



# Justice Committee

House of Commons London SW1A 0AA  
Tel 020 7219 8196/8198 Email [justicecom@parliament.uk](mailto:justicecom@parliament.uk)  
Website [www.parliament.uk/justicecttee](http://www.parliament.uk/justicecttee)

The Right Honourable Lord Justice Holroyde  
The Sentencing Council for England and Wales

7 September 2021

## **By email only**

### **Justice Committee response to Sentencing Council consultation: Sexual offences guidelines**

Dear Lord Justice Holroyde,

Thank you very much for giving my Committee the opportunity to respond to the Sentencing Council's consultation on the sexual offences guidelines. We are grateful also to the Council for sharing other responses to the consultation with us in advance of our submission.

Overall, the changes proposed in this consultation are welcome. The recent case law in this area illuminates some of the challenges that sentencers have faced. The consultation therefore presents an important opportunity to clarify key principles and ensure consistency in sentencing.

The offences considered in the consultation are serious offences of great concern to the public, many with significant maximum sentence limits. It is essential for public confidence in our justice system that that sentencing for sexual offences sufficiently reflects the seriousness with which the public views them. It is also essential that there is consistent sentencing and an effective deterrent for offenders to prevent potential victims being targeted in the future.

We note from the resource assessment that accompanied the consultation that some of the proposed changes will likely lead to increased sentence lengths and require significantly more prison places. Whilst we support the changes to the guidelines, and note that they may lead to increased sentence lengths, there must always be adequate resource for necessary custodial control, and we would call on the government to provide additional prison resource if necessary.

We have responded to each consultation question in turn. However, the key themes that underlie our responses can be summarised as follows:

- Clarifying some of the proposed amendments;
- Ensuring consistency between the guidelines;

- Ensuring that the approach of sentencers is in line with the intention of the relevant statute; and
- Acknowledging the resource implications of the proposed changes.

**Question 1: Do you have any comments on the proposed amendments to the section 14 guideline?**

We welcome the proposed amendments to the section 14 guideline as they clarify how principles set out in legislation and recent case law should be applied.

From the outset we note that section 14 of the Sexual Offences Act 2003 does not require there to be any sexual contact for the offence to take place “*a person commits an offence if: (a) he intentionally arranges or facilitates something that he intends to do, intends another person to do, or believes that another person will do...*”. We also note that section 63 of the Sentencing Act 2020 requires the court in assessing the seriousness of any offence to consider intended or foreseeable harm, as well as harm that was caused:

**Assessing seriousness**

Where a court is considering the seriousness of any offence, it must consider—

- (a) the offender's culpability in committing the offence, and
- (b) any harm which the offence—
  - (i) caused,
  - (ii) was intended to cause, or
  - (iii) might foreseeably have caused.

We agree that the amended guideline text proposed is a useful reflection of the most recent case law in *Privett and Others* [2020] EWCA Crim 557, namely the principle that sentencers should first identify the category of harm on the basis of the sexual activity intended, and then adjust the sentence to be commensurate with, or proportionate to the applicable starting point and range if no sexual activity had occurred (including because the victim was fictional).<sup>1</sup>

We recommend that some additional text or examples be added to enhance clarity in relation to how a “downward adjustment” might be applied. The proposed guidance states:

*The extent of this adjustment will be specific to the facts of the case. In cases where an offender is only prevented by the police or others from conducting the intended sexual activity at a late stage, or where a child victim does not exist and, but for this fact, the offender would have carried out the intended sexual activity, a small reduction within the category range will usually be appropriate.*

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<sup>1</sup> *Privett and Others* [2020] EWCA Crim 557, 67

*Where, for instance, an offender voluntarily desisted at an early stage a larger reduction is likely to be appropriate, potentially going outside the category range.*

*In either instance, it may be the case that a more severe sentence is imposed in a case where very serious sexual activity was intended but did not take place than in a case where relatively less serious sexual activity did take place.*

Greater clarity should be provided as to what a “small reduction” might be in cases where the victim does not exist. While we accept the general proposition in *Privett* that the harm in any case is usually greater when there is a real victim involved rather than a fictional victim, we also note the purpose of section 63 of the Sentencing Act is that intended and foreseeable harm should be considered when assessing the seriousness of the case. As Lord set out in *Reed*:

*[i]f the seriousness of an offence is to be judged by reference not just to the harm caused, but to the harm intended, then when a defendant encourages a child to engage in sexual activity but without that activity taking place, or attempts to engage in sexual activity with a child, the effect of section 63 Sentencing Act 2000 is that the harm should be assessed by reference to the defendant's state of mind and intentions.<sup>2</sup>*

While we accept that the extent of the adjustment must be specific to the facts of the case, as a principle we do not think the downward adjustment should be too significant, if at all, in certain cases where the harm was intended but did not take place because there was no real victim. We note the comment in the case of *Reed and Others* [2021] EWCA Crim 572,<sup>3</sup> and reflected in the proposed guidance for section 10 offences, that “Where relevant, no additional reduction should be made for the fact that the offending is an attempt”.<sup>4</sup> There should be greater clarity as to how, and the instances in which a downward adjustment should be applied, as well as further guidance to determine how great that adjustment should be.

We note, according to the resource assessment, that at present the average custodial sentence length (ACSL) for those sentenced to immediate custody for this offence is 3 years and 10 months. Given that the maximum penalty set by Parliament for a section 14 offence is 14 years’ custody, we would note that there is a significant gap between the ACSL and the maximum penalty. The analysis in the resource assessment estimates that sentence lengths for Section 14 offences would increase and as a result may require approximately 40 additional prison places per year. This is a significant increase, and the estimation must be considered by the Government and reflected in prison resource.

**Question 2: Do you have any comments on the proposed amendments to the section 10 guideline?**

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<sup>2</sup> *Reed and Others* [2021] EWCA Crim 572, 21

<sup>3</sup> *Reed and Others* [2021] EWCA Crim 572, 24

<sup>4</sup> *Reed and Others* [2021] EWCA Crim 572, 24

We support the revised guideline, in line with our suggestion in response to question 1. There should be a consistent approach in the sentencing of section 10 offences and section 14 offences.

We note the analysis included within the resource assessment that estimates that average custodial sentences may increase by about 2 years and 4 months with the potential requirement for approximately 190 additional prison places per year. This is a significant increase and again must be considered by the Government and reflected in prison resource.

**Question 3: Do you agree that these changes should be made to the guidelines for all the “causing or inciting” offences in the 2003 Act? Please give reasons where you disagree.**

We agree that the changes should be made to the guidelines for all the “causing or inciting” offences in the 2003 Act. The same principles regarding intended versus actual harm apply across these offences. The approach adopted within sections 10 and 14 must also equally apply to all those offences relating to causing or inciting to ensure consistency.

**Question 4: Do you agree that the above text should be added as a drop-down in sex offence guidelines where the harm factor “severe psychological or physical harm” appears? Please give reasons where you disagree.**

We agree with the addition of the drop-down explanation on the basis of the assessment that it should enhance certainty and reduce inconsistency in the application of the harm factor of “severe psychological harm”.

**Question 5: Do you agree that the above text should be added as a drop-down in sex offence guidelines where the culpability factor “abuse of trust” appears? Please give reasons where you disagree.**

We agree with the addition of the drop-down explanation for “abuse of trust” where it appears as a culpability factor. We note that the explanation of this principle is included elsewhere in the guidance (for example where “abuse of trust” is an aggravating factor).

**Question 6: Do you agree that all sex offence guidelines (as listed in Annex B) should include the mitigating factors “Age and/or lack of maturity” and “Physical disability or serious medical condition requiring urgent, intensive or long-term treatment” with the above expanded explanations? Please give reasons where you disagree.**

As a general principle we think the Sentencing Council should take great care in considering the addition of any additional mitigating factors, and give very careful consideration as to how such additional factors might change sentencing behaviour.

In relation to the sexual offence guidelines listed in Annex B, we are concerned that the inclusion of these two mitigating factors in relation to all sexual offence guidelines could lead to unduly lenient sentences in some cases. Although the Council note that it is likely that sentencers already take such factors into account, we would welcome further evaluation of how the addition of these factors (and some of the definitions contained

within them such as the concept of “young adults”, physical disability or a serious medical condition) might affect sentencing decisions. The Committee would also like to know whether the Council has any specific reason for the inclusion of these mitigation factors in relation to these offences specifically as opposed to offences in general.

We recognise that in certain circumstances it will be appropriate for sentencers to take these factors into account but raise the concern that their inclusion might send a signal that a sentence should normally be shorter when these factors are present. Such a signal could lead to sentences that do not reflect the seriousness of the offence or its effects on those against who it was committed.

**Question 7: Do you agree with this addition relating to remote activity to the relevant sexual offence guidelines? Please give reasons where you disagree.**

Developments in technology will have made it easier for offenders to commit offences remotely; it is helpful if the guidelines are amended accordingly to reflect that change.

We strongly agree with the starting principle that for the offences of sexual activity with a child and causing or inciting a child to engage in sexual activity it is immaterial whether the offending is remote or in-person, and that the courts should not be treating offenders in other parts of the world less seriously than equivalent offending against victims in this jurisdiction. We therefore support the addition of the suggested text in all relevant sexual offence guidelines.

**Question 8: Do you agree that the above text should be added as a drop-down to the ancillary orders step in each relevant sex offence guideline? Please give reasons where you disagree.**

We agree that the proposed drop-down text for Sexual harm prevention orders (SHPOs) should be added.

**Question 9: Do you agree that the above amendments should be made to the guidance on historic sex offences to reflect better the principles set out by the Court of Appeal? Please give reasons where you disagree.**

We agree with the amendments on the basis that the guidance should be brought in to line with the case law set out in *R v Forbes* [2016] to ensure consistency.

However, the change does appear to bring about an unexplained inconsistency between historic cases, where “age and/or lack of maturity” is treated as a culpability factor, and contemporary cases where “age and/or lack of maturity” is still treated as a mitigating factor (see question 6). It is not clear why this change has only been suggested in relation to historic sex offences. The Council should either give reason why an apparent inconsistency in the guidelines might be justified, or review the changes to ensure consistency and clarity.

We agree with the change of “have regard” to “sentence by reference”.

**Question 10: Do you have any comments on the proposed harm factors?**

Overall, we welcome the addition of a guideline for section 15A offence (sexual communication with a child) and support the intention that the new guideline will encourage consistency of sentencing in an area where no guideline currently exists.

We agree that the two proposed factors indicate raised harm. However, we would welcome further clarification. It would be helpful if the Council could clarify what is meant by “sexual images”. Section 15A is broadly framed in terms of “communication” and it is possible to conceive of other ways of communicating sexually in a way that does not include “sexual images sent or received” (for example sound recordings). It would also be helpful to further clarify how “significant psychological harm or distress cause to the victim” is understood here, for example whether it is consistent with descriptor of the harm factor “severe psychological or physical harm” in question 4.

We note that the factors indicating raised harm for the Section 15 offence (Meeting a child following sexual grooming) are:

- Continued contact despite victim’s attempts to terminate contact
- Sexual images exchanged
- Victim exposed to extreme sexual content (for example, extreme pornography)
- Child is particularly vulnerable due to personal circumstances

The Council should consider whether some of these factors should be included as raised harm indicators for Section 15A offences, and how best to ensure consistency between the guidelines for these two offences.

**Question 11: Do you have any comments on the proposed culpability factors?**

We agree with the proposed culpability factors.

We would agree with other respondents that an additional culpability factor concerning the age of the offender should be added. To illustrate this, we would note that there is arguably a difference between a case of a 15-year-old being communicated with inappropriately by an 18-year-old, as opposed to being communicated with by a 58-year-old, and that it should be considered that there should be increased culpability in examples of the later kind (with regard to the specific facts of the case).

**Question 12: Do you have any comments on the proposed sentence levels?**

Given the serious nature of these offences we agree that the starting point should be a custodial sentence. We note according to the statistical bulletin around 320 adult offenders have been sentenced since the offence came into force in 2017 and from the resource assessment that around 280 offenders were sentenced for this offence in 2019. Approximately 42 per cent were sentenced to a community order, a further 36 per cent received a suspended sentence and that 15 per cent received an immediate custodial sentence (the remaining 6 per cent were recorded as “otherwise dealt with”). Of the 15 per

cent that received an immediate custodial sentence the average (mean) custodial sentence length was 10 months. In the proposals the minimum starting point is 6 months' custody.

This suggests that the proposed sentence levels will lead to a significant shift in current sentencing practice. We note the resource impact states that as a result of the changes "there may be a small increase in sentencing severity, with some offenders who previously have received a community order now receiving a short immediate custodial sentence; in practice it is likely that most of these sentences would be suspended and so there would be minimal impact on prison resources."

**Question 13: Do you have any comments on the proposed aggravating and mitigating factors?**

We agree with the proposed aggravating and mitigating factors and suggest that these should be consistent with other comparable offences.

**Question 14: Do you have any further comments on the proposed section 15A guideline?**

No further comments.

**Question 15: Do you consider that any elements of the draft guidelines and revisions presented here, or the ways in which they are expressed, could risk being interpreted in ways which could lead to discrimination against particular groups?**

We cannot think of any ways in which the draft guidelines and revisions presented here could risk being interpreted in ways which could lead to discrimination against particular groups.

**Question 16: Are there any other equality and diversity issues these guidelines and revisions should consider?**

We cannot think of any other equality or diversity issues that these guidelines or revisions should consider.

We look forward to working with the Council on future guidelines.

A handwritten signature in black ink, appearing to read 'Sir Robert Neill', with a stylized flourish at the end.

**Sir Robert Neill MP**

Chair  
Justice Committee