Sentencing Council

Sexual Offences Guidelines

Response to consultation

Sexual offences

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May 2022

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Foreword

From 13 May to 13 August 2021 the Sentencing Council consulted on a number of proposed amendments to the guidelines on sexual offences. These were intended to reflect recent case law, particularly in relation to cases where sexual activity was arranged or incited, but did not take place. The Council also consulted on a new guideline for sexual communication with a child.

I would like to thank all those who responded to this consultation and to the judges and magistrates who took part in research during the development of these new and revised guidelines. Consultation and research are always a vital part of the process of producing sentencing guidelines and, as always, we have considered in detail all the points raised with us. This has resulted in a number of changes to our proposals, which are set out in this response document.

Lord Justice Holroyde

Chairman, Sentencing Council

Introduction

The current definitive sexual offences guidelines were published in 2013 and came into force in 2014. From 13 May to 13 August 2021 the Sentencing Council consulted on a number of proposed amendments to the guidelines to provide greater clarity and to reflect Court of Appeal case law, and on a new draft guideline for the relatively new offence of sexual communication with a child.

The cases of *Privett and Others* [2020] EWCA Crim 557 and *Reed and Others* [2021] EWCA Crim 572 provided the courts with guidance about how to approach the assessment of harm in cases where there is no actual child victim. These will often occur in the context of undercover "sting" operations. The case of *Privett* involved arranging or facilitating the commission of a child sex offence where there was no child, and *Reed* involved sexual activity which was incited but ultimately did not take place.

The Council also consulted on a new guideline for the offence of sexual communication with a child (section 15A of the Sexual Offences Act 2003). This offence was created by the Serious Crime Act 2015 and came into force in 2017. It has a maximum penalty of two years' imprisonment.

Following the findings of the 2018 assessment of the sexual offences guidelines, the Council also consulted on some minor amendments to several sexual offence guidelines to provide extra clarity on some harm and culpability factors. Finally, the Council consulted on minor changes to the wording of its guidance on sentencing historical sexual offences better to reflect Court of Appeal case law.

In the consultation process, the Council sought views on:

- the addition of principles and guidance to existing guidelines for situations where no sexual activity has taken place;
- the addition of further explanations and guidance for sentencers across various existing sexual offence guidelines;
- the principal factors included within the new draft guideline that make section 15A (sexual communication with a child) offences more or less serious;
- the additional factors that should influence the sentence in these cases; and
- the types and lengths of sentence that should be passed.

Summary of analysis and research

Before, during and after the consultation period, the Council carried out analytical and research work to ensure that the objectives of the guideline are realised, that they work as intended, and to understand better their potential resource impacts.

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. A review of case law and knowledge of the sentences and factors used in previous cases, in conjunction with Council members' experience of sentencing, have helped to inform the development of the guidelines.

Research with sentencers was also carried out, to explore whether the guidelines would be implemented as anticipated. The revised guidelines for arranging or facilitating the commission of a child sex offence and causing or inciting a child to engage in sexual activity were used in interviews with Crown Court judges. Specifically, the Council wanted to understand how sentencers interpret the guidance for determining harm where no sexual activity has taken place, whether the new guidance on determining harm is clear, as well as understanding what sort of reduction judges will give in practice for these cases. The proposed guideline for sexual communication with a child was used in interviews with Crown Court judges, district judges and magistrates. Interviews were conducted with the aim of understanding how sentencers would use the guideline, whether they find it clear and usable, and the severity of sentence imposed and when sentencers would consider suspending a sentence.

This research has provided some further understanding of the way the new and revised guidelines will be used in practice, the likely impact of the guidelines on sentencing practice, and the subsequent effect on the prison population and probation resources.

Summary of responses

There were 34 responses to the consultation. A breakdown of responses is as follows:

Breakdown of respondents	
Charity / not for profit organisations	2
Government	-
Members of Parliament or Parliamentary bodies	1
Judiciary/Judicial bodies	5
Legal professional	4
Magistrate	12
Prosecutor	1
Public and private sector bodies	1
Academic	3
Other	5

Overview

Details of the responses to proposals for the draft guideline and suggestions made are detailed below.

Cases where no activity takes place

In its consultation, the Sentencing Council proposed additional text to be added to the guideline for arranging or facilitating the commission of a child sexual offence (under section 14 of the Sexual Offences Act 2003) and to various guidelines where sexual activity is caused or incited (most notably the guidelines covering sections 9 and 10 of the Sexual Offences Act 2003).[1]

Most respondents agreed with the Council's proposed approach, in following the reasoning set out in the cases of *Privett* and *Reed* mentioned above. This means assessing seriousness on the basis of what the offender intended, but providing a small discount for the fact that no victim existed, or that sexual activity was incited but did not take place.

A few responses questioned the basic premise of the proposed revisions.

> "…to prescribe a small, and undefined, reduction at Step 2 is both unhelpful to sentencers and insufficient to recognise the absence of actual harm. It places almost all the emphasis on the harm intended. It is also inconsistent with sentencing in other contexts where the intended outcome was impossible. Consider solicitation to murder, another incitement offence. If the person incited to commit murder is an undercover police officer, the intended victim's death cannot result from the incitement. The offender intends to kill through the intermediary, yet sentences for such incitement fall well short of the minimum term that would be imposed in the event that the intended victim had died." – *Sentencing Academy*

> "It is … in respect of harm, not coherent to use the concept of 'intention' to replace 'incitement, arrangement or encouragement'. Making arrangements to meet a child for sexual gratification is undoubtedly more than merely preparatory to making that arrangement, but the intention in the attempted offence (i.e. to do the impossible because the 'child' is in fact a police officer), is the intention to make the arrangements, not to commit the contact offence. Is it suggested that merely arranging by telephone to meet somebody whom D mistakenly believes is rich whereas they are in fact a pauper with a view to robbing them, amounts to attempted robbery? It is not, in short, appropriate to use the terminology of s.63 (b)(ii) to such inchoate circumstances when it comes to assessing harm.
>
> I would also point out, in any event, that there is no order of priority as between s.63 (b) (i), (ii) and (iii) [of the Sentencing Code]. Thus, whilst no doubt the CACD in Baker and Cook may arguably not have given sufficient weight to (ii) (harm 'intended' - although see

[1] The full list of "causing or inciting" offences in scope is: section 8 (causing or inciting a child under 13 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).

above), the effect of Fulford LJ's judgment - that only a modest reduction should be given in some cases to reflect the impossibility of harm - is to give (ii) a completely unwarranted precedence over (i) (the ACTUAL harm caused). The two should be, at the very least, equally weighted." – *HHJ Colin Burn*

"There is a huge difference in harm but not culpability in inciting children to participate in sexual activity. It is the incitement which the Criminal Law Solicitors Association say is the graver of the offences. There can be no harm on the basis that no victim existed.

Perhaps what is required is a separate section to deal with the issue of potential harm were there to be a genuine victim. There can be no harm if there is no victim but if the intended harm was to be substantial then this should be taken into account and there should be an adjustment in sentencing.

It is right that there always should be an adjustment for both aggravating and mitigating features and of course the list is not finite or comprehensive.

However, any sentence that is imposed should take into account that the child is not real.

The subjective issue of harm causes the Criminal Law Solicitors Association concerns, it is not an assessment which can properly be undertaken and should not be left to the Judge who sentences to ascribe an arbitrary harm to an offence which did not occur." – *Criminal Law Solicitors Association*

The Council noted the strength of feeling of these respondents on these points. However, it is important to be clear that section 14 is a complete offence when arrangements have been made, whether the victim is real or not. The Council was not therefore persuaded by the comparisons with attempted murder and attempted assault. Under the current sentencing guidelines a premeditated murder attempt even with no harm caused carries a starting point of 20 years' imprisonment, which is not insignificant.

The Council also believed that the concept of applying too much weight to one type of harm set out in section 63 of the Sentencing Code (i.e. harm caused, intended to cause, or harm which might foreseeably have caused) over another implied a false choice. Under the statute, harm can be assessed by reference to any or all of these at the same time.

One respondent considered the position of actual victims of this offending:

"The approach advocated by Privett, and by this consultation, devalues the harm caused to real children who have been abused. If a real victim of a s10 offence is caused to engage in penetrative activity by a much older defendant, the starting point will be 5 years. If a similar defendant attempts to cause a "decoy" child to engage in such activity, and does not desist from doing so early in the case, the approach of Privett would lead to only a modest reduction within the range (which is 4-10 years) - i.e. a sentence of perhaps 4 1/2 years. If they became aware of this, the real victim in the first case would justifiably feel that the pain and suffering they had endured, with the often life-changing impact that it may carry, counted for almost nothing." – *Giles Fleming, Barrister*

On the other hand, one magistrate respondent did not believe there should be a reduction for the lack of a real victim at all:

> "I don't think there should be any reduction at all for there being no actual harm done, if the only reason for that was that the defendant was apprehended or the child did not exist. There should only be a reduction if the defendant voluntarily backed off from the abuse."

The Council acknowledged the theoretical risk that real victims of this sort of offending could see the harm and suffering they have experienced as devalued by the proposed approach. The actual harm which has occurred is lower, and that is precisely the reason for applying a discount. The Council also took the view that victims would want to see perpetrators duly punished for what they have planned, and prevented from causing harm to other victims in future.

During the interviews conducted with judges during the consultation period, sentencers applied a downward adjustment for the arranging or facilitating offences where there was no real child, though fewer did so for the causing or inciting case where there was a real child victim but no sexual activity took place. One finding was that sentencers applied differing reductions to reflect the lack of a real victim. In the scenario of a 13 year old decoy the reduction varied between six months and three years. This was the main cause of a wide range of resulting sentences, between two years' and six years' imprisonment. Overall, there was a considerable range in the adjustments made for other scenarios, although in some of these the range in final sentences appeared to relate in part to the differing weight given to aggravating and mitigating factors.

There was also some variation in the stage at which the adjustment was made. Most sentencers made their adjustment at the beginning of step 2, though a few made the adjustment at mitigation or guilty plea stage. Some said it was unclear at which stage they should make the adjustment.

The Sentencing Academy noted this point:

> "The whole point of the guidelines is to structure that discretion and not to leave individual sentencers to decide on the level of reduction. The consultation document states that 'the Council's aim is to ensure that all sentences are proportionate' (p. 6); simply leaving an issue to the sentencer's discretion, without more, cannot fulfil the Council's aim." – *Sentencing Academy*

The Justice Select Committee agreed with the need for more clarity:

> "We recommend that some additional text or examples be added to enhance clarity in relation to how a "downward adjustment" might be applied…
>
> While we accept that the extent of the adjustment must be specific to the facts of the case, as a principle we do not think the downward adjustment should be too significant, if at all, in certain cases where the harm was intended but did not take place because there was no real victim….There should be greater clarity as to how, and the instances in which a downward adjustment should be applied, as well as further guidance to determine how great that adjustment should be." – *Justice Committee*

The Council believed that the wording "a small reduction within the category range will usually be appropriate" should have led to reductions of a year or under in most decoy cases where the offender is apprehended at the scene. It noted, however, that there was a risk of this producing inconsistent sentences. Although the Council did not want to go as far as to place a specific figure on the reduction which might be applied across a wide

range of circumstances where offending has been prevented for a variety of reasons, it agreed to be more prescriptive in the language used (amendments in bold):

"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."*

One respondent was concerned that sentencers could miss the guidance when cross-referencing from the section 14 guideline to the guidelines for the underlying offending:

> "There is the danger that the sentencer concentrates on the guideline they are referred to, rather than the overarching points that are made in the s.14 guideline….While the s.14 guideline should hyperlink to the relevant comparator guidelines, it would require the judge to remember to return to the initial guideline and not simply sentence on the basis of what is set out in, for example, the section 9 guideline. It is submitted that the culpability and harm factors will be common across most s.14 cases. Thus, it would be possible to create a guideline for s.14 instead of a 'gateway guideline'." – *Professor Alisdair Gillespie*

Virtually all section 14 cases at present involve section 9 (sexual activity with a child) as the offence being facilitated or arranged. The Council considered drawing up one substantive section 14 guideline essentially replicating the guideline for section 9 and section 10 offending. Some explanatory text could have provided a link to other guidelines on the rare occasion the offending being planned was not section 9 sexual activity. However, following commencement of the relevant provisions in the Police, Crime, Sentencing and Courts Act 2022, further section 14 guidelines would be needed for cases where the intended offending comes under sections 5 to 8 of the 2003 Act (i.e. where the apparent victim is under 13 years old).

On balance, the Council believed further complication was risked by creating multiple standalone guidelines. There is no evidence of widespread confusion about the operation of the guideline, and in interviews most participants said that the guidance was clear and easy to use. However, the Council did agree that, to avoid anything being lost in cross-referencing, an additional drop down box should be added to the guidelines for the underlying offences which replicates the guidance given in the section 14 guideline.

The consultation proposed making amendments to all "causing or inciting" offences in the Sexual Offences Act 2003. HM Council of District Judges (Magistrates Courts) suggested that this would imply some unlikely scenarios:

> "First, the section 17 offence provides for a person abusing a position of trust causing or inciting a child to engage in sexual activity. This offence requires proof that the defendant was in a position of trust in relation to the complainant. It is difficult to see any case where the words from the proposed amendment "or in attempts where a child victim does not exist" would ever apply to such an offence. It is far-fetched to imagine any sting operation creating a fake child to whom the defendant is actually in a position of trust.
>
> Secondly, this observation applies equally, if not with greater force, to the section 26 offence of inciting a child family member to engage in sexual activity. For that offence, the prosecution must prove that the relationship between defendant and complainant is a family relationship within section 27 of the 2003 Act. We find it difficult to envisage a situation where that could be proved "in attempts where a child victim does not exist". We

do not expect this offence to be charged where there is a sting operation which involves only a fictitious child.

The fictitious child (or even a fictitious adult victim) situation is also very unlikely to apply to the section 31 offence of causing or inciting a person with a mental disorder impeding choice to engage in sexual activity. We note that any such offence involving a child complainant under section 31 is more likely to be charged as a child sexual offence with the additional aggravating feature of the mental disorder of such a child (specific targeting of a particularly vulnerable child). But how would the prosecution prove that the complainant had a mental disorder and the defendant knew, or reasonably could be expected, to know that he had a mental disorder?

Finally, we see no way in which the fictitious child (or fictitious adult victim) scenario might apply to the section 39 offence of a care worker causing or inciting sexual activity. How could the prosecution prove that the complainant has a mental disorder, that the defendant knows or could reasonably be expected to know that the complainant has a mental disorder and that the defendant is involved in the complainant's care?" – *HM Council of District Judges (Magistrates Courts)*

The Council considered this point, but has concluded that the wording should be added to all those guidelines for completeness' sake, even if they are never needed and imply some unlikely scenarios. As the North London Bench pointed out in its response, the text will need to be modified to refer to "a victim" rather than "a child victim" for the offences involving victims over 16.

Further cross-cutting amendments

Additional guidance

The consultation proposed various additions and amendments to the sexual offences guidelines to reflect recent case law and to bring them into line with common elements in current sentencing guidelines.

The Council proposed an expanded explanation about the assessment of psychological harm at step one of various sexual offence guidelines. Most responses agreed with the proposal, although some questioned the premise of the explanation.

> "While the text states that the assessment of psychological harm 'may be assisted by expert evidence', we are not sure that the sentencer's 'observation of the victim whilst giving evidence' should be said to be sufficient for a judgment of psychological harm, severe or not. Perhaps there may be clear cases where such observation may be sufficient, but surely there should also be some cautionary words." – *Sentencing Academy*

> "The Criminal Law Solicitors' Association are concerned about the broad based construction as to what is harm and that there is no consistent approach. The sentencing judge is not able as either a psychologist or a psychiatrist to assess harm on the basis of evidence including the evidence of a victim personal statement or his or her observation of the victim. Harm is a subjective issue which in the view of the criminal law solicitors Association should be objective as opposed to being a subjective and therefore the above text contained in the drop-down box should not be adopted." – *Criminal Law Solicitors' Association*

3.29 Others felt that the explanation needed further expansion:

> "The guidance quoted in the consultation from the case of Chall is vague and unlikely to be helpful, amounting to little more than shrugging the shoulders and saying "it's up to you". It is also incomplete - whilst the sections of Chall quoted might be likely to encourage more judges to make a finding of severe psychological harm based on a VPS alone, the court in Chall also made a number of comments which serve to moderate such an approach, including
>
> - pointing out that, to justify an increase in sentence, harm caused must be "significantly greater than would generally be seen" in cases of the type in question, since the expected level of harm is taken into account in the guideline (at [26])
>
> - that judges should be cautious as to the risk of VPSs overstating the objective reality, given their intensely personal nature, as well as noting the real difficulty that the defence would face in challenging such a VPS (at [32])" – *Giles Fleming, Drystone Chambers*

"We wonder whether, in addition, the text should set out that a clear justification should be given if severe psychological harm is found, to ensure the assessment is undertaken with appropriate care as per *R v Chall* [2019] EWCA Crim 865." – *Judges at Kingston Crown Court*

3.30 The Council maintained that the key point being made by the proposed expanded explanation is that expert evidence is not necessary for a finding of severe psychological harm. It did not therefore believe it would be necessary or helpful to repeat in full the principles set out in the case of *Chall*. Some respondents did want to see the guidance acknowledge that a certain level of harm should be assumed, including harm which only manifests itself later in life. The answer to this may lie at least partially in the fact (which is made in *Chall*, at paragraphs 25-6) that sentence levels are designed with the inherent harm in the offence in mind. The Council agreed that these points are worthy of emphasis so has made the following additions to the wording proposed:

*"**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**."*

The consultation proposed adding the expanded explanation on "abuse of trust" (which currently appears in guidelines where that is an aggravating factor) as a drop down at step one of the sexual offence guidelines where it appears as a culpability factor. The vast majority of respondents were content with this approach so the Council will add this drop down.

Mitigating factors

Most respondents were content to add (or amend) the now standard mitigating factors "Age and/or lack of maturity" and "Physical disability or serious medical condition requiring urgent, intensive or long-term treatment". A small number, including the Justice Select Committee, were concerned that they could be overused resulting in unduly lenient sentences. The Law Society thought they would be of use in limited numbers of cases and that the expanded explanations would just add unnecessary reading. The Prison Reform Trust queried whether age/lack of maturity should more properly sit under step one culpability.

One respondent had an alternative objection to the age/lack of maturity proposal:

"Although young people under 16 might be affected by this, young persons over 16 are reaching sexual maturity and at 25 will be very sexually mature. Carrying out sexual offences at 25 is very different to carrying out sexual offences at 15. If it is legal to consent to sex at 16, and be considered mature enough to consent, then age and maturity should only be considered up to this age." – *Member of the public*

However, the Council is of the firm view that young people can and should be distinguished from older people in terms of control over their behaviour which may lead to

criminality. Of course, where victims are very young the youth of any adult offender may carry little weight. The question of youth and immaturity, which is a mitigating factor speaking both to the culpability of the offender and their personal circumstances at the point of sentencing is relevant across a whole range of offending and the Council saw no reason for a different approach for sexual offences. Similarly, the health of an offender at the point of sentence is something that Courts are bound to take into account when considering the impact of custody. The Council therefore believed that it was correct to take these factors into account at step two of the guidelines, and did not believe there was a significant risk of the factor having a disproportionate impact on sentencing in sexual offence cases.

Victims overseas

All respondents welcomed in principle the proposed inclusion of the following text in relevant guidelines:

"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."

Indeed, some respondents thought we should go further and make this an aggravating factor:

> "If the activity relates to a place like the Philippines with GNP much lower than UK, (national health care generally vaccines and birth control only; food difficult to acquire for the children), then something akin to 'breach of trust' should apply if the offender is resident in the UK." – *Member of the public*

> "I respectfully recommend that 'defendant seeks to remotely exploit children outside of the jurisdiction' is added as an aggravating factor. If this was thought to be too wide, it could be restricted to those situations where there is commercial sexual exploitation." – *Professor Alisdair Gillespie*

The Council was not convinced that abuse of children overseas should be treated automatically more seriously than abuse which takes place within one jurisdiction, although the facts in specific cases might merit that. Two respondents thought the wording might be refined:

> "In this context, we believe it is not just the harm caused. We would therefore propose a slight change to the wording, as follows (changed text in italics):
>
> "Sentencers should draw no distinction between activity caused or incited in person and activity caused or incited remotely, nor *whether a victim is located in this jurisdiction or is located* anywhere else in the world." – *West London Magistrates Bench*

"I agree with the principle, but would suggest a slight change in wording (which is designed to capture what is the stated intention in the consultation):

'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 (save where the facts of a specific case mean that either distinction in some way affects harm or culpability).'" – *Giles Fleming*

On further consideration, the Council agreed that the guidelines should not necessarily preclude a finding that the fact that the offending was conducted remotely or the location of the victim in some way might affect the seriousness of an offence. Whilst keeping the emphasis on the assessment of the harm caused to victims, the Council has clarified the intent behind the guidance as follows:

"Sentencers should approach the assessment of seriousness in the same way regardless of whether activity was caused/incited in person or remotely, and regardless of whether harm was caused to a victim in this jurisdiction or to a victim anywhere else in the world."

In terms of which guidelines this text should apply to, the consultation had proposed including it in 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). Professor Gillespie suggested adding it also to the guidelines for section 15 (meeting a child following sexual grooming), section 15A (sexual communication with a child) and section 47 (paying for sexual services of a child). The CPS also thought it could apply to other offences, including section 17 (abuse of a position of trust: causing or inciting a child to engage in sexual activity).

The intention of this added wording was to address concerns about international child sexual exploitation and the risk that courts would treat remote offending less seriously than that conducted in-person. The Council was therefore not persuaded that it should be applied to further guidelines relating to contact offending. However, given the increased possibility of abuse of trust to occur online the Council agreed that the text should also be added to the guideline 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

All respondents agreed to include text on Sexual Harm Prevention Orders (SHPOs) in the sexual offence guidelines. The Justices' Legal Advisers and Court Officers Services made two suggestions for additions to the text:

"We propose that there be after "positive obligations", a specific reference to prohibitions on foreign travel; unlike other prohibitions this has specific further requirements. We believe it would be helpful to highlight the different impact of making an order (section 349 Sentencing Code) on existing sexual harm prevention orders (which automatically cease) and sexual offences prevention orders and foreign travel orders (s114 Sexual Offences Act 2003) which cease unless the court orders otherwise." – *Justices' Legal Advisers and Court Officers Services*

Whilst not wanting to provide an exhaustive commentary on SHPOs and their terms and availability, the Council agreed that further information along these lines would be helpful.

In fact, since the consultation the Police, Crime, Sentencing and Courts Act 2022 has changed the law on SHPOs so that they can impose positive requirements. The Council has therefore decided to make the following changes to the text on SHPOs that was proposed (amendments and additions in bold):

Sexual harm prevention orders (SHPOs)

Sentencing Code s345

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 sets out further matters related to making SHPOs [link to be provided].

Historical sexual offences

The consultation proposed changes to the Sentencing Council's guidance on sentencing historical sex offences to bring it closer into line with Court of Appeal case law. This involved changing an existing reference to youth and immaturity being a mitigating factor, to it being regarded as a culpability factor. However, the proposal led some respondents to question why in historical cases youth and immaturity would be treated as a matter of culpability, as opposed to personal mitigation as it is in present-day sexual offence cases.

The Council has considered this point in detail, and understands the scope for misunderstanding about how the factor of age an immaturity could be treated differently in different cases. To be clear, the mitigating factor of youth/immaturity included in current sexual offence guidelines applies both to the blameworthiness of the offending and the circumstances of the offender. In practice, where it is found to be present it is likely to result in significant downward adjustment, regardless of whether it is considered at step one or step two. The Council was persuaded that this could be set out clearly in paragraph 9 of the guidance for sentencing historical cases in the following way, without contradicting the Court of Appeal case law (amendments in bold):

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 regarded as*** *mitigation* ***~~significantly reduce~~ affecting*** *the offender's culpability.*

The Justice Select Committee asked for "clarification on whether the assessment of this will just be based on age, as it would be difficult to assess maturity retrospectively for historic offences." In practice it will be for the defence to make a case on immaturity if they wish to rely on it and for the prosecution to argue against. The judge can make an assessment on the evidence before them, and in many cases it may be that immaturity will go hand in hand with youth.

Other responses picked up on the wording of how the Court is meant to use current guidelines. HM Council of District Judges (Magistrates' Courts) pointed to the plethora of formulations in use:

> "(i) "Sentence will be imposed…by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts" (R v H EWCA Crim 2753 at [47]).
>
> (ii) "A court should have regard to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003" (Current Sentencing Council guideline, confirmed by R v Forbes [2016] 2 Cr.App.R.(S.) 44 at [9] to mean the same as (i).
>
> (iii) "…use the guideline in a measured and reflective manner to arrive at the appropriate sentence…to guard against too mechanistic approach…Whilst a judge should have regard to the current guidelines in this way, the judge should go no further and should not attempt…to construct an alternative notional sentencing guideline" (further observations in R v Forbes at [9]-[10]).
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> (iv) "The court should sentence by reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003" (current proposal for Sentencing Council guideline).
>
> (v) "Where there is no definitive sentencing guideline for the offence…the court should take account of…definitive sentencing guidelines for analogous offences…apply these carefully, making adjustments for any differences in the statutory maximum sentence and in the elements of the offence. This will not be a merely arithmetical exercise." (Sentencing Council's General Guideline: Overarching Principles).
>
> We query whether the proposed new wording, at (iv), adds yet another phrase to the possibilities. We wonder whether it would be sensible for the wording either to be consistent with that used by the Court of Appeal (either in H or Forbes) or to be consistent with that used by the Sentencing Council itself in its overarching principles guideline." – *HM Council of District Judges (Magistrates' Courts)*

The judges from Kingston Crown Court also suggested that the guidance follow more strictly the wording in *R v H*. The Council agreed that it would be counterproductive to add another formula for sentencers to follow, so will add "measured" to the relevant passage in paragraph 3 of the guidance:

*"The court should sentence by **measured** reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003."*

After the consultation closed, the Court of Appeal handed down judgment in the case of *Limon [*2022] EWCA Crim 39*.* This judgment made the link between sentencing historical offences and paragraphs 6.1-6.3 of the Sentencing Children and Young People guideline, which state:

> 6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily turning 12, 15 or 18 years old).
>
> 6.2 In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence but when this occurs the purpose of sentencing adult offenders has to be taken into account…
>
> 6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate.

The main case law on historical sexual offences predates that guideline, which was issued in 2017. The Council has therefore agreed to provide suitable cross references to these principles in the guidance on historical sexual offences, as follows (additions in bold):

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. ***When sentencing an offender who was under 18 at the time of the offence, see also paragraph 9 below.*** *[…]*

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. ***(However, where the offender was under 18 at the time of the offence, see paragraph 9 below.)*** *[…]*

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 regarded as mitigation affecting the offender's culpability. ***Further, where the offender was under 18 at the time of the offence the court must consider the principles set out at paragraphs 6.1 to 6.3 of the Sentencing Children and Young People guideline. The court should take as its starting point the sentence likely to have been imposed at the time of the offending, and bear in mind the maximum sentence which could then have been imposed on the child offender.***

Finally, it was helpfully pointed out during the consultation that the current guidance is entitled "Approach to sentencing historic sexual offences". However, it would better be called *historical* sexual offences, as they are simply events which happened in the past, rather than being significant events. The Council has agreed that the title of the guidance should be corrected in this way.

Sexual communication with a child

The consultation included a new draft guideline for sexual communication with a child, an offence under section 15A of the Sexual Offences Act 2003.

Step one

In terms of harm factors, a number of responses asked us to look at the section 15 guideline (meeting a child following sexual grooming) for consistency of approach. For example, where the consultation had proposed “sexual images sent or received”, some respondents suggested “sexual images exchanged”. In this instance, the Council believed it would be right to retain the wording “sent or received” because it would be quite possible for an offender to send unsolicited images without receiving anything in return.

Some respondents suggested broadening “images” to be clear it could refer to other material such as videos or sound recordings. The Council agreed that there was scope to make this a broader harm factor than simply images, so has changed this factor to “Sexual images **or digital media** sent or received”.

Another factor from the section 15 guidelines suggested for inclusion under harm was “child is particularly vulnerable due to personal circumstances”. However, this is already at least partially covered by the culpability factor “targeting of a particularly vulnerable child” and the aggravating factor “Victim particularly vulnerable (where not taken into account at step one)”. As well as the risk of double counting, there is scope for uncertainty by including a harm factor on vulnerability: in the majority of cases the child will be fictional, so such a harm factor should not apply, although the “targeting” culpability factor would be relevant.

Several respondents, including the Justice Select Committee, were concerned about the use of the phrase “significant psychological harm” arguing that it was a subjective term, that harm might not manifest itself till later on in life, and that harm is inevitably caused in all such offences. A base level of harm is assumed by the sentencing levels in these cases and the published guideline would include the proposed drop-down text on the assessment of psychological harm discussed above, which addresses these points.

In interviews conducted during the consultation period, one district judge questioned why cases where images have been sent or received should be the most harmful type of case. A Crown Court judge thought this would be better placed in aggravating factors to avoid every sexual image case being placed in category 1A.

Finally, some sentencers interviewed said they struggled to assess the harm where there was no real victim, because they were unable to assess whether “significant psychological harm or distress” was caused to the victim. One questioned whether they should be assessing the harm they would expect to be caused to a victim. One sentencer thought that the guideline was “pitched too high,” noting that all the starting points are custodial

sentences even though the maximum sentence is just two years. The Council has therefore added text to allow for this common scenario: "Significant psychological harm or distress caused to victim, **or very likely to have been caused to intended victim.**"

Turning to culpability factors, again, several respondents looked to the section 15 guideline for possible additions. "Offender acts together with others to commit the offence" may be a rare feature of this offending but the Council agreed that it was useful to include as a factor worthy of higher culpability.

One respondent also suggested bringing the wording of "use of threats (including blackmail)" in line with the section 15 guideline factor "use of threats (including blackmail), gifts or bribes". The Council agreed that this would be welcome for consistency purposes.

In interviews conducted using the draft guideline, opinions were split on the conspicuousness of the narrative about the downward adjustment to reflect the lack of a real child victim. When asked, most sentencers said they had found it clear, though in practice not all had applied it. Some said they liked the fact that it stood out in a blue box, while another said it needed to be highlighted so that sentencers would read it.

Step two

Most respondents were content with our proposed sentencing levels, some explicitly agreeing with our proposals for all categories to have a custodial starting point and for the upper end of the sentencing range to be the maximum penalty.

However, a few respondents thought the levels were too high:

> "As a Bench experienced in sitting in the youth court, and noting the guidance referred to earlier in the consultation about age and/or lack of maturity, we wonder whether it is right that the starting point for all such offences should be at least 6 months' custody…One can envisage many cases involving, for example, a relationship between an 18-year-old and a 15-year-old where sexual communications take place on a (factually, if not legally) consensual basis…
>
> We note, for example, that sexual activity with a child (section 9) and causing or inciting a child to engage in sexual activity (section 10) are clearly serious offences – they carry up to 14 years' custody - yet these offences both envisage category 3B offences with a starting point of a community order… it is unusual, for an offence carrying 'only' two years' custody, for the Sentencing Council to provide an offence range which reaches the maximum sentence. Having regard to the guidelines for voyeurism and exposure, which also carry the same maximum sentence, we note that the offence ranges only reach 18 months' and 12 months' custody respectively. We do note that the guideline for the offences of penetrative sex with an adult relative (sections 64 and 65 of the Sexual Offences Act 2003) do have a range up to the maximum sentence of 2 years' custody, but these are offences involving actual (and penetrative) sexual activity, which the section 15A offence does not." – *HM Council of District Judges (Magistrates Courts)*

> "Category 2A could start at 9 months with a range of high level community order to 15 months. Category 2B start at 4 months with a range of medium level community order to 9 months." – *Suffolk Magistrates Bench*

> "We do not agree that all forms of offending for an offence with a two year maximum should carry a starting point sentence of six months custody. The consequence is likely that all convictions will result in a sentence of imprisonment. We propose a three month starting point. This is much more realistic, given that around one-third of cases currently receive a suspended sentence order. There should be a link to the Council's Imposition guideline, thereby increasing the likelihood that courts may impose a suspended sentence order or a high-level community order where appropriate." – *Sentencing Academy*

Bearing in mind the balance of opinion, the Council believed that the starting points and category ranges proposed were correct. The rate of suspended sentences is separate to the question of the length of custodial starting points: lowering the lowest starting point to three months would in any case still mean all starting points are custodial. Where an offender is 18 they will be able to rely on the mitigation of youth, and if the relationship is "ostensibly consensual" it is inevitably going to fall into culpability B (if prosecution has been found to be in the public interest at all).

For step two aggravating and mitigating factors, again a common theme in responses was consistency with other child sexual offence guidelines. The Council was not persuaded to add "presence of others, especially children" which appears in several child sexual offence guidelines, although not in that for section 15. Given the remote nature of the offence, this was not thought to be relevant.

The Council did agree with those respondents who proposed adding the standard mitigating factor "demonstration of steps taken to address offending behaviour". This appears in some but not all child sexual offence guidelines, and the Council thought it could be relevant to this guideline.

The Prison Reform Trust asked us to remove "commission of offence whilst under the influence of alcohol or drugs" as part of a wider stance on this aggravating factor:

> "There is clear evidence that misuse of drugs and alcohol is often related to an underlying mental health disorder, a learning disability or autism…Access can be particularly problematic for people from black and minority ethnic communities who experience poor mental health, and for women who commonly have histories of abuse and trauma. Consequently, individuals may self-medicate by using drugs and alcohol." – *Prison Reform Trust*

This is a standard aggravating factor across a wide range of guidelines, and the Council maintains that it is important to reflect that an offender is intoxicated (and indeed, the expanded explanation for this factor provides guidance on situations where an offender has an addiction). However, on reflection the Council believed that this factor was not likely to be relevant to this sort of remote offending.

Quite a few respondents suggested removing "physical disability or medical condition" as a mitigating factor. There were concerns that this could be a "get out of jail free card" and there were suggestions it more properly goes to the question of whether to suspend a sentence, or what sort of disposal to impose, but should not be part of the assessment of seriousness. However, the Council maintains that, as with most offences, it is clearly relevant to personal mitigation.

One respondent, Professor Alisdair Gillespie, had suggested a culpability factor about asking a child to cover up the offending whilst it takes place. The Council considered this and regarded it as more closely related with the existing aggravating factor “attempts to dispose of or conceal evidence”. It has therefore expanded this factor to become “attempts to dispose of or conceal evidence **(including asking the victim to conceal the offending)**”.

Impact

Resource impact

This is explored in more detail in the resource assessment published by the Council.

Equality and diversity

As a public body the Council is subject to the Public Sector Equality Duty (PSED) which means it has a legal duty to have due regard to:

- the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010;
- the need to advance equality of opportunity between those who share a "protected characteristic" and those who do not;
- the need to foster good relations between those who share a "protected characteristic" and those who do not;

Under the PSED the relevant protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

Alongside the draft guidelines the Council published information on the demographic makeup (specifically age, ethnicity and sex) of offenders for sexual offences, which has subsequently been updated for the definitive guideline.

The consultation sought suggestions from respondents as to how issues of equality and diversity could be addressed by the guidelines. The only substantive response received was as follows:

> "Yes - mostly positive discrimination. Female offenders receive more lenient sentences whereby they are often more harmful; both in terms of the impact on the victim through breaching expectations of women as being caring/nurturing, and also women often having more contact in trusting positions with children/victims. E.g. females giving personal care to disabled female and male service users, whereas male workers would not usually be expected to give personal care to female service users.
>
> There is also a tendency for non-white offenders to receive different sentences; black offenders are often treated more harshly; Asian offenders often receive more lenient sentences. Perhaps for fear of being accused of racism. Cultural factors should be excluded from any consideration and sentences should be equal across the board.
>
> There may also be a lack of clarity or uncertainty about sentencing offenders who identify as trans or have non-binary gender/sexual identity. Specific guidance should be taken from experienced professionals in terms of risk considerations and the impact required on sentencing…." – *Dr Nici Grace*

It is difficult to assess these suggestions in relation to the guidelines for which we are revising as the volumes for female offenders and for Black, Mixed, Asian and Other

ethnicity offenders are so low for each individual offence**,** which means that meaningful differences in sentencing outcomes between these groups cannot be accurately identified.

Fewer than one percent of offenders sentenced in 2020 for arranging or facilitating the commission of a child sexual offence (section 14) were female. The same trend was seen across the other sexual offences which have been the focus of the guideline development and revisions; fewer than one percent of offenders sentenced for both causing or inciting a child to engage in sexual activity (section 10) and sexual communications with a child (section 15A) were female.

There is a similar issue when looking at ethnicity; across the same three offences in 2020, the majority of offenders (where ethnicity was known) were White; 89 per cent of offenders sentenced for section 14 and section 10 offences and 93 per cent of section 15A offences.

Conclusion and next steps

As a result of the consultation the Council has made the changes set out in the sections above. The amended versions of the guidelines and explanatory materials are published on the Council's website (https://www.sentencingcouncil.org.uk) on 17 May 2022. The amendments to existing guidelines will come into force on 31 May 2022, and the new guideline for sexual communication with a child will come into force on 1 July 2022.

The final resource assessment is published on 17 May 2022 on the Council's website.

Following the implementation of the definitive guidelines, the Council will monitor their impact.

Consultation respondents

HHJ Colin Burn

John Connor JP (Magistrate)

Coventry and Warwickshire Magistrates

Criminal Law Solictors' Association

Crown Prosecution Service

Dorset Bench

Giles Fleming (Barrister)

Professor Alisdair Gillespie, Lancaster University

Dr Nici Grace

HHJ Ian Graham

HM Council of District Judges (Magistrates Courts)

International Justice Mission

Justice Select Committee

Justices' Legal Advisers and Court Officers Services

Crown Court Judges at Kingston

Law Society of England and Wales

Magistrates Association

National Police Chiefs Council

North & East Devon Bench

North London Bench

Prison Reform Trust

Jackie Redding JP (Magistrate)

Sentencing Academy

Suffolk Magistrates Bench

Lizzie Tench JP (Magistrate)

Patricia Tillotson JP (Magistrate)

Dr Sandra Walker, SanityCo and
University of Portsmouth

West Glamorgan Magistrates Bench

West London Magistrates' Bench

Five members of the public