



Sentencing Guidelines Council

Sexual Offences Act 2003

Response to Consultation

April 2007

Foreword

On 30 April 2007, the Sentencing Guidelines Council published a guideline in relation to sentencing of offenders convicted of offences in the Sexual Offences Act 2003 which, by law, courts are required to take into account.

The guideline has been agreed by the Council after careful consideration of advice from the Sentencing Advisory Panel and of responses to its consultation guideline, published simultaneously on 7th June 2006.

This document sets out the main issues raised in the responses, the conclusions of the Council and the reasoning behind the conclusions.

The Council is grateful for the comments received, particularly in view of the size and complexity of the guideline. The general principles to underpin sentencing for such a large number of offences which vary greatly in terms of their nature and severity were supported in the responses. Important issues were raised for the Council to consider in relation to some of the technical and sensitive aspects of the legislation regarding non-consensual offences which would present practical difficulties for sentencers. Helpful suggestions were also made in relation to a number of individual offences.

The definitive guideline can be found at www.sentencing-guidelines.gov.uk or can be obtained from the Sentencing Guidelines Secretariat, 4th Floor, 8-10 Great George Street, London SW1P 3AE.

Chairman
Sentencing Guidelines Council
April 2007

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1. Background

1.1 The draft guideline was published for consultation on 7th June 2006. Those invited to respond were:

- Home Secretary
- Lord Chancellor
- Attorney General
- Home Affairs Committee
- Party Leaders and the Convenor of the Crossbench Peers in the House of Lords

1.2 A detailed response in the form of a report was received from the Home Affairs Committee. The Committee expressed concerns that its investigations were prejudiced and the number and length of responses that it received were affected by the short consultation period for the draft guideline on this occasion. The Council was happy to assure the Committee that consultations will not be so curtailed in the future.

1.3 Additional responses were received from:

- Dr Helen Jones
- HM Council of Circuit Judges
- Jon Mack
- Alisdair A Gillespie
- Quakers, Quaker Peace & Social Witness
- Crown Prosecution Service
- Rights of Women
- Philip N S Rumney

1.4 Some months after the consultation period had closed, a response was received from the Home Secretary which incorporated the comments of the Lord Chancellor and the Attorney General. In this paper it is referred to as the “Ministers’ response”. Late receipt of the response was unfortunate and meant that the comments and suggestion of the Ministers were not considered alongside those from other respondents and delayed development of the definitive guideline.

1.5 The draft guideline was a substantial document separated into seven parts. The majority of the issues raised and comments and suggestions made were in relation to Part 1 – General Principles and Part 2 – Non-consensual offences. A number of individual offences were the subject of comment and matters were raised for the Council to consider.

2. Part 1 – General principles

2.1 The first section of the guideline sets out the key general principles relevant to sentencing for all of the sexual offences contained in the guideline.

A wide range of behaviours is covered by the fifty or so offences for which individual guidelines have been developed which vary considerably in terms of seriousness. The guideline emphasises the need for flexibility in the sentencing process for this category of offences, a point made strongly in one response given that the circumstances and consequences in sexual cases vary greatly. Part 1 identifies and provides guidance in relation to the factors that will influence the assessment of seriousness and decision as to the appropriate sentence, as well as setting out other orders that may be mandatory or discretionary in individual cases.

Culpability and harm

2.2 An issue was raised in relation to the term 'standard offence' used by the Council in the Summary of General Principles (at ii.) and elsewhere in the guideline as a description for a category of seriousness upon which a suggested starting point is based. A point was made that if cases of a 'standard offence' assume the use of some form of violence, there is potential for a lower sentence than the starting point to be imposed where there is no evidence of physical injury.

2.3 In its advice to the Council the Panel used the description 'standard offence' which had been used in previous work. The Panel subsequently developed a new approach which uses 'basic offence' as a description, meaning one in which the ingredients of the offence as defined are present, and assuming no aggravating or mitigating factors.

The Council decided to adopt the Panel's new approach and to amend the guideline as appropriate.

Information for sentencers, treatment programmes and interventions

2.4 Some of the responses dealt with the information provided to sentencers in pre-sentence reports, stressing the importance of proposals for non-custodial sentences with treatment programmes to be supported by information about the access to and availability of such programmes should such a sentence be imposed. Where programmes are available it was suggested that sentencers should be in a position to indicate their expectations for completion of them. One response suggested going further and setting out the aim of sentences (the expected outcome and actions necessary to achieve it) so that the effectiveness and costs (fiscal and other) of sentences imposed for sexual offences and sentencing practice could be monitored.

The Council considered that sentencers should check the availability, content and timing of programmes recommended in a pre-sentence report. Programme requirements should commence as soon as practicable after a sentence is imposed.

2.5 From the perspective of victims it was submitted that research shows that most want recognition by the offender of the harm done, restitution and a commitment not to re-offend. It was suggested that the section of the guideline dealing with victim personal statements should be expanded to make clear that the absence of such a statement should not have a negative impact on sentencing.

The Council agreed that, where there was no victim personal statement, it should not be assumed that the offence has had no impact.

2.6 Two responses (including that of the Home Affairs Committee) encouraged the Council to refer to restorative justice approaches as an option in appropriate cases on the basis that such processes are popular when available and produce considerable satisfaction on the part of victims, often being more helpful to them than making a victim personal statement. It might be possible for compensation to be agreed between parties and a mentor supporting an order could help make any order effective.

Until such time as restorative justice interventions and approaches become an established and generally available option for sentencers, the Council considered that it would not be appropriate to encourage their use.

Aggravating and mitigating factors

2.7 A number of the responses made comments in relation to the aggravating and mitigating factors detailed in Part 1 (which were reproduced from the Council's *Overarching Principles: Seriousness* guideline published in December 2004) some enquiring as to how they apply to certain offences.

To avoid confusion, the Council agreed that a statement be added before the extracts from the *Seriousness* guideline making clear that the listed factors apply to a range of criminal offences and may not be relevant to sexual offences.

2.8 Several responses contained suggestions for additional aggravating factors such as 'grave psychological damage to children', and 'filming or photographing offences' as well as expanding some existing factors to include reference to domestic violence. The aggravating and mitigating factors in Part 1 are those that are general in nature and can apply to a range of offences. These are supplemented by offence specific additional factors in each individual offence guideline.

The Council considered that the lists in Part 1 should not be amended and that the points raised were dealt with appropriately in factors contained in the individual guidelines. The factors listed throughout the guideline are not exhaustive.

2.9 The Home Affairs Committee recommended that drug or alcohol misuse should not be a mitigating factor in relation to sexual offences. It also proposed that the guideline disapply provocation as a mitigating factor in relation to offences of rape and make clear in the guideline that not all general aggravating and mitigating factors will be relevant to sexual offences.

As drug or alcohol is not listed as a possible mitigating factor, the Council considered that there was no need to state that it is not a mitigating factor. The Council did however find merit in the suggestion that the guideline make clear that not all of the general factors would apply to sexual offences and agreed to amend the guideline accordingly.

Young offenders

2.10 In Part 1 of the draft guideline there were various references to sentencing young offenders convicted of sexual offences. Views were expressed about inconsistency in relation to the terminology used and it was suggested that some aspects of the text should be expanded, such as that in relation to the grave crime test applied by courts when allocating cases. In relation to six offences the Act prescribes a lower statutory maximum penalty where the offender was aged under eighteen and guidelines had been developed to assist sentencers dealing with such cases. A suggestion was made that separate guidelines for sentencing young offenders should be produced for all offences.

The guidelines are primarily intended for use by courts sentencing adult offenders. The Council considered that all guidance in relation to sentencing young offenders that was appropriate for inclusion in the guideline should be located in a single place which was Part 7 dealing with the six specific offences.

3. Part 2 – Non-consensual offences

The relationship between the victim and offender

3.1 Several of the responses examined the principle in the guideline that the same starting points should be used when sentencing offenders convicted of non-consensual offences, regardless of the existence or type of relationship that may have existed between the parties.

3.2 This principle was established in the guideline judgment *Millberry and others*¹ which provided guidance in relation to sentencing offenders convicted of rape. The Panel advised (supported by the vast majority of those who responded to its consultation), and the Council agreed that in relation to the

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¹ [2003] 2 Cr App R (S) 31

non-consensual offences in the Sexual Offences Act 2003 there should be no fundamental distinction between offences committed by strangers and those committed by acquaintances as it cannot be said that either is less serious.

3.3 Application of the principle to this group of offences was challenged by some of the respondents. One argument was that relationships between parties do not reduce the impact of the offence, and in fact enhances it, in which case the relevance should be to increase the sentence not reduce it (reference to the sexual familiarity issue at paragraph ?? below). Others submitted that the reasoning for inclusion of the principle should be included with reference to the fact that consent can be withheld or removed at any point, regardless of the relationship between the parties.

The Council affirmed its view that the established principle should be applied to all non-consensual offences and that the starting point should be the same whether the offence was committed by a stranger or an acquaintance. However, it agreed that the guideline should make clear that the circumstances in which an offence occurs are relevant to the sentence imposed and that there are likely to be more severe aggravating factors present where an offence was committed by a stranger.

Consent and reasonable belief

3.4 The Sexual Offences Act 2003² creates a rule of law that there is no defence of consent where sexual activity is alleged in relation to a child under 13 years of age or a person who has a mental disorder impeding choice.

3.5 When preparing the draft guideline for consultation, the Council considered that it should not in any way undermine the presumption inherent in the relevant non-consensual offences that such victims cannot consent to any form of sexual activity in the guideline. It was decided that no guidance in relation to cases where it might be submitted that a victim had in fact consented should be included.

3.6 The Ministers' response and a number of the other respondents suggested that guidance was desirable since the Court of Appeal in *Corran and others*³ had held that actual consent is a material factor and that reasonable belief on the part of an offender that the victim was aged 16 or over would be a mitigating factor, particularly where the offender was young.

The Council decided that there should be guidance in relation to these issues.

² See offences under ss.5-8 and 30-33

³ [2005] EWCA Crim 192

Preceding mutually agreed activity

3.7 In the draft consultation guideline the Council adopted the advice of the Panel in relation to another important principle established in *Millberry* that culpability will be somewhat less in cases where the victim consented to sexual familiarity with the offender on the occasion in question. The guideline provided that the principle should apply to rape and the other non-consensual offences of assault by penetration and sexual assault, but not in cases where the victim is under 13 or has a mental disorder impeding choice.

3.8 In some of the responses it was noted that there was no explanation by the Council as to why this should be so, particularly as *Millberry* preceded the significant changes to the law brought about by the 2003 Act. However, the Panel did explain the reasoning for its proposal in its advice (paragraphs 50 and 60-62) and the Council did not disagree with this and considered that the detail did not need to be included in the guideline.

3.9 The Home Affairs Committee supported the principle from *Millberry* and recommended that any reduction in sentence should be small and may not apply in all circumstances.

3.10 The Ministers' response expressed concern that the guideline might be misinterpreted in relation to culpability being reduced where consensual sexual activity takes place immediately before rape and put forward a countervailing view that the previous sexual relations might actually constitute a breach of trust and not reduce culpability at all.

3.11 Another concern was that the principle creates a mitigating factor which only applies in cases involving non-strangers so there should be justification for it and guidance to indicate by how much a sentence should be reduced for such a mitigating factor.

3.12 The Council accepted that fuller guidance would be helpful to sentencers given the complexities of this issue. It was important to ensure that the right of the victim to withhold or withdraw consent to penetrative sexual activity is clear, but the culpability of the offender should be less than where an offender set out with the intention to commit an offence. This important difference would be ascertained through consideration of factors such as the type of consensual activity that occurred, its similarity to what followed and timing. It was for the sentencer to decide how much weight should be attached to the mitigating factor where it was established, but the seriousness of the non-consensual offence committed may override it in any event.

The Council affirmed its view that the established principle should be applied to three of the non-consensual offences. However, it was agreed that the guideline should be amended to include fuller guidance in relation to the circumstances in which the principle might apply and the factors relevant to culpability in such cases.

Additional aggravating factor

3.13 In the introductory section of Part 2, aggravating and mitigating factors of specific relevance to the non-consensual offences were listed. Ministers suggested that an additional factor should be included relating to cases where the offender uses the fact that the victim is voluntarily intoxicated as an opportunity to offend.

3.14 The Council considered that it is not implicitly worse to offend against a victim who does not resist because he or she is intoxicated than it is to offend against a victim who does not resist because he or she is sober. Deliberately targeting a victim who is drunk would be encompassed in the general aggravating factor of targeting a vulnerable victim.

The Council considered that it was not necessary to include a separate factor as such circumstances would fall within the general aggravating factors of 'deliberate targeting of a vulnerable victim' which indicates higher culpability.

4. Specific offences

4.1 A general point was made in one response that guidelines should not be developed for the newly created offences in the Sexual Offences Act 2003 (under sections 11 and 12, 18 and 19, 36 and 37, and 40 and 41) until a body of knowledge about prosecutorial decisions and the range of activities leading to a conviction for the offences could be considered. It was suggested that the narrative be included in the guideline without the formulaic detail.

4.2 The Council was satisfied that the length of time that the process for developing the guidelines has taken has enabled emerging guidance from the Court of Appeal and other pertinent information to be incorporated. The approach of the Panel which tackled the general principles of sentencing for sexual offences and specific issues relating to various types of offending behaviour has enabled the Council to develop a comprehensive and coherent guideline which reflects the purposes of the 2003 Act and will help sentencers properly reflect the seriousness of individual offences.

(1) Rape

4.3 In the Ministers' response it was noted that the guideline omitted an explicit starting point of 15 years for offenders who commit multiple rape or rape the same victim repeatedly over a period of time which had been recommended by the Panel. Another response commented that the 5 year starting point is woefully inadequate where the offender and victim are adults, particularly where mitigating factors take the sentence lower. However, as this stemmed from existing guidance and was supported by those who responded to the Panel's consultation the Council decided that it was the appropriate

starting point in the situations described in the guideline. The presence of aggravating factors (general or additional factors specific to the offence) would result in a sentence above the suggested starting point.

The Council agreed that a third category of seriousness with a starting point of 15 years custody should be added to the guideline.

(2) Assault by penetration

4.4 In the Ministers' response attention was drawn to one of the factors to be taken into consideration relating to cases where there is brief penetration and no physical harm is caused to the victim. The response appeared to refer to this in the context of the offence of rape but it is only included for assault by penetration and the Council considered that it is an appropriate factor to be considered in relation to that offence.

4.5 A number of inconsistencies in relation to how particular factors should be considered in relation to offences of rape and assault by penetration were identified in the Minister's response. These included abduction or detention of the victim and how use of drugs or alcohol was regarded.

The Council agreed that the approach should be consistent in both guidelines. Where a particular factor appears in the type/nature of activity offence description and as an additional aggravating factor it would not be counted twice for the purposes of assessing seriousness.

(3) Sexual assault

4.6 In one response attention was drawn to the fact that it is difficult for a guideline to take account of all potential situations in which this offence might be committed. This is something that the Council has acknowledged and as a result has ensured that flexibility has been built into the categories of seriousness and the starting points and sentencing ranges proposed.

4.7 In the Ministers' response several points were made in relation to the guideline for this offence. It was submitted that the starting points do not reflect the increase in culpability which Parliament intended when setting the maximum penalty higher than for the previous offence that dealt with such behaviours. It was also pointed out that a category of the offence had been omitted in the lowest category of offending (contact between part of the offender's body (other than the genitalia) and the clothed genitalia of the victim) and that the aggravating factor 'causing physical harm' should be added.

The Council considered that as the offence involves touching without penetration the starting points are appropriate. The Council agreed to amend the second of the offence categories.

(4) Causing a child to watch a sexual act

4.8 Two points were raised by respondents relating to whether the fact that the sexual act watched is live or recorded should have a bearing on sentencing, and if the image used is not 'real' should this make any difference to the sentence imposed. It was suggested that the Council could consider live sex acts to either be a serious aggravating factor or treat it as a separate type/nature of activity description with a specific starting point.

4.9 In addition, in the Ministers' response the view was expressed that the suggested custodial starting points for this offence when it is committed by a person under the age of 18 for which there is a lower maximum penalty are too high and that a community order should be the starting point in such cases.

4.10 The Council reviewed the guidelines for the offence in relation to adult and young offenders in light of the comments and suggestions. It agreed where the activity that the victim is caused to watch is live, this is the most serious form of the offence and should be a distinct category. In such cases, the appropriate starting point should be custodial in the case of adult and youth offenders. The Council also re-defined the other categories emphasising that the key factor is the type of activity rather than whether the image is still or moving.

The Council revised the guideline as it relates to adult and youth offenders, based upon the type of activity that the victim is caused to watch. Where the image or activity is live, the appropriate starting point for adult and youth offenders is a custodial sentence.

(5) Arranging a child sex offence

4.11 One respondent invited the Council to consider whether procuring a child for another is more serious than procuring a child for the defendant himself. It was proposed that if the Council considered that it was, the guideline could be altered either to produce a third "type/nature of activity" category or the "number of adults (offenders) involved" could be added as an aggravating factor.

The Council considered that the key issue is whether or not the activity is commercial and that no further definition or categorisation was required.

(6) Sexual Grooming

4.12 One respondent raised several matters in relation to the proposed guideline given the complexity of the offence. It was submitted that the guideline should offer guidance in relation to the distinction between the types of intended activity which might give rise to the need for a Newton hearing to

establish the intention of the offender and establish the factual basis for sentencing. The Council was also invited to reconsider the justification for the starting point of up to one-half of the penetrative starting point where the child is under 13 and the ultimate intent is one of non-penetrative abuse, whereas it is one quarter where the child is over 16. In addition, it was suggested that the Council consider whether the issue of consecutive sentencing should be dealt with in the guideline as the offence of grooming may be charged alongside other offences, to reflect the deliberate preparation in the offence.

The Council decided that the guideline properly reflected the principles of the Sexual Offences Act in relation to protection of children of different ages and that the starting points were appropriate. The need for a Newton hearing is a matter for the discretion of the sentencer and guidance is not required in the guideline. The principles for consecutive sentencing are well established and are set out in the general principles section of the guideline.

(7) Indecent Images of Children

4.13 In the Ministers' response two changes were proposed in relation to the factors that should be taken into consideration when sentencing. The Council was encouraged to amend the factor relating to the ability of the sentencer to make an order disqualifying an offender from working with children to say that courts should consider this in all cases. It was also suggested that an additional factor be added inviting courts to consider making a forfeiture order in relation to possessions used in the commission of the offence.

The Council agreed to amend the guideline as proposed.

4.14 Two responses referred to the established (five) levels of seriousness for this offence which are based upon the Copine scale of categories of indecent image. It was recommended that the guideline should use alternative wording when describing Level 1 (images depicting erotic posing with no sexual activity) to reflect the fact that other images may be considered to be indecent, for example, indecent images not portraying sexual activity.

The Council considered that established principles such as the levels of seriousness should not be changed without further consultation.