



Offences of rape

**Scottish Sentencing Council report on public
consultation**

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Contents

Chair's foreword	3
Glossary	5
Introduction.....	12
Rationale and objectives	13
Effect of guidelines	14
Public consultation responses.....	16
Summary of key guideline changes	16
Other changes	19
Specific issues: Offender known to the victim and historical offences	20
Assessing seriousness: culpability	26
Assessing seriousness: harm	32
Sentencing ranges and public protection.....	36
Aggravating factors	43
Mitigating factors	45
Potential impacts of the guidelines	47
Influence on sentencing practice	48
Impact on public understanding.....	48
Perceived costs	49
Additional comments.....	50
Other matters.....	51
Sentencing process guideline	52
Outwith scope of guidelines	52
Next steps	54
Submission of guidelines for approval	54
Entry into force.....	54



Chair's foreword



I am pleased to introduce this report on the Scottish Sentencing Council's response to our public consultation on draft sentencing guidelines for rape offences. These are very serious offences of great concern to the public. The guidelines are intended to assist judges in determining appropriate sentences, and enhance consistency in sentencing. They can also help to increase general understanding of how sentencing decisions are reached.

They have been developed with an evidence-based approach including wide-ranging engagement across the justice, government, and charity

sectors. We have also analysed relevant sentences imposed by the Scottish courts over a period of years. We commissioned research projects, including a national survey and a report exploring the views of rape victim-survivors.

The public consultation was a significant part of the development process, and we are grateful to everyone who took the time to participate. Each response has been independently analysed, and carefully considered by the Council, before decisions were taken on finalising the guidelines. The report focusses on areas where changes were made as a result of the consultation exercise, as well as on some of the more commonly raised issues.

Following our analysis of all of the evidence, including the consultation responses and a review of current sentencing practice, some of the sentencing ranges in each guideline have been increased. The Council believes that this better reflects current sentencing practice as set out by the Appeal Court. All of the options provided remain long-term custodial sentences. Other key changes include the removal of specific mitigating factors for these offences, instead referring users to the mitigating factors listed for all offences in the Council's guideline on the sentencing process.

A further section addressing non-harassment orders has been added to the guidelines, as well as a number of clarifications to help assist general understanding of certain features and factors which can make the offences more serious for the purpose of sentencing. The report sets out the rationale for all of the decisions taken in relation to the final guidelines, which will now be submitted to the High Court for approval.

I am very grateful to all of our Council members, past and present, who contributed to this work, particularly those who served on the committee which oversaw the development of these guidelines.

I would also like to thank all those who have contributed to the development process including, of course, those who took the time to consider the consultation and offer their views. Your interest in the Council's work is greatly appreciated, and we could not fulfil our aims without it.

The Right Hon Lord Beckett
Lord Justice Clerk and Chair of the Scottish Sentencing Council

Glossary

Sentencing, and the law surrounding it, can be complex. The following information is provided to help explain some of the terms and concepts referred to in this consultation report. Further information about sentences and sentencing, as well as a jargon buster, are available on the Council website.¹

Aggravating and mitigating factors

Aggravating factors are facts and circumstances which may make an offence more serious for sentencing purposes. Mitigating factors, including factors personal to the offender, may lead to a less severe sentence. Some aggravations are statutory, meaning that they are set out in law. When proven, they must be taken into account by the judge in deciding a sentence. These include offences motivated by hatred or prejudice based on age, race, religion, disability, sexual orientation, or transgender identity.

Appeal against sentence

An offender can appeal against their sentence if they think it is too high or that the court did not get it right. The prosecutor - who brings the case against the offender to court - can also appeal against a sentence if they think it is too low (below what would be the normal range). If the appeal is allowed, the appeal judges can reduce the sentence, make no change to the sentence, or increase the sentence.

Culpability

Culpability is the level of blame of the offender in committing the offence.

Disposal

A disposal is the sentence or outcome of a criminal case.

Domestic abuse

When an offence is committed against a partner or ex-partner, it is sentenced under Scottish legislation as an offence of domestic abuse. There are different pieces of legislation for domestic abuse offences. Section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2009² may make any domestic abuse offence more serious for sentencing purposes. This includes the offence

¹ [Scottish Sentencing Council](#)

² [Section 1 of the Abusive Behaviour and Sexual Harm \(Scotland\) Act 2009](#)

of rape when it is against a partner or ex-partner. A course of behaviour causing physical or psychological harm can also be prosecuted under separate legislation set out in section 1 of the Domestic Abuse (Scotland) Act 2018 (DASA).³ Section 5 of DASA⁴ can make this offence more serious when a child is involved. The Council is currently developing a separate guideline on sentencing domestic abuse offences. It is intended that this would be read alongside the guidelines for rape offences where the victim is a partner or ex-partner (subject to the guidelines being approved by the High Court).

Double-counting

When deciding a sentence, a judge follows a number of steps. The first step is to assess the seriousness of the offence by determining the culpability of the offender and the harm caused to the victim. Step 2 is to select the sentencing range, and step 3 is to identify the factors that might make the sentence more (aggravating) or less (mitigating) severe. If a feature of culpability or harm is considered during the first step, it should not be considered again as an aggravating or mitigating factor at step 3. If it were, this would be 'double-counting' and could lead to a disproportionate sentence.⁵

Guilty plea consideration

By law, where an offender has pled guilty to a crime, the court must take that into account in deciding the sentence. This often leads to a reduction in the sentence imposed. This recognises that a plea of guilty saves court time and resources throughout the criminal justice system, which means that other cases might be dealt with sooner. A plea of guilty before a trial commences also means that victims and witnesses will be spared having to give evidence. The court will consider how early the plea was made.

Headline sentence

The headline sentence is the sentence selected by the court which takes into account the seriousness of the offence and any aggravating and mitigating factors. It does not take into account any adjustment to the sentence for other reasons, such as time the offender has already spent in custody during court proceedings, or a reduction for a plea of guilty. Therefore, the headline sentence may not be the final sentence imposed by the court.

³ [Section 1 of the Domestic Abuse \(Scotland\) Act 2018](#)

⁴ [Section 5 of DASA](#)

⁵ [The sentencing process guideline](#), effective from 22 September 2021, paragraph 18

Legislation and common law

Scottish legislation is made up of laws passed by the Scottish Parliament and by the UK Parliament. Common law offences, such as assault and theft, are based on Scottish legal principles and court decisions rather than on legislation.

Licence

Offenders released 'on licence' before the end of their sentence are let out of custody into the community, and must follow certain conditions. The person will be under the supervision of a justice social worker in the community. The conditions might be, for example, that they must stay at a designated address, and keep in regular contact with their social worker. If they do not follow the conditions, they can be sent back into custody to serve the rest of their sentence. The licence will last until the sentence is completed. For further information, see 'Automatic early release' under the heading 'Types of sentence' below.

'Sex offenders register'

A person is subject to notification requirements (sometimes called the 'sex offenders register') if they are convicted of certain sexual offences, including rape. When someone is convicted of rape, the notification requirements automatically apply. By law, the length of time for which the requirements apply is determined by the sentence. Beyond deciding the sentence, the judge has no discretion over how long the requirements apply. For example, the requirements will apply indefinitely if someone is sentenced to imprisonment for a period of 30 months or more, or if a life sentence or order for lifelong restriction is imposed. More information, including a table setting out all the periods of time that the requirements are set for, is available on the Council's website.⁶

Sexual harm prevention order (SHPO)

A sexual harm prevention order can be made if the court is satisfied that it is necessary for the protection of the public, children, vulnerable adults, or any particular individuals from sexual harm from the offender. Under such an order, offenders convicted of a sexual crime can be told to follow certain rules and can be prohibited from doing anything listed in the order. For example, an SHPO might order an offender not to use the internet to contact a child under the age of 16. An SHPO can be imposed as a standalone disposal or as part of another sentence.

⁶ [Scottish Sentencing Council – Sex offenders register explained](#)

Sexual Offences (Scotland) Act 2009

The Sexual Offences (Scotland) Act 2009⁷ replaced many common law offences, including rape, with statutory offences under legislation.⁸ In the Act, rape is intentional or reckless penetration, with the offender's penis, of a victim's vagina, anus or mouth, without the victim's consent and without any reasonable belief that the victim consented. This is broader than the common law offence of rape, which was restricted to when a male person had (vaginal) sexual intercourse with a female person without her consent. The Act also sets out the law on consent, including a list of situations where consent cannot be given, for example: where the victim is incapable of consenting because of the effect of alcohol or any other substance; where the victim is asleep or unconscious; where the victim agrees or submits to the conduct because of violence or threats of violence; or where the victim has been deceived. A child under the age of 13 cannot, under the law, consent to intercourse or other sexual activity.⁹ The offence of rape is defined in section 1 of the Act. If the victim is aged under 13, this is a separate offence, defined in section 18 of the Act. We have prepared separate sentencing guidelines for each offence.

Statutory consultees

Under legislation, all of the Council's sentencing guidelines must be submitted to the High Court for approval before coming into effect.¹⁰ Before submission, the Council must consult the Scottish Ministers, the Lord Advocate, and anyone else it considers appropriate. The Council has decided to consult publicly on all its guidelines.

Stealthing

This is not a term used in Scottish legislation, but is commonly understood as deliberately removing or not using a protective condom during sexual intercourse, without a partner's consent. This act has been successfully prosecuted in Scotland as rape under section 1 of the Sexual Offences (Scotland) Act 2009.¹¹ For more information see the Crown Office and Procurator Fiscal Service website.¹²

⁷ [Sexual Offences \(Scotland\) Act 2009](#)

⁸ See the glossary entry 'Legislation and common law'.

⁹ The age of consent is 16, however the law varies in relation to offences against younger children under 13 and older children aged between 13 and 16.

¹⁰ [Criminal Justice and Licensing \(Scotland\) Act 2010, section 5](#)

¹¹ [Sexual Offences \(Scotland\) Act 2009, section 1](#)

¹² [Crown Office and Procurator Fiscal Service website](#)

Types of sentence¹³

Custodial sentence

This is a sentence of imprisonment or detention. Adults are sent to prison, young people aged 18 to 20 are sent to a young offenders institution, and young people aged under 18 are normally placed in secure accommodation under the care of the local authority. In most cases, people will serve part of their sentence in the community under certain conditions. If they commit an offence while serving their sentence in the community, the court can order their return to prison. See below for further information about automatic early release.

Determinate sentences

This is a custodial sentence which is set by the judge for a fixed length of time. These sentences are either short-term (under four years) or long-term (four years or more). However, the offender will not necessarily spend the whole of this time in prison. See below for further information about automatic early release.

Automatic early release

This is a system where people serving sentences of imprisonment or detention are released into the community on licence after serving part of their sentence in custody. If someone breaches the conditions of their licence they can be sent back to custody. Automatic early release on licence for those serving long-term sentences (four years or more) takes place six months before the end of their sentence, unless the Parole Board for Scotland recommends that they be released earlier after serving at least half of their sentence. Short-term prisoners (those serving less than four years) are released on licence automatically when they have served a fixed portion of their sentence. This is presently 40%, except for those serving sentences for sexual offences or domestic abuse, for whom it is 50%. Automatic early release does not apply to those serving extended sentences (see the glossary entry below).

Extended sentence

The purpose of an extended sentence is to protect the public. It combines a period in prison, or detention for those aged under 21 (the custodial term), with a further set time of supervision in the community (the extension period). The extension period of the sentence in the community can be up to 5 years for sheriff court cases and up to 10 years for High Court

¹³ Further information on how sentences work is available on the Council [website](#).

cases. Offenders who commit an offence while under supervision can be returned to custody. Automatic early release (see the entry above) does not apply to extended sentences.

Indeterminate sentences

These are sentences that do not have a set end point, such as a life sentence. However, the judge will set a punishment part (see 'Life sentence' below) for such sentences.

Life sentence

A life sentence must be given for murder under the law, but can also be given for other exceptionally serious offences. If a person is sentenced to life imprisonment, the judge must, by law, set a punishment part of the sentence. This is the minimum time the person must spend in prison before they can be considered for release into the community by the Parole Board for Scotland. The Parole Board will consider a number of factors in deciding whether, or when, a person should be released into the community. If a person sentenced to life imprisonment is released into the community, they will be on licence for the rest of their life and can be returned to prison if they breach the terms of their licence.

Order for lifelong restriction (OLR)

An order for lifelong restriction is a lifelong sentence put in place to protect the public. It is a sentence of imprisonment which can be imposed on people convicted at the High Court of the offences covered by these guidelines, among other offences. The court must impose an OLR where it appears that, because of the nature or circumstances of the offence, there is a likelihood that the offender will, in the future, seriously endanger the lives, or physical or psychological wellbeing, of members of the public, if he or she is not in custody. The judge must set a punishment part of the OLR, which is the minimum time the offender must spend in prison before being considered by the Parole Board for Scotland for release into the community. If offenders are considered to be safe to serve the rest of their sentence in the community, they will remain under the supervision of a justice social worker. If the person commits another crime, they can be sent back to custody.

Victim/Survivor/Victim-survivor

The guidelines use the word 'victim' throughout rather than any other descriptor such as 'survivor' or 'victim-survivor'. During the engagement process, the Council sought views, including those of

interest groups, on the most appropriate terminology, and no consensus emerged. The Council based its decision on the fact that ‘victim’ is used in Scottish legislation and is widely recognised. When referencing research commissioned by the Council, or submissions provided by respondents, we mirror the terminology used by those sources.

Introduction

1. As part of its development of sentencing guidelines for rape¹⁴ offences, the Scottish Sentencing Council¹⁵ held a public consultation on two draft sentencing guidelines from 25 July to 18 October 2024. One guideline relates to offences of rape under section 1 of the Sexual Offences (Scotland) Act 2009; and the common law offence of rape. The other guideline relates to offences of rape of a young child under section 18 of the Sexual Offences (Scotland) Act 2009 (defined as a child 'who has not attained the age of 13 years'); and the common law offence of rape where the victim is a young child (a child under the age of 13).
2. An independent analysis of responses to the consultation was commissioned by the Council, and is available on its website.¹⁶ This examines each of the consultation questions and responses provided, summarising the key points and themes.¹⁷ The consultation received 76 responses from 61 individuals and 15 organisations. The independent report has separated the organisations into three categories: third sector organisations (7), legal profession and academic organisations (5), and public sector organisations (3). The Council also received responses from the statutory consultees, the Scottish Ministers and the Lord Advocate. The statutory responses, along with those from organisations and individuals who gave their consent, have been published on the Council website.¹⁸ These are accompanied by the original consultation paper, and associated documents.¹⁹
3. The views expressed by respondents, and the findings from the analysis, have been carefully considered by the Council and taken into account in its final decisions regarding the content of the two guidelines. Analysis of the responses, alongside other evidence, has led to a number of amendments to the drafts consulted on. The finalised versions will now be submitted to the High Court of Justiciary for approval.²⁰ For more information on this process see paragraphs 114 - 115.

¹⁴ References to rape offences in this paper include offences of both rape and rape of a young child.

¹⁵ [Scottish Sentencing Council](#)

¹⁶ [Scottish Sentencing Council - Consultations](#)

¹⁷ [Draft sentencing guidelines for rape offences, a Scottish Sentencing Council public consultation: Analysis of responses](#), October 2025, prepared for the Scottish Sentencing Council by Alison Platts and Dawn Griesbach

¹⁸ [Scottish Sentencing Council - Consultations](#)

¹⁹ Ibid

²⁰ Under [section 5 of the Criminal Justice and Licensing \(Scotland\) Act 2010](#), all sentencing guidelines must be approved by the High Court before they can take effect.

4. This report focuses on addressing those matters of most interest to respondents and explains how the guidelines have been amended as a result. While not all points raised are covered in this report, all of the responses received have been considered. The Council has also taken into account the full range of engagement, evidence gathering, and research activity carried out during the first three stages²¹ of the development of the guidelines. The Council's published research includes the following independent projects conducted on its behalf:
- a national survey, published in September 2019,²² which explores, among other things, public attitudes to the sentencing of sexual offences including rape
 - a literature review, published in February 2021,²³ which examines the available data and evidence (including in other jurisdictions) in relation to the sentencing of rape offences
 - a report, published in July 2021,²⁴ which explores public perceptions of sentencing sexual offences in depth, including the perceptions of victims and a support worker
 - a report, published in May 2024,²⁵ which focuses on victims' views and experiences of sentencing for rape, and other sexual offences.
5. The Council also supplemented its analysis of statistical data by considering recent High Court opinions in appeals against sentence for these offences.

Rationale and objectives

6. The guidelines have been developed in recognition of the public concern about sexual offending, which accounts for a significant proportion of sentencing in Scottish courts. Rape offences can cover a broad variety of circumstances and can therefore involve challenges for

²¹ [How are sentencing guidelines developed](#), Scottish Sentencing Council website

²² [Public perceptions of sentencing: National survey report](#), September 2019, prepared for the Scottish Sentencing Council by Carolyn Black, Rachel Warren, and Rachel Ormston (Ipsos MORI Scotland), and Professor Cyrus Tata (University of Strathclyde)

²³ [Sexual offences involving rape: Literature Review](#), February, 2021, prepared for the Scottish Sentencing Council by Dr Rachel McPherson, Mr Nicholas Burgess, Dr Jay Gormley and Professor Cyrus Tata (School of Law, University of Glasgow and Centre for Law, Crime and Justice, School of Law, Strathclyde University)

²⁴ [Public perceptions of sentencing in Scotland: Qualitative research exploring sexual offences](#), July 2021, prepared for the Scottish Sentencing Council by Hannah Biggs, Susan Reid, Kaushi Attygalle, Konstantina Vosnaki (ScotCen), Dr Rachel McPherson (University of Glasgow) and Professor Cyrus Tata (Centre for Law, Crime and Justice, School of Law, University of Strathclyde)

²⁵ [Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences](#), May 2024, prepared for the Scottish Sentencing Council by Oona Brooks-Hay, Michele Burman and Jenn Glinski, (SCCJR, University of Glasgow)

sentencing courts. We believe guidelines will assist courts in reaching sentencing decisions, and thereby enhance consistency and predictability in sentencing in cases involving rape offences. Guidelines will also assist public understanding. Clarity around the sentencing process, and what factors are taken into account, will give all those involved in, or affected by, these cases a greater understanding of how sentences are reached.

7. As well as the courts, the guidelines have been developed to be useful to:
 - legal practitioners
 - those involved in the delivery and administration of criminal justice
 - those involved in, or with an interest in, such cases, for example victims, families, and support organisations
 - those accused or convicted of an offence of rape
 - the public
 - the media.
8. The guidelines cannot cover every possible situation, but aim to capture a range of circumstances relevant to these offences in order to provide useful guidance to judges while preserving the flexibility necessary for them to consider the particular facts and circumstances of each individual case.

Effect of guidelines

9. Courts must have regard to all applicable guidelines when sentencing.²⁶ The principles and purposes of sentencing guideline²⁷ and the sentencing process guideline²⁸ apply to all offences, including rape offences. The rape guidelines are therefore intended to be read alongside those general guidelines and have been drafted with that in mind. The principles and purposes of sentencing guideline provides that the overarching principle of sentencing is that sentences must be fair and proportionate. The sentencing process guideline makes it clear that this should be considered throughout the sentencing exercise, and was developed with a view to ensuring that it would not be necessary to repeat the general factors it sets out again in offence guidelines. This approach is intended to allow offence guidelines to be succinct and

²⁶ [Criminal Justice and Licensing \(Scotland\) Act 2010, section 6](#)

²⁷ [Principles and purposes of sentencing guideline](#), effective from 26 November 2018

²⁸ [The sentencing process guideline](#), effective from 22 September 2021

easily referenced in the court setting. The sentencing young people guideline provides that the nature and duration of a sentence imposed on a young person should be different from that which might be imposed on an older person being sentenced for the same, or a similar, offence; and that a custodial sentence for a young person should be shorter than that for an older person who is to be sentenced for the same, or a similar, offence.²⁹ For the purpose of the guideline, a young person is someone who is under the age of 25 at the date of their conviction. The guideline is further discussed in more detail at paragraph 78.

²⁹ [Sentencing young people](#), effective from 26 January 2022

Public consultation responses

Summary of key guideline changes

10. A brief summary of the key points raised by respondents is provided in this paper, but we recommend that the independent consultation analysis,³⁰ or its executive summary,³¹ is read for further context.
11. Responses to the consultation from individuals and organisations alike have been of considerable assistance to the Council. As a result of its analysis of the responses - as part of its overall engagement, research and analysis work - the Council has made a number of substantive changes to the draft guidelines consulted on. The table below lists the key amendments made to both guidelines in the order that they arise in the amended documents. The report then considers each consultation question asked in turn, including discussion of the changes made.

Issues raised	Actions taken
OFFENDER KNOWN TO VICTIM	
Responses were fairly evenly divided as to whether the guidelines should address instances where the offender is known to the victim. Those who thought that the guidelines should address this often focused on situations where a personal or family relationship existed, or cases where the offender held a position of trust and was known to the victim in a professional capacity.	A breach of trust or authority is already listed in the guidelines as a feature of culpability that would make the offence more serious. However, to assist understanding, what this feature of culpability can involve has been clarified through the provision of specific examples, such as the relationship of a carer and dependant including those which are familial, or a professional relationship such as teacher and student, or temporary relationships such as a taxi driver and passenger. (See paragraphs 15 - 23 for further discussion.)

³⁰ [Draft sentencing guidelines for rape offences, a Scottish Sentencing Council public consultation: Analysis of responses](#), October 2025, prepared for the Scottish Sentencing Council by Alison Platts and Dawn Griesbach

³¹ Ibid, paragraphs 1 – 33

FEATURES OF CULPABILITY & HARM	
One respondent felt that the targeting of a vulnerable victim, listed as an aggravating factor, spoke to the culpability of the offender and would sit better as a feature of culpability. Separately, another respondent felt that victims can be vulnerable in different ways.	The targeting of a vulnerable victim has been moved from the list of aggravating factors to the list of features of culpability level A. A footnote has been added to explain that the types of vulnerability can involve both one of a continuing nature such as a physical or mental condition, and one of a temporary nature such as unconsciousness. (See paragraphs 45 - 46 for further discussion.)
One respondent felt that the use of a weapon to frighten or injure a victim, listed as an aggravating factor, would sit better as a feature of seriousness.	The use of a weapon to frighten or injure a victim has been moved to the features of culpability level A. (See paragraph 47 for further discussion.)
Several respondents suggested that the feature of recording the offence should be clarified, while another respondent felt that the guidelines should also address the public sharing of any recording.	The feature of recording the offence has been clarified by a footnote to ensure that all forms of recording are included. An additional feature of harm has been added regarding the public sharing of a recording. (See paragraphs 44 and 63 for further discussion.)
A number of responses raised issues about offending committed against the same victim. Several respondents felt that 'repeated offences committed against the same victim', listed under harm level 2 in the guidelines, increased both the harm to the victim, but also the culpability of the offender. The draft guidelines consulted upon also included 'previous violence, or other offending, against the victim' as a feature of culpability. Separately, a response from a statutory consultee suggested that previous	The features of seriousness 'previous violence, or other offending, against the same victim' and 'repeated offences committed against the same victim' have been consolidated and moved to the table of aggravating factors. This enables the court to give appropriate weight to repeated offending against the victim, while aiming to remove any potential risk of double-counting. (See paragraph 48 for further discussion.)

offending against other victims should similarly increase culpability.	
Several respondents suggested that the definition of culpability level B should be clarified to ensure that it was not read as an absence of features listed at level A, as opposed to an absence of features which would be assessed at level A whether listed or not.	Culpability level B has been clarified to explain that it includes both the absence of features not listed at level A as well as any features which might be assessed by the court as falling into level A, even if they are not listed. A similar clarification has been made at level 1 harm for the same purpose. (See paragraph 40 for further discussion.)
Some respondents felt that 'impact on lifestyle, and social and economic functioning' should be added to the features of harm.	'Impact on lifestyle, or on social or economic functioning' has been added in a footnote as examples of psychological harm or trauma. (See paragraph 62 for further discussion.)
SENTENCING RANGES	
Most respondents disagreed with the sentencing ranges in the guidelines, generally considering them to be too lenient.	The Council has carefully considered the consultation responses received, and recent decisions of the Appeal Court in respect of appeals against sentence in cases of rape. Taking all of this into account, the sentencing ranges have been increased to start at 5 years' imprisonment for rape and 7 years' imprisonment for rape of a young child. The Council has increased the lower end of the sentencing ranges for both offences, but overall the increase is greater in the guideline on rape of a young child. The highest points of the sentencing ranges remain at 13 years for rape and 14 years for rape of a young child. The options of extended sentences and orders for lifelong restriction (a form of life sentence) remain. (See paragraphs 68 - 77 for further discussion.)

PUBLIC PROTECTION	
Some respondents felt that there should be more use of measures such as non-harassment orders (NHOs).	A final section has been added to the guidelines explaining the use of NHOs for these offences. (See paragraphs 78 - 80 for further discussion.)
AGGRAVATING FACTORS	
One respondent suggested that the aggravating factor in relation to an offence committed while the offender is under the influence of alcohol or drugs means that a sober offender would receive a less severe sentence than an intoxicated offender for rape offences.	An offence committed while under the influence of alcohol or drugs has been removed from the guidelines. (See paragraph 85 for further discussion.)
MITIGATING FACTORS	
Many respondents felt that the mitigating factor relating to no previous convictions should be removed from the guidelines.	Specific mitigating factors have been removed from the guidelines, and have been replaced with a reference to the sentencing process guideline. This guideline contains a list of examples of possible mitigating factors which may apply to any sentencing decision. (See paragraphs 89 - 94 for further discussion.)
Many respondents felt that the mitigating factor relating to mental health issues should be removed from the guidelines.	
Many respondents felt that the mitigating factor relating to remorse should be removed from the guidelines.	

Other changes

- A number of further changes have been made to the guidelines regarding issues not raised in the consultation. Under the 'Applicability' section of the rape of a young child guideline, we have clarified the definition of a young child as set out in section 18 of the Sexual Offences (Scotland) Act 2009.³² In order to assist public understanding, a footnote has been added stating that a young child refers to someone under the age of 13.

³² [Sexual Offences \(Scotland\) Act 2009](#)

13. We have amended a number of features of seriousness under culpability, and under harm. We have amended the feature of culpability at level A, 'violence (beyond that which is inherent in the offence)' to include the word 'significant', and to reference all offences of rape, so that it reads 'significant violence (beyond that which is inherent in the offence of rape)'. This recognises that all rape offences are inherently violent by their nature. However, significant violence can make the offence even more serious. We have also amended the feature of culpability at level A, 'abduction', to include involuntary detention so that it now reads 'abduction, including detaining the victim against their will where this involves a significant restriction of the victim's freedom of movement'. In line with this amendment, the feature of harm at level 2 'prolonged detention or sustained incident' has been amended to 'prolonged or sustained incident'. The Council takes the view that detention should be aligned to abduction as a feature of culpability. Features relating to physical harm and psychological harm at both levels 2 and 3 have been combined simply for ease of reference to read: 'psychological or physical harm or trauma'.
14. We have also re-ordered the three lists of features of culpability, features of harm, and aggravating factors, in a more methodical way. The order has been changed to provide a general timeframe of how these features and factors might occur during the commission of a relevant offence, although we acknowledge that there will be inevitable overlap and that there will not necessarily be consistency across offences. The lists start with those features or factors that do not fall under any timeline. The orders do *not* relate to the degree of significance of any particular feature or factor which will be assessed by the judge based on the particular circumstances of each individual case.

Specific issues: Offender known to the victim and historical offences

Offender known to the victim

15. Question 1 of the consultation asked whether the guidelines should explicitly address whether the offender is known to the victim, as opposed to not known, and if so, what guidance would be useful.

16. The responses to this question were fairly evenly divided.³³ Those who thought that the guideline should not address this felt that both situations (where the offender is known or unknown to the victim) could impact on the nature and seriousness of a case in a variety of different ways, and that defining such relationships was subjective. It was thought that the other factors which might be likely to be present in either set of circumstances such as the degree of planning, use of violence, breach of trust, or harm caused may indicate an increased level of seriousness.
17. Those who thought that the guideline should address this often focused on situations where a personal or family relationship existed, or cases where the offender held a position of trust and was known to the victim in a professional capacity.
18. The Council has carefully reviewed these responses and considers that certain personal or family relationships can often reflect an abuse of power or of a position of trust or authority. It is for that reason that the guidelines include this as a feature of culpability. This feature is placed at the higher level of culpability (A) which increases the seriousness of the offence. However, in order to assist clarity and general understanding around the wide range of situations this is intended to cover, we have added a footnote³⁴ providing a number of examples. These include relationships such as teacher and student, employer and employee, or carer and dependant, including family relationships, and situations where there is no ongoing relationship or where the position of trust or authority is temporary, such as childcare, or a taxi driver and passenger. Regarding familial relationships where the court considers that there has *not* been a breach of trust in terms of the culpability of the offender, resultant psychological harm or trauma would fall to be considered as part of the assessment of harm.
19. Examples listed by respondents as being particularly relevant, and therefore particularly harmful, in cases where the offender is known to the victim include betrayal, a breach of responsibility, or the abuse of power including in familial and personal relationships where there may be grooming, maliciousness, repetition of the offence against the victim, and premeditation. The Council acknowledges that these features may certainly be present in such

³³ 34 of 71 respondents who answered the question in relation to the rape guideline agreed that the guideline should explicitly address whether the offender is known to the victim, and 34 of 67 who answered the question agreed in relation to the rape of a young child guideline. Organisations and individuals were divided in their views; however almost all the third sector organisations agreed.

³⁴ This list provides examples to indicate the wide range of relationships this feature of culpability is intended to cover and is *not* exhaustive.

circumstances, but takes the view that they are captured in the guidelines, and that the court will take appropriate account of the degree of harm they can cause. For example, the guidelines include features and factors around the abuse of power or of a position of trust or authority, planning, coercion to facilitate the offence, grooming, significant violence (beyond what is inherent in the offence of rape), additional degradation or humiliation, and repeated offending against the victim.³⁵

20. Respondents also highlighted the impact, where there has been some form of relationship between the offender and the victim, on the victim's home life, family, social relationships, networks, and in some cases employment upheaval resulting from relocation. The Council acknowledges that these are aspects of harm that can often be present where the offender is known to the victim, but they can also be present in some cases where the offender is a stranger. In both situations, these are aspects of harm, and accordingly have been added to the guidelines as examples of psychological harm (see paragraph 62 for further discussion).
21. It is also worth noting that when the offence is committed against a partner or ex-partner, this is treated as an aggravation of the offence under Scottish legislation making it more serious for sentencing purposes. The Council is currently developing a separate guideline on sentencing domestic abuse offences. It is intended that this will be read alongside the guidelines for rape offences where the victim is a partner or ex-partner (subject to the guidelines being approved by the High Court).³⁶
22. The Council takes the view that the rape of a victim by someone known to them, for example an acquaintance, should not be considered more or less serious than the rape of a victim by someone not known to them because of that fact alone. Rather, it is the presence of other factors relating to the commission or consequences of the offence that may indicate increased culpability or harm, which will have a bearing on the seriousness of the offence, such as the degree of planning, use of threats or coercion, breach of trust, or psychological or physical harm caused. For this reason, the Council has concluded that the guidelines should not explicitly address whether the offender is known or not known to the victim.

³⁵ These are listed in the features of culpability and harm apart from repeated offending against the victim which is listed as an aggravating factor.

³⁶ See the glossary entry for domestic abuse.

Summary of decisions

23. The guidelines do not explicitly make provision as to whether the offender is known or not known to the victim; however, clarification around existing features where a relationship may exist has been provided.

Historical rape offences

24. Question 2 of the consultation asked whether further guidance should be provided in relation to historical rape offences in either guideline, and if so, what guidance would be useful.
25. A small majority of individuals felt that such guidance should be provided. However, the independent analysis provided to the Council states that some 'may have understood this question as asking about whether previous offending by the offender should be a factor in reaching a sentencing decision' and notes that the presence of previous convictions is included as an aggravating factor in the guidelines.³⁷ The organisations were fairly evenly divided in their views.³⁸
26. Respondents who thought that no further guidance should be provided generally felt that:
- the features and factors set out in the draft guidelines were enough to assess the seriousness of the offence
 - additional guidance was already available in Appeal Court decisions³⁹
 - there was difficulty in defining such cases
 - there was a risk of making the guidelines overly complicated.

³⁷ [Draft sentencing guidelines for rape offences, a Scottish Sentencing Council public consultation: Analysis of responses](#), October 2025, prepared for the Scottish Sentencing Council by Alison Platts and Dawn Griesbach, paragraph 3.23

³⁸ 44 of 71 respondents who answered the question said further guidance should be provided in the rape guideline; and 42 of 69 who answered the question said it should be provided in the rape of a young child guideline.

³⁹ In addition to the case of [HMA v CB](#) discussed in paragraph 32 of this paper, one respondent to the consultation also noted [Greig v HMA](#) as being of assistance to the court in historical rape cases.

27. Those who felt guidance⁴⁰ should be provided, noted the following as factors which could be relevant to sentencing:

- impact on the victim
- actions of the offender
- age of the offender
- subsequent conduct of the offender.

However, the independent analysis states that ‘respondents were not necessarily explicit about the additional guidance that might be provided’.⁴¹

28. After taking careful account of the responses, the Council has concluded that the factors listed in the paragraph above are already considered by judges, including in the assessment of the seriousness of the offence, and are covered in what material is, or is likely to be, available to the court. This includes the rape guidelines, the sentencing process guideline which relates to all offences,⁴² and opinions of the Appeal Court.

29. The **impact on the victim** will be part of the assessment of harm, and will take into account the long-term effects including the impact linked to the passage of time such as living with unresolved trauma.

30. Responses pointing to the **actions of the offender** included preventing the reporting of the offence or other attempts to evade justice. These are covered in the table of aggravating factors⁴³ listed in the guidelines, which can increase the severity of the sentence.

31. The **age of the offender** is addressed in the sentencing process guideline which applies to all offences including historical offences. It states that factors relevant to the assessment of the culpability of the offender include the ‘offender’s age, or level of maturity, at the time of

⁴⁰ One respondent also said that historical cases should be ‘time barred’ to limit the time allowed between the offence taking place and reporting it for the case to be prosecuted. This would be a matter for legislation. Decisions on prosecuting cases in court are a matter for the Crown Office and Procurator Fiscal Service.

⁴¹ [Draft sentencing guidelines for rape offences, a Scottish Sentencing Council public consultation: Analysis of responses](#), October 2025, prepared for the Scottish Sentencing Council by Alison Platts and Dawn Griesbach, paragraph 3.25

⁴² [The sentencing process guideline](#), effective from 22 September 2021

⁴³ ‘an attempt to dispose of or conceal evidence’; ‘steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution’

committing the offence'. The guideline also refers to 'infirmary' as a mitigating factor, which may occur in older age.⁴⁴

32. The **subsequent conduct** of the offender was also raised. In relation to the consideration of a sentence, some argued that otherwise good conduct may point to a low risk of the offender to the public, while others noted the years of freedom experienced by an offender prior to prosecution. In the Appeal Court decision *HMA v CB*, for example, the court took the view that when set alongside the aggravating features in that case any mitigating considerations, including good character, were 'of limited weight,' and should be set against the evasion of prosecution for many years.⁴⁵ 'Previous otherwise good character' is listed in the sentencing process guideline⁴⁶ as a potential mitigating factor in relation to all offences. The Council's consultation paper, however, proposed that previous otherwise good character might be used to facilitate an offence such as rape - for example, an offender who is respected because they have volunteered as a leader of a community or youth organisation could be seen as having a previous otherwise good character.⁴⁷ In situations where they used this status to access or to silence victims this could, in fact, be regarded as an aggravating factor. The Council has taken the view that what weight, if any, should be given to this factor will be a matter for the judge in their consideration of the particular circumstances of the offence.

Summary of decision

33. The Council has concluded that the consideration of a sentencing decision in relation to historical, or non-recent offences is an issue which can arise in respect of a wider range of offences, rather than being specific to the offences of rape. The factors relevant to historical offences are already considered by judges, including in the assessment of the seriousness of the offence, and are covered in what material is, or is likely to be, available to the court such as the rape guidelines, the sentencing process guideline which relates to all offences, and opinions of the Appeal Court.

⁴⁴ [The sentencing process guideline](#), effective from 22 September 2021, paragraph 10 and Annex C

⁴⁵ *HMA v CB* [2023] HCJAC 4, paragraph 38

⁴⁶ [The sentencing process guideline](#), effective from 22 September 2021, Annex C

⁴⁷ [Sentencing rape offences: A Scottish Sentencing Council consultation](#), July 2022, paragraph 104

Assessing seriousness: culpability

34. Questions 3 - 5 of the consultation asked whether respondents agreed with the levels of culpability; the appropriateness of the features of culpability listed; and whether any features should be added or removed.
35. The first step in the sentencing process is to assess the seriousness of the offence by determining the culpability of the offender and the harm caused to the victim. The guidelines provide two levels of culpability: level A (which lists features that increase culpability) and level B. This provides that all offences of rape are serious and sentenced as such, but that certain features can *increase* the seriousness of the offence.

Levels of culpability

36. Respondents were fairly evenly divided as to whether the guidelines should have two levels of culpability.⁴⁸
37. Those who agreed noted that two levels were appropriate and would promote consistency in sentencing.
38. Among those who disagreed, there were different views as to the number of levels of culpability the guidelines should contain, with suggestions for both a single level and for three levels. Those who suggested a single level generally felt that all sentences for this offence should be at a higher level. Less commonly, respondents suggested three levels. One legal/academic organisation said that, even for such a serious offence, there will be cases which involve a lower level of culpability. This respondent also argued that, in relation to the features of culpability, the high number of level A features would result in a majority of cases being assigned to the highest level of culpability, which may change the distribution of cases and result in more being categorised at higher levels.

⁴⁸ 38 of 70 respondents who answered the question agreed that there should be two levels of culpability in the rape guideline, while 31 of 69 who answered the question agreed in relation to the rape of a young child guideline. Organisations were more likely than individuals to agree.

39. After considering these differing responses, the Council has decided to retain two levels of culpability in the guidelines. Following further engagement and analysis, the Council believes that the features of culpability listed in the guidelines at level A will result in an appropriate evaluation of the relative levels of seriousness.

Culpability level B

40. Several respondents suggested that the definition of culpability level B should be clarified to prevent oversimplification and to ensure that it was not read as an absence of features listed at level A, as opposed to an absence of features which would be assessed at level A whether listed or not. The Council agrees with this suggestion and has amended the guidelines along those lines.

Appropriateness of features

41. More than half of respondents felt that the features of culpability were appropriate in each guideline⁴⁹ and no respondents felt that any of the listed features should be removed.
42. Some respondents felt that certain features should be further defined. The Council has provided examples in footnotes for two of these - abuse of trust, and recording of the offence - where it feels clarification would be of assistance. However, the Council has avoided further definition where it feels it would decrease the flexibility of the court to apply any of the features to the particular circumstances of different cases. For example, it has not specifically defined 'grooming', with the intention that it can cover a wide range of behaviour.⁵⁰ It has also moved two aggravating factors into the list of features of culpability: targeting a vulnerable victim and use of a weapon. These changes are all discussed below.

⁴⁹ 40 of 70 respondents who answered the question agreed that the features of culpability were appropriate in relation to the rape guideline, while 36 of 67 who answered the question agreed in relation to the rape of a young child guideline. Most organisations agreed.

⁵⁰ The Appeal Court described grooming as an 'imprecise but convenient shorthand to refer to offending which involves the use of cynical and manipulative behaviour designed to achieve a sexual objective, frequently involving a breach of trust' in [HMA v LM](#) [2025] HCJAC 3, paragraph 32.

Clarifications

Abuse of trust

43. As discussed at paragraph 18, the Council has provided a footnote with examples to increase clarity around the wide range of situations that ‘abuse of power, or of a position of trust or authority’ is intended to cover.

Recording the offence

44. Two respondents sought clarity around whether recording the offence would include moving images and audio recordings. The Council has added a footnote to clarify that it can include ‘still images, audio recordings, and filming’. Separately, in consideration of a response from a statutory consultee, the Council has also added an additional feature under harm in relation to the public or private sharing of such a recording. See paragraph 63 for further discussion of this additional feature of harm.

Features added

Targeting a vulnerable victim

45. The draft guidelines consulted on contained an aggravating factor regarding the targeting of a vulnerable victim. This has been removed as an aggravating factor and added as a feature of culpability at level A. The vulnerability of a victim was raised by respondents in answer to a number of the consultation questions. The guidelines consulted on included ‘targeting of a victim who is vulnerable at the time of the offence, including where the victim is asleep or unconscious’ as an aggravating factor. It was suggested by a third sector organisation that this could cover two distinct types of behaviour: targeting a vulnerable person due to their personal circumstances, and targeting a person who is asleep, unconscious, or otherwise incapacitated. A response from a statutory consultee suggested that the act of deliberately targeting a vulnerable victim speaks to the culpability of the offender and should be listed in the guidelines as a feature of culpability. Another view from a legal/academic organisation stated that treating the victim’s vulnerability as inevitably increasing culpability would undermine the distinction between harm and culpability.

46. Having considered all the matters raised, the Council has taken the view that the act of targeting relates to the culpability of the offender, while the harm caused in relation to a particular vulnerability would be assessed under psychological or physical harm or trauma. (See paragraphs 54 - 67 regarding the assessment of harm.) The new feature of culpability reads: 'targeting of a victim who is vulnerable at the time of the offence'. A footnote has been added to clarify that the feature can cover vulnerability of both a continuing nature such as physical and mental conditions or impairments, or of a temporary nature such as sleep or unconsciousness. Where the harm to a victim is increased due to a vulnerability regardless of targeting, this will be assessed as part of the physical and psychological harm or trauma caused. In the rape of a young child guideline, the feature refers to 'a victim who has an additional vulnerability'. This is because the Council considers that all young children can be regarded as vulnerable due to their age, and that this is reflected in the higher sentencing ranges for this offence (see paragraphs 68 - 77).

Use of a weapon to frighten or injure the victim

47. This factor was listed as an aggravating factor in the draft guidelines consulted upon. However, it was suggested by a legal/academic organisation that it would sit better as a feature of seriousness rather than as an aggravating factor. The Council agrees and has added it to the list of features of culpability level A alongside other features such as 'use of threats or coercion to facilitate the offence'.

Features moved

Repeated offences or previous violence against the victim

48. Offending against the same victim arose within responses relating to both the features of culpability and harm. Several respondents felt that 'repeated offences committed against the same victim', listed under harm level 2, increased both the harm caused to the victim, but also (as it involved the targeting of the same victim) increased the culpability of the offender. The draft guidelines consulted upon separately included 'previous violence, or other offending, against the victim' as a feature of culpability. A response from a statutory consultee also suggested that previous offending against other victims should similarly increase culpability. The guidelines list previous convictions, which can include offending against both the victim

and other previous victims, as an aggravating factor. Having given the matter consideration, the Council decided to consolidate the two separate features into one, and move the updated version to the table of aggravating factors. This aggravating factor now reads ‘repeated offending against the victim (other than previous convictions)’ and enables the factor to be considered as something which increases the seriousness of the offence for sentencing purposes⁵¹ while aiming to remove any potential risk of double-counting. It also places the factor alongside the aggravating factor regarding previous convictions, which may relate to other victims. For this reason, it includes guidance against double-counting these two aggravating factors where previous offending against the victim may have occurred in an earlier offence.

Other features

49. After careful consideration, the Council has taken the view that other suggestions made in relation to additional features of culpability are either already covered elsewhere in the guidelines or by separate legislation, or are not sufficiently prevalent in the offences of rape to be included in these particular guidelines. Where a feature is covered by separate legislation, such as stalking,⁵² this is likely to be libelled by the prosecution in the charges put before the court and would thereby be taken into account by the judge as a separate offence. It is up to the Crown Office and Procurator Fiscal Service⁵³ to decide what charges are brought against an offender. Offences may also involve statutory aggravations⁵⁴ which will make them more serious, for example if the victim is a partner or ex-partner;⁵⁵ or if the offence is motivated by certain prejudices based on particular characteristics⁵⁶ such as religion or race.⁵⁷

⁵¹ In a recent case, [HMA v MacGregor](#) [2025 HCJAC 28], the published opinion stated at paragraph 32 that the Appeal Court ‘has recognised that repetition usually makes a crime more serious, certainly in the cases of sexual offences’.

⁵² [Criminal Justice and Licensing \(Scotland\) Act 2010, section 39](#)

⁵³ [Crown Office and Procurator Fiscal Service](#)

⁵⁴ See the glossary entry for statutory aggravation.

⁵⁵ See the glossary entry for domestic abuse.

⁵⁶ [Hate Crime and Public Order \(Scotland\) Act 2021](#)

⁵⁷ The Scottish Government has laid a draft Scottish Statutory Instrument (SSI) in Parliament to add the characteristic of sex to the Hate Crime and Public Order (Scotland) Act 2021; and is currently considering responses to a recent consultation it held on the draft.

50. Separate from the statutory aggravations, a legal/academic organisation suggested the addition of cultural violation.⁵⁸ Following further engagement and consideration, the Council takes the view that there is insufficient evidence to indicate that cultural violation is sufficiently prevalent in the specific offences of rape to be included in these particular guidelines. The list of matters to be taken into account in the assessment of culpability, and the list of potentially aggravating factors in the guidelines, are not exhaustive and the Council considers that cultural violation would be taken into account by a court if it arose in the course of an offence of rape. However, it will further explore, and engage on, this topic as it continues to develop, and review, its sentencing guidelines, including on domestic abuse.
51. Other suggested features are, in the Council's view, already addressed within the guidelines. These are:
- 'Forced abortion after a rape' would fall to be considered under the feature of harm 'pregnancy, and any consequences, as an outcome of the offence'.
 - 'Blackmail' can be taken into account by the court under 'use of threats and coercion to facilitate the offence', and can also be prosecuted as a separate offence.
 - 'Preventing the victim from obtaining assistance' is listed as part of the broader aggravating factor 'steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution'. It can also be prosecuted as a separate offence.

As discussed at paragraph 8, the guidelines cannot cover every possible situation, but aim to capture a range of circumstances relevant to these offences in order to provide useful guidance to judges while remaining succinct for easy reference in court, and preserving the flexibility necessary for judges to consider the particular facts and circumstances of each individual case.

Stealth

52. Several respondents suggested that the removal of a victim's contraceptive device, or of a condom without the victim's consent during sex (sometimes known as 'stealth'), should be added as a feature of culpability, or alternatively as an aggravating factor. In these specific circumstances, it is the lack of the victim's consent (through the breach of a condition of consent) that renders the act an offence, and that will be taken into account by the court when assessing culpability. Where the court considers deception has been used this is also covered

⁵⁸ Cultural harm was also raised. This was raised by one individual in relation to the features of harm.

by the feature of culpability 'use of deception to facilitate the offence'. The harm caused as a result and consequence of the offence will be assessed separately to culpability under the consideration of harm. It was suggested that adding 'stealth' to the guideline would help victims to identify that they had been raped in such cases. The Council accepts the value in raising awareness of this behaviour and will consider how it might appropriately be addressed in public education material.

Summary of decisions

53. All of the responses regarding the assessment of culpability were considered by the Council before taking the following decisions. The guidelines retain two levels of culpability; however culpability level B has been clarified. The features of culpability relating to an abuse of trust and recording the offence have been clarified by the provision of examples set out in footnotes. A new feature of sharing a recording has been created (under features of harm). Targeting a vulnerable victim, and use of a weapon, have been moved from aggravating factors to features of culpability, while repeated offending against the victim has been moved from features of seriousness to aggravating factors. A number of suggested further features discussed in paragraphs 49 - 52 have not been added to the guidelines for the reasons set out.

Assessing seriousness: harm

54. Questions 6 - 8 of the consultation asked whether respondents agreed with the levels of harm; the appropriateness of the listed features of harm; and whether any features should be added or removed.

Levels of harm

55. The guidelines have three levels of harm:
- Level 1 is 'the extreme nature of, or the extreme impact caused by, one or more Level 2 features or other features of harm may elevate an offence to level 1'.
 - Level 2 lists six features including 'severe psychological or physical harm or trauma'.

- Level 3 lists 'psychological or physical harm or trauma'.

56. More respondents felt that the guidelines should have three levels of harm.⁵⁹ Those who agreed that there should be three levels of harm generally felt that it would allow for flexibility, while enabling the court to make a more nuanced judgement in each case, and also increase the likelihood of consistency in sentencing. Those who disagreed thought there should be one level of harm at the highest level. Some respondents also raised questions about how the different levels of psychological harm were to be assessed.
57. The assessment of harm is always a matter for the court based on the information before it and how that information is given weight. The violation of the victim's bodily autonomy through the act of rape is harm in itself. Every rape is serious and level 3, in listing psychological harm or trauma and physical harm or trauma, takes into account that both physical and psychological harm are caused by the offence itself. Whether the harm caused is considered by the court to be severe or extreme will depend upon the particular circumstances of the case.
58. Harm can be assessed by the court in a number of ways. It can be assessed through the evidence given at a trial, or by the prosecutor where there is a guilty plea. Available information may include the circumstances of the victim, the content of victim statements, and additional information from different reports or assessments, for example medical or psychological reports. These often provide information about the impact, including ongoing impact, that the offence has on the victim, for example where it inhibits their ability to work, or to socialise leading to a loss of housing or relationships, or leads to the victim deciding to relocate. In some cases, the trauma may have led to psychological disorders. Appeal Court decisions can also assist judges in the assessment of harm.⁶⁰
59. It is further worth noting that both the principles and purposes of sentencing⁶¹ and the sentencing process⁶² guidelines make clear that the impact on the victim is central to the

⁵⁹ 41 of 70 respondents who answered the question agreed that there should be three levels of harm in the rape guideline, and 33 of 70 who answered the question agreed in relation to the rape of a young child guideline. Organisations were more likely to agree.

⁶⁰ For example, a recent opinion, [HMA v MacGregor](#) [2025 HCJAC 28], sets out the harm caused to the victim as severe psychological damage (paragraph 35). It also references another 2025 case, [HMA v RB](#) [2025 HCJAC 7], where psychological harm was considered to be severe in relation to a young victim (paragraph 25).

⁶¹ [Principles and purposes of sentencing guideline](#), effective from 26 November 2018, paragraph 2, bullet points 1 and 3

⁶² [The sentencing process guideline](#), effective from 22 September 2021, paragraphs 13 and 46

sentencing exercise, with the former stating that this includes the impact on others affected by the case. Both guidelines also say that the court should set out the reasons for its decision as clearly and openly as circumstances permit.

60. Having carefully considered all the responses received, the Council has retained three levels of harm in the guidelines in order to enable the court to reach the appropriate sentence based on the facts and circumstances before it.

Features of harm

61. More respondents agreed than disagreed that the features listed under the levels of harm were appropriate.⁶³ Some respondents also suggested additional features which are discussed below.

Clarifications

Impact on lifestyle, social and economic functioning

62. Some respondents felt that the 'impact on lifestyle, social and economic functioning' should be included in the guidelines and provided examples of what these features might entail such as loss of home or employment/income, impacts on family or community relationships, and the development of negative coping strategies. It was suggested that this feature might be added to the guidelines as a separate feature to psychological harm, or alternatively mentioned as an aspect of psychological harm. The Council agrees that these factors are often taken into account by the court in the assessment of psychological harm. It believes that providing such examples may assist judges in their assessment of harm and a footnote to this effect has been added at harm level 2.

⁶³ 39 of 71 respondents who answered the question agreed that the features listed under of the levels of harm were appropriate in the rape guideline, and 37 of 71 who answered the question agreed in relation to the rape of a young child guideline.

Sharing of a recording

63. In consideration of a response from a statutory consultee, the Council has added an additional feature under harm in relation to the public or private sharing of a recording of the offence. As discussed at paragraph 44, the recording of the offence is listed as a feature of culpability. The Council has taken the view that listing the recording of the offence separately from the sharing of the recording would not lead to double counting as they are different actions; for example a third party may record an offence which is then shared publicly by the offender.

Features moved

Repeated offences

64. As discussed and explained at paragraph 46, 'repeated offences committed against the same victim', listed under harm level 2, has been removed from the guidelines.

Other features

Suicide

65. As already discussed at paragraph 8, guidelines cannot cover every possible situation. Instead, these guidelines aim to capture a range of circumstances particularly prevalent in, or relevant to, offences of rape, while preserving the flexibility for judges to consider the particular facts and circumstances of an individual case. In the comparatively small number of cases where the suicide of the victim is among the circumstances to be considered by the court, the Council expects that this would be taken into account appropriately by the judge.

Multiple victims

66. Where an offender has committed offences against multiple victims, it is probable that this would be prosecuted as a number of separate offences of rape. The sentencing process guideline addresses, in some detail, sentencing for multiple offences, discussing appropriate

approaches and their consideration in totality.⁶⁴

Summary of decisions

67. All the responses regarding the assessment of harm were considered by the Council before taking the following decisions. The guidelines retain three levels of harm. The impact of the offence on lifestyle, social and economic functioning has been added in a footnote as examples of psychological harm or trauma; the sharing of a recording of the offence has been added as a feature of harm; while the feature of repeated offences against the same victim has been removed. Features relating to suicide or multiple victims have not been added for the reasons provided.

Sentencing ranges and public protection

Sentencing ranges

68. Question 9 of the consultation asked respondents if they agreed with the sentencing ranges proposed in each of the guidelines, and question 10 asked if the guidelines sufficiently addressed the issue of public protection and risk.
69. This section provides a very brief summary of the main views provided in the consultation responses, followed by a discussion of each main point. Most respondents disagreed with the sentencing ranges in the guidelines, generally considering them to be too lenient.⁶⁵ Many of these respondents also felt that the guidelines did not sufficiently address the issue of public protection and risk.⁶⁶
70. Respondents who agreed with the proposed sentencing ranges said that they reflected current sentencing practice. Respondents who did not agree generally did not think that they reflected the nature and gravity of the offence and the long-term impact on victims. Some respondents

⁶⁴ [The sentencing process guideline](#), effective from 22 September 2021, paragraphs 29 - 34

⁶⁵ 20 of 71 respondents who answered the question agreed with the sentencing ranges in the rape guideline, and 18 of 68 who answered the question agreed in relation to the rape of a young child guideline.

⁶⁶ 25 of 71 respondents who answered the question agreed public protection was sufficiently addressed in the rape guideline, and 24 of 69 who answered the question agreed in relation to the rape of a young child guideline.

who felt that the ranges were lenient raised particular concern around the early release of offenders after serving part of a custodial sentence.⁶⁷

71. Some respondents suggested increasing the highest level of the sentencing ranges, or including a life sentence, while others suggested raising the lowest end of the ranges to start at 5 years' imprisonment for rape and 7 years' imprisonment for rape of a young child.
72. A national survey conducted on behalf of the Council addressed a number of topics including sexual offences. The report found that participants generally felt that the typical length of sentence for rape should range from 5 years up to life imprisonment.⁶⁸ Further Council-commissioned research with 14 victim-survivors found that some gravitated towards a minimum sentence of 5 to 7 years for single charges of rape with a sentence of up to life for repeat offenders.⁶⁹
73. In relation to the highest end of the sentencing range, the guidelines explain that the maximum sentence provided by law for the offence of rape is imprisonment or detention for life or, as is more usual in practice, an order for lifelong restriction (OLR), which is a form of life sentence. OLRs can be used when the court decides that the offence, and the risk to the public posed by the offender, is serious enough to impose a form of life sentence rather than a sentence with a set end point (as provided within the sentencing ranges). OLRs, as well as extended sentences, are sentences designed to protect the public, and their use for these offences is explained within the guidelines. Further details on these types of sentences are available in the glossary.
74. In addition to consideration of the consultation responses, the Council reviewed current sentencing practice, in particular recent appeals involving rape offences. In consequence the

⁶⁷ Automatic early release is a system where people serving sentences of imprisonment are released into the community on licence after serving part of their sentence in custody. For those serving long-term sentences (four years or more) this takes place six months before the end of their sentence, unless the Parole Board for Scotland recommends that they be released earlier after serving at least half of their sentence. Automatic early release is determined by legislation which is a matter entirely for the Scottish Government and outwith the scope of the guidelines. See the glossary entry.

⁶⁸ [Public perceptions of sentencing in Scotland: Qualitative research exploring sexual offences](#), July 2021, prepared for the Scottish Sentencing Council by Hannah Biggs, Susan Reid, Kaushi Attygalle, Konstantina Vosnaki (ScotCen), Dr Rachel McPherson (University of Glasgow) and Professor Cyrus Tata (Strathclyde Centre for Law, Crime & Justice, Law, School, University of Strathclyde) paragraph 3.5.2

⁶⁹ [Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences](#), May 2024, prepared for the Scottish Sentencing Council by Oona Brooks-Hay, Michele Burman and Jenn Glinski, (SCCJR, University of Glasgow) paragraph 4.7.2

Council has increased the sentencing ranges at the lower ends, which it believes better reflects current sentencing practice as elucidated by the Appeal Court.

75. In a recent decision, the Appeal Court states that: ‘...growing learning about the effects of trauma on the victims of sexual crime and its potential to cause harm and the increasingly common availability of victim statements allowing the court more understanding of harm actually caused to complainers has had some effect. These developments appear to have prompted a greater appreciation of the true gravity of sexual offending. This court has started to impose higher sentences than may have been common previously, and has approved others imposed at first instance.’⁷⁰
76. The Appeal Court also observes, in this opinion, that the culpability, or level of blame, of the offender will usually be higher in offences of rape where the victim is a young child. It states: ‘Rape of a young child will generally be more culpable than rape of an older person, serious though both crimes are. It is also likely that there will be a higher level of harm.’ In consequence, the court concludes that, in general, the appropriate sentence for rape of a young child will be ‘significantly higher’ than for other offences of rape.⁷¹ The Council has increased the lower end of the sentencing ranges for both offences, but overall the increase is greater in the guideline on rape of a young child.
77. The tables below provide a comparison of the ranges consulted on and the updated ranges in the amended guidelines which will be submitted to the High Court for approval.

⁷⁰ [HMA v McMahon \(first\) and Lambert \(second\)](#) [2025] HCJAC 34, paragraph 64 (This Appeal Court opinion continues (at paragraphs 65 and 66) to list examples to illustrate a general trend, and the court’s recognition that some cases are of such extreme gravity that hitherto unprecedented sentences have been imposed and approved.)

⁷¹ Ibid, paragraphs 74 - 75 (More fully, the opinion states: ‘Courts in both England and Scotland have recognised that sexual exploitation of a young child may be comparatively easy to commit given the physical and intellectual advantages of an adult over a young child. Both individual and general deterrence is an important sentencing objective. Whilst there can be exceptional cases with exceptional circumstances, in general in the absence of exceptional circumstances, the appropriate sentence for rape of a child under s 18 will be significantly higher than for rape under s 1.’)

DRAFT CONSULTATION GUIDELINE – RAPE

SENTENCING RANGES

		CULPABILITY	
		LEVEL A	LEVEL B
HARM	LEVEL 1	10 - 13 years' custody	9 - 11 years' custody
	LEVEL 2	8 - 10 years' custody	6 - 9 years' custody
	LEVEL 3	5 - 8 years' custody	4 - 6 years' custody

DRAFT CONSULTATION GUIDELINE – RAPE OF A YOUNG CHILD

SENTENCING RANGES

		CULPABILITY	
		LEVEL A	LEVEL B
HARM	LEVEL 1	11 - 14 years' custody	10 - 12 years' custody
	LEVEL 2	9 - 11 years' custody	7 - 10 years' custody
	LEVEL 3	6 - 9 years' custody	5 - 7 years' custody

REVISED GUIDELINE – RAPE

SENTENCING RANGES

		CULPABILITY	
		LEVEL A	LEVEL B
HARM	LEVEL 1	10 - 13 years' custody	9 - 11 years' custody
	LEVEL 2	8 - 10 years' custody	7 - 9 years' custody
	LEVEL 3	6 - 8 years' custody	5 - 7 years' custody

REVISED GUIDELINE – RAPE OF A YOUNG CHILD

SENTENCING RANGES

		CULPABILITY	
		LEVEL A	LEVEL B
HARM	LEVEL 1	12 - 14 years' custody	10 - 12 years' custody
	LEVEL 2	10 - 12 years' custody	8 - 10 years' custody
	LEVEL 3	8 - 10 years' custody	7 - 8 years' custody

Public protection

78. In relation to public protection, a few individuals commented on the sentencing of young offenders. One individual expressed the specific view that the existing guideline on sentencing young people should not apply to rape offences. This respondent argued that the deliberate violation of another in these offences did not fit the pattern of offending behaviour associated with the developing brain that the Council's guideline on sentencing young people was intended to recognise, such as impulsive behaviour or being subject to peer pressure.⁷² Thus, this respondent considered the possibility of a lower sentence for a young sex offender failed to adequately protect the public. As discussed in paragraph 9, where the offender is aged 24 or under when convicted, the relevant rape guideline must be read alongside the sentencing young people guideline, together with any other guidelines that apply to the offence or the offender. Features specific to offences of rape are addressed in the rape guidelines. By contrast, the sentencing young people guideline is an offender-specific guideline, which applies to all offences and accordingly sets out guidance of a more general nature. It addresses the consideration of the offender's culpability, but does *not* alter the court's consideration of the level of harm caused. Based on a range of international evidence, it outlines a number of factors that can contribute to offending by young people and which may reduce their culpability. Impulsive behaviour is not explicitly mentioned in the guideline, but it is only one such possible

⁷² [Sentencing young people](#), effective from 26 January 2022

factor among a range of complex issues addressed in the guideline relating to the development of cognitive maturity. However, it is a matter for the judge to assess the culpability of the particular young person in relation to the specific offence and the unique facts and circumstances of that particular offence. While the guideline states that rehabilitation is a primary consideration, other purposes of sentencing, such as public protection and punishment, must also be considered by the court. Offences of rape are very serious offences, and are treated as such by the courts, including in relation to the protection of the public. By law, judges can decide not to follow any applicable sentencing guideline, but must state the reasons for such a decision. This is made clear in the rape guidelines and applies equally to the sentencing young people guideline. In the Council's view, when read alongside each other, the rape guidelines and the sentencing young people guideline will assist courts in determining the most appropriate and effective sentence for a young person convicted of the very serious offence of rape. It should be noted, however, that it is for the judge to decide how to apply the relevant guidelines in any given case, after considering the law, and the evidence and submissions before the court.

Non-harassment orders

79. In relation to public protection, some respondents called for more use; more consistent use; or default use, of measures such as non-harassment orders (NHOs). Several respondents recommended that an NHO be considered as a default in the sentencing of sexual offences, unless it could be demonstrated that the victim would be safe without one, or as a matter of course upon completion of the offender's prison sentence. The Council has previously commissioned the Scottish Centre for Crime and Justice Research to obtain the views of victims of sexual offences in relation to sentencing. Their report, published in May 2024, states that the victim-survivors interviewed felt that, overall, an NHO offered reassurance in relation to safety, and, in sexual offences, should be imposed by default and be lifelong.⁷³ Making the imposition of an NHO mandatory in all rape cases, or on release from prison, would require a change of legislation to be enacted by the Scottish Parliament, while any potential issue around

⁷³ [Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences](#), May 2024, prepared for the Scottish Sentencing Council by Oona Brooks-Hay, Michele Burman and Jenn Glinski (SCCJR University of Glasgow), p. 45

the detail of NHOs imposed would be a matter for judicial training⁷⁴ rather than one for the scope of a sentencing guideline.

80. The Council agrees that NHOs can provide a degree of public protection and reassurance in respect of offences such as rape. It has therefore added a section to the guidelines to explain the use of such orders for these offences. The rape guideline includes reference to domestic abuse offences where the rape is against a partner or ex-partner. This guideline makes clear that the court *must* make an NHO in certain domestic abuse cases unless there is no need for one to protect the victim or a child living with the victim and/or offender; and that in other domestic abuse cases and certain non-domestic abuse cases, the court *may* make an NHO if it is appropriate and the prosecutor has applied for one. The rape of a young child guideline does not include reference to cases involving a partner or ex-partner, but does make clear that the court *may* make an order if it is appropriate and the prosecutor has applied for one. However, the law on this matter is set to change when certain provisions in the Victims, Witnesses, and Justice Reform (Scotland) Bill,⁷⁵ which was passed by the Scottish Parliament on 17 September 2025, come into force. Once commenced, these provisions will put sexual offences listed in section 288C of the 1995 Act,⁷⁶ which includes those covered by these guidelines, on the same footing as domestic abuse offences for the purposes of consideration of an NHO. The effect of this will be that the court must, for all offences of rape (whether in a domestic abuse context or not), consider the imposition of an NHO without the need for a Crown motion to that effect; and must impose an NHO unless it is satisfied that there is no need to do so. Once these provisions come into effect, it will be open to the Council to consider whether to submit revised guidelines to the High Court for its approval.

Summary of decisions

81. The Council has increased some of the guideline sentencing ranges at the lower ends, which it believes better reflects current sentencing practice as elucidated by the Appeal Court. The lowest range in the rape guideline now starts at 5 years' custody and the lowest range in the rape of a young child guideline at 7 years' custody. A number of the mid ranges have also been increased within each respective guideline. The highest points of the sentencing ranges remain

⁷⁴ The [Judicial Institute for Scotland](#) is responsible for judicial education.

⁷⁵ At the date of writing, the [Victims, Witnesses, and Justice Reform \(Scotland\) Bill](#) was awaiting Royal Assent.

⁷⁶ [Criminal Procedure \(Scotland\) Act, 1995 section 288C](#)

at 13 years for rape and 14 years for rape of a young child. The discussion of options of extended sentences and orders for lifelong restriction (a form of life sentence) remain. These sentences are designed to protect the public. In relation to NHOs, it would require a change of legislation by the Scottish Parliament for them to be mandatory in all rape offences. However, the Council has added a final section to the guidelines highlighting the use of such orders for these offences, including where a rape is domestic abuse, and explaining that an order must be made if certain conditions are met.

Aggravating factors

82. Questions 11 and 12 of the consultation sought views on the **aggravating** factors listed in each draft guideline, asking whether they were appropriate, and whether any factors should be added or removed.
83. The rape of a young child guideline listed three additional aggravating factors to those provided in the rape guideline: ‘particularly young victim’; ‘exploiting contact arrangements with a child to commit an offence’; and ‘victim encouraged to recruit others for the purpose of similar offending’.
84. Slightly more than half of the respondents felt that the factors listed in the draft guidelines were appropriate, although a few offered some suggestions for amendments.⁷⁷ Some of the suggestions made regarding certain factors are discussed below.

Factors removed

Influence of alcohol or drugs

85. It was suggested by a legal/academic organisation that treating this factor as aggravating would result in a sober offender receiving a less severe sentence than an intoxicated offender for rape offences. The Council agrees that a sentence should not, for that reason, be less severe for an offender who has committed a rape offence while sober as opposed to while intoxicated, and this factor has been removed from the guidelines. However, it is listed as an aggravating factor in the sentencing process guideline which applies to all offences and can be taken into account

⁷⁷ 38 of 71 respondents who answered the question agreed that the factors listed were appropriate in the rape guideline, and 36 of 68 who answered the question agreed in relation to the rape of a young child guideline.

by the court where appropriate to do so.⁷⁸

Other factors

Rape of an older child

86. Several third sector organisations suggested that the rape of an older child aged 13 -15 should be an aggravating factor in the rape guideline. The Council has taken the view that the age of a young victim will already be taken into account by the Court when assessing the harm caused by the offence, particularly in relation to the vulnerability of the victim.

Non-fatal strangulation (NFS)

87. One respondent suggested including NFS as an aggravating factor in the guidelines, but did not provide further explanation. The Scottish Government's 2025-26 programme for government commits to carrying out 'a comprehensive assessment of the law in relation to non-fatal strangulation to determine if there is further action that needs to be taken beyond existing provisions in law that could be used to tackle this issue'.⁷⁹ The Council will follow the progress of this development. Meantime, the Council takes the view that it would be open to the court to consider cases involving NFS as including 'significant violence (beyond that which is inherent in the offence of rape)' which is listed as a feature of culpability at level A in the revised guidelines.

Summary of decisions

88. The Council has removed the aggravating factor relating to an offender committing the offence while under the influence of drink or drugs. For the reasons provided, it has not added the rape of an older child or non-fatal strangulation as aggravating factors, but is following developments in relation to the latter.

⁷⁸ [The sentencing process guideline](#), effective from 22 September 2021, Annex B

⁷⁹ [Programme for Government 2025-26](#), 6 May 2025, Scottish Government, p. 37

Mitigating factors

89. Questions 13 and 14 of the consultation sought views on the mitigating factors listed in each draft guideline, asking whether they were appropriate, and whether any factors should be added or removed. A majority of the respondents did *not* think that the mitigating factors were appropriate.⁸⁰ Among individuals, there was a relatively common view that there should be no mitigation in any rape offences. This included in relation to the loss of the offender's professional status, job, or opportunities.
90. The guidelines consulted on contained three mitigating factors relating to: no previous convictions; mental health issues; and remorse.
91. The Council considered the matter carefully and has taken the view that there are no mitigating factors specifically relevant to the offences of rape which merit being highlighted in the guidelines. The mitigating factors consulted on have therefore been removed. However, reference to the sentencing process guideline, which lists mitigating factors relating to all offences, has been reinforced.⁸¹ The section on identifying aggravating and mitigating factors has also been slightly amended to take this change into account. It is worth noting that the removal of the mitigating factors from the guidelines does not mean that such factors, or other relevant mitigating factors, should not be considered by the court where it is appropriate to do so.

Factors removed

No previous convictions

92. The first listed mitigating factor in the guidelines consulted on was 'no previous convictions, or no relevant/analogous convictions'. The Council's consultation paper provided the view that previous, otherwise good character might be used in certain circumstances to facilitate an offence such as rape.⁸² It was suggested by an individual respondent that, given this point, it may be clearer for victims and members of the public if the guidelines only included previous

⁸⁰ 23 of 68 respondents who answered the question thought that the mitigating factors were appropriate in the rape guideline, and 22 of 67 who answered the question thought that they were appropriate in relation to the rape of a young child guideline.

⁸¹ [The sentencing process guideline](#), effective from 22 September 2021, Annex C

⁸² [Sentencing rape offences: A Scottish Sentencing Council consultation](#), July 2024, paragraph 104

convictions as an aggravating factor, and did not include 'no previous convictions' as a mitigating factor.

Mental illness or disability

93. The second mitigating factor listed was 'mental illness or disability, especially where linked to the commission of the offence'. One individual response suggested that, given the complexity of this topic, it may be preferable to address it through an overarching guideline on sentencing offenders with mental health issues, and, therefore, to remove it from the draft rape guidelines. The Council announced in its 2024-2027 business plan that it believes a guideline on mental health and related issues is necessary.⁸³ This factor is also listed in the sentencing process guideline which applies to all offences.⁸⁴

Remorse

94. Many consultation respondents did not favour the inclusion of 'remorse' as a mitigating factor. For the most part, respondents were sceptical of expressions of remorse by individuals who had been found guilty of rape. They considered that such expressions were not necessarily sincere or reliable but, more likely, simply demonstrated self-interested regret, with the aim of reducing their sentence. It was also suggested that expressions of remorse were used as a tactic by abusers in domestic contexts to silence, disorient and confuse their victim, and to discourage reporting of their behaviour.⁸⁵ In previous research conducted on behalf of the Council, a national survey found that more than three-quarters (79%) of respondents felt that remorse should make no difference to the sentence in rape offences⁸⁶ compared to just over half (51%) who held that view in relation to offences of causing death by careless driving.⁸⁷ In another commissioned study of the views of 14 victim-survivors of rape and other sexual offences, participants were fairly unanimous that remorse should carry limited weight in

⁸³ [Scottish Sentencing Council Business Plan 2024-27](#), published November 2024, p. 32

⁸⁴ [The sentencing process guideline](#), effective from 22 September 2021, Annex C

⁸⁵ [Draft sentencing guidelines for rape offences, a Scottish Sentencing Council public consultation: Analysis of responses](#), October 2025, Alison Platts and Dawn Griesbach, paragraphs 7.36 & 7.38

⁸⁶ [Public perceptions of sentencing National survey report](#), September 2019, prepared for the Scottish Sentencing Council by Carolyn Black, Rachel Warren, and Rachel Ormston (Ipsos MORI Scotland), and Professor Cyrus Tata (University of Strathclyde), p 32

⁸⁷ *Ibid*, p. 25

sentencing.⁸⁸ Remorse is also listed in the sentencing process guideline⁸⁹ which relates to all offences.

Other factors

95. Two organisational respondents suggested that previous sexual abuse, or other trauma, experienced by an offender may be viewed as a mitigating factor, and sought clarification around this. One organisation cited research discussing the impacts of adverse childhood experiences on future offending behaviour. The Council has considered research in this area and has taken the view that this factor is not sufficiently relevant to the particular offences of rape to be included in these guidelines. Whether this or any other possible mitigating factor is relevant to a specific case is always a decision for the court based on the particular facts and circumstances of the offence. The Council is, however, continuing to monitor studies in this area across a range of offences and offending behaviour.

Summary of decisions

96. All the mitigating factors have been removed from these particular guidelines, while reference to the sentencing process guideline, which lists mitigating factors for all offences, has been reinforced. The section on identifying aggravating and mitigating factors has also been slightly amended to take this change into account. 'Adverse childhood experiences' has not been added as a mitigating factor for the reasons discussed.

Potential impacts of the guidelines

97. Questions 15 - 18 of the consultation sought views on the likely impact of the guidelines, including in relation to potential costs and benefits.

⁸⁸ [Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences](#), May 2024, prepared for the Scottish Sentencing Council by Oona Brooks-Hay, Michele Burman and Jenn Glinski (SCCJR University of Glasgow), p. 45

⁸⁹ [The sentencing process guideline](#), effective from 22 September 2021, Annex C

Influence on sentencing practice

98. Question 15 asked respondents if they thought the guidelines would influence sentencing practice in Scotland. Less than half of the respondents thought that they would.⁹⁰
99. Those who thought that the guidelines would have an influence felt that they would provide useful resources for legal professionals and others with an interest in sentencing, and that they would assist judges in considering, reaching and explaining sentencing decisions, promoting consistency, accountability and clarity. One individual felt that they might help to bring about a 'culture change' in sentencing of these cases. Separately, a legal/academic organisation pointed to the impact already being made by published guidelines in assisting the courts.
100. Those who did not think that the guidelines would influence sentencing practice, felt that they were too open to interpretation, and may not change perceived attitudes and practices among judges. Third sector organisations highlighted the importance of awareness-raising and training for the judiciary and other relevant professionals in relation to adopting a trauma-informed approach to assessing harm, and understanding and assessing risk in rape cases.
101. A number of respondents did not know whether the guidelines would influence sentencing practice. Many thought that it would depend upon how the guidelines were implemented including in relation to training the judiciary and other relevant professionals. Others observed that the guidelines did not require to be followed, and any influence on practice would be difficult to predict.

Impact on public understanding

102. Question 16 asked if respondents thought that the guidelines would lead to an increase or decrease in public understanding of how sentencing decisions are made, while question 17 asked about perceived benefits or negative effects.

⁹⁰ 26 of 69 respondents who answered the question thought the guidelines would influence sentencing practice in relation to the rape guideline, while 26 of 68 who answered the question thought they would in relation to the rape of a young child guideline.

103. Due to the overlapping nature of the views expressed, questions 16 - 17 can be grouped together. Just under half of respondents felt that the guidelines would increase public understanding.⁹¹
104. Respondents who thought the guidelines would increase public understanding, and provide benefits, said that they were clear, user-friendly and sufficiently detailed to provide transparency as to how these offences were sentenced. This increased understanding would provide both greater consistency in sentencing, and a deterrent effect. However, this depended on dissemination and consistent application. Others suggested that the guidelines might assist the development of sentencing policy, and risk-intervention strategies.
105. Those who did not think that the guidelines would increase understanding, or would have a negative effect, suggested that they would only be of interest to those involved in a case and that members of the public would not take the time to read them. Some respondents felt that the guidelines were too open to interpretation, while in contrast others felt that they would restrict the discretion of a judge in relation to the nuance of particular cases and experiences of victims. Some respondents suggested a simplified version of the guidelines, explanations of less familiar disposals, information on how sentences operate in practice, and further knowledge exchange activities.
106. Contrasting views were also expressed regarding the anticipated effect of the guidelines on sentencing, with some envisaging harsher sentences and benefits from this; and others envisaging lenient sentences which would fail to act as a deterrent. Contrasting views were similarly provided in terms of the number of appeals against sentence that might result with some suggesting they would decrease in view of greater consistency in sentencing, while others felt that they would increase as defence agents scrutinised sentencing decisions for any departure from the guidelines.

Perceived costs

107. Question 18 asked respondents what costs, if any (financial or other), they saw arising from the introduction of the guidelines. Most of those who commented identified some costs, or possible

⁹¹ 29 of 65 respondents who answered the question agreed in relation to both of the guidelines that they would increase public understanding. Comments rather than figures were provided in relation to benefit and negative effects.

costs, related to the introduction of the guidelines.⁹² These were in terms of disseminating, evaluating or updating the guidelines; judicial training; additional appeal cases; longer custodial sentences; and increased reoffending due to lenient sentences. Others did not believe there would be any additional cost or that a reduced number of appeals would provide a saving.

Summary of decisions

108. A key part of the development and, if approved, introduction of sentencing guidelines, is to raise awareness among not only those working across the justice system but among the public. For this purpose, the Council engages with the media, conducts interviews, holds webinars, conferences and other events (including with judges), and publishes educational material, such as videos and interactive case studies, on its website. It also liaises with other bodies regarding training, and the promotion of guidelines as appropriate. The Council is mindful of the importance of continuing such activity and remaining alert to other opportunities to share information gathered through its research and engagement including in relation to this public consultation. The guidelines are designed to be succinct for easy reference in the courtroom; however a wealth of additional information on sentencing and sentences is provided in the educational material on the Council's website to assist public understanding. The Council has considered the range of views provided and, where appropriate, has incorporated them into the impact assessments provided for these guidelines. These impact assessments will be published on its website alongside the finalised guidelines (if approved by the High Court).

Additional comments

109. Question 19 invited respondents to make additional comment on anything they felt was of importance or omitted. A range of points and suggestions were provided, many of which have either been addressed elsewhere in this report or are outwith the scope of the guidelines (see paragraph 113). However, one particular point is discussed here in relation to the purposes of sentencing. A third sector organisation suggested that one of the possible purposes of sentencing listed in the Council's principles and purposes of sentencing guideline, 'giving the offender the opportunity to make amends', should be removed from that guideline as it could be

⁹² 28 respondents (6 organisations and 22 individuals) commented at this question.

detrimental to victims, particularly in sexual offence cases.⁹³ In sentencing any offence, including rape offences, the court will consider what purposes of sentencing it intends to fulfil through that sentence - for example, protection of the public, which includes the protection of victims. The principles and purposes guideline is a general guideline which applies to the sentencing of all offences. The reference to making amends is intended to include a range of possible sentences, for example unpaid work carried out as part of a community payback order. However, the guidelines for rape offences provide sentencing ranges comprised only of custodial sentences, and do not include community-based options. Accordingly, the Council does not agree that the purpose of sentencing relating to making amends should be removed from a general guideline which covers all offences.

Other matters

110. The Council is grateful for the time taken by all respondents who participated in its public consultation. Following consideration of these responses, a wide range of changes has been made to the guidelines as summarised in the table set out at paragraph 11. In relation to some of the other matters raised, the Council has come to the view that a number of these are either outwith the scope of the guidelines, or are already appropriately addressed within the guidelines - especially when read alongside other material such as the Council's sentencing process guideline (see paragraph 112). However, it may be worth noting that responses have been published (unless requested otherwise) and are publicly available, including to those working in other sectors of the justice system. The Council may also continue to consider certain matters raised as it takes its work programme forward including on the development of guidelines relating to domestic abuse offences.
111. In relation to any comparison of the sentencing ranges in Scottish guidelines against those in guidelines from other jurisdictions, for example England and Wales, independent research commissioned by the Council indicates that 'direct one-to-one comparisons between jurisdictions are fraught with difficulty, whether the measure is sentencing trends, the use of custody as a sanction or public attitudes towards sentencing'.⁹⁴ Notable differences between

⁹³ [Principles and purposes of sentencing guideline](#), effective from 26 November 2018, paragraph 5

⁹⁴ [The Methodological Challenges of Comparative Sentencing Research Literature Review](#), May 2022, prepared for the Scottish Sentencing Council by Dr Jay Gormley (University of Strathclyde), Professor Julian Roberts (University of Oxford), Dr Jose Pina-Sanchez (University of Leeds), Professor Cyrus Tata (University of Strathclyde) and Ana Veiga (University of Leeds), p. 3

England and Wales, and Scotland, regarding sentencing include the respective systems for automatic early release, and the availability of particular sentences, for example the use of orders for lifelong restriction in Scotland.

Sentencing process guideline

112. Some of the suggestions for additional guideline features and factors are already included in the Council's general guidelines and, although not repeated in the rape guidelines, can be taken into account by the court where appropriate. The sentencing process guideline lists certain features and factors of sentencing that can relate to all offences.⁹⁵ Those that are considered particularly relevant to offences of rape are repeated in the rape guidelines. Others listed in the sentencing process guideline are not repeated, although they will be relevant in certain rape offences in terms of the particular circumstances of the case. Where appropriate these will be taken into account by the court. As explained in paragraph 9, guidelines are intended to be succinct and easily referenced in the court setting. None of the lists of features or factors in any of the guidelines are exhaustive and simply because a factor is not listed does not mean it cannot be taken into account by the court. Some aggravations, which can make offences more serious for sentencing purposes, are set out in legislation and must be considered under the law.⁹⁶ For example, crimes motivated by hate related to certain forms of prejudice, or crimes involving a partner or ex-partner. Such aggravations are not only laid down in the law, but are also included in the sentencing process guideline.⁹⁷

Outwith scope of guidelines

113. Some of the consultation responses raised issues that do not form a direct part of the sentencing exercise and are therefore outwith the scope of the guidelines. The guidelines address matters relevant to sentencing following a conviction for offences of rape. This does not include other areas of the justice system such as:

- Scottish legislation or legislation under consideration

⁹⁵ [The sentencing process guideline](#), effective from 22 September 2021

⁹⁶ These are statutory aggravations. Examples are provided in the [Hate Crime and Public Order \(Scotland\) Act 2021](#).

⁹⁷ [The sentencing process guideline](#), effective from 22 September 2021, Annex A

- how cases are reported to the police and police investigations
- prosecution of charges including both whether any additional charges to rape are raised, for example stalking or attempted murder, or when a case is brought to court
- provision of evidence led at trial or the assessment of that evidence in relation to determining a verdict
- support of victims during court proceedings including in the preparation of victim statements, the weight given to victim statements (which is a matter for the judge), a mandatory requirement that statements can be read out in court by a victim (which would require legislation)
- the trauma-informed training of judges⁹⁸ and other legal professionals
- mandatory participation in sex offender programmes in prison (prison programmes are a matter for the Scottish Prison Service)
- the management of orders for lifelong restriction, the management of offenders in the community, and the funding of community programmes
- the release of prisoners including automatic or early release, or licence conditions on release
- disclosure of offences
- anonymity of offenders or victims throughout court proceedings.

⁹⁸ The [Judicial Institute for Scotland](#) is responsible for judicial education.

Next steps

Submission of guidelines for approval

114. Sentencing guidelines developed by the Council must be approved by the High Court of Justiciary which can approve, modify or reject them.⁹⁹ These guidelines have now been finalised for submission to the High Court, which is intended to take place shortly. If the guidelines are approved (either as submitted or with changes), they will be published on the Council's website thereafter.¹⁰⁰

Entry into force

115. If the guidelines are approved, the High Court will set the date that they are to come into force. The Council intends to work with the judges ahead of this to ensure they are familiar with the guidelines and their applicability, as well as to carry out further public education and awareness-raising work, including developing information on its website.¹⁰¹

Contact

116. If you wish to contact the Council for further information, please email sentencingcouncil@scotcourts.gov.uk.

⁹⁹ [Section 5 of the Criminal Justice and Licensing \(Scotland\) Act 2010](#)

¹⁰⁰ [Approved guidelines](#), Scottish Sentencing Council website

¹⁰¹ [Scottish Sentencing Council](#)

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