



# #11 Children facing allegations of sexual offending

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**This guide provides an overview of the law on allegations of sexual offences made against children.**

This guide will:

- give an overview of the key offences
- take you through the main stages in a case, from the initial allegation to sentence and criminal records
- provide practical advice on the work that needs to be done by the defence at each stage of a case.

# Introduction

Allegations of sexual offences have a lasting impact. They remain on a person's criminal record, inhibiting their ability to move on. The particular stigma attached to allegations of sexual offending causes unique difficulties for those accused.

Delays in the justice system mean that more children are turning 18 between the time of the offence and conviction. The impact for children who lose their anonymity upon reaching 18 is felt

particularly harshly when media reporting focuses on sexual allegations. Perversely, the legislation used in this space, in particular ss5–29 Sexual Offences Act (SOA) 2003, was designed to protect children from predatory adults. Practitioners should consider these issues from the outset, and concentrate on how best to ensure that your clients are recognised as children first, regardless of the circumstances.

# Key offences

## Introduction

Whether at the police station or post-charge, practitioners should be alert to and mindful of the specific legislative offence being proposed by the police or Crown Prosecution Service (CPS). The

same form of sexual activity can fall within a wide range of offences, each carrying different penalties, with related implications for your client's future.

Sexual Offences Act (SOA) 2003:

- s1 'Rape';
- s2 'Assault by penetration'
- s3 'Sexual assault'
- s4 'Causing a person to engage in sexual activity without consent'
- ss5–8 'Rape and other offences against children under 13'
- for child defendants, s13 makes any offence within ss9–12 an offence if committed by someone under 18: s9 'Sexual activity with a child'
- s10 'Causing or inciting a child to engage in sexual activity'
- s11 'Engaging in sexual activity in the presence of a child'; s12 'Causing a child to watch a sexual act'

The CPS guidance 'Sexual offences and youths' is essential reading.<sup>1</sup> It makes clear that prosecutors must have regard to the principal aim of the youth justice system, which is to prevent offending by children and young persons<sup>2</sup> – and must also have regard to the welfare of the offender,<sup>3</sup> noting that the overriding purpose of the SOA 2003 is to pro-

tect children. The full Code for Crown Prosecutors<sup>4</sup> also states (at 4.14(d)) that prosecutors must also have regards to the obligations arising under the United Nations 1989 Convention on the Rights of the Child.

There are specific categories of offences in relation to children under 13, and under 16.

## Sexual offences against children under 13

Practitioners should be particularly aware of the distinction in law of sexual offences committed against children below the age of 13, as set out in the SOA 2003 (ss5–8).

The CPS guidance acknowledges that 'there is a fine line between sexual experimentation and offending and in general children under 13 should not be criminalised for sexual behaviour in the absence of coercion, exploitation or abuse of trust'.

Mistaken belief that a child was over 13 is not a defence. However, where sexual activity was genuinely consensual and those involved are fairly close in age and development, a prosecution is unlikely to be appropriate.

The key factors for the CPS to consider and to address in representations are:

- the relative ages of both parties
- the existence and nature of any relationship
- the sexual and emotional maturity of both parties
- any emotional or physical effects as a result of the conduct
- whether the child under 13 agreed to the conduct (even though in law this is not a defence) or a genuine mistake as to their age was in fact made.

Note that CPS guidance 'Youth offenders'<sup>5</sup> states that where a child under 13 has not given 'ostensible consent' to the activity, then a prosecution contrary to ss5–8 SOA 2003 is likely to be the appropriate course of action (as opposed to an offence under s13 'Child sex offences committed by children or young persons').

1 21 May 2021, [bit.ly/3UrIWnA](https://bit.ly/3UrIWnA)

2 s37(1) Crime and Disorder Act 1998

3 s44 Children and Young Persons Act 1933

4 [bit.ly/3WPN6q1](https://bit.ly/3WPN6q1)

5 28 April 2020, [bit.ly/3X2YaAn](https://bit.ly/3X2YaAn)

Offences contrary to ss5–8 SOA 2003 are ‘grave crimes’ for the purposes of s24 Magistrates’ Courts Act 1980 and s250 Sentencing Act 2020 (see below).

Key case law in this area when considering the decision to charge is as follows:

- In *R v G*<sup>6</sup> Lord Hope commented that:

A heavy responsibility has been placed on the prosecuting authorities, where both parties are of a similar young age, to discriminate between cases where the proscribed activity was truly mutual on the one hand and those

where the complainant was subjected to an element of exploitation or undue pressure on the other. In the former case more harm than good may be done by prosecuting.

- In *R (E) v Director of Public Prosecutions*,<sup>7</sup> a decision to prosecute a 14-year-old girl for sexual offences committed against her two young sisters was quashed as the court found that the CPS decision failed to consider the views of the multi-agency reports that a prosecution was not in the best interests of any of the children, which was a policy requirement.

## Offences against children under 16

Section 13 SOA 2003 makes it an offence for a person under 18 to do anything which would be an offence under any of ss9–12 if the person were aged 18.

This means that in cases where both parties are under 16 years of age and engage in sexual activity which is consensual, it will amount to a criminal offence. However, the CPS guidance states that: ‘Consensual sexual activity between, for example, a 14 or 15 year-old and a teenage partner would not normally require criminal proceedings in the absence of aggravating features.’<sup>8</sup>

An offence is not committed if the complainant is 13 years or over but under 16 years if the suspect reasonably believed that the complainant was over 16 years.

An offence under s13 SOA 2003 is a ‘grave crime’ for the purposes of s24 Magistrates’ Courts Act 1980 and s250 Sentencing Act 2020 (see below).

Relevant considerations to decisions to prosecute include:

- the respective ages of the parties
- the existence and nature of any relationship
- the parties’ levels of maturity and
- whether there was a serious element of exploitation.

## Practical note

The police and CPS sometimes apply s8 SOA 2003 (‘Causing or inciting a child under 13 to engage in sexual activity’) rather than s10 (‘Causing or inciting a child to engage in sexual activity’) with s13 in cases where the defendant is under 18. This is significant when considering cautions and sentences. A caution for a s8 offence could result in notification requirements, whereas a caution for s13 will not (notification requirements will only apply to s13 where the young person is convicted and sentenced to 12 months or more). It is important to challenge such decisions to ensure that the best interests of your client – as a child – are protected.

<sup>6</sup> (2008) UKHL 37 para 14

<sup>7</sup> [2011] EWHC 1465 (Admin)

<sup>8</sup> ‘Youth offenders’, CPS legal guidance, emphasis added, [bit.ly/3X2YaAn](https://bit.ly/3X2YaAn)

<sup>9</sup> s160(1) Criminal Justice Act 1988: ‘Possession of indecent photograph of child’; s1(1) Protection of Children Act 1978: ‘Indecent photographs of children’: taking, distributing or possessing with intent to distribute indecent images of children; s33 Criminal Justice and Courts Act 2015: ‘Disclosing, or threatening to disclose, private sexual photographs and films with intent to cause distress’ (‘revenge porn’)

## Possession and making of indecent images: sexting etc

An area of particular difficulty for young people arises in cases where images of a sexual nature are shared by young people through social media such as WhatsApp. The images may have been shared without the subject’s consent. The recipients may not have requested or forwarded the images at any point, but they may still be caught by the relevant offences,<sup>9</sup> and the guidance that

indicates that consensual sharing between teens should not be criminalised will not apply.

See also s67 SOA 2003 ‘Voyeurism’. Note the leading case of *R v Richards*<sup>10</sup> in which consensual intercourse had been filmed without consent – it was held that there can be a reasonable expectation of privacy from a participant in a private act.

<sup>10</sup> [2020] EWCA Crim 95

# Pre-charge

## Action to take when notified of a school complaint

Sexual allegations may sometimes arise at a child's school, or be made directly to the school rather than to the police. If this occurs, the school may report this to the local authority designated officer, and social services may initiate either a s17 (child in need) or s47 (significant harm) investigation under the Children Act 1989.

Depending on the age of the child or the seriousness of the offence, the police may consider

dealing with the matter by way of a referral to social services,<sup>11</sup> which will likely in turn trigger a notification of the allegation to the school.

Wherever possible, it is important to ensure that the child is not required to speak about the specifics of the incident to the school or to anyone else until the police investigation has concluded.

## Practical advice – schools

Parents or guardians may need to communicate with the school and ensure their cooperation in limiting rumours and protecting the child's position and access to education wherever possible.

There is no reason for social services or the school to discuss the specifics of the allegation during their safeguarding procedures, and the authorities involved should be aware of the importance of the child preserving their position whilst a police investigation is ongoing, imminent or likely. However, it may be helpful for the child to confirm a simple denial, if that is the child's position.

Where the child is over 16 and no longer in full-time education, the police may be unaware of the relevant school or college the child attends or plans to attend. No one is under any obligation to provide the police with these details where requested. If the police insist otherwise, you can ask them to confirm in writing the legal authority for their request. To date we have not been provided with sufficient authority to compel such information.

Consider the following data protection issues:

- Who in the school knows or needs to know?
- Who is the point of contact within the school, and will the school delay their investigation until after the police investigation or decision on whether there is to be one?
- If a school has been notified, what information has the school gathered and where is this information stored?

## Police interview under caution

### Necessity of arrest

In many cases involving sexual allegations (particularly non-recent allegations) it will not be necessary to arrest (and/or detain) the child. If legal representatives are given notice of a police interview, they should raise the advisability of a voluntary attendance at a police station (if they

have any notice) or the child's parents (if there has been the opportunity to advise in advance). Of particular relevance is the recent case of *ST v Chief Constable of Nottinghamshire Police*,<sup>12</sup> which sets out a number of useful principles when arguing against arrest.

<sup>11</sup> Sometimes referred to as a 'MERLIN report' – the MERLIN system was created as a vehicle for police officers to deal with vulnerability, allowing the recording and sharing of concerns with partners in order to effectively safeguard members of the public: [bit.ly/3hxMIBT](http://bit.ly/3hxMIBT)

<sup>12</sup> [2022] EWHC 1280 (QB)

In particular at para 99:

[T]he welfare of children must begin with the first interaction, which, as regards a suspected offender, is usually within the investigation stage. Relevant to the current case, before any arrest, an officer should, as directed by guidance in Code G paragraph 2.8,<sup>13</sup> consider the broader circumstances and whether arrest is necessary. Within that assessment process the fact that the person to be arrested is a child requires specific consideration due to the need to have regard to the duty to safeguard and promote the welfare of children. Indeed it should be front and centre of the consideration of relevant circumstances and requires an assessment of whether a less intrusive step than arrest or detention is a practical alternative.

The advantage of avoiding an arrest from a criminal records perspective cannot be overstated. The police must consider an offer for a young person to attend voluntarily for interview, and it is insufficient for the police to claim that the need for arrest relates to conducting a search alone: ST v Chief Constable of Nottinghamshire Police.

See also ST v Chief Constable of Nottinghamshire Police para 94:<sup>14</sup>

As a broad principle, the starting point must be that it is wrong not to differentiate between children and adults when considering the necessity of arrest and detention. Age is an obviously material consideration and some thought must be given to it.

And para 126:

A better question would have been; given the material circumstances of the case did the officer have reasonable grounds for the belief that arrest was necessary at the time it took place.

## Practical tips – arrest v voluntary attendance

- Depending on the allegations, consider making representations as to whether an interview is necessary at all. You might propose a written statement under caution as an appropriate and practical alternative in, for example, a straightforward ‘sexting case’ without any aggravating features.
- Advise parents/client or other party present to propose a voluntary interview under caution.
- Where possible, and where the child has not yet been processed at the custody suite, ask the arresting officer to de-arrest<sup>15</sup> and allow for a voluntary interview under caution.
- In cases where the client has been processed, consider making representations to the custody sergeant or PACE inspector on the basis that there are insufficient grounds for the detention to be authorised and/or the arrest was unlawful and lacked sufficient grounds in circumstances where the client would have or did attend voluntarily.
- Wherever possible, children should be interviewed in a witness suite rather than in custody. Representations can be made to the police in respect of this.

## Approach in interview under caution

In an interview under caution, consider the following points in your approach:

- All children are vulnerable, and particularly so when placed in a police interview under caution. As their representative, you should consider the strength of the evidence and the ability of the client to cope in interview when assessing your advice as to whether to answer questions, provide a prepared statement or answer no comment.

- Care should be taken before advising a child to answer questions in full. A ‘no comment’ interview or prepared statement confirming their position will often be appropriate.
- The background to allegations of sexual offences can be particularly embarrassing and difficult for children and young people to discuss with their parents, guardians and a lawyer. Be mindful of this in the context of selecting the ‘appropriate adult’.<sup>16</sup>

<sup>13</sup> Of the Police and Criminal Evidence Act 1984 (PACE)

<sup>14</sup> Emphasis added

<sup>15</sup> s30(7) and (7A) PACE

<sup>16</sup> The police sometimes confuse this as excluding a parent who has received an account from their child. This is incorrect and it is only where a parent has received an admission of criminal conduct that they should be excluded from this role on the basis of an account

- ‘Appropriate adults’ should not include anyone who is: suspected of involvement in the offence; a victim; a witness; involved in the investigation; or has received admissions prior to attending.<sup>17</sup>
- It is essential to reassure your client as far as possible that you will not judge them, and there is nothing that they can say that will shock or surprise you or prevent you from doing your best to represent their interests.
- Explain key definitions to your client, for example:
  - ‘consent’<sup>18</sup>
  - ‘sexual’<sup>19</sup>
  - ‘sexual assault’.<sup>20</sup>
- Remind the police officer that your client is a child. This includes during interview if inappropriate comments are made, or if a combative tone is taken by the officer, including laughing at something your client says or commenting on their appearance or size.
- Questions about your client’s sexual orientation in the context of sexual allegations are rarely relevant to the investigation of an offence and you should challenge such questions and make a note of this for the purposes of the tape.
- Where you have welfare concerns about your client following an interview under caution, you should write to the Officer In Case (OIC) to confirm your concerns in writing and remind them of their obligations to act to safeguard and promote the welfare of children<sup>21</sup>. You can request that they handle the matter sensitively to avoid unnecessary embarrassment and/or public disclosure of the allegations. In some circumstances it will become apparent that your client is themselves a victim of sexual exploitation or manipulation by adults, and you should address this with the officer as appropriate. In addition to CPS guidance, you can refer to the Department for Education guidance on ‘Child sexual exploitation’<sup>22</sup> which addresses this issue.
- In some circumstances, you may want to consider preparing a s9<sup>23</sup> witness statement relevant to the investigation. The police can be receptive to this, particularly where the witnesses are likely to be defence witnesses in the event that the matter proceeds to charge. This allows you to manage the timing of the investigation to a degree and speed things along for your client where that is in their interest.

## Adverse inferences

The trend in recent judgments indicates that courts are requiring more full accounts at interview in order to avoid adverse inferences at trial. This is worth being mindful of in general but should not, in our view, override the significant advantage to children interviewed under caution of limiting their response to the police in such cases, particularly where there is limited evidence.

Two recent cases are relevant:

- R v Wainright:<sup>24</sup> Where the accused gives evidence that their failure to mention relevant facts was based on legal advice, it is proper for the judge to direct the jury that even if they accept that was the genuine basis for their ‘silence’, that does not prevent inferences ‘because a person given legal advice has the choice whether to accept it or reject it’.<sup>25</sup>

- R v Harewood and Rehman:<sup>26</sup> An inference is available where a suspect is expressly, or by necessary implication, invited to give account of the matter which has given rise to the interview.<sup>27</sup> In determining whether the accused could reasonably have been expected to mention a fact, the jury may consider the length of questioning and the relative significance of the fact.<sup>28</sup>

If you feel that there is insufficient disclosure or evidence to call for an account from your client at the time of interview, you can state that on the tape. However, whether that is correct will potentially remain an issue to be resolved at trial.

Consider the value of a ‘no comment’ interview or short statement that addresses the primary issues. The risk of an adverse inference, which can in any event be countered at trial by reference to your young client’s vulnerability, may be preferable to providing a detailed account at a time in which your client will inevitably be stressed and find it difficult to remember precise details (which may lead to challenge if the matter proceeds to trial).

<sup>17</sup> PACE Code C Notes for Guidance 1B

<sup>18</sup> s74 SOA 2003

<sup>19</sup> s78 SOA 2003

<sup>20</sup> s3 SOA 2003

<sup>21</sup> s11(2)(a) Children Act 2004

<sup>22</sup> ‘Child sexual exploitation: Definition and a guide for practitioners, local leaders and decision makers working to protect children from child sexual exploitation’, February 2017, [bit.ly/3Ts6tm5](http://bit.ly/3Ts6tm5)

<sup>23</sup> Criminal Justice Act 1967

<sup>24</sup> [2021] EWCA Crim 122

<sup>25</sup> Para 37

<sup>26</sup> [2021] EWCA Crim 1936

<sup>27</sup> Para 39

<sup>28</sup> Para 40

# Decision to prosecute

All cases of allegations of rape and serious sexual offences against children must be reviewed by a prosecutor who is both a rape and youth specialist prosecutor.<sup>29</sup> In cases where the evidential threshold has been met, the balance of the public interest must be carefully considered, and this will include the view of other agencies involved in the case. See, for example, R (E and others) v DPP<sup>30</sup> (proceedings for judicial review in which challenge was made to the decision of the DPP to prosecute a child for the alleged sexual abuse by her of her two younger sisters).

Prosecutors should also obtain and consider:

- the views of the local authority children's and young persons' services
- if one has already been completed, an assessment or report by the local authority or young offenders services such as AIM (assessment, intervention and moving on)
- background information and history of similar conduct by the parties
- the views expressed by the victim and the views of the families of all parties
- information about the relationship between the parties and the consequences for the victim of the decision whether or not to prosecute.

## Defence written representations

Defence representations are essential in advocating for any outcome that involves:

- a. charges not being brought
- b. a prosecution not being pursued, or
- c. a deferral of decision-making until rehabilitative work has been completed.

Ensure that the CPS are following their own directions as set out in guidance and the Code for Crown Prosecutors. Key resources for letters of representation are:

- CPS 'Code for Crown Prosecutors'<sup>31</sup>
- CPS legal guidance:
  - 'Rape and sexual offences – Chapter 13: Sexual offences and youths'<sup>32</sup>
  - 'Youth offenders'<sup>33</sup> (see in particular the section on 'Sexual offences and child abuse by young offenders')

- 'Social media – Guidelines on prosecuting cases involving communications sent via social media'<sup>34</sup>
- 'Revenge pornography – guidelines on prosecuting the offence of disclosing private sexual photographs and films'<sup>35</sup>
- 'Indecent and prohibited images of children'<sup>36</sup>

- Ministry of Justice and Youth Justice Board guidance: 'Youth cautions – Guidance for police and youth offending teams'<sup>37</sup>

Representations should make reference to the public interest test (with a particular focus on age and maturity) and the mitigating factors that apply in the case.

## Practical tip – expert reports

Consider whether a psychological assessment may be of assistance at this stage. For example, to confirm the emotional and developmental age of your client, their maturity or to conduct a risk-assessment. It may also be helpful for your client (particularly if a first-time offender) to participate in some form of counselling or therapy related to safe sexual behaviour for their own benefit, but also to demonstrate to the various interested bodies that their concerns are being managed effectively and appropriately without the need for a criminal justice intervention.

Expert reports can assist at all stages of the process: diversion, bail, intermediary assistance, culpability and sentence.

<sup>29</sup> CPS legal guidance: 'Youth offenders', [bit.ly/3A5cxtM](http://bit.ly/3A5cxtM)

<sup>30</sup> [2011] EWHC 1465 (Admin)

<sup>31</sup> [bit.ly/3WPN6q1](http://bit.ly/3WPN6q1)

<sup>32</sup> [bit.ly/3A0yuug](http://bit.ly/3A0yuug)

<sup>33</sup> [bit.ly/3A5cxtM](http://bit.ly/3A5cxtM)

<sup>34</sup> [bit.ly/3UFSvP7](http://bit.ly/3UFSvP7)

<sup>35</sup> [bit.ly/3EIL62m](http://bit.ly/3EIL62m)

<sup>36</sup> [bit.ly/3DYTt1p](http://bit.ly/3DYTt1p)

<sup>37</sup> [bit.ly/3UOoex7](http://bit.ly/3UOoex7)

# Diversion – out of court disposals

This guide does not examine out of court disposals at length. However, in many cases of children facing allegations of sexual offences it will be inappropriate to proceed by way of court proceedings, particularly where the young person has no previous criminal history of sexual offending. Reference should be made to the ACPO<sup>38</sup> Gravity Matrix (which is currently under review), but solicitors should not feel limited in any way by the terms of the matrix in drafting representations. In many cases a conditional caution may satisfy concerns raised by more serious offending.

In respect of ‘sexting’ offences, the College of Policing issued a briefing note in 2016 on ‘Police action in response to youth produced sexual imagery (“sexting”’).<sup>39</sup> The note confirms ‘Outcome 21’ as an alternative disposal outcome in cases where there was no abuse, exploitation, malice or inappropriate sharing. A crime will be recorded, but no further action (NFA) will be taken. However, wherever possible it is preferable to avoid an

Outcome 21 being recorded and to persuade the police that NFA is appropriate. There is a risk that details of the allegation leading to the Outcome 21 appearing on an ‘enhanced Disclosure and Barring Service (DBS) check’ at the discretion of the reviewing officer.

In any letter of representations (to police, CPS, YOT) where the child or young person has no previous sexual offending history, reference should be made to the fact an out of court disposal is likely to be a proper and proportionate outcome. A decision by a YOT to deal with the young person promptly would ensure that the principal aim in preventing reoffending is met, whereas a prosecution and the associated time and delay involved in arriving at sentence would likely be unnecessary. This is particularly relevant when the outcome of prosecution (a referral order involving referral to a YOT) will be the same as proceeding by way of a conditional caution (referral to a YOT).

## Practical tips – diversion and out of court disposal options

- Consider the offence being investigated and whether another non-sexual offence might be more appropriate – for example, common assault or an offence under the Malicious Communications Act 1988.
- In cases where the behaviour was not sexually motivated, make representations that the offending behaviour was not ‘sexual’ in nature and that an alternative charge/outcome should be imposed.
- Remind the police/CPS that the legislation was designed to protect children from predatory adults – consider citing relevant parliamentary debates to demonstrate the intention behind the legislation.
- In some cases, it may be appropriate to liaise directly with the YOT in the relevant area to discuss out of court disposal options for your client. This can help identify any specific diversion schemes operating in that area. You can also then refer the OIC to the relevant person if they are otherwise unaware of the key contact.
- If you disagree with the approach recommended by the YOT, you can ask to make written representations to them directly.
- Note the age of your client and chase police/YOT as appropriate. A youth caution will only be available where your client is under 18 at the point at which the caution is accepted. Youth cautions (for all offences) are spent at the time administered and should not automatically appear on basic or standard DBS checks in future.

<sup>38</sup> The Association of Chief Police Officers (ACPO) was replaced by the National Police Chiefs’ Council (NPCC) on 1 April 2015

<sup>39</sup> [bit.ly/3UrYbMf](https://bit.ly/3UrYbMf)

# Post-charge

The post-charge stage includes allocation, and preparation for and participation at trial.

## Allocation

Section 24(1) of the Magistrates' Courts Act 1980 contains a statutory presumption that children and young people under 18 will be tried in the youth court. This is a strong presumption with limited exceptions which are as follows:

- the offence is a 'grave crime' as defined by s91(1) Powers of Criminal Courts (Sentencing) Act 2000
- the 'dangerousness' provisions apply in the case of 'specified offences' (Sch 18 Part 2 Sentencing Act 2020 and s38 SOA 2003) or
- the child or young person is jointly charged with an adult and it is in the interests of justice for the case to be tried together in the Crown Court.

The 'grave crime' exception is likely to be considered where the offending is deemed to be serious. The principles to be applied to this consideration are set out in *R (H, A and O) v Southampton Youth Court*:<sup>40</sup>

- Trial in Crown Court should be reserved for the most serious cases. Those under 18, and in particular under 15, should, wherever possible, be tried in the youth court.
- Generally, first-time offenders aged 12–14 and all offenders under 12 should not be detained in custody. Those under 15 will rarely attract a period of detention, and even more rarely, those under 12. The exceptional power to detain for grave offences should not be used to water down this general principle.

- The test: is there a real prospect, having regard to their age, that the defendant might require a sentence of, or in excess of, two years? Or, alternatively, although the sentence may be less than two years, is there some unusual feature of the case which justifies declining jurisdiction? Note that the youth court's lack of power to impose a detention and training order (DTO) for a child under 15 is not an unusual feature.

The Sentencing Council's 'Overarching guideline on sentencing children and young people'<sup>41</sup> is relevant to the court's consideration as to jurisdiction in all cases involving allegations of sexual offences which may be considered 'grave crimes'. Historically, the position was that the youth court should never accept jurisdiction in a rape case. Developments in case law and the wider definition of rape under the SOA 2003 now mean that certain rape cases may not fall within the grave crime exception and can appropriately be tried in the youth court.<sup>42</sup>

If jurisdiction is retained by the youth court and the allegation involves actual or alleged penetrative activity, the case must be tried by an authorised District Judge (Magistrates' Court).

In *R v W and M*,<sup>43</sup> the court considered the test for jurisdiction of the youth court in rape cases. It concluded: 'The test, in other words, is the real likelihood of a sentence which would be beyond the powers of the youth court.'<sup>44</sup>

In a case with multiple defendants, the allocation decision must be considered separately in relation to each defendant.

40 [2004] EWHC 2912 (Admin)

41 [bit.ly/3GjeZku](http://bit.ly/3GjeZku)

42 See also para 2.10 of the Sentencing Council's 'Overarching guideline on sentencing children and young people' regarding the power to commit for sentence after trial: [bit.ly/3GjeZku](http://bit.ly/3GjeZku). Also covered at Blackstones D24.34

43 [2010] EWCA Crim 1926

44 Para 40

## Practical note – youth court v jury trial

In many cases involving children, practitioners consider the youth court the best forum for the client. However, in cases involving allegations of sexual offences, and particularly where the predominant issue is one of reasonable belief as to consent, it is important to consider whether a jury trial may be preferable for your client as opposed to the decision of one district judge in the youth court (however well experienced). See Criminal Practice Directions (CrimPD) 2015 (CPD XIII Listing, Annex 2 Sexual offences in the youth court)<sup>45</sup> for constitution of the youth court. Ultimately the decision as to jurisdiction is taken by the youth court and there is no right for your client to elect trial by jury.

## Preparation for and participation at trial

Section 6 of the Criminal Procedure and Investigations Act (CPIA) 1996 allows the accused to give a defence statement to the prosecutor to the court. Defence statements are voluntary in the youth court (s6(2) CPIA 1996). However, where a statement is not provided, the defendant cannot make an application for specific disclosure (under s8 CPIA 1996) and the youth court cannot make an order for disclosure of unused material. It is difficult to envisage a case involving allegations of sexual offences where it would be in your client's interest to limit access to disclosure in this way.

Examination of disclosure materials is essential to any trial preparation. Constant chasing and reminders to the CPS including s8 applications

where appropriate should form the basis of any trial preparation including the use of detailed disclosure schedules to confirm what has and has not been received.

The CrimPD and Criminal Procedure Rules (CrimPR) (see in particular Parts 18 and 24 of the CrimPR) govern the conduct of proceedings for vulnerable defendants and provide guidance for measures to assist vulnerable defendants with understanding and with an active participation in proceedings. This may include the appointment of an intermediary to assist your client (see YJLC Legal Guide on 'Intermediaries for child defendants'<sup>46</sup>).

<sup>45</sup> [bit.ly/3TFacwV](https://bit.ly/3TFacwV)

<sup>46</sup> [bit.ly/3Uth38Y](https://bit.ly/3Uth38Y)

# Sentence

Many instances of ‘sexual offending’ by children arise in the context of immaturity, lack of awareness of the nuances of consent, sexual experimentation and peer pressure. It is long recognised that it was not the intention of parliament to punish children using legislation designed to protect them. Sentencing children for sexual offences should always involve a close consideration of

their developmental maturity, and expert reports can be an invaluable resource. At all times, practitioners should remind the police, CPS and the courts of the principal aims of the youth justice system.

For further guidance on the impact of turning 18 during proceedings and how this impacts sentence, see YJLC Legal Guide ‘Turning 18’.<sup>47</sup>

## Forum for sentence

In the majority of cases, a child or young person will be sentenced in the youth court. The youth court can pass sentence in cases remitted from the Crown Court and adult magistrates’ court.

The youth court can commit a child or young person to the Crown Court for sentence where they meet the ‘dangerousness’ criteria or in cases where a sentence of long-term detention is deemed necessary. See the Judicial College guidance ‘Youth defendants in the Crown Court’,<sup>48</sup> chapter 8: ‘Jurisdiction: youths committed for sentence’.

The sentencing options for the court will depend on your client’s age at the time of conviction. The options available to the youth court will be:

- referral orders
- youth rehabilitation orders (YROs) and DTOs (maximum of 24 months)
- absolute and conditional discharges and
- fines.

Ancillary orders such as a compensation order can also be made.

Only the Crown Court can issue a sentence of detention under s250 (long-term detention), s259 (life imprisonment) and ss254 and 258 (sentences for dangerous ‘young offenders’) of the Sentencing Act 2020.

A referral order is mandatory if the ‘compulsory referral conditions’ are met (s85 Sentencing Act 2020):

- the offence is an imprisonable offence
- the offender pleads guilty and
- the offender has no previous convictions.

The judge must consider whether a custodial sentence is necessary. It should be a ‘measure of last resort’.<sup>49</sup> A custodial sentence is ‘most likely to be unavoidable where it is necessary to protect the public from serious harm’.<sup>50</sup>

## Sentencing guidelines

### Key sentencing principles

When sentencing a child or young person the court must have regard to:

a. the principal aim of the youth justice system to prevent offending by children and young people (s37(1) Crime and Disorder Act 1998) and

b. the welfare of the offender (s44(1) Children and Young Persons Act 1933).

47 [bit.ly/3A79Acf](https://bit.ly/3A79Acf)

48 August 2022, [bit.ly/3EIUnXk](https://bit.ly/3EIUnXk)

49 ‘Sentencing children and young people’, Sentencing Council, para 6.42, [bit.ly/3hv309d](https://bit.ly/3hv309d)

50 ‘Sentencing children and young people’, Sentencing Council, para 6.44, [bit.ly/3hv309d](https://bit.ly/3hv309d)

# Key sentencing considerations

Since 1 April 2014,<sup>51</sup> the courts are required to apply the specific guidelines when sentencing offenders under 18 for any offences under ss9–12 SOA 2003. The key elements for consideration are:

- the age of the offender (chronological and emotional)

- the seriousness of the offence
- the likelihood of further offences being committed
- the extent of harm likely to result from those further offences.

## Key sentencing guidance

Key guides for sentencing sexual offences are the following:

- Sentencing Council:
  - 'Sentencing children and young people'<sup>52</sup>
  - 'Sentencing children and young people – overarching principles and offence specific guidelines for sexual offences and robbery – definitive guideline'<sup>53</sup>

- 'Sexual offences – Sentencing children and young people'<sup>54</sup>
- 'Guidelines for specific offences'<sup>55</sup> (apply to those over 18 and provides a starting point from which to consider appropriate sentence for children and young people)
- 'Magistrates' courts sentencing guidelines'<sup>56</sup>
- 'Youth Court Bench Book'<sup>57</sup>

### Sentencing Council guidelines: overarching principles – definitive guideline

The Sentencing Council has issued a definitive guideline relating to the sentencing of children and young people under 18, specifically dealing with the sentencing of sexual offences: 'Sentencing children and young people – Overarching principles and offence specific guidelines for sexual offences and robbery – Definitive guideline'.<sup>58</sup>

#### Age considerations

Of key importance in these cases is section 6 of the definitive guideline, which addresses instances where a young person crosses a significant age threshold between commission of offence and sentence. Where a client will have turned 12, 15 or 18 by the time of the finding of guilt, attention should be drawn to this guideline which confirms:

6.2 In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence but when this occurs the purpose of sentencing adult offenders has to be taken into account, which is:

- the punishment of offenders;
- the reduction of crime (including its reduction by deterrence);

- the reform and rehabilitation of offenders;
- the protection of the public; and
- the making of reparation by offenders to persons affected by their offences.

6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate.

It is important to note that where your client turns 18 after conviction but before sentence, the court can impose a sentence which it would have made at the point of conviction as a child.<sup>59</sup> For example, a DTO or YRO.<sup>60</sup>

There are a number of key cases to employ in any case where a child passes a significant age threshold, and it is now recognised that turning 18 should not be a 'cliff edge' in terms of sentencing. See YJLC Legal Guide 'Turning 18'<sup>61</sup> for guidance on this important aspect of sentencing. In short, the starting point for sentencing should be the appropriate sentence at the date of the commission of the offence (*R v Ghafoor*<sup>62</sup> and 'Sentencing children and young people – Overarching principles and offence specific guidelines for sexual offences and robbery – Definitive guideline' at section 6).

<sup>51</sup> 'Sexual offences and youths', CPS guidance, under 'Youth sentencing', [bit.ly/3A0yuug](https://bit.ly/3A0yuug)

<sup>52</sup> [bit.ly/3Apn0Aq](https://bit.ly/3Apn0Aq) /

<sup>53</sup> [bit.ly/3UKRfd0](https://bit.ly/3UKRfd0)

<sup>54</sup> [bit.ly/3hw0mhn](https://bit.ly/3hw0mhn)

<sup>55</sup> [bit.ly/3Ul2MH](https://bit.ly/3Ul2MH)

<sup>56</sup> [bit.ly/3UESPNi](https://bit.ly/3UESPNi)

<sup>57</sup> [bit.ly/3G2Ms2o](https://bit.ly/3G2Ms2o)

<sup>58</sup> [bit.ly/3hk4nqX](https://bit.ly/3hk4nqX)

<sup>59</sup> The key point is the start of the proceedings rather than the date of conviction. If the defendant appears in the youth court before they are 18 and it retains jurisdiction, then the court's sentencing powers remain those of the youth court even if the defendant turns 18 by the time they are convicted (s29 CYPA 1963, confirmed in *Aldis v Director of Public Prosecutions [2002] EWHC 403 (Admin)*)

<sup>60</sup> s29 Children and Young Persons Act 1963 and s177 Sentencing Act 2020

<sup>61</sup> [bit.ly/3A79Acf](https://bit.ly/3A79Acf)

<sup>62</sup> [2002] EWCA Crim 1857 per Dyson LJ at para 31

## Sentencing Council guidelines: ‘Sexual offences – Sentencing children and young people’

The guidance<sup>63</sup> sets out the considerations for the court:

- Step 1 – Offence seriousness: nature of the offence
- Step 2 – Offence seriousness: aggravating and mitigating factors
- Step 3 – Personal mitigation
- Step 4 – Reduction for guilty plea (which includes reducing custodial sentence to community sentence or community sentence to an alternative disposal outcome)
- Step 5 – Review the sentence (to ensure it is the most appropriate one for the child).

Section 255 of the Sentencing Act 2020 allows for the imposition of an extended sentence for certain sexual offences where the court is of the

opinion that there is a significant risk to members of the public of serious harm. The court will decide whether the ‘dangerousness’ provisions are engaged. Relevant factors for consideration are:

- nature and circumstances of the offence
- previous convictions
- any information about the offender (eg evidence of violence or problematic sexual behaviour) – see s308 Sentencing Act 2020.

Practitioners should insist upon a pre-sentence report being prepared for all children and young people being sentenced. Where the court is assessing dangerousness in respect of your client, it will be important to obtain an expert report which demonstrates your client’s level of maturity and the likely risk of any future harmful behaviour.

<sup>63</sup> [bit.ly/3hw0mhn](https://bit.ly/3hw0mhn)

# Notification requirements and ancillary orders

Clients must be advised of the possibility of notification requirements and ancillary orders that may be imposed following a conviction for a sexual offence. In particular:

- notification requirements

- sexual harm prevention orders (SHPOs)<sup>64</sup>
- disqualification orders
- sexual risk orders
- parenting orders.

## Notification requirements

The offences which attract notification requirements are listed in Sch 3 to the SOA 2003. For some of those listed, the requirements will follow automatically from a conviction or caution. However, for many of the most common sexual offences which are listed in Sch 3, the notification requirements will not be imposed following a

caution: they will only be imposed where the client is sentenced to a period of imprisonment (DTO) of 12 months or more. This is particularly important when considering the appropriate offence for a caution, and care should be taken to ensure that the correct charge is applied to avoid the notification requirements.

## 12-month minimum offences

The offences for which the '12-month minimum' criteria for notification requirements applies are:

- sexual assault (s3 SOA 2003)
- sexual assault of a child under 13 (s7)
- child sex offences committed by children or young persons (ss9–12 and 13). Note that s8 is not subject to this requirement and so a caution for s8 will result in notification requirements. It is essential that practitioners identify this issue early on and liaise with the CPS youth justice specialist where the police are not engaging
- arranging or facilitating the commission of a child sex offence (s14)
- familial sex offences (ss25–26 and 64–65)
- offences by care workers on persons with a mental disorder (ss38–41)
- paying for the sexual services of a child (s47)
- trespassing or committing an offence with the intent to commit a sexual offence (ss62–63)
- exposure (s66)
- voyeurism (s67)
- voyeurism (operating equipment or recording an image: 'upskirting') (s67A), but only if operating or recording for 'sexual gratification'
- intercourse with an animal (s69)
- sexual penetration of a corpse (s70)
- indecent images of children (s1 Protection of Children Act 1978 and s160 Criminal Justice Act 1988), if children shown are under 16.

<sup>64</sup> Previously known as sexual offence prevention orders (SOPOs)

If at all possible, a caution for any of the offences which do not have the 12-month minimum should be avoided. Where notification requirements are imposed, the court may direct that a parent or

person with parental responsibility will fulfil the obligations of the notification requirements until the young person reaches the age of 18.<sup>65</sup>

## Sexual harm prevention orders

A SHPO can be made where the court considers it is necessary for the purpose of protecting the public from sexual harm from the defendant. The fundamental purpose of a SHPO is to protect the

public. It should not be used as a punitive measure, and where imposed upon a child the court must be mindful to ensure that it contains proportionate conditions (R v J<sup>66</sup>).

## Case law

See YJLC case update:<sup>67</sup> R v H.<sup>68</sup> The appellant was 16 at time of the relevant offending and 20 when sentenced. He received a five-year SHPO and was subject to notification requirements pursuant to s89 SOA 2003.

Prohibitions which can be imposed by an SHPO must be necessary, proportionate and not oppressive. The Court of Appeal in R v Smith and others<sup>69</sup> reinforces the need for the terms of a SHPO to be tailored to the exact requirements of the case.

## Practical tips – where a SHPO is likely

- Consider the CPS timing of any SHPO application
- Have you been able to take instructions?
- Does the pre-sentence report (PSR) identify a high risk of re-offending?
- Was there any delay between date of offence and sentence? The longer the period without any repeat offending, the less likely a SHPO will be necessary.
- Are the conditions proposed related to the offending?
- What other adverse impacts might the prohibition have on the child's social, educational or other needs?
- Are the prohibitions clearly defined?
- Was the draft SHPO served late and therefore does the application require a properly argued skeleton and timetable separate to the sentencing exercise?

The CrimPR require that applications are uploaded in good time for them to be considered by all parties before a hearing (rule 31.3(1) and (5) of the CrimPR 2020) and the court emphasised this point in R v Jackson.<sup>70</sup>

The Home Office guidance on Part 2 of the SOA 2003<sup>71</sup> sets out the principles to be applied when applying for an SHPO in relation to youths:<sup>72</sup>

- early consultation and participation of the YOT in the application process
- 14- to 17-year-olds made subject to civil injunctions in relation to harmful sexual behaviour should be offered appropriate interventions to reduce their harmful behaviour

- the nature and extent of that support is based on a structured assessment that takes into account the needs of the young person and the imminent risk, and
- the welfare of the child or young person is the paramount consideration, in line with local safeguarding procedures.

Note that if a SHPO is made, the police will consider disclosure of this fact to other agencies, such as the head teacher of a school, and the wider community.

<sup>65</sup> s89 SOA 2003

<sup>66</sup> [2005] EWCA Crim 362

<sup>67</sup> [bit.ly/3UN5azo](https://bit.ly/3UN5azo)

<sup>68</sup> [2022] EWCA Crim 127

<sup>69</sup> [2011] EWCA Crim 1772

<sup>70</sup> [2012] EWCA Crim 2602

<sup>71</sup> [bit.ly/3WNudEb](https://bit.ly/3WNudEb)

<sup>72</sup> Chapter 2 section 2 of the guidance

# Criminal records

Any information recorded on the Police National Computer (PNC) in connection with a sexual offence may be disclosed at the discretion of the police on an enhanced DBS check. Non-conviction information should only be disclosed where it is sufficiently ‘serious’, ‘current’ and ‘credible’<sup>73</sup> but it is not clear how those assessments will be made in practice.

Youth cautions and conditional cautions for sexual offences are spent as soon as administered and should not appear on any basic or standard DBS check.

Convictions received when someone is under 18 years old will be filtered from a criminal record certificate if the following criteria are met:

- the offence is not a ‘specified offence’
- 5.5 years have elapsed since the date of the conviction
- the offence did not result in a custodial sentence or suspended sentence.

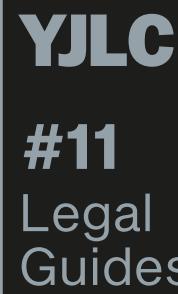
Where a standard or enhanced DBS certificate is requested, your client will receive the certificate directly and can then challenge the contents if any information is incorrectly recorded, or if they wish to challenge the decision to disclose additional information on an enhanced DBS certificate.

<sup>73</sup> ‘Statutory disclosure guidance’ updated 11 February 2022, [bit.ly/3UMexPY](https://bit.ly/3UMexPY)

#11

## Allegations of sexual offences against children

Written by Áine Kervick (Kingsley Napley LLP) and Sandra Paul (Kingsley Napley LLP) in collaboration with Katya Moran and Laura Cooper at the Youth Justice Legal Centre. With thanks to Benjamin Newton (Doughty Street Chambers).



#01  
Turning 18

#02  
Intermediaries for  
child defendants

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Youth Justice Legal Centre  
[yjlc.uk](http://yjlc.uk)

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

Doughty Street Chambers  
[doughtystreet.co.uk](http://doughtystreet.co.uk)

Doughty Street Chambers offers extensive expertise across numerous child rights-related areas and has wide-ranging experience in bringing ground-breaking litigation for and concerning children in public law, extradition, immigration, mental health, community care, prison law, trafficking, education, criminal justice, clinical negligence and inquests. Many of our members specialise in complex and developing areas concerning the rights of children, including female genital cutting (FGC) and children, abortion rights for vulnerable teenagers, unaccompanied minors' rights, the education rights of children in custody, inclusive education for disabled children, children's effective participation in criminal trials, and the rights of LGBTQI children.

Just for Kids Law  
[justforkidslaw.org](http://justforkidslaw.org)

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued.

The Dawes Trust

The Dawes Trust is a charity set up from funds of the estate of the late Christopher Dawes. The Trust's object is to fight crime, including organised crime, by the protection of people and property, the preservation of public order and the prevention and detection of crime for the public benefit.

The Trust provides funding to various organisations and projects in furtherance of its object.