

Section six: Indecent images of children

This section covers offences relating to indecent images of children. The offences under consideration are:

- possession of an indecent photograph or pseudo photograph of a child, Criminal Justice Act 1998 – section 160(1) and
- taking, making, distributing and sharing an indecent photograph or pseudo photograph of a child, Protection of Children Act 1978 – section 1(1)

These offences relate to photographs or ‘pseudo’ photographs of children. This covers photographs (including moving images) and also images made, for example, on a computer but which look like real photographs.

There are other areas of legislation⁷⁴ that deal with prohibited non-photographic images of children; for example, cartoons and drawings. Such types of prohibited images are not dealt with under this guideline. This is because of the particularly low volume of prosecutions for these offences; there have only ever been six people sentenced for prohibited images since the introduction of the offence in 2009. In addition this guideline does not deal with the possession of extreme pornographic images⁷⁵ or wider obscene publication offences where children are not depicted in the images.

The indecent images offences have a statutory maximum of five years’ imprisonment

for possession of images and 10 years’ imprisonment for the distribution, taking or making of such images. Sentences passed for an offence cannot be higher than the statutory maximum. The definition of ‘child’ for these offences is anyone under 18 years of age.

This is an area of offending that, due to advances in technology, has changed since the offences were created and the present guidelines were written by the Sentencing Guidelines Council (SGC). The ease with which images, including moving images, can be shared and downloaded has increased offenders’ ability to share or trade in such images; advances in electronic storage capacities have also meant that offenders can retain a much larger volume of images than previously. These developments, amongst others, have shaped the way such offences are committed. Judicial understanding of the way in which offenders behave has also developed – see full guideline at page 251.

The approach taken in this guideline is different from that adopted for other sexual offences. This is because the Council believes that this guideline does not lend itself to the harm and culpability model used for the other offences, often because there will be no identified victim before the court. In a large number of cases, the victim in the image will not have been identified or located. However, harm and culpability remain the focus of this model, albeit expressed in a different way. Where the victim has not been identified the court will consider the nature

⁷⁴ s.62 Coroners and Justice Act 2009

⁷⁵ ss.63–67 Criminal Justice and Immigration Act 2008

and level of harm caused by indecent images. The victim who has been abused to create the image is subjected also to further harm due to the image being recorded and viewed. There is also further harm due to the fact that viewing the images creates a market and demand for these pictures and so leads to further abuse. Mr Justice Keith articulates the approach taken by the court to harm in the case *R v Beaney*⁷⁶ where he states:

“The serious psychological injury which they [the children in the picture] would be at risk of being subjected to arises not merely from what they are being forced to do but also from their knowledge that what they are being forced to do would be viewed by others. It is not difficult to imagine the humiliation and lack of self-worth they are likely to feel. It is not simply the fact that without a market for these images the trade would not flourish. If people... continue to download and view images of this kind... the offences which they commit can properly be said to contribute to the psychological harm which the children in those images would suffer by virtue of the children’s awareness that there were people... watching them forced to pose and behave in this way.”

STEP ONE

Determining the offence category

The Council has included what it believes to be the main factual elements of the offence. The Council has chosen to determine the offence category firstly, by identifying the role of the offender (broadly reflecting culpability) and secondly, by considering the severity of the image (broadly representing harm).

Role of the offender

The Council believes that one of the principal factors to be considered by the sentencer is the offender’s role and involvement with the images. Although the discussion around role principally focuses on computer-related crime, it should not be overlooked that a variety of media and methods can be used in the creation, distribution and possession of indecent photographs of children.

- Possession of images: offenders will be placed in this category if they possess images but there is no evidence of distributing, possession with a view to distributing, or involvement in the production of the image. ‘Making’ of an image by downloading should be distinguished from the category ‘production/taking’ which is discussed below. If ‘making’ is charged in relation to downloading and does not involve production/taking of the image then for the purposes of sentencing ‘making’ by downloading should be treated as possession.
- Distribution: includes both actual distribution and possession of the images with a view to distributing them or showing them or making them available to others.⁷⁷
- Production/taking: includes an offender being involved in the actual taking or making of an image at source; in other words involvement in producing the original image. This is to be distinguished from ‘making’ by downloading, discussed above under possession. Any offender found guilty of production/taking will be placed in the highest category.

In order to provide clarity the Council is proposing to include guidance in the text clarifying how these categories should be used – see full guideline at page 251.

⁷⁶ [2004] EWCA Crim 449

⁷⁷ s.1(1)(c) Protection of Children Act 1978

Severity of the image

The existing SGC guideline sets out five levels of prohibited image based on those set out in the judgment in *Oliver*⁷⁸ which adapted the image classification found in the Copine scale.⁷⁹ The image levels used are:

- level one – images depicting erotic posing with no sexual activity;
- level two – non-penetrative sexual activity between children, or solo masturbation by a child;
- level three – non-penetrative sexual activity between adults and children;
- level four – penetrative sexual activity involving a child or children or both children and adults; and
- level five – sadism or penetration of, or by, an animal.

The Council is sensitive to the fact that classification of images can be a difficult and resource intensive job for the investigating and prosecuting authorities. The Council is also aware that the images before the court may give only a partial indication of the abuse suffered by the victim in the image, and image level alone does not give a complete account of the offender's behaviour. However, the court can only sentence what is before it and the Council believes that, despite the limitations around using image level, the severity of the sexual offence depicted in the image can be an initial guide to the harm that will have been suffered by the victim depicted.

Given the challenges presented by the classification of images, the Council proposes the levels of images can be simplified further. The proposed levels are set out below.

- Category A: 'Images involving penetrative sexual activity'; 'possession of images involving sexual activity with an animal or

sadism'. The Council believes that any image showing a child involved in penetrative sexual activity should be placed in the highest category. In line with the other sexual offences involving a child discussed in section five page 36, it is envisaged this would involve penetration of the vagina or anus (using body or object) and penile penetration of the mouth in either case by, or of, the victim. It is not proposed that a distinction is made between penetrative activity between an adult and child and penetrative activity between children.

It is also intended that category A includes images involving sexual activity with an animal or sadism. In the existing SGC guideline, 'penetrative activity and sadism' and 'penetration of, or by, an animal' are expressed as different levels of image (four and five respectively) but they attract exactly the same sentence starting points and ranges. The Council has therefore placed both of these into category A.

The Council has changed the wording 'penetration of, or by, an animal' to 'sexual activity involving an animal' to ensure that it covers images involving non-penetrative activity and addresses a difficulty that currently arises. This difficulty is highlighted in the CPS charging guidance in relation to the current categorisation which states:

"A question is raised as to what happens if a photograph shows a non-penetrative sexual act involving an animal (for example an animal licking the sexual organs of a child). A strict interpretation of level five would suggest that it could not come within that level but neither would it fit into any other level other than, conceivably, level one"⁸⁰

78 [2003] 1 Cr App R 28 CA

79 The Copine project (Combating Paedophile information networks in Europe) at the University of Cork developed a scale to categorise child abuse images. It has ten levels and was originally developed to look at the psychological approach to pictures rather than for use in courts.

80 CPS charging guidance indecent photographs of children http://www.cps.gov.uk/legal/h_to_k/indecent_photographs_of_children/#a03

- Category B: ‘Possession of images involving non-penetrative sexual activity’. This category combines the SGC levels two and three. The SGC made a distinction between non-penetrative sexual activity between children (or a child on their own) and non-penetrative sexual activity between an adult and a child. The Council is of the opinion that even if the image does not contain an adult, this does not mean that an adult was not involved in making it or otherwise exploiting the victim in order to generate the image. In addition, the ongoing victimisation of the child that flows from the image being recorded and viewed will be great even if there is not an adult in the picture. The Council is aware of the intensive law enforcement resources needed to classify images; the Council has taken the view that a distinction between images involving just children and those involving adults and children is not required for sentencing purposes as both create similar levels of harm and culpability. The Council is, therefore, consulting on the basis that all non-penetrative sexual activity should be dealt with using the same starting point and category ranges.
- Category C: ‘Images of erotic posing’. This category is included to capture other prohibited images which do not fall within A and B above. ‘Erotic posing’ is a term used in the SGC guideline but may be misleading. There may be cases where an image is not posed or ‘erotic’ but could still be deemed indecent, for example, a naked picture of a child not engaged in sexual activity but with a focus on the child’s genitals. The Council invites views on whether this category could be defined differently to better reflect indecent images not captured in A and B.

It will be noted that the levels have been labelled as A, B and C rather than numbered. The reason for this is that for a number of years those working in the criminal justice system have been used to referring to the image levels by the current 1 to 5 labelling. In all the

Sentencing Council guidelines, the highest starting points and ranges are found in category 1. However, under the current SGC grading system based on *Oliver*, category 1 is the lowest starting point and range. The Council feels it would be confusing to reverse the order and so is proposing to use A, B and C.

Q39

Do you agree with the proposed rationalisation of the current levels 1 to 5?

It will be rare that the court will sentence an offender for only one level of image as most offenders have collections containing mixed levels of images. This can cause difficulties for sentencers and the Council is proposing that for ‘mixed collections’ the highest category of image level present in the collection will initially determine the appropriate starting point and range. If, however, to use that category will be unrepresentative of the offender’s conduct, a lower category may be appropriate. However, it is suggested that a lower category is unlikely to be appropriate if the offender has produced or taken higher level material. To assist sentencers in dealing with mixed collections it is suggested that an explanation is included in the guideline. The wording proposed is:

“In most cases the intrinsic character of the most serious of the offending images will initially determine the appropriate category. If, however, the most serious images are unrepresentative of the offender’s conduct a lower category may be appropriate. A lower category will not, however, be appropriate if the offender has produced or taken (i.e. photographed) images of a higher category.”

Q40

Do you agree with the approach suggested to dealing with mixed collections? If not, please state why.

An important difference from the existing SGC guideline is that the quantity of material will not be used to determine the category at step one. Currently the SGC classes quantity by reference to a ‘small number’ and ‘large number’ to determine sentence starting points and ranges for different levels of images. These terms are not, however, defined and this has caused difficulties for judges in assessing what constitutes ‘small’ or ‘large’. The Council has formed the view that the number of images is not necessarily an indicator of the offender’s culpability; what the offender has done with the images is a better indicator of this. For example,

an offender who has produced even a small number of images attracts a higher starting point than an offender in possession of the same number.

However, as a large volume of images may provide an additional indicator of increased culpability in some cases, it is included as an aggravating feature in step two, allowing the court to move up from the starting point in appropriate cases. This is discussed at page 83.

In light of the points raised above, the proposed structure at step one is therefore:

	Possession	Distribution*	Production**
Category A (previously levels 4 and 5)	Possession of images involving penetrative sexual activity	Sharing images involving penetrative sexual activity	Creating images involving penetrative sexual activity
	Possession of images involving sexual activity with an animal or sadism	Sharing images involving sexual activity with an animal or sadism	Creating images involving sexual activity with an animal or sadism
Category B (previously levels 2 and 3)	Possession of images involving non-penetrative sexual activity	Sharing of images involving non-penetrative sexual activity	Creating images involving non-penetrative sexual activity
Category C (previously level 1)	Possession of images of erotic posing	Sharing of images of erotic posing	Creating images of erotic posing

* Distribution includes possession with a view to distributing or sharing images

** Production includes the taking or making of any image at source, i.e. the original image

Making an image by simple downloading should be treated as possession for the purposes of sentencing

Q41

Do you agree with the use of role and the use of image levels A, B and C to determine the category of offence and the exclusion of volume at step one? If not, please give reasons.

Q42

Do you have any suggestions for how level C ‘erotic posing’ could be re-labelled?

STEP TWO**Starting points and category ranges**

Once the appropriate category has been determined using role and image level as described above, the court is asked to identify whether there are any additional factors which might 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.

It is important to highlight that the list of factors at step two is non-exhaustive. The Council's intention is to set out factors that are likely to be relatively common to these offences to ensure that they are considered equally by all courts. It is also important to note that the list of factors is not a checklist; however, where any such factor is present the court can take it into account rather than relying on volume alone.

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

Age and/or vulnerability of the child depicted*

Visible physical pain suffered by child depicted

Period over which images were possessed, made or distributed

Large volume of images possessed, distributed or produced/taken

Placing images where there is the potential for a high volume of viewers

Collection includes moving images

Attempts to dispose of or conceal evidence

Abuse of position of trust

Child depicted known to the offender

Active involvement in a network or process that facilitates or commissions the creation or sharing of indecent images of children

Deliberate or systematic searching for images portraying young children, category A images or the portrayal of familial sexual abuse

Systematic storage of collection

* Age and/or vulnerability of the child should be given significant weight. In cases where the actual age of the victim is difficult to determine sentencers should consider the development of the child (infant, pre-pubescent, post-pubescent)

- 'Previous convictions' and 'offence committed whilst on bail' – see discussion at page 23.
- 'Age and/or vulnerability of the child depicted' should be given significant weight. In cases where the actual age of the victim is difficult to determine sentencers should consider the development of the child (infant, pre-pubescent, post-pubescent). This is included to deal with cases where, for example, the victim has not been identified and so the court cannot know the actual age of the child. The current SGC guideline includes a suggestion that starting points should be higher where the subject of the photograph is under the age of 13. The Council recognises the difficulty for sentencers in ascribing an age to an unidentified victim and does not believe that there should be a strict cut-off in age terms when assessing the harm caused to the victim. It is recommending that an assessment of the developmental stage of the child will assist the sentencer rather than a reference to an actual age.
- 'Visible physical pain suffered by the child depicted' is intended to cover the increased harm to the victim demonstrated by the victim visibly responding to physical pain.

- ‘Period over which the images were possessed, made or distributed’ builds a more comprehensive picture of the offender’s behaviour and may be relevant to risk. Where an offender is claiming previous good character as mitigation, but has been involved with such images over a long period, sentencers may wish to take this into consideration in determining whether any weight is given to previous good character.
- ‘Large volume of images possessed, distributed or produced/taken’ allows the volume of images to be taken into account where it is a significant consideration. There will be cases when a large volume of images is a very significant aggravating factor especially where the material is being distributed or produced.
- ‘Placing images where there is the potential for a high volume of viewers’ has been included to deal with the increased harm to the victim where an offender puts images in a place where, potentially, a large number of people could access those images. It is intended to reflect the emotional distress caused to such a victim by the potential for large numbers of unknown individuals viewing them in a vulnerable state.
- ‘Collection includes moving images’. The Council feels that one moving image of, for example, 20 minutes does not equate directly with one still image as there may be more than one abusive incident which takes place during that period. Potentially, hundreds of still images may be taken from the one 20-minute film. In order to reflect this, the Council is recommending the inclusion of moving imagery as an aggravating feature.
- ‘Attempts to dispose of or conceal evidence’. This is designed to address issues arising from offenders’ increasingly sophisticated efforts to prevent images being discovered. It ranges from the mislabelling of files to give the impression that the content is lawful to advanced encryption techniques.
- ‘Abuse of position of trust’ and ‘child known to the offender’ are both aggravating factors because both indicate the close proximity of the offender to the commission of the abuse. It will be more common that the victim will not have been identified by the court but where knowledge of the child or abuse of trust is established evidentially it demonstrates increased culpability on the part of the offender due to the targeting or manipulation of the victim.
- ‘Active involvement in a network or process that facilitates or commissions the creation or sharing of indecent images of children’. Where such a factor is present it demonstrates a higher level of culpability on the part of the offender.
- ‘Deliberate or systematic searching for images portraying young children, category A images or the portrayal of familial sexual abuse’. Where such searches are uncovered by forensic examination, they can reveal that the offender has been searching for higher levels of image than those recovered. Whilst the offender can only be sentenced for the images recovered, such searches can assist the court in assessing the offender’s culpability.
- ‘Systematic storage of collection’. It has already been discussed above that attempts made to conceal may aggravate an offence. However, systematic storage could also increase the offender’s culpability where it demonstrates the deliberate thought and effort invested by the offender in collecting specific indecent images.

Mitigation

The mitigating factors below have already been discussed in previous guidelines and a full discussion of these can be found at page 24.

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 where it affects the responsibility of the offender
Mental disorder or learning disability, where linked to the commission of the offence

Q43 Do you agree with the aggravating and mitigating factors proposed at step two for the indecent images offences? If not, please specify which you would add or remove and why.

Sentence levels for indecent images of children

The maximum sentence available for possession of indecent images is five years' imprisonment and 10 years' imprisonment for distribution and production.

The discussion at page 80 sets out the difficulties with sentencing for mixed collections. The approach proposed by the Council is that the most severe images should be used as an initial starting point.

For the highest category of images (A) a custodial option is recommended as a starting point in all cases whether the offender has

been charged with possession, distribution or production. Where an offender has been involved in the taking or making of an image at source and this involves penetration, sadism or an animal, then the Council has recommended a range that goes towards the very top end of the 10-year ceiling set by the statute and a starting point of 6 years with a range of 4–9 years is recommended. For all the image level A categories a custodial starting point has been recommended.

Level B images also attract a custodial starting point under the proposed guidelines.

The Council has moved away from the very short custodial sentences recommended in the existing SGC guideline; for example, currently four weeks is available in two of the categories. The Council does not believe that such short sentences are appropriate because of the very limited work the prison authorities would be able to do to address the behaviour of the offender in such a short period.

It will be seen that a non-custodial starting point is recommended for possession and distribution of level C images and for possession of level B images. Section two of the consultation – page 10 – sets out a discussion on the purposes of sentencing and the importance of public protection when sentencing sexual offences. For offences involving indecent images, there may be cases where the sentencer considers that a lengthy community order with a sexual offences treatment programme, such as the *i-sotp*⁸¹ programme (specifically designed to treat internet offenders), will be more appropriate than a very short custodial sentence. Such an intensive community-based order may be more likely to achieve the purposes of sentencing and of protecting the public because the offender's thinking and behaviour will be better addressed via

⁸¹ *i-sotp* (Internet Sex Offender Treatment Programme) is a programme designed to explore and address internet sex offending; the aim is to reduce the risk of further similar offending and, like other sex offender programmes, increases the offenders understanding of the impact of their offending on others, including their victims

treatment and the degree of risk posed to the community by the offender can be closely monitored. However, the Council has also deliberately included a custodial option as part of the sentencing range in **every** category to ensure that sentencers retain such an option

in appropriate cases. This is a change from the existing SGC guidelines where only a non-custodial option is available for possession of the lowest level. The proposed sentence starting points and ranges are:

	Possession	Distribution	Production
Category A	Starting point 1 year's custody	Starting point 3 years' custody	Starting point 6 years' custody
	Category range 26 weeks' – 2 years' custody	Category range 2 – 5 years' custody	Category range 4 – 9 years' custody
Category B	Starting point 26 weeks' custody	Starting point 1 year's custody	Starting point 2 years' custody
	Category range High level community order – 18 months' custody	Category range 26 weeks' – 2 years' custody	Category range 1 – 4 years' custody
Category C	Starting point High level community order	Starting point 13 weeks' custody	Starting point 18 months' custody
	Category range Medium level community order – 26 weeks' custody	Category range High level community order – 26 weeks' custody	Category range 1 – 3 years' custody

Section 2 at page 11 includes an explanation of the additional orders that a court can impose when an offender is convicted of sexual offences. Sentencers will wish to consider carefully which orders to impose for these offences, particularly where the offender is placed on a community order. For example, the court could impose a sexual offences prevention order with a condition that the offender is prevented from accessing the internet unless the police are given access to the computer history.

In addition to the community order, a sexual offences prevention order can provide a useful additional safeguard.

Q44 Please give your views on the proposed sentence levels (starting points and ranges) for this offence. If you disagree with the levels stated please give reasons why.