

Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

28 January 2022
SC(22)JAN07 – Sexual Offences
Adrian Fulford
Ollie Simpson
07900 395719

1 ISSUE

1.1 Signing off finalised revisions to the sexual offence guidelines and a new guideline for sexual communication with a child.

2 RECOMMENDATIONS

2.1 That Council:

- signs off the revisions to the sexual offences guidelines and the new section 15A guideline (subject to two final points in relation to the new guideline) as set out in **Annex A**; and
- signs off the revised publication stage resource assessment at **Annex B**;
- agrees that, with the exception of the new section 15A guideline, the changes should come into effect from the point of publication.

3 CONSIDERATION

3.1 The consultation on revisions to the sexual offences guidelines ran between 13 May and 13 August 2021. This paper summarises revisions made to the draft guidelines and the resource assessment following consultation, and raises a specific point covered in the resource assessment relating to the new proposed aggravating factor on age disparity.

Section 14

3.2 The draft revised guideline for section 14 of the Sexual Offences Act 2003 is at page 1 of Annex A, with post-consultation amendments in red. As agreed by Council, it remains a brief textual guideline directing sentencers to the guideline for the offence which was being facilitated or arranged.

3.3 Currently those are the guidelines for sections 9 to 12 of the 2003 Act: sexual activity with a child/causing or inciting sexual activity with a child, and engaging in sexual activity in the presence of a child/causing a child to watch a sexual act. When the relevant provisions in the Police, Crime, Sentencing and Courts Bill are commenced that will be extended to the

guidelines for offences under sections 5 to 8: rape of a child under 13, assault of a child under 13 by penetration, sexual assault of a child under 13 and causing or inciting a child under 13 to engage in sexual activity.

3.4 Following consultation and road testing, we amended the section 14 text to:

*“In cases where an offender is only prevented by the police or others from conducting the intended sexual activity at a late stage, or where a child victim does not exist and, but for this fact, the offender would have carried out the intended sexual activity, **only a very small reduction within the category range will usually be appropriate.**”*

to mitigate the risk that sentencers give too much of a discount to reflect the lack of a real victim. We have also added brackets to the text consulted on to be clearer that the guidance covers all cases where no sexual activity takes place, including but not limited to cases where the victim is fictional:

“No sexual activity need take place for a section 14 offence to be committed (including in instances where no child victim exists). In such cases the court should identify the category of harm on the basis of the sexual activity the offender intended etc etc”

“Causing or inciting” offences

3.5 The additional text being added to the guidelines for the “causing or inciting” offences in the Sexual Offences Act¹ is on page 3 of Annex A. This simply mirrors the change outlined above for section 14. Whilst the fictional victim scenario is unlikely to occur with some of those offences, it was agreed that it could not hurt to include the guidance. The reference to a “child victim” will simply be to a “victim” if the offence involves adult victims.

3.6 Council has agreed to add a drop down in the guidelines for the child sex offences covered by section 14 which replicates in full the guidance from the section 14 guideline, in response to concerns that this could get missed by sentencers in the process of cross-referencing.

Drop down explanations

3.7 The drop down text proposed as a step one “expanded explanation” for the harm factor “significant psychological harm” is at page 4 of Annex A, again with post-consultation changes in red. In response to various comments received on the text we have amended the

¹ These are section 8 (causing or inciting a child under 13 to engage in sexual activity); section 10 (causing or inciting a child to engage in sexual activity); section 17 (abuse of position of trust: causing or inciting a child to engage in sexual activity); section 26 (inciting a child family member to engage in sexual activity); section 31 (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity); section 39 (care workers: causing or inciting sexual activity); sections 48 (causing or inciting sexual exploitation of a child); and section 52 (causing or inciting sexual exploitation for gain).

text for clarity, to be clear that a degree of psychological harm is inherent in the offending and taken into account in setting sentencing levels, and that the absence of a finding of significant psychological harm is not to diminish the psychological harm which has occurred.

3.8 The proposed drop down text on abuse of trust, which is based on the existing expanded explanation, is on page 5 of Annex A. No changes are being made to this post-consultation.

Mitigating factors

3.9 Council has also agreed to amend the mitigating factor “age and/or lack of maturity where it affects the responsibility of the offender” to the new standard “age and/or lack of maturity” and to add the now standard “physical disability or serious medical condition requiring urgent, intensive or long-term treatment” to all relevant sexual offence guidelines.

Overseas victims/remote offending

3.10 In response to the concerns about the potential for confusion, Council has agreed to revise the text consulted on in relation to remote offending and the approach to victims who are overseas (see page 6 of Annex A, post-consultation changes in red). This reflects the fact that there may be factual elements in an individual case related to the location of offender or victim, and the remote nature of the offending that *do* merit consideration as part of the assessment of seriousness, but the *approach* to that assessment should be the same regardless.

3.11 We consulted on adding this text to the guidelines for section 8 (causing or inciting a child under 13 to engage in sexual activity); section 10 (causing or inciting a child to engage in sexual activity); section 48 (causing or inciting sexual exploitation of a child); and section 52 (causing or inciting sexual exploitation for gain). Following responses to the consultation, we will also add it to the guidelines for section 17 (abuse of a position of trust: causing or inciting a child to engage in sexual activity) and section 47 (paying for sexual services of a child).

Sexual Harm Prevention Orders

3.12 We are amending the wording on information on sexual harm prevention orders in response to requests for additional information from consultees (see page 7 of Annex A). These cover the time limits on foreign travel restrictions, and the effect on existing orders, Although we are not providing exhaustive information on SHPOs, we will provide a link to the relevant part of statute. The changes also reflect the fact that the Police, Crime, Sentencing and Courts Bill will permit positive obligations to be imposed via SHPOs.

Historical sexual offences

3.13 We had proposed two changes to the guidance on historical sexual offences to bring its wording more into line with Court of Appeal case law, and following consultation we are changing these amendments. The final text (with our proposed changes as they now stand) is at page 8 of Annex A.

3.14 For the third bullet, we had consulted on the text “The court should sentence by reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003.” However to avoid creating yet another formulation for the Courts to follow, this will now be “The court should sentence by **measured** reference to...” which is the exact wording used in *R v H [2011] EWCA Crim 2753*.

3.15 The existing guidance speaks of youth/immaturity being a mitigating factor. The Court of Appeal in *R v Forbes [2016] EWCA Crim 1388* said in fact this should be a culpability factor (presumably because it related to the circumstances of the historical offending, not the offender currently before the courts). We consulted on moving to this approach, but concerns were raised about the difference in treatment between these and present-day cases (where youth/immaturity is a step two factor under the guidelines). In practice, a mitigating factor can relate both to the circumstances of the offence and the offender. The proposed wording therefore acts as a compromise and says “...[youth/immaturity] may be regarded as mitigation affecting the offender’s culpability.”

3.16 We will also change the title of the guidance to “Approach to sentencing historicala sexual offences” following feedback provided during consultation.

Section 15 A – Sexual communication with a child

3.17 The proposed section 15A guideline with post-consultation amendments is at page 10 of Annex A. In the raised harm category we are expanding sending or receiving “images” out to “digital media” in response to consultation responses.

3.18 Council also wanted to reflect in this category the raised harm that was likely to have been caused to a victim, bearing in mind many are fictitious. I have inserted “Significant psychological harm or distress caused, **or very likely to have been caused**, to victim/**intended victim**”. At the meeting where we considered this the wording suggested was “Significant psychological harm or distress caused to victim, **or very likely to result from intended conduct**”. The difficulty with that wording is that with section 15A no particular further conduct is intended. So I recommend adopting the amendment I have suggested.

Question 1: are you content with the raised culpability factor now being “Significant psychological harm or distress caused, or very likely to have been caused, to victim/intended victim”?

3.19 In raised culpability, we have expanded “Use of threats (including blackmail)” to include gifts and bribes in response to suggestions from consultees. We have also added “Offender acted together with others to commit the offence” which appears in a number of child sexual offence guidelines.

3.20 We have removed the aggravating factor “Commission of offence whilst under the influence of alcohol or drugs” as it is irrelevant to this offence. In response to one respondent’s suggestion we have amended the aggravating factor “attempts to dispose of or conceal evidence” to include “asking the victim to conceal the offending”.

3.21 Council agreed to include “substantial disparity between age of offender and victim/intended victim” as an aggravating factor (where it appears as a culpability factor in other child sexual offence guidelines). This arose from a discussion which concluded that lying about one’s age was so commonplace in this offending that it should not be included as an aggravating factor. On reflection, the same could be said of this factor: this is discussed further in the Impact section below.

3.22 We have added the mitigating factor common in sexual offence guidelines “steps taken to address offending behaviour” in response to a suggestion from consultees.

4 EQUALITIES

4.1 The consultation asked

- Do you consider that any elements of the draft guidelines and revisions presented here, or the ways in which they are expressed, could risk being interpreted in ways which could lead to discrimination against particular groups?
- Are there any other equality and diversity issues these guidelines and revisions should consider?

4.2 We are not making any amendments in relation to the few points raised in response to this question. The only substantive response on this had suggested that offending by women should be treated more seriously (which the Council did not propose to take up) and that, in general, there were disparities in sentencing between different ethnic groups. Given the low volumes of Black, Asian, Mixed and Other ethnicity offenders for these offences, this is difficult to evidence.

5 IMPACT AND RISKS

5.1 The resource assessment to accompany the definitive guideline is at Annex B. There are only a few substantive changes to the resource assessment which was published at the point of consultation, but the new resource assessment updates the latest statistics, and highlights some findings from road testing and changes made as a result of consultation.

5.2 There has been little change to the guideline for sexual communication with a child (section 15A) since the draft stage that would have any further impact on resource.

Therefore, we still estimate that there may be a small increase in sentencing severity, with some offenders who would previously have received a community order now receiving a short immediate custodial sentence. However, it is likely that most of these would be suspended resulting in minimal impact on prison resources.

5.3 The revised resource assessment highlights that post-consultation we have tightened the language used for the section 14 guideline and the “causing or inciting” offences to ensure that sentencers do not provide too great a discount where no sexual activity takes place (“...**only** a **very** small adjustment...”). This change should confirm our original assessment about the expected impact of the revised guidance as the new wording should be in line with our original intentions. We therefore still estimate that there may be a small increase overall in sentence levels for cases in which no actual child is present for section 14 offences, with the potential requirement for approximately 40 additional prison places per year. For causing or inciting a child to engage in sexual activity (section 10), there may be an increase in sentencing severity for cases where no child exists, with the potential requirement for around 190 additional prison places per year.² The changes for the other “causing or inciting” guidelines are likely to have negligible impact on prisons or probation resources due to the small number of offenders sentenced for these offences.

5.4 Note, in any case, that these changes arise from the Court of Appeal case law so the changes in sentencing practice can be attributed to this rather than any intention of the Council to influence sentencing practice, albeit we publish these guidelines in the knowledge of what future sentencing practice will be.

5.5 Another post consultation change highlighted by the revised resource assessment is the addition of the aggravating factor “substantial disparity between age of offender and victim/intended victim” to the section 15A guideline. As mentioned above, this is likely to be

² As set out at Annex B, the transcripts used for the estimates for section 10 and 14 are cases from 2019, before the Court of Appeal ruling occurred in May 2020, therefore, the findings presented here represent the estimated impact of the guideline on 2019 sentencing practice.

present in a large number of these cases. Looking at the transcripts we have, in 89 per cent of cases, there was an age disparity of 10 years or more and the average difference in age between offender and victim was 24 years. Although not possible to quantify, this may lead to an increase in sentencing severity, although, based on current sentencing practice, these are likely to be suspended and as such would have limited impact on prison resource.

Question 2: can Council confirm it still wishes to add an aggravating factor of “substantial disparity between age of offender and victim/intended victim”?

Question 3: subject to that, is Council content with the revised resource assessment at Annex B?

5.6 Despite the public focus last year on sexual offences, particularly the safety of women and girls, it was readily understood that our consultation was seeking views on a specific and discrete issue. As covered in previous papers, there were a variety of views about how to deal with the central issue of cases where no sexual activity took place, with respondents from academia and the judiciary arguing in favour of a greater discount than we were suggesting. Others, such as the Howard League, were concerned that the sentencing levels for section 15A (sexual communication with a child) were too high. They may be disappointed by our ultimate approach.

5.7 Our rationale for the definitive guideline and any changes made (or not made) as a result of consultation will be set out in the consultation response document, which I will circulate in due course, and in communications material that we shall develop at the time of publication, which is scheduled for April.

5.8 The section 15A guideline would therefore come into effect from 1 July. Most of the other changes we are making involve clarifications to wording and expanded explanations which should reflect current case law. There is no particular necessity therefore for the changes to come into effect a period after publication.

5.9 The changes to the section 14 guideline and the insertion of text into the “causing or inciting” offences for cases where there is no victim is perhaps less clear cut as this could have a material impact on sentences (albeit in line with current Court of Appeal case law). In the case of the section 14 guideline the new addition adds significantly to the existing guideline.

5.10 I nonetheless propose that given the courts should be applying these rules already the changes come into effect upon publication of the changes. The “Effective from” date on the guideline should remain as 1 April 2014, but we will add a note to the guideline to be clear of the date that the revisions we are making have come into effect.

Question 4: does the Council agree to sign off the revisions to the existing sexual offence guidelines and guidance, and the new guideline for sexual communication with a child?

Question 5: are you content for all the changes to be effective from the point that we publish, with the exception of the new section 15 A guideline?

Arranging or facilitating the commission of a child sex offence - for consultation only

Sexual Offences Act 2003, s.14

Effective from: XXXXXXXXX

Triable either way

Maximum: 14 years' custody

For offences committed on or after 3 December 2012, these are offences listed in Part 1 of Schedule 15 for the purposes of sections 273 and 283 (life sentence for second listed offence) of the Sentencing Code.

These are **specified offences** for the purposes of sections 266 and 279 (extended sentence of imprisonment for certain violent, sexual or terrorism offences) of the Sentencing Code.

When sentencing a section 14 offence, sentencers should refer to the guideline for the applicable, substantive offence of arranging or facilitating under sections 9 to 12:

- [Sexual activity with a child](#), Sexual Offences Act 2003, s.9
- [Causing or inciting a child to engage in sexual activity](#), Sexual Offences Act 2003, s.10
- [Engaging in sexual activity in the presence of a child](#), Sexual Offences Act 2003, s.11
- [Causing a child to watch a sexual act](#), Sexual Offences Act 2003, s.12

The level of harm should be determined by reference to the type of activity arranged or facilitated. Where the activity takes place, sentences commensurate with the applicable starting point and range will ordinarily be appropriate.

No sexual activity need take place for a section 14 offence to be committed (including in instances where no child victim exists). In such cases the court should identify the category of harm on the basis of the sexual activity the offender intended, and then apply a downward adjustment at step two to reflect the fact that no or lesser harm actually resulted.

The extent of this adjustment will be specific to the facts of the case. In cases where an offender is only prevented by the police or others from conducting the intended sexual activity at a late stage, or where a child victim does not exist and, but for this fact, the offender would have carried out the intended sexual activity, **only** a **very** small reduction within the category range will usually be appropriate.

Where, for instance, an offender voluntarily desisted at an early stage a larger reduction is likely to be appropriate, potentially going outside the category range.

In either instance, it may be the case that a more severe sentence is imposed in a case where very serious sexual activity was intended but did not take place than in a case where relatively less serious sexual activity did take place.

The sentence will then be subject to further adjustment for aggravating and mitigating features, in the usual way.

For offences involving significant commercial exploitation and/or an international element, it may be appropriate to increase a sentence to a point above 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 range may be appropriate.

Other “causing or inciting” offences text

In section 10 cases where activity is incited but does not take place the court should identify the category of harm on the basis of the sexual activity the offender intended, and then apply a downward adjustment at step two to reflect the fact that no or lesser harm actually resulted.

The extent of downward adjustment will be specific to the facts of the case. Where an offender is only prevented by the police or others from carrying out the offence at a late stage, or in attempts where a [child] victim does not exist and, but for this fact, the offender would have carried out the offence, **only a very** small reduction within the category range will usually be appropriate. No additional reduction should be made for the fact that the offending is an attempt.

Where, for instance, an offender voluntarily desisted at an early stage a larger reduction is likely to be appropriate, potentially going outside the category range.

In either instance, it may be the case that a more severe sentence is imposed in a case where very serious sexual activity was intended but did not take place than in a case where relatively less serious sexual activity did take place.

The sentence will then be subject to further adjustment for aggravating and mitigating features.

Significant psychological harm - dropdown text

The sentence levels in this guideline take into account a basic level of psychological harm which is inherent in the nature of the offence. The assessment of psychological harm experienced by the victim **beyond this** is for the sentencer. Whilst **the court** may be assisted by expert evidence, such evidence is not necessary for a finding of psychological harm, including severe psychological harm. A sentencer may assess that such harm has been suffered on the basis of evidence from the victim, including evidence contained in a Victim Personal Statement (VPS), or on his or her observation of the victim whilst giving evidence. **It is important to be clear that the absence of such a finding does not imply that the psychological harm suffered by the victim is minor or trivial.**

Abuse of trust - dropdown text (no change)

A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found.

In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.

Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, employer and employee, professional adviser and client, or carer (whether paid or unpaid) and dependant. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. These examples are not exhaustive and do not necessarily indicate that abuse of trust is present.

Additionally an offence may be made more serious where an offender has abused their position to facilitate and/or conceal offending.

Where an offender has been given an inappropriate level of responsibility, abuse of trust is unlikely to apply.

Overseas victims/remote offending text

Sentencers should approach the assessment of seriousness in the same way regardless of whether ~~draw no distinction between~~ activity was caused/incited in person ~~or remotely~~ and ~~activity caused or incited remotely,~~ ~~nor between the~~ regardless of whether harm was caused to a victim in this jurisdiction ~~and that caused~~ or to a victim anywhere else in the world.

Sexual Harm Prevention Order text

Sexual harm prevention orders (SHPOs) Sexual Offences Act 2003, s103A

To make an SHPO, the court must be satisfied that the offender presents a risk of sexual harm to the public (or particular members of the public) and that an order is necessary to protect against this risk. The only prohibitions which can be imposed by an SHPO are those which are necessary for the purpose of protecting the public from sexual harm from the offender. ~~The order may include only negative prohibitions; there is no power to impose positive obligations.~~

The order may have effect for a fixed period (not less than five years) or until further order, ~~with the exception of a foreign travel prohibition which must be a fixed period of no more than five years (renewable). Different time periods may be specified for individual restrictions and requirements.~~

~~Where an SHPO is made in respect of an offender who is already subject to an SHPO, the earlier SHPO ceases to have effect. If the offender is already subject to a Sexual Offences Prevention Order or Foreign Travel Order made in Scotland or Northern Ireland, that order ceases to have effect unless the court orders otherwise.~~

~~Chapter 2 of Part 11 of the Sentencing Code [LINK] sets out further matters related to making SHPOs.~~

Approach to sentencing historical sexual offences

When sentencing sexual offences under the Sexual Offences Act 1956, or other legislation pre-dating the 2003 Act, the court should apply the following principles:^[1]

1. The offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. Under sections 57 and 63 of the Sentencing Code the court must have regard to the statutory purposes of sentencing and must base the sentencing exercise on its assessment of the seriousness of the offence.
2. The sentence is limited to the maximum sentence available at the date of the commission of the offence. If the maximum sentence has been reduced, the lower maximum will be applicable.
3. The court should sentence by **measured** reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003. Where the offence, if committed on the day on which the offender was convicted, would have constituted an offence contrary to section 5 or section 6 of the Sexual Offences Act 2003, sections 265 and 278 of the Sentencing Code (special custodial sentence for certain offenders of particular concern) apply.
4. The seriousness of the offence, assessed by the culpability of the offender and the harm caused or intended, is the main consideration for the court. The court should not seek to establish the likely sentence had the offender been convicted shortly after the date of the offence.
5. When assessing the culpability of the offender, the court should have regard to relevant culpability factors set out in any applicable guideline.
6. The court must assess carefully the harm done to the victim based on the facts available to it, having regard to relevant harm factors set out in any applicable guideline. Consideration of the circumstances which brought the offence to light will be of importance.
7. The court must consider the relevance of the passage of time carefully as it has the potential to aggravate or mitigate the

seriousness of the offence. It will be an aggravating factor where the offender has continued to commit sexual offences against the victim or others or has continued to prevent the victim reporting the offence.

8. Where there is an absence of further offending over a long period of time, especially combined with evidence of good character, this may be treated by the court as a mitigating factor. However, as with offences dealt with under the Sexual Offences Act 2003, 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.
9. If the offender was very young and immature at the time of the offence, depending on the circumstances of the offence, this may be **be regarded as mitigation significantly reduce affecting** the offender's culpability.
10. If the offender made admissions at the time of the offence that were not investigated this is likely to be regarded as personal mitigation. Even greater mitigation is available to the offender who reported himself to the police and/or made early admissions.
11. A reduction for an early guilty plea should be made in the usual manner.

[1] R v H and others [2011] EWCA Crim 2753

Sexual communication with a child

Sexual Offences Act 2003, s.15A

Effective from: XXXXXXXXXX

Triable either way

Maximum: 2 years' custody

Offence range: Community order – 2 years' custody

This is a **specified offence** for the purposes of sections 266 and 279 (extended sentence of imprisonment for certain violent, sexual or terrorism offences) of the Sentencing Code.

Step 1 – Determining the offence category

The court should determine which categories of harm and culpability the offence falls into by reference only to the tables below.

Harm

Use the factors given in the table below to identify the Harm category. If the offence involved multiple victims, sentencers may consider moving up a harm category or moving up substantially within a category range.

In cases of attempts where an offender tries to communicate with a child victim who does not exist, the court should identify the category of harm on the basis of the sexual activity the offender intended, and then apply a downward adjustment at step two to reflect the fact that no or lesser harm has actually resulted. In such cases **only a very** small reduction within the category range will usually be appropriate. No additional reduction should be made for the fact that the offending is an attempt.

Category 1

- Sexual images **or digital media** sent or received
- Significant psychological harm or distress caused, **or very likely to have been caused**, to victim/intended victim.

Category 2

- Factor(s) in category 1 not present

Culpability

Culpability A

- Abuse of trust

- Use of threats (including blackmail), **gifts or bribes**
- Targeting of a particularly vulnerable child
- Commercial exploitation and/or motivation
- Soliciting images
- **Offender acted together with others to commit the offence**

Culpability B

- Factor(s) in category A not present

Step 2 – Starting point and category range

Having determined the category of harm and culpability, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. Having determined the starting point, step two allows further adjustment for aggravating or mitigating features, set out below.

A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Where there is a sufficient prospect of rehabilitation, a community order with a sex offender treatment programme requirement under Part 3 of Schedule 9 to the Sentencing Code can be a proper alternative to a short or moderate length custodial sentence.

	Culpability A	Culpability B
Harm category 1	<p>Starting point 18 months' custody</p> <p>Category range 9 – 24 months' custody</p>	<p>Starting point 1 year's custody</p> <p>Category range High level community order – 18 months' custody</p>
Harm category 2	<p>Starting point 1 year's custody</p> <p>Category range High level community order – 18 months' custody</p>	<p>Starting point 6 months' custody</p> <p>Category range Medium level community order – 1 year's custody</p>

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions are likely to result in an upward adjustment.**

Aggravating factors

Statutory aggravating factors

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity

Other aggravating factors

- Failure to comply with current court orders
- Offence committed whilst on licence
- Financial or other reward offered to victim
- Offender lied about age or used a false identity
- **Substantial disparity between age of offender and victim/intended victim**
- Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution
- Attempts to dispose of or conceal evidence (**including asking the victim to conceal the offending**)
- Failure of offender to respond to previous warnings
- ~~Commission of offence whilst under the influence of alcohol or drugs~~
- Victim encouraged to recruit others
- Victim particularly vulnerable (where not taken into account at step one)
- Offence involved sustained or persistent communication

Mitigating factors

- No previous convictions or no relevant/recent convictions
- Remorse
- Previous good character and/or exemplary conduct*
- Isolated offence
- Age and/or lack of maturity
- **Demonstration of steps taken to address offending behaviour**

- Mental disorder or learning disability, particularly where linked to the commission of the offence
- Physical disability or serious medical condition requiring urgent, intensive or long-term treatment

* 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.

Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account [section 74 of the Sentencing Code](#) (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 4 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with [section 73 of the Sentencing Code](#) and the [Reduction in Sentence for a Guilty Plea](#) guideline.

Step 5 – Dangerousness

The court should consider whether having regard to the criteria contained in [Chapter 6 of Part 10 of the Sentencing Code](#) it would be appropriate to impose an extended sentence (sections [266](#) and [279](#)).

Step 6 – Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour. See [Totality](#) guideline.

Step 7 – Ancillary Orders

The court must consider whether to make any ancillary orders. The court must also consider what other requirements or provisions may automatically apply.

- Ancillary orders – Crown Court Compendium

Additional ancillary orders – sexual offences

Step 8 – Reasons

Section 52 of the Sentencing Code imposes a duty to give reasons for, and explain the effect of, the sentence.

Step 9 – Consideration for time spent on bail (tagged curfew)

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Code.

Final Resource Assessment

Sexual Offences

Introduction

This document fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services.¹

Rationale and objectives for new guideline

In April 2014, the Sentencing Council's *Sexual Offences Definitive Guideline* came into force, covering most sexual offences regularly sentenced by courts in England and Wales. It included guidelines for sentencing over 50 offences including offences relating to causing or inciting sexual offences and arranging and facilitating sexual offences under the Sexual Offences Act 2003 (SOA).

Recent Court of Appeal case law has clarified the approach that the courts should take in cases where no sexual activity takes place, including instances where no child victim exists, usually because the offender is the subject of a so-called "sting" operation. This will typically involve either the police, or an informal group, pretending to be a fictitious child or the parent of a fictitious child in order to identify those trying to commit sexual offences with children. The Court of Appeal requested that the Council consider clarifying the guideline for section 14 of the SOA to cater for these cases. The Council has considered that such an update is necessary. Additionally, following this case law, the Council has considered how the guidelines for causing or inciting offences (for example, section 10 of the SOA) would apply to the situation where activity is incited but not caused, and have revisited these to provide further clarification.

Section 67 of the Serious Crime Act 2015 inserted a new section 15A into the SOA making sexual communication with a child a specific offence. This offence came into effect on 3 April 2017, and no current guideline exists.

The Council has produced a new sentencing guideline covering the new offence under section 15A and has updated and revised the other relevant sexual offence guidelines, for use in all courts in England and Wales.

The Council's aim in developing these guidelines is to provide sentencers with a clear approach to sentencing sexual offences – including those where no sexual

¹ Coroners and Justice Act 2009 section 127: www.legislation.gov.uk/ukpga/2009/25/section/127

activity has occurred – that will ensure that sentences are proportionate to the offence committed and in relation to other offences, and to promote a consistent approach to sentencing.

Scope

As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the guideline on the prison service, probation service and youth justice services. Any resource impacts which may fall elsewhere are therefore not included in this assessment.

This resource assessment covers the guidelines for the following offences under the Sexual Offences Act 2003:

- Sexual communication with a child (section 15A)
- Arranging or facilitating the commission of a child sex offence (section 14)
- Causing or inciting a child to engage in sexual activity (section 10)
- Causing or inciting a child under 13 to engage in sexual activity (section 8)
- Abuse of position of trust: causing or inciting a child to engage in sexual activity (section 17)
- Causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity (section 31)
- Care workers: causing or inciting sexual activity (section 39)
- Causing or inciting sexual exploitation of a child (section 48)
- Causing or inciting prostitution for gain (section 52)

The offences shown above include all the guidelines that will see some change as a result of this revision. Some changes, like those made to sections 8, 10, 14 and 15A are more substantive and as such the resource implications of these guidelines has been discussed individually. For the remaining offences, the changes made are minor and as such are anticipated to have little or no impact, so the resource implications for these guidelines have been jointly presented within the resource assessment.

These guidelines apply to sentencing adults only; they will not directly apply to the sentencing of children and young people.

Current sentencing practice

To ensure that the objectives of the guideline are realised, and to understand better the potential resource impacts of the guidelines, the Council has carried out analytical and research work in support of them.

The intention is that the new section 15A guideline will encourage consistency of sentencing in an area where no guideline currently exists and that the revisions to existing guidelines will encourage consistency of sentencing and better reflect current case law.

Knowledge of recent sentencing was required to understand how the new guidelines may impact sentences. Sources of evidence have included the analysis of transcripts

of Crown Court judges' sentencing remarks for offenders sentenced for sexual offences and sentencing data from the Court Proceedings Database.^{2,3} A review of case law has informed the guidelines⁴ and knowledge of the sentences and factors used in previous cases, in conjunction with Council members' experience of sentencing, has helped to inform the development of the guidelines.

Research with sentencers has also been conducted, to explore whether the guidelines would be implemented as anticipated. This research has provided some further understanding of the likely impact of the guidelines on sentencing practice, and the subsequent effect on the prison population and probation resources.

Detailed sentencing statistics for sexual offences covered by the guidelines have been published on the Sentencing Council website at the following link: <http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=statistical-bulletin&topic=&year>.

Sexual communication with a child (section 15A)

The offence of sexual communication with a child came into force in April 2017 and has a statutory maximum sentence of 2 years' custody. Since then, the number of offenders sentenced has grown year on year, increasing by 65 per cent in the latest year, from around 280 in 2019 to around 470 in 2020. Of these offenders, 42 per cent were sentenced to a community order, a further 38 per cent received a suspended sentence order, 13 per cent received an immediate custodial sentence and 1 per cent received a fine. The remaining 6 per cent were recorded as otherwise dealt with.⁵ For those receiving immediate custody in 2020, the average (mean) custodial sentence length (ACSL) was 10 months.

Arranging or facilitating the commission of a child sex offence (section 14)

The statutory maximum sentence for arranging or facilitating the commission of a child sex offence is 14 years' custody. In 2020, around 120 offenders were sentenced for this offence, with the majority (78 per cent) sentenced to immediate custody. A further 18 per cent received a suspended sentence order, and 4 per cent

² The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics. The data presented in this resource assessment only include cases where the specified offence was the principal offence committed. When a defendant has been found guilty of two or more offences this is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe. Although the offender will receive a sentence for each of the offences that they are convicted of, it is only the sentence for the principal offence that is presented here. The average custodial sentence lengths presented in this resource assessment are average custodial sentence length values for offenders sentenced to determinate, immediate custodial sentences, after any reduction for guilty plea. Further information about this sentencing data can be found in the accompanying statistical bulletin and tables published here: <http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>.

³ Figures presented for 2020 include the time period since March 2020 in which restrictions were placed on the criminal justice system due to the COVID-19 pandemic. It is therefore possible that these figures may reflect the impact of the pandemic on court processes and prioritisation and the subsequent recovery, rather than a continuation of the longer-term series, so care should be taken when interpreting these figures.

⁴ Notably the case of *Privett and Others [2020] EWCA Crim 557*. More recently *Reed and Others [2021] EWCA Crim 572* confirmed the principles set out in *Privett* apply in cases beyond section 14.

⁵ Otherwise dealt with' covers miscellaneous disposals. Please note that due to a data issue currently under investigation, there are a number of cases which are incorrectly categorised in the Court Proceedings Database (CPD) as 'Otherwise dealt with'. Therefore, these volumes and proportions should be treated with caution.

received a community order. The ACSL for those sentenced to immediate custody was 3 years 3 months.⁶

Causing or inciting a child to engage in sexual activity (section 10)

The statutory maximum sentence for causing or inciting a child to engage in sexual activity is 14 years. In 2020, around 240 offenders were sentenced for this offence and over half were sentenced to immediate custody (55 per cent). A further 30 per cent received a suspended sentence order, 13 per cent received a community order and 3 per cent were recorded as otherwise dealt with.^{5,7} For those receiving immediate custody, the ACSL was 3 years.⁶

Causing or inciting a child under 13 to engage in sexual activity (section 8)

The statutory maximum sentence for causing or inciting a child under 13 to engage in sexual activity is life imprisonment. In 2020, around 140 offenders were sentenced for this offence and most offenders received an immediate custodial sentence (78 per cent). A further 13 per cent received a suspended sentence order, 6 per cent received a community order and 3 per cent were recorded as otherwise dealt with.⁵ In 2020, the ACSL for this offence was 4 years 4 months.

Other causing and inciting sexual offences (sections 17, 31, 39, 48 and 52)⁸

The statutory maximum sentence varies across these causing and offences under the sections of the SOA mentioned above, from 5 years' for section 17 (abuse of position of trust: causing or inciting a child to engage in sexual activity) to life imprisonment for section 31 (causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity where penetration was involved).⁹

Between 2016 and 2020, around 180 offenders were sentenced for the offences under the sections of the SOA mentioned above. Most of these (around 110 offenders, 70 per cent) were sentenced under section 48: causing or inciting sexual exploitation of a child. Around 20 offenders were sentenced under section 17 and section 52, around 10 offenders were sentenced under section 31 and fewer than 5 offenders were sentenced under section 52.¹⁰

For offenders sentenced under section 48 (the highest volume of these offences) between 2016 and 2020, 59 per cent of offenders were sentenced to immediate custody. Suspended sentence orders accounted for 22 per cent of sentences, community orders accounted for 14 per cent, 4 per cent were recorded as otherwise

⁶ Figures presented here include offending where there was a real child victim as well as offending where there was not. It should be noted that figures presented in the resource impact sections relate only to offending where there was no real child. Therefore, care should be taken when drawing comparisons between the two sets of figures

⁷ Percentages may not sum to 100 per cent due to rounding.

⁸ Due to the small number of offenders sentenced for these offences, 5 years of data have been presented. For offences with very low volumes, further breakdowns of sentence outcomes and ACSLs have not been provided.

⁹ The statutory maximum for section 39 offences is 14 years' custody, for section 48 offences the statutory maximum is 14 years' custody and for section 52 offences the statutory maximum is 7 years.

¹⁰ Figures on sentence outcomes have been presented for the highest volume offence (section 48), figures of sentencing outcomes for the other sections are available in the accompanying data tables.

dealt⁵ with and fines and discharges accounted for 1 per cent each.⁷ The ACSL for section 48 over the 5-year period was 3 years 8 months.

Key assumptions

To estimate the resource effect of a new guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is based on the objectives of the guideline and draws upon analytical and research work undertaken during guideline development. However, some assumptions must be made, in part because it is not possible precisely to foresee how sentencers' behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the new guideline are therefore subject to a substantial degree of uncertainty.

Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural change. In addition, for low volume offences, and those which have only recently been created, there are limited data available. The assumptions thus have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the guideline, and an assessment of the effects of changes to the wording of the guideline where a previous guideline existed.

The resource impact of the guidelines and changes to existing ones are measured in terms of the changes in sentencing practice that are expected to occur as a result of them. Any future changes in sentencing practice which are unrelated to the publication of the guidelines and revisions are therefore not included in the estimates.

In developing sentence levels for the guidelines, existing guidance and data on current sentence levels has been considered. While data exists on the number of offenders and the sentences imposed, assumptions have been made about how current cases would be categorised across the levels of culpability and harm proposed in the guidelines, due to a lack of data available regarding the seriousness of current cases. As a consequence, it is difficult to ascertain how sentence levels may change under the new guidelines.

During the consultation stage, research was conducted with sentencers, to examine how the guidelines may be applied in practice.¹¹ This research provided evidence to help further understand the likely impact of the guidelines on sentencing practice, and the subsequent effect on prison and probation resources.

¹¹ Interviews were conducted with 14 Crown Court judges (who were ticketed to sentence sexual offences), 3 district judges and 3 magistrates to further understand how the guidelines would be implemented in practice, specifically for cases where no sexual activity had taken place. Sentencers were presented with several different scenarios representing section 10, section 14 and section 15A offences and were first asked to sentence the case as if it were before them in court today and then to sentence the case using the new or revised guideline, answering some detailed questions about the process and outcomes as they went along. The sample size was small, which means the findings cannot be considered representative of all sentencers. However, they provide an insight into how these groups may use and respond to the guideline.

Resource impacts

This section should be read in conjunction with the guideline available at: <http://www.sentencingcouncil.org.uk/>.

Overall impacts

The expected impact of each guideline and revision is shown in detail below. Analysis of Crown Court judges' sentencing remarks for the relevant sexual offence cases has been conducted to assess how sentences may change under the guidelines. Research with sentencers during the consultation stage has enabled us to further understand the application of the guideline and to make changes accordingly.

For sexual communication with a child (section 15A), there is currently no guideline in place, so the aim of this guideline is to improve consistency of sentencing. However, it is estimated that there may be a small increase in sentencing severity, with some offenders who would previously have received a community order now receiving a short immediate custodial sentence; in practice it is likely that most of these sentences would be suspended and so there would be minimal impact on prison resources.

For arranging or facilitating the commission of a child sexual offence (section 14), there may be a small increase overall in sentence levels for cases in which no actual child is present. It is estimated that there may be a small increase in the ACSL for these cases with the potential requirement for approximately 40 additional prison places per year.¹²

For causing or inciting a child to engage in sexual activity (section 10), there may be an increase in sentencing severity for cases where no child exists (which are charged as attempts), or where the child does exist and the offence was incited but did not occur. It is estimated that for these cases, the ACSL may increase, with the potential requirement for around 190 additional prison places per year.¹²

For causing or inciting a child under 13 to engage in sexual activity (section 8) it is anticipated that there will be little change in sentencing practice and, as such, there will be little impact on prison resources.

For other causing and inciting sexual offences under sections 17, 31, 39, 42 and 52 of the SOA 2003, there may be a small increase in sentencing severity for cases where no real victim exists, or where a victim does exist and the offence was incited but did not occur. As volumes are low, it is difficult to ascertain the impact for these offences, but it is anticipated that any changes would have very little impact on prison and probation resources.

The revised guidelines for all arranging or facilitating and causing or inciting offences (sections 8, 10, 14, 17, 31, 39, 48 and 52 of the SOA) have been updated following guidance from the Court of Appeal and, as such, the estimated changes in

¹² These estimates are based on 2019 data and as such should be treated with caution, as current sentencing practice after May 2020 (and subsequently April 2021 for non-section 14 cases) may already be accounting for the Court of Appeal guidance. For more information on how the impacts were calculated, see page 8 for section 14 offences and page 9 for section 10 offences.

sentencing practice presented above are attributable to the case law which is now incorporated within the guideline, rather than it being a separate intention of the Council to influence sentencing practice.

Sexual communication with a child (section 15A)

The offence of sexual communication with a child, inserted by section 67 of the Serious Crime Act 2015, came into force on 3 April 2017; there is currently no guideline for this offence.

The new guideline has two levels of culpability and two levels of harm, leading to four offence categories. The sentencing range for this offence has been set with evidence of current sentencing practice in mind, spanning from a community order to 2 years' custody, which is the statutory maximum sentence for this offence. Since the offence came into force in April 2017, almost all offenders have received a sentence within this range (93 per cent).

Most offenders who are sentenced for sexual communication with a child are sentenced at the Crown Court (86 per cent in 2020) and analysis of a sample of Crown Court judges' sentencing remarks was undertaken during guideline development to understand the possible effects of the guideline on sentencing practice.¹³ This analysis suggests that offenders who would currently receive a community order may receive a short custodial sentence using the new guideline. However, based on current sentencing practice, it is likely that most of these sentences would be suspended and so there would be minimal impact on prison resources. If a higher proportion of custodial sentences are not suspended, this would require additional prison places. However, research with sentencers conducted during the consultation stage indicated that sentencing outcomes pre and post guideline were broadly stable, with most custodial sentences being suspended and as such it is still anticipated that this guideline will have minimal impact on prison resources.

Arranging or facilitating the commission of a child sex offence (section 14)

The existing guideline for section 14 offences asks sentencers to refer to the guideline for the applicable, substantive offence of arranging or facilitating under sections 9 to 12 of the SOA 2003 and provides brief guidance on how to apply those guidelines to section 14 cases. This approach remains suitable and appropriate; however, following a request from the Court of Appeal to consider whether further guidance was required, the Council proposes to amend the guideline to provide additional information for sentencers in cases in which no child exists.

The Court of Appeal case of *R. v Privett* highlighted that no sexual activity needs to take place for a section 14 offence to be committed and raised concerns about the previous approach taken regarding harm when no child existed. The Court of Appeal in *Privett* said that the court is required to consider the sexual activity intended (even if it does not occur) as part of its assessment of harm, and as such these offences should not automatically be treated as the lowest level of seriousness simply on the basis that no real child was involved. The revised guideline echoes this approach and

¹³ A total of 20 transcripts of Crown Court sentencing remarks for sexual communication with a child from 2019 were analysed to assess the impact this guideline may have on prison and probation services.

advises sentencers to identify the category of harm at step 1 based on the sexual activity intended and then apply a downward adjustment at step 2 to reflect the lack of harm which has actually resulted.

In 2020, all adult offenders sentenced for arranging or facilitating a child sexual offence were sentenced at the Crown Court. Analysis of a sample of Crown Court judges' sentencing remarks was undertaken to assess whether there might be any potential resource impact related to these changes. It found that 75 per cent of transcripts involved cases in which no real child existed. These transcripts were then used to identify possible impacts of the additional wording provided in the guideline.¹⁴

The transcripts were analysed with reference to the guidance provided in the revised guideline for these types of cases, to try to determine how sentences may change. For cases involving no actual child, original sentence practice varied, with most being placed in the lower levels of harm (around 70 per cent were placed in level 2 or 3, with around 30 per cent in level 1). The analysis suggests that overall, sentences would be likely to increase because most of these cases would now be placed into the highest harm category (about 90 per cent in level 1 and 10 per cent in level 2), and then adjusted accordingly. It was estimated that for cases where no real child was involved, most offences that previously attracted a community order or suspended sentence order would now be given an immediate custodial sentence instead,¹⁵ and custodial sentence lengths would increase. Sentence lengths are estimated to increase on average by 5 months for these offences, from 2 years 10 months to 3 years 3 months¹⁶ and, as a result, may lead to the need for approximately 40 additional prison places per year.¹⁷ This anticipated increase is lower than that for section 10 cases (see below) as some cases already appear to be taking a similar approach to that set out in the case of *Privett*. It should be noted that this increase in sentence severity would be attributable to the change in case law which is now incorporated within the guideline, rather than an intention of the Council to influence sentencing practice.

The transcripts used for this analysis are cases from 2019, before the Court of Appeal ruling occurred in May 2020; therefore, the findings presented here represent the estimated impact of the guideline on 2019 sentencing practice. To calculate the estimated impact, case specific details from the transcripts and knowledge of the case law was used to establish the appropriate reduction to make for cases in which no real child was present. Firstly, the harm and culpability levels were established, then an assumed reduction (for the purposes of this assessment only) of up to one year was applied from the starting point, before any other aggravation or mitigation

¹⁴ Of the 28 Crown Court transcripts analysed, 21 transcripts (75 per cent) were identified as relating to cases in which no real child was present; most of these were identified as police undercover operations, but a small proportion were identified as vigilante action.

¹⁵ Very few transcripts were analysed for those sentenced to community orders or suspended sentence orders, however, all those that were included in the analysis, saw the sentence increased to an immediate custodial sentence. Therefore, this estimate provides an indication of the movement of sentences in relation to these cases.

¹⁶ This ACSL was calculated using the sampled transcripts and represents the estimated average custodial sentence length of the section 14 offences within the transcript analysed where no real child was involved. It does not reflect the whole case mix of this offence and as such is not comparable to the ACSL set out in the 'Current sentencing practice' section of this document.

¹⁷ Using evidence from the transcript analysis, it has been estimated that around 75 per cent of offenders sentenced for the section 14 offence were sentenced for cases in which no real child existed, therefore this proportion has been applied to the overall number of offenders sentenced for this offence in 2019 to allow an estimation of the impact of this change

was applied. This was then compared to the original sentence to allow an estimate of the impact based on 2019 sentencing outcomes. The transcripts used for this analysis are cases from 2019, as such, the findings presented here represent the estimated impact of the guideline on 2019 sentencing practice. To calculate the estimated impact, case specific details from the transcripts and knowledge of the case law was used to establish the appropriate reduction to make for cases in which no real child was present. Firstly, the harm and culpability levels were established, then an assumed reduction (for the purposes of this assessment only) of up to one year was applied from the starting point, before any other aggravation or mitigation was applied. This was then compared to the original sentence to allow an estimate of the impact based on 2019 sentencing outcomes.

At the draft stage resource assessment (for which the latest available data was from 2019), it was anticipated that after May 2020, more sentencers would follow the approach set out by the Court of Appeal and that subsequently sentences may increase for offences in which no real child was present and that the revised guideline itself would have little impact on sentencing practice. However, the most recent sentencing data shows that the overall ACSL (which includes offending where there was a real child victim as well as offending where there was not) has remained stable at around 3 years across both 2019 and 2020. If sentencers had begun applying the guidance in May 2020, given that in 75 per cent of the transcripts studied by the Council no real child was present, we may have expected to see at least a small increase in the length of sentences given to offenders receiving immediate custody; however, this does not appear to have been the case. This may reflect the fact that some sentencers were following this approach even before May 2020, that the reductions being made for the lack of a real victim are substantial, and/or the case mix before the courts. However, it is possible that the guideline may help to further reinforce a change in sentencing practice when it comes into force, with the courts applying the guidance to cases in which no real child was present, resulting in an increase in sentence length for these cases and a subsequent need for some additional prison places.¹⁸

During the consultation period, research with sentencers was conducted to understand how the guideline would be applied in practice. Sentencers were presented with scenarios in which an offender had engaged in a section 10 offence where the child victim was not real. All sentencers arrived at the same categorisation and all made downwards adjustments as the case involved no actual child. However, the size of the adjustments made varied and, as such, the guideline has been altered since the draft stage to ensure a consistent approach, to be clearer that only a very small reduction will usually be appropriate in such cases. Therefore, it is still anticipated that the guideline will mean Courts follow the Court of Appeal approach closely and sentencing severity for section 10 cases where no actual child is involved will increase. It is important to note that the Police, Crime, Sentencing and Courts Act 2022 is expanding the list of offences that may be arranged or facilitated for a section 14 offence to occur to include sexual offences committed against children under 13 (sections 5 to 8 of the SOA). The Council intends to make consequential amendments to the guidelines to reflect these changes. Any resource impact from these further amendments would be the result of legislative changes, rather than changes the Sentencing Council has initiated. However, due to the nature of these

¹⁸ The estimations presented in this resource assessment are upper estimates of what the Council anticipate will happen, based on the information available

offences and the harm factors presented in their guidelines, it is anticipated that this change will have little impact on sentencing outcomes for this offence and, as such, any impact on prison or probation resources will be negligible (see further detail below on section 8).

Causing or inciting a child to engage in sexual activity (section 10)

The revised guideline for causing or inciting a child to engage in sexual activity repeats the guidance set out in the offence of arranging or facilitating the commission of a child sexual offence: that sentencers should identify the category of harm on the basis of the sexual activity the offender intended, rather than the sexual activity that occurred, then apply an appropriate downward adjustment at step 2.

Transcripts of Crown Court judges' sentencing remarks have been analysed in relation to the new guideline and cases where there was no real child or where the activity was incited with a real child but did not take place have been identified. These cases have been analysed to try to determine how sentences may change under the additional guidance.¹⁹

Similarly to the section 14 offence, the categorisation of harm for section 10 offences is expected to increase for cases where there is no real child or where the activity was incited with a real child but did not take place. These cases account for just over half (54 per cent) of those sentenced for section 10 offences and the analysis suggested that the harm would increase from level 3 under 2019 sentencing practice to level 1 under the revised guideline, with a reduction applied to allow for the lesser harm actually caused. Due to this, it is estimated that on average, immediate custodial sentences for cases where there was no real child or where the activity was incited with a real child but did not take place may increase by about 2 years 4 months, from 1 year 2 months to 3 years 6 months,²⁰ resulting in a need for approximately 190 additional prison places per year. This increase in sentence severity would be attributable to the change in case law which is now incorporated within the guideline, rather than an intention of the Council to influence sentencing practice. It is also expected that in cases where a real child was present or the sexual activity took place, sentences will remain unaffected by this change.²¹

As with the section 14 offence, the transcripts used for this analysis are cases from 2019, before the Court of Appeal ruling occurred in May 2020; therefore, the findings presented here represent the estimated impact of the guideline on 2019 sentencing practice. To calculate the estimated impact, case-specific details from the transcripts and knowledge of the case law was used to establish the appropriate reduction to make for cases in which no real child was present. Firstly, the harm and culpability levels were established, then an assumed reduction (for the purposes of this assessment only) of up to one year was applied from the starting point, before any

¹⁹ Of the 26 transcripts relating to causing or inciting a child to engage in sexual activity analysed, 14 were identified as involving no real child or where the activity was incited with a real child but did not take place.

²⁰ This ACSL was calculated using the sampled section 10 transcripts and represents the estimated average custodial sentence length of the specific offence within the transcript analysed where no real child was involved

²¹ Using evidence from the transcript analysis, where 54 per cent of offenders sentenced for section 10 offences were sentenced for offences in which no child was harmed, this proportion has been applied to the overall number of offenders sentenced for this offence in 2019 to allow an estimation of the impact of this change.

other aggravation or mitigation was applied. This was then compared to the original sentence to allow an estimate of the impact based on 2019 sentencing outcomes.

As with the section 14 offences, at the draft stage resource assessment (for which the latest available data was from 2019) it was anticipated that after May 2020, sentencers would follow the approach by the Court of Appeal and that subsequently sentences may increase for offences in which no real child was present and that the revised guideline itself would have little impact on sentencing practice. However, the most recent sentencing data shows a slight decrease in the overall mean ACSL (which includes offending where there was a real child victim as well as offending where there was not) between 2019 and 2020, from 3 years 11 months to 3 years 3 months. If sentencers had begun applying the guidance in May 2020, given that in 54 per cent of the transcripts studied by the Council no real child was present, we may have expected to see at least a small increase in the length of sentences given to offenders receiving immediate custody but, this does not appear to have been the case. This may reflect the fact that some sentencers were following this approach even before May 2020, that the reductions being made for the lack of a real victim are substantial, and/ or the case mix before the courts. Furthermore, given that the recent case of *Reed and Others [2021] EWCA Crim 57* in April 2021 confirmed that the principles set out in the May 2020 Court of Appeal ruling are relevant to section 10 offences, it may be possible that sentencing severity increases following this more recent guidance. It is therefore difficult to determine the impact of including the Court of Appeal guidance within the new guideline. It is possible that the guideline may help to further reinforce a change in sentencing practice when it comes into force, with the courts applying the guidance to cases in which no real child was present. If this is the case, we might expect an increase in sentence length for these cases and a subsequent need for some additional prison places.¹⁸

Research with sentencers was conducted during the consultation stage. This explored how sentencing practice may be influenced by the additional wording in the guideline after the Court of Appeal ruling when sentencing section 14 cases where there was no real child victim. As with the section 14 offences, the research suggested that there was a consistent approach to the offence categorisation and a subsequent reduction was made at the start of step 2 to account for the lack of real child. However, there was a varied approach to the adjustment, so the guidelines have been altered to account for this to be clearer that only a very small reduction will usually be appropriate in such cases. We therefore still anticipate that the severity of these sentences may increase under the new guideline, in line with the guidance given by the Court of Appeal.

The revised guideline also adds additional guidance for sentencers on cases where offences are committed remotely or online, clarifying that sentencers should draw no distinction between activity caused or incited in person and activity caused or incited remotely, nor between the harm caused to a victim in this jurisdiction and that caused to a victim anywhere else in the world. Due to the small number of offences of this nature captured by the transcripts, it is difficult to estimate the effect of this change on sentencing outcomes. However, it is expected that the changes to the guideline (and similar changes to other relevant guidelines) will help improve consistency when sentencing these cases, that it reflects current practice to a large extent, and any impact on sentences is likely to be small since the number of offenders sentenced for this type of offence is so low.

Causing or inciting a child under 13 to engage in sexual activity (section 8)

The revised guideline for causing or inciting a child under 13 to engage in sexual activity follows the same structure as the section 10 offence and advises sentencers to identify the category of harm on the basis of the sexual activity the offender intended rather than the sexual activity that occurred, then apply an appropriate downward adjustment at step 2.

Due to the nature of this offence and the harm factors presented in the guideline as it currently exists, it is not anticipated that this additional information would cause the harm category to increase for cases where no real child is involved, or the offence is incited but does not occur. The factors within the guideline that would lead to the higher levels of harm would usually require a real child to exist or for some aspect of the offending to have actually occurred, (for example, abduction and forcing entry into the victim's home). It is therefore anticipated that this change will have little impact on sentencing outcomes for this offence and as such any impact of correctional resources will be negligible.

Other causing and inciting sexual offences (sections 17, 31, 39, 48 and 52)

Due to very low volumes, the resource impacts for causing and inciting sexual offences (sections 17, 31, 39, 48 and 52) have been grouped together.

The additional explanatory wording provided within the guidelines for the section 8 and 10 offences, highlighting that sentencers should identify the category of harm on the basis of the sexual activity the offender intended rather than the sexual activity that occurred, then apply an appropriate downward adjustment at step 2, is also being applied to all other causing and inciting offence guidelines, to provide clarity on how sentencers should approach cases where no real victim is involved, or the offence is incited but does not occur.

Due to small volumes of these offences, it is difficult to estimate the effect of this change on sentencing outcomes, however, it is possible that this change may increase sentencing severity for these specific cases and consequently have an impact on correctional resources. Although it is not possible to quantify what this impact might be, it is anticipated to be minimal due to the small number of offenders sentenced for these offences, with a negligible impact on prison and probation resources.

Risks

Risk 1: The Council's assessment of current sentencing practice is inaccurate

An important input into developing sentencing guidelines is an assessment of current sentencing practice. The Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Inaccuracies in the Council's assessment could cause unintended changes in sentencing practice when the new guidelines comes into effect.

This risk is mitigated by information that is gathered by the Council as part of the guideline development and consultation phase. This includes providing case

scenarios as part of the consultation exercise which are intended to test whether the guidelines have the intended effect and inviting views on the guidelines. However, there are limitations on the number of factual scenarios which can be explored, so the risk cannot be fully eliminated. Transcripts of judges' sentencing remarks have provided a more detailed picture of current sentencing practice for these offences which has formed a large part of the evidence base on which the resource impacts have been estimated, however it should be noted that these are rough estimates which should be interpreted as indicative of the direction and approximate magnitude of any change only.

Risk 2: Sentencers do not interpret the new guidelines as intended

If sentencers do not interpret the guidelines as intended, this could cause a change in the average severity of sentencing, with associated resource effects.

The Council takes a number of precautions in issuing new guidelines to try to ensure that sentencers interpret them as intended. For the new section 15A guideline, sentencing ranges have been decided on by considering sentence ranges in the existing Sexual Offences guidelines, in conjunction with sentencing data and Council members' experience of sentencing. Transcripts of sentencing remarks of relevant sexual offence cases have been studied to gain a greater understanding of current sentencing practice and to ensure that the guidelines are developed with current sentencing practice in mind. Research with sentencers carried out during the consultation period has helped to identify possible issues with the interpretation and application of the guideline, and amendments have subsequently been made to the definitive guideline.

Consultees have also fed back their views of the likely effect of the guidelines, and whether this differs from the effects set out in the consultation stage resource assessment. The Council also uses data from the Ministry of Justice to monitor the effects of its guidelines to ensure any divergence from its aims is identified as quickly as possible.

Blank page