

Offences of rape

A Scottish Sentencing Council public consultation Analysis of responses

Submitted to the Scottish Sentencing Council in May 2025

Published October 2025

Authors: Alison Platts and Dawn Griesbach

Independent analysis of responses prepared for the consideration of the Scottish Sentencing Council. The views expressed are those of the authors and respondents and do not necessarily represent those of the Council.

scottishsentencingcouncil.org.uk
sentencingcouncil@scotcourts.gov.uk



A note about terminology

Some respondents to this consultation used the term ‘victim-survivor’ or ‘survivor’ in their responses to refer to a person who has been raped. The authors acknowledge the role that this terminology has in helping to empower people who have suffered from violence and trauma.

However, throughout this report, we use the term ‘victim’, partly for the sake of brevity, but also because this is consistent with the terminology used in the consultation paper and draft guidelines.

Table of contents

Executive summary	1
1 Introduction	7
Background	7
Guidelines on the sentencing of rape offences	8
The consultation	9
About the analysis	10
The report	11
2 Description of the responses and respondents	12
Number and types of responses received	12
Responses to individual questions	12
3 Specific issues: victim–offender relationship and historical offences	14
Whether the offender is known or not known to the victim (Q1)	14
Historical rape offences (Q2)	18
4 Assessing seriousness: culpability	23
Levels of culpability (Q3)	23
Appropriateness of the listed features of culpability (Q4)	26
Views on the features of culpability and suggested additions (Q5)	28
5 Assessing seriousness: harm	35
Levels of harm (Q6)	35
Appropriateness of the listed features of harm (Q7)	38
Proposed features for addition or removal (Q8)	41
6 Sentencing ranges, public protection and risk	43
Sentencing ranges (Q9)	44
Public protection and risk (Q10)	48
7 Aggravating and mitigating factors	53
Aggravating factors (Q11 and Q12)	54
Mitigating factors (Q13 and Q14)	60
8 Potential impacts	66
Influence on sentencing practice (Q15)	66
Impact on public understanding (Q16)	69
Perceived benefits or negative effects (Q17)	73
Perceived costs (Q18)	75
9 Other comments (Q19)	77
Annex 1: List of organisational respondents	80
Annex 2: Responses to individual questions	81

Executive summary

1. Between 25 July 2024 and 18 October 2024, the Scottish Sentencing Council carried out a public consultation to gather views on two draft guidelines on sentencing for rape offences. The guidelines focused on:

- Offences under section 1 of the Sexual Offences (Scotland) Act 2009 (rape) and the common law offence of rape, and
- Offences under section 18 of the Sexual Offences (Scotland) Act 2009 (rape of a young child) and the common law offence of rape where the victim is a young child (a child under the age of 13).

2. This report presents an analysis of the responses received to the consultation.

About the respondents

3. The consultation received 76 responses from 15 organisations and 61 individuals. Organisational respondents comprised third sector organisations (7), legal profession and academic organisations (5) and public sector organisations (3). All but one of the third sector organisations provided support services and/or had a campaigning role in relation to victims of crime in general or rape specifically. Some individual respondents identified themselves as having a professional interest in the consultation topic or related aspects of the criminal justice system. Others identified themselves as rape victims with experience of criminal proceedings.

Overview of findings

4. There was no clear consensus among respondents on many of the consultation questions. Organisations and individuals often had different views and, with respect to some of the questions, different views were expressed by different organisation types, with the views of third sector organisations often aligned with those of individuals. However, both groups (organisations and individuals) largely expressed agreement in relation to:

- The appropriateness of the features of culpability and harm listed in both guidelines
- The appropriateness of the aggravating factors listed in both guidelines.

5. Note, however, that among those who agreed that the respective features or factors were appropriate, some nevertheless offered suggestions for additional features/factors or requested clarification about certain features/factors.

6. There was less agreement about the appropriateness of the proposed mitigating factors. Organisations had a mix of views on this question, while individuals were more likely to say that the mitigating factors in both guidelines were **not** appropriate than appropriate.

7. Common themes across the consultation questions included the following:

- Among individuals, there was a recurring view, expressed at multiple questions, that the sentencing of rape cases (current and proposed) was too lenient.
- Among organisations (third sector organisations in particular), there was a common view that the guidelines should take account of the specific circumstance of rape within existing relationships or forming part of ongoing domestic abuse, but no clear consensus about how this should be done.

Specific issues: victim–offender relationship and historical offences (Q1 and Q2)

Should the guidelines explicitly address the victim–offender relationship?

8. There was no clear consensus about whether the guidelines should explicitly address situations where the offender is known or not known to the victim. However, third sector organisations were more likely than other respondents to say that both guidelines should address this situation.

9. Those who thought the guidelines **should** address this issue said that the nature of the relationship between the offender and victim should have a bearing on the seriousness of an offence (both in relation to the culpability of the offender and to the harm caused to the victim). Respondents who thought this issue should **not** be explicitly addressed in the guidelines made three main points. They said that (i) the nature of any relationship between the offender and victim would, in any case, be considered when assessing seriousness, (ii) relevant issues – including whether the rape had taken place within a domestic relationship – were adequately addressed in the draft guidelines, and (iii) the nature of the offender–victim relationship could impact on the seriousness of the case in a variety of ways; thus the guidelines should not attempt to make generalisations based on relationship.

Should further guidance be provided in relation to historical offences?

10. Overall, most respondents thought further guidance **should** be provided in relation to historical rape offences in both guidelines. However, while the majority of individuals offered this view, organisations expressed a mix of views on this question.

11. Respondents who thought further guidance **was** needed argued that this would help to improve consistency in the sentencing of these cases. This group highlighted a range of features associated with such cases which they thought were relevant to sentencing: (i) the impact of such cases on the victim, (ii) the nature of the offence and the actions of the offender, (iii) the subsequent conduct of the offender, (iv) the actions of the victim, and (v) the age of the offender at the time of the offence. Those who did **not** think further guidance was needed said that the draft guidelines, together with relevant published sentencing decisions, were sufficient to cover such cases.

Assessing seriousness: culpability (Q3–Q5)

Should there be two levels of culpability in both guidelines?

12. Overall, there were mixed views about whether there should be two levels of culpability in the guidelines. Organisations were more likely than individuals to agree there should be two levels of culpability in both guidelines. Among individuals, respondents were divided in their views in relation to the guideline on rape, while a slight majority said there should **not** be two levels of culpability in the guideline on rape of a young child.

13. Respondents who agreed that there should be two levels of culpability in both guidelines thought this would achieve greater consistency in sentencing.

14. Among those who disagreed, the most common point made (especially by individuals) was that ‘rape is rape’ and that no distinction should be made between different levels of culpability when sentencing for rape. Less commonly, those who did not agree that there should be **two** levels of culpability suggested that there should be **three** levels instead.

15. A small group of respondents (all individuals) agreed that there should be two levels of culpability in the guideline on rape but disagreed in relation to the guideline on rape of a young child. These respondents thought that there should be a single level of culpability (the highest level) where the victim is a young child.

Are the listed features of culpability appropriate?

16. A majority of respondents (organisations and individuals) thought the features of culpability listed in both guidelines were appropriate. Those who did not made suggestions about how certain listed features should be clarified in the guidelines and/or interpreted during sentencing, or they suggested additional features.

Assessing seriousness: harm (Q6–Q8)

Should there be three levels of harm in both guidelines?

17. A majority of respondents agreed there should be three levels of harm in the guideline on rape. However, respondents were more divided in their views in relation to the guideline on rape of a young child. In both cases, however, organisations were more likely than individuals to say there should be three levels of harm.

18. Respondents in favour of three levels of harm thought that having three levels, linked to narrower sentencing ranges, would allow courts to make more nuanced judgements, thus leading to greater consistency in sentencing. Respondents who were not in favour of three levels of harm most often thought there should be only one level. In particular, there was a recurring view that harm in cases of rape of a young child should always be categorised at the most serious level. There were additional concerns among this group of respondents

about how a sentencer would be able to differentiate between a 'high' and 'low' level of harm – particularly in relation to psychological harm; respondents also argued that the true impacts of rape may not be evident until years later. Some disagreed with the principle that one offender might receive a shorter sentence than another for a similar crime, because of the perceived impact on the victim.

Are the listed features of harm appropriate?

19. A majority of respondents (organisations and individuals) thought the features of harm listed in both guidelines were appropriate. Those who did not often raised questions or concerns about the assessment of psychological harm, specifically. Respondents also made a range of suggestions about how certain listed features should be clarified in the guidelines and/or interpreted during sentencing, or they suggested additional features.

Sentencing ranges, public protection and risk (Q9–Q10)

20. A majority of respondents overall (i) did not agree with the sentencing ranges for either guideline, and (ii) did not think either guideline sufficiently addressed the issue of public protection and risk. However, in both cases, this view was mainly that of individuals. Organisations expressed a mix of views on this question.

Do you agree with the sentencing ranges for each of the guidelines?

21. Those who agreed with the proposed sentencing ranges said that the ranges reflected current sentencing practice. Those who did not agree generally thought the ranges were too lenient – and did not reflect the nature and gravity of the offence or the long-term impact on victims. Some respondents were particularly critical of the ranges proposed for rape of a young child. Some respondents, organisations in particular, offered detailed comments on aspects of the proposed ranges for each offence.

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

22. Those who thought the issue of public protection and risk was sufficiently addressed noted the reference in the guidelines to extended sentences and Orders for Lifelong Restriction (OLRs). Some in this group thought the guidelines complemented existing risk assessment mechanisms in the criminal justice system. Those who did **not** think the issue of public protection and risk was sufficiently addressed – individuals in particular – often focused on the custodial element of sentences and reiterated the view that the proposed sentencing ranges were too lenient and did not reflect the seriousness of the offence.

Aggravating and mitigating factors (Q11–Q14)

Are the aggravating factors listed in the guidelines appropriate?

23. A small majority of respondents overall thought the aggravating factors listed in both guidelines were appropriate. Organisations were more likely than individuals to say this – around two-thirds of organisations said this compared to half of individuals.

24. Respondents who thought the listed aggravating factors were not appropriate often said that further guidance was needed on certain factors, or that the type of behaviour each factor would (or should) cover should be clarified. Some respondents also suggested additional aggravating factors, or the removal of some currently listed factors.

Are the mitigating factors listed in the guidelines appropriate?

25. There was a mix of views among organisations about whether the mitigating factors listed in the guidelines were appropriate. However, individuals were more likely to say ‘no’ rather than ‘yes’ or ‘don’t know’ in response to this question.

26. Among individuals, there was a relatively common view that there should be no mitigation in rape cases. Those who expressed this view argued that the harm caused to the victim outweighed any circumstances that might support a shorter sentence for the perpetrator. However, other respondents (individuals and organisations) commented on each proposed mitigating factor in turn – raising concerns or questions about each.

Potential impacts (Q15–Q18)

Do you think the guidelines will influence sentencing practice in Scotland?

27. There was a mix of views among respondents (both organisations and individuals) about whether the guidelines would influence sentencing practice in Scotland. Individuals were as likely to say ‘don’t know’ as they were to say ‘yes’ in relation to both guidelines.

28. Those who thought the guidelines **would** influence sentencing practice said the guidelines would assist judges in considering, reaching and explaining sentencing decisions, and would promote consistency, accountability and clarity. Those who thought the guidelines would **not** influence sentencing practice thought the guidelines were too open to interpretation, and that the burden of evidencing the various listed features and factors set out in the guidelines would fall on victims. The point was also made that the sentencing ranges in the guidelines were intended to reflect current practice, and therefore significant change was unlikely to arise.

Do you think the guidelines will lead to an increase in public understanding?

29. Organisations generally thought the guidelines would lead to an increase in public understanding of how sentencing decisions are made in cases of rape. However,

individuals had more mixed views on this question, with a slight majority saying 'don't know' in relation to both guidelines.

30. Respondents who thought public understanding of sentencing decisions would increase said the guidelines were clear and user-friendly, and that the language was easy (or relatively easy) to understand. Those (individuals) who did **not** think public understanding would increase often restated their views that the sentencing of rape cases was too lenient and/or they called for tougher sentences for all those convicted of rape.

Do you see any benefits or negative effects arising from the introduction of the guidelines?

31. Respondents identified the main (potential) benefits of the introduction of the guidelines as greater consistency and transparency in sentencing, and improved awareness and understanding of sentences, sentencing decisions and the factors considered in reaching such decisions. Respondents identified possible negative effects related to the application of the guidelines by the judiciary, and the experiences of victims with regard to the assessment of seriousness and aggravating or mitigating factors.

What costs may arise from the introduction of the guidelines?

32. Respondents who identified costs envisaged administrative costs (often seen as minimal) linked to the initial implementation of the guidelines, as well as costs associated with case proceedings; court disposals; and increased offending and reoffending.

Other comments

33. Respondents noted a range of other comments and suggestions about the draft guidelines. In addition, they offered broader comments on (i) the treatment of rape and other sexual offences in the criminal justice system, (ii) the experience of victims involved in such cases, and (iii) the available measures intended to address public protection and risk.

1 Introduction

1.1 The Scottish Sentencing Council has undertaken a public consultation to gather views on two draft guidelines on sentencing for rape offences. This report presents an analysis of the responses received to the consultation.

Background

1.2 The Scottish Sentencing Council is an independent body introduced by the Criminal Justice and Licensing (Scotland) Act 2010, and established in 2015. It aims to (i) promote consistency in sentencing practice; (ii) assist the development of policy in relation to sentencing; and (iii) promote greater awareness and understanding of sentencing policy and practice. One of the Council's key functions is to produce guidelines to promote consistency in sentencing. Guidelines can be general in nature, and cover all offences, or can relate to a particular category of offence or offender or a particular matter relating to sentencing.

1.3 To date, the Council has published two general guidelines intended to provide a high-level framework for sentencing in Scotland, and to create a firm foundation for subsequent guidelines. These are:

- [Principles and purposes of sentencing](#) (effective from November 2018)
- [The sentencing process](#) (effective from September 2021).

1.4 In addition, a guideline on [sentencing young people](#) (effective from January 2022) applies where the person being sentenced is under the age of 25 at the date they are convicted of an offence.

1.5 The Council has also now published its first offence-specific guideline, on [sentencing for statutory offences of causing death by driving](#) (effective from January 2024). Offence-specific guidelines are intended to be read alongside the Council's general guidelines.

1.6 The Council's current activities include developing guidelines on sexual offences, domestic abuse, environmental and wildlife offences, and sentence discounting following a guilty plea. Work is also due to commence on the development of guidelines on the sentencing of individuals with mental health and related issues, and on assault offences.¹ The public consultation on guidelines for rape offences, reported on here, forms part of the Council's wider work on sexual offences which also includes the development of guidelines on the sentencing of offences relating to sexual assault and indecent images of children.

¹ See the Council's [business plan for 2024–2027](#).

Guidelines on the sentencing of rape offences

1.7 The Council follows an eight-stage process in developing, implementing, and monitoring new sentencing guidelines. This involves (1) initial consideration of a topic, (2) development of a draft guideline (including stakeholder engagement and the gathering of evidence), (3) seeking the views of the judiciary, (4) consulting on guidelines with the public, Ministers and the Lord Advocate (note that consultation with Ministers and the Lord Advocate is a statutory requirement),² (5) finalising the guideline, (6) submission of the guideline to the High Court for approval, (7) raising awareness of the guideline, and (8) monitoring and reviewing the effect of the guideline following implementation. Work on the development of guidelines for rape offences has now reached Stage 4, consultation with the public, Ministers and the Lord Advocate.

1.8 The Council's [business plan for 2021–24](#) recognised the sentencing of sexual offending as an area of public concern.³ It noted that sexual offences account for a high proportion of sentencing, particularly in the High Court, and that the sentencing of cases of this type often involves difficult decisions and consideration of complex circumstances.

1.9 Challenges for sentencers (as outlined in the consultation paper) include the varied and complex nature of cases; the assessment of seriousness given the very wide range of circumstances involved in such cases; and the need to balance public protection, the risk of reoffending and the possibility of rehabilitation. As such, the Council believes that sentencing guidelines will be of benefit to the judiciary, those involved in such cases, and the wider public. The prioritisation of guidelines on the sentencing of rape, sexual assault and indecent images of children offences was announced following a [stakeholder conference](#) in June 2018, and a committee was formed to oversee this work.

1.10 Research and engagement work has been undertaken to inform the development of guidelines on rape offences. This included a review of relevant literature, research into public attitudes and perceptions, consultation with relevant experts, and an analysis of sentencing and appeal decisions, as well as early scoping work with sentencers.

1.11 This work resulted in the development of two draft sentencing guidelines: one focusing on offences under section 1 of the Sexual Offences (Scotland) Act 2009 (rape) and the common law offence of rape, and one focusing on offences under section 18 of the Sexual Offences (Scotland) Act 2009 (rape of a young child) and the common law offence of rape where the victim is a young child (a child under the age of 13). Further engagement work with sentencers in the form of an online survey was then carried out in autumn 2023

² [Criminal Justice and Licensing \(Scotland\) Act 2010, Section 4](#).

³ Note that the Council's new business plan for 2024–27 was published in November 2024, after the consultation on draft guidelines on rape offences which is the subject of this report had taken place.

seeking views on the initial draft guidelines. The views expressed helped to further develop and refine the two draft guidelines.

1.12 The key aim of the proposed guidelines is to promote consistency and predictability in the sentencing of rape cases, and to promote understanding among members of the public about how and why sentences are decided. It is anticipated that the guidelines will be useful to sentencers, legal practitioners, those involved in the delivery and administration of criminal justice, and those involved in, or with an interest in, such cases, including victims, support organisations, those accused or convicted of crimes, and the media.

The consultation

1.13 The current consultation now seeks the views of the public and stakeholder organisations and will assist the Council in finalising the draft guidelines prior to submitting them to the High Court for approval.

1.14 The consultation comprised (i) a consultation paper, (ii) copies of the two draft guidelines and two accompanying draft impact assessments, and (iii) an online consultation questionnaire hosted on Citizen Space and accessible via the consultation 'hub' on the Council's website.⁴ The consultation was published on 25 July 2024, with a deadline of 18 October 2024 for responses. It was promoted in the mainstream and legal media, including via national television and newspaper interviews. It was also promoted on the Council's four social media channels (LinkedIn, Facebook, Instagram and X) throughout the consultation period.

1.15 The consultation paper contained two main parts. Part 1 provided background information on the work of the Council, and outlined the development of the two rape guidelines. It set out the reasons for developing the guidelines, the research and engagement work undertaken, the challenges in sentencing rape cases, and the approach taken in the guidelines. Part 2 explained the two draft guidelines, discussed the approach taken to various specific issues in the guidelines, and addressed the issue of the impact of the guidelines. It also included the consultation questions.

1.16 The consultation questionnaire contained a combination of closed (tick-box) and open (free text) questions, which asked for views on both guidelines. There were 19 questions altogether. These focused on the following issues:

- The nature of the relationship between the offender and victim (Question 1)
- Historical offences (Question 2)
- Assessing seriousness (Questions 3 to 8)

⁴ [Citizen Space](#) is a digital citizen engagement platform provided by Delib.

- Sentencing ranges (Question 9)
- Public protection and risk (Question 10)
- Aggravating and mitigating factors (Questions 11 to 14)
- Impact of the guidelines (Questions 15 to 18).

1.17 A final question (Question 19) invited any other comments on the guidelines.

About the analysis

1.18 This report is based on a systematic analysis of the responses to the consultation. Frequency analysis was undertaken in relation to all the closed questions, and the findings are shown in tables throughout this report. Thematic qualitative analysis was undertaken of the comments made in response to each question.

1.19 The tables in the report show the number of responses received for each closed question, with a breakdown by respondent type and organisation type. Given the number of responses received (76 – see Chapter 2 for details), percentages are not reported. This helps ensure that the total number of responses being discussed is clear while reducing the risk of the findings being taken out of context. The qualitative analysis of the written comments aims to highlight the main themes and full range of views expressed in relation to each question.

1.20 As with all consultation analysis projects, the main focus of the analysis is not to identify how many or what proportion of respondents held particular views, but rather to understand the views submitted in response to each question or group of questions. Caution should be taken in interpreting the findings – neither the quantitative nor qualitative findings should be taken as necessarily representative of the wider views of stakeholder organisations or the general public.

Presentation of the qualitative analysis

1.21 The following should be noted in relation to the presentation of the qualitative analysis:

- The report presents a question-by-question analysis of the views submitted by respondents. As far as possible, comments on individual topics are covered in one place only in the report. In particular, it was common for respondents (individual respondents, in particular) to offer views on sentences (current and anticipated) for rape at every question. Such views are not discussed in full at every question but are covered in Chapter 6 where respondents' views on sentencing ranges are covered.
- In most cases, respondents did not discuss each guideline separately in their comments. Instead, they made general points applying to both guidelines (or which

have been assumed to apply to both guidelines). Comments that specifically addressed one or other guideline are highlighted where relevant.

- In general, respondents who answered 'don't know' at the closed questions or who did not answer the closed questions made comments that were similar to those made by respondents who agreed or disagreed (or said 'yes' or 'no'). Thus, the views of such respondents are not necessarily presented separately in relation to individual questions.
- Many of the consultation questions contained follow-up questions that invited comments from respondents who answered the previous closed questions in a specific way (e.g. 'if you disagree, please explain your reasons'). However, comments were also offered by some respondents who answered the questions in other ways (e.g. they 'agreed' or answered 'don't know', or did not answer the closed questions). These comments have also been reported.

The report

1.22 The remainder of this report is structured as follows:

- Chapter 2 presents information on the respondents to the consultation and the responses submitted.
- Chapters 3 to 9 present findings from the analysis of the responses to each of the consultation questions.

1.23 Annexes to the report present a list of organisational respondents (Annex 1) and the response rates for each consultation question (Annex 2).

2 Description of the responses and respondents

2.1 This chapter provides information about the respondents to the consultation and the responses submitted.

Number and types of responses received

2.2 The consultation received 76 responses from 15 organisations and 61 individuals (Table 2.1).

Table 2.1: Types of respondents

Respondent type	Number of respondents
Organisations	15
Individuals	61
Total	76

2.3 Organisational respondents comprised seven third sector organisations, five legal profession or academic organisations and three public sector organisations. All but one of the third sector organisations provided support services and/or had a campaigning role in relation to victims of crime and/or rape (Table 2.2). See Annex 1 for details.

Table 2.2: Types of organisational respondents

Organisation type	Number of respondents
Third sector organisations	7
Legal profession and academic organisations	5
Public sector organisations	3
Total	15

2.4 Given the small number of organisational respondents to the consultation, the tables presented in the remainder of this report (in Chapters 3 to 8) combine the legal profession/academic category and the public sector category into a single category. The results, therefore, allow a comparison between the views of (i) third sector organisations, (ii) legal, academic and public sector organisations and (iii) individuals.

2.5 Some individual respondents identified themselves as having a professional interest in the consultation topic or related aspects of the criminal justice system. Others identified themselves as rape victims who had experience of criminal proceedings.

Responses to individual questions

2.6 Respondents did not necessarily answer all the consultation questions. Between 65 and 71 respondents (out of the total 76) answered each of the closed questions. The

response rate for the open questions was lower, with between 6 and 54 respondents providing comments at each question. As mentioned in Chapter 1 (paragraph 1.21), several open questions were targeted at respondents who answered the preceding closed question(s) in a particular way. Open questions which simply invited respondents to provide reasons for their answers (regardless of their answer to the preceding closed question) generally had higher response rates. See Annex 2 for details.

3 Specific issues: victim–offender relationship and historical offences

3.1 This chapter presents views on two specific issues relevant to rape cases and how they might be covered in sentencing guidelines. These are (i) whether or not the offender is known or not known to the victim; and (ii) historical offences. Both of these issues were raised as challenges for sentencing in the course of engagement work with stakeholders carried out during the development of the draft guidelines. In both cases, the Council decided that the issue was sufficiently covered by the features relating to culpability and by consideration of aggravating and mitigating factors, and did not, therefore, need to be explicitly addressed in the guidelines. Two questions sought respondents' views on how each of these is addressed in the draft guidelines.

Q1: Should either of the rape guidelines explicitly address where the offender is known to the victim, as opposed to not known to the victim?

- Rape offences (section 1) [Yes / No / Don't know]
- Rape of a young child (section 18) [Yes / No / Don't know]

If yes, what guidance do you think would be useful?

Q2: Do you think further guidance should be provided in relation to historical rape offences in either of the guidelines?

- Rape offences (section 1) [Yes / No / Don't know]
- Rape of a young child (section 18) [Yes / No / Don't know]

If yes, what guidance do you think would be useful?

Whether the offender is known or not known to the victim (Q1)

3.2 As noted in the consultation paper, the Council had concluded that categorising the seriousness of a rape by reference to the relationship between the victim and offender is not appropriate. In particular, they thought other features of a case, which may be linked to whether the offender is known to the victim, were better indicators of seriousness. They also wished to avoid the risk of 'double-counting' – that is, considering an issue at more than one stage of the sentencing process.

3.3 Question 1 asked respondents if they thought either of the guidelines should explicitly address whether the offender is known, as opposed to not known, to the victim.

3.4 In relation to the rape offences guideline, Table 3.1a shows that around half of respondents (34 out of 71) said 'yes' (the guideline **should** address whether the offender is known to the victim), 31 said 'no', and 6 said 'don't know'. Organisations and individuals were divided in their views on this question. However, among the organisations, 6 of the 7 third sector organisations answered 'yes' to this question while all other organisational respondents answered 'no'.

Table 3.1a: Q1 – Rape offences (section 1) – Should the guideline explicitly address where the offender is known to the victim, as opposed to not known to the victim?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	6	1	–	7
Legal, academic and public sector organisations	–	5	–	5
Total organisations	6	6	0	12
Total individuals	28	25	6	59
Total, all respondents	34	31	6	71

3.5 In relation to the rape of a young child guideline, Table 3.1b shows that around half of respondents (34 out of 67) said 'yes' (the guideline **should** address whether the offender is known to the victim), 26 said 'no', and 7 said 'don't know'. Among the organisations answering this question, all the third sector organisations answered 'yes', while 2 of the 3 other organisational respondents answered 'no'. Individuals expressed a mix of views.

Table 3.1b: Q1 – Rape of a young child (section 18) – Should the guideline explicitly address where the offender is known to the victim, as opposed to not known to the victim?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	6	–	–	6
Legal, academic and public sector organisations	–	2	1	3
Total organisations	6	2	1	9
Total individuals	28	24	6	58
Total, all respondents	34	26	7	67

3.6 Respondents answering 'yes' in relation to either guideline were asked what guidance they thought would be useful. Altogether 36 respondents (11 organisations and 25 individuals) provided comments at this question. This included seven respondents who

answered 'no' or 'don't know' (to both questions), or who did not answer either of the closed questions. The views expressed are presented below.

Whether the offender is known to the victim should be explicitly addressed

3.7 Respondents who thought the guidelines should explicitly address whether the offender is known or not known to the victim often focused in their comments on situations where the offender is **known** to the victim. This included cases where a personal or familial relationship exists, or cases where the offender holds a position of trust and is known to the victim in a 'professional' capacity.

3.8 Respondents in this group noted that, in the vast majority of rape cases, the offender is known to the victim.⁵ They said that such cases can involve a range of features – betrayal and breach of trust, maliciousness, premeditation and repetition were all mentioned – which impact on both culpability and harm and need to be taken into account in assessing the seriousness of cases.⁶ The following features were also noted with regard to particular types of cases:

- Cases in which there is (or has been) a personal, social or familial relationship between the victim and offender: Respondents highlighted the impact of rape on (i) the victim's home life, family, social relationships and networks; (ii) co-parenting; and (iii) employment upheaval where the victim has had to relocate.
- Cases in which the offender is in or has been in a position of trust and responsibility: Respondents mentioned abuse of power and the use of grooming by the perpetrator. Particular mention was made of cases in which the offender is a teacher, social worker, health professional, police officer or other emergency service worker.

3.9 There was a broad view that such case characteristics were relevant for assessing culpability and heightened the impact of the offence (i.e. the harm) on the victim. For these reasons, respondents thought the nature of the relationship between victim and offender should be considered alongside all other relevant features and circumstances of a case in assessing seriousness.

3.10 In particular, it was argued that the currently proposed features of culpability/harm such as 'threats or coercion to facilitate the offence', 'degree of planning', and 'violence' do not adequately capture the circumstances and associated trauma of rape in the context of existing relationships and domestic abuse. Respondents stressed the importance of assessing offending behaviour in context and allowing victims to explain the full

⁵ Figures from Rape Crisis Scotland (2022) indicating that just 8% of sexual abusers are strangers were cited.

⁶ Several respondents referred to internal Victim Support Scotland research and [research commissioned by the Scottish Sentencing Council](#) as providing evidence on the impact of rape on victims.

circumstances of the offence and its impact. It was also suggested that the consideration of rape in this context could usefully be addressed in judicial training.

3.11 Among those respondents who discussed the implications for sentencing, some simply argued that the presence of such features merited a longer sentence. Others made more specific points about how such features might be accounted for in the sentencing guidelines as either features of culpability or harm or as aggravating factors, along with appropriate accompanying guidance. The points made included the following:

- Guidance should be provided under culpability or harm about the treatment of cases involving ‘a pattern of behaviour of coercive control and domestic abuse-related offending’ under section 1 of the Domestic Abuse (Scotland) Act 2018, and cases involving abuse of partners/ex-partners and attracting the domestic abuse aggravator under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.
- ‘Breach of trust’ should be included as an aggravating factor – particularly in respect of breach of trust in a professional capacity (reference was made to recent high profile cases involving police officers). (Note that this is currently included as a feature of culpability.)
- Grooming should be included as an aggravating factor. (Note that this is currently included as a feature of culpability.)
- The offender being known to the victim should be included as an aggravating factor in rape of a young child offences.

3.12 It was also suggested that the public protection aspect of sentencing needed to be fully considered in cases where the offender is known to the victim. In particular, it was argued that the presence of an existing offender–victim relationship should not be taken to mean that the perpetrator presents a low level of risk to the wider public.

3.13 Alongside those who identified specific features and factors for inclusion in the guidelines, there was a view expressed by some respondents that ‘stand-alone’ features and factors may not be required, but it nevertheless needed to be possible to address the characteristics of such cases within the features and factors listed in each guideline. Further, one respondent warned against a ‘default position’ that leads to the perception of a hierarchy of case types based on whether or not the offender is known to the victim.

3.14 Less commonly, respondents who said that there should be explicit guidance on this issue suggested that (i) rape within an existing relationship could be regarded as less serious than ‘stranger’ rape and/or that (ii) the behaviour of the victim and their motivation in reporting rape within an existing relationship needed to be considered in assessing the facts and circumstances of a case. Both of these points were made by individuals.

3.15 Finally, two more practical points were made by those who favoured explicitly addressing this issue in the guidelines. These related to the need for an accurate definition of ‘stranger’ rape, and the related need for accurate recording of offender type.

Whether the offender is known to the victim should not be explicitly addressed

3.16 Respondents who did not think the guidelines should explicitly address whether the offender is known to the victim commonly made three interlinked points, stating that:

- The relationship between the victim and offender will be considered alongside all other relevant circumstances in considering the facts of the case and assessing culpability and harm.
- Relevant issues were already adequately covered in the draft guidelines – both in the approach to assessing seriousness and in the consideration of aggravating and mitigating factors. Respondents also noted the potential application of the statutory ‘domestic aggravation’ included in section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.
- Both situations (where the offender is known **and** where the offender is not known to the victim) could impact on the nature and seriousness of a case in a variety of different ways. For that reason, respondents thought that it was not helpful to draw distinctions or make generalisations based on the nature of the relationship between victim and offender.

3.17 Other points made by respondents who did not wish to see further guidance on this issue were that:

- Defining types of relationships between offenders and victims was too subjective
- Considering the relationship between the offender and victim as a stand-alone factor risked ‘double-counting’. (Note that the issue of double-counting was also occasionally touched on by those in favour of additional guidance who acknowledged the concern about double-counting, but did not think it would happen.)

3.18 Additionally, one respondent in this group explicitly stated that the nature of the relationship between victim and offender should never be regarded as a mitigating factor.

Historical rape offences (Q2)

3.19 The Council believed that existing determinants of seriousness, along with appropriate aggravating and mitigating factors, could be used to address historical offending. They also noted the challenge of defining ‘historical’ offences. They concluded that no further guidance should be included in either guideline on this issue. Question 2 asked respondents if they thought further guidance should be provided in relation to historical rape offences in either of the guidelines.

3.20 In relation to the rape offences guideline, Table 3.2a shows that 44 out of 71 respondents said 'yes' (further guidance **should** be provided in relation to historical offences), 19 said 'no' and 8 said 'don't know'. Organisations were divided in their views on this question, while individuals were more likely to say 'yes' than 'no'.

Table 3.2a: Q2 – Rape offences (section 1) – Do you think further guidance should be provided in relation to historical rape offences in this guideline?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	3	4	–	7
Legal, academic and public sector organisations	2	3	–	5
Total organisations	5	7	0	12
Total individuals	39	12	8	59
Total, all respondents	44	19	8	71

3.21 In relation to the rape of a young child guideline, Table 3.2b shows that 42 out of 69 respondents said 'yes' (further guidance **should** be provided in relation to historical offences), 18 said 'no' and 9 said 'don't know'. Once again, organisations were divided in their views, while individuals were more likely to say 'yes' than 'no'.

Table 3.2b: Q2 – Rape of a young child (section 18) – Do you think further guidance should be provided in relation to historical rape offences in this guideline?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	3	3	–	6
Legal, academic and public sector organisations	2	1	1	4
Total organisations	5	4	1	10
Total individuals	37	14	8	59
Total, all respondents	42	18	9	69

3.22 Respondents answering 'yes' in relation to either guideline were asked what guidance they thought would be useful. Altogether, 39 respondents (9 organisations and 30 individuals) provided comments at this question. This included five respondents who answered 'no' or 'don't know' (to both questions), or who did not answer either of the closed questions. The views expressed are presented below.

3.23 It should be noted that the comments from some individual respondents (all of whom answered 'yes' at both closed questions) suggest that they may have understood this question as asking about whether **previous** offending by the offender should be a factor in

reaching a sentencing decision. The general view amongst these respondents was that previous offending (and particularly previous sexual offending) was relevant to sentencing, and should lead to a harsher sentence. (Note that previous convictions is included as an aggravating factor in each draft guideline, and further comments on this issue are presented in Chapter 7 together with views on other aggravating factors.)

Further guidance on historical cases should be provided

3.24 Respondents who favoured the inclusion of additional guidance noted the prevalence of historical cases (which made up around a quarter of sexual offence cases in 2021/22), and the media attention and public concern associated with such cases.⁷ It was suggested by one legal/academic organisation that additional guidance on such cases would assist the court, and would help in promoting consistency and public understanding.

3.25 Other respondents (third sector organisations and individuals) highlighted particular features of such cases which could impact on seriousness and/or which they thought should be considered as factors in reaching a sentencing decision. These included (i) the impact on the victim; (ii) the nature of the offence and actions of the offender; (iii) subsequent conduct of the offender; (iv) actions of the victim; and (v) age of the offender. Each of these is discussed briefly below (note, however, that respondents were not necessarily explicit about the additional guidance that might be provided):

- **Impact on the victim:** Third sector organisations and individuals highlighted the significant impact on the victim as a key feature of historical rape cases, given that this could be long-term and life-changing, and could manifest itself in different ways in different individuals. Respondents referred to the trauma of the actual offence(s), and any related abuse (emotional or physical) at the time; the impact of living with the long-term emotional and social effects of the offending; the complex reasons for victims not coming forward sooner and the impact of living with unresolved trauma; and the trauma of the prosecution and trial itself which may be complicated by evidential issues linked to the passage of time. Respondents stressed the need to consider harm in a holistic sense, taking account of all aspects of the victim's experience in reaching a sentencing decision.
- **Nature of the offence and actions of the offender:** Some respondents identified particular aspects of offending behaviour as factors in assessing culpability and harm. On this issue, some third sector respondents mentioned (i) rape as part of sustained domestic abuse, as well as (ii) actions taken by the offender to deter or prevent reporting of the offence, and (iii) actions taken to otherwise evade justice. There was a specific suggestion that these latter two points should be explicitly covered in the assessment of culpability.

⁷ Source: Scottish Government [Recorded Crime in Scotland 2021/22](#).

- **Subsequent conduct of the offender:** Some third sector organisations and individual respondents agreed that other offending by the perpetrator (previous and subsequent to the case being prosecuted) should be treated as a factor in sentencing. However, the issue of subsequent good conduct by the offender was also raised. Some argued that this should be a factor in sentencing, particularly as it may point to a low risk to the public. Others said guidance on this issue would be helpful in ensuring greater consistency in how this was reflected in sentencing. Some simply noted the years of freedom enjoyed by offenders prior to prosecution and thought that this should be accounted for in sentencing.
- **Actions of the victim:** While most respondents focused on the actions of the offender in their comments, there was one suggestion (from an individual) that a delay in reporting a section 1 rape should lead to a lighter sentence as the victim should have reported it at the time. In a similar vein, another respondent (also an individual) said that historical cases should be 'time barred' (i.e. there should be a limit on the time elapsed from the committing of an offence to the reporting of that offence, beyond which prosecution can not proceed). This suggestion would not affect sentencing but would prevent some cases coming to court at all.
- **Age of the offender:** Two different points were made by individuals in relation to the age of the offender. First, it was noted that, in some cases, the offender may have been a young person at the time of the offence, and that this should be taken into account in sentencing. Second, it was noted that in some cases, regardless of their age at the time of the offence, the offender may be elderly by the time a case comes to court, and that their advanced age should not be a factor in sentencing. In both scenarios, respondents believed that age at the time of the offence should be treated as the salient factor in sentencing.

3.26 Alongside these views, some respondents offered brief general comments. For example:

- One legal/academic organisation noted the importance of considering whether the passage of time and intervening events had any implications for sentencing.
- Two individuals argued that all cases (historical and otherwise) should be treated the same or treated equally seriously, and that this should be made clear in the guidelines. There was some concern expressed that historical cases are, or could be, treated more leniently.

3.27 In addition to the views reported above, respondents made two points related to definitions and terminology: firstly, the need to define 'historical' was noted; secondly, some respondents expressed a preference for the term 'non-recent' rather than 'historical' – it was suggested that this term might lessen the risk of 'historical' cases being regarded as somehow less serious than other cases.

Further guidance on historical cases should not be provided

3.28 Respondents who did not think the guidelines should provide further guidance in relation to historical offences generally thought the draft guidelines were sufficient to cover such cases. It was also noted that published sentencing decisions (e.g. *Greig v HM Advocate* 2013 JC 115) provided further guidance on this issue.

3.29 In addition, respondents in this group expressed concerns about (i) the difficulty of defining 'historical' cases and categorising cases on this basis given the very individual circumstances of cases, (ii) complicating the guidelines, and (iii) diluting the sense of justice for victims (if they thought different types of cases were dealt with differently).

4 Assessing seriousness: culpability

4.1 The consultation paper outlined the process for assessing seriousness as set out in Step 1 of the draft guidelines. This involves an assessment of (i) culpability and (ii) harm. The draft guidelines included lists of features intended to assist with the assessment of each. The features are not meant to be exhaustive, given the wide range of circumstances that can arise in cases. The consultation paper provided an explanation of some of the features listed in the draft guidelines and included six questions on assessing seriousness – three on culpability and three on harm. This chapter discusses respondents' views on the assessment of culpability. Chapter 5 presents views on the assessment of harm.

Q3: Do you agree or disagree that there should be two levels of culpability in the guidelines?

- Rape offences (section 1) [Agree / Disagree / Don't know]
- Rape of a young child (section 18) [Agree / Disagree / Don't know]

If you disagree, please explain your answer.

Q4: Do you think that the features of culpability listed in each of the guidelines are appropriate?

- Rape offences (section 1) [Yes / No / Don't know]
- Rape of a young child (section 18) [Yes / No / Don't know]

If you answered 'no' in relation to either guideline, please list which features of culpability are inappropriate and explain your reasons.

Q5: Should any features of culpability be added to either of the guidelines, or should any features be removed?

- If you believe any features of culpability should be added, please list these, identifying which guideline(s), and explain your reasons.
- If you believe any features of culpability should be removed, please list these, identifying which guideline(s), and explain your reasons.

Levels of culpability (Q3)

4.2 The consultation paper explained that each draft guideline includes two levels of culpability: Level A (the more serious level) and Level B. The features for determining culpability are listed under Level A. Level B culpability is then defined as 'features listed under Level A not present'. Question 3 asked respondents if they agreed or disagreed that there should be two levels of culpability in the guidelines for rape offences (section 1) and for the offence of rape of a young child (section 18).

4.3 In relation to the rape offences guideline, Table 4.1a shows that 38 out of 70 respondents agreed that there should be two levels of culpability, 30 disagreed and 2 said 'don't know'. Organisational respondents were more likely than individuals to agree whereas individuals were divided in their views on this question.

Table 4.1a: Q3 – Rape offences (section 1) – Do you agree or disagree that there should be two levels of culpability in the guideline?

Respondent type	Agree	Disagree	Don't know	Total
Third sector organisations	6	1	–	7
Legal, academic and public sector organisations	3	1	–	4
Total organisations	9	2	0	11
Total individuals	29	28	2	59
Total, all respondents	38	30	2	70

4.4 In relation to the rape of a young child guideline, Table 4.1b shows that 31 out of 69 respondents agreed there should be two levels of culpability, 35 disagreed and 3 said 'don't know'. Organisations were more likely than individuals to agree, whereas individuals were more likely to disagree.

Table 4.1b: Q3 – Rape of a young child (section 18) – Do you agree or disagree that there should be two levels of culpability in the guideline?

Respondent type	Agree	Disagree	Don't know	Total
Third sector organisations	5	1	–	6
Legal, academic and public sector organisations	2	1	1	4
Total organisations	7	2	1	10
Total individuals	24	33	2	59
Total, all respondents	31	35	3	69

4.5 A follow-up question asked respondents who disagreed in relation to either question to explain their answer. Altogether, 34 respondents (7 organisations and 27 individuals) made comments and these are discussed below.

Disagreement with two levels of culpability

4.6 Among those who answered 'disagree' in relation to one or both guidelines, the most common point made (especially among individuals) was that 'rape is rape' and that no distinction should be made between different levels of culpability when sentencing an

individual found guilty of rape. This group argued that, regardless of the circumstances, or the nature of the relationship between the victim and offender, rape has a serious, lifelong impact on the victim. They also suggested that having two levels of culpability would simply provide ‘loopholes to be exploited by legal defence teams’, or might imply that the victim is in some way partially to blame in cases where the offender is seen as less culpable. In general, this group of respondents argued that rape should be punished more severely than it currently is, with some calling for all sentencing for rape to be at the higher level of culpability.

4.7 Less commonly, those who did not agree that there should be **two** levels of culpability suggested that there should be **three** levels instead:

- One legal/academic organisation thought it was unclear why these very serious offences should have only two levels of culpability. This respondent noted that this was also the case in England and Wales, where the sentencing guideline for rape includes two levels of culpability while the guidelines for other serious offences include three levels. The respondent who made this point said that there would be cases of lower culpability even for such a serious offence, and thus three levels would be more appropriate.
- A similar point was made by an individual respondent who commented that ‘these cases are often complicated, and culpability is more of a gradient than binary’. This respondent was in favour of expanding the levels of culpability, arguing that this would increase the range of sentencing options, thus improving outcomes for those who were less culpable while also ensuring that the most dangerous of offenders receive a just and fair punishment.

4.8 A small group of respondents (all individuals) agreed that there should be two levels of culpability in the guideline on rape but disagreed in relation to the guideline on rape of a young child. There was a recurring view among these respondents that there should be a single level of culpability (the highest level) where the victim is a young child.

4.9 Finally, one respondent (an individual) agreed that there should be two levels of culpability in the guideline on rape of a young child but disagreed in relation to the guideline on rape. This respondent wanted to see **three** levels of culpability for rape, with the most serious level being for cases where the victim subsequently took their own life (which they considered increased the culpability of the offender) – and for which they suggested a sentencing range starting at 14 years. (This respondent further argued for even longer sentences in cases involving multiple victims, with at least one victim subsequently taking their own life.)

Agreement with two levels of culpability and other views

4.10 Respondents who answered 'agree' in relation to both guidelines, or who did not answer the closed questions for either guideline, mainly comprised legal, academic and public sector organisations. Some in this group noted that:

- It is helpful and appropriate to have two levels of culpability when assessing the seriousness of an offence. This will assist sentencers to achieve greater consistency in sentencing and support public understanding of the sentencing process.
- It is helpful and reasonable in assessing the seriousness of an offence to make a distinction between the culpability of the offender and the harm caused to the victim.
- It is helpful to state that the listed features of culpability are non-exhaustive, and that there is flexibility for sentencers to consider other circumstances in assessing culpability.

4.11 However, some in this group raised concerns or offered suggestions:

- There was a view that, although the framework would help provide clarity in relation to the sentencing process, there was also a risk of oversimplification in stating that the absence of factors listed under Level A would inevitably make an offender less culpable.
- There was concern that including two levels of culpability could be perceived by victims as downplaying the seriousness of some offences. To address this perception, it was suggested that the guidelines should include a statement to the effect that 'the level of culpability, in all cases of rape, is serious, and no inference should be drawn from its inclusion at Level B'.

Appropriateness of the listed features of culpability (Q4)

4.12 Question 4 asked respondents if they thought that the features of culpability listed in each draft guideline were appropriate. (Note that the features of culpability listed in both draft guidelines were identical.)

4.13 In relation to the rape offences guideline, Table 4.2a shows that 40 out of 70 respondents said 'yes' (the features listed were appropriate), 22 said 'no', and 8 said 'don't know'. Organisations were almost unanimous in agreeing that the features of culpability listed in the guideline were appropriate. Among individuals, around half (30 out of 59) answered 'yes', around a third (21 out of 59) answered 'no', and the remainder (8 out of 59) answered 'don't know'.

Table 4.2a: Q4 – Rape offences (section 1) – Do you think that the features of culpability listed in the guideline are appropriate?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	6	1	–	7
Legal, academic and public sector organisations	4	–	–	4
Total organisations	10	1	0	11
Total individuals	30	21	8	59
Total, all respondents	40	22	8	70

4.14 In relation to the rape of a young child guideline, Table 4.2b shows that 36 out of 67 respondents said 'yes' (the features listed were appropriate), 22 said 'no', and 9 said 'don't know'. The pattern of response was similar to that for the guideline on rape offences, with most organisations (7 out of 9) and half of individuals (29 out of 58) saying that the features listed in the guideline were appropriate.

Table 4.2b: Q4 – Rape of a young child (section 18) – Do you think that the features of culpability listed in the guideline are appropriate?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	5	1	–	6
Legal, academic and public sector organisations	2	–	1	3
Total organisations	7	1	1	9
Total individuals	29	21	8	58
Total, all respondents	36	22	9	67

4.15 A follow-up question asked respondents who answered 'no' in relation to either guideline to list the features of culpability they thought to be inappropriate and to explain their reasons. Comments made in response to this question overlapped to a large extent with comments made at Question 5. Question 5 was a two-part question which asked respondents if they thought (i) any additional features of culpability should be listed in either guideline, or (ii) any currently listed features should be removed. The views discussed at Question 4 and Question 5 are therefore presented together below.

4.16 Altogether:

- 28 respondents (7 organisations and 21 individuals) made comments at Question 4.

- 22 respondents (8 organisations and 14 individuals) made comments at the first part of Question 5.
- 11 respondents (1 organisation and 10 individuals) made comments at the second part of Question 5.

4.17 Note that **none** of the respondents who commented at the second part of Question 5 suggested the removal of any of the features of culpability currently listed in the guidelines.⁸ Instead, those who commented at this question made general statements about sentencing in rape cases and the need for tougher sentences. These comments are not discussed here but are covered together with other views on sentences in Chapter 6.

Views on the features of culpability and suggested additions (Q5)

4.18 This section focuses on areas where (i) respondents commented on or requested clarification about certain features of culpability and (ii) their suggestions for **additional** features of culpability. Respondents' more general views on the appropriateness (or not) of the current features of culpability are briefly summarised at the end of this section.

4.19 Note that respondents did not usually indicate whether their suggested changes related to one or other of the guidelines. Where they did, this has been stated below.

Comments on or requests for clarification about current features

4.20 Comments made are presented below. The points noted were usually made by just one or two respondents.

Significant degree of planning

4.21 It was noted by one third sector respondent that there is no explanation of how a 'significant degree of planning' would be quantified, or what would be regarded as a 'lesser' degree of planning. Any degree of planning in relation to rape should be a cause for concern. At the same time, the planning of an offence should not necessarily make it more serious than a spontaneous, unplanned offence (for example, in the context of domestic abuse).

4.22 A second respondent (an individual) also thought that distinguishing between levels of planning in the context of sexual offending was unlikely to be helpful in assessing culpability. This respondent suggested changing this feature to 'evidence of planning'.

⁸ One respondent suggested removal of 'ejaculation'. However, 'ejaculation' is not included in the list of features of culpability, but rather is listed in the guidelines as an aggravating factor. This point is therefore covered in Chapter 7.

Acting together with others to commit the offence

4.23 One third sector respondent thought clarity was needed about whether this covers situations where third parties (i) participated in (for example) the recording and distribution of recordings (film, tape, photographs, sound recordings) of the victim and the offence, (ii) participated in or facilitated the abduction and detention of the victim or (iii) encouraged others to record, participate, abduct/detain, but did not actually participate in the rape itself.

Administration of alcohol and/or drugs to the victim to facilitate the offence

4.24 There was a view from one third sector organisation that the guidelines should clarify if the 'administration of alcohol and/or drugs to the victim to facilitate the offence' would also cover cases of repeated administration of alcohol or drugs to subdue a victim (for example, in the context of domestic abuse).

4.25 Another respondent thought this feature should include providing forced medication.

Grooming

4.26 One respondent thought the guidelines should explain that the meaning of the feature 'grooming' is not restricted to the definition set out in section 15 of the Sexual Offences Act 2003 in order to give the court flexibility to consider the full circumstances of a case where grooming has been used to facilitate the offence.⁹

4.27 Another suggested the guidelines should provide more information about the concept of grooming – specifically relating to (i) grooming the environment, where the perpetrator puts themselves in a role that gives them access to potential victims, (ii) grooming the family, where the perpetrator gains the trust of parents or caregivers and maintains this relationship, and (iii) grooming the individual, where the victim believes they have put themselves at risk or agreed to the abuse by tolerating small boundary violations over a period of time.

Use of threats or coercion to facilitate the offence

4.28 In relation to the guideline on rape, one third sector organisation thought this may not adequately cover situations where an offence takes place in the context of domestic abuse, where the rape is not a 'one-off' behaviour, but part of a prolonged and sustained course of conduct. This feature should be reworded or expanded to include this situation, or a separate feature should be added to cover situations of domestic abuse.

4.29 One individual suggested this feature should also include threats made to third parties (e.g. children).

⁹ This issue is discussed at paragraph 64 of the consultation document but is not explicitly covered in the guidelines.

Previous violence, or other offending, against the victim

4.30 In relation to the guideline on rape, this wording was perceived by one third sector respondent to be unhelpful in relation to offences perpetrated by partners or ex-partners in the context of domestic abuse. The feature needs to be expanded to include coercive control by partners or former partners, with the following wording suggested: 'Previous violence, abuse or other offending, particularly that in the context of domestic abuse or gender-based violence, against the victim'.

4.31 One individual respondent thought the guidelines should clarify that this feature would cover situations in which the offender had been given, or was in breach of (i) a non-harassment order,¹⁰ (ii) a Risk of Sexual Harm Order (RoSHO or interim RoSHO),¹¹ (iii) a Sexual Offences Prevention Order (SOPO),¹² (iv) a Sexual Risk Order (SRO),¹³ which is due to replace RoSHOs, (v) a sexual harm prevention order,¹⁴ which is due to replace SOPOs, (vi) a domestic abuse protection order,¹⁵ or (vii) any other relevant orders which would include orders for civil damages awarded to victims of rape or other sexual assault.

Offence committed in the course of housebreaking, or following forced or uninvited entry into the victim's place of residence

4.32 One individual suggested this should be expanded to include the following additional text: 'including a hotel room or similar temporary accommodation or forced entry into any other private space where the victim would reasonably expect to be secure'.

Recording, or sharing of images of, the offence

4.33 One third sector respondent wanted clarification about whether a recording by a third party would be covered under 'recording or sharing images of the offence' – and whether recordings would include moving images (as well as still photographs) and sound recordings of the offence.

4.34 One individual suggested that this feature should be amended to also include audio recordings.

¹⁰ A non-harassment order made under section 234A of the Criminal Procedure (Scotland) Act 1995 or section 8 or 8A of the Protection from Harassment Act 1997.

¹¹ An RoSHO or interim RoSHO made under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

¹² An SOPO made under sections 104 or 105 of the Sexual Offences Act 2003.

¹³ An SRO made under provisions of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

¹⁴ A sexual harm prevention order made under sections 11 or 12 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

¹⁵ A domestic abuse protection order imposed under section 8 of the Domestic Abuse (Protection)(Scotland) Act 2021 (or an interim order under section 10 of that Act).

Additional features of culpability suggested

4.35 Respondents who suggested additional features of culpability often highlighted the difference between their suggestion(s) and one or more of the features of culpability currently listed in the guidelines. Other respondents suggested that features of harm or aggravating factors should also (or instead) be listed as features of culpability. Such comments indicated that respondents may have been somewhat uncertain about the conceptual distinction between features of culpability, features of harm and aggravating factors. While some respondents specifically stated that their proposed addition would not result in double-counting during the sentencing process, others did not refer to this and may have been less aware of (or less concerned about) this issue.

4.36 The suggestions below for additional features of culpability were made both by individuals and organisational respondents. Suggestions made most often (i.e. by more than one or two respondents) were as follows:

- **Exploitation of vulnerability in the victim:** An offender's knowledge of a specific vulnerability in the victim (e.g. neurodiversity, learning disability, old age, young age, physical disability, care experience, etc.) and/or the offender's exploitation of that vulnerability is relevant to culpability and is distinct from the exploitation of a relationship of trust. Currently it is listed as an aggravation ('targeting of a victim who is vulnerable'), but the victim's vulnerability should increase the offender's culpability regardless of whether there is targeting. However, there was also a contrasting view that treating the victim's vulnerability as inevitably increasing the offender's culpability would undermine the distinction being made in the guidelines between harm and culpability.
- **Offence is part of a pattern of coercive control or domestic abuse:** The guidelines should make specific reference to domestic abuse as a feature of culpability. (One third sector respondent suggested it should be a feature of either culpability or harm.) Sexual abuse and coercion may occur in the context of domestic abuse and result in repeated rapes over a prolonged period of time. This would include any offence of rape libelled and prosecuted under section 1 of the Domestic Abuse (Scotland) Act 2018 or one which attracts the aggravator under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 – where the offence is perpetrated against a partner or ex-partner.
- **Stalking/harassment of the victim:** This was seen to be different from 'planning', 'use of threats or coercion to facilitate the offence' and/or 'previous violence, and other offending, against the victim'. Stalking and harassment are often associated with domestic abuse, but more generally are behaviours that can intimidate a victim.

- **Crime motivated by hate (race, disability, sexual orientation, religion, etc.):** This type of behaviour would include situations in which a perpetrator tears off a woman's hijab, burqa, niqab, abaya or sheitel.
- **Crime motivated by misogyny:** Respondents identified this as a feature separate to 'rape motivated by hate'.
- **Offender's official status:** This would include behaviour where the perpetrator wears a uniform (police, military personnel, etc.) to gain the trust of the victim.

4.37 Suggestions made by just one or two respondents included the following:

- **Offender under the influence of drugs or alcohol:**¹⁶ It was noted that drugs and alcohol could be used deliberately to encourage/empower the offender.
- **Forced abortion after a rape:** This can occur as part of a pattern of domestic abuse or in cases where the offender is related to or is in a position of trust with the victim.
- **Removal of a condom or the victim's contraceptive device without the victim's consent** (in relation to the guideline on rape): This deliberate and calculated act (known as 'stealthing') is different from the harm of pregnancy which may be experienced by a victim (and so would not constitute double-counting). It indicates a lack of consent, contempt for the victim and a disregard for the health consequences of the offence. It may be a feature of rape, or domestic abuse, with the threat of pregnancy used to control and frighten the victim and prevent reporting. If this is not included as a feature of culpability, it should be added as an aggravating factor.
- **Repetition:** Two different respondents thought that 'repeated offences committed against the same victim' – currently listed as a feature of harm – could be listed under culpability as well as under harm. One said that, if it can only appear once, it should be listed under harm. However, the other respondent argued that this type of behaviour may well increase harm, but it should also increase culpability.
- **Repeat rape offences against the victim:** It was suggested that 'repeated rape offences' (distinct from the repetition of other types of offences) against a single victim should be included separately as a feature of culpability and specifically highlighted when sentencing.
- **Offender prevented the victim from disclosing the offence at the time or obtaining assistance:** This type of behaviour may be seen in cases of domestic abuse against a partner or multiple partners and in relation to children and young people, and can be a feature of historical cases. This should be removed from the list of aggravating factors and added to the features of culpability.

¹⁶ This is currently listed as an aggravating factor.

- **Use of blackmail:** One respondent noted there have been cases where rape has been used in lieu of payment of blackmail. This behaviour was seen to be somewhat different from 'use of threats or coercion to facilitate the offence' in that it is a specific type of control and abuse that disempowers the victim.
- **Offender is known to the victim:** Some of the features listed under Level A culpability imply certain types of established relationships between the offender and victim (grooming, abuse of power, or a position of trust or authority). However, any type of relationship between the offender and the victim should increase the level of culpability. An existing relationship between the offender and victim can result in greater harm to the victim. (See Chapter 3 for further discussion of this issue.)
- **Intent to murder:** This is distinct from 'violence'. Cases where the offender had planned to rape and subsequently murder the victim should be treated as more serious, as murder is an extreme form of violence.
- **Offence committed in the course of providing a service** (or the victim having engaged the offender to provide a service): This could include situations in which the victim had taken a taxi or allowed a worker into their home.
- **Consanguinity:** Incest is generally prosecuted as rape. 'Abuse of a relationship of trust' would cover some cases but would not cover offences between closely related young people.
- **Offence against a person subject to commercial sexual exploitation:** This would include the rape of a sex worker.

4.38 Finally, one respondent suggested that 'age and maturity of the offender, as well as that of the victim' should be included in the list of culpability features. However, no further information was provided to explain this suggestion.

General points about the features of culpability

4.39 Respondents who answered 'yes' at one or both of the closed questions at Question 4, or who did not answer either closed question often made comments of a general nature, rather than commenting specifically on individual factors. These comments were made by organisations (usually by one respondent, in each case) and are briefly discussed here.

- There was a view that there is overlap between some proposed features of culpability and proposed aggravating factors. For example, 'targeting a victim who is vulnerable' and 'location and timing' are both aggravators, which may relate to 'planning' by the perpetrator (a feature of culpability). To avoid double-counting, it may be helpful to review the wording and/or placement of these features.

- Some of the features of culpability listed in the guidelines (e.g. grooming, planning, violence, abduction, etc.) may be considered as separate and additional offences, and should carry an additional separate custodial sentence.
- It was noted that some of the listed features of culpability and aggravating factors (e.g. ‘use of threats and coercion’, ‘use of violence’, ‘previous convictions, particularly analogous’) were similar to factors that have been empirically validated as indicators of risk of future offending.
- Finally, one respondent suggested that the high number of Level A culpability features – some of which would be found in most cases of rape – will result in the majority of cases being assigned to the highest level of culpability. They noted that a typical distribution of cases for most offences would have a pyramid structure – with the most serious/higher culpability cases accounting for a smaller percentage than less serious/lower culpability cases. The current list of culpability features may change the distribution of rape cases and result in more being categorised at higher levels of seriousness.

4.40 Very occasionally, individuals also made general comments about the listed features of culpability. One individual thought that teenagers and young people aged 18–25 should be assessed for culpability in the same way as someone over 25. A second individual thought that Level B culpability was not sufficiently detailed.

5 Assessing seriousness: harm

5.1 As noted in Chapter 4, an assessment of seriousness involves not only an assessment of culpability (of the offender), but also an assessment of harm (to the victim). The draft guidelines provided lists of features intended to assist with the assessment of harm and noted that the features are not intended to be exhaustive. The consultation included three questions regarding the assessment of harm.

Q6: Do you agree or disagree that there should be three levels of harm in the guidelines?

- Rape offences (section 1) [Agree / Disagree / Don't know]
- Rape of a young child (section 18) [Agree / Disagree / Don't know]

If you disagree that there should be three levels of harm in the guidelines, please explain your answer.

Q7: Do you think that the features of harm listed in each of the guidelines are appropriate?

- Rape offences (section 1) [Yes / No / Don't know]
- Rape of a young child (section 18) [Yes / No / Don't know]

If you answered 'no' in relation to either guideline, please list which features of harm are inappropriate and explain your reasons.

Q8: Should any features of harm be added to either of the guidelines, or should any features be removed?

- If you believe features of harm should be added, please list these, identifying which guideline(s), and explain your reasons.
- If you believe features of culpability should be removed, please list these, identifying which guideline(s), and explain your reasons.

Levels of harm (Q6)

5.2 For the purpose of assessing seriousness, each draft guideline included three levels of harm: Level 1 (the most serious level), Level 2, and Level 3. These were defined as follows:

- Level 1 was defined with reference to Level 2 – the guidelines stated that 'the extreme nature of one or more Level 2 factors, or the extreme impact caused by a combination of Level 2 factors, may elevate an offence to Level 1'.
- Level 2 listed six factors including 'severe psychological harm or trauma' and 'severe physical harm'.
- Level 3 listed two factors: 'psychological harm or trauma' and 'physical harm'.

5.3 The factors of harm listed were identical in both guidelines.

5.4 Question 6 asked respondents if they agreed or disagreed that there should be three levels of harm in each of the guidelines.

5.5 In relation to the rape offences guideline, Table 5.1a shows that 41 out of 70 respondents agreed that there should be three levels of harm, 25 disagreed, and 4 said 'don't know'. Organisations were nearly unanimous in their views on this question – 11 out of 12 agreed. By contrast, individuals had more mixed views, with around half (30 out of 58) agreeing, two-fifths (24 out of 58) disagreeing, and the remaining 4 respondents saying 'don't know'.

Table 5.1a: Q6 – Rape offences (section 1) – Do you agree or disagree that there should be three levels of harm in the guideline?

Respondent type	Agree	Disagree	Don't know	Total
Third sector organisations	6	1	–	7
Legal, academic and public sector organisations	5	–	–	5
Total organisations	11	1	0	12
Total individuals	30	24	4	58
Total, all respondents	41	25	4	70

5.6 In relation to the rape of a young child guideline, Table 5.1b shows that 33 out of 70 respondents agreed that there should be three levels of harm, 32 disagreed and 5 said 'don't know'. Organisations (8 out of 11) were more likely than individuals (25 out of 59) to agree. Once again, individuals were more divided in their views. However, individuals were more likely to **disagree** that there should be three levels of harm in the guideline on rape of a young child – with around half (30 out of 59) disagreeing in this case – in contrast to their views on the rape guideline.

Table 5.1b: Q6 – Rape of a young child (section 18): Do you agree or disagree that there should be three levels of harm in the guideline?

Respondent type	Agree	Disagree	Don't know	Total
Third sector organisations	4	2	–	6
Legal, academic and public sector organisations	4	–	1	5
Total organisations	8	2	1	11
Total individuals	25	30	4	59
Total, all respondents	33	32	5	70

5.7 A follow-up question asked respondents who disagreed to explain their answer. Altogether, 35 respondents (7 organisations and 28 individuals) made comments. These are discussed below. Note that the discussion includes comments made by some respondents who answered 'agree' or 'don't know' or who did not answer the closed questions.

Views on whether there should be three levels of harm

5.8 Many of the comments made at Question 6 did not necessarily provide an explanation of respondents' views about whether there should be three levels of harm in the guidelines. Some respondents (individuals in particular) made comments to the effect that, for the purposes of sentencing, all rapes should be treated as having an impact at the highest level of harm (Level 1). Some also questioned or expressed reservations about the appropriateness of certain listed features of harm. These latter comments are not discussed here but are covered together with comments made at Questions 7 and 8.

5.9 There were three main views on whether there should be three levels of harm:

- **Three levels of harm are appropriate:** Respondents offering this view thought that having three levels – linked to narrower sentencing bands – would allow for flexibility, enable the court to make a more nuanced judgement in each case, and increase the likelihood of consistency in sentencing. Some (though not all) also thought this type of approach would assist in promoting public understanding of the sentencing process. While this group of respondents were, on balance, in favour of having three levels of harm, they also raised questions about how psychological harm (one of the features of harm), and different levels of psychological harm, would be assessed.
- **There should be one level of harm:** Some respondents (both organisations and individuals) thought there should be only one level of harm – or they expressed reservations about the proposal to have three levels. There was a consistent view in this group that the rape of a young child should, in all cases, be categorised at the most severe level – and that sentencing should reflect this. Respondents who favoured one level of harm suggested that the features listed at Levels 1 and 2 could be treated as aggravating factors.
- **There should be two levels of harm:** Less often, respondents suggested that there should be two levels of harm, but that it should be emphasised that the lower level is still very serious.

5.10 Respondents who did **not** support three levels of harm made a number of additional inter-related points, as follows:

- They questioned how a sentencer would be able to differentiate between a 'high' and 'low' level of harm – or between 'extreme' harm and 'severe' harm – particularly in

relation to psychological harm. One organisational respondent suggested that a sentencer could only know the true level of harm in some cases. Another argued that even if a sentencer **could** distinguish between different levels of harm, it was unlikely that the victim, their family and supporters, or members of the public would understand the distinction being made. There were concerns that harm assessed at Level 3 would be perceived by the victim as ‘insulting’ or as ‘devaluing’ their experience.

- They were concerned that this type of three-point scale would lead to the defence attempting to diminish or be dismissive of rape’s impact on the victim. They thought it was inappropriate that the victim should be required to prove harm.
- They pointed out that the true impacts of rape (and thus the extent of harm to the victim) may not be evident until many years after the event.
- They disagreed with the principle that one offender could receive a shorter sentence than another for a similar crime, based on the (perceived) impact on the victim. They noted that different individuals may react to the same set of circumstances in very different ways, because of factors personal to them, which bear no relationship to the offender’s level of culpability. Victims who are more resilient in recovering from a rape should not be ‘punished’ by giving greater leniency to their attacker.

Appropriateness of the listed features of harm (Q7)

5.11 Question 7 asked respondents if they thought that the features of harm listed in each guideline were appropriate.

5.12 In relation to the rape offences guideline, Table 5.2a shows that around half of respondents (39 out of 71) said ‘yes’ (the features of harm listed were appropriate), 24 said ‘no’, and 8 said ‘don’t know’. Around three-quarters of organisations (10 out of 13) and half of individuals (29 out of 58) thought the features were appropriate.

Table 5.2a: Q7 – Rape offences (section 1) – Do you think that the features of harm listed are appropriate?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	5	2	–	7
Legal, academic and public sector organisations	5	1	–	6
Total organisations	10	3	0	13
Total individuals	29	21	8	58
Total, all respondents	39	24	8	71

5.13 In relation to the rape of a young child guideline, Table 5.2b shows that around half of respondents (37 out of 71) thought the features of harm listed were appropriate, 27 thought they were not, and 7 said 'don't know'. Around two-thirds of organisations (8 out of 12) and around half of individuals (29 out of 59) thought the features were appropriate.

Table 5.2b: Q7 – Rape of a young child (section 18): Do you think that the features of harm listed are appropriate?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	4	2	–	6
Legal, academic and public sector organisations	4	1	1	6
Total organisations	8	3	1	12
Total individuals	29	24	6	59
Total, all respondents	37	27	7	71

5.14 Respondents who answered 'no' in relation to either guideline were asked to list the features of harm they thought to be inappropriate and to explain their reasons. Altogether, 31 respondents (6 organisations and 25 individuals) made comments. This included some respondents who answered 'yes' at both questions.

5.15 Note that Question 7 asked for views on the appropriateness of the listed features of harm. Any comments made at Question 7 on the addition or removal of features are covered in the discussion of Question 8 below.

Views of respondents who thought the features of harm were appropriate

5.16 Respondents who answered 'yes' at both closed questions reiterated their views that the listed features of harm in both guidelines were appropriate. However, this group also noted caveats or made suggestions, namely that (i) the features listed are appropriate, but not exhaustive, and (ii) both guidelines should explicitly address the possible situation in which there are multiple victims of a single perpetrator.

Views of respondents who did not think the features of harm were appropriate

5.17 Respondents who thought the features of harm were not appropriate in either guideline often raised questions or concerns about the assessment of psychological harm, specifically. They noted that, while physical harm would be relatively easy to assess, this would not be the case for psychological harm. In particular, they thought:

- It would be difficult in practice to distinguish between 'psychological harm or trauma' and 'severe psychological harm or trauma' as most victims of rape experience some

form of trauma. (There were similar concerns about how ‘additional degradation or humiliation’ would be determined.)

- Clarification is needed about how ‘psychological harm or trauma’ and ‘severe psychological harm or trauma’ were defined.
- Only physical harm can be measured accurately. An assessment of psychological harm, for the purposes of sentencing, will lead to disagreements between experts for the defence and for the Crown. These assessments will be matters of opinion and will not assist the court – and, more importantly, they will not assist victims.
- Any attempts to obtain a technical assessment of the nature or level of psychological harm or trauma suffered by the victim could, in itself, result in further traumatisation.

5.18 Some respondents in this group also made more general points about the listed features of harm. Specifically,

- There was a suggestion from one public sector organisation that a more substantial definition of the features of harm than currently provided would support greater consistency in approaches to sentencing. This organisation highlighted the types of definitions used in the context of decision-making in relation to Multi-Agency Public Protection Arrangements (MAPPA). These were not seen to be directly transferrable to a sentencing context but were simply provided as examples of more detailed definitions, which may be able to be adapted.
- One legal/academic organisation questioned the proposal to define Level 1 features by reference to the extreme nature of Level 2 features. This respondent thought it would be preferable to define the specific nature of harm that would be associated with the highest level.
- One individual thought that it would be preferable to provide more specific definitions of the features of harm for Levels 1 and 2, and then define Level 3 as ‘features in categories 1 and 2 not present’. This respondent acknowledged that the way the guidelines are currently drafted emphasises that rape offences will inevitably result in harm to the victim. However, they said that, on balance, they preferred more detailed definitions of Levels 1 and 2.
- The point was also made that, unless there is medical evidence, levels of harm cannot be proven for historical crimes.

Other points

5.19 Occasionally respondents made other points, some of which were not entirely related to the question of whether the features of harm listed were appropriate. For example, one respondent said, simply, that all rapes cause irreversible damage. Another suggested that

the listed features of harm in the guidelines do not fully acknowledge the harm victims may live with for the rest of their lives.

Proposed features for addition or removal (Q8)

5.20 Question 8 was a two-part question asking (i) if any additional features of harm should be listed in either guideline or (ii) if any currently listed features should be removed. Respondents were asked to list any features for addition or removal, identifying the relevant guideline(s), and to explain their reasons. Altogether 23 respondents (8 organisations and 15 individuals) made comments at the first part of the question and eight (2 organisations and 6 individuals) made comments at the second part.

5.21 Not all the comments made in response to Question 8 included a specific suggestion for features to be added or removed. Some respondents simply said 'no', 'none that come to mind' or 'none should be removed'. Others requested clarification about one or more current listed features. However, as the figures in paragraph 5.20 suggest, respondents were more likely to propose **additional** features of harm, than propose features for **removal**.

5.22 The sections below present respondents' (i) comments on the current features of harm, (ii) suggestions for proposed additional features, and (iii) suggestions for features that should be removed from the current list.

Comments on the current list of features of harm

5.23 Respondents' comments on the listed features of harm are presented below.

Psychological harm or trauma and severe psychological harm or trauma

5.24 It was suggested by one individual that this feature should be extended to include trauma or harm suffered by any other person present (such as a parent, child, sibling, or other person). This was not seen to be covered by the concept of 'additional degradation or humiliation' as this focuses on the effects for the victim, rather than any other individuals who may have witnessed the rape. Another respondent suggested it should be clear that 'severe psychological harm or trauma' would include complex post-traumatic stress disorder (PTSD) and other equivalent long-term impacts.

Pregnancy, and any consequences, as an outcome of the offence

5.25 One third sector respondent suggested that it should be clear that this would include the threat or fear of pregnancy, whether or not the victim became pregnant. It should also include miscarriage, termination, or forced termination in cases where the victim was pregnant.

Sexually transmitted infection as a consequence of the offence

5.26 One third sector respondent suggested that this should include the threat or fear of having contracted a sexually transmitted infection, whether or not one was contracted.

Proposed additional features

5.27 Two or more respondents suggested that the following features of harm should be added to the guidelines.

- **Impact on lifestyle, social and economic functioning:** Respondents perceived this as different from 'psychological harm'. It could include harm to the victim due to loss of home or loss of employment/income, as well as impacts on the victim's relationships in their family and/or community, and the development of negative coping strategies. However, it was suggested that if this feature is **not** separately added, it should be explicitly mentioned as an aspect of psychological harm.
- **Suicide:** This was considered to be an extreme expression of both psychological and physical harm.

5.28 The following suggestions were made by just one respondent in each case:

- **Cultural harm:** In some cultures and religious communities, rape may bring an element of shame on the victim and their family. The respondent who raised this point did not necessarily agree with these cultural interpretations but argued that this form of harm to the victim should nevertheless be recognised.
- **Impacts on a child resulting from the rape of a parent** (even if the child did not directly witness the offence): A child may suffer as a result of the psychological impact on their parent. Children may also experience fear of the offender and, if the offender is a parent, they may suffer loss of self-esteem or stigma.
- **Rape of a pregnant person:** This was seen to be distinct from pregnancy resulting from a rape, as it can result in a different type of harm – including, for example, miscarriage or other pregnancy complications. The point was made that any loss of a pregnancy is a traumatic event, and this specific type of harm should be clearly recognised in the guidance.

Proposed features for removal

5.29 One respondent suggested that 'psychological harm or trauma' should be removed as a feature of harm. This respondent reiterated points made in relation to Questions 6 and 7 about the difficulty of reliably identifying, assessing and quantifying 'psychological harm or trauma' given the very different ways this can present, and suggested that the guideline should simply acknowledge that the emotional and psychological harm associated with rape are always serious and always last a lifetime.

6 Sentencing ranges, public protection and risk

6.1 This chapter presents views on the sentencing ranges included in the draft guidelines, and on whether the guidelines sufficiently address the issue of public protection and risk.

6.2 Sentencing ranges are intended to assist in selecting a headline sentence. The consultation paper explained that the ranges included in the draft guidelines take account of both culpability and harm and are intended to reflect current sentencing practice. The sentencing ranges are not binding on courts but are intended to offer guidance while also providing flexibility to reflect the circumstances of individual cases.

6.3 Public protection is one of the purposes of sentencing (as set out in the Council's overarching guideline, [The principles and purposes of sentencing](#)), and the consultation paper noted that the public see the risk of reoffending and public protection as important factors in the sentencing of sexual offences. The draft guidelines for rape offences included discussion of two disposals intended to achieve public protection in cases where convicted offenders present high levels of risk – extended sentences and orders for lifelong restriction (OLRs) – and also referred to requirements relating to the 'sex offenders register'.¹⁷

6.4 The consultation included the following two questions on these issues:

Q9: Do you agree with the sentencing ranges for each of the guidelines?

- Rape [Yes / No / Don't know]
- Rape of a young child [Yes / No / Don't know]

Please provide any reasons for your answer.

Q10: Do the guidelines sufficiently address the issue of public protection and risk?

- Rape [Yes / No / Don't know]
- Rape of a young child [Yes / No / Don't know]

If answering 'no' please tell us why and explain your reasons.

¹⁷ The Sexual Offences Act 2003 requires registered sex offenders to notify specified personal details with the police, annually and whenever their details change. This system is generally referred to as the 'sex offenders register'.

6.5 Views on each question are presented below. However, it should be noted that there was some overlap in the comments made at each question. As far as possible issues are covered once, at the most relevant point in the chapter.

Sentencing ranges (Q9)

6.6 Question 9 asked respondents if they agreed with the sentencing ranges included in each guideline.

6.7 In relation to the rape offences guideline, Table 6.1a shows that 20 out of 70 respondents said 'yes' (they agreed with the sentencing ranges), 43 said 'no', and 7 said 'don't know'. Most individuals disagreed with the sentencing ranges in this guideline (37 out of 59 said 'no'), whereas organisations were more divided in their views. However, while legal, academic and public sector organisations mainly agreed with the sentencing ranges (3 out of 4 said 'yes'), most third sector organisations disagreed (6 out of 7 said 'no').

Table 6.1a: Q9 – Rape offences (section 1) – Do you agree with the sentencing ranges for this guideline?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	1	6	–	7
Legal, academic and public sector organisations	3	–	1	4
Total organisations	4	6	1	11
Total individuals	16	37	6	59
Total, all respondents	20	43	7	70

6.8 In relation to the rape of a young child guideline, Table 6.1b shows that 18 out of 68 respondents said 'yes' (they agreed with the sentencing ranges), 43 said 'no' and 7 said 'don't know'. Most individuals disagreed with the sentencing ranges in this guideline (39 out of 58 said 'no'), whereas organisations were more divided in their views.

Table 6.1b: Q9 – Rape of a young child (section 18) – Do you agree with the sentencing ranges for this guideline?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	2	4	–	6
Legal, academic and public sector organisations	2	–	2	4
Total organisations	4	4	2	10
Total individuals	14	39	5	58
Total, all respondents	18	43	7	68

6.9 Respondents were asked to provide any reasons for their answers. Altogether, 52 respondents (10 organisations and 42 individuals) provided comments.¹⁸ Those who disagreed were more likely than those who agreed to provide comments. In addition, most respondents commented on this issue in a general way, rather than offering views on specific aspects of the proposed ranges. Thus, the following two sections present general views related to agreement and disagreement with the proposed ranges, while a third section presents more detailed comments on various aspects of the proposed ranges. Note that one legal/academic respondent reported a range of different views among their membership on specific aspects of the proposed sentencing ranges. This range of views is described in the relevant sections below.

Agreement with the sentencing ranges – general views

6.10 Respondents who agreed with the proposed sentencing ranges said that the ranges reflected current sentencing practice. However, two caveats were noted: one respondent suggested that there may be issues in imposing sentences for multiple offences; a second respondent suggested that consideration may need to be given to any 'potential tensions' between the two proposed guidelines relating to rape and Council's existing guideline on [sentencing young people](#).

6.11 One individual respondent (who selected 'don't know' at both closed questions) noted that the ranges were broadly in line with the expectations of the public as reported in research on this issue.

Disagreement with or reservations about the sentencing ranges – general views

6.12 In general, respondents who did not agree with the proposed sentencing ranges thought the ranges were too lenient. These respondents did not think the proposed sentence ranges reflected the nature and gravity of the offence and the long-term impact on victims, particularly as offenders were likely to qualify for early release and serve only part

¹⁸ This excludes one organisational respondent who simply stated they had no observations to make.

of any custodial sentence imposed. Some respondents commented particularly that the sentences proposed were too lenient for the rape of a child (note that such respondents generally referred to rape of a 'child', rather than rape of a 'young child' and it is therefore not clear if they were referring to the ranges included in the guideline on rape of a young child, or offering a general view on sentencing relating to rape of a child of any age).

6.13 Individuals in particular often described the type of sentences they felt should be imposed. Typically, respondents wished to see much longer sentences with suggestions ranging from 8 years and 10 years respectively (at the lower end of the sentencing range for rape and rape of a young child) to life imprisonment. There was also a call for a minimum sentence length that would be maintained in all cases. There was a common view that a rapist should receive a life sentence (some said they should never be released), as this would reflect the lifelong impact the offence has on the victim. Some respondents said that all rapists should be given the same sentence, regardless of the circumstances of the case. Additionally, there were calls for no early release for those serving custodial sentences, or no release until an offender was deemed to be of no risk to the public, and consecutive rather than concurrent sentences for those convicted of multiple rapes. In a few cases respondents called for other measures such as drug treatment for sex offenders, financial penalties, and restrictions on internet and mobile phone access to be used.

6.14 Just one respondent (an individual) expressed general disagreement with the proposed sentencing ranges because they regarded them as too harsh. This respondent expressed the view that 'rape is not murder or involving death and should not be treated as such a severe crime'.

6.15 Occasionally, respondents expressed disagreement with or raised queries about the broad approach taken in the guidelines. One individual described the approach as 'too prescriptive', while another described the matrix format as 'too restrictive' and suggested that judges should be given greater discretion in their decision-making. Another individual (who selected 'don't know' at the closed questions) expressed uncertainty about the basis for the sentencing ranges proposed.

Detailed comments on proposed sentencing ranges

6.16 Respondents offering more detailed comments on specific aspects of the sentencing ranges included legal/academic, public sector and third sector organisations, as well as some individuals. Their views are summarised below.

Comments relevant to the guideline for rape

6.17 Comments on the lower end of the sentencing range included the following:

- Two respondents (a third sector organisation and an individual) thought the bottom point of 4 years was too lenient and favoured increasing this to 5 years. One of these

respondents expressed particular concern about sentences being further reduced once factors such as early pleas and the offender's age were accounted for; they also said that 5 years was an appropriate lower limit for cases tried in the High Court.

- One legal/academic respondent reported differing views among their membership. Some concurred with other respondents in believing that a lower point of 4 years might result in a sentence that 'fails to do justice' once all relevant factors are taken into account. They thought this was a particular risk given that the approach adopted in the draft guideline did not incorporate 'starting points', and noted that increasing the lower level of the bottom sentencing range could have implications for other ranges. Others, however, endorsed the proposed lower level of 4 years, and were content that a resulting sentence of less than 4 years may be appropriate in some circumstances (e.g. where the offender is a teenager or young adult).

6.18 Comments on the upper end of the sentencing range made by third sector organisations included the following:

- One respondent thought the guidelines should make explicit reference to the availability of life sentences for rape offences¹⁹ – they argued that currently proposed changes to dealing with rape offences were likely to lead to increased conviction rates, with the need for longer sentences then becoming more apparent.²⁰
- One respondent queried the proposed range maximum of 13 years. They pointed out that the maximum sentence available under section 1 of the Domestic Abuse (Scotland) Act 2018 is 14 years, and the upper limit (outwith a life sentence) is 19 years in the England and Wales guideline.

Comments relevant to the guideline for rape of a young child

6.19 Just one respondent offered detailed views relevant to the guideline for rape of a young child. This legal/academic organisation reported differing views among their membership on the lower end of the sentencing ranges included in the draft guideline: while some thought the lower level of 5 years was acceptable and allowed appropriate scope for adjusting sentences after account is taken of all relevant features, others believed the level was too low, and others believed it to be too high.

6.20 Those who thought the level was too low argued that a sentence of less than 5 years would only be imposed in very rare circumstances (including, potentially, where cases involved young offenders). These respondents wished to see a lower end more in line with

¹⁹ It was not clear from the comment whether the respondent thought this reference should be included in the rape guideline or in the existing [sentencing process guideline](#).

²⁰ This is assumed to refer to the reforms contained in the [Victims, Witnesses and Justice Reform Bill](#) introduced into the Scottish Parliament in April 2023. The Bill includes provisions relevant to all offences as well as provisions focused on sexual offences.

what was 'ordinarily acceptable' for this serious offence, with 7 years suggested as an alternative. It was noted that this would not prevent a lesser sentence being imposed in appropriate circumstances.

6.21 Those who thought the lower end of 5 years was too high made a number of different points:

- They pointed out that the Sexual Offences (Scotland) Act 2009 has widened the types of conduct classified as rape which, in turn, has led to the need for a wider range of sentencing options. As such, there was concern that the proposed lower level might have the effect of increasing sentences for some criminal acts not previously sentenced as rape.
- They noted that the offender in rape of a young child cases is often a young person (or was a young person at the time of offending), and a sentence of less than 4 years may be appropriate in some such cases. It was suggested that the ranges included in the guideline should allow for this, or, alternatively, that it should be made clear that the ranges do not apply to young people.
- They thought that the ranges should take account of the 'totality' of the sentence, including sexual offender registration requirements and the use of restrictive orders such as non-harassment orders (NHOs).

Comments relevant to both guidelines

6.22 Points relevant to both guidelines – both raised by legal/academic organisations – included the following:

- One respondent endorsed the upper ranges for each guideline, as long as it is 'recognised that there will be cases where sentence should exceed the upper end of the highest range'.
- One respondent pointed out that the ranges included in the comparable England and Wales guidelines expand with each level of seriousness; and that the midpoint of the combined ranges in the draft Scottish guideline is lower than the midpoint of the combined ranges for England and Wales. They suggested that this could result in rape being punished less severely in Scotland than in England and Wales.

Public protection and risk (Q10)

6.23 Question 10 asked if the guidelines sufficiently addressed the issue of public protection and risk.

6.24 In relation to the rape offences guideline, Table 6.2a shows that 25 out of 71 respondents said 'yes' (the guideline sufficiently addressed the issue of public protection), 39 said 'no', and 7 said 'don't know'. Organisations were more likely than individuals to say

that this guideline **did** sufficiently address the issue of public protection and risk (7 out of 11 said 'yes'). Individuals were more likely than organisations to think the guideline did **not** (35 out of 60 said 'no').

Table 6.2a: Q10 – Rape offences (section 1): Does this guideline sufficiently address the issue of public protection and risk?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	3	4	–	7
Legal, academic and public sector organisations	4	–	–	4
Total organisations	7	4	0	11
Total individuals	18	35	7	60
Total, all respondents	25	39	7	71

6.25 In relation to the rape of a young child guideline, Table 6.2b shows that 24 out of 69 respondents said 'yes' (the guideline sufficiently addressed the issue of public protection and risk), 38 said 'no' and 7 said 'don't know'. Organisations had mixed views on this question (6 said 'yes' and 4 said 'no'). Individuals were more likely than organisations to think the guideline did **not** sufficiently address the issue of public protection and risk (34 out of 59 said 'no').

Table 6.2b: Q10 – Rape of a young child (section 18): Does this guideline sufficiently address the issue of public protection and risk?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	2	4	–	6
Legal, academic and public sector organisations	4	–	–	4
Total organisations	6	4	0	10
Total individuals	18	34	7	59
Total, all respondents	24	38	7	69

6.26 A follow-up question asked respondents who answered 'no' to explain their answer. Altogether 45 respondents (10 organisations and 35 individuals) provided comments. This included nine respondents who answered 'yes' or 'don't know' (to both closed questions) or who did not answer the closed question. The comments offered by respondents were wide-ranging in nature, and the sections below present the views of respondents who said the guidelines sufficiently addressed the issue of public protection and risk, followed by the views of those who offered other perspectives on the issue of public protection and risk.

The guidelines sufficiently address the issue of public protection and risk

6.27 Respondents who thought the issue of public protection and risk was sufficiently addressed included legal/academic organisations. This group noted the reference in the guidelines to extended sentences and OLRs, and thought the guidelines complemented existing risk assessment mechanisms used in the criminal justice system.

6.28 However, other respondents in this group offered more qualified views. One third sector organisation stressed the importance of taking effective and proportionate measures to protect victims (rather than the wider public). Two respondents (a legal/academic organisation and an individual) said that the issue of public protection and risk may be adequately covered in the guidelines, but questioned the effectiveness of the processes and measures available for managing offenders in the community. Similar points were made by those who did not think public protection and risk were adequately addressed in the guidelines. These points are discussed below, or in Chapter 9.

Other perspectives on the issue of public protection and risk

6.29 This section summarises the views of respondents who did **not** think the guidelines sufficiently addressed the issue of public protection and risk. It also includes issues raised by respondents who answered 'don't know' or who did not answer the closed question.

6.30 Around two-thirds of respondents who commented at Question 10 made points similar to those made at Question 9. These respondents (individuals and some third sector organisations) focused on the custodial component of the sentence, and largely reiterated previously expressed views that the proposed sentencing ranges (or the sentences currently given to those convicted of rape) were too lenient and did not reflect the seriousness of the offence. Some respondents commented more directly on public protection, and said that sentences were too short to deter offending or to allow for rehabilitation, and meant that offenders were returned to the community where they were able to offend again. Broadly speaking, these respondents thought the issue of public protection and risk would be better addressed by ensuring that offenders served lengthy custodial sentences.

6.31 The main themes in the comments from other respondents related to (i) victim protection and the use of restrictive orders, (ii) the risk assessment process, (iii) young people and risk, and (iv) the coverage of public protection and risk in the guidelines. Each of these are discussed below. Note that some respondents offered views on the effectiveness of available processes and measures related to risk and public protection. Such comments are covered briefly in Chapter 9.

Protection of victims and the use of restrictive orders

6.32 A key issue for some respondents (third sector organisations and individuals) was the protection of victims. Respondents believed that the guidelines gave insufficient attention to

the protection of victims, as opposed to the protection of the public in general. Respondents described the anxiety felt by victims about the future release of convicted offenders and the life and behavioural changes many felt forced to make in order to feel safe (e.g. moving house, changing jobs, not going out socially). There was a range of calls for more use, mandatory use, or more consistent use of measures such as non-harassment orders (NHOs) and sexual harm prevention orders (SHPOs), and appropriate licence conditions to ensure the protection of victims and their families following the release of offenders from custody, and for guidance to be provided on this. It was suggested that this would offer some reassurance for victims, and be in keeping with research findings on the experiences of victims, and the aims and aspirations of the Scottish Government's [Equally Safe](#) strategy.

The assessment of risk

6.33 One public sector respondent with a specific role in relation to risk in the criminal justice system highlighted (i) the importance of decisions relating to public protection being informed by appropriately conducted risk assessments, and (ii) the need for sentencers to be equipped to understand and apply such risk assessments, and to be aware of national standards and protocols (such as the [Framework for Risk Assessment, Management and Evaluation \(FRAME\)](#)) in this area. This respondent indicated a willingness to work with the Council in facilitating training on this issue. The response also suggested that 'revisiting the placement of various factors relevant to harm, culpability and expounding the definitions of the levels of harm' may help support consistency in the application of the guidelines. This latter view is covered further in Chapters 4 and 5.

6.34 Some individuals also commented on the assessment of risk in particular types of cases. For example, some respondents said that it was important to recognise the wider public protection risks presented by offenders who committed rape within relationships, and those who used force such as strangulation in the course of committing rape. However, there was a less common view that not all offenders presented a significant risk and that sentencing needed to better differentiate between high risk and low risk offenders. It was, for example, suggested that those convicted of historical sexual crimes and who have not offended in the intervening years may not present a significant risk of reoffending.

Sentencing of young people

6.35 In a few cases, individuals commented on the sentencing of young offenders. There was a view that young people were treated lightly by the criminal justice system or with regard to rape offences in particular. On this latter point, one respondent expressed the specific view that the existing guideline on sentencing young people should not apply to rape offences, or that it should be made clear that the guideline can be departed from for such offences. This respondent argued that the deliberate violation of another in rape offences did not fit the pattern of other offending behaviour associated with the developing brain (linked, for example, to impulsiveness and the effects of peer pressure) that the Council's guideline on [sentencing young people](#) was intended to recognise. Thus, the

possibility of a reduced sentence for a young sex offender failed to adequately protect the public.

Coverage of public protection and risk in the guidelines

6.36 In a few cases, respondents made specific suggestions about how the guidelines might be revised to better address the issue of public protection.

- First, one legal/academic organisation suggested that the guidelines should make explicit reference to the need to consider public protection in reaching a sentencing decision – rather than simply relying on the reference to the guideline on the [principles and purposes of sentencing](#) included at paragraph 2 of the draft guidelines.
- Second, two respondents suggested revisions to assist with public and victim understanding. One respondent (an individual) suggested that the coverage of public protection and risk in the guidelines might be expanded, and might include a simple description of the statutory test for an OLR for those unfamiliar with the measure. Another respondent (a public sector organisation with a specific role in relation to risk in the criminal justice system) suggested that the text at paragraph 5 of each guideline on the maximum sentence available for rape and rape of a young child might be revised to clarify the circumstances in which a life sentence could be imposed.²¹ (This latter respondent also noted that the text included at paragraphs 21 to 27 of the guidelines may help improve understanding of extended sentences and OLRs.)

²¹ This respondent noted the following comments on why a life sentence may not be a competent disposal: 'following *McIntosh v HM Advocate*, it appears that the discretionary life sentence is no longer a competent disposal having been replaced by the OLR for any case that commenced on or after 20 June 2006; additionally, a life sentence cannot be made where a risk assessment order or interim compulsion order with assessment of risk is not made, or where the Court considers that the risk criteria are not satisfied.

7 Aggravating and mitigating factors

7.1 Step 3 of the sentencing process involves the identification and consideration of aggravating and mitigating factors. Each of the draft guidelines includes a list of non-exhaustive factors which may apply to the **offence** or to the **offender** and may lead to an increase or reduction in the headline sentence determined for the offence. These factors are presented in table format in each draft guideline. The consultation paper included four questions on aggravating and mitigating factors: two questions related to aggravating factors and two related to mitigating factors.

Q11: Are the aggravating factors listed in each guideline appropriate?

- Rape [Yes / No / Don't know]
- Rape of a young child [Yes / No / Don't know]

If you answered 'no' in relation to either guideline, please list what aggravating factors are inappropriate and explain your reasons.

Q12: Should any aggravating factors be added to either of the guidelines, or should any factors be removed?

- If you believe any aggravating factors should be added, please list these, identifying which guideline(s) and explain your reasons.
- If you believe any aggravating factors should be removed, please list these, identifying which guideline(s) and explain your reasons.

Q13: Are the mitigating factors listed in each guideline appropriate?

- Rape [Yes / No / Don't know]
- Rape of a young child [Yes / No / Don't know]

If you answered 'no' in relation to either guideline, please list what mitigating factors are inappropriate and explain your reasons.

Q14: Should any mitigating factors be added to either of the guidelines, or should any factors be removed?

- If you believe mitigating factors should be added, please list these, identifying which guideline(s) and explain your reasons.
- If you believe mitigating factors should be removed, please list these, identifying which guideline(s) and explain your reasons.

7.2 This chapter is presented in two parts – the first part covers aggravating factors while the second part covers mitigation factors.

Aggravating factors (Q11 and Q12)

7.3 Questions 11 and 12 sought views on the aggravating factors listed in the draft guidelines. Note that the list of aggravating factors is largely the same in both guidelines. The guideline on rape of a young child included three additional aggravating factors: (i) exploiting contact arrangements with a child to commit an offence, (ii) victim encouraged to recruit others for the purpose of similar offending, and (iii) particularly young victim.

Appropriateness of aggravating factors (Q11)

7.4 Question 11 asked respondents if they thought the aggravating factors listed in each guideline were appropriate.

7.5 In relation to the rape offences guideline, Table 7.1a shows that around half of respondents (38 out of 71) said 'yes' (the aggravating factors listed were appropriate), around a third (24 out of 71) said 'no', and 9 said 'don't know'. Around two-thirds of organisations (9 out of 13) and half of individuals (29 out of 58) answered 'yes' to this question.

Table 7.1a: Q11 – Rape offences (section 1) – Are the aggravating factors listed in this guideline appropriate?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	5	2	–	7
Legal, academic and public sector organisations	4	2	–	6
Total organisations	9	4	0	13
Total individuals	29	20	9	58
Total, all respondents	38	24	9	71

7.6 In relation to the rape of a young child guideline, Table 7.1b shows that around half of respondents (36 out of 68) said 'yes' (the aggravating factors listed were appropriate), around a third (22 out of 68) said 'no', and 10 said 'don't know'. More than two-thirds of organisations (7 out of 10) and half of individuals (29 out of 58) answered 'yes' to this question.

Table 7.1b: Q11 – Rape of a young child (section 18) – Are the aggravating factors listed in this guideline appropriate?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	5	1	–	6
Legal, academic and public sector organisations	2	1	1	4
Total organisations	7	2	1	10
Total individuals	29	20	9	58
Total, all respondents	36	22	10	68

7.7 A follow-up question asked respondents who answered ‘no’ in relation to either guideline to list the aggravating factors they regarded as inappropriate and to explain the reasons for their answer. Altogether 27 respondents (7 organisations and 20 individuals) provided comments. A small number of respondents who answered ‘yes’ to one or both questions or who did not answer either of the closed questions also commented.

7.8 Some respondents who agreed that the aggravating factors were appropriate went on to raise caveats or to offer suggestions. In particular:

- One respondent thought it was difficult to distinguish, conceptually, between culpability features and aggravating factors. (It should be noted that respondents who disagreed with one or more aggravating factors often suggested that those factors should be added to the list of culpability features instead.)
- One respondent highlighted the reference to statutory aggravations in the guideline on rape offences and suggested that it may be helpful to use the domestic abuse aggravation as the example given in the text, ‘given the inconsistent compliance with the requirement under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016’.
- One respondent suggested that the level of violence used in the offence should be the main factor for longer sentences – especially if the offender has previously been violent and this can be proved.

7.9 Respondents who thought the aggravating factors listed in the guidelines were not appropriate usually made comments about the factors (without suggesting additional factors or removal of a factor), or they asked for clarification or additional guidance about some of the factors. These comments are discussed together with similar comments made at Question 12 below.

7.10 However, one individual respondent who thought the aggravating factors were not appropriate for either guideline argued that any additional offences carried out by a

perpetrator at the time of the offence, or immediately before or after the offence, should be treated as separate offences (rather than aggravators for the offence of rape), and should carry additional custodial sentences.

Comments on the aggravating factors and suggested additions or removals (Q12)

7.11 Question 12 was a two-part question, asking respondents to list any aggravating factors they thought should be (i) added or (ii) removed from the guidelines, and to explain their reasons. Altogether 20 respondents (10 organisations and 10 individuals) made comments at the first part of the question, and 6 respondents (3 organisations and 3 individuals) made comments at the second part.

7.12 This section discusses (i) comments on, or requests for clarification about, the current list of aggravating factors, (ii) suggested additional factors, and (iii) factors suggested for removal.

Comments on the current list of aggravating factors

7.13 Respondents who thought the list of aggravating factors were inappropriate often did so because they thought further guidance was needed on certain factors, or they wanted to clarify the type of behaviour each factor would (or should) cover. These views are discussed here. In most cases, these comments were made by one or two respondents.

Previous convictions, particularly analogous and/or relevant previous convictions

7.14 One respondent suggested that additional guidance should be provided in the guidelines about what types of convictions would be relevant. Another noted that prior offending of a similar nature has consistently been shown to be one of the strongest predictors of reoffending. This respondent suggested that it may therefore be more appropriate to consider this as a feature of culpability, rather than as an aggravating factor. By contrast, a third respondent argued that a history of previous convictions may not necessarily be relevant as an aggravating factor, and an individual with **no** previous convictions should not necessarily receive a shorter sentence than someone who has previous convictions. (This issue is covered further in the discussion on mitigating factors below.) Two examples were given: (i) cases of rape in a domestic situation, where a partner's behaviour has been abusive for a period of time, but no incidents were previously reported, and (ii) cases involving younger children who may not be able to verbalise what has happened to them.

7.15 One respondent suggested this factor should include domestic abuse and other forms of gender-based violence such as stalking, rather than only sexual offences because of the clear links between these behaviours and sexual offending. It was also noted that, in relation to previous analogous offending, a failure to attend or complete rehabilitative interventions has consistently been identified as a risk factor for reoffending. It may

therefore be appropriate to incorporate this into the guidelines, possibly as a separate aggravating factor.

Use of a weapon to frighten or injure the victim

7.16 One respondent suggested this aggravating factor should be included as a feature of culpability or harm and considered at Step 1 as part of the assessment of seriousness. Another suggested it should be extended to include threats to the victim's family, threats of economic harm or other threats (e.g. threat of arrest where a police officer is abusing their position to target a victim).

Targeting of a victim who is vulnerable at the time of the offence, including where the victim is asleep or unconscious

7.17 One respondent suggested this should cover two distinct types of behaviour: (i) targeting a vulnerable person due to their personal characteristics, and (ii) targeting a person who is asleep, unconscious, or otherwise incapacitated. Another thought this factor should also include targeting victims who are vulnerable due to a perpetrator's position of power (e.g. as an employer or authority figure). However, a third respondent argued that all rape victims are vulnerable at the time of the offence. This comment was not entirely clear, but may suggest that, in the view of this respondent, there should be no lenience in sentencing simply because the victim was **not** asleep or unconscious.

Steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution

7.18 One respondent thought this should be removed from the list of aggravating factors and added to the features of harm (to be considered in assessing seriousness). Another thought this factor should be expanded to include the concept of 'deterrence' – i.e. 'steps taken to deter or prevent...' A third respondent suggested that it should be clear that this factor includes threats to blackmail the victim.

Ejaculation

7.19 One respondent questioned the inclusion of ejaculation as an aggravating factor and suggested that complications could arise in sentencing if this factor is understood as a proxy for harm caused, or the risk of harm. The respondent noted that there may be a risk of pregnancy or transmission of disease even without ejaculation. In addition, the victim may be unaware of whether ejaculation has occurred. This respondent suggested that the matter of ejaculation and the victim's response could be articulated in terms of the psychological and physical harms already covered at Step 1 of the sentencing process.

Proposed additional aggravating factors

- **Targeting of a victim with specific vulnerabilities:** One third sector organisation saw a distinction between this suggestion and 'targeting of a victim who is vulnerable

at the time of the offence' (currently listed as an aggravating factor). This respondent thought both these factors should be included. This same respondent thought the current factor should be changed to 'specific targeting of a victim who is vulnerable at the time of the offence' to better highlight the intent of the offender.

- **Discrimination:** One respondent also suggested an aggravation should apply where a rape involves discrimination on the basis of race, sex, LBGTQ+ status, or if the victim has a mental health issue or is neurodivergent. Another respondent simply said, 'Discrimination is not included'. This comment is not entirely clear. However, it is possible that the respondent wished to suggest that an aggravation of 'Discrimination' should apply where an offence has involved motivation on the basis of an individual's protected characteristics under the Equality Act 2010.²²
- **Repetition:** One respondent suggested that 'repetition' should be included in the list of features of culpability (it is currently listed as a feature of harm). However, this respondent also said that if it were not included as a feature of culpability, then it could be listed as an aggravating factor.
- **Offence committed while on early release, licence or parole:** Two respondents argued that offences committed in these circumstances are serious and demonstrate that the perpetrator is not ready to be released from custody – particularly where their original offence may also have involved a sexual crime. This should be seen as an aggravation – particularly in the context of current early release policies and concerns these have raised for victims.
- **Offence committed in breach of a court order:** There was a view from one third sector organisation that a breach of either a civil or criminal order, especially one intended to protect a victim of domestic abuse, indicates a contempt for justice and a determination to continue the abuse.
- **Withdrawal of consent** (in relation to the guideline on rape): One respondent noted the explanation in the consultation paper for not including 'withdrawal of consent' as an aggravating factor in the guideline on rape.²³ This respondent thought the explanation was unclear and asked for clarification of the rationale for not including it. There was a view that this was a serious issue which could lead to significant trauma for victims, and especially for young people between the ages of 13 and 16.
- **Lack of remorse:** It was noted that 'remorse' was listed as a mitigating factor, but lack of remorse was not listed as an aggravating factor. One respondent suggested that lack of remorse may be demonstrated through an offender's 'not guilty' plea or a late plea, which (in the respondent's view) could be related to a purposeful

²² Note that the guidelines specifically state: 'Where a statutory aggravation (for example that the offence is racially aggravated) is specifically libelled as such the court must take it into account in determining the appropriate sentence.'

²³ Paragraphs 99–101.

prolonging of harm and intent to retraumatise a victim. This respondent thought lack of remorse should be acknowledged in rape sentencing and treated as an aggravating factor.²⁴ Another respondent thought that ongoing abusive or harassing behaviour towards a victim and/or their family and friends during the criminal proceeding demonstrated a lack of remorse and should be treated as an aggravation.

- **Rape of an older child** (in relation to the guideline on rape): One third sector respondent suggested that rape of an older child (aged 13 to 16) should be included in the list of aggravating factors in the rape offences guideline, similar to the inclusion of 'particularly young victim' as an aggravating factor in the rape of a young child guideline. This factor would cover cases of underage rape by a peer (e.g. a 15-year-old raping a 13-year-old). There was a view that, while the victim of rape in such circumstances should not be treated in the same way as adults, the crime should be prosecuted in the court system, rather than through the Children's Hearings system.

7.20 A number of other suggestions for additional aggravation factors were also put forward by different respondents with no further explanation provided:

- Non-fatal strangulation
- Offence motivated by misogyny
- Offence motivated by hate
- Multiple victims of the same offender.

Proposed aggravating factors for removal

7.21 Respondents suggested the following factors should be removed from the list of aggravating factors in the guideline. Unless otherwise stated, each of these was suggested by one respondent:

- **'Influence of alcohol or drugs'**: One organisational respondent thought treating the influence of alcohol and drugs as an aggravating factor would result in a sober offender receiving a shorter sentence than an intoxicated offender for the same offence. A second organisational respondent thought it would be 'anomalous for the mere fact of an offender's intoxication to be viewed as an aggravating factor'. This respondent thought the guidelines should provide further explanation of why, and in what circumstances, intoxication by the offender would be an aggravating factor.

²⁴ One organisational respondent suggested that a guilty plea (rather than a plea of not guilty) could be considered to be either an aggravating factor or a mitigating factor. However, this respondent said they were uncertain about whether this should be included in the sentencing guidelines.

- **‘Location or timing of the offence’:** There was a view from a third sector organisation that this could be a relevant aggravating factor in some scenarios – for example, in relation to kidnapping. However, including it as an aggravating factor could lead to offences which occur outside a domestic setting being viewed as more serious. This would have the effect of reinforcing a mistaken stereotype of rape – that rape is more likely to be carried out by a stranger in a public place – when, in fact, the opposite is true. This stereotype is associated with ‘victim blaming’ – i.e. attributing blame to women because of their actions (such as socialising with friends or travelling alone) prior to being assaulted.

Mitigating factors (Q13 and Q14)

7.22 Questions 13 and 14 sought views on the mitigating factors listed in the draft guidelines. Note that both guidelines contained the same three mitigating factors: (i) no previous convictions, or no relevant/analogous convictions, (ii) mental illness or disability, especially where linked to the commission of the offence, and (iii) remorse.

Appropriateness of mitigating factors (Q13)

7.23 Question 13 asked respondents if they thought the mitigating factors listed in each guideline were appropriate.

7.24 In relation to the rape offences guideline, Table 7.2a shows that 23 out of 68 respondents said ‘yes’ (the mitigating factors listed were appropriate), 33 said ‘no’, and 12 said ‘don’t know’. Around two-thirds of organisations (7 out of 11) answered ‘yes’. However, individuals were more likely than organisations to think the mitigating factors listed in the guideline were **not** appropriate – with around half of individuals (29 out of 57) saying ‘no’.

Table 8.2a: Q13 – Rape offences (section 1) – Are the mitigating factors listed in this guideline appropriate?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	3	4	–	7
Legal, academic and public sector organisations	4	–	–	4
Total organisations	7	4	0	11
Total individuals	16	29	12	57
Total, all respondents	23	33	12	68

7.25 In relation to the rape of a young child guideline, Table 7.2b shows that 22 out of 67 respondents said ‘yes’ (the mitigating factors listed were appropriate), 34 said ‘no’ and 11 said ‘don’t know’. Organisations had mixed views on this question (5 out of 10 said ‘yes’, 4 said ‘no’, and 1 said ‘don’t know’). Individuals were more likely than organisations to think

the mitigating factors listed in this guideline were **not** appropriate – around half of this group (30 out of 57) said ‘no’.

Table 7.2b: Q13 – Rape of a young child (section 18) – Are the mitigating factors listed in this guideline appropriate?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	2	4	–	6
Legal, academic and public sector organisations	3	–	1	4
Total organisations	5	4	1	10
Total individuals	17	30	10	57
Total, all respondents	22	34	11	67

7.26 A follow-up question asked respondents who answered ‘no’ in relation to either guideline to list the mitigating factors they regarded as inappropriate and to explain the reasons for their answer. The responses to this question overlapped to a large extent with those made at Question 14. Question 14 was a two-part question, asking respondents to list any mitigating factors they thought should be (i) added or (ii) removed from the guidelines, and to explain their reasons.

7.27 Altogether, comments were submitted by:

- 35 respondents (8 organisations and 27 individuals) at Question 13
- 21 respondents (10 organisations and 11 individuals) at the first part of Question 14
- 16 respondents (4 organisations and 12 individuals) at the second part of Question 14.

7.28 Note that the figures shown for Question 13 above include comments from a small number of respondents who answered ‘yes’ or ‘don’t know’ – or who did not answer one or both of the closed questions.

7.29 Given the overlap in comments, the comments made at Question 13 and 14 are covered together. Views on each of the proposed mitigating factors are discussed, and any other comments (for example suggestions for additional mitigating factors) are covered briefly at the end of this section.

Views on the proposed mitigating factors (Q14)

7.30 Among individuals, there was a relatively common view that there should be no mitigation in cases of rape, or rape of a young child. Those who expressed this view argued

that the harm caused to the victim outweighed any circumstances that might support a shorter sentence for the perpetrator.

7.31 However, it was also common for individuals and organisations to comment on each of the proposed mitigating factors in turn, and there were several recurring themes in these comments. Note that it was **not** common for respondents to simply state that they thought the mitigating factors were appropriate. Just one organisation (in the legal/academic sector) said this. One other organisation (also in the legal/academic sector) accepted the mitigating factors as appropriate, but thought further clarification was needed in relation to two of them. (These views are included in the discussion below.) Comments on individual proposed mitigating factors are summarised below.

No previous convictions, or no relevant/analogous convictions

7.32 Organisations and individuals raised the same concerns about the inclusion of ‘no previous convictions, or no relevant/analogous convictions’ as a mitigating factor. In general, they said they did not see this as relevant – for the following reasons:

- Rape is under-reported and there are also low conviction rates for rape. Therefore, an individual’s lack of previous convictions does not necessarily mean they have not previously offended in this way.
- Rape occurring in a domestic context as part of a wider pattern of abuse may go on for many years and may not be documented by previous convictions.
- Given the points made in the consultation paper about ‘good character’ being used in some cases to facilitate offences, it may be clearer for victims and for members of the public if the guidelines only included previous convictions as an aggravating factor – and did not include ‘no previous convictions’ as a mitigating factor.
- Rape causes serious harm to victims. Even if an offender commits rape only once, it is one time too many for the victim.

Mental illness or disability, especially where linked to the commission of the offence

7.33 Organisational respondents who commented on mental illness or disability as a potential mitigating factor made the following points:

- One organisational respondent in the legal/academic sector thought the guidelines should clarify ways in which mental illness may be linked to the commission of the offence. This respondent suggested that this mitigating factor could, for example, include cases where offenders have a mental illness that makes them unaware that they have committed an offence (i.e. they have suffered a psychotic episode with hallucinations that drives them to offend, or they have an intellectual disability that makes it impossible for them to understand that they have committed an offence).

This respondent thought depression, substance use disorder, or personality disorder should not be considered as mitigating factors.

- There was also a call for clarification among some third sector respondents. These respondents acknowledged that a perpetrator's mental health condition (including intellectual disability) may be a mitigating factor in some cases. However, they thought the guidelines should provide further detail on the type and/or severity of conditions that would render the offender incapable of understanding the nature of the crime.
- One third sector respondent highlighted research carried out for the Scottish Sentencing Council which found that members of the public thought that the impact a sentence would have on an offender should only be considered if the offender had experienced similar victimisation or was deemed to be vulnerable in terms of their upbringing or mental health. By contrast, however, victims of rape did not think these factors should be considered.

7.34 One respondent in the legal/academic sector highlighted a somewhat different issue, noting that a serious mental disorder or intellectual disability may well have a bearing on the perpetrator's culpability but may also indicate a greater need for public protection. Therefore, careful judgement is required by the sentencer, particularly in cases of rape.

7.35 Some individual respondents who commented on mental illness or disability as a potential mitigating factor made slightly different points to those made by organisations:

- Mental illness or disability should not automatically be linked to an individual's capacity to rape – this type of approach not only misunderstands sexual offending but also has the potential to perpetuate harmful views about people with mental health conditions or disabilities.
- It would be helpful, both for victims and members of the public, to clarify the meaning and operation of mental illness/disability as a mitigating factor in cases of rape. However, given the complexity of this topic, it may be preferable to address it through a dedicated general/overarching guideline (e.g. the existing general guidelines pertaining to the [principles and purposes of sentencing](#) and the [sentencing process](#)), and to remove the reference to mental illness from the guidelines on rape.

Remorse

7.36 Respondents frequently raised concerns about, or entirely rejected, the inclusion of remorse as a mitigating factor. Some noted the practical difficulty of determining the authenticity of remorse – particularly where the perpetrator did not plead guilty to the offence at the first opportunity. Very occasionally, respondents thought that a guilty plea could, potentially, provide evidence of an individual's remorse. However, 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 sincere or reliable but, most likely, simply demonstrated self-interested regret, with the aim of reducing their sentence.

7.37 One organisation in the legal/academic sector suggested that any expressions of remorse in cases of rape should be expected to meet evidential standards that are at least the same as, or higher than, the standards the victim must meet in proving, for example, psychological harm. Other organisations in the legal/academic sector identified possible features of genuine remorse which could be used to guide sentencers. For example:

- The perpetrator had sought help for the victim.
- The perpetrator has taken responsibility for their own actions or has taken steps to reduce the chance of such a situation arising again.
- The perpetrator clearly recognised the impact of their actions on the life and wellbeing of the victim.

7.38 One third sector organisation suggested that the guidelines should provide details of how the meaningfulness of any stated remorse could be assessed – particularly in cases where there has been a ‘not guilty’ plea. However, most third sector organisations argued that, in cases of rape, the main focus should be on the harm caused to the victim and the need for accountability, rather than any feeling of remorse from the offender. One third sector organisation suggested that there is a public expectation that an offender **should** feel a sense of remorse where they have been convicted of an offence such as rape, but that this should not in itself lessen their sentence or punishment. Another third sector respondent pointed out that expressions of remorse are often used as a tactic by abusers in domestic contexts to silence, disorient and confuse their victim, and to discourage reporting of their behaviour. All but one of the third sector organisations commenting at Questions 13 or 14 thought remorse should **not** be included as a mitigating factor in cases of rape or rape of a young child.

7.39 Individual respondents who commented on the issue of ‘remorse’ generally also rejected this as a mitigating factor. The following points were made:

- Expressions of remorse are made easily, but recidivism rates indicate that they are not often sincere.
- Courts are not able to discern whether remorse is genuine. Thus, it would be preferable to discount any expressions of remorse at sentencing, and instead take account of the perpetrator’s engagement with rehabilitation in any decisions about early release.
- Showing remorse does not diminish the harm caused to the victim.

Other views

7.40 Two organisational respondents suggested that the offender's own history of trauma and abuse may be viewed as a mitigating factor. One noted that there is a substantial body of research on the impacts of adverse childhood experiences and the association with future offending behaviour, and evidence to indicate that sexual offenders are more likely to report having been sexually abused as children – sometimes repeatedly.

7.41 Finally, one individual respondent thought that the guidelines should clarify that the loss of the offender's professional status, job, or opportunities should not be a consideration in sentencing. This individual made two points, arguing that striking-off a doctor (for example) is 'an appropriate safeguarding measure' not an additional punishment, and that people with high social positions should not be treated more leniently than those with fewer advantages simply because they are perceived to have lost more.

8 Potential impacts

8.1 This chapter presents views on the potential impacts of the guidelines. The consultation paper explained that the Council is required to carry out and publish an assessment of the likely costs and benefits of sentencing guidelines and their likely effects on the criminal justice system generally. Four questions sought views on the potential impact of the guidelines, as follows:

Q15: Do you think either of the guidelines will influence sentencing practice in Scotland?

- Rape [Yes/No/Don't know]
- Rape of a young child [Yes/No/Don't know]

Please explain your reasons.

Q16: Do you think either of the guidelines will lead to an increase in public understanding of how sentencing decisions are made?

- Rape [Increase/Decrease/No Change]
- Rape of a young child [Increase/Decrease/No Change]

Please explain your reasons.

Q17: Do you see any benefits or negative effects arising from the introduction of each of these guidelines?

- If you believe benefits may arise, please state these and your reasons why.
- If you believe negative effects may arise, please state these and your reasons why.

Q18: What costs (financial or other) do you see arising from the introduction of each of these guidelines, if any? Please explain your reasons.

Influence on sentencing practice (Q15)

8.2 Question 15 asked respondents if they thought either of the guidelines would influence sentencing practice in Scotland.

8.3 In relation to the rape offences guideline, Table 8.1a shows that 26 out of 69 respondents said 'yes' (the guideline would influence sentencing practice), 17 said 'no', and 26 said 'don't know'. The views of organisations and individuals were both consistent with the overall pattern of responses to this question.

Table 8.1a: Q15 – Rape offences (section 1) – Do you think this guideline will influence sentencing practice in Scotland?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	2	2	3	7
Legal, academic and public sector organisations	3	1	1	5
Total organisations	5	3	4	12
Total individuals	21	14	22	57
Total, all respondents	26	17	26	69

8.4 In relation to the rape of a young child guideline, Table 8.1b shows that 26 out of 68 respondents said 'yes' (the guideline would influence sentencing practice), 15 said 'no', and 27 said 'don't know'. As with the rape guideline, the views of organisations and individuals reflected the overall pattern of responses to this question.

Table 8.1b: Q15 – Rape of a young child (section 18) – Do you think this guideline will influence sentencing practice in Scotland?

Respondent type	Yes	No	Don't know	Total
Third sector organisations	2	1	3	6
Legal, academic and public sector organisations	2	1	2	5
Total organisations	4	2	5	11
Total individuals	22	13	22	57
Total, all respondents	26	15	27	68

8.5 Respondents were asked to explain the reasons for their answer(s), and 41 respondents (11 organisations and 30 individuals) did so. Views are presented below for those who thought the guidelines would influence practice, those who thought the guidelines would not influence practice, and those expressing other views.

Views of those who thought the guidelines would influence sentencing practice

8.6 Respondents who thought the guidelines would influence sentencing practice made several points. They said the guidelines would provide a clear framework or useful resource for sentencers and reduce reliance on the England and Wales guidelines. They also thought the guidelines would be a helpful reference point for sentencers and legal professionals and others with an interest in sentencing. More specifically, respondents thought that the guidelines would assist judges in considering, reaching and explaining sentencing decisions, and would promote consistency, accountability and clarity.

8.7 It was also suggested (by one individual) that the guidelines may help bring about a 'culture change' in sentencing in rape cases.

8.8 However, the degree of certainty that the guidelines would result in change varied. Some respondents saw this as a 'foregone conclusion' or assumed this would be the case, while others said they 'hoped' the guidelines would influence practice. One legal/academic organisation pointed to the impact of already issued guidelines in their response.

Views of those who thought the guidelines would not influence sentencing practice

8.9 Among those who thought the guidelines would not influence sentencing practice, organisational respondents expressed two differing viewpoints:

- Two third sector respondents commented on the perceived 'culture' within the criminal justice system towards rape cases, and the experience of victims within the system. One respondent drew on research with staff, volunteers and victims in expressing concern that the guidelines were too open to interpretation, and that the burden of evidencing the various listed features and factors set out in the guidelines would fall on victims. Another respondent was positive about the detailed approach set out in the guidelines but called for greater system-wide change towards prosecuting rape. This respondent noted the previously proposed pilot of judge-only rape trials, and suggested that the guidelines could have greater impact if introduced in conjunction with such a victim-focused approach to hearing cases.²⁵
- One legal/academic respondent noted that the sentencing ranges included in the guidelines were intended to reflect current practice and therefore significant change should not arise; nevertheless, this respondent said that the guidelines may 'improve consistency of approach and outcome'.

8.10 For the most part, individuals provided brief comments focused on two main related issues in explaining why the guidelines would not influence practice:

- The 'non-mandatory' status of the guidelines, and the extent to which the various features and factors were open to interpretation
- Current perceived attitudes and practices among the judiciary and the variation within this.

Views of those selecting 'don't know' or expressing mixed or qualified views

8.11 As shown in Tables 8.1a and 8.1b, a relatively high number of respondents selected 'don't know' at the closed part of Question 15. This section summarises the views of this group of respondents, as well as those respondents who ticked 'yes' or 'no' or did not

²⁵ The Scottish Government announced in an [update to Parliament](#) in October 2024 that the pilot of judge-only rape trials proposed as part of the Victims, Witnesses, and Justice Reform Bill would not proceed.

answer the closed questions and went on to provide mixed or qualified views in their comments.

8.12 Some respondents (both organisations and individuals) made points similar to those raised by other respondents about the non-mandatory nature of the guidelines, or said that the influence on practice was hard to predict. However, the main additional substantive point made by respondents in this group was that the influence of the guidelines would depend on how they were implemented. In particular, third sector organisations highlighted the importance of awareness raising and training for the judiciary and other relevant professionals on the guidelines and in adopting a trauma-informed approach to assessing harm and understanding and assessing risk in rape cases.

8.13 Finally, one individual respondent who selected 'don't know' argued that legal precedent and appeals were key factors in shaping judicial sentencing.

Impact on public understanding (Q16)

8.14 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.

8.15 In relation to the rape offences guideline, Table 8.2a shows that 29 out of 65 respondents thought that the guideline would **increase** public understanding of sentencing decisions, 5 thought it would **decrease** public understanding and 31 thought there would be no change. Organisations (7 out of 9) were more likely than individuals (22 out of 56) to think the guideline would increase public understanding. Individuals (29 out of 56) were more likely than organisations (2 out of 9) to think there would be no change.

Table 8.2a: Q16 – Rape offences (section 1) – Do you think this guideline will lead to an increase or decrease in public understanding of how sentencing decisions are made?

Respondent type	Increase	Decrease	No change	Total
Third sector organisations	4	–	2	6
Legal, academic and public sector organisations	3	–	–	3
Total organisations	7	0	2	9
Total individuals	22	5	29	56
Total, all respondents	29	5	31	65

8.16 In relation to the rape of a young child guideline, Table 8.2b shows that 29 out of 65 respondents thought the guideline would **increase** public understanding of sentencing decisions, 5 thought it would lead to a **decrease** in understanding, and 31 thought there

would be no change. Organisations (7 out of 9) were more likely than individuals (22 out of 56) to think that understanding would increase. Individuals (29 out of 56) were more likely than organisations (2 out of 9) to think there would be no change.

Table 8.2b: Q16 – Rape of a young child (section 18) – Do you think this guideline will lead to an increase or decrease in public understanding of how sentencing decisions are made?

Respondent type	Increase	Decrease	No change	Total
Third sector organisations	4	–	2	6
Legal, academic and public sector organisations	3	–	–	3
Total organisations	7	0	2	9
Total individuals	22	5	29	56
Total, all respondents	29	5	31	65

8.17 Respondents were asked to explain the reasons for their answer(s), and altogether, 45 respondents (11 organisations and 34 individuals) provided comments. The sections below present the views of those who thought public understanding would increase and the views of those offering other perspectives on this issue. A final section covers specific points on which respondents thought further explanation may be required.

Views of those who thought public understanding will increase

8.18 Respondents who thought public understanding of sentencing decisions would increase said the guidelines were clear and user-friendly, and that the language was easy (or relatively easy) to understand. They also thought that the guidelines provided sufficient detail for people to understand the various features and factors listed, and would bring transparency to the sentencing process.

8.19 One individual noted that the guidelines would increase understanding by alerting people to the leniency of sentences.

8.20 However, there was some variation in how likely or how extensive respondents thought any increase in understanding would be. For example, while one respondent said they were ‘confident’ this would come about, another ‘hoped’ it would be achieved; there was also a view that any increase in understanding would be ‘modest’ or ‘marginal’.

8.21 It was also common for respondents (organisations and individuals) to say that any increase in understanding would be dependent on (i) correct and consistent application of the guidelines, and (ii) appropriate promotion and dissemination of the guidelines. The latter point in particular was also discussed by respondents who did not think understanding would increase (see paragraph 8.23).

Other views on the impact on public understanding

8.22 Those commenting on why public understanding may not increase were mainly individuals who often simply restated views that the sentencing of rape cases was too lenient and/or called for tougher sentences for all those convicted of rape. Occasionally, respondents discussed public understanding more directly, and said that the public would not understand the proposed sentencing ranges in the context of such a serious crime.

8.23 Some respondents (individuals and organisations) commented more specifically on why they thought the guidelines may not lead to an increase in public understanding of sentencing decisions and made the following points:

- They highlighted the importance of the guidelines being easy for the public to understand (a simplified version for the public was suggested), and including adequate explanations of less familiar disposals, and of how sentences operated in practice in terms of time in custody and time under supervision in the community.
- They said that public understanding would depend on the promotion and dissemination of the guidelines – one individual suggested further development of the Council's current knowledge exchange activities to assist with this. The role of the media was also noted.
- They highlighted the importance of **victim** understanding. One individual suggested that the court should issue a plain language sentencing statement for victims and other interested members of the public, and/or provide an oral explanation of a sentence for victims (and others present in court) at the end of a trial.

8.24 Other respondents focused on the perspective and likely receptiveness of the public, saying, for example, that the public would not take the time to read or understand the guidelines, or that the guidelines would only be of interest to those involved in a case in some capacity. There was also a view, expressed by one third sector organisation, that it was not necessary for the wider public to understand the guidelines; this respondent did, however, think it was important for victims and/or accused persons to understand them.

Specific points on which further explanation may be required

8.25 Respondents noted two specific points which they suggested would benefit from further explanation in the guidelines:

- One individual suggested that the guidelines may have relevance to the sentencing of other offences in the Sexual Offences (Scotland) 2009 Act, and that clarification on this point might be helpful to victims and the wider public.
- One organisational respondent (a legal/academic organisation) focused on the sentencing of young people. They called for more explicit explanation – either within the rape guidelines or on the Council website – of the interaction between the

proposed rape guidelines and the existing guideline on [sentencing young people](#), and the practical implications for sentencing decisions. They thought this would help avoid confusion and public criticism on this issue.

Perceived benefits or negative effects (Q17)

8.26 Question 17 was a two-part question which asked respondents about any (i) benefits or (ii) negative effects they saw arising from the introduction of the guidelines. Altogether, 45 respondents (11 organisations and 34 individuals) provided comments at either or both parts of the question. The sections below present views on perceived benefits and negative effects, while two further sections present comments on sentences and appeals – both of which were discussed in terms of benefits **and** negative effects (see paragraphs 8.34–8.36).

Perceived benefits

8.27 The comments made by respondents often focused on issues relating to sentencing practice and public understanding, and largely reflected points reported at Questions 15 and 16 above. In short, respondents identified greater consistency and transparency in sentencing and improved awareness and understanding of sentences, sentencing decisions and the factors considered in reaching such decisions as the main (potential) benefits of the introduction of the guidelines. Respondents thought this would be helpful for victims involved in court proceedings, as well as the wider public. It was also suggested that there may be an associated deterrent effect.

8.28 Comments on other issues were limited, and tended to be strategic in nature, with one organisational respondent suggesting that the guidelines might bring benefits for the development of policy in relation to sentencing, and the codification of current practice, and one individual respondent suggesting the guidelines might support the development of risk intervention strategies.

Perceived negative effects

8.29 Respondents identified possible negative effects related to the application of the guidelines by the judiciary, and the experiences of victims, as discussed below.

8.30 Respondents made two points relating to the **application of the guidelines**.

8.31 First, some respondents (legal/academic organisations and individuals) commented on the issue of judicial discretion and saw a risk of sentencers becoming overly reliant on the guidelines and applying them in a 'formulaic' or 'tick-box' way. There was a concern that the guidelines could impact on judicial discretion, leading to a less individualised approach to sentencing with less account taken of the detailed nuances of cases and the experiences of victims. One individual commented on the issue of judicial discretion from a slightly

different perspective. They endorsed the importance of such discretion, and warned that the guidelines should not become 'a stick to beat [sentencers] with'.

8.32 Secondly, one legal/academic organisation expressed concern that the guidelines provided may result in too many cases being drawn into the highest level of culpability.

8.33 Respondents (individual and one third sector organisation) made three related points expressing concerns about the possible impact on the **experience of victims** with regard to the assessment of features and factors, as follows:

- The burden of proof in relation to the various features and factors listed in the guidelines may fall on victims, further adding to the negative experience of appearing as a witness in court, and potentially further deterring the reporting of offences if victims feel their experience does not sufficiently meet the listed criteria.
- The assessment of harm may depend on how individual victims present themselves in court, and describe their experience and the impact of the offence. This may in turn result in objectively similar cases being assessed differently.
- The assessment of harm (and the three levels of harm) could leave some victims feeling as they have experienced 'less harm' than other victims.

Sentences

8.34 Respondents (largely individuals) offered two main contrasting perspectives on the sentences that might be imposed in the light of the guidelines.

- Some respondents anticipated or hoped for benefits in the form of harsher sentences that may act as a deterrent for potential offenders.
- In contrast, other respondents identified negative effects linked to the sentences they envisaged being imposed once the guidelines were in place. Respondents reiterated points made at other consultation questions. They argued that sentences would be too lenient (and, in particular, that periods in custody would be too short) and as such would not act as a deterrent, would fail to send out a clear message to society about the unacceptability of sexual violence, and would not support rehabilitation of offenders; some said that offending might actually increase. There was also a view (expressed by some individuals) that public trust and confidence in sentencing and the criminal justice system more generally would be undermined.

8.35 One legal/academic organisation made a somewhat different point. They argued that the guidelines had the potential to result in an overall increase in the length of custodial sentences imposed and that this may have implications for the prison estate – in terms of both physical capacity to accommodate prisoners, and resources to deliver programmes to address offending behaviour.

Appeals

8.36 A number of respondents commented on the implications of the guidelines for appeals, both in positive and negative terms:

- Some thought the number of appeals against sentence might increase, as defence agents scrutinised sentencing decisions for any departure from the guidelines. However, there was an alternative view that increased consistency in sentencing and clear explanations of sentences (with appropriate reference to the guidelines) might result in fewer appeals.
- Other respondents did not comment on the impact on the number of appeals, but said that the guidelines may make it easier to consider the viability of an appeal, and easier to construct an appeal with reference to relevant aspects of the guidelines.

Perceived costs (Q18)

8.37 Question 18 asked respondents what costs, if any (financial or other), they saw arising from the introduction of the guidelines. Altogether, 28 respondents (6 organisations and 22 individuals) commented at this question.²⁶

8.38 Most of those who commented identified some costs or possible costs related to the introduction of the guidelines. The costs identified by respondents related to the introduction and implementation of the guidelines; case proceedings; court disposals; and offending and reoffending. Each of these are discussed briefly below.

8.39 Respondents (legal/academic organisations, third sector organisations and individuals) identified possible **introduction and implementation** costs related to:

- The initial production and dissemination of the guidelines, and any future updating of the guidelines
- The provision of training for the judiciary and other relevant parties in using the new guidelines and adopting a trauma-informed approach to dealing with victims – it was noted that such training could, perhaps, be incorporated into existing judicial training.

8.40 Some suggested such costs would be minimal; however, it was also suggested that costs could be assessed as part of any future evaluation of the impact of the guidelines.

8.41 Respondents suggested additional cost may arise in individual **case proceedings**, linked to:

²⁶ This excludes 5 respondents who indicated they had no comment to make at this question.

- Increased court time (with no further detail as to how this might arise) (suggested by one legal/academic organisation)
- The collation and consideration of information related to the various features listed in the guidelines (suggested by one individual)
- The provision of appropriate support for victims to allow them to engage effectively in the criminal justice system and convey the impact of the offence to the court (suggested by third sector organisations and individuals)
- Additional appeals (suggested by some individuals).

8.42 Some respondents (third sector organisations and individuals) suggested there may be additional costs arising from **sentencing decisions**. Some identified costs linked to longer custodial sentences or offender management in the community. Some also called for greater use of programmes to address offender behaviour which would entail additional costs.

8.43 Some individuals saw potential costs related to **increased offending and reoffending** as a consequence of overly lenient sentences.

8.44 There were, however, three **other views**, each expressed by a small number of respondents:

- That there would be no costs arising from the introduction of the guidelines
- That the guidelines may result in savings rather than costs – respondents suggested that savings may arise from a standardised and straightforward process for sentencing and from fewer subsequent appeals
- That cost should not be an issue in sentencing for offenders. Some respondents expressed specific concern that reducing the prison population was prioritised over public safety.

9 Other comments (Q19)

9.1 A final open question invited respondents to make any other comments about matters arising from the consultation.

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

9.2 Altogether, 45 respondents (10 organisations and 35 individuals) provided comments at Question 19.²⁷ This chapter provides a brief summary of the main themes and points raised. It also includes comments made in response to earlier consultation questions but not covered in other chapters of the report. The chapter presents comments relating to the draft sentencing guidelines as well as comments relating to wider issues beyond the guidelines.

Comments on the draft guidelines

9.3 Comments on the draft guidelines were varied. However, it was common for respondents (individuals in particular) to reiterate comments on the appropriate sentences for rape offences – such views are covered in Chapter 6 and are not repeated here.

9.4 Other detailed comments on the draft rape guidelines or existing general guidelines which would also apply to rape cases included the following:

- The ‘making amends’ principle included in the Council’s general guideline on the [principles and purposes of sentencing](#) should not apply to rape or other types of sexual offences, given the particular dynamics of rape cases and the anxiety of victims about future contact with offenders.
- The Council’s existing guideline on the [sentencing process](#) may need to be updated to reflect the new section 210ZA of the Criminal Procedures (Scotland) Act 1995.
- The guidelines might refer to the requirement to make a referral to Disclosure Scotland barring individuals from working with children or protected adults.
- The guideline on rape of a young child should cover offences under the Criminal Law (Consolidation) (Scotland) Act 1995 section 5(1) – which did not use the term ‘rape’ but covers sexual intercourse with a girl under 13 – with this included at paragraph 1 of the guideline. (The respondent making this point also said that the second bullet point in the draft should refer to a child under the age of 12, not 13).

²⁷ This includes 4 respondents who indicated they did not have further comments to add.

- The guidelines on rape should refer to the forthcoming domestic abuse sentencing guidelines.²⁸

9.5 Additionally, respondents noted the seriousness of other sexual offences and the relevance of the draft guidelines for offences other than rape.

9.6 Respondents (mainly third sector organisations and individuals) commenting on wider criminal justice issues noted the following:

- **The treatment of rape and other sexual offences within the criminal justice system:** Some expressed concern that such offences were not treated seriously enough – some attributed this to a ‘culture’ within the system, and embedded attitudes towards offences with predominantly female victims and male perpetrators. There was a view that this culture needed to change in order to bring about change in how such offences are treated at all stages of the criminal justice process. Some saw sexual offending as a society-wide issue, linked to wider gender inequality, which needs to be addressed using a joined-up approach across different policy areas. However, there was an alternative view that the criminal justice system favours victims over alleged offenders in such cases and gives too much credence to victims’ perspectives. There were particular concerns raised about the use of corroboration and Moorov evidence in rape cases, and the reliability of evidence based on the recall of events that took place when the alleged victim was a young child.²⁹
- **The experience of victims in rape and other sexual offence cases at all stages of the criminal justice process:** Respondents noted the often-traumatic experience of criminal investigations and trials for victims, and wished to see a more victim-focused and trauma-informed approach to investigating and prosecuting rape and supporting those affected by such crimes. Respondents wished to see appropriate advocacy and support to help victims engage in the process, and prepare victim impact statements. They also called for (i) explicit reference to the importance of adhering to trauma-informed principles in considering the various features and factors listed in the guidelines, and (ii) clarity on the consideration that should be given to victim impact statements in assessing seriousness, and for victims to have the right to read their statement out in court. There was also a specific suggestion

²⁸ The Council’s work on a [sentencing guideline on domestic abuse](#) is currently at stage 2 of the development process.

²⁹ The Scottish Law Commission’s [Report on Similar Fact Evidence and the Moorov Doctrine](#) (2012) describes the Moorov doctrine as ‘a mechanism which applies where a person is accused of two or more separate offences, connected in time and circumstances. In such a case, where each of the offences charged is spoken to by a single credible witness, that evidence may corroborate, and be corroborated by, the other single witness, so as to enable the conviction of the accused on all the charges.’

that the accused should not be named if they are a close relative of the victim, in order to protect the anonymity of the victim.

- **The need for better psychological support for victims:** One respondent highlighted the barriers that many victims face in accessing pre-trial psychological therapy or support. Many choose not to engage with such services at all, in case this is seen by the defence as ‘coaching’ or for fear of compromising their case.

9.7 Finally, some respondents commented on **available systems and measures intended to address public protection and risk:**

- They questioned the effectiveness of arrangements for managing offenders in the community and minimising risk to the public – the MAPPA system, the sex offenders’ register, the Sexual Offences Act 2003, the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 were all mentioned in this context.
- They suggested that community services responsible for supervising and managing offenders were underfunded.
- They said that the prospect of being recalled to prison was not an effective deterrent, and reoffending was common.

9.8 Respondents particularly questioned the effectiveness of the statutory arrangements relating to OLRs in the Criminal Justice (Scotland) Act 2003, which were said by one third sector respondent to be ‘outdated’ and not in line with current thinking on risk assessment and gender-based violence. It was suggested that this provision needed urgent amendment, particularly as legislation such as the Bail and Release from Custody (Scotland) Act now places a duty on the court to consider victim safety in domestic abuse cases.

Annex 1: List of organisational respondents

The consultation received responses from **15 organisations**.

Third sector organisations (7)

- Fife Rape and Sexual Assault Centre
- Lanarkshire Rape Crisis Centre
- Rape Crisis Scotland
- Scottish Borders Rape Crisis Centre
- Scottish Women's Aid
- Scottish Women's Convention
- Victim Support Scotland

Legal profession and academic organisations (5)

- Faculty of Advocates
- The Law Society of Scotland
- Senators of the College of Justice
- Sentencing Academy
- University of Aberdeen, School of Law (Centre for Scots Law)

Public sector organisations (3)

- Risk Management Authority
- Scottish Borders Council
- Scottish Courts and Tribunals Service

Annex 2: Responses to individual questions

Question	Org number	Org % of 15	Ind number	Ind % of 61
Q1: Should either of the rape guidelines explicitly address where the offender is known to the victim, as opposed to not known to the victim?				
• Section 1 'Rape' [Yes / No / Don't know]	12	80%	59	97%
• Section 18 'Rape of a young child' [Yes / No / Don't know]	9	60%	58	95%
• If yes, what guidance do you think would be useful?	11	73%	25	41%
Q2: Do you think further guidance should be provided in relation to historical rape offences in either of the guidelines?				
• 'Rape' [Yes / No / Don't know]	12	80%	59	97%
• 'Rape of a young child' [Yes / No / Don't know]	10	67%	59	97%
• If yes, what guidance do you think would be useful?	9	60%	30	49%
Q3: Do you agree or disagree that there should be two levels of culpability in the guidelines?				
• 'Rape' [Agree / Disagree / Don't know]	11	73%	59	97%
• 'Rape of a young child' [Agree / Disagree / Don't know]	10	67%	59	97%
• If you disagree, please explain your answer.	7	47%	27	44%
Q4: Do you think that the features of culpability listed in each of the guidelines are appropriate?				
• 'Rape' [Yes / No / Don't know]	11	73%	59	97%
• 'Rape of a young child' [Yes / No / Don't know]	9	60%	58	95%
• If you answered 'no' in relation to either guideline, please list which features of culpability are inappropriate and explain your reasons.	7	47%	21	34%
Q5: Should any features of culpability be added to either of the guidelines, or should any features be removed?				
• If you believe any features of culpability should be added, please list these, identifying which guideline(s), and explain your reasons.	8	53%	14	23%
• If you believe any features of culpability should be removed, please list these, identifying which guideline(s), and explain your reasons.	1	7%	10	16%
Q6: Do you agree or disagree that there should be three levels of harm in the guidelines?				
• 'Rape' [Agree / Disagree / Don't know]	12	80%	58	95%
• 'Rape of a young child' [Agree / Disagree / Don't know]	11	73%	59	97%
• If you disagree that there should be three levels of harm in the guidelines, please explain your answer.	7	47%	28	46%

Question	Org number	Org % of 15	Ind number	Ind % of 61
Q7: Do you think the features of harm listed in each of the guidelines are appropriate?				
• 'Rape' [Yes / No / Don't know]	13	87%	58	95%
• 'Rape of a young child' [Yes / No / Don't know]	12	80%	59	97%
• If you answered 'no' in relation to either guideline, please list which features of harm are inappropriate and explain your reasons.	6	40%	25	41%
Q8: Should any features of harm be added to either of the guidelines, or should any features be removed?				
• If you believe any features of harm should be added, please list these, identifying which guideline(s), and explain your reasons.	8	53%	15	25%
• If you believe any features of harm should be removed, please list these, identifying which guideline(s), and explain your reasons.	2	13%	6	10%
Q9: Do you agree with the sentencing ranges for each of the guidelines?				
• 'Rape' [Yes / No / Don't know]	11	73%	59	97%
• 'Rape of a young child' [Yes / No / Don't know]	10	67%	58	95%
• Please provide any reasons for your answer.	11	73%	42	69%
Q10: Do the guidelines sufficiently address the issue of public protection and risk?				
• 'Rape' [Yes / No / Don't know]	11	73%	60	98%
• 'Rape of a young child' [Yes / No / Don't know]	10	67%	59	97%
• If answering 'no', please tell us why and explain your reasons.	10	67%	35	57%
Q11: Are the aggravating factors listed in each of the guidelines appropriate?				
• 'Rape' [Yes / No / Don't know]	13	87%	58	95%
• 'Rape of a young child' [Yes / No / Don't know]	10	67%	58	95%
• If you answered 'no' in relation to either guideline, please list what aggravating factors are inappropriate and explain your reasons.	7	47%	20	33%
Q12: Should any aggravating factors be added to either of the guidelines, or should any factors be removed?				
• If you believe any aggravating factors should be added, please list these, identifying which guideline(s), and explain your reasons.	10	67%	10	16%
• If you believe any aggravating factors should be removed, please list these, identifying which guideline(s), and explain your reasons.	3	20%	3	5%

Question	Org number	Org % of 15	Ind number	Ind % of 61
Q13: Are the mitigating factors listed in each of the guidelines appropriate?				
• 'Rape' [Yes / No / Don't know]	11	73%	57	93%
• 'Rape of a young child' [Yes / No / Don't know]	10	67%	57	93%
• If you answered 'no' in relation to either guideline, please list what mitigating factors are inappropriate and explain your reasons.	8	53%	27	44%
Q14: Should any mitigating factors be added to either of the guidelines, or should any factors be removed?				
• If you believe any mitigating factors should be added, please list these, identifying which guideline(s), and explain your reasons.	10	67%	11	18%
• If you believe any mitigating factors should be removed, please list these, identifying which guideline(s), and explain your reasons.	4	27%	12	20%
Q15: Do you think either of the guidelines will influence sentencing practice in Scotland?				
• 'Rape' [Yes / No / Don't know]	12	80%	57	93%
• 'Rape of a young child' [Yes / No / Don't know]	11	73%	57	93%
• Please explain your reasons.	11	73%	30	49%
Q16: Do you think either of the guidelines will lead to an increase or decrease in public understanding of how sentencing decisions are made?				
• 'Rape' [Increase / Decrease / No change]	9	60%	56	92%
• 'Rape of a young child' [Increase / Decrease / No change]	9	60%	56	92%
• Please explain your reasons.	11	73%	34	56%
Q17: Do you see any benefits or negatives effects arising from the introduction of each of these guidelines?				
• If you believe benefits may arise, please state these and your reasons why?	10	67%	25	41%
• If you believe negative effects will arise, please state these and your reasons why?	7	47%	22	36%
Q18: What costs (financial or other) do you see arising from the introduction of each of these guidelines, if any? Please explain your reasons.	10	67%	23	38%
Q19: Please provide details about anything else you feel is of importance or we may have omitted with regard to sentencing for rape offences. Please provide any reasons for your response.	10	67%	35	57%

Scottish Sentencing Council
Parliament House
Parliament Square
Edinburgh
EH1 1RQ

scottishsentencingcouncil.org.uk
sentencingcouncil@scotcourts.gov.uk



© Crown copyright 2025
ISBN: 978-1-912442-71-3

October 2025