

# Sentencing Council

**Sentencing Council meeting:** 25 September 2015  
**Paper number:** SC(15)SEP06(b) - Youths  
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## **1 ISSUE**

- 1.1 This is the first consideration of a new draft format sexual offences guideline for youths.
- 1.2 It is proposed that the Council will have an opportunity to consider a new draft format youth robbery guideline in October. The aim is for both guidelines to be signed off at the Council meeting in November, and out for consultation by February 2016.

## **2 RECOMMENDATION**

The Council is asked to consider

- The general format of the guideline;
- The scope of the guideline;
- The factors included within the non custodial group;
- The factors included within the custodial group;
- The aggravating and mitigating factors; and
- The reference to the use of adult guidelines.

## **3 CONSIDERATION**

- 3.1 At the July meeting the Council decided that offence specific guidelines drafted in the usual SC style, are not appropriate for youths as they are too specific and would likely lead to higher sentences than are currently imposed. It was felt that when sentencing young offenders there are too many

variables, specific to the offender. Instead it was proposed that guidance could be provided to assist sentencers in determining whether the case before them is so serious that it has crossed the custodial threshold. The Council also decided that if the case had clearly crossed the custodial threshold then only at this stage might the sentencer want to consult the equivalent adult guideline to provide broad assistance with the sentence level, taking into account reductions for the youth of the offender.

3.2 With these aims in mind I have drafted the attached guideline at **Annex A**.

### Structure

3.3 The Council will note that under the first box, which sets out the factors indicating lesser serious offending, sentencers are instructed that presence of one or more of those factors may lead the court to consider a non custodial sentence. However the next box, which deals with those cases that cross the custodial threshold, requires sentencers to find one of those factors plus one or more aggravating factors before concluding that the case may have crossed the custodial threshold. The reason for the different approach was that there did not appear to be any factors that, on their own, would certainly lead to a case crossing the custodial threshold. The aggravating factors listed are all ones which are quite serious in themselves, to ensure that a case should not tip over the custodial threshold by virtue of one relatively minor aggravating factor. However the aggravating factors are less serious than those factors listed in the second box, and on their own and perhaps even combined with each other, are insufficiently serious to warrant a custodial sentence.

3.4 It would be possible for a case to include factors indicating both a less serious offence and an offence that is so serious it could cross the custodial threshold. For example, where the offender has a mental disorder or learning disability, but the offence involves coercive penetrative activity with a significant degree of planning. In such a scenario the sentencer would have to weigh up for themselves which factors are more relevant on the facts of the case. This is not a new concept, even within the step by step guidelines usually produced by the Council sentencers will come across scenarios with factors indicating both higher and lesser levels of harm or culpability, and they would be expected to balance those factors to reach a fair assessment.

## **Question 1: Is the Council content with the structure of the guideline?**

### Scope

3.5 The factors included in the guideline all point toward sexual offences involving contact. The guideline would not, therefore, be suitable for the following types of sexual offence:

- Engaging in sexual activity in the presence of a child
- Causing a child to watch a sexual act
- Possession of indecent images
- Exploitation offences
- Others including exposure and voyeurism etc

3.6 However, given the very low numbers of offences of these types which, for young people, are unlikely to result in a custodial sentence, the need for a guideline in these areas is perhaps diminished. The general information provided within the newly drafted overarching principles, and the sexual offence specific detail at page 1 of this guideline should give the sentencer sufficient assistance.

## **Question 2: Is the Council content to provide a guideline that applies only to contact type sexual offences?**

### Non Custodial Factors

3.7 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 sexual offences.

## **Question 3: Is the Council content that the factors listed do describe offences that, in most cases, should not result in a custodial sentence?**

3.8 The use of the term 'non coerced sexual activity' is intended to capture those cases where two young people have willingly engaged in sexual activity without regard to the fact that the victim, by virtue of their age, is unable to legally consent. The SGC guideline used the phrase 'relationship of genuine affection' which may have been trying to capture the same thing, however is

perhaps a little less clear, and may result in mitigation being given where it is not warranted. For example an offender and victim may have been in a 'relationship of genuine affection' but if on this occasion the victim was forced to engage in sexual activity the fact of their existing relationship is likely to be irrelevant.

**Question 4: Is the Council content to use the phrase 'non coerced sexual activity'?**

Custodial Factors

- 3.9 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. Coercion appears twice within this list. On the first occasion; penetrative activity involving coercive behaviour. As discussed above, is intended to differentiate between those young people willingly engaging in sexual activity. The coercion within this factor need not be violent but could involve undue pressure, encouragement or blackmail.
- 3.10 Coercion through violence or threats of violence is intended to capture a higher level of coercion, but will apply to offences including non penetrative sexual behaviour.

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

Aggravating & Mitigating Factors

- 3.11 The aggravating and mitigating factors have been collated from a number of sources including the existing SGC youth guidelines and through a small-scale analysis of transcripts of youth sexual offence cases which have reached the Crown Court. 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 met with general support. Further road testing is planned for the consultation stage of the guidelines.

**Question 6: Is the Council content with the list of aggravating and mitigating factors?**

## The Use of Adult Guidelines

3.12 The SGC's Overarching Principles – Sentencing Youths guideline provides that when dealing with offenders aged 15, 16 or 17 whose offending has crossed the custodial threshold:

**...where there is no offence specific guideline, it may be appropriate, depending on maturity, to consider a starting point from half to three quarters of that which would have been identified for an adult offender.**

3.13 At the last Council meeting, when guidelines had been drafted providing sentencing levels of three quarters of the adult equivalent guideline, it was clear that the Council felt that the sentences proposed were too high.

3.14 Since the last Council meeting the analysis and research team have carried out an assessment of existing sentencing practice to consider whether in fact youth sentencers, when imposing a custodial sentence, do broadly sentence between half to three quarters of the adult equivalent. The results show that a far smaller percentage of youths received a custodial sentence than adults, but when a custodial sentence was imposed for the more serious offences which are being considered by the Council, such as robbery and rape, it was somewhere between half to two thirds of the equivalent adult sentence. This is only a slight downward adjustment to the previous provision.

3.15 It is therefore proposed that both within this sexual offences guideline, and within the new draft Overarching Principles document it states that

*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.*

**Question 7: Is the Council content that both the Overarching Principles and the Sexual Offences guideline make this reference to the equivalent adult 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.

## **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



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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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