

Rape

Draft sentencing guideline

Effective from [date]

Applicability

1. This guideline applies to all offenders who are sentenced on or after [date], and who have been convicted of one of the following offences:

- an offence under [section 1 of the Sexual Offences \(Scotland\) Act 2009](#) (rape)
- the common law offence of rape.

How to use this guideline

2. This guideline should be read alongside the Council's guidelines '[Principles and purposes of sentencing](#)' and '[The sentencing process](#)'. It should also be read along with any other guidelines which apply to the case, or to the offender. Details of guidelines in force can be found [on the Council's website](#).
3. A court must have regard to any sentencing guidelines which are applicable to the case under consideration at the time when the court is sentencing the offender, such as the Council's guideline on [sentencing young people](#). This may result in the selected sentence falling outwith the sentencing range originally identified.
4. If a court decides not to follow an applicable guideline it must state the reasons for its decision.
5. The maximum sentence provided by law for these offences is imprisonment or detention for life or, as is more usual in practice, an order for lifelong restriction (OLR).

Determinate custodial sentences

6. If the court is imposing a determinate custodial sentence (a sentence of imprisonment or detention which is set to run for a specified length of time) this guideline should be used to arrive at the headline sentence for the offence under consideration. The headline sentence is the sentence selected by the court after assessing the seriousness of the offence and taking into account any aggravating and mitigating factors. These issues are covered in steps 1 to 4 of '[The sentencing process](#)' guideline.
7. The court should then take into account any other issues which apply to the case, such as any effect on the sentence of the offender pleading guilty, or time already spent in custody before sentence. These issues are covered in steps 5 to 7 of '[The sentencing process](#)' guideline.
8. The court should then decide on the sentence to be imposed. This is covered in step 8 of '[The sentencing process](#)' guideline.

Other custodial sentences

9. Information about extended sentences and orders for lifelong restriction (OLRs) can be found at paragraphs 13-15 of this guideline.

Step 1: Assess the seriousness of the offence

10. The seriousness of an offence is determined by two things: the culpability of the offender and the harm caused, or which might have been caused, by the offence. As either or both culpability and harm increase, so may the seriousness of the offence.
11. In assessing seriousness the court should consider the features listed below in determining the offender's level of culpability and the level of harm. Neither list is exhaustive.

Culpability

Level A

- Significant degree of planning
- Abuse of power, or of a position of trust or authority¹
- Commercial exploitation and/or motivation
- Grooming
- Use of deception to facilitate the offence
- Targeting of a victim who is vulnerable at the time of the offence²
- Abduction, including detaining the victim against their will where this involves a significant restriction of the victim's freedom of movement
- Administration of alcohol and/or drugs to the victim to facilitate the offence
- Acting together with others to commit the offence
- Offence committed in the course of housebreaking, or following forced or uninvited entry into the victim's place of residence

¹ Whether a position of trust or authority exists at the time of the offence is for the court to assess, and it is not possible to provide a complete list of such situations. Examples may include relationships such as teacher and student, employer and employee, or carer and dependant, including where this relationship is a familial one. It may also include situations where there is no ongoing relationship or where the position of trust or authority is temporary, such as childcare, or a taxi driver and a passenger.

² Whether a victim is vulnerable at the time of the offence is for the court to assess, and it is not possible to provide a complete list of such instances. It may include, for example, vulnerability of a continuing nature such as physical and mental conditions or impairments, or of a temporary nature such as sleep or unconsciousness.

- Use of threats or coercion to facilitate the offence
- Use of a weapon or other item to frighten or injure the victim
- Significant violence (beyond that which is inherent in the offence of rape)
- Recording³ the commission of the offence

Level B

- Features which would result in an assessment of level A culpability (including but not limited to those listed above) not present

Harm

Level 1

- The extreme nature of, or the extreme impact caused by, one or more level 2 features or other features of harm may elevate an offence to level 1

Level 2

- Severe psychological or physical harm or trauma⁴
- Additional degradation or humiliation
- Prolonged or sustained incident
- Pregnancy, and any consequences, as a result of the offence
- Sexually transmitted infection as a result of the offence
- Public or private sharing of any recording³ of the commission of the offence

Level 3

- Psychological or physical harm or trauma⁴

³ This includes methods of recording such as still images, audio recordings, and filming.

⁴ The impact of psychological or physical harm can include (but is not limited to) an impact on lifestyle, or on social or economic functioning.

Step 2: Select the sentencing range

12. Having determined the levels of culpability and harm, the court should use the following table to identify the appropriate sentencing range. This is the range of sentences within which the appropriate headline sentence for the offence appears to fall, having regard to the assessment of seriousness at step 1.

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

Other custodial sentences

Extended sentences

13. Where the court intends to pass a determinate custodial sentence and considers that the period (if any) for which the offender would be subject to a [licence](#) would not be adequate for the purpose of protecting the public from serious harm from the offender, it may impose an [extended sentence](#).⁵

14. An extended sentence combines a period in prison (known as 'the custodial term') with a further set time of supervision in the community (known as 'the extension period'). When released the offender is on licence until the end of the extension period of the sentence, and can be recalled to prison if they breach the terms of their licence. The extension period can be a maximum of ten years for these offences.

⁵ [Criminal Procedure \(Scotland\) Act 1995, section 210A](#). Where the offence is a common law offence of rape, an extended sentence is competent if the offence took place on or after 30 September 1998.

Orders for lifelong restriction

15. Where the court is satisfied on a balance of probabilities that the nature of, or the circumstances of the commission of, the offence, either in themselves or as part of a pattern of behaviour, are such as to demonstrate that there is a likelihood that the offender, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large, it shall make an [order for lifelong restriction](#). (See paragraphs 22 – 28.)

Step 3: Identify aggravating and mitigating factors

16. Cases may have both aggravating and mitigating factors. Whether, and the extent to which, any factor has an aggravating or mitigating effect will depend on all of the circumstances of the case.
17. 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.
18. The following table contains a non-exhaustive list of possible aggravating factors which may apply to the offence and the offender. The court should consider which, if any, of these factors apply, together with any other aggravating or mitigating factors.
19. Regard should also be had to annexes A, B, and C to the Council's guideline '[The sentencing process](#)', which include further examples of aggravating and mitigating factors.
20. In some cases the consideration of aggravating and mitigating factors may move the headline sentence outside the range selected at step 2. However, factors which have been included in the initial assessment of seriousness should not also be considered as aggravating or mitigating factors.

AGGRAVATING FACTORS	MITIGATING FACTORS
Previous convictions, particularly analogous and/or relevant previous convictions	Mitigating factors may also be present. Some examples of mitigating factors can be found in annex C to the Council's guideline ' The sentencing process '
Repeated offending against the victim (other than previous convictions)	
Location or timing of the offence	
The presence of others, especially children	
Ejaculation	
An attempt to dispose of or conceal evidence	
Steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution	

Step 4: Determine the headline sentence

21. At the end of this process, the court will have determined the headline sentence if it is imposing a determinate sentence.

Orders for lifelong restriction

22. An OLR is a form of life sentence. When an OLR is imposed, the court must specify the punishment part of that sentence – this is the minimum time the offender must spend in prison before being considered for release on licence. A person with an OLR is subject to a risk management plan for the rest of their life.

23. In fixing the appropriate punishment part the court must:

- (i) assess the period of imprisonment which would have been appropriate for the offence had it not been imposing life imprisonment or an OLR, ignoring any period of imprisonment or detention which may be necessary for the protection of the public, and
- (ii) assess the part of that period which would represent an appropriate period to satisfy the requirements of retribution and deterrence.⁶

24. The court should then fix the punishment part as one half of the period arrived at after the process in paragraph 23.

25. However, the court can fix a greater proportion of that period, up to and including all of that period, if it considers that it would be appropriate to do so taking into account, in particular, the seriousness of the offence, or of the offence combined with other offences of which the offender is convicted on the same indictment; whether the offence was committed while the offender was serving a sentence for another offence; and any previous conviction.

⁶ [Prisoners and Criminal Proceedings \(Scotland\) Act 1993, sections 2, 2A, and 2B.](#)

26. If the offender pled guilty, the court should at this point apply the provisions of [section 196 of the Criminal Procedure \(Scotland\) Act 1995](#) to the period arrived at after the process outlined in paragraphs 23, 24, and 25.
27. In assessing the periods under paragraphs 23(i) and (ii), 24, and 25, the court should have regard to paragraphs 10 -12 and 16 - 20.
28. This should still not take into account any period of imprisonment or detention which may be necessary for the protection of the public.⁷

Notification requirements ('the register')

29. The imposition of any sentence for the offences to which this guideline applies will automatically result in the offender being made the subject of the notification requirements of the [Sexual Offences Act 2003](#). (These requirements are sometimes referred to as a 'register'.) The period for which the notification requirements apply to the offender depends on the sentence imposed.

Non-harassment orders

30. The court must make a non-harassment order (NHO) in respect of the victim unless it concludes that there is no need for the victim to be protected from harassment or further harassment by such an order.⁸
31. Where the offence is one to which the aggravation in section 1(1)(a) of the [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#) applies (offence aggravated by involving abuse of the partner or ex-partner of the person committing it):

⁷ [Prisoners and Criminal Proceedings \(Scotland\) Act 1993, sections 2A and 2B](#).

⁸ [Criminal Procedure \(Scotland\) Act 1995, section 234AZA](#).

- the court must, in considering the question of whether to make an NHO, have regard to any prior bail conditions imposed on the offender preventing contact with the victim; and
- if the court is making an NHO in respect of the victim, the court must in addition make an NHO in respect of a child usually residing with the offender, or the victim, or both the offender and the victim, unless it concludes that there is no need for any such child to be protected from harassment or further harassment by such an order.

32. An NHO may have effect for a specified or indeterminate period, and will require the offender to refrain from such conduct in relation to the victim, or any child named in the order, as is specified in the order.

33. An NHO can be made in addition to, or instead of, any other disposal.

34. In reaching a conclusion in respect of the matters in paragraphs 30 - 33 the court may have regard to the expressed views of the victim, but the final decision remains entirely one for the court.

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