

Section eight: Offences against those with a mental disorder

This section considers a number of offences designed to protect some of society's most vulnerable adults who have a mental disorder.⁹⁷ The Sexual Offences Act 2003 (SOA 2003) overhauled previous legislation in this area⁹⁸ and introduced a number of new offences, for example, offences committed by care workers. The offences against those with a mental disorder are split into three categories. These are:

- offences against a person with a mental disorder impeding choice, Sexual Offences Act 2003 – sections 30–33. This covers individuals whose mental functioning is so impaired at the time of the sexual activity that they are unable to refuse;
- offences against those who have the capacity to consent to sexual activity but have a mental disorder which makes them vulnerable to inducement, threat or deception, Sexual Offences Act 2003 – sections 34–37;
- offences by care workers against those with a mental disorder, Sexual Offences Act 2003 – sections 38–41.

This is a complex area due to the different levels of mental disorder which need to be established before a particular offence can be charged. There is a very small number of these offences prosecuted⁹⁹ but this may belie the fact that many more offences occur than are reported to the police and result in prosecution.

The guideline can only, however, address those cases where there has been a conviction and there is an offender to be sentenced.

Because of the low volume of offences it is important that sentencers are given appropriate guidance on these offences.

The legislation does not intend to criminalise all sexual activity that someone with a mental disorder might engage in and is not intended to restrict the right of a person to engage in sexual relationships; it does, however, seek to protect vulnerable people when this sexual activity is founded on exploitation and abuse.

Offences against a person with a mental disorder impeding choice

The offences discussed in this section all relate to someone with a mental disorder that impedes choice i.e. the victim lacks the capacity to choose whether to agree to the activity. This could be because the victim lacks sufficient understanding of the nature of the activity or the reasonably foreseeable consequences of what is being done, or it could be the victim is unable to communicate their choice to the offender.

The current Sentencing Guidelines Council (SGC) guidelines deal with mental disorder impeding choice and engaging a victim in sexual activity through inducement, threat or deception as one guideline. The Council is consulting on whether

⁹⁷ The Sexual Offences Act uses the same definition of “mental disorder” as the Mental Health Act 1983 which has now been amended by the Mental Health Act 2007 S1(1) to include “any disorder or disability of the mind”

⁹⁸ Sexual Offences Act 1956

⁹⁹ In 2011 22 people were sentenced for ss.30–33 offences; no one was sentenced for ss.34–37 offences; eight people were sentenced for ss.38–41 offences

to deal with these offences separately rather than combining them and is recommending that they should be covered by separate guidelines. The reasoning is that where a victim is unable to refuse, then in practical, if not legal, terms this is likely to have a similar impact to a lack of consent in cases where the victim does not have a mental disorder. The Council is therefore proposing that the guideline for offences where there is a mental disorder impeding choice should adopt a similar structure to the guidelines for rape, assault by penetration and sexual assault – see discussion at section four. However, for the mental disorder offences, inducement, threat or deception will often involve offender behaviours that are more akin to grooming and exploitation as set out in the sexual activity with a child guideline – see section five. This may lead to the appearance of a victim having ‘agreed’ to the activity but the reality is that any apparent agreement will have been obtained by exploitation. The Council would be interested in views on this suggested approach.

Q62

Do you agree that the offences concerning a victim with a mental disorder impeding choice should be treated separately from victims who engage in sexual activity due to inducement, threat or deception? If not, please give reasons.

Sexual activity with a person with a mental disorder impeding choice, Sexual Offences Act 2003 – section 30

and

Causing or inciting a person with a mental disorder impeding choice to engage in sexual activity, Sexual Offences Act 2003 – section 31

Maximum sentence:

If penetration, life imprisonment

**If no penetration, 14 years’ custody
(full guidelines page 285)**

This offence occurs where an offender who is aware that the victim has a mental disorder deliberately sexually touches the victim who is unable to refuse because of the mental disorder; it also occurs where the offender causes or incites the victim to engage in sexual activity with either the offender or a third party. This offence covers both penetrative and non-penetrative sexual activity.

STEP ONE

Determining the offence category

The first step the court will take is to consider the principal factual elements of the offence. Although this offence involves a wide range of sexual touching, the Council has identified what it believes will be the principal features of harm to the victim and culpability of the offender. Many of these factors have been discussed before under the rape and assault offences and the discussion is referenced below:

| Harm | |
|-------------------|--|
| Category 1 | <ul style="list-style-type: none"> • Extreme violence • The extreme nature of one or more category 2 factors may elevate to category 1 |
| Category 2 | <ul style="list-style-type: none"> • Pregnancy or STI as a consequence of sexual activity • Additional degradation/humiliation • Abduction/detention • Prolonged/sustained incident • Use of violence • Context of habitual sexual abuse • Forced entry into victim's home or residence |
| Category 3 | Factor(s) in categories 1 and 2 not present |

Category 3 does not include any factors. This is to reflect the inherent harm caused by offences of this type without any other factors being present.

Category 2 builds upon the harm that is a consequence of the sexual activity and lists factors that have already been discussed under the rape guideline at page 16.

- ‘Pregnancy or STI as a consequence of sexual activity’ is included and a discussion of this factor can be found at page 16. As this offence involves both penetrative and non-penetrative activity there may be instances of sexual touching that would be comparable to sexual assault where this factor will never be pertinent but it is included to cover the consequences of penetrative activity and the increased harm this would cause to an already vulnerable victim.
- ‘Additional degradation/humiliation’ – see discussion at page 17.
- ‘Abduction/detention’ – see discussion at page 17.
- ‘Prolonged/sustained incident’ – see discussion at page 17.

- ‘Use of violence’ – as with other discussions in this consultation it is acknowledged that serious offending can and does occur without the use of violence. An absence of violence will not mitigate or lessen the offence but where violence is present, this will increase the mental harm to the victim through fear and also will result in physical harm, which may in itself lead to longer-term consequences.
- ‘Context of habitual sexual abuse’ – see discussion at page 18.
- ‘Forced entry into victim’s home or residence’ – see discussion at 18. This can be particularly harmful in situations where the victim is in residential care due to the degree or nature of their mental disorder and the offender has forced entry into their room in order to commit the offence. The offender may also gain entry to the victim’s room through deception as to the purpose of their visit. The Council is interested in views on whether the wording needs to be widened to encompass entry by force **or** deception.

Category 1 adopts the same approach as seen in rape and assault by penetration at pages 18 and 28. This guideline also reflects that there are degrees of severity in the factors found in categories 1 and 2 and also that combinations of the factors may lead to heightened harm. The sentencer will therefore be left to assess the case on the facts before them.

Culpability

As with the harm factors the culpability factors stated below are the same as those for an offender found guilty of rape. Where there has been previous relevant discussion this is highlighted below:

Culpability**A**

Significant degree of planning

Member of group or gang during commission of offence

Use of alcohol/drugs on the victim to facilitate the offence

Abuse of position of trust

Recording of the offence

Stalking/harassment of victim

Previous violence against victim

Offence committed in course of burglary

Deliberate isolation of victim

Use of a weapon to frighten or injure

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 the victim's disability (or presumed disability)

B

Factor(s) in category A not present

Culpability B reflects the inherent culpability involved in the commission of any offence of this type. Any offender convicted of this offence will have taken a deliberate decision to abuse someone in a highly vulnerable position.

Culpability A lists factors that may further exacerbate the very high levels of culpability demonstrated by commission of this offence.

- 'Significant degree of planning' – see discussion at page 20.
- 'Member of group or gang during commission of offence' – see discussion at page 20.
- 'Use of alcohol/drugs on the victim to facilitate the offence' – see discussion at page 21. It is particularly culpable for an offender to use drugs to alter the effects of prescribed medication by the administration

of other drugs, or to use alcohol or drugs to alter the victim's behaviour.

- 'Abuse of position of trust' – there are specific offences relating to care workers who abuse their position of trust (sections 38–41, see discussion at page 120) but the definition of 'abuse of trust' within the context of culpability is wider than the statutory definition used for those offences. In this context it can include, for example, a trusted family member.
- 'Recording of the offence' – see discussion at page 21.
- 'Stalking/harassment of victim' – see discussion at page 21.
- 'Previous violence against victim' – see discussion at page 21.
- 'Offence committed in course of burglary' – see discussion at page 21.
- 'Deliberate isolation of victim' – covers situations where the already vulnerable victim is deliberately isolated by the offender and prevented from obtaining help or assistance.
- 'Use of a weapon to frighten or injure' – see discussion at page 22.
- '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 the victim's disability (or presumed disability)' – see discussion at page 22.

Q63

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 range**

Once the category of case has been determined the court will look at a non-exhaustive list of aggravating and mitigating factors in order to identify any other factors which have not been considered at step one that might aggravate or mitigate the offence. This would lead the court to decide whether to move up or down from the starting point.

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

Victim compelled to leave their home, institution, hospital, etc (including victims of domestic violence)

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

Presence of others, especially children

Commission of offence whilst under the influence of alcohol or drugs

- ‘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’ and ‘offence committed whilst on bail’ – see discussion at page 23.

- ‘Location of offence’ and ‘timing of offence’ – see discussion at page 24.
- ‘Victim compelled to leave their home, institution, hospital, etc (including victims of domestic violence)’. In relation to the current offence, the wording has been widened also to mean someone compelled to move from their care home or institution they are in as a result of the offence.
- ‘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.
- ‘Presence of others, especially children’ – see discussion at page 24.
- ‘Commission of offence whilst under the influence of alcohol or drugs’ – see discussion at page 24.

Mitigation

The mitigating factors proposed have already been discussed in some detail at page 24. The list of mitigating factors is non-exhaustive and is set out below.

Mitigating factors

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

Remorse

Previous good character and/or exemplary conduct*

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

Offender intervenes to stop the sexual activity taking place

* In the context of serious sexual offences good character and/or exemplary conduct should not be given significant weight and will not justify a substantial reduction of what would otherwise be the appropriate sentence

Q64

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.

Council is proposing that these offences should be treated as severely as the offences where there is no consent. The victim is likely to be very vulnerable by virtue of their mental disorder and it is proposed that the sentence starting points and ranges should reflect this vulnerability. As the offence deals with both penetrative and non-penetrative activity, two tables are included to distinguish between each type. As the penetrative activity will include both penile and other forms of penetration the sentence ranges proposed are wider than those found in the rape guidelines at page 27 to reflect this.

Sentence levels for sexual activity with a person with a mental disorder impeding choice

As set out at page 113 if a victim is unable to refuse by virtue of their mental disorder the

Where offence involves penetration

| | A | B |
|------------|---|---|
| Category 1 | Starting point 16 years' custody | Starting point 14 years' custody |
| | Category range 14 – 20 years' custody | Category range 11 – 17 years' custody |
| Category 2 | Starting point 13 years' custody | Starting point 10 years' custody |
| | Category range 8 – 17 years' custody | Category range 5 – 13 years' custody |
| Category 3 | Starting point 10 years' custody | Starting point 8 years' custody |
| | Category range 6 – 13 years' custody | Category range 5 – 11 years' custody |

The sentence starting points and ranges also reflect the inherent vulnerability of the victim.

Where offence did not involve penetration

| | A | B |
|------------|--|---|
| Category 1 | Starting point 7 years' custody | Starting point 4 years' custody |
| | Category range 4 – 9 years' custody | Category range 2 – 6 years' custody |
| Category 2 | Starting point 3 years' custody | Starting point 18 months' custody |
| | Category range 1 – 5 years' custody | Category range High level community order – 3 years' custody |
| Category 3 | Starting point 1 year's custody | Starting point High level community order |
| | Category range High level community order – 2 years 6 months' custody | Category range Medium level community order – 1 year's custody |

Q65

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 person with a mental disorder impeding choice, Sexual Offences Act 2003 – section 32 and Causing a person with a mental disorder impeding choice to watch a sexual act, Sexual Offences Act 2003 – section 33

Maximum sentence: 10 years' custody

These offences replicate the offence behaviours in sections 11 and 12 of the SOA 2003 which involve engaging in sexual activity in the presence of a child and causing or inciting a child to watch a sexual act. These offences are discussed at page 60. In the last 10 years there have been five cases of the section 32 offence (engaging in sexual activity in the presence of a person with a mental disorder impeding choice) sentenced; the section 33 offence has never been sentenced.

The Council's proposed approach is to use the section 11 and 12 guidelines as a template for the offence categories and sentence levels. The Council acknowledges that there are differences between activity involving children and vulnerable adults; however, both groups are vulnerable and a similar approach to that taken for the section 11 and 12 offences is therefore recommended. This means that harm will be predicated on the extreme nature of the activity which the victim has had to view and the culpability factors focus on exploitative and manipulative behaviour on the part of the offender.

Sentence levels proposed also equate to those for the child sex offences involving sexual activity in the presence of a child (section 11, please refer to page 64) and causing a child to watch a sexual act (section 12, please refer to page 64). The full guideline can be viewed at page 291.

Q66

Do you agree with the Council's approach to the guideline on engaging in sexual activity in the presence of a person with a mental disorder impeding choice or causing that person to watch a sexual act?

Offences involving inducement, threat and deception against a person with a mental disorder

The next category of offences deals with those with a mental disorder which makes a person vulnerable to agreeing to engage in sexual activity through inducement, threat or deception. This category of offences has only seen two cases sentenced in the last 10 years; one case involved inducement, threat and deception to procure sexual activity (section 34) and the other of causing a person to agree to or engage in sexual activity by inducement, threat or deception (section 35). Engaging in sexual activity in the presence of or causing a person to view sexual activity by inducement, threat or deception has never been sentenced.

Inducement, threat or deception to procure sexual activity with a person with a mental disorder, Sexual Offences Act 2003 – section 34 and

Causing a person with a mental disorder to engage in sexual activity by inducement, threat or deception, Sexual Offences Act 2003 – section 35

Maximum sentence: 14 years' custody

Procuring sexual activity through inducement, threat and deception and causing a person to agree to engage in sexual activity by inducement, threat or deception are offences which the Council proposes to approach in a similar way to the section 9 and 10 offences of engaging in sexual activity with a child (discussed at page 45). All these offences share a statutory maximum of 14 years. In common with the offences involving children, the victim may appear to have acquiesced to sexual activity but that has occurred due to exploitation or manipulation by the offender. In the offences involving children, harm is linked to the sexual activity that has been engaged in (with penetrative sexual activity treated as the highest level of harm); culpability for those offences concentrates on the exploitation and manipulation employed by the offender in order to procure the sexual activity. The same approach is proposed for these offences.

It is also proposed that the same sentence starting points and ranges are used for this offence as are used for the section 9 and 10 offences. The full guideline can be viewed at page 297.

Q67

Do you agree with the Council's approach to the guideline on procuring sexual activity through inducement, threat or deception and causing the person to engage in sexual activity by inducement, threat or deception?

Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder, Sexual Offences Act 2003 – section 36

and

Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception, Sexual Offences Act 2003 – section 37

Maximum sentence: 10 years' custody

These offences have never been used but the offending behaviours are the same as for the section 32 and 33 offences discussed at page 118. It is therefore proposed to adopt the same approach and the full guideline can be found at page 303.

Q68

Do you agree with the Council's approach to the guideline on engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder and of causing a person with a mental disorder to watch a sexual act by inducement, threat or deception?

Offences relating to care workers

The last category of cases involves offences committed by care workers¹⁰⁰ against people with a mental disorder. As explained in Rook and Ward on Sexual Offences:

“The purpose of these provisions is to protect a person with a mental disorder who has the capacity to consent but who may be particularly vulnerable to exploitative behaviour and may agree to sexual activity because of dependence upon their carer.”¹⁰¹

This type of offence has much in common with the abuse of trust offences that are discussed at page 69. The offender, in the course of their employment or otherwise, is involved in the care of the victim and as such is in a position of trust and power in relation to the victim. Under these provisions it is not necessary for the victim to have a mental disorder such that they are unable to refuse and the victim may maintain that the activity is consensual. The offence is, however, designed to protect a vulnerable victim who develops an emotional dependency on or attachment to the person caring for them which is exploited by the offender.

Care workers: sexual activity with a person with a mental disorder, Sexual Offences Act 2003 – section 38**and****Care workers: Causing or inciting sexual activity, Sexual Offences Act 2003 – section 39****Maximum sentence:****if penetration, 14 years’ custody****if no penetration, 10 years’ custody****(full guidelines page 309)**

These offences are committed where the offender sexually touches a person with a mental disorder who is in their care or causes or incites a person with a mental disorder to engage in sexual activity with either the offender or a third party.

STEP ONE**Determining the offence category**

The first step the court will take is to consider the principal factual elements of the offence. As with the abuse of trust offences discussed at page 69, harm is determined by the type of sexual activity that has taken place. This is because the victim may be reluctant or unable to articulate any harm done to them and may regard themselves as being in a genuine relationship with the offender. The Council therefore propose that harm equates to the type of sexual activity and has noted that the legislation creates a higher statutory maximum of 14 years’ custody for penetrative activity than for non-penetrative activity which carries a maximum of 10 years’ custody.

The proposed harm factors are:

¹⁰⁰ s.42 Sexual Offences Act 2003

¹⁰¹ *Rook and Ward on Sexual Offences Law and Practice* 4th edition para 7.165

| 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 | Factor(s) in categories 1 and 2 not present |

Culpability

The culpability factors are also adapted from the abuse of trust guideline and discussion of these factors can be found at page 71. It will be noted that one change from the abuse of trust guideline is that ‘vulnerable victim targeted’ has been removed because the victim will always be vulnerable and this is built into the sentencing starting points and ranges discussed at page 122.

| 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 |
| Sexual images of victim recorded, retained, solicited or shared |
| 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 |

Q69

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

STEP TWO

Starting point and category range

Having identified the appropriate category at step one, the court considers the starting point and identifies whether there are any additional factors not already considered at step one which would aggravate or mitigate the offence. At step two the list of aggravating and mitigating factors is non-exhaustive and so the most common are identified to assist sentencers. This leads the court to decide whether the sentence should be adjusted upwards or downwards within the relevant range.

The aggravating factors have been adapted from the abuse of trust factors and a discussion of the factors can be found at page 72.

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

Victim required to move care home, institution, hospital, etc as a result of relationship

Failure of offender to respond to previous warnings about the activity

Commission of offence whilst under the influence of alcohol or drugs

Mitigation

The mitigating factors are the same as for the abuse of trust offences and a discussion of the factors 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 |
| Offender voluntarily stops the sexual activity taking place |

Q70

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

Sentence levels for ‘care workers: sexual activity with a person with a mental disorder’ and ‘care workers: causing or inciting sexual activity’

Although the guideline is closely modelled on the abuse of trust guideline the Council is consulting on the basis that the starting points and sentence levels should be higher than those for the abuse of trust offence which, as stated at page 70, will ordinarily apply to 16 and 17 year olds. This is because there is potentially a wider range of vulnerability when the offender has a mental disorder.

| | A | B |
|-------------------|---|---|
| Category 1 | Starting point 3 years’ custody | Starting point 18 months’ custody |
| | Category range 2 – 5 years’ custody | Category range 1 – 2 years’ custody |
| Category 2 | Starting point 1 year’s custody | Starting point 26 weeks’ custody |
| | Category range 26 weeks’ – 18 months’ custody | Category range High level community order – 1 year’s custody |
| Category 3 | Starting point High level community order | Starting point Medium level community order |
| | Category range Medium level community order – 26 weeks’ custody | Category range Low level community order – High level community order |

Q71

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.

Care workers: sexual activity in the presence of a person with a mental disorder, Sexual Offences Act 2003 – section 40

and

Care workers: causing a person with a mental disorder to watch a sexual act, Sexual Offences Act 2003 – section 41

Maximum sentence: 7 years' custody

There have only been five offenders sentenced under these sections over the last five years. As the offending behaviours are the same as for the equivalent offences set out at page 118 it is proposed to adopt the same approach and sentencing levels as for the abuse of position of trust offences involving sexual activity in the presence of a child (section 18, please refer to page 74) and causing a child to watch a sexual act (section 19, please refer to page 74). The full guideline can be found at page 315.

Q72

Do you agree with the Council's approach to the guideline on care workers: sexual activity in the presence of a person with a mental disorder and causing a person with a mental disorder to watch a sexual act?