic violence in English law. We welcome the Sentencing Guidelines Council's (SGC) use of a definition of domestic violence which encompasses psychological, physical,

¹ Rights of Women is a membership organisation and our activities include producing publications, organising conferences and training courses and undertaking policy and research work. We run two national confidential legal advice lines for women (provided women lawyers), one general advice line specialising in family law issues, including domestic violence and another on criminal law and procedures in relation to sexual violence. For more information see our website www.rightsofwomen.org.uk

sexual, financial and emotional abuse. This reflects the lived experience of what constitutes domestic violence for many women.

However we are concerned that the SGC has reduced its understanding of domestic violence to single incidents, and the apparent lack of appreciation of the controlling and coercive context in which domestic violence takes place. In our experience, and that of others, it is not the norm for domestic violence to be a one-off isolated incident. Violence against women, including domestic violence, is characterised by the gendered nature of power and control. In this regard we would like to express our objection to the inclusion of the example in paragraph 3 which states that the SGC's definition of domestic violence could include two brothers. It must be made absolutely clear that violence which occurs within the domestic sphere, such as between brothers in the home, is not the same as domestic violence, which is a gender-specific form of violence.

Rights of Women recommends that the SGC definition of domestic violence be amended to include recognition of the gendered nature of this violence and the controlling and coercive context in which it occurs. It is crucial that the courts understand violence against women and its impact when sentencing perpetrators of domestic violence. The issues under discussion in the consultation have a profound impact on the way violence against women is addressed both in the courts and in wider society.

We would like to take this opportunity to reiterate our call on the Government to enact a statutory definition of violence against women which includes domestic violence. In this regard we strongly urge the adoption of the definition of violence against women contained within the United Nations Declaration on the Elimination of Violence against Women, under which “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’ (Article 1) (see Further Annex I, below). In the alternative, at the very least, Rights of Women calls for a general definition of domestic violence, as has been done in New Zealand and Australian jurisdictions, and we suggest a formulation along the lines of section 3 of the New Zealand Domestic Violence Act 1995 (See Annex II, below)

PART B: ASSESSING SERIOUSNESS

Rights of Women welcomes the SGC acknowledgement that offences committed in the domestic context should be treated no less seriously than those committed in the non-domestic context.

Rights of Women is, however, concerned as to how it will be ensured that the judiciary is aware of this assessment of seriousness. We recommend that once

the guidelines are finalised a comprehensive judicial education programme is established to accompany their implementation. Such training should include awareness of the 'starting point' for sentencing domestic violence offences as outlined in the consultation, in addition to raising knowledge levels about domestic violence and aggravating factors. Rights of Women believe it is essential that such training be delivered by or includes the contributions of women's organisations that have a experience and knowledge of addressing domestic violence.

PART C: AGGRAVATING AND MITIGATING FACTORS

Aggravating factors

(i) Abuse of trust and power: Rights of Women welcome the SGC inclusion of abuse of trust and power. However we are concerned that SCG considers these factors to not be significant in cases where the relationship between the perpetrator and victim has finished. This is inconsistent with research which demonstrates that separation from an abuser is one of the most significant risk factors for domestic violence. This has been recognised by both the Metropolitan Police Service and the Association of Chief Polices Officers, whose risk management policies in relation to domestic violence flag up the risk associated with separation.

(ii) Victim's vulnerability: Rights of Women welcome's the SGC acknowledgement of the victim's vulnerability on cultural, religious, language and other reasons. We believe it would be useful to articulate a longer list of vulnerabilities in order to avoid confusion or at the very least to note that this list is not exhaustive. Rights of Women believes that other equalities issues such as disability should be included in the vulnerabilities list. In addition to these equalities areas, Rights of Women strongly recommends that the SGC guidelines acknowledge the vulnerability that can exist through having experienced domestic violence.

(iii) Impact on children: Rights of Women welcome's the SGC's inclusion of the witnessing of violence by children as an aggregating factor. We do, however, have some concerns as to how this will be determined in practice. It is likely that there will be cases where the children will have to undergo some form of assessment in order to determine whether children were exposed to domestic violence and its impact. We are concerned as to how the criminal courts would undertake such assessments, given that they lack the dedicated services which the family courts have for such tasks (e.g. CAFCASS). There must be clear and ethical guidance on how the impact on children will be determined.

(iv) Contact arrangements: The manipulation of contact orders by perpetrators of domestic violence is an issue frequently raised by callers to our advice line.

Rights of Women therefore welcome's the SGC's inclusion of the perpetrator's exploitation of contact arrangements as an aggravating factor. However we have concerns over how this will operate in practice. Contact arrangements are made through the civil courts, and there is no formal mechanism for communication between these courts and those in the criminal justice system. If, however, effective communication can be established for the purposes of sentencing, we would also recommend that the criminal courts be made aware of other civil orders which the defendant may be subject to such as non-molestation orders and/or occupation orders (see point vi, below).

(v) Proven history of violence or abuse in the domestic setting: As we have noted domestic violence is rarely isolated, but rather takes place in a controlling, coercive context. Rights of Women therefore welcome's the SGC recognition of cumulative violent incidents or threats as an aggravating factor. However we require further clarification of what constitutes a 'proven' history. Rights of Women recommends that the SGC outline the types of evidence which can be submitted to show this history. Given that research has shown that on average women are attacked 35 times before they seek help from the criminal justice system against the perpetrators of domestic violence, it is clearly not enough to rely only on evidence of state bodies such as the police (e.g. for arrests) or to look only at prior convictions. Rights of Women recommends that the SGC define 'proven' to include evidence from women's groups providing services and support to the victim, and evidence from others such as health professionals.

(vi) History of disobedience of court orders: Rights of Women welcome's the SGC's inclusion of breach of civil orders as an aggregating factor. However we are not convinced as to how this will operate in practice. There is no formal mechanism for communication between the civil courts and the criminal courts. Indeed, the criminalisation of breach of a civil order, as contained in the Domestic Violence, Crime and Victims Act 2004, has yet to become law. We therefore remain concerned about how this issue will be dealt with.

(vii) Victim forced to leave home: Rights of Women welcome's the SGC's inclusion of the victim's leaving of the home as an aggregating factor. We also believe that this should be extended to consideration of whether the victim has had to take out non-molestation and/or occupation orders, and the whether she has had to have 'sanctuary' measures installed within the home.

Mitigating Factors

(i) Positive good character: Rights of Women welcome's the SGC's acknowledgement that perpetrators of domestic violence often have 'two persona'. We find it difficult to reconcile this with the SGC position that good character is relevant where the court is satisfied that the incident was a one-off. As we note above, domestic violence is rarely about an isolated incident, and more often occurs in the context of coercion and control. In addition, given the

SGC's acknowledgement on 'two persona', there is the clear potential for this mitigating factor to be manipulated. The court would be better placed to consider the victim's safety rather than the good character of the perpetrator.

(ii) History of the relationship: Given the nature of domestic violence, we welcome the SGC's assertion that the history of the relationship will often be relevant in assessing the gravity of the offence. However, we question why this issue has been placed only in the mitigating factors section. Given that the guidelines are dealing with domestic violence the history of the relationship should also be an aggravating factor, where appropriate. We also recommend that there needs to be clarification of how 'history of the relationship' with interact with the 'proven history of violence or threats'. Clearly, domestic violence is relevant to both, but the 'proven' requirement, may in practice make it more difficult for women to demonstrate their history of the relationship.

Rights of Women are also concerned at the reference to provocation by the victim. The reliance on provocation fails to place responsibility for domestic violence on the perpetrator, and reinforces the feelings of guilt and self-blame felt by many women who experience domestic violence. In addition, the concept of provocation in the English legal system has a complicated and discriminatory history. For example, to allow mitigation on the basis of provocation constituted by alleged infidelity or by the victim's leaving the perpetrator perpetuates the inequality which allows domestic violence to continue unpunished.

PART D: OTHER FACTORS INFLUENCING SENTENCING

(i) Wishes of the victim: Rights of Women acknowledge that the impact of the wishes of the victim on the perpetrator's sentence can be a difficult area. We welcome the SGC recognition of the various reasons why the wishes of the victim of domestic violence should not inform the sentence. We also acknowledge that there are instances where a victim may express a 'genuine' wish that they wish that the court show mitigation. However, it is our position that the sentence for all criminal offences should be determined by reference to the seriousness of the crime. The wishes of the victim in other crimes are not generally permitted for mitigation of the crime. We believe that there is a real risk that by allowing the victim to make statements for the purposes of mitigation will place a heavy burden on her, and provide an additional area for others (including the perpetrator or family members) to exert undue pressure on her. In this context it will be very difficult for the court to ever be confident that a victim's wishes are genuinely expressed.

(ii) Interests of the children: Rights of Women is concerned at the SGC's inclusion of the 'best interests of the child' concept in the draft guidance. This is a concept of civil law which the family law courts have developed. We have concerns about how the criminal law courts would assess the best interests of

the child, given that it lacks the specialist services of the family courts (e.g. CAFCASS). We are also concerned that the SGC has not, in drawing on the best interest concept, also highlighted section 120 Adoption and Children Act 2002, which defines harm against children as including the witnessing of violence. As with the victims of domestic violence, we believe that relying on the concept of best interests may place an undue burden and feeling of responsibility on the child, and presents an avenue for possible manipulation by the perpetrator or others.

PART E: FACTORS TO TAKE INTO CONSIDERATION

Rights of Women is concerned by references to remorse and non-custodial sentences. We believe that allowing the perpetrator's remorse to influence sentencing options sending a worrying message about the seriousness with which domestic violence is treated. We believe that it is not enough that offender expresses or is able to convince the court of their remorse. Rights of Women strongly believes that where an offence meets the custodial threshold, neither the relationship between the victim and the perpetrator nor the expression of remorse, should be used to downgrade the sentence. Further, given the reference to the 'two persona' of perpetrators earlier in the draft guidelines, we are also not convinced as to how the court will be satisfied of 'genuine' remorse. We have concerns about how judges would be trained to assess 'genuine' remorse, and reiterate our earlier position that once the guidelines are finalised they must be accompanied by judicial education.

CONCLUSION

Rights of Women urges the Sentencing Guidelines Council to recommend the changes outlined in our response to help ensure appropriate punishment for the perpetrators of domestic violence and justice for victims.

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Annex I

UN Declaration on Violence Against Women

Article 2 of the Declaration further states that violence against women encompasses, but is not limited to:

'(a) 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;

- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.'

Annex II

Section 3 Domestic Violence Act 1995, New Zealand:

'(1)In this Act, "domestic violence", in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.

(2)In this section, "violence" means—

(a)Physical abuse:

(b)Sexual abuse:

(c)Psychological abuse, including, but not limited to,—

(i)Intimidation:

(ii)Harassment:

(iii)Damage to property:

(iv)Threats of physical abuse, sexual abuse, or psychological abuse:

(v)In relation to a child, abuse of the kind set out in subsection (3) of this section.

(3)Without limiting subsection (2)(c) of this section, a person psychologically abuses a child if that person—

(a)Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or

(b)Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;— but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.

(4)Without limiting subsection (2) of this section,—

(a)A single act may amount to abuse for the purposes of that subsection:

(b)A number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

(5)Behaviour may be psychological abuse for the purposes of subsection (2)(c) of this section which does not involve actual or threatened physical or sexual abuse.'