

## **Sentencing Rape Offences – A Scottish Sentencing Council Consultation**

### **Response by the Centre for Scots Law at the University of Aberdeen**

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#### **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**

Rape may occur under a wide variety of circumstances and sentencing guidelines should reflect that variety. If one of those circumstances is linked to previous knowledge of the offender, it is especially important that said circumstance is included whilst taking into account the particularised contexts in which people develop relationships, specifically regarding the development of trust or lack thereof.

The offender may be very well known to the victim (e.g. if a member of the victim's immediate family) or a total stranger, and between those extremes there is clearly a spectrum of familiarity. In a given case, there may exist harm and trauma – additional to that already inherent in the offence – associated with the fact that the offender is a stranger; conversely, there may exist additional harm and trauma as a result of the fact that the offender was a close relative. Accordingly, it may be unwise to generalise as to the effect of the offender's being a stranger or known to the victim on the level of harm caused.

As to the level of culpability, it may be argued, in a given case, that the abuse of a position of trust increases the offender's culpability. However, arguably one should be wary of making generalisations based merely on the offender's being known to the victim. It does not follow simply from the fact that the offender was known to the victim that there was a relationship of trust; still less that the offender is ipso facto more culpable than one who targets a stranger. The specific characteristics of the prior relation, if at all existent, must be taken into account.

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

Some consideration should be given to the meaning of the word 'historical' in this context. With whose history are we concerned: the victim's or the offender's? Are we concerned with the history of the victim's and offender's relationship or with some broader history, e.g. that of a community?

It is conceivable that the historical nature of a rape might lead to a greater degree of harm than that already inherent in the offence. Where the offence occurred, say, thirty years ago, the

victim may have suffered from feeling unable to speak, and that may emerge from a victim statement. Also, the victim's inability to address the offence may have deprived them of life options. If that is true in a given case, then it could be relevant to sentencing in that particular case.

However, as with our answer to the question regarding whether the offender was known to the victim (question 1), we would caution against generalisations. Whether the fact that the offence occurred, say, thirty years ago will cause harm and trauma additional to the harm and trauma inherent in the offence will depend on the psyche of the victim and how they have responded to the offence.

### **3. Do you agree or disagree that there should be two levels of culpability in the guidelines?**

There is a risk of oversimplification in saying that the absence of factors mentioned in Part A will ipso facto make one less culpable. At the same time, this framework has the advantage of providing some clarity, even if somewhat simplified.

In separating culpability from harm, the guidelines seem to be premised on a reasonable assumption: namely, that the level of wrongdoing does not necessarily have any bearing on the level of harm. At the same time, the presence of wrongdoing may, from a certain normative standpoint, be viewed as a reflection of the fact that a certain act is likely to cause harm, and that the actor ought to know this. So, part of the reason why one who attempts to rape another is deemed to have committed a wrong is the fact that rape is harmful and the (would-be) rapist ought to know this; the extent to which harm *actually* arises in a given case is a separate question.

Although the distinction drawn in the guidelines between harm and culpability is, for the reasons just given, a reasonable one, there is still a danger of conflating harm and culpability. For the sake of example, suppose that an offender has targeted someone with a vulnerability of which he (the offender) is aware and that, in the event, that vulnerability leads to greater harm than would have befallen the victim otherwise. Here the offender might be deemed more culpable because he was aware of the victim's vulnerability and ought to have known that it would lead to greater harm. This line of reasoning seems unobjectionable. Two different aspects of the victim's vulnerability – its existence and the offender's knowledge, actual or imputed, thereof – are being taken into account at the culpability and harm stages respectively, and so there is no risk of a sort of double-counting as between harm and culpability. However, if the offender was unaware of the victim's vulnerability, arguably that vulnerability simply increases the harm to the victim and has no bearing on the offender's culpability. To view the victim's vulnerability as ipso facto increasing the offender's culpability would arguably undermine the distinction between harm and culpability on which the guidelines are based, which could lead to a sort of double-counting as between the harm and culpability elements of the 'seriousness' stage of the sentencing guidelines.

**4. Do you think that the features of culpability listed in each of the guidelines are appropriate?**

There could perhaps be clearer definitions of what the categories are, as in what constitutes each of the features. At the same time, the fact that neither list is exhaustive is appropriate.

**5. Should any features of culpability be added to either of the guidelines, or should any features be removed?**

The guidelines could perhaps take greater account of the exploitation of a particular sensitivity or susceptibility on the victim's part, for instance one resulting from disability or past trauma. Naturally, culpability is an offender-centric issue, but the offender's knowledge (actual or imputed) of a particular susceptibility or vulnerability on the victim's part and/or the offender's exploitation of that susceptibility is arguably very relevant to culpability and may be conceptually distinct from the exploitation of a relationship of trust. At the same time, we appreciate that, to some degree, exploitation of a particular sensitivity or susceptibility on the victim's part may already be encompassed by the concept of a significant degree of planning.

**6. Do you agree or disagree that there should be three levels of harm in the guidelines?**

The division of harm into three levels is appropriate. Level 1 has the benefit of clarity, drawing as it does on specific circumstances mentioned at Level 2. At the same time, the concept of such circumstances being particularly severe is comparatively open-ended, affording flexibility to sentencers and allowing them to make decisions that are context-sensitive.

It is commendable that trauma is not conflated with harm at Level 3 given that trauma is arguably distinct from harm.

We can see both merits and difficulties in the recognition that there is harm inherent in the offence of rape. The recognition that there is harm inherent in the offence acknowledges that harm is not any less real for being less obvious or visible to a sentencer. At the same time, we acknowledge that some victims of rape may wish not to feel that they are defined by their experience.

Naturally, the concept of harm and its role in criminal law, both in establishing that an offence has been committed and at the sentencing stage, is complex. We would offer only the following tentative observations. Firstly, account could perhaps be taken of the distinction between the perception of harm and the constitution of harm. Is there a difference and, if so, what is it? Secondly, in evaluating harm and/or trauma at Level 3, special consideration should be given to training judges (perhaps as part of more general unconscious bias training) to exclude certain

biases and misconceptions from their decision-making, for instance any biases relating to gender and misconceptions as to the language in which descriptions of trauma are couched.

**7. Do you think that the features of harm listed in each of the guidelines are appropriate?**

We agree with the specific criteria that have been included.

**8. Should any features of harm be added to either of the guidelines, or should any features be removed?**

We have particular reservations concerning the guidance relating to the rape of a young child. The definition of harm there ought to reflect the particularly harmful nature of the rape of a young child. Specific harms which may be relevant include developmental problems, neurological problems, long-term health problems, attachment and relationship problems, and emotional and social impacts more generally.

Also, as regards both children and adults, it may be worthwhile to consider the impact of the offence on the victim's relationships and social functioning, although we appreciate that that impact may fall under the broader category of psychological harm.

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

We are in broad agreement with the sentencing ranges in as much as they reflect current sentencing practice.

Difficult questions remain as to the extent to which the sentencing of young persons reflects modern scientific understandings of brain development and the extent to which those understandings have light to shed on such questions as culpability. The possibility that younger persons are to be treated differently is already reflected in the Sentencing Young People Guidelines. Consideration should perhaps be paid to any potential tensions between those guidelines and the guidelines proposed here relating to rape.

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

The question seems to imply post-custodial measures to monitor offenders and their rehabilitation is an effective means of protecting the public and minimising risk: an assumption that is, at the very least, contestable. However, allowing for that assumption, the proposals regarding protection of the public seem unobjectionable.

**11. Are the aggravating factors listed in each of the guidelines appropriate?**

Yes, although it is difficult to discern the conceptual distinction between culpability factors and aggravating factors beyond the generally more abstract nature of the former and the more concrete nature of the latter. However, this conceptual difficulty may simply reflect existing practice and therefore inhere in the codification of that practice.

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

We would welcome some clarification in the guidelines of the aggravating factor regarding drugs and alcohol and of the rationale for that factor. It may also be worthwhile to consider the potential interaction between intoxication as a potential defence and an aggravating factor. For instance, suppose that an offender became intoxicated only because a third party, X, tampered with the offender's non-alcoholic drink before the offence was committed, but that, in the result, the intoxication is not seen to warrant a defence (e.g. because the level of intoxication was insufficient). Even so, in a question of sentencing, it would be anomalous for the mere fact of the offender's intoxication to be viewed as an aggravating factor. Similarly, suppose that, in a case of self-intoxication, the defence fails precisely because the intoxication was self-inflicted *and* the mere fact of intoxication is regarded as an aggravating factor on sentencing. There is a potential for a sort of double-counting in such cases (i.e. intoxication being used both to negate an otherwise viable defence and intoxication being used as an aggravating factor). Difficulties in cases such as this – and more subtle examples may be envisaged – can be avoided by specifying the precise nature of an aggravating factor based on intoxication. Why, and in what circumstances, might intoxication be an aggravating factor, and to what extent does this characterisation simply reflect paternalistic attitudes to substances like alcohol?

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

If remorse is to constitute a mitigating factor, the evidential standard by which sentencers judge whether there is sufficient remorse must be at least the same as, and possibly higher than, that to which the victim is held in proving, say, psychological harm.

There perhaps needs to be greater consideration of what constitutes remorse. Remorse, arguably, should be distinguished from merely self-interested regret. Further, it might be said that remorse entails not only an effort at moral improvement on the offender's part but some causal link between that effort and the wrong committed, including a recognition of how the offender's actions are linked to the life and well-being of the survivor, and how the remorse felt or manifested needs to embody this link.

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

In practice, the offender's own history of trauma and abuse may be viewed as a mitigating circumstance. Whatever the merits of that practice, the guidelines must reflect it. That way, the debate as to whether the offender's traumatic history ought to be included as a mitigating factor can be held more openly. We acknowledge there are arguments on both sides of the issue. In any case, sentencers do not necessarily face a binary choice between viewing the offender's traumatic background as ipso facto a mitigating circumstance, on the one hand, and excluding that traumatic background outright as a category of mitigation, on the other. Perhaps, for example, a distinction could be drawn between *relevant* mitigating factors and those that are irrelevant, and that in turn may be a question of degree.

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

It is difficult to predict what impact, if any, the proposed guidelines will have, although the effect of existing sentencing guidelines may afford some general indication.

It is possible that some judges will find the guidelines useful. At the same time, there is a risk of judges becoming over-reliant on guidelines and treating them, inappropriately, as inflexible rules. If judges do use the guidelines, those guidelines are likely to influence sentencing practice although the precise nature of that impact is unpredictable and may not align with the Sentencing Council's aims. That is not so much a criticism of the proposed guidelines as a more general observation of the unpredictability of how, by whom and to what effect *any* new set of guidelines might be used.

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

It is possible that the guidelines will lead to neither an increase nor a decrease in the public's understanding of how sentencing decisions are made. If the guidelines (or some simplified version of them designed for use by the public) can be made succinct and easy to understand then the public's understanding of sentencing decisions is likely to improve.

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

We see potential benefits arising from the guidelines, including the potential for more consistent sentencing decisions and a better understanding of such decisions for a range of stakeholders in the trial. The specification of decision-making factors may incentivise judges to explain more clearly how they reached their decisions. Such transparency has benefits both for the victim and the Crown in presenting its case and to the accused in knowing how to defend it. If a sentencing decision purports to be made on the basis of the guidelines and yet the sentencer's decision seems to be premised on some sort of misunderstanding thereof, appeals from sentencing decisions will be simplified.

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

We are not certain as to what additional costs might arise, although there is potential for an increase in court time and for increased costs arising from training regarding, say, potential judicial biases and misconceptions (see above our answer to question 6).

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

The process leading to this consultation on rape sentencing shows a clear awareness of trauma on the part of the Scottish Sentencing Council. However, the documentation relating to this consultation could make that awareness and the Council's adherence to trauma-informed principles set out by Scotland's National Trauma Training Programme more explicit.