

# Sentencing Council

**Sentencing Council meeting:** 20 November 2015  
**Paper number:** SC(15)NOV07 - Youth  
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## 1 ISSUE

- 1.1 This is the second consideration of a new draft format sexual offences guideline for youths, and the first consideration of a new draft robbery guideline for youths.
- 1.2 The aim is for both guidelines to be signed off at the Council meeting in January, and out for consultation by April 2016 alongside the Overarching Principles for Sentencing Youths guideline. This is a revised timetable, with the consultation period being later than originally intended so as not to clash with the guilty plea consultation as we anticipate both will receive a high degree of interest.

## 2 RECOMMENDATION

- The Council is asked to reconsider the sexual offences guideline with regard to the custodial threshold test, and confirm its preferred approach;
- Confirm that it is content with the minor amendments to and the scope of the sexual offences guideline; and
- Confirm that it is content with both the structure and the specific factors for the robbery guideline.

## 3 CONSIDERATION

### **Sexual Offences Guideline**

- 3.1 At the October meeting the Council considered the attached guideline at **Annex A** and broadly agreed with the draft. There were a number of minor

changes proposed which have now been made and appear in blue on the new version at **Annex B**. In addition I have made a number of other minor changes such as including additional references to the Overarching Principles.

**Question 1: Is the Council content with these minor changes in Annex B?**

- 3.2 There were a couple of areas where the Council suggested more significant changes.
- 3.3 The main proposed change related to the threshold for custody. The original design (**Annex A**) provided that the custody threshold would be crossed if one of the factors in the box was present plus at least one aggravating factor. Some Council members suggested that this was unnecessarily cumbersome and that the factors in the box alone would be sufficient.
- 3.4 I have now had the opportunity to look again at those factors and to consider them against some transcripts that we had obtained when originally devising the guideline. I have also spoken to a Youth Offending Team senior manager, who has spoken to me about the methods of assessing young people who have committed sexual offences.
- 3.5 Looking at the new draft there is a concern that removing the requirement to find an aggravating factor over simplifies the model, making it far easier for a case to fall into the custodial bracket, and it does not allow for the huge array of circumstances that may exist in each case.
- 3.6 Whilst the guideline only suggests that presence of those factors in the box 'may lead a court to conclude that the threshold has been crossed', it would still lead a sentencer to believe that the 'norm' would be a custodial sentence, and this may be more difficult to move away from in a case with numerous additional aggravating factors.
- 3.7 As the Council will be aware the number of young offenders convicted of the most serious sexual offences is very small and so the data we have, and the number of transcripts we have is very limited. For example in 2013 there were only 20 young offenders sentenced for rape and 13 for assault by penetration.
- 3.8 In the small number of transcripts that we have been able to obtain, none of the offenders ended up receiving a custodial sentence even though the

majority involved repeated offences and many included penetrative activity with coercive behaviour.

3.9 To illustrate here are two cases from the transcripts we have obtained:

#### Case Study 1

- The offender was 15 at the time of the offences, and the two male victims were aged 7.
- The offender and the two victims were at a public event on a Saturday evening.
- The offender forced his penis into both the victims' mouths in turn, in the presence of four other boys aged 12-16.
- The incident was unplanned. The offender pleaded guilty and had no previous convictions.

In this case study there has been penetrative activity involving coercion, and it was a repeated offence. Additional aggravating factors include deliberately committing the offence before a group of peers; and significant disparity of age.

This offender was sentenced to a YRO with an Intensive Supervision and Surveillance package.

#### Case Study 2

- The offender was 15 at the time of the offences, and the victim, his cousin, was 6 years old.
- The offender was playing on a computer game, and the victim wanted to play. The offender said he 'had to take the pain if he wanted to play'. The offender then starting thrusting his penis between the victim's buttocks, simulating sex. After a time the offender got lubricant and anally penetrated the victim.
- There were two other occasions of sexual assault.
- The offender was of previous good character, pleaded guilty and recognised he had a problem that he needed help with.

In this case study there was penetrative activity involving coercive behaviour, and there were repeated offences. Additional aggravating factors include abuse of trust, bribery (grooming) and significant disparity of age.

This offender was sentenced to a 2 year YRO with a local authority residence requirement.

3.10 Under the original two stage version of the guideline the sentencer, in both of these scenarios may consider that the custodial threshold has been passed because there is at least one factor present from the first box, and there are additional aggravating factors. These factors would be used together to reach the starting point of custody. The sentencer would then consider the mitigating factors.

3.11 Under the simplified one stage test the sentencer may consider that the custodial threshold has been passed because there is at least one factor in the first box, thus crossing the threshold far sooner. The sentencer would then come on to consider aggravating factors and would find that there are several, perhaps strengthening their view that this is certainly a custody case and maybe increasing the length of custody that would be appropriate. Mitigation would be considered next which may help to reduce the custodial period.

3.12 The simplified approach could therefore have the effect of increasing the likelihood of a young person receiving a custodial sentence.

3.13 In addition when we come on to look at other youth guidelines including robbery (discussed below), and in the future knife offences, there are likely to be similar issues as it will be difficult to find a list of factors that alone should result in a custodial sentence.

**Question 2: Is the Council minded to reconsider the two stage test for crossing the custodial threshold?**

3.14 There was a concern expressed by some Council members that, if we adopt the originally proposed format, there may be cases which have numerous factors in the first box, but no aggravating factors; these cases are likely to be the most serious but our guideline would suggest that they would not cross the custodial threshold. To overcome this concern I have made all of the

factors in box 1 aggravating factors as well so that once you have found a factor in box 1 you are then able to count the others as aggravating factors. This change is highlighted in blue on the version at **Annex B**.

**Question 3: Is the Council content with the addition of the box one factors in the aggravating factors list?**

Scope

- 3.15 The last time that the Council saw this guideline I indicated that the factors included in the guideline point toward sexual offences involving contact. However the Council suggested that there may be other offences that we would want to cover including *causing or inciting a child to engage in sexual activity*. The scenario that was envisaged was where an offender has used a webcam over the internet to cause a child to commit sexual acts for his enjoyment.
- 3.16 Looking at the factors listed in the guideline as it is drafted at present, it seems that, whilst this may not be a typical ‘contact offence’, the guideline could be used to sentence a case of this kind. The equivalent adult guideline is copied below to show the factors that had been considered for an adult offender. The majority of the factors present in the adult guideline that would be relevant in an internet type case, are present in our new draft. I do, however, propose adding ‘blackmail’ as an aggravating factor as, although some offenders may threaten violence to encourage a young person to engage in the sexual behaviour, many may use blackmail for example ‘I’ll send this video to your friends/ family unless you do x’.

Harm	
Category 1	<ul style="list-style-type: none"> <li>• Penetration of vagina or anus (using body or object)</li> <li>• Penile penetration of mouth</li> </ul> <p>In either case by, or of, the victim</p>
Category 2	Touching, or exposure, of naked genitalia or naked breasts by, or of, the victim
Category 3	Other sexual activity

Culpability
A
Significant degree of planning
Offender acts together with others to commit the offence
Use of alcohol/drugs on victim to facilitate the offence
Grooming behaviour used against victim
Abuse of trust
Use of threats (including blackmail)
Sexual images of victim recorded, retained, solicited or shared
Specific targeting of a particularly vulnerable child
Offender lied about age
Significant disparity in age
Commercial exploitation and/or motivation
Offence racially or religiously aggravated
Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) or transgender identity (or presumed transgender identity)
Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)
B
Factor(s) in category A not present

**Question 4: Is the Council content that the guideline would adequately cover the offence scenario described with that one amendment?**

### **Robbery Guideline**

- 3.17 The draft robbery guideline, attached at **Annex C**, follows much the same structure as the new youth guideline, and aims to cover all types of robbery. The factors have come from a variety of sources including the existing SGC youth guideline, our new adult guideline and sentencing remarks from transcripts of youth robbery cases that we have been able to obtain.
- 3.18 The factors were also 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.

3.19 The number of youth offenders sentenced for robbery offences has been declining year on year, from approximately 3,700 in 2011 to 2,300 in 2013. In 2013, 73% of those sentenced received a community sentence.

#### Non Custodial Factors

3.20 The factors listed within the first box 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.

**Question 5: Is the Council content that the factors listed do describe offences that, in most cases, should result in a non custodial sentence?**

#### Custodial Factors

3.21 The factors listed within the second box are intended to be the most serious factors which, when combined with an aggravating factor would lead the case to cross the custodial threshold.

3.22 The structure of the guideline at this stage will depend upon the Council's earlier decision for sexual offences. Should the Council wish to adopt a simplified one stage approach we may need to reconsider the list to ensure that there is no danger of larger numbers of cases falling within the custodial bracket, bearing in mind that in reality 75% of offenders will receive a non custodial sentence.

**Question 6: Is the Council content with the factors and the structure of the custodial section within the guideline?**

#### Aggravating & Mitigating Factors

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

**Question 7: Is the Council content with the list of aggravating and mitigating factors?**

#### **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.



## **Sexual Offences**

Sentencing youths for sexual offences requires a number of different considerations from adults to be considered. The primary difference is the age and immaturity of the offender. Young people are less emotionally developed than adults; offending can arise through lack of control; inappropriate sexual experimentation; confusion about sexual identity or orientation; gang or peer group pressure to engage in sexual activity; lack of understanding around consent, and coercion. All these circumstances have the potential to mitigate the young person's level of culpability for the offence.

Background factors may also be relevant to the sentencing decision. These include, but are not limited to the following:-

- 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

The approach to sentencing a youth should always be individualistic. However, the starting point of sentencing will require the court to assess the seriousness of the offence. The tables below include offence-related factors that may indicate that the case is either below, or alternatively, has crossed, the custodial threshold. This threshold is likely to be higher for young persons than adults, due to the more harmful effects that custody has upon a juvenile.

If the custodial threshold has been passed the court should consider whether an alternative penalty is available and if so whether that penalty would be appropriate. In particular, in those cases where it is available, the court should consider whether a Youth Rehabilitation Order with Intensive Surveillance and Supervision would be an appropriate alternative to custody.

**Presence of one or more of the following factors may lead the court to consider a **community penalty or an appropriate non custodial sentence** is the most suitable disposal**

- Any form of non penetrative sexual activity
- Particularly young or immature offender
- Mental disorder or learning disability, particularly where linked to the commission of the offence
- Non coerced sexual activity

**Presence of one of the following factors combined with one or more aggravating features may lead the court to conclude that the **custodial threshold\*** has been passed**

- Penetrative activity involving coercive behaviour
- Severe psychological or physical harm caused to the victim
- Coercion through violence or threats of violence
- Sustained or repeated offence

\*the court should consider whether a YRO with ISS could be justified before passing a custodial sentence

**The Court must also consider the aggravating and mitigating features before deciding upon a final sentence.**

**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)
- Recording of the offence or other actions designed to humiliate or degrade the victim
- 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
- Coercion through violence or threats of violence (where not considered above)

**Mitigating factors (non exhaustive)**

- No previous convictions **or** no relevant/ recent convictions
- Good character and/or exemplary conduct
- Remorse
- 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

## Annex A

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| <p>behaviour, exposure to pornography or sexually explicit materials</p> <ul style="list-style-type: none"><li>– Determination and/or demonstration of steps taken to address offending behaviour</li><li>– Participated in offence due to peer pressure/ bullying</li><li>– Genuine belief that activity was lawful</li><li>– Particularly young or immature offender (where not considered above)</li><li>– Mental disorder or learning disability, particularly where linked to the commission of the offence (where not considered above)</li><li>– Non coerced sexual activity (where not considered above)</li></ul> |
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**If satisfied that the offence crosses the custodial threshold, and that no other sentence is appropriate, the court may as a preliminary consideration consult the equivalent adult guideline in order to decide upon the appropriate length of the sentence.**

**When 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 adult sentence. 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.**

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## Sexual Offences

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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

The approach to sentencing a youth should always be individualistic. However, the starting point of sentencing will require the court to assess the seriousness of the offence. The tables below include offence – related factors that may indicate that the case is either below, or alternatively, has crossed, the custodial threshold. This threshold is likely to be higher for young persons than adults, due to the more punitive effects that custody has upon a young person.

If the custodial threshold has been passed the court should consider whether an alternative penalty is available and if so whether that penalty would be appropriate. In particular the court should consider whether a Youth Rehabilitation Order with Intensive Surveillance and Supervision would be an appropriate alternative to custody.

**This guideline should be read alongside the Overarching Principles – Sentencing Youths definitive guideline which provides comprehensive guidance on issues including grave crime determination and reduction for guilty pleas.**

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

- Any form of non penetrative sexual activity
- Particularly young or immature offender
- Mental disorder or learning disability, particularly where linked to the commission of the offence
- Sexual activity (including penetrative activity) not obtained through coercion, exploitation or pressure

**A custodial sentence\* may be justified where one of the following factors is present along with at least one aggravating factor**

- Penetrative activity involving coercion, exploitation or pressure
- Severe psychological or physical harm caused to the victim
- Coercion through violence or threats of violence
- Sustained or repeated offence

\*the court should consider whether a YRO with ISS could be justified before passing a custodial sentence.

\*refer to the [Overarching Principles – Sentencing Youths definitive guideline](#), for details of the restrictions on imposing custodial sentences on offenders of different ages and the length of custodial sentences that are available.

**The Court must also consider the aggravating and mitigating features before deciding upon a final sentence.**

**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

**The following aggravating factors are only to be considered where they have not already been taken into consideration at an earlier stage**

- Penetrative activity involving exploitative behaviour

- Severe psychological or physical harm caused to the victim
- Coercion through violence or threats of violence
- Sustained or repeated offence

**Mitigating factors (non exhaustive)**

- 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
- Participated in offence due to peer pressure/ bullying
- Genuine belief that activity was lawful
- Particularly young or immature offender (where not considered above)
- Mental disorder or learning disability, particularly where linked to the commission of the offence (where not considered above)
- Non coerced sexual activity (where not considered above)

**Once satisfied that the offence crosses the custodial threshold, and that no other sentence is appropriate the court may want to consider the equivalent adult guideline in order to decide upon 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.**

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## **Robbery**

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The approach to sentencing a youth should always be individualistic. However, the starting point of sentencing will require the court to assess the seriousness of the offence. The tables below include offence – related factors that may indicate that the case is either below, or alternatively, has crossed, the custodial threshold. This threshold is likely to be higher for young persons than adults, due to the more punitive effects that custody has upon a young person.

If the custodial threshold has been passed the court should consider whether an alternative penalty is available and if so whether that penalty would be appropriate. In particular the court should consider whether a Youth Rehabilitation Order with Intensive Surveillance and Supervision would be an appropriate alternative to custody.

**This guideline should be read alongside the Overarching Principles – Sentencing Youths definitive guideline which provides comprehensive guidance on issues including grave crime determination and reduction for guilty pleas.**

**Presence of one or more of the following factors may lead the court to consider a **community penalty or an appropriate non custodial sentence** is the most suitable disposal**

- Threat or use of minimal force
- Mental disability where linked to the commission of the offence
- Particularly young or immature offender
- Involved in offence due to peer pressure/ bullying
- No/ minimal physical or psychological harm caused to the victim

**Presence of one of the following factors combined with one or more aggravating features may lead the court to consider that the **custodial threshold\*** has been passed**

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

\*the court should consider whether a YRO with ISS could be justified before passing a custodial sentence

\*refer to the Overarching Principles – Sentencing Youths definitive guideline, for details of the restrictions on imposing custodial sentences on offenders of different ages and the length of custodial sentences that are available.

**The Court must also consider the aggravating and mitigating features before deciding upon a final sentence.**

**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
- Threat or use of a weapon other than a bladed article, firearm or imitation firearm (whether produced or not)
- Victim is target due to vulnerability (or a perceived vulnerability), including but not limited to age, mental or physical disability
- A leading role where offending is part of a group
- Attempt to conceal identity (for example, wearing a balaclava or hood)
- High value goods or sums targeted or obtained (includes economic, personal or sentimental)
- Restraint, detention or additional degradation of the victim

**The following aggravating factors are only to be considered where they have not already been taken into consideration at an earlier stage**

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

**Mitigating factors (non exhaustive)**

- No previous convictions **or** no relevant/ recent convictions
- Good character and/or exemplary conduct
- Remorse

## Annex C

- 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 to pornography or sexually explicit materials
- Determination and/or demonstration of steps taken to address offending behaviour
- Participated in offence due to peer pressure/ bullying
- Particularly young or immature offender (where not considered above)
- Mental disorder or learning disability, particularly where linked to the commission of the offence (where not considered above)

**Once satisfied that the offence crosses the custodial threshold, and that no other sentence is appropriate the court may want to consider the equivalent adult guideline in order to decide upon 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 mechanically. 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.**

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