

# Sentencing Council

**Sentencing Council meeting:** 18 December 2015  
**Paper number:** SC(15)DEC04 - Youth  
**Lead officials:** Vicky Hunt & Jo Keatley  
020 7071 5786  
**Lead Council member:** John Saunders

## 1 ISSUE

1.1 The Council is asked to consider a new structure for the youth guidelines following the discussion at the Council meeting in November.

## 2 RECOMMENDATION

2.1 The Council is asked to:

- agree the structure of the youth guidelines;
- make a decision about the approach to sentencing young offenders who are in 'relationships' with under 16 year olds and willingly engage in sexual activity;
- agree to the other minor changes in the sexual offences guideline; and
- agree to the factors in the youth robbery guideline.

## 3 CONSIDERATION

### *Structure*

3.1 The new draft youth sexual offences and robbery guidelines follow a stepped approach. Steps 1 and 2 relate to offence seriousness. Step 1 sets out examples of harm and culpability factors that would indicate a certain threshold of sentence is likely to have been crossed, and Step 2 requires the sentencer to consider the aggravating and mitigating factors in order to conclude the assessment of seriousness.

3.2 Step 3 is specifically about offender mitigation and, for the first time, this is separated out from the offence mitigation to emphasise the importance of tailoring the sentence to the individual young offender.

- 3.3 Step 4 requires the sentencer to reduce the sentence where the young offender has pleaded guilty. This section reminds sentencers that this may mean changing from one type of sentence down to another.
- 3.4 Finally the sentencer must review the sentence at Step 5 to ensure it is appropriate. The sentencer is required to consider whether the sentence addresses the likelihood of an offender reoffending and the risk of that offender causing serious harm. This section illustrates that even where there is a high likelihood of offending or a high risk of serious harm, an intensive YRO should be able to address those concerns. In addition it shows that the court could consider a community alternative to custody under a YRO with Intensive Surveillance and Supervision (ISS) or a YRO with fostering. Finally custodial sentences are discussed, illustrating that these are sentences of last resort to be imposed where custody is unavoidable.
- 3.5 It is hoped that this new structure addresses the concerns raised at the last meeting and makes clear that many serious offences will cross the custody threshold, but before imposing such a sentence the court must give full consideration to the individual offender, in particular their age, level of maturity and their background, to consider whether a custodial sentence is appropriate. The structure presents a number of opportunities for the court, who may have originally assessed an offence as meriting custody, to move away from that initial assessment and impose a different type of sentence, should that prove suitable.

***Question 1: Is the Council content with the general structure of the youth guidelines?***

*Changes to the Factors*

- 3.6 Since the Council last saw the youth sexual offences guidelines there have been a number of changes to the factors at Step 1 which are highlighted and underlined in the draft at **Annex A**.
- 3.7 The first change is the addition of the word *isolated* in the second factor of the community order box so that it now reads; *Sexual activity (including **isolated penetrative activity**) without coercion, exploitation or pressure*. In the custodial box, the first factor has changed to **repeated penetrative activity or any penetrative activity involving coercion, exploitation or pressure**.

3.8 With these amendments only an isolated incident of penetrative activity would fall into the community order sentencing bracket, and any sort of repeated penetrative activity would be sufficient to cross the custodial threshold. This change would reflect the fact that repeated activity indicates a higher level of seriousness.

3.9 However this would mean that those young offenders who are involved in a sexual 'relationship' with a person under 16, where both parties willingly engage in sexual activity (although the younger party is not in a position to legally consent) would now fall into the custodial threshold category. This is something that the Council will need to consider and take a view on.

3.10 The CPS charging standards says the following:

*It should be noted that where both parties to sexual activity are under 16, then they may both have committed a criminal offence. However, the overriding purpose of the legislation is to protect children and it was not Parliament's intention to punish children unnecessarily or for the criminal law to intervene where it was wholly inappropriate.*

*Consensual sexual activity between, for example, a 14 or 15 year-old and a teenage partner would not normally require criminal proceedings in the absence of aggravating features. The relevant considerations include:*

- *the respective ages of the parties;*
- *the existence and nature of any relationship;*
- *their level of maturity;*
- *whether any duty of care existed; and*
- *whether there was a serious element of exploitation.*

3.11 It seems that most young people, who have willingly engaged in penetrative activity with a person under 16, are unlikely to be brought to Court. However if they are prosecuted it is most likely to be because the CPS took the view that the age gap, or gap in the level of maturity was such that there was an element of exploitation; or because there was an abuse of trust (breach of duty of care), which similarly could be described as exploitation.

3.12 Whilst the considerations for sentencing are likely to be different to those relevant to prosecution the Council may want to consider whether coercion, exploitation or pressure are potentially the most relevant features when considering the relative seriousness of an offence. The existence of any of these factors would place the offence into the custodial category under the existing draft.

***Question 2: Does the Council consider that repeated penetrative activity should lead to the custodial threshold being crossed, or should the presence of exploitation, coercion or pressure be sufficient on its own to indicate that the custodial threshold is crossed?***

3.13 One further change has been made to the last factor in the custodial box, to change the factor from **severe** psychological or physical harm to **significant** psychological or physical harm, as it was felt that severe made the threshold too high.

***Question 3: Does the Council agree to the change from severe to significant psychological or physical harm?***

3.14 As discussed above, one of the main changes to the structure of the guideline was to make the first step about the offence seriousness, and then to separate out the mitigation into offence and offender mitigation. In doing so two of the factors have been removed from the community order box at Step 1 (*Particularly young or immature offender, and Mental disorder or learning disability, particularly where linked to the commission of the offence*) and put into the offender mitigation box at Step 3.

***Question 4: Does the Council agree to the removal of these factors from Step 1, and putting them into Step 3?***

3.15 In the offence mitigating factors at Step 2, one additional factor has been added; 'Limited awareness or understanding of the offence'. This is a factor that is present in some of our other guidelines and may be a useful addition here. It is similar to the factor, 'genuine belief that activity was lawful' but may cover a wider set of circumstances.

***Question 5: Does the Council agree to the addition of this factor in the offence mitigating factors?***

3.16 At Step 3, the offender mitigating factors remain the same as in the earlier draft but are now separated from the offence mitigating factors.

**Question 6: is the Council content with Step 3 or are there any additional factors, or explanatory wording to be added?**

#### *Additional Steps*

3.17 Step 4 reminds the sentencer to reduce the sentence to take account of a guilty plea, where appropriate.

3.18 Step 5 is a new section, presenting a final opportunity for a sentencer to review the sentence to ensure it is adequate to prevent reoffending (rehabilitation) and minimise the risk of harm to the public (protection of the public). It shows the community and custodial options in more detail, demonstrating that custody should only be imposed where it is unavoidable.

**Question 7: is the Council content with Steps 4 and 5?**

#### *Robbery Guideline*

3.19 The Robbery guideline at **Annex B** has been drafted to replicate the sexual offences guideline in structure. It aims to cover all types of robbery.

3.20 The factors included in the guideline are the same as in earlier drafts but have been reorganised to ensure that those factors relating to the offender have been moved to the offender specific mitigation section at step 3.

3.21 The factors have been previously discussed (albeit in a different style of guideline) with magistrates and district judges during the first stage of our road testing on the youth guidelines, where they were met with general support. Further road testing is planned for the consultation stage of the guidelines.

3.22 The factors listed within the first box of Step 1 indicate those cases where it would seem unlikely that a custodial sentence would result. It is intended to capture the lower level type robbery offences, and the factors included relate only to the offence, not the offender.

**Question 8: Is the Council content with the factors in the community order box?**

3.23 The factors listed within the second box at Step 1 are intended to be the most serious factors which should cross the custodial threshold.

**Question 9: Is the Council content with the factors in the custodial sentence box?**

3.24 The aggravating and mitigating factors are the most commonly considered factors, but as always the lists are non exhaustive.

**Question 10: Is the Council content with the list of aggravating and mitigating factors?**

3.25 The guideline from Step 3 onwards is a replication of the sexual offences guideline.

**Question 11: Is the Council content with the final sections of the guideline?**

#### **4 IMPACT**

The potential impact of the proposed guidelines will be further explored during the consultation period. The intention is that the new guidelines do not impact sentencing practice but ensure a consistent approach by sentencers.

#### **5 RISK**

The youth of the offender requires a different approach to sentencing than that for adults. Sentencing is more individualistic and focuses heavily on the offender. There are differing ideas as to the best way to approach sentencing guidelines for youths. The Council will need to be able to give clear and cogent reasons for the choices it makes.

Sentencing youths for sexual offences involves a number of different considerations from adults. The primary difference is the age and immaturity of the offender. Young people are less emotionally developed than adults; offending can arise through inappropriate sexual experimentation; confusion about sexual identity or orientation; gang or peer group pressure to engage in sexual activity; or a lack of understanding regarding consent, exploitation and coercion.

Background factors may also play a part:-

- A history of abuse within the family (sexual, physical or emotional)
- Exposure to pornography or materials which are unsuitable for a person of the age of the offender
- Involvement in gangs associated with child sexual exploitation
- Unstable living or educational arrangements
- A trigger event such as the death of a close relative or a family breakdown

**This guideline should be read alongside the Overarching Principles – Sentencing Youths definitive guideline which provides comprehensive guidance on the full range of sentences that are available by age. The guideline also includes details on issues such as grave crime determination and dangerousness.**

The first step in determining the sentence is to assess the seriousness of the offence. This assessment is made by considering the nature of the offence and any aggravating and mitigating factors relating to the offence itself. **The fact that a sentence threshold is crossed does not necessarily mean that that sentence should be imposed.**

### **STEP 1: OFFENCE SERIOUSNESS – Nature of the offence**

The boxes below give **examples** of the type of culpability and harm factors that may indicate that a particular threshold of sentence has been crossed.

**A community sentence or an appropriate non custodial sentence may be the most suitable disposal where one or more of the following factors apply:**

- Any form of non penetrative sexual activity
- Sexual activity (including **isolated** penetrative activity) without coercion, exploitation or pressure
- No psychological or physical harm caused to the victim

**A custodial sentence or Youth Rehabilitation Order with Intensive Supervision and Surveillance or Fostering may be justified where one or more of the following factors apply:**

- **Repeated penetrative activity or** any penetrative activity involving coercion, exploitation or pressure
- Coercion through violence or threats of violence
- Sustained or repeated offence
- Significant psychological or physical harm caused to the victim

### **STEP 2: OFFENCE SERIOUSNESS – Aggravating and mitigating factors**

To complete the assessment of seriousness the court should consider the aggravating and mitigating factors relevant to the offence.

**Aggravating factors (non exhaustive)**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Significant degree of planning
- Offender acts together with others to commit the offence
- Use of alcohol/ drugs on victim to facilitate the offence
- Abuse of trust (e.g. where the offender is babysitting the victim or is an older relative of the victim)
- Deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intent of causing additional distress or circulating details/photos/videos etc of the offence on social media or within peer groups
- Grooming



- Significant disparity of age between offender and victim
- Specific targeting of particularly vulnerable victim
- Any steps taken to prevent reporting the incident/ seeking assistance
- Pregnancy or STI as a consequence of offence
- Blackmail

#### **Mitigating factors (non exhaustive)**

- No previous convictions **or** no relevant/ recent convictions
- Good character and/or exemplary conduct
- Participated in offence due to peer pressure/ bullying
- Genuine belief that activity was lawful
- **Limited awareness or understanding of offence**

### **STEP 3: OFFENDER MITIGATION**

Having assessed the offence seriousness the court should then consider the mitigation personal to the offender to determine whether a custodial sentence or a community sentence is necessary. The effect of personal mitigation may reduce what would otherwise be a custodial sentence to a non-custodial one or a community sentence to a different means of disposal.

#### **Offender mitigating factors (non exhaustive)**

- Particularly young or immature offender
- Mental disorder or learning disability, particularly where linked to the commission of the offence
- Unstable upbringing including but not limited to numerous care placements, exposure to drug and alcohol abuse, lack of attendance at school, lack of familial presence or support, victim of neglect and/or abuse, exposure to familial criminal behaviour, exposure by others to pornography or sexually explicit materials
- Determination and/or demonstration of steps taken to address offending behaviour

### **STEP 4: REDUCTION FOR GUILTY PLEAS**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

The reduction in sentence for a guilty plea can be taken into account by imposing one type of sentence rather than another; for example:

- by reducing a custodial sentence to a community sentence, or
- by reducing a community sentence to a different means of disposal.

See the Overarching Principles – Sentencing Youths definitive guideline for details of other available sentences including Referral Orders and Reparation Orders.

## STEP 5: REVIEW THE SENTENCE

The court must now review the sentence to ensure it is the most appropriate one for the young offender. This will include an assessment of the likelihood of reoffending and the risk of causing serious harm. A report from the Youth Offending Team may assist.

### Youth Rehabilitation Order

The following non custodial sentences are available under a Youth Rehabilitation Order:

|                  | <b>Offender profile</b>  | <b>Requirements of order</b>  |
|------------------|--|---|
| <b>Standard</b>  | Low likelihood of re-offending <b>and</b> a low risk of serious harm       | Primarily seek to repair harm caused through, for example: <ul style="list-style-type: none"> <li>• reparation;</li> <li>• unpaid work;</li> <li>• supervision; and/or</li> <li>• attendance centre.</li> </ul>   |
| <b>Enhanced</b>  | Medium likelihood of re-offending <b>or</b> a medium risk of serious harm  | Seek to repair harm caused and to enable help or change through, for example: <ul style="list-style-type: none"> <li>• supervision;</li> <li>• reparation;</li> <li>• requirement to address behaviour e.g. drug treatment, offending behaviour programme, education programme; and/or</li> <li>• a combination of the above.</li> </ul>  |
| <b>Intensive</b> | High likelihood of re-offending <b>or</b> a very high risk of serious harm | Seek to ensure the control of the young person through, for example: <ul style="list-style-type: none"> <li>• supervision;</li> <li>• reparation;</li> <li>• requirement to address behaviour;</li> <li>• requirement to monitor or restrict movement, e.g. prohibited activity, curfew, exclusion or electronic monitoring; and/or</li> <li>• a combination of the above.</li> </ul> |

### YRO with Intensive Supervision and Surveillance (ISS) or YRO with fostering

A YRO with an ISS or fostering requirement is a community alternative to custody. The YRO with ISS includes an extended activity requirement, a supervision requirement and curfew. The YRO with fostering requires the offender to reside with a local authority foster parent for a specified period of up to 12 months.

### Custodial Sentences

Where a custodial sentence is **unavoidable** the length of custody imposed must be commensurate with the seriousness of the offence. The court may want to consider the equivalent adult guideline in order to determine the appropriate length of the sentence.

If considering the adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the appropriate adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. The individual factors relating to the offence and the offender are of the greatest importance and may present good reason to impose a sentence outside of this range.

Blank page

**This guideline should be read alongside the Overarching Principles – Sentencing Youths definitive guideline which provides comprehensive guidance on the full range of sentences that are available by age. The guideline also includes details on issues such as grave crime determination and dangerousness.**

The first step in determining the sentence is to assess the seriousness of the offence. This assessment is made by considering the nature of the offence and any aggravating and mitigating factors relating to the offence itself. **The fact that a sentence threshold is crossed does not necessarily mean that that sentence should be imposed.**

### **STEP 1: OFFENCE SERIOUSNESS – Nature of the offence**

The boxes below give **examples** of the type of culpability and harm factors that may indicate that a particular threshold of sentence has been crossed.

**A community sentence or an appropriate non custodial sentence may be the most suitable disposal where one or more of the following factors apply:**

- Threat or use of minimal force
- No/ minimal physical or psychological harm caused to the victim

**A custodial sentence or Youth Rehabilitation Order with Intensive Supervision and Surveillance or Fostering may be justified where one or more of the following factors apply:**

- Use of very significant force
- Threat or use of a bladed article, firearm or imitation firearm
- Serious physical or psychological harm caused to the victim

### **STEP 2: OFFENCE SERIOUSNESS – Aggravating and mitigating factors**

To complete the assessment of seriousness the court should consider the aggravating and mitigating factors relevant to the offence.

**Aggravating factors (non exhaustive)**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Significant degree of planning
- Threat or use of a weapon other than a bladed article, firearm or imitation firearm (whether produced or not)
- Victim is targeted due to vulnerability (or a perceived vulnerability)
- A leading role where offending is part of a group
- Attempt to conceal identity (for example, wearing a balaclava or hood)
- Any steps taken to prevent the reporting the incident/ seeking assistance

- High value goods or sums targeted or obtained (includes economic, personal or sentimental)
- Restraint, detention or additional degradation of the victim

**Mitigating factors (non exhaustive)**

- No previous convictions **or** no relevant/ recent convictions
- Good character and/or exemplary conduct
- Participated in offence due to peer pressure/ bullying
- Remorse, particularly where evidenced by voluntary reparation to the victim
- Little or no planning

**STEP 3: OFFENDER MITIGATION**

Having assessed the offence seriousness the court should then consider the mitigation personal to the offender to determine whether a custodial sentence or a community sentence is necessary. The effect of personal mitigation may reduce what would otherwise be a custodial sentence to a non-custodial one or a community sentence to a different means of disposal.

**Offender mitigating factors (non exhaustive)**

- Particularly young or immature offender
- Mental disorder or learning disability, particularly where linked to the commission of the offence
- Unstable upbringing including but not limited to numerous care placements, exposure to drug and alcohol abuse, lack of attendance at school, lack of familial presence or support, victim of neglect and/or abuse, exposure to familial criminal behaviour
- Determination and/or demonstration of steps taken to address offending behaviour

**STEP 4: REDUCTION FOR GUILTY PLEAS**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

The reduction in sentence for a guilty plea can be taken into account by imposing one type of sentence rather than another; for example:

- by reducing a custodial sentence to a community sentence, or
- by reducing a community sentence to a different means of disposal.

See the Overarching Principles – Sentencing Youths definitive guideline for details of other available sentences including Referral Orders and Reparation Orders.

## STEP 5: REVIEW THE SENTENCE

The court must now review the sentence to ensure it is the most appropriate one for the young offender. This will include an assessment of the likelihood of reoffending and the risk of causing serious harm. A report from the Youth Offending Team may assist.

### Youth Rehabilitation Order

The following non custodial sentences are available under a Youth Rehabilitation Order:

|                  | <b>Offender profile</b>  | <b>Requirements of order</b>  |
|------------------|--|---|
| <b>Standard</b>  | Low likelihood of re-offending <b>and</b> a low risk of serious harm       | Primarily seek to repair harm caused through, for example: <ul style="list-style-type: none"> <li>• reparation;</li> <li>• unpaid work;</li> <li>• supervision; and/or</li> <li>• attendance centre.</li> </ul>   |
| <b>Enhanced</b>  | Medium likelihood of re-offending <b>or</b> a medium risk of serious harm  | Seek to repair harm caused and to enable help or change through, for example: <ul style="list-style-type: none"> <li>• supervision;</li> <li>• reparation;</li> <li>• requirement to address behaviour e.g. drug treatment, offending behaviour programme, education programme; and/or</li> <li>• a combination of the above.</li> </ul>  |
| <b>Intensive</b> | High likelihood of re-offending <b>or</b> a very high risk of serious harm | Seek to ensure the control of the young person through, for example: <ul style="list-style-type: none"> <li>• supervision;</li> <li>• reparation;</li> <li>• requirement to address behaviour;</li> <li>• requirement to monitor or restrict movement, e.g. prohibited activity, curfew, exclusion or electronic monitoring; and/or</li> <li>• a combination of the above.</li> </ul> |

### YRO with Intensive Supervision and Surveillance (ISS) or YRO with fostering

A YRO with an ISS or fostering requirement is a community alternative to custody. The YRO with ISS includes an extended activity requirement, a supervision requirement and curfew. The YRO with fostering requires the offender to reside with a local authority foster parent for a specified period of up to 12 months.

### Custodial Sentences

Where a custodial sentence is **unavoidable** the length of custody imposed must be commensurate with the seriousness of the offence. The court may want to consider the equivalent adult guideline in order to determine the appropriate length of the sentence.

If considering the adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the appropriate adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. The individual factors relating to the offence and the offender are of the greatest importance and may present good reason to impose a sentence outside of this range.