

RESPONSE TO THE SCOTTISH SENTENCING COUNCIL CONSULTATION ON DRAFT SENTENCING GUIDELINES FOR RAPE AND RAPE OF A YOUNG CHILD

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

The Risk Management Authority (RMA) is a non-departmental public body with a range of functions in relation to the assessment and management of those who pose a risk of serious harm to the public. We have, amongst other things, responsibility for the setting and publication of national standards for those who work in risk assessment and risk management in the justice system; the evaluation, approval, and rejection of risk management plans (RMPs) for those subject to the order for lifelong restriction (OLR); the training of risk management practitioners; research and policy development; and the provision of advice to the Scottish Ministers on matters within our remit. Additionally, we support our partner agencies, including the Scottish Prison Service (SPS), Police Scotland and local authority justice social work services, to implement effective approaches to the assessment and management of risk. Our response to this consultation is therefore framed principally as a response to question 10, but may touch upon issues covered by other questions.

Risk of Serious Harm

In the context of public protection, the risk we are particularly focused on relates to seriously harmful offending behaviour; that is:¹

[The] likelihood of harmful behaviour of a violent or sexual nature which is life threatening and/or traumatic, and from which recovery, whether physical or psychological, may reasonably be expected to be difficult or impossible.

This definition is part of Scotland's nationally agreed [Framework for Risk Assessment, Management and Evaluation](#) (FRAME), and [Multi-Agency Public Protection Arrangements National Guidance](#). It is important to note that, beyond the broad categories of violent and sexual offending, the concept of serious harm is not tied to specific offences. The significance of this is twofold. First, those with functions in relation to the assessment and mitigation of risk must consider the risk of serious harm when assessing individuals who have perpetrated offences against persons – regardless of where that offence sits in our legal hierarchy – and

¹ Risk Management Authority, *Framework for Risk Assessment, Management and Evaluation* (2010) p. 25; Scottish Government, *Multi-Agency Public Protection Arrangements National Guidance* (2022), p. 25.

must undertake an appropriate depth of risk assessment.² Second, it supports an approach to risk management that is proportionate to risk so that the measures employed are ethically defensible, and resources can be targeted where there is greatest concern. For the purposes of sentencing, this means that custody – as set out in the Scottish Government’s [Vision for Justice](#) – must be a last resort:³ people should only be sentenced to imprisonment (or, as the case may be, detention) when they present a risk of serious harm to other people that cannot be managed effectively with measures short of custody; and any period of custody should be no longer than required for this purpose.

Reflecting Risk in Sentencing

As the High Court of Justiciary has recognised, determinate sentences ‘are basically retributive in character’⁴ which is to say that, in keeping with our general philosophy of punishment, most sentences are intended to be reflective of – that is proportionate to – the culpability or wrongdoing of the individual who falls to be sentenced. If sentences were to be proportionate to risk, however, the calculation may be rather different. For example, while some factors associated with an increased risk of reoffending – such as prior offending – may be considered to increase culpability,⁵ the inverse may be true, such as where an individual is experiencing mental ill health of a nature and degree that mitigates blameworthiness but does not exculpate completely. It is therefore challenging to incorporate risk-proportionality into a determinate sentencing framework that centres culpability-proportionality.

There are, however, key decision points in the sentencing process at which consideration of the risk of serious harm can be particularly informative: in determining whether a community disposal is feasible; and, where custody is considered necessary to manage a risk of serious harm, whether an “ordinary” determinate sentence is sufficient, or whether additional measures are required for the protection of the public, e.g., an extended sentence, or OLR.⁶ As the draft guidelines note, specific legislative criteria apply in relation to these sentences, and risk assessments serve to assist the court in establishing whether the relevant tests are met.

² For more information on depth of assessment see FRAME, pp. 61-65 – the subject is returned to later in this response.

³ Scottish Government (2022), *Vision for Justice*, pp. 23-27

⁴ *Petch and Foye v HM Advocate* 2011 J.C. 210, at para. 43.

⁵ Whether regarded as aggravation, loss of mitigation or accounted for at some other stage – we assume that the principle against double counting will mean that it is considered only once.

⁶ For the purposes of this consultation, we have considered imprisonment and (non-medical) detention only, but similar considerations will apply where the court is contemplating a hospital direction or restriction order, although additional specific criteria will apply.

The OLR in particular differs significantly from a determinate sentence. In our experience, both the media and the general public struggle to understand the mechanics of the OLR (and indeed life sentences), tending to equate the punishment part with the entirety of the term. The discussion of the interaction between these proposed sentencing guidelines and the calculation of the punishment part at paragraphs 21 to 27 may therefore improve public understanding of the sentence. Finally, we would observe that the statement concerning life sentences at paragraph 5 of the draft guideline would benefit from clarification: following *McIntosh v HM Advocate*,⁷ it appears that the discretionary life sentence is no longer a competent disposal having been replaced by the OLR for any case that commenced on or after 20 June 2006;⁸ additionally, a life sentence cannot be made where a risk assessment order or interim compulsion order with assessment of risk is not made,⁹ or where the Court considers that the risk criteria are not satisfied.¹⁰

Risk Assessment in the Justice System

If any stage of the sentencing process is properly to take account of the need to protect the public, it must be informed by risk assessment undertaken at the appropriate time, to and the appropriate depth, by a suitably qualified professional. Sentencers must also be able to evaluate and apply risk assessments to the decisions that they are intended to inform, and have confidence in their ability to do this. This is especially so in cases where there may be more than one report, and where findings may conflict. We suggest that it would be beneficial for all sentencers to have an awareness of what the national standards, set out in FRAME, and expounded upon in the [Standards and Guidelines for Risk Management](#) (2016), require. The RMA has previously facilitated awareness sessions for members of the judiciary on this national approach to risk assessment and risk management and is committed to working with the Sentencing Council, Judicial Institute and other interested parties in further developing judicial awareness.

For the present purposes, the Council may find the following brief overview of the triage approach to risk assessment outlined within the FRAME policy, and within methods developed for justice social work services, to be of interest as it may inform sentencing (and also rehabilitation and progression during a sentence.).

⁷ 2016 S.C.L. 923.

⁸ Criminal Justice (Scotland) Act 2003 (Commencement no. 9) Order 2006 (SSI 2006/332), art. 2(2); For the purposes of this provision, cases are regarded as having commenced on the date on which the Procurator Fiscal receives a report.

⁹ Criminal Procedure (Scotland) Act 1995, s. 210G(1)(1)(a)

¹⁰ *Ibid*, s. 210G(2)

FRAME identifies three depths or levels of assessment: as the level of concern increases, so too should the depth of inquiry into the nature and extent of that risk.¹¹ This is illustrated in Figure 1 below.

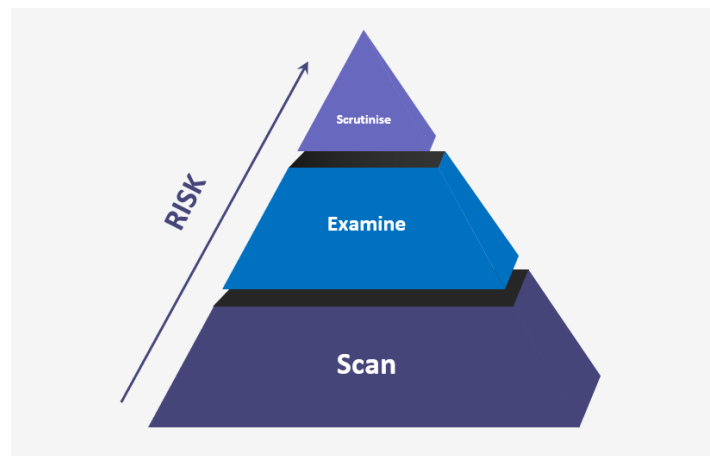


Fig. 1

Assessments at the 'scan' level are those typically associated with the pre-sentencing stage and will often form the basis of the social worker's court report. A scan-level risk assessment will identify key indicators of risk and is sufficient to ground an awareness of the nature and level of risk. One of the outcomes of such an assessment might be that the assessor determines that there are indicators that the individual presents a risk of serious harm to others and that, therefore, a more in-depth assessment is indicated. This will often require an additional period of time to complete, given the more intensive level of assessment required. Justice Social Workers tasked with preparing pre-sentence reports for the courts should use their professional judgement to determine if more in-depth assessment is required and request additional time from courts commensurate with the level of assessment required.

An 'examination' of risk is used to inform decision-making and planning around case management and interventions. It considers a broad range of factors drawn from a variety of sources on information including: risk factors; any strengths or protective factors that may be present; the likelihood of reoffending; the potential impact of reoffending; individuals/groups of people who may be victims of reoffending; potential barriers to engagement with risk management/rehabilitation efforts; and the level or intensity of work that requires to be done with the individual to mitigate the risk they present. Assessments at this depth will include an analysis of how, why, and when the individual offends. Examination-level assessments are often carried out in respect of individuals who will be subject to statutory social work supervision using a system and method known as the Level of Service/Case Management Inventory or LS/CMI. The outcome of such an assessment will be that risk can be mitigated

¹¹ FRAME (2010), pp. 61-65

sufficiently through routine measures; that intensive case management is required; or that scrutiny-level assessment of the risk of serious harm is required.

A 'scrutiny' of risk is an in-depth assessment of the risk of serious harm. It should be emphasised, however, that risk of serious harm is a key consideration at *all* levels of assessment. Scrutiny-level assessments are based on a wide range of sources, which may involve multiple risk tools in which the author has been trained, and may draw upon risk assessments undertaken by other professionals. The purpose of scrutinising risk is to produce an individualised narrative – called a formulation – that aims to explain how different factors interact to result in an episode of seriously harmful offending behaviour. The assessment should set out plausible scenarios in which future offending could occur and identify early warning signs that may indicate that offending is becoming more likely. At this depth, it is expected that the assessor take steps to verify or corroborate information and have regard to and highlight any gaps or inconsistencies, if appropriate, explaining how such information has been evaluated and the weight given to information in respect of which it was difficult to obtain supporting evidence. The findings of such an assessment should be communicated clearly and concisely in a report that is tailored to the purpose of the assessment so that those who are tasked with taking decisions on the strength of the information therein are best equipped to do so. An example of scrutiny-level assessment is that undertaken for the purpose of preparing a risk assessment report (RAR) in cases where the Court considers that the OLR's risk criteria may be met. The RAR is the product of the most in-depth risk assessment undertaken in the justice system.¹²

Seriousness and Risk

Culpability

Both draft guidelines direct the sentencer to assess the seriousness of the offence by giving consideration to the individual's level of culpability, and to the level of harm caused. The guidelines also set out an inexhaustive list of factors that may be considered to aggravate or mitigate the offence. We note that some of those factors which tend toward increasing culpability (regardless of which stage they are accounted for at) bear some similarity to factors that may be identified in a risk assessment as empirically validated indicators of risk of future offending. In general terms, 'harm' for the purposes of assessing culpability will be accounted for in terms of 'impact' in a risk assessment.

¹² *Ferguson v HM Advocate* 2014 S.L.T. 431 at 90.

As regards an increased likelihood of sexual reoffending specifically, the work of Mann *et al.* (2010) divided factors into those with evidence to support their relevance, and those that were promising (i.e. emerging evidence).¹³

Supported factors were –

- Sexual preoccupation
- Any deviant sexual interest (including sexual preference for children, sexualised violence, multiple paraphilias)
- Offence-supportive attitudes
- Emotional congruence with children (i.e. identifying emotionally with children)
- Lack of emotionally intimate relationships with adults (including never married, conflicts in intimate relationships)
- Lifestyle impulsivity
- General self-regulation problems (impulsivity, recklessness, employment instability)
- Poor cognitive problem-solving
- Resistance to rules and supervision (included childhood behaviour problems, noncompliance with supervision, violation of conditional release)
- Grievance/hostility
- Negative social influences

Promising factors were –

- Hostility toward women
- Machiavellianism (i.e. cunning, scheming, deceptive, etc.)
- Callousness/lack of concern for others
- Dysfunctional coping (e.g. sexualised coping, externalising)

The report of an Australian study published in 2004¹⁴ identified the following factors, amongst others:¹⁵

- *rapists vis-à-vis incest offenders;*
- *extra-familial child molesters;*
- *offenders who victimise strangers;*
- *offenders who violate males;*
- *offenders who choose victims of different ages;*

¹³ R.E. Mann, R.K. Hanson, and D. Thornton (2010), 'Assessing Risk for Sexual Recidivism: Some Proposals on the Nature of Psychologically Meaningful Risk Factors', *Sexual Abuse* vol. 22, no. 2.

¹⁴ D. Livemore (2004), *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy*

¹⁵ *Ibid*, p. 45.

- *offenders who sexually assault victims of both genders; and*
- *offenders who use overt force*¹⁶

In addition, the following were found – by the same study – to be ‘specific predictors of sexual recidivism’:¹⁷

- *sexual deviancy;*
- *a history of sex offending, especially early onset of offending and engaging in a range of sexual crimes;*
- *diversity in offending, including violent and general crimes;*
- *psychological maladjustment, including substance use or abuse, antisocial attitudes and personality disorders;*
- *prior sexual victimisation; and*
- *failure to complete treatment*

Parallels between some of these – for example, ‘use of threats and coercion’; use of violence; and ‘previous convictions, particularly analogous’ can readily be seen. Of these prior offending of a similar nature is of important, as this is consistently shown to be one of the strongest predictors of reoffending. For this reason, it might be more appropriately be considered under the heading of culpability than aggravating factors. Given that there is a general principle against double-counting, however, it may also be the case that it makes little or no difference to the sentence calculation, so long as that principle is adhered to. We, do, however strongly agree that it should be accounted for at some stage of the exercise. Similarly to previous analogous offending, failure to attend or complete rehabilitative interventions has consistently been identified as a risk factor for reoffending. The Council may wish to consider incorporating this into the guideline at some stage, perhaps as an aggravating factor in some form.

We note that there is overlap between some factors identified as indicators of culpability and those identified as aggravating factors. For example ‘targeting a victim who is vulnerable’ and ‘location and timing’ accounted for as aggravators, is similar to planning, accounted for under indicators of culpability. In order to avoid violating the principle of double-counting it may, therefore, be helpful review the wording and/or placement of these factors.

As regards mitigating factors, we note that a history of trauma is not among them. There is a substantial body of literature on the adverse childhood experiences of people who have offended, and there is evidence to suggest that sexual offenders are significantly more likely

¹⁶ See R.K. Hanson & M.T. Bussière, (1998), “Predicting relapse: A meta-analysis of sexual offender recidivism studies”, *Journal of Consulting and Clinical Studies*, vol. 66, no. 2, cited in Livmore (2004).

¹⁷ Livmore (2004), p. 60.

to report having been sexually abused, sometimes repeatedly.¹⁸ Such is the prevalence of adverse childhood experiences amongst individuals who offend, that it has become an area of focus for professionals working in criminal justice. We would, therefore, recommend that the Council consider whether trauma/adverse childhood experiences should be considered a mitigating factor.

Harm

Risk of serious harm, the definition of which was set out above, refers to both likelihood and seriousness/impact of offending behaviour. Evaluation of both elements is necessary to identify the level of risk an individual poses. Seriousness/impact is broadly equivalent to the concept of harm that is employed by the proposed guidelines. It is not, however, clear to us what the distinction is between extreme harm and severe harm. In the context of a scrutiny-level assessment, assessors will have regard to agreed definitions used support decision-making in relation to Multi-Agency Public Protection Arrangements (MAPPA). These are as follows:¹⁹

- Very High: there is an imminent risk of serious harm. The potential event is more likely than not to happen imminently and the impact would be serious;
- High: there are identifiable indicators of serious harm. The potential event could happen at any time and the impact would be serious;
- Medium: there are identifiable indicators of serious harm. The individual has the potential to cause such harm, but is unlikely to do so unless there is a change in circumstances, for example failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse; and
- Low: current evidence does not indicate a likelihood of causing serious harm.

While we recognise that these are not entirely apposite to a calculation substantially reflective of wrongdoing, we consider that a somewhat more substantial definition than that currently provided by the Levels and lists of factors may support consistency in judicial approaches to sentencing.

Key Issues

In summary, we would consider the following to be key considerations: (a) in the present context, the risk with which we should be concerned is the risk of serious harm to others; (b)

¹⁸ See S.Dhawan & W.L. Marshall (1996) "Sexual abuse histories of sexual offenders", *Sexual Abuse: A Journal of Research and Treatment*, vol. 8, no. 1.

¹⁹ Scottish Government (2022) *Multi-Agency Public Protection Arrangements (MAPPA) National Guidance*, p. 26.

risk of serious harm is not a consideration that is specific to particular crimes – it is relevant to a broad spectrum of offending; (c) it is challenging to accommodate risk and public protection within a retributive framework, particularly in relation to determinate sentences; (d) sentencing must nevertheless be informed by assessments carried out at an appropriate time, to the appropriate depth, by appropriate professionals, and in conformity with the national standards for risk practice; (e) sentencers must have competence and confidence in evaluating information on risk presented to the court, and in using it to inform sentencing decisions to which risk is relevant; and (f) consistency in the application of the guidelines may be supported by revisiting the placement of various factors relevant to harm, culpability and risk, and by expounding the definition of the levels of harm. The RMA will be happy to work with the Council on these, or any other, issues surrounding risk and risk management, should this be desired.