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22 April 2004

Dear Colleague

CONSULTATION PAPER ON THE SEXUAL OFFENCES ACT 2003 - THE EXPLOITATION OFFENCES

As I announced in February, the Sentencing Advisory Panel intends to propose comprehensive sentencing guidelines for all of the offences in Part 1 of the Sexual Offences Act 2003, which is expected to come into force in May 2004.

Following on from the first consultation paper (Paper 1), which was published on 12 February and which covered the majority of the offences in the Part 1 of the Act, this paper now gives detailed consideration to specific issues relating to the sexual exploitation offences. The paper is supported by three annexes. In particular, Annex B brings together the offences covered, maximum penalties, proposed starting points or sentencing principles and other key factors.

Although this paper is shorter than Paper 1 and covers a far smaller number of offences, it nevertheless covers some complex sentencing issues, on which we are anxious to receive your views. The extent to which exploiting someone for gain increases the seriousness of offending behaviour and the different approaches that might be adopted depending on levels of coercion and corruption and whether commercial activities involve children, young people aged 16 and 17 or adults, are among the key issues raised. As in Paper 1, the Panel has sought to structure its proposed sentencing guidelines in a way that links custodial and non-custodial sentences to the seriousness of the offending behaviour.

In accordance with the provisions of 171(2) of the Criminal Justice Act 2003, the Panel will provide its advice to the Sentencing Guidelines Council for consideration. Before submitting its proposals to the Council, the Panel is required to obtain and consider the views of interested organisations and individuals. The consultation period for this paper is 3 months.

Please send your responses to the Secretary to the Panel, Mrs Lesley Dix, either by post to Room G11, Allington Towers, 19 Allington Street, London SW1E 5EB, by fax to 020

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7035 5159, or by e-mail to info@sentencing-guidelines.gsi.gov.uk. **Responses should be received by Friday 23 July 2004.**

The Panel does not routinely publish responses to its consultation papers, but respondents' names will be published in the Panel's advice to the Council. **In addition, all responses will be treated as public documents and will be made available to third parties on request.** Anonymous responses will be accepted.

Additional copies of the consultation paper can be obtained from Gareth Sweny at the above address, or from the Panel's website at www.sentencing-guidelines.gov.uk.

Yours sincerely

Professor Martin Wasik

Chairman of the Sentencing Advisory Panel.

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SENTENCING GUIDELINES ON SEXUAL OFFENCES:

CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES

INTRODUCTION

1. Part 1 of the Sexual Offences Act 2003 (SOA), which is scheduled to come into force on 1 May 2004, implements, with some relatively minor changes, the recommendations stemming from the Home Office review of sex offences which were published in the report *Setting the Boundaries*.¹ The SOA creates a number of new offences, as well as redefining some existing offences and, in some instances, changing the maximum penalties. The Panel believes it would be helpful for the Sentencing Guidelines Council to issue sentencing guidelines on the whole range of sexual offences, for use by sentencers once the new legislation is in force.

2. The Panel has already published (on 12 February 2004) one consultation paper on sexual offences, which is referred to throughout this paper as Paper 1. This second paper considers the specific features of the category of offences relating to trafficking, prostitution and commercial sexual exploitation, which were not included in Paper 1. Much of what appears in *Paper 1, Section A : General Considerations* is equally relevant to the offences covered here and should be read again in conjunction with this paper. Section A of Paper 1 makes specific reference to the existing special provisions for dangerous and persistent offenders and the new 'imprisonment for public protection' powers in the Criminal Justice Act 2003², which may be particularly relevant to some of the offending behaviour identified in this Paper. The information has not been reproduced here, in the interests of keeping this paper as brief as possible.

3. The core element of the offences considered in this paper is the particular harm caused by the sexual exploitation of victims, whether or not for gain. Our proposals are based on the underlying principle that what needs to be addressed is the intentional exploitation of a vulnerable individual and not just the commission of the sexual act itself. Indeed, in some cases, for example the prostitution offences, the sexual acts themselves may not be unlawful; it is the act of causing, inciting or controlling the prostitution of another person that the offences are designed to cover.

4. As in Paper 1, we consider first what general principles might be applied in assessing the seriousness of the individual offences and the relative seriousness of different offences. We then look in more detail at the specific features of each offence (or group of offences) under the SOA. Annex A lists the offences covered by this

¹ Home Office, July 2000. The Government announced its intention to legislate on the basis of the Review in the White Paper *Protecting the Public*; HMSO, November 2002 (Cm 5668)

² Criminal Justice Act 2003, sections 225 and 226

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consultation paper with details of the maximum penalties and the mode of trial for each offence. The table in Annex B proposes sentencing starting points for each offence, with outline justifications for each proposal.

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A : GENERAL CONSIDERATIONS

The nature of sexual offences and the harm they cause

5. Paper 1 discussed the various types of generic harm caused by sexual offences. All sexual offences involve, to a greater or lesser degree, the exploitation or abuse of a victim or victims. The offences that remain to be considered in this paper all involve the intentional exploitation of victims and, in some cases, the additional element that the offences are committed 'for gain'. The Act defines 'gain' as
(a) *any financial advantage, including the discharge of an obligation to pay for the provision of goods or services (including sexual services) gratuitously or at a*

discount; or

(b) the goodwill of any person which is, or appears likely, in time, to bring financial advantage.

6. The sexual exploitation offences cover a range of offending behaviour, which is broken down into four groups in the SOA -

- (i) Indecent photographs of children;
- (ii) Abuse of children through prostitution and pornography;
- (iii) Exploitation of prostitution; and
- (iv) Trafficking.

Groups (i) and (ii), as their names imply, specifically relate to the exploitation and abuse of children. For the purposes of these offences, 'child' means anyone under the age of 18. The 'Exploitation of prostitution' offences relate to adult victims and the 'Trafficking' offences are designed to protect victims of all ages.

7. Only the offences in group (iii) specifically require the prosecution to prove that the activity was carried out 'for gain'. However, the common thread in the four groups of offences is the sexual exploitation of victims and, whether or not it is implicit in the offence that the prosecution is seeking to prove, in most cases someone connected with the activity will secure an advantage from the exploitation. For example, the offence of 'Paying for the sexual services of a child' is an offence that does not require the prosecution to prove that the activity was carried out for gain, although the simple fact that payment has been promised or has actually changed hands means that someone will be gaining financially from the enterprise. (This will normally be the person controlling the activities of the child prostitute and this person can, of course, be prosecuted separately.) In addition, the term 'prostitution', which is used in most of the offences in these groups, is defined as providing sexual services for payment or promise of payment and 'payment' is defined as being 'any financial advantage'.

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8. Where it is not necessary for the prosecution to prove that the defendant acted 'for gain', it is the defendant's intentional involvement in the activity that justifies prosecution. Persons involved at any level in, for example, the prostitution of a child or in a trafficking chain, will not be able to avoid prosecution on the grounds that they did not stand to benefit by their involvement. The Panel's provisional view is that for these offences there should be a starting point for sentencing that is based solely on the criminality of taking part in sexual exploitation without taking into account any benefits, financial or otherwise, that the defendant may receive. The level of personal involvement of the offender, the offender's own financial gain and the size of any commercial enterprise are all aggravating features that should be considered separately by the Court when determining the appropriate sentence for individual offenders. This is consistent with the Panel's advice on Offences Involving Child Pornography [2002] which was adopted in a slightly amended form by the Court of Appeal in *R v Oliver, Hartrey and Baldwin*. The Panel's advice on this topic is discussed in more detail in paragraphs 18 to 26 below.

9. In relation to the 'Exploitation of prostitution' offences, the prosecution is required to prove that the defendant acted 'for gain' and the fact that the offender will have benefited from the crime should, consequently, be reflected in the starting point for sentencing. As the essence of the offences is activity for gain, this cannot be an additional aggravating feature. In light of the fact that this group of offences relates to those who control the activities of persons who are over the age of consent, the maximum penalties are actually lower than for those offences where the prosecution does not have to prove

that the defendant acted 'for gain' and this could be taken as an indication that starting points should also be lower. However, the Panel's provisional view is that starting points should be comparatively high in view of the commercial exploitation that has taken place. 10. In Paper 1, the Panel took the view that the proposed starting point of 3 years for adults who commit an offence of 'Arranging or facilitating the commission of a child sex offence' should be doubled to 6 years where the offence was commercially motivated. Persons involved in the exploitation of adult prostitutes are not enabling the commission of a sexual offence and the less serious nature of their offending behaviour is reflected in the lower maximum penalty. Nevertheless, following the line of thinking that commercial exploitation of another person's vulnerability is socially unacceptable, the Panel is minded to suggest that the starting point for the 'Exploitation of prostitution' offences should still be significant, regardless of the lower maximum penalty attached to the offences.

Q1. The Panel's view is that, in relation to exploitation offences that do not necessarily involve a 'for gain requirement', evidence that the offence was motivated by, or resulted in, an element of gain should be treated as an aggravating feature for sentencing. Do you agree?

³ [2003] 1 Cr App R 28

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Q2. The Panel considers that where the 'for gain requirement' is an inherent feature of an offence, this should already be reflected in the sentencing starting point, but that evidence of significant financial or other advantage to the offender should be an aggravating feature for sentencing. Do you agree?

The age of the victim

11. In line with the principles established in the Panel's advice on rape [2000], as adopted in *Millberry and others*⁴, and the proposals in Paper 1, the Panel suggests that the starting points for sentencing should be higher where the victim is under 16. It also questions whether starting points should automatically be higher where the victim is under 13. On this issue, the Panel's general intention is to adjust proposals in relation to sentencing levels for the offences in this paper in line with the conclusions reached for Paper 1 (but please see Q7 at paragraph 30).

The offender's culpability in sexual offences

12. As established in Paper 1, the harm caused by sexual offences is, in general, intentional on the part of the offender. In broad terms, an intention to cause harm is at the highest level of criminal culpability and the worse the harm intended, the higher the offender's culpability. Planning an offence makes the offender more highly culpable than impulsive offending.

13. The common thread of the commercial exploitation offences is the planned abuse of vulnerable victims, with the main purpose of the offender being the securing of some form of personal gain, whether this is financial gain or reward, obtaining sexual services or experiencing personal sexual gratification (as in the offence of 'Paying for sexual services of a child'). As the combination of culpability with harm determines the seriousness of an offence, it follows that the offences covered by this paper are at the higher end of the scale and that significant sentencing provisions are needed. The Panel considers that evidence of the offender's involvement in, or management of, a wellplanned and large scale operation should be an aggravating feature for sentencing purposes and should always result in a significant increase to the sentence passed.

The risk of re-offending

14. The way in which the risk of re-offending in relation to commercial exploitation offences should be addressed will depend on the nature of, and motivation for, the offences committed. These offences are of a level of seriousness that suggests a custodial sentence will normally be appropriate and the discussion of the use of pre-sentence reports and extended sentences in Paper 1 is relevant here. In terms of preventing reoffending, a person found guilty of, for example, 'Paying for sexual services of a child', or, in some cases, 'Causing or inciting child prostitution or pornography', may very well

⁴[2003] 1 Cr App R (S) 396

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benefit from taking part in a sex offender treatment programme, which will help the offender to recognise and control sexually deviant tendencies. The need to ensure that offenders are assessed for their suitability to take part in such programmes and that periods spent on licence in the community are of a sufficient length to enable such programmes to take place, was discussed in detail in Paper 1.

15. However, different issues arise where the courts are sentencing someone whose behaviour has nothing to do with personal sexual deviancy but is based on exploiting the sexual appetites or deviancies of others, whether or not for gain. In such cases, sex offender treatment programmes would not appear to be appropriate, whereas the use of fines, or community punishments containing requirements such as curfews and residence orders and, in accordance with section 177 of the Criminal Justice Act 2003 once it comes into force, unpaid work requirements and prohibited activity requirements, may be effective in discouraging future offending. Anti-social behaviour orders may also prove to be an effective way of, for example, controlling the public nuisance of soliciting and kerb-crawling in known 'red-light districts'.

Financial penalties

16. The Criminal Justice Act 1988, as amended by the Proceeds of Crime Act 2002 (POCA), sets out the circumstances in which the Courts are entitled to make a confiscation order to recover some of the proceeds of an offender's crime. The Court must be satisfied both that the offender has a 'criminal lifestyle' and that he has benefited from 'his general criminal conduct' before it can consider making an order. All of the exploitation offences discussed in this paper are (by virtue of consequential amendments made by the SOA) listed in Schedule 2 of POCA. Anyone found guilty of an offence in Schedule 2 is automatically deemed to have a 'criminal lifestyle'. The question of whether someone has benefited from their crime will be a matter of evidence in each case and the size of the 'recoverable amount' will be determined by the offender's financial circumstances. In cases involving the prosecution of pimps running large prostitution empires and those at the head of people trafficking chains, a confiscation order is something that the Courts will clearly wish to consider. POCA provides that the prosecution may suggest consideration of a confiscation order and also that the Court may decide of its own volition to consider making such an order where the circumstances suggest that such an order would be appropriate. In 2003, the Government also established a new financial crime unit, as part of 'Reflex', the immigration crime taskforce, which has the power to seize criminal assets.

17. The Court must also consider making a compensation order, in accordance with the provisions of the Powers of Criminal Courts (Sentencing) Act 2000, in respect of any personal injury, loss or damage occasioned to a victim. This may be especially pertinent in cases involving large numbers of trafficked victims who have been deceived into paying for the 'services' offered by the traffickers.

B : INDECENT PHOTOGRAPHS OF CHILDREN

18. The SOA does not create any new offences in this category, but makes amendments to the Protection of Children Act 1978 and the Criminal Justice Act 1988. The definition of 'child' in each piece of legislation (which used to mean a person under 16) has been amended to apply to any person below the age of 18. As a result, it is now a crime to take, make, permit to take, distribute, show, possess, possess with intent to distribute, or to advertise, indecent photographs or pseudo-photographs of any person below the age of 18. This accords with the terms of the UK's agreement with other EU Member States to adopt a common definition of a 'child' for the purpose of identifying illegal photographs. It also echoes the approach taken in creating 'abuse of trust' offences and 'familial child sex' offences in the SOA, which aim to protect young people aged 16 or 17 in circumstances where they are known to be targeted for exploitation and abuse.

19. As mentioned in paragraph 8, the Court of Appeal adopted the Panel's advice (subject to a minor amendment) on the sentencing of offences involving child pornography in 2002 in the case of *R v Oliver, Hartrey and Baldwin*. The SOA does not make any changes to the nature of the offending behaviour covered by the existing offences; nor are the maximum penalties increased. We can, therefore, see no reason to review the position established by the Court of Appeal in 2002 in so far as it applies to children under 16. The aggravating and mitigating features to be taken into account on sentencing were clearly set out in the Panel's advice and the Court of Appeal judgment and these remain relevant. One of the aggravating factors, the level of involvement of the offender, is now a fundamental element of the new 'abuse of children through prostitution and pornography' offences, which are discussed in section C below.

20. The Panel's previous advice on pornography involving children under 16 recommended that where material consists entirely of computer-generated pseudophotographs or no more than a small quantity of images of real children⁶ and where those images depict nudity or erotic posing with no sexual activity, the appropriate penalty should be a fine or, in some cases, a conditional discharge. The Panel pointed out that, under the terms of section 14 of the Powers of Criminal Courts (Sentencing) Act 2000, a conditional discharge did not result in a requirement to register under the Sex Offenders Act 1997. This position has been changed in relation to adult offenders by section 134 of the SOA. An adult (aged 18 or over) who is given a conditional discharge in relation to offences involving a victim or victims aged under 16 will now be subject to registration requirements. The provisions relating to adult offenders given a conditional discharge for offences involving victims aged 16 or 17 remains unchanged and in such cases the requirement to register is triggered by a sentence or caution, but not by an absolute or conditional discharge. As before, offenders aged under 18 will only be subject to registration requirements if they are given a custodial sentence of 12 months or more. The Panel welcomes this change but, in relation to cases where a conditional discharge does not result in registration, repeats its caveat that a conditional discharge should not be

⁵ where no harm has been occasioned to a real victim

⁶ where there is an identifiable victim who has been involved in a level of sexual abuse and where there is a degree of harm to the victim that can be measured

given purely in order to avoid the requirement for registration. The power to make a court order disqualifying an offender from working with children has been amended by schedule 30 of the Criminal Justice Act 2003 and courts now have the discretion to make an order disqualifying an offender (adult or juvenile) from working with children

regardless of the sentence imposed. Although disqualification orders are not likely to be made in relation to conditional discharges or fines, the legislation does not rule out the possibility.

21. In its previous advice, the Panel made use of the ten stage typology used by the COPINE⁷ project to describe the range of images used by paedophiles and adapted these, for use by the courts, into five levels of material according to the degree of harm to the victims. In *R v Oliver, Hartrey and Baldwin*, the Court of Appeal did not accept that COPINE typologies 1 [nudist (naked or semi-naked in legitimate settings/sources)] and 2 [erotica (surreptitious photographs showing underwear/nakedness)] give rise, of themselves, to pornographic images and ruled that they should be excluded from Level 1 (images depicting nudity or erotic posing, with no sexual activity). In all other respects, the Court of Appeal accepted the Panel's 5 Level approach based on the COPINE technology.

22. The Levels for sentencing agreed by the Court of Appeal are

- Level 1 - images depicting erotic posing with no sexual activity;
- Level 2 - sexual activity between children, or solo masturbation by a child;
- Level 3 - non-penetrative sexual activity between adults and children;
- Level 4 - penetrative sexual activity between children and adults;
- Level 5 - sadism or bestiality

The Panel can see no reason to suggest any changes to this as a result of the extension of the protection offered by these offences to young people aged 16 and 17.

23. However, it does remain to be considered whether lower sentencing levels should apply where the victim is over the age of consent. Paper 1 raises similar questions in relation to the starting points for the 'familial child sex' offences, where it is suggested that the harm caused to the victim may be mitigated in some circumstances by the fact that he or she is over the age of consent. In its judgment in *R v Oliver, Hartrey and Baldwin*, the Court of Appeal made the point that although pseudo-photographs should generally be treated as less serious than real images, they can, in exceptional cases, for example where the imagery is particularly grotesque and beyond the scope of normal photography, be just as serious as photographs of a real child. Whether the child in the photograph is real or computer-generated is not necessarily relevant to the degree of harm caused to any vulnerable person who sees the photograph and it follows that the

⁷Combating Paedophile Information Networks in Europe, at the University of Cork

purported age of the child depicted in the pseudo-photograph (be it under 16 or under 18) is equally irrelevant.

24. The situation in relation to actual photographs of real children is, of course, different. The Court of Appeal agreed with the Panel's suggestion, in its advice on pornography involving children under 16, that a community sentence may be appropriate where the offender is in possession of a large amount of material described in Level 1 or a small number of images at Level 2 **and where the material has not been distributed or shown to others**. The custody threshold is usually passed where the material has been shown or distributed to others, or where there is a large amount of material at Level 2, or a small amount at Level 3 or above. The sentence thresholds are on a sliding scale according to the type of sexual activity in which the child was involved and the consequent levels of sexual abuse. With this in mind, in relation to actual photographs of an identified victim aged 16 or 17, the Panel's provisional view is that where the material consists of activity within Levels 1, 2 and 3 and **provided it can be proved that the**

offender was in possession of the material purely for his or her own personal use and it has not been distributed or shown to others, the sentencing starting point should be a fine or a conditional discharge. (As mentioned in paragraph 20, it must be remembered that a conditional discharge would not result in a requirement for the offender to register as a sex offender.) This would have the effect of raising the custody threshold to material involving penetrative sexual activity with adults and sadism or bestiality. Where the victim has not been identified and there is doubt about his or her age, starting points should be based on those for children under 16.

Q3. The Panel's provisional view is that starting points for offences involving the making, taking, permitting to take or possession of indecent photographs for the offender's own use should be lower where the victim is aged 16 or 17. Do you agree? If so, what reduction do you think should be made?

25. In relation to the showing or distribution of indecent photographs or pseudophotographs the Court of Appeal in its judgment in *R v Oliver, Hartrey and Baldwin* said

"Any element of commercial gain will place an offence at a high level of seriousness. In our judgement, swapping of images can properly be regarded as a commercial activity, albeit without financial gain, because it

fuels demand for such material. Wide-scale distribution, even without financial profit, is intrinsically more

harmful than a transaction limited to two or three individuals, both by reference to the potential use of the

images by active paedophiles, and by reference to the shame and degradation to the original victims."

This view is consistent with the fact that the maximum penalty is 5 years imprisonment for possessing indecent photographs or pseudo-photographs, whereas the maximum penalty is 10 years for taking or making an indecent photograph or pseudo-photograph of a child, or to distribute or show such photographs, or to possess such photographs with a view to their being distributed or shown, or to publish an advertisement conveying that the advertiser distributes or shows such photographs or intends to do so.

26. Clearly, showing or distributing indecent photographs or pseudo-photographs even on a very small scale is regarded as serious offending behaviour and wide-scale

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distribution is seen as offending behaviour of the most serious category. In cases involving non-consensual distribution (whatever form that takes), the level of trauma and distress experienced by a 16 or 17 year old may be equally as intense (if not greater in view of the victim's heightened sexual awareness), as that experienced by younger victims. In terms of sentencing levels, the Panel questions whether the fact that the victim is over the age of consent should carry any weight at all. Where the material is shown or distributed without the victim's consent, it is hard to see why the fact that the victim is over the age of consent should have any bearing on sentencing levels, even if the material was originally taken and possessed with his or her consent. However, consideration needs to be given to the correct approach to sentencing where a 16 or 17 year old gives his or her genuinely informed consent to the distribution of pornographic material and, perhaps, also receives some financial gain. It could be argued that this should be a mitigating feature for sentencing but the young person's consent would not alter the fact that distribution of such material encourages the trade and is, therefore, not in the public interest. The Panel is therefore seeking views on whether the consent of the young person to the distribution and his or her active involvement in it, should have any effect in sentencing terms.

Q4. The Panel considers that where the intention is to distribute or advertise photographs or pseudo photographs without the consent of persons aged 16 or 17 who are depicted in the images, the starting points should be the same as those for cases where the children depicted are below the age of 16. Do you agree?

Q5. Should the genuine informed consent of a 16 or 17 year old to the distribution of pornographic material in which he or she is featured have any impact on the starting points for sentencing? If so, what?

Q6. Should the fact that a 16 or 17 year old has (or would have) gained financially from the consensual distribution of pornography in which he or she is featured have any impact on sentencing? If so, what?

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C : ABUSE OF CHILDREN THROUGH PROSTITUTION AND PORNOGRAPHY

27. The individual offences in this category, together with a brief definition and the maximum penalty for each, are set out in the table below.

Offence Definition Maximum penalty

Paying for sexual services
of a child

Intentionally obtaining for
oneself the sexual services
of a person under 18
having made, or promised
to make, payment for those
services

Life imprisonment where
the victim is aged under 13
and the activity involves
penetration; 14 years where
the activity does not involve
penetration;
14 years where the victim is
aged 13 or over but under
16;

7 years where the victim is
aged 16 or 17.

Causing or inciting child
prostitution or pornography
Intentionally causing or
inciting a person under 18
to become a prostitute or to
be involved in pornography
anywhere in the world.

14 years

Controlling a child
prostitute or a child
involved in pornography
Intentionally controlling
any of the activities of a

child under 18 relating to the prostitution of the child or the child's involvement in pornography anywhere in the world.

14 years

Arranging or facilitating child prostitution or pornography

Intentionally arranging or facilitating the prostitution or involvement in pornography anywhere in the world of a person under 18.

14 years

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Paying for sexual services of a child

28. The offence of 'Paying for sexual services of a child' is the only offence in this group that involves the offender in actual physical sexual activity with the victim. While the underlying purpose of the exploitation offences is to target those who are prepared to sexually exploit victims for financial advantage, the underage sex market only exists and survives because there are sufficient clients to support it. This offence targets those who are willing to contribute to the sexual exploitation of children and to be personally involved in sexual crime. It carries staged maximum penalties according to the age of the victim and the nature of the sexual services provided or offered. The Panel's inclination would be to follow that lead and to propose a range of starting points in line with the same criteria.

29. In relation to children aged 13 or over but under 16, it would seem sensible to apply the same starting point as for the offence of 'sexual activity with a child' (discussed in Paper 1) but with an increase (perhaps 25%?) to reflect the commercial exploitation of the victim. In relation to non-penetrative sexual activity, the question as to whether or not different starting points should apply where a victim is under 13 may, to an extent, depend on the responses to Paper 1, unless respondents believe that different principles should apply in relation to the sexual exploitation offences. However, bearing in mind that the oral, vaginal or anal penetration of a child under 13 has been redefined as 'rape' in the SOA, it is proposed that the starting points for any penetrative act involving a child under 13 should follow the Panel's earlier advice on sentencing for rape (2002) with an increase to reflect the fact that the child is being sexually exploited for gain.

30. With regard to paying for the sexual services of children who are aged 16 or 17 and who can freely consent to sexual activity in normal circumstances, the offender is being punished for encouraging young people, who are still vulnerable to abuse and manipulation, to perpetuate their own sexual exploitation. The Panel's initial view is that the starting point for sentences in cases involving children aged 16 or 17 should be based on those for the 'abuse of trust' offences. However, we would be very interested to know whether respondents consider that this is the right approach to adopt. This would effectively equate the offence of paying for sexual services from an anonymous child where the question of affection is likely to be wholly irrelevant, with the offence of

abusing a position of trust, within which a certain level of affection may exist, to manipulate a child into agreeing freely to take part in sexual activity. Does the degradation involved in selling sexual services justify higher sentencing starting points and, if so, what sort of increase should be applied? Some suggestions are set out in Annex B.

Q7. The Panel proposes that, in relation to victims aged 13 and over but under 16, the starting points for the offence of 'Paying for sexual services of a child' should be based on those for the offence of 'sexual activity with a child' with an increase to reflect the commercial exploitation of the victim. Do you agree? What level increase do you think would be appropriate?

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Q8. The Panel also proposes that starting points should be on a sliding scale depending on the age of the victim (under 13; 13 and over but under 16; and 16 or over but under 18) and the nature of the offending behaviour that takes place. Do you agree?

Q9. In relation to the offence of 'Paying for sexual services of a child', where the child in question is aged 16 or 17, should the starting points be the same as for 'Abuse of position of trust : sexual activity with a child' ? If not, how much higher should they be?

Child prostitution or pornography

31. Three offences fall within this group -

- (i) Causing or inciting child prostitution or child pornography;
- (ii) Controlling a child prostitute or a child involved in pornography; and
- (iii) Arranging or facilitating child prostitution or pornography.

In all cases the offender is intentionally involving a child in sexual exploitation or abuse, or in some way assisting with that child's involvement. As discussed above, financial reward may not always be a factor in someone's involvement and the prosecution is not required to prove that the offender stood to gain from taking part in such activities. These offences cover anyone who takes any part, for whatever reason, in a child's involvement in prostitution or pornography.

32. The starting points for sentencing for these offences needs to be relatively high, in line with established principles about the serious nature of commercial exploitation. A landlord who intentionally leases a flat to a photographer to make pornographic films involving children or a person who delivers a child to a flat intending that the child will sell sexual services there, in return for cash, or drugs, should be in no doubt that he or she will face a custodial sentence. However, in cases where the offender is another victim (for example a child prostitute who recruits another child into the 'profession' or helps to organise the appointments of another prostitute) the courts may wish to take a more lenient stance. The Panel proposes that this should be achieved by treating such circumstances as a mitigating feature and adjusting the starting point downwards.

33. Suggested aggravating and mitigating features relevant to this group of offences are -

Aggravating features

- background of intimidation or violence
- use of a weapon to frighten or injure the victim

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- use of drugs, alcohol or other substance to secure a child's compliance
- abduction or detention

- exceptionally serious physical or psychological effect on the victim (e.g. in relation to prostitution - pregnancy, sexually transmitted infection, physical injury)
- abuse of trust / offence committed by a family member or other person in a position of responsibility towards the victim at the time of sexual activity in which the child has been involved
- number of persons involved in sexual activity (e.g. group sex)
- in relation to pornography - forcing a victim to violate another person, who is also a victim (especially where the other victim is a family member)
- in relation to 'inciting' offences - the only reason the offence did not take place was due to circumstances outside the offender's control
- victim is very young (e.g. penetration of a baby, although the Panel continues to believe that the age of a victim of child pornography is not an aggravating feature in its own right - the relevant issue is whether extreme youth will result in a greater level of physical harm)
- victim is particularly vulnerable (e.g. recruitment of a child living on the streets)
- degree of degradation of victim (e.g. involvement of animals in pornography, widespread distribution of pornography / involvement in unnatural sexual acts)
- nature of photographs (the 5 levels of photograph as set out in the Panel's advice to the Court of Appeal on offences involving child pornography - 2002)
- distribution of pornography on public areas of the Internet as opposed to pornography sites
- pornographic images distributed to other children or persons known to victim
- scale of the operation
- in relation to 'paying for sex' - offender is aware that he is suffering from a serious sexually transmitted infection (where the nature of the offence could involve transmission)
- offence is motivated by prejudice (e.g. race, religion, sexual orientation)

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Mitigating features

- Offender is also being controlled in prostitution or pornography and is subject to threats or intimidation (e.g. from a 'pimp')
- Viewing pornographic images without storing or distributing them
- Holding photographs or images for personal use

Q10. Do you agree that the circumstances listed in paragraph 33 are the relevant aggravating or mitigating features for the 'Abuse of children through prostitution and pornography' offences? Are there any others?

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D : EXPLOITATION OF PROSTITUTION

34. These offences all relate to the exploitation of adults who make their living through prostitution. These offences replace the gender-specific offences in the Sexual Offences Act 1956 and will enable the prosecution of anyone who causes, incites or controls the activities of a prostitute either for their own financial gain or for the financial gain of a third person. The two new offences in this group are -

Offence Definition Maximum penalty

Causing or inciting prostitution for gain
Intentionally causing or inciting another person to

become a prostitute
anywhere in the world for,
or in the expectation of gain
for oneself or a third person

7 years

Controlling prostitution for
gain

Intentionally controlling
any of the activities of a
third person relating to that
person's prostitution
anywhere in the world for,
or in the expectation of,
gain for oneself or a third
person

7 years

35. The SOA also removes the sexual bias from the offence of 'Keeping a brothel' and increases the maximum penalty from 6 months for a second offence to 6 months on summary conviction or 7 years on indictment. The offence of 'Keeping a brothel for prostitution' covers anyone who keeps, manages, or acts or assists in the management of a brothel to which people resort for practices involving prostitution. This offence enables the prosecution of anyone involved in any way in the running of premises where prostitution takes place. It can be used where it might be difficult for the prosecution to make out the element of 'control' in the 'controlling prostitution for gain' offence, for example where the owner of a brothel distances himself from the actual running of the brothel.

36. Prostitution by adults aged 18 or over is not illegal in this country. However, although some people choose to work in prostitution, others are lured or coerced into it. The purpose of the exploitation of prostitution offences is to enable the effective and appropriate punishment of those who are prepared to profit from the prostitution of others, often using violence or intimidation to control the activities of the prostitutes and keeping them in poor living conditions with very little money. These offences effectively cover two levels of criminal activity - firstly the coercion of another person into

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prostitution and secondly controlling his or her activities for gain. In some cases one defendant will commit both types of offence; on other occasions each level of offence will be committed by a different defendant e.g. a female prostitute recruits another woman to work with her and the pimp controls the activities of them both.

37. The offence of 'Causing or inciting prostitution for gain' is designed to capture those who recruit others into prostitution for their own gain or for the gain of a third person, regardless of whether this is achieved by force or otherwise. It covers not only the recruitment of those who have never before been involved in prostitution, but also those who may have left prostitution and are coerced back into it. The offence of 'Controlling prostitution for gain' captures anyone who controls for gain any of the activities of another person relating to that person's prostitution, for example controlling the price that a prostitute charges for different sexual services, requiring a prostitute to work in a particular place or requiring a prostitute to provide sexual services to a particular number of clients each night.

38. The Sex Offences Reviews heard some evidence that the legislation in the Sexual Offences Act 1956 was difficult to implement and that some of those charged with the offences of 'living off immoral earnings' or 'controlling a prostitute' would seek to justify their actions (in the hopes of securing a reduced sentence) on the grounds that the victim was "only a prostitute". There can be no justification for basing sentences on any preconceived ideas about the lifestyle of the victim; the issue of importance to the courts is that the victim is being exploited by someone else for financial gain and this is wholly unacceptable.

39. Current sentencing guidance suggests that coercion and corruption are the crucial sentencing factors and that a sentence exceeding 2 years should be reserved for cases where there is some evidence of physical or mental coercion of the prostitute involved, or of corruption.⁹ The Panel sees no need to depart from this position and considers that the degree of coercion, both in terms of recruitment and subsequent control of the prostitute's activities, is highly relevant as an aggravating factor in terms of sentencing. The degree to which a victim is exploited or controlled, the harm suffered as a result, the level of involvement of the offender and the timescale over which the operation has been run, will all be relevant in terms of assessing the seriousness of the offence.

40. The Panel considers that the aggravating features that would increase sentencing levels for this group of offences are -

- background of intimidation or violence
- use of a weapon to frighten or injure the victim
- use of drugs, alcohol or other substance to secure compliance
- abduction or detention

⁸ *Setting The Boundaries* Chapter 7, page 116

⁹ *R v Farrugia* (1979) 69 Cr. App. R. 108, *R v Malik* [1998] 1 Cr. App. R. (S) 115 and *Current Sentencing Practice* B5-1

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- exceptionally serious physical or psychological effect on the victim (e.g. pregnancy, sexually transmitted infection, physical injury)
- abuse of trust / offence committed by a family member or other person in a position of responsibility towards the victim
- nature of sexual activity in which victim required to take part
- number of persons involved in sexual activity (e.g. group sex or large number of clients each day)
- the scale of the operation - recruiting or controlling a large number of prostitutes at a time or over a period of time, may be more serious than controlling only one or two, but this will depend on the individual circumstances.
- in relation to 'inciting' offences - the only reason the offence did not take place was due to circumstances outside the offender's control
- victim is particularly vulnerable (e.g. recruited while living on the streets)
- offence is motivated by prejudice (e.g. race, religion, sexual orientation)

41. The only mitigating factor would be the situation where an offender is also a prostitute or other person who acts on behalf of a pimp through fear or intimidation.

Q11. Do you agree with the list of aggravating and mitigating features in relation to the 'exploitation of prostitution' offences (paragraphs 40 and 41). Are there others?

42. In line with the principle established in Paper 1, the Panel proposes that the penalty should be the same whether prostitution was 'caused' or 'incited'. The fact that an incited activity did not take place would be a mitigating feature for sentencing purposes,

but not in cases where the reason why the act did not take place was outside the control of the offender.

43. The question that remains to be considered is what the starting point for sentencing should be where there is no evidence of coercion or corruption. Sentencing practice suggests that the Courts are inclined to sentence leniently unless there are aggravating features. In *R v Hilton*¹⁰ the Court of Appeal upheld a custodial sentence in relation to 'living on the earnings of prostitution' where there was no evidence of coercion, but suggested that the appropriate penalty should be reduced from 12 to 6 months in custody. The Court also commented -

¹⁰*R v Hilton* (1982) 4 Cr. App. R. (S.) 184

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"it would be wrong to say that there are no circumstances in which a prison sentence ... would be inappropriate".

In *R v Robinson*¹¹ the Court of Appeal found that there was no evidence of force, coercion or corruption in the operation of a sauna offering sexual services as many of the women had previously been working as prostitutes. It directed that two salaried employees of the sauna who were of previous good character and who pleaded guilty respectively to living on the earnings of prostitution and aiding and abetting that offence should not have been sentenced to immediate custody. Their 9 month prison sentences were quashed; one appellant, who had spent 28 days in prison was given a £100 fine and the other appellant was placed on probation for 12 months. The Court directed that the manager of the sauna, who had been sentenced to 2 years imprisonment and a fine of £10,000, should be released after having spent just 9 weeks in custody and that his fine should be reduced to £5000. In *R v Kirk*¹² the Court of Appeal directed that, although there was no evidence of corruption or violence, the appellant's original sentence of 9 months in custody should be upheld on the basis that *"he was deeply involved in the running and servicing of the business of these two brothels and had derived significant financial benefit from so doing"*. His position was distinguished from that of his coaccused who were paid employees and who were described by the Court as 'little more than cleaners'; these men had been sentenced to a community service order for a period of 240 hours.

44. Bearing in mind that the SOA does not increase the maximum penalty for these offences, the Panel's provisional view is that community sentences may be appropriate. Where a non-custodial sentence is passed, the Panel considers that the disposal should normally include some form of punishment to signal that society is not prepared to tolerate such behaviour and to discourage future offending.

Q12. The Panel would like respondents to comment on the circumstances in which a non-custodial sentence might be justified for the offences of 'Causing or inciting prostitution for gain', 'Controlling prostitution for gain' or 'Keeping a brothel used for prostitution'.

Q13. What would be a meaningful sentence for someone who is not sentenced to custody?

¹¹*R v Robinson* (1984) 6 Cr. App. R. (S.) 159

¹²*R v Kirk* (1995) 16 Cr. App. R. (S.) 895

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E : TRAFFICKING

45. Trafficking for the purposes of sexual exploitation is a significant problem in many parts of the world¹³ and international agreements such as the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (to which the UK is a signatory)

have been reached in a unified effort to tackle it. Trafficking for sexual exploitation involves several elements. Firstly it requires the recruitment of people from one place to work in another, whether this is between countries or within territorial boundaries. The recruiting process may involve deception of the victims as to the nature of the work they will ultimately be doing, with those trafficked often believing that they are coming to work as au pairs, waitresses or exotic dancers. Others are fully aware that they are to work in prostitution but may be deceived about the conditions of work, the numbers of men for whom they are expected to provide services, and the amount of money that can be earned. Often, trafficking from abroad is arranged as a “package” with fees charged for travel, accommodation and “management” in the UK. This can create a form of debt bondage that can never be fully paid.

46. The next step in the trafficking process is arranging or facilitating the transport of the person from the place of origin to the destination. Where this involves the crossing of international borders, it may involve immigration offences as well, though not always. The arranging or facilitating of trafficking may involve the creation of false papers, or assistance in securing transport, or the provision of food or shelter en route. The final element is the managing of sex workers at the destination. Individuals are often held in circumstances which effectively restrict their freedom: passports and identification are removed, there may be limits on their ability to refuse clients or certain sexual practices and violence may be used to control them. Victims often face significant “costs”, for example for food, accommodation and cleaning services, which means that they receive very little money for themselves. Trafficking is a growing international industry within which victims are treated as commodities and operators can make vast sums of money. UN figures for trafficking in women for sexual exploitation are set at \$7 billion a year – equivalent to the global drug trafficking market. As the fight against drug trafficking becomes more and more effective, criminal syndicates are turning to the trafficking of women as an easier and equally lucrative option.

47. The SOA introduces three new offences relating to the trafficking of persons for sexual exploitation - (i) 'Trafficking into the UK for sexual exploitation'; (ii) 'Trafficking within the UK for sexual exploitation'; and (iii) 'Trafficking out of the UK for sexual exploitation'. These offences all carry a maximum penalty of 14 years imprisonment and replace the stop-gap offences of 'Trafficking in Prostitution', which were introduced by the Nationality, Immigration and Asylum Act 2002. The introduction of these offences fulfils the UK's obligation under agreements reached with other EU Member States and UN colleagues.¹⁴ These agreements require signatories to tackle this recognised

¹³ The International Office of Migration estimated that in 1995 half a million women were trafficked into the EU.

¹⁴ The EU Framework Decision on Trafficking and the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons

international problem by introducing criminal offences to combat people trafficking for sexual purposes. [In addition, section 72 of the SOA re-enacts part 2 of the Sex Offenders Act 1997 and provides for so-called offences of 'sex tourism' (that is, acts that are sexual offences in the country where they are perpetrated and which would have constituted a sexual offence had they been perpetrated in England, Wales and Northern Ireland) to be prosecuted in this country.]

48. The type of activity covered by the new trafficking offences is broadly the same, with the only difference being the geographical area within which the trafficked persons are moved. As with the previous two groups of offences, the harm being addressed here is sexual exploitation, in this case both of children and of adults. The offences are designed to cover the wide range of behaviour involved in people trafficking that is

discussed in paragraphs 45 and 46. Typically, trafficking may involve any one of, but more usually a combination of, the following features - threats; the use of force or other forms of coercion; abduction; fraud; deception; the abuse of power or of a position of vulnerability; or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person (e.g. a parent or sibling).

49. The trafficking offences are designed to capture anyone involved in any stage of the trafficking operation, whether or not there is evidence of financial gain. Thus, the offences apply where it can be proved that the offender arranged or facilitated travel either with the intention of doing something that would involve the commission of a sexual offence, or in the belief that the actions of a third party would be likely to involve the commission of such an offence. The Act provides for such offences to be triable either way.¹⁵ This is serious offending behaviour, which society as a whole finds repugnant, and it is unlikely that sentencers will regard a financial penalty or community penalty as sensible options.

50. Where violence or sexual violence is used to secure the compliance of victims of trafficking, there are other specific offences that can be charged alongside the offence of trafficking but the Panel's view is that the normal disposal for trafficking offences should of itself be custodial. It is hard to think of any generic mitigating factors that are particularly relevant to this form of offending behaviour other than evidence to show that the offender was acting under duress or fear (for example, circumstances may exist where the defendants have, themselves, been victims of trafficking). The degree of coercion used and the level of control over the trafficked person's liberty will be relevant to assessing the seriousness of the offender's behaviour. The nature of the sexual exploitation to which the victim is exposed will also be relevant, as will the victim's age and vulnerability.

51. A question arises as to the importance that should be attached to the level of personal involvement between the offender and the victim. Many sexual offences (e.g.

¹⁵ A 'triable either way' offence is one that can either be tried summarily in the magistrates' courts or on indictment in the Crown Court. The decision on how to proceed will depend on the level of seriousness of the alleged offence and the maximum sentence available in the magistrates' courts.

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'rape' and 'sexual assault') concern the physical abuse of a victim by an offender. Others (e.g. 'Arranging or facilitating the commission of a child sex offence') can involve the close personal involvement of an offender in the exploitation of the victim. In general terms, the greater the level of involvement the more serious the crime. Those at the top of an organised trafficking chain may have very little personal involvement with day to day operations and may have no knowledge at all of individual victims. However, the Panel's view is that being in control of a money making operation that is based on the degradation, exploitation and abuse of the vulnerable is more serious than the actions of an individual who is personally involved in an operational part of the same chain.

52. The Panel considers that the following aggravating features increase the seriousness of an offence -

- high degree of planning, organisation or sophistication
- large number of people trafficked
- involvement over a long period of time
- threats against the victim or member of victim's family
- use of force or other forms of coercion
- abduction
- fraud (e.g. forgery, for example of documentation such as passports and visas)

- deception (as to purpose for which the person is being trafficked or the exact nature and duration of the sexual services that have been agreed)
- abuse of power or trust (e.g. where person uses a position of power or authority to identify and manipulate victims, or encourages a friend or relative to agree to be trafficked)
- victim particularly vulnerable (e.g. is in debt or unemployed in country of origin)
- victim is very young
- bribes given to achieve the consent of a person having control over another person (e.g. a parent or sibling)
- financial extortion of the victim (e.g. charging for travel, passports etc and then requiring regular payments to stay in the place to which they have been trafficked)
- inhumane treatment of trafficked persons
- restriction of victim's liberty

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- confiscation of the victim's passport

Q14. Do you agree that the aggravating features in paragraph 52 will increase the seriousness of the trafficking offences? Are there others?

53. As mentioned in paragraph 47, trafficking offences were introduced as an interim measure in the Immigration and Asylum Act 2002 (IAA), but, as far as we are aware, there are no Court of Appeal judgments on which to base sentencing guidelines. We have, therefore, based our proposals on the sentencing principles that have been established in relation to other immigration offences, for example facilitating illegal entry. Defendants found guilty of facilitating illegal entry in recent years have faced significant custodial sentences. In its judgment in *R v Van Binh Le*¹⁶ the Court of Appeal made observations on the principles to be observed in sentencing offenders for facilitating illegal entry. It was held that

"it is plain from the authorities to which we have referred ... that in the ordinary way the appropriate penalty for all but the most minor offences ... is one of immediate custody. The offence is one which calls very often for deterrent sentences and, as the statistics make plain, the problem of illegal entry is on the increase. Plainly the seven year maximum must accommodate offences with the most aggravating features. There are indeed a number of features which may aggravate the commission of this offence."

54. Arranging the entry of strangers rather than family members and acting for the purpose of financial gain, which are both inherent features in the offence of trafficking, were identified as aggravating factors in relation to facilitating illegal entry. Other aggravating features identified by the Court are already included in the list proposed at paragraph 52. The Court also concluded that

"the more prominent the role of the defendant the greater the aggravation of the offence."

55. In *R v Van Binh Le*, the Appeal Court reduced the sentence from three and a half years imprisonment to two and a half years for the first appellant, who had facilitated the entry of a single immigrant and where there was no evidence of financial gain. In the case of the second appellant, who had facilitated entry for nine immigrants for financial reward, the Court reduced his sentence from five years to three and a half years. In reaching its decision, the Court referred to a number of previous cases, including *R v Brown*¹⁷, in which the appellant had facilitated the entry of 19 people for financial gain; in this case the youth and previous good character of the appellant were factors in the decision to reduce the sentence from 7 years imprisonment (the maximum) to 5.

56. One of the most high-profile of recent years involved the defendant *Luan*

*Plakici*¹⁸. Plakici, of Albanian origin, was identified as having trafficked women from Eastern Europe over a period of time and having detained them in a brothel to provide sexual services against their will. As the offences pre-dated the trafficking offences introduced in the IAA, Plakici was charged with a range of offences including facilitating

¹⁶ *R v Van Binh Le* [1999] 1 Cr App R (S) 422

¹⁷ *R v Brown* [1997] 1 Cr App R (S) 205

¹⁸ The Times 23 December 2003

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illegal entry, kidnapping, procuring a girl to have unlawful sex, living on prostitution, incitement to rape and false imprisonment. He was found guilty and sentenced to 10 years imprisonment. This was clearly a very serious case of its type but the sentence passed is indicative of the courts' current robust response to such crimes.

57. As the Court of Appeal commented in *R v Van Binh Le*, the problem of facilitating illegal entry is on the increase. The Panel believes that the Courts need to take a firm stance by passing custodial sentences in all cases where the defendant has intentionally been involved in people trafficking for sexual exploitation. Only in exceptional circumstances, for example where the defendant's involvement in the crime was secured through serious levels of intimidation or violence, should a non-custodial sentence be considered. Aggravating features such as commercial enterprise, significant financial gain and coercion of victims should move sentences towards the maximum 7 years.

Q15. Do you agree that the normal disposal for a trafficking offence should be custodial, with a lesser penalty only being recommended in cases where extraordinary mitigating features exist? If not, why not?

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LIST OF QUESTIONS POSED IN THE CONSULTATION PAPER

Q1. The Panel's view is that in relation to exploitation offences that do not necessarily involve a 'for gain requirement', evidence that the offence was motivated by, or resulted in, an element of gain should be treated as an aggravating feature for sentencing. Do you agree?

Q2. The Panel considers that where the 'for gain requirement' is an inherent feature of an offence, this should already be reflected in the sentencing starting point, but that evidence of significant financial or other advantage to the offender should be an aggravating feature for sentencing. Do you agree?

Q3. The Panel's provisional view is that starting points for offences involving the making, taking, permitting to take or possession of indecent photographs for the offender's own use should be lower where the victim is aged 16 or 17. Do you agree? If so, what reduction do you think should be made?

Q4. The Panel considers that where the intention is to distribute or advertise photographs or pseudo photographs without the consent of persons aged 16 or 17 who are depicted in the images, the starting points should be the same as those for cases where the children depicted are below the age of 16. Do you agree?

Q5. Should the genuine informed consent of a 16 or 17 year old to the distribution of pornographic material in which he or she is featured have any impact on the starting points for sentencing? If so, what?

Q6. Should the fact that a 16 or 17 year old has (or would have) gained financially from the consensual distribution of pornography in which he or she is featured have any impact on sentencing? If so, what?

Q7. The Panel proposes that, in relation to victims aged 13 and over but under

16, the starting points for the offence of 'Paying for sexual services of a child' should be based on those for the offence of 'sexual activity with a child' with an increase to reflect the commercial exploitation of the victim. Do you agree? What level increase do you think would be appropriate?

Q8. The Panel also proposes that starting points should be on a sliding scale depending on the age of the victim (under 13; 13 and over but under 16; and 16 or over but under 18) and the nature of the offending behaviour that takes place. Do you agree?

Q9. In relation to the offence of 'Paying for sexual services of a child', where the child in question is aged 16 or 17, should the starting points be the same as for 'Abuse of position of trust : sexual activity with a child' ? If not, how much higher should they be?

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Q10. Do you agree that the circumstances listed in paragraph 33 are the relevant aggravating or mitigating features for the 'Abuse of children through prostitution and pornography' offences? Are there any others?

Q11. Do you agree with the list of aggravating and mitigating features in relation to the 'exploitation of prostitution' offences (paragraphs 40 and 41). Are there others?

Q12. The Panel would like respondents to comment on the circumstances in which a non-custodial sentence might be justified for the offences of 'Causing or inciting prostitution for gain', 'Controlling prostitution for gain' or 'Keeping a brothel used for prostitution'.

Q13. What would be a meaningful sentence for someone who is not sentenced to custody?

Q14. Do you agree that the aggravating features in paragraph 52 will increase the seriousness of the trafficking offences? Are there others?

Q15. Do you agree that the normal disposal for a trafficking offence should be custodial, with a lesser penalty only being recommended in cases where extraordinary mitigating features exist? If not, why not?

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Annex A

EXPLOITATION OFFENCES UNDER THE SEXUAL OFFENCES ACT 2003 BY MAXIMUM PENALTY

An asterisk (*) denotes indictable only offences

This table covers only offences relating to prostitution, pornography and trafficking.

Maximum penalty Offence and Section Number

Life

imprisonment

- Paying for sexual services of a child [penetration of, or by, child under 13] (section 47)*
- 14 years** • Paying for sexual services of a child [victim aged 13 or over but under 16] (section 47)
- Causing or inciting child prostitution or pornography (section 48)
- Controlling a child prostitute or a child involved in pornography (section 49)
- Arranging or facilitating child prostitution or pornography (section 50)
- Trafficking into the UK for sexual exploitation (section 57)
- Trafficking within the UK for sexual exploitation (section 58)
- Trafficking out of the UK for sexual exploitation (section 59)

10 years • Indecent photos etc of a child under 18 (amendment to sections 1, 2 and 7 Protection of Children Act 1978)

7 years • Paying for sexual services of a child [victim under 18] (section 47)

- Causing or inciting prostitution for gain (section 52)
- Controlling prostitution for gain (section 53)
- Keeping a brothel used for prostitution (section 55)

5 years • Possession of indecent photograph of a child under 18 (amendment to section 160 Criminal Justice Act 1988)

- Indictable only offence - the offence can only be tried on indictment in the Crown Court
- Triable either way offence - the offence can be tried either (i) summarily in the magistrates' courts or (ii) on indictment in the Crown Court; the decision will depend on the level of seriousness of the alleged offence and the maximum sentence available in the magistrates' courts.

ANNEX B

SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES PROPOSED SENTENCING LEVELS

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- **The sentencing levels proposed in this table relate to conviction after a plea of not guilty.**
- **The starting points for each type of offence are based on a standard offence of its category and will be subject to the aggravating and mitigating factors discussed in the consultation paper.**
- **Unless specifically stated, starting points assume that the offender is an adult. A lower level of sentences may be appropriate where the offender is a youth.**
- **CRO = Community rehabilitation order**
- **The section number cited in brackets after each offence refers to the relevant section in the Sexual Offences Act 2003**

ANNEX B

SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES PROPOSED SENTENCING LEVELS

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New Offence Maximum penalty Suggested starting point Justification

1 Indecent photographs of children (section 45)

Taking, making, permitting to take, distributing, showing, possessing, possessing with intent to distribute, and advertising indecent photographs or pseudo-photographs of children under 18

5 years for possession;

otherwise 10 years

Where the victim is under 16

No change to existing guidance.

Where the victim is aged 16 or 17

For possession of material within Levels 1, 2 and 3,

provided it is purely for the personal use of the offender, the starting point should be a fine or conditional discharge. Sentencing Advisory Panel's advice on Offences Involving Child Pornography (2002) as adopted in *R v Oliver, Hartrey and Baldwin* [2003] 1 Cr App R 28.

In line with the thinking that runs through this Paper and Sex Offences Paper 1, that starting points should be lower for offences involving ostensibly consensual activity with children over the age of consent. Coercion, intimidation etc would be aggravating features for sentencing purposes.

2 Paying for sexual services of a child (section 47)

Intentionally obtaining the sexual services of a child having made or promised payment or knowing that another person has made or promised payment

Life imprisonment (indictable only) where the child is under 13

Child under 13

12 months custody for touching naked body parts other than the genitalia e.g. breasts, buttocks (no aggravating features); 18 months custody with aggravating features e.g. intimidation, serious psychological effect;

The sentencing starting points commence at behaviour involving touching of naked body parts. Starting points can be moved downwards if the behaviour does not involve physical contact between the parties.

In relation to children under

ANNEX B

SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES PROPOSED SENTENCING LEVELS

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New Offence Maximum penalty Suggested starting point Justification

3 years custody for touching

naked genitalia (no aggravating features); 4 years custody with aggravating features e.g. degradation of victim, more than one offender;

6 years custody for masturbation (no aggravating features); 8 years custody with aggravating features e.g. intimidation, degradation of victim, psychological harm;

10 years custody for penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or object (no aggravating features);

12 years custody with aggravating features e.g. transmission of serious sexual infection / physical harm caused to victim;

15 years custody where there is a history of paying for penetrative sex with children under 13.

13, the starting point for any form of penetration cannot be lower than for rape - Sentencing Advisory Panel's advice on rape (2002) and Sexual Offences Paper 1 - and is set at a suggested 25% higher than that to reflect the fact that the child is being commercially exploited.

ANNEX B

SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES PROPOSED SENTENCING LEVELS

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New Offence Maximum penalty Suggested starting point Justification

14 years where the child is

13 or over but under 16

Child aged 13 or over but under 16

6 months custody for touching naked body parts other than the genitalia e.g. breasts, buttocks (no aggravating features); 9 months custody with aggravating features e.g. intimidation, serious psychological effect;

2 years custody for touching naked genitalia (no

aggravating features); 3 years custody with aggravating features e.g. degradation of victim, more than one offender;

3 years custody for masturbation (no aggravating features); 4 years custody with aggravating features e.g. intimidation, degradation of victim;

4 years custody for penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or object

For children aged 13 to 16, the proposals in relation to the offence of 'Sexual activity with a child' (Sex Offences Paper 1) are used as a starting point, but with a suggested increase of 25%, for the same reasons as given above.

ANNEX B

SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES PROPOSED SENTENCING LEVELS

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New Offence Maximum penalty Suggested starting point Justification

7 years where the child is aged 16 or 17 (no aggravating features); 6 years custody with aggravating features e.g. transmission of infection, physical harm caused to victim.

Victim aged 16 or 17
3 months custody for touching naked body parts other than genitalia (no aggravating features);
6 months custody for touching naked genitalia (no aggravating features);
12 months custody for penetration.

Excluding the penalties for touching over clothes, in line with the approach taken above. **The starting points are relatively low to reflect the fact that the child is over the age of consent but the existence of any aggravating features at all**

should quickly increase the penalties beyond these levels.

3 Causing or inciting child prostitution or pornography (section 48)

Intentionally causing or inciting a child to become a prostitute, or to be involved in pornography, anywhere in the world

14 years Where the offence relates to the commercial exploitation of a victim under 16

6 years custody

Where the victim is under 13, a distinction needs to be made between penetrative and non-penetrative activity.

Where the activity involves penetration, the CPS can be

In line with 'Arranging or facilitating a child sex offence' where the activity is arranged or facilitated as part of a commercial enterprise in Sex Offences Paper 1.

No prima facie difference is

ANNEX B

SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES
PROPOSED SENTENCING LEVELS

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New Offence Maximum penalty Suggested starting point Justification

expected to charge the alternative offence of

'Causing or inciting a child under 13 to engage in sexual activity' as this carries a maximum penalty of life imprisonment.

At the bottom end of the scale, for example where a 14 year old girl suggests to her classmate that she could make some money by posing naked for a photographer, a custodial sentence would not be appropriate for the girl.

Where the offence relates to the non-commercial exploitation of a victim under 16

Between this last example and the well-organised commercial exploitation of children under 16 for which the 6 year custodial starting

point is suggested, there can be an extremely wide range of offending behaviour that may or may not have a commercial element. In such cases, community penalties and much lower custodial sentences may be appropriate made between causing or inciting prostitution as opposed to pornography - much pornographic material will involve physical sexual activity and the harm caused to the victim will depend very much on the facts of the case.

Where the victim is over the age of consent, relatively low non-custodial starting points may be appropriate but the existence of any aggravating features at all should quickly increase the penalties beyond these levels.

ANNEX B

SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES PROPOSED SENTENCING LEVELS

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New Offence Maximum penalty Suggested starting point Justification

as starting points, for example where someone asks youngsters to pose for him and retains the photographs purely for personal use.

4 Controlling a child prostitute or a child involved in pornography (section 49)

Intentionally controlling any of the activities of a child under 18 where those activities relate to the child's prostitution, or involvement in pornography, anywhere in the world

14 years As for 'Causing or inciting child prostitution or pornography'

As above. The maximum penalty is the same and, in terms of sentencing starting points, the degree of culpability is broadly the same. The degree of

involvement of the offender and the nature of the sexual activity in which the child is involved, will be relevant factors for sentencing purposes.

5 Arranging or facilitating child prostitution or pornography (section 50)

Intentionally arranging or facilitating the prostitution of a child, or the child's involvement in pornography, anywhere in the world

14 years As for 'Causing or inciting child prostitution or pornography'

As above.

6 Causing or inciting prostitution for gain (section 52)

Intentionally causing or inciting another person to become a prostitute anywhere in the world

7 years Where there is no evidence that the prostitute was physically or mentally

coerced or corrupted and the involvement of the offender is low-key - CRO including some form of punishment;

Where there is no coercion or Starting points are based on

offences with no additional aggravating features, any of which might move sentences beyond those recommended here, which are based on the judgments in *R v Robinson* (1984) 6 Cr App R (S) 159.

ANNEX B

SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES
PROPOSED SENTENCING LEVELS

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New Offence Maximum penalty Suggested starting point Justification

corruption but the offender is closely involved in the victim's prostitution - 6 months custody;

Where there is evidence of physical or mental coercion - 2 years custody.

7 Controlling prostitution for gain (section 53)

Intentionally controlling any of the activities of another

person relating to that person's prostitution in any part of the world

7 years As in 'Causing or inciting prostitution for gain'

As with the child offences, the degree of culpability of the offender is broadly the same, whether he or she causes or incites someone into prostitution or controls their activities; the relevant factors in sentencing terms are the level of involvement and the existence of any of the aggravating factors as identified.

8 Keeping a brothel used for prostitution (section 55)

Keeping, managing, or acting or assisting in the management of a brothel

7 years Starting points should be on a rising scale according to the scale of the operation and the personal level of involvement of the accused in the prostitution of victims.

For example, at the lowest levels of involvement, where the offender is employed as a cleaner or maintenance engineer, the most appropriate starting point for sentencing is likely to be a

In *R v Kirk* (1995) 16 Cr App R (S) 895, the Court of Appeal reduced custodial sentences to fines on the basis that the offenders were 'little more than cleaners'.

ANNEX B

**SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES
PROPOSED SENTENCING LEVELS**

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New Offence Maximum penalty Suggested starting point Justification
fine.

At the other end of the scale, where the offender is the keeper of a brothel and has made substantial profits from the exploitation of others, a starting point of 12 months in custody might be more appropriate.

In *R v Elul* [2001] 2 Cr App R (S) 68, the Court of Appeal

reduced sentence from 18 months to four sentences of 12 months to run concurrently where an appellant had pleaded guilty to four counts of living on the earnings of prostitution having recruited, without any coercion or corruption, 20 female prostitutes to provide sexual services from premises that were owned by him.

In *R v Hall* (1987) 9 CR App R (S) 121, the Court of Appeal reduced a custodial sentence from 3 years to 18 months where the appellant was the landlord of premises used by prostitutes and he lived on some of their earnings. He was not involved in the recruitment or control of the prostitutes.

9 Trafficking into/within/out of the UK for sexual exploitation (sections 57, 58 and 59)

Intentionally arranging or 14 years

Where the victim is over 18
Where there is evidence of personal gain - 4 years
custody

R v Van Binh Le [1999] 1 Cr App R (S) 422 and *R v Brown* [1997] 1 Cr App R (S) 205.

ANNEX B

SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES
PROPOSED SENTENCING LEVELS

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New Offence Maximum penalty Suggested starting point Justification

facilitating a person's arrival /travel within / departure from the UK, intending or believing that a sexual offence will be committed
Where there is no evidence of personal gain - 2 years
custody

Where the offender is a person under 18, the starting points might need to be lowered to reflect the offender's lack of maturity and understanding of the

crime in which he or she is involved. Sentencing levels will also be influenced by any deception, coercion or intimidation used to secure the young offender's involvement.

Where the victim is a child under 18

Where there is evidence of personal gain - 6 years custody

It is to be remembered that these offences are 'triable either way' and, in some cases, it must therefore be anticipated that a custodial sentence may not be appropriate. It is hard to envisage circumstances in which a custodial sentence would not be passed, except, perhaps, where the offender's involvement has been secured through substantial threat or violence - an example could be where a trafficked person fears for the safety of family members if she does not co-operate in encouraging others to agree to being trafficked.

In line with the general approach taken in relation to offences involving the commercial exploitation of children. As a general principle, the younger the child victim, the higher starting point for sentencing.

ANNEX B

SEXUAL OFFENCES CONSULTATION PAPER 2 - THE EXPLOITATION OFFENCES PROPOSED SENTENCING LEVELS

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New Offence Maximum penalty Suggested starting point Justification

Where there is no evidence of personal gain - 3 years custody

As with the offence of 'causing or inciting child prostitution or pornography', where the child is under 13 and the offence involves penetrative activity, the CPS may elect to charge one of the specific offences designed to protect children

under 13, where the maximum penalty is life imprisonment.

Following the principle established above.

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ANNEX C

LIST OF CONSULTEES

Copies of the consultation paper have been sent to the people and organisations listed below. In addition, copies have been sent to the Resident Judge at each Crown Court Centre in England and Wales.

Anti-Slavery International

Association of Black Probation Officers

Association of Chief Police Officers

Association of Directors of Social Services

Association of Women Barristers

Ashworth Hospital

Barnardo's

Alice Bloch, Goldsmiths College

Broadmoor Hospital

Centre for Crime and Justice Studies

Chairs of Youth Panels in England and Wales

Childline

Children's Legal Centre

Children's Society

Professor Jeremy Coid, Professor of Forensic Psychiatry, St Bartholomew's Hospital

Coalition Against Trafficking in Women

Coalition for the Removal of Pimping

COATNET - International Network of

Catholic Organisations against Trafficking in Women

Commission for Racial Equality

Council of Her Majesty's Circuit Judges

Crime Concern

Crown Prosecution Service

ECPAT (UK)

Equal Opportunities Commission

Foundation for People with Learning Disabilities

General Council of the Bar

Global Alliance Against Trafficking in Women

Professor Don Grubin, Professor of Forensic Psychiatry, St Nicholas

Hospital and University of Newcastle

upon Tyne
Dr Rob Hale, the Portman Clinic
H M Prison Service
Howard League for Penal Reform
Justice
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Justices' Clerks' Society
Kent Police Trafficking Unit
Kidscape
Professor Liz Kelly, University of North
London
Law Society
Legal Action Group
Liberty
Local Government Association
London Criminal Courts Solicitors'
Association
Lucy Faithfull Foundation
Magistrates' Association
Rhys Matthews, Senior Psychologist,
HM Prison Leyhill
Mencap
Metropolitan Police Advisory Group on
Rape and Serious Sexual Offences
Metropolitan Police Trafficking Unit
Mind
National Association of People Abused
in Childhood
National Association for the Care and
Resettlement of Offenders
National Association of Asian Probation
Staff
National Association of Probation
Officers
National Black Police Association
National Crime Squad
National Organisation for the Treatment
of Abusers
National Probation Service
National Children's Bureau
National Council of Voluntary Childcare
Organisations
NCH Action for Children
NSPCC
Parole Board
Dr Janet Parrott, Clinical Director, the
Bracton Centre
Penal Affairs Consortium

Police Federation of England and Wales
Police Superintendents' Association
Prevention of Professional Abuse
Network
Prison Governors' Association
Prison Officers' Association
Prison Reform Trust
Prison Service Trade Union Side
Probation Boards' Association
Probation Managers' Association
Rampton Hospital
Linda Regan, Senior Research Officer,
Child and Woman Abuse Studies Unit,
London Metropolitan University
The Refugee Council

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Respond
Royal College of Psychiatrists
Society of Black Lawyers
Society of District Judges (Magistrates'
Courts) for England and Wales
Society of Legal Scholars
Stonewall
Turning Point
Victim Support
Victims of Crime Trust
Victims' Voice
Voice UK
Women's Aid Federation of England
Ray Wyre, Ray Wyre Associates -
internationally acknowledged expert in
the field of sexual crime
Youth Justice Board for England and
Wales

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