

Scottish Sentencing Council Consultation - views on draft sentencing guidelines for rape offences

Response from Scottish Women's Aid

Scottish Women's Aid (SWA) is the lead organisation in Scotland working to end domestic abuse and plays a vital role in campaigning for effective responses to domestic abuse.

SWA is the umbrella organisation for local Women's Aid organisations across Scotland; each providing practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our members include crisis intervention, advocacy, counselling, outreach, follow-on support and temporary refuge accommodation.

We also run the Scotland's Domestic Abuse and Forced Marriage Helpline taking over 1000 calls, WhatsApp messages, and texts (24h/365) every month.

Introduction

SWA welcomes the creation of these Guidelines and the opportunity to comment on them. They have the potential to introduce consistency in sentencing for this offence and provide survivors with clarity as to why their rapist received a particular sentence.

However, application of the Guidelines can only be done if sentencers have a clear and appropriately informed understanding of the crime, dynamics and impact on victim.

Sentencers' interpretation of the features indicating culpability, harm, aggravations and mitigating factors, what constitutes evidence of these and how these are addressed in sentencing, particularly the application of mitigating factors, has the unforeseen consequence of potentially influencing the investigation of rape offences, the prosecution and, importantly, conduct of the defence.

Therefore, care must be taken around the support and protection of victims and witnesses and how they are treated in court, the questions they are asked and that this does not result in the process becoming even more intrusive for the purposes of establishing or disproving one of these matters above.

We have commented on all aspects of the sentencing process below in our response.

Offender known or not known to victim

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?

- Section 1- 'Rape'- Yes-No-Don't know
- Section 18- 'Rape of a young child'- Yes-No-Don't know

We do not believe that specifying whether the offender is known or not known to the victim as a determinant of seriousness will lead to double counting as the paper does not demonstrate a full understanding of the factors at play when rape is perpetrated in the context of domestic abuse.

The consultation paper, at paragraph 52, states that the SSC *“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 appropriate for a number of reasons.”* However, the consultation itself also acknowledges in the earlier paragraph 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.*
29”

We would also refer you to the research carried out with survivors of domestic abuse and the charges against their perpetrators set out in Table 5 of that paper which, for, included multiple charges of rape and sexual assault against individual women, on one occasion six charges of rape and two sexual assaults against the same victim by the perpetrator.

In addition, the views of survivors interviewed in the 2024 research commissioned by the SSC itself states, **Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences** 19. *“Where rape and sexual assault are perpetrated by someone known to the victim-survivor, as is the case with most sexual offences, the breach of trust that occurs was highlighted as an aggravating factor.”*¹

The context of the use of *“threats or coercion to facilitate the offence”* and that wording do not reflect the prolonged, sustained, repeated and deliberate nature of the sexual abuse perpetrated against women in the context of domestic abuse. The victim living with coercive control, is highly unlikely to disclose this abuse. Perpetrators of domestic abuse have myriad tools for threatening and coercing women they are raping, including threats to children, threats of financial destitution, and indeed threats of assault and murder.

It is not simply *“the degree of planning”* or use of *“Violence”* that should have a bearing on the seriousness of the offence and this wording does not reflect the reality that, in fact, rape and sexual assault perpetrated against a partner or ex-partner in the context of domestic abuse does not necessarily at all involve a strategic planning of the timing and nature of crime and behaviour surrounding the commission of the crime- it may be carried out spontaneously but regularly and repeatedly as part of the abusive behaviour and pattern of abuse perpetrated against

¹ <https://www.scottishsentencingcouncil.org.uk/media/4dufxpcj/victim-survivor-views-and-experiences-of-sentencing-for-rape-and-other-sexual-offences.pdf>

the victim so demonstrate the totality of the perpetrator's control over them. We will discuss this further in relation to culpability and aggravating factors.

It is also important that this behaviour is seen in context, not only in relation to repeated abuse against one partner when used by serial abusers against multiple partners.

If yes, what guidance do you think would be useful?

We would suggest that this matter be incorporated into the Guidance under “*Culpability*” or “*Harm*”, under separate headings, worded as

- **“Offence is part of a pattern of coercive control and domestic -abuse related offending under section 1 of the Domestic Abuse (Scotland) Act 2018”** and
- **“Offence involves the abuse of a partner or ex-partner and attracts the aggravator under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.”**

We are firmly of the opinion that any offence of rape labelled and prosecuted as part of the course of conduct under the section 1 Domestic Abuse (Scotland) Act 2018 (DASA) offence must be included under “*Culpability*” or “*Harm*.”

We note that where abuse of a partner or ex-partner is involved, under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, this is listed as an Aggravation under Annexe A of the Sentencing Principles document. However, we are of the opinion that this categorisation does not go far enough in addressing and highlighting the nature of the offence and harm caused to the victim.

Therefore, similarly, where the offence attracts the statutory 2016 aggravator of being perpetrated against a partner or ex-partner and is not prosecuted as part of the 2018 course of conduct offence, again, this should be included under “*Culpability*”.

It is important that this dynamic features in the training of the judiciary in relation to domestic abuse and the use of rape and sexual assault as a dynamic, coercive and controlling factor within the pattern of abuse.

Historical offences

2. Do you think further guidance should be provided in relation to historical rape offences in either of the guidelines? If yes, what guidance do you think would be useful?

Rape- Yes-No-Don't know

Rape of a young child- Yes-No-Don't know

Paragraph 57 of the consultation paper refers to some of the factors taken into account and while “*breach of trust*” and a “*sustained and repeated offence*” is included under “*Culpability*” in the draft Guidelines, the fact that offender had “*evaded prosecution during the intervening years and lived at liberty*” is not listed and should be added.

Also, the fact that the offender prevented the victim from disclosing the offence at the time or obtaining assistance must also be taken into account for historical offences,

particularly those committed as part of the ongoing tactics of abuse used by a perpetrator of domestic abuse against a partner or multiple partners and in relation to children and young people. Such action, and the fact that the offence was sustained and repeated, both must be added to the factors listed under “*Culpability*” as a general principle and we will discuss further below.

The consultation paper also referred to “*the victim was in a position to describe the long-term psychological impact of the offences over time*” and certainly any impact of this nature must be a determinative factor in the seriousness of a sentence.

Assessing seriousness

3. Do you agree or disagree that there should be two levels of culpability in the guidelines? If you disagree, please explain your answer.

- **Rape- Agree-Disagree-Don't know**
- **Rape of a young child-Agree-Disagree-Don't know**

Firstly, the text at paragraph 10 of the draft Rape Guideline should be expanded to emphasise that the consideration of harm of any degree, physical, mental, emotional, psychological, must be taken into account, so that the emphasis is not solely placed on physical harm, so with the addition of the text in red, the paragraph would read as follows: -

“10. The seriousness of an offence is determined by two things: the culpability of the offender and the harm caused, (e, g **physically, mentally, emotionally, psychologically**) or which might have been caused, **to any degree (including any impact on the victim(s))** by the offence. As either or both culpability and harm increase, so may the seriousness of the offence.”

We have concerns around differentiating “harm” into different levels of “seriousness”, Level A and the lesser Level B, as this introduces a hierarchy which may not match the actual experiences of victims and how the rape has impacted across all of their life. Every victim’s experience is different, and the impact of the rape on them is equally different. Thresholds such as “serious” and “significant” are unhelpful as what may appear to the court, prosecution and the defence as insignificant and not important was overwhelmingly traumatic to the victim and similarly, an impact or constriction in the way that they lead their life, engage in society, family and work that appears insignificant and not important may be hugely detrimental traumatic.

It is not clear how “significant” would be defined, and by whom and what would constitute “significant?”

4. Do you think that the features of culpability listed in each of the guidelines are appropriate? If you answered 'no' in relation to either guideline, please list which features of culpability are inappropriate and explain your reasons

- **Rape- Yes-No-Don't know**
- **Rape of a young child-Yes-No-Don't know**

We have commented on the individual aspects of certain features of culpability, which would apply across both sets of Guidelines, as appropriate, as follows: -

Culpability -Level A

Significant degree of planning - relevant to both sets of Guidelines.

- There is no explanation as to how a “*significant degree of planning*” will be quantified, as evidence of **any** degree of planning should cause concern so not clear what would be regarded as a “*lesser*” effort.
- Our comments in relation to Question 1 on rape in the context of domestic abuse and “planning” are valid here, given that perpetrators of abuse do not “plan” the how they will abuse women in the way that this inferred by this feature.

Acting together with others to commit the offence- relevant to both sets of Guidelines.

- This may not cover situations where third parties participated in, for instance, the recording and then distribution, including across social media, of film, tape, photographs, sound recordings of the victim and of the offence, or where they participated in/facilitated the abduction/ detention of the victim, encouraged others to record, participate, abduct/detain but did not actually participate in the rape itself.
- It is also unclear whether third party action of recording, etc, would be covered under “*Recording or sharing images of the offence.*”

Administration of alcohol and/or drugs to the victim to facilitate the offence- relevant to both sets of Guidelines.

- Repeated administration of alcohol or drugs to repeatedly facilitate the offence may not be covered by this feature and this may be a tactic routinely employed by an offender to subdue their victim, especially where when the offence is perpetrated in the context of domestic abuse.

“Grooming” - relevant to both sets of Guidelines.

- It is noted that in relation to “grooming”, paragraph 64 of the consultation paper stated “*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.*”
- For the avoidance of doubt, this position must be clearly explained in the Guidelines.

Use of threats or coercion to facilitate the offence- main Guideline only

- As discussed above, this will not adequately take into account situations where the offence is perpetrated in the context of domestic abuse and where the coercion is not a “one-off” behaviour but part of a prolonged, sustained course of conduct
- This feature requires to be expanded and reworded to take this into account or even better, a separate entry along the lines of “***Use of threats or coercion in the context of domestic abuse to facilitate the offence.***”

Previous violence, or other offending, against the victim- main Guideline only

- This wording is unhelpful in relation to offences perpetrated by partners or ex-partners in the context of domestic abuse. It does not reflect the 2018 DASA legislation and the role of coercive control and therefore the fact that the rape

may have been committed as part of the perpetrator's ongoing strategy of abuse against the woman.

- The feature needs to cover coercion in a relationship/former relationship so the wording requires expanding to accommodate coercive control and to recognise that violence is not the sole dynamic in domestic abuse and Gender Based Violence (GBV), so with the addition of the text in red, the wording should read along the lines of **“Previous violence, *abuse, or other offending, particularly that in the context of domestic abuse or gender-based violence, against the victim.*”**

Offence committed in the course of housebreaking, or following forced or uninvited entry into the victim's place of residence- we have commented on this below under “Harm”.

Recording, or sharing of images of, the offence- relevant to both sets of Guidelines

- See our comments above in relation to “Acting with others”.
- This feature requires clarification as to whether it would cover recording of the abuse by the offender and/or others who were not part of the actual rape, noting that this is not the same as the feature of “Acting together with others to commit the offence.”
- Also, this may not cover moving images, as opposed to still photographs and sound recordings of the offence, so must be amended accordingly.

5. Should any features of culpability be added to either of the guidelines, or should any features be removed? If you believe any features of culpability should be added, please list these, identifying which guideline(s), and explain your reasons.

Consideration should be given to adding the following to the main Guideline:

Offence is part of a pattern of coercive control and domestic -abuse related offending or attracts the 2016 aggravator.

We would refer to our response to Question 1 above to the effect that both any offence of rape labelled and prosecuted as part of the course of conduct under the section 1 DASA offence, or where the offence attracts the 2016 aggravator of being perpetrated against a partner of ex-partner, must be included under “Culpability” or “Harm”, for the reasons set out in our response to Question 1.

Forced abortion after a rape- relevant to both sets of Guidelines -this can occur as part of the pattern of domestic abuse or by someone related to or in a position of trust with the victim.

Stalking and harassment of the victim- relevant to both sets of Guidelines- this is different from “planning” and may also be a tactic of domestic abuse.

Removal of a condom or removal of a victim's contraceptive device deliberately and against victim's consent-

- This not only displays contempt for the victim but a complete disregard for health consequences of the offence, noting also that this may be a feature of a rape, or rapes carried out in the context of domestic abuse, with the threat

of pregnancy used to control and frighten the victim, especially to prevent reporting.

- It should also be noted that this is a deliberate and calculated act so different from the “harm” of pregnancy experienced by the victim, so is not “double counting.” If not considered under “*Culpability*” then this should be added as an “*Aggravating Factor*.”

Offender prevented the victim from disclosing the offence at the time or obtaining assistance - relevant to both sets of Guidelines.

- For the reasons discussed above in relation to the offender being known to the victim and for historical offences, this should be moved from being a category of “*Aggravation*” and elevated to the factors listed under “*Culpability*” as a general principle.
- It should also be added to the separate Guideline covering young children.

If you believe any features of culpability should be removed, please list these, identifying which guideline(s), and explain your reasons.

6. Do you agree or disagree that there should be three levels of harm in the guidelines? If you disagree that there should be three levels of harm in the guidelines please explain your answer

- Rape-Agree-Disagree-Don't know
- Rape of a young child-Agree-Disagree-Don't know

We would firstly address the issue of Victim Impact Statements (VIS). Paragraph 49 states that “*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.*” If the concept of “harm” is to be a major factor in determining a sentence, survivors must have the right to read out their VIS in court, should they choose to do so.

We understand that currently, the courts’ response to allowing survivors to exercise their legal right to present and read their VIS in court is not consistent across Scotland. It is not appropriate that access to this is randomly decided- their decision to read their VIS must be supported by the court and their decision and their right supported by the court must be uniformly available and applied across Scotland. In addition, completion of the VIS may be a traumatic and emotional process for survivors so support must be available for those who wish to engage in this process, particularly children and young people, as it is important that their voice and the impact of the offending on them be heard by the sentencer.

Three levels of Harm

We are very concerned at this differentiation; what appears to be “low” level in terms of the three levels in the draft Rape Guideline may actually be significant to the victim and it is not clear how an offence would be “elevated” from Level 3, the “lowest” level, up to Level 3, defined by either “extreme nature” or “extreme impact caused”.

It is not clear how this would be measured and what criteria will be used, for example: -

- nature of the rape and surrounding circumstances

- measuring impact restriction of and reduction in victim's agency and interference with their everyday life, work and relationships
- restriction long-term physical consequences involving treatment, medical intervention
- the necessity of the victim having clinical diagnoses or being prescribed, medication

All of this runs the risk of the defence diminishing and being dismissive of the victim's experiences and the shame this offending caused them, especially adult or child victims of historical rape, and turning the whole prosecution into a further traumatic and shameful experience.

Rape is an invasive crime and the burden on the victim to prove harm and lasting nature of the harm is neither victim centred, nor trauma informed.

It is not clear whether there will be a need for a professional diagnosis of the "harm" and the existence of a "condition" especially mental health of the victim. We are concerned about conclusions drawn by third parties from counselling records, or otherwise, inappropriately downgrading the harm that a victim has incurred. Also, the notes from any sessions being requested by the defence and referred to in court or interpreted in such a way as to diminish the impact and harm, with the resultant detrimental effect on the victim of their experience being treated in this way, especially where the court chooses to accept such positions, discounting this harm or finding it not persuasive.

Level 1 refers to "*The extreme nature of, or the extreme impact caused by, one or more level 2 features may elevate an offence to level 1.*" However, it is not clear what an "extreme impact" would look like; how it will be defined and by whom; how "extreme" will be measured and what it will be compared to against other "impacts" on other victims? It is also not clear what these covers and whether it will measure long-term and/or short-term impacts and the range of impacts, e.g., physical, mental, psychological?

There is also the issue of the impact on other people, for instance, a woman's children if they were present in the locus during single incident or ongoing abuse. While this is listed under "*Aggravations*" it should be elevated to listing under "*Culpability*" or "*Harm*" where the rape was perpetrated against a partner or ex-partner as it is not recognised that the offence may have been deliberately perpetrated while children were present or nearby to humiliate and silence the woman, to deter and silence children from reporting the abuse and also as a tactic of abuse against the children.

7. Do you think that the features of harm listed in each of the guidelines are appropriate? If you answered 'no' in relation to either guideline, please list what features of harm are inappropriate and explain your reasons

- Rape- Yes-**No**-Don't know
- Rape of a young child- Yes-**No**-Don't know

8. Should any features of harm be added to either of the guidelines, or should any features be removed? If you believe features of harm should be added, please list these, identifying which guideline(s), and explain your reasons.

We have identified that amendments are needed to the following: -

- **Pregnancy, and any consequences, as an outcome of the offence-relevant to both sets of Guidelines- *clarity*** is needed as to whether this takes account of abortion, forced abortion and, spontaneous abortion/miscarriage where the victim has been pregnant
- **Prolonged detention, or sustained incident - relevant to both sets of Guidelines** – we would refer to comments above in relation to domestic abuse.

We suggest that the following features are added to the list of “Harm”-

That the victim was “*particularly vulnerable due to personal circumstances*”- relevant to both sets of Guidelines

- Offenders can, and do, target victims who are vulnerable due to personal circumstances such as age (younger and older victims), illness, mental or physical disability. Women with a disability are at increased risk for experiencing sexual violence².
- Women from black and minority ethnic backgrounds are also less likely to report rape meaning that they are also vulnerable to predatory offenders and perpetrators of domestic abuse will utilise this fact to silence women and continue the abuse unhindered.
- An alternative would be to include “***Motivated by either race, sexual orientation or disability***” under “*Culpability*” as this appears in the guidance from England and Wales but is not listed here. This may be covered by the statutory aggravations listed in Annex A of the Sentencing Process Guideline³ but would more appropriately be considered as a more serious factor and therefore added to the main Rape Sentencing Guideline under “*Culpability*.”

Suicide of the victim following the rape

There is a noted relationship between sexual abuse and female suicidal behaviour.⁴ The emotional and physical after-effects of rape are such that the survivor can feel so distressed that suicide is seen as a way as escaping from the pain and distress.⁵

Offence committed following forced or uninvited entry into the victim’s place of residence where that victim has co-located due to previous offending or abuse from the offender

- We note that included in the list of features determining “*Culpability*” is that the “*offence committed in the course of housebreaking or following forced or uninvited entry into the victim’s place of residence*” and paragraph 68 of the

² <https://www.cdc.gov/sexual-violence/about/sexual-violence-and-intimate-partner-violence-among-people-with-disabilities.html#:~:text=Disability%20affects%20more%20than%20one,violence%20and%20intimate%20partner%20violence.>
Sexual Violence Against Women With Disabilities: Experiences With Force and Lifetime Risk

<https://www.sciencedirect.com/science/article/pii/S0749379722000496>

³ <https://www.scottishsentencingcouncil.org.uk/media/jtbhlsre/the-sentencing-process-guideline-d.pdf>

⁴ The relationship between sexual abuse and female suicidal behavior <https://pubmed.ncbi.nlm.nih.gov/8281805/>
Justice Journeys Informing policy and practice through lived experience of victim-survivors of rape and serious sexual assault
https://www.sccjr.ac.uk/wp-content/uploads/2019/08/Justice-Journeys-Report_Aug-2019_FINAL.pdf

⁵ <https://www.rapecrisisscotland.org.uk/resources/suicidalthoughts.pdf>

consultation paper states that *“This invasion may leave the victim no longer feeling safe in their own home or place of residence.”*

- We are of the opinion that the wording of the feature **“Offence committed in the course of housebreaking, or following forced or uninvited entry into the victim’s place of residence”** should be expanded, or a separate category created, to address situations where the perpetrator broke into, or forced their way into, their ex-partner’s home when this home/residence was not the former family/shared home and where the perpetrator has tracked down the woman to her new home/residence and committed the rape and possibly other offences.
- This facet of the offence would very much leave women feeling no longer safe anywhere, not just in a new home or residence and makes the perpetration of the offence more purposeful, targeted and devastating to the victim.

Victim forced to leave their home or place of residence

- To complement the above and also demonstrate additional harm caused to the victim by this, it is necessary that *“Victim forced to leave their home or place of residence”* is added under the list of *“Harms.”* Where the harm experienced as a result of the rape has rendered them unable to live in the place where the rape occurred, for a variety of reasons, including safety and fear of repeat offending, and they have been obliged to move, or even to move again, this must be recognised in sentencing.
- This will be a specific issue where the rape occurred in the context of domestic abuse and the victim was forced to leave her home, to which she may have moved when fleeing from the perpetrator, since the woman may have felt that in addition to the memory of the rape, that the home/residence was no longer a safe place for her and her children.

Rape of a young person over the age of 13 and under 16

- The accompanying Guideline on sentencing for Rape of a Young Child covers rape of a child under 13. It appears, however, that the main Rape sentencing Guideline is intended to cover those over 16. This looks to have created an unintended gap on addressing this offending against children aged 13 and over up to under 16.
- Therefore, specific consideration of children aged 13 and over up to under 16 needs added to the main Guideline in line with the Sexual Offences (Scotland) Act 2009.
- In this regard, it should be emphasised that within this Guideline, rape of a young person over the age of 13 and under 16 is a different consideration to rape of an adult and arguably needs considered as a separate and specific “Harm.”

We suggest a reclassification and elevation to the status of a “Harm” for the following “Aggravations”: -

Steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution.

- Given the particularly predatory nature of the offence, in both sets of Guidelines, **“Steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution”** should be moved from the category of being an “Aggravation” and elevated to inclusion under “Harm.”

- This particular behaviour in itself will cause additional harm and fear to an already traumatised victim, where they are threatened, coerced, shamed, blackmailed by the offender. This is not only an interference with their legal and human rights but also being prevented from accessing support may have profound additional harm to the victim in so many ways.

If you believe features of harm should be removed, please list these, identifying which guideline(s), and explain your reasons.

Sentencing ranges

9. Do you agree with the sentencing ranges for each of the guidelines? Please provide any reasons for your answer

- **Rape-Yes-No-Don't know**
- **Rape of a young child-Yes-No-Don't know**

It is not entirely clear as to the source of the sentencing range figures in paragraph 12 and why the maximum sentence for the “most serious” Level A and Level 1 is set at a maximum of 13 years, particularly given that the maximum sentence applicable on indictment in relation to a conviction under section 1 of the DASA is 14 years.

This seems an arbitrary figure given that the maximum sentence threshold in England and Wales, outwith a life sentence, can be 19 years.

On the matter of “life sentences” and Orders for Lifelong Restriction (OLR), this section needs to be much clearer. Specifically, the information in paragraphs 21- 27 should be included earlier in the document at paragraph 15 which should clearly state that an OLR is available in addition to the custodial sentence range set out. Otherwise, as a sentencing option, an OLR seems to be presented as an afterthought, not attracting the same attention or weight. If the OLR option was to be overlooked, this would be unhelpful as these are particularly useful in protecting the public AND specific victims from serial rapists and perpetrators of domestic abuse who have raped multiple partners.

At any rate, the text around the OLR option in paragraph 24 should be expanded to emphasise the considerations that should come into play around the imposition of this sentence, with the addition of the wording in red, as follows: -

*“24. However, the court can fix a greater proportion of that period, up to and including all of that period, if it considers that it would be appropriate to do so taking into account in particular the seriousness of the offence, **including the impact on the victim** or of the offence combined with other offences of which the offender is convicted on the same indictment; **whether the offence was committed while out of prison on licence, early release or parole; whether the offence was committed while the offender was subject to bail conditions and/or subject to any court order**; whether the offence was committed while the offender was serving a sentence for another offence; and any previous conviction. “*

Public protection and risk

10. Do the guidelines sufficiently address the issue of public protection and risk? If answering 'no' please tell us why and explain your reasons.

- **Rape- Yes-No-Don't know**

- **Rape of a young child- Yes-No-Don't know**

While not a matter for this consultation specifically, the statutory arrangements surrounding the imposition of an OLR under section 1 of the Criminal Justice (Scotland) Act 2003, are outdated. The 2003 Act introduced the concept of a sentence addressing risk, the OLR, into the Criminal Procedure (Scotland) Act 1995, under section 210F, underpinned by risk criteria listed in section 210E.

The sole emphasis on the protection of the “public at large” without consideration of the need to also protect a specific victim or specific group of victims from that offender does not reflect current understandings of risk assessment, particularly in relation to Gender-Based Violence offending, and is not victim-focussed. The section urgently requires amendment, given that the particular consideration of victim safety has been introduced as a duty on the court through other legislation such as the Bail and Release from Custody (Scotland) Act 2023.

Aggravating & mitigating factors

11. Are the aggravating factors listed in each of the guidelines appropriate? If you answered 'no' in relation to either guideline, please list what aggravating factors are inappropriate and explain your reasons

- **Rape--Yes-No-Don't know**
- **/Rape of a young child--Yes-No-Don't know**

In relation to the Guideline on sentencing rape of a young child, we support the inclusion of the three additional aggravating factors

- “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”.

We have commented on two specific factors as follows: -

Steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution

We reiterate the position set out above under “Harm” that in both sets of Guidelines, this be moved from being merely an “Aggravating” factor and listed instead under “Harm

Targeting of a victim who is vulnerable at the time of the offence, including where the victim is asleep or unconscious

These are two different sets of circumstances so to highlight and differentiate, should be split into separate categories of: -

- *Targeting of a victim with specific vulnerabilities*
- *Targeting of a victim who is vulnerable at the time of the offence, including where the victim is asleep or unconscious. Additionally, this factor requires to be re- worded as “**specific** targeting of a victim who is vulnerable at the time of the offence...” as this will better highlight the intent of the offender.*

12. Should any aggravating factors be added to either of the guidelines, or should any factors be removed?If you believe any aggravating factors should

be added, please list these, identifying which guideline(s) and explain your reasons.

We suggest that the following be added to the list of Aggravations for both sets of Guidelines:

Exploiting contact arrangements with a child to commit an offence- this is an additional aggravating factor in the guideline on sentencing rape of a young child but is also relevant to the rape of an adult woman perpetrated in these circumstances as part of the course of conduct of domestic abuse and so must be added to the main Rape guideline as an “Aggravation.”

Offence committed while on early release, on licence, parole

- While the statutory aggravations listed in Annex A of the Sentencing Process Guideline⁶ cover offences committed on bail as a bail aggravation, these factors do not appear to be covered either in that document or the current draft.
- Offences committed in these circumstances are a serious and aggravating matter which must be taken into account, particularly in the current climate of early release and the concerns this has raised for victims.

Offence committed in breach of a court order

- Again, this factor does not appear to be covered under the separate Sentencing Principles and does not feature in this draft.
- Breach of either a civil or criminal protective order, especially one which has been granted to protect a victim of domestic abuse from further abuse, displays both contempt for the judicial decision and a determination to continue the perpetration despite a legal prohibition being in place.
- If women are to have confidence that breach of orders will be taken seriously and that they, therefore, are of use, then any breaches must be considered as an aggravation.

Steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution-

- It is unclear whether this factor specifically would include threats being made by the offender that they will blackmail the victim if the offence is disclosed/reported.
- Given that this behaviour is a repeated and common action, part of the course of conduct in cases involving domestic abuse, it should be added as a separate aggravating factor since offenders, perpetrators of domestic abuse in particular, will use threats to blackmail a victim and facilitate the repeated commission of the offence again against the same victim, as part of the ongoing course of conduct of domestic abuse.

Withdrawal of consent (rape guideline only)

We note from the consultation paper that the SSC has decided not to include this – “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) ... 101. Therefore, the Council has not included withdrawal of consent as a

⁶ <https://www.scottishsentencingcouncil.org.uk/media/jtbhlsre/the-sentencing-process-guideline-d.pdf>

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."

We are still unclear as to the rationale as to why the SSC has decided not to include withdrawal of consent as an aggravating factor, as this is a very serious issue and will give out the message that such offending will not be considered as making the offence even more traumatic for the victim, especially young people over 13 and under 16.

If you believe any aggravating factors should be removed, please list these, identifying which guideline(s) and explain your reasons.

13. Are the mitigating factors listed in each of the guidelines appropriate?

- **Rape-Yes-No-Don't know**
- **Rape of a young child-Yes-No-Don't know**

If you answered 'no' in relation to either guideline, please list what mitigating factors are inappropriate and explain your reasons.

We reject all three mitigating factors set out on page 10 of the Guidance.

No previous convictions, or no relevant/analogous convictions

- It is irrelevant to the victim whether the offender apparently has not committed this or similar offences previously, as the harm has been done to them and cannot be undone. For the victim, that one occurrence is too many.
- Care must be taken that a rape or sexual offence that occurred as part of the course of conduct libelled under the section 1 DASA offence is identified, and it may not be immediately obvious to the sentencer that an offence, or offences, under the DASA included such behaviour.
- Also, consideration must be given to previous prosecutions that may have involved similar behaviour, but the charge was amended to a lesser one or was dropped completely.
- All of these matters are particularly important given the acknowledged significant under-reporting of rape and low conviction rates for this offence.⁷

Mental disorder or learning disability, particularly where linked to the commission of the offence

There are particular concerns that this will become a routine part of the defence plea in mitigation and that any factor relating to mental health will be used. It is not clear what type of mental disorder would be considered as mitigating or the severity of any such disorder; similarly, how profound the learning disability would be that would render the offender incapable of understanding the nature of the crime and that the victim was not consenting.

⁷ <https://www.rapecrisisScotland.org.uk/news/news/our-statement-on-new-figures-on-conviction-rates-for-rape-in-scotland/>
<https://www.rapecrisisScotland.org.uk/news/news/conviction-rate-for-rape-is-the-lowest-for-any-crime-type-in-scotland/>
<https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2023/10/criminal-proceedings-scotland-2021-22/documents/criminal-proceedings-scotland-2021-22/criminal-proceedings-scotland-2021-22/govscot%3Adocument/criminal-proceedings-scotland-2021-22.pdf>

We note the important and determinate views of victims expressed in paragraph 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...*

Remorse

- This is wholly inappropriate as a mitigating factor. The text in the consultation paper in paragraph 106 relating to victims' views and their view that remorse should carry limited weight is instructive – *"This scepticism stemmed from their belief that offenders were adept at 'saying sorry' so that they could continue their abuse."*⁴⁹
- Paragraph 107 goes on to say *"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."* It is not the court's place to "facilitate" expressions of remorse that will, undoubtedly, be expressed with a view to securing a lesser sentence. There is absolutely no way of gauging whether this "remorse" is genuine.
- This would be an issue for repeat offenders, particularly perpetrators of domestic abuse who have repeatedly raped their partner. For the victim, acceptance of a contrived expression of remorse would be dismissive of their experience and wholly debilitating, since one of the tactics of abusers is to "express remorse" to their victim in order to silence them, prevent reporting, disorient and confuse in order to continue the abuse.

14. Should any mitigating factors be added to either of the guidelines, or should any factors be removed?

- If you believe mitigating factors should be added, please list these, identifying which guideline(s), and explain your reasons.
- If you believe mitigating factors should be removed, please list these, identifying which guideline(s), and explain your reasons.

We note in paragraph 104 that in relation to "previous *otherwise good character or exemplary conduct*" that *"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"* and the paragraph goes on to state *"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."*

SWA supports both of these positions and also that further that the mitigating factors do not include *"that the offender was now elderly and/or had health issues"* as this has no consequence on their offending perpetrated, potentially, against numerous victims and possibly repeatedly.

It is important that the mental and physical impact of offenders' crime(s) on their victims is not discounted and dismissed in such a way and to do so would evidence a callous disregard for the victims and not be trauma-informed, victim-focussed practice.

Potential impacts

15. Do you think either of the guidelines will influence sentencing practice in Scotland?

- Rape--Yes-No-Don't know
- Rape of a young child--Yes-No-Don't know
- Please explain your reasons.

While it is not possible to predict whether the Guidelines will influence sentencing, noting that the Guidelines are not mandatory, we would hope that sentencing practice would be positively influenced in terms of arriving at more meaningful and considered sentences that reflect the harm caused to victim. We do note paragraph 73 of the Impact Assessment on the main Guideline, mirrored in paragraph 58 in relation to the Impact Assessment on offences against children: *“It may be the case that sentencers interpret the guideline in a different fashion than that intended by the Council, which could result in the guideline having unexpected consequences for sentencing practice which cannot be predicted. The Council has taken steps to mitigate this risk by engaging with members of the judiciary to estimate any likely changes in practice.”*

Research has highlighted that⁸ *“...Being found guilty of lesser offences predictably resulted in lower penalties compared to the sentencing options available for serious sexual offences. Nonetheless it was difficult for victim-survivors to accept the disparity between the gravity of the offences that they had reported and what they perceived as the relatively minor penalties that the offender ultimately incurred (e.g. community service, probation or fines). In one of the two cases where a guilty verdict was returned on the sexual charges, the victim-survivor was also dissatisfied with the sentence given in the context of the suffering for decades after being sexually abused as a child.”*

This would be more likely to happen, bringing clarity and certainty to the process, if the final Guidelines are appropriately worded, with consideration given to the issues raised above included, and judiciary receive training and awareness raising around the use of the Guidelines.

16. Do you think either of the guidelines will lead to an increase or decrease in public understanding of how sentencing decisions are made?

- Rape--Increase-Decrease-No change
- Rape of a young child--Increase-Decrease-No change

Please explain your reasons.

Any explanation of the factors and rationales behind sentencing may serve to increase public understanding but only if the Guidelines are followed correctly and consistently by sentencers.

17. Do you see any benefits or negative effects arising from the introduction of each of these guidelines?

⁸ Justice Journeys Informing policy and practice through lived experience of victim-survivors of rape and serious sexual assault
https://www.sccjr.ac.uk/wp-content/uploads/2019/08/Justice-Journeys-Report_Aug-2019_FINAL.pdf

- **If you believe benefits may arise, please state these and your reasons why.**
- **If you believe negative effects will arise, please state these and your reasons why.**

As stated in our introductory text, application of the Guidelines can only be done if sentencers have a clear and appropriately informed understanding of the crime, dynamics and impact on victim.

Sentencers' interpretation of the features indicating culpability, harm, aggravations and mitigating factors, what constitutes evidence of this and how these are addressed in sentencing, particularly the application of mitigating factors, will influence the investigation of rape offences, the prosecution and, importantly, conduct of the defence.

Therefore, care must be taken around the support and protection of victims and witnesses and how they are treated in court.

18. What costs (financial or other) do you see arising from the introduction of each of these guidelines, if any?

- **Please explain your reasons.**

There will be costs to the judiciary in training around the use of these guidelines and on ensuring that responses to sentencing are couched from an informed response and competent understanding.

This will link into the work necessary to ensure that courts, the defence and the COPFS are working to a trauma- based framework, as per the Trauma-based Framework and the provisions of the Victims, Witnesses and Justice Reform (Scotland) Bill currently making its way through the Scottish Parliament.

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

- Paragraph 3- specific reference cannot be made highlighting a single Guidance. For instance, if the young people's guidance is referred, then it is entirely appropriate to also refer to the guidance on domestic abuse sentencing as this will be clearly important and relevant in consideration of offending where domestic abuse is an issue and there will be a "read across."

We look forward to working further with the SSC in the development of these Guidelines and are happy to answer any questions on this response.

Final questions

20. Are you responding as an individual or an organisation?

/ Organisation

21. Name of person responding: Louise Johnson

22. Name of your organisation (if responding on behalf of an organisation):
Scottish Women's Aid

23. Phone number: 0131 226 6606

24. Address, including postcode: 2nd Floor, 132 Rose Street, Edinburgh EH2 3JD

25. The Scottish Sentencing Council would like your permission to publish your consultation response. Please indicate your preference:

- **(Required) Publish response with name**
- Publish response only (without name)
- Do not publish response

26. We may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Sentencing Council to contact you again in relation to this consultation exercise?

- **Yes**
- No