Sentencing Council

Sentencing Council meeting:	**22 October 2021**
Paper number:	**SC(21)OCT03 – Sexual Offences**
Lead Council member:	**Adrian Fulford**
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1 ISSUE

1.1 The first meeting considering responses to the consultation on revisions to the sexual offence guidelines.

2 RECOMMENDATIONS

2.1 That:

- Council continue with the proposed approach to cases where no activity takes place, following the reasoning in *Privett* and *Reed*;
- the guidance is a little more explicit about the reduction to apply (up to one year when the offender desisted only through outside intervention);
- the section 14 guideline stays as brief guidance linking to the underlying offence guidelines, but that drop down text boxes be added to those guidelines relating to section 14;
- wider suggested changes to culpability, harm and aggravating factors be left out of scope of this revising exercise;
- wording be added to the guidance on sexual harm prevention orders (SHPOs) on foreign travel restrictions and on the effect on existing orders;
- the wording on remote offending/overseas victims be refined, and added also to the guideline for section 47 (paying for the sexual services of a child).

3 CONSIDERATION

3.1 The consultation on revisions to the sexual offences guidelines ran between 13 May and 13 August this year, to which we received 34 responses. We also conducted road testing during this period with 30 Crown Court judges, six district judges and six magistrates.

3.2 The consultation sought views on various proposed amendments to the sexual offences guidelines. The primary reason for the amendments was to provide clarity on the

approach to take in child sexual offence cases when contact offending has not occurred, either because the victim is not real or because activity has been incited but not caused. The consultation also sought views on a new guideline for sexual communication with a child (section 15A of the Sexual Offences Act 2003), small amendments to the guidance on historical sexual offending, and on other cross-cutting revisions, including drop-down text on sexual harm prevention orders (SHPOs), abuse of trust, severe psychological harm, age and/or lack of maturity, and physical disability or serious medical condition requiring urgent, intensive or long-term treatment.

3.3 This paper covers responses received on i) the section 14 and causing/inciting amendments where no sexual activity has taken place, ii) the proposed text on sexual harm prevention orders; and iii) wording on remote offending and overseas victims. We will aim to consider the rest, including the new section 15A guideline, in November's meeting.

Cases where no sexual activity takes place or there is no real victim

3.4 Most respondents agreed with our proposed approach, in following the reasoning set out in *Privett* and *Reed*: to assess seriousness on the basis of what the offender intended, but provide a small discount for the fact that no victim existed, or the sexual activity incited did not take place. However, a few responses questioned the basic premise of the revisions. I have reproduced extracts of these responses at **Annex A**.

3.5 The objections can be summarised as being that our approach places too much emphasis on harm *intended* over harm *caused*; that it would result in a disproportionate response by analogy with attempted offences such as murder or robbery; that it over-penalises the mere thought of doing something; and that it does not provide clarity for sentencers.

3.6 These objections avoid the fact that section 14 is a complete offence when arrangements have been made, whether the victim is real or not. For that and other reasons, the comparisons with attempted murder and assault are interesting but not persuasive. We are dealing with offenders who intend to commit serious contact offences indiscriminately, contrasting with most failed murder attempts. In any case, a premeditated murder attempt with no harm carries a starting point of 20 years' custody which is not insignificant.

3.7 The idea of applying too much weight to one strand of section 63 of the Sentencing Code (harm caused, intended to cause, might foreseeably have caused) over another seems a false choice. Harm can be assessed by reference to any or all of these, and it does seem to be the case that previous case law barely considered the latter two strands.

3.8 The Sentencing Academy suggested that this is such a fundamental part of the facts surrounding the case that it should be moved from step two to step one. We had considered various options for this, but considered them too convoluted. In essence, our proposal asks sentencers to make an adjustment at the start of step two to provide for a lower starting point, and notes in some instances that the reduction will result in a starting point outside the range, so the practical difference in approach may be limited.

3.9 On the other hand, one magistrate respondent didn't believe there should be a reduction at all (as was the case in some of the cases joined with *Privett*):

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

3.10 We should acknowledge the risk that real victims of this sort of offending could see the harm and suffering they have experienced as devalued or minimised by the proposed approach, but that is precisely the reason for applying a discount. For the reasons set out above, and in light of the general support for it, I do not propose to change the basic approach we consulted on.

Question 1: do you agree to continue with the proposed approach to situations where no sexual activity takes place?

3.11 A finding from road testing was that sentencers applied differing reductions to reflect the lack of a real victim. In the scenario of a "13 year old" decoy the reduction varied between six months and three years, being the main cause of a wide range of resulting sentences, between two years' and six years' imprisonment.

3.12 The Sentencing Academy noted this point:

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

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

> *"We recommend that some additional text or examples be added to enhance clarity in relation to how a "downward adjustment" might be applied…*
>
> *While we accept that the extent of the adjustment must be specific to the facts of the case, as a principle we do not think the downward adjustment should be too significant, if at all, in*

certain cases where the harm was intended but did not take place because there was no real victim….There should be greater clarity as to how, and the instances in which a downward adjustment should be applied, as well as further guidance to determine how great that adjustment should be." – Justice Committee

3.14 The wording "*a small reduction within the category range will usually be appropriate*" should have led to reductions of a year or under in most decoy cases where the offender is apprehended at the scene. If this is unclear, we could be more explicit via the text marked in bold, as follows:

"The extent of this adjustment will be specific to the facts of the case. However, in cases where an offender is only prevented by the police or others from conducting the intended sexual activity at a late stage, or where a child victim does not exist and, but for this fact, the offender would have carried out the intended sexual activity, a reduction **of up to a year's imprisonment** will usually be appropriate. Where, for instance, an offender voluntarily desisted at an early stage a larger reduction is likely to be appropriate, potentially going outside the category range."

3.15 The facts surrounding earlier voluntary desistance could differ so greatly that I do not recommend providing a specific figure; the suggestion that sentences could potentially go outside the category range provides some guide.

Question 2: do you agree to amend the wording to be more explicit about the sort of reduction that should be applied?

3.16 Professor Alisdair Gillespie was concerned that sentencers could miss the guidance if we continued the approach of cross-referencing guidelines for the underlying offending:

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

3.17 Virtually all section 14 cases at present involve section 9 (sexual activity with a child) as the offence being facilitated or arranged. To eliminate any confusion, we could draw up one substantive section 14 guideline essentially replicating the section 9/10 guideline, incorporating the additional text for cases where no sexual activity takes place, and with a banner directing users to other guidelines in the rare event that the underlying offence is not

section 9. The wording in the harm table could be amended slightly to be clear that it refers to the activity which was arranged or facilitated.

3.18 Note, however, that if the provisions in the Police, Crime, Sentencing and Courts Bill become law we would need further section 14 guidelines for cases where the intended offending comes under sections 5 to 8 of the 2003 Act (i.e. where the apparent victim is under 13 years old). We could add further section 14 guidelines which replicate these guidelines in the same manner, and could be accessed from a section 14 “landing page”.

3.19 This links with a suggestion from the Justices' Legal Advisers and Court Officers Service that the usual details about ancillary orders be included in the section 14 guideline. A substantive section 14 guideline would include that as standard; alternatively if sentencers are guided to an underlying guideline then they will see that information there.

3.20 In road testing, most sentencers made their adjustment as the guidelines proposed, at the beginning of step 2. A few made the adjustment at mitigation or guilty plea stage and some said it was unclear at which stage they should make the adjustment.

3.21 On balance, I believe we risk creating further complication by having a standalone guideline. There is no evidence of widespread confusion about the operation of the guideline, and most road testing participants did say that the guidance was clear and easy to use.

3.22 At the moment, the guidelines for the underlying offences do repeat the section 14 guidance in a blue box: Council members thought that this looked repetitious given the very similar text added to those guidelines for cases of attempted incitement where no activity had taken place. If there remains a concern about the guidance getting lost, or there is uncertainty about when to make an adjustment, we could add a drop down box at the start of the relevant guideline (for example section 9) which repeats the approach to take in section 14 cases. I will aim to demonstrate this at the meeting.

Question 3: do you want to retain the current format of the section 14 guideline as a brief textual guideline linking to the guidelines for the underlying offences?

Question 4: if so, do you want to add some drop-down text in the guidelines for the underlying offences (currently sections 9 to 12, but potentially also 5 to 8 in future) repeating the section 14 guidance?

Question 5: are you content to make equivalent changes to apply to arranging or facilitating offences under sections 5 to 8 without further consultation when those provisions in the Police, Crime, Sentencing and Courts Bill become law?

3.23 Professor Gillespie also questioned whether the section 14 guideline should cover the situation where section 14 is charged as an attempt:

"In Reed the Court of Appeal also stated, 'no additional reduction should be made for the fact that the offending is an attempt'. It is respectfully submitted that the comments should also be included in the guideline as the CPS does, occasionally, continue to fail to adhere to its own charging standards and continue to charge attempted s.14. In such circumstances, it is important that there is no 'double downward adjustment' as the initial adjustment encapsulates the attempt point.…

The current phrasing leaves open the question whether there will be a downward adjustment where there is a real child. The proposed guideline says:

'No sexual activity need take place for a section 14 offence to be committed, including in instances where no child victim exists. In such cases the court should identify the category of harm on the basis of the sexual activity the offender intended, and then apply a downward adjustment…'

The use of the term 'in such cases' is unclear. Is it where no sexual activity takes place, where there is no real child, or both? In many instances where a real child is involved, the proper charge will be an attempt (most likely attempted s.9) but s.14 could still be applicable, not least because the steps taken to 'arrange' or 'facilitate' may not constitute 'more than merely preparatory steps' for the purposes of the Criminal Attempts Act 1981.

Arguably the guideline – including the downward adjustment – should apply irrespective of whether there is a real child or not because it is reflecting that no substantive (sexual) harm has taken place. However, it is respectfully recommended that the guideline should make clear that there should be no additional reduction to reflect the fact that it was an attempt."

3.24 We intend "in such cases" to apply to all situations where no activity takes place. We could put the words "including in instances where no child victim exists" in parentheses to put the matter beyond doubt.

3.25 However, I am concerned about including the language about attempts into the section 14 guideline. In relation to the first scenario (incorrect charging), we should be reinforcing the idea that section 14 is charged substantively and is a substantive offence even where no child exists. In relation to the second, where someone has not gone beyond "merely preparatory steps" in the process of *making arrangements* it may well be that a significant reduction is the right approach and an "attempt discount" could be appropriate.

Question 6: do you agree not to amend the section 14 wording to include text about attempts (but consider putting "*including in instances where no child victim exists"* in brackets)?

3.26 We proposed making amendments to all "causing or inciting" offences in the Sexual Offences Act 2003.[1] HM Council of District Judges (Magistrates Courts) suggested that this would imply some unlikely scenarios:

"First, the section 17 offence provides for a person abusing a position of trust causing or inciting a child to engage in sexual activity. This offence requires proof that the defendant was in a position of trust in relation to the complainant. It is difficult to see any case where the words from the proposed amendment "or in attempts where a child victim does not exist" would ever apply to such an offence. It is far-fetched to imagine any sting operation creating a fake child to whom the defendant is actually in a position of trust.

Secondly, this observation applies equally, if not with greater force, to the section 26 offence of inciting a child family member to engage in sexual activity. For that offence, the prosecution must prove that the relationship between defendant and complainant is a family relationship within section 27 of the 2003 Act. We find it difficult to envisage a situation where that could be proved "in attempts where a child victim does not exist". We do not expect this offence to be charged where there is a sting operation which involves only a fictitious child.

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

Finally, we see no way in which the fictitious child (or fictitious adult victim) scenario might apply to the section 39 offence of a care worker causing or inciting sexual activity. How could the prosecution prove that the complainant has a mental disorder, that the defendant knows

[1] These are: section 8 (causing or inciting a child under 13 to engage in sexual activity); section 10 (causing or inciting a child to engage in sexual activity), section 17 (abuse of position of trust: causing or inciting a child to engage in sexual activity); section 26 (inciting a child family member to engage in sexual activity); section 31 (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity); section 39 (care workers: causing or inciting sexual activity); sections 48 (causing or inciting sexual exploitation of a child); and section 52 (causing or inciting sexual exploitation for gain).

or could reasonably be expected to know that the complainant has a mental disorder and that the defendant is involved in the complainant's care?"

3.27 Offering a contrary view, one respondent thought that where this scenario applied to an "abuse of trust", relative or care home scenario the harm was inherently greater i) precisely because of the abuse of trust and ii) because it was more likely in those scenarios that there would be a real victim and contact offending would only be prevented by a third party. I would argue (i) is covered by sentencing levels in those guidelines and (ii) can be assessed by the judge on the facts before them.

3.28 We did consider before consultation that the wording could be added to all those guidelines for completeness' sake, even if they are never needed and imply some absurdities. If we do keep them, however, the North London Bench pointed out that for the offences involving over 16s we will need to amend the wording of the guidance slightly to refer to "a victim" rather than "a child victim".

Question 7: do you still want the guidance to apply to all the causing or inciting offences (with a reference to "victim" rather than "child victim" where appropriate)?

3.29 Although we were not seeking views on the various factors in the section 9/10 guideline, Professor Gillespie proposed two additions to higher culpability:

- taking steps to hide one's identity before contact offending takes place (for example asking the child to delete messages, or getting the child to save their number under a false name);
- activity with a child family member (noting that the offences relating to child family members in the 2003 Act are reserved in practice for child victims aged 16 and 17) – this, it is argued, would help the definition of "abuse of trust".

3.30 As a matter of principle I am not minded to open up the guidelines to wider amendment unless we have firm evidence that they are not working in practice. The points above are covered to some extent by the existing factors of grooming behaviour and abuse of trust, even if those could be subject to some interpretation. I believe, rather than making piecemeal changes which other stakeholders have not had the chance to consider, they should wait until a fuller refresh of the guidelines in due course.

Question 8: do you agree not to make these additions to the culpability factors?

Sexual Harm Prevention Orders

3.31 All respondents agreed to include text on Sexual Harm Prevention Orders (SHPOs) in the sexual offence guidelines. Professor Gillespie proposed including the "general

principle that the duration of the SHPO should not exceed the duration of the notification period", citing the cases of in *R v McLellan [2017] EWCA Crim 1464* and *R v Stephenson [2019] EWCA Crim 2418*. However, my reading of *McLellan* is that there is precisely no general principle on this point:

> "*First, there is no requirement of principle that the duration of a SHPO should not exceed the duration of the applicable notification requirements… it all depends on the circumstances*." [paragraph 25][2]

I believe we would be creating a broad-brush principle in what is intended to be short, factual guidance for the court and would not recommend making this addition. However, I make a brief suggestion in square brackets below if Council would like to do so.

3.32 The Justices' Legal Advisers and Court Officers Services made two other suggestions for additions to the text:

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

3.33 The Police, Crime, Sentencing and Courts Bill is changing the law on SHPOs to permit positive requirements. The relevant provisions and proposed amendments on SHPOs are set out at **Annex B**. This means we will need to amend our text anyway and the above suggestion on requirements of foreign travel prohibitions becomes redundant. On the assumption that the changes to the law are in force when the revised guidelines come into force, I propose that we amend the proposed text on SHPOs as follows (additional text in bold):

Sexual harm prevention orders (SHPOs) Sentencing Code s345 To make an SHPO, the court must be satisfied that the offender presents a risk of sexual harm to the public (or particular members of the public) and that an order is necessary to protect against this risk. The only prohibitions **or requirements** which can be imposed by an

[2] Although the same paragraph of that judgment goes on to say: "All concerned should be alert to the fact…that the effect of a SHPO of longer duration than the statutory notification requirements has the effect of extending the operation of those notification requirements… Notification requirements have real, practical, consequences for those subject to them; inadvertent extension is to be avoided." The conclusion is that an SHPO should not be used as a means of extending notification requirements.

SHPO are those which are necessary for the purpose of protecting the public from sexual harm from the offender. ~~The order may include only negative prohibitions; there is no power to impose positive obligations~~.

The order may have effect for a fixed period (not less than five years) or until further order, **with the exception of a foreign travel prohibition which must be a fixed period of no more than five years (renewable). [In practice, the duration of an SHPO will usually be the same as the notification period.] Different time periods may be specified for individual restrictions and requirements.**

Where an SHPO is made in respect of an offender who is already subject to an SHPO, the earlier SHPO ceases to have effect. If the offender is already subject to a Sexual Offences Prevention Order or Foreign Travel Order made in Scotland or Northern Ireland, that order ceases to have effect unless the court orders otherwise.

Chapter 2 of Part 11 of the Sentencing Code [LINK] sets out further matters relating to making SHPOs.

Question 9: do you agree to make these amendment to the proposed text on SHPOs, to reflect the new legislation and to provide some detail on duration and effect on existing orders?

3.34 Professor Gillespie pointed to various cases where the Crown Court has erroneously varied the terms of an SHPO where it has no powers to do so, resulting in appeals.[3] These cases are all in the context of breaches of SHPOs which are not included in Schedules 3 or 5 to the 2003 Act, so there is no power to make new SHPOs upon conviction or vary the terms without a separate application being made by someone permitted to do so. We are already proposing changes which should resolve any confusion here via the Miscellaneous Amendments consultation.

Remote offending/victims overseas

3.35 All respondents welcomed our proposed inclusion of the following text: *"Sentencers should draw no distinction between activity caused or incited in person and activity caused or incited remotely, nor between the harm caused to a victim in this jurisdiction and that caused to a victim anywhere else in the world."* Indeed, some respondents thought we should go further and make this an aggravating factor:

"If the activity relates to a place like the Philippines with GNP much lower than UK, (national health care generally vaccines and birth control only; food difficult to acquire for the

[3] For example *R v McLoughlin [2021] EWCA Crim 165* and *R v Rowlett [2020] EWCA Crim 1748*, to which I would add *R v Ashford and Others [2020] EWCA Crim 673*.

children), then something akin to 'breach of trust' should apply if the offender is resident in the UK." – Member of the public

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

3.36 I am not convinced that abuse of children overseas should be treated automatically more seriously than abuse which takes place within one jurisdiction, although the facts in specific cases might merit that (see below). This is another issue, like the extensive points raised by the charity International Justice Mission, that I propose should wait until a more comprehensive revision of the guidelines.

3.37 Two respondents thought the wording might be refined:

"In this context, we believe it is not just the harm caused. We would therefore propose a slight change to the wording, as follows (changed text underlined):

"Sentencers should draw no distinction between activity caused or incited in person and activity caused or incited remotely, <u>nor whether a victim is located in this jurisdiction or is located anywhere else in the world</u>." – West London Magistrates Bench

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

'Sentencers should draw no distinction between activity caused or incited in person and activity caused or incited remotely, nor between the harm caused to a victim in this jurisdiction and that caused to a victim anywhere else in the world (save where the facts of a specific case mean that either distinction in some way affects harm or culpability).'" – Giles Fleming

3.38 I agree that the guidelines should not necessarily preclude a finding that remote offending or the location of the victim in some way affects the seriousness of a case and it could be argued that the current proposed wording, read literally, could have that effect. I do think we should keep an emphasis on the harm caused to victims and I think the most effective way of clarifying the wording would be:

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

Question 10: do you agree to amend the wording of the text on remote offending/overseas victims?

3.39 We had proposed including this text in the guidelines for section 8 (causing or inciting a child under 13 to engage in sexual activity); section 10 (causing or inciting a child to engage in sexual activity); section 48 (causing or inciting sexual exploitation of a child); and section 52 (causing or inciting sexual exploitation for gain). Professor Gillespie suggested adding it also to the guidelines for section 15 (meeting a child following sexual grooming), section 15A (sexual communication with a child) and section 47 (paying for sexual services of a child). The CPS also thought it could apply to other offences, including section 17 (abuse of a position of trust: causing or inciting a child to engage in sexual activity).

3.40 The intention of this added wording was to address concerns about international child sexual exploitation. It may be that it is unlikely to bite on an "abuse of trust" offence, although there are increasing opportunities for teachers and others to offend remotely. Because of the 2003 Act's territorial scope, in theory we could extend the principle about harm to victims in other jurisdictions to all contact offences (for example, if a child was raped by a UK national in the Philippines we could make the point that harm to the overseas victim is to be approached in the same way as that done to a victim in England and Wales).

3.41 There is a risk of scope creep here. I am persuaded to add it to section 47, but suggest we would be expanding the principle too far by adding it to other guidelines.

Question 11: do you agree to add the wording about remote offending/location to victim to the section 47 guideline? Are there any other guidelines to which it should be added?

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 riskbeing 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?

Aside from one response cautioning vaguely against "positive discrimination", the only substantive response received was as follows:

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

4.2 It is difficult to assess whether these claims are true in relation to the offences the guidelines for which we are revising as the volumes for female offenders and for Black and Asian offenders are so low for each individual offence. To provide an indication of any disparities between sex and ethnicity, we can group offences under section 8, 10 and 14 together along with five years of data (2016-2020). However, care should be taken when interpreting these statistics as it is possible that this may mask differences between offences and/or years.

4.3 Between 2016-2020 and across these offences, the proportion of adult female offenders receiving immediate custody was higher than for males (74 per cent vs 65 per cent) and the ACSL for females was also higher at 5 years and 3 months, compared to 3 years and 7 months for males.

4.4 The custody rate for Black offenders was 77 per cent, compared to White (66 per cent), Asian (68 per cent), and Mixed ethnicity offenders (57 per cent), all offenders of Other ethnicity were sentenced to immediate custody. However, the ACSL, was similar across the highest volume ethnicities, between 3 years and 5 months and 3 years and 7 months.

4.5 Overall, offenders sentenced for this offence are predominantly White and male and I would be very cautious about suggesting that the harm caused by women is inherently greater. The comments on ethnicity above seem more general. I do not propose making any changes on the basis of this response.

5 IMPACT AND RISKS

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

Annex A

Extracts of responses on the approach where no activity takes place/no child exists

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

… as a basic principle of ethics and fairness, most people would I suggest agree that harm caused is more important than harm intended (especially if the question is taken away from the particularly emotionally evocative context of sexual abuse). Ask for example which of the following should receive a higher sentence: a defendant who intends a battery, but by misfortune causes a death and is convicted of manslaughter; or a defendant who intended a death but, by good fortune, only caused battery-level injuries? The former is far more serious, because of the real consequences of the defendant's actions.

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

"It is … in respect of harm, not coherent to use the concept of 'intention' to replace 'incitement, arrangement or encouragement'. Making arrangements to meet a child for sexual gratification is undoubtedly more than merely preparatory to making that arrangement, but the intention in the attempted offence (i.e. to do the impossible because the 'child' is in fact a police officer), is the intention to make the arrangements, not to commit the contact offence. Is it suggested that merely arranging by telephone to meet somebody

whom D mistakenly believes is rich whereas they are in fact a pauper with a view to robbing them, amounts to attempted robbery? It is not, in short, appropriate to use the terminology of s.63 (b)(ii) to such inchoate circumstances when it comes to assessing harm.

I would also point out, in any event, that there is no order of priority as between s.63 (b) (i), (ii) and (iii) [of the Sentencing Code]*. Thus, whilst no doubt the CACD in Baker and Cook may arguably not have given sufficient weight to (ii) (harm 'intended'- although see above), the effect of Fulford LJ's judgment- that only a modest reduction should be given in some cases to reflect the impossibility of harm- is to give (ii) a completely unwarranted precedence over (i) (the ACTUAL harm caused) The two should be, at the very least, equally weighted."* HHJ Colin Burn

"The proposed amendments do not clearly or sufficiently set out the reduction or 'downward adjustment' in sentence where there is no actual child so no harm to anyone could possibly result from the defendant's actions. These are pure "thought crimes".

In the case of Vasile and others [2021] EWCA Crim 572 Fulford LJ (at para. 20) refers to s63 of the Sentencing Act 2020 and says its terms are critical. He then however chooses one of the tests ('any harm which the offence was intended to cause') and disregards the other two (any harm which the offence caused' and 'any harm which the offence might foreseeably have caused'). In the case of a fictional child the answer to both those tests is "none". In those circumstances the reduction or downward adjustment where there is no actual child should be considerable, I would suggest two thirds from the starting point that would apply where actual activity has taken place.

The suggestion that it would be acceptable for a more severe sentence to be imposed where there was a fictional child as opposed to where sexual activity has taken place with an actual child strikes me as perverse." – HHJ Ian Graham

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

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

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

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

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

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Annex B

Relevant Sentencing Code provisions on sexual harm prevention orders (with prospective amendments to be made by the Police, Crime, Sentencing and Courts Bill in red)

s343 Sexual harm prevention order

~~(1) In this Code "sexual harm prevention order" means an order under this Chapter made in respect of an offender which prohibits the offender from doing anything described in the order.~~

(1) In this Code a "sexual harm prevention order" means an order made under this Chapter in respect of an offender.

(1A) A sexual harm prevention order may—

(a) prohibit the offender from doing anything described in the order;
(b) require the offender to do anything described in the order.

(2) The only prohibitions or requirements that may be included in a sexual harm prevention order are those necessary for the purpose of—

(a) protecting the public or any particular members of the public from sexual harm from the offender, or
(b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the offender outside the United Kingdom.

(3) The prohibitions or requirements which are imposed on the offender by a sexual harm prevention order must, so far as practicable, be such as to avoid—

(a) any conflict with the offender's religious beliefs,
(b) any interference with the times, if any, at which the offender normally works or attends any educational establishment, and
(c) any conflict with any other court order or injunction to which the offender may be subject (but see section 349)."

s344 Meaning of "sexual harm"

(1) In this Chapter, "sexual harm" from a person means physical or psychological harm caused—

(a) by the person committing one or more offences listed in Schedule 3 to the Sexual Offences Act 2003 (sexual offences for the purposes of Part 2 of that Act), or

(b) (in the context of harm outside the United Kingdom) by the person doing, outside the United Kingdom, anything which would constitute an offence listed in that Schedule if done in any part of the United Kingdom.

(2) Where an offence listed in that Schedule is listed subject to a condition that relates—

(a) to the way in which the offender is dealt with in respect of an offence so listed, or
(b) to the age of any person,

that condition is to be disregarded in determining for the purposes of subsection (1) whether the offence is listed in that Schedule.

s345 Sexual harm prevention order: availability on conviction

(1) Where a person is convicted of an offence listed in Schedule 3 or 5 to the Sexual Offences Act 2003 (sexual offences, and other offences, for the purposes of Part 2 of that Act), the court dealing with the offender in respect of the offence may make a sexual harm prevention order.

(2) Where an offence listed in Schedule 3 to that Act is listed subject to a condition that relates—

(a) to the way in which the offender is dealt with in respect of an offence so listed, or
(b) to the age of any person,

that condition is to be disregarded in determining for the purposes of subsection (1) whether the offence is listed in that Schedule.

s346 Exercise of power to make sexual harm prevention order

Where a sexual harm prevention order is available to a court, the court may make such an order only if satisfied that it is necessary to do so for the purpose of—

(a) protecting the public or any particular members of the public from sexual harm from the offender, or
(b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the offender outside the United Kingdom.

s347 Sexual harm prevention orders: matters to be specified

(1) A sexual harm prevention order must specify—

(a) the prohibitions and requirements included in the order, and

(b) for each prohibition or requirement, the period for which it is to have effect (the "~~prohibition period~~ specified period").

See section 348 for further matters to be included in the case of a prohibition on travelling to any country outside the United Kingdom.

(2) The ~~prohibition period~~ specified period must be—

(a) a fixed period of not less than 5 years, or
(b) an indefinite period (so that the prohibition or requirement has effect until further order).

This is subject to section 348(1) (prohibition on foreign travel).

(3) A sexual harm prevention order—

(a) may specify fixed periods for some of its prohibitions or requirements and an indefinite period for others;
(b) may specify different periods for different prohibitions or requirements.

s347A Sexual harm prevention orders: requirements included in order etc.

(1) A sexual harm prevention order that imposes a requirement to do something on an offender must specify a person who is to be responsible for supervising compliance with the requirement. The person may be an individual or an organisation.

(2) Before including such a requirement in a sexual harm prevention order, the court must receive evidence about its suitability and enforceability from—

(a) the individual to be specified under subsection (1), if an individual is to be specified;
(b) an individual representing the organisation to be specified under subsection (1), if an organisation is to be specified.

(3) Subsections (1) and (2) do not apply in relation to electronic monitoring requirements (see instead section 348A(5) and (6)).

(4) It is the duty of a person specified under subsection (1)—

(a) to make any necessary arrangements in connection with the requirements for which the person has responsibility ("the relevant requirements");
(b) to promote the offender's compliance with the relevant requirements;
(c) if the person considers that—

(i) the offender has complied with all the relevant requirements, or
(ii) the offender has failed to comply with a relevant requirement,

to inform the appropriate chief officer of police.

(5) In subsection (4)(c) the "appropriate chief officer of police means—

(a) the chief officer of police for the police area in which it appears to the person specified under subsection (1) that the offender lives, or
(b) if it appears to that person that the offender lives in more than one police area, whichever of the chief officers of police of those areas the person thinks it is most appropriate to inform.

(6) An offender subject to a requirement imposed by a sexual harm prevention order must—

(a) keep in touch with the person specified under subsection (1) in relation to that requirement, in accordance with any instructions given by that person from time to time, and
(b) notify that person of any change of the offender's home address.

These obligations have effect as requirements of the order.

(7) In this section "home address", in relation to an offender, means—

(a) the address of the offender's sole or main residence in the United Kingdom, or
(b) where the offender has no such residence, the address or location of a place in the United Kingdom where the offender can regularly be found and, if there is more than one such place, such one of those places as the offender may select.

s348 Sexual harm prevention orders: prohibitions on foreign travel

(1) A prohibition on foreign travel contained in a sexual harm prevention order must be for a fixed period of not more than 5 years.

(2) Subsection (1) does not prevent a prohibition on foreign travel from being extended for a further period (of no more than 5 years each time) under section 350.

(3) A "prohibition on foreign travel" means—

(a) a prohibition on travelling to any country outside the United Kingdom named or described in the order,
(b) a prohibition on travelling to any country outside the United Kingdom other than a country named or described in the order, or
(c) a prohibition on travelling to any country outside the United Kingdom.

(4) A sexual harm prevention order that contains a prohibition within subsection (3)(c)—

(a) must require the offender to surrender all of the offender's passports at a police station, and
(b) must specify—

(i) the police station at which the passports are to be surrendered, and
(ii) the period within which they must be surrendered (if not surrendered on or before the date when the prohibition takes effect).

(5) Any passports surrendered must be returned as soon as reasonably practicable after the offender ceases to be subject to a sexual harm prevention order containing a prohibition within subsection (3)(c) (unless the offender is subject to an equivalent prohibition under another order).

(6) Subsection (5) does not apply in relation to—

(a) a passport issued by or on behalf of the authorities of a country outside the United Kingdom if the passport has been returned to those authorities;
(b) a passport issued by or on behalf of an international organisation if the passport has been returned to that organisation.

(7) In this section “passport” means—

(a) a United Kingdom passport within the meaning of the Immigration Act 1971;
(b) a passport issued by or on behalf of the authorities of a country outside the United Kingdom, or by or on behalf of an international organisation;
(c) a document that can be used (in some or all circumstances) instead of a passport.

s349 Making of sexual harm prevention order: effect on other orders

(1) Where a court makes a sexual harm prevention order in relation to an offender who is already subject to—

(a) a sexual harm prevention order, or
(b) an order under section 103A of the Sexual Offences Act 2003 (sexual harm prevention orders under that Act),

the earlier order ceases to have effect.

(2) Where a court makes a sexual harm prevention order in relation to an offender who is already subject to—

(a) a sexual offences prevention order under section 104 of the Sexual Offences Act 2003, or
(b) a foreign travel order under section 114 of that Act,

the earlier order ceases to have effect (whichever part of the United Kingdom it was made in) unless the court orders otherwise.

s350 Sexual harm prevention orders: variations, renewals and discharges

(1) Where a sexual harm prevention order has been made in respect of an offender, a person within subsection (2) may apply to the appropriate court for an order varying, renewing or discharging the sexual harm prevention order.

(2) The persons are—

(a) the offender;
(b) the chief officer of police for the area in which the offender resides;

(c) a chief officer of police who believes that the offender is in, or is intending to come to, that officer's police area.

(3) An application under subsection (1) may be made—

(a) where the appropriate court is the Crown Court, in accordance with rules of court;
(b) in any other case, by complaint.

(4) Subsection (5) applies where an application under subsection (1) is made.

(5) After hearing—

(a) the person making the application, and
(b) if they wish to be heard, the other persons mentioned in subsection (2),

the court may make any order, varying, renewing or discharging the sexual harm prevention order, that it considers appropriate.

This is subject to subsections (6) and (7).

(6) An order may be renewed, or varied so as to impose additional prohibitions or requirements on the offender, only if it is necessary to do so for the purpose of—

(a) protecting the public or any particular members of the public from sexual harm from the offender, or
(b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the offender outside the United Kingdom.

Any renewed or varied order may contain only such prohibitions and requirements as are necessary for this purpose.

(6A) Any additional prohibitions or requirements that are imposed on the offender must, so far as practicable, be such as to avoid—

(a) any conflict with the offender's religious beliefs,
(b) any interference with the times, if any, at which the offender normally works or attends any educational establishment, and
(c) any conflict with any other court order or injunction to which the offender may be subject.

(7) The court must not discharge an order before the end of the period of 5 years beginning with the day on which the order was made, without the consent of the offender and—

(a) where the application is made by a chief officer of police, that chief officer, or
(b) in any other case, the chief officer of police for the area in which the offender resides.

(8) Subsection (7) does not apply to an order containing a prohibition on foreign travel and no other prohibitions or requirements.

(9) In this section “the appropriate court” means—

(a) where the Crown Court or the Court of Appeal made the sexual harm prevention order, the Crown Court;
(b) where a magistrates’ court made the order and the offender is aged 18 or over—

(i) the court which made the order, if it is an adult magistrates’ court,
(ii) a magistrates’ court acting in the local justice area in which the offender resides, or
(iii) if the application is made by a chief officer of police, any magistrates’ court acting for a local justice area that includes any part of the chief officer’s police area;

(c) where a youth court made the order and the offender is aged under 18—

(i) that court,
(ii) a youth court acting in the local justice area in which the offender resides, or
(iii) if the application is made by a chief officer of police, any youth court acting for a local justice area that includes any part of the chief officer’s police area.

In this subsection “adult magistrates’ court” means a magistrates’ court that is not a youth court.

(10) For circumstances in which a sexual harm prevention order ceases to have effect when a court in the United Kingdom makes another order, see the following provisions of the Sexual Offences Act 2003—

(a) section 103C(6) (sexual harm prevention order under that Act);
(b) section 136ZB(2) (certain orders made by a court in Northern Ireland or Scotland).

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