

Section ten: Offences committed by offenders under the age of 18

Part 7 of the existing Sentencing Guidelines Council (SGC) guidance includes guidelines for six sexual offences committed by offenders **under** the age of 18. These offences are:

- Sexual activity with a child, Sexual Offences Act 2003 – section 13 (section 9 for adult offenders);
- Causing or inciting a child to engage in sexual activity, Sexual Offences Act 2003 – section 13 (section 10 for adult offenders);
- Sexual activity with a child family member, Sexual Offences Act 2003 – section 25
- Inciting a child family member to engage in sexual activity, Sexual Offences Act 2003 – section 26
- Engaging in sexual activity in the presence of a child, Sexual Offences Act 2003 – section 13 (section 11 for adult offenders); and
- Causing a child to watch a sexual act, Sexual Offences Act 2003 – section 13 (section 12 for adult offenders).

All of these offences have a lower statutory maximum sentence of 5 years' imprisonment but, in all other respects, are equivalent to the adult offences discussed in section five involving sexual activity with a child or sexual activity with a child family member. The Council has decided to include these draft guidelines to ensure proportionate sentencing between adult and youth offenders.

The Council proposes that the format and structure of the young offender guidelines are based on the equivalent adult guidelines. This is complex as the Council has had to consider the different sentencing framework which operates under the youth justice system. This provides different sentencing options and obliges the court to approach the sentencing exercise in a different way to adult offenders. The Council has taken into account the following statutory principles of sentencing youths:

- that the principal aim of the youth justice system is to prevent offending by children and young persons;¹⁰⁴ and
- that the court is obliged to have regard to the welfare of the offender.¹⁰⁵

Many young offenders are dealt with in the youth court which is designed to address the needs of young offenders, witnesses and victims. When sentencing a young offender the sentencing options available to the court are different from those available for adults and the maximum sentence the youth court can pass is a two year detention and training order; for example, where the offender is of good character and the court does not impose a custodial sentence, the youth court is required to make a referral order under which the offender will be referred to a Youth Offender Panel which will then take appropriate action, including by way of restorative justice.¹⁰⁶ The youth court can also

¹⁰⁴ s.37 Crime and Disorder Act 1998

¹⁰⁵ s.44 Children and Young Persons Act 1933; for further information on the youth justice system refer to <http://www.justice.gov.uk/youth-justice> and the *Overarching Principles – Sentencing Youths Definitive Guideline*, Sentencing Guidelines Council, http://sentencingcouncil.judiciary.gov.uk/docs/web_overarching_principles_sentencing_youths.pdf

¹⁰⁶ ss.16 and 17 Powers of Criminal Courts (Sentencing) Act 2000

impose youth rehabilitation orders which are community based sentences within which various requirements can be made.

A particular feature of the youth justice system is that custody is considered as a last resort. As these rules are determined by legislation, they are outside the scope of the consultation but they are important in understanding how a sentencing court must approach a sentencing exercise.

The type of sexual activity that falls within the scope of child sex offences is broad. It is a difficult and sensitive area of the law when dealing with offenders under 18 as it includes both inappropriate and exploitative sexual behaviour but could also include offences committed as part of non-exploitative sexual experimentation between two young people. Section 13 would, for example, include a 17 year old who exploits and gives alcohol to a 13 year old and coerces her into performing oral sex. It would, however, also cover a 16-year-old boy in a sexual relationship with a 15-year-old girl where there is no exploitation.

Whether individual cases are prosecuted is a matter for the prosecution who will have to decide whether it is in the public interest to charge a young person. The CPS guidance, in respect of this offence, states:

“It should be noted that where both parties to sexual activity are under 16, then they may both have committed a criminal offence. However, the overriding purpose of the legislation is to protect children and it was not Parliament’s intention to punish children unnecessarily or for the criminal law to intervene where it was wholly inappropriate. Consensual sexual activity between, for example, a 14 or 15 year old and a teenage partner would not normally require criminal proceedings

in the absence of aggravating features. The relevant considerations include:

- the respective ages of the parties;
- the existence and nature of any relationship;
- their level of maturity;
- whether any duty of care existed;
- whether there was a serious element of exploitation.”¹⁰⁷

As set out in the discussion of the adult offences (at page 45) the offence of sexual activity with a child will normally be charged when the victim is aged between 13 and 15 in circumstances in which the victim maintains s/he agreed to the sexual activity. Where other situations arise, prosecutors will consider the appropriate charges to bring against the offender.

Q90

Do you agree that guidelines for these six offences committed by offenders under the age of 18, included in the current SGC guideline, should be included? If you disagree, please give reasons.

¹⁰⁷ http://www.cps.gov.uk/legal/v_to_z/youth_offenders/index.html#a29

Sexual activity with a child, Sexual Offences Act 2003 – section 13 (with reference to section 9);

and

Causing or inciting a child to engage in sexual activity, section 13 (with reference to section 10)

Maximum sentence: 5 years' custody (full guidelines page 351)

These offences are identical to the adult offences (sections 9 and 10) discussed at page 45 save that they are committed by offenders aged under 18. The Council is consulting on the basis that the young offender guideline for these offences is structured in a similar way to the adult guideline with a step-by-step approach, but reflects the lower statutory maximum and the different options available when sentencing youths.

Unlike the existing SGC guidance, which contains separate, but very similar, guidelines for young offenders convicted of sexual activity with a child (with reference to section 9) and causing or inciting a child to engage in sexual activity (with reference to section 10), the Council is consulting on providing guidance for both types of offending within one guideline, mirroring the structure of the adult guideline which is set out at page 215.

Q91

Do you agree that both offences should be contained in one guideline? If not, please state your reasons.

STEP ONE

Determining the offence category

The first step that the court will take is to consider the main factual elements of the offence. Both offences deal with penetrative and non-penetrative sexual activity and therefore encompass a wide range of sexual touching and sexual activity as previously discussed at page 46.

In other guidelines, the Council has moved away from determining sentence levels solely in terms of the sexual activity which has taken place. For these offences, however, the Council is consulting on the basis that harm is determined by reference to the sexual activity that has taken place. The reason for this is that, in this offence, the child may not see themselves as a victim and may not be conscious of harm having been done to them. They may be reluctant to articulate or recognise the psychological or emotional harm that has been done to them. The Council therefore suggests that harm must be correlated to the nature of the sexual activity, because where penetrative activity has taken place this will generally be more harmful and corrupting to the child than non-penetrative sexual activity. The suggested categorisation is set out below and is the same as that for the adult offence (at page 47).

Harm

Category 1

- Penetration of vagina or anus (using body or object)
- Penile penetration of mouth
In either case by, or of, the victim

Category 2 Masturbation by, or of, the victim

Category 3 Other sexual activity

Category 3 covers sexual activity that does not involve penetration or masturbation.

Category 2 involves masturbation. The Council is consulting on this as an analysis of case law highlights the fact that masturbation is involved in a large volume of cases currently being sentenced by the courts.

Category 1 involves penetrative activity which could be penile, or by an object or other body part if it is of the vagina or anus, or penile penetration of the mouth. The Council has placed penetrative activity in the highest category because the consequences of this type of activity can be the most harmful to victims.

Culpability

The Council has adapted the culpability factors from the adult guideline to reflect the fact that both parties are young people. The culpability factors centre around whether the activity is exploitative, coercive or bullying and whether peer pressure has been used to gain acquiescence to the sexual activity.

Culpability

A

Use of gifts/bribes to coerce the victim

Use of threat (including blackmail)

Use of alcohol/drugs on victim to facilitate the offence

Abuse of position of trust

Sexual images of victim recorded, retained, solicited or shared

Vulnerable victim targeted

Member of group or gang during commission of offence

Offence 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 to the victim based on his or her disability (or presumed disability)

B

Factor(s) in category A not present

Culpability B has no factors listed, as with previous guidelines. It is envisaged that the type of offender who would fall into this category is one who is in an unlawful and inappropriate relationship with their victim and there are no signs of exploitation.

Culpability A lists factors which demonstrate that the offender has manipulated or coerced the victim or where there is disparity due to the offender's position in relation to the child. The specific factors that have been listed are:

- 'Use of gifts/bribes to coerce the victim' – it is acknowledged that gifts can be used as a genuine part of a non-exploitative friendship but this factor would apply where gifts have been used as a means of coercion or control. This would be determined on the facts before the court.
- 'Use of threat (including blackmail)' – see discussion at page 40.
- 'Use of alcohol/drugs on victim to facilitate the offence' – see discussion at page 40.
- 'Abuse of position of trust' – this has been included as a factor but it is recognised that this factor will not be as pertinent when there are two young people involved as it will be when there is an adult offender and a child victim. There may still be instances where, for example, a 17 year old has been asked to look after a 13 year old whilst the parents are out and they abuse the trust that has been placed in them. The Council is interested in views as to whether abuse of trust is a principal factor when both parties are young and whether there is justification for keeping this factor at step one for this offence.
- 'Sexual images of victim recorded, retained, solicited or shared'. This has been adapted from 'recording of the offence' which is found in the rape and assault guidelines. This is deliberate as, in the commission of these offences, the offender may have persuaded the victim to take naked pictures of themselves on a mobile phone and send them to the offender. The practice of "sexting", which refers to exchanging sexual messages or images through mobile phones or the internet, has been the subject of a

recent report commissioned for the NSPCC.¹⁰⁸ The report highlights the fact that activity is often coercive and linked to harassment, bullying and even violence. The summary to the report states:

“...status can be achieved in new ways through technology. This can involve soliciting, collecting and distributing peer produced sexualised images of girls, which operate as a form of commodity or currency.”

- ‘Vulnerable victim targeted’ – see discussion at page 40.
- ‘Member of group or gang during commission of offence’ – see discussion at page 20.
- ‘Offence racially or religiously aggravated’, ‘offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)’ and ‘offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)’ – see discussion at page 22.

Q92

Do you agree with the harm and culpability factors proposed at step one for these offences? If not, please specify which you would add or remove and why.

STEP TWO

Starting point and category ranges

The starting points in the existing SGC guidance are based on a sentence for a 17-year-old first-time offender who has pleaded not guilty. The Council is recommending that the sentencing starting points and ranges in all the under 18 draft guidelines should not be based on a specific age but rather that the sentencing court should take the age of the young offender into account at step two, having first established the harm and culpability arising from the offence.

Q93

Do you agree that the starting point should not be based on the age of the offender? If you disagree, please give reasons.

Having identified the appropriate category at step one, the court considers the starting point and is then asked to identify whether there are any additional factors that have not already been considered at step one which might either aggravate or mitigate the offence. This would then lead the court to decide whether the sentence should be adjusted upwards or downwards within the relevant range from the starting point set out in the guideline.

The sentencing options available to courts where the offender is under 18 are set out in statute. The Council intends to annex a table which sets out those options to assist practitioners and would welcome views on whether such an approach would be helpful.

Although the list of factors at step two is non-exhaustive the Council’s intention is to highlight factors that are likely to be relatively common to ensure they are considered by all courts.

¹⁰⁸ *A qualitative study of children, young people and ‘sexting’* A report prepared for the NSPCC, Jessica Ringrose (Institute of Education, London), Rosalind Gill (King’s College, London), Sonia Livingstone (London School of Economics), Laura Harvey (Open University), May 2012

The table below sets out the proposed aggravating factors for the offence of sexual activity with a child and causing/inciting sexual activity.

Where the factors have already been discussed the reference to the relevant discussion is given. Any new factors are explained in full below.

Aggravating factors

Statutory aggravating factors

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors

Location of offence

Timing of offence

Failure to comply with current court orders

Offence committed whilst on licence

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Attempts to dispose of or conceal evidence
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Pregnancy or STI as a consequence of sexual activity
--

Failure of young offender to respond to previous warnings about his/her behaviour

Commission of offence whilst under the influence of alcohol or drugs
--

- ‘Previous convictions’ and ‘offence committed whilst on bail’ – see discussion at page 23.
- ‘Location of offence’ and ‘timing of offence’ – see discussion at page 24.
- ‘Failure to comply with current court orders’ and ‘offence committed whilst on licence’ – see discussion at page 24.
- ‘Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the

prosecution’ and ‘attempts to dispose of or conceal evidence’ – see discussion at page 24.

- ‘Pregnancy or STI as a consequence of sexual activity’ – see discussion at page 50.
- ‘Failure of offender to respond to previous warnings about his/her behaviour’ has been included because there may be instances where a young offender has been warned, for example by the victim’s parents, about the inappropriate nature of the relationship but they have persisted with it.
- ‘Commission of offence whilst under the influence of alcohol or drugs’ – see discussion at page 24.

Mitigation

There are a number of mitigating factors that the Council is consulting on. The sensitivity of mitigating factors combined with the importance of giving them proper consideration in this consultation, is discussed in further detail in page 24.

Where the factors have already been discussed in previous sections the reference to the relevant discussion is given. Any new factors are explained in full below. The list of mitigating factors is non-exhaustive.

Mitigating factors

No previous convictions or no relevant/recent convictions
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Remorse

Previous good character and/or exemplary conduct
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Determination and/or demonstration of steps taken to address sexual behaviour

Age and/or lack of maturity of the young offender

Mental disorder or learning disability, where linked to the commission of the offence

Young offender intervenes to stop the sexual activity taking place
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- ‘No previous convictions or no relevant/recent convictions’ – see discussion at page 25.
- ‘Remorse’ – see discussion at page 25.
- ‘Previous good character and/or exemplary conduct’ has been included but the Council is interested in views on whether this factor would apply in the same way to youths as to adult offenders. Previous convictions will already have been taken into account and it may be more difficult for a child to demonstrate the development of ‘good character’ than for an adult, as the child will have less experience to draw upon and they may still be developing in terms of maturity and character.
- ‘Determination and/or demonstration of steps taken to address sexual behaviour’ – see discussion at page 51.
- ‘Age and/or lack of maturity of the young offender’ – see discussion at page 26. This is a key mitigating factor in the youth justice system and would usually operate along a sliding scale providing greater mitigation to a 12 year old of average maturity than for a 17 year old with average maturity.
- ‘Mental disorder or learning disability, where linked to the commission of the offence’ – see discussion at page 26.
- ‘Young offender intervenes to stop the sexual activity taking place’ is a factor that has been included to deal with situations where sexual activity is incited but does not, in fact, take place because the offender causes the activity to cease. This would not apply where the offence did not take place through the intervention of a third party, for example, a parent.

Q94

Do you agree with the aggravating and mitigating factors proposed at step two for these offences? If not, please specify which you would add or remove and why.

Sentence levels

As set out at page 146, these offences encapsulate a wide range of activity and therefore the ranges must be broad enough to allow sentencers to reflect this. The proposed ranges and starting points include both custodial and non-custodial options. The custodial sentence proposed is a detention and training order, with a 12 month starting point proposed for a category 1A offence, reflecting the exploitative or coercive nature of the offence, and a 4 month starting point for a category 1B offence reflecting the harm that may be caused by penetrative activity. The Council recognises that a 4 month starting point, being the shortest period allowed under law, may be problematic for several reasons including what could be achieved in a custodial sentence in that length of time. Therefore, a youth and rehabilitation order with suitable requirements may be more appropriate. The Council would welcome views on these issues. However, in appropriate cases where there is no evidence of exploitation or grooming, the Council is also recommending community sentences (youth rehabilitation orders). The sentencing options are very broad because of the different principles and statutory provisions that apply to courts sentencing youths (as discussed at page 139), which will often depend on the age of the youth offender. This is why no levels or types of youth rehabilitation orders are specified, unlike for adult community orders in the draft guideline for adults. This approach provides the most flexibility for the court to exercise its discretion.

For offenders under 18, the sentencer must also pass a sentence that will best ensure the young person does not reoffend (whilst recognising that in some circumstances custody cannot be avoided). In particular cases, the court may, therefore, decide that a youth rehabilitation order with suitable requirements (including intensive supervision and surveillance)

designed to address the young offender's sexual behaviour, in addition to punishing him, is a suitable alternative to a custodial sentence, to be served in the community.

The proposed new sentence levels are set out below.

	A	B
Category 1	Starting point 12 months' detention and training order	Starting point 4 months' detention and training order
	Category range Youth rehabilitation order – 24 months' detention and training order	Category range Youth rehabilitation order – 12 months' detention and training order
Category 2	Starting point Youth rehabilitation order	Starting point Youth rehabilitation order
	Category range Youth rehabilitation order – 12 months' detention and training order	Category range Youth rehabilitation order
Category 3	Starting point Youth rehabilitation order	Starting point Youth rehabilitation order
	Category range Youth rehabilitation order	Category range Youth rehabilitation order

Q95

Please give your views on the proposed sentence levels (starting points and ranges) for these offences. If you disagree with the levels stated, please give reasons why.

Engaging in sexual activity in the presence of a child, Sexual Offences Act 2003 – section 13 (with reference to section 11);

and

Causing a child to watch a sexual act, Sexual Offences Act 2003 – section 13 (with reference to section 12)

Maximum sentence: 5 years' custody (full guidelines page 357)

These offences are identical to the adult offences (sections 11 and 12, Sexual Offences Act 2003 (SOA 2003)) discussed at page 60 save that they are committed by those aged under 18. The Council is also recommending that the young offender guideline for these offences is structured in a similar way to the adult guideline with a step by step approach, but tailored to reflect the lower statutory maximum of 5 years' custody.

Q96

Do you agree that both offences should be contained in one guideline? If not, please state your reasons.

STEP ONE

Determining the offence category

The first step that the court will take is to consider the main factual elements of the offence. These offences deal with engaging in, and watching of, both penetrative and non-penetrative sexual activity and therefore encompass a wide range of offending.

For these offences the Council is consulting on the basis that harm is determined by reference to the sexual activity that has taken place or been viewed. The reasons for this are discussed at page 61. The suggested categorisation is set out below and many of the factors are the same as for the adult offence (at page 61) but where

there are differences they are set out below. An adult showing child pornography or engaging in sexual activity in the presence of a child, may be doing so as part of the grooming process, to desensitise the child to sexual imagery. It is less likely that a young person will be grooming or using pornography in quite the same way but it may still be used by a young offender as part of a process of coercion, bullying and harassment of the victim.

Harm	
Category 1	<ul style="list-style-type: none"> Causing victim to view extreme pornography Engaging in or causing a victim to view live sexual activity involving sadism/violence/sexual activity with an animal/a child
Category 2	Engaging in or causing a victim to view images or view live sexual activity involving <ul style="list-style-type: none"> penetration of vagina or anus (using body or object) penile penetration of the mouth masturbation
Category 3	None of the factors in categories 1 and 2 are present

Category 3 – see discussion at page 61.

Category 2

- 'Engaging in or causing a victim to view images or view live sexual activity involving: penetration of vagina or anus (using body or object); penile penetration of the mouth; masturbation' – see discussion at page 61.

Category 1

- 'Causing victim to view extreme pornography' – see discussion at page 61.
- 'Engaging in or causing a victim to view live sexual activity involving sadism/violence/sexual activity with an animal' – see discussion at page 61.

In the adult guideline the factor 'causing victim to view indecent/prohibited images of children' placed an offender in category 1. This has been

removed from the young offenders guideline because the prevalence of ‘sexting’ (see page 142) and the way in which children are using technology to exchange images with each other, would otherwise mean that too many young offenders would be placed in category 1. The exchange of sexual images between children is a difficult area but the Council considers that children exchanging and showing pictures of themselves or children of the same age to other similarly aged children, should not be in the same category as an adult showing a child indecent images of other children. The Council would be interested in views on this issue.

Culpability

Culpability has been adapted from the adult guideline and many of these factors have already been discussed under sexual activity committed by an offender under 18 at page 142.

Culpability

A

Use of gifts/bribes to coerce the victim

Use of threat (including blackmail)

Use of alcohol/drugs on victim to facilitate the offence

Abuse of position of trust

Vulnerable child targeted

Offence 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 to the victim based on his or her disability (or presumed disability)

B

None of the factors in category A present

Culpability B has no factors listed as the culpability level reflects the inherent abusive and corruptive effects of exposing a child to sexual imagery or sexual activity.

Culpability A lists factors that demonstrate an offender has manipulated, exploited or coerced the victim.

- ‘Use of gifts/bribes to coerce the victim’ – see discussion at page 142.
- ‘Use of threat (including blackmail)’ – see discussion at page 40.
- ‘Use of alcohol/drugs on victim to facilitate the offence’ – see discussion at page 40.
- ‘Abuse of position of trust’ – see discussion at page 142.
- ‘Vulnerable child targeted’ – see discussion at page 40.
- ‘Offence racially or religiously aggravated’, ‘offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)’ and ‘offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)’ – see discussion at page 22.

Q97

Do you agree with the harm and culpability factors proposed at step one for these offences? If not, please specify which you would add or remove and why.

STEP TWO**Starting point and category ranges**

Having identified the appropriate category at step one, the court considers the starting point and is then asked to identify whether there are any additional factors that have not already been considered at step one which might either aggravate or mitigate the offence. These then lead the court to decide whether the sentence should be adjusted upwards or downwards within the relevant range from the starting point set out in the guideline.

Although the list of factors at step two is non-exhaustive the Council's intention is to highlight factors that are likely to be relatively common to ensure they are considered by all courts.

The table below sets out the proposed aggravating factors.

Aggravating factors*Statutory aggravating factors*

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors

Location of offence

Timing of offence

Failure to comply with current court orders

Offence committed whilst on licence

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Attempts to dispose of or conceal evidence

Failure of young offender to respond to previous warnings about his/her behaviour

Commission of offence whilst young offender under the influence of alcohol or drugs

Please refer to the discussion of sexual activity with a child by young offenders at page 144 and of the equivalent adult offence at page 49 for further explanation of these aggravating factors.

Mitigation

There are also a number of mitigating factors that the Council is consulting on. The sensitivity of mitigating factors, and the importance of giving them due consideration in this consultation, is discussed in further detail in page 24.

The Council is consulting upon the same mitigating factors as for sexual activity with a child when committed by a young offender (see page 144).

Mitigating factors

No previous convictions **or** no relevant/recent convictions

Remorse

Previous good character and/or exemplary conduct

Determination and/or demonstration of steps taken to address sexual behaviour

Age and/or lack of maturity of the young offender

Mental disorder or learning disability, where linked to the commission of the offence



Do you agree with the proposed aggravating and mitigating factors at step two for these offences? If not, please specify what you would add or remove and why.

Sentence levels

As set out at page 147, these offences encapsulate a wide range of activity and therefore the ranges must be broad enough to allow sentencers to reflect this. The proposed ranges and starting points include both

custodial and non-custodial options. The custodial sentence proposed is a detention and training order, with an 8 month starting point proposed for a category 1A offence, reflecting the more extreme nature of the offence, and a 4 month starting point for a category 1B offence. The Council recognises that a 4 month starting point, being the shortest period allowed under law, may be problematic for several reasons including what could be achieved in a custodial sentence in that length of time. Therefore, a youth and rehabilitation order with suitable requirements may be more appropriate. The Council would welcome views on these issues. However, in appropriate cases where there is no evidence of exploitation or grooming, the Council is also recommending community sentences (youth rehabilitation orders). The sentencing options are very broad because of the different principles and statutory provisions that apply to courts sentencing youths (as discussed at page 139), which will often depend

on the age of the youth offender. This is why no levels or types of youth rehabilitation orders are specified, unlike for adult community orders in the draft guideline for adults. This approach provides the most flexibility for the court to exercise its discretion.

For offenders under 18, the sentencer must also pass a sentence that will best ensure the young person does not reoffend (whilst recognising that in some circumstances custody cannot be avoided). In particular cases, the court may, therefore, decide that a youth rehabilitation order with suitable requirements (including intensive supervision and surveillance) designed to address the young offender's sexual behaviour, in addition to punishing him, is a suitable alternative to a custodial sentence, to be served in the community.

The proposed new sentence levels are set out below.

	A	B
Category 1	Starting point 8 months' detention and training order	Starting point 4 months' detention and training order
	Category range Youth rehabilitation order – 12 months' detention and training order	Category range Youth rehabilitation order – 12 months' detention and training order
Category 2	Starting point Youth rehabilitation order	Starting point Youth rehabilitation order
	Category range Youth rehabilitation order – 4 months' detention and training order	Category range Youth rehabilitation order
Category 3	Starting point Youth rehabilitation order	Starting point Youth rehabilitation order
	Category range Youth rehabilitation order	Category range Youth rehabilitation order

Q99

Please give your views on the proposed sentence levels (starting points and ranges) for these offences. If you disagree with the levels stated, please give reasons why.

Sexual activity with a child family member, Sexual Offences Act 2003 – section 25 (offender under 18);

and

Inciting a child family member to engage in sexual activity, Sexual Offences Act 2003 – section 26 (offender under 18)

Maximum sentence: 5 years' custody (full guidelines page 363)

These offences are identical to the adult offences discussed at page 54 save that when committed by those aged under 18 they have a lower statutory maximum of 5 years' custody. Unlike the offences discussed earlier in this section, the victim can be aged up to 17 years old; this higher age limit reflects the fact that the victim has a family relationship with the young offender. The statutory definition of family relationship includes brothers and sisters, cousins and step-brothers and step-sisters.¹⁰⁹ As with the offence of sexual activity with a child (section 13 at page 141) these offences may be committed in a broad range of scenarios, from those involving exploitative behaviour within a family to those involving inappropriate sexual experimentation. The Council recommends that the young offender guideline for these offences is structured in a similar way to the adult guideline with a step-by-step approach, but tailored to reflect the lower statutory maximum.

The existing SGC guideline contains one guideline for both of these offences and the Council is recommending that this approach is maintained.

Q100

Do you agree that both offences should continue to be dealt with in one guideline? If not, please state your reasons.

STEP ONE

Determining the offence category

The first step that the court will take is to consider the main factual elements of the offence. These offences deal with both penetrative and non-penetrative sexual activity and therefore encompass a wide range of sexual touching and sexual activity.

As set out in the discussion at page 47, the Council has generally moved away from determining sentence levels solely in terms of the sexual activity which has taken place. For these offences, however, the Council is consulting on the basis that harm is determined by reference to the sexual activity that has taken place. The reason for this is that, in this offence, the child may not see themselves as a victim and may not be conscious of harm having been done to them. They may be reluctant to articulate or recognise the psychological or emotional harm that has been done to them. The Council therefore suggests that harm must be correlated to the nature of the sexual activity, because where penetrative activity has taken place this will generally be more harmful and corrupting to the child than non-penetrative sexual activity. The suggested categorisation is set out below and is the same as that for the adult offence (at page 55).

Harm

Category 1	<ul style="list-style-type: none"> • Penetration of vagina or anus (using body or object) • Penile penetration of mouth In either case by, or of, the victim
Category 2	Masturbation by, or of, the victim
Category 3	Other sexual activity

Category 3 involves sexual activity that does not involve penetration or masturbation.

¹⁰⁹ Defined by s.27 SOA 2003

Category 2 involves masturbation. The Council is consulting on this as an analysis of case law highlights the fact that masturbation is involved in a large volume of cases currently being sentenced by the courts.

Category 1 involves penetrative activity which could be penile, or by an object or other body part if it is of the vagina or anus, or penile penetration of the mouth. The Council has placed penetrative activity in the highest category because the consequences of this type of activity are the most harmful to victims.

Culpability

The proposed factors are set out below.

Culpability
A
Use of gifts/bribes to coerce the victim
Use of threat (including blackmail)
Use of alcohol/drugs on victim to facilitate the offence
Abuse of position of trust
Sexual images of victim recorded, retained, solicited or shared
Vulnerable child targeted
Offence 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 to the victim based on his or her disability (or presumed disability)
B
Factor(s) in category A not present

Culpability B has no factors listed, as with previous guidelines. It is envisaged that the type of sexual activity would involve an unlawful and inappropriate relationship between the offender and the victim where there are no signs of exploitation.

Culpability A lists factors which demonstrate that the offender has manipulated or coerced the victim or where there is disparity due to the young offender's position in relation to the child. The specific factors that have been listed are:

- 'Use of gifts/bribes to coerce the victim' – see discussion at 48.
- 'Use of threat (including blackmail)' – see discussion at page 40.
- 'Use of alcohol/drugs on victim to facilitate the offence' – see discussion at page 40.
- Abuse of position of trust is included as there may be instances where, for example, an older sibling has been entrusted with the care of a younger sibling and has abused that trust. Unlike the adult offence discussed at page 54 there is no assumed breach of trust in the starting points and ranges at page 155 when the offender is young themselves; the offender will not automatically be in a position of trust or responsibility over the victim.
- 'Sexual images of victim recorded, retained, solicited or shared' – see discussion at page 48.
- 'Vulnerable child targeted' – see discussion at page 40.
- 'Offence racially or religiously aggravated racially or religiously aggravated', 'offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)' and 'offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)' have all been included for the sake of consistency but the Council would be interested in whether these would be pertinent in the context of family members.

The culpability A factors are similar to those for sexual activity with a child committed by young offenders (discussed at page 141). The ‘member of group or gang during commission of offence’ factor has not been included as the Council believes this factor would be less relevant when dealing with offences between family members, but would be interested in views on this point.

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Do you agree with the harm and culpability factors proposed at step one for these offences? If not, please specify which you would add or remove and why.

STEP TWO

Starting point and category ranges

Having identified the appropriate category at step one, the court considers the starting point and is then asked to identify whether there are any additional factors that have not already been considered at step one which might either aggravate or mitigate the offence. These then lead the court to decide whether the sentence should be adjusted upwards or downwards within the relevant range from the starting point set out in the guideline.

Although the list of factors at step two is non-exhaustive the Council’s intention is to highlight factors that are likely to be relatively common to ensure they are considered by all courts.

The table below sets out the proposed aggravating factors.

Where the factors have already been discussed the reference to the relevant discussion is given. Any new factors are explained in full below.

Aggravating factors

Statutory aggravating factors

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors

Location of offence

Timing of offence

Failure to comply with current court orders

Offence committed whilst on licence

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Attempts to dispose of or conceal evidence

Pregnancy or STI as a consequence of sexual activity

Failure of young offender to respond to previous warnings about his/her behaviour

Commission of offence whilst under the influence of alcohol or drugs

- ‘Previous convictions’ and ‘offence committed whilst on bail’ – see discussion at page 23.
- ‘Location of offence’ and ‘timing of offence’ – see discussion at page 24.
- ‘Failure to comply with current court orders’ and ‘offence committed whilst on licence’ – see discussion at page 24.
- ‘Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution’ and ‘attempts to dispose of or conceal evidence’ – see discussion at page 24.
- ‘Pregnancy or STI as a consequence of sexual activity’ – see discussion at page 50.

- ‘Failure of young offender to respond to previous warnings about his/her behaviour’ is included as if, for example, parents discover that there has been sexual touching between two of their children, they may wish to try and resolve the behaviour within the family and warn the children before engaging the police.
- ‘Commission of offence whilst under the influence of alcohol or drugs’ – see discussion at page 24.
- ‘Determination and/or demonstration of steps taken to address sexual behaviour’ is discussed at page 51.
- ‘Age and/or lack of maturity of the young offender’ – see discussion at page 26. This is a key mitigating factor in the youth justice system and would usually operate along a sliding scale providing greater mitigation to a 12 year old of average maturity than for a 17 year old with average maturity.

Mitigation

There are also a number of mitigating factors that the Council is consulting on. The sensitivity of mitigating factors, and the importance of giving them proper consideration in this consultation, is discussed in further detail in page 24.

Where the factors have already been discussed in previous sections the reference to the relevant discussion is given. Any new factors are explained in full below. The list of mitigating factors is non-exhaustive.

Mitigating factors
No previous convictions or no relevant/recent convictions
Remorse
Previous good character and/or exemplary conduct
Determination and/or demonstration of steps taken to address sexual behaviour
Age and/or lack of maturity of the young offender
Mental disorder or learning disability, where linked to the commission of the offence

- ‘No previous convictions or no relevant/recent convictions’ – see discussion at page 25.
- ‘Remorse’ – see discussion at page 25.
- ‘Previous good character and/or exemplary conduct’ is discussed at page 25.

- ‘Mental disorder or learning disability, where linked to the commission of the offence’ – see discussion at page 26.

Sentence levels

As set out at page 155, these offences encapsulate a wide range of activity and therefore the ranges must be broad enough to allow sentencers to reflect this. The proposed ranges and starting points include both custodial and non-custodial options. The custodial sentence proposed is a detention and training order, with a 12 month starting point proposed for a category 1A offence, reflecting the exploitative or coercive nature of the offence, and a 4 month starting point for a category 1B offence reflecting the harm that may be caused by penetrative activity. The Council recognises that a 4 month starting point, being the shortest period allowed under law, may be problematic for several reasons including what could be achieved in a custodial sentence in that length of time. Therefore, a youth and rehabilitation order with suitable requirements may be more appropriate. The Council would welcome views on these issues. However, in appropriate cases where there is no evidence of exploitation or grooming, the Council is also recommending community sentences (youth rehabilitation orders). The sentencing options are very broad because of the different principles and statutory provisions that apply to courts sentencing youths (as discussed at page 139), which will often depend on the age of the youth offender. This is why no levels or types of youth

rehabilitation orders are specified, unlike for adult community orders in the draft guideline for adults. This approach provides the most flexibility for the court to exercise its discretion.

For offenders under 18, the sentencer must also pass a sentence that will best ensure the young person does not reoffend (whilst recognising that in some circumstances custody cannot be avoided). In particular cases, the court may,

therefore, decide that a youth rehabilitation order with suitable requirements (including intensive supervision and surveillance) designed to address the young offender's sexual behaviour, in addition to punishing him, is a suitable alternative to a custodial sentence, to be served in the community.

The proposed sentence levels are set out below.

	A	B
Category 1	Starting point 12 months' detention and training order	Starting point 4 months' detention and training order
	Category range Youth rehabilitation order – 24 months' detention and training order	Category range Youth rehabilitation order – 12 months' detention and training order
Category 2	Starting point Youth rehabilitation order	Starting point Youth rehabilitation order
	Category range Youth rehabilitation order – 12 months' detention and training order	Category range Youth rehabilitation order
Category 3	Starting point Youth rehabilitation order	Starting point Youth rehabilitation order
	Category range Youth rehabilitation order	Category range Youth rehabilitation order

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Please give your views on the proposed sentence levels (starting points and ranges) for these offences. If you disagree with the levels stated, please give reasons why.