

Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

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SC(21)NOV05 – Sexual Offences
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1 ISSUE

1.1 Further consideration of responses to the consultation on revisions to the sexual offence guidelines.

2 RECOMMENDATIONS

2.1 That:

- changes are made to the step one and step two factors in the s15A guideline as set out below but that sentencing levels remain as proposed;
- the drop down on “severe psychological harm” is amended, but that on abuse of trust remains as proposed in the consultation;
- the added/amended mitigating factors on youth and ill-health are added as proposed in the consultation;
- that the guidance on how current guidelines are applied to historical cases is brought further into line with the wording in the case of *RvH*.

3 CONSIDERATION

3.1 This is the second meeting considering responses to the consultation on revisions to the sexual offences guidelines which ran between 13 May and 13 August this year. This paper covers responses received on i) the new section 15A guideline (sexual communications with a child); ii) the drop down expanded explanations proposed on abuse of trust, psychological harm, and mitigating factors age/lack of maturity and physical disability or serious medical condition requiring urgent, intensive or long-term treatment; and iii) principles for sentencing historical sexual offences.

Section 15A guideline

3.2 A copy of the draft section 15A guideline is at **Annex A**, with the amendments proposed in this paper in red. A summary of the findings from road-testing is at **Annex B**. Road testers generally applied the guidelines consistently in terms of arriving at a starting

point, although there was some inconsistency in how the reduction to reflect the lack of a real victim was (or was not) applied. Variations in final sentences depended heavily on how mitigating factors were applied.

3.3 Looking first at the 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 we had proposed “sexual images sent or received”, they suggested “sexual images exchanged”. Although consistency may be desirable, I would defend “sent or received” in this context because it would be quite possible for an offender to send unsolicited images without receiving anything in return.

3.4 Other factors from the section 15 guidelines suggested for inclusion here were “child is particularly vulnerable due to personal circumstances” and “continued contact despite victim’s attempts to terminate contact”.

3.5 The former is already at least partially covered by the culpability factor “targeting of a particularly vulnerable child”, although this is equally true in the section 15 guideline. As well as the risk of double counting, there is scope for uncertainty by including a harm factor on vulnerability: in the apparent majority of cases the child will be fictional, so such a harm factor should not apply (rather the “targeting” culpability factor would be relevant). We have an aggravating factor “Victim particularly vulnerable (where not taken into account at step one)” and this seems to me the most appropriate place for this to be considered.

3.6 “Continued contact despite victim’s attempts to terminate contact” is similar to our proposed aggravating factor “offence involved sustained or persistent communication”. Whether this comes at step one or step two is finely balanced. I would argue that the section 15 guideline is designed for a different type of offending, i.e. a course of conduct intended to result, or which has resulted in, contact offending. The seriousness of a section 15A offence may be realised either in a one-off communication or in a longer course of conduct (though still not resulting in contact offending), often without a real victim to attempt to terminate contact, and so it may be better for the duration of the offending to remain at step two.

3.7 One further harm element from section 15 mentioned by a respondent is “victim exposed to extreme sexual content (for example, extreme pornography)”. This links with a concern raised by Professor Alisdair Gillespie that even the exchange of sexual content risks confusing prosecutors into pursuing a section 15A prosecution rather than the more appropriate section 12 (causing a child to watch a sexual act). While I doubt inclusion within the guidelines would confuse prosecutors, I believe this is covered adequately by “sexual images sent or received”.

3.8 One respondent suggested we should be clear on our definition of the word “sexual” noting the differing definitions used in the law on disclosing images, voyeurism, and upskirting, recently explored by the Law Commission in its consultation on intimate image abuse. I do not believe the guidelines need to employ or signpost more of a definition than the reasonable person test which appears on the face of the statute for this offence:

“For the purposes of this section, a communication is sexual if—

(a) any part of it relates to sexual activity, or

(b) a reasonable person would, in all the circumstances but regardless of any person's purpose, consider any part of the communication to be sexual;

and in paragraph (a) “sexual activity” means an activity that a reasonable person would, in all the circumstances but regardless of any person's purpose, consider to be sexual.”

3.9 Some respondents suggested broadening “images” to be clear it could refer to other material such as videos or sound recordings. Professor Gillespie suggested “stories” as well, but I would be concerned that that would elevate too much of what is inherent in the offence. I believe in most cases “images” would be understood to include video footage. We could use the word “content” from the section 15 guideline but with this (or the word “material”) we risk catching the basic communication.

3.10 On balance, I believe “images” captures what we want it to, and if another form of media is used, the sentencer will have flexibility to consider whether that has caused particular harm.

3.11 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. The last point argues in favour of including some kind of qualifier and a base level of harm is assumed by the sentencing levels in these cases. We cannot direct sentencers to assume a significant level of harm which may only manifest itself later, and I believe in practice it is possible to distinguish between differing levels of harm evidenced in victims.

3.12 We would be using here the proposed drop-down text on the assessment of psychological harm (and I propose some refinements to this below, based on consultees’ responses). However, we could add some wording to that which is found in a similar piece of text in the child cruelty harm table: “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”. We can consider that as part of the amendments proposed to the drop-down.

3.13 I have considered whether the term “significant” could be replaced with an alternative. Other sexual offence guidelines refer to “severe” psychological harm and the child cruelty guidelines refer to “serious” psychological harm. Given the nature of this (non-contact) offending, these adjectives would set the bar too high. “Significant” is used in harassment/stalking guidelines and I believe is pitched at the right level.

3.14 The Justices’ Legal Advisers and Court Officers Service suggested:

“We would propose that rather than the additional wording [at the top of the harm table], that “significant number of victims” be added to category 1 Harm. “Significant” would avoid the inclusion of merely more than one (which multiple would include); an additional other aggravating factor (at step 2) could be added “ more than one victim where not already taken into account “ would cover more than one but less than significant.”

I do not believe this offers more flexibility than we currently have to reflect the differing circumstances of different cases where there may be more than one victim (for example where very low-level messaging is sent to various victims).

3.15 Some responses suggested that there be more detail and examples given for lower harm (which we propose to be anything that does not come under raised harm). I believe we can defend this two-category/four-box system as being clear and appropriate for a sexual offence with a relatively low maximum penalty and where common elements are found across much of the offending.

3.16 Finally, some sentencers in road testing found it difficult to assess harm when there was no real child, given that one of the two existing raised harm factors is “significant psychological harm or distress caused”. I do not think this is necessarily a problem although in such scenarios it does leave sending images as the only factor to mark out raised harm.

Question 1: are there any changes you would like to make to the harm table, as proposed by consultees?

3.17 Turning to culpability factors, again, several respondents looked to section 15 for possible additions. It was conceded that “offender acts together with others to commit the offence” may be rare but was still thought to be worthy of higher culpability. We had viewed “offender lied about age/persona”, alongside a disparity in age, to be a fairly fundamental aspect of the offending (therefore putting the former as an aggravating factor) but several respondents thought this should go at step one.

3.18 It is certainly the case that there will usually be a significant disparity in age in these offences (although the Justice Select Committee asks us to consider the difference between an 18 year old and a 58 year old targeting a 15 year old victim). However, reviewing the 31

transcripts we have only three cases remark on the use of deceit as to age or identity (and in one of those the offender claimed to be 57 when he was 59). On that basis, it is open to us to include “offender lied about age/persona” as a step one factor.

3.19 It was also suggested to bring the wording of “use of threats (including blackmail)” in line with the section 15 guideline factor “use of threats (including blackmail), gifts or bribes”. I agree that this would be welcome for consistency purposes.

3.20 The CPS suggested the culpability factor “sexual images of victim recorded, retained, solicited or shared” which appears in other child sexual offence guidelines. (We already include soliciting images as a raised culpability factor.) My concern with including this is it double counts the high harm factor “images sent or received” as any images are highly likely to be recorded and retained in some form. In the cases I have seen there is no suggestion that images are shared with third parties in these cases (and this in any case would amount to a separate offence).

3.21 Professor Gillespie revived his suggestion for the other child sexual offence guidelines for a culpability factor involving asking a victim to lie or conceal the offending while it is happening (for example asking the victim not to tell their parents and to delete messages). I suggest this may properly be an aggravating factor rather than something for raised culpability.

Question 2: do you agree to add/amend the culpability factors as follows:

- **offender acts together with others to commit the offence;**
- **offender lied about age/persona;**
- **use of threats (including blackmail), gifts or bribes;**

Question 3: are there any other changes you would like to make to the culpability table, as proposed by consultees?

3.22 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.

3.23 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 an 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

3.24 Given the balance of opinion, I believe we should stick to our proposed starting points. It is unclear how the rate of suspended sentences is an argument for reducing the lowest starting point to three months, which in any case still means all starting points are custodial. One risk of lowering the Harm Category B levels too low is that many fairly serious offenders may fall into this category because they were not communicating with a real child. 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).

3.25 One response suggested specifying certain requirements to be attached to a community order or suspended sentence order:

“Consideration should also be given to the fact that these offenders will need rehabilitative intervention, which will not be available for any of the custodial terms above. Therefore I would recommend specific factors to be applied to community sentences given to offenders of sexual offences which mandate engaging in structured intervention. Clearly this would require additional availability of probation interventions, or better engagement with mental health commissioners to enforce mental health services engaging with MHTRs and community intervention.” – Dr Nici Grace

3.26 I would be wary of mandating certain treatments in a guideline because of the risks associated with local availability and it would be contrary to our general approach of not specifying or mandating specific interventions. In practice, most sentencers will have a good sense of what they can and should impose as part of a rehabilitation requirement.

Question 4: are you content to leave the sentencing levels as they stand?

3.27 For step two factors, again a common theme was consistency with section 15 and other child sexual offence guidelines. The following additions/amendments were suggested:

- add “presence of others, especially children”; this appears in several child sexual offence guidelines, although not in section 15. Our view had been that this was not generally relevant to this offence (and would it refer to presence at the offender’s end, the victim’s end, or both? Would it include an online presence?);
- add “demonstration of steps taken to address offending behaviour”; this appears in some but not all child sexual offence guidelines. I can see no reason not to include it in this guideline;
- if we add “offender lied about age/person” as a culpability factor (see above), we should remove “offender lied about age or used a false identity” as an aggravating factor;
- the Prison Reform Trust asked us to remove “commission of offence whilst under the influence of alcohol or drugs” as part of a wider point they have made (i.e. *“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). Council may wish to consider this in the round but we will include the standard dropdown on this aggravating factor.¹ I do not believe there is a good reason to single this guideline out now as one where this factor is not relevant;

- the Sentencing Academy proposed “single or transitory communication with victim”. We currently have “isolated offence” which is a slightly broader concept. I would argue that whilst sustained or persistent communication is aggravating, a single communication should not be mitigating. (One respondent thought that sustained or persistent communication was inherent in almost all examples of offending, but from the transcripts I have seen this is not the case);
- quite a few respondents suggested removing “physical disability or medical condition” as a mitigating factor. Linked with our proposed drop-down explanation (see below) 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, I believe it is clearly relevant to personal mitigation;
- two respondents proposed we remove good character, given how this can be used to facilitate offences. It was suggested that the court should only be concerned about previous convictions. However, we do include the standard text being clear that the more serious the offence the less weight should be applied to this factor, and that where it has been used to facilitate the offence it may be aggravating;
- remove age/lack of maturity (see below discussion on the proposed drop-down text);
- Professor Gillespie had suggested a culpability factor about “pre-concealing” – asking a child to cover up the offending whilst it takes place. This seems closely related with the existing aggravating factor “attempts to dispose of or conceal evidence”, but I can see the case for particularising it: “attempts to

¹ This includes the wording *“In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has sought help or engaged with any assistance which has been offered or made available in dealing with the addiction.”*

dispose of or conceal evidence **(including asking the victim to conceal the offending)**”

Question 5: do you want to:

- **add the mitigating factor “demonstration of steps taken to address offending behaviour”;**
- **remove the aggravating factor “offender lied about age or used a false identity” (if this becomes a culpability factor); and**
- **amend the aggravating factor “attempts to dispose of or conceal evidence”, as above?**

Question 6: are there any other changes you would like to make to the step two factors, as proposed by consultees?

Drop-down expanded explanations

3.28 We proposed an expanded explanation about the assessment of psychological harm at step one of various sexual offence guidelines (see **Annex C** for the text of the drop downs we consulted on). Although most responses agreed with the proposal, 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 essential point being made by our drop down is that expert evidence is not necessary for a finding of severe psychological harm, so I do not feel the drop down needs to contain a full repetition of the findings in Chall but I suggest some additions below which make some of these points. On a related note, some respondents did wish to have a certain level of harm assumed, including harm which only manifests itself later in life. The answer to this may lie at least partially in the fact (also made in Chall, paras 25-6) that sentence levels are designed with the inherent harm in the offence in mind. Again, I propose some text which could help make this clear:

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 it may be assisted by expert evidence, such evidence is not necessary for a finding of psychological harm, including severe psychological harm. **Such a finding may be made on the basis of a dispassionate and careful assessment** ~~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~~ **the sentencer's** ~~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.**

3.31 The National Police Chiefs' Council suggested an amendment to the drop down to cover cases where there was no real victim, to include reference to an assessment of "likely' harm caused as if from a subjective viewpoint". I would not recommend we go this far. This would undermine the fact that each assessment needs to be made carefully on its facts and the based on the evidence before the court. In most child sexual offence guidelines the harm is assessed in relation to the activity, and the harm done to the victim is factored into the sentence levels. A downward adjustment is made precisely *because* no harm has been done and to then adjust for a notional degree of harm seems inconsistent.

Question 7: are you content to make the suggested amendments to the drop down on severe psychological harm?

3.32 We proposed adding the existing drop-down on abuse of trust at step one of the sexual offence guidelines where it appears as a culpability factor. Most respondents were content, although some thought there was scope for confusion:

"The position regarding (for example) relatives of a child or close family friends of a child and whether they have the same level of responsibility or accountability for the child as would a teacher seems somewhat unclear to us. The first paragraph says it is something more than behaving properly, with which we agree, and the second paragraph gives examples where a relationship or duty of care of some sort exists. Indeed, Forbes says that abuse of trust "plainly includes" pupil / teacher relationships, but then goes on to say that "it may also" occur in "parental or quasi-parental relationships" – to us, this seems to imply a lesser likelihood for a level of responsibility exists and so a breach of trust to occur. We are sure this is not meant to imply that in no cases can abuse of trust take place by a relative, neighbour or close family friend. We cannot think of a situation or "relationship" in which the responsibility and accountability for another is stronger than that between a parent (or quasi-parent or someone acting in loco parentis) and a child. Nowhere else can the duty of care and protection for a child be stronger than with their parents or guardians. So how is this to be reconciled?" – West London Magistrates Bench

"The proposed text in the consultation reads:

Examples MAY include relationships such as teacher and pupil, parent and child, employer and employee, professional adviser and client, or carer (whether paid or unpaid) and dependant. It MAY also include ad hoc situations such as a late-night taxi driver and a lone passenger.

(emphasis added)

By using "may" in both places, the suggested text gives the impression that abuse of trust is equally likely to be found in both types of situation, which is not the case. – Giles Fleming

"Abuse of trust is in the context of these offences a rather vague concept. It should perhaps simply be replaced with 'abuse of position'. That is then more victim/complainant oriented- they may 'look up' to the D or follow his or her instructions, even though nobody else has placed D in a position of 'trust'" – HHJ Colin Burn

3.33 Professor Gillespie suggested splitting this out so that “familial relationship” becomes a new culpability factor, thereby defining “abuse of trust” more tightly. This proposition may have merit but it could clearly have broader implications, even beyond sexual offence guidelines, so I believe this should be considered as part of a broader review in due course.

3.34 I am not persuaded that the existing dropdown is the source of much confusion and the “may/plainly” wording from Forbes does not need to be followed slavishly to be clear. “Abuse of position” seems to be a narrower concept than what we want to cover.

Question 8: are you content to leave the drop down explanation for abuse of trust as it is?

3.35 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.

3.36 One respondent had an interesting 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

3.37 However, young people can still be distinguished from older people in terms of control over their behaviour. Where victims are very young this may carry little weight but it is arguably more relevant for teenage offenders with victims approaching 16. In short, I believe none of the arguments against outweigh the interest in consistent guidelines and we can

assure the Justice Committee (and others) in the response document that these factors are present across a broad range of guidelines and we do not expect them to have a disproportionate impact on sentencing in sexual offence cases.

Question 9: are you content to include the mitigating factors “Age and/or lack of maturity” and “Physical disability or serious medical condition requiring urgent, intensive or long-term treatment” and accompanying expanded explanations as proposed?

Historical sexual offences

3.38 Our aim with the amendments to the guidance on sentencing historical sex offences (as set out at **Annex D**) was to bring it closer into line with Court of Appeal case law. However, it led some respondents, including Professor Gillespie, the Magistrates Association and the Justice Select Committee to question why in historical cases youth and immaturity would be treated as a matter of culpability as opposed to personal mitigation.

3.39 I suspect this is more a semantic distinction than anything that would substantially affect sentence outcomes. Nonetheless, we can defend our proposal to treat immaturity as a pure culpability factor in historical cases, given that it will be irrelevant to personal mitigation for an older offender. In terms of the disparity with present-day cases, the mitigating factor of youth (which applies both to the offending and the circumstances of the offender) will in practice result in significant downward adjustment. Youth may well also be indirectly relevant to an assessment of lower culpability (eg no significant disparity in age).

3.40 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 retrospective for historic offences.*” We can provide something on this in the response document. 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, although in many cases it may be that immaturity will be assumed to go hand in hand with youth.

3.41 Other responses picked up on the wording of how the Court is meant to use current guidelines. HM Council of District Judges (Magistrates’ Courts) rightly 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]).

(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.”

3.42 The judges from Kingston Crown Court also suggested that we follow the wording in *R v H*. I agree that it is counterproductive for the sake of a word to add another formula for sentencers to follow, so recommend we add “measured”, to become: “The court should sentence by **measured** reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003”.

3.43 Professor Gillespie proposed a further principle for inclusion in the historical sexual offences guidance:

“In *R v Webber* the Court of Appeal said something which is very pertinent:

‘Of course, a sentence of 32 years’ imprisonment on a man of 79 years of age, who is, we understand, in infirm health and who is now registered blind, will have a serious impact on him. It will be more difficult for him to cope in prison than it would be for a younger or healthier man. Nevertheless, while his victims have been suffering in the way we have described, the appellant has had the benefit of living a life in the community for many years as a respected member of society.’

This is an important point. While the impact on an offender must be taken into account, it must also be recognised that, particularly in cases of historic abuse, a person has enjoyed their life in a way that their victims have not. To an extent, this is reflected in the third bullet point of your drop-down text:

“There will always be a need to balance issues personal to an offender against the gravity of the offending (including the harm done to victims), and the public interest in imposing appropriate punishment for serious offending.”

If the Council are confident that the inclusion of this note in other guidance has not led to inappropriate sentencing, then it should be included within the sexual offences guideline. However, I respectfully submit that the comment in Webber should be referenced in the historic offences guideline.”

3.44 I believe that this point is sufficiently complex and controversial that it would need to be the subject of further consultation and, again, could be picked up in a broader review of sexual offence guidelines. However, I would like to limit changes to this guidance to points of wording to ensure no disparity with case law.

3.45 Finally, it was helpfully pointed out that the current guidance is entitled “Approach to sentencing **historic** sexual offences”, and we refer throughout to them in this way. However, they would better be called **historical** sexual offences (as they happened in the past, rather than being significant events).

Question 10: should the guidance refer to youth and immaturity as elements relevant to culpability rather than personal mitigation?

Question 11: do you agree that the guidance should direct Courts to sentence by measured reference to any applicable guidelines?

Question 12: do you agree to amend the guidance to refer to historical sexual offences?

4 EQUALITIES

4.1 The consultation asked

- Do you consider that any elements of the draft guidelines and revisions presented here, or the ways in which they are expressed, could risk being interpreted in ways which could lead to discrimination against particular groups?

- Are there any other equality and diversity issues these guidelines and revisions should consider?

We discussed at last month's meeting the suggestion from one response that offending by women should be treated as more seriously, and that there was not particularly clear evidence of disparities in sentencing different ethnic groups. No further changes to the guidelines are proposed.

5 IMPACT AND RISKS

5.1 We will present a revised resource assessment to Council in January ahead of finalising the revisions, setting out the expected impacts of the guideline as revised in light of consultation responses.

Sexual communication with a child

Sexual Offences Act 2003, s.15A

Effective from: XXXXXXXXXX

Triable either way

Maximum: 2 years' custody

Offence range: Community order – 2 years' custody

This is a **specified offence** for the purposes of sections 266 and 279 (extended sentence of imprisonment for certain violent, sexual or terrorism offences) of the Sentencing Code.

Step 1 – Determining the offence category

The court should determine which categories of harm and culpability the offence falls into by reference only to the tables below.

Harm

Use the factors given in the table below to identify the Harm category. If the offence involved multiple victims, sentencers may consider moving up a harm category or moving up substantially within a category range.

In cases of attempts where an offender tries to communicate with a child victim who does not exist, the court should identify the category of harm on the basis of the sexual activity the offender intended, and then apply a downward adjustment at step two to reflect the fact that no or lesser harm has actually resulted. In such cases a small reduction within the category range will usually be appropriate. No additional reduction should be made for the fact that the offending is an attempt.

Category 1

- Sexual images sent or received
- Significant psychological harm or distress caused to victim

Category 2

- Factor(s) in category 1 not present

Culpability

Culpability A

- Abuse of trust
- Use of threats (including blackmail), **gifts or bribes**
- Targeting of a particularly vulnerable child
- Commercial exploitation and/or motivation
- Soliciting images
- **Offender acted together with others to commit the offence**
- **Offender lied about age/persona**

Culpability B

- Factor(s) in category A not present

Step 2 – Starting point and category range

Having determined the category of harm and culpability, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. Having determined the starting point, step two allows further adjustment for aggravating or mitigating features, set out below.

A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Where there is a sufficient prospect of rehabilitation, a community order with a sex offender treatment programme requirement under Part 3 of Schedule 9 to the Sentencing Code can be a proper alternative to a short or moderate length custodial sentence.

	Culpability A	Culpability B
Harm category 1	<p>Starting point 18 months' custody</p> <p>Category range 9 – 24 months' custody</p>	<p>Starting point 1 year's custody</p> <p>Category range High level community order – 18 months' custody</p>
Harm category 2	<p>Starting point 1 year's custody</p> <p>Category range High level community order – 18 months' custody</p>	<p>Starting point 6 months' custody</p> <p>Category range Medium level community order – 1 year's custody</p>

The table below contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions are likely to result in an upward adjustment.**

Aggravating factors

Statutory aggravating factors

- 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
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity

Other aggravating factors

- Failure to comply with current court orders
- Offence committed whilst on licence
- Financial or other reward offered to victim
- ~~Offender lied about age or used a false identity~~
- Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution
- Attempts to dispose of or conceal evidence (including asking the victim to conceal the offending)
- Failure of offender to respond to previous warnings
- Commission of offence whilst under the influence of alcohol or drugs
- Victim encouraged to recruit others
- Victim particularly vulnerable (where not taken into account at step one)
- Offence involved sustained or persistent communication

Mitigating factors

- No previous convictions or no relevant/recent convictions
- Remorse
- Previous good character and/or exemplary conduct*
- Isolated offence
- Age and/or lack of maturity

- **Demonstration of steps taken to address offending behaviour**
- Mental disorder or learning disability, particularly where linked to the commission of the offence
- Physical disability or serious medical condition requiring urgent, intensive or long-term treatment

* Previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less the weight which should normally be attributed to this factor. Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor.

Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account section 74 of the Sentencing Code (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 4 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 73 of the Sentencing Code and the Reduction in Sentence for a Guilty Plea guideline.

Step 5 – Dangerousness

The court should consider whether having regard to the criteria contained in Chapter 6 of Part 10 of the Sentencing Code it would be appropriate to impose an extended sentence (sections 266 and 279).

Step 6 – Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour. See Totality guideline.

Step 7 – Ancillary Orders

The court must consider whether to make any ancillary orders. The court must also consider what other requirements or provisions may automatically apply.

- Ancillary orders – Crown Court Compendium

Additional ancillary orders – sexual offences

Step 8 – Reasons

Section 52 of the Sentencing Code imposes a duty to give reasons for, and explain the effect of, the sentence.

Step 9 – Consideration for time spent on bail (tagged curfew)

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Code.

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Road testing findings s15A Sexual communication with a child

Introduction

The current sexual offences guidelines were published in 2013 and came into force in 2014. The 2020 Court of Appeal case of *Privett* provided the courts with guidance about how to approach the assessment of harm in cases where sexual activity was incited but ultimately did not take place. This often occurs in the context of undercover ‘sting’ operations where there is no child, though could also include cases where there is a child but no sexual activity took place. These cases have tended to be placed automatically in the lowest category of harm. However, the Council has proposed amendments to the guidelines in line with the *Privett* ruling, with directions that judges should determine harm on the basis of what an offender intended, even if no sexual activity ultimately takes place (including situations where there is no real child victim), before making a downward adjustment to reflect the fact that no activity took place.

The Council has also developed a draft guideline for the offences of sexual communication with a child. There is no current guideline for this offence. The same principle applies for determining harm where there is no real child.

Qualitative research was required to understand how the draft guidelines would be used in practice. The s15A Sexual communication with a child guideline was tested with Crown Court judges, district judges and magistrates, with the aim of understanding how sentencers use the guideline, whether they find it clear and usable, and the severity of sentence imposed and when sentencers would consider suspending. The Council also wanted to understand how sentencers interpret the guidance for determining harm where no sexual activity has taken place and what sort of reduction sentencers will give in practice for these cases.

Methodology

A random sample of judges, district judges and magistrates was taken from the research pool¹ and invited to take part in qualitative research interviews. For the new s15A guideline, sentencers were first asked to sentence the case as if it were before them in court today, and then to sentence the case using the draft guideline. Participants were sent the draft guidelines and scenarios one week in advance, to allow time to read through them before the interview.

Table 1: Number of participants sentencing each scenario

Scenario	Guideline	Crown Court judges	District judges	Magistrates	Total
D	s15A	8	3	3	14
E	s15A	8	3	3	14

¹ The database of sentencers who have agreed to be approached by the Sentencing Council to take part in research from time to time.

Key findings

- In scenario D, 12 out of 14 sentencers placed the offender in category B1, and all 14 sentencers had a starting point of 1 year. Two Crown Court judges and two district judges made downward adjustments of three months to reflect the fact that the child victim did not exist. Final sentences ranged from a community order to 9 months custody. Two sentencers gave immediate custody, all others gave a community order or suspended sentence. Of the four sentencers who had made an adjustment on the basis of no child victim, all arrived at a final sentence of 6 months, three of which were suspended.
- In scenario E, all sentencers placed the offender in category B2, and 12 out of 14 gave a starting point of 6 months. One Crown Court judge and one district judge made downward adjustments of two months to reflect the fact that the child victim did not exist. Final sentences ranged from a medium level community order to 10 months custody. One Crown Court judge gave immediate custody, all others gave a community order or suspended sentence.
- There was consistency in both scenarios in sentencers' assessments of culpability and harm, as well as starting points. The range in final sentences appeared to relate to the variation in weight given to the mitigating factors.
- Some sentencers said they struggled to assess the harm in the s15A scenarios where there was no child victim, because they were unable to assess whether harm or distress was caused to a victim in the level 1 factors.
- Most sentencers did not make a downward adjustment to reflect the fact that the child victim did not exist, or seem to take the narrative in the guideline into account.

Scenario D (s15A sexual communications)

Offender is aged 30 and lives with his partner. He met the apparent victim (in fact a member of a vigilante group) on a dating app. Her profile claimed she was 18, but soon after they started communicating she revealed that she was in fact 13. He asked her to keep quiet and make sure she did not tell her parents. The conversation soon moved from the dating app on to another messenger service. He asked whether he could be her boyfriend, whether she wanted to kiss him and whether they could meet for a drink. He then turned to discussing the size of her breasts, her experience of puberty, and what underwear she owned. He sent two explicit images of a vagina. They discussed having sex and the risks of getting pregnant. There was some vague discussion of meeting up. These exchanges continued for about two weeks until he was arrested, at which point he admitted everything.

The offender has old and irrelevant convictions for which a community order was given and complied with. The Pre-sentence Report suggests he is minimising responsibility for the offending. A psychological report says he had a difficult childhood and has a very low IQ ("intellectually impaired or suffering from a learning difficulty") which means he has a support worker. The psychologist says this – alongside his other difficulties – was linked with the offending. Psychologist concludes that he will be vulnerable in custody and going to prison is likely to increase chances of reoffending.

Scenario D was tested with eight Crown Court judges, three district judges and three magistrates. It was based on the case of *Hale* for which a 3 year community order was handed down. In road testing, final sentences ranged from a community order to 9 months custody.

In assessing harm, 12 out of 14 sentencers placed the offender in harm category 1 on the basis of images sent. One district judge and one magistrate, having acknowledged the images sent, each placed the offender in category 2 on the basis that there was no impact or harm caused to a victim.

In assessing culpability, 13 out of 14 sentencers placed the offender in culpability category B, on the basis that there were no category A factors. One district judge placed the offender in category A though did not identify any factors that led to this assessment. This sentencer had also put harm in level 2. All sentencers gave a starting point of 1 year.

Two district judges made an adjustment on the basis that the child victim did not exist and reduced their sentences by three months down to 9 months. No Crown Court judges or magistrates made adjustments at this stage, though two Crown Court judges brought their sentences down by three months at mitigation stage to reflect the fact that the child victim did not exist.

Most sentencers did not make an adjustment or seem to take the narrative from the guideline into account. One Crown Court judge noted after giving a final sentence that they had not accounted for the fact that it was an attempt but said this would not alter their final sentence of a high level community order.

Three sentencers brought their sentences down due to mitigating factors, and a further two, as described above, brought sentences down at this stage on the basis there was no real harm caused. One district judge raised the sentence from 9 months to 10 months due to the aggravating factors.

Sentences prior to guilty plea reduction ranged from a high level community order to 1 year custody, and final sentences ranged from a community order to 9 months custody. None of the Crown Court judges sentenced to immediate custody: three gave community orders, two gave suspended sentences of 6 months, and three gave suspended sentences of 8 months. District judges all arrived at a final sentence of 6 months, two of which were suspended. Magistrates arrived at final sentences of 6 months and 1 year (both suspended) and 9 months immediate custody.

Of the four sentencers who had made an adjustment on the basis of no child victim, all arrived at a final sentence of 6 months, three of which were suspended.

Sentencers were also asked to sentence this scenario as they would now, without a guideline in place. Most arrived at very similar final sentences, though one Crown Court judge said they would give a custodial sentence, with a starting point of 18 months to 2 years custody, without the guideline, and came to 8 months, suspended, when using the guideline. They stated that they were happy with the final suspended sentence order they came to, though would have been happy with a custodial sentence too. They concluded that the guideline's approach makes a suspended sentence order more reasoned and justifiable.

In weighing up whether to suspend the sentence, sentencers said they would consider whether there was sufficient prospect of rehabilitation, and the fact that the offender had no previous convictions. One said it would never be appropriate for him to be sent to custody, and gave a community order. Of the two sentencers who gave immediate custodial sentences, one magistrate said they would send the case to the Crown Court and expect it to be suspended. The other, a district judge, said they would consider suspension, and would be balancing the offender's vulnerability against "serious, persistent, harmful behaviour that is very concerning."

Most said they would probably attach rehabilitation activity requirement (RAR) days so that the offender could have one-to-one support rather than the Sexual Offender Treatment Programme (SOTP), due to his low IQ. Five said they would include unpaid work as a punitive element.

Scenario E (s15A sexual communications)

This offending consists of five counts, all attempted sexual communication with a child. These were decoys set up by vigilante groups. The offender is aged 28, and has no previous convictions. The apparent victims were aged 13 and 14. Each of the cases lasted from a few days, up to at most a month and the whole course of offending takes place over about 10 weeks. There was a series of persistent communications to each of the victims. He asked what they were wearing, whether they were wearing a school uniform, whether he could kiss them, whether he could be their boyfriend, and he asked them suggestive questions about their experience, and what they had done with female relatives.

The vigilante group posted the conversation on Facebook and called the police. He made immediate admissions of guilt and put in a guilty plea at the earliest opportunity. The Police found (legal) photographs of young women in school uniform on his phone. His employer dismissed him and he subsequently made a call to the police suggesting he was going to kill himself. He has a history of self-harm and since his arrest he has been getting treatment for mental health issues. He has learning difficulties, is isolated, and lives with his mother. However, he is now in an age-appropriate relationship. The Pre-Sentence Report noted that he recognises that what he did was wrong and that he needs help.

Scenario E was tested with eight Crown Court judges, three district judges and three magistrates. It was based on the case of *Burton*, for which a 3 year community order was handed down, as with the previous scenario. In road testing, final sentences ranged from a medium level community order to 10 months custody.

All sentencers placed the offender in harm level 2, on the basis there were no level 1 factors, and in culpability category B, on the basis there were no category A factors.

For the starting points, 12 out of 14 sentencers gave 6 months custody. Two Crown Court judges gave a starting point of 1 year, to take into account the five counts. One Crown Court judge and one district judge made adjustments on the basis of no child victim, reducing their sentences by two months, to 10 months and 4 months respectively.

Despite identifying a considerable number of mitigating factors across the group, only three sentencers (two Crown Court judges and one district judge) reduced their sentences from the starting point based on mitigation. One Crown Court judge increased the sentence from 6 months to 15 months to account for the five counts. Two district judges also increased their sentences on the basis of aggravation. Other sentencers made no adjustment on the balance of aggravation and mitigation, and sentences prior to the guilty plea reduction ranged from 3 months to 15 months custody. Following the guilty plea reduction, sentences ranged from a medium level community order to 10 months custody.

Six out of eight Crown Court judges gave a final sentence of a medium or high level community order, one gave 6 months custody, suspended, and one gave 10 months immediate custody. Two

district judges gave a high level community order and one gave 6 months custody, suspended. One magistrate gave a high level community order and two gave 4 months custody, suspended.

The Crown Court judge who gave ten months custody stated, when asked, that they had included an adjustment in their final sentence, though had not highlighted this during the sentencing process. They stated the reduction would be fairly small, and noted that they had not been able to take distress caused into account, which would stop the sentence going higher.

Reasons for suspending or giving a community order included: the offender's mental health and learning difficulties, the prospect of rehabilitation, first offence and the assessment that he is unlikely to reoffend. One Crown Court judge said that longer orders are better for this type of offending, to allow time to complete programmes that will address offending behaviour.

Again, most sentencers indicated they would attach RAR days rather than the SOTP requirement, given the vulnerability of the offender, and would attach an unpaid work requirement if he were able to do this.

Some sentencers said they struggled to assess the harm where there was no real victim, because they were unable to assess whether 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.

Other comments on the guideline

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.

One judge questioned why location and timing of offence are included in the aggravating factors but not in other guidelines.

Opinions were split on the conspicuousness of the narrative about the adjustment. When asked, most sentencers said they had found it clear, though 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.

One magistrate said the guideline was "quite clear you should be considering it as, if the defendant thinks the victim is real, then you should be considering them as a real person." This sentencer was able to assess the harm appropriately though did not apply a subsequent adjustment on the basis there was no real child.

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.

Scenario D – s15A Sexual communication with a child: Crown Court judges, district judges and magistrates

	Harm	Factors	Culpability	Factors	SP	After adjustment	Reduction for no victim	Aggravating factors	Mitigating factors	Pre-GP sentence	Final sentence
Crown Court judges											
1	1	<ul style="list-style-type: none"> Images sent 	B	<ul style="list-style-type: none"> No Cat A factors 	1 year						CO or SSO
2	1	<ul style="list-style-type: none"> Images sent 	B	<ul style="list-style-type: none"> No Cat A factors 	1 year			<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> Mental disorder/ learning disability <i>Vulnerable in custody</i> 	1 year	High level community order
3	1	<ul style="list-style-type: none"> Images sent 	B	<ul style="list-style-type: none"> No Cat A factors 	1 year			<ul style="list-style-type: none"> Steps to prevent reporting 	<ul style="list-style-type: none"> No relevant convictions Mental disorder/ learning disability <i>Vulnerable in custody</i> 	High level community order	High level community order
4	1	<ul style="list-style-type: none"> Images sent 	B	<ul style="list-style-type: none"> No Cat A factors 	1 year		3 months	<ul style="list-style-type: none"> Steps to prevent reporting Sustained communication 	<ul style="list-style-type: none"> Good character Mental disorder/ learning disability 	9 months	6 months, suspended for two years
5	1	<ul style="list-style-type: none"> Images sent 	B	<ul style="list-style-type: none"> No Cat A factors 	1 year		3 months			9 months	6 months, suspended
6	1	<ul style="list-style-type: none"> Images sent 	B	<ul style="list-style-type: none"> No Cat A factors 	1 year			<ul style="list-style-type: none"> Disparity in age Attempt to conceal Sustained communication 	<ul style="list-style-type: none"> Good character Mental disorder/ learning disability 	1 year	8 months, suspended
7	1	<ul style="list-style-type: none"> Images sent 	B	<ul style="list-style-type: none"> No Cat A factors 	1 year					1 year	8 months, suspended
8	1	<ul style="list-style-type: none"> Images sent 	B		1 year				<ul style="list-style-type: none"> No relevant convictions Remorse Mental disorder/ learning disability 	1 year	8 months, suspended for 2 years
District judges											

9	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year	9 months	3 months	<ul style="list-style-type: none"> • Steps to prevent reporting • Sustained communication 	<ul style="list-style-type: none"> • No relevant convictions • Mental disorder/ learning disability • <i>Isolated offence</i> • <i>Vulnerable in custody</i> 	6 months	6 months, suspended
10	2	<ul style="list-style-type: none"> • Images sent • <i>No impact on victim</i> 	A		1 year			<ul style="list-style-type: none"> • Sending images • Unpleasant discussion 	<ul style="list-style-type: none"> • No relevant convictions • Mental disorder/ learning disability 	6 months	6 months, suspended
11	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year	9 months	3 months	<ul style="list-style-type: none"> • Steps to prevent reporting • Attempt to conceal evidence • Sustained communication 	<ul style="list-style-type: none"> • Mental disorder/ learning disability • <i>Difficult childhood</i> 	10 months	6 months
Magistrates											
12	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year			<ul style="list-style-type: none"> • Steps to prevent reporting 	<ul style="list-style-type: none"> • No relevant convictions • Mental disorder/ learning disability 	1 year	9 months
13	2	<ul style="list-style-type: none"> • Images sent • <i>No harm to victim</i> 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year			<ul style="list-style-type: none"> • Attempt to conceal evidence 	<ul style="list-style-type: none"> • No relevant convictions • Mental disorder/ learning disability 	6 months, suspended	[credit is keeping the case in the magistrates' court]
14	1	<ul style="list-style-type: none"> • Images sent 	B	<ul style="list-style-type: none"> • No Cat A factors 	1 year			<ul style="list-style-type: none"> • Steps to prevent reporting • <i>Minimising responsibility</i> 	<ul style="list-style-type: none"> • Mental disorder/ learning disability • <i>Isolated offence</i> • <i>Vulnerable in custody</i> 	1 year	1 year, suspended

Scenario E – s15A Sexual communication with a child: Crown Court judges, district judges and magistrates

	Harm	Factors	Culpability	Factors	SP	After adjustment	Reduction for no victim	Aggravating factors	Mitigating factors	Pre-GP sentence	Final sentence
Crown Court judges											
1	2	<ul style="list-style-type: none"> No level 1 factors 	B (x5)		1 year	10 months	2 months		<ul style="list-style-type: none"> Good character 	9 months	6 months, suspended for 18 months
2	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> No previous convictions Remorse Mental disorder/ learning disability Age/lack of maturity 		Medium level community order
3	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	1 year (for 5)				<ul style="list-style-type: none"> Good character Remorse Mental disorder/ learning disability 	10 months	3 year community order
4	2	<ul style="list-style-type: none"> No level 1 factors 	B		6 months				<ul style="list-style-type: none"> <i>Immediate admissions</i> <i>Social isolation</i> <i>Self-harm</i> 		2 year community order
5	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months for single offence				<ul style="list-style-type: none"> Mental disorder/ learning disability <i>Immediate admissions</i> <i>Self-harm</i> <i>Age-appropriate relationship</i> 	15 months (for 5)	10 months
6	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> <i>Number of victims</i> 	<ul style="list-style-type: none"> No previous convictions Remorse Good character Lack of maturity Mental disorder/ learning disability 		High level community order
7	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months				<ul style="list-style-type: none"> Mental disorder/ learning disability <i>Age-appropriate relationship</i> <i>Isolated offence</i> 		Medium level community order

8	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months				<ul style="list-style-type: none"> No previous convictions Remorse Lack of maturity <i>Lost job</i> 	6 months	High level community order
District judges											
9	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> No previous convictions Remorse Mental disorder/ learning disability <i>Self-harm</i> <i>Steps to obtain treatment</i> 	9 months	6 months, suspended (x5 concurrent)
10	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> Sustained communication <i>Images on phone</i> 	<ul style="list-style-type: none"> Good character Mental disorder/ learning disability 	6 months	High level community order
11	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months	4 months	2 months	<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> Good character Mental disorder/ learning disability <i>Immediate admissions</i> <i>Socially isolation</i> 	3 months	8 weeks (for single offence) For all 5: High level community order
Magistrates											
12	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months				<ul style="list-style-type: none"> Remorse Mental disorder/ learning disability 	6 months	4 months, suspended
13	2	<ul style="list-style-type: none"> No level 1 factors 	B (x5)	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> No previous convictions Mental disorder/ learning disability 	6 months	4 months, suspended
14	2	<ul style="list-style-type: none"> No level 1 factors 	B	<ul style="list-style-type: none"> No cat A factors 	6 months			<ul style="list-style-type: none"> Sustained communication 	<ul style="list-style-type: none"> No previous convictions Mental disorder/ learning disability <i>Age-appropriate relationship</i> 	6 months	High level community order

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Psychological harm

The assessment of psychological harm experienced by the victim is for the sentencer. Whilst it 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.

Abuse of trust

- A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found.
- In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.
- Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, employer and employee, professional adviser and client, or carer (whether paid or unpaid) and dependant. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. These examples are not exhaustive and do not necessarily indicate that abuse of trust is present.
- Additionally an offence may be made more serious where an offender has abused their position to facilitate and/or conceal offending.
- Where an offender has been given an inappropriate level of responsibility, abuse of trust is unlikely to apply.

Age and/or lack of maturity

Age and/or lack of maturity can affect:

- the offender's responsibility for the offence and
- the effect of the sentence on the offender.

Either or both of these considerations may justify a reduction in the sentence. The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults (typically aged 18-25) are still developing neurologically and consequently may be less able to:

- evaluate the consequences of their actions
- limit impulsivity
- limit risk taking

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Immaturity can also result from atypical brain development. Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may affect development.

An immature offender may find it particularly difficult to cope with custody and therefore may be more susceptible to self-harm in custody.

An immature offender may find it particularly difficult to cope with the requirements of a community order without appropriate support.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

Many young people who offend either stop committing crime, or begin a process of stopping, in their late teens and early twenties. Therefore a young adult's previous convictions may not be indicative of a tendency for further offending.

Where the offender is a care leaver the court should enquire as to any effect a sentence may have on the offender's ability to make use of support from the local authority. (Young adult care leavers are entitled to time limited support. Leaving care services may change at the age of 21 and cease at the age of 25, unless the young adult is in education at that point). See also the Sentencing Children and Young People Guideline (paragraphs 1.16 and 1.17).

Where an offender has turned 18 between the commission of the offence and conviction the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed, but applying the purposes of sentencing adult offenders. See also the Sentencing Children and Young People Guideline (paragraphs 6.1 to 6.3).

When considering a custodial or community sentence for a young adult the National Probation Service should address these issues in a PSR.

Physical disability or serious medical condition requiring urgent, intensive or long-term treatment

- The court can take account of physical disability or a serious medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the offender, or as a matter of generally expressed mercy in the individual circumstances of the case.
- However, such a condition, even when it is difficult to treat in prison, will not automatically entitle the offender to a lesser sentence than would otherwise be appropriate.
- There will always be a need to balance issues personal to an offender against the gravity of the offending (including the harm done to victims), and the public interest in imposing appropriate punishment for serious offending.
- A terminal prognosis is not in itself a reason to reduce the sentence even further. The court must impose a sentence that properly meets the aims of sentencing even if it will carry the clear prospect that the offender will die in custody. The prospect of death in the near future will be a matter considered by the prison authorities and the Secretary of State under the early release on compassionate grounds procedure (ERCG).

- But, an offender's knowledge that he will likely face the prospect of death in prison, subject only to the ERCG provisions, is a factor that can be considered by the sentencing judge when determining the sentence that it would be just to impose

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Approach to sentencing historic sexual offences

When sentencing sexual offences under the Sexual Offences Act 1956, or other legislation pre-dating the 2003 Act, the court should apply the following principles:^[1]

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.
2. The sentence is limited to the maximum sentence available at the **date of the commission of the offence**. If the maximum sentence has been reduced, the lower maximum will be applicable.
3. The court should ~~have regard~~ **sentence by reference** to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003. Where the offence, if committed on the day on which the offender was convicted, would have constituted an offence contrary to section 5 or section 6 of the Sexual Offences Act 2003, sections 265 and 278 of the Sentencing Code (special custodial sentence for certain offenders of particular concern) apply.
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.
5. When assessing the culpability of the offender, the court should have regard to relevant culpability factors set out in any applicable guideline.
6. The court must assess carefully the harm done to the victim based on the facts available to it, having regard to relevant harm factors set out in any applicable guideline. Consideration of the circumstances which brought the offence to light will be of importance.
7. The court must consider the relevance of the passage of time carefully as it has the potential to aggravate or mitigate the seriousness of the offence. It will be an aggravating factor where the offender has continued to commit sexual offences against the victim or others or has continued to prevent the victim reporting the offence.
8. Where there is an absence of further offending over a long period of time, especially combined with evidence of good character, this may be treated by the court as a mitigating factor. However, as with

offences dealt with under the Sexual Offences Act 2003, previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less the weight which should normally be attributed to this factor. Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor.

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 personal mitigation **significantly reduce the offender's culpability.**
10. If the offender made admissions at the time of the offence that were not investigated this is likely to be regarded as personal mitigation. Even greater mitigation is available to the offender who reported himself to the police and/or made early admissions.
11. A reduction for an early guilty plea should be made in the usual manner.

[\[1\]](#) R v H and others [2011] EWCA Crim 2753