

# **Assessing the implementation of the Sentencing Council's Sexual Offences Definitive Guideline**

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## Assessing the implementation of the Sentencing Council's Sexual Offences Definitive Guideline

### Summary

- The Sexual Offences Definitive Guideline came into force on 1 April 2014. After the guideline had been in force for a number of years, analysis was undertaken to assess whether the guideline had an impact on sentencing outcomes (and whether these impacts differed from those expected) and to explore whether there were any problems or issues with the guideline's implementation. The overall methodology was mixed, and involved statistical analysis of courts and survey data and interviews with judges.
- For most offences, the guideline did not appear to have had an impact on average sentencing severity. This was in line with expectations in the resource assessment published alongside the guideline.
- The exception was for the offence of sexual assault, where analysis suggested that there was an increase in sentencing severity after the guideline came into force, and that this increase was at the upper limits of expectations. There was also some evidence to suggest that sentencing may have increased for the offence of sexual assault of a child under 13. The new harm factors 'Violence or threats of violence' and 'Severe psychological harm' appeared to be associated with increased sentencing severity for sexual assault. In interview judges expressed uncertainty regarding the meaning of 'Severe psychological harm' and the evidence required to establish this factor. This indicates that additional guidance on this factor may be of use.
- Judges expressed general support for the guideline. The qualitative research also indicated that in general, there was a degree of consistency in the way in which judges construed and implemented the guideline.

# 1. Introduction

## 1.1 The Sexual Offences Definitive Guideline

The Sexual Offences Definitive Guideline came into force on 1 April 2014,<sup>1</sup> replacing the previous guideline produced by the Sentencing Guidelines Council (SGC) in 2007. In 2011, which was seven years after the implementation of the Sexual Offences Act 2003, a clearer picture was available of the way that courts used the new offences which were created by the Act. There were also areas where the nature of offending had changed since the SGC guideline was drafted. Consequently, it was deemed necessary to update sentencing guidance not only to 'promote clarity and consistency in sentencing',<sup>2</sup> but also to respond to the changing nature of offending, for example the use of technology to facilitate sexual exploitation and grooming of children, and changes in societal attitudes towards sexual offending. These changes took place in the context of Operation Yewtree, where high profile individuals were investigated for, and in some cases found responsible for, historical sex offending.<sup>3</sup> The new guideline relates mainly to offences contrary to the Sexual Offences Act 2003.<sup>4</sup>

As part of the guideline development during 2011-2013, research was carried out to assess the potential impact of the new guideline and to inform its final shape. Research into attitudes to sentencing sexual offences was conducted on behalf of the Sentencing Council. In addition, qualitative research was undertaken with Crown Court judges, and transcripts of sentencing remarks for selected offences were analysed.<sup>5</sup> This research suggested that for the majority of offences, the new guidelines had been set at a level that was consistent with sentencing practice at the time. It was anticipated that for some offences of rape, the new guideline might result in a moderate increase to sentencing levels in some instances. The magnitude of this increase was subject to a substantial degree of uncertainty, and therefore a range of estimates was produced. The lower bound estimate was that the guideline would have no resource impact (based on analysis of transcripts), while the higher bound estimate was that sentences might increase by around six months on average, prior to any reduction for guilty plea (based on research interviews with Crown Court judges, where it was noted that the presence of the new factor 'Severe psychological harm' might increase the severity of some sentences).

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<sup>1</sup> Sentencing Council *Sexual Offences Definitive Sentencing Guideline* (Sentencing Council, 2014), effective from 1 April 2014: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Final\\_Sexual\\_Offences\\_Definitive\\_Guideline\\_content\\_web1.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Sexual_Offences_Definitive_Guideline_content_web1.pdf)

<sup>2</sup> Sentencing Council *Final Resource Assessment: Sexual Offences* (Sentencing Council, 2013) p. 1.

<sup>3</sup> The investigation was the subject of a report by the National Society for the Prevention of Cruelty to Children (NSPCC) and the Metropolitan Police Service (MPS). See NSPCC and MPS *Giving Victims a Voice* (NSPCC, MPS, 2013): <https://www.nspcc.org.uk/globalassets/documents/research-reports/yewtree-report-giving-victims-voice-jimmy-savile.pdf>.

<sup>4</sup> Annex B to the guideline gives guidance as to the approach to sentencing for historic sexual offences.

<sup>5</sup> These research reports can be found here: <https://www.sentencingcouncil.org.uk/publications/?topic=sexual-offences&s&cat=research-report>

The Sexual Offences Definitive Guideline adopts a two-step approach to sentencing. In step one, the court determines the offence category on the basis of the harm caused, and the culpability of the offender, based on the principal factual elements of the case. In determining the offence category, courts should only refer to the harm and culpability factors set out in the guideline. Some of these factors are new, whereas other features that were previously included as aggravating factors in the SGC guideline, are now placed within the harm and culpability categories. Further, the new harm and culpability factors relate more to specific aspects of the offence and feature a greater acknowledgement of the psychological harm to victims. Step two of the guideline sets out the starting point for the sentence and the sentencing range, with reference to the offence category. After determining the starting point, the court may adjust the sentence upwards or downwards within the sentencing range, by referring to a non-exhaustive list of aggravating and mitigating factors. The starting point applies to all offenders, with a reduction for a guilty plea only being applied after the appropriate sentence has been identified.

The Sentencing Council guideline aimed to reflect more fully the long-term effects of sexual offences on victims, hence the introduction into the step one assessment of harm of the new factor of 'Severe psychological harm'. It also aimed to look at the full context and motivation for the offences, putting emphasis on factors such as grooming and the targeting of vulnerable victims. A new aggravating factor, aiming to keep step with the wider use of technology, was the filming and photographing of victims during the commission of the offence. When the guideline was introduced these changes were particularly highlighted as demonstrating the victim focus.<sup>6</sup>

The Sentencing Council guideline also introduced significant changes to the sentencing model for some offences, particularly sexual assault and indecent images of children. In relation to the former, the type and nature of the activity previously determined the seriousness of the offence and the sentencing range. More specifically, the SGC guideline focused upon those parts of the body that were touched and were used to commit the offence (e.g. contact between naked genitalia of offender and naked genitalia, face or mouth of the victim). In contrast, under the Sentencing Council guideline, the offence category/seriousness was established by reference to the principal features of the offence (e.g. 'Severe psychological harm' and 'Significant degree of planning'). Nevertheless, whether the assault involved the touching of naked genitalia or breasts would impact upon the categorisation of harm.

In relation to indecent images of children, the new guideline was designed to simplify the way these offences were dealt with by focusing upon the content and use of the material. In contrast, the previous guideline was centred upon the volume of images. Accordingly, under the new model the offence category and sentencing ranges for indecent images were determined on the basis of the nature of the images, with the

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<sup>6</sup> <https://www.sentencingcouncil.org.uk/news/item/new-sentencing-guideline-gives-greater-focus-to-impact-of-sex-offences-on-victims/>

most extreme images falling within category A,<sup>7</sup> and the offender's conduct in relation to such, with a distinction being drawn between possession, distribution and production. In contrast to the approach adopted for the other sexual offences, the new indecent images offences guideline did not include harm and culpability factors. Volume was included as an aggravating factor.

## 1.2 The research

One of the Sentencing Council's statutory duties under the Coroners and Justice Act 2009 is to monitor the operation and effect of its sentencing guidelines and to draw conclusions from this information.<sup>8</sup> The Sentencing Council commissioned the University of Leicester to assess the sentencing guideline for sexual offences.<sup>9</sup> The evaluation was undertaken to assess whether the guideline had an impact on sentencing outcomes (and whether these impacts differed from expected) and to explore whether there were any problems or issues with the guideline's implementation. The Sexual Offences Definitive Guideline includes a large number of different offences.<sup>10</sup> In this report, we focus upon a smaller number of high volume offences, in particular rape, sexual assault and indecent images of children. The overall methodology was mixed, and involved statistical analysis of court and survey data and interviews with judges, and this is explained in the next section.

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<sup>7</sup> Category A includes penetrative sexual activity with a child, sexual activity with an animal or sadism; category B includes images of non-penetrative sexual activity with a child; and category C encompasses other indecent images not falling with categories A and B.

<sup>8</sup> The Council must (a) monitor the operation and effect of its sentencing guidelines, and (b) consider what conclusions can be drawn from the information obtained by virtue of paragraph (a) (s128 Coroners and Justice Act 2009).

<sup>9</sup> The Robbery guideline also formed part of the evaluation and will be the subject of a separate report.

<sup>10</sup> These include rape and assault offences (ss1-4 Coroners and Justice Act 2009), offences where the victim is a child (ss5-19), indecent images of children (s160 Criminal Justice Act 1988 and s1 Protection of Children Act 1978), exploitation offences (ss47-50, ss52-53, s59A and s33A Sexual Offences Act 1956), offences against those with a mental disorder (ss30-41) and other sexual offences e.g. exposure (ss61-66).

## 2. Methodology

### 2.1 Approach

A three-stage approach was taken to assess the impact of the Sentencing Council's Sexual Offences Definitive Guideline on sentencing outcomes and whether there were any implementation issues. The Council's resource assessments assess any impact on sentencing practice that is expected to occur as a result of the guideline, over and above any changes caused by unrelated issues, such as the nature of the cases coming to court. Stage one of the work was therefore directed at establishing whether the observed impact was as predicted. Stage two was also partly related to assessing impact, with a particular focus on exploring which of the factors in the guideline were influencing sentencing outcomes. The third stage involved qualitative research to explore how the guideline was being construed and used by judges, to ascertain if it was being implemented as expected.

#### Stage 1

The Ministry of Justice's Court Proceedings Database (CPD) was used to explore trends in the types of sentence outcomes imposed (such as community orders, suspended sentence orders, immediate custodial sentences etc) and, for those sentenced to immediate custody, the average custodial sentence lengths (ACSL).<sup>11</sup> These trends were analysed for different types of sexual offences in the 12 months before (January to December 2013) and the 12 months after (April 2014 to March 2015) the guideline came into effect.<sup>12</sup> This analysis covered adult offenders only (those aged 18 or over at the time of sentence), as the Sexual Offences guideline is not applicable to sentencing children and young people. The analysis included offences covered by the Sexual Offences Act 2003 only, apart from the offence of rape where it was not possible to separate out historic sex offences (i.e. rape offences committed before the Sexual Offences Act 2003 had been enacted). Therefore the analysis was based on all adult offenders sentenced for rape. As the data included a mix of sentences of varying lengths and types, to ensure comparability between different types of sentences, they were converted into a continuous 'severity' scale, with scores ranging from 0 to 100, representing the full range of sentence outcomes, from discharge (score of 0) to 20 years' custody (score of 100). However, it is acknowledged that this measure is not perfect and so should not be seen as an absolute objective measure of sentence severity.

Analysis of trends in outcomes and ACSLs do not take account of 'normal' fluctuations in the average severity of sentencing over time due to changes in

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<sup>11</sup> The average custodial sentence length (ACSL) is the average (mean) sentence length for determinate custodial sentences only. It therefore excludes indeterminate sentences (life sentences or Imprisonment for Public Protection, IPPs). This approach for calculating ACSL is consistent with that used for sentencing statistics produced by the Ministry of Justice. Finally, the ACSLs have been adjusted using data from the Crown Court Sentencing Survey (CCSS, see footnote 15 for further details) to provide estimates of the sentence length *prior* to any reduction for guilty plea. These estimates allow a better assessment of the use of sentencing guidelines as the category ranges specified in the guidelines are those before any guilty plea reduction is applied.

<sup>12</sup> This timeframe excludes the vast majority of time when the guideline had been published but not yet in force.

sentencing practice which are unrelated to guidelines – e.g. the changing number and seriousness of cases coming before the courts, changes in charging practice, etc. The data was therefore also used to conduct time series analyses using data from the CPD from 2005 to 2015. Time series analysis allowed us to distinguish between these ‘normal’ fluctuations in sentencing and changes that could reasonably be attributed to the guideline, by taking historic trends into account and using these to predict what future values might have been in the absence of the guideline. These time series models allowed us to forecast likely sentencing outcomes in the absence of the guideline and then compare this to what did happen, by seeing if the actual trend in sentence severity was within the ‘forecasted severity region’ in the model. If average severity stayed within the ‘forecasted severity region’ when the guideline came into force, then this suggests that the guideline did not have an impact on average sentences, whereas if average severity went outside of this region, then the guideline may have caused changes to average sentences. Statistical software was used to determine the best fitting time series model for the dependent variable of sentence severity separately for each offence. These models were then used to produce forecasts for sentence severity.

Based on the available CPD data, the time series models were created to forecast the likely range of sentence severity values for 21 months after the guideline came into force (April 2014 – December 2015<sup>13</sup>), assuming that no guideline had been issued. These forecasts are represented on the graphs (Figures 1 and 3-10 in the report) as the region between the dotted lines,<sup>14</sup> with the actual trend in sentence severity represented by the red line. These can be compared against each other to see if the sentence severity post-guideline fell within the forecasted region.

## Stage 2

Data from the Crown Court Sentencing Survey (CCSS)<sup>15</sup> were used to examine which guideline factors might have been influencing sentencing outcomes before and after the guideline came into force. This was carried out for offences where the observed trend may have differed from the anticipated effect, or where the guideline model was believed to have changed most substantially. The offences included in the analysis were: rape; rape of a child under 13; sexual assault; sexual assault of a child under 13; and indecent images (possession and production/distribution).

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<sup>13</sup> This was the latest available data at the time the analysis was performed.

<sup>14</sup> On the graphs, the dotted lines show the confidence interval (also called the margin of error) of the estimate. At the 95 per cent confidence level, over many repeats of a survey under the same conditions, it is expected that the confidence interval would contain the true population value 95 times out of 100.

<sup>15</sup> During the period 1 October 2010 to 31 March 2015, the Sentencing Council conducted a data collection exercise called the Crown Court Sentencing Survey (CCSS). The paper form-based survey was completed by the sentencing judge (or other sentencer) passing sentence in the Crown Court. It collected information on the factors taken into account by the judge in working out the appropriate sentence for an offender and the final sentence given. The CCSS recorded details on the factors taken into account by the judge when determining the appropriate sentence for an offender (such as harm and culpability factors, and aggravating and mitigating factors), and the final sentence given. For further information please see:

<http://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/>.



The analysis used regression methods to isolate the influence of specific sentencing factors on sentencing severity, and compared the influence of these factors for 2013 (12 months before the implementation of the guideline) and for 2014/15 (12 months after the implementation).<sup>16</sup> The CCSS data collected different information before and after the guideline came into force to reflect changes in the sentencing guidelines over this period, and therefore results are not always directly comparable.<sup>17</sup>

### Stage 3

The third stage involved qualitative research comprising semi-structured interviews with 26 Crown Court judges, mainly over the telephone. The majority of the participants were recruited via the Sentencing Council's existing research 'pool',<sup>18</sup> but some were recruited via invitations circulated by key court contacts made during the quantitative data collection exercise for the accompanying evaluation of the Robbery sentencing guideline. The interview schedule, devised in consultation with the Sentencing Council, aimed to explore with sentencers the extent to which the definitive guideline was being used in practice, whether or not they faced any difficulties when applying the guideline and the perceived existence of any unanticipated consequences.

In addition, judges were asked to consider a scenario (either rape, sexual assault or indecent images) and complete the form used in the previous CCSS, which was used during the stage 2 data collection exercise. Full details of the sentencing scenarios used can be found in an appendix to this report. It was not possible for each judge to consider every scenario in depth so scenarios were randomly allocated and sent to participants prior to the interview, resulting in each scenario being considered by either 8 or 9 judges in total. The scenarios were used to facilitate discussion about the judge's sentencing practices for the particular offence. Inevitably the qualitative findings contain more depth on the three selected offences, although judges did comment on other offences and indeed were encouraged to do so. With permission, interviews were recorded and they lasted between 30 and 55 minutes. Interviews were then transcribed and all data were coded for themes using the Nvivo software.<sup>19</sup>

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<sup>16</sup> Further information on the methodology and analysis adopted in stage 2 can be found in the appendix.

<sup>17</sup> In addition, the CCSS covered only offenders sentenced in the Crown Court (and not in the magistrates' court), and the response rate for the CCSS was around 60 per cent. Therefore the data may not be fully representative of all offenders sentenced. The CCSS forms listed the key factors influencing sentencing and provided space for sentencers to indicate other factors which were taken into account when sentencing an offender, but may not cover all factors taken into account when sentencing. For further information please see the CCSS Quality and Methodology note, which can be accessed here: <http://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/>.

<sup>18</sup> The Council has a list of judges who have indicated willingness to be contacted for research purposes. The judges who take part are self-selecting and therefore the research findings presented in this report should be regarded as indicative and not conclusive.

<sup>19</sup> At the start of these interviews, it was explained to the judges that what they said would be held and used in the strictest confidence and anonymised in any reporting.

### 3. Overall Findings

Sentencing severity for the sexual offences covered by the guideline has generally been increasing over the past decade, and, for many of the offences, sentencing severity continued to increase after the guideline came into force. These increases were mostly within the confidence limits which represent the range, based on historic trends, that sentencing severity might have taken in the absence of the guideline, which suggests that the guideline has not had an impact on average sentencing severity. The exception was for the offence of sexual assault, where increases in sentencing were at the upper limits of expectations, which may be due to the sentencing guideline.

In addition, in interview, many judges perceived that there had been an upward trend in sentences, and this was attributed to the new guideline. However, most judges agreed that where there had been an increase, this was appropriate and overwhelmingly, judges expressed support for the new guideline. The guideline was considered to provide substantial assistance when sentencing, and to have brought consistency.

### Offence specific findings

#### 3.1 Rape

Almost all sentences imposed for rape result in immediate custody, a pattern that has not changed over the last 10 years (2005-2015). As shown in Figure 1, the severity of sentences for all rape offences (both offences covered by the guideline and historical rape offences)<sup>20</sup> has shown a steady increase over time, with the adjusted average custodial sentence length (ACSL)<sup>21</sup> increasing from 8 years 6 months in 2005 to 10 years 2 months in 2013. The adjusted ACSL continued to increase after the guideline came into force, to 11 years in the 12 months after the guideline came into force.<sup>22</sup> These increases have been documented in other publications, for example the Criminal Justice Statistics quarterly publication<sup>23</sup> and have occurred in the context of high-profile coverage of sexual offences and increased reporting of sexual offending following investigations such as Operation Yewtree.<sup>24</sup>

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<sup>20</sup> It is not possible to separate offences covered by the guideline (Sexual Offences Act 2003 offences) and historic sex offences (Sexual Offences Act 1956 offences) prior to 2011.

<sup>21</sup> Pre-guilty plea sentence lengths have been estimated based on the stage at which offenders entered a plea and the reduction given, as found in the Crown Court Sentencing Survey 2014.

<sup>22</sup> The adjusted ACSL for offences covered by the guideline (Sexual Offences Act 2003 offences) increased from 9 years 4 months in 2013 to 10 years in the 12 months after the guideline came into force.

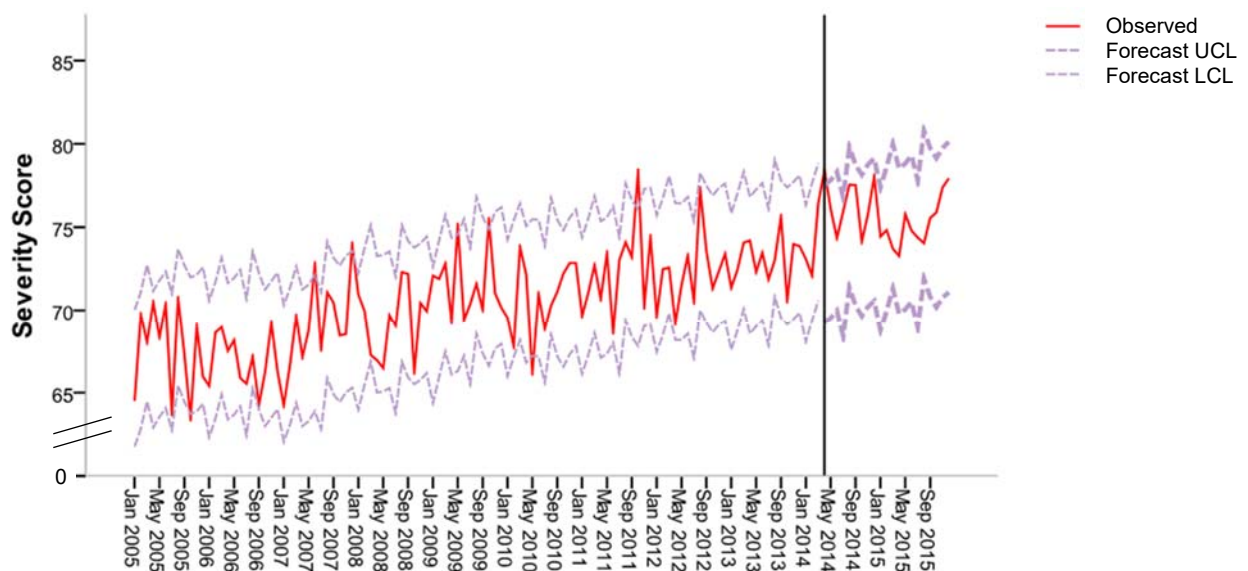
<sup>23</sup> <https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly>

<sup>24</sup> <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017>

The upper and lower confidence limits (represented by the dashed lines on Figure 1 below) indicate the range of values that sentencing severity might have taken in the absence of the guideline, taking into account the general increase in sentencing severity since 2005. As can be seen, sentence severity remained within these confidence limits after the guideline came into force, therefore there is no strong statistical evidence that the guideline caused a change in sentencing severity for rape.

These findings are consistent with the lower bound estimate in the resource assessment which anticipated that the guideline would have no impact on sentencing levels (the higher bound estimate was that there may be a moderate increase in sentence lengths).<sup>25</sup>

**Figure 1: Sentencing severity time series analysis for rape<sup>26</sup>**



### ***Frequency and influence of individual factors***

In terms of factors used by judges when sentencing rape offences, analysis of the CCSS data revealed that ‘Abuse of trust’ and ‘Victim is particularly vulnerable’ were the most frequently cited factors reported, present on 38 per cent and 36 per cent of CCSS forms respectively in 2014/15.

The regression analyses showed that the culpability A factor ‘Abuse of trust’ had a significant impact on sentencing, associated with an increase of 22 months to

<sup>25</sup> The lower bound estimate was based on analysis of transcripts of sentencing remarks from the Crown Court and Court of Appeal, while the higher bound estimate was based on research interviews with Crown Court judges.

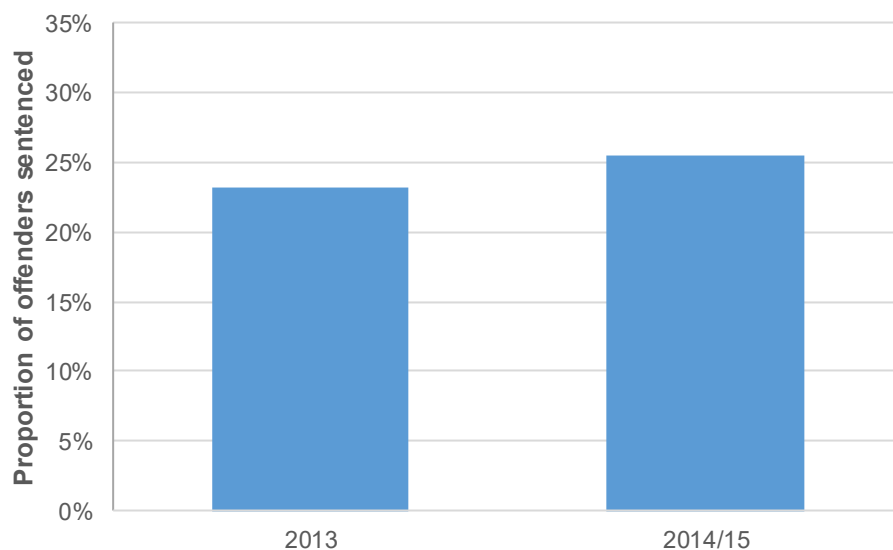
<sup>26</sup> The number on the vertical axis is the sentencing severity score. The forecast UCL refers to the ‘upper confidence limit’ of the forecast model, and the forecast LCL refers to the ‘lower confidence limit.’ The area within these limits represents the 95 per cent confidence interval for the forecast model.

sentence lengths. This was similar to the impact the factor had in the previous guideline. The aggravating factor 'Steps taken to prevent the victim reporting' was also associated with an increase in sentencing severity, adding 20 months to custodial sentences. Again, this was similar to the impact the factor had in the previous guideline.

### **Offence categories**

Prior to the Sentencing Council's Sexual Offences Definitive Guideline coming into force in April 2014, a guideline produced by the Sentencing Guidelines Council was in use for rape offences.<sup>27</sup> In both guidelines, the sentence range for offenders falling into the highest level of seriousness was 13-19 years' custody. Analysis shows that the estimated proportion of offenders receiving sentences above 13 years (prior to any reduction for guilty plea and including life sentences) was similar before and after the guideline came into force (see Figure 2 below), which further supports the conclusion that the guideline has not had an impact on average sentencing severity.

**Figure 2: Proportion of offenders with a sentence of over 13 years for rape (prior to any reduction for guilty plea and including life sentences), before and after the Sexual Offences Definitive Guideline came into force**



In addition, in the new guideline, the text states that 'offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate', whereas in the SGC guideline the starting point for an offence involving repeated rape of the same victim over a course of time, or rape involving multiple victims, was 15 years. Again, analysis shows that the estimated proportion of offenders receiving sentences above 20 years (prior to any reduction

<sup>27</sup>[http://webarchive.nationalarchives.gov.uk/%2B/http://www.sentencingcouncil.org.uk/docs/web\\_SexualOffencesAct\\_2003.pdf](http://webarchive.nationalarchives.gov.uk/%2B/http://www.sentencingcouncil.org.uk/docs/web_SexualOffencesAct_2003.pdf)

for guilty plea and including life sentences) was similar before and after the guideline came into force (at 5.5 per cent and 6.1 per cent respectively), which suggests that the text in the new guideline may have been reflective of sentencing practice at the time and therefore the guideline does not appear to have had an impact on average sentencing severity.

### **Research interviews**

In interview, judges were generally positive about the rape guideline, highlighting that the structure in relation to the categorisation of harm and culpability assisted when sentencing, and that most of the factors were appropriate and often used.

The introduction of harm factors and the opportunity to consider the level of impact, particularly of psychological harm, seem to be the major influences on judges' perceptions that the guideline had led to a slight increase in sentencing severity. The regression analysis also showed that the harm factor 'Severe psychological or physical harm' had a significant impact on sentencing, associated with an increase of 13 months to custodial sentences.

Judges generally agreed that the recognition of psychological harm was to be commended. However, a number of judges also felt that the lack of a definition of 'Severe psychological harm' could cause some difficulties when sentencing a case:

*I think that the one factor that always troubles me is the criteria in so far as psychological harm is concerned. It says severe in the guidelines ... and there's no actual definition in the guidelines, no assistance as to what is meant by [severe]*

There was also uncertainty about what would be held to amount to sufficient evidence to establish severe psychological harm: comments included it being "terribly difficult to assess", and "How much evidence do you need of that? Do you need psychologists' evidence?". This suggests that further guidance on psychological harm could be useful.

The responses to the rape sentencing scenario<sup>28</sup> indicated that there are no obvious implementation issues; all but one of the eight judges classified the offence in category 2A. One sentencer considered that the case was on the "borderline" of harm categories 2 and 3, and during interviews several judges emphasised the importance and necessity of being able to be flexible when classifying cases.

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<sup>28</sup> The scenario involved a victim who met the defendant to discuss job opportunities and was taken to the defendant's flat where she was raped. Afterwards the offender said that if she did not stay with him he would find her and her parents and kill her. The victim was fearful that he would kill her and made a victim personal statement indicating that she continued to be fearful in everyday situations.

Sentences passed in relation to the scenario ranged from 8 to 12 years, which corresponds closely with the category range for a category 2A offence<sup>29</sup> and therefore suggests the guideline is being implemented as anticipated.

### **3.2 Assault by penetration**

The majority of sentences imposed for assault by penetration are immediate custodial sentences (87 per cent of offenders sentenced in 2015 received an immediate custodial sentence).

The severity of sentences has shown a slight increase over time, with the adjusted ACSL increasing from 4 years 5 months in 2005 to 5 years 3 months in 2013. The adjusted ACSL continued to increase after the guideline came into force, to 6 years 3 months in 2014/15. Again, increases in sentencing for sexual offences have been documented elsewhere.<sup>30</sup> They have occurred in the context of high-profile coverage of sexual offences and increased reporting of sexual offending following investigations such as such as Operation Yewtree. The increase in sentences also reflects the increased statutory maximum penalty for this offence introduced in the Sexual Offences Act 2003, of life imprisonment,<sup>31</sup> which was continuing to work its way into judicial practice from 2004 onwards.

The upper and lower confidence limits (represented by the dashed lines on the chart – see Figure 3, on the next page) indicate the range of values that sentencing severity might have taken in the absence of the guideline, taking into account the general increase in sentencing severity since 2005. As can be seen, sentence severity remained within these confidence limits after the guideline came into force, and therefore there is no strong statistical evidence that the guideline caused a change in sentencing practice for this offence.

These findings are in line with the resource assessment which anticipated that the guideline would not have an impact on average sentencing severity for this offence. As the time series analysis did not produce any unexpected results, further analysis with the CCSS data was not conducted for this offence.

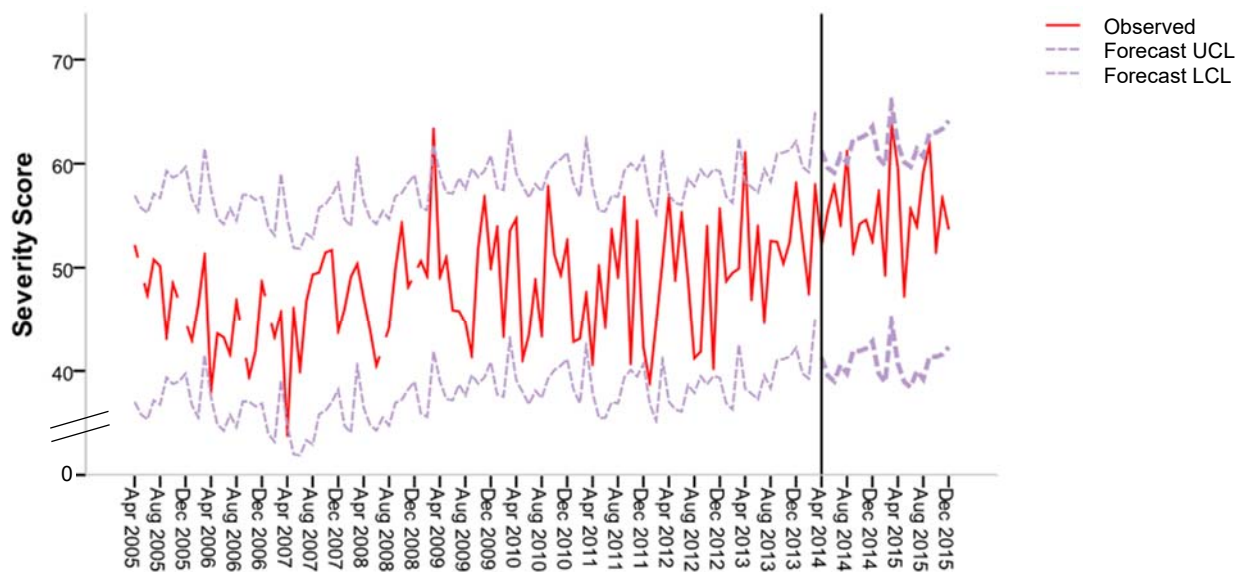
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<sup>29</sup> The category range for a category 2A offence is 9 to 13 years.

<sup>30</sup> See footnote 23.

<sup>31</sup> The offence would previously have been sentenced as the offence of indecent assault under the Sexual Offences Act 1956, with a statutory maximum sentence of 10 years.

**Figure 3: Sentencing severity time series analysis for assault by penetration**



### 3.3 Sexual assault

Average sentencing severity for sexual assault generally remained at similar levels in the years before the guideline came into force (2005-2013). In 2013 custodial sentences<sup>32</sup> were the most frequently used disposals for this offence (comprising 53 per cent of offenders sentenced), followed by community orders (35 per cent). In the 12 months after the guideline came into force, there was a shift to more severe disposals, with 58 per cent of offenders sentenced to a custodial sentence, and 33 per cent sentenced to a community order.<sup>33</sup> As seen in Figure 4 (on the next page), this increase in severity crosses the upper confidence limit of the forecast range. This suggests that the guideline may have increased sentencing severity for this offence, which was not anticipated in the resource assessment.<sup>34</sup>

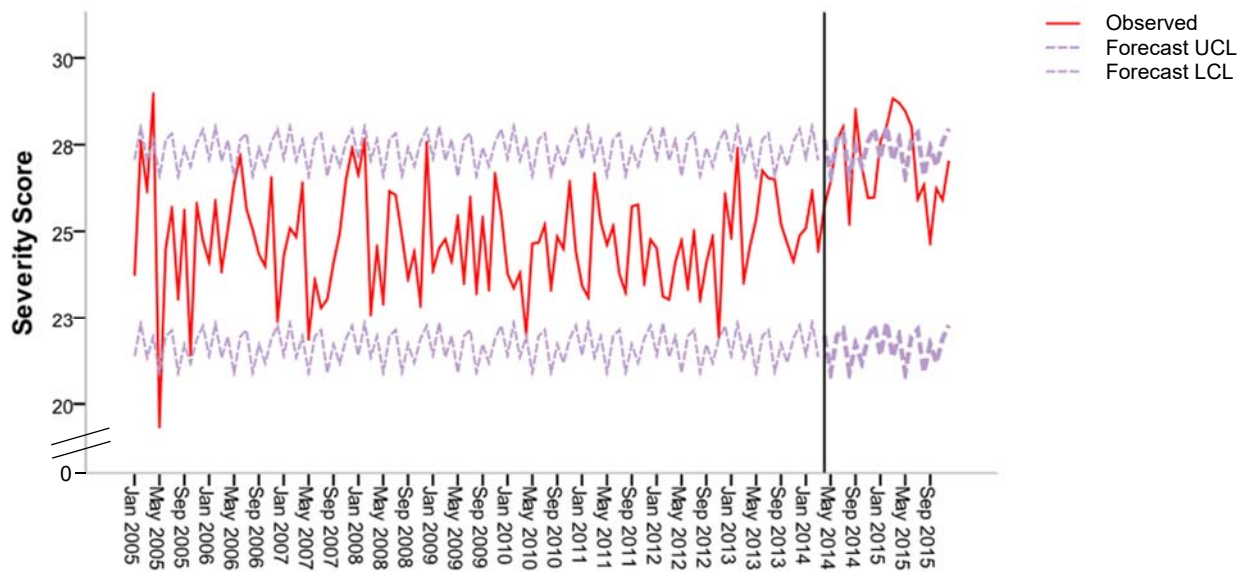
The importance of being able to pass a community order or suspend a sentence for sexual assault was highlighted by judges in interviews, along with the attractiveness of placing the offender on a sexual offending programme, if one was available. Mixed views, however, emerged regarding the sentencing ranges for sexual assault. While some judges thought they were “good”, others thought that they produced sentences that were sometimes too low or too high. These differing views may be linked to the fact that sexual assault is a very broad offence, the variety of which makes it difficult to capture within a guideline.

<sup>32</sup> Custodial sentences include immediate custodial sentences and suspended sentence orders.

<sup>33</sup> The adjusted ACSL remained stable at 1 year 7 months in 2013 and 1 year 6 months in the 12 months after the guideline came into force.

<sup>34</sup> The resource assessment anticipated that the guideline would not have an impact on average sentencing severity for this offence.

**Figure 4: Sentencing severity time series analysis for sexual assault**



### ***Frequency and influence of individual factors***

Both before and after the introduction of the guideline, 'Abuse of trust' and 'Victim is particularly vulnerable' were among the most frequently cited factors in sentencing, present on 30 per cent and 20 per cent of CCSS forms respectively in 2014/15.

A regression analysis found that the new category 1 harm factor 'Violence or threats of violence' had the greatest influence on sentencing, associated with an increase of 15 months to custodial sentences. This factor was present on 6 per cent of CCSS forms after the guideline came into force. In the old guideline, the similar factor 'Physical harm caused' was also present in around 6 per cent of CCSS forms and had the greatest impact on sentencing, associated with an increase of 11 months to custodial sentences. This suggests that the addition of this new factor in the guideline, which now includes threats of violence, may have contributed to the increase in sentencing severity for this offence.

The factor 'Severe psychological harm'<sup>35</sup> also had a significant impact on sentencing severity, present on 9 per cent of CCSS forms after the guideline came into force and associated with an increase of 9 months to custodial sentence lengths. This was a new factor in the guideline and therefore some of the increase in sentencing severity for this offence may be attributable to these two factors.

<sup>35</sup> This factor was included as an aggravating factor on the CCSS form, and it is this aggravating factor that was found to have a significant impact on sentencing for sexual assault. In the guideline, the factor is included in the harm factor 'Severe psychological or physical harm'.



## **Research interviews**

In interview, a divergence of opinion emerged amongst judges regarding the extent to which the changed model of the sexual assault guideline, with a shift away from the detailed focus on the specific nature of the sexual assault, had affected practice. Some judges indicated that this had had an influence, and were supportive of this change:

*Yes, I think it has. It used to be a rather artificial basis.*

Others, however, commented that it remained important to be attentive to the dynamics of the sexual assault:

*I think one has to be very careful and very cautious about where is touched....and it can be a very individual matter as far as the victim is concerned.*

Differing views could also be seen with respect to the new guideline's differentiation between sexual assaults which take place under and over clothing.<sup>36</sup> On the one hand, this was considered to be helpful and appropriate, as indicated below:

*The distinction between touching under and over clothing is a valid distinction. I think that touching under clothing is much more serious, that's my own view, that's the one factor that I look at when dealing with sexual assault.*

This perspective was not, however, adopted by all. Several judges felt that touching over clothing could be as serious as under clothing.

There were some inconsistencies in how the offender in the sexual assault scenario was sentenced.<sup>37</sup> It was expected that the scenario would be categorised as a '3A' offence. Four judges categorised the offence as a '3A' and one as a '3B'. Three judges considered the case to be on the border of 2/3A, and one as a '2A'. Accordingly, only one of the judges contemplated that the victim had suffered severe psychological harm. Her fearfulness to leave the home was in this instance considered to amount to "*long-lasting impact*", and "*anything that is long-lasting ... has the potential to fall into 'severe'.*" These findings further support the suggestion that additional guidance on psychological harm may be required.

Some divergence also arose in relation to the factor 'Location of the offence'. Most judges identified location as an aggravating factor in the scenario involving a sexual assault on a busy commuter train; "*this is a deeply unpleasant experience for a*

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<sup>36</sup> Touching of naked genitalia or breasts is explicitly listed as a factor in the level 2 harm category.

<sup>37</sup> The scenario involved a male who assaults a female standing in front of him on a busy commuter train. The assault lasts for about 20 seconds and the victim feels scared, especially when she notices that the defendant is holding his mobile phone pointing it towards her.

*woman on the tube, or a train...travelling home from work. It is not only unpleasant in itself but it means that every time you get on the train, your confidence is undermined, and it is difficult to get over...there should be some marking of that.* However, a few judges did not think the location was significant, with one judge commenting: *"I wouldn't have said that the location on public transport is particularly an aggravating feature."* The CCSS data showed that this factor is cited frequently as a factor in sentencing (present on 30 per cent of CCSS forms in 2013), although in the regression analysis this factor did not have a significant effect on sentencing. Therefore, further detail on the relevance of the location of the assault may prove useful. The Council recently consulted on a draft guideline which would give expanded explanations of this and other factors.

### **3.4 Rape of a child under 13**

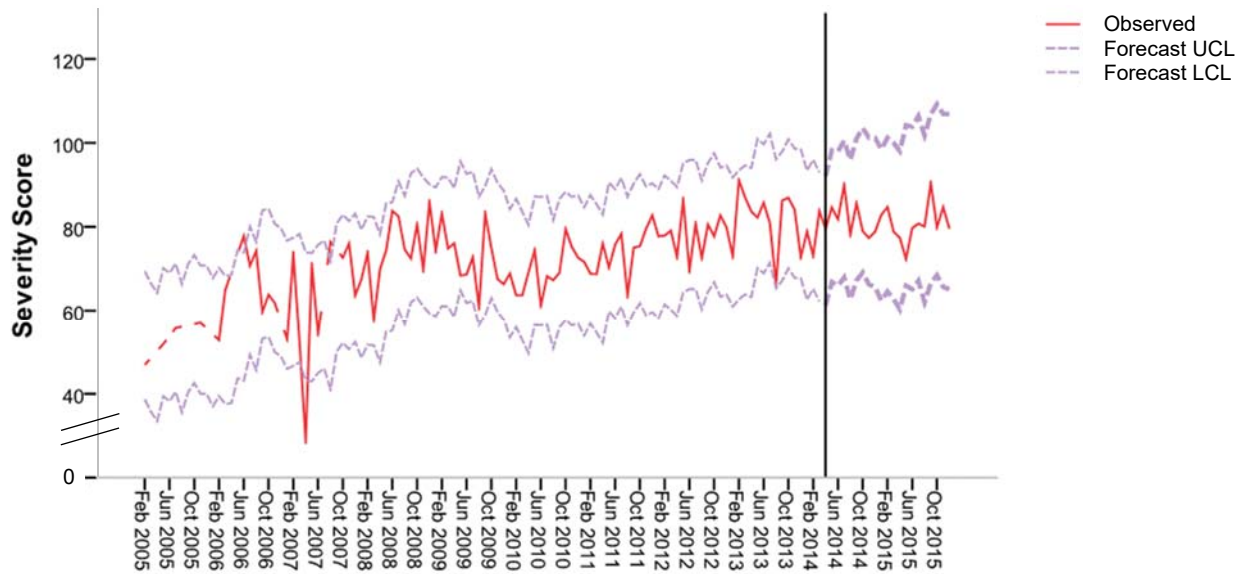
Almost all sentences imposed for rape of a child under 13 result in immediate custody. Since 2005 sentencing severity has increased for this offence (as shown in Figure 5, on the next page), with the adjusted ACSL increasing from 7 years in 2005 to 13 years 11 months in 2013. This increase has been documented elsewhere, along with the fact that the offence of rape of a female child under 13 by a male had the largest increase in sentence length of all types of sexual offence, over the period 2006-2016.<sup>38</sup> Again, this increase took place in the context of increased reporting of sexual offences, including increased reporting of offences where the victim was a child.

After the guideline came into force the adjusted ACSL did not change significantly, and was 13 years 7 months in the 12 months after the guideline came into force. As can be seen from Figure 5 (on the next page), sentencing severity remained within the confidence limits after the guideline came into force and therefore the guideline did not appear to change average sentencing severity for this offence. These findings are in line with the resource assessment which anticipated that the guideline would not have an impact on average sentencing severity for this offence.

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<sup>38</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/614414/criminal-justice-statistics-quarterly-december-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/614414/criminal-justice-statistics-quarterly-december-2016.pdf)

**Figure 5: Sentencing severity time series analysis for rape of a child under 13 years**



### ***Frequency and influence of individual factors***

As with the offence of rape, the CCSS data shows that the factors ‘Abuse of trust’ and ‘Victim is particularly vulnerable’ were the most frequently cited factors in sentencing for this offence, present on 71 per cent and 40 per cent of CCSS forms respectively in 2014/15.

The regression analyses showed that the aggravating factor ‘Specific targeting of a vulnerable victim/child’ had a significant impact on sentencing, associated with an increase of 23 months to sentence lengths. The culpability A factor ‘Abuse of trust’ was also associated with an increase in sentence severity, adding 21 months to custodial sentences. A comparison with the old guideline was not possible because there was not enough data available to perform a robust regression analysis for this period.

### ***Research interviews***

Crown Court judges commented that they often faced difficulties in relation to defining the factor ‘Abuse of trust’, particularly in cases involving a child and adult, but also in cases involving a wider relationship such as a friendship. It was observed that many cases involving children are intrafamilial, but many judges felt that there had to be more than a family relationship for abuse of trust. The Court of Appeal discussed the issue of abuse of trust in *R v Forbes*,<sup>39</sup> and judges were aware of this:

<sup>39</sup> *R v Forbes* [2016] EWCA Crim 1388.

*Abuse of trust is a difficult one and, obviously, the Court of Appeal have now clarified what is meant by abuse of trust, in the case of Forbes. So just because somebody's around a child, doesn't necessarily mean it's an abuse of trust ...there has to be something more than that.*

Another judge observed that abuse of trust is:

*Something that imports the fact that the child has been put, and entrusted to your care, rather than just being present with you.*

This judge noted that, “*taking advantage*” of a family occasion to abuse a child relation was not necessarily, following *R v Forbes*, to be viewed as an abuse of trust, whereas if a relative had been particularly asked to look after a child, that would be an abuse of trust.

Another judge had a more encompassing notion of abuse of trust, such as a student sleepover following a night out, or drink with a work colleague, “*where there is a friendship, there is [an] element of belief and trust, and an element of safety, being in the company of that particular individual.*”

Given the frequency with which ‘Abuse of trust’ was cited as a factor, further guidance may be of use. The Council recently consulted on a draft guideline which would give expanded explanations of this and other factors.

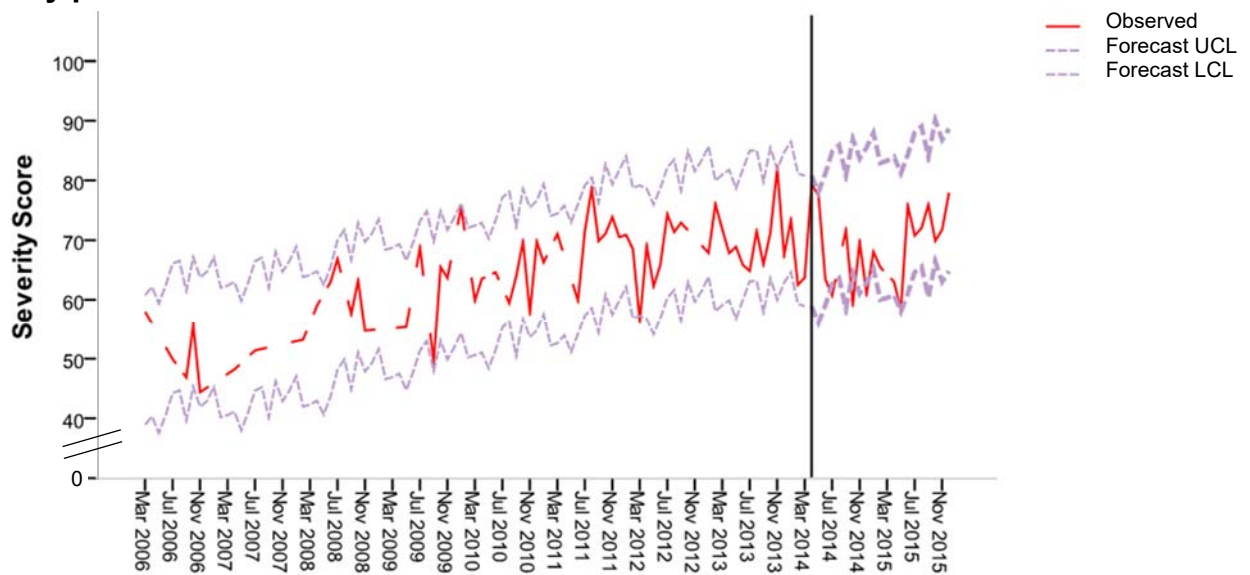
### **3.5 Assault of a child under 13 by penetration**

Almost all sentences for this offence result in immediate custody. Average sentencing severity steadily increased in the years before the guideline came into force, with the adjusted ACSL increasing from 4 years 8 months in 2005 to 9 years 7 months in 2013. As with the offence of assault by penetration, this may reflect the increase in the maximum penalty for this offence, following the introduction of the Sexual Offences Act 2003, which was continuing to work its way into judicial practice from 2004 onwards. In the 12 months after the guideline came into force the adjusted ACSL was 8 years 6 months. As shown in Figure 6 (on the next page), sentencing severity remained broadly within the confidence limits after the guideline came into force,<sup>40</sup> and therefore there is no strong statistical evidence that the guideline caused a change in sentencing severity for this offence. This was in line with the expectation in the resource assessment, and therefore no further analysis was conducted for this offence.

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<sup>40</sup> Average sentencing severity went slightly below the lower confidence limit in two of the months after the guideline came into force, however for all other months sentencing severity was within the confidence limits.

**Figure 6: Sentencing severity time series analysis for assault of a child under 13 by penetration<sup>41</sup>**



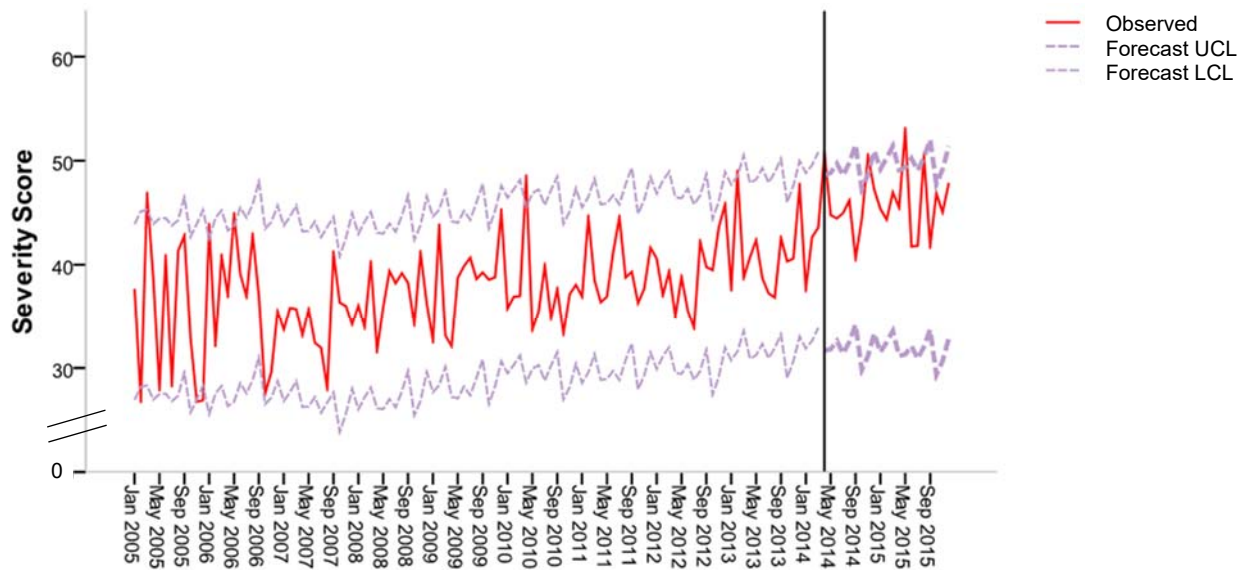
### 3.6 Sexual assault of a child under 13

The majority of offenders sentenced for this offence received an immediate custodial sentence (79 per cent in 2015), with 10 per cent receiving a suspended sentence order and 9 per cent receiving a community order. These proportions were similar for before and after the guideline came into force, however the adjusted ACSL increased from 3 years 3 months in 2013 (before the guideline came into force) to 4 years 4 months in the 12 months after the guideline came into force.

As shown in Figure 7 (on the next page), the severity of sentencing after the guideline came into force offers tentative evidence that the guideline may have increased severity for this offence as the increase was towards the upper confidence limit of the forecast range. This was not anticipated in the resource assessment and so it was explored further using the CCSS data.

<sup>41</sup> Where the severity score would have been based on fewer than five offenders sentenced in any month, the average severity score has been omitted from the time series analysis so as not to be disclosive.

**Figure 7: Sentencing severity time series analysis for sexual assault of a child under 13**



### ***Frequency and influence of individual factors***

Analysis of the CCCS data revealed that the factors 'Abuse of trust' and 'Victim is particularly vulnerable' were among the most frequently cited factors in sentencing both before and after the guideline came into force, present on 64 per cent and 26 per cent of CCSS forms respectively in 2014/15.

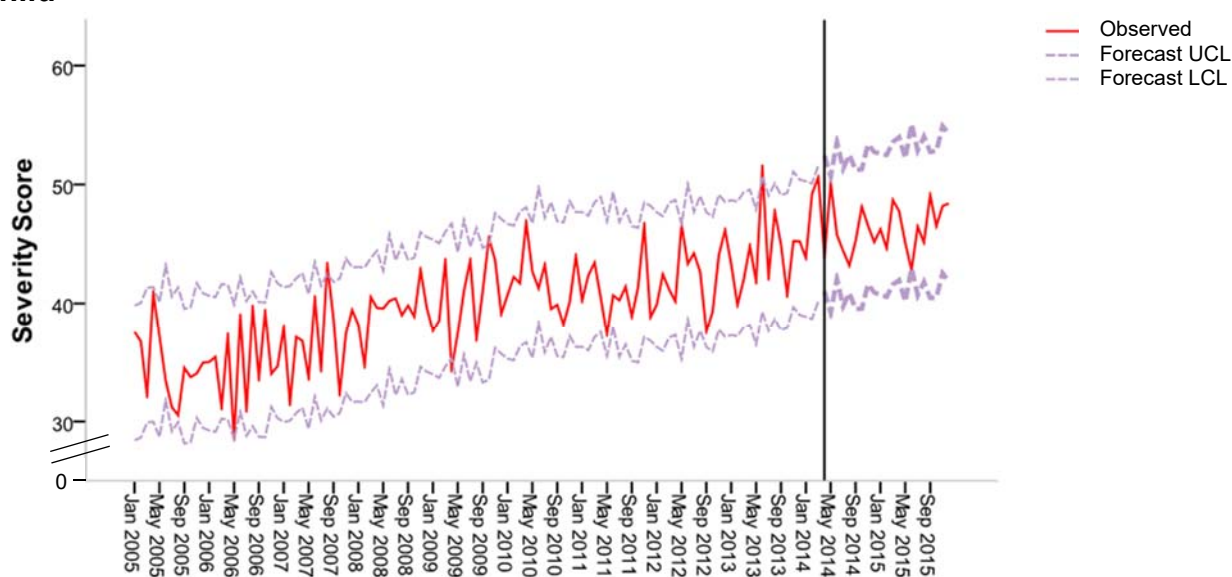
The regression analyses showed that the factor 'Prolonged detention/sustained incident' had a significant impact on sentencing, associated with an increase of 16 months to sentence lengths. The comparable factor in the previous guideline ('Sustained assault/repeated assault on same victim') did not have a significant impact on sentences. The factor 'Significant degree of planning' was also associated with an increase sentence severity after the guideline was introduced, adding 14 months to custodial sentences. This factor was not included in the previous guideline. Therefore these two new factors may have contributed to an increase in sentencing severity for this offence.

The factor 'Abuse of trust' was found to be associated with an increase in sentencing both before and after the guideline came into force, but was found to have a greater impact on sentencing severity after the guideline came into force. As with rape under 13 years, judges' comments in interview about the difficulties posed by the factor 'Abuse of trust' (i.e. which relationships fall within this category), are equally relevant to this offence, and all other sexual offences involving children. This further supports the suggestion that additional guidance on this factor may be required.

### 3.7 Sexual activity with a child

The majority of offenders sentenced for this offence received an immediate custodial sentence (74 per cent in 2015), with 14 per cent receiving a suspended sentence order and 11 per cent receiving a community order. This was an increase in sentencing severity since 2005, when 66 per cent of offenders received an immediate custodial sentence, and 28 per cent received a community order.<sup>42</sup> Again, this may reflect the increase in the maximum penalty for this offence, following the introduction of the Sexual Offences Act 2003,<sup>43</sup> which was continuing to work its way into judicial practice from 2004 onwards. Sentencing severity continued to increase after the guideline came into force, with the adjusted ACSL increasing from 4 years 2 months in 2013 to 4 years 11 months in the 12 months after the guideline came into force. As can be seen from Figure 8 below, sentencing severity remained within the confidence limits after the guideline came into force, and therefore there is no strong statistical evidence that the guideline caused a change in sentencing practice and no further analysis was conducted for this offence.

**Figure 8: Sentencing severity time series analysis for sexual activity with a child**



### 3.8 Indecent images of children offences

These offences cover the possession, making and distribution of indecent images of children. The following outlines key findings in relation to these, but it should be noted that there were some difficulties in making comparisons between the data before and after implementation of the new guideline. This relates to the fact that

<sup>42</sup> Suspended sentence orders were introduced in April 2005.

<sup>43</sup> The maximum penalty for intercourse with a girl between 13 and 16 was two years under the Sexual Offences Act 1956, while the maximum penalty for sexual activity with a child under the Sexual Offences Act 2003 is 14 years' custody.

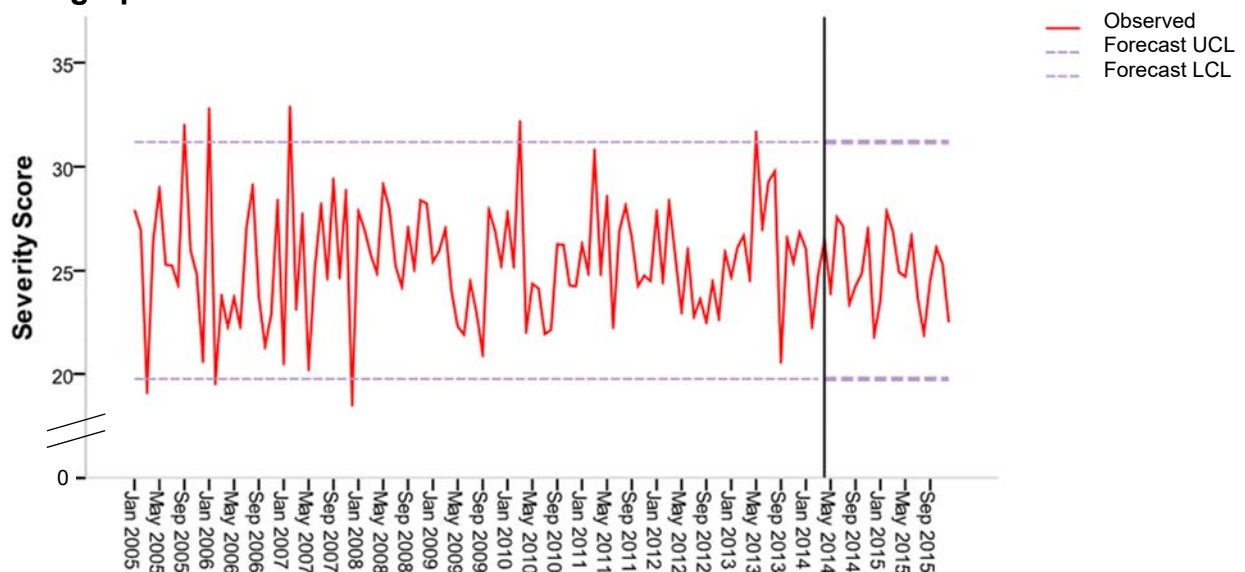
different data was collected for this offence before and after the new guideline came into force, reflecting the changes made to the sentencing model for these offences.

### ***Possession of indecent photographs of children***

Around half of offenders sentenced for this offence were given community orders (45 per cent in 2015), with around half given custodial sentences (27 per cent were given suspended sentence orders and 25 per cent were given immediate custodial sentences in 2015). Sentencing severity remained fairly stable for this offence both before and after the guideline came into force, with the adjusted ACSL remaining stable at 1 year 8 months in 2013 and 1 year 7 months in the 12 months after the guideline came into force.

The resource assessment anticipated no impact on sentencing severity for this offence. Sentencing severity remained within the confidence limits of that expected if no guideline came into force (see Figure 9 below), which indicates that the guideline did not change average sentencing severity.

**Figure 9: Sentencing severity time series analysis for possession of indecent photographs of children**



### ***Research interviews***

The ability to pass a community order or suspended sentence order that includes a rehabilitative requirement for these types of offences (for example, requiring attendance on an offender’s treatment programme) was highlighted during interviews as being very important, particularly in cases involving a first-time offender and the possession of a limited number of images and/or the possession of lower category images.



However, some concern was expressed regarding the public's perception and understanding of sentencing in this area, with it being noted that it is often (wrongly) assumed that offenders who receive such sentences “*get off lightly or scot free.*” Consequently, it was thought that public education on sentencing practices and interventions may be advantageous to address these misperceptions.

Judges overwhelmingly expressed support for the model adopted in the new guideline. As noted in the introduction, there is an increased focus upon the *nature* of the indecent images, over and above the *volume* possessed. It was frequently commented that modern technology enabled a large volume of images to be possessed, but the key factor ought to be the nature of the image.

This is not to suggest, however, that the volume was not a relevant factor, and as such it is appropriate that it is listed as an aggravating factor:

*I think the number of images is also important because it is such an aggravating feature.*

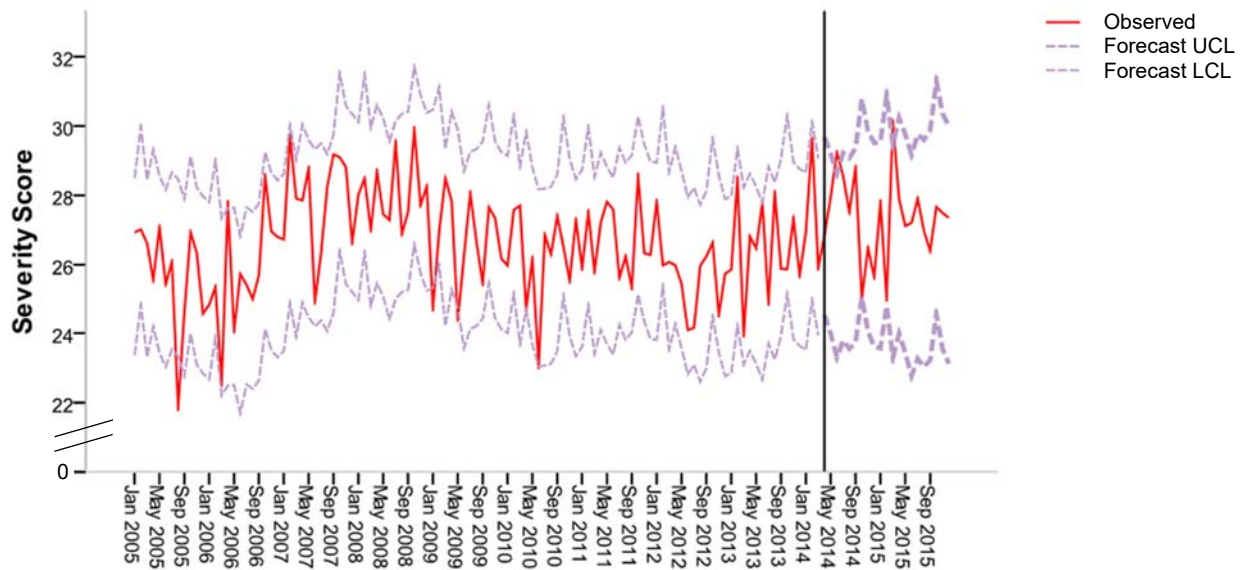
There was, however, some discussion about what constituted ‘high volume’ and the lack of clarity on that issue:

*What does high volume mean? In some cases, you can have 20,000 images; in other cases, you can have 100 ... I think that there could be a little more assistance with what high volume means.*

### ***Indecent photographs of children (production and distribution)***

Around 39 per cent of offenders sentenced for this offence in 2015 were given community orders, with a further 31 per cent given suspended sentence orders and 27 per cent given an immediate custodial sentence. The adjusted ACSL increased from 2 years 1 months in 2013 to 2 years 4 months in the 12 months after the guideline came into force. However, as can be seen in Figure 10 (on the next page), sentencing severity remained within the confidence limits of that expected if no guideline came into force, which indicates that there is no strong evidence that the guideline changed average sentencing severity.

**Figure 10: Sentencing severity time series analysis for indecent photographs of children (production and distribution)**



### **Research interviews**

The sentencing scenario was sentenced consistently by the small group of judges who looked at it, which suggested that there were no obvious implementation issues.<sup>44</sup> The expectation was that the images would fall under category A of the guideline, and all judges categorised the offence as involving distribution and category ‘A’ images. All but one judge imposed a prison sentence, ranging from 8 months to two years. One judge passed a three-year community order on the basis that the offender had distributed the images but had not produced them. Furthermore, other judges commented that they would not rule out a non-custodial sentence, but this would be dependent upon the information contained in a pre-sentence report.

### **3.9 Other sexual offences**

Time series analysis was conducted for a number of additional offences:

- Causing or inciting a child under 13 to engage in sexual activity;
- Causing or inciting a child under 16 to engage in sexual activity;
- Meeting a child following sexual grooming;
- Exposure; and,
- Voyeurism.

<sup>44</sup> The scenario involved a defendant whose laptop was seized, and found to contain images of erotic posing, non-penetrative sexual activity and penetrative sexual activity with a child. The computer had also been used to distribute images of a child to 12 different people on 23 occasions.

The analysis suggested that sentencing had not changed for these offences following the introduction of the guideline, and therefore it was not necessary to conduct further analysis.

## **4. Conclusion**

This research has enabled an assessment of the impact and implementation of the Sentencing Council's Sexual Offences Definitive Guideline. By examining the changes to sentencing practice that are likely to have occurred without the guideline and comparing them to what actually happened when the guideline came into force in 2014, it has been possible to observe that most (although not all) of the impacts were anticipated. These quantitative findings suggest that the guideline is generally being implemented in the way that the Sentencing Council anticipated, although increases in sentencing severity for sexual assault were at the upper limits of what was forecasted. The analysis of the sentences for offence scenarios also indicates, in general, a level of consistency with regards to the categorisation of the offence, the aggravating and mitigating factors identified, and the sentences imposed. This also suggests that the guideline is being implemented as anticipated.

The guideline factors of 'Abuse of trust' and 'Victim is particularly vulnerable' were generally frequently cited factors associated with increases in sentencing, both before and after the new guideline came into force. The new guideline factors 'Violence/threats of violence', 'Prolonged detention/sustained incident' and 'Significant degree of planning' appeared to lead to an increase in sentencing for some offences.

It was anticipated that the new harm factor of 'Severe psychological harm' might lead to an increase in sentencing severity for rape. While the quantitative analysis suggested that average sentencing severity did not increase for rape, this factor did have a significant impact on sentences for some sexual offences, including sexual assault, and may have contributed to the increase in severity seen for this offence. In interview, judges highlighted some issues around interpretation of this factor, and therefore further guidance may be of assistance to sentencers.

The Council has considered this analysis and is committed to revisiting areas of the guideline where issues were identified.

## **Acknowledgements**

We would like to thank all the judges who kindly gave up time to participate in this work.

## Appendix

### Further methodological information

#### Stage 2

Regressions were conducted to see which aggravating, mitigating, harm or culpability factors impacted on sentence severity score and ACSL. For this analysis, frequencies were generated for the aggravating, mitigating, harm and culpability factors. The regressions were conducted with simultaneous entry of predictors. Due to the large number of aggravating, mitigating, harm and culpability factors, it was decided to enter only those factors that reached a 5 per cent frequency threshold for each offence. Where there were smaller samples for the ACSL regressions for the 2014/15 indecent images offences, this cut-off was raised to a frequency of 10 cases in which the factor was cited as being relevant to sentencing, regardless of percentage. Doing this also ensured that the analyses would detect at least a medium effect in terms of the ratio of number of predictors/number of cases.

#### Stage 3

##### *Rape sentencing scenario*

D (aged 32) started chatting to V (aged 20) in a coffee shop. V told him she was looking for a job and D said he owned a firm and could get her work. They exchanged numbers. D phoned that evening and they arranged to meet and go to a restaurant to discuss job opportunities. When they met V got into D's car and D drove her to his flat as he said he needed to get changed. V suggested she stay in the car but D persuaded her to go into the flat.

Once inside D guided V to a bedroom and told her to undress. V refused but D said that if she didn't he would be strong with her and that his friend was in the flat and he would call him in too. D started to undress V and she tried to push him away but he was too strong. D pushed V down onto the bed, climbed on top of her and penetrated her vaginally without using a condom. Afterwards he said that he had dangerous and influential friends and V shouldn't mess with him. He said that if she did not stay with him he would find her and her parents and kill her. She was genuinely fearful he would kill her.

V was afraid and so accompanied him to a restaurant where he threatened her again. When V went to the lavatory she asked a waiter to get her a taxi - but couldn't find a means to get away from D so went with him to a bar. At the bar, she managed to enlist the help of a woman who got her a taxi and she got away. D phoned her and because she was scared and didn't want him to think she had run away she agreed to meet him the following day. When she got home a friend took her to the hospital and called the police.

V made a victim personal statement indicating that she continued to be fearful in everyday situations. D said that the sexual activity was consensual and was convicted following trial. He has 2 previous convictions for theft offences.

#### *Sexual assault sentencing scenario*

D, a male aged 40, whilst standing on a busy, evening commuter train, assaults V, a 30 year old woman, who is standing in front of him. He stares into her eyes whilst he touches her thighs and vagina over her trousers. The assault lasts for about 20 seconds and D does not say anything. V feels scared, especially when she notices D is also holding his mobile phone pointing it towards her. V says nothing and no-one else appears to notice. As soon as the assault is over, D moves away and leaves the train at the next stop. V then alerts police and he is arrested on the same day. His phone contains a short video in which the assault can be seen.

He makes admissions to police and pleads guilty to sexual assault at the earliest opportunity. D has no previous convictions. V feels less confident following the assault and feels scared when she leaves her home.

#### *Indecent images sentencing scenario*

Police executed a search warrant at D's address and seized a laptop that contained 51 images of erotic posing, and 2 images of non-penetrative sexual activity. When the computer was examined the police also found that D had been using his computer to distribute images of what appeared to be the same child to 12 different people on 23 occasions. 14 of the images distributed were erotic posing or non-penetrative sexual activity and 9 were of penetrative sexual activity with a child.

D made immediate admissions to the police when interviewed and pleaded guilty to distributing indecent photographs of children at the earliest opportunity. He was of previous good character.