

# Consultation Response

Sentencing rape offences

A Scottish Sentencing Council  
consultation

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## Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Sentencing Council consultation: Sentencing rape offences. The Committee has the following comments to put forward for consideration.

## Consultation questions

### Question 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?

For the reasons stated in paragraphs 52-55 of the Consultation paper, we agree that it is not appropriate to categorise the seriousness of a rape by reference to whether the offender is known or not known to the victim.

While recognising this circumstance could have an expressive function for some victims, the guidelines already consider more specific factors that imply that the offender is known to the victim as features that increase culpability of harm, such as abuse of trust or grooming.

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

The fact that a case is historic should not affect its seriousness. Some features of historic cases are covered in the guidelines, for example, an offender exerting influence to deter or prevent the complainer from reporting the case is a feature of Level A culpability. The trauma of living with the aftermath of a historic case would be recognised in an assessment of harm. The reason for the case only coming to court years later may not be due to the actions of the accused. The seriousness of the case will be assessed by consideration of all the relevant facts and circumstances.

We agree that for the reasons set out in paragraphs 56-59 that no further guidance on this issue is necessary.

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

We agree. As the consultation paper says, every rape is serious in relation to culpability, but some have features which make them more serious than others.

Therefore, it is recommended that the guidelines include a statement to the effect that the level of culpability in all cases is serious and that no inference should be drawn from its inclusion in Level B. Otherwise, there is a risk that a two-level system might be perceived by victims as downplaying the overall seriousness of an offence.

### Question 4: Do you think that the features of culpability listed in each of the guidelines are appropriate?

Yes, we do.

However, we consider that regarding the feature of grooming, the guidelines should provide more information about the concepts of grooming the environment, the family and the individual.

Grooming the environment makes reference to situations where the perpetrator set up or put themselves in positions where access to potential victims is possible.

Grooming of the family includes situations where the perpetrator gains trust with caregivers and maintains this relationship, causing the victim to feel that they cannot speak about the offence or who has committed it. This situation reinforces the idea that the caregivers support the perpetrator's behaviour or would not believe in the victim's claims.

Grooming the individual includes situations where the victim believes that they have put themselves at risk, or agreed to the abuses by tolerating small boundary violations. Some victims in those situations may feel that the blame is located on them.

### Question 5: Should any features of culpability be added to either of the guidelines, or should any features be removed?

We consider that the use of official status, especially uniformed status, should be explicitly mentioned as a feature of culpability.

Additionally, we consider that the feature *Administration of alcohol and/or drugs to the victim to facilitate the offence* should include providing forced medication.

We also consider that cultural violations should be explicitly added as a feature of culpability. We are aware of cases in which the perpetrator tears off a woman's hijab, burqa, niqab, abaya or sheitel.



## Question 6: Do you agree or disagree that there should be three levels of harm in the guidelines?

Yes, we agree.

On the one hand, while sentencers may be able to distinguish between the levels of psychological harm or trauma and physical harm in levels 2 and 3, it may not be obvious to victims, their families and supporters or to the general public where the threshold lies between instances of 'ordinary' harm or trauma, and severe or extreme cases. There is a risk that victims of cases categorised as suffering Level 3 harm could feel that their case has been devalued.

However, the sentencer must make an objective assessment based on all the facts and circumstances of the case, and some cases will have a less severe impact on the victim or result in less serious injuries than others. Having three levels of harm would permit the court to make a more nuanced judgement of each case.

If there were to be two levels of harm only, then the ranges for Level B offences would be very wide.

We note cases in which victims develop a great level of resilience in recovering from sexual abuse. We consider that this resilience should not mitigate the assessment of the level of harm, as in many cases the victims have worked arduously to overcome the harm created by the perpetrator.

## Question 7: Do you think that the features of harm listed in each of the guidelines are appropriate?

Yes, we do.

## Question 8: Should any features of harm be added to either of the guidelines, or should any features be removed?

We consider that behaviours designed to leave scarring or reduce women's sexual attractiveness should be included as a feature of harm. While we note that the list of circumstances of Level 2 include *severe physical harm*, we are of the view that behaviours designed to leave scarring or reduce women's sexual attractiveness involve a particular type of harm that should be considered in the sentencing process.

We also consider that forcing someone to engage in acts that they consider humiliating should be explicitly stated in Level 2 features of harm.

### Question 9: Do you agree with the sentencing ranges for each of the guidelines?

It appears from the consultation documents that the purpose of issuing guidelines is to codify what was previously unwritten practice (see paras 80-83 for a description of the evidence used to decide upon the ranges).

We consider that the ranges accurately capture current sentencing practice. However, there may be issues in terms of multiple charges.

### Question 10: Do the guidelines sufficiently address the issues of public protection and risk?

Yes, they do. We note that paragraphs 13-15 and 21-24 discuss the imposition of extended sentences and OLRs. We also note that paragraphs 22-24 explain how the court should calculate the punishment part of an OLR.

### Question 11: Are the aggravating factors listed in each of the guidelines appropriate?

Yes, we consider that the aggravating factors listed in the guidelines are appropriate.

### Question 12: Should any aggravating factors be added to either of the guidelines, or should any factors be removed?

No, we have not identified aggravating factors to be added or removed.

We note that care has been taken to keep separate factors contributing to culpability and those which aggravate the offence.

### Question 13: Are the mitigating factors listed in each of the guidelines appropriate?

Yes, they are.

However, we consider that the guidelines should provide clarity on the scope of mental illness linked to the commission of the offence. This mitigating factor should include cases of offenders with a mental illness that makes them unaware of the commission of the offence (i.e., the perpetrator suffers a clear psychotic episode with command control hallucinations that drives them to offend, or the perpetrator has a clear intellectual disability that impedes them to understand that they are committing an offence). Conversely, we are of the view that cases in which the perpetrator suffers from depression, substance use disorder, anxiety, or personality disorder should not be considered as a mitigating factor.

Additionally, we consider that the perpetrator should demonstrate remorse clearly with their behaviour to be considered as a mitigating factor. Those behaviours may include taking steps to seek help for the victim, taking responsibility for their actions, and reducing the chance that the situation happens again.

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

No. We haven't identified mitigating factors to be added or removed.

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

They should not, other than perhaps to improve consistency of approach and outcome. As the sentencing ranges have been chosen to reflect current practice, there should be no noticeable difference in sentences imposed pre or post introduction of the guidelines, if approved.

#### 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?

They should assist public understanding. The guidelines are concise, clearly presented, and avoid the use of overly complicated legal language.

However, there is one aspect that may not effectively manage the victim's or the public's expectations that the stated ranges will apply to all offenders. Paragraph 3 addresses the requirement to have regard to any sentencing guidelines that are applicable to the case. It ends as follows: "This may result in the selected sentence falling outwith the sentencing range originally identified".

We doubt that the final sentence, used here and in the Causing Death by Driving Guideline, though easily understood by the judiciary and the profession, sufficiently explains to the public the interrelationship of the proposed guidelines and the Sentencing Young People Guideline, or the practical implications in terms of the sentence imposed.

On the face of it, a person convicted of an offence judged to be of Level A culpability and Level 2 harm could expect a sentence of between 8 and 10 years. However, if the offender is under the age of 25, there is a presumption that "the nature and duration of the sentence should be different from that which might be imposed on an older person being sentenced for the same or a similar offence." (SYP Guideline para 20). Also, "a custodial sentence should only be imposed when the court is satisfied that no other sentence is appropriate, but where it is imposed it should be shorter than that which would have been imposed on an older person." (SYP Guideline Para 21). Whilst where a young person is convicted of rape, the court is likely to consider that no other sentence is appropriate, the



duration of that sentence will most likely be lower than that indicated in the guideline and may fall below the lower end of the stated sentencing range. There is considerable potential for confusion and disappointment on the part of the victim and avoidable public criticism of the sentence unless the practical effect of the SYP guideline is explained in greater detail, either on the face of the guidelines or in an explanatory note on the Scottish Sentencing Council website for example.

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

The benefits are clarity, consistency and the codification of current practice.

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

We do not have any views on this question.

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

We do not have anything else to add.





For further information, please contact:

Liliana Torres Jimenez  
Policy Team  
Law Society of Scotland  
[LilianaTorresJimenez@lawscot.org.uk](mailto:LilianaTorresJimenez@lawscot.org.uk)