Sentencing Council

CONSULTATION RESPONSE

Sexual Offences

Response to Consultation

December 2013

Contents

Foreword

When the Sentencing Council began revising and updating the guidelines on sentencing sexual offences in May 2011, the sensitivity and complexity of this area of sentencing was apparent. It was also clear that the nature and reporting by victims of sexual offending was evolving and the extent of the impact of such offences has been increasingly highlighted. It continued to evolve during our development of the guidelines, as shown in the past year by a wave of high-profile cases which have further evidenced the very varied nature of sexual offending. The Council has sought to make the guidelines flexible enough to accommodate such developments and assist judges in reflecting the core aspects of harm and culpability in sentence levels.

This is the largest and most complex guideline the Council has completed to date, covering over 50 sexual offences. Setting out the Council's thinking across this very wide range of offences led to a significant consultation document, and I acknowledge that its sheer size made it a challenge for those responding. Nonetheless, the Council has been hugely impressed by the time, effort and consideration that went into the responses we received.

What has been most important is that where respondents disagreed with our proposals, they provided reasoned argument as to why and suggested alternative ways to deal with the issue. The Council has maintained its overall approach, but the responses have been of great assistance in honing the guidelines to make them as clear and transparent as possible. A number of changes that have been made as a result of the responses received are set out in detail in this response paper.

I would especially like to thank all those from non-governmental organisations, the police, the Crown Prosecution Service (CPS) and members of the judiciary who gave their time during the development of the guidelines both in advance of, and during, the consultation period. If it were not for their openness, frankness and generosity in sharing their experiences, our work would have been made even more difficult. I would also like to thank Professor Alisdair Gillespie and His Honour Judge Rook QC, both of whom have provided the Council with the benefit of their very considerable experience in this field.

The Rt Hon Lord Justice Leveson
Chairman of the Sentencing Council to
3 November 2013

As the new Chairman and an existing member of the Council who has been involved in the development of these guidelines from the outset, I know the debt of gratitude that is owed to Lord Justice Leveson for his leadership of the Council and in setting the tone for the very substantial programme of work which we have undertaken. I am confident that the new guidelines will reflect more effectively the impact of these offences on victims and will provide clarity for sentencers, victims and the public about the approach to sentencing in this difficult and sensitive area of offending. I hope that the content of this response document demonstrates how valuable the consultation process is to the Council and how carefully we consider the responses made.

The Rt Hon Lord Justice Treacy
Chairman of the Sentencing Council

Chapter one Introduction

"I must first congratulate you [Lord Justice Leveson] and the Sentencing Council for leading the development of this comprehensive and welcome piece of guidance. In my opinion this guidance has the potential to reach much further than its original intent of delivering tougher and more appropriate sentences.... It isn't often that sentencing guidelines are capable of changing the public perception of an offence but these draft guidelines might just help to do that."
Vera Baird QC, Police and Crime Commissioner for Northumbria

In December 2012, in accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council published a consultation on draft guidelines on sentencing sexual offences. The consultation, which tackled 54 separate offences in 33 guidelines, was the culmination of over a year's work engaging with sentencers, non-governmental organisations (NGOs), law enforcement agencies, prosecutors, lawyers and academics specialising in this area. Their generosity in sharing time and expertise was essential in shaping the proposals in the consultation.

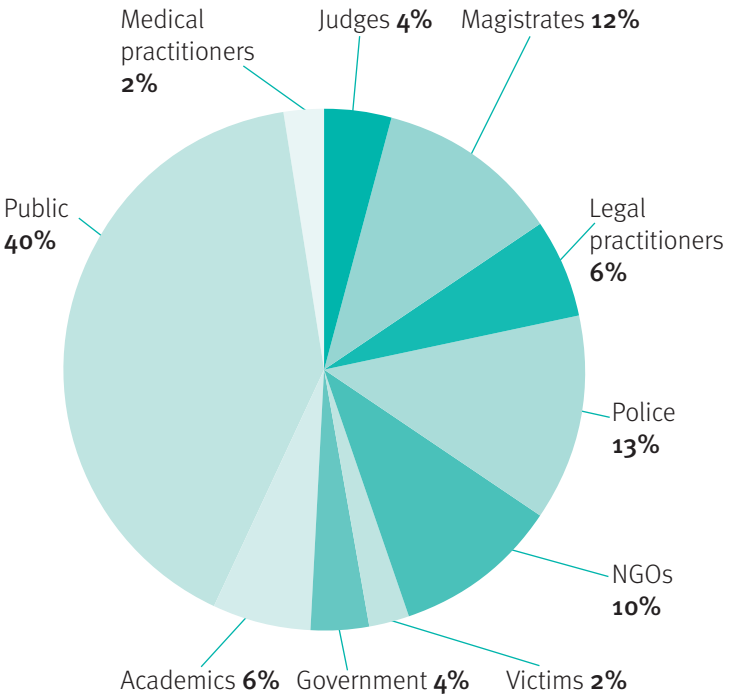
The consultation period ran for 14 weeks, during which Council members and officials from the Office of the Sentencing Council ran a number of consultation events:

23 January 2013	General approach, rape and assault	Legal practitioners	London
14 February 2013	Indecent images of children, rape	Police representatives from numerous forces and CEOP	London
28 February 2013	Child victims	Barnardo's, NSPCC, Internet Watch Foundation	London
28 February 2013	Rape and assault	Rape Crisis, Rights of Women	London
6 March 2013	Mental disorder offences	Respond, Ann Craft Trust, Mencap, The Havens	London
7 March 2013	Rape, sexual activity with a child, indecent images of children	Police, legal practitioners, probation, academics	Lancaster
7 March 2013	Indecent images of children, sexual assault, exposure	Magistrates	Birmingham

These events enabled specific issues to be examined in detail and explored any perceived problems with the proposals. Those who attended the sessions came willing to engage, talk frankly about their experience of working in this field and to offer constructive comments. The Council is grateful to all who gave up time to attend the events and especially to those who travelled some distance to offer their views.

In total, 165 responses were received; of these 69 were sent in as letters or emails whilst 96 responded to the online consultation. Respondents were drawn from a variety of backgrounds including judges, magistrates, practitioners, the police, NGOs and victims of sexual offending. The breakdown of responses is shown here:

A further breakdown of organisations who responded is found at Annex A.



Breakdown of respondents by type

Category	Number of responses
Judges	7
Magistrates	19
Legal practitioners	10
Police	21
NGOs	17
Victims	4
Government	6
Academics	10
Public	67
Medical practitioners	4
Total	**165**

Research

Throughout the development and consultation process the Council has used its team of social researchers to commission and conduct detailed research to help inform the proposals including:

- an email survey of Crown Court judges to establish how they would sentence certain sexual offences using the current SGC guidelines (January/February 2012);
- externally commissioned research on the attitudes of the public and victims/survivors to sentencing sexual offenders (carried out by Natcen Social Research and published March 2012);
- content analysis of a number of sentencing transcripts for cases involving rape of a child under 13 (March/April 2012);
- qualitative research to explore judicial views on an early draft of revised guidelines and to identify any behavioural implications of the proposals (April/May 2012);
- externally commissioned research on sex offender treatment programmes (May 2012);
- content analysis of a number of sentencing transcripts involving adult rape cases (November 2012);
- qualitative research with judges during the consultation which assisted the Council in assessing the resource implications associated with the guidelines (January to April 2013).

Overarching themes

Answers to specific questions are set out and analysed in subsequent chapters, but there were some themes that pervaded a number of responses.

Myths around sexual offending

A number of responses highlighted the fact that sexual offending is an area that is beset with myths especially around violence.

"Often 'fear of further violence limits women's resistance'[1] and evidence has shown that beliefs persist that a normal reaction to rape is to fight back.[2] However it must be understood that where a woman has not fought her assailant the rape is not a lesser offence."
Rape Crisis

"...the public tended to have monolithic views of the type of harm the offence may have to victims, relating it to the immediate details and aftermath – the fear and distress the victim would feel, the injuries sustained due to violence – rather than the long term harm that victim/survivors described and ensuing effect on their day to day life."
Natcen research into sentencing sexual offenders

"We agree that 'use of violence' should be a step one factor but note in passing that lack of injury is more of a problem with juries and gaining convictions and the guidelines should not reiterate the misconception that no injury equals a mitigating feature."
Criminal Bar Association (CBA)

"It is clear from the literature that more work needs to be done to address the current cultural and social attitudes which exist towards victims of rape and the impact it has on them and their families. Particularly there needs to be increased awareness of the stereotypes surrounding rape which still permeate the public viewpoint. Such views are archaic and erosive to society and negate the possibility of fair and just trials in such cases."
Dr Fiona Mason, Chief Medical Officer, St Andrews Healthcare

Mindful of this, the Council took care when drafting the guidelines and deliberately sought to move away from language that would perpetuate myths. That said, when analysing responses the Council did not shy away from those that challenged wording and factors that strayed into stereotyping. The Council carefully reviewed the format of the guideline to ensure it did not encourage a distorted view of rape. Amendments can be found throughout the chapters, and the treatment of "violence" is discussed in some detail at page 11.

Children as victims

An area where respondents were keen to engage was the description of victims. Many respondents felt that offences involving children required the most attention, particularly in relation to the language used; for example, those guidelines labelled in the Sentencing Guidelines Council (SGC) guidelines as cases of "ostensible consent". A common theme amongst those who responded to the section on offences where the victim is a child was that "consent" and related concepts are not relevant in any case where a child has been sexually abused or exploited.

1 Rape Crisis: Common Myths about Rape http://www.rapecrisis.org.uk/mythsampfacts2.php
2 Brown, Hovarth, Kelly and Westmarland, *Connections and disconnections: Assessing evidence, knowledge and practice in responses to rape* Government Equalities Office (2010)

"Barnardo's believes that the public would share our view that children should never be viewed as having truly consented when sentencing child sexual abuse and exploitation. The Sentencing Council's review of sentencing guidelines has begun the process through its removal of explicit references to consent and ostensible consent."
Barnardo's

"The impact of coercive environments, particularly the pressure of a group, the violent reputation of a street gang, and the threat of reprisals can be enough to coerce consent."
Office of the Children's Commissioner

"In the case of those trafficked for sexual exploitation, the victims often do not see themselves as victims and may think they have consented to the exploitation in order to earn money or say that they have as they fear the repercussions of telling the truth. This is also the case for those who have been groomed and believe that the accused is their 'boyfriend' or loves them.... This legislation should protect those who believe they are able to consent to sex and seek to punish those who abuse their innocence and vulnerability."
ECPAT

For offences where the victim is a child, the Council wanted to ensure that it used the new guidelines to challenge the traditional approach of focusing on the conduct of the victim and labelling the victim as "consenting", either explicitly or implicitly. The new guidelines concentrate on the offender's culpability and behaviour, prompting the sentencer to look for signs of exploitation or grooming. This approach was well received and further discussion can be found at page 26. The approach is also consistent with the CPS guidance on prosecuting cases of child sexual exploitation published on 17 October 2013.[3]

Sentencing remarks

A number of respondents made representations about the language used in sentencing and the impact this can have on the victim. For example, there was some concern expressed about the negative impact that discussion of an offender's "good character" can have on the victim. There is further discussion of mitigation in chapter two, page 18.

"We know that as well as an appropriate sentence being set by the judge, it is important that the victim feels respected and believed. This is something that could be addressed through sentencing remarks. We believe that the guidelines should outline best practice in sentencing, which is to acknowledge the harm caused to the victim in making sentencing remarks and ensure that, if the victim is present, the sentence is explained in full not only to the offender but also to the victim."
Victim Support

"We welcome the Council's wish to highlight the perspective of victims. Some victims are present at the sentencing procedure. Others find the experience of seeing the offender too great a strain and choose not to attend. But in all cases the victim is likely to hear or have reported to him or her, the sentencing remarks of the judge. Moreover, even where the victim is not present, the submissions of the advocates and any discussion between them and the judge may also attract the attention of victims or their supporters. Where those remarks are reported it will often be the case that the report is incomplete and may not be balanced or accurate. But whichever be the case, the sentencing remarks and the mitigation presented may affect the victim."
Council of HM Circuit Judges

3 www.cps.gov.uk/legal/a_to_c/child_sexual_abuse

"Whilst we are aware in this response what falls within and what falls outside of the Sentencing Council's remit, we wish to emphasise that the sentence received for a sex offence does obviously have an impact on the victim as well as the wider public, but that this impact can be greatly enhanced either positively or negatively by the way in which the judge or magistrates panel explains the sentence given in court and justifies the decision they came to. Therefore, in addition to using the final set of guidelines we would also urge that consideration be given to the way in which sentences are explained in court including adherence to the sensitivities of the victim in terms of their credibility, their sense of justice etc."
Rights of Women

"There were victim/survivors who felt that it had been very important for them to be in court for the sentencing. This was so they could 'see with their own eyes' the offender being sentenced, and when the sentence was given this could also provide comfort as they had 'proof' they were indeed in custody. However, experiences of being in court for the sentencing were mixed. On one hand, when the judge had made comments as to the severity of the offence, a lengthy sentence was given to reflect this, and the outcome was clearly explained to the victim/survivor, they described the process as fairly positive and a 'relief' that the case was over. On the other hand however, victim/survivors expressed deep disappointment if the judge described mitigating factors which they felt at their best deemed their experience less serious, and at their worst, indicated they were also culpable....

In some cases the victim/survivor felt the offender had 'worked the system' due to the explanations they had given for the circumstances of the offence being taken into account and used to reduce the sentence length. Consequently this led to a sense of being 'laughed at' or taunted by the offender when the sentence was handed down. Finally, the comments made by the judge about the reduced culpability of the offender was described as another form of 'attack' on the victim."
Natcen report on attitudes to sentencing sexual offences (commissioned by the Sentencing Council)

"Rape myths pervade the criminal justice system and their proof is as often in the sentence handed down as it is in the dicta of the presiding judge."
Rape Crisis

The Council fully understands that the guidelines, although they can give the victim clarity and understanding about how sentencing works, are only part of the picture in terms of the experience of the victim. The way in which the sentencing remarks are delivered by the judge is central to ensuring that the victim feels they have received a just outcome. The Council has no remit in relation to how the judge delivers the sentencing remarks, but given the strength of the representations made, the Council has engaged with those responsible for judicial training to ensure that the importance of how the sentence is delivered in sexual offences cases is fully understood by all.

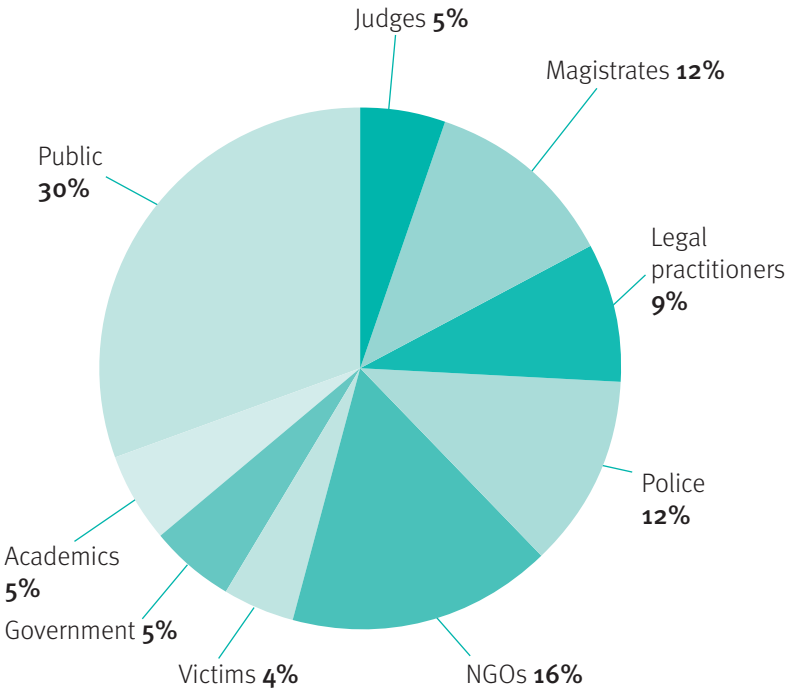
Chapter two
Rape and assault offences

This chapter will consider the responses received to proposals on sentencing rape, assault by penetration, sexual assault and sexual activity without consent.

92 direct responses were received to this chapter but many of the points made by respondents are also applicable to other offences.

Rape

"The proposed guidelines are a welcome move in the right direction in the campaign for justice for victims of rape and serious sexual assault. They acknowledge the psychological harm suffered by victims and shift the exclusive focus on physical harm. Importantly, vulnerable victims are given particular emphasis, especially children and people with a mental disorder."
Dr Fiona Mason, Chief Medical Officer, St Andrews Healthcare



Breakdown of respondents by type

Category	Number of responses
Judges	5
Magistrates	11
Legal practitioners	8
Police	11
NGOs	15
Victims	4
Government	5
Academics	5
Public	28
Total responses	**92**

Harm and culpability

Question 1[4] sought views on the proposal to move away from the structure of previous Sentencing Council guidelines, which express harm and culpability as "greater" and "lesser" harm and "higher" and "lower" culpability. The removal of "greater" and "lesser" and "higher" and "lower" reflected the baseline of harm and culpability inherent in the act of rape. There was a minority view that the Council should keep the structure and language of previous guidelines to maintain a continuity of approach and clarity. However, the majority favoured the proposed approach, specifically tailored to sexual offences.

"Sexual offences carry a particular and unique trauma which distinguishes them from other offences."
Criminal Bar Association

Rape Crisis felt the three tiers of harm consulted upon were inappropriate because "harm cannot be differentiated by the method of the rapist". The Council explored the format in some detail with Rape Crisis and Rights of Women[5] at a consultation event on 28 February 2012 and is grateful for the contributions of all those who attended. There was a lengthy discussion about the tension between providing adequate guidance for sentencers whilst at the same time not wishing to reinforce a 'hierarchy of rape' which exacerbates myths about the harm that is caused in different situations. Rights of Women articulates this very clearly in its response, along with alternative suggestions for how it could be dealt with.

"There is a tension throughout this consultation between the clear aim of the Sentencing Council to incorporate current policy approaches to sexual violence within the criminal justice system, for example, an awareness of, and a move away from, "victim blaming", whilst at the same time meeting the demands of a guideline that by its very nature requires sexual violence to be categorised and defined to aid those imposing sentences....
....There are, we think, two possible ways to overcome this problematic issue. The first proposal would be to assume that there is a level of harm for all victims of rape and therefore not to have categories of harm at all, and instead raise all sentencing starting points to reflect the level of harm and categorise only by culpability of the offender. The second approach would be to keep the harm categories but include more harm factors in category 1 and category 2 to try and reflect the level of harm is perhaps increased by the use of force but other factors also raise level of harm, for example, a context of vulnerability, a deceptive element within the relationship."
Rights of Women

The Council considered both alternatives. After much thought it was felt that dispensing with categories would provide inadequate guidance for sentencers, the result of which could be an inconsistency and uncertainty in sentencing that would be unfair on victims. This was reinforced by the response received from the Council of HM Circuit Judges.

"Without such categories the guidelines would amount to no more than a statement of factors which should be taken into consideration. Whilst such an approach may have supporters, we do not consider that it would produce a guideline which complies with the statutory regime which Parliament has prescribed".[6]
Council of HM Circuit Judges

The Council has decided to retain the three categories of harm, but has given specific consideration to the factors in the categories; this is discussed in further detail below.

Harm factors

Question 2 asked for views on the proposed harm and culpability factors.

4 A full list of the questions can be found at Annex B at page 62
5 In addition on 7th March 2013 Rights of Women in partnership with Eaves' Sexual Violence Action and Awareness Network (SVAAN) delivered a workshop examining the draft guidelines. The aim of the workshop was to provide a summary of the guidelines for those participants who wanted to provide their own response and to encourage discussion from participants who did not want to complete their own response but who wanted to contribute ideas.

In category 1 the Council proposed a narrative approach:

- the extreme nature of one or more category 2 factors may elevate to category 1.

The majority of respondents welcomed this approach. However, there were some comments about ambiguity in the wording.

"Consultation commentary makes it clear that a combination of category 2 factors may result in a move to category 1, but the draft guideline does not make this clear.... The Government believes that sentencers may benefit from further direction on this."
Government response

The Council has reconsidered the wording in light of these comments and has amended it to "the extreme nature of one or more category 2 factors or the extreme impact caused by a combination of category 2 factors may elevate to category 1".

This is wide enough to encompass situations where either the impact of a single factor is extreme or the combination of a number of factors results in an extreme impact on the victim.

Treatment of "violence" as a harm factor

When the Council consulted on including the factor "violence" it was conscious that the use of force and violence in sexual offences are areas where there can be misunderstanding. The Council wishes to emphasise that the law does not require either force or violence to be used for an offence of rape to be committed. However, the Council also considers that where violence is used, this additional dimension should be marked to reflect the very real impact on the victim. Therefore, "violence" does appear in category 2. The Criminal Bar Association (CBA) agreed with this but noted that a lack of injury in these cases creates a problem in gaining convictions by juries. Therefore, they stressed that the guideline should not reiterate the misconception that the absence of injury is in some way mitigation. The Council is in agreement with the CBA on this point.

A number of respondents queried the inclusion of "extreme violence" in category 1. The Law Society, Rape Crisis, Eaves, Criminal Law Solicitors Association (CLSA) and the CBA all felt that where extreme violence is present, a serious assault such as section 18 should be charged in addition to rape. Whilst charging issues are not within the remit of the Council, it will ensure that this issue is shared with the Crown Prosecution Service (CPS).

The Council of HM Circuit Judges commented that "extreme violence" as a factor does not add anything.

"It is no more than an example of one of the category 2 factors which, by itself is so serious that it merits elevation into category 1."
Council of HM Circuit Judges

In recognition of these consultation responses, and after further reflection, the Council has removed references to "extreme violence" from category 1. The Council believes that the amended category 1 narrative, discussed above, makes it unnecessary to single out "extreme violence" in this way. The Council does not wish to give violence prominence over other factors as this could potentially undermine the Council's aim of ensuring that force is not regarded as an essential element of the offence.

6 Coroners and Justice Act 2009 s121 (2))
The guidelines should, if reasonably practicable given the nature of the offence, describe, by reference to one or more of the factors mentioned in subsection (3), different categories of case involving the commission of the offence which illustrate in general terms the varying degrees of seriousness with which the offence may be committed.
(3) Those factors are—
(a) the offender's culpability in committing the offence;
(b) the harm caused, or intended to be caused or which might foreseeably have been caused, by the offence;
(c) such other factors as the Council considers to be particularly relevant to the seriousness of the offence in question.

Having considered the responses, it seems that it is not the inclusion of violence that is objected to, it is the risk that an inference can be drawn that an absence of overt violence in a rape means it is not harmful or is somehow a lesser form of the offence. The ways in which the Council is ensuring this inference is not drawn from the guideline are as follows:

- Widening of the wording "use of violence" in category 2 to "violence or threats of violence (beyond that which is inherent in the offence)". This recognises that fear of violence can be as harmful as the violence itself.

"The psychological harm caused by the threat of violence can be as severe as that caused by the actual harm. In fact it may be more severe because of the fear of what might happen to the victim."
Dr Karen Harrison, Hull University

- Increasing the range of factors in the harm categories so that harm is not necessarily tied to the offender's methods, for example, the inclusion of severe psychological or physical harm.
- Sharing the issues that arose from the consultation about propagation of myths with those responsible for training the judiciary. Dispelling myths around violence and rape is something that can be addressed to some extent by the guidelines, but there are also wider issues for the training of those who sentence these cases.

Severe psychological or physical harm

"The long term effects I suffer with are paranoia, sexual intimacy issues like not knowing when to say no, having things done to me which are wrong, and associating touch with pain. I feel lonely most of the time and feel like I have to block everyone out. I feel the need to take control of everything because my abuser took all my power away from me. I have trust issues with everyone and my confidence/self esteem is non-existent. I used to self harm and I still suffer with depression, my attack is something I will never get over. I have suffered with flashbacks for the past nine years, I have trouble sleeping and I still have nightmares. I blame myself for what happened and believe that I am disgusting because that's what he drilled into my head."
Case study included in the response from *You Have Not Defeated Me*

The factor "severe psychological harm" was included in the rape guideline as an aggravating factor at step two of the process. A number of respondents including ACPO, West Yorkshire Police and Northumbria University, submitted that this factor sat more naturally at step one harm as a primary driver of the sentence starting point. This factor was originally placed at step two as the Council wanted to acknowledge that people may have differing psychological responses and that harm should not be solely determined by the resilience or lack of resilience of a victim. On reflection, the Council accepts the argument that in cases where there is either severe *psychological* or *physical* harm this should be reflected at step one harm.

Victim Support and the Government response queried how psychological harm would be determined and the Council of HM Circuit Judges suggested that the use of the word "severe" could create difficulty in determining when the degree of psychological harm becomes such that the case merits a higher level of sentence.

Assessing psychological harm is not a new concept for courts. Psychological harm was introduced by the Council in its assault and burglary guidelines and was welcomed by respondents to both those consultations. The factor "significant physical or psychological injury or other trauma to the victim" is included as a greater harm factor at step one of the guideline on sentencing burglary and "injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence" is included as a greater harm factor at step one in the guideline for sentencing grievous bodily harm, both influencing the initial starting point. Psychological harm is already something that may form part of the prosecution's case and the court may have recourse to medical records, psychiatric reports or may be able to glean other relevant information from the victim's personal statement.

Taking into account the responses received on this factor, the Council has included "severe psychological or physical harm" under category 2 harm at step one.

Pregnancy/STI as a consequence of the offence

The Council proposed a factor of "pregnancy/STI as a consequence of the offence".

The factor was very well received by the majority of respondents. However, some respondents were concerned about the removal of the reference to "ejaculation" which is currently contained in the SGC guideline. The primary concern was that this would mean that it would *not* be possible to take into account the *fear of* pregnancy or of an STI. During the course of the consultation the Council interviewed a number of judges who said they regarded ejaculation as a serious aggravating factor in cases of oral rape. The Council has therefore decided to include "ejaculation" as a step two aggravating factor enabling the starting point to be increased where this has occurred. However, this does not mean that mitigation is available if there is an absence of ejaculation, which was a fear expressed by some respondents. In order to deal with any concerns about double counting where "STI/pregnancy as a consequence" is present at step one, the step two factor is worded as "ejaculation (where not taken into account at step one)."

Abduction/detention and prolonged/sustained incident

The Council consulted on the factor "abduction/detention". The Society of Legal Scholars, Kingsley Napley and Northumbria University commented that all rape contains an element of detention for the duration of every offence and it was felt a strict reading of detention would elevate every case. The Council, mindful of this, has altered the wording to read "prolonged detention/sustained incident".

Another point raised was that abduction can and probably should be charged separately where it is a significant feature of the offence. The Council cannot dictate charging practice but has decided to retain "abduction" as a factor for instances when it has not been charged separately. The Council has separated "abduction" from "prolonged detention" in recognition that it is a different and distinct factor.

Forced entry into victim's home

The Council consulted on the factor "forced entry into victim's home". A number of respondents felt that the harm was the psychological harm of no longer feeling safe in your own home which can happen in a wider range of circumstances than someone forcing their way into the home. Rape Crisis did not agree with the distinction between the stranger who has broken into the victim's home as opposed to someone granted entry by the victim or others.

"...as well as an invasion of their body, an invasion of their home has taken place that will impede their recovery and will be a significant factor in the lasting psychological impact the rape has on the victim."
Rape Crisis

The Government response was concerned that the current wording did not capture the full range of circumstances.

"It would not, for example, include situations where an ex-partner has retained or stolen a spare key. In the recent Attorney General's Reference (No 27 of 2012) (R v Shaw)[7] the offender was present when the elderly female victim told someone the key code to her flat. He later used it to gain entry and rape her."
Government response

In light of these comments, the Council has widened this factor to "forced/uninvited entry into victim's home". In addition, at step two the Council has retained "location of the offence" so that if the sentencer feels that the impact to the victim is increased due to it occurring in their home, this can move the sentence up the sentencing range (see further discussion on location below at page 16).

Vulnerability and the context of habitual sexual abuse

There was strong support for inclusion of the factor "context of habitual sexual abuse". Both the CPS and the CBA agreed with its inclusion but felt it needed to be clearer that this could include abuse of the victim at the hands of someone other than the offender, as a history of abuse by the offender would be covered by the range of charges brought in the case.

"...we consider it too narrowly defined.... We consider the impact upon a victim who is inherently vulnerable as a result of habitual physical, other than sexual, or emotional abuse should be reflected too."
Criminal Bar Association

The Council has reviewed this factor in the context of the wider issue of vulnerability. The draft guideline deals with vulnerability by inserting the culpability factor "vulnerable victim targeted". It is included as culpability because it relates to the targeting behaviour of the offender. Some respondents were concerned that this would limit consideration of vulnerability to situations where the offender had deliberately targeted the victim, which is not always the case.

A number of judges we spoke to also highlighted the fact that under the draft guidelines there was no means of considering the vulnerability of victims who are young but over the age of 13 (offences where the victim is aged under 13 are included in a separate guideline with higher sentence levels discussed in chapter three).

The Council has given the issue of vulnerability careful consideration in light of the consultation responses and has decided that there should be a greater emphasis on vulnerability in the harm factors. A factor of "victim is particularly vulnerable due to personal circumstances" has been included in category 2 harm. This factor would encapsulate the harm to a victim subjected to habitual sexual abuse, but is now broad enough to include many other factors relating to the victim's personal circumstances that render them vulnerable; for example, a background of emotional or physical abuse or vulnerability due to age or disability. There are other causes of vulnerability as set out by Eaves.

"...there may be other versions [of vulnerability] that should be taken into account.... For many BME women, to be a victim of a sexual offence can bring with it a range of additional harms and dangers... and can force the victim to cut off links with her family or be at risk of so-called honour violence at worst and disownment or divorce at best."
Eaves

The widening of this factor will allow the sentencer to take better account of the range of vulnerability that may increase harm. As this factor is now included in harm, the issue of targeting has been moved to an aggravating factor at step two, allowing for an increase from the starting point where appropriate.

7 [2012] EWCA Crim 2752

Culpability

As with harm, the Council consulted on a structure involving a baseline of culpability (culpability B) and a higher category (culpability A) where particular factors were identified. There was a high level of agreement with this approach and with the individual factors included in culpability A.

Member of group or gang during the commission of the offence

There was universal agreement that the guidelines should provide guidance on offences where there is more than one offender.

The draft guideline suggested the following wording "member of group or gang during commission of offence" using wording previously contained in the assault and burglary guidelines. However, the Office of the Children's Commissioner thought that a more nuanced approach to culpability may help as different perpetrators may play different roles within the hierarchy of both organised and disorganised groups and gangs. The CLSA and the CBA felt that the term "gang" may be misleading, requiring identification of a formal grouping, and was also emotive in its association. They suggested that the Council was trying to identify situations where more than one offender acted together, irrespective of the nature of the structure of the grouping. For the sake of clarity, the factor has been amended to "offender acts together with others to commit the offence".

Abuse of position of trust

The Council included this as a culpability A factor. There were some calls for a widening of the factor. The CPS suggested the wording "abuse of trust or authority" to cover situations where there is no formal position of trust. Eaves felt that it should be broad enough to apply to a partner or friend who the victim had felt they could trust. There is established case law on the meaning of abuse of trust and it is currently interpreted by the courts as denoting something more formal than an acquaintance or friend who has betrayed a trust. Recent cases have highlighted situations where, although the offender has not been in a *formal position of trust* with the victim, they have abused the trust that has been invested in them as a result of their status and standing. The recent Hall[8] judgment states:

> "From the point of view of the victims, he was, and must have seemed, a figure of power, authority and influence. That is a feature of the case which involves significant breach of trust which seriously aggravates the offences that he committed."

The Council has therefore decided to remove the word "position" from this factor so that the sentencer is encouraged to consider abuse of trust in circumstances where a formal position may not be held by the offender but they have abused the trust engendered by their status. The factor now reads "abuse of trust".

Aggravating and mitigating factors

Question 3 sought agreement with the aggravating and mitigating factors proposed. As with all Sentencing Council guidelines, step two identifies factors that put the offence in context, both in terms of aggravating and mitigating features. It is important to remember that the guideline identifies the most common of those but that step two is non-exhaustive so that any relevant factors that have not been taken into account at step one can be considered at this stage. The purpose of identifying these factors is for the court to consider to what extent, if any, they should move the sentence up or down the range from the starting point.

Aggravating factors

There were high levels of agreement with those factors that the Council had identified for rape offences.

"Psychological harm" and its inclusion in step one harm rather than step two has already been discussed at page 12.

Factors that attracted considerable comments were "location" and "timing of the offence". Whilst some concerns were raised as to what type of location or time of day makes an offence worse, the Council deliberately framed these factors in a non-prescriptive way to allow the sentencer to decide whether the location or the timing of the offence in the circumstances of the individual case before them aggravates the offence. This adopts the approach set out in the Sentencing Council's guideline on sentencing Assault which judges are already familiar with. Some respondents felt that location should only aggravate when the rape occurred at the victim's home but "location of offence" would enable aggravation in a number of circumstances.

Scenario A
The offender deliberately waits and chooses a time during the day knowing that the victim will be on their own in the house and neighbours will be out at work. The fact that the offence has happened in the home irrespective of the time of day is likely to be regarded as an aggravating factor (as suggested by a number of respondents).

Scenario B
The offender rapes the victim late at night by taking her to an isolated alley where there is very little chance of being disturbed or the victim getting help. In this situation, the location and timing increase the harm to the victim and are likely to result in an increase from the starting point.

Attendees at a number of the consultation events argued that location and time should be immaterial as respondents felt there was not a time or a place that would make the commission of a rape any less serious. It is agreed that location or time would never act as mitigation or lessen the offence. The inclusion of this factor allows the sentencer to increase the sentence where they decide that time or location had increased the fear felt by the victim or caused the victim to suffer psychologically because they feel unsafe in their home.

The factor "commission of the offence whilst under the influence of alcohol or drugs" is a factor that divided opinions as to whether it should aggravate the offence or mitigate because the offender is not acting completely of their own free will. Current sentencing practice treats the use of alcohol or drugs by the offender at the time of the offence as an aggravating factor on the basis that the offender has voluntarily taken a substance leading or contributing to a loss of self control, thereby demonstrating a degree of recklessness. The Council has consulted on this factor in a number of draft guidelines and received overwhelming support for this interpretation. The Council believes there is no reason to depart from this well established principle and it will be therefore included as an aggravating factor.

A number of respondents welcomed the inclusion of "victim compelled to leave their home (including victims of domestic violence)" but there were some requests for this factor to be widened to include victims who want to leave their home, but feel compelled to stay because of financial reasons. Rape Crisis suggested the wording "Victim *feels compelled* to leave home (including victim of domestic violence) irrespective of whether financial circumstances or local authority resources permits the move." Rights of Women suggested the factor "victim compelled to leave their home and/or other significant disruption to the victim's life (including victims of domestic violence)". The Council has considered these points in some detail but has concluded that the particularly aggravating feature is the physical removal of the victim from what should be their place of safety. It should be noted that the factors at step two are non-exhaustive, enabling a court to take into account the wider circumstances highlighted by respondents in the context of a specific case.

8 R v Hall [2013] EWCA Crim 1450

Mitigating factors

The impact of mitigation on sentence levels is a complex and sensitive topic for all offences but particularly in relation to sexual offending. Factors relating both to the circumstances in which the offence was committed and the offender's personal circumstances are frequently put forward on behalf of offenders at the time of sentencing; indeed that is the role of the defence advocate in the sentencing process. Having been addressed on these issues, sentencers will often refer to those factors in their sentencing remarks, but this can lead to misunderstandings about the extent to which they have had an impact on the sentence. In its consultation, the Council sought to increase understanding of the use of mitigating factors in the sentencing process and encourage debate about the factors that would be relevant to sexual offences, whilst being clear that mitigating factors could not be ignored. The mere presence of a mitigating factor does not lead to an automatic reduction in the sentence because the precise weight to be attached, if any, will depend on the individual circumstances of the case.

There was general disquiet amongst some respondents at the consideration of any mitigation due to the nature of the harm caused by the offence and the very high culpability of any offender convicted of this offence. The response below, from a member of the public, reflects a sentiment expressed by a number of people:

"The mitigating factors I do not agree with or support in any shape or form.... I cannot think of one mitigating factor which should warrant.... the defendant being treated less severely. The act of rape is brutal, life destroying and not only physical."
Member of the public

As a general principle and for reasons of transparency it is important that common mitigating factors are listed in the guideline so that the difficult job the sentencer has to undertake in weighting factors is understood.

The Howard League felt that the presentation of a short list of mitigating factors (when compared with the list of aggravating factors):

"...connotes a reluctance to include mitigating factors in the sentencing guideline and suggests that the consideration of mitigating factors is not an important element in sentencing of sexual offences."
The Howard League

The Council strongly refutes this and has spent much time considering mitigation, ensuring that common factors are included to ensure transparency for victims, offenders and sentencers.

The two specific factors that attracted the most comment were "remorse" and "previous good character and/or exemplary conduct".

Remorse

A number of respondents queried the inclusion of "remorse" as there was a view it could be easily faked and 'switched on' by manipulative offenders. This factor appears in all Sentencing Council guidelines and is one that sentencers are adept at assessing. Sentencers sitting in courts on a daily basis are alive to the ease with which 'sorry' can be said but not meant. Evidence obtained during the course of interviews with judges confirmed the way in which judges carry out this assessment; often the judges used phrases in conversation with us such as 'genuinely remorseful', 'genuine remorse' and 'true remorse'. This confirms the Council's view that the consideration of remorse is nuanced, and all the circumstances of the case will be considered by the sentencer in deciding whether any expressed remorse is in fact genuine.

Previous good character and/or exemplary conduct
The Council has included "previous good character and/or exemplary conduct" as a mitigating factor in all its guidelines. This factor attracted a number of comments and the Rights of Women response echoed a commonly held view on good character.

"Previous good character and/or exemplary conduct is a dangerous factor to have as mitigation, even with the caveat provided that little weight should be attached. Although an offender may have led an exemplary life or be of good character up to the point of the offence, this does not mean that, now having committed an offence, they should have their sentence reduced because of their previous activities prior to it.... This is also dangerous because exemplary conduct could be conducted alongside a life of sexual offending, for example, it is possible for someone to win a Nobel peace prize and simultaneously conduct a campaign of rape against their wife".
Rights of Women

The Judge's summing up stressed the fact that the defendants perceived 'good character' meant that he had access to victims and evaded justice for so long.

'It is clear to me that you set out and preyed on vulnerable women. You hid your base intent behind the veneer of charm and lulled each victim into a false sense of security. Each of them was beguiled into believing that with your military background and apparent social attributes that you were a gentleman and would behave as one. Each of them described in chilling evidence your change from plausible and caring into a bullying, self obsessed, arrogant sexual predator who was determined to indulge in fulfilling your sexual desires irrespective and dismissive of their pleas that you should desist."

Sentencing remarks in a case study provided by Rape Crisis

The Council fully understands the point made and, as with remorse, judges will carefully assess how relevant previous good character is. This is something that is shown in the recent judgment in R v Hall[9] which gives a good illustration of how a judge will weigh issues such as character on the very specific facts before them.

> "The offender's successful career provides no mitigation. On the contrary, it was the career that put him in a position of trust which he was then able to exploit and which contributed to his image as a cheerful, fun-loving, fundamentally decent man. This contributed to the view that he could be trusted; and second, if he could not be trusted, effectively he was untouchable. It is true that he has no previous convictions of any kind. It is true that he has behaved decently on occasions and deserves credit for that. But we now know, as the world at large knows, that since the mid-1960s he molested children and growing girls and therefore that he lived a lie – a lie for more than half his life; a lie repeated on the steps of the magistrates' court for the benefit of the accompanying media."

However, even prior to Hall, the Court of Appeal had recognised that previous good character should have limited impact in sexual offences. The Council had regard to the established authority of Millberry[10] that this mitigation factor should have a limited impact in certain sexual offences, and the Council consulted upon the following qualification for a range of offences:

> "In the context of this offence, generally good character and/or exemplary conduct should not be given significant weight and will not justify a substantial reduction of what would otherwise be the appropriate sentence."

9 [2013]EWCA Crim 1450
10 Millberry [2002] EWCA Crim 2891

This was welcomed and respondents, including the Justice Select Committee, felt that such a caveat should be applied to all offences. The Council has carefully considered the principled basis on which the caveat should apply. Given the breadth of sexual offending from rape through to exposure the Council decided that the following caveat should be applied to *all* offences:

> "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."

In addition, the following wording will be added to all offences carrying a maximum of life or 14 years:

> "In the context of this offence, good character/exemplary conduct should not normally be given any significant weight and will not normally justify a substantial reduction in what would otherwise be the appropriate sentence."

This approach follows established principles about lesser weighting in all serious offences but allows consideration of previous good character in a way that clearly signals to the public and sentencers that the process of assessing this mitigation requires careful consideration and weighting.

As mentioned earlier at page 7 the way in which both "remorse" and "good character" are dealt with in sentencing remarks are wider than the guidelines and better dealt with in judicial training. The Council has highlighted issues that have emerged from the consultation with those responsible for judicial training, in particular that the fair consideration of the offender's remorse or character does not require the victim to feel like there has been an attack on their character by contrast with the offender's.

Sentence levels

Question 4 sought views on the draft sentence levels for rape. The levels retained the starting points in the SGC guideline of five and eight years, but a clearer articulation of the culpability of the offender means that these starting points increased to seven and 10 years. In addition, the current SGC guidelines reserved the top level of 15 years for multiple rapes; but the Council felt that multiple rapes should be charged and sentenced separately with the principle of totality applied,[11] meaning that the highest category could now be used for single rapes. The Government, CPS, Law Society, the CBA, Society of Legal Scholars, Council of HM Circuit of Judges, West Yorkshire Police, the Police Federation and Probation Chiefs' Association all agreed with the sentence levels proposed.

> "The Government agrees with the approach proposed by the Council, in that starting points follow those in the Court of Appeal judgment in Millberry with a clearer articulation of offender culpability and increased starting points where this applies. We also agree with the approach that rapes should be charged separately and the totality principle applied as to whether sentences should be concurrent or consecutive."
> Government response

Having considered all the responses and the support given for this approach, the Council has decided that sentencing levels should stay as proposed in the consultation. These reflect current sentencing practice which has seen average sentences rising since 2005. As set out in the *Sentencing Council Sexual Offences Data bulletin*[12] for rape cases the average custodial sentence length received in 2011 before applying any reductions for a guilty plea was nine years and 10 months. This has been increasing since 2005 and is shown in the table below.

11 Sentencing Council Guideline – Totality and Offences Taken into Consideration
12 Sentencing Council Sexual Offences Sentencing Data December 2012

Average custodial sentence length

Year	Average sentence
2004	8.50
2005	8.43
2006	8.11
2007	8.82
2008	8.84
2009	9.69
2010	9.36
2011	9.84
2012	9.89

Assault by penetration

Question 5 asked whether this offence should be included as a separate guideline to rape. In the Natcen research commissioned by the Council it was found that the public and victims made very little distinction between the harm caused by rape and the harm caused by assault by penetration where objects other than a penis could be used to commit the offence. The Council acknowledged the high degree of crossover between the offences, but felt that because the potential types of offending are wider for assault by penetration the two offences should be contained in separate guidelines.

The Council's suggestion to treat the offences separately was supported by the Law Society, Council of HM Circuit Judges, the CBA, CPS, CLSA, Society of Legal Scholars, Rape Crisis, Rights of Women, Eaves, Kingsley Napley, ACPO, West Yorkshire Police, Police Federation, Probation Chiefs' Association and You Have Not Defeated Me.

"We form the view that the (separate) guideline allows rape to be unclouded and creates clarity on the seriousness of assault by penetration regardless of the age of the victim".
You Have Not Defeated Me

Respondents agreed with the Council's rationale that assault by penetration is an offence that is wider in scope and therefore requires broader ranges than rape. Given the support for treating these offences separately the Council has adopted this position.

Questions 6 and 7 sought views on the proposed harm and culpability and aggravating and mitigating factors for the offence of assault by penetration. The factors for assault by penetration are the same as those for rape with the exception of an additional factor "penetration using large or dangerous object(s)" and the omission of "pregnancy or STI". Most respondents submitted the same answers as those provided for rape; amendments to the rape guideline have therefore been transposed across to this offence.

Question 8 solicited agreement to the sentence levels proposed from a large number of respondents including the CPS, Police Federation, the CBA and the Probation Chiefs' Association. The sentence levels are identical to rape in category 1 but in categories 2 and 3 the ranges are slightly broader to reflect the wider range of offending that can occur in this offence. The Law Society felt that some of the proposed levels were too high and wanted to remove the highest category. However the Council decided on principle to maintain the same levels as rape.

Generally those respondents that considered the sentence levels too low centred their comments on category 3. The draft guideline had already increased the starting point from two years in the SGC guidelines to four years when culpability A factors are present. The Government and a number of individuals expressed concern about the inclusion of a high level community order in the bottom of the range. The Government response recognised that the inclusion of the community order gives courts flexibility but it was cautious about their use for sexual offences.

The wide range of behaviour captured by this offence could mean that an offender in category 3B could be guilty of behaviour similar to a sexual assault. The fact that penetration is involved is reflected by the starting point of two years. However the Council recognises that there may be situations where public protection and rehabilitation of the offender is better achieved by the imposition of a tailored community order and has therefore decided to include a high level community order at the bottom of the range.

Sexual assault

The format of the guideline on sexual assault is the same as that for rape and so amendments to the format followed those made at page 10.

Harm

Question 9 sought views on harm and culpability. Step one moved away from the SGC approach of deciding sentences based *solely* on physical activity. This was a move that was welcomed by many, as the nature of the physical activity did not fully encompass either the harm caused to the victim or the culpability of the offender. A number of respondents supported the assertion made in consultation that to focus just on activity is too narrow and can make it difficult to reflect the full harm.

"...in the overall context of the guideline the amended criteria constitutes a more logical approach than previously and is more likely to prove of assistance to the sentencer."
Council of District Judges (Magistrates' Courts)

A number of respondents specifically supported the inclusion of "threats of violence" for this offence as the fear of escalation of the attack was a large component of harm.

"I agree with threats of violence. It made me too afraid to scream and the ongoing psychological replay in my head even after 10 years has not significantly diminished."
Member of the public

However, "threats of violence" was included as a culpability A factor in the draft guideline on the basis that it reflected the offender's behaviour. Responses such as the one above caused the Council to reconsider its view but the Council also wanted to ensure that it did not perpetuate myths that violence is a prerequisite. It has therefore included the following as a category 2 harm factor "violence or threats of violence (beyond that which is inherent in the offence)".

Although the proposed approach moves away from focusing solely on the physical activity, it was felt that the nature of the physical activity could sometimes be relevant. For example, there were submissions that a reference to touching of genitalia should be included as a step one harm factor because this involved an intimate violation of the victim.

In consultation, the Council deliberately made no distinction between whether the victim was clothed or unclothed at the time of the offence as it was possible to envisage circumstances where touching over clothing could be equally as harmful to the victim. Respondents and judges (during interview) were divided on whether a distinction between clothed and naked should be made in the guideline. Some respondents (for example the Law Society and Society of Legal Scholars) felt that assaults over clothing are a lesser violation and show a lower level of intent to harm. They felt that a distinction should be made with category 2 only covering offences involving naked genitalia. Others, for example the Government, felt that the proposed change with no distinction between over or under clothing 'seemed sensible'. The Council of HM Circuit Judges reported a divergence of opinion amongst their members The CBA felt there would be inconsistencies in sentencing unless the Sentencing Council clarified whether this factor refers to touching under or over clothing.

The Council agrees that there is a need for clear guidance and has included an additional factor at harm category 2 of "touching of naked genitalia or naked breasts". An example of how this would apply is the scenario given in the consultation:

An offender follows a victim home at night. When she is alone on a quiet street, the offender grabs her between the legs over clothing and pulls her to the ground.

This will certainly be category 2 harm and may be elevated to category 2 harm if severe psychological harm can be shown.

In terms of the other harm factors there were a number of comments very similar to those made for rape and those amendments to the

rape guideline have been transposed to this guideline.

Culpability

As the issues raised were similar to those for rape, many respondents referred back to their earlier comments. Consequently, the same amendments have been made to this guideline.

Aggravating and mitigating factors

Question 10 sought views on aggravating and mitigating factors. Comments echoed those made in relation to rape and so the same amendments have been made.

Sentence levels

Question 11 solicited general agreement with the sentencing levels proposed and an acknowledgment that the wide range of behaviour seen with this offence meant that a judge would need a range of sentencing options. A number of respondents, including the Society of Legal Scholars and the Government, approved of the inclusion of community orders for some levels of this offence given the very wide range of offending behaviour that comes before courts.

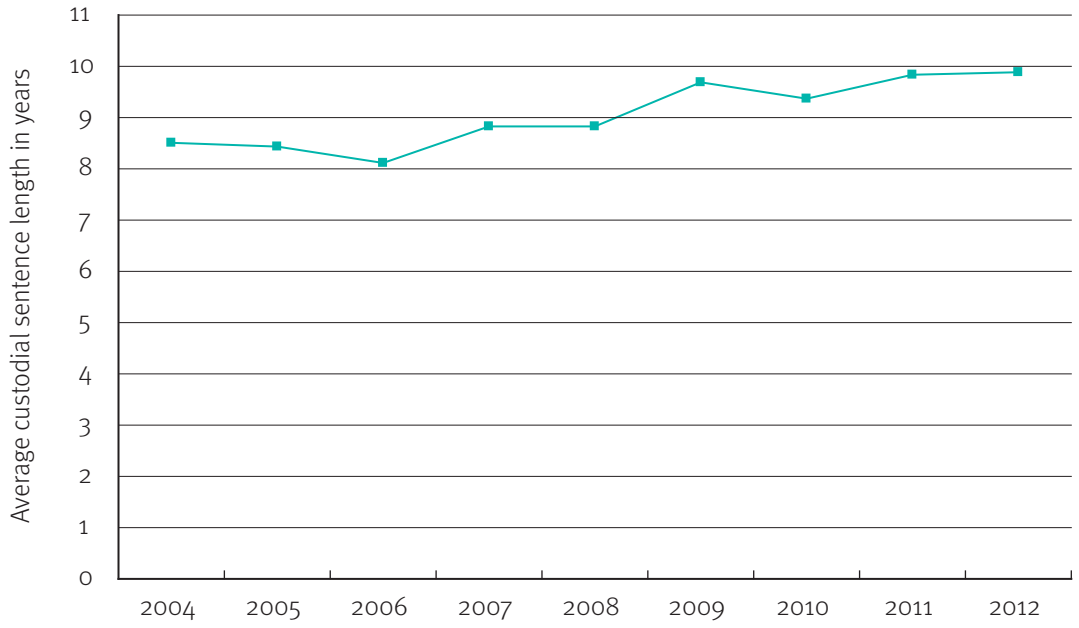
Given the general levels of support for the sentencing levels it is proposed that the Council retains the sentence levels that were consulted on.

Sexual activity without consent

Question 12 addressed the Council's approach to this guideline. This offence is rarely charged (36 offenders sentenced from 2010 to 2012), but it can cover a variety of scenarios ranging from forcing a victim to engage in sexual activity with a third party, forcing the victim to masturbate the offender or masturbate themselves to forcing the victim to engage in sexual activity with the offender. The offence includes both penetrative and non-penetrative activity and has two different statutory maxima depending on whether penetration was involved.

The Council consulted on the basis that the approach and sentence levels in assault by penetration and sexual assault should be replicated as these were the offences that were closest in terms of ranges of offending behaviours. Of those that commented, everyone agreed with this approach.

Average custodial sentence length received by adults sentenced to immediate custody for rape between 2004 and 2012 (before guilty plea reduction)

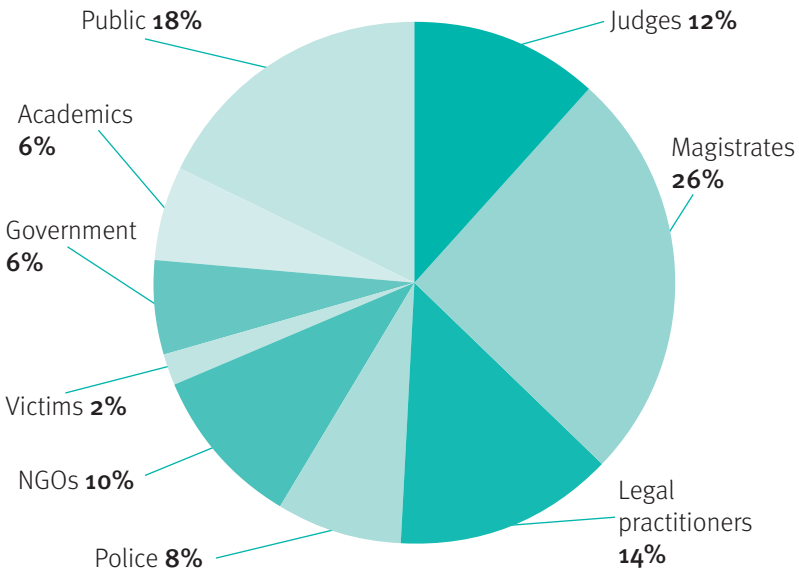


Chapter three
Offences where the victim is a child

Offences relating to children under 13

The Sexual Offences Act 2003 (SOA 2003) created new offences that apply only to children under 13. These include rape, assault by penetration and sexual assault of a child under 13 and causing or inciting a child under 13 to engage in sexual activity.[13]

The main difference between these offences and the equivalent adult offences is that where the victim is under 13 the prosecution is not required to prove the child's state of mind; the offence is established once the prosecution prove that the relevant sexual activity took place and the age of the victim. This means that the offences and guidelines for under 13 encompass a wide range of very different circumstances. The activity that could be charged as rape of a child under 13 can range from forced non-consensual activity to instances where an adult offender has exploited or groomed a child to the extent that the child maintains that they have given consent. The child may even regard themselves as in a genuine relationship with the offender because they have become habituated to the activity. The offence also covers cases where an offender who is just over 18 but who lacks maturity themselves has formed an illegal and



Breakdown of respondents by type

Category	Number of responses
Judges	6
Magistrates	13
Legal practitioners	7
Police	4
NGOs	5
Victims	1
Government	3
Academics	3
Public	9
Total responses	**51**

13 s5 SOA – Rape of a child under 13; s6 SOA Assault of a child under 13 by penetration; s7 SOA Sexual assault of a child under 13; s8 Causing or inciting a child under 13 to engage in sexual activity

inappropriate, but non-exploitative, relationship with the child.

A small number of respondents raised concerns about treating children under 13 as a separate category, arguing that all children under 18 should be treated equally. However, Parliament has created this statutory distinction and it is therefore something the Council must reflect. This does not lower the age of consent to 13; it is still unlawful to engage in sexual activity with a child aged 13 to 15 but the offences and penalties for these offences are different to those for under 18s. These are set out at page 27.

Rape of a child under 13

Questions 13 and **14** sought views on the harm and culpability and the aggravating and mitigating factors for sentencing rape of a child under 13.

Harm

The majority of respondents referred the Council back to the comments they had made in relation to the sentencing guidelines for rape of an adult victim, as they felt the same issues applied to this offence, for example, physical and psychological harm being moved to step one and the treatment of violence in the guidelines, (see discussion on pages 10 to 12).

There were further representations about vulnerability. West Kent Police noted that there was no reference to extremely young children and babies and suggested there was a risk that offences involving these children could be classed as category 3. All children are vulnerable (a point made by a number of respondents including Rape Crisis) and their inherent vulnerability is already reflected in the starting points for this offence. However, the Council acknowledges the need to reflect additional vulnerability and has therefore adopted the same approach as for rape at page 14. Category 2 harm now includes the wording "child is particularly vulnerable due to extreme youth and/or personal circumstances" which the Council believes captures *additional* vulnerability, whether through extreme youth, disability or other personal circumstances.

"While any child, in theory, can be sexually exploited, evidence submitted to the Child Sexual Exploitation by Groups and Gangs (CSEGG) Inquiry indicated that some children are more vulnerable to this form of abuse than others. In particular children living in chaotic households, children with a history of abuse (including child sexual abuse, risk of forced marriage and domestic abuse), and children who have suffered a recent and significant bereavement were identified as particularly vulnerable. While the majority of sexually exploited children live at home, children in care are also disproportionately vulnerable. We therefore welcome the acknowledgement of vulnerability within the guideline."
Office of the Children's Commissioner

The remaining harm factors replicate those for rape where the victim is an adult.

Culpability

There was a general consensus that the culpability factors identified are a proper reflection of the offender's behaviour and any changes made mirror those made to the rape guideline.

Aggravating factors

Question 14, relating to aggravating factors, generated very few comments with most respondents referring back to their previous answers on rape which are discussed at pages 15 and 16. However, Barnardo's highlighted the issue of sexually exploited children being deliberately recruited by existing victims.

"We would add a separate factor to reflect the fact that a victim may also be used to recruit or engage other children for abuse and exploitation. This recruitment attempt may or may not be successful but the attempt itself could be considered as an additional culpability factor in the conduct of the offence. Alternatively, it could be considered as an additional aggravating factor."
Barnardo's

Recruitment of others was also raised by the Office of the Children's Commissioner. In light of these representations, the Council have decided to add the wording "victim encouraged to recruit others" as an aggravating factor to all the offences where the victim is a child.

Mitigating factors

In relation to mitigation similar concerns were expressed about the inclusion of "previous good character/exemplary conduct" and "remorse" as mitigating factors as those previously discussed at pages 17 to 19. As was explained in that chapter, we have now added a caveat to all offences. This caveat will also remind sentencers that, although "good character" may be listed as a mitigating factor in the guideline, where "previous good character/exemplary conduct has been used to facilitate the offence" it may be more appropriate to treat the "good character" as an aggravating rather than a mitigating factor. This is especially pertinent in child sexual offences where status and "good character" may be one of the main ways an offender controls and prevents a child from reporting the offending.

The scope of offending and inclusion of narrative guidance

Question 15 sought agreement to the inclusion of proposed narrative guidance regarding rape of a child under 13. As discussed at page 23, the statutory definition of rape of a child under 13 can cover a range of factual scenarios, the scope of which was recognised by the Council.

Barnardo's welcomed the narrative saying it recognised that rape of a child under 13 can be committed in the context of exploitation. However, in some exceptional cases, there may be cases that fall outside the guidelines because they hinge on quite specific facts, for example, an offender who is relatively young, who had a reasonable and genuine belief that the child was 16 or over and where there are *absolutely* no signs of exploitation. The narrative was designed to give sentencers the confidence to move outside the guideline in these very specific circumstances. The narrative was well received by respondents including the Law Society, The Society of Legal Scholars, the CPS, the Council of HM Circuit Judges and the Police Federation.

A number of judges voiced that there were complexities with regard to these unlawful but non-exploitative offences. They emphasised the need for flexibility and some requested the inclusion of the mitigating factor from the SGC guidelines: "reasonable belief (by a young offender) that the victim was aged 16 or over". The Council had considered this with great care prior to the consultation and deliberately chose not to include that factor because of the risk that it would incorrectly focus on the behaviour of the victim. The narrative approach consulted on at Question 15 was a direct alternative to including such specific mitigation. The wording included in the narrative identified very limited factual circumstances which might warrant a sentencer departing from the guideline and imposing a sentence lower than the bottom of the category range of six years. For example, a non-custodial sentence might be appropriate for a young adult offender who *reasonably* believed that the victim was over 16 (and therefore that they were engaged in lawful sexual activity), and where there was no evidence of grooming or exploitation of the victim.

The Council remains of the view that including a mitigating factor would not be as effective in addressing this situation as the narrative. Mitigation is normally used to move down the sentencing range, not to move significantly outside it. The Council has also decided that mitigating factors are intended to capture the most frequent factors relevant to the offence whilst these are unusual, and fact specific, cases.

The Council acknowledges the complexity and sensitivity of these offences and also recognises that whilst the guideline provides an important structure for sentencers in such cases, this needs to be accompanied by judicial training. The Council has engaged with those tasked with leading the training for specially selected judges who will deal with particularly sensitive sexual offences cases involving children.

Sentence levels

Question 16 asked for views on proposed sentence levels. The majority of respondents agreed with the levels proposed and it is therefore recommended that no amendment is made.

Guidelines for other offences where the victim is aged under 13

Question 17 asked whether the remaining under-13 offences (assault by penetration, sexual assault and causing or inciting a child to engage in sexual activity) should depart from the SGC approach and be dealt with in separate guidelines from those for victims aged 13 and over. There was almost complete agreement that this was the correct approach. Of the minority who did not agree with this approach the main objection was based on a misunderstanding of the statutory distinction between those under and over 13, as discussed at page 23. The legislative distinction is not something that falls within the remit of the Council; it is an issue for Parliament, and the Council must give effect to the different statutory regimes that are in place for those under and over the age of 13.

Question 18 sought responses on the proposed guidelines for assault of a child under 13 by penetration, sexual assault of a child under 13 and causing or inciting a child to engage in sexual activity. Very few respondents provided new comments on these guidelines and instead relied on comments they had made in relation to rape of an under-13 or the equivalent adult victim offences. A small number of respondents were of the view that there should be no community sentences available for any of the under-13 offences. However, a community order is only an alternative in a case with the lowest levels of harm and culpability in the lowest category of sexual assault. This is because sexual assault includes such a wide range of activity that can include any type of sexual touching. However, the starting point is always a custodial sentence.

Sexual offences against children aged over 13

The consultation considered the group of offences not specific to children under 13 starting with sexual activity with a child. The offences here will, in practice, normally be charged where the children are 13 to 15 years of age and where a section 1 rape charge would not be applicable because, for example, the victim maintains they agreed to the activity. This means that a charge of rape is unlikely to be successful but sexual activity could be charged. This would allow the court to look at issues such as whether the child had been manipulated, groomed or exploited. The SGC guideline refers to these offences as "ostensible consent" offences. The Council took a decision to move away from this labelling because of its focus on the behaviour of the victim and to focus instead on the behaviour and culpability of the offender. The approach taken by the Council has been well received by a range of respondents.

"The NSPCC supports the proposal in the consultation to move away from using the term "ostensible consent" and focus, instead, on the behaviour of the offender. Existing guidance, by using the term "ostensible consent", can focus the sentencer on the behaviour of the victim rather than the coercive, manipulative or grooming behaviour of the offender. We agree with the dicta of Lord Justice Pitchford in his judgment on an "unduly lenient" referral from the Attorney general, that such terminology is likely to "...obscure the true nature of the encounter between the offender and the victim"."
NSPCC

"We are glad that the Council "intends to move away from the label of ostensible consent" and "is proposing that the guideline should concentrate on the offender's behaviour rather than the behaviour of the victim". This is consistent with Barnardo's *Remember they are children* petition which called for sentencers (and the wider legal system) not to treat children as if the abuse is their fault – a call which gained the support of 30,160 members of the public."
Barnardo's

"A move away from "ostensible consent" within the draft guideline is of particular significance. It is clear from our interviews with children and young people, and evidence submitted to the CSEGG Inquiry, that even victims may perceive that they have been consenting when there is clear evidence of grooming, manipulation or coercion on the part of the offender(s)."
Office of the Children's Commissioner

Sexual activity with a child and causing and inciting sexual activity with a child

Question 19 asked whether sexual activity with a child and causing or inciting sexual activity should be dealt with in one guideline. The Council proposed this approach as the offences have the same statutory maximum sentence of 14 years and the harm to the victim and culpability of the offender can be the same in both offences. The majority of respondents agreed with the proposal to deal with both offences in one guideline for reasons of parity of the harm and culpability and the fact that they have the same statutory maxima. Of those that disagreed, Kent Police, the Council of HM Circuit Judges and South East London Magistrates' Bench submitted that in their experience the causing or inciting offence was increasingly being charged in situations where the offender was not physically present, for example, via webcam. They suggested it might therefore be more appropriate to have a separate guideline. However, the guideline was developed to cover situations where the offender is present as well as where the offender exploits the child remotely over the internet.

Harm

Question 20 sought views on the harm and culpability factors proposed for sexual activity with a child. The Council has tested the guideline with different factual scenarios and has made some revisions to ensure that remote offending is captured adequately. In light of the concerns expressed above and having looked at recent cases on remote, online offending,[14] the Council has made some revisions to this guideline. Category 2 included "masturbation by or of the victim" in the consultation paper but it was felt that this would not adequately cover some of the online offending. We have now included in category 2 harm "touching, or exposure, of naked genitalia or naked breasts by, or of, the victim". This will cover the situation where a victim has been blackmailed into stripping via webcam and will enable a sentencer to treat this with the gravity it merits. The Council is confident that the guideline can cope with both online and face-to-face offending and believes that equal treatment of the offending is best achieved by combining both types of activity in the same guideline.

We have already discussed the changes made to category 2 harm and these changes also address concerns expressed that category 2 "masturbation" might be too narrowly defined. This concern was expressed by the Birmingham magistrates' bench, HHJ Webb, and the Council of HM Circuit Judges. HHJ Webb thought that the wording proposed in consultation might decrease sentences for certain activity:

"If it is the Council's intention that some sexual touching of the genitalia, either naked or outside clothing, should come into category 3 that will set the guideline for such cases at a lower range than the present one. If this is not the intention then a solution could be to rephrase category 2 to include "any touching of the genitalia of or by the victim."
HHJ Webb

In order to avoid this outcome, the Council has altered category 2. As discussed above the wording has been widened to include both "touching" and "exposure" and now captures a range of contact and remote offending that was not catered for in the Council's original proposal.

Culpability

A number of respondents commented on the factor "significant disparity in age". The Council of HM Circuit judges suggested the wording "difference in age between the defendant and victim". As was stated in consultation, as the

14 R v Shayne Prince [2013] EWCA Crim 1768; 2013 WL 5336121

guideline only deals with offenders aged 18 and over and victims under 16, there will be limited circumstances where the age gap is not significant. The Council also consulted on whether this should be a step one or step two factor. The small number of responses received on this specific factor showed divided opinion; the Society of Legal Scholars, the Justices' Clerks' Society and Council of District Judges (Magistrates' Courts) felt that it should remain at step one. This was because the bigger the age gap, the more mature the offender and the more certain it is that they were acting in a highly culpable manner which should determine the starting point. Dr Harrison of Hull University, Kingsley Napley and the South East London Bench submitted that this should be included at step 2 to move an offender up from the starting point. Given the responses received the Council has decided to keep the "disparity of age" factor as a culpability factor at step one because it is such a key factual element of the case.

Aggravating and mitigating factors

Question 21 sought agreement to the aggravating and mitigating factors proposed at step two. There were very few comments received about the aggravating factors but a number were received on the mitigating factors. Some of the points on mitigation reiterated the general concern about the use of remorse and good character (see discussion at pages 17 to 19). However, respondents queried whether the caveat used in the rape offence "in the context of this offence, previous good character/ exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence" should be used in this type of offence.

"I have reservations about including these [caveats] in respect of these offences. In my view, if the main influence in setting the starting point and ranges is culpability the rationale for including the note is harder to defend than if the main influence was harm."
Professor Suzanne Ost

A number of other respondents felt that the caveat should be included because, as Barnardo's stated, "previous good character can be one of the very factors leading a child to trusting the offender and could both facilitate the offence and make it harder for the child to report or be believed". As stated in chapter two the Council has decided to include the wording on mitigation for all offences that have a statutory maximum of 14 years or more which means that it will apply to this offence. A more detailed discussion of this point can be found at page 19.

Another issue raised in relation to mitigation was the approach taken to addressing situations where the activity was incited but never actually carried out. In the draft guideline "offender voluntarily stops the sexual activity taking place" was included as a mitigating factor, reflecting the approach taken in the SGC guideline. The alternative approach which the Council consulted on was to place a factor in the lowest culpability category (category 3) at step one "sexual activity was incited but did not take place".

Those that favoured the option of treating this factor as mitigation included the Justices' Clerks' Society, West Yorkshire Police and Dr Karen Harrison of Hull University. They felt that this was more appropriately dealt with as mitigation because putting incitement activity automatically into category 3 may downplay the seriousness of the incident; including it as a mitigating factor would allow greater flexibility.

Those that favoured the alternative approach of including it in category 3 culpability included the LCCSA, National Bench Chairmen's Forum (NBCF) and the Birmingham Magistrates' Bench. Having carefully considered all the responses the Council has decided to adopt the approach consulted on and has included it as a mitigating factor.

Sentence levels

Question 22 generated some comments on the sentence levels proposed. Barnardo's welcomed the fact that there was a custodial option within the range for all cases involving exploitation or grooming, but felt that levels at the more serious end could be higher. This view was echoed by West Yorkshire Police, Eaves, Essex Magistrates, You Have Not Defeated Me and the Society of Legal Scholars. The top range consulted upon at category 1A was a starting point of five years' custody with a range of four to 10 years. The Council has deliberately included a very wide sentence range for this category. The Council has, however always been clear that guidelines are not able to deal with every type of case that appears before the courts and therefore the Council normally allows a gap between the top of the sentence range and the statutory maximum to allow judges the flexibility to deal with those exceptional cases.

Representations were also made by judges that there should be more flexibility at the lower category 3A to accommodate cases where the offender has behaved in a persistently sinister and threatening way, but the actual activity that the victim engaged in was slightly less than that set out in category 2. The top of the range has been increased from two years to three years in light of these representations.

Arranging or facilitating a child sexual offence

Section 14 of the SOA 2003, arranging or facilitating a child sexual offence was omitted from the consultation paper. The statutory maximum for this offence is 14 years' custody and it applies to arranging or facilitating an offence under sections 9 to 12 of the SOA (sexual activity with a child, causing or inciting a child to engage in sexual activity, engaging in sexual activity in the presence of a child and causing a child to watch a sexual act). The approach taken by the SGC was that for cases with no commercial element the starting point and ranges should be commensurate with the relevant substantive offence. Where a commercial element was present the SGC directed the sentencer to increase the starting point for the substantive offence. This offence can be committed by an offender anywhere in the world and the SGC guideline is clear that the guideline was primarily aimed at offenders organising the commission of relevant sexual offences for gain and across international borders. These are relatively low volume cases for the purposes of sentencing; the highest number of cases sentenced in any one year was 32, in 2012.

We discussed the proposed approach with members of the judiciary. The Council's statutory consultees (the Lord Chancellor and the Justice Select Committee) were made aware of this omission and were consulted on the proposed text:

> "Sentencers should refer to the guideline for the applicable, substantive offence of arranging or facilitating under sections 9 to 12. The level of harm should be determined by reference to the type of activity arranged or facilitated. Sentences commensurate with the applicable starting point and range will ordinarily be appropriate. For offences involving substantial commercial exploitation and/or an international element, it may, in the interests of justice, be appropriate to increase a sentence to a point in excess of the category range. In exceptional cases, such as where a vulnerable offender performed a limited role, having been coerced or exploited by others, sentences below the starting point and range may be appropriate."

Both consultees agreed with the proposed approach; the definitive guideline will include a cross reference to section 14 referring the sentencer to the relevant substantive offences in order to assist sentencers.

Sexual activity with a child family member

Question 23 invited consultees to comment on the proposal to deal with the offences of sexual activity with a child family member and causing and inciting a child family member to engage in sexual activity in the same guideline. The majority of respondents agreed that they should be included in one guideline. The Council also consulted on the inclusion of narrative text indicating that the greater the abuse of trust within the relationship, the graver the offence. This narrative was well received and commented upon as helpful by the Council of HM Circuit Judges.

Aggravating and mitigating factors

Questions 24 and **25** relating to specific harm and culpability and aggravating and mitigating factors solicited a number of the same comments made in response to sexual activity with a child at page 28. A number of respondents felt that the factor "group or gang" and "failure to respond to previous warnings" should be included here because these factors are not necessarily irrelevant just because the offenders are family members. The Council agreed and has therefore included at step one "offender acted together with others to commit the offence". The factor "failure to respond to previous warnings" is included as an aggravating factor at step two.

Sentence levels

Question 26 sought views on the sentence levels for the offence of sexual activity with a child family member. Comments from respondents reiterated those made for sexual activity with a child and the amendments to that guideline have been replicated in this guideline.

Engaging in the presence of and causing a child to watch sexual activity

Questions 27 to **30** sought views on sentencing for the offence of engaging in the presence of and causing a child to watch sexual activity. The consultation suggested combining these offences into one guideline. Respondents were in agreement with this due to the parity in harm caused to victims of these offences and similar behaviours by offenders. Such conduct is often part of the grooming of children and respondents welcomed the recognition of this.

> "The Council has approached the assessment of harm based upon the type of sexual activity viewed by the victim; this is of course the most sensible approach. The NBCF prefers the way the Council has identified specific levels of activity in the categories as opposed to the broad approach in the existing guidelines."
> National Bench Chairmen's Forum

Sentence levels

There were very few comments on sentence levels. Of those that were received, Kingsley Napley solicitors felt that sentence levels were now excessive at the highest range. However, the Council of HM Circuit Judges wanted the highest range widened further from three to six years to three to eight years to cover the wide range of activity that might be captured and instances where the behaviour has gone on over a period of time. The Council has already increased sentence starting points and ranges considerably from the SGC guideline[15] to recognise the fact that these offences can be part of the wider context of grooming and normalising a child to sexual behaviour. The full extent of the way in which this offence can be utilised was not fully realised at the time the original guidelines were drafted. The Council is satisfied that the sentence ranges consulted on are proportionate to the offending behaviour, reflect current sentencing practice and provide sufficient flexibility for the sentencer.

15 Current top range under the SGC guideline for engaging in sexual activity in the presence of a child is two years' starting point, one – four years' range, and for causing a child to watch is 18 months' starting point, 12 months' – two years' range

Meeting a child following sexual grooming

Questions 31 to **33** sought responses to the format of the guideline for this offence, the proposed harm and culpability factors and sentence levels.

The elements of this offence can sometimes be misunderstood as covering behaviour which is commonly referred to as 'grooming'. However, the offence requires the offender to have arranged or travelled to meet a child following grooming. It is an offence designed to allow early intervention to prevent a more serious sexual offence being committed. This is described as a 'preparatory' offence; whilst the culpability of the offender is likely to be high, the harm is likely to be of a different nature to that caused by the contact offences. The Council therefore proposed that a slightly different approach should be taken for this offence, reverting to a similar format found in previous Sentencing Council guidelines on assault and burglary. This approach was strongly supported by respondents; the Council of District Judges (Magistrates' Courts) regarded it as more sophisticated than the current SGC guideline and You Have Not Defeated Me commented that "the approach to this guideline is commendable in dealing with a complex sexual offence".

Kent Police queried whether changes in Schedule 15 of the Criminal Justice and Immigration Act (CJIA) 2008 were covered by the draft guideline; the amendment in the CJIA 2008 added "travels with the intention of meeting B in any part of the world *or arranges to meet B in any part of the world*". Kent Police felt that there should be a differentiation depending on whether the offender actually travelled or had arranged to meet. Having considered this point the Council is confident that the guideline allows the full context of the offending to be considered and already accommodates both scenarios.

Harm and culpability

The majority of respondents agreed with the harm and culpability factors proposed.

The consultation specifically sought views on whether to include the culpability factor "offender deliberately targets a child under 13". Previous general comments received from organisations including the Office of the Children's Commissioner and the Justice Select Committee argued that unless specified in legislation there should be no distinction in age groups. In order to ensure consistency with other offences, this factor has been widened to "specific targeting of a particularly vulnerable child".

Sentence levels

In the SGC guideline the sentence increases where the child is under 13 but for the reasons set out above the Council felt that this was inappropriate. Instead the Council proposed that where there is raised harm and raised culpability, regardless of the child's age, the highest sentence level and range should be available. Removing the age distinction was strongly supported by respondents, as were the sentence levels. These included the Law Society, the Council of HM Circuit judges, CPS, ACPO, Professor Suzanne Ost and a number of magistrates' benches. The Council of District Judges (Magistrates' Courts) were, however, concerned that the sentence levels were higher than for sexual activity with a child and queried whether "there [is] an unwritten assumption that an adult who meets a child following sexual grooming, is intent on committing a more serious form of the sexual activity offence".

Although the offence of grooming is a preparatory offence, the activity that was intended by the offender and the age of the victim could be wider in scope than would ordinarily be found under the offence of sexual activity with a child, for example, the intent could be to rape an eight year old child. For this reason a wide range of sentencing levels is required and the Council is satisfied that the sentence levels proposed will be able to accommodate the range of offending charged under this offence.

Abuse of trust

Questions 34 to **38** solicited a small number of responses to the questions posed but of those that did respond there was general agreement with the Council's proposals. Berkshire Magistrates' Bench and South Cambridgeshire Magistrates' Bench disagreed with the removal of the factor on "group or gangs" in the draft guideline.

> "We disagree with the removal of the factor "member of a group or gang during the commission of an offence" although this may not "normally" be a factor, as suggested, we believe that there are circumstances where it will exist and, in such cases, is of such significance that it must be recognised by guidelines."
> Berkshire Magistrates' Bench

As a result the guideline will now include "offender acts together with others to commit the offence" to bring this into line with other offences.

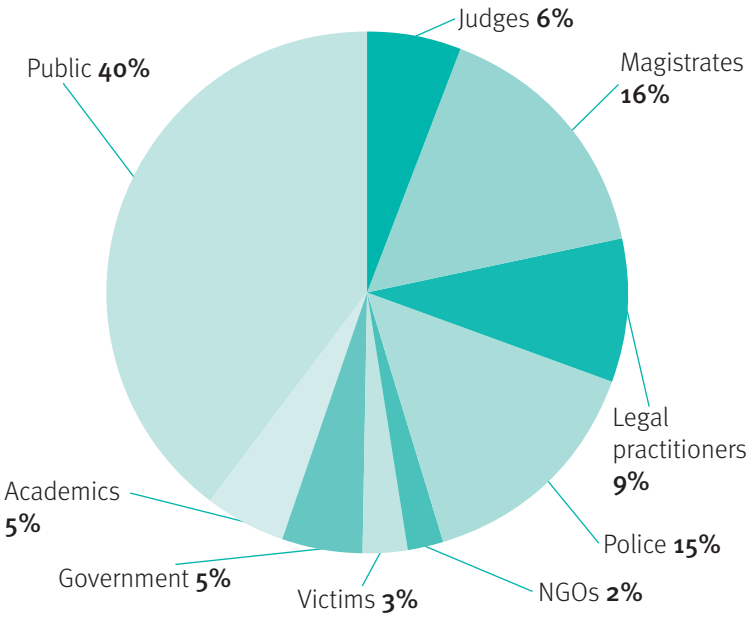
There was also some concern about the factor "previous good character" in this context as it was felt that without the "previous good character" the offender would not have been in the position of trust and that "previous good character" was a prerequisite of the commission of the offence. We have revised the wording on good character and this is explained above in this chapter at page 28 and in some detail on pages 17 to 19.

Sentence levels

There was significant support for the sentence levels proposed by the Council and given the level of support the Council has retained the sentence levels consulted on.

Chapter four
Indecent images of children

There was a good level of response to the chapter on indecent images of children with 67 replies. During the consultation period events were held with NGOs and the police[16] to consider these offences; the results of these events have been incorporated into this chapter.
In the consultation the Council stated that indecent images did not lend itself to the harm and culpability model without some modification. This is because often there will be no identified victim before the court. In many cases the victim in the image will not have been identified or located. The Council is of the view that harm can be equated to image level and culpability to the offender's role and involvement with the images.



Breakdown of respondents by type

Category	Number of responses
Judges	4
Magistrates	11
Legal practitioners	6
Police	10
NGOs	1
Victims	2
Government	3
Academics	3
Public	27
Total responses	**67**

Image levels

Question 39 sought agreement to the proposed rationalisation of the current levels one to five of indecent images of children.

As stated above, step one focuses on the image level in the same way as other guidelines focus on harm. The SGC guideline sets out five levels of prohibited image which are based on (but amend) those set out in the

16 Representatives attended from Barnardo's, NSPCC, Internet Watch Foundation, Child Exploitation and Online Protection Unit, and police forces in Derbyshire, South Yorkshire, Stafford, Hampshire, West Midlands, Kent, Sussex, Leicestershire, Met and South Wales

judgment in Oliver[17] which in turn had been drawn from the COPINE scale. The current image levels are:

- level one – images depicting erotic posing with no sexual activity;
- level two – non-penetrative sexual activity between children, or solo masturbation by a child;
- level three – non-penetrative sexual activity between adults and children;
- level four – penetrative sexual activity involving a child or children or both children and adults; and
- level five – sadism or penetration of, or by, an animal.

The Council consulted on rationalising these levels, an approach that was informed by early discussions with the police and CPS about the grading and classification of images. The Council proposed three levels:

- category A: images involving penetrative sexual activity, sexual activity with an animal or sadism;
- category B: images involving non-penetrative sexual activity; and
- category C: images of erotic posing.

There was almost universal support for this proposed simplification of the levels including from the Law Society, CPS, Government, ACPO, Police Federation, Magistrates' Association, Council of HM Circuit Judges, NSPCC, and the CBA.

The ACPO National Grading Panel is the main centre of expertise in relation to images for all UK police forces and is responsible for producing guidelines for investigators on how to count and categorise indecent images of children.

"The panel unanimously supports the reduction in categories. The majority believed that there should be a maximum of three, there were a few who felt that the reduction could go further to possibly two, or even only one.... No one felt that the current five categories should remain."
ACPO National Grading Panel

The grading panel's views were particularly persuasive because of their role in dealing with these images on a day-to-day basis. The Internet Watch Foundation, which is responsible for removing indecent images from the internet, supported rationalisation if it would result in more proactive capacity being available for those investigating these types of offences. Given the level of support for its proposal, the Council has decided to implement this approach.

Mixed collections

Question 40 sought views on the Council's proposal as to how the court should tackle the issue of collections containing a mixture of different image levels. This acknowledges that it will be rare for the court to sentence an offender for only one level of image.

The draft guideline provided direction that the highest level of image present in the collection should initially determine the appropriate starting point and range, adjusting down if this image was unrepresentative of the offender's conduct. The proposed wording was:

> "In most cases the intrinsic character of the most serious of the offending images will initially determine the appropriate category. If, however, the most serious images are unrepresentative of the offender's conduct a lower category may be appropriate. A lower category will not, however, be appropriate if the offender has produced or taken (for example, photographed) images of a higher category."

The majority of respondents agreed with the principle of this approach. The CPS agreed but felt it could go further and that a lower category would not be appropriate if there was evidence of any distribution, not just production. The Council believes that the wording gives sentencers the flexibility to decide that distribution would mean that a lower category would not be appropriate but will allow the

17 [2003] 1 Cr App R 28 CA

sentencer to look at the full facts before them. The ACPO Grading Panel, the NBCF and some of the police representatives who attended consultation events questioned whether further guidance might be needed. One of the very few voices that disagreed was the Council of HM Circuit Judges.

"We do not consider that it is appropriate to make the most serious the basis of initial determination... We suggest that the judge should be required to make the determination of the nature and quantity of the images as a whole having regard to the features which determines each category."
Council of HM Circuit Judges

However, Council officials conducted research with judges who sentence these type of cases to test the usability of the guideline and whether they would find the new formulation difficult to work with. Although the guideline asks the sentencer to make an initial determination on the image level and role without reference to volume, most judges were comfortable with the approach taken in the draft guideline. They agreed that they would look at the overall context when deciding their final sentence:

During testing with judges, when asked how they would choose an offence category and decide how to weight mixed collections, most judges said that unless there were just one or two images, they would allocate the category based on the most serious images in the collection. As one judge put it, you would "sentence people for the really serious thing they've done". One judge also said they would be particularly interested in any films in the collection when deciding on the weighting.

Other judges also said that the level of image was important, but in conjunction with other issues that provided overall context to the offence: one judge said that quantity would therefore be important here; another that they would go with the majority but taking into account the seriousness of the totality of images, and another that they would move first to the category for the highest level of images in the collection – if there were some of the lower levels, this would then further aggravate the sentence as they had both higher and lower levels.[18]

This indicates that, although the judges would use step one image levels and role to get to the initial sentence level, the factors that provide context at step two would help them arrive at the appropriate sentence when faced with a mixed collection. Also, it was established that some fluidity between the steps is to be expected. The Council is, therefore, assured that the wording proposed for mixed collections will be of assistance to sentencers.

Role

The Council decided to base the culpability of the offender on what he had done with the image, whether this is possession, distribution or production. The majority of respondents supported the approach suggested by the Council. ACPO viewed it as a positive step to allow people to be sentenced appropriately taking into consideration all the circumstances.

"We agree that what the offender has done with the images is a better indicator of culpability, rather than numbers of the images. The old references to large and small numbers of images are too vague."
The Law Society

Volume

Question 41 addressed another major proposal in the guideline being the exclusion of volume at step one. Respondents were asked whether they were content with the use of role and image level at step one and the exclusion of quantity at this stage (with volume treated as a serious aggravating factor at step two).

Currently the quantity of images and the image level are the two factors that determine sentence level. The Council consulted on the basis that the number of images is not necessarily the

18 Internal findings of testing conducted with judges

best indicator of the offender's culpability; what an offender does with the image is a better indication. This is particularly the case with the ability of offenders to download and store thousands of images in a way that was never envisaged by the original case law guidelines. On this basis, the draft recommended that an offender who *produces* even a small number of images attracts a higher starting point than an offender in *possession* of the same number.

The majority of respondents supported the approach. The ACPO Grading Panel whilst supportive of the principle, cautioned that care must be taken to ensure that there would not be an injustice if a person with a very low number of high level images would be placed in the highest category for sentencing whilst an offender with a very high number of low level images would remain in the lower category. The Council has, however, mitigated this problem through the sentencing ranges suggested for these categories (see page 38) which allows the sentencer a degree of flexibility. The sentencer has a custodial option at the start of the range where sentencing an offender with a high number of category C images.

A number of respondents, whilst not objecting to moving the factor "volume of images" to step two, requested further guidance on "large volume" as an aggravating factor. The Council believes a degree of judicial discretion is required on this point. As this factor is now not at step one, but will be considered as part of the wider context, there will be scope for the sentencer to consider whether the number of images is an aggravating factor in the case before them. The guideline will not be more prescriptive about what "large collection" means and will leave that to the sentencer to decide whether volume is a fact that makes the case before them materially worse.

Given the overall support received for the approach consulted upon, the Council will maintain this in the final guideline.

Erotic posing

Question 42 invited views on whether there may be a better way of describing Category C, the lowest category of images that uses the term "erotic posing" (reflecting the wording in the SGC guideline). It was considered by the Council that this term was potentially problematic as there may be cases where the image is not posed or "erotic" but could still be deemed indecent.

The main criticism of those who disliked the labelling of the category was that the language was felt to be outdated and inappropriate and that "erotic posing" somehow implied intention on the part of the child.

"...erotic posing indicates that responsibility lies with the victim. Also it may support attempts to place indecent images in the same bracket as legitimate erotic art."
Oxfordshire Magistrates

"...the use of the word erotic in this context is to engage with the offender's view that his/her attitude to children is gentle rather than basely sexual."
The Council of District Judges (Magistrates' Courts)

There were a number of suggestions for variants of "erotic posing" including "indecent posing", "sexual posing" and "inappropriate posing". The most popular suggestion was "other indecent images not falling within categories A or B" or similar wording. This was suggested by the CPS, the ACPO grading panel, the Government, the Justices' Clerks' Society and the NBCF amongst others.

"It is better to define category C as indecent images which do not fall into categories A and B. This may seem weaker terminology in some respects but it benefits from the removal of the concepts of "posed" and "erotic". It does of course then depend on what constitutes indecent but we would argue that the concept of indecency is likely to produce a far greater degree of consensus than what constitutes "erotic".
Scarborough Magistrates' Bench

The Law Society and Professor Suzanne Ost from Lancaster University did, however, caution against wording which was too expansive as this could result in innocuous pictures being included, such as those taken by parents of their children. The Council would stress, however, that by the time these guidelines become pertinent the images will have already have been proven indecent on the basis of a guilty plea or conviction.

There were some respondents such as the Council of HM Circuit Judges who felt that, whilst the current wording may be imperfect, it has become a term with a known meaning and so altering it may cause difficulties.

"In my experience having sentenced in a number of these cases, there is in practice no linguistic confusion.... "posing" is a word which could have caused difficulty but in my experience it has never been suggested that it means that the child is conscious that she/he is being photographed or filmed at the direction of the person producing the image."
HHJ Webb

The Council has considered this difficult issue with great care. It acknowledges that altering wording may not solve problems but instead create new ones. As the ACPO grading panel suggest "any attempt to use words that need further interpretation should be avoided". The Council has therefore decided that "other indecent images not falling within categories A or B" is the clearest alternative as the question of whether the images are indecent or not has by then been dealt with by virtue of the conviction.

Aggravating and mitigating factors

Question 43 asked about aggravating and mitigating factors to ensure that at step two the most common contextual factors were included. Respondents were generally content with the factors identified (discussion of volume can be found at page 35) but suggested some modifications.

Systematic storage

The Law Society and the Internet Watch Foundation were unconvinced that "systematic storage of collection" would be a reliable indicator of an aggravating factor. The Law Society responded that it could not see how the systematic storage of a collection can amount to an aggravating factor where it does not involve hiding or concealment. The Council believes that hiding or concealment is the greater aggravating feature and so retains "attempts to dispose or conceal of evidence" but has removed systematic storage.

Physical pain

A number of respondents including the Council of HM Circuit Judges, the CBA, the ACPO Grading Panel, CPS, JCS and NBCF commented on the factor "visible physical pain suffered by the child depicted" and felt it needed greater clarification. Oxfordshire Magistrates' Bench suggested that "visible" should be amended to "acts that could reasonably be expected to cause the victim distress or pain" as sometimes the face might be hidden. The Council of HM Circuit Judges acknowledged that there may be instances where the pain suffered is not visible but argued that where it is visible it should be a significant aggravating factor. The consultation event for the police led to representations that audible pain should also be taken into account. An amendment to this factor has been made in light of comments received so the factor now reads "Discernable pain or distress suffered by the child depicted."

Additional factors

A small number of respondents, including the Probation Chiefs' Association, felt that distributing for financial gain should also be included and an aggravating factor has been added in this regard.

Another issue raised by the ACPO Grading Panel was how to factor in the number of victims involved, and whilst this may to some extent be captured by large volume, it could also be a distinct factor which the Council agrees should be reflected and is therefore now included. It also suggested the factor "evidence of victim drugged or intoxicated" which has also been added.

The ACPO Grading Panel welcomed the listing and description of aggravating factors but did not want these to become a check list that had to be provided for each image that was produced as evidence. This is not the intention of the Council. The aggravating factors are non-exhaustive examples that, if uncovered in the course of categorisation and assessing the images, could be cited and produced as evidence, which should cause no additional work. This type of issue will fall to the training of those involved and the Council is liaising with the College of Policing to ensure this message is disseminated to police working in this area.

Sentence levels

Question 44 sought views on sentence levels. The consultation made clear that sentencers can only sentence within the maximum powers set by Parliament. For offences of possession of indecent images, the statutory maximum is five years imprisonment and for distribution and production offences the maximum sentence is 10 years imprisonment. The sentence levels recommended by the Council are therefore constrained by these statutory maxima.

There was almost unanimous support for the approach the Council has taken in moving away from very short custodial sentences and offering the option of a community order with treatment programme for the lower level offences. Respondents were also in favour of the guidelines' flexibility in providing a custodial option within the ranges for all levels of offence.

> "We are pleased to note that the well recognised view that in many cases a short custodial sentence will achieve nothing is expressed and that the Council has indicated a move away from such sentences.... The Council of HM Circuit Judges has, for a long time, been advocating the use of Community Orders with requirements on sexual offenders treatment courses as being a much more effective approach to the issues which such offenders present."
> The Council of HM Circuit Judges

The Council of HM Circuit Judges submitted that the range in category A possession should be increased and the CBA argued that the category ranges were not high enough for possession. You Have Not Defeated Me thought category A possession should carry a starting point of 18 months' custody with a one to three year range.

> "Victims were pleased with the overall sentencing levels, however it has been heavily suggested that the Category A starting point for possession should be 18 months' custody, the range should be 1 year to 3 years custody in recognition of the seriousness of the offending mind."
> You Have Not Defeated Me

The Council has reviewed the sentence levels for the highest category of possession and in light of the representations made and the desire to give judges sufficient flexibility, the range has been increased from two years to three years.

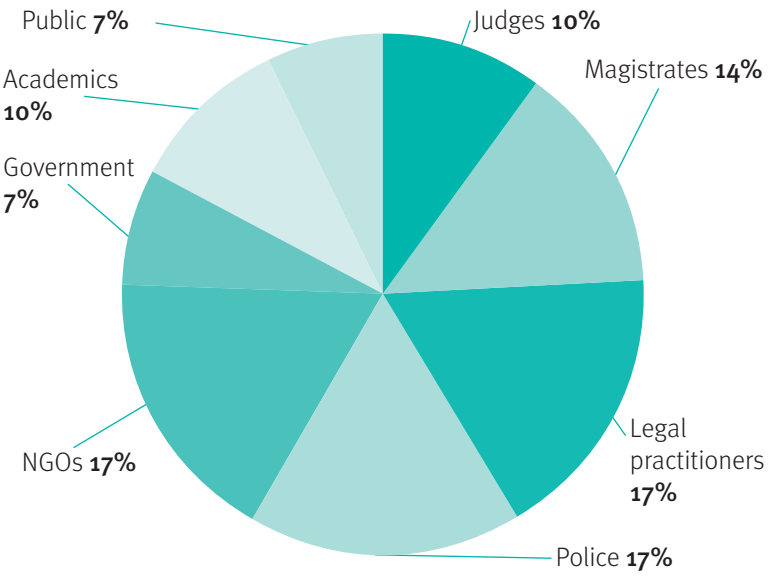
Chapter five
Exploitation offences

This section of the consultation dealt with offences concerning the commercial exploitation of both adults and children.

Language

An issue that was not directly consulted on but provoked some of the strongest representations was the language around exploitation offences. The Council, in drafting the guidelines, was sensitive to the issue but many of the concerns around language arise from the statutory definitions of these offences and so would require parliamentary amendment, outside the remit of the Council.

The very strong view of a substantial number of respondents including the Children's Commissioner, End Child Prostitution and Trafficking (ECPAT), Rights of Women, Barnardo's, Eaves and West Yorkshire Police was that using the terminology 'child prostitution' and 'child pornography' was wholly inappropriate as these do not reflect the fact that the underlying criminal activity is child abuse. In order to deal with these concerns, only the statutory title of the offence uses this language. Elsewhere in the guideline, the reference is to "victims" and not to "child prostitute". Where the terms 'prostitution' or 'pornography' occur it is only when that is



Breakdown of respondents by type

Category	Number of responses
Judges	3
Magistrates	4
Legal practitioners	5
Police	5
NGOs	5
Government	2
Academics	3
Public	2
Total responses	**29**

required to identify the statutory offence. There was a typographical error in the aggravating factors we consulted on that talked about "harm to prostitute's family/friends" rather than the victim's, which has now been remedied.

Some respondents also expressed concern about the use of the term "prostitute" in the adult offences.

"[Prostitute] is a loaded, stigmatised and pejorative term....The language is heated in this debate – there are those that say the term should be sex workers, there are those that say the term should be women exploited or abused in prostitution. As an acceptable middle ground we would suggest that wherever prostitute is used it should be replaced by women in prostitution."
Eaves

Rights of Women suggested replacing "prostitute" with "victim" or, as an alternative, "those involved in prostitution". The Council considered carefully whether to amend the terminology to "those involved in prostitution" but felt, that on balance, this could result in a lack of clarity as it could make the guideline wider than the Act. The Council also considered whether to use the term "victim" but, as stated by Eaves, language is an area where views differ and there would be those that would take issue with the use of "victim" in relation to adults involved in prostitution. However, where possible we have removed references to "prostitute", for example, "prostitute forced or coerced into seeing many customers" now becomes "individual(s) forced or coerced into seeing many 'customers'".

The Council acknowledges the sensitivities around language and makes clear on the title page of these offences that, "the terms "prostitute" and "prostitution" or "child prostitute" and "pornography" are used in this guideline in accordance with the statutory language contained in the SOA 2003". This is intended to make it clear that there is no intention to stigmatise but is a reflection of the statutory language. The Council will also commit to revise and update the language if and when there are any statutory changes made to the title of these offences.

Harm and culpability

Questions 45 and **48** sought views on the harm and culpability factors listed in causing/inciting/controlling prostitution for gain and keeping a brothel used for prostitution.

The format of these draft guidelines was slightly different as they are set out with only two categories of harm and three categories of culpability to reflect the wide range of culpability that can be found in these offences. These range from an offender with links to organised crime controlling a network of people involved in prostitution, right through to an exploited woman previously involved in prostitution but now looking after the other women in the brothel as a means of exiting prostitution. There was a general consensus that it was right to distinguish between those who run exploitative operations and those involved because of coercion.

"We agree with the Sentencing Council's approach to culpability for these offences, ...Whilst we would warn against over complication of the sentencing categories by having three categories of culpability, we do agree with the 3 levels in principle here to reflect different "power positions" and involvement."
Rights of Women

Eaves expressed concern that the reference to "coercion" in the harm category was an attempt to suggest prostitution can be a full, free and informed choice in some cases and the result of coercion in others. The Council recognises that all these offences involve some level of exploitation but the harm categories identify factors that increase harm; for example, where the "individual is forced or coerced into seeing many 'customers'" the offender is placed in category 1, the highest level of harm. This is not a commentary on freedom of choice but rather

recognition that where coercion forms part of the exploitation, a higher level of sentencing should be available.

The Law Society and the CBA suggested adding "threats of violence" to the factor "violence" in category 1 harm to reflect the psychological damage that can be caused by the use of threats. The Council agrees with this and has added "threats". This will also make it consistent with other guidelines that have been amended to include "threats of violence".

All respondents agreed with the harm and culpability factors set out for the offence of keeping a brothel.

Aggravating and mitigating factors

Questions 46 and **49** addressed the proposed aggravating and mitigating factors. There was a general consensus that the aggravating factors identified were the correct ones although there were some suggestions about where the factors should sit. It was suggested by West Yorkshire Police, Scarborough Magistrates' Bench, the NBCF and Eaves that the aggravating factor "use of drugs/alcohol or other substance to secure prostitutes compliance" should be moved to step one, culpability A. Eaves also stated that there is often not just a one-off incident of using drugs or alcohol as inducement to a sexual act, but frequently a deliberate cultivation of addiction to secure compliance in both the long and short term. A respondent who is a volunteer at Rape Crisis suggested that systematic grooming of women into prostitution should be recognised. The Council agrees and has added "grooming of individual(s) to enter prostitution including through cultivation of a dependency on drugs or alcohol" as a step one culpability factor.

ACPO highlighted situations where the threats made are those of exposing the victim to their family or friends as a means of further controlling them. The Council has included an additional aggravating factor of "threats of exposure" to cover those situations.

The Council of HM Circuit Judges submitted that many of the aggravating factors are simply means of committing the Section 53 offence of "controlling prostitution for gain" and raised the risk of 'double counting' these factors with the result that almost every offence will be aggravated. The Council gave careful consideration to these representations but decided that the controlling behaviours identified in the guidelines are particularly severe examples which should be taken into account by the sentencer. The Council did not agree that this would lead to double counting and trusts that judges will be able to weigh up the facts to avoid this.

There was less agreement with regard to mitigating factors. In relation to the offence of causing/inciting or controlling prostitution, the LCCSA was of the opinion that "remorse" was not plausible for this offence; others disagreed with "exemplary conduct" as mitigation. The Society of Legal Scholars suggested "previous good character" was sufficient and "exemplary conduct" lacked specificity and had the potential for misapplication. These comments echo wider views expressed about mitigation which are discussed in more detail in chapter two. Whilst the weight given to these factors may be limited, as a matter of principle the Council has decided that they should be included in all offences.

A mitigating factor specific to keeping a brothel is "prostitute engaged in prostitution without being pressured or corrupted by offender and exploitation minimal". This factor was questioned by a number of respondents. The NBCF thought that it may be seen as encouraging commercial prostitution. Rights of Women argued mitigation should focus on the offender's behaviour and that this mitigating factor created issues relating to an assessment of the victim and their level of exploitation. It is agreed that there is an incongruity in the way that this factor is drafted as it does not focus on the offender. The Council has therefore removed this factor.

Sentence levels

Questions 47 and **50** requested views on the proposed sentence levels and the majority of respondents expressed agreement with the proposals. The Government welcomed the starting points and ranges in category C.

"The Government agrees with the Council especially in relation to category C culpability which will generally apply to "maids" working in brothels. The Government is often lobbied by those who provide front line services to those involved in prostitution that the presence of a maid can improve safety and it is unhelpful for them to be criminalised. CPS charging guidance makes it unlikely that prosecutors would charge a maid who has low level involvement and it is helpful that the relatively low seriousness of the offence is also reflected in the sentencing guidelines."
Government response

The LCCSA thought there was a danger that "maids" could be found to be in culpability B and receive custodial sentences and that non-custodial ranges should be available. Whether a "maid" would be sentenced in category C or B would depend on how limited their function or the degree of control was, but in both categories there is a non-custodial option available in the range which the Council believes addresses the LCCSA's concern.

Sexual exploitation of children

The consultation dealt with sexual exploitation of children for offences of causing or inciting, controlling, arranging or facilitating child prostitution or pornography (sections 48, 49 and 50 SOA 2003) and paying for the sexual services of a child (section 47 SOA 2003).

As already discussed at page 39 many of the comments in relation to the child guidelines concerned the language of the statute and the terms "child prostitution" and "child pornography".

Harm and culpability

Question 51 solicited agreement from the majority of respondents. ECPAT suggested that the harm factor "victim passed around by the offender to other adults and/or moved to other brothels" identified behaviours which amount to the separate offence of trafficking. ECPAT was concerned that this could provide an incentive for this offence to be charged rather than the offences concerning human trafficking which would perpetuate the problem of underuse of human trafficking legislation. The Council has always been clear that charging decisions are a matter for the CPS and that sentencers can only sentence the offences that are before them. However, having consulted with the CPS, the reality is that these offences are sometimes used as alternative charges to trafficking. The guideline was drafted with the intention that, whichever offence is charged, where there is evidence of a child being passed between offenders or trafficked, the harm to the child should be reflected by placing it in the highest category of harm.

West Yorkshire Police and Barnardo's submitted that "threats" should be included in category 1 harm due to the degree of menace and emotional harm caused. This factor has now been added into this guideline as for the adult offences (see discussion at page 21).

Aggravating and mitigating factors

Question 52 regarding aggravating and mitigating factors solicited very few comments, aside from general comments on mitigation discussed in chapter two.

Sentence levels

Question 53 sought feedback from the approach set out in the consultation paper suggesting differing starting points and ranges depending on whether the child is under 13, 13 to 15 or 16 to 17. The alternative approach would be to refer the sentencer to the guideline on causing or inciting sexual activity with a child, when the child is under 16 and increase sentence levels to reflect the commercial

element involved in these offences. This guideline would then only apply to 16 and 17 year olds who would not be covered by the other child sexual offences. It should be noted that the sentencing outcome should be the same whichever approach is used and so the question was about format and presentation of the guideline.

The majority of respondents favoured distinguishing between the ages of victims. Supporters of this approach included the Law Society, Society of Legal Scholars, the CPS, South East London Magistrates' Bench, the NBCF, the Council of HM Circuit Judges, the CBA, NSPCC, ACPO and West Yorkshire Police. The NSPCC felt that the guideline should be split by age as otherwise the sexual activity offences become very broad, covering a wide range of harm and culpability and requiring a very broad range of sentences. This could make the guideline imprecise and of limited use to the sentencer.

Those who favoured the other approach, and felt that there should be reference to the causing or inciting sexual activity with a child guideline, were the Office of the Children's Commissioner, ECPAT, the Government, Barnardo's and You Have Not Defeated Me. ECPAT felt that distinguishing by age demeaned the experience of older victims and the Office of the Children's Commissioner did not agree with categorising the age of the victim in line with the legal age of consent. Barnardo's stated that the fact that a victim is 16 or 17 should not undermine their status as children and to distinguish in this way might put that group at a disadvantage in sentencing decisions.

As stated above, whichever approach is taken the sentencing outcome is intended to be the same and the issue is therefore the ease of use of the guideline in the courtroom. The Council has therefore decided to adopt the majority view and use different age ranges in this instance.

"We prefer the suggestion of distinguishing between age groups. It is clearer than having to refer to an earlier guideline and then applying an up-lift to reflect the commercial element. It may be that it would produce a comparable range but we prefer simplicity and clarity."
The Council of HM Circuit Judges

Question 54 asked for views on the proposed sentence levels, with all but one of those who responded in agreement with those proposed. Barnardo's welcomed the fact that sentences at the upper end were substantial reflecting the very considerable harm caused by these offences. The only respondent that disagreed with the sentence levels was the LCSSA which felt that a non-custodial option should be included within the range. The Council believes that it would not be appropriate to recommend a non-custodial option for an offence where a child has been commercially sexually exploited.

Paying for the sexual services of a child

Question 55 sought feedback on the format of the guideline for paying for the sexual services of a child.

Unlike the other offences discussed in this chapter, this offence is not about orchestrating the exploitation of a child. It is a contact offence where the offender has paid for sexual activity with a child. As discussed in the consultation paper, there are other offences covering sexual contact with a child under 16. It was recommended that, in this instance (unlike the offence of causing or inciting child prostitution or pornography) there is such a direct overlap in the offences that it would be appropriate to refer a sentencer to the relevant guidelines for other offences in order to determine the sentence and use the commercial element to uplift the sentence. The offence guideline for paying for the sexual services of a child would then be used only for 16 and 17 year olds who have no comparable offences providing legal protection elsewhere in the Act. There was universal agreement from respondents that this approach should be taken.

Harm and culpability

Questions 56 and **57** dealt with harm and culpability and aggravating and mitigating factors for this offence.

A number of respondents objected to "penetrative sexual activity" being included in harm category 2. In other guidelines for sexual activity with a child, where the child is under the age of consent, penetrative sexual activity automatically places the offender in category 1. The Council's rationale in the consultation for not including it in the highest category was because the victim is over the age of consent. The Society of Legal Scholars and the NBCF both argued that penetrative activity should be included in category 1 regardless of age because the commercial exploitation outweighs the issue of the age of consent. The Council believes there is force to this argument and has now placed penetrative activity into category 1 harm in order to bring this into line with the other guidelines.

Aggravating and mitigating factors

In relation to aggravating and mitigating factors at step two there was a high degree of consensus with the Council's proposals.

Sentence levels

Question 58 generated no disagreement with the sentence levels proposed.

Trafficking

Since the consultation, the three trafficking provisions of the SOA 2003[19] have been replaced by the new broader offence of 'trafficking people for sexual exploitation'. The new offence extends jurisdiction and provides that a UK national commits an offence regardless of where in the world it occurs and regardless of the country of arrival, travel or departure. The statutory maximum of 14 years is unchanged and apart from amendment of the statutory references that will be required it will not have any other effect on the structure of the guideline.

Some respondents made general comments about the trafficking legislation. ECPAT argued that there should be a separate offence of trafficking children as it is difficult to make one statutory provision and one guideline to cover both child and adult victims. This is not an issue that is within the Council's remit, but the concerns that were raised have been passed on to the Home Office trafficking team which has policy responsibility for trafficking legislation.

Harm and culpability

Question 59 addressed the harm and culpability factors and most respondents agreed with the factors proposed. Rights of Women welcomed the format of the guideline and felt it was a positive move away from ranking harm by the use of violence to the detriment of other factors, as appeared in the SGC guideline.

A number of suggestions were made in relation to the harm factors. The CPS suggested an extension of the factor "victim tricked/deceived into purpose of the visit" to cover instances where an individual knows she is coming to work as a prostitute but is tricked and exploited as to the nature and conditions of the work. The Council ultimately decided that this might over-complicate the factor at step one and it would always be open to the prosecution to bring this forward as an aggravating factor at step two which is non-exhaustive.

Barnardo's suggested that some of the harm factors were not easily applicable to offences involving children, echoing the comments of ECPAT above. The legislation applies to both adults and children, but to address this the Council has placed "victim under 18" in category 1 harm. This means that none of the other factors in category 1 would need to be utilised in relation to children as they may be inappropriate; however, where the victim is a child the harm will be in the highest category of harm.

19 Trafficking into the UK, within the UK and out of the UK for sexual exploitation (ss57–59 SOA 2003 replaced by s59A SOA 2003

Aggravating and mitigating factors

Question 60, which addressed the aggravating and mitigating factors, gained a high level of agreement. However, ECPAT expressed concern about the use of "particularly" vulnerable victim as it felt that all victims are vulnerable. The Council acknowledged the inherent degree of vulnerability in the consultation but proposed that there are some instances where a victim is more vulnerable.

The CPS suggested extending the factor "victim's children left in home country" to cover other family members left in the home country. It is, however, suggested that this would widen the factor too much as it is probably a likely consequence of being trafficked into or out of the UK, that family is left behind. It is suggested that children being left behind is more harmful, both for the victim and their children.

There were a number of general points made about mitigation which have already been covered in chapter two.

Sentence levels

Question 61 solicited a high degree of agreement over the sentence levels. The only comments made were by the Government and Rights for Women who both requested that the top range of category 1A be extended from 10 years to 12 years to reflect the very high harm associated with trafficking and the particular harms and culpability levels that could be evidenced at this top end of offending.

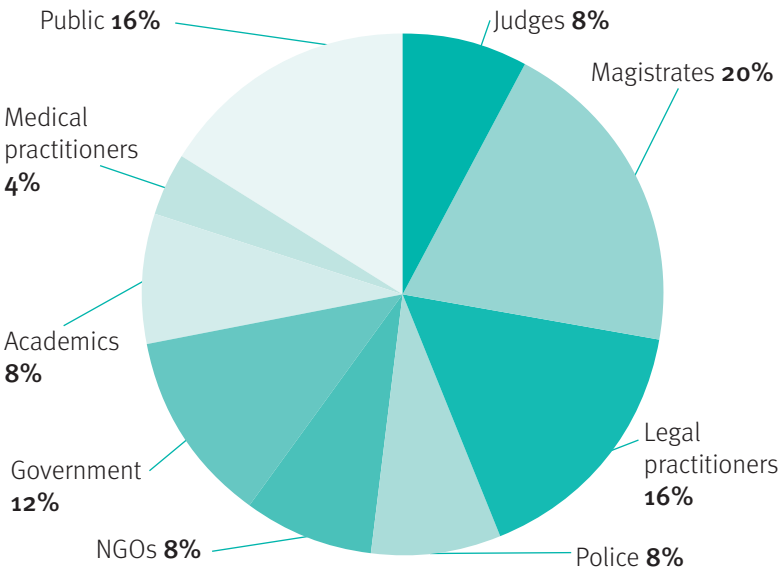
Essex Magistrates felt that the tariffs were too low and there should be no community options available for the offence of trafficking. The LCCSA felt, however, that the starting point in category 1C of 18 months was too high and should be lower. The maximum sentence for this offence is 14 years and given the strong representations made and the potential for these high level cases to be particularly severe, the Council has extended the top of the range from 10 years to 12 years' custody.

Chapter six
Offences against those with a mental disorder

A small number of responses (25) were received to the questions on mental disorder. This is unsurprising as it is a complex area of the law, the number of cases sentenced is very low and for some offences there is no record of cases being sentenced (for example the offence of inducement, threat or deception to procure sexual activity with a person with a mental disorder). The infrequency with which these offences are sentenced led magistrates in South East London, South Cambridgeshire and the LCSSA to question why the Council was producing separate guidelines for offences that are so rarely before the courts. The Council took the decision to include these offences after representations from members of the judiciary, the CPS and mental health charities who argued that it was exactly because these cases arose so rarely and were so complicated that guidance was needed.

There are three sub-categories of offence involving mental disorder:

- Offences against a person with a mental disorder impeding choice (SOA 2003 sections 30–33). This covers individuals whose mental functioning is so impaired at the time of the sexual activity that the victim is unable to refuse.



Breakdown of respondents by type

Category	Number of responses
Judges	2
Magistrates	5
Legal practitioners	4
Police	2
NGOs	2
Government	3
Academics	2
Medical practitioners	1
Public	4
Total responses	**25**

- Offences against a mentally disordered victim where agreement is obtained by inducement, threat and deception (SOA sections 34–37). The prosecution does not have to prove the complainant was unable to refuse for a reason related to a mental disorder, but needs to establish that the victim has a mental disorder that the offender knew or could reasonably have known about.
- Offences committed by care workers against those suffering from a mental disorder (SOA sections 38–41). Again the prosecution does not have to prove the complainant was unable to refuse, but needs to establish that the victim has a mental disorder that the offender knew or could have reasonably known about.

In the SGC guideline, the first two categories, mental disorder impeding choice and inducement, threat and deception are dealt with under the same guideline. The Council consulted on the basis of separating these offences into individual guidelines. The rationale for this was that for offences where a person has a mental disorder impeding choice and is therefore unable to refuse, this raises similar issues of harm and culpability to the non-consensual rape and assault offences where the victim does not have a mental disorder.

For offences involving inducement, threat or deception, these are more akin to the grooming and exploitation offences as set out in the sexual activity with a child guideline. The offence may have the appearance of the victim having "agreed" to the activity, but the reality is that any apparent agreement will have been obtained by exploitation.

Question 62 sought views as to whether these categories of mental disorder offence should be dealt with separately. The majority of those that responded (including the CPS, Law Society, LCSSA, the Police Federation and Respond, a mental health NGO) thought that they should be treated separately. The Law Society said that the most obvious reason for this was that Parliament has chosen to create separate offences and combining them could lead to evidential difficulties. Respond broadly agreed with separating them as it accorded with their experience of vulnerable adults groomed by people who appear to befriend them and offer inducements and have identified their victims as vulnerable in order to exploit them.

Three responses from individual magistrates disagreed on the basis that there should be one guideline to reduce the length of the document, with one suggesting inducement, threat and deception should be an aggravating factor for the other offences. Given the support for separating these offences out the Council has adopted this approach.

Mental disorder impeding choice

The offences of sexual activity with a person with a mental disorder impeding choice and causing or inciting a person with a mental disorder impeding choice to engage in sexual activity cover both penetrative and non-penetrative sexual activity. The guidelines have therefore been closely modelled on the rape and assault offences. Changes already made to those guidelines (discussed in chapter two) have been replicated in this guideline. In category 2 harm there is, however, no reference to the victim being vulnerable as that is inherent in this offence and sentence levels are higher than the other non-consensual adult offences to reflect the vulnerability in all three categories.

Harm and culpability

Question 63 asked specifically for respondents' views on whether the harm factor of "forced entry into the home or residence" should be widened to "entry by force or deception" to take account of those occasions where the victim is deceived into allowing entry. Mental health workers at the consultation event reported that it was much more common for a person with a mental disorder to be "befriended" or tricked into trusting someone or letting them gain entry rather than people trying to exploit by force. A number of respondents agreed with

the widening of the factor which has now been altered to "forced/uninvited entry into victim's home or residence". This widens the behaviour, but the scenario in which someone is befriended equates to "grooming"; it has therefore been dealt with under culpability rather than harm. A number of respondents submitted that there should be a factor to deal with psychological harm; this has been moved to step one harm making it consistent with the amended rape guideline (discussed in chapter two).

Aggravating and mitigating factors

Question 64 solicited agreement with the aggravating factors and the same concerns were expressed about the mitigating factors of "remorse" and "previous good character" as with other offences (see discussion at pages 17 to 19).

Sentence levels

Question 65 generated a high degree of consensus about the sentence levels.

Inducement threat or deception

Questions 66 to **68** regarding inducement, threat or deception solicited no substantive comments, the majority of respondents agreeing with the Council's approach. This category of offences is difficult as only two cases have been sentenced since 2003.

Offences relating to care workers

Questions 69 to **72** concerned offences relating to care workers. These offences are designed to protect a person with a capacity to consent, but who may agree to sexual activity because of a dependence on their carer. A consultation event was held with NGOs[20] working with vulnerable adults. Some attendees expressed concern about the frequency of this type of offending but felt the low number of prosecutions reflected the evidential difficulty of these cases. They stressed that care workers can be the nearest a victim has to family meaning that the abuse of trust involved can be very grave indeed. The most common scenario with vulnerable adults appears to be the offender befriending and offering the victim affection, building trust to the point where they are able to exploit or abuse the victim. Thus, it would be rare for the victim to be threatened or for any violence to be used to coerce the victim.

There was also some concern expressed that if a care worker was involved in an offence they would automatically be charged under the care worker offence. In reality, it was sometimes more appropriate to charge another offence such as rape, sexual activity with a person with a mental disorder impeding choice or inducement, threat or deception which have higher statutory maxima. As previously set out, charging practice is a matter for the CPS and the Council has raised these concerns accordingly.

Question 69 was concerned with harm and there was broad consensus on the proposals set out in the consultation. Harm is based on the sexual activity that took place as the victim may sometimes be unwilling or unable to articulate harm and believe themselves to be in a relationship with the care worker, similar to the abuse of trust guideline.

The majority of comments received focused on sentence levels. The Police Federation, West Yorkshire Police, the NBCF, Council of District Judges and the Justice Select Committee were concerned that sentence levels were too low, especially at the higher end and were not reflective of the statutory maximum of 14 years (where there is penetration) and 10 years if (where there is no penetration). The starting point consulted on for the highest category of offence in the draft guidelines was three years with the top of the range at five years (see Annex A page 58). The Council stated in consultation that the sentencing starting points and ranges for this offence should be higher than those for the other abuse of trust offences which will apply to 16 and 17 year olds where the offender is a teacher or in a formal position of authority over them. This is because there is potentially a wider range of vulnerability when the victim

20 Attended by representatives from Respond, Ann Craft Trust, Mencap and The Havens

is a vulnerable adult with a mental disorder. In addition, the abuse of trust offence has a statutory maximum of five years, considerably less than the care worker abuse of trust statutory maximum of 14 years.

The sentencing starting points and ranges used for the care worker offence were based on the SGC guideline and roughly accord with current sentencing practice. However, so few of these cases have been sentenced that it is hard to build an accurate picture of "practice".

"We ask the Council to look again at these four (care worker) offences and consider the appropriateness of raising starting points and lengthening category ranges, or including wording within the guideline to indicate when the higher sentence lengths would be appropriate."
Justice Select Committee

The Council has given sentencing of this offence further consideration and been persuaded by the representations of those working with vulnerable adults that the sentence levels should be raised when there is evidence of exploitation or grooming. The Council has altered the sentence levels so that in category 1 when there is culpability A the starting point is five years with a range of four to 10 years. This brings it into line with the levels that are available for exploitation cases under section 9 of the SOA 2003. The range is now wide enough to result in higher sentences in cases where vulnerable adults are groomed and exploited by care workers, who they trust in the same way they would a family member.

Chapter seven
Other offences

The consultation dealt with a range of "other offences" which included:

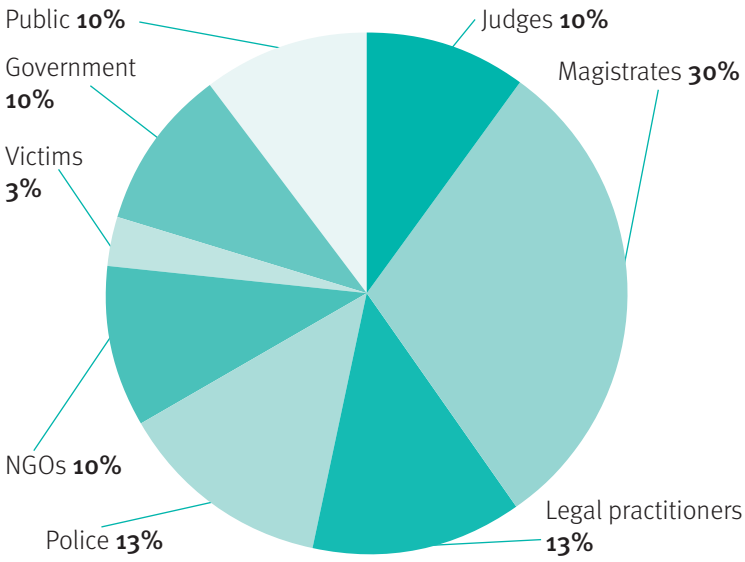
- exposure;
- voyeurism;
- sex with an adult relative; and
- preparatory offences.

Exposure

Harm and culpability

The SGC guidelines on exposure have only two categories: repeat offender and basic offence. The Council consulted on a more nuanced version which identified specific harm and culpability factors. Additionally, reference to repeat offending was removed from the harm and culpability factors at step one as previous convictions are now dealt with at step two.

Question 73 solicited agreement from all the respondents regarding the harm and culpability factors identified although some additions were suggested. The Magistrates' Association, the CBA, Northumberland Magistrates' Bench and Nottingham and Newark Magistrates' Bench suggested including a factor of "multiple offences against the same victim". It was argued that this is different to "previous convictions" as it describes persistent behaviour against a *specific* victim. However, the Council of HM Circuit Judges pointed out that this offence is normally committed against strangers. The Council has decided that instead of



Breakdown of respondents by type

Category	Number of responses
Judges	3
Magistrates	9
Legal practitioners	4
Police	4
NGOs	3
Victims	1
Government	3
Public	3
Total responses	**30**

creating a new factor, additional wording will be added to "vulnerable victim targeted". This factor now appears as "specific or previous targeting of a vulnerable victim".

Aggravating and mitigating factors

Question 74 generated responses from the Magistrates' Association and a number of magistrates' benches who were of the view that the factor "offence committed whilst on licence" is normally covered by "previous convictions" and so should be removed from the list. There are, however instances where it may be relevant to include that factor separately and therefore it has been retained. There was also the suggestion that "failure to comply with current court orders" should be included as with the other guidelines and as such, it has been included.

South Cambridgeshire Magistrates' Bench suggested an additional aggravating factor relating to the presence of others, for example, a mother subject to exposure whilst children were present thereby increasing the fear and intimidation caused to the victim. The Council agrees with this submission and has now included the factor "presence of others, especially children".

Sentence levels

Question 75 sought views on the starting points and ranges proposed. There was general agreement with the starting points. The levels proposed an increase at the top of the range to one year's custody from the SGC guideline level of 26 weeks. The Government and the Council of HM Circuit Judges was of the view that some offending was serious enough to warrant this.

Voyeurism

Harm and culpability

A similar format to exposure was adopted for voyeurism.

Question 76 generated a high degree of consensus around the step one factors proposed in the consultation and some additional suggestions were made. The Law Society, the NBCF and the Government felt that if the offender had profited from or shared the images then this should be reflected in a higher sentence. For this reason the factor "commercial exploitation and/or motivation" has now been placed at step one harm. The Council has also widened the factor "images circulated to people known to victim" to "distribution of images whether or not for gain" as an aggravating factor.

The Government and the Probation Chiefs' Association submitted that the factor "observed in own home" was too narrow and should be expanded to cover locations that are a private setting similar to a home. This factor was intended to cover situations where the harm to a victim was increased because they no longer felt safe in their own home, due to the knowledge of the intrusion. As consulted upon it was not intended to cover a temporary residence. However, following these representations the Council acknowledges that the guideline should cover situations where, for example, the victim resides in a care home or other institution. This factor has now been amended to "victim observed or recorded in their home or residence" so as to cover these types of situations.

Aggravating and mitigating factors

Question 77 respondents were in agreement with the aggravating factors listed. The Magistrates' Association argued that "period over which the victim is observed" should be included as an aggravating factor at step two. The Council agreed that this could be a relevant factor and has included it.

Sentence levels

Question 78 saw feedback from the majority of respondents that it was appropriate for the category 1 sentence ranges to be higher than those for exposure as there is greater harm and culpability where there is recording of the offence. The Government welcomed the fact that the Council has acknowledged that this type of

offending has developed with greater ease of use of recording equipment and of sharing and distributing images electronically. ACPO, NBCF, Nottingham Magistrates' Bench and a number of individual respondents felt that the proposed sentences are too lenient at the lower range. The Council believes the spread of the lowest sentencing range, that is Band A fine to high level community order, provides the sentencer with wide discretion when considering an offence where there is no raised harm or raised culpability.

Sex with an adult relative

This offence is committed when consenting adults who are closely related engage in penetrative sexual activity. It is important to note that this offence cannot be charged where the victim is a child; the appropriate charge in that situation is section 25 SOA 2003 sexual activity with a child family member.

There are two offences that can be charged in relation to such activity; one offence relates to the individual who has carried out the penetration and the other relates to the individual who has consented to penetration.

Harm and culpability

Question 79 sought views on the harm and culpability factors. There was general approval of the Council's approach in identifying those cases with a vulnerable or exploited victim.

"Overall we agree with the harm and culpability factors proposed. We recognise that there are particular sensitivities around the offence of sex with an adult relative and that whilst both parties potentially commit the offence it is important to identify issues of inequality including differences in age and/or understanding and one party's vulnerability."
CPS

A number of other respondents including the NBCF, magistrates' benches, a representative from Merseyside Police and some individuals thought that "vulnerability" should be included as a step one harm factor. Having reconsidered this issue, the Council has decided to encompass other vulnerability, including exploitation. To make this consistent with other guidelines the wording will now be "victim is particularly vulnerable due to personal circumstances".

There were a small number of respondents who thought that the "closeness of the familial relationship" should be included as a factor indicating higher culpability. This factor was deliberately excluded by the Council as the relevant relationships are defined in the legislation and it is only relatives with close blood ties or very high levels of trust, for example, adoptive parents to whom this offence would apply.

Aggravating and mitigating factors

Question 80 solicited no objections to the aggravating factors the Council had proposed.

Sentence levels

Question 81 sought views on sentence levels. ACPO expressed concern about the two year statutory maximum. However, this is set by Parliament and is therefore outside the Council's remit.

The majority of respondents recognised the sensitivity and complexity of sentencing these cases and agreed with the sentences the Council proposed.

"Our members experience in family courts shows that people involved in this sort of offending have commonly been the victim of abusive relationships themselves and community orders may help them not to perpetuate the criminality in future generations."
The Justices' Clerks' Society

Preparatory offences

There are three offences that are designed to deal with activity that takes place in preparation for committing a sexual offence:

- administering a substance with the intent to stupefy or overpower the victim so as to enable any person to engage in sexual activity with them;
- committing an offence to commit a relevant sexual offence; and
- trespass with intent to commit a relevant sexual offence.

Harm and culpability

Question 82 dealt with harm and culpability factors for administering a substance with the intent to stupefy or overpower the victim so as to enable any person to engage in sexual activity. There was support for the approach adopted in the draft guideline. The Government agreed with the Council's proposed approach because it '...will give more flexibility to sentencers and enables consideration of additional harm factors rather than solely the nature of the offence to be committed."

The Law Society expressed concern about the inclusion of the factor "abduction/detention" as it felt that this should be charged separately. The wording has been amended so abduction is removed and "prolonged detention/sustained incident" included to make it consistent with the wording in other offences.

The Council has added narrative text to step one of the guidelines for the preparatory offences to provide guidance when sentencing offenders who, after committing the preparatory offence, have *not* gone on to commit a sexual offence. This amendment was made following submissions from senior judges. The wording now states:

> "Where no substantive sexual offence has been committed the main consideration for the court will be the offender's conduct as a whole including, but not exclusively, the offender's intention."

Several consultees suggested amendments to ensure that the factors within the guideline are consistent with the overall approach of the other guidelines. In particular, the factors indicating raised harm now include "severe psychological or physical harm" to ensure that the effects of the offence on the victim are recognised at step one.

Aggravating and mitigating factors

Question 83 solicited specific feedback from the CBA arguing that the nature of the substance may be pertinent as spiking a drink with an illegal substance rather than alcohol might have a more dangerous physical effect on the victim. Another respondent said that the physical impact on the victim of the substance administered should be taken into account. The Council has addressed this point by including the factor "severe psychological or physical harm" at step one harm.

Sentence levels

Question 84, relating to sentence levels, generated general agreement and the Law Society felt that the overlap in sentence ranges was helpful.

Committing an offence with intent to commit a sexual offence

This is a difficult offence as it has the potential to cover a very wide ambit of offending.

Question 85 sought agreement to the Council's proposed approach, similar to the SGC guideline which includes a narrative rather than a guideline.

> "The starting point and sentencing range should be commensurate with that for the preliminary offence actually committed, but with an enhancement to reflect the intention to commit a sexual offence. The enhancement will need to be varied depending on the nature and the seriousness of the intended sexual offence, but two years is suggested as a suitable enhancement where the intent was to commit rape or an assault by penetration."

The Law Society supported this approach as did the Council of HM Circuit Judges.

"The offence has a wide ambit and we consider judges are well able to determine the appropriate enhancement which should be dependant upon the specific circumstances of the offence".
Council of HM Circuit Judges

The narrative approach will therefore be adopted for this offence.

Trespass with intent to commit a sexual offence

Questions 86 to **88** covered the proposals for this offence which generated a small number of responses. Of those, many replicated the revisions that have been made to other guidelines. However, the CBA responded that raised harm may be indicated by entry into victims home but suggested that this may not be confined to forced entry. The Council has therefore amended this factor to "offence committed in victim's home". Those that did comment were broadly content with the sentence levels as set out.

Historic offences

There are instances where a sexual offence will not have been reported by the victim until many years after it was committed. These are often referred to as historic sexual offences. This does not diminish the impact on the victim or the pain and suffering caused to them.

The challenge for sentencers when faced with an offence committed before the SOA 2003 came into force is how to ensure an appropriate sentence is given, particularly where the maximum sentence that would have been available at the time of the offence has subsequently changed.

Question 89 asked if sentencers would be assisted by provision of a table setting out a comparison of sentences available under old legislation and the equivalent offences and sentences today.

There was universal agreement that this would be useful and this is now included in the guidelines, along with narrative text providing a summary of how sentencers should approach the sentences. The Council is grateful to HHJ Rook and his publishers Sweet and Maxwell for allowing us to reproduce elements of the historic table.[21]

21 From *Rook and Ward on Sexual Offences Law and Practice*

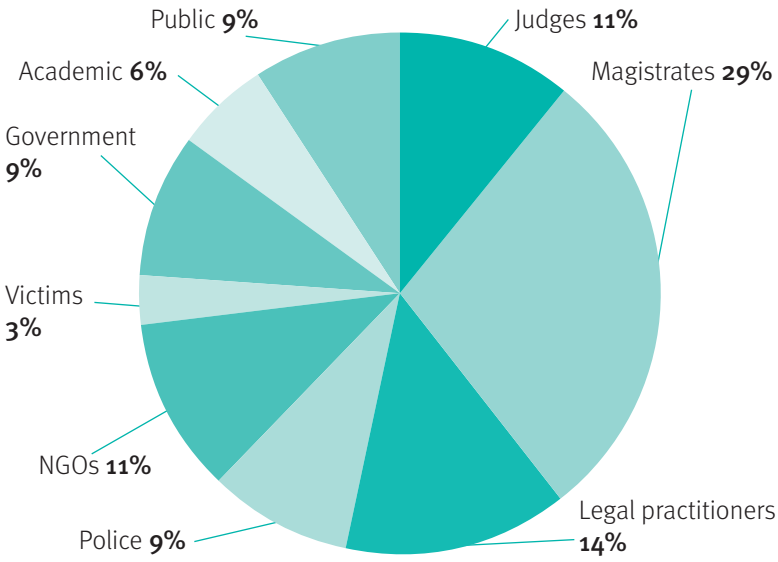
Chapter eight
Offences committed by offenders under the age of 18

All the guidelines referred to elsewhere in this response paper apply to offences committed by adult offenders, aged 18 or over. When dealing with offenders under that age, sentencers are bound by a different set of principles. In particular, sentencers must have regard to:

- the principal aim of the youth justice system which is to prevent offending by children and young people;[22] and
- the welfare of the young offender.[23]

Sentencers have at their disposal different sentencing options designed to address the needs of the youth justice system. These have been established by statute and are outside the scope of the consultation, but provide the context in which section ten of the consultation was set.

The SOA 2003[24] created a lower statutory maximum of five years for six offences (when committed by an adult the maxima is 14 years or 10 years, depending on the offence). General guidance on the sentencing of those aged under 18 is contained in the SGC *Overarching Principles – Sentencing Youths* guideline. In addition, the SGC provided offence specific guidelines for offenders aged under 18 in the *Robbery Definitive Guideline* and for these six offences in the *Sexual Offences Act 2003* guideline.



Breakdown of respondents by type

Category	Number of responses
Judges	4
Magistrates	10
Legal practitioners	5
Police	3
NGOs	4
Victims	1
Government	3
Academic	2
Public	3
Total responses	**35**

22 s.37 Crime and Disorder Act 1998
23 s.44 Children and Young Persons Act 1933
24 Section 13, with reference to sections 9–12; and sections 25 and 26

The consultation proposed the inclusion of three guidelines for these six offences committed by offenders *under* the age of 18:

- sexual activity with a child;
- causing or inciting a child to engage in sexual activity;
- engaging in sexual activity in the presence of a child;
- causing a child to watch a sexual act;
- sexual activity with a child family member; and
- inciting a child family member to engage in sexual activity.

Question 90 asked respondents whether these guidelines should be included in the definitive guidelines.

There were mixed views expressed by respondents. Berkshire Magistrates' Bench, the Law Society, the Office of the Children's Commissioner, the CPS and the Howard League disagreed or expressed reservations in respect of the proposed approach of including these guidelines.

"There is a danger that replicating the guidelines for under 18 year olds will lead to the wrong sentence, or the need to ignore certain factors. Separate guidelines in this area would be preferable, to avoid treating children and young people who offend sexually as mini-adults. There is such disparity in the issues and relevant factors in sentencing the under 18's that it is very difficult to apply adult guidelines."
The Law Society

Whilst supportive of the Council's proposals, the Office of the Children's Commissioner was of the view that further consideration should be given to the guidelines, particularly in respect of group and gang related offending, noting that the Council was due to begin work on reviewing the youth sentencing guidelines in 2014. The Office of the Children's Commissioner highlighted the particular complexities involved in considering these types of offending in the initial findings from its inquiry – Child Sexual Exploitation in Gangs and Groups (CSEGG).

"The Child Sexual Exploitation in Gangs and Groups (CSEGG) inquiry received evidence of boys being exploited or groomed to exploit their female peers; in some instances boys were subjected to physical or sexual violence to enforce compliance. During a site visit the CSEGG Inquiry was informed of two boys who were grooming their peers on behalf of older males, and who were also made to have sex with one another, this was filmed, and they were told that if they told anybody about what was happening the film would be put on the internet and they would bring shame on their families."
The Office of the Children's Commissioner

The Magistrates' Association agreed with the inclusion of these guidelines but was of the view that the Council should undertake work on the broader issue of youth sentencing. The Justices' Clerks' Society also agreed with their inclusion but made the point that "*a direct adaptation of the adult guideline is less appropriate*".

The CPS believed that guidelines for the six youth sexual offences should not be included but would be better included within the youth sentencing guidelines, the development of which is due to commence in autumn 2014.

Part of the rationale for including these guidelines was because they were included in the SGC guideline and there was a concern that a sentencing 'gap' might be created by their omission. However, the consultation highlighted that respondents did not feel that this was a significant risk.

"Sexual offences in general constitute a very small proportion of the offences which come before the youth court: less than two per cent of all offences (including out of court disposals) on the YOT [Youth Offending Team] caseload for 2011 to 12 comprised sexual offences,[25] and the offences comprised within s.13 are themselves a small fraction of the sexual offences which may be prosecuted."
The Council of District Judges (Magistrates' Courts)

A further limitation to the current SGC guideline noted by the Council of District Judges (Magistrates' Courts), is that the SGC guidelines for under 18s are *only* applicable to a first time offender aged 17 who pleads not guilty. The SGC guideline makes clear that for younger offenders a sentencer would need to consider a lower starting point in recognition of the offender's age or immaturity. Additionally, there is a number of laws which restrict the types of sentence that can be passed on offenders aged under 18, many of which depend on the age of the offender on the date of conviction. For example, the custodial sentence available to the youth court, the detention and training order, cannot, by law, be made against 10 and 11 year olds and may only be made in respect of offenders aged 12 to 14 in limited circumstances.[26] The Council of District Judges (Magistrates' Courts) was of the view that in all cases the sentencing court must be familiar with the SGC guideline *Overarching principles – Sentencing Youths*, which sets out the applicable principles for sentencing those aged under 18.

The Council recognises that the type of offences committed by young offenders against victims aged under 18 can be very different in nature to those committed by adult offenders, not least because of the use of social media. As stated, a significant amount of research into this area has been conducted by the Office of the Children's Commissioner. The inquiry report was published on 25 November 2013 and the Council wishes to consider the findings of the CSEGG report when developing its subsequent definitive guidelines for youth sexual offending.

The Council is due to commence work on sentencing youths more generally in autumn 2014, at which time the whole approach to these guidelines will be reviewed. The Council was concerned that producing guidelines for a very narrow range of serious youth offending, without considering the wider approach the Council should take to the sentencing of those aged under 18, could cause problems in the later development of those guidelines.

Whilst the Council acknowledges the argument that guidelines are needed for offences that do not regularly appear before sentencers, it was persuaded that to include the six offences at this stage was more likely to cause difficulties than be of assistance. The Council placed considerable weight on the fact that sentencing youths requires a different approach and that its proposals in consultation had been the subject of criticism. Therefore the Council will **not** be including definitive guidelines for these offences.

In order to minimise the risk of sentencers continuing to follow the SGC guidelines and the risk of creating a sentencing 'gap', the guidelines will include narrative guidance designed to assist sentencers dealing with these offences, stating that they must:

- follow the definitive guideline *Overarching Principles – Sentencing Youths*;

and have regard to:

- the principal aim of the youth justice system (to prevent offending by children and young people); and
- the welfare of the young offender.

The Council is of the view that this approach will mitigate the risk of any confusion being caused by its decision and has prioritised the development of its broader work on youth guidelines.

Questions 90 to **102** of the response paper sought views on guidelines for sentencing offenders aged under 18. In light of the Council's decision not to include those offences in the guideline, the responses received will be used to assist in the formulation of its approach to the guideline on sentencing youths, work on which will commence next year.

25 Youth Justice Statistics 2011/12 England and Wales, Youth Justice Board/Ministry of Justice Statistics bulletin

26 If the offender is considered a 'persistent offender' – there is no statutory definition but the court will consider, among other things, the offender's previous convictions

Annex A
Consultation respondents

Rape and assault offences

Responses from organisations

Association of Chief Probation Officers
Berkshire Magistrates
Birmingham Magistrates
Central Buckinghamshire Magistrates
Council HM Circuit Judges
Council of District Judges (Magistrates' Courts)
Criminal Bar Association
Crown Prosecution Service
Devon Rape Crisis Centre
Eaves
Gloucestershire Rape Crisis Centre
Gwent Police
Justice Select Committee
Justices' Clerks' Society
Kent Police
Kingsley Napley Solicitors
Law Society
London Criminal Courts Solicitors' Association
Lucy Faithfull Foundation
Ministry of Justice (incorporating response from the Home Office and the Attorney General's Office)
National Aids Trust
National Bench Chairmen's Forum
Northumbria University
Office of the Children's Commissioner
Police and Crime Commissioner for Northumbria
Police Federation
Rape Crisis
Rights of Women
Society of Legal Scholars
South Cambridgeshire Magistrates
South East London Magistrates
South East Staffordshire Magistrates
South West Staffordshire Magistrates
Victim Support
West Yorkshire Police
Wolverhampton Magistrates
You Have Not Defeated Me

Responses from individuals

Dr Thom Brooks, Durham University
Brian Chapman, National Offender Management Service
Shonagh Dillon, Aurora New Dawn
Justine Eardley-Dunn, Savana
Dr Myrna Gilbert, Group of Essex Magistrates
Dr Karen Harrison, University of Hull
His Honour Judge Inman
Zoe Jackson, Aurora New Dawn
Laura Jones, Gwent Police
Tina Landale, Recorder and Barrister
Ebony Lee, Derbyshire Constabulary
Mirelle Lloyd-Taylor, Youth Justice Board
Claire Loving, Surrey Police
Moira Macdonald, Trustee and Director of Devon Rape Crisis Services
Inspector Andy Maultby, Humberside Police
Karen McBride, Surrey Police
Laura McGowan, Barrister and founder of All Our Daughters
Sandra Norburn, Doncaster Council
Dr Tanya Palmer, University of Bristol
Jill Saward, Lancashire Against Domestic Abuse Forum

Ben Snuggs, Hampshire Police
His Honour Judge Stokes
Laura Timms, East London Rape Crisis Service
His Honour Judge Webb
Barbara Wharrier, Magistrate

A number of responses were also received from members of the public

Offences where the victim is a child

Responses from organisations

Association of Chief Police Officers
Barnado's
Berkshire Magistrates
Birmingham Magistrates
Council of District Judges (Magistrates' Courts)
Council of HM Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Eaves
ECPAT
Justice Select Committee
Justices' Clerks' Society
Kent Police
Kingsley Napley Solicitors
Law Society
London Criminal Courts Solicitors' Association
Mid and South East Northumberland Magistrates
Ministry of Justice (incorporating response from Home Office and Attorney General's Office)
National Bench Chairmen's Forum
NSPCC
Office of the Children's Commissioner
Oxfordshire Magistrates
Police Federation
Probation Chiefs' Association
Rape Crisis
Scarborough Magistrates
Society of Legal Scholars
South Cambridgeshire Magistrates
South East London Magistrates
South East Staffordshire Magistrates
South West Staffordshire Magistrates
West Yorkshire Police
Wolverhampton Magistrates
You Have Not Defeated Me

Responses from individuals

Justine Eardley-Dunn, Savana
Dr Karen Harrison, University of Hull
His Honour Judge Inman
Laura McGowan, Barrister and founder of All Our Daughters
Professor Suzanne Ost, Lancaster University
Jill Saward, Lancashire Against Domestic Abuse Forum
His Honour Judge Stokes
His Honour Judge Tremberg
His Honour Judge Webb
Sarah Wenban, Magistrate

A number of responses were also received from members of the public

Indecent images of children

Responses from organisations

Association of Chief Police Officers Grading Panel
Council of District Judges (Magistrates' Courts)
Council of HM Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Internet Watch Foundation
Justices' Clerks' Society
Kent Police
Kingsley Napley Solicitors
Law Society
London Criminal Courts Solicitors' Association
Magistrates' Association
Mid and South East Northumberland Magistrates
Ministry of Justice (incorporating responses from Home Office and Attorney General's Office)
National Bench Chairmen's Forum
NSPCC
Nottingham and Newark Magistrates
Oxfordshire Magistrates
Police Federation
Probation Chiefs' Association
Scarborough Magistrates
South East London Magistrates
South Cambridgeshire Magistrates
Society of Legal Scholars
Telford and South Shropshire Magistrates
West Yorkshire Police

Responses from individuals
Garry England, Surrey Police
Dr Myrna Gilbert, Group of Essex magistrates
Tina Landale, Recorder and Barrister
Jon Merry, Surrey Police
Professor Suzanne Ost, Lancaster University
Gill Partridge, Essex Police Online Investigation Team
Jill Saward, Lancashire Against Domestic Abuse Forum
His Honour Judge Stokes
Debbie Tipton, Merseyside Police
His Honour Judge Webb

A number of responses were also received from members of the public

Exploitation offences

Responses from organisations
Association of Chief Police Officers
Barnado's
Council of District Judges (Magistrates' Courts)
Council of HM Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Eaves
ECPAT
Justices' Clerks' Society
Kent Police
Law Society
London Criminal Courts Solicitors' Association
Ministry of Justice (incorporating response from Home Office and Attorney General's Office)
National Bench Chairmen's Forum
Police Federation
Probation Chiefs' Association
Rights of Women
Society of Legal Scholars
South Cambridgeshire Magistrates
South East London Magistrates
West Yorkshire Police

Responses from individuals
Dr Thom Brooks, Durham University
Dr Myrna Gilbert, Group of Essex magistrates
Jill Saward, Lancashire Against Domestic Abuse Forum
Debbie Tipton, Merseyside Police
His Honour Judge Webb

A number of responses were also received from members of the public

Offences against those with a mental disorder

Responses from organisations
Council of District Judges (Magistrates' Courts)
Council HM Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Justices' Clerks' Society
Law Society
London Criminal Courts Solicitors' Association
Ministry of Justice (incorporating response from Home Office and Attorney's General's Office)
National Bench Chairmen's Forum
Police Federation
Probation Chiefs' Association
Respond
Royal College of Psychiatrists
Society of Legal Scholars
South Cambridgeshire Magistrates
South East London Magistrates
West Yorkshire Police

Responses from individuals
Dr Thom Brooks, Durham University
Dr Myrna Gilbert, Group of Essex magistrates
Jill Saward, Lancashire Against Domestic Abuse Forum

A number of responses were also received from members of the public

Other offences

Responses from organisations
Association of Chief Police Officers
Council of District Judges (Magistrates' Courts)
Council HM Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Justice Select Committee
Justices' Clerks' Society
Kent Police
Law Society

London Criminal Courts Solicitors' Association
Magistrates' Association
Mid and South East Northumberland Magistrates
Ministry of Justice (incorporating responses from Home Office and Attorney General's Office)
National Bench Chairmen's Forum
Nottingham and Newark Magistrates
Oxfordshire Magistrates
Police Federation
Probation Chiefs' Association
Rape Crisis
Society of Legal Scholars
South Cambridgeshire Magistrates
South East London Magistrates
Telford and South Shropshire Magistrates
West Yorkshire Police
You Have Not Defeated Me

Responses from individuals
Dr Thom Brooks, Durham University
Dr Myrna Gilbert, Group of Essex magistrates
His Honour Judge Henderson
Jill Saward, Lancashire Against Domestic Abuse Forum

A number of responses were also received from members of the public

Offences committed by offenders under the age of 18

Responses from organisations
Berkshire Magistrates
Council of District Judges (Magistrates' Courts)
Council of HM Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Howard League
Justices' Clerks' Society
Law Society
London Criminal Courts Solicitors Association
Lucy Faithfull Foundation
Magistrates' Association
Mid and South East Northumberland Magistrates
Ministry of Justice (incorporating responses from Home Office and Attorney General's Office)
National Bench Chairmen's Forum
Nottingham and Newark Magistrates
Office of the Children's Commissioner
Oxfordshire Magistrates
Police Federation
Probation Chiefs' Association
Society of Legal Scholars
South Cambridgeshire Magistrates
South East London Magistrates
Telford and South Shropshire Magistrates
West Yorkshire Police

Responses from individuals
Dr Myrna Gilbert, Group of Essex magistrates
Professor Gwyneth Boswell, Boswell Research Fellows & University of East Anglia
His Honour Judge Bourne-Arton
Jill Saward, Lancashire Against Domestic Abuse Forum
Debbie Tipton, Merseyside Police

Responses were also received from members of the public

General responses

Centre for Child and Family Law Reform
Crime Commissioner for Wiltshire Swindon
Macclesfield Magistrates (Cheshire branch)
Prison Reform Trust
Project Guardian
T2A Alliance
His Honour Judge Gilbart

Annex B
Consultation questions

Question no.	Question	Page reference
Rape and assault offences		
Q1	Do you agree with the approach to harm and culpability proposed for the rape guideline in order to reflect the fact that all rape involves harm to the victim and a high level of culpability?	10
Q2	Do you agree with the harm and culpability factors proposed at step one for rape? If not, please specify which you would add or remove and why.	10
Q3	Do you agree with the aggravating and mitigating factors proposed at step two for the offence of rape? If not, please specify which you would add or remove and why.	15
Q4	Please give your views on the proposed sentence levels (starting points and ranges) for the offence of rape. If you disagree with the levels stated, please give reasons why.	19
Q5	Do you agree that assault by penetration and rape should be treated separately in the guideline?	20
Q6	Do you agree with the harm and culpability factors proposed for assault by penetration? If not, please specify which you would add or remove and why.	20
Q7	Do you agree with the aggravating and mitigating factors proposed for assault by penetration? If not, please specify which you would add or remove and why.	20
Q8	Please give your views on the proposed sentence levels (starting points and ranges) for assault by penetration. If you disagree with the levels stated, please give reasons why.	20
Q9	Do you agree with the harm and culpability factors proposed at step one for sexual assault? If not, please specify which you would add or remove and why.	21

Question no.	Question	Page reference
Q10	Do you agree with the aggravating and mitigating factors proposed at step two for sexual assault? If not, please specify which you would add or remove and why.	22
Q11	Please give your views on the proposed sentence levels (starting points and ranges) for the offence of sexual assault. If you disagree with the levels stated, please give reasons why.	22
Q12	Do you agree with the Council's approach to the guideline on sexual activity without consent?	22
Offences where the victim is a child		
Q13	Do you agree with the harm and culpability factors proposed at step one for rape of a child under 13? If not, please specify which you would add or remove and why.	24
Q14	Do you agree with the aggravating and mitigating factors proposed at step two for rape of a child under 13? If not, please specify which you would add or remove and why.	24
Q15	Do you agree with the narrative guidance for rape of a child under 13? If not, do you have other suggestions as to the wording?	25
Q16	Please give your views on the proposed sentence levels (starting points and ranges) for rape of a child under 13. If you disagree with the levels stated, please give reasons why.	26
Q17	Do you agree that the remaining under 13 offences should be treated separately from the 13 and over guidelines? If not, please give reasons.	26
Q18	Do you agree with the proposed guidelines for the remaining under 13 offences? If not, please specify which factors you would add or remove and why.	26
Q19	Do you believe that engaging in sexual activity with a child and causing or inciting a child to engage in sexual activity should be dealt with in the same guideline?	27
Q20	Do you agree with the harm and culpability factors proposed at step one for sexual activity with a child? If not, please specify which you would add or remove and why.	27
Q21	Do you agree with the aggravating and mitigating factors proposed at step two for sexual activity with a child? If not, please specify which you would add or remove and why.	28
Q22	Please give your views on the proposed sentence levels (starting points and ranges) for the offences of engaging in sexual activity with a child and causing or inciting a child to engage in sexual activity. If you disagree with the levels stated, please give reasons why.	29

Question no.	Question	Page reference
Q23	Do you believe that engaging in sexual activity with a child family member and inciting a child family member to engage in sexual activity should be dealt with in the same guideline? If not, please give reasons.	30
Q24	Do you agree with the harm and culpability factors proposed at step one for sexual activity with a child family member and inciting a child family member to engage in sexual activity? If not, please specify which you would add or remove and why.	30
Q25	Do you agree with the aggravating and mitigating factors proposed at step two for sexual activity with a child family member and inciting a child family member to engage in sexual activity? If not, please specify which you would add or remove and why.	30
Q26	Please give your views on the proposed sentence levels (starting points and ranges) for sexual activity with a child family member and inciting a child family member to engage in sexual activity. If you disagree with the levels stated, please give reasons why.	30
Q27	Do you believe that the offences of engaging in sexual activity in the presence of a child and causing a child to watch a sexual act should be dealt with in the same guideline? Please give reasons for your answer.	30
Q28	Do you agree with the harm and culpability factors proposed at step one for engaging in sexual activity in the presence of a child and causing a child to watch a sexual act? If not, please specify which you would add or remove and why.	30
Q29	Do you agree with the aggravating and mitigating factors at step two for engaging in sexual activity in the presence of a child and causing a child to watch a sexual act? Please give reasons for your answer.	30
Q30	Please give your views on the proposed sentence levels (starting points and ranges) for engaging in sexual activity in the presence of a child and causing a child to watch a sexual act. If you disagree with the levels stated, please give reasons why.	30
Q31	Do you agree with the format of the guideline for the offence of meeting a child following sexual grooming?	31
Q32	Do you agree with the harm and culpability factors proposed at step one for the offence of meeting a child following sexual grooming? If not, please specify which you would add or remove and why.	31
Q33	Please give your views on the proposed sentence levels (starting points and ranges) for the offence of meeting a child following sexual grooming. If you disagree with the levels stated, please give reasons why.	31

Question no.	Question	Page reference
Q34	Do you agree with the harm and culpability factors proposed at step one for abuse of trust: sexual activity with a child and abuse of trust: causing or inciting a child to engage in sexual activity? If not, please specify which you would add or remove and why.	32
Q35	Do you agree with the aggravating and mitigating factors proposed at step two for abuse of trust: sexual activity with a child and abuse of trust: causing or inciting a child to engage in sexual activity? If not, please specify which you would add or remove and why.	32
Q36	Please give your views on the proposed sentence levels (starting points and ranges) for abuse of trust: sexual activity with a child, and abuse of trust: causing or inciting a child to engage in sexual activity. If you disagree with the levels stated, please give reasons why.	32
Q37	Do you agree with the harm and culpability factors proposed at step one for abuse of trust: sexual activity in the presence of a child, and abuse of trust: causing a child to watch a sexual act? If not, please specify which you would add or remove and why.	32
Q38	Please give your views on the proposed sentence levels (starting points and ranges) for abuse of trust: sexual activity in the presence of a child, and abuse of trust: causing a child to watch a sexual act. If you disagree with the levels stated, please give reasons why.	32
Indecent images of children		
Q39	Do you agree with the proposed rationalisation of the current levels 1 to 5 of indecent images of children?	33
Q40	Do you agree with the approach suggested to dealing with mixed collections of indecent images of children? If not, please state why.	34
Q41	Do you agree with the use of role and the use of image levels A, B and C to determine the category of offence and the exclusion of volume at step one of the guideline for the indecent images offences? If not, please give reasons.	35
Q42	Do you have any suggestions for how level C 'erotic posing' could be re-labelled within the guideline for the indecent images offences?	36
Q43	Do you agree with the aggravating and mitigating factors proposed at step two for the indecent images offences? If not, please specify which you would add or remove and why.	37
Q44	Please give your views on the proposed sentence levels (starting points and ranges) for the indecent images offences. If you disagree with the levels stated, please give reasons why.	38

Question no.	Question	Page reference
Exploitation offences		
Q45	Do you agree with the harm and culpability factors proposed at step one for the offences of causing/inciting and controlling prostitution? If not, please specify which you would add or remove and why.	40
Q46	Do you agree with the aggravating and mitigating factors proposed at step two for the offences of causing/inciting and controlling prostitution? If not, please specify which you would add or remove and why.	41
Q47	Please give your views on the proposed sentence levels (starting points and ranges) for the offences of causing/inciting and controlling prostitution? If you disagree with the levels stated, please give reasons why.	42
Q48	Do you agree with the harm and culpability factors proposed at step one for keeping a brothel for prostitution? If not, please specify which you would add or remove and why.	40
Q49	Do you agree with the aggravating and mitigating factors proposed at step two for keeping a brothel for prostitution? If not, please specify what you would add or remove and why.	41
Q50	Please give your views on the proposed sentence levels (starting points and ranges) for keeping a brothel for prostitution. If you disagree with the levels stated, please give reasons why.	42
Q51	Do you agree with the harm and culpability factors proposed at step one for the child prostitution or pornography offences? If not, please specify which you would add or remove and why.	42
Q52	Do you agree with the aggravating and mitigating factors proposed at step two for the child prostitution or pornography offences? If not, please specify which you would add or remove and why.	42
Q53	Do you prefer the approach of starting points and ranges within the guideline for the child prostitution or pornography offences that distinguish between those aged under 13, 13–15 and 16 and over, or do you favour referring the sentencer to the guideline on causing and inciting sexual activity or an alternative approach?	42
Q54	Please give your views on the proposed sentence levels (starting points and ranges) for the child prostitution or pornography offences. If you disagree with the levels stated, please give reasons why.	43
Q55	Do you agree that where sentencing an offender for paying for the sexual services of a child, it would be appropriate to refer the sentencer to the guidelines for ss.5–9 SOA 2003 if the victim is under 16?	43

Question no.	Question	Page reference
Q56	Do you agree with the harm and culpability factors proposed at step one for paying for the sexual services of a child? If not, please specify which you would add or remove and why.	44
Q57	Do you agree with the aggravating and mitigating factors proposed at step two for paying for the sexual services of a child? If not, please specify what you would add or remove and why.	44
Q58	Please give your views on the proposed sentence levels (starting points and ranges) for paying for the sexual services of a child. If you disagree with the levels stated, please give reasons why.	44
Q59	Do you agree with the harm and culpability factors proposed at step one for the trafficking offences? If not, please specify which you would add or remove and why.	44
Q60	Do you agree with the aggravating and mitigating factors proposed at step two for the trafficking offences? If not, please specify which you would add or remove and why.	45
Q61	Please give your views on the proposed sentence levels (starting points and ranges) for the trafficking offences. If you disagree with the levels stated, please give reasons why.	45
Offences against those with a mental disorder		
Q62	Do you agree that the offences concerning a victim with a mental disorder impeding choice should be treated separately from victims who engage in sexual activity due to inducement, threat or deception? If not, please give reasons.	47
Q63	Do you agree with the harm and culpability factors proposed at step one for the offences of sexual activity with a person with a mental disorder impeding choice? If not, please specify which you would add or remove and why.	47
Q64	Do you agree with the proposed aggravating and mitigating factors at step two for the offences of sexual activity with a person with a mental disorder impeding choice? If not, please specify what you would add or remove and why.	48
Q65	Please give your views on the proposed sentence levels (starting points and ranges) for the offences of sexual activity with a person with a mental disorder impeding choice. If you disagree with the levels stated, please give reasons why.	48
Q66	Do you agree with the Council's approach to the guideline on engaging in sexual activity in the presence of a person with a mental disorder impeding choice or causing that person to watch a sexual act?	48

Question no.	Question	Page reference
Q67	Do you agree with the Council's approach to the guideline on procuring sexual activity through inducement, threat or deception and causing a person with a mental disorder to engage in sexual activity by inducement, threat or deception?	48
Q68	Do you agree with the Council's approach to the guideline on engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder and of causing a person with a mental disorder to watch a sexual act by inducement, threat or deception?	48
Q69	Do you agree with the harm and culpability factors proposed at step one for offences relating to care workers? If not, please specify which you would add or remove and why.	48
Q70	Do you agree with the aggravating and mitigating factors proposed at step two for offences relating to care workers? If not, please specify which you would add or remove and why.	48
Q71	Please give your views on the proposed sentence levels (starting points and ranges) for offences relating to care workers. If you disagree with the levels stated, please give reasons why.	48
Q72	Do you agree with the Council's approach to the guideline on care workers: sexual activity in the presence of a person with a mental disorder and causing a person with a mental disorder to watch a sexual act?	48
Other sexual offences		
Q73	Do you agree with the harm and culpability factors proposed at step one for exposure? If not, please specify which you would add or remove and why.	50
Q74	Do you agree with the aggravating and mitigating factors proposed at step two for exposure? If not, please specify which you would add or remove and why.	51
Q75	Please give your views on the proposed sentence levels (starting points and ranges) for exposure. If you disagree with the levels stated, please give reasons why.	51
Q76	Do you agree with the harm and culpability factors proposed at step one for voyeurism? If not, please specify which you would add or remove and why.	51
Q77	Do you agree with the aggravating and mitigating factors proposed at step two for voyeurism? If not, please specify which you would add or remove and why.	51
Q78	Please give your views on the proposed sentence levels (starting points and ranges) for voyeurism. If you disagree with the levels stated, please give reasons why.	51

Question no.	Question	Page reference
Q79	Do you agree with the harm and culpability factors proposed at step one for the sex with an adult relative offences? If not, please specify which you would add or remove and why.	52
Q80	Do you agree with the aggravating and mitigating factors proposed at step two for the sex with an adult relative offences? If not, please specify which you would add or remove and why.	52
Q81	Please give your views on the proposed sentence levels (starting points and ranges) for the sex with an adult relative offences. If you disagree with the levels stated, please give reasons why.	52
Q82	Do you agree with the harm and culpability factors proposed at step one for administering a substance with intent to stupefy or overpower? If not, please specify which you would add or remove and why.	53
Q83	Do you agree with the aggravating and mitigating factors proposed at step two for administering a substance with intent to stupefy or overpower? If not, please specify which you would add or remove and why.	53
Q84	Please give your views on the proposed sentence levels (starting points and ranges) for administering a substance with intent to stupefy or overpower. If you disagree with the levels stated, please give reasons why.	53
Q85	Do you agree with the approach to committing an offence with the intention of committing a sexual offence? If not, please give reasons why.	53
Q86	Do you agree with the harm and culpability factors proposed at step one for trespass with intent to commit a sexual offence? If not, please specify which you would add or remove and why.	54
Q87	Do you agree with the aggravating and mitigating factors proposed at step two for trespass with intent to commit a sexual offence? If not, please specify which you would add or remove and why.	54
Q88	Please give your views on the proposed sentence levels (starting points and ranges) for trespass with intent to commit a sexual offence. If you disagree with the levels stated, please give reasons why.	54
Q89	Do you agree with the addition of an annex to the sentencing guidelines which sets out a comparison of the sentences available under old laws and what the equivalent offences and sentences would be under the SOA 2003?	54

Question no.	Question	Page reference
Offences committed by offenders under the age of 18		
Q90	Do you agree that guidelines for the six offences committed by offenders under the age of 18, included in the current SGC guideline, should be included? If you disagree, please give reasons.	56
Q91	Do you agree that the offences of sexual activity with a child and causing/inciting a child to engage in sexual activity should be contained in one guideline? If not, please state your reasons.	57
Q92	Do you agree with the harm and culpability factors proposed at step one for sexual activity with a child and causing/inciting a child to engage in sexual activity? If not, please specify which you would add or remove and why.	57
Q93	Do you agree that the starting points in the guideline for sexual activity with a child and causing/inciting a child to engage in sexual activity should not be based on the age of the offender? If you disagree, please give reasons.	57
Q94	Do you agree with the aggravating and mitigating factors proposed at step two for sexual activity with a child and causing/inciting a child to engage in sexual activity? If not, please specify which you would add or remove and why.	57
Q95	Please give your views on the proposed sentence levels (starting points and ranges) for sexual activity with a child and causing/inciting a child to engage in sexual activity. If you disagree with the levels stated, please give reasons why.	57
Q96	Do you agree that the offences of sexual activity in the presence of a child and causing a child to watch a sexual act should be contained in one guideline? If not, please state your reasons.	57
Q97	Do you agree with the harm and culpability factors proposed at step one for sexual activity in the presence of a child and causing a child to watch a sexual act? If not, please specify which you would add or remove and why.	57
Q98	Do you agree with the aggravating and mitigating factors proposed at step two for sexual activity in the presence of a child and causing a child to watch a sexual act? If not, please specify which you would add or remove and why.	57
Q99	Please give your views on the proposed sentence levels (starting points and ranges) for sexual activity in the presence of a child and causing a child to watch a sexual act. If you disagree with the levels stated, please give reasons why.	57
Q100	Do you agree that the offences of sexual activity with a child family member and inciting a child family member to engage in sexual activity should continue to be dealt with in one guideline? If not, please state your reasons.	57

Question no.	Question	Page reference
Q101	Do you agree with the harm and culpability factors proposed at step one for sexual activity with a child family member and inciting a child family member to engage in sexual activity? If not, please specify which you would add or remove and why.	57
Q102	Please give your views on the proposed sentence levels (starting points and ranges) for sexual activity with a child family member and inciting a child family member to engage in sexual activity. If you disagree with the levels stated, please give reasons why.	57

Consultation Co-ordinator contact details

If you have any comments about the way this consultation was conducted you should contact the Sentencing Council Consultation Co-ordinator at:
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