

1

PUBLISHED FOR CONSULTATION ONLY

Sexual Offences Act 2003

Consultation Guideline

2

Sexual offences

3

FOREWORD

The Sentencing Guidelines Council was created in 2004 in order to frame guidelines to assist courts as they deal with criminal cases across the whole of England and Wales. The Council receives advice from the Sentencing Advisory Panel which consults widely before tendering that advice. The Council then produces a draft guideline on which it seeks the views of a limited group as provided by the Criminal Justice Act 2003.

This draft guideline is the most extensive piece of work that the Council has tackled to date and has been a challenging task. Guidelines for a group of offences of this size and magnitude will not often come to be considered together. Since such a wide range of sexual offences is now contained in a single piece of legislation, this has been a useful and important opportunity to prepare guidelines on the basis of a clear overview of both general and more offence specific principles.

The Council is indebted to the Sentencing Advisory Panel for its comprehensive advice. This followed two public consultations. It included a review of work that the Panel had previously undertaken in relation to offences of rape and of child pornography where its advice had led to guideline judgments from the Court of Appeal.

The Act contains a large number of new or amended offences for which there was no sentencing case law. Following implementation of the Act in May 2004, a small number of cases has now reached the Court of Appeal and some guidance has been forthcoming pending publication of this guideline.

The Panel used the starting point of 5 years for the rape of an adult with no aggravating or mitigating factors (derived from *Millberry and others*¹) as the baseline from which all other sentences in the guidelines have been calculated. Since the judgment in *Millberry*, the changes introduced by the Criminal Justice Act 2003 have made custodial sentences of 12 months and above more demanding than under the previous framework. Accordingly, a 5 year custodial sentence is a more severe sentence than it was at the time that *Millberry* was decided. The Council agrees with the Sentencing Advisory Panel that this increase in sentence severity is appropriate. The advice (and the consultation papers that preceded it) contains further background details. The advice is published alongside this consultation (draft) guideline. All documents can be found at www.sentencing-guidelines.gov.uk or can be obtained from the Council's Secretariat at 85 Buckingham Gate, London SW1E 6PD.

When the consultation period is concluded, the Council will consider any responses received and then issue a definitive guideline to which every court is required to have regard in accordance with section 172 of the 2003 Act.

Chairman of the Council

June 2006

¹[2003] 2 Cr App R (S) 31

CONTENTS

Foreword

Part 1 General Principles 7-19

Part 2 Non-Consensual Offences 20-42

2A. Rape and assault by penetration 25-30

2B. Sexual assault 31-33

2C. Causing or inciting sexual activity 34-37

2D. Other non-consensual offences 39-43

Part 3 Offences Involving Ostensible Consent 45-71

3A. Offences involving children 46-61

3B. Offences against vulnerable adults 62-71

Part 4 Preparatory Offences 73-81

Sexual grooming 74-75

Committing another offence with intent 76-77

Trespass with intent 78-79

Administering a substance with intent 80-81

Part 5 Other Offences 83-95

Prohibited Adult Sexual Relationships: Sex with an adult relative 84-85

Sexual Activity in a Public Lavatory 86-87

Exposure 88-89

Voyeurism 90-91

Intercourse with an animal 92-93

Sexual penetration of a corpse 94-95

Part 6 Exploitation Offences 97-119

6A. Indecent Photographs 101-105

6B. Abuse of Children through Prostitution & Pornography 107-111

6C. Exploitation of Prostitution 113-117

6D. Trafficking 118-119

Part 7 Sentencing Youths – 121-126

Offences with a Lower Statutory Maximum

PART 1: GENERAL PRINCIPLES

Introduction

1.1 The Sexual Offences Act 2003 came into force on 1 May 2004. Part 1 creates a number of new sexual offences. It also includes a large number of pre-existing offences, some of which have been redefined and/or have revised maximum penalties.

1.2 The Criminal Justice Act 2003² provides that the seriousness of an offence should be determined by two main parameters: the *culpability* of the offender and the *harm* caused, or risked, by the offence, including the impact on the victim(s). The Sentencing Guidelines Council guideline on Seriousness³ provides that the seriousness of an offence is to be

determined according to the relative impacts of the culpability of the offender and the actual or foreseeable harm caused to the victim. Where there is an imbalance between culpability and harm, the culpability of the offender in the particular circumstances of an individual case should be the primary factor in determining the seriousness of the offence.

1.3 The guidelines have been formulated on the basis of the sentencing framework that is currently in force. When they are published by the Council as definitive guidelines, adjustments will be made to sentence lengths for custodial sentences of less than 12 months in consequence of the introduction of the custody plus order.

For these types of offence more than for many others, the sentencing process must allow for flexibility and fluidity. The suggested starting points and sentencing ranges contained in the offence guidelines are not rigid and movement within and between ranges will be dependent upon the circumstances of individual cases and, in particular, the aggravating and mitigating factors that are present.

In order to assist in developing consistency of approach, a decision making process is set out at page 19.

1.4 In the guideline published by the Council to support the new sentencing framework introduced by the Criminal Justice Act 2003,⁴ in relation to custodial sentences of 12 months or more it is stated that, generally, a court should only make *specific* recommendations about the requirements to be included in the licence conditions when announcing shorter sentences where it is reasonable to anticipate the relevance of the requirement at the point of release. However, sentencing for a sexual offence is an example of an occasion where the court may sensibly suggest interventions that could be useful, either during the custodial

² section 143(1)

³ *Overarching Principles: Seriousness* published 16 December 2004 - www.sentencing-guidelines.gov.uk

⁴ *New Sentences: Criminal Justice Act 2003*, published 16 December 2004 - www.sentencing-guidelines.gov.uk

8

period or on release. The court's recommendation will not form part of the sentence, but will be a helpful guide for the probation service.

1.5 Apart from the offence of rape which, when charged as a primary offence, is confined to male defendants, the Act makes no distinction in terms of liability or maximum penalties for male and female offenders. The guidelines are proposed on the basis that they should apply irrespective of the gender of the victim or of the offender, except in specified circumstances where a distinction is justified by the nature of the offence.

Seriousness

1.6 The guidelines for sentencing for serious sexual offences have been based on the guideline judgment on rape - *Millberry and others*⁵ - in which the Court of Appeal stated that:

'... there are, broadly, three dimensions to consider in assessing the gravity of an individual offence of rape. The first is the degree of harm to the victim; the second is the level of culpability of the offender; and the third is the level of risk posed by the offender to society.'

1.7 In the subsequent *Attorney General's Reference (Nos. 91, 119, 120 of 2002)*,⁵ the Court of Appeal held that 'similar dimensions should apply to other categories of sexual offences', and added that there would also be a need to deter others from acting in a similar fashion.

1.8 These statements established the general principles for assessing the seriousness of sexual offences that are now encapsulated in the provisions of the Criminal Justice Act 2003.

1.9 The maximum penalty and mode of trial prescribed by Parliament for each sexual offence give a general indication of the relative seriousness of different offences and these have also acted as a broad guide for the proposed sentencing starting points.

The Harm Caused by Sexual Offences

1.10 All sexual offences where the activity is non-consensual, coercive or exploitative result in harm. Harm is also inherent where victims ostensibly consent but where their capacity to give informed consent is affected by their youth or mental disorder.

1.11 The effects of sexual offending may be physical and/or psychological. The physical effects – injury, pregnancy or sexually transmitted infections – may be very serious. The psychological effects may be equally or even more serious, but much less obvious (even unascertainable) at the time of sentencing. They may include any or all

⁵[2003] 2 Cr App R (S) 31

⁶[2003] 2 Cr App R (S) 338

Sexual offences

9

of the following (although this list is not intended to be comprehensive and items are not listed in any form of priority):

- *Violation of the victim's sexual autonomy*
- *Fear*
- *Humiliation*
- *Degradation*
- *Shame*
- *Embarrassment*
- *Inability to trust*
- *Inability to form personal or intimate relationships in adulthood*
- *Self harm or suicide*

The Offender's Culpability in Sexual Offences

1.12 According to the Council's guideline on Seriousness,⁷ culpability is determined by the extent to which the offender intends to cause harm – the worse the harm intended, the greater the offender's culpability. Sexual offences are somewhat different in that the offender's intention may be to obtain sexual gratification, financial gain or some other result, rather than to harm the victim. However, where the activity is in any way non-consensual, coercive or exploitative, the offence is inherently harmful and therefore the offender's culpability is high. Planning an offence makes the offender more highly culpable than engaging in opportunistic or impulsive offending.

1.13 In general, the difficulty of assessing seriousness where there is an

imbalance between culpability and harm does not arise in relation to sexual offences. However, some offences in the Act are defined in terms of the offender's intention to commit an offence that does not, in fact, take place, for example the 'incitement offences', the 'preparatory offences' and the new offence of 'meeting a child following sexual grooming etc'. In such cases, the level of actual harm to the victim may be lower than in cases involving the commission of a physical sexual offence. Here the level of culpability will be the primary factor in determining the seriousness of the offence, with the degree of harm that could have been caused to an individual victim, and the risk posed to others by the offender, being integral to the sentencing decision.

The culpability of young offenders

1.14 The Act makes special provision for young offenders found guilty of certain sexual offences – namely those in the 'ostensibly consensual' category in Part 3 - by providing that offenders aged under 18 will face a maximum penalty of 5 years detention, as opposed to the maximum 14 years for offenders aged 18 or over.

⁷ *Overarching Principles: Seriousness*, published 16 December 2004 - www.sentencing-guidelines.gov.uk

10

1.15 The age of the offender will also be significant in the sentencing exercise in relation to non-consensual offences, where no special sentencing provisions have been provided for in the legislation. Its significance is particularly acute in relation to the strict liability offences such as 'rape of a child under 13', where the maximum penalty is life imprisonment, especially if an offender is very young and the disparity in age between the offender and the victim is very small.

1.16 The youth and immaturity of an offender must always be potential mitigating factors for the courts to take into account when passing sentence. Section 44(1) of the Children and Young Person's Act 1933 provides that every court dealing with a child or young person, as an offender or otherwise, 'shall have regard to the welfare of the child or young person'.

1.17 Where the facts of a case are particularly serious, the youth of the offender will not necessarily mitigate the appropriate sentence.⁸

Sentencing of youths for offences with a lower statutory maximum

1.18 The Act makes special provision in respect of the maximum sentence that can be imposed for certain offences where committed by a person under the age of 18. The sentencing framework that applies to the sentencing of youths is also different.

1.19 Part 7 of the guideline deals with those offences within the context of the framework that currently applies. Many cases will be sentenced in the youth court but a significant proportion may also be dealt with in the Crown Court. The essential elements of each offence, relevant charging standards and any other general issues pertaining to the offence are set out in the offence guidelines.

1.20 The offences with which Part 7 is concerned are:

- a) sexual activity with a child (s.9)
- b) causing or inciting a child to engage in sexual activity (s.10)

- c) engaging in sexual activity in the presence of a child (s.11)
- d) causing a child to watch a sexual act (s.12)
- e) sexual activity with a child family member (s.25)
- f) inciting a child family member to engage in sexual activity (s.26)

1.21 In relation to each offence, the maximum sentence for an offence committed by a person under 18 years is 5 years custody compared with a maximum of 14 years or 10 years for an offender aged 18 or above. Offences under a), b), e) and f) above can be committed to the Crown Court for greater sentence.⁸ The provisions relating to the sentencing of dangerous offenders apply to young offenders with some variation and, where appropriate, cases should be sent for trial or committed for sentence in the Crown Court.

⁸ *R v Pawan Asi-Akram* [2005] EWCA Crim 1543, *R v Patrick M* [2005] EWCA Crim 1679

⁹ Powers of Criminal Courts (Sentencing) Act (PCCSA) 2000, s.91

Sexual offences

11

The Nature of the Sexual Activity

1.22 The nature of the sexual activity covered by some offences in the Act (such as 'rape' and 'assault by penetration') is quite precisely defined whilst others - for example, 'sexual activity with a child', 'sexual activity with a child family member', 'abuse of a position of trust' - are drawn very widely and cover all forms of intentional activity involving sexual touching, including penetration.

Sexual activity involves varying types and degrees of touching ranging from genital or oral penetration through to non-genital touching of the victim's clothed body.

Penetrative acts are more serious than non-penetrative acts. The fact that the offender or victim (especially the victim) is totally or partially naked makes the activity more serious.

The touching may be consensual, ostensibly consensual or nonconsensual. Where the victim's ability to consent is impaired by, for example, youth or mental incapacity, this makes the activity, regardless of its nature, more serious.

Aggravating and mitigating factors

1.23 A Council guideline¹⁰ sets out aggravating and mitigating factors that are applicable to a wide range of cases. Care needs to be taken to ensure that there is no double counting where an essential element of the offence charged might, in other circumstances, be an aggravating factor. Sentencers should refer to paragraphs 1.20 – 1.27 of the Council guideline. For ease of reference, extracts from the guideline are provided below.

¹⁰ *Overarching Principles: Seriousness*, published 16 December 2004 - www.sentencing-guidelines.gov.uk

12

Factors indicating a more than usually serious degree of harm:

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable
- Location of the offence (for example, in an isolated place)

- Offence is committed against those working in the public sector or providing a service to the public
- Presence of others e.g. relatives, especially children or partner of the victim
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

Factors indicating higher culpability:

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

Sexual offences

13

The Risk of Re-Offending

1.24 One of the purposes of sentencing set out in the Criminal Justice Act 2003¹¹ is 'the protection of the public'. Part 2 of the Sexual Offences Act 2003 strengthens the current system of registration for sex offenders and also introduces a number of new orders, some of which are available on conviction and others by application in civil proceedings to a magistrates' court. There are also a number of sentencing options, custodial and non-custodial, open to sentencers where the risk of re-offending is high.

1.25 The arrangements for registration of sex offenders (see also paragraph 1.28 below) follow automatically on conviction, and are not part of the sentencing process. The duty to give reasons for and to explain the effect of sentencing is now set out in the Criminal Justice Act 2003.¹²

1.26 If a victim personal statement has not been produced, the court should enquire whether the victim has been given the opportunity to make one. A pre-sentence report should normally be prepared before sentence is passed for any sexual offence as this may contain important information about the sexually deviant tendencies of an offender and an assessment of the likelihood of re-offending; a psychiatric report may also be appropriate. It is clearly in the interests of public protection to provide effective treatment for sex offenders at the earliest opportunity.

¹¹ section 142(1)

¹² section 174

Personal mitigation

Section 166(1) Criminal Justice Act 2003 makes provision for a sentencer to take account of any matters that 'in the opinion of the court, are relevant in mitigation of sentence'.

When the court has formed an initial assessment of the seriousness of the offence, then it should consider any offender mitigation. The issue of remorse should be taken into account at this point along with other mitigating features such as admissions to the police in interview.

Factors indicating significantly lower culpability:

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

14

Dangerous Offenders

1.27 In relation to custodial sentences, the starting point will be the assessment of dangerousness as set out in section 229 of the Criminal Justice Act 2003 since the majority of the offences in the Sexual Offences Act 2003 are 'specified' offences (as defined in section 224 and listed in Schedule 15, part 2). There are three sentencing options; discretionary life sentences, indeterminate sentences of 'imprisonment for public protection', and the redefined extended sentences.¹³

1.27.1 The criterion for the assessment of dangerousness in all cases falling within the provisions for dangerous offenders is whether the court considers that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.¹⁴ If the criteria are met, the options available depend on whether the offence is a 'serious' offence or a 'specified' offence.

1.27.2 Where a specified offence carries a maximum penalty of life imprisonment or a determinate period of 10 years or more, it is a 'serious' offence for the purposes of section 225 which applies to adult offenders. In such cases, if the risk criterion is met, a life sentence or imprisonment for an indeterminate period for public protection must be imposed.

1.27.3 In relation to "specified" offences that are not 'serious' offences and the risk criterion is met in relation to an adult offender, under section

227 the court is required to extend the period for which the offender will be subject to a licence on release from custody; the custodial element in such cases must be for a minimum of 12 months. Within the statutory limits, the period of licence must be of such length as the court considers necessary for the purposes of protecting members of the public from serious harm occasioned by the commission of further specified offences.

1.27.4 In setting the minimum term to be served within an indeterminate sentence under these provisions, in accordance with normal practice that term will usually be half the equivalent determinate sentence. Such period will normally be reduced by time spent on remand in custody.

Other orders

1.28 There are a number of orders and requirements relevant to those convicted of sexual offences. Some follow automatically on conviction and others can be applied for:

¹³ Criminal Justice Act 2003, ss.225 to 228

¹⁴ *ibid.* s.225(1)

Sexual offences

15

- *schedule 1* Inclusion of an offender's name on a sex offenders register – used for risk management by local authorities and other statutory agencies to indicate that an individual may pose an ongoing risk to children - follows automatically on conviction or caution for a sexual offence.¹⁵
- notification orders impose sex offender registration requirements on offenders living in the U.K. who have been convicted of a sexual offence overseas – available on application by complaint to a magistrates' court.¹⁶

1.29 The courts have a duty to consider making two ancillary orders that require the intervention of the sentencer, namely sexual offences prevention orders (SOPO)¹⁷ and orders disqualifying an offender from working with children.¹⁸

- sexual offences prevention orders - civil preventative orders that can be made either at the point of sentence in the Crown Court or a magistrates' court, or by complaint to a magistrates' court in respect of someone previously convicted of a sexual offence where that person's behaviour suggests the possibility of re-offending.
- disqualification orders - an order disqualifying an offender convicted of an offence against a child from working with children, which *must* (or in defined circumstances *may*) be imposed unless the court is satisfied that the offender is unlikely to commit a further offence against a child.

Community Orders

1.30 The availability of requirements able to be included within a community order, and the suitability of them for an individual offender, will be detailed in a pre-sentence report. Some options of direct relevance to sex offenders are considered below:

Sex offender treatment programmes

1.30.1 These are available both in prisons and in the community. Participation in a programme whilst in custody is voluntary, but programmes in the community can be a mandatory requirement of a community order

¹⁵ Children and Young Persons Act 1933, schedule 1 – currently subject to a cross-government review, in light of the alternative provisions that now exist to prohibit working with children

¹⁶ Sexual Offences Act 2003, s.97

¹⁷ Sexual Offences Act 2003, s.104

¹⁸ Criminal Justice and Courts Services Act 2000, ss.28 and 29, as amended by the Criminal Justice Act 2003, s.299 and sched.30

When passing sentence for a sexual offence the court must always consider whether or not it would be appropriate to make a sexual offences prevention order or an order disqualifying the offender from working with children.

16

where a PSR writer has made a recommendation and commented on the suitability of the offender for such a requirement.

Accredited treatment programmes are targeted at males, who form the overwhelming majority of sex offenders, but individual programmes are devised for female offenders.

Treatment programmes are usually only available to those who are given a long community order (normally 3 years), and may not always be available for those sentenced to shorter custodial sentences.

Curfews

1.30.2 A curfew requirement, usually associated with electronic monitoring, may be helpful in restricting an offender's right to be out in public at the same time as, for example, schoolchildren. A curfew requirement is most likely to be effective when used in conjunction with a residence requirement requiring an offender to live in approved accommodation where behaviour and compliance can be monitored. Such a requirement can be for between 2 and 12 hours per day and last up to six months.

Financial Orders

1.31 In addition to the sentence imposed for the offence(s), the following supplementary penalties should be considered:

Confiscation orders

1.31.1 Depending on the date of the offence, the Criminal Justice Act 1988 or Proceeds of Crime Act 2002 set out the circumstances in which the courts are entitled or required to make a confiscation order to recover some of the proceeds of an offender's crime. The prosecution may suggest consideration of a confiscation order but, where appropriate, the court should consider making such an order of its own volition.

Deprivation orders

1.31.2 The courts should also consider whether, in the particular circumstances of the case, it would be appropriate to make an order depriving an offender of property used for the purposes of crime.¹⁹ This will be a particularly relevant consideration where, for example,

¹⁹ Powers of Criminal Courts (Sentencing) Act 2000, s.143

When a court imposes a community order for a sexual offence, it should always consider imposing a requirement to attend a special treatment programme designed to help the offender recognise and control any

sexually deviant tendencies.

Sexual offences

17

someone convicted of a voyeurism or child pornography offence possesses a camera or a computer used to make, store or circulate sexual material connected to the offence, or where a pimp convicted of controlling prostitution uses a car to drive prostitutes to their 'patch'. A Crown Court can also make a restraint order²⁰ in respect of realisable property held by an offender who is believed to have benefited from criminal conduct, prohibiting them from dealing with it.

Compensation orders

1.31.3 The court must 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. Compensation should benefit, not inflict further harm on, the victim. Any financial recompense from the offender for a sexual offence may cause the victim additional humiliation, degradation and distress. The victim's views are properly obtained through sensitive discussion with the victim by the police or witness care unit, when it can be explained that the offender's ability to pay will ultimately determine whether, and how much, compensation is ordered. The views of the victim regarding compensation should be made known to the court and respected and, if appropriate, acknowledged at the time of sentencing. A victim may not want compensation from the offender, but this should not be assumed.

²⁰ Proceeds of Crime Act 2002, section 41

Whenever an offender has profited in some way from the sexual exploitation of others, the court should give serious consideration to the making of a confiscation order to recover the proceeds of the crime. The court should also, especially in relation to offences involving voyeurism, prostitution, pornography and trafficking, consider whether it would be appropriate to make an order depriving an offender of property used, or intended to be used, in connection with the offence.

18

Summary of General Principles:

- i. Except where otherwise indicated, the offence guidelines all relate to sentencing on conviction for a first offence after a plea of not guilty.
- ii. Starting points are based on a standard offence of its category. Aggravating and mitigating factors that are particularly relevant to each offence are listed in the individual draft offence guidelines. The list of aggravating factors is not exhaustive and the factors are not ranked in any particular order. A factor which is an ingredient of an offence cannot also be an aggravating factor. Sexual offences will often involve some form of violence as an essential element of the offence and this has been included in fixing the starting points. Where harm is inflicted over and above that necessary to commit the offence, that will be an aggravating factor.
- iii. In relation to sexual offences, the presence of generic and offence specific aggravating factors will significantly influence the type and length of sentence imposed. The generic list of aggravating and mitigating factors identified by the Sentencing Guidelines Council in its guideline on Seriousness is reproduced at para 1.23 but not for each offence.
- iv. Unless specifically stated, the starting points assume that the offender is an adult. Sentences will normally need to be reduced where the offender is sentenced as a

youth, save in the most serious cases (see para 1.16 above).

v. Specific guidance on sentencing youths for one of the child sex offences that attracts a lower statutory maximum penalty where the offender is under 18 can be found in Part 7 of the guideline.

vi. There are a large number of new or amended offences in the Sexual Offences Act 2003 for which there is no sentencing case law. The guidelines use the starting point of 5 years for the rape of an adult with no aggravating or mitigating factors (derived from *Millberry and others*²¹) as the baseline from which all other sentences have been calculated.

vii. Where a community order is the recommended starting point, the requirements to be imposed are left for the court to decide according to the particular facts of the individual case. Where a community order is the proposed starting point for different levels of seriousness of the same offence or for a second or subsequent offence of the same level of seriousness, this should be reflected by the imposition of more onerous requirements. For further information, see the Council Guideline *New Sentences: Criminal Justice Act 2003*, section B: 'Imposing a Community Sentence - The Approach'.

viii. Treatment programmes are not specifically mentioned in the guidelines. A sentencer should always consider whether, in the circumstances of the individual case and the profile of the offending behaviour, it would be sensible to require the offender to take part in a programme designed to address sexually deviant behaviour.

ix. Reference to 'non-custodial sentence' in any of the offence guidelines suggests that the court consider a community order or a fine. In most instances, an offence will have crossed the threshold for a community order. However, in accordance with normal sentencing practice, even in those circumstances a court is not precluded from imposing a financial penalty where that is determined to be the appropriate sentence.

x. In all cases, the court must consider whether it would be appropriate to make any other ancillary orders, such as an order banning the offender from working with children, an order requiring the offender to pay compensation to a victim, or an order confiscating an

²¹ [2003] 2 Cr App R (S) 31

Sexual offences

19

offender's assets or requiring the forfeiture of equipment used in connection with an offence.

The Decision Making Process

The process set out below is intended to show that the sentencing approach for sexual offences is fluid and requires the structured exercise of discretion.

1. Identify Dangerous Offenders

Most sexual offences are specified offences for the purposes of the public protection provisions in the 2003 Act. The court must determine whether there is a significant risk of serious harm by the commission of a further specified offence. The starting points in the guidelines are a) for offenders who do not meet the dangerous offender criteria and b) the basis for the setting of a minimum term within an indeterminate sentence for those who do meet the criteria.

2. Identify the appropriate starting point

Because many acts can be charged as more than one offence, consideration will have to be given to the appropriate guideline once findings of fact have been made. The sentence should reflect the facts found to exist and not just the title of the offence of which the offender is convicted.

3. Consider relevant aggravating factors, both general and those specific to the type of offence

This may result in a sentence level being identified that is higher than the suggested starting point, sometimes substantially so.

4. Consider mitigating factors and personal mitigation

There may be general or offence specific mitigating factors and matters of personal mitigation which could result in a sentence that is lower than the suggested starting point (possibly

substantially so), or a sentence of a different type.

5. Reduction for guilty plea

The court will then apply any reduction for a guilty plea following the approach set out in the Council's Guideline "*Reduction in Sentence for a Guilty Plea*"

6. Consider ancillary orders

The court should consider whether ancillary orders are appropriate or necessary. These are referred to in some of the offence guidelines.

7. The totality principle

The court should review the total sentence to ensure that it is proportionate to the offending behaviour and properly balanced

8. Reasons

When a court moves from the suggested starting points and sentencing ranges identified in the guidelines, it should explain its reasons for doing so.

20

PART 2: NON-CONSENSUAL OFFENCES

2.1 The offences in this category include 'rape', 'assault by penetration', 'sexual assault' and 'causing' a victim to 'take part in sexual activity without consent'. Some offences are generic; others protect victims who are under 13 or who have a mental disorder impeding choice.

2.2 The Act creates a rule of law that there is no defence of consent where sexual activity is alleged against a child under 13 years of age or against a person who has a mental disorder impeding choice.²²

The Harm Caused by Non-Consensual Offences

2.3 All non-consensual offences involve the violation of the victim's sexual autonomy and will result in harm.

2.4 The seriousness of the violation may depend on a number of factors but the nature of the sexual behaviour will be the primary indicator of the degree of harm caused in the first instance.

2.5 The principle that offences involving sexual penetration are more serious than non-penetrative sexual assault is reflected in the higher maximum penalty accorded in statute to these offences.

The relationship between the victim and the offender

2.6 The guideline judgment in *Millberry* established the principle that sentencers should adopt the same starting point for 'relationship rape' or 'acquaintance rape' as for 'stranger rape'. The Council proposes that the same principle should apply to all non-consensual offences.

The age of the victim

2.7 The extreme youth or old age of a victim should be an aggravating factor.

2.8 In addition, in principle, the younger the child and the greater the age gap between the offender and the victim, the higher the sentence should be.

2.9 However, the youth and immaturity of the offender must also be taken into account in each case.

2.10 The court in *Millberry* adopted the principle that a sexual offence against a child is more serious than the same offence perpetrated against an adult and attracts a higher starting point. No distinction was

²² See, for example, the offences set out in Sexual Offences Act 2003, ss.5-8 and 30-33

21

made between children aged 13 and over but under 16, and those aged under 13.

2.11 Special weight has subsequently been accorded to the protection of very young children by the introduction of a range of strict liability offences in the Act specifically designed to protect children under 13:

the offences of 'rape of a child under 13', 'assault by penetration of a child under 13', and 'causing a child under 13 to engage in sexual activity' where the activity included sexual penetration carry the maximum life penalty.

the maximum penalty for the new offence of 'sexual assault of child under 13' is 14 years, as opposed to a maximum of 10 years for the generic 'sexual assault' offence.

2.12 In keeping with the principles of protection established in the Act, the Council proposes that:

higher starting points in cases involving victims under 13 should normally apply, but there may be exceptions.

particular care will need to be taken when applying the starting points in certain cases, such as those involving juvenile offenders or offenders whose judgement is impaired by a mental disorder.

proximity in age between a young victim and an offender is also a relevant consideration.

The extreme youth or old age of the victim of a sexual offence should always be an aggravating factor.

In principle, the younger the child victim of a sexual offence is, and the greater the age gap between the offender and the victim, the higher the sentence should be.

The fact that the victim of a sexual offence is a child under 13 should normally trigger a higher starting point for sentencing, but there may be exceptions.

Particular care should be taken when applying the starting points in certain cases, such as those involving juvenile offenders or offenders whose judgement is impaired.

Proximity in age between a young victim and an offender can be a mitigating factor.

22

Victims with a mental disorder

2.13 The Act introduces three groups of offences specifically designed to protect vulnerable adults who have a mental disorder. The aim is to protect all victims with a mental disorder, whether or not they have the capacity to consent to sexual activity, but the legislation has been drafted to make a distinction between:

(i) those persons who have a mental disorder 'impeding choice' - persons whose mental functioning is so impaired at the time of the sexual activity that they are 'unable to refuse';

(ii) those who have a mental disorder (but not falling within (i) above²³) such that any ability to choose is easily overridden and agreement to sexual activity can be secured through relatively low levels of

inducement, threat or deception; and

(iii) those who have a mental disorder, regardless of their ability to choose whether or not to take part in sexual activity, whose actions may be influenced by their familiarity with, or dependence upon, a care worker.

(The latter two groups are considered in Part 3 of the draft guideline, which relates to offences involving ostensible consent.)

2.14 The maximum penalty for non-consensual offences involving victims with a mental disorder is high, indicating the relative seriousness of such offending behaviour.

2.15 In line with the thinking relating to the protection of children under 13, the fact that the victim has a mental disorder impeding choice should always aggravate an offence, bearing in mind that it will have been proven that the offender knew, or could reasonably have been expected to know, that the victim had a mental disorder impeding choice.

²³ that is, it is not of such a character that it "impedes choice" within the meaning of the Act

The starting points for sentencing for offences involving victims with a mental disorder impeding choice should be higher than in comparable cases where the victim has no such disability.

Sexual offences

23

The Offender's Culpability in Non-Consensual Offences

2.16 All the non-consensual offences involve a high level of culpability on the part of the offender, since that person will have acted either deliberately without the victim's consent or without giving due consideration to whether the victim was able to or did, in fact, consent.

2.17 The planning of an offence indicates a higher level of culpability than an opportunistic or impulsive offence.

2.18 In *Millberry*, the Court of Appeal established that the offender's culpability in a case of rape would be 'somewhat less' in cases where the victim had consented to sexual familiarity with the offender on the occasion in question than in cases where the offender had set out with the intention of committing rape.

2.19 The same principle should apply to the generic offences of 'assault by penetration' and 'sexual assault'. Save where there is close proximity of age between the offender and the victim, it should not apply to the equivalent offences relating to victims who are under 13 or who have a mental disorder impeding choice, given the presumption inherent in these offences that the victim cannot in law consent to any form of sexual activity.

2.20 Whether the offender is an acquaintance, an ex-partner or a current partner is not, of itself, relevant to consideration of the starting point for sentence. Any rape is a traumatic and humiliating experience and, although the particular circumstances in which the rape takes place may affect the sentence imposed, the starting point for sentencing should be the same.

2.21 The fact that a rape was perpetrated by someone known to the victim

and that it was immediately preceded by mutually agreed sexual activity must have some relevance for sentencing purposes.

2.22 Anyone involved in consensual non-penetrative activity has the right to refuse to engage in penetrative sex and an offender who takes no notice of a victim's wishes is guilty of rape.

Where the victim is over the age of 16, an offender's culpability for a sexual offence will be less if the offender and victim were engaged in consensual sexual activity immediately before the offence took place.

24

Aggravating Factors

The Council suggests that, in addition to the aggravating factors listed in the Guideline on Seriousness (see para. 1.23 above), additional factors that would aggravate a non-consensual sexual offence include –

Mitigating Factors

The Council suggests that, in addition to the mitigating factors listed in the Guideline on Seriousness, additional factors that would mitigate a nonconsensual sexual offence include –

- **youth or immaturity of the offender**
- **if the offender is a young offender, a reasonable belief that the victim was aged 16 or over**
- **history of intimidation or coercion or grooming**
- **threats to prevent the victim reporting the incident, especially where the victim is a child or a person with a mental disorder**
- **covert use of drugs, alcohol or other substance**
- **history of previous assaults on the same victim**
- **more than one offender acting together**
- **proved or admitted abduction or detention (unless separately charged)**
- **offender is aware that he or she is suffering from a sexually transmitted infection (where the nature of the offence could involve transmission)**
- **victim is forced to violate another person, who is also a victim (especially in familial situations)**

Sexual offences

25

PART 2A: RAPE AND ASSAULT BY PENETRATION

2A.1 The guideline judgment of *Millberry*, established that:

the starting point for the rape (anal or vaginal) of an adult victim, where there were no aggravating or mitigating factors, should be 5 years;

the starting point for the rape (anal or vaginal) of a child, and rape (anal or vaginal) of an adult where certain specified aggravating factors were involved, should be 8 years.

2A.2 In 2004, the vast majority (72%) of custodial sentences were for more than 5 years, with 86% being over 4 years. The average sentence was 7 ½ years. There is no reason to suppose that the average length of sentence will be reduced as a result of any of the measures in the Act or the recommendations for starting points set out in these guidelines.

2A.3 The Act has redefined the offence of rape so that it now includes nonconsensual penile penetration of the mouth and has also introduced a

new offence of 'assault by penetration'. Parliament agreed the same maximum penalty of life imprisonment for these offences.

2A.4 It is impossible to say that any one form of non-consensual penetration is inherently a more serious violation of the victim's sexual autonomy than another. The Council therefore proposes that the sentencing starting points established in *Millberry* should apply to all nonconsensual offences involving penetration of the anus or vagina or penile penetration of the mouth.

5 years is intended to be the starting point for a case involving an adult victim raped by a single offender in a case that involves *no aggravating factors at all*.

8 years is the suggested starting point where any of the particular aggravating factors identified in the draft guidelines are involved.

2A.5 In addition:

where identified aggravating factors exist and the victim is a child, the recommended starting point is 10 years.

for the rape of a child under 13 where there are no aggravating factors a sentencing starting point of 10 years is recommended, rising to 13 years for cases involving any of the particular aggravating factors identified in the guideline.

the same starting points apply where the victim has a mental disorder impeding choice.

2A.6 These are starting points. The existence of aggravating factors may significantly increase sentence. The new sentences for public protection are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.

26

RAPE

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases of rape.

a) As a result, imprisonment for life or an order of imprisonment for public protection will be imposed in some cases. Both sentences are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.

b) Life imprisonment is the maximum for the offence. Such a sentence may be imposed either as a result of the offence itself where a number of aggravating factors are present or because the offender meets the dangerousness criterion.

c) Within any indeterminate sentence, the minimum term will generally be half the appropriate determinate sentence. The starting points will be relevant, therefore, to the process of fixing of any minimum term that may be necessary.

2. Rape includes penile penetration of the mouth.

3. There is no distinction in the starting points for penetration of the vagina, anus or mouth.

4. All the non-consensual offences involve a high level of culpability on the part of the offender, since that person will have acted either deliberately without the victim's consent or without giving due care to whether the victim was able to or did, in fact, consent.
5. The planning of an offence indicates a higher level of culpability than an opportunistic or impulsive offence.
6. An offender's culpability will be less if the offender and victim were engaged in consensual sexual activity immediately before the offence took place.
7. The seriousness of the violation of the victim's sexual autonomy may depend on a number of factors but the nature of the sexual behaviour will be the primary indicator of the degree of harm caused in the first instance.
8. The presence of any of the general aggravating factors identified in the Council Guideline on Seriousness or any of the additional factors identified in the guidelines will indicate a sentence above the normal starting point.

Sexual offences

27

RAPE

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CJA 2003

1. Rape (section 1): Intentional non-consensual penile penetration of the vagina, anus or mouth

2. Rape of a child under 13 (section 5): Intentional penile penetration of the vagina, anus or mouth of a person under 13

Maximum penalty for both offences: **Life imprisonment**

Type/nature of activity Starting points

Rape accompanied by any one of the following: abduction or detention; offender aware that he is suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; offence motivated by prejudice (race, religion, sexual orientation, physical disability); sustained attack

13 years if the victim is under 13

10 years if the victim is a child aged 13 or over but under 16

8 years if the victim is 16 or over

Single offence of rape by single offender with no aggravating or mitigating factors

10 years if the victim is under 13

8 years if the victim is 13 or over but under 16

5 years if the victim is 16 or over

Additional aggravating factors Additional mitigating factors

1. Offender ejaculated or caused victim to ejaculate
2. Background of intimidation or coercion
3. Use of drugs, alcohol or other substance to facilitate the offence
4. Threats to prevent victim reporting the incident
5. Proved or admitted abduction or detention (unless separately charged)
6. Offender aware that he is suffering from

a sexually transmitted infection

7. Pregnancy results

Where the victim is aged 16 or over - Victim engaged in consensual sexual activity with the offender immediately before the offence

Where the victim is under 16 – Sexual activity between two children (one of whom is the offender) was mutually agreed and experimental

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

28

ASSAULT BY PENETRATION

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases of assault by penetration. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm. Within any indeterminate sentence, the minimum term will generally be half the appropriate determinate sentence. The starting points will be relevant, therefore, to the process of fixing of any minimum term that may be necessary.
2. This offence involves penetration of the vagina or anus only, with objects or body parts. It may include penile penetration where the means of penetration is only established during the trial.
3. All the non-consensual offences involve a high level of culpability on the part of the offender, since that person will have acted either deliberately without the victim's consent or without giving due care to whether the victim was able to or did, in fact, consent.
4. The planning of an offence indicates a higher level of culpability than an opportunistic or impulsive offence.
5. An offender's culpability will be less if the offender and victim were engaged in consensual sexual activity immediately before the offence took place.
6. The seriousness of the violation of the victim's sexual autonomy may depend on a number of factors but the nature of the sexual behaviour will be the primary indicator of the degree of harm caused in the first instance.
7. The presence of any of the general aggravating factors identified in the Council Guideline on Seriousness or any of the additional factors identified in the guidelines will indicate a sentence above the normal starting point.
8. Brief penetration with fingers, toes or tongue may result in a significantly lower sentence where no physical harm is caused to the victim.

Sexual offences

29

ASSAULT BY PENETRATION

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CJA 2003

1. **Assault by penetration** (section 2): Non-consensual penetration of the vagina or anus with objects or body parts.
2. **Assault of a child under 13 by penetration** (section 6): Intentional penetration of

the vagina or anus of a person under 13 with objects or body parts.

Maximum penalty for both offences: **Life imprisonment**

Type/nature of activity Starting points

Penetration with an object or body part, accompanied by any one of the following; use of drugs, alcohol or other substance to facilitate the offence; threats to prevent victim reporting the incident; proved abduction or detention (unless separately charged); more than one offender acting together; abuse of trust; offence motivated by prejudice (race, religion, sexual orientation, physical disability); sustained attack

13 years if the victim is under 13

10 years if the victim is 13 or over but under 16

8 years if the victim is 16 or over

Penetration with an object - in general, the larger or more dangerous the object, the higher the sentence should be

7 years if the victim is under 13

5 years if the victim is 13 or over but under 16

3 years if the victim is 16 or over

Penetration with a body part (fingers or tongue) where no physical harm is sustained by the victim

5 years if the victim is under 13

4 years if the victim is 13 or over but under 16

2 years if the victim is 16 or over

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Threats to prevent victim reporting the incident
4. Proved abduction or detention (unless separately charged)
5. Offender aware that he or she is suffering from a sexually transmitted infection
6. Physical harm arising from the penetration

Where the victim is aged 16 or over -Victim engaged in consensual sexual activity with the offender immediately before the offence

Where the victim is under 16 – Sexual activity between two children (one of whom is the offender) was mutually agreed and experimental

Penetration is minimal or for a short duration

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

30

Sexual offences

PART 2B: SEXUAL ASSAULT

2B.1 The new offence of 'sexual assault' covers all forms of sexual touching. The maximum penalty is 10 years imprisonment where the victim is an adult and 14 years where the victim is a child under 13.

2B.2 Various activities previously covered by the offence of 'indecent assault' now fall within the definitions of other offences in the Act:

Forcible penile penetration of the mouth now comes within the definition of 'rape'.

Penetration of the vagina or anus with a body part or other object is covered by the offence of 'assault by penetration'.

All forms of ostensibly consensual sexual activity involving children under 16 (who cannot in law give any consent to prevent an act being an assault) now fall within a range of child sex offences.

Vulnerable adults subjected to a sexual assault are now protected by the offences of 'sexual activity with a person with a mental disorder impeding choice' and 'causing or inciting a person with a mental disorder impeding choice to engage in sexual activity'.

2B.3 The offence of 'sexual assault' will largely be used in relation to the lesser forms of assault that would have previously fallen at the lower end of the penalty scale.

2B.4 The exact nature of the sexual activity should be the key factor in assessing the seriousness of a sexual assault and should be used as the starting point from which to begin the process of assessing the overall seriousness of the offending behaviour.

2B.5 The presence of aggravating factors can make an offence significantly more serious than the nature of the activity alone might suggest.

The nature of the sexual activity will be the primary factor in assessing the seriousness of an offence of sexual assault.

In all cases, the fact that the offender has ejaculated or has caused the victim to ejaculate will increase the seriousness of the offence.

SEXUAL ASSAULT

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases of sexual assault. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The new offence of 'sexual assault' covers all forms of sexual touching and therefore covers a huge range of offending behaviour. Some offences may justify a lesser sentence where the actions were more offensive than threatening and comprised a single act rather than more persistent behaviour.
3. The nature of the sexual activity will be the primary factor in assessing the seriousness of an offence of sexual and should be used as the starting point from which to begin the process of assessing the overall seriousness of the offending behaviour.

4. The presence of aggravating factors can make an offence significantly more serious than the nature of the activity alone might suggest.

5. For the purpose of the guideline, types of sexual touching are broadly grouped in terms of seriousness. An offence may involve activities from more than one group. In all cases, the fact that the offender has ejaculated or has caused the victim to ejaculate will increase the seriousness of the offence.

Sexual offences

33

SEXUAL ASSAULT

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CJA 2003

1. Sexual assault (section 3): Non-consensual sexual touching

Maximum penalty: **10 years**

2. Sexual assault of a child under 13 (section 7): Intentional sexual touching of a person under 13

Maximum penalty: **14 years**

Type/nature of activity Starting points

Contact between naked genitalia of offender and naked genitalia, face or mouth of the victim

5 years if the victim is under 13

3 years if the victim is aged 13 or over

Contact between naked genitalia of offender and another part of victim's body

Contact with naked genitalia of victim by offender using part of his or her body other than the genitalia, or an object

Contact between either the clothed genitalia of offender and naked genitalia of victim or naked genitalia of offender and clothed genitalia of victim

2 - 4 years if the victim is under 13

26 weeks - 2 years if the victim is aged 13 or over

Contact between part of offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)

26 weeks if the victim is under 13

Community order if the victim is aged 13 or over

Additional aggravating factors Additional mitigating factors

1. Offender ejaculated or caused victim to ejaculate

2. Background of intimidation or coercion

3. Use of drugs, alcohol or other substance to facilitate the offence

4. Threats to prevent victim reporting the incident

5. Proved or admitted abduction or detention (unless separately charged)

6. Offender aware that he or she is suffering from a sexually transmitted infection

Where the victim is aged 16 or over - Victim engaged in consensual sexual activity with the offender immediately before the offence

Where the victim is under 16 - Sexual activity between two children (one of whom is the offender) was mutually agreed and experimental

Youth and immaturity of the offender

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

34

PART 2C: CAUSING OR INCITING SEXUAL ACTIVITY

2C.1 There are three offences in this category covering a wide range of sexual activity:

'causing a person to engage in sexual activity without consent'

'causing or inciting a child under 13 to engage in sexual activity'

'causing or inciting a person with a mental disorder impeding choice to engage in sexual activity'

2C.2 The maximum penalty for the second and third of these offences is the same whether the sexual activity is *caused* or *incited*. This recognises that, with vulnerable victims, incitement to indulge in sexual activity is, of itself, likely to result in harm.

2C.3 Deciding sentence may be complex where an incited offence did not actually take place. While the effect of the incitement is of no relevance to whether or not the offence incited was *committed*, it is likely to be relevant to the sentence imposed.

2C.4 Accordingly, the starting point should be the same whether or not the sexual activity takes place. Where it does not take place, the harm (and sometimes the culpability) is likely to be less and the sentence should be reduced appropriately to reflect this.

2C.5 If the activity does not take place because the offender desists of his or her own accord, culpability (and sometimes harm) will be reduced. This should be treated as a mitigating factor for sentencing purposes and does not affect the principle that starting points for 'causing' or 'inciting' an activity should be the same.

2C.6 If the offender is prevented from achieving their aim by reasons outside their control, culpability may not be reduced but it is possible that the harm will be less than if the activity had taken place.

2C.7 Culpability must be the primary indicator for sentencing in such cases but it would make no sense for the courts to pass the same sentence for an incited offence that did not actually take place as it would for the substantive offence itself. In these circumstances, the sentence should be calculated using the starting point for the substantive offence, taking account of the nature of the harm that would have been caused had the offence taken place and the degree to which an intended victim may have suffered as a result of knowing or believing that the incited offence would take place, but nevertheless reflecting the facts if no actual harm has been caused to a victim.

Sexual offences

35

2C.8 The offence of 'causing a person to engage in sexual activity without consent' covers situations where, for example, a victim is forced to carry out a sexual act involving his or her own person, such as self-masturbation, or to engage in sexual activity with a third party, or situations in which the victim is forced to engage in sexual activity with the offender.

2C.9 The underlying purpose is to create offences that carry the same level of penalties for what amounts to the same type of offending behaviour, regardless of the gender or sexual orientation of the offender. This is reflected in the recommended starting points for penetrative acts charged within this category.

2C.10 The two main factors determining the seriousness of an offence of 'causing or inciting sexual activity without consent' will be the nature of the sexual activity (as an indication of the degree of harm caused, or likely to be caused, to the victim) and the level of the offender's culpability. Culpability will be higher if the victim is forced to engage in sexual activity with the offender, or with another victim, than in cases where there is no sexual contact between the victim and the offender or anyone else. In all cases, the degree of force or coercion used by the offender will be an indication of the offender's level of culpability and may also exacerbate the harm suffered by the victim.

2C.11 The same sentencing starting points for offences involving nonconsensual penetration of the vagina or anus of another person will apply regardless of whether the offender is male or female. There should be no differentiation between the starting point for 'rape' and an offence where a female offender causes or incites a non-consenting male to penetrate her vagina, anus or mouth. Similarly, where a victim is caused or incited to take part in penetrative activities with a third party or where the offender causes or incites other forms of sexual activity, there is no reason to differentiate sentence for male and female offenders.

The starting points for sentencing for sexual activity that is caused or incited by the offender without the consent of the victim(s) should mirror those for similar activity perpetrated within the offences of 'rape', 'assault by penetration' and 'sexual assault'.

- **The starting point should be the same whether an offender causes an act to take place or incites an act which does not take place.**
- **A reduction will generally be appropriate where the incited activity does not take place.**
- **Where an offender voluntarily desists from any action he is taking to incite a sexual act, or personally and of his own volition intervenes to prevent a sexual act from taking place, this will be an additional mitigating factor.**
- **Whether or not the sexual activity takes place, the degree of harm done to the victim will be a material consideration when considering the sentence**

36

CAUSING SEXUAL ACTIVITY WITHOUT CONSENT

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases of causing sexual activity. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of

serious harm.

2. The same degree of seriousness applies whether an offender causes an act to take place, incites an act that actually does take place, or incites an act that does not take place only because it is prevented by factors beyond the control of the offender.

3. The same starting points apply whether the activity was caused or incited and whether or not the incited activity took place, but some reduction will generally be appropriate when the incited activity does not, in fact, take place.

4. Where an offender voluntarily desists from any action he is taking to incite a sexual act or personally, and of his own volition, intervenes to prevent a sexual act that he has incited from taking place, this should be treated as a mitigating factor.

5. The effect of the incitement is relevant to the length of the sentence to be imposed. The courts should take into account the degree to which the intended victim may have suffered as a result of knowing or believing that an offence would take place.

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the guideline take account of this.

Sexual offences

37

CAUSING SEXUAL ACTIVITY WITHOUT CONSENT

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003

1. Causing a person to engage in sexual activity without consent (section 4): Forcing someone else to perform a sexual act on him or herself or another person.

Maximum penalty: **Life imprisonment** if the activity involves penetration; **10 years** if the activity does not involve penetration

2. Causing or inciting a child under 13 to engage in sexual activity (section 8: Causing or inciting a person under 13 to perform a sexual act on him or herself or another person

Maximum penalty: **Life imprisonment** if the activity involves penetration; **14 years** if the activity does not involve penetration

3. Causing or inciting a person with a mental disorder impeding choice, to engage in sexual activity (section 31): Intentionally causing or inciting a person with a mental disorder impeding choice to engage in sexual activity.

Maximum penalty: **Life imprisonment** if the activity involves penetration; **14 years** if the activity does not involve penetration

Type / nature of activity Starting points:

PENETRATIVE ACTIVITY

Penetration with any of the aggravating factors 5 or 6 below; more than one offender acting together; abuse of trust; offence motivated by prejudice (race, religion, sexual orientation, physical disability); sustained attack
13 years if the victim is a child under 13 or a person with a mental disorder

10 years if victim is 13 or over but under 16

8 years if the victim is 16 or over

Single offence of penetration of or by single offender with no aggravating or mitigating factors

7 years if the victim is a child under 13 or a person with a mental disorder

5 years if victim is 13 or over but under 16

3 years if victim is 16 or over

NON-PENETRATIVE ACTIVITY

Contact between naked genitalia of offender and naked genitalia of victim, or causing two or more victims to engage in such activity with each other, or causing

victim to masturbate him/herself

5 years if the victim is a child under 13 or a person with a mental disorder

3 years

Contact between naked genitalia of offender and another part of victim's body or causing two or more victims to engage in such activity with each other

Contact with naked genitalia of victim by offender using part of his body other than the genitalia or an object or causing two or more victims to engage in such activity with each other

Contact between either the clothed genitalia of offender and naked genitalia of victim between naked genitalia of offender and clothed genitalia of victim, or causing two or more victims to engage in such activity with each other

2-4 years if the victim is a child under 13 or a person with a mental disorder

26 weeks – 2 years

Contact between part of offender's body (other than the genitalia) with part of victim's body (other than the genitalia)

26 weeks if the victim is a child under 13 or a person with a mental disorder

Community order

Additional aggravating factors Additional mitigating factors

1. Offender ejaculated or caused victim to ejaculate

2. History of intimidation or coercion

3. Use of drugs, alcohol or other substance to facilitate the offence

4. Threats to prevent victim reporting the incident

5. Proved or admitted abduction or detention (unless separately charged)

6. Offender aware that he/she may be transmitting a sexual infection

Where the victim is aged 16 or over - Victim engaged in consensual sexual activity with the offender immediately before the offence

Where the victim is under 16 or has a mental disorder - Sexual activity between two children or two persons with a mental disorder (one of whom is the defendant) was mutually agreed and experimental

38

Sexual offences

39

PART 2D: OTHER NON-CONSENSUAL OFFENCES

2D.1 Four other offences fall within the general category of non-consensual offences:

'engaging in sexual activity in the presence of a child'

'engaging in sexual activity in the presence of a person with a mental disorder impeding choice'

'causing a child to watch a sexual act'

'causing a person with a mental disorder impeding choice to watch a sexual act'

2D.2 These are offences that relate to lesser forms of offending behaviour than offences that involve physical touching of the victim, but they nevertheless attract maximum penalties of 10 years imprisonment in recognition of the fact that the victims are particularly vulnerable.

2D.3 The guidelines are predicated on the principle that the more serious the nature of the sexual activity a victim is forced to witness, the higher the sentencing starting point should be.

2D.4 These offences can cover a very wide range of sexual activity and an equally wide range of circumstances in which a victim is subjected to witnessing it.

2D.5 However, any form of sexual activity in the presence of a child or person with a mental disorder impeding choice may well be serious enough to merit a custodial starting point. It is always within the power of the court in an individual case to consider whether there are particular factors that mitigate sentence and should move it back below the custodial threshold.

The same starting points for sentencing should apply in relation to the various levels of activity falling within the offences of 'engaging in sexual activity in the presence of a child' and 'engaging in sexual activity in the presence of a person with a mental disorder impeding choice'. Similarly, the same starting points should apply in relation to the offences of 'causing a child to watch a sexual act' and 'causing a person with a mental disorder impeding choice to watch a sexual act.'

An offence involving an offender who intentionally commits a sexual act in the presence of a child or a person with a mental disorder impeding choice in order to obtain sexual gratification will potentially be serious enough to merit a custodial sentence. In an individual case the court will need to consider whether there are particular mitigating factors that move the sentence below the custodial threshold.

40

SEXUAL ACTIVITY IN THE PRESENCE OF ANOTHER PERSON

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases of causing sexual activity. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. These offences involve intentionally, and for the purpose of obtaining sexual gratification, engaging in sexual activity in the presence of person under 16, or a person with a mental disorder, knowing or believing that person to be aware of the activity.
3. The guidelines are predicated on the principle that the more serious the nature of the sexual activity a victim is forced to witness, the higher the sentencing starting point should be.
4. These offences will potentially be serious enough to merit a custodial sentence. In an individual case the court will need to consider whether there are particular mitigating factors that move the sentence below the custodial threshold.

Sexual offences

41

SEXUAL ACTIVITY IN THE PRESENCE OF ANOTHER PERSON

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

1. **Engaging in sexual activity in the presence of a child** (section 11)

Maximum penalty: **10 years** (5 years if offender is under 18)

2. **Engaging in sexual activity in the presence of a person with a mental disorder impeding choice** (section 32)

Maximum penalty: **10 years**

Type/nature of activity Starting points

Consensual intercourse or other forms of consensual penetration

2 years

Masturbation (of oneself or another person)

18 months

Consensual sexual touching involving naked genitalia

12 months

Consensual sexual touching of naked body parts but not involving naked genitalia

26 weeks**Additional aggravating factors Additional mitigating factors**

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Threats to prevent victim reporting the incident
4. Proved or admitted abduction or detention (unless separately charged)

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

42

CAUSING OR INCITING ANOTHER PERSON TO WATCH A SEXUAL ACT

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. These offences include intentionally causing or inciting, for the purpose of sexual gratification, a person under 16, or a person with a mental disorder to watch sexual activity or look at a photograph or pseudo-photograph of sexual activity.
3. The guidelines are predicated on the principle that the more serious the nature of the sexual activity a victim is caused to witness, the higher the sentencing starting point should be.
4. These offences will potentially be serious enough to merit a custodial sentence. In an individual case the court will need to consider whether there are particular mitigating factors that move the sentence below the custodial threshold.
5. The same starting points apply whether the activity was caused or incited and whether or not the incited activity took place.

Sexual offences

43

CAUSING OR INCITING ANOTHER PERSON TO WATCH A SEXUAL ACT

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

1. Causing a child to watch a sexual act (section 12)

Maximum penalty: **10 years (5 years** if offender is under 18)

2. Causing a person with a mental disorder impeding choice, to watch a sexual act (section 33)

Maximum penalty: **10 years**

Type/nature of activity Starting points

Moving images of people engaged in sexual activity involving penetration

18 months

Still images of people engaged in sexual activity involving penetration

12 months

Moving images of people engaged in sexual activity other than penetration

26 weeks

Still images of people engaged in sexual activity other than penetration

Community order

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Threats to prevent victim reporting the incident
4. Proved or admitted abduction or detention (unless separately charged)
5. Images of violent activity

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

44

Sexual offences

45

PART 3: OFFENCES INVOLVING OSTENSIBLE CONSENT

3.1 There are several groups of offences in the Act that involve a compliant or willing partner. Any sexual activity involving a person below the age of consent is unlawful notwithstanding any ostensible consent. In addition, there are circumstances where sexual activity takes place with the ostensible consent of both parties but where one of the parties is in such a great position of power over the other that the sexual activity is wrong.

3.2 There are two categories of offence within this broad grouping:

- sexual activity with children under 16 - or under 18 where there is an imbalance of power (for example, within the family unit) or an abuse of trust (for example, between a teacher and a pupil) ; and
- sexual activity with adults who have the capacity to consent but who, by reason of, or for reasons related to, a mental disorder are susceptible to coercion and exploitation

46

Part 3A: Offences Involving Children

3A.1 In addition to the range of non-consensual sexual offences designed to protect children under 13, there are three further groups of offences that cover all forms of ostensibly consensual sexual activity involving

children under 16 and also provide additional protection for older children:

(i) 'Child sex offences' (covering unlawful sexual activity with children under 16) including 'arranging or facilitating the commission of a child sex offence';

(ii) 'Familial child sex offences' (relating to offences committed by members of the child's family or household and primarily intended to ensure that charges can be brought in relation to victims aged 16 or 17); and

(iii) 'Abuse of a position of trust' (another offence which enables the prosecution of sexual activity involving victims aged 16 or 17, in this case where the offender has a relationship of trust with the child, such as that of a teacher or care worker).

3A.2 A 'reasonable' belief that the child was aged 16 or over is a defence to all the 'child sex offences', provided the child was, in fact, aged 13 or over. With the same proviso, a reasonable belief that the victim was aged 18 or over is a defence to the 'familial child sex offences' and the 'abuse of trust offences'.

3A.3 The maximum penalties for the offences in these groups give some indication of their relative seriousness and of the factors that increase the seriousness of an offence.

3A.4 Conversely, the lower maximum penalties for offenders aged under 18 indicate that the offence is less serious when the age gap between the victim and the offender is relatively narrow. The young age of an offender may often be seen as a mitigating factor for sentencing. This principle has already largely been catered for in the child sex offences by the provision in statute of lower maximum penalties for young offenders, which are designed to take account of their immaturity. However, the extreme youth of an offender and close proximity in age between the offender and the victim are both factors that will still be relevant for the court to consider when deciding sentence.

The significance of family relationships

3A.5 'Family relationships', as defined in the Act in relation to the offences of 'sexual activity with a child family member' and 'inciting a child family member to engage in sexual activity', are not restricted to blood relationships and include relationships formed through adoption, fostering, marriage or partnership.

Sexual offences

47

3A.6 Some relationships, such as parents and siblings, are automatically covered. Others, such as step-parents and cousins, fall within the definition of 'family member' only if they live, or have lived, in the same household as the child or if they are, or have been, regularly involved in caring for, training, supervising or being in sole charge of the child.

3A.7 More distant 'relationships', such as lodgers and au pairs are covered only if they were living in the same household as the child at the time of the offence and were regularly involved in caring for, training, supervising or being in sole charge of the child at that time.

3A.8 As the abuse of trust or power is inherent in these offences and cannot be treated as an aggravating factor, the relevance of the relationship for sentencing purposes is unclear.

3A.9 These offences bring ostensibly consensual sexual activity between persons over the age of consent (which would not otherwise be unlawful) within the scope of the criminal law. All children, even those aged 16 or 17, are potentially vulnerable to exploitation within the family unit and the offences attract the same maximum penalty regardless of the age of the victim. The Council's view is that the worst aspect of child sexual abuse within the family is that the offender is one of the very people to whom the child would normally expect to turn for support and protection.

3A.10 Victims aged 16 or 17 may have been 'groomed' by a family member from a very young age before sexual activity takes place. Evidence of grooming can be treated as an aggravating factor for sentencing purposes, as can the extreme youth of a victim. However, the closeness of the relationship in such cases increases the seriousness of the offence regardless of the age of the victim and should be reflected in the sentencing starting points.

3A.11 There is a clear difference between a young person being coerced into sexual activity by an adult who holds a position of trust in his or her life outside the family unit and being coerced into a sexual relationship by someone (adult or child) who holds a position of trust within the family unit.

3A.12 The starting points for sentencing where the child is aged 13 or over but under 16 should be higher than for the equivalent child sex offences to reflect the inherent abuse of trust. The amount of enhancement should vary to reflect the wide range of 'familial' relationships covered by this offence - on the basis that abuse by a parent is more serious than abuse by, for example, a foster sibling or lodger.

48

3A.13 Where a victim is over the age of consent, the starting points should only be significant where the offender is a close relative and where the abuse of a familial relationship is most serious. Where the activity is commenced when the victim is already aged 16 or 17 and the sexual relationship is unlawful only because it takes place within a 'familial' setting (e.g. the activity is between foster siblings or involves an 'aupair' or lodger) the starting points for sentencing should be lower than those for 'sexual activity with a child' and should be matched with the starting points for the 'abuse of trust' offences.

Abuse of a position of trust

3A.14 These offences criminalise sexual activity by adults over 18 with children under 18 in situations where the adults are looking after the children in educational establishments or in various residential settings, or where their duties involve them in the regular unsupervised contact of children in the community.

3A.15 The maximum penalty for the offences of abuse of trust (5 years) is

relatively low because the offences are primarily designed to protect young people who are over the legal age of consent (i.e. aged 16 or 17) from being persuaded to engage in sexual activity that would not be criminal except for the offender's position of trust in relation to the victim.

3A.16 In view of the fact that these offences will only be charged where the victim is aged 16 or 17, the sentencing starting points in the guidelines are significantly lower than those for a child sexual offence involving the same type of sexual activity. The potential harm caused to victims who have been coerced and manipulated into undesirable sexual relationships has not been underestimated and evidence of serious coercion, threats, or trauma would all be aggravating factors that would move a sentence well beyond the starting point. However, some

Where the victim of a familial child sex offence is aged 16 or 17 when the sexual activity is commenced and the sexual relationship is unlawful only because it takes place within a 'familial' setting, the starting points for sentencing should be in line with those for the generic 'abuse of trust' offences.

Evidence that a victim has been 'groomed' by the offender to agree to take part in sexual activity will aggravate sentence.

The starting points for sentencing for the familial child sex offences should be between 25% and 50% higher than those for the generic child sex offences in all cases where the victim is aged 13 or over but under 16; the closer the familial relationship, using the statutory definitions as a guide, the higher the increase that should be applied.

Sexual offences

49

relationships caught within the scope of these offences, although unlawful, will be wholly consensual. The length of time over which a relationship has been sustained and the proximity in age between the parties could point to a relationship born out of genuine affection. Each case must be considered carefully on its own facts.

Assessing the seriousness of sexual offences against children

3A.17 The culpability of the offender will be the primary indicator of offence seriousness, and the nature of the sexual activity will provide a fundamental guide as to the seriousness of the harm caused to the victim, for any of the offences in the three categories involving ostensibly consensual activity with children. Other factors will include:

the age and degree of vulnerability of the victim - as a general indication, the younger the child, the more vulnerable he or she is likely to be, although older children may also suffer serious and long term psychological damage as a result of sexual abuse

the age gap between the child and the offender

the youth and immaturity of the offender must also be taken into account.

except where it is inherent in an offence, any breach of trust arising from a family relationship between the child and the offender or from the offender's professional or other responsibility for the child's welfare

will also make an offence more serious.

When sentencing for an abuse of trust offence, evidence of serious coercion, threats, or trauma are aggravating factors that should move a sentence well beyond the starting point.

50

SEXUAL ACTIVITY WITH A CHILD

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.

2. The culpability of the offender will be the primary indicator of offence seriousness, and the nature of the sexual activity will provide a fundamental guide as to the seriousness of the harm caused to the victim, for any of the offences in the three categories involving ostensibly consensual activity with children. Other factors will include:

the age and degree of vulnerability of the victim - as a general indication, the younger the child, the more vulnerable he or she is likely to be, although older children may also suffer serious and long term psychological damage as a result of sexual abuse

the age gap between the child and the offender

the youth and immaturity of the offender must also be taken into account.

except where it is inherent in an offence, any breach of trust arising from a family relationship between the child and the offender or from the offender's professional or other responsibility for the child's welfare will also make an offence more serious.

3. The same starting points apply whether the activity was caused or incited. Where an offence was incited but did not take place as a result of the voluntary intervention of the offender, that is likely to reduce the severity of the sentence imposed.

Sexual offences

51

SEXUAL ACTIVITY WITH A CHILD

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

1. Sexual activity with a child (section 9)

Intentional sexual touching of a person under 16

2. Causing or inciting a child to engage in sexual activity (section 10)

Intentionally causing or inciting a person under 16 to engage in sexual activity
Maximum penalty for both offences: **14 years (5 years if offender is under 18)**

Type/nature of activity Starting points

Penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or an object

4 years

Contact between naked genitalia of offender and naked genitalia or another part of victim's body, particularly face or mouth

2-3 years

Contact between naked genitalia of offender

or victim and clothed genitalia of victim or offender or contact with naked genitalia of victim by offender using part of his or her body other than the genitalia or an object

26 weeks – 18 months

Contact between part of offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)

Community order

Additional aggravating factors Additional mitigating factors

1. Offender ejaculated or caused victim to ejaculate
2. Threats to prevent victim reporting the incident
3. Offender aware that he or she is suffering from a sexually transmitted infection
1. Offender intervenes to prevent incited offence from taking place
2. Small disparity in age between the offender and the victim

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

52

FAMILIAL CHILD SEX OFFENCES

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The culpability of the offender will be the primary indicator of offence seriousness, and the nature of the sexual activity will provide a fundamental guide as to the seriousness of the harm caused to the victim, for any of the offences in the three categories involving ostensibly consensual activity with children. Other factors will include:
 - the age and degree of vulnerability of the victim - as a general indication, the younger the child, the more vulnerable he or she is likely to be, although older children may also suffer serious and long term psychological damage as a result of sexual abuse
 - the age gap between the child and the offender
 - the youth and immaturity of the offender must also be taken into account.
3. The starting points for sentencing for the familial child sex offences should be between 25% and 50% higher than those for the generic child sex offences in all cases where the victim is aged 13 or over but under 16; the closer the familial relationship, using the statutory definitions as a guide, the higher the increase that should be applied.
4. Where a victim is over the age of consent, the starting points assume that the offender is a close relative.
5. Where the victim of a familial child sex offence is aged 16 or 17 when the sexual activity is commenced and the sexual relationship is unlawful only

because it takes place within a 'familial' setting, the starting points for sentencing should be in line with those for the generic 'abuse of trust' offences.

6. Evidence that a victim has been 'groomed' by the offender to agree to take part in sexual activity will aggravate the seriousness of the offence.

Sexual offences

53

FAMILIAL CHILD SEX OFFENCES

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

1. Sexual activity with a child family member (section 25)

2. Inciting a child family member to engage in sexual activity (section 26)

Maximum penalty for both offences: **14 years** (5 years if offender is under 18)

For use in cases where:

(a) the victim is 13 or over but under 16 regardless of the familial relationship with the offender; (b) the victim is 16 or 17 but the sexual relationship commenced when the victim was under 16; and (c) the victim is aged 16 or 17 and the offender is a blood relative.

Type/nature of activity Starting points

Penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or object

5 years

Contact between naked genitalia of offender and naked genitalia of victim

4 years

Contact between naked genitalia of offender or victim and clothed genitalia of the victim or offender

Contact between with naked genitalia of victim by another part of the offender's body or an object, or between the naked genitalia of offender and another part of victim's body

12 months - 2 years 6 months

Contact between part of offender's body (other than the genitalia with part of the victim's body (other than the genitalia)

Community order

For use in cases where the victim was aged 16 or 17 when the sexual relationship commenced and the relationship is only unlawful because of the abuse of trust implicit in the offence.

Type/nature of activity Starting points

Penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or object

2 years

Any other form of non-penetrative sexual activity involving the naked contact between the offender and victim

12 months

Contact between clothed part of offender's body (other than the genitalia) with clothed part of victim's body (other than the genitalia)

Community order

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance

3. Threats deterring the victim from reporting the incident
4. Offender aware that he or she is suffering from a sexually transmitted infection
5. Closeness of familial relationship
1. Small disparity in age between victim and offender

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

54

ABUSE OF TRUST : SEXUAL ACTIVITY WITH A PERSON UNDER 18

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The culpability of the offender will be the primary indicator of offence seriousness, and the nature of the sexual activity will provide a fundamental guide as to the seriousness of the harm caused to the victim, for any of the offences in the three categories involving ostensibly consensual activity with children. Other factors will include:
 - the age and degree of vulnerability of the victim - as a general indication, the younger the child, the more vulnerable he or she is likely to be, although older children may also suffer serious and long term psychological damage as a result of sexual abuse
 - the age gap between the child and the offender
 - the youth and immaturity of the offender must also be taken into account.
3. These offences will only be charged where the victim is aged 16 or 17. Therefore, the sentencing starting points in the guidelines are only intended for those cases and are significantly lower than those for a child sexual offence involving the same type of sexual activity which should be applied in all other cases.
4. When sentencing for an abuse of trust offence, evidence of serious coercion, threats, or trauma are aggravating factors that should move a sentence well beyond the starting point.
5. Some relationships caught within the scope of these offences, although unlawful, will be wholly consensual. The length of time over which a relationship has been sustained and the proximity in age between the parties could point to a relationship born out of genuine affection. Each case must be considered carefully on its own facts.
6. The same starting points apply whether the activity was caused or incited. Where an offence was incited but did not take place as a result of the voluntary intervention of the offender, that is likely to reduce the severity of the sentence imposed.

Sexual offences

55

ABUSE OF TRUST : SEXUAL ACTIVITY WITH A PERSON UNDER 18

THESE ARE SPECIFIED OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

1. Abuse of position of trust: sexual activity with a child (section 16): Intentional sexual touching of a child under 18 by a person aged 18 or over who is in a position of trust in relation to the child

2. Abuse of position of trust: Causing or inciting a child to engage in sexual activity (section 17): Intentional causing or inciting of a child under 18 to engage in sexual activity, by a person aged 18 or over who is in a position of trust in relation to child

Maximum penalty for both offences: **5 years**

The starting points produced below are intended to be used only in relation to victims aged 16 or 17. Where the victim is a child under 16 one of the child sex offences in sections 9 to 13 should normally be charged. If one of the abuse of trust offences has nevertheless been charged, the starting points should be the same as they would be for the relevant child sex offence.

Type/nature of activity Starting points

Penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with another body part or object

18 months

Other forms of non-penetrative activity

26 weeks

Contact between part of offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)

Community order

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Offender ejaculated or caused the victim to ejaculate
3. Use of drugs, alcohol or other substance to facilitate the offence
4. Offender aware that he or she is suffering from a sexually transmitted infection
1. Small disparity in age between victim and offender
2. Relationship of genuine affection
3. No element of corruption

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

56

ABUSE OF TRUST: SEXUAL ACTIVITY IN PRESENCE OF A PERSON UNDER 18

Factors to take in to consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The guidelines are predicated on the principle that the more serious the nature of the sexual activity a victim is forced to witness, the higher the sentencing starting point should be.

3. These offences will only be charged where the victim is aged 16 or 17. Therefore, the sentencing starting points in the guidelines are only intended for those cases and are significantly lower than those for a child sexual offence involving the same type of sexual activity which should be applied in all other cases.

4. These offences will potentially be serious enough to merit a custodial sentence. In an individual case the court will need to consider whether there are particular mitigating factors that move the sentence below the custodial threshold.

Sexual offences

57

ABUSE OF TRUST: SEXUAL ACTIVITY IN PRESENCE OF A PERSON UNDER 18

THIS IS A SPECIFIED OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Abuse of trust: sexual activity in the presence of a child (section 18)

Intentionally, and for the purpose of obtaining sexual gratification, engaging in sexual activity in the presence of person under 18 (abuse of trust-professional), knowing or believing that person to be aware of the activity

Maximum penalty: **5 years**

Type/nature of activity Starting points

Consensual intercourse or other forms of consensual penetration

2 years

Masturbation (of oneself or another person)

18 months

Consensual sexual touching involving naked genitalia

12 months

Consensual sexual touching of naked body parts but not involving naked genitalia

26 weeks

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Threats to prevent victim reporting the incident
4. Proved or admitted abduction or detention (unless separately charged)

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

58

ABUSE OF TRUST: CAUSE PERSON UNDER 18 TO WATCH SEXUAL ACT

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The culpability of the offender will be the primary indicator of offence

seriousness, and the nature of the sexual activity will provide a fundamental guide as to the seriousness of the harm caused to the victim, for any of the offences in the three categories involving ostensibly consensual activity with children. Other factors will include:

the age and degree of vulnerability of the victim - as a general indication, the younger the child, the more vulnerable he or she is likely to be, although older children may also suffer serious and long term psychological damage as a result of sexual abuse

the age gap between the child and the offender

the youth and immaturity of the offender must also be taken into account.

3. Evidence of serious coercion, threats, corruption or trauma are aggravating factors that should move a sentence well beyond the starting point.

4. Some relationships caught within the scope of these offences, although unlawful, will be wholly consensual. The length of time over which a relationship has been sustained and the proximity in age between the parties could point to a relationship born out of genuine affection. Each case must be considered carefully on its own facts.

5. These offences will only be charged where the victim is aged 16 or 17. Therefore, the sentencing starting points in the guidelines are only intended for those cases and are significantly lower than those for a child sexual offence involving the same type of sexual activity which should be applied in all other cases.

6. The guideline is predicated on the principle that the more serious the nature of the sexual activity a victim is forced to witness, the higher the sentencing starting point should be.

7. The offence will potentially be serious enough to merit a custodial sentence. In an individual case the court will need to consider whether there are particular mitigating factors that move the sentence below the custodial threshold.

Sexual offences

59

ABUSE OF TRUST: CAUSE PERSON UNDER 18 TO WATCH SEXUAL ACT

THIS IS A SPECIFIED OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Abuse of position of trust: causing a child to watch a sexual act (section 19)

Intentionally causing or inciting, for the purpose of sexual gratification, a person under 18 (abuse of trust) to watch sexual activity or look at a photograph or pseudo-photograph of sexual activity

Maximum penalty: **5 years**

Type/nature of activity Starting points

Moving images of people engaged in sexual activity involving penetration

18 months

Still images of people engaged in sexual activity involving penetration

12 months

Moving images of people engaging in sexual

activity other than penetration

26 weeks

Still images of people engaging in sexual activity other than penetration

Community order

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence

3. Threats to prevent victim reporting the incident

4. Proved or admitted abduction or detention (unless separately charged)

5. Images of violent activity

1. Small disparity in age between victim and offender

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

60

ARRANGING A CHILD SEX OFFENCE

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases.

They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.

2. Sentencers should refer to the individual guideline for the substantive offence under sections 9 to 13 of the Sexual Offences Act 2003 that was arranged or facilitated.

3. In cases where there is no commercial exploitation, the range of behaviour within, and the type of offender charged with, this offence will be wide. In some cases, a starting point below the suggested starting point for the substantive child sex offence may be appropriate.

Sexual offences

61

ARRANGING A CHILD SEX OFFENCE

THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Arranging or facilitating commission of a child sex offence (section 14)

Intentionally arranging or facilitating the commission of a child sex offence by the defendant or another person, anywhere in the world

Maximum penalty: **14 years**

Type/nature of activity Starting points

Where the activity is arranged or facilitated as part of a commercial enterprise, even if the offender is under 18

As this offence is primarily aimed at persons organising the commission of relevant sexual offences for gain, and sometimes across international borders, this is the most likely aggravating factor.

Starting points for sentencing should be increased above those for the relevant substantive offence at sections 9 to 13.

Standard offence The starting point should be commensurate with that for the relevant substantive offence at sections 9 to 13.

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Threats to prevent victim reporting the incident
4. Proved or admitted abduction or detention (unless separately charged)
5. Number of victims involved

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

62

Part 3B: Offences Against Vulnerable Adults

3B.1 The offences in the Act that are designed to protect those who have a mental disorder impeding choice are referred to in Part 1.

3B.2 In addition, the Act includes a group of offences designed to protect adults whose mental impairment is not so severe that they are unable to make a choice, but who are nevertheless vulnerable to relatively low levels of inducement, threats or deception.

3B.3 The structure of these offences broadly parallels that of the offences against children, but the maximum penalties for the offences are higher and mirror those for the offences relating to persons with a mental disorder impeding choice. Charges brought under these offences relate to ostensibly consensual activity but cases will be brought in circumstances where there is clear evidence to suggest that agreement has been secured unlawfully.

3B.4 Although the level of mental impairment of the victim is different between the offences in Part 1 and those in this Part, the prosecution is required in all cases to prove that the offender knew of the victim's mental disorder. Thus the victim's capacity to consent will be irrelevant to a finding of guilt and the level of offender culpability is high.

Where a victim is unable to refuse, the sexual activity may, or may not, have been forced upon the victim.

Where a victim has the capacity to consent but is vulnerable to coercion, the activity will be ostensibly consensual, but the level of trauma and harm caused, or risked, to the victim may be very high.

3B.5 The level of protection accorded to the victim should be the same and sentencing starting points for the two groups of offences should also be comparable.

3B.6 There is a further group of offences designed to protect those with a mental disorder which consists of four offences relating to sexual activity by care workers. As with the 'abuse of trust' offences protecting children, these offences primarily relate to ostensibly consensual sexual activity with persons over 16 that is only criminal because of the care worker relationship.

3B.7 These offences are primarily designed to be charged where victims have the capacity to choose and where there is no clear evidence of inducement, threat or deception. The maximum penalties, therefore, are lower than those arising from the other two groups of 'mental disorder' offences and it follows that starting points for sentencing should be proportionately lower. The maximum penalties, however, are more significant than those for the range of **The starting points for sentencing for a sexual offence should be the same whether the victim has a mental disorder impeding choice, or has a mental disorder and the activity has been procured by inducement, threat or deception.**

Sexual offences

63

'abuse of trust' offences, in recognition of the fact that these offences are designed to protect a particularly vulnerable group of victims, and this has been taken into account in the guideline.

3B.8 The nature of the sexual activity and the degree of vulnerability of the victim will be the main determinants of the seriousness of an offence in these categories. All of the aggravating factors identified in the Council Guideline on Seriousness and in Part 1 are relevant to these offences.

3B.9 The period of time during which sexual activity has taken place will be relevant in determining the seriousness of an offender's behaviour but could, depending on the particular circumstances, be considered as either an aggravating or a mitigating factor. The fact that an offender has repeatedly involved a victim in exploitative behaviour over a period of time will normally be an aggravating feature for sentencing purposes. However, in cases involving ostensibly consensual sexual activity with a person over the age of consent who has a low level mental disorder that does not impair his or her ability to choose, evidence of a long-term relationship between the parties may indicate the existence of genuine feelings of love and affection that deserve to be treated as a mitigating factor for sentencing. As with the 'abuse of trust' offences, each case must be carefully considered on its facts.

64

SEXUAL ACTIVITY WITH A PERSON WHO HAS A MENTAL DISORDER

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The starting points for sentencing for a sexual offence should be the same whether the victim has a mental disorder impeding choice, or has a mental disorder that makes him or her vulnerable to inducement, threat or deception.
3. The same starting points apply whether the activity was caused or incited. Where an offence was incited but did not take place as a result of the voluntary intervention of the offender, that is likely to reduce the severity of the sentence imposed.

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the

new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

65

SEXUAL ACTIVITY WITH A PERSON WHO HAS A MENTAL DISORDER

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

1. Sexual activity with a person with a mental disorder impeding choice (section 30): Intentional sexual touching of a person with a mental disorder

2. Inducement, threat or deception to procure sexual activity with a person with a mental disorder (section 34): Intentional sexual touching of someone with a mental disorder whose agreement has been obtained by the giving or offering of an inducement, the making of a threat or the practice of a deception

3. Causing a person with a mental disorder to engage in, or agree to engage in, sexual activity by inducement, threat or deception (section 35): using inducement, threat or deception to secure the agreement of a person with a mental disorder impeding choice to perform a sexual act on him or herself or another person. Maximum penalty: **Life** if activity involves penetration; **14 years** if no penetration

Type/ nature of activity Starting points

PENETRATIVE ACTIVITY

Penetration with the aggravating factors;
proved or admitted abduction; offender aware suffering from sexually transmitted infection;
more than one offender acting together;
offence motivated by prejudice (race, religion, sexual orientation, physical disability);
sustained or repeated activity

13 years

Single offence of penetration of/by single offender; no aggravating or mitigating factors

10 years

NON-PENETRATIVE ACTIVITY

Contact between naked genitalia of offender and naked genitalia of victim

5 years

- Contact between naked genitalia of offender and another part of victim's body or naked genitalia of victim by offender using part of his or her body other than the genitalia

- Contact between clothed genitalia of offender and naked genitalia of victim or naked genitalia of offender and clothed genitalia of victim

36 weeks - 3 years

Contact between part of offender's body (other than the genitalia) with parts of victim's body (other than the genitalia)

26 weeks

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Offender ejaculated or caused the victim to ejaculate
3. Use of drugs, alcohol or other substance to facilitate the offence

4. Threats to prevent the victim reporting the incident
5. Proved or admitted abduction or detention (unless separately charged)
6. Offender is aware that he/she is suffering from a sexually transmitted infection
 1. Relationship of genuine affection
 2. Offender had a mental disorder at the time of the offence that significantly affected his or her culpability

66

CARE WORKERS: SEXUAL ACTIVITY WITH A PERSON WHO HAS A MENTAL DISORDER

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The starting points for sentencing are predicated on the fact that these offences are designed to be charged where victims have the capacity to choose and where there is no clear evidence of inducement, threat or deception.

Sexual offences

67

CARE WORKERS: SEXUAL ACTIVITY WITH A PERSON WHO HAS A MENTAL DISORDER

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

- 1. Care workers: sexual activity with a person with a mental disorder** (section 38): Intentional sexual touching of a person with a mental disorder by someone involved in his or her care
- 2. Care workers: causing or inciting sexual activity** (section 39): Someone involved in the care of a person with a mental disorder intentionally causing or inciting that person to engage in sexual activity
Maximum penalty: **14 years** if activity involves penetration; **10 years** if activity does not involve penetration

Type/nature of activity Starting points

PENETRATIVE ACTIVITY

Standard offence of sexual activity involving penetration

3 years

NON-PENETRATIVE ACTIVITY

Other forms of non-penetrative activity

12 months

Naked contact between part of the offender's body with part of the victim's body

Community order

Additional aggravating factors Additional mitigating factors

1. History of intimidation
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Threats to prevent victim reporting the incident
4. Proved abduction or detention (unless

separately charged)

5. Offender aware that he or she is suffering from a sexually transmitted infection

Relationship of genuine affection

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

68

SEXUAL ACTIVITY IN THE PRESENCE OF A PERSON WITH A MENTAL DISORDER

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases.

They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.

2. The starting points for sentencing for a sexual offence should be the same whether the victim has a mental disorder impeding choice, or has a mental disorder that makes him or her vulnerable to inducement, threat or deception.

3. The guidelines are predicated on the principle that the more serious the nature of the sexual activity a victim is forced to witness, the higher the sentencing starting point should be.

4. These offences will potentially be serious enough to merit a custodial sentence. In an individual case the court will need to consider whether there are particular mitigating factors that move the sentence below the custodial threshold.

Sexual offences

69

SEXUAL ACTIVITY IN THE PRESENCE OF A PERSON WITH A MENTAL DISORDER

OFFENCES UNDER SECTION 36 ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

OFFENCES UNDER SECTION 40 ARE SPECIFIED OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

1. Engaging in sexual activity in the presence, secured by inducement, threat or deception, of a person with a mental disorder (section 36)

Intentionally, and for the purpose of obtaining sexual gratification, engaging in sexual activity in the presence of person with a mental disorder, knowing or believing that person to be aware of the activity

Maximum penalty: **10 years**

2. Care workers: sexual activity in the presence of a person with a mental disorder (section 40)

Care worker intentionally, and for the purpose of obtaining sexual gratification, engaging in sexual activity in the presence of person with a mental disorder, knowing or believing that person to be aware of the activity

Maximum penalty: **7 years**

Type/nature of activity Starting points

Consensual intercourse or other forms of consensual penetration

2 years

Masturbation (of oneself or another person)

18 months

Consensual sexual touching involving naked genitalia

12 months

Consensual sexual touching of naked body parts but not involving naked genitalia

26 weeks

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Threats to prevent victim reporting the incident
4. Proved or admitted abduction or detention (unless separately charged)

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

70

CAUSING OR INCITING A PERSON WITH A MENTAL DISORDER TO WATCH A SEXUAL ACT

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The starting points for sentencing for a sexual offence should be the same whether the victim has a mental disorder impeding choice, or has a mental disorder that makes him or her vulnerable to inducement, threat or deception.
3. The guidelines are predicated on the principle that the more serious the nature of the sexual activity a victim is forced to witness, the higher the sentencing starting point should be.
4. These offences will potentially be serious enough to merit a custodial sentence. In an individual case the court will need to consider whether there are particular mitigating factors that move the sentence below the custodial threshold.
5. The same starting points apply whether the activity was caused or incited. Where an offence was incited but did not take place as a result of the voluntary intervention of the offender, that is likely to reduce the severity of the sentence imposed.

Sexual offences

71

CAUSING OR INCITING A PERSON WITH A MENTAL DISORDER TO WATCH A SEXUAL ACT

OFFENCES UNDER SECTION 37 ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

OFFENCES UNDER SECTION 41 ARE SPECIFIED OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

1. **Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception** (section 37)

Intentionally causing by inducement, threat or deception, for the purpose of sexual

gratification a person with a mental disorder to watch sexual activity or look at a photograph or pseudo-photograph of sexual activity

Maximum penalty: **10 years**

2. Care workers: causing a person with a mental disorder to watch a sexual act
(section 41)

Intentionally causing, for the purpose of sexual gratification, a person with a mental disorder to watch sexual activity or look at a photograph or pseudo-photograph of sexual activity

Maximum penalty: **7 years**

Type/nature of activity Starting points

Moving images of people engaged in sexual activity involving penetration

18 months

Still images of people engaged in sexual activity involving penetration

12 months

Moving images of people engaging in sexual activity other than penetration

26 weeks

Still images of people engaging in sexual activity other than penetration

Community order

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Threats to prevent victim reporting the incident
4. Proved or admitted abduction or detention (unless separately charged)
5. Images of violent activity

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the

72 new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

73

74

PART 4: PREPARATORY OFFENCES

4.1 The characteristic feature of this group of offences is that the offender intended to commit a sexual offence that was not, in fact, carried out, either because the act was interrupted or because of a change of mind.

4.2 In some circumstances, an offender may be charged with both the preparatory and the substantive offence.

4.3 The new offence of 'meeting a child following sexual grooming etc' has been included within this category.

Offences in this section:

Sexual grooming

Committing another offence with intent

Trespass with intent

Administering a substance with intent

SEXUAL GROOMING

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. In a case where no substantive sexual offence has in fact been committed, the main dimension of seriousness will be the offender's *intention* - the more serious the offence intended, the higher the offender's culpability.
3. The *harm* to the victim in such cases will invariably be less than that resulting from a completed offence, although the *risk* to which the victim has been put is always a relevant factor.
4. In some cases, where the offender has come quite close to fulfilling his or her intention, the victim may have been put in considerable fear, and physical injury to the victim is a possible feature, in particular, of the offence of administering a substance with intent.
5. In addition to the generic aggravating factors identified in the Council guideline on Seriousness, and the list of aggravating factors identified in Part 2 of this draft guideline (page 24 above) as being particularly relevant to non-consensual sexual activity, the main factors determining the seriousness of a preparatory offence are -
 - the seriousness of the intended offence (which will affect both the offender's culpability and the degree of risk to which the victim has been exposed)
 - the degree to which the offence was planned
 - the sophistication of the grooming
 - the determination of the offender
 - how close the offender came to success
 - the reason why the offender did not succeed i.e. was it a change of mind or did someone or something prevent the offender from continuing?
 - any physical or psychological injury suffered by the victim
6. The starting point should be commensurate with that for the preparatory offence actually committed, with an enhancement to reflect the nature and severity of the intended sexual offence.

SEXUAL GROOMING

THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Meeting a child following sexual grooming etc: (section 15)

An offender aged 18 or over meeting, or travelling to meet, a child under 16 (having met or communicated with the child on at least two previous occasions) with the intention of committing a sexual offence against the child

Maximum penalty: **10 years**

Type/nature of activity Starting point ranges

Where the intent is to commit an assault by penetration or rape

4 years if the victim is under 13

2 years if the victim is 13 or over but under

16

Where the intent is to coerce the child into sexual activity

2 years if the victim is under 13

18 months if the victim is 13 or over but under 16

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Offender aware that he or she is suffering from a sexually transmitted infection
4. Proved or admitted abduction or detention (unless separately charged)

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

77

COMMITTING ANOTHER OFFENCE WITH INTENT

Factors to take into consideration

This guideline assumes that the intended sexual offence was not committed.

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. In a case where no substantive sexual offence has in fact been committed, the main dimension of seriousness will be the offender's *intention* - the more serious the offence intended, the higher the offender's culpability.
3. The *harm* to the victim in such cases will invariably be less than that resulting from a completed offence, although the *risk* to which the victim has been put is always a relevant factor.
4. In some cases, where the offender has come quite close to fulfilling his or her intention, the victim may have been put in considerable fear, and physical injury to the victim is a possible feature, in particular, of the offence of administering a substance with intent.
5. In addition to the generic aggravating factors identified in the Council Guideline on Seriousness, and the list of aggravating factors identified in Part 2 of this draft guideline (page 24 above) as being particularly relevant to non-consensual sexual activity, the main factors determining the seriousness of a preparatory offence are -
 - the seriousness of the intended offence (which will affect both the offender's culpability and the degree of risk to which the victim has been exposed)
 - the degree to which the offence was planned
 - the determination of the offender
 - how close the offender came to success
 - the reason why the offender did not succeed i.e. was it a change of mind or did someone or something prevent the offender from continuing?
 - any physical or psychological injury suffered by the victim
6. The starting point should be commensurate with that for the preparatory offence actually committed, with an enhancement to reflect the nature and severity of the intended sexual offence.

78

COMMITTING ANOTHER OFFENCE WITH INTENT

THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Committing an offence with intent to commit a sexual offence (section 62)

Maximum penalty: **Life imprisonment** if offence is kidnapping or false imprisonment; **10 years** for any other criminal offence

Type/nature of activity Starting points

Any offence committed with intent to commit a sexual offence e.g. assault

(See paragraph 4 of Factors to take into consideration)

The starting point should be commensurate with that for the preliminary offence actually committed but with an enhancement to reflect the intention to commit a sexual offence.

The enhancement will need to be varied depending on the nature and seriousness of the intended sexual offence, but **2 years** is suggested as a suitable enhancement where the intent was to commit rape or an assault by penetration.

Additional aggravating factors Additional mitigating factors

1. Use of drugs, alcohol or other substance to facilitate the offence

2. Offender aware that he or she is suffering from a sexually transmitted infection (where the intended offence would have involved penile penetration)

1. Offender decides, of his or her own volition, not to proceed with the intended sexual offence

2. Incident of brief duration

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

79

TRESPASS WITH INTENT

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.

2. In a case where no substantive sexual offence has in fact been committed, the main dimension of seriousness will be the offender's *intention* - the more serious the offence intended, the higher the offender's culpability.

3. The *harm* to the victim in such cases will invariably be less than that resulting from a completed offence, although the *risk* to which the victim has been put is always a relevant factor.

4. In some cases, where the offender has come quite close to fulfilling his or her intention, the victim may have been put in considerable fear, and physical injury to the victim is a possible feature, in particular, of the offence of administering a substance with intent.

5. In addition to the generic aggravating factors identified in the Council Guideline on Seriousness, and the list of aggravating factors identified in Part 2 of this draft guideline (page 24 above) as being particularly relevant to non-consensual sexual activity, the main factors determining the seriousness of a preparatory

offence are -

- the seriousness of the intended offence (which will affect both the offender's culpability and the degree of risk to which the victim has been exposed)
 - the degree to which the offence was planned
 - the determination of the offender
 - how close the offender came to success
 - the reason why the offender did not succeed i.e. was it a change of mind or did someone or something prevent the offender from continuing?
 - any physical or psychological injury suffered by the victim
6. The starting point should be commensurate with that for the preparatory offence actually committed, with an enhancement to reflect the nature and severity of the intended sexual offence.

80

TRESPASS WITH INTENT

THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Trespass with intent to commit a sexual offence: (section 63)

Knowingly or recklessly trespassing on any premises with intent to commit a sexual offence on those premises

Maximum penalty: **10 years**

Type/nature of activity Starting points

The intent is to commit rape or an assault by penetration

4 - 6 years

Intended sex offence is other than rape or assault by penetration

2 - 4 years

Additional aggravating factors Additional mitigating factors

1. Offender aware that he or she is suffering from a sexually transmitted infection (where intended offence would have involved penile penetration)
2. Targeting of a vulnerable victim
3. Significant impact on persons present in the premises

1. Offender decides, of his or her own volition, not to commit the intended sexual offence

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

81

ADMINISTERING A SUBSTANCE WITH INTENT

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. In a case where no substantive sexual offence has in fact been committed, the main dimension of seriousness will be the offender's *intention* - the more serious the offence intended, the higher the offender's culpability. This is equally so where the offence is committed by an offender for the benefit of another.

3. The *harm* to the victim in such cases will invariably be less than that resulting from a completed offence, although the *risk* to which the victim has been put is always a relevant factor.

4. In some cases, where the offender has come quite close to fulfilling his or her intention, the victim may have been put in considerable fear, and physical injury to the victim is a possible feature, in particular, of the offence of administering a substance with intent.

5. In addition to the generic aggravating factors identified in the Council Guideline on Seriousness, and the list of aggravating factors identified in Part 2 of this draft guideline (page 24 above) as being particularly relevant to non-consensual sexual activity, the main factors determining the seriousness of a preparatory offence are -

- the seriousness of the intended offence (which will affect both the offender's culpability and the degree of risk to which the victim has been exposed)

- the degree to which the offence was planned

- the determination of the offender

- how close the offender came to success

- the reason why the offender did not succeed i.e. was it a change of mind or did someone or something prevent the offender from continuing?

- any physical or psychological injury suffered by the victim

6. The starting point should be commensurate with that for the preparatory offence actually committed, with an enhancement to reflect the nature and severity of the intended sexual offence.

7. The offence may be committed by a person for the benefit of another

82

ADMINISTERING A SUBSTANCE WITH INTENT

THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Administering a substance with intent (section 61):

Administering a substance, without the consent of the victim, with the intention of overpowering or stupefying the victim in order to enable any person to engage in sexual activity involving the victim

Maximum penalty: **10 years**

Type/nature of activity Starting points

If intended offence is rape or assault by penetration

8 years if the victim is under 13

6 years otherwise

If intended offence is any sexual offence other than rape or assault by penetration

6 years if the victim is under 13

4 years otherwise

Additional aggravating factors Additional mitigating factors

1. Threats to prevent the victim reporting an offence

2. Proved or admitted abduction or detention (unless separately charged)

3. Offender aware that he or she, or the person planning to commit the sexual offence, is suffering from a sexually transmitted infection

4. Targeting of the victim

1. Offender intervenes to prevent the

intended sexual offence from taking place

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

83

84

PART 5: OTHER OFFENCES

5.1 This category covers a small number of relatively minor offences, none of which involves direct sexual contact with a person who was not consenting:

Prohibited Adult Sexual Relationships: Sex with an adult relative

Sexual Activity in a Public Lavatory

Exposure

Voyeurism

Intercourse with an animal

Sexual penetration of a corpse

Sexual offences

85

PROHIBITED ADULT SEXUAL RELATIONSHIPS

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The two offences within this category are triable either way and carry a maximum penalty of two years' imprisonment on conviction on indictment. The relatively low maximum penalty for these offences reflects the fact that they involve sexual relationships between consenting adults.
3. For these offences, unlike those against child family members, the relationship between offender and victim is narrowly defined in terms of close blood relationships only: 'a parent, grandparent, child, grandchild, brother, sister, halfbrother, half-sister, uncle, aunt, nephew or niece'.
4. It is a defence to both offences that the offender was unaware of the blood relationship, unless it is proved that he or she could reasonably have been expected to be aware of it.
5. These offences could be charged in a wide range of circumstances and the most important issue for the sentencer to consider is the particular circumstances in which an offence has taken place and the harm that has been caused or risked:
 - Where an offence involves no harm to a victim (other than the offensiveness of the conduct to society at large) the starting point for sentencing should normally be a community order.
 - Where there is evidence of the exploitation of a victim or significant aggravation, the normal starting point should be a custodial sentence.
 - The presence of certain aggravating factors should merit a higher custodial starting point.
6. Examples of aggravating factors especially relevant to these offences include -
 - high level of coercion or humiliation of the victim
 - imbalance of power
 - evidence of grooming

- age gap between the parties
- history of sexual offending
- sexual intercourse took place with the express intention of conceiving a child or resulted in the conception of a child - as established in *R v B (M R)* ²⁴
- no attempt taken to prevent the transmission of a sexual infection

²⁴ [2003] 1 Cr App R (S) 484

86

SEX WITH AN ADULT RELATIVE

THESE ARE SPECIFIED OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

1. Sex with an adult relative: penetration (section 64):

Intentional penetration of the vagina or anus of an adult blood relative with a body part or object; or penetration of the vagina, anus or mouth with the penis

2. Sex with an adult relative: consenting to penetration (section 65):

Consenting to intentional penetration of the vagina or anus by an adult blood relative with a body part or object; or penetration of the vagina, anus or mouth with the penis

Maximum penalty for both offences: **2 years**

Type / nature of activity Starting points

Evidence of long-term grooming that took place at a time when the person being groomed was under 18

12 months if offender is 18 or over

Where there is evidence of grooming of one party by the other at a time when both parties were over the age of 18

Sexual penetration with no aggravating factors

Community order

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Threats to prevent the victim reporting an offence
4. Evidence of long term grooming
5. Offender aware that he or she is suffering from a sexually transmitted infection
6. Where there is evidence that no effort was made to avoid pregnancy or sexually transmitted infection

1. Small disparity in age between victim and offender

2. Relationship of genuine affection

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

87

SEXUAL ACTIVITY IN A PUBLIC LAVATORY

Factors to take into consideration

1. This is a new offence, introduced to give adults and children the freedom to use public lavatories for the purpose for which they are designed, without the fear of being an unwilling witness to overtly sexual behaviour of a kind which most people would not expect to be conducted in public.

2. This offence, being a public order offence rather than a sexual offence, carries the lowest maximum penalty in the Act - 6 months imprisonment - and the starting point for sentencing reflects this.

3. The Criminal Justice Act 2003 makes provision for the common law offence of 'Outraging public decency' to be triable either way, so that it can be charged for the comparatively minor offences involving sexual conduct in public.

88

SEXUAL ACTIVITY IN A PUBLIC LAVATORY

Sexual activity in a public lavatory (section 71)

Intentionally engaging in sexual activity in a public lavatory

Maximum penalty: **6 months**

Type / nature of activity Starting points

Repeat offending and/or aggravating factors

Community order

Standard offence

Fine

Additional aggravating factors Additional mitigating factors

Intimidating behaviour / threats of violence to member(s) of the public

Sexual offences

89

EXPOSURE

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.

2. The new offence replaces section 4 Vagrancy Act 1824 and section 28 Town Police Clauses Act 1847. It is gender neutral (covering exposure of male or female genitalia to a male or female witness) and carries a maximum penalty of two years.

3. These offences are sometimes more serious than they may, at first, appear. Although there is no physical contact with the victim, the offence may cause serious alarm or distress, especially when the offender behaves aggressively or uses obscenities.

4. A pre-sentence report,²⁵ which can identify sexually deviant tendencies, will be extremely helpful in determining the most appropriate disposal. It will also help determine whether an offender would benefit from participation in a programme designed to help an offender address those tendencies.

5. A person convicted of this offence is subject to notification requirements.²⁶

²⁵ as defined in the Criminal Justice Act 2003, s.158

²⁶ In accordance with Sexual Offences Act 2003, s.80 and sched.3, para.33

90

EXPOSURE

THIS IS A SPECIFIED OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Exposure (section 66)

Intentional exposure of the offender's genitals, intending that someone will see them and be caused alarm or distress

Maximum penalty: **2 years**

Type / nature of activity Starting points

Repeat offender

12 weeks

Standard offence or some offences with aggravating factors

An appropriate non-custodial sentence***Additional aggravating factors Additional mitigating factors**

1. Threats to prevent the victim reporting an offence
2. Intimidating behaviour / threats of violence
3. Victim is a child

* "Non-custodial sentence" in this context suggests a community order or a fine. In most instances, an offence will have crossed the threshold for a community order. However, in accordance with normal sentencing practice, a court is not precluded from imposing a financial penalty where that is determined to be the appropriate sentence.

Sexual offences

91

VOYEURISM**Factors to take into consideration**

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The new offence of voyeurism covers cases where someone who has a reasonable expectation of privacy is secretly observed. The offence may be committed in a number of ways:
 - by direct observation on the part of the offender;
 - by operating equipment with the intention of enabling someone else to observe the victim;
 - by recording someone doing a private act, with the intention that the recorded image will be viewed by the offender or another person; or
 - by installing equipment or constructing or adapting a structure with the intention of enabling the offender or another person to observe a private act.
3. In all cases the observation, or intended observation, must be for the purpose of obtaining sexual gratification and must take place, or be intended to take place, without the consent of the person observed.
4. The Act defines a 'private act', in the context of this offence, as an act carried out in a place which, in the circumstances, would reasonably be expected to provide privacy, and where the victim's genitals, buttocks or breasts are exposed or covered only in underwear; *or* the victim is using a lavatory; *or* the person is 'doing a sexual act that is not of a kind ordinarily done in public'.
5. The harm inherent in this offence is intrusion on the victim's privacy. While less serious than non-consensual touching, it may nevertheless cause severe distress, embarrassment or humiliation to the victim, especially in cases where a private act is not simply observed by one person, but where an image of it is disseminated for wider viewing. A higher sentencing starting point is recommended for cases where the offender records and shares images with others.
6. For offences involving the lowest level of offending behaviour i.e. spying on someone for private pleasure, a non-custodial sentence is recommended as the starting point.

7. A pre-sentence report,²⁷ which can identify sexually deviant tendencies, will be extremely helpful in determining the most appropriate disposal. It will also help determine whether an offender would benefit from participation in a programme designed to help an offender address those tendencies.

²⁷ as defined in the Criminal Justice Act 2003, s.158

92

VOYEURISM

THIS IS A SPECIFIED OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Voyeurism (section 67)

For the purpose of obtaining sexual gratification, and knowing that the other person does not consent to being observed, observing another person engaged in a private act

Maximum penalty: **2 years**

Type / nature of activity Starting points

Offence with serious aggravating factors such as recording sexual activity and placing it on a website or circulating it for commercial gain

12 months

Offence with aggravating factors such as recording sexual activity and showing it to others

26 weeks

Standard offence e.g. the offender spies through a hole he has made in a changing room wall

An appropriate non-custodial sentence*

Additional aggravating factors Additional mitigating factors

1. Threats to prevent the victim reporting an offence
2. Recording activity and circulating pictures/videos
3. Circulating pictures or videos for commercial gain - particularly if victim is vulnerable e.g. a child or person with a mental or physical disorder
4. Distress to victim, for example where the pictures/videos are circulated to people known to the victim

* "Non-custodial sentence" in this context suggests a community order or a fine. In most instances, an offence will have crossed the threshold for a community order. However, in accordance with normal sentencing practice, a court is not precluded from imposing a financial penalty where that is determined to be the appropriate sentence.

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

93

INTERCOURSE WITH AN ANIMAL

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases.

They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.

2. This replaces the previous offence of 'buggery' with an animal, for which the maximum penalty was life imprisonment. The maximum penalty of 2 years imprisonment attached to this offence is sufficient to recognise an offender's predisposition towards unnatural sexual activity.

3. A custodial sentence for an adult for this offence will result in an obligation to comply with notification requirements and this seems to be the most appropriate course of action for a repeat offender. The offence can be charged in addition to existing offences relating to cruelty to animals.

4. A pre-sentence report,²⁸ which can identify sexually deviant tendencies, will be extremely helpful in determining the most appropriate disposal. It will also help determine whether an offender would benefit from participation in a programme designed to help an offender address those tendencies.

²⁸ as defined in the Criminal Justice Act 2003, s.158

94

INTERCOURSE WITH AN ANIMAL

THIS IS A SPECIFIED OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Intercourse with an animal (section 69)

Intentionally penetrating a live animal's anus or vagina with the offender's penis; or intentionally causing or allowing a person's anus or vagina to be penetrated by the penis of a live animal

Maximum penalty: **2 years**

Type / nature of activity Starting points

Standard offence **Community order**

Additional aggravating factors Additional mitigating factors

Recording activity and /or circulating pictures or videos

Symptom of isolation rather than depravity

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

95

SEXUAL PENETRATION OF A CORPSE

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.

2. This is a new offence with a maximum penalty of 2 years imprisonment.

3. Necrophilia is associated with 'other very deviant behaviour', and killers who use the bodies of their victims for sexual gratification cannot, under the existing law, be formally recognised as, or treated as sexual offenders.

4. A pre-sentence report²⁹ (and in some cases a psychiatric report), which can identify sexually deviant tendencies, will be extremely helpful in determining the most appropriate disposal. It will also help determine whether an offender would benefit from participation in a programme

designed to help an offender address those tendencies.

²⁹ as defined in the Criminal Justice Act 2003, s.158

96

SEXUAL PENETRATION OF A CORPSE

THIS IS A SPECIFIED OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Sexual penetration of a corpse (section 70)

Intentional sexual penetration of part of the body of a dead person with a part of the offender's body or an object

Maximum penalty: **2 years**

Type / nature of activity Starting points

Repeat offending and /or aggravating factors

26 weeks

Standard offence

Community order

Additional aggravating factors Additional mitigating factors

1. Distress caused to relatives or friends of deceased
2. Physical damage caused to body of the deceased
3. The corpse was that of a child
4. The offence was committed in a funeral home or mortuary

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

97

98

PART 6: THE EXPLOITATION OFFENCES

6.1 Whilst all sexual offences involve, to a greater or lesser degree, the exploitation or abuse of a victim or victims, the specific sexual exploitation offences involve a high degree of offender culpability, with offenders intentionally exploiting vulnerable individuals. In some cases, for example the prostitution offences, the sexual acts themselves may not be unlawful but the purpose of the legislation is to address the behaviour of those who are prepared to exploit others by causing, inciting or controlling their sexual activities, whether or not for gain.

The Harm Caused by the Offences

6.2 Section 54 of the Sexual Offences Act 2003 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.*

6.3 The sexual exploitation offences cover a range of offending behaviour that is broken down into four groups in the Act -

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

(iv) Trafficking.

6.4 Groups (i) and (ii) specifically relate to the exploitation and abuse of children; for the purposes of these offences, 'child' means anyone under the age of 18.

6.5 The 'Exploitation of prostitution' offences relate to adult victims. The offences in group (iii) include the specific element that the activity was carried out 'for gain'. However, whether or not it is implicit in the offence that the prosecution is seeking to prove, in most cases someone will secure an advantage from the exploitation.

6.6 The 'Trafficking' offences are designed to protect victims of all ages.

6.7 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'.

Sexual offences

99

6.8 The offences that do not require the prosecution to prove that the offender acted 'for gain' have the effect that offenders cannot avoid prosecution by claiming that they did not stand to benefit by their involvement. For these offences, the starting points for sentencing are 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.

6.9 Confiscation and compensation orders have particular relevance in the context of exploitation offences, where it is extremely likely both that there will be property that can be seized from the offender and also that exploited victims will have been caused a degree of harm that might merit compensation.

6.10 The 'for gain' element is inherent in the 'Exploitation of prostitution' offences; therefore, it cannot be treated as an aggravating factor and is reflected in the starting points for sentencing. This group of offences relates to offenders who control the activities of those over the age of consent and the maximum penalties are lower than for offences where the prosecution is not required to prove that the defendant acted 'for gain'. However, the commercial sexual exploitation of another person's vulnerability is serious and socially unacceptable offending behaviour and the starting point for these offences should still be significant.

6.11 Although the courts must bear in mind the actual 'recoverable amount'³⁰ when making a confiscation order, they can legitimately take into account, as an aggravating factor for sentencing purposes, not only the benefits secured by the offender in fact, but also the benefits that he or she would have accrued from the offence had the activity not been intercepted or disrupted. Courts should also take into account nonmonetary profits such as payment in kind, gifts or favours, which will need to be carefully assessed in each individual case.³¹

³⁰ Proceeds of Crime Act 2002, s.9

³¹ *ibid.* ss.79 to 81

Where a sexual exploitation offence requires the prosecution to prove that the offender acted for personal gain and this is already reflected in the starting point for sentencing, evidence of substantial financial or

other advantage to a value in the region of £5000 and upwards (in line with the provisions of section 75(4) of the Proceeds of Crime Act 2002) should be treated as an aggravating factor.

Where a sexual exploitation offence does not require the prosecution to prove that the offender acted for gain, the degree of personal involvement of the offender and the levels of personal or financial gain should be treated as aggravating factors for sentencing.

100

The Offender's Culpability

6.12 In the Council's guideline on Seriousness,³² it is stated that, in broad terms, an intention to cause harm is at the highest level of criminal culpability - the worse the harm intended, the higher the offender's culpability - and planning an offence makes the offender more highly culpable than impulsive offending.

6.13 The common thread of the exploitation offences is the planned abuse of vulnerable victims, with the main purpose of the offender being to secure some form of personal advantage, whether this is financial gain or reward, sexual services or personal sexual gratification (as in the offence of 'Paying for sexual services of a child').

6.14 As the combination of culpability with harm determines the seriousness of an offence, it follows that the offences covered in this section are at the higher end of the scale of seriousness and robust sentencing provisions are needed.

The Age of the Victim

The Risk of Re-Offending

6.15 The sexual exploitation offences are of a level of seriousness that suggests a custodial sentence will normally be appropriate, but the way in which the risk of re-offending should be addressed will depend on the nature of, and the motivation for, the offences committed.

³² *Overarching Principles: Seriousness*, published 16 December 2004 – www.sentencing-guidelines.gov.uk

In general, the younger the age of the child, the higher the sentence should be for an offence involving the sexual exploitation of a child.

In particular, the starting points for sentencing should be higher where the victim is under 13. The starting points for offences involving victims aged 16 or 17 should be lower than those for victims aged 13 or over but under 16, to recognise that they are over the legal age of consent, but any evidence of grooming, coercion, threats or intimidation should increase a sentence in line with that which would apply if the victim were aged 13 or over but under 16.

Evidence of an offender's involvement in, or management of, a wellplanned or large scale commercial operation resulting in sexual exploitation should be treated as an aggravating factor for sentencing: the greater the offender's degree of involvement, the more serious the offence.

Sexual offences

101

6.16 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 benefit from taking part in a sex offender

treatment programme, which will help the offender to recognise and control sexually deviant tendencies. There is a 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.

6.17 However, different issues arise where the courts are sentencing someone whose behaviour has nothing to do with personal sexual deviance but instead involves the exploitation of the sexual appetites or deviancies of others, whether or not for gain. In such cases, sex offender treatment programmes are unlikely to be appropriate. The use of fines or community orders containing requirements such as a curfew, residence, unpaid work and prohibited activity may be effective in discouraging future offending.

102

PART 6A: INDECENT PHOTOGRAPHS OF CHILDREN

6A.1 The Sexual Offences Act 2003 makes amendments to the Protection of Children Act 1978 and Criminal Justice Act 1988. 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 pseudophotographs of any person below the age of 18.

6A.2 The levels for sentencing of offences involving pornographic images were established in the case of *R v Oliver, Hartrey and Baldwin*.³³ These levels have been reviewed in terms of the nature of the images falling into each level:

- Images depicting non-penetrative activity are less serious than images depicting penetrative activity
- Images of non-penetrative activity between children are generally less serious than images depicting non-penetrative activity between adults and children
- All acts falling within the definitions of rape and assault by penetration which carry the maximum life penalty should be classified as level 4

6A.3 Pseudo-photographs should generally be treated as less serious than real images. However they can be just as serious as photographs of a real child, for example where the imagery is particularly grotesque and beyond the scope of normal photography.

6A.4 The aggravating and mitigating factors set out in the case of *Oliver* remain relevant and are set out in the guideline for this offence.

³³ [2003] 2 Cr App R(S) 15

The levels of seriousness (in ascending order) for sentencing for offences involving pornographic images are:

Level 1 images depicting erotic posing with no sexual activity;

Level 2 non-penetrative 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 involving a child or children, or both children and adults;

Level 5 sadism or penetration of or by an animal

Offences involving any form of sexual penetration of the vagina or anus

or penile penetration of the mouth (except where they involve sadism or intercourse with an animal, which fall within level 5) should be classified as activity at level 4.

Sexual offences

103

6A.5 An adult (aged 18 or over) who is given any sentence (including a conditional discharge) in relation to offences involving a victim or victims aged under 16 will be subject to registration requirements.³⁴

Where the offences involved a victim or victims aged 16 or 17, the requirement to register is triggered by a sentence other than an absolute or conditional discharge. Where the imposition of a conditional discharge would not result in registration, it should not be imposed purely to avoid the requirement for registration.

6A.6 Courts have the discretion to make an order disqualifying an offender (adult or juvenile) from working with children regardless of the sentence imposed.³⁵

Possession of Indecent Photographs where the Child Depicted is Aged 16 or 17

6A.7 The starting points for sentencing should reflect the fundamental facts of a case, including that the victim is over the legal age of consent.

6A.8 The presence of any aggravating factors will substantially increase a sentence and the principle of lower sentences should not be applied where an offender possesses images at level 5 as these will involve either non-consensual or unlawful activity.

6A.9 Where it cannot be established that a victim was under 13, penalties will need to be based on the sentencing starting points for children aged 13 or over but under 16. In many cases however, the extreme youth of the child in a photograph or pseudo photograph will either be a matter of proven fact or will be a question that is beyond reasonable doubt. Where the nature of the image indicates that the victim is likely to have suffered particularly serious harm, this should always aggravate the sentence.

³⁴ Sexual Offences Act 2003, s.134

³⁵ Criminal Justice and Court Services Act 2000, s.29A as inserted by Criminal Justice Act 2003, sched.30

Starting points for sentencing for possession of indecent photographs should be higher where the victim is a child under 13.

Sentences should be lower than those involving photographs of children under 16 where:

- **an offender possesses only a few indecent photographs, none of which include sadism or penetration of or by an animal, and**
- **the images are of children aged 16 or 17, and**
- **the photographs are retained solely for the use of the offender.**

104

6A.10 The court cannot make inferences about the status of unknown material because of the fundamental principle that a person may only be convicted and sentenced according to the facts that have been proved. However if an offender has used devices to destroy or hide material then it falls within the general aggravating factor 'An attempt to conceal or dispose of evidence'.

Showing or Distributing and the Element of Financial Gain

6A.11 The starting points in the guideline reflect the differences in terms of relative seriousness and maximum penalty available for possessing indecent photographs or pseudo-photographs (5 years) and taking or making, distributing or showing etc such photographs (10 years).

6A.12 Showing or distributing indecent photographs or pseudo-photographs even on a very small scale is regarded as serious offending behaviour. Wide-scale distribution is in the most serious category of offending behaviour.

6A.13 Where the material is shown or distributed without the victim's consent, the fact that the victim is over the age of consent should not have any bearing on sentencing levels, even if the material was originally taken and possessed with his or her consent.

6A.14 Where the offence involves a victim aged 16 or 17, the starting points for sentencing should reflect the fact that the victim is above the age of consent. The fact that the victim was not coerced or forced into the activity must be relevant for sentencing purposes and starting points should be lower to encourage consistency. Any evidence of threats or intimidation to induce consent should have the effect of increasing sentence in an individual case.

6A.15 Any profit for the victim, financial or otherwise, actual or anticipated, should be neutral for sentencing purposes.

The showing or distribution of pornographic images of children under 16, or of children aged 16 or 17 without their consent, is an aggravating factor for sentencing purposes.

Sexual offences

105

INDECENT PHOTOGRAPHS OF CHILDREN

Factors to take into consideration:

1. The levels of seriousness (in ascending order) for sentencing for offences involving pornographic images are:

Level 1 images depicting erotic posing with no sexual activity;

Level 2 non-penetrative 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 involving a child or children, or both children and adults;

Level 5 sadism or penetration of or by an animal

2. Offences involving any form of sexual penetration of the vagina or anus or penile penetration of the mouth (except where they involve sadism or intercourse with an animal, which fall within level 5) should be classified as activity at level 4.

3. Pseudo-photographs generally should be treated less seriously than real photographs

4. Sentences should be lower than those involving photographs of children under 16 where:

- an offender possesses only a few indecent photographs, none of which include sadism or penetration of or by an animal, and
- the images are of children aged 16 or 17, and
- the photographs are retained solely for the use of the offender.

5. The fact that the subject of (an) indecent photograph(s) is aged 16 or 17 has **no** impact on sentencing starting points where the activity depicted is at level 5.
6. Starting points for sentencing for possession of indecent photographs should be higher where the victim is a child under 13.
7. Registration requirements attach to a conviction for this offence dependent upon the age of the victim portrayed and the sentence imposed.
8. Courts have the discretion to make an order disqualifying an offender (adult or juvenile) from working with children regardless of the sentence imposed.

106

INDECENT PHOTOGRAPHS OF CHILDREN

Indecent photographs of children (section 45):

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

Maximum penalty: **5 years** for possession; otherwise **10 years**

Type/nature of activity Starting points

- Offender commissioned or encouraged the production of level 4 or 5 images
- Offender involved in the production of level 4 or 5 images

6 years

Level 4 or 5 images shown or distributed

3 years

Offender involved in the production of, or has traded in, material at levels 1-3

2 years

- Possession of a large quantity of level 4 or 5 material for personal use only
- Large number of level 3 images shown or distributed

12 months

- Possession of large quantity of level 3 material for personal use
- Possession of a small number of images at level 4 or 5
- Large number of level 2 images shown or distributed
- Small number of level 3 images shown or distributed

26 weeks

- Offender in possession of a large amount of material at level 2 or small amount at level 3
- Offender has shown or distributed material at level 1 or 2 on a limited scale
- Offender has exchanged images at level 1 or 2 with other collectors, but with no element of financial gain

12 weeks

Possession of a large amount of level 1 material and/or no more than a small amount of level 2, and the material is for personal use and has not been distributed or shown to others

An appropriate non-custodial sentence*

Additional aggravating factors Additional mitigating factors

1. Images shown or distributed to others, especially children
2. Collection is systematically stored or organised, indicating sophisticated approach to trading or a high level of personal interest
3. Images stored, made available, or distributed in such a way that they can be inadvertently accessed by others

4. Use of drugs, alcohol or other substance to facilitate the offence of making or taking
5. Background of intimidation or coercion
6. Threats to prevent victim reporting the activity
7. Threats to disclose victim's activity to friends or relatives
8. Financial or other gain

1. A few images held solely for personal use
2. Images viewed but not stored
3. A few images held solely for personal use and it is established both that the subject is aged 16 or 17 and that he or she was consenting

* "Non-custodial sentence" in this context suggests a community order or a fine. In most instances, an offence will have crossed the threshold for a community order. However, in accordance with normal sentencing practice, a court is not precluded from imposing a financial penalty where that is determined to be the appropriate sentence. *The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.*

Sexual offences

107

108

PART 6B: ABUSE OF CHILDREN THROUGH PROSTITUTION AND PORNOGRAPHY

6B.1 The four offences in this category are:

Paying for sexual services of a child

Causing or inciting child prostitution or pornography

Controlling a child prostitute or a child involved in pornography

Arranging or facilitating child prostitution or pornography

Sexual offences

109

PAYING FOR SEXUAL SERVICES OF A CHILD

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The offence of 'Paying for sexual services of a child' is the only offence in this group that involves actual physical sexual activity between an offender and a victim.
3. It carries staged maximum penalties according to the age of the victim, in this case under 16, or over 16 but under 18, and also, specifically in relation to victims under 13, whether the sexual services provided or offered involved penetrative activity.
4. The starting points for sentencing for the offence of 'Paying for sexual services of a child', where the victim is aged 13 or over, but under 16, are higher than those for the offence of 'sexual activity with a child' to reflect the fact that the victim has been commercially exploited.
5. Starting points for victims aged 16 or 17 are lower than the equivalent starting points for victims aged 13 to 15, in line with the difference in the maximum penalty, to reflect the fact that the victim is above the legal age of consent
6. The starting points where the victim is aged 13 or over, but under 16, are higher than those for the offence of 'sexual activity with a child' to reflect

the fact that the victim has been commercially exploited.

7. The starting points for sentencing for the offence of 'Paying for sexual services of a child' where the victim is under 13 are higher than those for the specific 'under 13' offences covering the same type of sexual activity, to reflect the fact that the victim has been commercially exploited.

8. The offence of 'Paying for sexual services of a child' includes higher maximum penalties to cater for those (albeit rare) cases where the age of the victim is only established during the course of a trial. The same principle has been applied to the starting points for sentencing.

110

PAYING FOR SEXUAL SERVICES OF A CHILD

THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

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.

Maximum penalty: **Life imprisonment** for offences involving penetration where the child is under 13, otherwise **14 years**; **14 years** where the child is aged 13 or over but under 16; **7 years** where the child is aged 16 or 17.

Type/nature of activity Starting points

History of paying for penetrative sex with children under 18.

If the victim is under 13, the CPS would normally charge the offence of 'rape of a child under 13' or 'assault of a child under 13 by penetration'. Any commercial element to the offence and any history of repeat offending will be aggravating factors.

However, if this offence is charged - **15 years**

7 years if the victim is 13 or over but under 16

3 years if the victim is aged 16 or 17

Penile penetration of the vagina, anus or mouth or penetration of the vagina or anus with an object or another body part)

If the victim is under 13, the CPS would normally charge the offence of 'rape of a child under 13' or 'assault of a child under 13 by penetration'. Any commercial element to the offence will be an aggravating factor.

However, if this offence is charged - **12 years**

5 years if the victim is 13 or over but under 16

2 years if the victim is aged 16 or 17

Sexual touching falling short of penetration If the victim is under 13, the CPS would normally charge the offence of 'sexual assault of a child under 13'. Any commercial element to the offence will be an aggravating factor.

However, if this offence is charged - **5 years**

4 years if the victim is 13 or over but under 16

12 months if the victim is aged 16 or 17

Additional aggravating factors Additional mitigating factors

1. Use of drugs, alcohol or other substance to secure the victim's compliance

2. Proved or admitted abduction or detention (unless separately charged)

3. Threats to prevent victim reporting the activity

4. Threats to disclose victim's activity to friends or relatives

5. Offender aware that he or she is suffering from a sexually transmitted infection

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially

more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

Sexual offences

111

CHILD PROSTITUTION OR PORNOGRAPHY

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
 2. Three offences fall within this group;
 - causing or inciting child prostitution or child pornography
 - controlling a child prostitute or a child involved in pornography
 - arranging or facilitating child prostitution or pornography.
 3. The level of involvement of the offender is a fundamental element of the 'abuse of children through prostitution and pornography' offences.
 4. Financial reward may not always be a factor in someone's involvement in these offences. Thus the offences cover anyone who takes part in any way, for whatever reason, in a child's involvement in prostitution or pornography. However, most offenders will stand to gain in some way from their involvement and sentencing starting points need to be relatively high, in line with established principles about the serious nature of commercial exploitation.
 5. The courts should consider making an order confiscating any profits stemming from the offender's criminal life-style or forfeiting any possessions (for example cameras, computers, property) used in connection with the commission of the offence.
 6. Evidence of an offender's involvement in, or management of, a well-planned or large scale commercial operation resulting in sexual exploitation should be treated as an aggravating factor for sentencing: the greater the offender's degree of involvement, the more serious the offence.
 7. The starting point for the child prostitution and pornography offences will always be a custodial sentence.
 8. The same starting points apply whether the activity was caused or incited. Where an offence was incited but did not take place as a result of the voluntary intervention of the offender, that is likely to reduce the severity of the sentence imposed.
 9. Aggravating factors considered specifically relevant to the offence and other mitigating factors are listed in the offence guideline (additional to the general aggravating factors set out in the Guideline on Seriousness (see Part 1, para. 1.23 above)).
 10. In cases where a number of children are involved, consecutive sentences may be appropriate leading to cumulative sentences significantly higher than the suggested starting points for individual offences.
 11. In cases where the offender is, to a degree, another victim the courts may wish to take a more lenient stance. The courts might consider whether the circumstances of the offender should mitigate sentence. This will depend on the merits of each case.
- The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the guideline take account of this.*

112

CHILD PROSTITUTION AND PORNOGRAPHY

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

1. **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.
2. **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 child's prostitution, or involvement in pornography, anywhere in the world.
3. **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.

Maximum penalty for all offences: **14 years**

Type/nature of activity Starting points

PENETRATIVE ACTIVITY

Organised commercial exploitation If the victim is under 13, the CPS would normally charge the offence of 'causing or inciting a child under 13 to engage in sexual activity' The commercial element of the offence will be an aggravating factor.

However, if this offence is charged - **10 years**

8 years if the victim is 13 or over but under 16

4 years if the victim is aged 16 or 17

Offender's involvement is minimal and not perpetrated for gain

If the victim is under 13, the CPS would normally charge the offence of 'causing or inciting a child under 13 to engage in sexual activity' The commercial element of the offence will be an aggravating factor.

However, if this offence is charged - **8 years**

5 years if the victim is 13 or over but under 16

2 years if the victim is aged 16 or 17

NON-PENETRATIVE ACTIVITY

Organised commercial exploitation If the victim is under 13, the CPS would normally charge the offence of 'causing or inciting a child under 13 to engage in sexual activity'. The commercial element of the offence will be an aggravating factor.

However, if this offence is charged - **8 years**

6 years if the victim is 13 or over but under 16.

3 years if the victim is aged 16 or 17

Offender's involvement is minimal and not perpetrated for gain.

If the victim is under 13, the CPS would normally charge the offence of 'causing or inciting a child under 13 to engage in sexual activity'. The commercial element of the offence will be an aggravating factor.

However, if this offence is charged - **6 years**

3 years if the victim is aged 13 or over but under 16

12 months if the victim is aged 16 or 17

Additional aggravating factors Additional mitigating factors

1. Background of threats or intimidation
 2. Large-scale commercial operation
 3. Use of drugs, alcohol or other substance to secure the victim's compliance
 4. Induced dependency on drugs
 5. Forcing a victim to violate another person
 6. Victim has been manipulated into physical and emotional dependence on the offender
 7. Proved abduction or detention (unless separately charged)
 8. Threats to prevent victim reporting the activity
 9. Threats to disclose victim's activity to friends or relatives
 10. Storing, making available or distributing images in such a way that they can be inadvertently accessed by others
 11. Images distributed to other children or persons known to the victim
 12. Financial or other gain
1. Offender also being controlled in prostitution or pornography and subject to threats or intimidation

Sexual offences

113

Part 6C: EXPLOITATION OF PROSTITUTION

6C.1 The offences in this section relate to the exploitation of adults who work as prostitutes, replacing gender-specific offences in the Sexual Offences Act 1956. Offenders who cause, incite or control the activities of a prostitute for their own gain or for the gain of a third person can be prosecuted under two new offences.

6C.2 The offences 'Causing or inciting prostitution for gain' and 'Controlling prostitution for gain' cover two levels of criminal activity
(i) the coercion of another person into prostitution, and
(ii) controlling his or her activities for gain.

114

EXPLOITATION OF PROSTITUTION

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The degree of coercion, both in terms of recruitment and subsequent control of a prostitute's activities is highly relevant to sentencing.
3. The degree to which a victim is exploited or controlled, the harm suffered as a result, the level of involvement of the offender, the scale of the operation and the timescale over which it has been run, will all be relevant in terms of assessing the seriousness of the offence.
4. Where an offender has profited from his or her involvement in the prostitution of others, the courts should always consider making a confiscation order approximately equivalent to the profits enjoyed.
5. Aggravating factors considered specifically relevant to the offences are listed on the offence guidelines (additional to the general aggravating factors in the guideline on Seriousness).
6. Where there is evidence that an offender convicted of an exploitation of prostitution offence is not actively involved in the coercion or control of the victim(s), that he or she acted through fear or intimidation and that he or she is trying to exit prostitution, the courts may wish to consider whether, in the particular circumstances of the case, this should mitigate sentence.
7. The starting points are the same whether prostitution was caused or incited and whether or not the incited activity took place. Where the offence was incited, the sentencer should begin from the starting point that the offence was incited, taking account of the nature of the harm that would have been caused had the offence taken place and calculating the final sentence to reflect that no actual harm was occasioned to the victim but being mindful that the intended victim may have suffered as a result of knowing or believing the offence would take place.
8. The starting point for the exploitation of prostitution offences where an offender's involvement was minimal, and he or she has not actively engaged in the coercion or control of those engaged in prostitution, is a non-custodial sentence.
9. A fine may be more appropriate for very minimal involvement.
10. Where an offender has profited from his or her involvement in the prostitution of others, the court should consider making a confiscation order³⁶ approximately equivalent to the profits enjoyed.

³⁶ Criminal Justice Act 1988 as amended by the Proceeds of Crime Act 2002

Sexual offences

115

EXPLOITATION OF PROSTITUTION

THESE ARE SPECIFIED OFFENCES FOR THE PURPOSES OF SECTION 227 CRIMINAL JUSTICE ACT 2003.

1. Causing or inciting prostitution for gain (section 52):

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

2. 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.

Maximum penalty: for both offences **7 years**

Type/nature of activity Starting points

Evidence of physical and/or mental coercion

3 years

No coercion or corruption but the offender is closely involved in the victim's prostitution

12 months

No evidence victim was physically coerced or corrupted and the involvement of the offender was minimal

An appropriate non-custodial sentence*

Additional aggravating factors Additional mitigating factors

1. Background of threats, intimidation or coercion
2. Large-scale commercial operation
3. Substantial gain (in the region of £5000 and upwards)
4. Use of drugs, alcohol or other substance to secure the victim's compliance
5. Induced dependency on drugs
6. Proved abduction or detention (unless separately charged)
7. Threats to prevent victim reporting the activity
8. Threats to disclose victim's activity to friends or relatives

1. Offender also being controlled in prostitution and subject to threats or intimidation

* "Non-custodial sentence" in this context suggests a community order or a fine. In most instances, an offence will have crossed the threshold for a community order. However, in accordance with normal sentencing practice, a court is not precluded from imposing a financial penalty where that is determined to be the appropriate sentence.

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

116

KEEPING A BROTHEL USED FOR PROSTITUTION

Factors to take into consideration

1. The offence covers anyone who keeps, manages or acts or assists in the management of a brothel. The degree of coercion, both in terms of recruitment and subsequent control of a prostitute's activities is highly relevant to sentencing.
2. The degree to which a victim is exploited or controlled, the harm suffered as a result, the level of involvement of the offender, the scale of the operation and the timescale over which it has been run, will all be relevant in terms of assessing the seriousness of the offence.
3. Aggravating factors considered specifically relevant to the offences are listed on the offence guidelines (additional to the general aggravating factors in the Council guideline on Seriousness).
4. Where there is evidence that an offender convicted of an exploitation of prostitution offence is not actively involved in the coercion or control of the

victim(s), that he or she acted through fear or intimidation and that he or she is trying to exit prostitution, the courts may wish to consider whether, in the particular circumstances of the case, this should mitigate sentence.

5. The starting points are the same whether prostitution was caused or incited and whether or not the incited activity took place. Where the offence was incited, the sentencer should begin from the starting point that the offence was incited, taking account of the nature of the harm that would have been caused had the offence taken place and calculating the final sentence to reflect that no actual harm was occasioned to the victim but being mindful that the intended victim may have suffered as a result of knowing or believing the offence would take place.

6. A non-custodial sentence may be appropriate for very minimal involvement.

7. Where an offender has profited from his or her involvement in the prostitution of others, the courts should always consider making a confiscation order approximately equivalent to the profits enjoyed.

Sexual offences

117

KEEPING A BROTHEL USED FOR PROSTITUTION

Keeping a brothel used for prostitution (section 55):

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

Maximum penalty: **7 years**

Type/nature of activity Starting points

Offender is the keeper of a brothel and has made substantial profits in the region of £5000 and upwards

2 years

Offender is the keeper of the brothel and is personally involved in its management

12 months

Involvement of the offender was minimal

An appropriate non-custodial sentence*

Additional aggravating factors Additional mitigating factors

1. Background of threats, intimidation or coercion
2. Large-scale commercial operation
3. Personal involvement in the prostitution of others
4. Proved or admitted abduction or detention (unless separately charged)
5. Financial or other gain

1. Using employment as a route out of prostitution and not actively involved in exploitation
2. Coercion by third party

* "Non-custodial sentence" in this context suggests a community order or a fine. In most instances, an offence will have crossed the threshold for a community order. However, in accordance with normal sentencing practice, a court is not precluded from imposing a financial penalty where that is determined to be the appropriate sentence.

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

SENTENCERS ARE REMINDED THAT A NUMBER OF FINANCIAL ORDERS CAN BE MADE IN ADDITION TO THE SENTENCE IMPOSED FOR THIS OFFENCE. (See Part 1, para. 1.31 on pages 16/17 above).

118

Part 6D: TRAFFICKING

Factors to take into consideration

1. The new sentences for public protection must be considered in all cases. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.
2. The type of activity covered by the various trafficking offences in the Act is broadly the same, the only difference being the geographical area within which the trafficked persons are moved. The harm being addressed is sexual exploitation, but here either children or adults may be involved as victims.
3. The offences are designed to cover anyone involved in any stage of the trafficking operation, whether or not there is evidence of gain. This is serious offending behaviour, which society as a whole finds repugnant, and a financial or community penalty would rarely be an appropriate disposal.
4. 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.
5. 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 being in control of a money making operation that is based on the degradation, exploitation and abuse of vulnerable people may be equally, if not more, serious than the actions of an individual who is personally involved at an operational level.
6. Aggravating factors considered specifically relevant to the offence are listed (additional to the general aggravating factors in the Guideline on Seriousness (see also Part 1, para.1.23 above)). Some of the general factors may also be listed as being specifically relevant to the offence
7. Circumstances such as the fact that the offender is also a victim of trafficking and their actions were governed by fear could be a mitigating factor if not accepted as a defence.
8. The starting point for sentencing for offences of trafficking for sexual exploitation should be a custodial sentence. Aggravating factors such as participation in a large-scale commercial enterprise involving a high degree of planning, organisation or sophistication, financial or other gain and the coercion and vulnerability of victims should move sentences towards the maximum 14 years.
9. In cases where a number of children are involved, consecutive sentences may be appropriate leading to cumulative sentences significantly higher than the suggested starting points for individual offences.
10. Where an offender has profited from his or her involvement in the prostitution of others, the court should consider making a confiscation order³⁷ approximately equivalent to the profits enjoyed.

³⁷ Criminal Justice Act 1988 as amended by the Proceeds of Crime Act 2002

Sexual offences

119

TRAFFICKING

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

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

Intentionally arranging or facilitating a person's arrival/travel within/ departure from the UK, intending or believing that a sexual offence will be committed.

Maximum penalty: for all offences **14 years**

Type/nature of activity Starting points

Involvement at any level in any stage of the trafficking operation.

Note: If the victim is under 13, the CPS would normally charge one of the specific under 13 offences. Any commercial exploitation element will be an aggravating factor.

4 - 10 years

Additional aggravating factors Additional mitigating factors

1. Large-scale commercial operation
2. High degree of planning or sophistication
3. Large number of people trafficked
4. Substantial financial (in the region of £5000 and upwards) or other gain
5. Fraud
6. Financial extortion of the victim
7. Deception
8. Use of force, threats of force or other forms of coercion
9. Threats against victim or members of victim's family
10. Proved or admitted abduction or detention (unless separately charged)
11. Restriction of victim's liberty
12. Inhumane treatment
13. Confiscation of victim's passport

1. Coercion by third party
2. No evidence of personal gain

The Council Guideline New Sentences: Criminal Justice Act 2003 recognised the potentially more demanding nature of custodial sentences of 12 months or longer imposed under the new framework introduced by the Criminal Justice Act 2003. The sentencing ranges and starting points in the above guideline take account of this.

120

Sexual offences

121

PART 7: SENTENCING YOUTHS

OFFENCES WITH A LOWER STATUTORY MAXIMUM

7.1 The following guidelines are for those offences where the court considers that the facts found by the court justify the involvement of the criminal law – these findings may be different from those on which the decision to prosecute was made.

7.2 The sentencing framework that applies to young offenders (under 18) is different from that for adult offenders. The significant factors are set out below.

7.3 The offences in this section are 'serious' offences. Where the significant harm criterion is met, the court is required³⁸ to impose one of the sentences for public protection.

7.4 For each offence, the circumstances that would suggest that a custodial sentence should be passed where it is available to the court and those that would suggest that a case should be dealt with in the Crown Court (as grave crimes) are set out. As for adult offenders, these guidelines relate to sentencing on conviction for a first offence after a plea of not guilty.

(i) The principal aim for all involved in the youth justice system is to prevent offending by children and young persons.³⁹

(ii) A court imposing sentence on a youth must have regard to the welfare,⁴⁰ maturity, sexual development and intelligence of the youth. These are always important

factors.

(iii) Where a youth pleads guilty to one of these offences and it is the first offence of which the youth is convicted, a youth court may impose an absolute discharge, a mental health disposal, a custodial sentence, or else make a referral order.

(iv) Where the youth is aged 12, 13 or 14, a custodial sentence may only be imposed if the youth is a “persistent offender” or has committed a “grave crime” warranting detention for a period in excess of 2 years.⁴¹

(v) Where a youth is aged 10 or 11, no custodial sentence is available in the youth court.

(vi) Where a custodial sentence is imposed in the youth court, it must be a Detention and Training Order (DTO), which can only be for 4/6/8/10/12/18 or 24 months.

(viii) Where a custodial sentence is imposed in the Crown Court, it may be a DTO or it may be detention for a period up to the maximum for the offence.

³⁸ Criminal Justice Act 2003, ss.226 and 228

³⁹ Crime and Disorder Act 1998, s.37

⁴⁰ Children and Young Persons Act 1933, s.44

⁴¹ PCC(S)A 2000, s.100

122

SEXUAL ACTIVITY WITH A CHILD

(when committed by a person under the age of 18)

THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Intentional sexual touching of a person under 16 (section 9)

Maximum penalty: **5 years** (14 years if offender is 18 or over)

The ‘starting points’ below are based upon a first-time offender aged 17 years old who pleaded not guilty. For younger offenders, sentencers should consider whether a lower starting point is justified in recognition of the offender’s age or immaturity.

Type/nature of activity Starting points

Offence involving penetration where one or more aggravating factors exist or where there is a substantial age gap between the parties.

Detention and Training Order – 12 months

CUSTODY THRESHOLD

Any form of sexual activity (non-penetrative or penetrative) not involving any aggravating factors.

Community order

Aggravating factors Mitigating factors

1. Offender ejaculated or caused victim to ejaculate
 2. Background of intimidation or coercion
 3. Use of drugs, alcohol or other substance to facilitate the offence
 4. Threats to prevent victim reporting the incident
 5. Proved or admitted abduction or detention (unless separately charged)
 6. Offender aware that he or she is suffering from a sexually transmitted infection
1. Relationship of genuine affection
 2. Youth and immaturity of offender

Sexual offences

123

CAUSING OR INCITING A CHILD TO ENGAGE IN SEXUAL ACTIVITY

(when committed by a person under the age of 18)

THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Intentional causing/inciting of person under 16 to engage in sexual activity (section 10)
Maximum penalty: **5 years (14 years** if offender is 18 or over)

The same starting points apply whether the activity was caused or incited and whether or not the incited activity took place.

The 'starting points' below are based upon a first-time offender aged 17 years old who pleaded not guilty. For younger offenders, sentencers should consider whether a lower starting point is justified in recognition of the offender's age or immaturity.

Type/nature of activity Starting points

Offence involving penetration where one or more aggravating factors exist or where there is a substantial age gap between the parties.

Detention and Training Order – 12 months CUSTODY THRESHOLD

Any form of sexual activity (non-penetrative or penetrative) not involving any aggravating factors.

Community order

Aggravating factors Mitigating factors

1. Offender ejaculated or caused victim to ejaculate
 2. Background of intimidation or coercion
 3. Use of drugs, alcohol or other substance to facilitate the offence
 4. Threats to prevent victim reporting the incident
 5. Proved or admitted abduction or detention (unless separately charged)
 6. Offender aware that he or she is suffering from a sexually transmitted infection
1. Relationship of genuine affection
 2. Offender intervenes to prevent incited offence from taking place
 3. Youth and immaturity of offender

124

ENGAGING IN SEXUAL ACTIVITY IN THE PRESENCE OF A CHILD

(when committed by a person under the age of 18)

THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Intentionally, and for the purpose of obtaining sexual gratification, engaging in sexual activity in the presence of person under 16, knowing or believing that the child is aware of the activity (section 11)

Maximum penalty: **5 years (10 years** if offender is 18 or over)

The 'starting points' below are based upon a first-time offender aged 17 years old who pleaded not guilty. For younger offenders, sentencers should consider whether a lower starting point is justified in recognition of the offender's age or immaturity.

Type/nature of activity Starting points

Sexual activity involving penetration involving one or more aggravating factors.

Detention and Training Order - 12 months

CUSTODY THRESHOLD

Any form of sexual activity (non-penetrative or penetrative) not involving any aggravating factors.

Community order

Aggravating factors Mitigating factors

1. Background of intimidation or coercion
 2. Use of drugs, alcohol or other substance to facilitate the offence
 3. Threats to prevent victim reporting the incident
 4. Proved or admitted abduction or detention (unless separately charged)
1. Youth and immaturity of offender

Sexual offences

125

CAUSING A CHILD TO WATCH A SEXUAL ACT

(when committed by a person under the age of 18)

THIS IS A SERIOUS OFFENCE FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Intentionally causing a person under 16 to watch sexual activity or look at a photograph or pseudo-photograph of sexual activity, for the purpose of obtaining sexual gratification (section 12)

Maximum penalty: **5 years** (10 years if offender is 18 or over)

The 'starting points' below are based upon a first-time offender aged 17 years old who pleaded not guilty. For younger offenders, sentencers should consider whether a lower starting point is justified in recognition of the offender's age or immaturity.

Type/nature of activity Starting points

Moving images of people engaged in sexual acts involving penetration

Detention and Training order – 12 months

Still images of people engaged in sexual acts involving penetration

Detention and Training order – 8 months

CUSTODY THRESHOLD

Moving images of people engaged in sexual acts other than penetration

Community order

Still images of people engaged in sexual acts other than penetration

Community order

Aggravating factors Mitigating factors

1. Background of intimidation or coercion
2. Use of drugs, alcohol or other substance to facilitate the offence
3. Threats to prevent victim reporting the incident
4. Proved or admitted abduction or detention (unless separately charged)
5. Images of violent activity

1. Youth and immaturity of offender

126

SEXUAL ACTIVITY WITH A CHILD FAMILY MEMBER

And

INCITING A CHILD FAMILY MEMBER TO ENGAGE IN SEXUAL ACTIVITY

(when committed by a person under the age of 18)

THESE ARE SERIOUS OFFENCES FOR THE PURPOSES OF SECTION 224 CRIMINAL JUSTICE ACT 2003.

Intentional sexual touching with a child family member (section 25)

Intentionally inciting sexual touching by a child family member (section 26)

Maximum penalty for both offences: **5 years** (14 years if offender is 18 or over)

The 'starting points' below are based upon a first-time offender aged 17 years old who pleaded not guilty. For younger offenders, sentencers should consider whether a lower starting point is justified in recognition of the offender's age or immaturity.

Type/nature of activity Starting points

Offence involving penetration where one or more aggravating factors exist or where there is a substantial age gap between the parties.

Detention and Training Order – 18 months

CUSTODY THRESHOLD

Any form of sexual activity that does not involve any aggravating factors.

Community order

Additional aggravating factors Additional mitigating factors

1. Background of intimidation or coercion
 2. Use of drugs, alcohol or other substance
 3. Threats deterring the victim from reporting the incident
 4. Offender aware that he or she is suffering from a sexually transmitted infection
1. Small disparity in age between victim and offender
 2. Relationship of genuine affection
 3. Youth and immaturity of offender