

Section four: Rape and assault offences

This section considers the offences of rape, assault by penetration, sexual assault and sexual activity without consent. These draft guidelines are for offenders who are 18 years of age and over who have committed offences against victims who are 13 years of age and over. Offences committed against victims aged under 13 are addressed in the next section on child sex offences.

Rape, Sexual Offences Act 2003 – section 1

Maximum sentence: Life imprisonment (full guideline page 173)

The first offence to be considered is rape, as it is the offence which will set a benchmark for the sentence levels for many other offences.

Baroness Stern’s report²⁵ stated that:

“Rape is a serious and deeply damaging crime. It is unique in the way it strikes at the bodily integrity and self respect of the victim, in the demands it makes on those public authorities required to respond to it and in the controversy it generates....

Rape can occur in a range of circumstances. Those usually referred to as ‘stranger rapes’, the sort of incidents most often reported in the newspapers, where the victim and perpetrator do not know each other, are a small proportion of rape cases. Most rapes are carried out by someone the victim knows. Much rape

occurs in families... Vulnerable and powerless people are often the victims of men who identify them as easy targets and take advantage of their need for attention and affection.”

Throughout its consideration of the guideline on rape, the Council has considered the range of circumstances outlined by Baroness Stern above, and that rape is not simply about ‘stranger rape’; the whole range of scenarios needs to be accommodated when preparing a sentencing guideline.

STEP ONE

Determining the offence category

The first step that the court will take is to consider the main factual elements of the offence. The guideline for these offences directs the sentencer to do this by considering the harm to the victim and the culpability of the offender. In the Council’s previous guidelines for assault and burglary the formulation of harm and culpability has set out factors that indicate greater or lesser harm and those that indicate higher or lower culpability.

In the guidelines for rape and sexual assault the Council is proposing a move away from this formulation in recognition of the fact that all rape is extremely harmful to the victim. The approach taken has therefore been to assume that there is **always** a baseline of harm. This

²⁵ *The Stern Review*; A report by Baroness Vivien Stern CBE following an independent review into how rape complaints are handled by public authorities in England and Wales – (2010)

is reflected by category 3 harm which has an absence of factors which indicates to the sentencer that once an offender has been found guilty of rape, they do not need to identify additional factors for the offence to be deemed harmful or serious. The violation of the victim through the act of rape is harm in itself. It would be unhelpful to articulate this as ‘lesser harm’ as these offences are inherently harmful. However, the Council also recognises that the level of harm caused by a rape can vary and categories 1 and 2 build upon the baseline of harm.

The Council also believes that an offender who carries out a rape demonstrates a high degree of culpability. For this reason, the Council believes that the use of ‘lower culpability’ would not be appropriate. Instead, the Council proposes a list of factors that may be taken into consideration that go beyond the culpability inherent in the act of rape itself.

The approach taken by the Council also differs from the approach taken in the existing Sentencing Guidelines Council (SGC) guideline which considers the gravity of the offence in terms of the physical nature of the sexual activity. The Council is concerned that simply labelling sentence levels in terms of activity does not fully reflect the seriousness or complexity of the offence.

Specific step one harm and culpability factors will be considered below.

Harm factors

Step one features an exhaustive list of the principal harm factors that a sentencer should take into account.

Harm	
Category 1	<ul style="list-style-type: none"> • Extreme violence • The extreme nature of one or more category 2 factors may elevate to category 1
Category 2	<ul style="list-style-type: none"> • Pregnancy or STI as a consequence of rape • Additional degradation/humiliation • Abduction/detention • Prolonged/sustained incident • Use of violence • Context of habitual sexual abuse • Forced entry into victim’s home
Category 3	Factor(s) in categories 1 and 2 not present

Category 3 has no factors listed. This is because, as stated above, the Council feels it is important to recognise that the violation of the victim as a result of rape constitutes inherently serious harm, even in the absence of any other factors.

Category 2 contains a list of features that, when found, indicate additional harm.

- The existing SGC guideline lists ‘pregnancy or infection’ as an aggravating factor. The Council proposes to move these factors to step one, expressed as ‘pregnancy or STI as a consequence of rape’. The Council is consulting on the basis that these are principal factual elements which, where present, may exacerbate still further the long-term harm experienced by the victim. The phrase ‘pregnancy’ is also intended to cover instances where the victim has undergone an abortion. The Council has removed a specific reference to ‘ejaculation’ which is currently found as an aggravating factor in the SGC guideline. The rationale for this is that harm

to the victim occurs at the point penetration takes place, whether or not the offender subsequently ejaculates during penetration. The Council believes that the potential consequence of ejaculation, in other words an STI or pregnancy, is a better expression of harm. The Council does not believe that a signal should be sent out that the rape is somehow mitigated if there is no ejaculation but is keen to seek views on this. The court can also take it into account as an element of additional degradation or humiliation discussed below.

- ‘Additional degradation/humiliation’ has been included as a step one factor. This is not to detract from the fact that all rape involves elements of degradation and humiliation but it has been included to cover instances where the offender has additionally subjected the victim to further acts of degradation or humiliation. This may take a variety of forms²⁶ for example, urinating or ejaculating over the victim, leaving the victim naked in a public place, forcing the victim to dress up or strip for the offender. The Council believes that the psychological harm done to the victim as a result of this form of control, manipulation or humiliation by the offender justifies inclusion in category 2.
- ‘Abduction/detention’ is included to reflect the increased psychological harm that being detained or abducted would have on a victim. It is not intended to cover only the scenario where a victim is abducted from the street by a stranger but also to include, for example, the arguably more common scenario of a victim being prevented from leaving their home during an attack. The Council believes this factor should be included in category 2 as the increased psychological harm generated by the fear of escalation of the attack if the victim is unable to escape or get help, increases trauma.
- ‘Prolonged/sustained incident’ is included in category 2. The Council understands that a rape which is not prolonged or sustained is still highly traumatic. However, the inclusion of this factor is to reflect the fact that a prolonged or sustained incident may increase the psychological harm to the victim who has to endure a longer period where there is the fear of escalation and psychological trauma of not knowing if and when they may escape from the offender. In the SGC guideline there is the feature of repeated rape in the course of one attack; for example, if someone was raped vaginally and anally during one incident. The Council believes that these should be treated as two counts of rape; if they are not, the factor of ‘prolonged/sustained incident’ would be likely to apply.
- ‘Use of violence’ is included in category 2. The Council has approached this factor with a degree of caution as it is aware that force and violence in the context of sexual offences are issues around which there can be misunderstanding. As Dr Fiona Mason states when talking about the psychological effects of rape:

“The issue of force is another area around which myths abound. Force is not an essential element of the offence of rape and many rapes do not involve additional physical assault or threat going beyond the act of penetration. Often victims do not resist and many are not physically injured. However if the basic assumption made is that anyone raped would fight back, and/or be injured, this will cloud the judgments made about whether an incident was or was not rape.”²⁷

Mindful of this, the Council proposes to include ‘violence’ because where it is a feature of an offence, it should be reflected

²⁶ See for example AG Ref 113 2005 [2006] Cr App R (S) 105, *R v Doei* [2010] EWCA Crim 2178, *R v Bouguenoune* [2008] EWCA Crim 198

²⁷ Dr Fiona Mason Psychological effects of rape and serious sexual assault, chapter 23 *Rook and Ward on Sexual Offences Law and Practice* 4th edition

in a higher sentence level. The Council does not wish to convey the impression that a lack of violence or physical harm makes a rape less serious and so has focused the wording on the use of violence, rather than on physical injury or on how far the victim has fought back. As Rape Crisis point out:

“Faced with the reality of rape, women make second by second decisions, all of which are directed at minimising the harm done to them. At the point where initial resistance, struggling and reasoning have failed, the fear of further violence often limits women’s resistance. The only form of control that seems available to women at this point is limiting the harm done to them.”²⁸

The Council would particularly welcome views on this factor.

- ‘Context of habitual sexual abuse’ is a factor that was not included by the SGC. The Council proposes this factor is placed at step one. Victims with a history of, for example, childhood sexual abuse will be especially vulnerable and are more likely to be subject to repeat victimisation.²⁹ The Council believes that the psychological harm that a rape will have on a victim who is inherently vulnerable owing to previous abuse, should be reflected by inclusion in category 2. The Council would welcome views on this proposition.
- ‘Forced entry into the victim’s home’ has been deliberately worded to capture both the stranger who breaks into the victim’s home and the offender who is known to the victim; for example, an ex-partner who enters the victim’s home uninvited. The Council wishes to ensure that the guideline on rape gives weight to both ‘stranger rape’ and rape that

is committed by someone known to the victim. This factor is included in category 2 to acknowledge the fact that the invasion of one’s home is an invasion of the place one should feel safe and have sanctuary and privacy. The psychological strain and long-term harm of victims no longer feeling safe in their homes is something that the Council believes should be acknowledged in category 2.

Category 1 adopts an approach that differs from that taken by the SGC which placed repeated rape of the same victim over a course of time or rape involving multiple victims in the category with the highest starting sentence. It is the view of the Council that if there are multiple rapes or victims, these should be charged as separate instances of rape with the overall sentence subject to the principles of totality. The draft guidelines are concerned with sentence levels for a single offence. This means that under the new guidelines, the most severe sentence may be available for a single rape.

Unlike other guidelines the Council has produced, category 1 (the highest category) does not rely solely on new factors to increase the severity of the sentence but instead permits a combination of category 2 factors to elevate a case.

Extreme violence is the only new factor which would place a case in category 1. In including this factor the Council has looked again at the arguments that are raised at page 17 concerning use of violence above and beyond that needed to commit rape. The Council does not wish to propagate myths about only violent rapes being extremely harmful but it does believe that where there has been extreme violence, this will increase the harm suffered by the victim which should be reflected in the sentence length.

²⁸ Rape Crisis: Common myths about rape <http://www.rapecrisis.org.uk/mythsampfacts2.php>

²⁹ CC Classen, O Palesh and R Aggarwal *Sexual Re-victimisation: A review of the empirical literature. Trauma, Violence and Abuse* 2005 Vol 6 no. 02 103–129

'The extreme nature of, or combination of, category 2 factors may elevate a rape to category 1' is the other factor articulated in category 1. The Council has deliberated about the factors that potentially increase harm in rape and believe that a degree of flexibility is required for sentencers given the unique nature of rape. The Council believes that many of the factors articulated in category 2, when combined, will increase the psychological and/or physical harm to the victim. This approach relies on the sentencer, in full possession of all the facts of the case, being best placed to determine when either the extreme nature

of a factor, or a combination of the factors in category 2 would justify the elevation of the case to category 1. This places more onus on the sentencer to exercise discretion and judgement. The testing to date with Crown Court judges has identified a split between those sentencers who think flexibility is helpful and those who want more direction. Some felt the definition of 'combination' needed to be clearer and that category 1 should be reserved for the most severe cases.

The scenarios below give examples of cases where discretion would be applied:

Scenario A

The victim (V) was waiting at a bus stop when approached by the offender (O) who covered V's mouth, produced a knife and said he would kill her if she screamed. O punched her in the face and dragged her into a park. O used his fingers to penetrate V and then vaginally raped her. O ordered V to adopt various positions. Each time, V was humiliated and subject to O's will. O ejaculated over V, said that he knew where she lived and would kill her if she reported the incident. O then left her semi-naked in the park. V crawled to a road where she managed to flag down a passer-by who helped her. The attack lasted 45 minutes.

This case involves elements of abduction, humiliation, degradation, violence and a sustained attack which would elevate this case to category 1.

Scenario B

The victim (V) became friendly with the offender (O) and agreed to meet up one evening for a drink. O persuaded V to come to his home so he could get changed before they went out. Once inside the flat O raped V vaginally and afterwards said that he was a powerful man and had friends that could harm her if she reported the attack. Due to the threats made, V stayed in the flat with him until he had changed and went to dinner with him, whereupon she found an opportunity to escape. V subsequently discovered that she had Chlamydia as a result of the rape.

This case, although it contains elements of detention and an STI, would remain in category 2 as the combination of factors is less extreme.

The Council would welcome views on the approach to category 1 and whether greater flexibility or direction is desirable.

Culpability

As stated at page 15, the approach being taken to culpability is different from previous guidelines. The Council considers that anyone who has committed rape has demonstrated a high degree of culpability and so it is unhelpful to talk in terms of 'lower culpability'.

Culpability
A
Significant degree of planning
Member of group or gang during commission of offence
Use of alcohol/drugs on the victim to facilitate the offence
Abuse of position of trust
Recording of the offence
Vulnerable victim targeted
Stalking/harassment of victim
Previous violence against victim
Offence committed in course of burglary
Use of a weapon to frighten or injure
Offence racially or religiously aggravated
Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)
B
Factor(s) in category A not present

Culpability B has no factors listed. This is to reflect the fact that the act of rape inherently involves a high level of culpability. It is not a lower culpability category but the absence of any of the additional factors found in category A indicates a baseline of culpability that exists when a rape is committed.

Culpability A factors are examples of the main culpability factors which the Council believes should be taken into account over and above the baseline of culpability that already exists.

- ‘A significant degree of planning’ was a factor highlighted in the NatCen report by victims and the public as something that was seen

to increase the culpability of the offender.³⁰ The existing SGC guideline sets out that the planning of an offence indicates a higher level of culpability than an opportunistic or impulsive offence.

- ‘Member of group or gang during commission of offence’. This is an area that has been the subject of recent research and where work is ongoing. The Home Office has produced a report that considers amongst other issues gangs and rape.³¹ A two-year study on child sexual exploitation and groups and gangs is also being conducted by the Children’s Commissioner. Emerging findings were published in July 2012³² and state:

“From our emerging findings we have ascertained that children are being victimised through gang and group associated sexual exploitation from the age of 10 upwards, and are both female and male (although predominantly female). They come from a full range of ethnic backgrounds represented in England, and some are disabled. The abuse is taking place across England in urban, rural and metropolitan areas. Children are being sexually exploited by groups and gangs made up of people who are both the same, and different, ages, ethnicities and social backgrounds from those that characterise them as victims.”

Being a member of a group or gang is a factor that does not just pertain to children and has also been included in previous guidelines such as assault. It reflects the enhanced fear and intimidation created by the presence of more than one offender.

30 *Attitudes to sentencing sexual offences* para 6.2 p49, Sentencing Council Research series 01/12 www.sentencingcouncil.org.uk

31 *Ending gang and youth violence: cross-government report* (November 2011), Home Office

32 *Emerging findings from the inquiry into gangs and groups*, Children’s Commissioner (July 2012)

- ‘Use of alcohol/drugs on the victim to facilitate the offence’ is included as the Council wishes to reflect the increased culpability of someone who, in a common scenario, deliberately gets a victim drunk or administers some form of drug in order to render them incapable of consenting to sexual activity.
- ‘Abuse of position of trust’ – the fact that an offender’s culpability is increased if they are in a position of responsibility is something that was established in *R v Billam*.³³ This case gave a number of examples of ‘responsibility’. The Council believes that this is an important factor in terms of increasing culpability.
- ‘Recording of the offence’ by the offender has become more prevalent since the SGC guideline was published. This was specifically referred to by the Lord Chief Justice in *R v Anigbugu*³⁴ where he said:

“A pernicious new habit has developed by which criminals take photographs of their victims – often just to show off to their friends; often just to add to the humiliation which their victim is already suffering; and sometimes... either as a form of pressure to discourage any complaint but also possibly for the purposes of blackmail... We make it clear that from now onwards the taking of photographs should always be treated as an aggravating feature of any case and in particular of any sexual cases. Photography in these cases usually constitutes a very serious aggravating feature of the case.”
- ‘Vulnerable victim targeted’ has been included as a culpability factor. The wording encompasses different types of vulnerability, and could include the victim being targeted because they are elderly, frail, separated from friends or under the influence of alcohol. Baroness Stern stated:

“Alcohol was frequently raised by the police as a complicating factor. Excessive drinking leads to vulnerability. Memories are clouded by drunkenness so the case is difficult to investigate and to take through the courts.”³⁵
- ‘Stalking/harassment of victim’ and ‘previous violence against victim’ are both culpability factors that apply in cases where the offender is someone known to the victim, although they could also apply to a ‘stranger rape’. As stated at the beginning of this section the Council believes that it is important the factors considered are not just weighted towards rape by someone unknown to the victim but also recognise the reality that rape is more often committed by someone known to the victim.
- ‘Offence committed in course of burglary’ is a factor that the Lord Chief Justice identified in the case of *R v Anigbugu*:³⁶

“In a case where rape has been committed after or in the course of a burglary in a home – even if there are no additional features beyond the rape and burglary – the starting point will rarely be less than 12 years’ imprisonment.”

The Council believes that creating a permanent record of the attack, thereby subjecting the victim to re-victimisation, should be included at step one.

33 [1986] 1 WLR 349

34 [2011] EWCA Crim 633

35 See footnote 25, *The Stern Review*

36 See footnote 34

In the proposed formulation of harm and culpability, an offence committed in the course of a burglary, combined with the category 2 harm factor of forced entry into the victim's home would result in a sentencing range that would accommodate the views expressed in the *Anigbugu* case.

- 'Use of a weapon to frighten or injure' is a means of controlling the victim that the Council believes should be reflected as increased culpability.
- 'Offence racially or religiously aggravated', 'offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)' and 'offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)' are all factors that are found in the assault guideline. The Council considers that if the offender demonstrates motivation on one of these grounds, that his culpability should increase in terms of rape and should therefore be at step one.

Q1

Do you agree with the approach to harm and culpability proposed, in order to reflect the fact that all rape involves harm to the victim and a high level of culpability?

Q2

Do you agree with the harm and culpability factors proposed at step one for rape? If not, please specify which you would add or remove and why.

STEP TWO

Starting point and category range

Having identified the appropriate category at step one, the court considers the starting point and is then asked to identify whether there are any additional factors that have not already been considered at step one which might either aggravate or mitigate the offence. This would then lead the court to decide whether the sentence should be adjusted upwards or downwards within the relevant range from the starting point set out in the guideline. For example, the starting point in category 2A is 10 years' imprisonment with a range of nine to 13 years.

These aggravating and mitigating factors allow the sentencer to consider the wider context of the offence, and also relevant factors relating to the offender. The lists at this step are not exhaustive and any factors not considered at step one, but which the sentencer considers relevant to either the harm to the victim or the culpability of the offender, can be taken into account at this step. A factor being present does not mean that the sentencer must take it into account; the sentencer has discretion to decide whether factors are influential in the case before them and, if so, will make an assessment of the weight to be given to them. In exceptional cases, having considered all the factors and their impact on the seriousness of the offence, the court may decide to move outside the category range identified at step one.

Although the list of factors is not exhaustive the Council's intention is to highlight factors that are likely to be relatively common to the offence to ensure that they are considered equally by all sentencers.

The table below sets out the proposed aggravating factors for the offence of rape.

Aggravating factors*Statutory aggravating factors*

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors

Severe psychological harm to the victim

Significant physical injury to the victim

Location of offence

Timing of offence

Victim compelled to leave their home (including victims of domestic violence)

Failure to comply with current court orders

Offence committed whilst on licence

Exploiting contact arrangements with a child to commit an offence

Presence of others, especially children

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Attempts to dispose of or conceal evidence

Commission of offence whilst under the influence of alcohol or drugs

- ‘Previous convictions’ and ‘offence committed whilst on bail’ are factors where there is a statutory requirement for sentencers to take them into account when assessing the seriousness of an offence. As with previous guidelines the Council recommends that these factors should be considered at step two, only after the starting point has been established. Previous convictions for sexual offences will be regarded as particularly aggravating, as will an offence committed on bail for an offence against the same victim.
- ‘Severe psychological harm to the victim’ is the first non-statutory factor the Council

is proposing. The Council is sensitive to the fact that individuals will have differing psychological responses and that assumptions should not be made about the severity of a rape based solely on the resilience or lack of resilience of a victim. Dr Fiona Mason states:

“Many factors will affect an individual’s response to trauma and psychological reactions vary between individuals... elements that contribute significantly to post-traumatic responses include perception of life threat, actual injury and being the victim of a completed, as opposed to attempted, rape. Other variables are also important as listed below: pre-existing individual variables; age, prior psychiatric history, previous exposure to trauma and preparedness; stressor variables; unpredictability, suddenness, receiving intentional harm, relationship to perpetrator; response of external world; lack of support, victim blaming; and specific experiences of the individual; captivity, a sense of hopelessness, cultural beliefs, repeat traumatisation interrupting the recovery process.”³⁷

The Council has reflected the fact that all rape involves psychological harm into the starting points. Sentencers should be enabled to increase the starting points for all categories of cases where severe psychological harm has ensued and has therefore included it at step two.

- ‘Significant physical injury to the victim’ is a factor that can be viewed independently of the step one factor of violence; it is possible for the victim to sustain injury even if the level of overt violence is not significant, although in many instances the two will be related. There has already been discussion, see page

17 above, on the treatment of violence as a harm factor. The Council has not included injury as a step one harm factor as it does not wish to propagate the myth that a lack of physical harm makes a rape less serious. For this reason, the Council is proposing that this factor aggravates the offence at step two. This will allow sentencers to move upwards from the starting point where the victim has sustained significant physical injury.

- ‘Location of offence’ and ‘timing of offence’ are aggravating factors that are found in other guidelines such as assault and burglary. The factors are deliberately not prescriptive about which type of location or what time of day would aggravate an offence. This is in order to give the sentencer the flexibility to decide, based on the specific facts of the case before the court. For example, where a rape occurs in the daytime, but the offender has deliberately waited and chosen that time because he knows the victim will be at home alone, it will be as serious as the case where an offender has assaulted a victim late at night in a public place. In the same way, an attack in the home as a result of which the victim no longer feels safe in that home, can be as serious as an attack where the victim has been deliberately taken to an unknown place in order to isolate and disorientate them.
- ‘Victim compelled to leave their home (including victims of domestic violence)’, ‘failure to comply with current court orders’, ‘offence committed whilst on licence’, ‘exploiting contact arrangements with a child to commit an offence’ and ‘presence of others, especially children’ are all factors found in previous guidelines and have their roots in the SGC guidance on domestic violence.³⁸ The Council believes it is important to include aggravating factors that pertain to a rape that has occurred within a relationship, particularly because rapes within relationships are far more prevalent than

‘stranger rape’. Compulsion to leave home might apply not only to an offence within a domestic relationship but also where, following a stranger attack in the home, the victim feels unable to return to it.

- ‘Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution’ and ‘attempts to dispose of or conceal evidence’ are both factors which have been included in previous guidelines and are intended to reflect the serious aggravation created where offenders attempt to intimidate their victims into remaining silent. Steps taken to prevent reporting cover a wide range of scenarios and could, in the case of rape, include instances of threats that physical harm will be done, or photographs taken during the offence will be circulated, if a report is made.
- ‘Commission of offence whilst under the influence of alcohol or drugs’ has been included in this guideline as intoxication generally aggravates offences and in the context of rape may mean that the offender has made himself insensible to the effect on his victim.

Mitigation

There are a number of mitigating factors that the Council is consulting upon. The Council is aware of the difficulties and sensitivities concerning the treatment of mitigation in sexual offences. The NatCen research commissioned by the Council reported that:

“Both the public and victims/survivors were reluctant to identify mitigating factors, with the only broadly agreed mitigation being the mental capacity or mental health of the offender. This was felt to influence the nature not duration of the custodial sentence suggested, with an emphasis on treatment or care under supervision.”

³⁸ SGC *Overarching Principles: Domestic Violence Definitive Guideline*

However, mitigating factors must be considered by the courts when sentencing sexual offences and part of the aim of the guideline is to ensure that the sentencing process is transparent to both victims and the public. For that reason, the Council believes that the mitigating factors currently considered by the courts should be discussed in consultation and should appear within the guideline. The Council wishes to encourage a discussion about these factors and to also increase understanding about the impact these factors can have on the sentence. It is important to understand that the presence of a factor in the list does not mean that the sentencer must take it into account. In cases where it is relevant, it is for the individual sentencer to decide the extent to which, if any, it mitigates the level of sentence.

Mitigating factors

No previous convictions **or** no relevant/recent convictions

Remorse

Previous good character and/or exemplary conduct*

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability, where linked to the commission of the offence

* In the context of this offence, generally good character and/or exemplary conduct should not be given significant weight and will not justify a substantial reduction of what would otherwise be the appropriate sentence

- ‘No previous convictions or no relevant/recent convictions’ is the other side to the statutory aggravating factor of previous convictions. However, with serious sexual offences, the harm caused to the victim and the culpability of the offender are likely to mean that an absence of previous convictions does not result in much movement from the starting point sentence (see the discussion on ‘previous good character and/or exemplary conduct’ below).

- ‘Remorse’ has been included and is separate from the issue of an early guilty plea (dealt with at step four of the guideline). Remorse has always been recognised as a factor that can be taken into account as a mitigating factor.³⁹ Simple statements of remorse will rarely be sufficient to satisfy a sentencer of their true nature unless accompanied by other evidence of remorse, including the time at which the remorse was expressed. As with all mitigating factors, it will be for the sentencer in the individual case to decide how much weight should be attached to it as it will not always carry the same weight.
- ‘Previous good character and/or exemplary conduct’ is included but an explicit caveat has been included to make it clear that in the context of rape, these factors should not be given significant weight and will not justify a substantial reduction of what would otherwise be the appropriate sentence. This wording follows the principle set out in the case of *R v Millberry*⁴⁰ which stated:

“While the fact that an offender has previous convictions for sexual or violent offences can be a significant aggravating factor, the defendant’s good character, although it should not be ignored, does not justify a substantial reduction of what would otherwise be the appropriate sentence.”

This issue is particularly complex in the context of historical sexual offences where there is likely to have been a substantial length of time between the offence being committed and the offender being sentenced. In the intervening period, the offender may have behaved in a number of different ways and the court will need to consider whether that behaviour aggravates or mitigates the offence.

39 Archer [1998] 2 Cr App R (S) 76

40 [2002] EWCA Crim 2891

For example, the fact that an offender has for many years been involved in voluntary work as a leader of a youth organisation and is a trusted pillar of the community, could be regarded as providing limited mitigation. However, if that offender had used this apparent good character and status to access or silence victims this would be regarded as a significantly aggravating factor.

The difficulties raised by this were highlighted by Lord Chief Justice Judge in *R v Hall*:⁴¹

“The passing of the years may demonstrate aggravating features if, for example, the defendant has continued to commit sexual crime or he represents a continuing risk to the public. On the other hand, mitigation may be found in an unblemished life over the years since the offences were committed, particularly if accompanied by evidence of positive good character.”

This demonstrates the difficulty of mitigation which must be assessed very carefully against the facts of the case before the court.

- ‘Age and/or lack of maturity where it affects the responsibility of the offender’ is a standard factor in previous Sentencing Council guidelines and is intended to deal with those offenders who are only just over the age of 18 or those over 18 but who are not as mature as others in their peer group.

The age factor can also be applied to offenders who are very elderly at the time of sentence. This generally arises in the case of historic sex offences, where the offender is sentenced decades after

offences have taken place. In *Millberry*⁴² the Court of Appeal considered that:

“In addition, the court is always entitled to show a *limited degree* of mercy to an offender who is of advanced years, because the impact that a sentence of imprisonment can have on an offender of that age.”

- ‘Mental disorder or learning disability, where linked to the commission of the offence’ appears in previous guidelines. This is a mitigating factor that the NatCen research found had support amongst victims and members of the public.

Q3

Do you agree with the aggravating and mitigating factors proposed at step two for the offence of rape? If not, please specify which you would add or remove and why.

Sentence levels for rape

The starting point and ranges in the existing SGC guidelines follow the Court of Appeal judgment in *Millberry*.⁴³ This recommended the following starting points:

- five years for a single offence of rape on an adult victim by a single offender with no other aggravating features;
- eight years where: there is more than one offender; or the offender is in a position of responsibility; or where the victim is a child or vulnerable; or the offence is racially motivated; or there is repeated rape in the course of an attack; or the offender is knowingly suffering from an STI; and
- 15 years and upwards for a ‘campaign’ of rape.

⁴¹ [2011] EWCA Crim 2753

⁴² [2002] EWCA Crim 2891

⁴³ *ibid*

The Council has considered the application of the existing SGC guideline based on *Millberry*. The Council recommends keeping the starting points of five and eight years with a clearer articulation of the culpability of the offender than appears in the existing guideline. This will mean that where any of the culpability A factors are present during the offence, see page 20, the starting point is likely to be seven and 10 years, not five and eight years, before any further adjustment for aggravating factors at step two.

In the existing SGC guideline a starting point of 15 years is reserved for multiple rapes. It is

the Council's view that multiple rapes should be charged and sentenced separately and the totality principle applied as to whether those sentences should be concurrent or consecutive.

The highest category can now be used for single rapes of particular severity, which in the Council's view will mean that there is the opportunity for a full reflection of harm in these cases.

The proposed new sentence levels are set out below.

	A	B
Category 1	Starting point 15 years' custody	Starting point 12 years' custody
	Category range 13 – 19 years' custody	Category range 10 – 15 years' custody
Category 2	Starting point 10 years' custody	Starting point 8 years' custody
	Category range 9 – 13 years' custody	Category range 7 – 9 years' custody
Category 3	Starting point 7 years' custody	Starting point 5 years' custody
	Category range 6 – 9 years' custody	Category range 4 – 7 years' custody

Q4

Please give your views on the proposed sentence levels (starting points and ranges) for this offence. If you disagree with the levels stated, please give reasons why.

Assault by penetration, Sexual Offences Act 2003 – section 2

Maximum sentence: Life imprisonment (full guideline page 179)

Assault by penetration is an offence that involves penetration of the vagina or anus with objects or body parts other than the penis. The types of penetration and offending behaviours are wider than found under the definition of rape and range from acts as severe as the highest category rape (for example, a violent sexual attack involving penetration of the victim with an object intended or likely to cause significant injury to the victim), to an activity that whilst involving severe sexual violation of a victim, is more akin to a serious sexual assault (for example, momentary penetration with fingers).

In the research conducted by NatCen, the public and victims found very little distinction between the severity of assault by penetration and rape:

“Assault by penetration was also discussed with focus group participants. They felt that assault by penetration was akin to rape and should be sentenced accordingly. Penetration by objects such as bottles or knives was described as a particularly aggravated form of rape by participants – potentially more serious and more physically damaging than penetration with a penis.”⁴⁴

The Council agrees that there is a high degree of crossover between this offence and rape in the situations described above. However, because the range of potential types of offending is wider for assault by penetration, the Council is proposing that the two offences should be treated separately in the draft guideline. Whilst many of the factors will be similar at the upper

ends of both offences, the Council believes that the differences in offending in category 3 are such that there should be separate guidelines, but would be interested in views on this approach.

Q5

Do you agree that assault by penetration and rape should be treated separately in the guideline?

STEP ONE

Determining the offence category

Harm

Under the existing SGC guidelines, a lower sentence is given for penetration with a body part, such as a finger or tongue where no other physical harm is sustained. A higher sentence would be given for penetration with an object (the larger or more dangerous the object, the higher the sentence should be) or penetration combined with abduction, detention, abuse of trust or more than one offender acting together.

The Council agrees with the conclusions of the NatCen research that states:

“Generally where penetration of genitals had occurred, the public and victims/survivors felt this was akin to rape regardless of what had been used to penetrate due to the level of violation inherent.”⁴⁵

The Council is proposing that the harm factors for such assaults should generally be treated in very similar terms to those in the rape guideline, with some amendments discussed below.

⁴⁴ *Attitudes to sentencing sexual offences*: Sentencing Council Research series 01/12 www.sentencingcouncil.org.uk

⁴⁵ *ibid*

Harm	
Category 1	<ul style="list-style-type: none"> • Extreme violence • The extreme nature of one or more category 2 factors may elevate to category 1
Category 2	<ul style="list-style-type: none"> • Penetration using large or dangerous object(s) • Additional degradation/humiliation • Abduction/detention • Prolonged/sustained incident • Use of violence • Context of habitual sexual abuse • Forced entry into victim's home
Category 3	Factor(s) in categories 1 and 2 not present

The only difference to the harm factors specified in the rape guideline is that the factor relating to pregnancy or an STI occurring as a consequence of the offence is not included in the assault by penetration draft guideline. Since the offence does not involve penile penetration, these risks do not arise.

Instead, 'penetration using large or dangerous object(s)' has been added to this guideline. Whilst it is acknowledged that psychological harm results whatever the means of penetration, where a large or dangerous object has been used, the Council is of the view that this is of such significance that it should increase the starting point for the sentence. This is because it not only increases the physical consequences of the attack but also increases the psychological harm – see the discussion of severe psychological harm at page 23. Additionally it should be noted that an individual's psychological response to trauma may vary and that the object used will not always have a direct correlation to the psychological harm suffered.

For discussion on all the other harm factors listed in this proposed guideline please see the paragraphs on harm and rape at pages 16 to 19.

Culpability

For the reasons set out above, the Council believes that given the degree of similarity between offenders' behaviour in rape and in assault by penetration, the same culpability factors will apply.

Culpability

A

Significant degree of planning

Member of group or gang during commission of offence

Use of alcohol/drugs on the victim to facilitate the offence

Abuse of position of trust

Recording of the offence

Vulnerable victim targeted

Stalking/harassment of victim

Previous violence against victim

Offence committed in course of burglary

Use of a weapon to frighten or injure

Offence racially or religiously aggravated

Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)

Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)

B

Factor(s) in category A not present

For a discussion of the rationale behind the inclusion of all these factors please see the section on culpability in rape at pages 19 to 22.

Q6

Do you agree with the harm and culpability factors proposed for assault by penetration? If not, please specify which you would add or remove and why.

STEP TWO**Starting points and category ranges**

Once the category and starting point has been decided the sentencer will then look at any aggravating and mitigating factors to allow the sentencer to consider the wider context of the offence. The Council believes that the same aggravating and mitigating factors apply to the offence of assault by penetration as to rape. Full discussion of these factors can be found under the discussion on rape at pages 22 to 26.

Aggravating factors*Statutory aggravating factors*

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors

Severe psychological harm to the victim

Significant physical injury to the victim

Location of offence

Timing of offence

Victim compelled to leave their home (including victims of domestic violence)

Failure to comply with current court orders

Offence committed whilst on licence

Exploiting contact arrangements with a child to commit an offence

Presence of others, especially children

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Attempts to dispose of or conceal evidence

Commission of offence whilst under the influence of alcohol or drugs

Mitigating factors

No previous convictions **or** no relevant/recent convictions

Remorse

Previous good character and/or exemplary conduct*

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability, where linked to the commission of the offence

* In the context of this offence, generally good character and/or exemplary conduct should not be given significant weight and will not justify a substantial reduction of what would otherwise be the appropriate sentence

Q7

Do you agree with the aggravating and mitigating factors proposed for assault by penetration? If not, please specify which you would add or remove and why.

Sentence levels for assault by penetration

The proposed sentence levels are set out below.

	A	B
Category 1	Starting point 15 years' custody	Starting point 12 years' custody
	Category range 13 – 19 years' custody	Category range 10 – 15 years' custody
Category 2	Starting point 8 years' custody	Starting point 6 years' custody
	Category range 5 – 13 years' custody	Category range 4 – 9 years' custody
Category 3	Starting point 4 years' custody	Starting point 2 years' custody
	Category range 2 – 6 years' custody	Category range High level community order – 4 years' custody

As discussed above, the means of penetration, whether it be penile, another body part or object, may not in every case make a difference to the victim as the violation incurred by the penetration is as severe. The Council believes that there is no justification for any difference in sentencing between rape and assault by penetration for category 1 offences. The same starting points of 15 years (culpability A) or 12 years (culpability B) custody is therefore proposed. For further discussion of these starting points, please see pages 26 and 27.

In categories 2 and 3, the ranges are broader than those in the rape guideline to accommodate the broader range of offending that can be encompassed in this offence. For example a category 2 assault by penetration could include an assault where the victim has been detained in their home by a partner for a prolonged period and as part of the assault there has been very brief penetration with a finger. However, it could also include a scenario where an ex-partner has broken into the victim's

house and carried out a violent assault and penetrated the victim with his fist.

In category 3, the starting points are higher than those in the existing SGC guideline for offences where any of the culpability A factors are present (four years as opposed to two years). In the SGC guideline this category is focused solely on the type of penetration for example, finger, toes or tongue. The Council's aim is to move away from a focus on the physical acts involved and to reflect the harm caused to the victim by any penetration, irrespective of the way in which it is carried out. Category 3 therefore reflects a baseline of harm without the need for the presence of any other factors.

Q8

Please give your views on the proposed sentence levels (starting points and ranges) for this offence. If you disagree with the levels stated, please give reasons why.

Sexual assault, Sexual Offences Act 2003 – section 3

Maximum sentence: 10 years' custody (full guideline page 185)

Sexual assault is any form of non-consensual sexual touching. It covers a range of offending from touching of the victim over clothing to non-penetrative touching of the victim's genitals. This offence excludes any penetrative sexual activity which is covered by either the offence of rape or assault by penetration.

STEP ONE

Determining the offence category

Harm

The existing SGC guideline categorises this offence purely by reference to the type of touching that has taken place, for example, 'contact between either the clothed genitalia of offender and naked genitalia of victim or naked genitalia of offender and clothed genitalia of victim'. The Council is of the view that this focus on the activity is too narrow an approach and can make it difficult for judges to reflect fully the harm caused to the victim, in particular the fear and intimidation that may be suffered by the victim. The changes proposed by the Council are intended to reflect both the emotional and physical harm that can be caused by this offence.

The proposed harm factors are set out below.

Harm	
Category 1	<ul style="list-style-type: none"> • Use of violence • Abduction/detention of victim • Forced entry into victim's home
Category 2	<ul style="list-style-type: none"> • Touching of genitalia • Prolonged/sustained assault • Additional degradation/humiliation • Context of habitual sexual abuse
Category 3	Factor(s) in categories 1 and 2 not present

Category 3 does not list any factors. This follows the same approach as that adopted in the rape and the assault by penetration draft guidelines and is intended to reflect that there is an inherent degree of harm caused by any sexual assault, without requiring the presence of any other additional factors.

Category 2 'touching of genitalia' contains the only reference to physical contact in the assessment of the level of harm. Whilst the Council maintains that the type of physical touching should not be the *only* determinant of harm, the degree of violation inherent in the touching of genitalia would always constitute at least a category 2 level of harm. The existing SGC guideline draws a distinction between clothed and unclothed genitalia. However, the Council does not believe that there is always such a clear distinction. For example, the degree of psychological harm caused by the isolation and fear of escalation in an assault where the victim is followed home at night by a stranger who, on a quiet street, grabs the victim between the legs, touches their clothed genitalia and pulls them to the ground, should constitute a category 2 level of harm, irrespective of the fact the touching of genitalia was over clothing. It is for that reason that the factor does not specify whether the genitalia should be clothed or unclothed.

The other three factors in this category are discussed under rape at pages 17 and 18.

Category 1 includes a number of factors that are found at category 2 in rape and assault by penetration. This is because category 1 sexual assaults will never be as severe as category 1 rapes or assault by penetration. This is reflected in the fact that the statutory maximum for this offence is 10 years rather than life. For example, a rape during the course of a forced entry into a home would warrant a starting point of 10 years. For sexual assault, which has a maximum sentence of 10 years allowed under the law, forced entry into the home has to be placed

in category 1 in order to enable sentencers an opportunity to pass a sentence that reflects the severity of this aggravation. The same rationale applies for use of violence and abduction/detention. For further discussion of these factors please see pages 17 and 18.

Culpability

The Council believes that there is enough commonality in offender behaviour for rape, assault by penetration and sexual assault to replicate the culpability factors. The proposed culpability factors are therefore:

Culpability
A
Significant degree of planning
Member of group or gang during the commission of the offence
Use of alcohol/drugs on the victim to facilitate the assault
Abuse of position of trust
Recording of the offence
Vulnerable victim targeted
Stalking/harassment of victim
Previous violence against victim
Offence committed in course of burglary
Use of weapon to frighten or injure
Threats of violence/threatening or violent sexual language
Offence racially or religiously aggravated
Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)
B
Factor(s) in category A not present

These are discussed at pages 19 to 22.

There is one additional culpability factor not found in either the rape or assault by penetration guidelines. This is 'threats of violence/threatening or violent sexual language'. It is included for this offence because the Council believes that the fear of escalation of an attack is likely to increase the psychological harm on a victim to the extent that it should affect the starting point sentence. For example, offenders may seek to control the victim using threatening language and especially violent sexual language to force compliance. In the case of rape and assault by penetration, this use of language may be secondary to the harm done by the actual penetrative assault but, in the case of non-consensual sexual touching, it can be central to the offence. The Council would welcome views on the inclusion of this factor for sexual assault.

Q9

Do you agree with the harm and culpability factors proposed at step one for sexual assault? If not, please specify which you would add or remove and why.

STEP TWO

Starting points and category ranges

Once the category and starting point has been decided, the sentencer will then consider aggravating and mitigating factors to allow the sentencer to consider the wider context of the offence. The Council believes that the same aggravating and mitigating factors would apply to the offence of sexual assault as to rape or assault by penetration. Full discussion of these factors can be found under the discussion on rape at pages 22 to 26.

Aggravating factors*Statutory aggravating factors*

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors

Severe psychological harm to the victim

Significant physical injury to the victim

Location of offence

Timing of offence

Victim compelled to leave their home (including victims of domestic violence)

Failure to comply with current court orders

Offence committed whilst on licence

Exploiting contact arrangements with a child to commit an offence

Presence of others, especially children

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Attempts to dispose of or conceal evidence

Commission of offence whilst under the influence of alcohol or drugs

Mitigating factors

No previous convictions **or** no relevant/recent convictions

Remorse

Previous good character and/or exemplary conduct*

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability, where linked to the commission of the offence

* In the context of this offence, generally good character and/or exemplary conduct should not be given significant weight and will not justify a substantial reduction of what would otherwise be the appropriate sentence

These are discussed at pages 22 to 26.

Q10

Do you agree with the aggravating and mitigating factors proposed at step two for sexual assault? If not, please specify which you would add or remove and why.

Sentence levels for sexual assault

As has been stated above the statutory maximum for sexual assault is 10 years, which means that the sentence levels must necessarily start below those for assault by penetration and rape where the maximum sentence is life imprisonment. The starting points and ranges for culpability A are slightly higher than the existing SGC starting points and ranges. This is because the Council is taking a wider view than just the physical activity that has taken place and it reflects the inclusion of a broader range of culpability factors at step one in the draft guideline than is included in the SGC guideline.

Community orders have been included as the bottom of the range available to sentencers for categories 2B and 3 sexual assault offences. This is to reflect the very wide range of offending behaviour that can come before the courts to be sentenced. Whilst they are all serious cases, preventing reoffending and rehabilitating the offender may be better achieved by imposing a community sentence rather than a short custodial sentence where the offender's behaviour is unlikely to be addressed. For example, an offender approaches a woman at a crowded bus stop and grabs her breast over her clothing. The offender has no previous convictions. There is no doubt that this would be a very distressing experience for the victim and the sentencer will want to impose a sentence that prevents other women from being assaulted in a similar way in the future. For this type of case, the judge may wish to impose a community order for a period of up to two years with a requirement that the offender attends a sex offender treatment programme where his offending behaviour can be challenged and addressed.

The Council proposes the starting points and sentence ranges set out below.

	A	B
Category 1	Starting point 4 years' custody	Starting point 2 years 6 months' custody
	Category range 3 – 7 years' custody	Category range 2 – 4 years' custody
Category 2	Starting point 2 years' custody	Starting point 1 year's custody
	Category range 1 – 4 years' custody	Category range High level community order – 2 years' custody
Category 3	Starting point 26 weeks' custody	Starting point High level community order
	Category range High level community order – 1 year's custody	Category range Medium level community order – 26 weeks' custody

Q11

Please give your views on the proposed sentence levels (starting points and ranges) for this offence. If you disagree with the levels stated, please give reasons why.

Sexual activity without consent, Sexual Offences Act 2003 – section 4 **Maximum sentence: Life imprisonment if penetration involved; 10 years' custody if not**

This offence covers a range of activity from forcing a victim to engage in sexual activity with a third party; for example, through the use of threats, forcing the victim to masturbate the offender or masturbate themselves or forcing the victim to engage in sexual activity with the offender; for example, a woman forces a man to penetrate her. As a woman cannot be charged with rape because penile penetration is required, this charge would be the alternative in the scenario where a woman forces a man to penetrate her.

This offence covers both penetrative and non-penetrative activity and has two different statutory maxima depending on the nature of the activity involved.

This offence is very rarely charged and since it came into force under the Sexual Offences Act 2003, there have never been more than 20 cases sentenced in any one year. In 2010, six cases were sentenced.

The Council proposes to replicate both the approach and sentence levels of the assault by penetration guideline where penetration is involved in the offence and the sexual assault guideline where there is no penetration involved. This is because very similar offender behaviour is involved in these offences and the Council believes there is enough commonality to use the same approach.

Q12

Do you agree with the Council's approach to the guideline on sexual activity without consent?