

A Sentencing Guideline for Unlawful Sexual Intercourse within the ECSC

Within the ECSC, on the nine member states and territories the offence of unlawful sexual intercourse can be described in different language and have different maximum sentences. These offences span a wide range of criminality. At the lowest end of the sentencing range, non-custodial sentences or diversion from the criminal justice process may be appropriate. This may be particularly the case in consensual relationships between young people.

Applicability of Guideline

In sentencing for these offences, the Chief Justice has issued guidelines and the court must apply the relevant guidelines and sentence accordingly, unless to do so would not be in the interests of justice. It is only permissible to depart from the guidelines in exceptional circumstances, where such departure can be justified. Clear reasons for not applying the guideline must be given when passing sentence.

It is expected that every court will follow the steps below, with each relevant step being identified to the offender in public before the sentence is passed. Starting points and ranges apply to all adult offenders¹ whether they have pleaded guilty or been convicted after a trial. Credit for a guilty plea is taken into consideration only at Step 3.

Step 1

Consider the seriousness of the offence. Find the starting point by consulting the guideline and the grid below. Then adjust the figure within the range for the aggravating and mitigating factors of the offence.

¹ For persons below 18, see the **Practice Direction on Sentencing Guidelines**, no. of 2019.

Step 2

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender.

Step 3

Adjust the figure on assessing discount for any plea of guilty, if applicable.

Step 4

Adjust the figure on assessing totality if sentencing for more than one offence.

Step 5

Give credit for time served on remand.

Step 6

Finally, consider ancillary orders, compensation, restraining orders, etc, if applicable.

Pass the Sentence

The court must give reasons explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.

Constructing the Sentence

STEP 1

The first step in constructing a sentence is to establish the starting point for the offence.

A case of unlawful sexual requires an assessment of the seriousness of the offence and its consequences by reference to the harm caused. In assessing seriousness, this should include reference to the culpability of the offender.

To establish the starting point for the offence within the relevant range, there are three stages within Step 1.

The first stage is to assess the evidence in order to establish the category of the offence, by reference to the harm caused by the offence. This should include an assessment of the evidence.

The second stage is to assess the seriousness of the offence by reference to a non-exhaustive list of factors.

The third stage is to consult the grid to establish the starting point for the offence within the relevant range.

FIRST STAGE

Assess the harm caused by the offence.

Categories arising from harm caused are as follows:

Category 1 – Exceptional

- Extreme psychological or physical harm supported by evidence, (this can come from the victim)
- Extreme degradation/humiliation
- The extreme impact caused by a combination of category 2 factors may elevate to category 1
- Victim is a child under 10 years of age

Category 2 – High

- Serious psychological or physical harm supported by evidence, (this can come from the victim)
- Significant degradation/humiliation
- Significant use of force
- Pregnancy or STI as a consequence of the offence
- Victim is under 13 years of age

Category 3 – Significant

- Category 1 and 2 factors not present

SECOND STAGE

The second stage is to consider seriousness by assessing the culpability of the offender.

Levels of seriousness may be indicated by one or more of the following:

Seriousness - Level A (High)

- Abuse of position of trust, especially in a familial relationship
- Abduction
- Significant degree of planning, including grooming or enticement
- Group or gang attack
- Disparity of age
- Prolonged detention/sustained incident
- Violence or threats of violence
- History of violence against the victim
- Steps taken to prevent reporting
- Recording of incident, and/or distribution, including uploading it to the internet
- Use of a weapon to frighten or injure
- Forced/uninvited entry into victim's home
- Use of drugs or alcohol on victim to facilitate the offence

Seriousness - Level B (Lesser)

- None of the above present

THIRD STAGE

Having determined the category of harm and level of seriousness find the starting point by consulting the grid below.

Maximum sentence is 'x'².

Percentages are approximations and may not divide neatly, so that some adjustment is permissible.

<u>CATEGORY 1</u>	<u>SERIOUSNESS Level A</u> Starting point 75% x Range 60% – 90%	<u>SERIOUSNESS Level B</u> Starting point 65% x Range 50% - 80%
<u>CATEGORY 2</u>	Starting point 50% x Range 35% - 60%	Starting point 40% x Range 25% - 55%
<u>CATEGORY 3</u>	Starting point 25% x Range 15% – 40%x	Starting point: Likely non-custodial

² Where the maximum sentence is life imprisonment, 'x' is 30 years.

Having determined the starting point, consider the following list of non-exhaustive aggravating and mitigating factors of the offence and adjust upwards or downwards if required, taking care not to double-count factors considered in stages 1 and 2.

AGGRAVATING FACTORS of offence

- Victim is particularly vulnerable due to personal circumstances which can include mental or physical disability
- Offence in the presence of children
- Ejaculation

MITIGATING FACTORS of offence

- No violence
- Parties involved in a consensual relationship with little disparity in age
- Mental disorder or learning disability if it helps to explain why the offence occurred

STEP 2

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender.

AGGRAVATING FACTORS of offender

- Previous convictions for sexual offences
- Recent or relevant convictions for other offences
- Offence committed whilst on bail
- Dangerousness

MITIGATING FACTORS of offender

- Good character
- Genuine remorse
- Evidence of genuine attempt to address offending behaviour
- Age and/or lack of maturity
- Physical or mental disability or ill-health
- Where appropriate, primary carer for dependant family members

STEP 3

Credit should be given for a guilty plea as appropriate. A reduction of one-third should be given for a guilty plea entered at the earliest practicable opportunity. Credit will reduce if the plea is later, down to one-tenth for a plea on the day of trial.

STEP 4

Adjust the figure on assessing totality if sentencing for more than one offence.

STEP 5

Credit must be given for time spent on remand for the relevant offence, to be calculated with precision³.

³ See the requirements for assessing time on remand in **Gomes v The State 2015** UKPC 8, see para 12; **Shonovia Thomas v The Queen** Appeal no.6 of 2010; and **Romeo Da Costa Hall v The Queen 2011** CCJ 6.

STEP 6

Finally, consider ancillary orders, compensation, restraining orders, etc, if applicable.

Pass the Sentence

The court must give reasons explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.