

Section five: Offences where the victim is a child

This section considers offences where the victim is a child and the offender is over the age of 18. The definition of ‘child’ varies between offences in the Sexual Offences Act 2003 (SOA 2003). Generally, a child is defined as anyone under the age of 16 but there are some offences designed to give greater protection to those under the age of 13 and others where the definition of ‘child’ extends to anyone under the age of 18. At the beginning of the discussion of each offence it will be made clear which definition is applicable.

Offences relating to children under the age of 13

The first group of offences considered below are those that apply to children under the age of 13. The offences include:

- rape of a child under 13;
- assault of a child under 13 by penetration;
- sexual assault of a child under 13; and
- causing or inciting a child under 13 to engage in sexual activity.

The Sentencing Guidelines Council (SGC) included the under 13 offences in the same guideline as the equivalent offence for a victim over 13; for example, there is currently a single guideline for section 1 rape and section 5 rape of a child under 13. The Council is proposing a different approach which is to detach the under-13 offences from the offences for victims over 13 (which have already been discussed in section four).

The Council is of the view that there are issues and sensitivities unique to offences against children under 13 that require a separate guideline to ensure clarity for sentencers as to the factors to be taken into account and to provide a transparent process for others concerned with these cases.

The main difference between the under-13 offences and the equivalent offences for those 13 and over is that a victim aged under 13 is deemed to be legally incapable of consenting to sexual activity. An individual is therefore guilty of an under-13 offence if it is proved a) the sexual activity in question took place; and b) the child was under the age of 13. The under-13 offences were included in the SOA 2003 as the result of a policy decision to provide increased protection for younger children. As the then Lord Chancellor, Lord Falconer, explained during the passage of the Bill through Parliament:

“A fundamental justification for the under 13 offence is the age and vulnerability of the victim. We do not think it is right that where the victim is 12 or under the question of consent should arise. There would be many cases where it would be utterly invidious for a 12 year old or under to have to give evidence in relation to consent. We therefore think that there needs to be a cut off period. We think we have got the cut off period right.”⁴⁶

The issue of whether a victim under 13 consented to sexual activity is not a matter that a jury would have to consider in order to decide if an offender is guilty. The criminal justice system and courts can sometimes deal with cases where a child under 13 maintains that they willingly consented to sexual activity. Children in cases such as these are frequently vulnerable for a variety of reasons and subject to manipulation by sexual offenders. These cases demonstrate why the issue of consent was removed as a requirement for a conviction. In any event, the chronological age and emotional immaturity of these children preclude any meaningful consent.

Once a conviction has been obtained, sentencers will be faced with a variety of factual circumstances that will influence the type and length of sentence and the guideline seeks to deal with the most common of these. These factual circumstances can range from forced non-consensual activity seen in the equivalent offences for victims aged 13 and over discussed in section four, to instances where an adult offender has exploited or groomed a child to the extent that the child maintains they have consented to the activity and may even regard themselves as being in a 'genuine' relationship with the offender, or where, over time, the child has become habituated to the activity.

The Council feels it is important that, for these under-13 offences, cases where a child has been groomed into acquiescence are treated equally by sentencers as cases where there is forced non-consensual sexual activity and notes the recent report by the children's charity Barnardo's which found:

"Younger children are increasingly at risk of sexual exploitation. The experience of at least a third of our services is that overall, the children we are working with are getting younger. During the last five years, the average age of service users has fallen from 15 to around 13, and some services have started working with children as young as 10. One service stated: 'It is widely accepted by professionals, that 13 year old females are sexually active'. Another noted that 11, 12 and 13 year olds are being forced to have sex under the influence of alcohol. Some services suggested that the rise in children at risk of exploitation could be linked to earlier sexual abuse or exposure to overtly sexual content in the media, on the internet or via mobile phones. In these cases referrals are often made to projects on the basis that a child is displaying inappropriate sexualised behaviour."⁴⁷

⁴⁷ *Puppet on a String: The urgent need to cut children free from sexual exploitation*, Barnardo's (2011)

Rape of a child under 13, Sexual Offences Act 2003 – section 5

Maximum sentence: Life imprisonment (full guideline page 191)

Rape of a child under the age of 13 is committed if there is penile penetration of the vagina, anus or mouth of a child under 13. As set out above,

nothing else needs to be proved for the offence to have been committed and there is no defence of believing the child to be 13 or older.

Examples of the range of behaviour that may be charged and brought to court are given in the scenarios below and illustrate why sentencing for this offence presents challenges.

Scenario A

The victim (V) is a 12-year-old girl who lives with her mother and her mother's boyfriend, the offender (O), aged 31. O starts to kiss and sexually touch V. He orders V not to tell anyone otherwise the family will be split up and she will be taken into care. The touching becomes more frequent and escalates to one occasion of O vaginally raping V and threatening to kill her unless she complies. V breaks down and tells her mother everything and they go to the police.

Scenario B

The victim (V) is a 12-year-old girl and is in the park with her friend (A). They have been drinking alcohol when they are approached by the offender (O), who is 19, and O's friend (B). O strikes up a conversation with V and they go off together to a corner of the park where they start kissing and V performs oral sex on O. He asks V if she will go further and have sex with him. She hesitates at first but then agrees. They have vaginal intercourse, then return to their friends in the park where all four carry on drinking. V later tells A what happened; A tells V's older sister who reports the matter to their mother. V's mother reports the incident to the police.

Scenario C

The victim (V) is a 12-year-old girl and starts emailing the offender (O) (aged 26) on an internet chat room. They are in regular contact and exchange personal information which becomes sexually explicit. V admits her age to O but they continue to correspond. O tells her that age doesn't matter because he loves her. O persuades V to send him naked pictures of herself and in return sends her a naked picture of himself. V regards O as her boyfriend and they start to meet on a regular basis as V comes out of school when they go to O's house and have vaginal sexual intercourse. V always returns home before her parents are back from work so they are unaware of what is happening. V tells her best friend about her 'boyfriend' and his age. Her best friend is sufficiently concerned to tell their form teacher who reports the matter to V's parents and the police.

Scenario D

The victim (V) is a 12-year-old girl and lives next door to the offender (O) who is 19. They have known each other for a number of years. O lives at home with his parents and has learning difficulties with very few friends of his own age. V and O begin to spend a lot of time together and O asks V if she will be his girlfriend. There are no signs of exploitation with both believing they are in a genuine relationship. They have sex on two occasions. V's parents find out she is seeing O and confront O's parents who say they will sort it out. V's parents find her visiting O a couple of weeks later and report him to the police.

STEP ONE**Determining the offence category**

The first step the court will take is to consider the main factual elements of the offence. It has already been discussed that there may be a wide range of factual scenarios given the nature of the offence. The guideline does not attempt to deal with cases that are exceptional; instead it captures the most common cases that may come before the court.

Step one features an exhaustive list of the main harm factors that a sentencer should take into account.

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 rape • Additional degradation/humiliation • Abduction/detention • Prolonged/sustained incident • Use of violence • Context of habitual sexual abuse • Forced entry into victim's home
Category 3	Factor(s) in categories 1 and 2 not present

Category 3 has no factors listed. The Council believes it is important for the guideline to reflect the fact that any rape of a child under the age of 13 involves an inherent serious harm, without the presence of any other factors.

Category 2 contains a list of principal features that when found in addition to the rape indicates additional harm. These harm factors are the same as those found in the section 1 SOA 2003 rape guideline and full explanations for each are found at pages 16 and 18.

Category 1 adopts the same approach as for the section 1 SOA 2003 rape offence set out at page 18. In the same way, the presence of extreme violence or the extreme nature of any category 2 factor could elevate a case to category 1. A full explanation of the rationale can be found at page 18.

Culpability

As set out earlier, there is a very wide range of offending behaviour exhibited by those who commit this offence, including exploitative behaviour used to obtain the acquiescence of the victim. For this reason, the culpability factors in this guideline are wider than those found in the section 1 SOA 2003 rape guideline at page 19 and these additional factors are explained in detail 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
Use of gifts/bribes to coerce the victim
Evidence of grooming by offender
Use of threat (including blackmail)
Abuse of position of trust
Recording of the offence
Vulnerable child targeted
Previous violence against victim
Offence committed in course of burglary
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 his or her disability (or presumed disability)
B
Factor(s) in category A not present

Culpability B has no factors listed. This is to reflect the fact that the act of rape of a child under the age of 13 already involves high culpability. It indicates the high culpability that will always exist even in the absence of any other factors.

Culpability A factors are examples of the principal culpability factors which the Council believes should be taken into account over and above the inherent culpability. A number of these factors are found in the SOA 2003 section 1 rape draft guideline at page 19. Where the factors have already been discussed the reference to the relevant discussion is given.

- ‘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. In addition to the use of alcohol to incapacitate the victim, access to alcohol and/or drugs may be used as part of the grooming process by offenders to gain the trust or friendship of a child by allowing them to behave in a way that would not be permitted by their parents or other responsible adults.
- ‘Use of gifts/bribes to coerce the victim’ is included because gifts or bribes may also be used as part of the process of exploiting or grooming a child to gain their trust.
- ‘Evidence of grooming by offender’ is included as a separate factor to cover a wide variety of sexual exploitation. Whilst two particularly harmful examples of this type of behaviour are separately listed above (use of alcohol and gifts), the Council understands that grooming behaviour can take many forms and there should be a more widely drafted factor to enable the courts to take this into account when determining the starting point for the sentence.
- ‘Use of threat (including blackmail)’ will increase the culpability of the offender. The offender may use the threat of telling others about the activity as a way of controlling the victim.
- ‘Abuse of position of trust’ has been previously discussed at page 21 but it is worth noting that for victims under the age of 13, trust arises not only from a position of formal responsibility but also from the offender’s relationship with the child, for example, a babysitter or a family friend who has been trusted to look after the child on a day out.
- ‘Recording of the offence’ – see discussion at page 21.
- ‘Vulnerable child targeted’ has been adapted from the section 1 SOA 2003 rape guideline where the factor is: ‘vulnerable **victim** targeted’. The higher starting points and ranges for this offence already account for vulnerability due to the age of the victim. There is, however, targeting of additional vulnerability that sentencers will need to reflect in the starting point, for example, an offender who targets children in care⁴⁸ or children whose home life is chaotic or dysfunctional,⁴⁹ knowing they are likely to be more susceptible to the attention of an adult who befriends them and professes to care for them.
- ‘Previous violence against victim’ – see discussion at page 21.
- ‘Offence committed in course of burglary’ – see discussion at page 21.

⁴⁸ Briefing for the Rt Hon Michael Gove MP, Secretary of State for Education, on the emerging findings of the Office of the Children’s Commissioner’s Inquiry into Child Sexual Exploitation in Gangs and Groups, with a special focus on children in care (July 2012)

⁴⁹ *Listening to Troubled Families*, a report by Louise Casey CB (July 2012) <http://www.communities.gov.uk/documents/communities/pdf/2183663.pdf>

- ‘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 his or her disability (or presumed disability)’ – see discussion at page 22.

Q13 Do you agree with the harm and culpability factors proposed at step one for rape of an under 13 year old? 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 that have not already been considered at step one which either aggravate or mitigate the offence. This leads 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.

These aggravating and mitigating factors allow the sentencer to consider the wider context of the offence, and also factors which relate to the offender. The factors are not exhaustive; any factors not already considered at step one but which the sentencer considers relevant to either the harm to the victim or the culpability of the offender, can be taken into account here as can additional relevant factors. The mere fact that a factor is present does not mean that the sentencer must take it into account; the sentencer must use their discretion to decide whether they are influential in the case before them and, if so, make an assessment of the weight to be given to them. In exceptional cases,

having considered all the factors and their impact on the level of the sentence, the court may decide to move outside the category range identified at step one.

Although the list of factors is non-exhaustive, the Council’s intention is to highlight the most common factors to ensure that they are considered equally by **all** courts.

The table below sets out the proposed aggravating factors for the offence of rape. A number of these factors are found in the SOA 2003 section 1 rape draft guideline. Where the factors have already been discussed the reference to the relevant discussion is given. Any additional factors are explained 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

Severe psychological harm to the victim

Significant physical injury to the victim

Location of offence

Timing of offence

Victim compelled to leave their home, school, etc

Victim’s education disrupted

Failure to comply with current court orders

Offence committed whilst on licence

Exploiting contact arrangements with a child to commit an offence

Presence of others, especially other children

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

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

- ‘Previous convictions’ and ‘offence committed whilst on bail’ – see discussion at page 23.
- ‘Severe psychological harm to the victim’ – see discussion at page 23.
- ‘Significant physical injury to the victim’ – see discussion at page 23.
- ‘Location of offence’ and ‘timing of offence’ – see discussion at page 24.
- ‘Victim compelled to leave their home, school, etc’ and ‘victim’s education disrupted’ have been included to reflect the fact that where a child has had to move from their home, place of care or school as a result of the rape it can create even longer term harm as they will have had their education disrupted or been uprooted from friendship and support networks.
- ‘Failure to comply with current court orders’, ‘offence committed whilst on licence’, ‘exploiting contact arrangements with a child to commit an offence’ and ‘presence of others, especially other children’ – 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’, ‘attempts to dispose of or conceal evidence’ and ‘commission of offence whilst offender 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 and further details of these are given in the section on rape and assault at page 24. The Court must consider mitigating factors and an explanation of why it is important that the Council fully consults on mitigating factors can be found at page 25.

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

* In the context of this offence, generally 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

Q14

Do you agree with the aggravating and mitigating factors proposed at step two for rape of a child under 13? If not, please specify which you would add or remove and why.

Sentence levels for rape of a child under the age of 13

The Council is consulting on the basis that sentencing starting points and ranges for this offence should be higher than for the equivalent starting points and ranges in the SOA 2003 section 1 offence of rape in order to reflect the increased harm and culpability that exists when an adult offender decides to engage in penetrative sexual activity with a child under the age of 13.

The Council recognises that given the range of factual scenarios with which a sentencer may be faced, (examples are given at page 38) there is a necessity for flexibility within the sentencing regime. The Council is proposing the inclusion of explanatory text at the beginning of the guideline in order to indicate to sentencers that flexibility may be necessary. The wording proposed is:

“When dealing with the statutory offence of rape of a child under 13, the court may be faced with a wide range of offending behaviour.

Sentencers should have particular regard to the fact that these offences are not only committed through force or fear of force but may include exploitative behaviour towards a child which should be considered to indicate high culpability.

The guideline is designed to deal with the majority of offending behaviour which deserves a significant custodial sentence; the starting points and ranges reflect the fact that such offending merits a significant custodial sentence. There may however be a relatively small number of cases where a lengthy community order with a requirement to participate in a sex offender treatment programme may be the best way of changing the offender’s behaviour and of protecting the public by preventing any repetition of the offence, for example where the offender is himself young and particularly vulnerable.

Sentencers are reminded that if moving outside the guideline they must be satisfied that it would be contrary to the interests of justice to follow the guideline.”

This narrative guides a sentencer contemplating a sentencing option not available under the guideline. It is intended to cover exceptional cases, such as is outlined in scenario D at page 38, where the offender is an adult who is young themselves (19), with learning difficulties and there are no signs of exploitation. In this case, a sentencer may decide that a non-custodial sentence is more appropriate to address the behaviour of that offender. A lengthy community order with a sexual offences treatment programme attached may better enable the offender to understand his behaviour and see why the relationship is inappropriate and illegal. This sort of scenario will be rare but is

highlighted here to illustrate the difficult and sensitive decisions a sentencer can be faced with in trying to decide how best to lessen the chances of reoffending.

The Council seeks views as to whether the above explanatory text would assist sentencers, reinforcing flexibility in exceptional circumstances, whilst stressing the importance of taking due regard of exploitative and grooming behaviour.

Q15 Do you agree with the narrative guidance for rape of a child under 13? If not, do you have other suggestions as to the wording?

As stated above, the Council recommends that sentencing starting points and ranges for this offence should be higher than for rape of victims over the age of 13 to reflect the increased harm and culpability that exists when an adult offender engages in penetrative sexual activity with a child under the age of 13.

In the existing SGC guideline there are higher starting points and ranges for victims under the age of 13 except in the highest category where the starting point is 15 years’ custody, whatever the age of the victim. The logic to this is that when a rape has factors placing it in the highest category, the age of the victim becomes secondary to the extreme nature of those other factors.

Whilst the Council appreciates the logic of this approach, it feels there should be a differential in the sentence level to reflect the inherent vulnerability and harm done to a young victim by the commission of this offence. It is therefore proposing that the starting point is raised in the highest category so that it becomes a starting point of 16 years’ custody for victims under the age of 13 as opposed to 15 years’ custody for victims over the age of 13.

As was stated at page 27, the highest sentence level in the existing SGC guideline is reserved for multiple rapes. The Council proposes a move away from this approach and is recommending that the 16 year starting point should be available for single rapes.

The proposed new sentence levels are set out below.

	A	B
Category 1	Starting point 16 years' custody	Starting point 13 years' custody
	Category range 13 – 19 years' custody	Category range 11 – 17 years' custody
Category 2	Starting point 13 years' custody	Starting point 10 years' custody
	Category range 11 – 17 years' custody	Category range 8 – 13 years' custody
Category 3	Starting point 10 years' custody	Starting point 8 years' custody
	Category range 8 – 13 years' custody	Category range 6 – 11 years' custody

Q16 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.

Assault of a child under 13 by penetration, Sexual Offences Act 2003 – section 6

Maximum sentence: Life imprisonment (full guideline page 197)

Sexual assault of a child under 13, Sexual Offences Act 2003 – section 7

Maximum sentence: 14 years' custody (full guideline page 203)

Causing or inciting a child under 13 to engage in sexual activity, Sexual Offences Act 2003 – section 8

**Maximum sentence:
If penetration, life imprisonment
If no penetration, 14 years' custody (full guideline page 209)**

The issues and sensitivities that are attached to the offence of rape of a child under 13 are shared by the other under 13 offences (assault of a child under 13 by penetration, sexual assault of a child under 13 and causing or inciting a child under 13 to engage in sexual activity). The Council proposes to adopt the same approach and to keep the guidelines for these offences separate from the equivalent offence for those 13 and over. The guidelines, like the rape of a child under-13 guideline, will follow the format of the over-13 guidelines but have the addition of factors that more specifically relate to 'grooming' as these offences, unlike the over-13 offences, could involve a child being coerced and groomed into sexual activity.

The starting points and ranges are higher than for the over-13 guidelines but the same issue arises as discussed at page 38 about the potential range of offending behaviours because of the statutory definitions of these offences. The Council acknowledges that there may be exceptional cases when the judge is faced with a factual set of circumstances that do not fit within the guidelines and a greater degree of flexibility is required.

The guidelines are set out at pages 197 to 213.

Q17

Do you agree that the remaining under 13 offences should be treated separately from the 13 and over guidelines? If not, please give reasons.

Q18

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

Other sexual offences against children

The second group of offences to be considered are not specific to children under the age of 13. The offences looked at here will, in practice, normally be charged where the children are aged between 13 and 15 years.

Sexual activity with a child, Sexual Offences Act 2003 – section 9

and

Causing or inciting a child to engage in sexual activity, Sexual Offences Act 2003 – section 10

Maximum sentence: 14 years' custody (full guidelines page 215)

The offence of sexual activity with a child involves a person over the age of 18 engaging in penetrative or non-penetrative (touching) sexual activity with a child under the age of 16. The offence was introduced in the Sexual Offences Act 2003 following the Home Office review in 2000, *Setting the boundaries: reforming the law on sex offences*.⁵⁰ The review concluded that:

“... [Offences of] rape, sexual assault by penetration and sexual assault, all of which deal with non-consensual

⁵⁰ *Setting the Boundaries: Reforming the law on sex offences*, Home Office (2000)

behaviour, should be available for use as needed. There should be a separate offence to tackle behaviour that would not be an offence if committed between consenting adults but was wrong and inappropriate when children were involved. In general, therefore, consent was irrelevant – the culpability of the behaviour was because it was with a child.”

The offence of sexual activity with a child is normally charged where a victim is aged 13 to 15⁵¹ and the child maintains that they agreed to the sexual activity. Where a victim is over 13, lack of consent would need to be proved to obtain a rape conviction. Where a victim over the age of 13 maintains they have consented to the sexual activity, a charge of rape is unlikely to be successfully prosecuted. However, due to the age of the child, the offence of sexual activity with a child can be charged and successfully prosecuted instead of rape. This is because there needs to be proof only that the offender engaged in the sexual activity, irrespective of whether the child maintains that they agreed to the activity.

This offence applies to offenders over the age of 18 only. Where the offender is under the age of 18, a different regime applies and is discussed at page 139. As the CPS charging guidance makes clear: “sections 9 to 13 [of the SOA 2003] clarify that any sexual activity involving consenting children under 16 is unlawful”.⁵²

Similarly, the offence of causing or inciting a child to engage in sexual activity involves a person over the age of 18 intentionally causing or inciting a child under the age of 16 to engage in penetrative or non-penetrative sexual activity. The offence can be committed

where the offender has not touched the victim but has caused or incited the victim to engage in sexual activity on their own (for example, masturbation) or with a third party (for example, an offender persuades their victim to perform oral sex on another child). Unlike the section 9 offence, it does not require any touching to have taken place and extends to causing or inciting any sexual activity, for example, an offender persuading their victim to strip. This offence could also be conducted remotely, for example, if an offender caused their victim to engage in sexual activity via a webcam.

In the existing SGC guideline these offences and others, discussed below in this section, are referred to as ‘ostensible consent offences’.⁵³ In a recent Attorney General’s reference case, Lord Justice Pitchford noted:

“‘Ostensible consent’ and ‘willingness’ are terms which, in the context of offences against the young in particular, are susceptible to misunderstanding and, even if accurately used, are liable to obscure the true nature of the encounter between the offender and the victim.”⁵⁴

The Council agrees that the current focus and prominence given to the ‘ostensible consent’ of the victim does not fully address the culpability of the offender and is proposing that the guideline should concentrate on the offender’s behaviour rather than the behaviour of the victim. The Council intends to move away from the label of ‘ostensible consent’ and instead to focus the draft guideline on the way in which the offender has obtained the agreement of the child; for example, by the manipulation, coercion or grooming of the child to get them to agree to the activity and to maintain that agreement when the authorities become involved.

51 Where the child is under the age of 13, the normal charge is rape of a child under 13 or sexual assault of a child under 13, regardless of whether the child maintains consent

52 CPS charging guidance: *Sexual Activity with a Child*

53 Sentencing Guidelines Council *Sexual Offences Act 2003: Definitive Guideline*, pp48–58

54 AG Ref numbers 11 and 12 of 2012 (*R v Channer and another*) [2012] EWCA Crim 1119

As with the existing SGC guideline the Council has decided to deal with these two offences of engaging in sexual activity and causing or inciting sexual activity in the same guideline as they have the same statutory maximum sentence of 14 years' custody. The Council is also of the view that there is parity in terms of the harm done to the child and the culpability of the offender. The Council is interested in views on whether maintaining this approach of dealing with these offences together is generally supported.

Q19 Do you believe that engaging in sexual activity with a child and causing or inciting a child to engage in sexual activity should be dealt with in the same guideline?

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.

The approach of the existing SGC guideline is to focus purely on the nature of the sexual contact to determine offence starting points and ranges. In the section on rape and assault offences – see page 16 – the Council has already set out its concerns about labelling sentence levels solely in terms of activity because it does not fully reflect the seriousness or complexity of the offence. 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. This is because, 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 see the offender as their 'boyfriend' and may be unable or reluctant to articulate or recognise any 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.

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.

Category 2 involves masturbation. The Council has decided to consult on the basis of category 2 containing only masturbation; an analysis of case law highlights the fact that masturbation and penetrative activity are involved in the majority of cases that come before the courts to be sentenced. The Council is seeking views on whether this makes category 2 too narrow but is keen to move away from the current complex formulation of physical contact found in the SGC guideline; for example, 'contact between naked genitalia of offender and naked genitalia or another part of victim's body, particularly face or mouth'.

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. The legislation already recognises the increased

severity if penetration occurs, as the offence becomes triable only in the Crown Court if penetrative activity has occurred.⁵⁵

Culpability

In this offence, the Council believes that the culpability of the offender is particularly important in determining the severity of the offence.

Culpability

A

Use of gifts/bribes to coerce the child or other preparatory 'grooming' behaviours

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

Offender lied about age

Member of group or gang during commission of offence

Significant disparity in age

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 earlier 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 but there is not a significant disparity in age and there are no signs of exploitation (but see discussion on significant disparity in age below).

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 age or position in relation to the child. The specific factors that have been listed are:

- 'Use of gifts/bribes to coerce the child or other preparatory 'grooming' behaviours' is included to capture a wide range of behaviours. There has already been discussion of this factor in the rape of child under 13 guideline at page 40. This factor has been drafted widely to enable the courts to take into account the wide range of grooming behaviours that offenders employ when determining the starting point for the sentence. These behaviours are designed and used to gain the trust of the child to engage in the sexual activity and to subsequently exert control over the child.
- '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 40.
- 'Sexual images of victim recorded, retained, solicited or shared has been widened from the wording 'recording of the offence' which is found in the other 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 him/herself. The images will be self-generated by the victim rather than recorded by the offender. The reason for inclusion of 'sexual images solicited' as a culpability factor is that the Council believes that an offender is culpable if he is soliciting sexual images from his victim regardless of whether the victim is robust enough to turn down the request. The Council would be

interested in views on the wording of this factor.

- ‘Vulnerable child targeted’ – see discussion at page 40.
- ‘Offender lied about age’ has been included to cover those instances, especially when contact has been made electronically, where an offender has misled their victim about their age so the victim believes they are in contact with a peer.
- ‘Member of group or gang during commission of offence’ – see discussion at page 20.
- ‘Significant disparity in age’ has been included as a culpability factor that increases seriousness. The Council feels that it is important to acknowledge disparity in age but, as this guideline deals only with offenders over the age of 18, there will be very few instances where the disparity in age is not significant. The Council would be interested in views on whether this factor should be included at step one or should be an aggravating factor at step two and reasons why this would be the preferred approach.
- ‘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.

Q20

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

STEP TWO

Starting points 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. 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.

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 equally by all courts.

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

Exploiting contact arrangements with a child to commit an offence

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 offender to respond to previous warnings about the relationship

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’, ‘offence committed whilst on licence’ and ‘exploiting contact arrangements with a child to commit an offence’ – 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’ is included at step two for this offence; for other offences it is at step one. This has been done deliberately because the Council is proposing, as discussed at page 47, that for this offence, penetrative sexual activity will place the offender in the highest category of harm. If pregnancy or STI resulted as a consequence of the penetrative activity, and was placed at step one there would be no opportunity for the sentencer to aggravate the sentence to take into account this additional factor. However, including pregnancy or STI at step two allows the sentencer to move upwards from the starting point from the highest category and treat pregnancy or STI as an aggravating factor.

- ‘Failure of offender to respond to previous warnings about the relationship’ has been included because there may be instances where an offender has been warned, for example by the victim’s parents, about the inappropriate nature of the relationship but they have continued with the relationship.
- ‘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, 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 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

- ‘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 included, as it is in other guidelines. An explanatory note has been placed against this factor in the rape and assault offences which states that in the context of those offences, generally good character and/or exemplary conduct should not be given significant weight and will not justify a substantial reduction in what would otherwise be the appropriate sentence (see page 25). The Council is interested in whether it is felt that this should be reserved for offences such as rape and assault or whether such an explanation should be provided for the offences under discussion in this section.
- ‘Offender voluntarily stops the sexual activity taking place’ is a factor that has been included as there may be situations when a section 10 offence (causing or inciting sexual activity) is charged where sexual activity is incited but does not take place. The Council is consulting on whether the guideline should adopt a similar approach to that taken in the existing SGC guideline of including this as a mitigating factor. An alternative might be to include in category 3, attracting the lowest starting point, a factor stating that sexual activity was incited but did not take place. The Council would be interested in views on the preferred approach.
- ‘Determination and/or demonstration of steps taken to address sexual behaviour’ is a factor that is not included as mitigation in all offences. There are some offences such as rape where it is felt that this should not be listed as the gravity and complexity of the offending mean that this mitigation would carry very little weight. The Council is, however, consulting on whether in some sexual offences it may be appropriate to give the offender some credit for recognising and trying to address their behaviour and prevent future offending, so further victims are not created. As with remorse, simple statements of wanting to address behaviour will rarely, if ever, be sufficient to satisfy a sentencer of their true nature unless accompanied by clear evidence of how the offender has tried to address their behaviour. It will be for the sentencer in the individual case to decide how much weight should be attached to this factor as it will vary based on the facts before the judge.
- ‘Age and/or lack of maturity where it affects the responsibility of the offender’ – see discussion at page 26.
- ‘Mental disorder or learning disability, where linked to the commission of the offence’ see discussion at page 26.

Q21

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

Sentence levels for sexual activity with a child

The starting points and ranges for sexual activity with a child and causing or inciting sexual activity are, in this draft guideline, influenced more by culpability than harm; starting points reflect two different and distinct levels of culpability which have already been discussed at page 48. Where the offence does not involve the exploitation or grooming of the victim, the sentence levels are substantially lower than those for offences where exploitation or grooming is involved.

Where the offender falls into the culpability B category (where there is no evidence of grooming or exploitation or significant disparity in age – see the example given under culpability B at page 48), then a non-custodial option will be open to the sentencer as part of the available range. The sentencer must assess the facts in the case before them and must be able to pass a sentence that will not only punish

the offender but also protect the public and any future victims by addressing the offender's behaviour and thinking, to best ensure they do not reoffend. In particular cases, the sentencer may, therefore, decide that a lengthy community order with not only punitive elements, but also a requirement that the offender engages in a sexual offender treatment programme will challenge their past behaviour and thinking, will be the best way to do this.

Where, however, there has been penetrative sexual activity, a custodial starting point is

always proposed. Similarly, where there is evidence of exploitation or grooming, a custodial starting point is recommended at every category level. Additionally, for the top category, the Council is proposing to increase the existing SGC starting point of four years and range of three to seven years, to a five year starting point with a range of four to 10 years. The Council believes that this increase is representative of sentences that are already being passed by courts⁵⁶ and is needed in order to address what can be very serious offending. The scenario below illustrates the point.

Scenario E

The offender (O) is a 40-year-old man who has a 13-year-old daughter (A). A has a 14-year-old friend (the victim, V) who has a difficult relationship with her parents and is emotionally vulnerable. V is a regular visitor to O's house to visit A. O allows V to smoke and drink and provides her with cigarettes and alcohol in the absence of A. He tells V that he is 'there for her' if her parents don't listen or understand her and provides V with money to top up her mobile phone so they can stay in touch. O starts texting V sexually explicit messages and encourages V to send naked pictures of herself to him which she does. O escalates the nature of the relationship and engages V in various sexual activities over a period of months including masturbation, oral sex and vaginal intercourse on numerous occasions. V believes herself to be in love with O. O persuades V not to tell anyone about the relationship by telling her that if she does he will go to prison. V's parents become suspicious about the amount of time she is spending at O's house and go to the police when V refuses to come home one weekend. When questioned by the police O denies any relationship. Under the draft guidelines, this would fall into category 1A with a starting point of five years and a range between four and 10 years.

⁵⁶ In 2011 36 per cent of offenders received a sentence of over 4 years

The proposed new sentence levels are set out below.

	A	B
Category 1	Starting point 5 years' custody	Starting point 1 year's custody
	Category range 4 – 10 years' custody	Category range High level community order – 2 years' custody
Category 2	Starting point 3 years' custody	Starting point 26 weeks' custody
	Category range 2 – 6 years' custody	Category range High level community order – 1 year's custody
Category 3	Starting point 6 months' custody	Starting point Medium level community order
	Category range High level community order – 2 years' custody	Category range Low level community order – High level community order

Q22 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
and
Inciting a child family member to engage in sexual activity, Sexual Offences Act 2003 – section 26
Maximum sentence: 14 years’ custody (full guideline page 221)

The SOA 2003 contains specific provisions for sexual activity with a child or inciting a child to engage in sexual activity when a family relationship is involved.

There is some overlap between sexual activity with a child family member in section 25 and sexual activity with a child in section 9 (discussed at page 45).

The section 25 offence is committed when a family member sexually touches a child under the age of 18; this can be either penetrative or non-penetrative sexual touching.

The section 26 offence is similar to but narrower than the section 10 offence of causing or inciting a child to engage in sexual activity (discussed at page 45).

The section 26 offence cannot involve a third party and is committed when the family member incites the child to touch them or allows themselves to be touched by the child.

It should be noted that the definition of ‘child’ for these offences involving a family member is a person aged under 18, and not a person aged under 16. The rationale for this higher age limit was set out in the Home Office report *Setting the Boundaries* which preceded the SOA 2003:

“...children up to the age of 18 deserve protection from abuse and exploitation in situations where they might not be

able to make an informed and mature choice of sexual partner because of their dependence on members of the family. Children in a family are particularly vulnerable... until [the age of 18] they are still legally children and dependent in many ways on adult parents or guardians.”⁵⁷

Unlike sections 9 and 10 the offender does not have to be over the age of 18 under the legislation but this section deals only with offenders over that age. For a discussion of this offence for offenders under the age of 18 please see section ten.

The definition of ‘family member’ is wider than blood relationships to recognise the fact that family units can be diverse and complex.⁵⁸ It includes blood relations of a child along with step parents and step siblings, foster parents and anyone living in the same household as the child who is regularly involved in caring for, training, supervising or being in sole charge of the child.

These offences will normally be charged where the victim maintains that he or she agreed to the sexual activity (see explanation at page 46).

The Council intends to take a similar approach to that proposed for sexual activity with a child explained at pages 45 to 53. This means the Council is consulting on the basis of dealing with both section 25 and 26 offences in the same guideline. They have the same statutory maximum sentence of 14 years and the Council believes that there is parity in terms of the harm done to the child and the culpability of the offender. As with the section 9 and 10 offences above the Council is interested in views on whether dealing with these offences together is generally supported.

⁵⁷ *Setting the Boundaries*, Home Office (2000), para 5.5.7

⁵⁸ s.27 Sexual Offences Act 2003

Q23

Do you believe that engaging in sexual activity with a child family member and inciting a child family member to engage in sexual activity should be dealt with in the same guideline? If not, please give 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 cover both penetrative and non-penetrative sexual activity and so encompass a wide range of sexual touching and sexual activity.

Before consideration of the harm and culpability of the offence, the Council believes it is important to emphasise that abuse of trust is an inherent feature of these offences and that, given the range of family relationships that are set out under the SOA 2003, the closer the family relationship between the offender and the victim, the greater the harm and the culpability for that offence will be. The narrative proposed for inclusion in the guideline is:

“The court should determine which category of harm the offence falls into by reference only to the table below. The court should then determine whether any level A culpability factors are present in order to ascertain the starting point. This offence involves those who have a family relationship with the victim and it should be assumed that the greater the abuse of trust within this relationship the more grave the offence.”

The Council is interested whether it is felt that the inclusion of this type of narrative at this point would assist sentencers and, if not, how it would be proposed to deal with the degree of trust within the relationship?

The Council is proposing to adopt the same format as the offence of sexual activity with a child, as the same challenges arise in terms of the child not always perceiving or articulating the harm done to them and the fact the Council intends the emphasis for the sentence to be on the offender’s culpability rather than the child’s actions (see page 46).

The harm factors have already been discussed at page 47.

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

Culpability

As with sections 9 and 10 of the SOA 2003, the Council believes that the culpability of the offender is particularly important in determining the severity of these offences. It is therefore proposed that the same approach is adopted and where the factors have already been discussed, this is indicated. Any additional factors are fully explained below.

Culpability**A**

Use of gifts/bribes to coerce the victim or other preparatory 'grooming' behaviours

Use of threat (including blackmail)

Use of alcohol/drugs on victim to facilitate the offence

Sexual images of victim recorded, retained, solicited or shared

Vulnerable child targeted

Significant disparity in age

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. Given that the offender will always be in a family relationship⁵⁹ with the victim there will be a very high level of culpability on the part of the adult offender which will be reflected in the sentence starting points and ranges discussed below.

Culpability A lists factors that demonstrate manipulation, exploitation and coercion of the victim, in addition to the abuse of trust inherent in this offence.

- 'Use of gifts/bribes to coerce the victim or other preparatory 'grooming' behaviours' – see discussion at page 48.
- 'Use of threat (including blackmail)' – see discussion at page 40. This factor is likely to be particularly relevant in the context of family relationships where the offender may use threats to exploit the child's fears of

family breakdown as a way of persuading them not to reveal the abuse.

- 'Use of alcohol/drugs on victim to facilitate the offence' – see discussion at page 40.
- 'Sexual images of victim recorded, retained, solicited or shared' – see discussion at page 48.
- 'Vulnerable child targeted' – see discussion at page 40.
- 'Significant disparity in age' – see discussion at page 49.
- '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.

There are differences between some culpability A factors in this guideline and those found in the sexual activity with a child guideline at page 48. The first of these is 'abuse of position of trust' which does not appear in this guideline. As set out above, abuse of trust is inherent in these offences and is already reflected in the sentencing starting points and ranges.

The next difference is the absence of the factor 'offender lied about age' as in these offences it is assumed the victim will be aware of the offender's age because of the family relationship. It is not included at step one as a principal factors of these offences but if it is relevant to the facts of a particular case, the sentencer can take it into account as an aggravating factor at step two to increase the sentence from the starting point.

⁵⁹ As defined by s.27 Sexual Offences Act 2003

The third difference is the absence of ‘member of group or gang during commission of offence’. The Council is, however, seeking views as to whether this should be listed as a step one principal factor when a family member is involved or whether it can be considered as an aggravating factor at step two.

Q24

Do you agree with the harm and culpability factors proposed at step one for sexual activity with a child family member and inciting a child family member to engage in sexual activity? If not, please specify which you would add or remove and why.

STEP TWO

Starting points 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. This would then lead the court to decide whether the sentence should be adjusted upwards or downwards in the relevant range.

The Council has identified what it believes to be the most common factors but this is not an exhaustive list and sentencers will have the flexibility to take into account other relevant factors to increase the sentence from the starting point.

The table below sets out the proposed aggravating factors. Where factors have been discussed already the reference to the relevant discussion is given.

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 child 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

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 child 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.
- ‘Commission of offence whilst under the influence of alcohol or drugs’ – see discussion at page 24.

The Council has not included ‘failure of offender to respond to previous warnings about the relationship’ because the offence is committed in the context of a family relationship and therefore it is unlikely that warnings about contact between the offender and the victim will have been given. It is more likely that other family members will immediately contact the relevant authorities. The Council is, however, seeking views on this reasoning.

Mitigation

The Council is consulting upon the same mitigating factors as for the offence of sexual activity with a child. A more extensive discussion of mitigating factors is 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

Sentence levels for sexual activity with a child family member

As with sexual activity with a child in a non-familial relationship, culpability is particularly significant in terms of the suggested starting points and ranges. To reflect the fact that abuse of trust is always present in these offences, the proposed starting points and ranges are higher than for the offence of sexual activity with a child. Given that the current offence will always involve a family member, the Council is recommending that where the offence includes penetrative sexual activity, a custodial sentence would always be appropriate. The Council is not recommending community orders for this higher category.

However, because of the wide definition of ‘family member’ the Council is recommending giving sentencers the option of a non-custodial sentence in cases where there has been neither penetrative sexual activity or masturbation and where there are no signs of exploitation or grooming. Such a scenario is set out below.

Q25

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.

Scenario F

An 18-year-old male au pair lives with a family and is responsible for being in sole charge of a 14-year-old girl after school, driving her home from school and cooking dinner. The au pair and girl become close and are caught by the parents in a state of undress kissing and touching each other. There is no evidence of exploitation and the victim maintains she wanted to kiss the au pair and become his girlfriend.

The au pair comes within the definition of ‘family member’ by virtue of section 27(4) of the SOA 2003 and has therefore committed the section 25 offence. As a result of the conviction, the au pair will be placed on the sex offenders register. This is a difficult sentencing exercise but in such a case a sentencer may wish to impose a community order with both punishment (unpaid work) and rehabilitation elements (for example, psychological treatment challenging the thought processes that led the offender to think his behaviour was acceptable) as opposed to a relatively short custodial sentence.

The proposed sentence levels are set out below.

	A	B
Category 1	Starting point 6 years’ custody	Starting point 3 years 6 months’ custody
	Category range 4 – 8 years’ custody	Category range 2 years 6 months’ – 5 years’ custody
Category 2	Starting point 4 years’ custody	Starting point 18 months’ custody
	Category range 2 – 6 years’ custody	Category range 6 months’ – 2 years 6 months’ custody
Category 3	Starting point 1 year’s custody	Starting point Medium level community order
	Category range High level community order – 2 years’ custody	Category range Low level community order – High level community order

Q26

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 11
and
Causing a child to watch a sexual act, Sexual Offences Act 2003 – section 12
Maximum sentence: 10 years’ custody
(full guidelines page 227)

The section 11 offence is committed where an offender aged over 18 intentionally engages in sexual activity knowing they can be observed by a child, and obtaining sexual gratification from being observed. The offender may be in the same room as the child but equally could be conducting the sexual activity at a different location via a webcam.

The section 12 offence is committed by an offender over the age of 18 causing a child to watch a third party engage in sexual activity or causing a child to look at an image of a person engaging in sexual activity, and obtaining sexual gratification from making the child watch the act. For the purposes of these offences a child is defined as anyone under the age of 16.⁶⁰

The Council proposes to deal with both these offences in one guideline as it is of the opinion that there are common offending behaviours involved and that they are both equally harmful. They also share a statutory maximum of 10 years’ imprisonment. Although the existing SGC guidelines treat these offences separately, since their publication there has been an increased understanding of the ways in which children can be groomed. The activities in both these offences can be deployed by offenders to normalise and desensitise children to sexual activity. The European Online grooming project found:

“Visual desensitisation involved sending young people adult pornography and/or indecent images of children. Where online groomers talked about a gradual process of offence intensity and escalation, images were used to instigate sexual discussion. Use of images also intensified the abuse process for the offender. For example, it was not uncommon for some offenders to describe masturbating to ejaculation whilst discussing images with young people.”⁶¹

Q27

Do you believe that the offences of engaging in sexual activity in the presence of a child and causing a child to watch a sexual act should be dealt with in the same guideline? Please give reasons for your answer.

STEP ONE**Determining the offence category**

The first step that the court will take is to consider the principal factual elements of these offences.

In this draft guideline, severity of harm is determined by the type of sexual activity viewed by the victim. The existing SGC guideline gives the highest starting point to images of consensual penetration and live sexual activity. However, the Council believes that there are some images of sexual activity which should attract the highest starting point because of the depravity portrayed in them and their distorting effect on the child’s view of sexual activity. The proposed categorisation is set out below.

⁶⁰ s.11(1)(d) and s.12(1)(c), Sexual Offences Act 2003

⁶¹ European online grooming project final report p7, <http://www.european-online-grooming-project.com/>

Harm	
Category 1	<ul style="list-style-type: none"> • Causing victim to view extreme pornography • Causing victim to view indecent/prohibited images of children • 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	Factor(s) in categories 1 and 2 not present

Category 3 involves a wide range of sexual imagery and activity that does not involve penetration, masturbation or extreme images.

Category 2 deals with penetrative sexual activity and masturbation. Causing a victim to view penetrative activity is currently the highest category of harm in the SGC guideline. The Council wishes to retain similar sentence levels for causing a child to view this type of activity and does not propose to reduce sentence levels. The Council does, however, feel there is another level of imagery deserving even higher sentence starting points and ranges (see discussion of category 1 below).

Category 1 covers offences where the child is exposed to extreme pornography,⁶² indecent or prohibited images of children or views live sexual activity which involves sadism, violence, sexual activity with an animal or a child. When the SGC guideline was written, the offence of extreme pornography had not been created but the Council believes that the guidelines should now be brought up to date to include a reference to extreme pornography.

Culpability

As set out earlier in this discussion, exposure to sexual imagery can be used by offenders to desensitise a child to sexual activity in order to facilitate further sexual offending by the offender or others. The Council is recommending that the culpability factors should focus on whether there is evidence of such grooming or manipulation of the child. Increased culpability will be demonstrated by an offender who is deliberately trying to corrupt and desensitise the child alongside the sexual gratification they are getting in exposing the child to the imagery or sexual activity.

Many of the factors identified below have already been discussed in relation to other offences such as sexual activity with a child and that is indicated below.

Culpability

A

Use of gifts/bribes to coerce the victim or other preparatory 'grooming' behaviours

Use of threat (including blackmail)

Use of alcohol/drugs on victim to facilitate the offence

Abuse of position of trust

Vulnerable child targeted

Significant disparity in age of parties

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

⁶² Extreme pornography is defined in s.63(7) Criminal Justice and Immigration Act 2008 as an image which: "portrays, in an explicit and realistic way, any of the following - (a) an act which threatens a person's life, (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals, (c) an act which involves sexual interference with a human corpse, or (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive)."

Culpability B has no factors listed but the sentence starting points and ranges reflect the inherent abusive and corrupting behaviour that will always be present when an offender exposes a child to sexual imagery for the offender's sexual gratification.

Culpability A lists factors that demonstrate an offender has manipulated, exploited or coerced a child.

- 'Use of gifts/bribes to coerce the victim or other preparatory 'grooming' behaviours' – see discussion at page 48.
- 'Use of threat (including blackmail)' – see discussion at page 40.
- 'Use of alcohol/drugs on victim to facilitate the offence' – for these offences, alcohol or drugs may not just be used to obtain the victim's agreement to view the activity or make them incapable of resistance, alcohol and drugs may also be used to obtain the victim's trust as part of the wider grooming process.
- 'Abuse of position of trust' – see discussion at page 40.
- 'Vulnerable child targeted' – see discussion at page 40.
- 'Significant disparity in age of parties' – see discussion at page 49.
- '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.

Q28

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 points and category ranges

Having identified the appropriate category at step one, the court is then guided to identify whether there are any additional factors which might aggravate or mitigate the offence warranting adjustment from the starting point.

Where factors have been discussed already the reference to the relevant discussion is given.

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

Commission of offence whilst offender 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' – see discussion at page 24.

- ‘Attempts to dispose of or conceal evidence’ – see discussion at page 24.
- ‘Commission of offence whilst offender under the influence of alcohol or drugs’ – see discussion at page 24.

Mitigation

The Council is consulting upon the same mitigating factors as for the offence of sexual activity with a child. A more extensive discussion of mitigating factors is 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

Q29

Do you agree with the aggravating and mitigating factors proposed at step two? Please give reasons for your answer.

Sentencing starting points and ranges

As discussed in the introductory paragraphs to this offence (see page 60), the Council is recommending a different approach to that taken by the SGC. The maximum sentences that were recommended in the SGC guideline for these offences were:

- two years’ imprisonment with a range of one to four years’ imprisonment for sexual activity in the presence of a child which involved consensual penetration; and
- 18 months’ imprisonment with a range of 12 months to two years’ imprisonment for causing or inciting a child to watch a live sexual act.

Both of these types of activity are now likely to be encompassed in category 2 with similar sentence levels as described in the scenarios below.

Scenario G

The offender (O), a 25-year-old male, has been emailing his victim (V), a boy aged 11, over a number of weeks after they started chatting on an online forum about video games. O has offered to support V as he has been having a difficult time with bullying at school. They start to communicate by webcam. One evening O asks V sexually explicit questions and then masturbates in front of the webcam knowing that V is watching him remotely. O tells V he must continue to communicate with him so they can do it again and if he doesn’t maintain contact or if he tells anyone what has happened he will tell people at V’s school that V is gay. This is likely to be a section 11 offence falling into category 2A with a starting point of two years and a range of one to three years.

Scenario H

The offender (O), a 25-year-old male is looking after the victim (V), an 11-year-old boy, whilst his mother is out for the evening. During the course of the evening O starts talking to V explicitly about sex and tells V the sorts of sexual activity he enjoys. V is uncomfortable with the conversation and says he wants to go to bed. O becomes verbally aggressive towards V and insists he should watch a DVD he has brought with him. V is intimidated and stays and O shows V a pornographic film. O describes graphically how he is sexually aroused watching the film with V and what sexual activity he would like to engage in with V. O then tells V he will get into serious trouble for having watched it. He also tells V that if V tells his mother she will think her son is a pervert for looking at pornography. The offence comes to light when V gets very distressed and breaks down when his mother asks O to babysit again. This is likely to be a section 12 offence falling into category 2A with a starting point of two years and a range of one to three years.

The Council is also consulting on the inclusion of additional activity to be included in category 1 for the reasons set out at page 60. For example, where a child is forced to watch pornography that involves sadism or is shown indecent images of children, for the sexual gratification of the offender, then this will fall into category 1. The Council believes that the harm done to the child is increased by the extreme nature

of the imagery and, where it is combined with manipulative and coercive behaviour on the part of the offender, it should attract a custodial sentence higher than currently reflected in SGC guidelines.

The proposed sentence levels and starting points are set out below.

	A	B
Category 1	Starting point 4 years' custody	Starting point 2 years' custody
	Category range 3 – 6 years' custody	Category range 1 – 3 years' custody
Category 2	Starting point 2 years' custody	Starting point 1 year's custody
	Category range 1 – 3 years' custody	Category range High level community order – 18 months' custody
Category 3	Starting point 26 weeks' custody	Starting point Medium level community order
	Category range High level community order – 1 year's custody	Category range Low level community order – Medium level community order

Q30

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.

Meeting a child following sexual grooming, Sexual Offences Act 2003 – section 15

Maximum sentence: 10 years’ custody (full guideline page 233)

This offence is committed when an offender aged 18 or over meets or communicates with a child (for this offence defined as ‘under the age of 16’) who then either meets the child or travels with the intention of meeting the child intending to commit an offence under the SOA 2003. This offence is different to the child sexual offences discussed so far, which have involved the offender committing the substantive offence, whereas this offence is committed by preparing to commit one of those substantive offences.

The offence is often referred to by the shorthand of ‘grooming’. However, as set out earlier in this section, that phrase can also be used to describe manipulative behaviour used by offenders to condition victims to obtain their apparent acquiescence to sexual activity with the offender or others. There has recently been reporting of ‘on-street grooming’ and also ‘internet grooming’ but it is important to distinguish the wider activity this can involve from the activity required for the commission of this offence.

The section 15 offence specifically requires:

- communication⁶³ with a child on at least two occasions; and
- the offender travels to meet the child following this communication with the intention of committing a sexual offence.

It is important to appreciate that both the above elements will have to be proved for an offender to be guilty of the offence of grooming. It is not applicable where an adult has communicated

with their victim but has not also travelled to meet the child. The reason this offence was introduced into the SOA 2003 was because, prior to the act, unless a sexual offence had already been committed there would be nothing that an offender could have been charged with and therefore this offence “enables earlier intervention than would otherwise be possible.”⁶⁴

STEP ONE

Determining the offence category

The first step that the court will take is to consider the main factual elements of the offence.

The fact that this offence is designed to enable early intervention and to prevent an offender committing further offences means that harm and culpability may not have been fully realised due to that intervention. For this reason it is difficult to articulate harm and culpability in the same way as for other sexual offences.

It is proposed therefore that the guideline categories are as follows below.

Category 1	Raised harm and raised culpability
Category 2	Raised harm or raised culpability
Category 3	Grooming without raised harm or culpability factors present

Harm factors

The existing SGC guideline has just two categories of offence. The highest is reserved for cases when the intent of the offender is to commit an assault by penetration or rape. The second category applies where the offender’s intent is to coerce the child into any other form of sexual activity.

⁶³ This communication could be in person or remotely via phone or the internet

⁶⁴ *Rook and Ward on Sexual Offences*, 4th edition, para 4.135

The Council is proposing that harm and culpability should be articulated in more detail than in the existing SGC guideline. The proposed factors indicating raised harm are set out below.

Factors indicating raised harm
Child threatened (including blackmail)
Continued contact with victim despite victim's attempts to terminate contact
Sexual images of victim exchanged
Vulnerable victim targeted
Child exposed to extreme sexual content for example, extreme pornography
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)

- ‘Child threatened (including blackmail)’ is included here as a harm factor. This is different to other guidelines where it is a culpability factor. In other offences, for example, sexual activity with a child, the use of threats increases the offender’s culpability in procuring the sexual activity which subsequently takes place. In this offence, because no actual sexual activity has necessarily taken place, the harm to the child will be psychological as a result of the threats made to them.
- ‘Continued contact with victim despite victim’s attempts to terminate contact’ has been included to deal with cases where the offender has persisted with his offending behaviour despite attempts by the victim to terminate contact. This is likely to induce a sense of menace in the victim and therefore increases the psychological harm.
- ‘Sexual images of victim exchanged’ – in other guidelines this is expressed as the culpability factor ‘sexual images of victim recorded, retained, solicited or shared’. It is included here as a feature of harm for this offence because of the damage caused by the victim’s knowledge that there are images held by the offender which may be circulated and over which they have no control.
- ‘Vulnerable victim targeted’ is intended to cover vulnerability over and above the fact that the victim is a child (see also the discussion on vulnerability under the offence of sexual activity with a child at page 40). Barnardo’s in their report *Puppet on a String* have said:

“...some groups of young people are more vulnerable to targeting by the perpetrators of sexual exploitation. These include children living in care, particularly residential care, those who are excluded from mainstream school and those who misuse drugs and alcohol. Barnardo’s is concerned that these children are increasingly being targeted by abusers who are developing more sophisticated grooming techniques.”⁶⁵
- ‘Child exposed to extreme sexual content for example, extreme pornography’ – there has already been discussion of exposure to extreme pornography at page 60 in relation to the offence of causing a child to watch sexual activity. If the communication with the offender has included exposure to extreme sexual content, then this will have had a harmful and corrupting effect on the child.
- ‘Offence racially or religiously aggravated’, ‘offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual

65 Barnardo’s report *Puppet on a String* http://www.barnardos.org.uk/ctf_puppetonastring_report_final.pdf

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.

In terms of culpability, the offender starts with a high degree of culpability by communicating with, and travelling to meet the victim in order to engage them in some form of sexual activity. There are, however, a number of culpability factors that the Council believes further increases culpability. These are set out below.

Factors indicating raised culpability

Communication indicates penetrative sexual activity is intended
Lied about age/persona
Use of coercion through threats, gifts or bribes
Abuse of position of trust
Offender deliberately targets a child under the age of 13
Abduction or detention
More than one offender acting together

- ‘Communication indicates penetrative sexual activity is intended’ – this factor demonstrates the severity of the sexual offence the offender intended to commit.
- ‘Lied about age/persona’ is included as the Council feels there is increased culpability because of the additional deception on the part of the offender. The Council is alive to the fact that not all offenders will disguise their identity and that some will exploit the fact that, for example, a young girl may be looking for an older ‘grown up’ boyfriend. It is certainly not intended that if someone has been honest about their age and persona it should be used as mitigation. The Council does, however, feel a deliberate change to identity indicates a high level of planning and culpability. The European Online Grooming Project reported:
 - ‘Use of coercion through threats, gifts or bribes’ are elements of sexual exploitation that has already been discussed for other offences at pages 40 and 48.
 - ‘Abuse of position of trust’ – see discussion at page 40.
 - ‘Offender deliberately targets a child under the age of 13’ – the Council believes that higher sentence levels should potentially be available where the offender deliberately targets a child victim, whatever their age. However, it is consulting on whether deliberate targeting of those under the age

“Online identities were shaped to present the men positively to young people. There were men that described making ‘minor’ changes to their identity such as changing their name, age, marital status or using a younger (perhaps more attractive) photograph of themselves. Some men made these minor changes to their identity based on unsuccessful previous attempts at contact. There were also people that made major changes to their identity. Here changes went beyond amending age or name, and could involve pretending to be a young girl or woman. Some offenders also talked about using multiple concurrent identities online, and switching between them to maximise the opportunity of contact. Finally, there were online groomers that did not change their identity before or during their online encounters with any young people. Alongside listing legitimate details, some men were also explicit about their sexual interest in young people. That some of these men went on to develop contact with young people raises important questions about the vulnerability of some young people online.”⁶⁶

66 European Online Grooming Project <http://www.european-online-grooming-project.com/>

of 13 should increase culpability as this age group were specifically identified in the SGC guideline as an increased culpability factor. The Council would welcome views on this.

- ‘Abduction or detention’ would increase the offender’s culpability – see discussion at page 17.
- ‘More than one offender acting together’ – earlier Sentencing Council guidelines⁶⁷ have included ‘offending committed in the context of group or gang activity’ as a higher culpability factor. The Council is aware that grooming by groups and gangs is the subject of an ongoing report by the Children’s Commissioner.⁶⁸ The Council is continuing to monitor developments in this area but recommends that offences committed in this context should be treated as a factor increasing the offender’s culpability.

Q31

Do you agree with the format of the guideline for the offence of meeting a child following sexual grooming?

Q32

Do you agree with the harm and culpability factors proposed at step one for the offence of meeting a child following sexual grooming? If not, please specify which you would add or remove and why.

STEP TWO

Starting points and category ranges

Having identified the appropriate category at step one the court is then guided to identify whether there are any additional factors which might aggravate or mitigate the offence warranting adjustment from the starting point.

Where factors have been discussed already the reference to the relevant discussion is given.

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

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

- ‘Previous convictions’ and ‘offence committed whilst on bail’ – see discussion at page 23.
- ‘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’ – see discussion at page 24.
- ‘Attempts to dispose of or conceal evidence’ – see discussion at page 24.

⁶⁷ Sentencing Council: *Assault: definitive guideline*

⁶⁸ <http://www.childrenscommissioner.gov.uk/info/csegg1>

Mitigation

The Council is consulting upon the same mitigating factors as those present in all the offences where children are victims. A more extensive discussion of mitigating factors is 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

Sentence levels for meeting a child following sexual grooming, etc

The Council recommends that category 1 should have the same starting point and ranges as the top range under the existing SGC guideline. The SGC guideline, however, has higher starting points and ranges for offences committed against those under the age of 13. The Council recommends that the SGC higher level starting point for those under the age of 13 should be available for all age groups where higher harm and higher culpability are present.

Category 1	Starting point 4 years' custody
	Category range 3 – 7 years' custody
Category 2	Starting point 2 years' custody
	Category range 1 – 4 years' custody
Category 3	Starting point 18 months' custody
	Category range 1 year – 2 years 6 months' custody



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.

Abuse of position of trust

There are a number of offences specific to child victims where the offender is in a formal position of trust in relation to the child. The offences are:

- abuse of position of trust: sexual activity with a child, Sexual Offences Act 2003 – section 16;
- abuse of position of trust: causing or inciting a child to engage in sexual activity, Sexual Offences Act 2003 – section 17;
- abuse of position of trust: sexual activity in the presence of a child, Sexual Offences Act 2003 – section 18; and
- abuse of position of trust: causing a child to watch a sexual act, Sexual Offences Act 2003 – section 19.

69 s.21(4) Sexual Offences Act 2003 “This subsection applies if A looks after persons under 18 who are accommodated and cared for in one of the following institutions - (a) a hospital; (b) an independent clinic; (c) a care home, residential care home or private hospital; (d) a community home, voluntary home or children’s home; (e) a home provided under section 82(5) of the Children Acts (1989) or (f) a residential family centre.
s.21(5) This subsection applies if A looks after persons under 18 who are receiving education at an educational institution and B is receiving, and A is not receiving, education at that institution.”

The offending activity mirrors that found in the equivalent child sexual offences discussed earlier in this section – see page 45; there are, however, key differences which will be discussed below. Under the legislation abuse of trust offences occur where the victim is a child under the age of 18 and the offender is in a formal position of trust in relation to that child as defined by section 21 SOA 2003.⁶⁹ The definition includes, amongst others: teachers, people working in hospitals, clinics, care homes and children’s homes.

CPS charging guidance makes it clear that, even though it would be possible to use the abuse of trust legislation in respect of a child of any age, abuse of position of trust offences are charged only when the child is over the age of 16 and it appears that they agreed to the activity. The CPS charging guidance states:

“These [sections 16–19 SOA 2003] offences will only be charged where the victim is aged 16 or 17. Therefore, the sentencing starting points in the guidelines are only intended for those cases and are significantly lower than those for a child sex offence involving the same type of sexual activity, which should be applied in all other cases.”⁷⁰

The reason it is only applied to 16 and 17 year olds is that the offence overlaps with other sexual offences. If, for example, a teacher engages in sexual activity with a pupil under the age of 16, the teacher would also commit the offence of sexual activity with a child.⁷¹ That offence has a higher maximum sentence of 14 years, whereas the abuse of trust offences have a maximum of five years.

Abuse of position of trust: sexual activity with a child, Sexual Offences Act 2003 – section 16 and

Abuse of position of trust: causing or inciting a child to engage in sexual activity, Sexual Offences Act 2003 – section 17

Maximum sentence: 5 years’ custody (full guidelines page 239)

STEP ONE

Determining the offence category

The Council is consulting on adopting the approach of the existing Sentencing Guideline Council (SGC) guideline which includes both these offences in the same guideline, as harm and culpability are equally weighted in these offences and they have the same statutory maximum.

The court will consider the main factual elements of these offences at step one. The Council has decided to replicate the approach to harm that was taken in the sexual activity with a child guideline (see discussion at page 45). As with that offence, the victim may believe him/herself to be in a relationship with the adult in the position of trust and may not be aware of the harm that is being done to them. Harm is therefore attributed based upon the degree of sexual activity that has taken place. The suggested categorisation is therefore:

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, a child
Category 2	Masturbation by, or of, a child
Category 3	Factor(s) in categories 1 and 2 not present

⁷⁰ CPS Legal Guidance, s.16 Abuse of a position of trust – http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/s16_abuse_of_a_position_of_trust_sexual_activity_with_a_child/

⁷¹ s.9 Sexual Offences Act 2003

An explanation of these harm categories can be found under the sexual activity with a child guideline at page 47.

Culpability

A number of the culpability factors have been replicated from the guideline on sexual activity with a child and where the factors have already been discussed the relevant discussion is highlighted.

Culpability

A

Use of gifts/bribes to coerce the victim or other preparatory 'grooming' behaviours

Use of threat (including blackmail)

Use of alcohol/drugs on victim to facilitate the offence

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

- 'Use of gifts/bribes to coerce the victim or other preparatory 'grooming' behaviours' – see discussion at page 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.
- 'Sexual images of child recorded, retained, solicited or shared' – see discussion at page 48.

- '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.

There are a number of culpability factors which appear in the sexual activity with a child guideline which have been omitted here. The first is 'abuse of position of trust'. This is because an abuse of a position of trust is an essential feature of these offences; it has to be present for the offender to be guilty of the offences and is therefore not listed as a culpability factor.

'Offender lied about age' is not included as it is the nature of the contact that creates the offender's culpability (for example, teacher and pupil) and deception about age is less likely to be a principal factor in abuse of trust cases. The Council would be interested in views on this point.

'Member of group or gang during the commission of the offence' has been removed as, based on the types of cases that are prosecuted, the Council does not believe that in abuse of trust cases, membership of a group or gang is normally a key factual element of the offence. The Council is seeking views and evidence as to whether this is correct or whether this should be included as a step one factor for these offences.

'Significant disparity in age' is not included as the Council feels that the age of the offender is not as significant a culpability factor as the position of trust the offender holds in relation to the child.

Q34

Do you agree with the harm and culpability factors proposed at step one for ‘abuse of trust: sexual activity with a child’ and ‘abuse of trust: causing or inciting a child to engage in sexual activity’? If not, please specify which you would add or remove and why.

STEP TWO
Starting points and category ranges

Having identified the appropriate category at step one the court will consider the starting point and identify whether there are additional factors that aggravate or mitigate the offence. This is a non-exhaustive list of factors.

The table below sets out the proposed aggravating factors. Where the factors have already been discussed the reference to the relevant discussion is given.

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 child 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

Child required to move school, institution, home, hospital, etc as a result of relationship and/or adverse impact on child’s education or training

Failure of offender to respond to previous warnings about the activity

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 child 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.
- ‘Child required to move school, institution, home, hospital, etc as a result of relationship and/or adverse impact on child’s education or training’ has been included because of the type of offenders likely to be charged with this offence. Where, for example, the victim has had to change schools because the offender was their teacher, the long-term effect of the disruption to their education should be reflected in an upward movement from the starting point.
- ‘Failure of offender to respond to previous warnings about the activity’ is included here to cover situations where, for example, a teacher has been warned by the school about becoming too close to a pupil and then proceeded to engage in sexual activity with that pupil.
- ‘Commission of offence whilst under the influence of alcohol or drugs’ – see discussion at page 24.

Mitigation

The Council is consulting on the same mitigating factors as in the guideline on sexual activity with a child – see discussion at page 24. The Council is seeking views as to whether these mitigating factors are also relevant for the abuse of trust offences.

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

Q35 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 for:

- **abuse of trust: sexual activity with a child; and**
- **abuse of trust: causing or inciting a child to engage in sexual activity.**

Although very similar factors to the sexual activity with a child (section 9) offence have been used to determine the category of these offences, their statutory maximum is five years as opposed to 14 years for the section 9 offence. Therefore, the starting points and ranges must be lower.

The proposed sentencing starting points and ranges are therefore:

	A	B
Category 1	Starting point 18 months' custody	Starting point 1 year's custody
	Category range 1 – 2 years' custody	Category range 26 weeks' – 18 months' 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 26 weeks' custody	Starting point Medium level community order
	Category range High level community order – 1 year's custody	Category range Low level community order – High level community order

Q36 Please give your views on the proposed sentence levels (starting points and ranges) for this offence. If you disagree with the levels, please give reasons why.

Abuse of position of trust: sexual activity in the presence of a child, Sexual Offences Act 2003 – section 18 and Abuse of position of trust: causing a child to watch a sexual act, Sexual Offences Act 2003 – section 19
Maximum sentence: Five years' custody (full guideline page 245)

Sections 18 and 19 mirror the section 11 and 12 offences already discussed at page 60. As with the previous offences, the offender will be in a position of trust and the victim will be under the age of 18 when the activity takes place. This offence will ordinarily only be charged when the victim is aged 16 or 17 for the reasons given at page 70.

STEP ONE

Determining the offence category

The Council proposes to replicate the harm factors that have been set out for the section 11 and 12 offences and a full discussion of these factors can be found at page 61.

Harm	
Category 1	<ul style="list-style-type: none"> Causing victim to view extreme pornography Causing victim to view indecent/prohibited images of children Engaging in or causing 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	Factor(s) in categories 1 and 2 not present

Culpability

The culpability factors also replicate those found under the section 11 and 12 offences. All the factors below are discussed at page 61. There are factors found in the section 11 and 12 offences which have been omitted from this offence.

The first factor that has been omitted is 'abuse of position of trust'. This is because an abuse of a position of trust is an essential factual element of the offence as explained at page 70.

'Significant disparity in age' is not included as the Council feels that the age of the offender is a secondary consideration to the fact that they are in a position of trust in relation to the child in abuse of trust cases.

Culpability

A

Use of gifts/bribes to coerce the victim or other preparatory 'grooming' behaviours

Use of threat (including blackmail)

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

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

Q37

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 points and category ranges**

Having identified the appropriate category at step one, the court will consider the starting point and identify whether there are additional factors that aggravate or mitigate the offence. This is a non-exhaustive list of factors.

The table below sets out the proposed aggravating factors. These are exactly the same factors as discussed at page 72 and a full explanation can be found under that section. ‘Pregnancy or STI as a consequence of sexual activity’ is, however, removed as a factor as these offences are about causing the child to view, rather than engage in, activity and so this factor is not relevant for this offence.

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 child reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Attempts to dispose of or conceal evidence

Adverse impact on child's education or training

Child required to move school, institution, home, hospital, etc as a result of activity

Failure of offender to respond to previous warnings about activity

Commission of offence whilst under the influence of alcohol or drugs

These are discussed at page 72.

Mitigation

The same mitigating factors are listed as discussed at page 73 and the same issues arise. For a full discussion see 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

These are discussed at page 72.

Sentence levels for abuse of trust

As with the other abuse of trust offences, the statutory maximum for these offences is five years’ imprisonment. The sentence levels have

therefore been lowered from the section 11 and 12 equivalent offences for victims who are under 16. The proposed sentence levels are therefore:

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

In the current SGC guidelines the starting point and ranges if an offender has consensual intercourse in the presence of the victim⁷² are higher (2 years starting point, 1–4 years’ custody) than the starting points and ranges given for having penetrative intercourse with the victim⁷³ (18 months starting point, 1 year – 2 years 6 months’ custody). The Council, whilst accepting that both forms of activity should have a custodial starting point, does not believe that there is a justification for the starting point to be

higher if an offender has sexual activity in the presence of the victim than if the offender has penetrative sexual intercourse with the victim. Views are sought on this point.

Q38 Please give your views on the proposed sentence levels (starting points and ranges) for this offence. If you disagree with the levels, please give reasons why.

72 s.18 Sexual Offences Act 2003

73 s.16 *ibid*