

328.8a Disclosing private sexual images with intent Intimidatory Offences Guideline 2018

Intimidatory Offences Guideline 2018 www.banksr.com Other Matters Guidelines tab In force 1 October 2018 p 21

Disclosing private sexual images [Criminal Justice and Courts Act 2015 s 33](#)

[Also known as revenge porn]

Where [the] offence [was] committed in a domestic context, also refer to the [*Domestic Violence Guideline 2006.*]

STEP ONE**Determining the offence category**

The court should determine the offence category with reference only to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of **culpability** is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

Culpability demonstrated by one or more of the following:**A Higher culpability:**

- Conduct intended to maximise distress and/or humiliation
- Images circulated widely/[publicly]
- Significant planning and/or sophisticated offence
- Repeated efforts to keep images available for viewing

B Medium culpability:

- Some planning
- Scope and duration that falls between categories A and C
- All other cases that fall between categories A and C

C Lesser culpability:

- Offender's responsibility substantially reduced by mental disorder or learning disability
- Little or no planning
- Conduct intended to cause limited distress and/or humiliation
- Offence was limited in scope and duration

Harm

The level of harm is assessed by weighing up all the factors of the case

Category 1

- Very serious distress caused to the victim
- Significant psychological harm caused to the victim
- Offence has a considerable practical impact on the victim

Category 2

- Harm that falls between categories 1 and 3, and in particular:
- Some distress caused to the victim
 - Some psychological harm caused to the victim
 - Offence has some practical impact on the victim

Category 3 • Limited distress or harm caused to the victim

STEP TWO
Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Culpability			
Harm	A	B	C
Category 1	Starting point 1 year's custody	Starting point 26 weeks' custody	Starting point 12 weeks' custody
	Category range 26 weeks' to 1 year 6 months' custody	Category range 12 weeks' to 1 year's custody	Category range High-level community order to 26 weeks' custody
Category 2	Starting point 26 weeks' custody	Starting point 12 weeks' custody	Starting point High-level community order
	Category range 12 weeks' to 1 year's custody	Category range High-level community order to 26 weeks' custody	Category range Low-level community order to 12 weeks' custody
Category 3	Starting point 12 weeks' custody	Starting point High-level community order	Starting point Low-level community order
	Category range High-level community order to 26 weeks' custody	Category range Low-level community order to 12 weeks' custody	Category range Discharge to high-level community order

For the meaning of high-level and low-level community orders, see [15.12](#) in Volume 1.

328.8b [Aggravating and mitigating factors]

Page 24 The court should then consider any adjustment for any aggravating or mitigating factors. Below is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender.

Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

Factors increasing seriousness

Statutory aggravating factors:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity

Other aggravating factors:

Impact of offence on others, particularly children

Victim is particularly vulnerable (not all vulnerabilities are immediately apparent)
Failure to comply with current court orders
Offence committed on licence or post sentence supervision
Offences taken into consideration
Factors reducing seriousness or reflecting personal mitigation
No previous convictions or no relevant/recent convictions
Offender took steps to limit circulation of images
Remorse
Good character and/or exemplary conduct
Serious medical condition requiring urgent, intensive or long-term treatment
Age and/or lack of maturity
Mental disorder or learning disability (where not taken into account at step one)
Sole or primary carer for dependent relatives
Determination and/or demonstration of steps having been taken to address offending behaviour

STEP THREE, STEP FOUR and STEP FIVE relate to assistance to the prosecution, guilty plea reduction and the totality principle.

STEP SIX

Compensation and ancillary orders

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

Compensation order

The court should consider compensation orders in all cases where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to award compensation in such cases.

Other ancillary orders available include:

Restraining order

Where an offender is convicted of any offence, the court may make a restraining order (section 5 of the Protection from Harassment Act 1997).

The order may prohibit the offender from doing anything for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which amounts to harassment or will cause a fear of violence.

The order may have effect for a specified period or until further order.

STEP EIGHT and STEP NINE relate to giving reasons and tag time.

328.16 *Extended sentences*

R v Wheeler 2018 EWCA Crim 774 D pleaded guilty to three section 1 and one section 62(1) image offences. On his laptop were found three Category A images, 18 Category B images, 232 Category C images and 24 prohibited images. They all involved children. He was now aged 70 and in 2009 he was sentenced to 12 years for five rapes and one gross indecency involving girls all aged under 16. The Judge found the following aggravating factors: a) the previous convictions, b) the ages of the children, c) the fact that some of the girls on the images were raped, some bound and gagged, d) there were moving images, and e) there were searches on the Internet. The mitigation was the comparatively small number of Category A images and some remorse. The defence appealed the extended sentence and the overall term. Held. *R v Terrell* 2007 (see above) remains relevant and helpful. It is important to consider

not only the significant risk but also the nature of the risk. The new offences took place within 12 months of D's release from prison. The risk here is the risk of committing offences involving images rather than the risk of contact offences. When reaching his decision about the extended sentence, the Judge did not have regard to the fact that he was making an SHPO. Had he done so he would have concluded the criteria for an extended sentence were not made out. Order quashed.

R v Jones 2018 EWCA Crim 1733 D pleaded to possessing indecent photographs and two breaches of a SOPO. D had similar offences in 2007, 2009, and three times in 2013. He had a very serious medical condition and was in a wheelchair. The Judge passed two consecutive 7½-year extended sentences (30 months' custody 5 years' extended licence). Held. The Judge erred in finding D a dangerous offender. In *R v Guest 2011* [see below] the Court said it was wrong in principle to make that finding for non-contact offences, even if the mechanism of the distribution had a high degree of sophistication and the case was in the more serious bracket.

Note: The Court said the two sentences were both 5-year extended sentences when they were in fact 7½-year extended sentences. The Court also said the sentences collectively made a 10-year extended sentence (5 years' custody 5 years' extended licence). In fact, the sentences made a 15-year extended sentence (5 years' custody 10 years' extended licence), see *R v Thompson and Others 2018 EWCA Crim 639*. Ed.

328.18 Cat A Penetration etc. Fewer than 1,000 images

R v Wheeler 2018 EWCA Crim 774 D pleaded guilty to three section 1 and one section 62(1) image offences. His police sex offender case manager called at his home and found a laptop which had not been present on a previous visit. D denied it was his, but it was seized and examined. Three Category A images, 18 Category B images, 232 Category C images and 24 prohibited images were found. They all involved children. One showed a 12-year-old being vaginally raped and two showed an adult male having sex with a female with a child's face superimposed on the image. One showed a 'very small child' who was bound and gagged. Another showed an adult male holding his hand over the mouth of a 'very young child' during a rape. In interview D made full admissions. He was now aged 70 and in 2009 he was sentenced to 12 years for five rapes and one gross indecency involving girls all aged under 16. The Judge found the following aggravating factors: a) the previous convictions, b) the ages of the children, c) the fact some of the girls on the images were raped, some bound and gagged, d) there were moving images, and e) there were searches on the Internet. The mitigation was the comparatively small number of Category A images and some remorse. Held. We too start at 12 months, but move to **3 years** not 6, making 2 years not 4.

See also: *R v Jagdev 2017 EWCA Crim 2242* (D pleaded to seven child image offences (235 Category A images and 1,400 images in total). He made full admissions. D was aged 22 with no previous convictions. He had made an attempt to address his offending. Held. Consecutive sentences were wrong. We start with a 3-year overall sentence, making with the pleas 2 years not 3. Suspending it would be wrong.)