

Scottish  
Sentencing  
Council



# Sentencing rape offences

A Scottish Sentencing Council consultation  
July 2024

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## Chair's foreword

### The Rt Hon Lady Dorrian, Lord Justice Clerk, Chair of the Scottish Sentencing Council



I am pleased to introduce the Council's public consultation on sentencing guidelines for offences of rape. Two draft guidelines have been prepared. The first is on the offence of rape under section 1 of the Sexual Offences (Scotland) Act 2009, and its common law equivalent, and the second covers the offence of rape of a young child (someone under the age of 13) under section 18 of the Act, and its common law equivalent. These guidelines are the first of an intended series on sexual offences, and we are currently developing further guidelines on sexual assault and offences involving indecent images of children.

The Council recognises that sexual offending is an area of public concern and accounts for a rising proportion of sentencing in Scottish courts. We believe that guidelines will bring benefits to the courts, to those involved in such cases, and to the wider public. Offences of rape can involve a wide variation of circumstances. By listing some of the factors to be considered, the guidelines will assist courts in reaching what, at times, can be difficult sentencing decisions. We believe this will promote consistency and predictability in sentencing for these offences.

The sentencing ranges set out in the guidelines aim to provide both guidance and flexibility for the particular circumstances of each case before the court. All of the sentences within these ranges are sentences of imprisonment and extend to 13 and 14 years (for section 1 and 18 offences respectively). The guidelines also discuss sentences designed to help protect the public in the future. These include extended sentences where supervision continues in the community following release from prison, and orders for lifelong restriction, which are a life sentence involving risk management for the rest of the offender's life.

Like all of our offence guidelines, these are to be read alongside our three general guidelines on the [principles and purposes of sentencing](#), on [the sentencing process](#) and on [sentencing young people](#). These draft guidelines build on the general approach to sentencing set out in our published guidelines, and provide guidance that is particularly relevant to the offences of rape. As with all of our guidelines, they are intended to be concise, easy for sentencers to reference in court, and accessible to the public.

All of our guidelines are evidence-based and informed by research and consultation. We have engaged with a wide range of organisations and people, including the judiciary, the legal profession, criminal justice bodies, interest groups and other key stakeholders. On behalf of the

Council, I would like to thank all of them, and everyone else who has contributed to our guideline development. As always, I am also grateful to my fellow Council members for their careful and considered work.

We have now reached perhaps the most significant stage yet in the development of these guidelines – this public consultation. We want our guidelines to be useful to the courts, court users, and the public in general. It is therefore essential that we get the widest possible range of views to help ensure that these drafts are fit for purpose. I encourage you to take the time to respond to this consultation. We appreciate the effort that goes into providing a response, and each one received will be carefully considered before any decisions are made in finalising the guidelines. The guidelines will then be submitted to the High Court for its consideration and approval.

I look forward to receiving your views to help us to ensure that these guidelines best serve their purpose.

**The Rt Hon Lady Dorrian**  
**Lord Justice Clerk and Chair of the Scottish Sentencing Council**

## What guidelines cover

The Council creates [guidelines](#) to assist judges to decide what sentence to impose in criminal cases in Scottish courts. The guidelines are only about sentencing. The guidelines are not about any of the steps before or after sentencing, including: the police investigation, any decision about whether to take the case to court, the prosecution of the case including any trial or plea of guilty, the treatment of victims and witnesses in the case, the participation in any prison programmes where the offender is sentenced to imprisonment, release from prison, parole decisions, or victim notification schemes.

## Glossary

Sentencing, and the law surrounding it, can be complex. The following information is provided to help explain some of the technical terms and concepts referred to in the consultation paper. We hope it assists readers in responding to the consultation. Further information about sentences and [sentencing](#), as well as a [jargon buster](#), are available on our website.

### Aggravating and mitigating factors

Aggravating factors are facts and circumstances which may make the offence more serious for sentencing purposes. Mitigating factors, including factors personal to the offender, may lead to a less severe sentence.

### Culpability

This is the level of blameworthiness of the offender.

### Disposal

A disposal is the sentence or outcome of a criminal case.

### Double-counting

When deciding a sentence, a judge follows a number of steps. The first step is to assess the seriousness of the offence by determining the culpability of the offender and the harm caused to the victim. Step 2 is to select the sentencing range, and step 3 is to identify the factors that might make the sentence more (aggravating) or less (mitigating) severe. If a feature of culpability or

harm is considered during the first step, it should not be considered again as an aggravating or mitigating factor at step 3. If it were, this would be 'double-counting'.<sup>1</sup>

## Guilty plea consideration

By [law](#), where an offender has pled guilty to a crime the court must take that into account in deciding on the sentence. This often leads to a reduction in the sentence being imposed. This recognises that a plea of guilty saves court time and resources throughout the criminal justice system, which means that other cases might be dealt with sooner. A plea of guilty before a trial commences also means that victims and witnesses will be spared having to give evidence.

## Licence

Offenders released 'on licence' are let out of prison into the community on certain conditions - which means they must follow certain rules. The person will be under the supervision of a justice social worker in the community. The conditions might be, for example, that they must stay at a certain address, and keep in regular contact with their social worker. If they do not follow the conditions, they can go back to prison to serve the rest of their sentence. The licence will last until the sentence is finished.

## Sentencers

Sentencers is a term used to describe judges who preside over criminal cases at all of the court levels from justices of the peace to High Court judges. Rape prosecutions are dealt with in the High Court, so sentencers in these cases will be High Court judges.

## 'Sex offenders register'

A person is subject to the [notification requirements](#) (sometimes called a 'sex offenders register') if they are convicted of certain sexual offences, including rape. When someone is convicted of rape, the notification requirements automatically apply. By law, the length of time for which the requirements apply is determined by the sentence. Beyond deciding the sentence, the judge has no discretion over how long the requirements apply for. More information, including a table which sets out of the periods of time that the requirements are set for, is available on the Council's [website](#).

## Sexual harm prevention order (SHPO)

A [sexual harm prevention order](#) can be made if the court is satisfied that it is necessary for the protection of the public, children, or vulnerable adults, or any individuals from sexual harm from the offender. Under such an order, offenders convicted of a sexual crime can be told to follow

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1. [The sentencing process](#) sentencing guideline, effective from 22 September 2021, paragraph 18.

certain rules and can be prohibited from doing anything listed in the order. For example, a SHPO might order an offender not to use the internet to contact a child under the age of 16. A SHPO can be imposed as a stand-alone disposal or as part of another sentence.

## Sexual Offences (Scotland) Act 2009

The [Sexual Offences \(Scotland\) Act 2009](#) replaced many common law offences (these are based on legal principles and court decisions rather than on legislation), including rape, with statutory offences (these are based on legislation). In the Act, rape is intentional or reckless penetration, with the offender's penis, of a victim's vagina, anus or mouth, without the victim's consent and without any reasonable belief that the victim consented.

This is broader than the common law offence of rape, which was restricted to when a male person had (vaginal) sexual intercourse with a female person without her consent.

The Act also sets out the law on consent, including a [list of situations](#) where consent cannot be given, for example:

- where the victim is incapable of consenting because of the effect of alcohol or any other substance
- where the victim is asleep or unconscious
- where the victim agrees or submits to the conduct because of violence or threats of violence
- where the victim has been deceived.

A child under the age of 13 cannot, under the law, consent to intercourse or other sexual activity. The offence of rape is defined in [section 1 of the Act](#). If the victim is aged under 13 years old this is a separate offence, defined in [section 18 of the Act](#). We have prepared separate sentencing guidelines for each.

## Types of sentence

### Custodial sentence

This is a sentence of imprisonment. Adults are sent to prison and young people aged 16 to 21 are sent to a young offenders institution.<sup>2</sup>

### Determinate sentences

A determinate sentence is a custodial sentence where the judge sets the fixed time the offender will spend in prison, or in a young offenders institution, before being released into the community.

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2. As a result of the [Children \(Care and Justice\) \(Scotland\) Act 2024](#), a person under the age of 18 will no longer be detained in a young offenders institution and will instead be placed in secure accommodation. However, the relevant provisions of the 2024 Act have not been commenced as at the date of writing.

These sentences are either short term (under four years) or long term (four years or over). However, the offender will not necessarily spend the whole of this time in prison. See below for further information about automatic early release.

### **Automatic early release**

This is a system where people serving sentences of imprisonment are released into the community on licence after serving part of their sentence in custody. If someone breaches the conditions of their licence they can be sent back to custody. Automatic early release on licence for those serving long term sentences (four years or more) takes place six months before the end of their sentence, unless the Parole Board for Scotland recommends that they be released earlier after serving at least half of their sentence. Short term prisoners (those serving less than four years) are released on licence automatically when they have served half of their sentence. Automatic early release does not apply to those serving extended sentences.<sup>3</sup>

### **Extended sentence**

The purpose of an extended sentence is to protect the public. It combines a period in prison, or detention for those aged 16 – 21 (the custodial term) with a further set time of supervision in the community (the extension period). The extension period of the sentence in the community can be up to five years for sheriff court cases and up to 10 years for High Court cases. Offenders who commit an offence while under supervision can be returned to prison. Automatic early release (see the entry above) does not apply to extended sentences.

### **Indeterminate sentences**

These are sentences that do not have a set end point, such as a life sentence. However, the judge will set a punishment part (see 'Life sentence' below) for such sentences.

### **Life sentence**

A life sentence must be given for murder under the law, but can also be given for other extremely serious offences. If a person is sentenced to life imprisonment, the judge must, by law, set a punishment part of the sentence. This is the minimum time the person must spend in prison before they can be considered for release into the community by the Parole Board for Scotland. If a person sentenced to life imprisonment is released into the community, they will be on licence for the rest of their life and can be recalled to prison if they breach the terms of their licence.

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3. The Scottish Government is currently [consulting on](#) changes for release arrangements.



## **Order for lifelong restriction (OLR)**

An order for lifelong restriction is a lifelong sentence put in place to protect the public. It is a sentence of imprisonment which can be imposed on people convicted at the High Court of the offences covered by these guidelines, amongst other offences. The court must impose an OLR where it appears that, because of the nature or circumstances of the offence, there is a likelihood that the offender will, in the future, seriously endanger the lives, or physical or psychological well-being, of members of the public, if he or she is not in custody. The judge must set a punishment part of the OLR, which is the minimum time the offender must spend in prison before being considered by the Parole Board for Scotland for release into the community. If offenders are considered to be safe to serve the rest of their sentence in the community, they will remain under the supervision of a justice social worker. If the person commits another crime, they can be sent back to prison.

## **Suspended sentence**

A suspended sentence is not available as a sentence in Scottish courts. However, it is used in England and Wales.

## **Victim/Survivor/Victim-survivor**

The draft guidelines use the word 'victim' throughout rather than any other descriptor such as 'survivor' or 'victim-survivor'. During our engagement process, with interest groups in particular, there appeared to be no broad consensus as to the most appropriate terminology. The Council based its decision on the fact that 'victim' is used in Scottish legislation and is widely recognised.

# Part 1

## Responding to this consultation

1. Responses to this paper are welcomed by midnight on **Friday 18 October 2024**.
2. Responses can be submitted online at:  
<https://consultations.scottishsentencingcouncil.org.uk/>. If you have any questions about the consultation process, any difficulties with the online response form, or cannot respond online, please contact us: by email at [sentencingcouncil@scotcourts.gov.uk](mailto:sentencingcouncil@scotcourts.gov.uk), by phone on 0300 790 0006, or by post at Scottish Sentencing Council, Parliament House, Parliament Square, Edinburgh, EH1 1RQ.
3. We will publish the responses we receive, except where respondents ask for confidentiality. Where confidentiality is sought it should be noted that the Scottish Sentencing Council is subject to the [Freedom of Information \(Scotland\) Act 2002](#) so we may be required to release some information if requested, although this will be done without contravening the data protection principles in Articles 5(1) and 10 of the UK General Data Protection Regulation and in sections 10(5) and 35(1) of the [Data Protection Act 2018](#).

# Introduction

## The Scottish Sentencing Council

4. The Scottish Sentencing Council was established in 2015 under the [Criminal Justice and Licensing \(Scotland\) Act 2010](#). We have three objectives which, by law, we must aim to achieve when carrying out our functions.

We must seek to:

- promote consistency in sentencing practice
- assist the development of policy in relation to sentencing
- promote greater awareness and understanding of sentencing policy and practice.

Our main responsibilities include:

- preparing sentencing guidelines for the Scottish courts
- publishing guideline judgments issued by the Scottish courts
- publishing information about sentences imposed by the Scottish courts.

5. The Council is made up of 12 members: six judicial members, three legal members (a prosecutor, an advocate, and a solicitor), a police constable, a victims' expert, and one other person who is not qualified as a judicial or legal member.

## Developing sentencing guidelines

6. An important part of our role in promoting consistency is to prepare sentencing guidelines for the Scottish courts. When sentencing someone who has committed an offence, a court<sup>4</sup> must take into account any relevant sentencing guidelines. If a court decides not to follow the guidelines, the reasons for that decision must be stated. Sentencing guidelines can be general, which means they cover all offences, or they can be more specific and cover a particular offence or group of offences.

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4. The words 'court' and 'sentencer' are used in this consultation paper to include judges in the High Court, sheriffs principal, sheriffs, summary sheriffs, and justices of the peace, when presiding over a court.

## Approval process and consultation

7. Sentencing guidelines developed by the Council must be approved by the [High Court of Justiciary](#) in order to come into effect. Before submitting a guideline for approval, we must publish a draft of the guideline. We must also publish a draft impact assessment giving our views on the likely impact, costs, and benefits of the guideline. We are required to consult the Scottish Ministers and the Lord Advocate on these drafts. We must also invite views from anyone else we think should be consulted. To ensure our guidelines are useful, and that we have as much information as we can about their potential effects, we want to hear from as wide a range of people as possible. This includes the public as well as criminal justice organisations, support and advocacy services, and other organisations which have an interest in the guideline. With this in mind, we consult publicly on all our draft guidelines.
8. Four guidelines are already in force: three guidelines which relate to all types of offence and one guideline relating to a particular group of offences. The three guidelines which apply to all offences cover:
  - the principles and purposes of sentencing
  - the sentencing process
  - sentencing young people.
9. Our first offence guideline addresses the statutory offences of causing death by driving. It came into effect on 16 January 2024.
10. The draft rape guidelines being consulted on will therefore, if approved, be the second and third offence guidelines developed for use in the Scottish courts. They are intended to be read alongside the principles and purposes and sentencing process guidelines, and, where applicable, the sentencing young people guideline.
11. The consultation asks questions on:
  - the content of the guidance contained within the guidelines
  - the potential impacts of the guidelines.
12. The consultation can be completed online at <https://consultations.scottishsentencingcouncil.org.uk/>.

## Guideline development

13. We have carried out a range of research and engagement to help inform the structure and content of these guidelines.
14. A [conference](#) was held in June 2018 to discuss the sentencing of sexual offences in general and included a range of attendees from across the justice, governmental, and third sectors, including members of the judiciary, and relevant interest groups. Attendees considered the challenges involved and issues arising in the sentencing of these offences, and the case for producing guidelines.
15. We have commissioned a range of independently conducted research examining issues in relation to sentencing sexual offences generally, and the offence of rape in particular:
  - A [national survey](#), published in September 2019, explored, amongst other things, public attitudes to the sentencing of sexual offences including rape.
  - A [literature review](#), published in February 2021, examined the available data and evidence (including in other jurisdictions) in relation to the sentencing of rape offences.
  - A [report](#), published in July 2021, explored public perceptions of sentencing sexual offences in depth, including the perceptions of victims and a support worker.
  - A [report](#), published in May 2024, focussed on victims' views and experiences of sentencing for rape, and other sexual offences.
16. As well as considering statistical data in relation to the sentencing of these offences, case analysis has been carried out, including of appeal decisions. This included listening to cases using a court recording system,<sup>5</sup> in order to collate and analyse factors considered relevant to the sentences imposed, and the nature and duration of the sentences.
17. Complementing our commissioned research with victims, we have also engaged directly on an ongoing basis with interest groups who support and represent victims. We have engaged on the structure, content, and accessibility of the guidelines.
18. We have further engaged across the justice system, particularly in relation to the features of culpability and harm, and the aggravating and mitigating factors that can make a sentence more or less severe.

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5. The VIQ system is the court recording system used by the Scottish Courts and Tribunals Service (SCTS) to make audio recordings of cases.

19. Sentencers have been consulted throughout the development process. Engagement with sentencers took place in 2020 – 2021 to discuss judicial experiences, and ascertain the various challenges which arise during the sentencing of sexual offences. We also conducted a wide-ranging judicial survey with sentencers in 2023.

## Why the guidelines are being developed

20. Sexual offending is an area of public concern and accounts for a rising proportion of sentencing in Scottish courts.<sup>6</sup>
21. There are challenges for the courts in sentencing rape cases, particularly as they can include a broad variety of circumstances. We believe guidelines will assist courts in reaching sentencing decisions and promote consistency and predictability in sentencing.
22. Guidelines will also assist public understanding. These cases attract a significant degree of public and media interest, particularly in relation to the serious harm caused. Clarity around the sentencing process, and what factors are taken into account, will give all those involved in, or affected by, these cases a greater understanding of how sentences are reached.

## Challenges for sentencers

23. The research and engagement we have carried out with judicial office holders suggests challenges in a number of areas. Rape cases can be complex by nature and can involve difficult assessments of seriousness in relation to the breadth and variety of circumstances which may be involved in the offence.
24. Scottish courts can use the Sentencing Council for England and Wales' definitive [guideline](#) on rape offences as a cross-check. However, courts are discouraged from applying such guidelines too rigidly or mechanistically.<sup>7</sup> There are, generally, limitations in applying guidance

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6. There was an increase of 52% in the number of convictions for sexual crimes, from 841 in 2020-21 to 1,279 in 2021-22. The number of convictions for rape and attempted rape increased by 105% from 78 in 2020-21 to 160 in 2021-22. The number of proceedings for these crimes increased to a greater extent by 123% between 2020-21 and 2021-22 and the total number of prosecutions in 2021-22 (336) was the highest seen since 1990. Scottish Government (2023) [Criminal Proceedings in Scotland, 2021-22](#), Scottish Government.

7. See, e.g., [Milligan v HMA \[2015\] HCJAC 84](#), and [HMA v MG \[2023\] HCJAC 3](#).

from other jurisdictions, in part because of the differences in sentencing regimes.<sup>8</sup> Notable differences between England and Wales, and Scotland include the respective systems for automatic early release, and the availability of suspended sentences in the former and orders for lifelong restriction in the latter.

## Public perception

25. The [national survey](#) conducted by Ipsos MORI into public attitudes to sentencing in Scotland included questions about a case study involving an offence of rape. In response to the scenario, the most common sentence range selected by respondents was between 5 to 10 years.<sup>9</sup> The scenario included an aggravating factor (drugging the victim's drink) and a mitigating factor (immediately showing genuine remorse). A majority of people felt that the sentence should be increased as a result of the aggravating factor but should not be changed as a result of the mitigating factor.<sup>10</sup>
26. A further report, [Public perceptions of sentencing in Scotland](#) by ScotCen, explored the public perceptions of sentencing sexual offences, including rape, in more depth through focus groups involving members of the public, and interviews with victims and a support worker.<sup>11</sup> The researchers concluded that, generally, members of the public and victims of sexual offences believe that current sentences are too lenient and do not reflect the harm caused to victims and their families. For some, this view was linked to representations in the media. However, when members of the public considered a scenario based on a real case, the sentence they proposed was similar to the actual sentence passed.<sup>12</sup> For the offence of rape, participants believed that the typical sentence should be severe and clearly show that such behaviour is unacceptable. Imprisonment was seen as appropriate and, in general, it was felt that the typical length of the sentence should range from five years up to life imprisonment.<sup>13</sup>

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8. [The Methodological Challenges of Comparative Sentencing Research Literature Review](#) (May 2022), prepared for the Scottish Sentencing Council by Dr Jay Gormley (University of Strathclyde), Professor Julian Roberts (University of Oxford), Dr Jose Pina-Sanchez (University of Leeds), Professor Cyrus Tata (University of Strathclyde) and Ana Veiga (University of Leeds), p. 51.

9. [Public perceptions of sentencing national survey report](#) (September 2019), prepared for the Scottish Sentencing Council by Carol Black, Rachel Warren, and Rachel Ormston of Ipsos MORI Scotland, and Professor Cyrus Tata (University of Strathclyde), p.29.

10. *ibid*, pp.31-32.

11. [Public perceptions of sentencing in Scotland. Qualitative research exploring sexual offences](#) (July 2021), prepared for the Scottish Sentencing Council by Hannah Biggs, Susan Reid, Kaushi Attygalle, Konstantina Vosnaki (ScotCen), Dr Rachel McPherson (University of Glasgow) and Professor Cyrus Tata (University of Strathclyde), p. 1.

12. *ibid*, pp. 1-2.

13. *ibid*, pp 30-31.

For sexual offences in general, members of the public felt that the risk of reoffending and the protection of the public were important factors to consider during sentencing. They also felt that offenders should have access to support to aid rehabilitation.<sup>14</sup> Participants held mixed views as to whether evidence of previous good character should be taken into account. Members of the public thought that the impact a sentence would have on an offender should only be taken into account if an offender had experienced similar victimisation or was deemed vulnerable in terms of their upbringing or mental health. Even under these circumstances, victims did not think these factors should be considered. When faced with a specific scenario, members of the public regarded personal circumstances, such as mental health, as important in determining the sentence.<sup>15</sup>

27. The most recent [report](#) commissioned by the Council focussed wholly on the views of victims of rape and other sexual offences. The findings of the report are based on interviews with 14 victims of sexual violence, all of whom were women. Nine cases involved rape. The report identifies harm particular to sexual violence as stemming from the removal of control and bodily integrity, fear, and the abuse of trust (as most rapes are committed by someone known to the victim). It describes the offences as involving multiple and often enduring physical and emotional impacts.<sup>16</sup> The participants felt that sentences for sexual offences should primarily serve the purpose of ensuring the safety of victims and wider public protection. Several referred to the importance of rehabilitation within a custodial sentence, while relatively few mentioned punishment.<sup>17</sup> In relation to factors that might make an offence less serious, participants were fairly unanimous that guilty pleas and expressions of remorse on the part of the perpetrator should carry limited weight.<sup>18</sup> The majority of the women viewed the sentence imposed in their case as lenient. Those who gave a view on sentence lengths gravitated toward a minimum custodial sentence of five to seven years for single charges of rape with up to life imprisonment for repeat offenders.<sup>19</sup> The participants broadly agreed that information about sentencing options and guidelines would help them to understand why a particular sentence had been imposed.<sup>20</sup>

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14. *ibid*, pp. 2-3.

15. *ibid* p. 74.

16. [Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences](#), (May 2024) prepared for the Scottish Sentencing Council by Oona Brooks-Hay, Michele Burman and Jenn Glinski, SCCJR, University of Glasgow, p. 45.

17. *ibid*, p. 43.

18. *ibid*, p. 45.

19. *ibid*, p. 40.

20. *ibid*, p. 15.



28. This range of commissioned research is referenced again later in this consultation document in discussion of the draft guidelines.
29. Other [research](#) conducted in Scotland indicates that several myths may still exist in relation to rape. A report published by the Scottish Government provided data on a national survey conducted in 2019 involving around 1000 participants. The report stated that, amongst other findings, “around 3 in 10 still felt that the woman was at least partly to blame for the offence taking place (giving a score of between 2 and 7 on the scale) if she wore revealing clothing (29%) or was very drunk (30%).”<sup>21</sup> The report also explored other examples of myths about rape.

## Issues raised by stakeholder engagement

30. Engagement across the justice sector also raised questions around challenges in sentencing. These include:
- whether offences should be sentenced differently where at the time of the offence the offender is known, or not known, to the victim
  - how historical offences should be sentenced
  - how cases should be sentenced where consent has initially been given but then withdrawn during a sexual encounter
  - whether misogyny should be considered as a potentially aggravating factor.<sup>22</sup>

## Approach

31. The draft guidelines set out a framework for the appropriate approach to the sentencing exercise, and provide guidance on selecting the appropriate sentence.

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21. [Scottish Social Attitudes Survey 2019: attitudes to violence against women](#) (December 2020), published by the Scottish Government, Table 2.3. More recently, the Crown Prosecution Service in England and Wales commissioned [research](#), published in January 2024, which showed that public understanding of rape had improved over the past 20 years, but was still outweighed by false beliefs, misunderstanding, lack of knowledge, and underlying stereotypes. The research, which included focus groups and a survey of more than 3000 adults across Great Britain, evidenced points of uncertainty and conflicted public views.

22. This engagement took place prior to the Scottish Government’s consultation ‘[Reforming the criminal law to address misogyny: consultation](#)’. The proposals consulted on include that the introduction of a statutory aggravation of misogyny should be created but that it should not apply to the rape of a woman or girl, on the basis that these offences are inherently misogynistic. The [Scottish Government](#) has undertaken to bring forward legislation to criminalise misogynistic conduct as informed by the public consultation.

32. They have been developed to be useful to:

- sentencers
- legal practitioners
- those involved in the delivery and administration of criminal justice
- those involved in, or with an interest in, such cases, for example victims, families, and support organisations
- those accused or convicted of an offence of rape
- the media.

They are also intended to be helpful to the general public in explaining how sentences for these offences are decided.

33. The draft guidelines are expressed as clearly and simply as possible. They are not intended to cover every possible situation. Instead, they set out, amongst other things, factors which can be relevant to rape cases, what consideration should be given to them, and how they should be considered in deciding the sentence.

34. In order to ensure guidelines are as accessible to the public as possible, we have avoided jargon and provided clear explanations of concepts where we can. We have sought to use precise language (while recognising that a degree of interpretation will always be necessary) in order to promote consistency in sentencing, and to mitigate against the application of the guidelines leading to an inadvertent increase in appeals.

35. The draft guidelines follow broadly the same style and approach as the Council's first offence guideline (on sentencing [death by driving offences](#)), particularly with regard to the interaction with other guidelines. The Council considered these issues in detail following consultation on the death by driving guideline, so we do not propose to explore them further in this consultation.

## Part 2

# The draft guidelines explained

## Applicability

36. Subject to approval by the High Court, the first guideline in relation to rape will apply to all offenders who have been convicted of one of the following offences:
- an offence under section 1 of the Sexual Offences (Scotland) Act 2009 (rape)
  - the common law offence of rape.
37. Subject to approval by the High Court, the second guideline in relation to rape will apply to all offenders who have been convicted of one of the following offences:
- an offence under section 18 of the Sexual Offences (Scotland) Act 2009 (rape of a young child)
  - the common law offence of rape where the victim is a young child (a child under the age of 13).
38. See the glossary entry for the Sexual Offences (Scotland) Act 2009 for further explanation.

## Structure

39. Guidance is set out in a combination of explanatory text, tables, and a matrix of sentencing ranges to assist the court in determining the headline sentence.<sup>23</sup> The guidance follows the general framework set out in steps 1- 4 of the [sentencing process guideline](#).
40. Under step 1, guidance is provided on assessing the seriousness of the offence which lists various features that might be present in relation to culpability, or level of blame, of the offender, and to the harm caused to the victim. There are two levels of culpability, A and B, and three levels of harm, 1, 2, and 3.

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23. The headline sentence does not take account of a guilty plea, or time already spent in custody. Offence guidelines are also intended to be read alongside the published guidelines of general application on the principles and purposes of sentencing, the sentencing process, and sentencing young people.

41. Step 2 is to select the sentencing range. The different levels of culpability and harm are used to create a matrix of sentencing ranges. The two levels of culpability are listed across the top of the matrix, while the three levels of harm are listed along the side of the matrix. This creates six levels of seriousness: A1, B1, A2, B2, A3 and B3. The draft guidelines provide sentencing ranges by reference to the six categories of seriousness laid out in the matrix. This is explained at paragraph 12 of the guidelines. This section also includes explanatory notes on two types of sentence which are designed to protect the public: extended sentences and orders for lifelong restriction.
42. Step 3 is to identify the aggravating and mitigating factors. The guidelines provide a non-exhaustive list of factors which might increase or reduce the sentence, and indicate that these may move the headline sentence outwith the range selected at step 2, including above the maximum or below the minimum where appropriate.
43. Step 4 is to determine the headline sentence. This is the selection of the sentence deemed appropriate for the offence after consideration of all of the matters contained in steps 1-3 of the draft guidelines.

## Interaction with other guidelines

44. Courts must have regard to all applicable guidelines when sentencing.<sup>24</sup> The principles and purposes of sentencing guideline and the sentencing process guideline apply to all offences, including rape offences. The rape guidelines are therefore intended to be read alongside those general guidelines and have been drafted with that in mind.
45. The principles and purposes of sentencing guideline provides that the overarching principle of sentencing is that sentences must be fair and proportionate. The sentencing process guideline makes it clear that this should be considered throughout the sentencing exercise. This will be of particular importance when sentencing for multiple offences.<sup>25</sup>
46. The sentencing process guideline was developed with a view to ensuring that it would not be necessary to repeat the general factors it sets out in offence guidelines. This approach is intended to allow offence guidelines to be succinct and easily referenced in the court setting. The sentencing process guideline provides guidance on the further considerations courts may

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24. [Section 6 of the Criminal Justice and Licensing \(Scotland\) Act 2010](#).

25. [The sentencing process](#), sentencing guideline, effective from 22 September 2021, paragraph 34.

require to take into account before imposing the final sentence: the possibility of a reduction in the sentence where a plea of guilty has been tendered, consideration of time already spent in custody awaiting determination of the case,<sup>26</sup> and [ancillary orders](#).

47. The sentencing young people guideline provides that the nature and duration of a sentence imposed on a young person should be different from that which might be imposed on an older person being sentenced for the same, or a similar, offence; and, specifically, that a custodial sentence for a young person should be shorter than that for an older person who is to be sentenced for the same, or a similar, offence. The guideline addresses the consideration of the offender's culpability, but does not alter the sentencer's consideration of the level of harm caused.<sup>27</sup> The sentencing young people guideline will only apply to rape offences when the offender is 24 years or under at the time of conviction. A link has been provided within the rape guidelines to the [approved guidelines section](#) on the Council website as a signpost to the other guidelines that may be relevant.
48. General and offence guidelines are developed to be complementary and applied alongside one another.

## Specific aspects of the draft guidelines

### Victim statements

49. The harm caused to victims is central to the sentencing process and victim statements (sometimes called 'victim impact statements') are one means, amongst others, for information about harm to be provided to the court. They give victims the chance to explain in their own words how the offence has affected them. Victim statements are discussed in the Council's general guideline on the sentencing process,<sup>28</sup> which states that: "harm includes the impact on any victim or victims. In particular, in assessing the level of harm the court must have regard to any victim statement which has been put before it, to the extent that it considers the information in the statement to be relevant to the offence". As discussed above at paragraph 48, the rape guidelines are intended to be read alongside this general guideline and they

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26. This may also include consideration of time spent on electronically monitored [bail](#) (often referred to as tagging), in line with the provisions of [section 210ZA of the Criminal Procedure \(Scotland\) Act 1995](#).

27. The Appeal Court recently issued a judgment stating that: "the assessment of culpability for a young person does not involve a mere discounting exercise of an arithmetical nature. The correct approach, in our opinion, is to assess the seriousness of the offence having regard to the level of culpability and the harm." ([Dunn v HMA \[2023\] HCJAC 34](#), p. 3).

28. [The sentencing process](#), sentencing guideline, effective from 22 September 2021, paragraph 13.

therefore do not repeat this information. However, the rape guidelines do include a list of factors relating to physical and psychological harm which may be particularly relevant to rape offences and which the court should take into account.

## Offender known or not known to victim

50. According to Rape Crisis Scotland, whose figures are based on information provided by people contacting their centres, around 27% of abusers are partners or ex-partners, around 8% are strangers, and most of the rest are someone known or related to the victim.<sup>29</sup>
51. The independent literature review on rape offences published by the Council states that “prior to the introduction of the Sexual Offences (Scotland) Act 2009, familiarity between the offender and victim was considered lacking in aggravation (something which makes an offence more serious)”.<sup>30</sup> However, in 2015 the Appeal Court found the reasoning persuasive that, in relation to culpability, there are no separate regimes for sexual violation of a partner/ ex-partner or a ‘stranger’.<sup>31</sup>
52. Having considered the matter, the Council is of the view that categorising the seriousness of a rape by reference to whether the offender is known or not known to the victim is inappropriate for a number of reasons.
53. The Council does not consider that the rape of a victim by someone known to them, for example an acquaintance, should be considered more or less serious than the rape of a victim by someone not known to them because of that fact alone. Rather, it is the presence of other factors, which may indicate increased culpability or harm, such as the degree of planning or use of violence, which will have a bearing on the seriousness of the offence.
54. For example, features that might be present in the rape of a victim by someone known to them might include:
- abuse of power, or of a position of trust or authority
  - use of threats or coercion to facilitate the offence
  - previous violence, or other offending, against the victim.

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29. [Rape Crisis Scotland Annual Report 2021-2022](#), p. 30; in this context abuse relates to sexual abuse.

30. [Sexual offences involving rape Literature Review](#), (February, 2021), prepared for the Scottish Sentencing Council by Dr Rachel McPherson, Mr Nicholas Burgess, Dr Jay Gormley and Professor Cyrus Tata School of Law, University of Glasgow and Centre for Law, Crime and Justice, School of Law, Strathclyde University, p. 24.

31. [HMA v SSK \[2015\] HCJAC 114](#), paragraphs 25 - 27.

And features that might be present in a rape of a victim by someone unknown<sup>32</sup> might include:

- administration of alcohol and/or drugs to the victim to facilitate the offence
- abduction
- prolonged detention, or sustained incident.

55. The Council also believes that specifying whether the offender is known or not known to the victim as a determinant of seriousness may lead to ‘double-counting’<sup>33</sup> in view of the other factors that may be present.

### QUESTION

1. **Should either of the rape guidelines explicitly address where the offender is known to the victim, as opposed to not known to the victim?**

## Historical offences

56. The Scottish Government’s national statistics on recorded crime state that just under a quarter (23%) of sexual crimes in 2021-22 were historical (recorded at least one year after they occurred).<sup>34</sup> If guidance in relation to historical offending were to be included in these guidelines, it is likely that a definition would be required in relation to what timeframe constitutes a historical offence.

57. Based on a recent case at the Appeal Court,<sup>35</sup> and discussions with sentencers, the Council understands that some of the factors taken into account in sentencing historical offences include that:

- there was a breach of trust
- the offence was sustained and repeated
- the offender had evaded prosecution during the intervening years and lived at liberty
- the offender prevented the victim from disclosing the offence at the time or obtaining assistance

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32. These features might also be present in an offence involving someone known to the victim.

33. [The sentencing process](#), sentencing guideline, effective from 22 September 2021, paragraph 18.

34. [Recorded Crime in Scotland, 2021-22](#), Scottish Government, p. 24.

35. [HMA v CB \[2023\] HCJAC 4](#), paragraphs 36 - 38.

- the victim was in a position to describe the long-term psychological impact of the offences over time.

The referenced Appeal Court judgment also considered the following mitigating factors, but regarded them as “of no great significance”:

- the offender had been of otherwise good character and had not reoffended since the offence
- the offender was now elderly and/or had health issues.

58. The factors listed in the draft guidelines address the level of culpability of the offender in relation to the offence, as well as the level of harm that has been caused to the victim. Many of these will be relevant, for example “an abuse of power, or of a position of trust or authority”, “physical harm” and “psychological harm or trauma”. We do not consider that the seriousness of the offence is necessarily altered by the passage of time. Where the offender was a young person at the time of the offence, the sentencing process guideline provides that their maturity at that time should be considered.<sup>36</sup> At step 3 (identify the aggravating and mitigating factors), many of the factors in the draft guidelines may be relevant to cases of historical offending, such as any “steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution”. The sentencing process guideline includes “physical disability or infirmity” as a possible mitigating factor.<sup>37</sup> The lists of factors in the guidelines are non-exhaustive and the sentencer will be expected to take into account any other factors that are relevant to the specific case before them.

59. We have taken the view that the current determinants of seriousness and harm, and the aggravating and mitigating factors listed in the draft guidelines, alongside relevant factors listed in the sentencing process guideline, can be used to address the matter of historical offending, and that no further guidance should be provided in these guidelines.

## QUESTION

- 2. Do you think further guidance should be provided in relation to historical rape offences in either of the guidelines?**

36. [The sentencing process](#), sentencing guideline, effective from 22 September 2021, paragraph 10, bullet point 5.

37. *ibid* Annex C, bullet point 2.



## Assessing seriousness

60. Step 1 of the draft guidelines provides guidance on the assessment of seriousness as determined by an assessment of the level of culpability (level of blame) of the offender and an assessment of the level of harm caused by the offence.
61. For the purpose of deciding the appropriate sentence, the draft guidelines provide non-exhaustive lists of features present which may increase the seriousness of the offence. The features are drawn broadly so as to capture the wide range of circumstances that may be present in these offences.
62. Features determining culpability are listed in two categories: level A (which is the more serious) and level B. A list of features is given for level A, whereas level B is set as “features listed under level A not present”. Level B sets out that all offences of rape are serious in relation to culpability. Where there are additional features of culpability the level of blame of the offender rises to level A.
63. Further explanation of some of the listed features is provided below where we think it may be helpful.
64. The feature “grooming” is not specifically defined in the guidelines. The term is referenced in legislation, such as [section 15](#) of the Sexual Offences Act 2003. However, we have not restricted the definition of this feature in order to provide the court flexibility regarding the particular circumstances of a case where a form of grooming has been used to facilitate an offence.
65. The feature “use of deception to facilitate the offence” is intended to capture offences, for example, where an offender pretends to be a different person, or visits a particular place on false pretences, to gain access to a victim.
66. The feature “abuse of power, or of a position of trust or authority” is intended to capture a number of situations, for example where the offender is a parent, a teacher, a coach, or an employer.
67. “Violence (beyond that which is inherent in the offence)” is intended to reflect that all rape offences involve a violation of the victim’s sexual integrity. This feature captures offences where the violence is additional to that.

68. The feature “offence committed in the course of housebreaking, or following forced or uninvited entry into the victim’s place of residence” is intended to capture both scenarios where a person unknown to the victim is housebreaking or a person known to the victim has forced their way in. This invasion may leave the victim no longer feeling safe in their own home, or place of residence.
69. Features determining harm are set out in three lists: level 1 (which is the most serious), level 2 and level 3. Most of the features are listed under level 2 including severe psychological harm or trauma and severe physical harm. Level 1 states that “the extreme nature of, or the extreme impact caused by, one or more level 2 features may elevate an offence to level 1”. Level 3 has two features: psychological harm or trauma, and physical harm. The violation of the victim through the act of rape is harm in itself. Every rape is serious and level 3, in listing psychological harm and physical harm, takes into account that harm is caused by the offence in itself.
70. Whether the harm caused is considered by the court to be “severe” or “extreme” will depend upon the particular circumstances of the case. There are different ways that a court can receive information about the harm caused. It can be provided through evidence at a trial, or by the prosecutor where there is a guilty plea. Information available to the courts may also include the circumstances of the victim, the content of victim statements, and additional information from, for example, medical or psychological reports. These may include information about the impact the offence has had on the victim, for example where it inhibits their ability to work, or to socialise. In some cases, the trauma may have led to psychological disorders or suicidal ideation. Background reports may also point to a ripple effect of damaging consequences arising from the circumstances of the offence. For example, in a case involving a young victim where the offender is part of their family, the child may be removed from their home and re-housed in a different area, which may include a change of school. This is likely to have a further impact on them. It is ultimately a matter for the judge, using their training and experience, to assess the level of harm based on the information provided to the court.
71. The feature “pregnancy as a consequence of the offence” is included as a factor that may be considered by the court, without distinguishing between any decisions taken by the woman in response.
72. The feature “additional degradation or humiliation” is included at level 2 harm. This is intended to capture degradation or humiliation that is additional to that inherent in the offence itself, for

example committing the offence in front of witnesses.

73. “Prolonged detention or sustained incident”, which is also included at level 2 harm, can happen in a number of ways. For example, this could be by an offender unknown to the victim, or by the victim’s partner within their own home.
74. The Council has given consideration as to whether the guidelines should address offences where there are multiple victims. The sentencing process guideline provides that where there are multiple victims this may form part of the assessment of harm. However, this is primarily of relevance in relation to a single incident. The sentencing process guideline provides guidance on sentencing for multiple offences,<sup>38</sup> and it is expected that courts will have regard to that guidance when sentencing cases where there are multiple victims of rape offences.
75. The guidelines are not intended to capture the potential circumstances of every offence but instead aim to include factors particularly relevant to sentencing the offence and address areas of difficulty. The guidance, therefore, explains that the lists of features (or determinants) of seriousness are not exhaustive and that the court may have regard to any other features which it considers relevant. The features listed to be considered in determining the seriousness of the offence, are separate from the consideration of aggravating and mitigating factors at step 3 (identify aggravating and mitigating factors).
76. The sentencing process guideline provides guidance on the need to prevent factors from being double-counted under steps 1 (assess the seriousness of the offence) and 3 (identify aggravating and mitigating factors). As that guidance applies to every sentencing decision, it is not repeated in these draft guidelines.
77. The sentencing process guideline provides that judges should give reasons for their sentencing decisions.<sup>39</sup> This, amongst other things, assists the public to understand what, and how, factors have been taken into account by the sentencer.
78. We welcome views on the approach to seriousness set out within the guidelines, and the listed features of seriousness generally.

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38. [The sentencing process](#), sentencing guideline, effective from 22 September 2021, paragraphs 29 - 34.

39. *ibid*, paragraph 46.

## QUESTIONS

3. Do you agree or disagree that there should be two levels of culpability in the guidelines?
4. Do you think that the features of culpability listed in each of the guidelines are appropriate?
5. Should any features of culpability be added to either of the guidelines, or should any features be removed?
6. Do you agree or disagree that there should be three levels of harm in the guidelines?
7. Do you think that the features of harm listed in each of the guidelines are appropriate?
8. Should any features of harm be added to either of the guidelines, or should any features be removed?

## Sentencing ranges

79. Step 2 of the guidelines is to select the sentencing range. Sentencing ranges are presented in a matrix, by reference to both levels of culpability and levels of harm. This enables the court to consider the level of culpability, or blame, of the offender alongside the level of harm caused to the victim, to determine the appropriate sentencing range.

80. The ranges set out in the matrix take into account, and broadly reflect, the Council's understanding of current sentencing practice based on the research it has undertaken and considered. They are intended to assist the court in reaching a headline sentence, while allowing sufficient flexibility to take into account the range of circumstances which may be present in these cases.

81. Data provided by the Scottish Courts and Tribunals Service (SCTS)<sup>40</sup> show that there was

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40. The figures provided by the SCTS are based on charge level data and classified by date of disposal. This means that each case may involve multiple charges or disposals, resulting in offenders potentially being counted more than once depending on the number of disposals per case.

a total of 747 offences of rape under section 1 of the Sexual Offences (Scotland) Act 2009 disposed of by the courts in the 12 year period from 2011/2012 to 2022/2023. The average number disposed of by the courts annually was approximately 62, with a median of 58. The mean number of disposals in each four year period within the 12 year period shows an increase with an average of 32, 57, and 98 disposals imposed during the financial years 2011/2012 - 2014/2015, 2015/2016 - 2018/2019, and 2019/2020 - 2022/2023, respectively. Approximately 56% of the disposals were imposed on offenders aged between 31-60 years. Within this age bracket, the highest number of disposals was imposed on offenders in the 31-40 age group. Determinate sentences of imprisonment accounted for more than 99% of disposals. The average number of imprisonment days for determinate sentences was 2149, equivalent to just under 6 years (approximately 5.9 years). The highest number of the custodial sentences fell into the 4-6 years bracket (47%), followed by the 6-8 years bracket (22%), followed by the 2-4 years bracket (19%). Sentences of more than 10 years accounted for 3% of the total.

82. Data provided by the SCTS show that there was a total of 113 offences of rape of a young child under section 18 of the Sexual Offences (Scotland) Act 2009 disposed of by the courts in the 12 year period from 2011/ 2012 to 2022/ 2023. Of these cases, the average number disposed of by the courts annually was approximately 9, with a median also of 9. During the first four years of the 12 year period (2011/12 - 2014/2015), there was an average of 7 disposals. This is followed by an average of 11 disposals during the subsequent 4 years (2015/2016 - 2018/2019), with a slight dip to an average of 10.5 for the last 4 years (2019/2020 - 2022/2023). Approximately 26% of the disposals were imposed on offenders aged under 18; while 12% of offenders were aged 18-20, and 9% were aged 21-24. The 31-40, 41-50, and 51-60 age groups each accounted for 12% of the disposals over the 12 year period. Sentences of imprisonment accounted for a large majority of disposals. The average number of imprisonment days for determinate sentences was 2106, equivalent to approximately 5.8 years. The average number of imprisonment days where the offender was under the age of 21 was 1194 days, equivalent to approximately 3.3 years. The highest number of the custodial sentences fell into the 4-6 years bracket (35%), followed by the 2-4 years bracket (25%), followed by the 6-8 years bracket (19%). Sentences for more than 10 years accounted for approximately 5% of the total.
83. Data in relation to common law offences for both rape and rape of a young child during the same 12 year period are available in the impact assessments provided along with this document on the Council website consultation page. These data are provided as an overall total for both rape and rape of a young child due to the challenge of distinguishing between

common law offences committed against adults versus children, with complete accuracy. For further information on sentencing data provided for both offences, see the impact assessments.

84. The uppermost range in the matrix for level A culpability and level 1 harm within the draft guideline for rape is set at 10 – 13 years' custody for determinate sentences. The upper most range for the rape of a young child is 11 – 14 years for determinate sentences. The sentencing ranges cover determinate sentences where an end point is set for the years of imprisonment. For the most serious rape offences, the guideline also recognises the use of orders for lifelong restriction. These are indeterminate sentences where there is no set end point to the years of imprisonment. Therefore, these sentences do not fit within a sentencing range matrix, and are discussed in separate sections of the guideline. Although these sentences are a form of life sentence, the sentencer must set what is called the 'punishment part' of the sentence. The guidelines include what considerations must be taken into account by the sentencer in determining the punishment part of the sentence. See the glossary for more information on these sentences.
85. The lowest range in the matrix for level B culpability and level 3 harm within the draft guideline for rape is set at 4 – 6 years' custody. The lowest range for the rape of a young child is 5 – 7 years. In a recent case heard at the Appeal Court ([HMA v MG](#)<sup>41</sup>), the Crown appealed against a sentence of four years' imprisonment as being unduly lenient. The Appeal Court decided that the sentence was lenient, although not *unduly* lenient (which is the legal test for a successful Crown appeal).
86. As stated, the Council's guidelines are not intended to cover every eventuality, including the rare occasions on which a sentence higher than, or lower than, the sentencing ranges set out in these guidelines might be imposed. The ranges do not encompass the maximum sentence set out in law, which is life imprisonment (as noted within the guidelines at paragraph 5). Although sentences of life imprisonment are, on occasion, imposed for very serious rape offences, this is very rare. Including the statutory maximum within the sentencing ranges does not seem to reflect actual sentencing practice, and may not provide sufficient guidance as to the appropriate sentence, which could limit its usefulness both in terms of assisting the court and of promoting consistency and predictability. It is also worth noting that, as ranges become wider, they may become less helpful to the court as well as to the wider public in terms of understanding sentencing.
87. It is worth noting that guidelines are not binding on courts. A court could conclude that an

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41. [HMA v MG \[2023\] HCJAC 3](#).

individual case was sufficiently serious to justify the imposition of a headline sentence higher than that at the top end of the range, including the maximum life sentence. The Council considers that the types of case which are so serious as to justify a sentence outwith the maximum ranges of the guidelines are sufficiently rare that they need not be included within the guidelines. Equally, the Council considers that the types of case which involve the mitigating circumstances necessary to justify a headline sentence outwith the lowest range within the guidelines are also too infrequent to be included.<sup>42</sup>

## QUESTION

### 9. Do you agree with the sentencing ranges for each of the guidelines?

## Public protection and risk

88. The Council's overarching guideline on the principles and purposes of sentencing applies to sentencing in all cases, including rape cases. The core principle is that sentences should be fair and proportionate, and the guideline sets out what this requires. The guideline provides a non-exhaustive list of purposes that a sentence might seek to achieve including: protection of the public, punishment, rehabilitation of offenders, giving offenders the opportunity to make amends, and expressing disapproval of offending behaviour.
89. The draft rape guidelines do not emphasise any particular purposes of sentencing, as the Council considers that any, or all, purposes of sentencing<sup>43</sup> may be appropriate depending on the circumstances of the case.
90. The work commissioned by the Council on public perceptions indicates that, in relation to sexual offences in general, members of the public feel that the risk of reoffending and the protection of the public are important factors to consider during sentencing.<sup>44</sup>

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42. As previously noted, the headline sentence does not take account of a guilty plea, or time already spent in custody. Offence guidelines are also intended to be read alongside the published guidelines of general application on the principles and purposes of sentencing, the sentencing process, and sentencing young people.

43. [Principles and purpose of sentencing](#), sentencing guideline, effective from 26 November 2018.

44. [Public perceptions of sentencing in Scotland. Qualitative research exploring sexual offences](#) (July 2021) prepared for the Scottish Sentencing Council by Hannah Biggs, Susan Reid, Kaushi Attygalle, Konstantina Vosnaki (ScotCen), Dr Rachel McPherson (University of Glasgow) and Professor Cyrus Tata (University of Strathclyde), p. 38.

91. Discussion of two specific sentences intended to assist in providing public protection - extended sentences and orders for lifelong restriction - is included within the draft guidelines. To assist the courts, as well as to promote public understanding, the draft guidelines explain what these sentences are and how they operate. The explanatory narrations can be found at paragraphs 13 – 14 (extended sentences), and at paragraph 15 and paragraphs 21 – 27 (orders for lifelong restriction) of the guidelines.
92. The [Criminal Procedure \(Scotland\) Act 1995](#) provides that where the court intends to pass a determinate sentence and considers that the period (if any) for which the offender would be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender, it may impose an extended sentence. Before passing an extended sentence, a court must consider a justice social work report about the offender and their circumstances and, if the court thinks it necessary, hear from the author of the report.
93. The [Criminal Procedure \(Scotland\) Act 1995](#) also sets out the process for imposing an order for lifelong restriction. A report providing an assessment of the level of risk posed to the public by the offender is ordered to support the judge's decision as to whether the risk criteria are met for the order to be imposed.
94. In addition to discussion of these particular sentences, the guidelines also make reference (at paragraph 28) to the notification requirements of the Sexual Offences Act 2003, sometimes referred to as the 'sex offenders register'. The imposition of any sentence for these offences will automatically result in the offender being made subject of the requirements. The offender must notify the police of certain personal data, including their home address and passport details. These requirements provide a further measure of public protection.

#### QUESTION

- 10. Do the guidelines sufficiently address the issues of public protection and risk?**



## Aggravating and mitigating factors

95. Particularly relevant aggravating and mitigating factors are provided at step 3 of the guidelines. Aggravating factors are facts and circumstances which may make the offence more serious for sentencing purposes. Mitigating factors, including factors personal to the offender, may lead to a less severe sentence. Cases may have both aggravating and mitigating factors. If one of the aggravating factors is an integral feature of the offences it will already have been taken into account at step 1 in assessing the seriousness of the offence, and should not be considered again at this stage.
96. Mitigating factors are also considered by the court, including in relation to serious offences such as rape. They are listed in the guidelines to help the public better understand the sentencing process that is followed. Three mitigating factors, generally considered by the courts for all offences, are included in the guidelines: “no previous convictions or no relevant/ analogous convictions”, “mental illness or disability, especially where linked to the commission of the offence”, and “remorse”. The latter two are discussed further in this consultation (see paragraphs 105-110).
97. The guideline on sentencing rape of a young child includes three additional aggravating factors. These are: “exploiting contact arrangements with a child to commit an offence”; “victim encouraged to recruit others for the purpose of similar offending”; and “particularly young victim”.
98. We welcome views on the lists generally, and on a number of specific issues discussed below.

### **Withdrawal of consent (rape guideline only)**

99. During our engagement process, a question arose in relation to sentencing rape offences where there has been initial consent to sexual intercourse which is later withdrawn, or consent to sexual intercourse under certain conditions which are secretly breached, for example with agreement to sexual intercourse with use of a condom which is secretly removed during the intercourse (‘stealthing’).
100. The Council has taken the approach that such cases may, in some circumstances, lack certain aggravating factors (which can make an offence more serious). For example, such cases may lack factors such as:

- administration of alcohol and/or drugs on the victim to facilitate the offence
- offence committed in the course of housebreaking, or following forced or uninvited entry into the victim's place of residence
- recording, or sharing of images, of the offence
- commercial exploitation and/or motivation
- abduction
- prolonged detention, or sustained incident.

101. Therefore, the Council has not included withdrawal of consent as a factor that would make the offence of rape more or less serious. This does not apply to the guideline on the rape of a young child. The law says that a child under the age of 13 cannot legally consent to sexual intercourse.

## Location of offence

102. During engagement conducted by the Council, the question was raised as to whether the term "location" was too vague as to be of assistance to the court.

103. According to the Council's analysis of recent cases, the courts, at times, treat a rape in certain locations as an aggravating factor. This primarily includes the victim's home. According to Rape Crisis Scotland, whose figures are based on information provided by people contacting their centres, around 38% of abuse takes place in the victim's home.<sup>45</sup> The Council's study of recent cases also includes other locations which might be relevant to the sentencing decision: an unknown and unfamiliar location following an abduction, a prison, and a hospital. However, it may also be that other locations in relation to the victim may make the offence more serious. The draft guidelines include "location or timing of the offence" as an aggravating factor, which also aligns with the approach set out in the definitive guideline for rape offences published by the Sentencing Council for England and Wales. This could contribute to current sentencing practice when this guideline is used as a cross-check. Location is not defined further to enable flexibility in relation to the particular circumstances of a case.

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45. [Rape Crisis Scotland Annual Report 2021-2022](#), p. 31; in this context abuse relates to sexual abuse.

## Previous otherwise good character or exemplary conduct

104. Although “previous otherwise good character or exemplary conduct” is a mitigating factor which is taken into account in many offences, the Council has not included it in the draft guidelines. It is listed as a mitigating factor in the [sentencing process guideline](#) (at Annex C, bullet point 7) and can be considered by the court where relevant. However, the Council does not consider that it is particularly relevant to the offence of rape. There may also be circumstances where this factor might be used to facilitate the offence. For example, an offender who is respected because they have volunteered as a leader of a community or youth organisation could be seen as having a previous otherwise good character. However, if they used this status to access or to silence victims this could in fact be regarded as an aggravating factor. For these reasons it is not included in the draft guidelines.

## Remorse

105. Remorse, while included in the [sentencing process guideline](#) (at Annex C, bullet point 5) as a mitigating factor, is also included in the draft guidelines for the purpose of consultation.

106. In relation to public views, more than three-quarters (79%) of the participants in the public perceptions research carried out on behalf of the Council felt that remorse should make no difference to the sentence given to the offender in rape offences.<sup>46</sup> When a similar public perception exercise was conducted for an offence of causing death by careless driving, around half of the respondents (51%) felt that remorse should make no difference to the sentence.<sup>47</sup> In a study of victims’ views, participants were fairly unanimous that remorse should carry limited weight.<sup>48</sup> This scepticism stemmed from their belief that offenders were adept at ‘saying sorry’ so that they could continue their abuse.<sup>49</sup>

107. It is our understanding that remorse, and actions showing remorse, for offences in general are considered to be a part of mitigation by many sentencers. Remorse can be seen not only to show the level of the offender’s regret, but also to show that the offender may be more open to rehabilitation and ending their offending behaviour.

46. [Public perceptions of sentencing national survey report](#) (September 2019), prepared for the Scottish Sentencing Council by Carolyn Black, Rachel Warren, and Rachel Ormston (Ipsos MORI Scotland), and Professor Cyrus Tata (University of Strathclyde), p 32.

47. *ibid*, p. 25.

48. [Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences](#), (May 2024) prepared for the Scottish Sentencing Council by Oona Brooks-Hay, Michele Burman and Jenn Glinski (University of Glasgow), p. 45.

49. *ibid*, p. 41.

## Mental illness

108. “Mental illness or disability,<sup>50</sup> especially where linked to the commission of the offence”, which is included in the [sentencing process guideline](#) (at Annex C, bullet point 1) as a mitigating factor, is also included in the draft guidelines, for the purpose of consultation.
109. It is our understanding that a mental illness or disability, especially where linked to the commission of an offence is considered by many sentencers to be part of mitigation for offences in general.
110. In relation to the Council’s commissioned research on sexual offences, members of the public thought that the impact a sentence would have on an offender should only be taken into account if an offender had experienced similar victimisation or was deemed vulnerable in terms of their upbringing or mental health. Even under these circumstances, victims did not think these factors should be considered. When faced with a specific scenario, members of the public regarded personal circumstances, such as mental health, as important in determining the sentence.<sup>51</sup>

### QUESTIONS

11. **Are the aggravating factors listed in each of the guidelines appropriate?**
12. **Should any aggravating factors be added to either of the guidelines, or should any factors be removed?**
13. **Are the mitigating factors listed in each of the guidelines appropriate?**
14. **Should any mitigating factors be added to either of the guidelines, or should any factors be removed?**

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50. Use of the terminology around the discussion of mental health is still being considered by the Council as we continue to engage on the subject.

51. [Public perceptions of sentencing in Scotland, Qualitative research exploring sexual offences](#) (July 2021), prepared for the Scottish Sentencing Council by Hannah Biggs, Susan Reid, Kaushi Attygalle, Konstantina Vosnaki (ScotCen), Dr Rachel McPherson (University of Glasgow) and Professor Cyrus Tata (University of Strathclyde), p. 74.

## Potential impacts of the guidelines

111. The Council must carry out an assessment of the likely costs and benefits of guidelines and of their likely effects on the criminal justice system generally. We must publish this at the same time as publishing any draft guidelines. We would be grateful for your views on the potential impacts of these guidelines to assist with our projections and further development of the guidelines themselves.
112. We think that the main benefits of these guidelines will be to assist the courts in reaching sentencing decisions in rape cases, thereby aiding consistency, and increasing public understanding of how sentencing decisions are made. We do not think that the guidelines will result in any significant costs.

### QUESTIONS

15. Do you think either of the guidelines will influence sentencing practice in Scotland?
16. Do you think either of the guidelines will lead to an increase or decrease in public understanding of how sentencing decisions are made?
17. Do you see any benefits or negative effects arising from the introduction of each of these guidelines?
18. What costs (financial or other) do you see arising from the introduction of each of these guidelines, if any?

## Further comments

113. The engagement and consultation process is a critical part of developing sentencing guidelines intended to assist judges and the public. We welcome any further comments on these guidelines.

### QUESTION

19. Please provide details about anything else you feel is of importance or we may have omitted with regard to sentencing for rape offences.



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