



Rape Sentencing Guideline

Non-standard consultation response

Dr Jay Gormley and Dr Rachel McPherson, University of Glasgow

September 2024

We welcome this draft guideline from the Scottish Sentencing Council and consider it to be coherent and well drafted. Here, we wish to outline several matters that the Council may wish to consider. While our comments are best represented in a non-standard response, the matters noted primarily concern Question 16, “Do you think either of the guidelines will lead to an increase or decrease in public understanding of how sentencing decisions are made?” Several of the points we note are also relevant to victims/survivors.

Victims/survivors and public understanding of disposals

The introduction of offence-specific guidelines brings with it an opportunity to reflect on how sentences are communicated to victims/survivors and the public more generally. The draft guideline already conveys complex information in a more accessible manner than before. However, we would note that some of the terminology used to describe disposals (e.g., determinate sentences) and the disposals themselves (including non-custodial disposals and ancillary orders) may not be well-understood by all. Where there is a lack of understanding, this may negatively impact confidence in sentencing.

As an example, here we will focus on custodial sentences. Helpfully, the guideline clarifies that the offences in question will almost always result in custodial sentences. However, perhaps more could be done to explain what a custodial sentence is since it may not be well understood by all. For instance, release provisions may cause confusion. While release provisions (currently a developing area) can be used to aid public protection (ensuring offenders are more safely reintegrated into the community), this may not be fully known by the public. Additionally, the headline custodial sentence (e.g., “X years” may be reported in the media) may form a psychological anchor in the minds of the public/victims/survivors about how long an offender should be incarcerated. Where an offender is not incarcerated for this entire period (e.g., because part of the sentence is served in the community on licence) this may lead to a greater risk of the sentence being viewed as too lenient and/or opaque.

Accordingly, we wonder whether there might be a benefit to considering how sentences might be explained to the public and (especially) victims/survivors in clearer language. There are various ways this might be done, and we only advocate for consideration of communication and not any specific method of communication. For example, perhaps communication could be aided by way of guidelines specifying “10-13 years to be served in prison and on license in the community.” While points such as this are basic for legal professionals and judges, it could be beneficial to clarify for the public and victims/survivors. Alternatively, a written sentencing statement, akin to the kind typically published but in plain language could be provided for the public and victims/survivors. Finally, in certain cases, judges (or some other suitable person) might debrief victims/survivors post-sentence. This may help with illuminating some of the processes to victims/survivors and help them to feel the harm done has been recognised, that they have been heard, and that offenders have been held accountable.¹

We appreciate that these are complex issues that extend beyond this specific guideline. Indeed, public and victim/survivor understandings are likely to be shaped by several things, including but not limited to a guideline. As such, guidelines may be most effective when used in combination with knowledge exchange activities. The Council already undertakes an excellent range of such activities, and this is likely to remain essential going forward. Perhaps such activities could even be extended further to promote public legal education: for example, through new school partnerships, legal outreach, or legal education.

Alignment with the Sexual Offences (Scotland) Act 2009

As legal professionals will be aware, a primary focus of the Sexual Offences (Scotland) Act 2009 (and Sexual Offences Act 2003) is sexual autonomy, and this is reflected in Part 2 of the Act in particular. There may be a merit, therefore, to integrating the concept of sexual autonomy into the concept of harm within the guideline so it is clear to victims/survivors and the public. Similarly, offences under Part 1 of the 2009 Act can be committed both recklessly and intentionally and as such, there may be a benefit to distinguishing between the two mental states at the point of sentencing - where the basis of a jury’s findings are clear to the sentencer.

Moreover, the public and victims/survivors may wonder if the offences in sections 1-3 of the 2009 Act exist in a hierarchy (e.g., some may assume that a section 2 offence is inherently less serious than a section 1 offence). Yet, in some contexts, section 2 and section 3 offences might not necessarily be less serious than section 1 offences (questions such as when/why COPFS might charge one offence over another are

¹ See Gormley 2024, “Reconceptualizing the Effectiveness of Sentencing: Four Perspectives”, pp.38-39. Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Effectiveness-report-FINAL-Sept-2024.pdf>

beyond the scope of this response). For this reason, it could be suggested that the guideline might potentially have relevance beyond section 1 offences in some cases. Clarifying this could aid the understanding victims/survivors and the public have of sentencing for these offences.

Risk Assessment

While the role of risk in sentencing may be apparent to legal professionals, it may be unclear to the victims/survivors and the public. At the moment, risk is primarily articulated through reference to the OLR and the extended sentence, which have existing criteria independent of section 1. As such, risk assessment and public protection might be further articulated within the guideline.

Aggravating and mitigating factors

First, we would highlight that including ejaculation as an aggravating factor may cause complications if this factor is a proxy for the harm caused/risked. Notably, there can be a risk of pregnancy and disease even without full ejaculation. Additionally, it may be the case that a victim is unaware whether ejaculation has occurred. As such, we would wonder whether the matter of ejaculation and the victim's response could somehow be articulated in terms of psychological and physical harms (already noted in the guideline). For example, if there appears to be an increased risk of disease above that inherent in the offence (e.g. via ejaculation) might this be the relevant factor?

Second, in terms of "mental illness" as a mitigating factor, it would seem helpful to clarify the meaning and operation of this. As the Council recognises, this is an especially complex area, and the public and victims/survivors may well benefit from elaboration to minimise misconceptions. Given the complexity of this area (even the terminology raises important questions), this could be a matter best addressed through a dedicated general/overarching guideline. If so, then it may simplify matters to remove reference to mental illness here (the factor would be covered by the existing general guidelines pertaining to the sentencing process and the principles and purposes of sentencing).

Third, no previous convictions as a mitigating factor could cause confusion given the points the Council has raised concerning good character (e.g., in some cases being used to facilitate access to commit offences). Thus, it may be clearer for the public and victims/survivors to only have previous convictions as an aggravating factor (either noting here or retaining it only in the general sentencing process guideline). In practice, the effect on sentencing may be similar (those with relevant prior convictions receiving more severe sentences as appropriate). Yet, in terms of how this approach articulates matters to the public and victims/survivors, it may be simpler. However, this is a complex question, and we simply raise the point for consideration and acknowledge there are arguments each way.

Interaction Effects

In terms of interaction effects, it is worth considering if/how the introduction of the guideline may interact with a specialised sexual offences court if these were to be introduced. For example, if both were introduced at the same time, there may be a lot of information to communicate to the public and victims/survivors.

Including information on OLRs in the guideline might incline some to imply that OLRs should be used more in this context. Therefore, the statutory test for an OLR might be clarified in simple terms for those unfamiliar with it.

Impact Assessment

Whilst beyond the scope of sentencing and the work of the council, there is an important socio-economic consequences of convictions in this area that may be overlooked. The impact assessment highlights that conviction rates for offences of this type are higher in areas of socio-economic deprivation. This deprivation may be exacerbated by the socially stigmatising effects of sexual offence convictions on the families of offenders (who may themselves have been victimised by the offender). Indeed, the stigma families face has been recognised in work carried out by Rachel Condry.² Convictions also give rise to economic effects for an offender's family. As such, there exists an opportunity to address this through targeted support and specialised services for these communities.

² See Condry 2007, *Families Shamed: The Consequences of Crime for Relatives of Serious Offenders*. London: Routledge.