

Scottish Sentencing Council
Parliament House
Edinburgh
EH1 1RQ

Friday, 2 August 2024

Response to SSC Public Consultation on Sentencing Rape Offences

Dear *The Right Hon. Lady Dorrian*, The Lord Justice Clerk
& *The Right Hon. Lord Matthews*, Chair of SSC Sexual Offences Committee

I am writing in response to the [Draft Sentencing Guidelines for Rape¹](#), published by the Scottish Sentencing Council (SSC) on 25th July 2024, to provide my perspective on the proposed changes as a rape survivor with first-hand experience of the Scottish High Court sentencing process. As a participant in the research report you commissioned by the SCCJR, University of Glasgow, [Exploring Victims' Views and Experiences of Sentencing for Rape and Other Sexual Offences²](#), I feel compelled to share my insights.

Having reviewed the draft sentencing guidelines, I struggle to understand the objectives of the proposed amendments beyond prolonging sentences. More alarmingly, the guidelines fail to respond fully to the research and subsequent recommendations of the report you commissioned. The Scottish Courts & Sentencing Council are failing to adequately address the impact of sexual offences on survivors, especially those who have aided a conviction. I fear that, without amendments, the draft guidelines will perpetuate this inadequacy and continue to fail victims.

In 202¹, my ex-partner and abuser was sentenced to a year custodial sentence judge in the Court after the jury returned guilty verdicts for the rape and assault charges on the indictment. Now, years on, I am awaiting news from the Parole Board on his potential early release, faced with the prospect that, once his sentence is spent, my rapist may legally be entitled to contact me as direct result of the Judge and decision not to move for a non-harassment order at the sentencing hearing. Whilst my abuser was able to appeal his sentence and conviction, I, like many other survivors, have no avenue to challenge this oversight, raising significant concerns about the effectiveness of current sentencing guidelines in safeguarding victims of domestic and sexual crime post-conviction. Notably, the draft guidelines proposed by the SSC also fail to

¹ **Rape Draft Sentencing Guideline**

Published for Consultation July 2024 | Scottish Sentencing Council. Full Document: <https://www.scottishsentencingcouncil.org.uk/media/ufcaqjes/rape-draft-guideline.pdf>

² **Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences**

Published May 2024 | Authors: Oona Brooks-Hay, Michele Burman and Jenn Glinski, SCCJR, University of Glasgow. Full Report: <https://www.scottishsentencingcouncil.org.uk/media/4dufxpci/victim-survivor-views-and-experiences-of-sentencing-for-rape-and-other-sexual-offences.pdf>

address the issue of NHOs, despite the recommendations made by the SCCJR in their report.

I write to you today with **the objective of ensuring that victims who have given evidence for the crown in the High Court are granted non-harassment orders as a mandatory ancillary order in the sentencing of sexual offences** (unless it can be demonstrated that the victim actively opposes the motion).

As I understand, the [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#)³ introduced statutory domestic abuse aggravators and claims to have given courts power to make non-harassment orders in cases where they previously could not do so. However the current [Sentencing Process & Guideline](#)⁴ as set out by the SSC specify non-harassment orders in the sentencing of sexual offences as a *discretionary ancillary order* meaning judges are at liberty to grant them and advocate deputes are under no obligation to make motions to obtain them. The discretionary nature results in inconsistent protections for victims whereby victims in like for like cases can receive 25+ years protection from the courts OR they can receive nothing depending solely on the judge allocated to their case.

This proposed amendment to the guidelines is particularly relevant for cases in which statutory domestic abuse aggravators have been applied and cases where the assailant was known to the victim, where I would suggest continued safety post-conviction is imperative.

The current inconsistency in protecting victims post-conviction is a stark deviation from [The Principles and Purposes of Sentencing](#)⁵ and it's Core Principles as set out by the SSC. The guidelines clearly specify that sentencing in Scotland must be '*fair and proportionate*' and '*sentencing decisions should treat similar cases in a similar way, assisting consistency and predictability.*' Having read through the majority of sentencing statements available on [Judiciary.scot](#)⁶ one thing you won't find is consistency. It seems evident that an enormous disparity exists between judges and what is obvious to me, certainly, is that there are judges that grant NHOs as standard and there's judges that *never* grant them, meaning ultimately the likelihood of leaving court with a non-harassment order in place as a victim is entirely down to the Judge leading your case. The guidelines evidently lack a uniform approach to protecting victims post-conviction and are being interpreted inconsistently by decision-makers. The safety of survivors that support crown prosecutions, often at the expense of their own mental wellbeing, should never come down to pot-luck or a matter of personal discretion.

To illustrate the gravity of this issue, I draw your attention to two sentencing statements, both from the October of 2021. The first, [HMA Vs Scott Kelly](#)⁷ and what could be considered a

³ **Abusive Behaviour and Sexual Harm (Scotland) Act 2016** | Scottish Parliament
Relevant subsections: Part 1, Section 5: [Making of non-harassment orders in criminal cases](#)
Full Legislative Act: <https://www.legislation.gov.uk/asp/2016/22/contents?view=plain>

⁴ **The Sentencing Process & Sentencing Guideline** | Scottish Sentencing Council
Effective from 22 September 2021 | (Relevant subsections: Page 12 - Step 7: Consider ancillary orders, Page 17 - ANNEX D Examples of Ancillary Orders)
Full Document: <https://www.scottishsentencingcouncil.org.uk/media/itbhlsrc/the-sentencing-process-guideline-d.pdf>

⁵ **Principles and Purposes of Sentencing** | Scottish Sentencing Council
Effective from 26 November 2018
Full Document: <https://www.scottishsentencingcouncil.org.uk/media/j1jo1tw2/guideline-principles-and-purposes-of-sentencing.pdf>

⁶ **Sentencing Statements** | Judiciary of Scotland
<https://judiciary.scot/home/sentences-judgments/sentences-and-opinions>

⁷ **HMA Vs Scott Kelly** | Judiciary of Scotland Sentencing Statement
<https://judiciary.scot/home/sentences-judgments/sentences-and-opinions/2021/10/22/hma-v-scott-kelly>

'similar case' [HMA Vs Dillon Anderson](#)⁸. Both cases depict rapes in which the assailant had pre-existing relationships with the victim(s), the attacks were both characterised by the compression of the victims neck and in neither case was there an admission of guilt from the assailant. Whilst no long-term protective measures were applied in the first case, the victims in *HMA vs Dillon Anderson* were recognised for their contribution to the conviction and secured non-harassment orders for a period of 25yrs. Lady Poole commented *"Your victims have suffered long term effects from what you did to them, and deserve to be protected from you. I therefore make orders that you must refrain from approaching or contacting or attempting to approach or contact your four victims for a period of 25 years."*

Whilst the proposed guidelines promise the possibility of longer sentences, they do little to address the issue of survivor safety, something felt deeply by victim-survivors, evidenced by the report you commissioned by SCCJR ([Section 4.6.2](#)⁹). Within this research report, survivors expressed clear concerns about the *'lack of clarity in relation to whether they will have continued legal protection from their abusers through the application of non-harassment orders, and how they will operate in practice.'* There was a common view that in **sexual offence cases, non-harassment orders should be imposed by default and be lifelong** to address the safety concerns that often do not cease following the imposition of a custodial sentence.

One survivor commented *"He's not allowed to contact me for [xx] years, which is stupid to say the least. Why is that even being brought up in court? Why should he ever be allowed to contact me?"*

Another, *"... from my perspective, the custodial sentence was the last thing that I would've worried about or necessarily wanted. I think my main concern was that he was on a register and that there was some kind of non-harassment order or, some consideration for my protection based on the fact that I felt like I had put myself through these two years of hell and especially the few weeks in court which was worse than the offence itself."*

For me personally, the decision for a NHO not to be granted where I had made absolutely clear in a victim impact statement that it was to be an important part of sentencing felt like further dismissal by a system I once thought had a duty to protect me. Prior to trial, the offender was subject to an interim interdict within their bail conditions, which was effective in its purpose. I struggle to understand how the interdict and the reasons for it become void at the point the offender is proven guilty. The implementation of the interdict in the first place unarguably suggests that either Police Scotland found sufficient evidence in their investigations to deem it necessary for my protection, or, that it was common practice where charges are brought for sexual offences. Why should this standard practice not extend to sentencing once guilt is proven?

The research report carried out by SCCJR deduced that NHOs were *'very much welcomed by survivors, and they helped to provide reassurance and alleviate anxiety surrounding their safety'*. It therefore made the recommendation that **'To protect victim-survivor safety and provide consistency in sentencing, a non-harassment order should be considered as**

⁸ **HMA Vs Dillon Anderson** | Judiciary of Scotland Sentencing Statement
<https://judiciary.scot/home/sentences-judgments/sentences-and-opinions/2021/10/12/hma-v-dillon-anderson>

⁹ **Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences**
Published May 2024 | Authors: Oona Brooks-Hay, Michele Burman and Jenn Glinski, SCCJR, University of Glasgow. (Relevant Subsections: **Section 4.6.2 - Safety Concerns**)
Full Report: <https://www.scottishsentencingcouncil.org.uk/media/4dufxpci/victim-survivor-views-and-experiences-of-sentencing-for-rape-and-other-sexual-offences.pdf>

a default in sentencing of sexual offences, unless it can be demonstrated that the victim-survivor will be safe without one.’ ([Section 6](#)¹⁰) However, this is something that isn’t reflected within the draft guidelines published by the SSC which fails to mention NHOs at all. It seems apparent that the guidelines pander to public opinion and in doing so plays into the misconception that a conviction and custodial sentence are to be a ‘successful’ outcome at court for victims. However what the research makes clear is that in the current justice system, there is no ‘successful’ outcome for victims – only further life-changing re-traumatisation before they are spat back out into society with little to no safe-guarding in place for them to resume their lives.

Further to this, I understand Scotland’s ‘[Equally Safe Strategy](#)’¹¹ aims to eradicate ‘different forms of violence experienced because of being a woman or girl’ and in no uncertain terms, makes clear ‘Women and girls should not need to change their behaviour, and should not be blamed, shamed or further traumatised when they seek support or access to justice’. As someone who has been blamed, shamed, rejected from support services and heavily re-traumatised by the justice system I implore you to consider how you can support this crucial amendment. Where we are not actioning NHOs by default, we are by definition asking victims to modify their behavior, thereby perpetuating harmful attitudes and facilitating additional fear into the day-to-day lives of survivors. I personally made the difficult decision to relocate in pursuit of safety, little did I know this would have a catastrophic impact on my ability to seek support from Scottish services throughout the trial and thereafter. The circumstances in which a survivor chooses to live in order to prioritise their safety should never render long-term protective measures from the crown unnecessary.

In regards to the introduction of ‘culpability’ and ‘harm’ indicators as a measure of offence seriousness, I would suggest this poses similar practical concerns. Several of the factors listed will undoubtedly introduce an unspoken threshold of evidence for them to be applied. In particular those listed in Level 2 & 3 of the ‘harm’ attributes¹² relating to ‘psychological harm or trauma’. Certainly in my experience, there are still severe barriers to accessing medical and psychological attention due to outdated guidance on pre-trial therapy. Even where this is possible under [The Code of Practice to Facilitate the Provision of Therapeutic Support to Adult Witnesses in Court Proceedings](#)¹³ – support is limited for victims seeking justice. Many choose not to engage with pre-trial therapy in fear of accusations of ‘coaching’ or their cases being compromised. In my case, I have only now, more than years after my assault, received a PTSD diagnosis and to say this was near impossible to obtain would be an understatement after being turned away from multiple NHS and private services prior to trial. I am only now able to freely engage with talking and EDMR therapies after my trial has concluded. It is imperative that we do not rely on medical

¹⁰ **Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences**
Published May 2024 | Authors: Oona Brooks-Hay, Michele Burman and Jenn Glinski, SCCJR, University of Glasgow. (Relevant Subsections: **Section 6 - Recommendations** | **Sentencing Decisions, point 1**)
Full Report: <https://www.scottishsentencingcouncil.org.uk/media/4dufxpcj/victim-survivor-views-and-experiences-of-sentencing-for-rape-and-other-sexual-offences.pdf>

¹¹ **Equally Safe 2023 - preventing and eradicating violence against women and girls: strategy** | Scottish Government | Published 7 December 2023 | Director of Equality, Inclusion and Human Rights.
Full Strategy: <https://www.gov.scot/publications/equally-safe-scotlands-strategy-preventing-eradicating-violence-against-women-girls/>

¹² **Rape Draft Sentencing Guideline**
Published for Consultation July 2024 | Scottish Sentencing Council. Full Document:
<https://www.scottishsentencingcouncil.org.uk/media/ufcaqjes/rape-draft-guideline.pdf>

¹³ **Pre-trial therapy provision for victims of sexual crime** | Crown Office & Procurator Fiscal Service
First published 14 October 2020. Full Guidance: <https://www.copfs.gov.uk/publications/pre-trial-therapy-provision-for-victims-of-sexual-crime/html/>

diagnosis for this aggravation to be applied as this, in I imagine most cases, isn't established until after the conclusion of a trial when sentencing has been passed. In my case, the jury posed the question to the judge in deliberation as to whether 'Rape to Injury', as it appeared on the indictment, included mental or psychological injury, in which the judge confirmed it did not. This led to the deletion of the term 'to her injury' from the indictment when they returned a guilty verdict. This raises the question as to whether psychological harm or trauma should be written into law and specified within indictments rather than applied afterwards as an aggravating factor.

In addition, the 'culpability' attributes would also introduce an inadvertent evidence threshold which may be challenging to meet. One of the biggest surprises to me during my experience of the judicial system was how an month relationship could be deduced to three isolated incidents with very little context to the coercion and planning that led to them. The evidence that was given in cross-examination was limited to the indictment – any discussion alluding to coercive control was quickly dismissed as objections by the defence advocate. If these attributes could only be applied in rape cases that include separate charges of coercive control, it will have limited impact. Complainers should have opportunity to submit evidence to quantify the aggregations even if it wasn't already evident from crown productions and testimonies and they should be applied as a 'balance of probabilities', much like it would for CICA.

It goes without saying that in a landscape in which the overpopulation of prisons is of increasing concern, the danger in introducing guidance that realistically **only** increases potential for longer sentences must also consider how much difference it can make in practice. Whilst in theory, it addresses some survivors (but mostly public) concerns surrounding lenient sentencing, I would query how effective this will be in prevention and rehabilitation should [proposals for the early release of long-term prisoners](#)¹⁴ be approved in future by parliament and if this will reverse any intended objectives of the guidelines. The introduction of mandatory NHOs would however go a long way in alleviating the anxiety that victims suffer in relation to the early release of offenders. As I understand where prisoners are released on licence earlier than their prescribed sentence, they more often than not are placed under conditions which prevent the offender from contacting their victim or risk recall. However, where no long-term protective order is granted at court prior, the day that the sentence is considered 'spent', the license conditions expire, leaving victims vulnerable to further harm and harassment.

Whilst I feel the proposed guidelines do little to address the views expressed by victim-survivors within the SCCJR report past increasing potential for longer sentences, it seems to me that the real objective of these changes is to satisfy public opinion and deliver headlines they'd prefer to read. It is worth noting here, that had I have been asked my views on the judicial process in rape cases before I became a victim of it – I would have assumed the courts existed to protect victims and would uphold that expectation should I ever become a victim of crime. I certainly would never have imagined a victim of rape by someone known to them would be subject to the experiences I have endured whilst seeking justice, let alone believed that an offender would be free to contact that victim once the sentence was spent. The general public are in important part of the justice system, they make up juries after-all,

¹⁴ **Long-term Prisoner Release Process: Consultation** | Scottish Government

Published 8 July 2024 | Justice Directorate

Full Consultation: <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2024/07/long-term-prisoner-release-process-consultation/documents/long-term-prisoner-release-process-consultation/long-term-prisoner-release-process-consultation/govscot%3Adocument/long-term-prisoner-release-process-consultation.pdf>

but it would be a misstep to assume the average person has enough experience of the nuances of a purposely complex and opaque system to dictate priorities in sentencing. Survivors must be kept front and centre and remain priority in decision making.

Survivors that support crown cases deserve to live free of their abusers, they deserve to feel safe and to be given the tools they need to pick their lives back up where they left them prior to the offence – which imaginably should be the desired outcome of the criminal justice system. Custodial sentences alone are not enough to achieve this.

I ask you to consider the above carefully and understand fully the limitations and changes that have been placed on my life, and undoubtedly many others as a direct result of the Scottish Courts failing to provide a satisfactory outcomes at sentencing. Myself and many others have aided in the prosecution of crown cases at considerable personal expense to protect others from similar harm. Despite this effort, I have never felt that the sentencing reflected any consideration for my own safety. I have no confidence that under the new guidelines, the outcome would be different.

Thank you for considering my perspective. I hope it helps inform the necessary amendments to the draft guidelines to better protect and support survivors of sexual offences.