



# Sexual offences involving sexual assault

## Literature Review

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The remit of this review was to consider in particular, the following offences under the Sexual Offences (Scotland) Act 2009: 2, 3, 4, 19, 20, 21, 28, 29, 30, 31 and 37 and other contact offences of a sexual nature under the 2009 Act and the common law equivalents. It was considered that such a review would include amongst other things, the available data on sentencing in this area, an overview of studies which have examined public perceptions of sexual assault sentencing and reference to relevant academic literature such as that which consider the wider principles and purposes of sentencing. It was never the intention that this review provide an analysis of current definitions of offences, an extended discussion of the problems pertaining to conviction rates in this area or the feminist framework which situates sexual offences as a form of violence against women, all of which lie outwith the Council's remit. There is a significant body of legal and sociological literature on the subject of sexual offences which is not the focus of this report.

With additional thanks to Elaine Ferguson of the University of Glasgow for sharing her unpublished data relating to Orders of Lifelong Restriction and offering her expertise and views on their use.

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# 1.0 Sexual offences involving sexual assault in Scotland

## 1.1 The legal framework

Under the common law, two types of sexual assault existed: rape and indecent assault<sup>1</sup>, both of which were dependent on a lack of consent. Although the crime of rape was gendered in the sense that it could only be carried out by a male against a female<sup>2</sup>, the crime of indecent assault was, and remains, gender neutral in its meaning.

Historically, the scope of indecent assault was very wide. It has been narrowed by the introduction of the Sexual Offences (Scotland) Act 2009. In 2004, the Scottish Law Commission was asked by Scottish Ministers to review the law of rape and sexual offences, against the backdrop of growing “public, professional and academic”<sup>3</sup> unease with the existing law. What followed was a series of recommendations which proposed comprehensive reform of the law of sexual offences in Scotland. The resulting Sexual Offences (Scotland) Act 2009 came into force in December 2010, adopting most of the Scottish Law Commission’s proposals. As well as introducing a number of new sexual offences, the 2009 Act abolished the common law offences of rape, clandestine injury to women, lewd, libidinous practice or behaviour, and sodomy.<sup>4</sup> Indecent assault was not abolished, but its practical application would now appear to be limited. Following the introduction of the 2009 Act, Chalmers suggested that the appropriate scope of this common law offence would be narrowed to cases in which an assault takes place, aggravated by circumstances of indecency, but not entirely sexual in nature.<sup>5</sup>

When bringing together its proposals, the Scottish Law Commission considered, in detail, the structure of sexual offences involving sexual assault. It considered whether sexual assault could be contained within the general law of assault, but concluded that a separate offence of sexual assault was necessary. For the Commission:

“the specific wrong of sexual assault is the infringement of sexual autonomy; the use of violence is an additional, not a central, part of the wrongdoing.”<sup>6</sup>

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<sup>1</sup> Lewd, indecent and libidinous practices also existed as a further type of indecent assault before its abolition following the introduction of Sexual Offences (Scotland) Act 2009 section 52. It has been suggested that this charge was reserved for cases where the victim was a child under the age of puberty (at that time 14 for boys and 12 for girls), *R.L v H.M Advocate*, 1999 J.C. 40.

<sup>2</sup> It was, and remains the case, that a female may be convicted of rape under the doctrine of art and part liability if she has assisted the principal offender by, for example, restraining another female, but she herself could not be the principal offender.

<sup>3</sup> Scottish Law Commission., 2006. *Discussion Paper on Rape and Other Sexual Offences*. Edinburgh: The Stationary Office. at p 1 para 1.3.

<sup>4</sup> Sexual Offences (Scotland) Act 2009, s 52.

<sup>5</sup> Chalmers, J., 2010. *The New Law of Sexual Offence in Scotland*. Edinburgh: W.Green. at p 35.

<sup>6</sup> Scottish Law Commission., 2006. (n3) at p 46 para 4.5.

The offence of sexual assault is now defined in section 3 of the 2009 Act:

(1) If a person (“A”)—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.

Under subsection 2:

(2) Those things are, that A—

(a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,

(b) intentionally or recklessly touches B sexually,

(c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,

(d) intentionally or recklessly ejaculates semen onto B,

(e) intentionally or recklessly emits urine or saliva onto B sexually.

In order to constitute an offence, the accused must act without consent or reasonable belief in consent, either intentionally or recklessly. Lack of consent and reasonable belief in consent is central to each of the offences contained within Part 1 of the Act. Part 2 of the 2009 Act defines consent and reasonable belief. Under section 12, consent is defined as “free agreement” with section 13 further stipulating the circumstances in which free agreement is absent:

- where the conduct occurs at a time when B is incapable because of the effect of alcohol or any other substance of consenting to it
- where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person
- where B agrees or submits to the conduct because B is unlawfully detained by A, where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct
- where B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B
- where the only expression or indication of agreement to the conduct is from a person other than B.

Section 16 provides that: “In determining, for the purposes of Part 1, whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were.”

The Scottish Law Commission further recommended that the law of sexual assault should distinguish between assaults involving penetration of the victim's body and assaults not involving penetration, with it being noted that an offence of sexual penetration had previously been proposed in the Draft Criminal Code drawn up by the Commission.<sup>7</sup> It was recognised that:

“This type of conduct is analogous to rape (except that it does not involve penile penetration) and is to be differentiated from forms of touching by the type of violation of sexual integrity which penetration involves.”<sup>8</sup>

Accordingly, section 2 of the 2009 Act introduced the offence of sexual assault by penetration. This offence is defined in the following terms:

(1) If a person (“A”), with any part of A's body or anything else—

(a) without another person (“B”) consenting, and

(b) without any reasonable belief that B consents,

penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of B then A commits an offence, to be known as the offence of sexual assault by penetration.

The Scottish Law Commission's discussion of sexual assault also included consideration of the law's treatment of sexual conduct which is achieved through coercion. Noting the provisions introduced in England and Wales by the Sexual Offences Act 2003, it proposed an offence of coercing another person to engage in any sexual activity without that person's consent. The resulting offence of sexual coercion is contained within section 4 of the 2009 Act, defined in the following terms:

If a person (“A”)—

(a) without another person (“B”) consenting to participate in a sexual activity, and

(b) without any reasonable belief that B consents to participating in that activity,

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<sup>7</sup> Clive, E., Ferguson, P., Gane, C., and McCall Smith, A., 2003. *A Draft Criminal Code for Scotland with Commentary*. Edinburgh: Scottish Law Commission.

<sup>8</sup> Scottish Law Commission., 2006. (n3) at p 51 para 4.23.

Intentionally causes B to participate in that activity, then A commits an offence, to be known as the offence of sexual coercion.

The structure of the Sexual Offence (Scotland) Act 2009 is such that it presents consent-based offences as well as non-consent-based offences, further categorised into those pertaining to younger children (those under the age of 13), older children (those older than 13 but younger than 16) and those offences relating to abuses of trust. The Scottish Law Commission referred to these as offences based on the 'protective principle':

"The underlying idea here is that the criminal law should give special protection to persons about whom consenting to sexual activity is problematic... There are several rationales for the protective principle. One is that it simply adds to the consent requirement, in that such persons cannot consent to sexual activity. This is the position in regard to young children. However the protective principle goes further and applies in cases where the person to be protected can give consent... Here the protective principle acts to protect vulnerability and to prevent exploitation. It must be noted that in these situations the protective principle overrides the principle that sexual conduct based on the consent of the parties should not be criminalised."<sup>9</sup>

Part 4 of the Act relates to offences against children, largely replicating Part 1, but in the form of non-consent-based offences. The offences under sections 2, 3 and 4 of the Act are replicated under sections 19, 20 and 21 in respect of young children (those under the age of 13).

Equivalent offences do not exist in respect of older children (those older than 13 but younger than 16). Instead, there is an offence of having intercourse with an older child, provided for under section 28:

If a person ("A"), who has attained the age of 16 years, with A's penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child ("B"), who—

(a) has attained the age of 13 years, but

(b) has not attained the age of 16 years,

then A commits an offence, to be known as the offence of having intercourse with an older child.

Section 29 provides the offence of engaging in penetrative sexual activity with or towards an older child, section 30 provides the offence of engaging in sexual activity

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<sup>9</sup> Scottish Law Commission., 2006. (n3) at p 16 para 2.6.

with or towards an older child, and section 31 provides the offences of causing an older child to participate in sexual activity.

Lastly, section 37 pertains to older children engaging in sexual conduct with one another. Older children are able to engage in sexual activity short of penile penetration of the vagina, anus or mouth or the touching of the vagina, anus or penis with one's mouth. A defence of proximity of age is contained under section 39 for those older than 16 who engage in sexual conduct with an older child. However, in order for the defence to be applicable, the difference in age cannot exceed two years.

## 2.0 Sentencing framework

This section considers the sentencing framework for the offences outlined above. Offences within the scope of the 2009 Act encompass a wide degree of variation in terms of the culpability of the offender<sup>10</sup> and the harm caused to victims. As such, the sentences given to offenders convicted under the 2009 Act range from lengthy custodial sentences and notification under the Sexual Offences Act 2003 to absolute discharges. The effect of this variability means that it is difficult to provide more general principles that impact sentencing.

For the purposes of sentencing, the structure of the Sexual Offences (Scotland) Act 2009 can loosely be divided into three segments. Part 1 (sections 1-11) concerns offences against adults. Part 4 (sections 18-27) is concerned with offences against "young children." Part 5 (sections 28-38) is mostly concerned with offences against "older children." The offences within the scope of this review aim to protect sexual autonomy and protect those who are vulnerable or who may be unable to consent to sexual activity. There are also various supporting and elucidatory provisions in the 2009 Act.

Some of the most significant differences between Parts 1, 4, and 5 of the 2009 Act relate to the culpability of the accused and the capacity of the victim to consent. For the purposes of Part 1, at least in general (and barring mental disorders for which some special provision is made),<sup>11</sup> adults can be regarded as generally capable of consenting to sexual activity (the autonomy principle). However, the ability of an adult to consent will depend on the facts of the specific case, and this ability may be impaired by, *inter alia*, drugs or alcohol. As provided above, section 13 provides for the circumstances in which free agreement (consent) does not exist. Section 14 further explains that a person cannot consent to sexual activity when asleep or unconscious and section 15 clarifies that the scope of consent is specific and not generic.<sup>12</sup>

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<sup>10</sup> See section 3 below.

<sup>11</sup> See Sexual Offences (Scotland) Act 2009, s 17.

<sup>12</sup> See section 3 below.



## 2.1 Statutory sentencing penalties

Schedule 2 of the 2009 Act provides the maximum penalties which can be imposed for each offence contained within the Act. It is worth noting that Scotland does not have so-called ‘whole life’ sentences. Where an offender is given a sentence of life imprisonment, a punishment part must be set by the court. This punishment part is the minimum time the person will spend in prison before they can be considered for release. If granted release, the person will remain on licence for the rest of their life. They may be recalled to prison at any time if they are considered to be a risk to the public – including by breaching their licence conditions. They do not need to have committed a fresh offence in order to be recalled to prison. This position differs from England and Wales where a ‘whole life order’ can be passed, meaning that the person can never be considered for release from prison. In 2018, the Sentencing Council of England and Wales noted in that there were 66 offenders subject to whole life sentences in England and Wales at that time, including several high profile serial killers.<sup>13</sup>

**Table 1: Maximum penalties under the 2009 Act**

Offence	Section	Maximum penalty (summary conviction)	Maximum penalty (conviction on indictment)
Sexual assault by penetration	2		Life imprisonment and a fine
Sexual assault	3	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Life imprisonment or a fine (or both)
Sexual coercion	4	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Life imprisonment or a fine (or both)
Sexual assault on a young child by penetration	19		Life imprisonment and a fine

<sup>13</sup> Sentencing Council., *Life Sentences*. Available at: <<https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/life-sentences/#:~:text=When%20a%20court%20passes%20a,the%20rest%20of%20their%20life.&text=The%20only%20exception%20to%20this.of%20their%20life%20in%20prison.>> [Accessed 14 July 2020]

Sexual assault on a young child	20	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Life imprisonment or a fine (or both)
Causing a young child to participate in a sexual activity	21	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Life imprisonment or a fine (or both)
Having intercourse with an older child	28	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Engaging in penetrative sexual activity with or towards an older child	29	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Engaging in sexual activity with or towards an older child	30	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Causing an older child to participate in a sexual activity	31	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Engaging while an older child in sexual conduct with or towards another older child	37(1)	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)
Engaging while an older child in consensual sexual conduct with another older child	37(4)	Imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)	Imprisonment for a term not exceeding 10 years or a fine (or both)

The 2009 Act does not specify mandatory minima sentences. Scotland has tended to avoid specifying mandatory minima. Although it may be argued that mandatory minima ensure a guaranteed level of punishment, there are various reasons why not

specifying mandatory minima in statutes or guidelines may be considered beneficial. Fundamentally, in a liberal society, the state-infliction of pain and control on the citizen should be no greater than is necessary to achieve the demands of proportionate punishment. A second and related reason is to reduce the potential for undesirable sentence inflation, which can follow the introduction of mandatory minima.<sup>14</sup>

Another argument against mandatory minima is that by restricting judicial discretion they undermine the sensitive calibration of justice according to the unique circumstances of the individual case. While mandatory minima can appear to ensure certainty, it can end up violating the principle of penal proportionality.<sup>15</sup>

In addition to imprisonment or community-based sanctions, those convicted of a sexual offence may be subject to additional restrictions in the form of sex offender notification requirements under the UK-wide Sexual Offences Act 2003. Convictions for offences under sections 2 and 3 of the 2009 Act automatically result in notification requirements.

Under the Sexual Offences Act 2003, the offender must notify the police of certain personal details, in person at a prescribed police station. Initial notification will subsequently be followed by notification of any changes to these details, periodic (annual) notification and notification of foreign travel.<sup>16</sup> Failure to comply with notification requirements is an offence in itself.<sup>17</sup>

The period of notification is dependent on the sentence imposed. Where the sentence dispensed ranges from 6 months to 30 months, the notification requirements will be in place for a period of 10 years. Where a prison sentence of 30 months or more is dispensed, the notification requirement will remain in place for an indefinite period. Where the offender has been convicted as an adult and placed on the register indefinitely, there will be an automatic review after 15 years. Where the offender has been convicted as a juvenile and placed on the register indefinitely, there will be an automatic review after 8 years. Where the offender has been made subject to a Sexual

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<sup>14</sup> See *Written Evidence from the Sentencing Council of England and Wales* to the Justice Committee on the issue of prison populations. Available at:

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/prison-population-2022/written/78134.html>> [Accessed 29 July 2020]. See also, *Prison population 2022: planning for the future*. at para 74 especially. Available at: <<https://publications.parliament.uk/pa/cm201719/cmsselect/cmjust/483/report-files/48307.htm>> [Accessed 29 July 2020].

<sup>15</sup> *HM Advocate v Daniel Cieslak*, 2017. Sentencing Statement. Available at: <<http://www.scotland-judiciary.org.uk/8/1754/HMA-v-Daniel-Cieslak>> [Accessed 29 March 2020].

<sup>16</sup> For details on Police standard operating procedure in relation to notification requirements see Police Scotland, 2018. *Sex Offender Notification Requirements*. Available at: <<https://www.scotland.police.uk/assets/pdf/151934/184779/sex-offender-notification-requirements-sop>> [Accessed 13 March 2020].

<sup>17</sup> Sexual Offences Act 2003, s 91. If convicted under summary procedure this offence can carry a maximum prison sentence of 6 months (in addition to a fine not exceeding the statutory maximum). Where convicted under indictment, the maximum sentence is 5 years' imprisonment.

Offences Protection Order, they will be eligible to apply for a review of their notification requirements.<sup>18</sup>

In addition to the recording of personal data such as address, photographs and bank account details, the offender will be subject to offender management whereby police officers will conduct home visits which are likely to include questions about their sexual activity. Being subject to notification requirements is also likely to have a significant impact upon employment.

In some cases involving rape, the court may specifically impose an Order for Lifelong Restriction (OLR). This indeterminate sentence can be imposed by the High Court on those convicted of serious violent or sexual offences and must be imposed where the nature or circumstances of the offence are such that serious risk is posed to the public when the offender is not in custody. When OLRs are passed, the court must set a punishment part which will be the minimum period of time that the offender must spend in prison before being considered for release. An offender will only be released on licence (parole) following an assessment of the risks posed by the offender to the community. The principal aim of an OLR is protection of the public. They allow for intensive, potentially lifelong supervision of offenders who are considered particularly high risk.<sup>19</sup> Offenders on an OLR are subject to a risk management plan (RMP) for life. The relationship between the licence and the RMP has not entirely been resolved, but currently the Parole Board has a statutory duty to have regard to the RMP when taking decisions about parole or licence conditions. Breach of licence conditions is sufficient to warrant recall. That breach does not have to amount to an offence. OLR offenders are further subject to multi-agency public protective arrangements (MAPPA). Those offenders subject to an OLR can be returned to prison if they commit a further crime upon their release into the community.<sup>20</sup>

## 2.2 Proceeding and convictions

The Scottish Government's *Criminal Proceedings* publication provides data on the number of people proceeded against for sexual assault.

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<sup>18</sup> Sexual Harm Protection Orders have been introduced to Scotland through the Absuive Behaviour and Sexual Harms (Scotland) Act 2016 but at the time of writing, are not yet in force. Police Scotland currently manage a small number of offenders subject to Sexual Harm Prevention Orders relating to offenders who were convicted in England or Wales and subsequently moved to Scotland.

<sup>19</sup> See Criminal Procedure (Scotland) Act 1995, ss 210B-G.

<sup>20</sup> OLRs are managed by the Risk Management Authority. For further information see: <<https://www.rma.scot/order-for-lifelong-restriction/olr-faq/>> [Accessed 11 March 2020].

**Table 2: Numbers of people proceeded against for sexual assault and other sexual crimes<sup>21</sup> between the period 2009-10 and 2018-19.<sup>22</sup>**

Year	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Sexual assault	218	216	218	314	373	453	447	443	482	526
Other sexual crimes	417	367	444	560	678	744	835	731	792	869

The numbers of those convicted during the same period are as follows:

**Table 3: Numbers of people convicted of sexual assault and sexual crimes between the period 2009-10 and 2018-19.<sup>23</sup>**

Year	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Sexual assault	159	160	151	204	236	276	278	266	300	292
Other sexual crime	366	315	384	443	570	607	694	600	659	734

This data does not distinguish between convictions for the different types of sexual assault contained under the 2009 Act. Instead information is provided in a separate crime for proceedings of 'other sexual crimes'. In March 2020, a Freedom of Information (FOI) request was made to the Justice Analytical department for a further breakdown of data on the basis of individual sections of the Act. They provided the following information relating convictions for sexual assault:

<sup>21</sup> This category does not include rape or attempted rape which are recorded separately.

<sup>22</sup> As calculated from Scottish Government, 2020. *Criminal Proceedings in Scotland 2018-19*. at table 4a. Available at: < <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/10/> > [Accessed 13 July 2020].

<sup>23</sup> As calculated from Scottish Government, 2020. *Criminal Proceedings in Scotland 2018-19*. at table 4b. Available at: < <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/11/> > [Accessed 13 July 2020].

**Table 4: Numbers of people convicted of offences involving sexual assault between the period 2009-10 and 2018-19**

Year	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Sexual assault	-	-	-	-	-	-	-	-	3	2
Indecent assault	6	3	6	5	12	16	19	15	19	18
Indecent assault of a child under 16	-	-	-	2	3	1	-	1	1	3
Indecent assault to injury	-	-	-	-	-	-	-	-	1	3

Data relating to offences involving sexual offences by penetration where the complainer was over the age of 16 was also provided, as Table 5 shows:

**Table 5: Numbers of people convicted of offences involving sexual assault by penetration between the period 2009-10 and 2018-19**

Year	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Sexual assault by penetration	-	-	1	2	11	4	6	9	9	9
Sexual assault by penetration & sexual assault	-	-	-	3	2	3	9	8	3	5

Table 6 below shows the data relating to offences involving sexual offences involving coercion where the complainer was over the age of 16:

**Table 6: Numbers of people convicted of offences involving sexual coercion between the period 2009-10 and 2018-19**

Year	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Sexual coercion	-	-	-	-	1	-	2	3	-	2
Sexual coercion & communicating indecently	-	-	-	-	-	-	-	-	1	-

Non consent-based offences were presented separately. Tables 7 and 8 below shows those offences involving the sexual assault of a child under 13.

**Table 7: Numbers of people convicted of offences involving sexual assault of a child under the age of 13 between the period 2009-10 and 2018-19**

	2009 -10	2010 -11	2011 -12	2012 -13	2013 -14	2014 -15	2015 -16	2016 -17	2017 -18	2018 -19
S 20	-	1	9	23	18	17	20	20	25	17
S 20 & 25	-	-	-	-	-	1	-	-	-	1
S 20 & 22	-	-	-	-	-	-	1	1	2	-
S 20 & 21	-	-	-	-	-	-	3	1	1	-
S 20 & 24	-	-	-	-	-	-	-	1	-	-
S 20, 24 & 25	-	-	-	-	-	-	-	-	-	1
S 20, 21 & 22	-	-	-	-	-	-	-	1	-	1

**Table 8: Numbers of people convicted of offences involving causing a young child to participate in sexual activity between the period 2009-10 and 2018-19**

	2009 -10	2010 -11	2011 -12	2012 -13	2013 -14	2014 -15	2015 -16	2016 -17	2017 -18	2018 -19
S 21	-	-	-	1	2	5	4	1	3	3
S 21, 23 & 24	-	-	-	-	-	-	1	-	1	-
S 21 & 24	-	-	-	-	-	-	-	1	-	1
S 21, 22 & 25	-	-	-	-	-	-	-	1	-	-

Data was provided separately on those offences involving older children, as shown in Table 9 below:

**Table 9: Numbers of people convicted of offences involving an older child between the period 2009-10 and 2018-19**

Year	2009 -10	2010 -11	2011 -12	2012 -13	2013 -14	2014 -15	2015 -16	2016 -17	2017 -18	2018 -19
S 28	-	-	11	21	27	33	32	26	22	29
S 28, 29 & 30	-	-	2	4	2	3	5	1	2	2
S 28 & 30	-	-	1	3	4	4	10	7	6	4
S 28 & 29	-	-	5	4	4	2	7	3	1	1
S 28, 29 & 31	-	-	-	-	-	-	2	1	-	-
S 29	-	-	2	3	-	1	2	2	-	3
S 29 & 30	-	-	-	-	1	-	4	1	-	1
S 30	-	-	12	13	16	7	12	9	10	8
S 30, 34 & 35	-	-	-	-	-	-	1	-	-	-
S 30 & 31	-	-	-	-	-	-	-	1	1	-
S 31	-	-	1	3	2	3	3	1	4	3
S 31, 33 & 34	-	-	-	-	-	-	-	1	-	2
S 31 & 34	-	-	-	-	-	-	-	1	1	-

Lastly, data was provided on older children convicted of engaging in sexual conduct with one another:

**Table 10: Numbers of older children convicted of engaging in sexual conduct with another older child between the period 2009-10 and 2018-19**

Year	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
S 37	-	-	-	-	-	-	-	-	1	1
S 37 & 3	-	-	-	-	-	1	1	-	-	-

This data shows that the common law crime of indecent assault remains a relevant charge in Scotland despite the introduction of sexual assault under the 2009 Act. By analysing data which is broken down by specific offences, the relevance of section 2 and section 3 can be seen. It is also clear that there are significantly more convictions for offences involving older children than there are for offences involving younger children. In particular, there are a significant number of convictions which involved the offence of having intercourse with an older child. It is clear that there are few convictions of older children who engage in sexual conduct with another older child. This will be discussed further below.

### 2.3 Sentencing data

Separately data pertaining to the sentencing of sexual offences involving sexual assault was analysed. Tables 11 and 12 provide data relating to those offenders who received custodial sentences:

**Table 11: People convicted of sexual assault who received custodial sentences between 2008-9 and 2017-18<sup>24</sup>**

	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
%	62	46	45	48	46	38	43	54	40	42
Number	99	74	68	97	105	120	143	120	124	3

<sup>24</sup> As calculated from Scottish Government., 2020. *Criminal Proceedings in Scotland 2018-19*. at tables 9 (a) and 9(b). Available at: < <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/24/> > and < <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/25/> > [Accessed 13 July 2020].

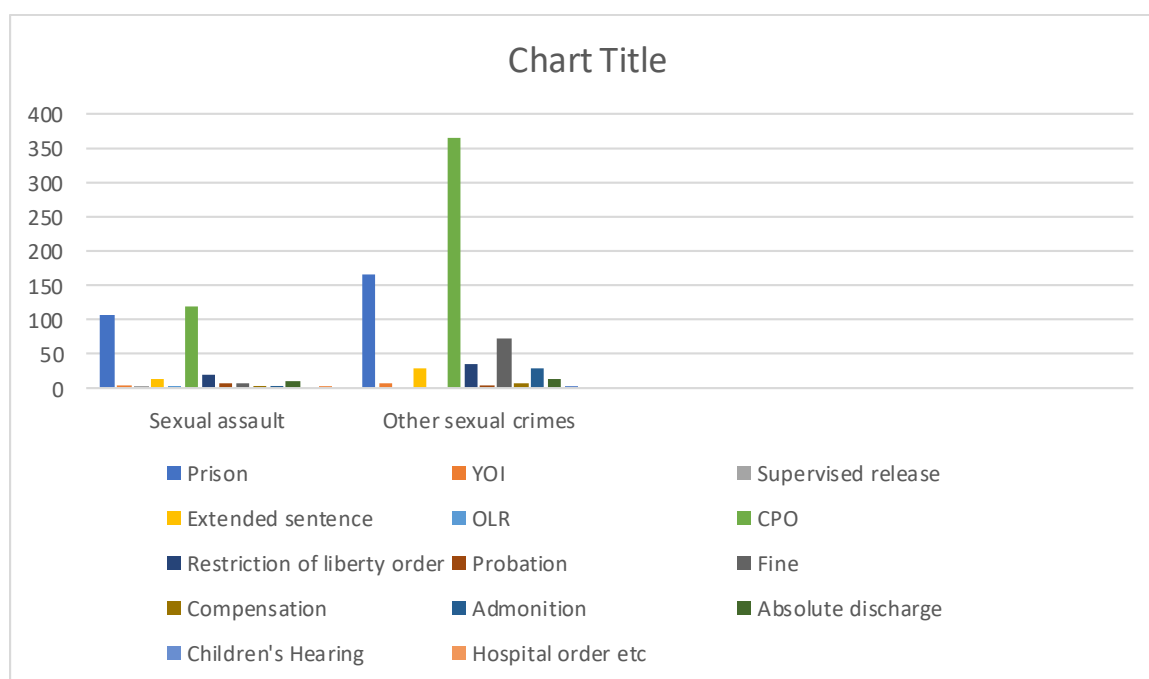


**Table 12: People convicted of other sexual crimes<sup>25</sup> who received custodial sentences between 2008-9 and 2017-18<sup>26</sup>**

	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
%	27	28	24	28	29	24	24	26	27	28
Number	100	89	92	126	168	143	167	154	180	202

For the period 2018-19 specifically, the breakdown of the main penalty type received is specified in Figure 1 below<sup>27</sup>:

**Figure 1: Main penalty type for those convicted of sexual assault and other sexual crimes<sup>28</sup> 2018-19<sup>29</sup>**



For both sexual assault and other sexual crimes, a Community Payback Order (CPO) was the most common sentence dispensed by the courts. CPOs can include unpaid work, compensation or other activity including treatment. The second most common sentence for both categories was a custodial sentence. For those who did receive

<sup>25</sup> This category does not include rape or attempted rape; these are presented separately.

<sup>26</sup> As calculated from Scottish Government., 2020. *Criminal Proceedings in Scotland 2018-19*. at tables 9 (a) and 9(b). Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/24/>> and <<https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/25/>> [Accessed 13 July 2020].

<sup>27</sup> To clarify, prison, YOI (Young Offender Institute), extended sentences and OLRs are all types of custodial sentences.

<sup>28</sup> This category excludes rape and attempted rape which are presented separately.

<sup>29</sup> As calculated from Scottish Government., 2020. *Criminal Proceedings in Scotland 2018-19*. at table 8(a). Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/21/>> [Accessed 7 July 2020].

custodial sentences, the length of these sentences are shown in Tables 13 and 14 below. It is worth noting that the data in these tables includes young offenders but excludes a small number of cases which resulted in the detention of a child under the age of 16. It also excludes OLRs on the basis that they are indeterminate.

**Table 13: Percentage of people receiving custodial sentence for sexual assault by length of custodial sentence 2018-19<sup>30</sup>**

Up to 3 months	4
Over 3 months to 6 months	8
Over 6 months to 1 year	25
Over 1 year to 2 years	36
Over 2 years to less than 4 years	31
4 years and over (including life sentences)	19

**Table 14: Percentage of people receiving custodial sentence for other sexual crimes by length of custodial sentence 2018-19<sup>31</sup>**

Up to 3 months	7
Over 3 months to 6 months	28
Over 6 months to 1 year	51
Over 1 year to 2 years	60
Over 2 years to less than 4 years	34
4 years and over (including life sentences)	22

As discussed above, a number of those convicted of sexual assault and other sexual crimes will be subject to notification requirements. Data is not available on notification requirements for each of the individual offences, but extracts of the data used by the

<sup>30</sup> As calculated from Scottish Government, 2020. *Criminal Proceedings in Scotland 2018-19*. at table 10(a). Available at: < <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/26/> > [Accessed 13 July 2020].

<sup>31</sup> Ibid.

police (the Violent and Sex Offender Register (ViSOR)) are presented in Table 15 below<sup>32</sup>:

**Table 15: Numbers of Registered Sex Offenders in Scotland, 2018 to 2019<sup>33</sup>**

Category	2018	2019
RSOs - in custody and at Liberty - on 31 March	5,371	5, 629
RSOs at liberty in Scotland on 31 March	4, 101	4, 218
RSOs at liberty managed at Level 1 on 31 March	3, 951	4, 104
RSOs at liberty managed at Level 2 on 31 March	149	112
RSOs at liberty managed at Level 3 on 31 March	1	2
RSOs reported for breaches of notification	314	303
RSOs convicted of a further group 1 or 2 crime <sup>34</sup>	51	112
RSOs wanted on 31 March	12	15
RSOs missing on 31 March	0	0

## 2.4 Limitations of official data

Currently, official data collating and reporting of criminal proceedings, convictions and sentencing is subject to a number of significant limitations which should be recognised. These limitations are not restricted to sexual offences nor are they unique to Scotland.<sup>35</sup>

Official data in Scotland and elsewhere tends to struggle to distinguish between single and multi-conviction cases. This is apparent in the Scottish Government *Criminal Proceedings* publication, a point which is relevant across all contexts.<sup>36</sup> Multi-conviction cases are likely to attract higher sentences. A further complication is the fact that sentences may be passed consecutively, concurrently or in cumulo (covering all offences in a single sentence). The representation of sentencing practices by official data tends to make relatively little distinction between single and multi-conviction cases. A question arises about how the effective sentence in a multi-conviction case should be represented. Again this limitation is shared in other countries. Where there is more than one conviction, a main, or principal, conviction is selected by an official administrative body (e.g. criminal records office), not by the sentencing court itself. Although in many cases the main conviction may be thought by the administrative body to be a self-evident, it may often be less apparent, where, for instance, there is more than one conviction which might appear to be of similar gravity. Those selecting the conviction against which the total effective sentence is to be recorded may select the conviction which receives the most severe penalty. This is the practice in Scotland.

<sup>32</sup> A request for this data was made in the Freedom of Information request made in March but it was advised by the Justice Analytical department that this was not available.

<sup>33</sup> Scottish Government., 2019. *Multi-agency public protection arrangements (MAPPA) in Scotland: national overview report 2018 to 2019*. Edinburgh: Scottish Government. at Appendix B.

<sup>34</sup> Group 1 relates to non-sexual crimes of violence and group 2 to sexual crimes.

<sup>35</sup> Tata, C., 2020. *Sentencing: A Social Process. Re-thinking Research and Policy*. Cham: Palgrave.

<sup>36</sup> See McPherson, R., and Tata, C., 2018. *Causing death by driving offences: Literature Review*. Edinburgh: Scottish Sentencing Council.

However, this raises its own difficulties. For example, multiple-conviction cases may attract different sentences. Sentences may be passed consecutively, concurrently (or in some combination of the two), or in cumulo (covering all offences in a single sentence). This can make it difficult for an administrative data body to know (and thus present) what the court perceives to be the principal conviction. As McPherson and Tata have previously observed:

“The consequence of this complex problem is that quite frequently the different gravity of different cases may not be clearly reflected in the representations made by official data about sentencing practices. Furthermore, the comparison between sentences passed for cases which may or may not have involved more than one similarly serious conviction is questionable.”<sup>37</sup>

These limitations present fundamental issues to those governmental bodies responsible for collecting and publishing such data. However, while intricate in nature, they should not be seen as a minor footnote. The consequences of these limitations are far from merely technical. They mean that the ability to describe and characterise patterns of sentencing for different kinds of cases is severely limited and the possibility that sentencing is not always accurately represented cannot be discarded. None of this should be taken as criticism of the individuals working diligently to improve the quality and presentation of official data, but it is to recognise that the ability to inform both the public and indeed professional decision-makers (including judicial decision-makers) about the typical patterns of sentencing for specific kinds of cases is currently limited. Potential solutions to such complexities have been discussed at length elsewhere.<sup>38</sup>

## 2.5 Overview of sentencing in the Scottish Court of Criminal Appeal

In terms of judicial guidance, the courts have been cautious about setting maxima. For example, in *Ahmadi*,<sup>39</sup> the appeal concerned the sentence following a conviction for rape. The court substituted the initial seven-year sentence for one with a five-year custodial term and two-year extension period. In doing so, the court noted:

“We make it clear that we are not setting down, nor are we to be taken to be setting down, any sort of minimum or indeed any sort of maximum [sentence]. We deal with this case and the circumstances of this case alone.”<sup>40</sup>

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<sup>37</sup> Ibid, at p 8.

<sup>38</sup> Tata, C., 1997. Conceptions and representations of the sentencing decision process. 24(3) *Journal of Law and Society* 395; Tata, C., 2020. (n35).

<sup>39</sup> *Ahmadi v HM Advocate*, 2016 S.C.L. 329.

<sup>40</sup> Ibid, at para 3.

Thus, the objective in *Ahmadi* appears to have been to pass a sentence that is commensurate with other similar offences rather than to set out any sentence ranges. Of course, the question then becomes how to characterise similarities between different cases. As noted above, going only by the offence itself (e.g. section 18) is not sufficient. One alternative approach is based on the seriousness of the offence as explained by Von Hirsch and Jareborg:

“Seriousness of crime has two dimensions: harm and culpability. Harm refers to the injury done or risked by the act; culpability, to the factors of intent, motive and circumstance that determine the extent to which the offender should be held accountable for the act. Both dimensions affect crime seriousness; to use familiar examples, murder is more serious than aggravated assault because the injury is greater, and it is more serious than negligent homicide because the actor's culpability is greater. The problem is to develop criteria for harmfulness and culpability that are more illuminating than simple intuition.”<sup>41</sup>

Sentencing may also be affected by whether there is a guilty plea and, if so, at what stage this is tendered in the process.<sup>42</sup> Where a guilty plea is tendered in a sexual offence case, there may be particular benefits to some victims in sparing them the ordeal of giving evidence. However, it should be noted that “some victims might actually wish to go through the ordeal of giving evidence because it gives them the opportunity to be heard.”<sup>43</sup>

A useful reference is *Collins*.<sup>44</sup> This case concerned historical offences against young and older children but offered more wide-ranging guidance. For penetrative offences aggravated by a breach of trust *Collins* suggests a possible headline sentence (the sentence which takes into account aggravating and mitigating factors of the case but does not take into account additional adjustments such as discounts as so many not be the sentence imposed in practice):

“For offences involving the rape of a complainer, or other penetrative sexual abuse of several complainers, in respect of whom the offender was in a position of trust or authority, headline sentences in the region of 8 to 10 years may be appropriate”.<sup>45</sup>

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<sup>41</sup> Von Hirsch, A., and Jareborg, N., 1991. Gauging Criminal Harm: A Living-Standard Analysis. 11 *Oxford Journal of Legal Studies* 1 at pp 2-3.

<sup>42</sup> See Gormley, J., McPherson, R., and Tata, C., (2019) *Sentence discounting: Sentencing and plea decision making*. Report produced for the Scottish Sentencing Council publication forthcoming.

<sup>43</sup> Leverick, F., 2004. Tensions and balances, costs and rewards: the sentence discount in Scotland. 8(3) *Edinburgh Law Review* 360 at p 373.

<sup>44</sup> *HM Advocate v Collins* [2016] HCJAC 102.

<sup>45</sup> *Ibid.*

The case also provided guidance on sentencing for offences against children and vulnerable persons. To the limited extent one can generalise, offences against young children will receive the highest sentences, followed by those against older children, vulnerable adults, and adults:

“A review of the case law involving rape and other sexual offences committed either in institutional settings or in other circumstances in which the accused was in a position of trust vis-à-vis the complainers discloses that significantly longer sentences have been imposed by the courts in such circumstances. In particular, sexual crimes involving children are particularly odious. Sexual abuse of children and other vulnerable persons is not acceptable in modern society. It is the responsibility of the courts to reflect that understanding.”<sup>46</sup>

Likewise, in *HM*,<sup>47</sup> the Appeal Court supported the view of the trial judge that:

“The sexual abuse of children is abhorrent and that rape stands at the most serious end of the scale of sexual offences... anyone who commits such an offence must expect to receive a significant custodial penalty whenever they are brought to justice.”<sup>48</sup>

Consequently, previous cases may prove a useful guide to sentencers. However, finding such guidance from case law can pose challenges. In the case of *Collins*, noted above, the prosecuting advocate depute was unable to find an applicable sentencing precedent.<sup>49</sup> Moreover, the role of previous cases cannot be pushed too far. In an appeal against sentence in *CH*, the court was invited to look at other disposals that had been determined by the Scottish Court of Criminal Appeal. The court noted precedent could be informative:

“We accept the potential utility of such an exercise. An objective in sentencing is consistency... Equally, what is the appropriate range of sentences in a particular case will be informed by what has been done by sentencers in similar cases on previous occasions. Regard must therefore be had to precedent, at least where it enunciates a relevant principle or demonstrates a consensus in decision-making in relation to a particular pattern of facts...”<sup>50</sup>

However, in *CH* when discussing the potential utility of previous sentences it was emphasised that while comparable, every case is also in some ways unique:

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<sup>46</sup> *Ibid*, at para 31.

<sup>47</sup> *HM v HM Advocate* [2018] HCJAC 26.

<sup>48</sup> *Ibid*, at para 3 and para 6.

<sup>49</sup> The Court did find relevant precedent. However, the difficulties are still notable.

<sup>50</sup> *HM Advocate v CH* [2017] HCJAC 71 at para 26.

“It is however to be borne in mind that the process of sentencing is case-sensitive and the facts in one case will seldom exactly conform to the facts in another case.”<sup>51</sup>

Additionally, even if a similar offence is identified, there may be multiple offences in a given case, meaning that any comparisons should be between types of cases rather than simply between singular offences voided of their context and relationship with other offences.<sup>52</sup> For example, in *Graham*<sup>53</sup> the appellant was sentenced to a total of 10 years' imprisonment based on three consecutive sentences: three years in respect of a section 2 offence, 18 months for abduction and assault, and seven years for a section 1 (rape) offence. Where there are multiple offences, it may be important to consider whether the sentences are to be served consecutively, concurrently, or cumulo – which can yield very different total effective sentences.<sup>54</sup> In this regard, the courts may give consideration to the effective sentence as a whole. For example, in *SSK*<sup>55</sup>, the Crown successfully appealed against a sentence as unduly lenient.<sup>56</sup> It was noted that:

“Had the offences in charges 13, 15, 18 and 19 [two charges of indecent assault and two anal rapes contrary to s1 of the 2009 Act] stood alone, a sentence in the region of 6 years might have been regarded as appropriate (see eg *HM Advocate v Cooperwhite* (supra) at para [15]).<sup>57</sup> However, since it is appropriate that these offences should attract a consecutive sentence to that imposed for the lewd conduct against the children, regard must be had to their cumulative effect. In such circumstances, a consecutive period of 4 years is appropriate, to produce an overall custodial element of 8 years.”<sup>58</sup>

Likewise, in *M(H)*<sup>59</sup>, the court noted that:

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<sup>51</sup> *Ibid*, at para 26.

<sup>52</sup> *Tata*, C., 2020. (n35).

<sup>53</sup> *Graham v HM Advocate* [2018] HCJAC 69.

<sup>54</sup> The courts have cautioned against the use of cumulo sentences where there may be an issue following any appeal (*HM Advocate v Collins* [2016] HCJAC 102 at para 47). See also Gordon, G.H., and Gane, C.H.W., 2014. *Renton and Brown Criminal Procedure: Volume 1*. Edinburgh: Sweet and Maxwell. at Part VII (Sentencing) pp 22-36.

<sup>55</sup> *HM Advocate v SSK* (also known as *HM Advocate v K*) [2015] HCJAC 114.

<sup>56</sup> The conviction was for sexual offences against two adults and their children. The sentence was initially a seven-year extended sentence with two years' supervision. This was substituted for a 12-year extended sentence with four years' supervision.

<sup>57</sup> *HM Advocate v Cooperwhite* [2013]HJAC 88 suggested that “although there are, as yet, no guidelines available to sentencers, the level selected in *Shearer* has undoubtedly been used by sentencers as the benchmark” (at para 19). This benchmark was three and a half years for rape in which force was not used (in the *Shearer* case the victim was unconscious or asleep, *HM Advocate v Shearer* 2003 S.L.T. 1354).

<sup>58</sup> *HM Advocate v SSK* [2015] HCJAC 114.

<sup>59</sup> *M(H) v HM Advocate* [2018] HCJAC 26.



“If these crimes had been sentenced individually, in many cases it would have been appropriate to impose sentences of four years, six years and six years. We also agree with the trial judge that a cumulative total of 16 years would have been an excessive penalty and that he was correct to impose a lower cumulative sentence”.<sup>60</sup>

To conclude, the law permits a wide variety of sentences for various offences. In turn, any given category of offence may capture wide disparities in terms of the culpability of offenders and the harm done to victims. Some jurisdictions such as England and Wales have implemented guidelines concerning sentences for sexual offences based on a matrix of harm and culpability along with a presumptive “starting point.”<sup>61</sup> The question as to whether these guidelines inform sentencing practice in Scotland is addressed below following a discussion of section 37.

### **2.5.1 Section 37 (older children engaging in sexual conduct with each other)**

In general, there is a degree of parity between the offences in each part of the 2009 Act. The notable exception is section 37 (concerning older children engaging in sexual conduct with each other). Section 37 is, perhaps, the most radical departure from the Scottish Law Commission’s recommendations. The Scottish Law Commission had suggested that consensual sexual activity between children be grounds for referral to a children’s hearing – the concern being for the child’s welfare:

“We have reconsidered our position in the light of the points raised during consultation, and we now recommend that the provisions should not apply where the parties are under 16. We wish to emphasise that these provisions deal only with conduct involving consent. There is no question of removing criminal liability for people under 16 who participate in sexual conduct with someone who does not consent to it.”<sup>62</sup>

However, despite this recommendation, and other criticism, it seems that section 37 exists primarily as a symbolic measure to communicate to children that they should not be engaged in sexual activity:

“While we agree with the SLC that there is a distinction to be drawn between such predatory sexual behaviour and consensual sexual activity, we are

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<sup>60</sup> Ibid, at para 3.

<sup>61</sup> Sentencing Council for England and Wales., 2013. *Sexual Offences Definitive Guideline*. Available at: < <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sexual-offences-definitive-guideline-Web.pdf> > [Accessed 11 March 2020].

<sup>62</sup> Scottish Law Commission., 2006. (n3) at p 75 para 5.57 citing their own comments from their earlier *Discussion Paper on the Age of Criminal Responsibility* (2001) at para 3.12.



concerned that the law should continue to make clear that society does not encourage underage sexual intercourse as it can be cause for concern for the welfare of a child, even where it is consensual”<sup>63</sup>

As such, it seems that the intention is that section 37 was intended to rely on prosecutorial discretion and be seldom used. Consequently:

“The result is that, at least theoretically, Scots law makes criminals out of significant numbers of older children involved in such [sexual] activity in Scotland. However, even though the Scottish Government legislated to create specific offences explicitly criminalising older children for their consensual behaviour, this was accompanied by the intention that the provision was to be enforced discretionally and seldom charged and where it is, this is usually in addition to other offences than as a standalone charge.”<sup>64</sup>

Indeed, it seems that the intention that section 37 would be rarely used has been borne out in practice

“Over the seven year period following section 37 coming into force, there were, on average, nineteen to twenty charges reported to the COPFS each year. The most common action taken, in relation to sixty-four of the 137 charges, was a referral to the Children's Reporter. Court proceedings were the second most common outcome with thirty-two of the charges resulting in that outcome.”<sup>65</sup>

As Table 10 above shows, there were be only two convictions in which an offence under section 37 was the only charge. This dearth of section 37 offences means that there is little guidance on sentencing for these offences.

## 2.5.2 Indecent assault

When considering the retention of indecent assault as a common law crime, the Scottish Law Commission were of the view that keeping the offence in place would

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<sup>63</sup> Scottish Government., 2008. *Sexual Offences (Scotland) Bill Policy Memorandum*. at para 110. Available at :

<[https://www.parliament.scot/S3\\_Bills/Sexual%20Offences%20\(Scotland\)%20Bill/b11s3-intro-pm.pdf](https://www.parliament.scot/S3_Bills/Sexual%20Offences%20(Scotland)%20Bill/b11s3-intro-pm.pdf)> [Accessed 11 March 2020].

<sup>64</sup> Callander, I., 2019. Regulating consensual sexual behaviour between older children: the case against the current approach under the Sexual Offences (Scotland) Act 2009. 23(2) *Edinburgh Law Review* 177.

<sup>65</sup> Ibid, at p.184. See also, *Lord Advocate's Guidelines to Chief Constables: Reporting to Procurators Fiscal of Offences Alleged to have been Committed by Children: Revised Categories of Offence which Require to be Jointly Reported*. Available at: <[https://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Lord\\_Advocates\\_Guidelines/Lord%20Advocates%20Guidelines%20offences%20committed%20by%20children.pdf](https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Lord_Advocates_Guidelines/Lord%20Advocates%20Guidelines%20offences%20committed%20by%20children.pdf)> [Accessed 14 July 2020].

allow for the availability of adequate charges to capture conduct that may not be covered by the 2009 Act.<sup>66</sup> Table 4 above shows that the offence continues to have relevance since the introduction of the 2009 Act. At the time of writing the most recent appeal concerning indecent assault is *Afzal*.<sup>67</sup> This case concerned charges of rape and indecent assault occurring in 2010 - for which the sentence was one of seven years in custody.

However, despite the ongoing relevance of indecent assault, many offences that would have been charged as common law indecent assault are now charged under section 3 or other sections of the 2009 Act. For example, in *Hay*<sup>68</sup> the court noted there could be advantages to charging under the 2009 Act as a specific list offence. The issues in *Hay* concerned questions of fair notice and whether the offence libelled had a significant sexual aspect for the purposes of the Sexual Offences Act 2003 Schedule 3, paragraph 60:

“These appeals raise a difficult question in relation to the application of paragraph 60. When charged with a specific list offence the accused will know from the libel itself that he will be subject to registration if convicted. In a case under paragraph 60, however, it may not be apparent to the accused that the question of there being a significant sexual aspect may arise. The problem is typically encountered in the following ways. Where it is alleged that the accused has touched the complainer inappropriately, the Crown may charge that species facti as indecent assault, or since 1 December 2010 as a sexual assault (Sexual Offences (Scotland) Act 2009, s 3), or as a simple assault or as a breach of the peace. Where it is alleged that the accused has exposed himself in public, the Crown may charge that species facti as a statutory offence under by-laws; or as public indecency.”<sup>69</sup>

Likewise, in *Heatherall v McGowan*<sup>70</sup> (heard with *Hay*) the court noted the potential benefits of charging under the 2009 Act for similar cases in the future:

“Section 8 of the 2009 Act is a specific list offence in the sense in which I have used that expression in *Hay v HM Adv*. If the Crown were to consider, in a case of this kind, that the exposure was sexual in nature, it could avoid the issue that has arisen in this appeal by charging the accused under section 8.”<sup>71</sup>

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<sup>66</sup> Scottish Law Commission., 2006. (n3).

<sup>67</sup> *Afzal v HM Advocate* [2013] HCJAC 103.

<sup>68</sup> *Hay v HM Advocate* [2012] HCJAC 28.

<sup>69</sup> Paragraph 60 enables the court (when sentencing or otherwise disposing of an offence not listed in paragraphs 36 to 59ZL) to subject an offender to notification requirements of the 2003 Act.

<sup>70</sup> [2012] HCJAC 25.

<sup>71</sup> This issues in this appeal concerned questions of fair notice and whether the offence libelled had a significant sexual aspect for the purposes of the Sexual Offences Act 2003, schedule 3 para.60.

Thus, it seems that there is likely a preference for charging under the 2009 Act where possible. Where there is uncertainty regarding the date of an offence and whether the 2009 Act was in effect at the time, section 53 provides for continuity by enabling a conviction for whichever of the “new” (2009 Act) or the “existing” (pre-2009 Act) offences has the lower maximum penalty. Where the maximum penalties are the same, or the new offence has a lower maximum penalty, conviction is to be for the new offence.

### 2.5.3 Historical and common law offences

Most common law sexual offences were abolished by the Sexual Offences (Scotland) Act 2009. However, common law sexual offences are still crucial in the Scottish criminal process due to the reporting of historical offences (i.e. cases reported to the police or prosecuted some years after the date of offence, and which may pre-date the 2009 Act) currently being prosecuted in Scotland that pre-date the 2009 Act. Furthermore, as outlined, the common law offence of indecent assault still exists and continues to have relevance amongst convictions for sexual offences.

There is no statute of limitations in Scotland. An offence committed in the past can be prosecuted at any time in the future. There has been a significant number of historical sexual offences coming before the courts in recent years. There may be various reasons for this trend, including “greater confidence on the part of those abused that their accounts will be listened to by the police following the successful outcome of cases, including historical crimes.”<sup>72</sup> However, a discussion of this is beyond the scope of the present review.

While the number of historical cases charged that pre-date the 2009 Act may decrease over time, at present “the issue of historical reporting of sexual crime also continues to play a role in the latest statistics.”<sup>73</sup> Official figures show that in the latest reporting period for which data are available (2018-19), there were 288 offences of sexual assault recorded by the police where the incident alleged occurred prior to 1 December 2010. There were also 1194 recorded incidents of lewd and libidinous practices. Thus, of the 5123 sexual assaults recorded by the police, 1482 (about 30%) pre-date the 2009 Act.

Sentencing depends on the facts of the case. However, historical cases raise particular questions. One question, in light of potential changes to the law and policy,

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<sup>72</sup> Inspectorate of Prosecution in Scotland., 2007. *Thematic Review of the Investigation and Prosecution of Sexual Crimes*. at p 3. Available at: <  
<https://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2017/11/thematic-review-investigation-prosecution-sexual-crimes/documents/00527738-pdf/00527738-pdf/govscot%3Adocument/00527738.pdf>> [Accessed 14 July 2020].

<sup>73</sup> Scottish Government, 2019. *Recorded crime in Scotland: 2018-2019*. at p.36. Available at: <  
<https://www.gov.scot/publications/recorded-crime-scotland-2018-19/>> [Accessed 27 March 2020].

is whether the court ought to sentence the offender according to contemporary standards or those at the time of the commission of the offending.

As noted, offences that pre-date the 2009 Act are (subject to section 53)<sup>74</sup> be charged under the legal framework that existed at the time that the offence was committed. This is compliant with the rights of the accused and Article 7 of the European Convention on Human Rights. As such, sentences for historical offences are limited to the maximum at the time the crime was committed. However, within this maximum, the courts may follow a contemporary approach to sentencing. For historical sexual offences, this may mean an increased sentence compared to what would have been imposed if the offender were sentenced nearer the time when the crime was committed. For example, regarding sexual offences against children, the court in *SSK* noted the primacy of contemporary sentencing practice:

“In the modern era, even for an offender with no analogous previous convictions, a custodial sentence of at least 4 years would be appropriate for such lewd practices...”<sup>75</sup>

A contemporary view of sentencing may include having regard to any subsequently implemented guidelines. Such an approach appears to have been taken in England and Wales:

“In principle, the defendant must be sentenced in accordance with the sentencing regime applicable at the date of sentence. Nevertheless as the offence he committed years earlier contravened the criminal law in force at the date when it was committed, he is liable to be convicted of that offence and no other, therefore the sentence is limited to the maximum sentence then available for the offence of which he has been convicted. Changes in the law which create new offences, or increase the maximum penalties for existing offences do not apply retrospectively to crimes committed before the change in the law. In short, the offence of which the defendant is convicted and the sentencing parameters (in particular, the maximum available sentence) applicable to that offence are governed not by the law at the date of sentence, but by the law in force at the time when the criminal conduct occurred.”<sup>76</sup>

In terms of sentencing historical offences in Scotland, one case of note in this regard is *Collins*, where the court stated that:

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<sup>74</sup> Section 53 enables, in some circumstances, for a conviction under the 2009 Act where there is a failure to establish beyond reasonable which provision was in force at the time of the offending behaviour.

<sup>75</sup> *HM Advocate v SSK* [2015] HCJAC 114 at para 24.

<sup>76</sup> *R v H* [2011] EWCA Crim 2753 at para 16, drawing on the dicta of the well known case of *R. v Millberry (William Christopher)* [2002] EWCA Crim 2891, [2003] 1 W.L.R. 546, [2002] 12 WLUK 212.

“The authorities appear to suggest that the appropriate ranges of sentence for sexual offences committed whilst in a position of trust and/ or authority are as follows. For offences comprising historic charges of lewd and libidinous practices involving, for example, digital penetration or attempted sodomy, or offences involving indecent assault over a prolonged period of time, headline sentences of at least 4 years' imprisonment (and possibly more) up to headline sentences in the region of 9 years will be appropriate...”<sup>77</sup>

In addition to noting positions of trust or authority as aggravating factors, the court went on to discuss other factors that may affect the sentence:

“In particular, the degree of abuse, including the nature and extent of any inappropriate penetration, will be relevant to sentence, as will the number of victims, the number of occasions on which the abuse occurred, and the length of the period over which it occurred...The degree of harm, including the psychological harm, caused by the abuse is relevant. A further important consideration is the violation of the complainant's physical and psychological integrity...”<sup>78</sup>

Thus, it seems that when sentencing for historical offences courts will use a contemporary approach subject to any maxima that may have existed previously. However, where the offender was young at the time of committing the offence, their culpability may be reduced,<sup>79</sup> and their risk of reoffending may be deemed low if they have not reoffended. Moreover, where guidelines are given in an appeal, these are not typically applied retrospectively to the decision of that appeal.<sup>80</sup>

## 2.6 The Sentencing Council for England and Wales

The Sentencing Council for England and Wales has published a definitive guideline for sentencing in sexual offence cases including sexual assault in 2014. Sexual assault by penetration is an offence triable only on indictment, carries a maximum sentence of life imprisonment, and has a sentencing range which runs from a community order to 19 years' custody.<sup>81</sup> For sexual penetration of children under 13, the sentencing range is raised to 2-19 years' custody.<sup>82</sup> Simple sexual assault is triable either way, has a maximum sentence of 10 years and a sentencing range of a community order

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<sup>77</sup> *HM Advocate v Collins* [2016] HCJAC 102.

<sup>78</sup> *Ibid*, at para 40.

<sup>79</sup> See *Greig v HM Advocate* [2012] HCJAC 127.

<sup>80</sup> Gordon, G.H., and Gane, C.H.W., 2014. (n57) at para 22-17.2.

<sup>81</sup> Sentencing Council for England and Wales., 2013. (n61) at p 13.

<sup>82</sup> *Ibid*, at p 33.

to 7 years' custody.<sup>83</sup> Where the victim is a child under 13, the maximum sentence is raised to 14 years and the sentence range is a community order to 9 years' custody.<sup>84</sup>

As mentioned, the guidelines in England and Wales prescribe numerical sentences following a 9-step process, unlike those in Australia which instead list guideline judgements. Firstly, judges must determine the alphanumeric offence category: categories 1-3 involve decreasing levels of harm, based on factors such as severe physical or psychological harm; penetration using large or dangerous objects; abduction; humiliation; violence; forced entry into the victim's home; prolonged duration; the vulnerability of child victims; and whether the offence involved touching a child's naked genitalia or breast area.<sup>85</sup> Categories A and B relate to the offender's culpability, based on the degree of planning; the number of offenders; the victim's intoxication; abuse of trust; previous violence against the victim; recording of the offence; whether it was committed during a burglary; and whether it was commercially or racially/otherwise discriminatorily motivated/aggravated.<sup>86</sup>

Secondly, a headline sentence and category range is identified. The most serious instances of sexual assault by penetration (category 1A) attract a headline sentence of 15 years with a 13-19 year range<sup>87</sup> (16-year headline sentence where the victim is a child under 13)<sup>88</sup> whereas the least serious (category 3B) carry a headline sentence of 2 years with a range of a high level community order to 4 years' custody<sup>89</sup> (4-year headline sentence with a 2-6 year range where the victim is a child under 13).<sup>90</sup>

The most serious instances of sexual assault (category 1A) attract a 4-year headline sentence with a range of 3-7 years. The least serious (category 3B) have a high level community order as the headline sentence, with a range of a medium level community order to 16 weeks' custody.<sup>91</sup> Where the victim is under 13, the most serious offences have a 6-year headline sentence of a 4-9 year range, and the least serious have a 26 weeks' custody headline sentence, with a range of a high-level community order to 1 year imprisonment.<sup>92</sup>

The guidelines provide a further, non-exhaustive list of aggravating/mitigating factors which judges can consider when adjusting the headline sentence.<sup>93</sup> Aggravations include, *inter alia*, recent and relevant previous convictions; committing the offence on bail; the presence of children; steps taken to prevent the victim reporting the incident;

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<sup>83</sup> Ibid, at p 17.

<sup>84</sup> Ibid, at p 37.

<sup>85</sup> Ibid, at pp 15, 18, 34 and 38.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid, at p 15.

<sup>88</sup> Ibid, at p 35.

<sup>89</sup> Ibid, at p 15.

<sup>90</sup> Ibid, at p 35.

<sup>91</sup> Ibid, at p 19.

<sup>92</sup> Ibid, at p 39.

<sup>93</sup> Ibid, at pp 15, 19, 35 and 39.



and attempts to conceal evidence. Mitigations include remorse, previous good character, age/lack of maturity and mental disorder. However, the more serious the offence, the less weight is attached to the offender's previous good character.

Steps 3 and 4 relate to factors indicating a reduction, namely assistance to the prosecution and guilty pleas. Step 5 requires the judge to consider dangerousness, and whether it would be appropriate to impose a life or extended determinate sentence. Step 6 relates to the totality principle, which requires that 'the total sentence is just and proportionate to the offending behaviour'.<sup>94</sup> The final three steps involve the consideration of creating ancillary orders, giving reasons for the sentence, and consideration for time spent on bail, respectively.

The Sentencing Council published an impact assessment of the Sexual Offences Definitive Guideline in 2018.<sup>95</sup> When the guideline was introduced, prescribed sentences generally conformed to sentencing practice at the time.<sup>96</sup> The research found that sentencing severity for sexual offences had been increasing over the preceding decade, and this trend continued following the introductions of the guidelines in 2014.<sup>97</sup> In 2005, the average custodial sentence for sexual assault by penetration was 4 years 5 months. This increased to 5 years 3 months in 2013, and 6 years 3 months in 2014/15.<sup>98</sup> However, there was "no strong statistical evidence that the guideline caused a change in sentencing practice for this offence".<sup>99</sup> In sexual assault cases, "in the 12 months after the guideline came into force, there was a shift to more severe disposals [suggesting] that the guideline may have increased sentencing severity for this offence, which was not anticipated in the resource assessment".<sup>100</sup>

Some judges thought that the sentencing ranges for sexual assault were good, though 'others thought that they produced sentences that were sometimes too low or too high'.<sup>101</sup> The research also suggested that the inclusion of 'threats of violence' in the category 1 harm factors "may have contributed to the increase in sentencing severity for [sexual assault]".<sup>102</sup> In the context of some other sexual offences, concerns were

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<sup>94</sup> Ibid, at pp 16, 20, 36 and 40.

<sup>95</sup> Carline, A., Palmer, E., Burton, M., and Kyd, S., 2018. *Assessing the Implementation of the Sentencing Council's Sexual Offences Definitive Guideline*. Available at: <  
<https://www.sentencingcouncil.org.uk/wp-content/uploads/Sex-offences-guideline-assessment.pdf> >  
[Accessed 27 March 2020]

<sup>96</sup> Ibid, at p 4.

<sup>97</sup> Ibid, at p 10.

<sup>98</sup> Ibid, at p 14.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid, at p 15.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid, at p 16.

raised about the difficulty of establishing what constitutes sufficient psychological harm,<sup>103</sup> and how to define ‘abuse of trust’.<sup>104</sup>

The definitive guidelines in England and Wales concerning sexual offences may be informative in various regards. The courts have suggested that it would be unusual if similar offences attracted vastly different sentences. Moreover, the courts have indicated that the English and Welsh Guidelines can operate as a “cross-check” - though they should not be applied too rigidly. In *B*,<sup>105</sup> it was noted that:

“The Sexual Offences Definitive Guideline is a useful comparator from a neighbouring jurisdiction, but one which should not be applied too rigidly...It must be borne in mind that in England and Wales there are statutorily defined sentencing purposes ( Criminal Justice Act 2003, s 142 ) which are not directly applicable in Scotland. Nevertheless, the relevant sentencing range is a matter with which a sentence selected in Scotland might be cross-checked to see if any major disparity appears.”<sup>106</sup>

This view was affirmed in *Scottish Power Generation Ltd v HM Advocate*.<sup>107</sup> However, cases such as *Sutherland*<sup>108</sup> and *Milligan*<sup>109</sup>, have only supported the guidelines from England and Wales as a cross-check and they have not endorsed a mechanistic application:

“We caution against too rigid an application of the English sentencing guidelines. They are not to be applied even in England in mechanistic fashion and it must be borne in mind that those guidelines in England are to be understood in a different sentencing regime from the Scottish sentencing regime.”<sup>110</sup>

Yet, it should be noted that since these cases, Scotland now has its own guidelines on the principles and purposes of sentencing.<sup>111</sup> It remains to be seen how this will affect the application of cross-checks from neighbouring jurisdictions. It is possible that, to the extent that the principles and purposes of sentencing are similar in both jurisdictions, the cross-check will remain useful. However, as Scotland continues to generate its own guidance, it is also possible that there will be less utility in drawing on other jurisdictions’ guidelines.

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<sup>103</sup> Ibid.

<sup>104</sup> Ibid, at p 19. See also *R v Forbes* [2016] EWCA Crim 1388.

<sup>105</sup> *HM Advocate v B* [2015] HCJAC 106.

<sup>106</sup> Ibid, at para 13.

<sup>107</sup> [2016] HCJAC 99.

<sup>108</sup> *Sutherland v HM Advocate* [2015] HCJAC 115 at para 8.

<sup>109</sup> *Milligan v HM Advocate* [2015] HCJAC 84.

<sup>110</sup> Ibid, at para 5.

<sup>111</sup> Scottish Sentencing Council., 2018. *Principles and purposes of sentencing: Sentencing guideline*. Available <<https://www.scottishsentencingcouncil.org.uk/media/1927/guideline-principles-and-purposes-of-sentencing.pdf>> [Accessed 9 June 2020].



## 3.0 Culpability

Factors the courts may consider when determining a sentence include the culpability of the offender and the harm done to the victim(s). As such, questions of harm and culpability will be intrinsic to the sentencing process. Harm is assessed based on a number of elements, including those specific to the victim.<sup>112</sup> Culpability is also assessed based on several factors such as whether: the offender was in a position of trust, the offender's previous conduct/offences, the offender's intentions, whether the offence was recorded,<sup>113</sup> etc. The guidelines in England and Wales note that culpability may be affected by:<sup>114</sup>

- Significant degree of planning
- Offender acting together with others to commit the offence
- Use of alcohol/drugs on victim to facilitate the offence
- Abuse of trust
- Previous violence against victim
- Offence committed in course of burglary
- Recording of the offence
- Commercial exploitation and/or motivation
- 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) or transgender identity (or presumed transgender identity)
- Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)

Some factors affecting culpability can be contentious. For example, in the past, it seems that "relationship rape" was considered less serious. In Scotland it is now well established that most rapes are committed by men against women known to them<sup>115</sup> with the relationship between rape and domestic abuse now widely recognised in law and society.

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<sup>112</sup> In the case of sexual offences there is the potential harm of a sexually transmitted disease. In various jurisdictions this has been deemed to be an aggravating factor: e.g. *R. v Baker (Carl)* [2004] EWCA Crim 715.

<sup>113</sup> *HM Advocate v H* [2017] HCJAC 82.

<sup>114</sup> Sentencing Council for England and Wales., 2013. (n61) at p 9.

<sup>115</sup> The Scottish Crime and Justice Survey found that 83 per cent of those who had experienced serious sexual assault since the age of 16 knew the offender in some way, and 54 per cent reported that the perpetrator was their partner, Scottish Government., 2014. *Scottish Crime and Justice Survey 2012-13: Sexual Victimization and Stalking*, at 'Serious Sexual Assault statistics'. Available at: <<https://www2.gov.scot/Publications/2014/06/3479> Accessed 29> [Accessed 29 March 2020].

### 3.1 Age

The discussion of section 37 of the 2009 Act shows there are complicated questions concerning children and (sexual) offending which make age a factor particularly relevant in this context. At present, the Scottish Sentencing Council is working on guidelines relating to the sentencing of young persons.<sup>116</sup> These draft guidelines, along with previous caselaw, would suggest that youth makes an offender “less blameworthy than an adult.”<sup>117</sup> For example, in *McCormick* the need to consider young persons differently was recognised:

“These considerations [regarding young person’s development] are relevant to the retributive and deterrent aspects of sentencing, in that they indicate that the great majority of juveniles are less blameworthy and more worthy of forgiveness than adult offenders. But they also show that an important aim, some would think the most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity... It is important to the welfare of any young person that his need to develop into fully functioning, law abiding and responsible member of society is properly met. But that is also important for the community as a whole, for the community will pay the price, either of indefinite detention or of further offending, if it is not done.”<sup>118</sup>

Currently under Scottish procedure, a person may be a statutory child for the purposes of the Criminal Procedure (Scotland) Act 1995 if they are between the ages of 16 and 18 and subject to a compulsory supervision order in terms of the Children's Hearings (Scotland) Act 2011.<sup>119</sup> Moreover, where an adult is sentenced for offences committed whilst a child “that sentence must take into account his age, and hence relative immaturity, at the time of the offences”.<sup>120</sup>

### 3.2 Consent and culpability

Culpability can be linked to the question of consent.<sup>121</sup> Consent (or the lack thereof) may also affect the harm and distress caused to victims. The way consent is used in the 2009 Act aims to safeguard the sexual autonomy of individuals and protect certain groups where consent is problematic. For example, various forms of sexual behaviour

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<sup>116</sup> Scottish Sentencing Council. *Sentencing of young people guideline: Draft Guideline*. Available at: <<https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/guidelines-in-development/sentencing-of-young-people-guideline/>> [Accessed 27 March 2020].

<sup>117</sup> *McCormick v HM Advocate* [2016] HCJAC 50.

<sup>118</sup> *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51 at para 25.

<sup>119</sup> See *HM Advocate v O'D* [2019] HCJAC 3.

<sup>120</sup> *Greig v HM Advocate* [2012] HCJAC 127 at para 11.

<sup>121</sup> See Part 2 of the 2009 Act and the importance attached to “free agreement” and “circumstances in which conduct takes place without free agreement.”

between adults are not criminal as long as there is consent. However, for young children, there are strict liability defences where consent is irrelevant to the criminality of the conduct (though still relevant to sentencing).

Regarding adults who are generally capable of consenting, the importance that consent be given can be seen in sections 14 and 15. The effect of these sections is that consent cannot be assumed, and this is highlighted in the case of *GW*.<sup>122</sup> Here the accused argued that his conduct was not contrary to section 1 (rape) of the 2009 Act. The argument was that the victim had given prior consent to sexual intercourse (in this case while asleep). The accused averred this prior consent existed on the basis of previous conduct. The court was unequivocal in its dismissal of the appeal, and emphasised that:

“Section 15 is clear that consent to conduct does not of itself imply consent to any other conduct. Thus, the fact that consensual conduct of the same type has happened before will not, at least on its own, constitute consent to the same conduct occurring at a different time.”<sup>123</sup>

Likewise, the court emphasised that an individual cannot consent while unconscious and that consent cannot be given in advance:

“Section 14 is equally clear in its statement that a person cannot consent to conduct whilst she is asleep or unconscious. This too is unambiguous. It means what it says. A sleeping person is not capable of consenting. Therefore, given that the consent must be given at the time, sexual conduct which occurs when the person is in that state is criminal. It cannot be consented to at a remote point in advance.”<sup>124</sup>

Thus, while many adults may be generally capable of consenting, it is incumbent upon each party to ensure the other has given valid consent. Moreover, as noted, section 17<sup>125</sup> makes special provision for adults who are “deemed to be incapable of consent.”<sup>126</sup> This provision aims to protect while not infringing autonomy:

“The challenge in making provision for sexual activity with people with mental disorder is to recognise the rights of those persons to engage in sexual activity and promote their sexual autonomy as far as possible. This aim must be balanced with the need to protect vulnerable persons from sexual exploitation

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<sup>122</sup> *GW v HM Advocate* [2019] HCJAC 23.

<sup>123</sup> *Ibid*, at para 28.

<sup>124</sup> *Ibid*, at para 29.

<sup>125</sup> Section 46 creates the offence of sexual abuse of trust of a mentally disordered person. The other sexual offences committable against adults continue in the 2009 Act apply where the victim has a mental disorder.

<sup>126</sup> *W v HM Advocate* (also known as *CW v HM Advocate*) [2016] HCJAC 44 at para 26.

and to recognise that in certain situations mental disorder may act as a barrier to meaningful understanding of, and valid consent to, sexual activity.”<sup>127</sup>

Where there is no legally valid consent, then a criminal offence may be committed<sup>128</sup>. The extent to which the offender may have a reasonable basis for (or was reckless in) erroneously believing there was consent is something that may affect either criminal liability and culpability.

## 4.0 Public perceptions of sentencing in cases involving sexual assault

This section discusses the evidence of public perceptions surrounding sentencing for sexual offences and explores the factors and attitudes driving sentencing expectations. Attention is given to the public’s views on: the purposes of sentencing; aggravating/mitigating factors and the relative weight that should be attached to these factors; general sentencing practice for sexual offences; and suggested case-specific appropriate sentences. Victim perceptions of the sentencing process are also considered.

It is important to note that, generally speaking, research on public perceptions of sentencing has found that there is a widespread perception that criminal sentences are too lenient. The seriousness of crime tends to be over-estimated in terms of violence especially. Views of leniency are often informed by high profile, very serious cases, rather than the daily working of courts, which most people are unfamiliar with. There is, however, support for proportionality in sentencing.

### 4.1 Perceptions in a UK context

The Scottish Sentencing Council published a report in 2019 (‘the SSC report’) on public perceptions of sentencing.<sup>129</sup> In descending order of importance, respondents said that public protection, rehabilitating offenders and punishing crime should be the priority of sentencing.<sup>130</sup> However, when sentencing young offenders, the most important consideration was rehabilitating offenders, followed by public protection and

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<sup>127</sup> Scottish Law Commission., 2006. (n3) at p 81 para 5.80.

<sup>128</sup> This is not guaranteed. For example, defences may be applied successfully such as the proximity of age defence which relates to section 37.

<sup>129</sup> Black, C., Warren, R., Ormston R., and Tata, C., 2019. *Public Perceptions of Sentencing: National Survey Report*. Scottish Sentencing Council. Available at:

<<https://www.scottishsentencingcouncil.org.uk/media/1996/20190902-public-perceptions-of-sentencing-report.pdf>> [Accessed 21 March 2020].

<sup>130</sup> Ibid.

punishing crime.<sup>131</sup> Over a third of respondents thought 16 was the appropriate age at which an offender should be sentenced as an adult.<sup>132</sup> Rehabilitative notions were shared by respondents to the 2017/18 Scottish Crime and Justice Survey (SCJS), who generally thought that custodial sentences should facilitate prisoners in addressing problem behaviours.<sup>133</sup> In a 2012 Sentencing Council for England and Wales report on attitudes to sentencing sexual offences, the purposes of sentencing included public protection; punishment; acknowledgement of the harm/seriousness of the offence; symbolic condemnation of the conduct; and rehabilitation/the prevention of repeat offending.<sup>134</sup> Support for this latter purpose of rehabilitation was associated with assumptions that treatment is widely available in prisons, whereas this is often not the case.<sup>135</sup>

Respondents in the SSC report indicated that significant previous convictions; the involvement of multiple victims or incidents; and premeditation should generally result in an increased sentence. When asked about offenders specifically, drugging the victim's drink and a lack of remorse were regarded as aggravations.<sup>136</sup> Conversely, over three quarters thought that an offender's genuine remorse should not alter the sentence,<sup>137</sup> and over half felt that a guilty plea should make no difference to sentences generally.<sup>138</sup> Reservations surrounding guilty plea sentence discounts for sexual offenders were held among participants in the 2012 Sentencing Council for England and Wales report.<sup>139</sup> Aggravating factors in this report reflected those in the SSC report, but also included the age/vulnerability of the victim (including young, elderly and disabled victims); the use of weapons/torture;<sup>140</sup> abduction/detention; and the production/distribution of images of the offence.<sup>141</sup> Participants held the view that the absence of aggravating factors should not mitigate.<sup>142</sup>

Participants in the Sentencing Council for England and Wales *Attitudes to Sentencing Sexual Offences Report* were reluctant to suggest mitigating factors. They thought that the offender's good character and youth should not reduce the sentence, except where

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<sup>131</sup> Ibid.

<sup>132</sup> And the average age across all respondents was 16.74 years, Black, C., Warren, R., Ormston R., and Tata, C., 2019. (n 129) at p 18.

<sup>133</sup> Scottish Government., 2019. *The Scottish Crime and Justice Survey 2017-2018: Main Findings*. at p 84. Available at: < <https://www.gov.scot/news/scottish-crime-and-justice-survey-2017-18/> > [Accessed 21 March 2020].

<sup>134</sup> McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. *Attitudes to Sentencing Sexual Offences*. Sentencing Council of England and Wales. at iv. Available at: <[https://www.sentencingcouncil.org.uk/wp-content/uploads/Attitudes to Sentencing Sexual Offences web1.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Attitudes_to_Sentencing_Sexual_Offences_web1.pdf)> [Accessed 21 March 2020].

<sup>135</sup> Ibid, at p 29.

<sup>136</sup> Black, C., Warren, R., Ormston R., and Tata, C., 2019. (n129) at pp 16 and 32.

<sup>137</sup> Ibid, at p 32.

<sup>138</sup> Ibid, at p 16.

<sup>139</sup> McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n 134) at p 55.

<sup>140</sup> Although it was felt that violence which resulted in grievous bodily harm should be sentenced separately and served consecutively.

<sup>141</sup> McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n134) at pp 50-54.

<sup>142</sup> Ibid, at p viii.

a young offender was acting under duress.<sup>143</sup> Popular opinion in the USA appears to be that juvenile sexual offenders should be treated as adults.<sup>144</sup> The only mitigation with broad support in the report was the mental capacity/health of the offender, but this was felt to legitimise changes only to the nature of the sentence (with increased emphasis on treatment) rather than the sentence duration.<sup>145</sup>

In both the SSC and Sentencing Council for England and Wales reports, respondents attached far more weight to aggravating factors than to mitigating factors.<sup>146</sup> This was also observed in an Australian study of juror sentencing perceptions.<sup>147</sup> However, in contrast to the findings from England and Wales, approximately half of the Australian jurors thought that the offender's remorse and youth were legitimate mitigations, and 70% thought that the offender's good character should be a mitigating factor.<sup>148</sup>

When asked in general, abstract terms, the majority-held public perceptions in Scotland,<sup>149</sup> the wider UK,<sup>150</sup> the USA<sup>151</sup> and Australia<sup>152</sup> are that judges are too lenient. Studies also indicate that public perceptions of judicial leniency are even more pronounced in sexual offence cases. In the 2017/18 Scottish Crime and Justice Survey 38% of respondents thought that the criminal justice system generally gives appropriate sentences and in the SSC report this figure was 31% of respondents.<sup>153</sup> However, only 25% of participants in the SSC report thought that the offender in a hypothetical sexual assault case would get an appropriate sentence.<sup>154</sup> Similarly, whereas 70% of respondents in an English and Welsh survey thought sentences are

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<sup>143</sup> McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012 (n134) at pp 56 and viii.

<sup>144</sup> See generally: Miller, R.N., and Applegate, B.K., 2005. Adult Crime, Adult Time? Benchmarking Public Views on Punishing Serious Juvenile Felons. 40(2) *Criminal Justice Review* 151.

<sup>145</sup> McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n134) at p viii.

<sup>146</sup> Black, C., Warren, R., Ormston R., and Tata, C., 2019. (n129) at p 32; McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n134) at p 57.

<sup>147</sup> Warner, K., Davis, J., Spiranovic, C., Cockburn, H., and Freiberg, A., 2017. Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study. 19(2) *Punishment and Society* 180 at p 191.

<sup>148</sup> Ibid, at p 192. However, these were across all offences: rape-specific mitigations are not disseminated in the study.

<sup>149</sup> Black, C., Warren, R., Ormston R., and Tata, C., 2019. (n 129) at p 12.

<sup>150</sup> Hough, M., Radford, B., Jackson, J., and Roberts, R.J., 2013. *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales*. at p 23. Available at: <[http://eprints.lse.ac.uk/50440/1/Jackson\\_Attitudes\\_sentencing\\_trust\\_2013.pdf](http://eprints.lse.ac.uk/50440/1/Jackson_Attitudes_sentencing_trust_2013.pdf)> [Accessed 21 March 2020].

<sup>151</sup> See generally: Cohen, M.A., Rust, R.T., and Steen, S., 2002. *Measuring Public Perceptions of Appropriate Prison Sentences*. NCJRS. Available at: <<https://www.ncjrs.gov/pdffiles1/nij/grants/199364.pdf>> [Accessed 14 July 2020].

<sup>152</sup> Mackenzie, G., Spiranovic, C., Warner, K., Stobbs, N., Gelb, K., Indermaur, D., Roberts, L., Broadhurst, R., and Bouhours, T., '2012. Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinion Towards Sentencing. 45(1) *Australian and New Zealand Journal of Criminology* 45.

<sup>153</sup> Scottish Government., 2019. (n133) at p 82.

<sup>154</sup> Black, C., Warren, R., Ormston R., and Tata, C., 2019. (n 129) at p 34.



generally too lenient, 76% thought that rape sentences and 80% thought that sentences for offences involving indecent images of children are too lenient.<sup>155</sup>

Respondents in the 2012 Sentencing Council for England and Wales report raised overarching concerns that sentences do not reflect the actual time spent in custody as offenders are released on licence half way through their sentence; sentences do not reflect the seriousness, harm or duration of the offence; and that concurrent sentences fail to take into account the harm inflicted to each victim on each occasion.<sup>156</sup>

Restriction orders (which prevent sexual offenders from approaching or having contact with their victim) were supported in the Sentencing Council for England and Wales *Attitudes to Sentencing Sexual Offences Report*.<sup>157</sup> Furthermore, there is wide public support in English-speaking common law countries for sex offender registration to complement sentences, despite public scepticism of the efficacy of such measures.<sup>158</sup> Generally, custodial sentences were thought appropriate for sexual offences in the Sentencing Council for England and Wales *Attitudes to Sentencing Sexual Offences Report*.<sup>159</sup> Studies in the USA have indicated that 90% of Americans support custodial sentences for the sexual assault of an adult,<sup>160</sup> and there appears to be significant public support for the capital punishment of 'those who sexually molest a child'.<sup>161</sup>

More recently, together with Rachel McPherson and Cyrus Tata, Scotcen conducted research in Scotland into public perceptions sentencing in cases involving all sexual offences.<sup>162</sup> The aim of this research was to explore, in depth, public perceptions of sexual offences sentencing in Scotland, including the perceptions of victims of sexual offences. Amongst other matters, the role of the guilty plea was discussed by participants in the study. It was held to be an important factor since it spares the victim the trauma of a trial. However, both members of the public and victims/survivors viewed a last-minute guilty plea as a last resort for the accused and not something which should be considered mitigatory. Participants in the study could not reach a

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<sup>155</sup> Marsh, N., McKay, E., Pelly, C., and Cereda, S., 2019. *Public Knowledge of and Confidence in the Criminal Justice System and Sentencing: A Report for the Sentencing Council*. at pp 24-25. Available at: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf>> [Accessed 21 March 2020].

<sup>156</sup> McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n 134) at pp 45-46.

<sup>157</sup> Ibid, at p 30.

<sup>158</sup> Ibid; King, L., and Roberts, J., 2017. The Complexity of Public Attitudes Towards Sex Crimes. 12(1) *Victims and Offenders* 71 at 74; Napier, S., Dowling, C., Morgan, A., and Talbot, D., 2018. What Impact do Public Sex Offender Registries have on Community Safety? 550 *Trends and Issues in Crime and Criminal Justice* 8.

<sup>159</sup> McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n 134) at p iv.

<sup>160</sup> Mears, D.P., Mancini, C., Gertz, M., and Bratton, J., 2008. Sex Crimes, Children and Pornography: Public Views and Public Policy. 54 *Crime and Delinquency* 532.

<sup>161</sup> Cullen, F.T, Fisher, B.S., and Applegate, B.K., 2000. Public Opinion About Punishment and Corrections. 27 *Crime and Justice* 1 at p 11.

<sup>162</sup> Reid, S., Biggs, H., Attygalle, K., Vosnaki, K., McPherson, R., and Tata, C., 2019. *Public Perceptions of Sentencing in Scotland: Qualitative research involving sexual offences*, forthcoming, Edinburgh: Scottish Sentencing Council.

consensus on whether personal circumstances of the offender and remorse should be taken into account during sentencing.

Other findings from the research included the fact that members of the public and victims/survivors initially perceived sentences for sexual offences to be too lenient and not reflective of the harm caused, both to the victim and the family of the victim. For some participants, this was linked to media representations of the sentencing of sexual offences. Sentencing was also perceived as inconsistent and participants reported difficulty in understanding the variation in sentences between cases which seemed similar in nature. Participants were of the view that greater transparency was required. The factors which they considered to be significant were: the seriousness of the offence, the harm caused and the impact on the victim. For members of the public, the risk of reoffending and the protection of the public were also important factors to consider during sentencing.

## 4.2 Responses to case studies

When asked to consider sentencing in specified cases, public perceptions of appropriate sentencing tend to become less punitive: 'previous research has suggested [this is] because the public are recalling the worst offenders as a result of media coverage of lenient sentences, or because they do not consider the full range of sentences available'.<sup>163</sup> In the aforementioned English and Welsh survey where 76% of respondents thought rape sentences and 80% thought that sentences for offences involving indecent images of children were too lenient, this figure dropped to 41% and 68% respectively after respondents were provided with a specific information from a case vignette.<sup>164</sup> However, this trend was not observed in the SSC<sup>165</sup> or 2012 Sentencing Council for England and Wales reports when respondents were asked to consider sexual assaults. In the SSC report, the offence in a historical sexual assault vignette was felt to warrant sentences ranging from a community payback order to 5-10 years in prison, and 'in general, respondents tended to be more severe in their preferred sentences than actual practice'.<sup>166</sup> Similarly, participants in the 2012 Sentencing Council for England and Wales report suggested more severe sentences than are currently imposed when considering two sexual assault vignettes.<sup>167</sup> The first involved the sexual assault of an adult woman, and it was felt this deserved a sentence from 6-10 years, with a 6-year headline sentence. The second related to a 12 year old girl, which attracted suggestions of 10-20 years or an indeterminate sentence. The 2012 Sentencing Council for England and Wales report notes that 'existing guidelines currently have a headline sentence of a community order for the offence of sexual

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<sup>163</sup> Marsh, N., McKay, E., Pelly, C., and Cereda, S., 2019. (n155) at p 26.

<sup>164</sup> Ibid, at pp 24-25.

<sup>165</sup> Reid, S., Biggs, H., Attygalle, K., Vosnaki, K., McPherson, R., and Tata, C., 2019. (n162).

<sup>166</sup> Black, C., Warren, R., Ormston R., and Tata, C., 2019. (n129) at p 33.

<sup>167</sup> McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n134) at p 35.



assault (if the victim is over 13 years old and no genital contact has occurred), to a maximum penalty of 10 years custody for sexual assault of an adult and 14 years custody for sexual assault of a child'.<sup>168</sup>

The Australian study of juror sentencing perspectives provides further insights.<sup>169</sup> This study had the advantage of anchoring respondents who had a strong claim to representing the community to real sentencing exercises. In rape/aggravated sexual assault cases and those involving the sexual assault of children over 12, jurors propose sentences which were in line with or lower than those actually imposed by judges. However, jurors tended to suggest sentences that were more severe than those imposed by judges in cases involving sexual assaults of children under 12.

These studies suggest grounds for believing that while people tend overwhelmingly to see sentencing as excessively lenient, when asked to propose a sentence in specific scenarios their preferred sentence may be more in line with actual sentences passed than they might think. However, it is also important to emphasise that the ability to compare public perceptions and preferences with the reality of sentencing practices is hampered by the ability to collect and present meaningful sentencing information about sentencing practices in different types of cases.

#### **4.3 Victim/survivor perceptions of sentencing in cases involving sexual assault**

The 2012 Sentencing Council for England and Wales study included focus groups (comprised of members of the public) and also victims/survivors of sexual offences. The victims/survivors described their experiences as having had long-term effects including post-traumatic stress disorder and difficulties in forming relationships, and also stressed that their experience caused harm to a wider group of people than the victim/survivor themselves:<sup>170</sup> they felt that these factors should be taken into account during sentencing.<sup>171</sup> Victims/survivors also felt that sexual assault involving penetration was 'akin to rape and should be sentenced accordingly' due to the inherent violation in such offences.<sup>172</sup> Victim/survivor satisfaction was often increased where support was provided throughout the process; sentencing expectations were managed from the outset; and the judge's comments referenced the seriousness of the offence.<sup>173</sup> As mentioned above, victims/survivors thought concurrent sentences failed to take into account the harm inflicted upon each victim on each occasion.<sup>174</sup> While there was general support for victim/survivor personal statements (which allow victims/survivors to express the effect of the offence to the judge), there was a view

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<sup>168</sup> Ibid.

<sup>169</sup> Warner, K., Davis, J., Spiranovic, C., Cockburn, H., and Freiberg, A., 2017. (n147) at p 189.

<sup>170</sup> For example, the parents of child victims.

<sup>171</sup> McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n134) at p 21.

<sup>172</sup> Ibid, at p 36.

<sup>173</sup> Ibid, at pp 22-24.

<sup>174</sup> Ibid, at pp 45-46.

that they should not necessarily impact the sentence.<sup>175</sup> In a 2007 Scottish evaluation of a pilot victim statement scheme, only 5% of respondents were found to have made their statement with a view to influencing the sentence, although 16% did hope it would have an effect.<sup>176</sup>

## 5.0 Other jurisdictions

This section compares sentencing practice in other common law jurisdictions. The legal frameworks and/or guidelines for sentencing in sexual assault cases in Canada, Australia and England and Wales is outlined, and evidence of their impacts is discussed.

### 5.1 Canada

In Canada, criminal offences are regulated by the Criminal Code, which states that the fundamental purposes of sentencing are to promote public protection, symbolically condemn crimes, deter and rehabilitate offenders, and provide proportionate and consistent punishments.<sup>177</sup> When sentencing young offenders, the least restrictive sentence capable of rehabilitating the offender and achieving the purposes of sentencing must be employed.<sup>178</sup> However, applications can be made for an order that a person aged between 14 and 16 (depending on province) can be liable for an adult sentence for crimes which would carry (for adults) a term of over 2 years' imprisonment.<sup>179</sup> Furthermore, the sentences for sexual offences involving child victims have been increased relatively recently.<sup>180</sup>

There are numerous differences between Canada and Scotland in the sentencing of sexual assault cases. Most sexual offences in Canada, including rape, are defined in the language of 'sexual assault'. Simple assault is where, *inter alia*, someone applies direct or indirect force on another without the other person's consent;<sup>181</sup> this definition is also employed in the definition of sexual assault.<sup>182</sup> However, the Criminal Code further provides three severity-based gradations of sexual assault.

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<sup>175</sup> Ibid, at p 25.

<sup>176</sup> Leverick, F., Chalmers, J., and Duff, P., 2007. *An Evaluation of the Pilot Victim Statement Schemes in Scotland*. at 42. Available at: <  
<https://www.webarchive.org.uk/wayback/archive/20170701074158/http://www.gov.scot/Publications/2007/03/27152727/0>> [Accessed 21 March 2020].

<sup>177</sup> Canadian Criminal Code s 718.

<sup>178</sup> Youth Criminal Justice Act 2003 (Canada) s 38(2)(e).

<sup>179</sup> Ibid, s 64.

<sup>180</sup> Tougher Penalties for Child Predators Act 2015 (Canada) ss 14-15.

<sup>181</sup> Canadian Criminal Code s 265.

<sup>182</sup> Ibid, s 265(2).

Section 271 of the Criminal Code stipulates the minimum and maximum sentences in simple sexual assault cases. The maximum sentence on indictment is 10 years. However, where the complainant is under 16 the maximum sentence is raised to 14 years and there is a minimum sentence of 1 year.<sup>183</sup> On summary conviction, the maximum sentence is 18 months. However, where the complainant is under 16 the maximum sentence is raised to 2 years and there is a minimum sentence of 6 months.<sup>184</sup>

The second tier of sexual assault cases are those where the offender: carries, uses or threatens to use a weapon or imitation weapon; threatens to cause bodily harm to a third party other than the complainant; causes bodily harm to the complainant (including by choking); or is a party to the offence with another person.<sup>185</sup> These cases can be tried only on indictment. The maximum sentence is 14 years, except where the complainant was under 16, where the maximum sentence is raised to life imprisonment and there is a minimum sentence of 5 years.<sup>186</sup> Where firearms are used, minimum sentences of 4, 5 or 7 years are imposed, depending on whether or not the firearm was restricted, prohibited, or used in connection with a criminal organisation, or if it was a second or subsequent offence.<sup>187</sup> Relevant previous offences for the purposes of minimum sentencing include those of bodily harm, robbery and kidnapping except where 10 years have elapsed since the date of the previous relevant conviction.<sup>188</sup>

The most serious crimes of sexual assault are called 'aggravated sexual assaults'. These are where the offender 'wounds, maims, disfigures or endangers the life of the complainant'.<sup>189</sup> In all cases, the maximum sentence is life imprisonment. The minimum sentences are the same as those for 'second tier' sexual assaults.

Research into the impact of mandatory minimum sentences in Canada indicates that since their introduction/expansion, court delays have increased and there have been large increases in both the number and duration of custodial sentences for various sexual offences involving children.<sup>190</sup> Additionally, while some arguments in favour of minimum sentencing reference the likelihood of increased deterrence and consistency in sentencing, some evidence indicates they may be ineffective at deterring crime and

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<sup>183</sup> Ibid, s 271(a).

<sup>184</sup> Ibid, s 271(b).

<sup>185</sup> Ibid, s 272(1).

<sup>186</sup> Ibid, s 272(2)(a.2).

<sup>187</sup> Ibid, ss 272(2)(a)-(a.1).

<sup>188</sup> Ibid, s 272(3).

<sup>189</sup> Ibid, s 273.

<sup>190</sup> Allen, M., 2017. *Mandatory minimum penalties: An analysis of criminal justice system outcomes for selected offences*. Available at: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54844-eng.htm>> [Accessed 25 March 2020].

actually reduce proportionality in sentencing.<sup>191</sup> Numerous academic works have criticised Canadian mandatory minimum sentencing as being unpopular among judges, eroding public confidence by disallowing judicial derogation from the minima even in exceptional cases, and encouraging discriminatory sentences.<sup>192</sup>

## 5.2 Australia

Australian states, territories and the federal jurisdiction have each created their own statutes relating to sentencing, This section considers sexual assault sentencing in the two most populous states, New South Wales and Victoria.

### 5.2.1 New South Wales

Compared to those of other Australian jurisdictions, the courts of New South Wales (NSW) 'most enthusiastically embraced' the systematic development of guideline judgements.<sup>193</sup> 'Sexual assault' in NSW is a wide-ranging offence, which includes both the equivalent Scottish offences of rape and sexual assault by penetration.<sup>194</sup> NSW also has crimes of sexual touching, aggravated sexual touching, sexual acts, and aggravated sexual acts;<sup>195</sup> the Scottish equivalents to these offences are (broadly) those of sexual assault and sexual coercion.<sup>196</sup> The Crimes (Sentencing Procedure) Act 1999 (NSW) lays down, in general terms, relevant aggravating and mitigating factors,<sup>197</sup> the law relating to victim impact statements,<sup>198</sup> and also factors which must be taken into account when sentencing child sexual offences.<sup>199</sup> The sentencing guidelines state that when considering the seriousness of the offence, the nature of the offence (force, threats, effect on the victim etc.) will dictate the sentence:

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<sup>191</sup> Glynes Elliott, K., and Coady, K., 2016. *Mandatory Minimum Penalties in Canada: Analysis and Annotated Bibliography*. at pp 7-9. Available at: <<https://www.justice.gc.ca/eng/rp-pr/jr/mmp-pmo/mmp-pmo.pdf>> [Accessed 25 March 2020].

<sup>192</sup> For a list of works, see *ibid*, pp 38-43.

<sup>193</sup> Edney, R., and Bagaric, M., 2007. *Australian Sentencing: Principles and Practice*. Port Melbourne: Cambridge University Press. at p 38.

<sup>194</sup> Crimes Act 1900 (NSW) ss 61HA and 61I. *Cf* Sexual Offences (Scotland) Act 2009 s 1-2.

<sup>195</sup> Crimes Act 1900 (NSW) ss61KC – 61KF.

<sup>196</sup> Sexual Offences (Scotland) Act 2009, ss 3-4.

<sup>197</sup> Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(2)-(3): Aggravating factors include the use of violence, committing the offence in the victim's home or in the presence of someone under 18, and abuse of trust/authority. Mitigating factors include the offender's good character, remorse, and guilty plea. Other aggravating factors include spiking the victim's drink and where the offender is acting as a medical practitioner: NSW Sentencing Guidelines [20-760].

<sup>198</sup> *Ibid*, s 30E.

<sup>199</sup> *Ibid*, s 25AA: The sentence must follow current sentencing practice, but the non-parole period must be that which would have been applied at the time of the offence.

“... though each case is inherently serious, some are more serious than others. In some cases, the degree of violence, the physical hurt inflicted, the form of forced intercourse and the circumstances, of humiliation and otherwise, are much greater than are involved in this case. It is to be understood that in sentencing it is appropriate — indeed, in most cases it is necessary — that the sentencing judge form and record his assessment of where, on the relevant scale of seriousness, the particular offence lies.”<sup>200</sup>

Also similarly to Canada, NSW has three gradations of sexual assault, with varying minimum sentences. The lowest form carries a maximum sentence of 14 years, with current guidelines stipulating a non-probation period of 7 years.<sup>201</sup> Unlike Canada, however, exceptional circumstances may allow for non-custodial sentences.<sup>202</sup> The second-highest gradation is termed ‘aggravated sexual assault’, which attracts 20-year maximum sentences and non-probation periods of 10 years.<sup>203</sup> Stipulated aggravations include infliction of bodily harm; threat of harm by a weapon; the commission of the offence in company; where the victim is under 16, under the authority of the offender or has a serious physical or cognitive disability; breaking and entering to commit the sexual assault or any other serious indictable offence; and deprivation of the victim’s liberty.<sup>204</sup> The most serious, top-tier, form of sexual assault makes the offender liable to life imprisonment. This is in cases of forced sexual intercourse (which, as mentioned, includes the equivalent Scottish offence of sexual assault by penetration) with multiple aggravations, where the offender is in the company of others (i.e. gang rape) and inflicts or threatens to inflict bodily harm, or deprives the victim of their liberty.<sup>205</sup>

The maximum sentence for sexual touching is 5 years.<sup>206</sup> For aggravated sexual touching (i.e., where the offence is committed in company, by someone in authority, or where the victim is physically disabled/cognitively impaired) the maximum sentence is 7 years.<sup>207</sup> The maximum sentences for the lesser offences of ‘sexual act’ and ‘aggravated sexual act’ are 18 months and 3 years respectively.

The maximum sentence for sexual assault of a child under 10 in NSW is life, with a 15-year non-probation period.<sup>208</sup> For a child between 10-14 the maximum sentence is 16 years, with a 7-year non-probation period (20 and 9 years respectively when

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<sup>200</sup> *R v Gebrail* (unreported, 18/11/94, NSWCCA) per Mahoney JA; NSW Sentencing Guidelines [20-630].

<sup>201</sup> NSW Sentencing Guidelines [20-640].

<sup>202</sup> *Sabapathy v R* 2008 NSWCCA 82.

<sup>203</sup> NSW Sentencing Guidelines [20-660].

<sup>204</sup> Crimes Act 1900 (NSW), s 61J.

<sup>205</sup> NSW Sentencing Guidelines [20-670].

<sup>206</sup> Crimes Act 1900 (NSW), s 61KC.

<sup>207</sup> *Ibid*, s 61KD.

<sup>208</sup> Crimes Act 1900 (NSW) s 66A.

aggravated).<sup>209</sup> For a child between 14-16, the maximum sentence is 10 years, with no minimum non-probation period (12 and 5 years respectively when aggravated).<sup>210</sup>

### 5.2.2 Victoria

In Victoria, crimes are defined in the Crimes Act 1958,<sup>211</sup> and penalties are set according to a scale per the Sentencing Act 1991.<sup>212</sup> The definition of 'Rape' in Victoria includes the Scottish equivalent offence of sexual assault by penetration.<sup>213</sup> For the most serious offences, both maximum sentences and standard sentences are designated in statute to act as guides for judges. However, courts may impose indefinite sentences (regardless of the statutory maximum) for serious offences<sup>214</sup> where the court is satisfied, to a high degree of probability, that the (adult) offender is a serious danger to the community because of: their character, past history, age, health or mental condition; the nature and gravity of the serious offence; and any special circumstances.<sup>215</sup> The purposes of sentencing are to promote a fair and consistent approach in deterring, rehabilitating and punishing offenders,<sup>216</sup> to denunciate offensive conduct and to promote community protection.<sup>217</sup> However, in sentencing serious sexual offenders, community protection from the offender is the principal purpose: courts may impose longer sentences than are proportionate to the gravity of the offence considered in the light of the objective circumstances to achieve the purpose of community protection.<sup>218</sup>

Rape (which includes any sexual penetration) is a level 2 offence, which carries a maximum 25-year sentence with a standard sentence of 10 years.<sup>219</sup> There is no hierarchy of penetration e.g., digital or penile etc.<sup>220</sup> These maximum and standard sentences are the same for the sexual penetration of a child under 12.<sup>221</sup> However, sexual penetration of a child between 12 and 16 is a level 4 offence, with maximum and standard sentences of 15 and 6 years respectively.<sup>222</sup> Victoria also has a crime of sexually penetrating a 16 or 17 year old child who is under the care, supervision, or

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<sup>209</sup> Ibid, s 66C(1) and (2).

<sup>210</sup> Ibid, s 66C(3) and (4).

<sup>211</sup> Crimes Act 1958 (Vic).

<sup>212</sup> Sentencing Act 1991 (Vic).

<sup>213</sup> Crimes Act 1991 (Vic) ss 35A and 38. Cf Sexual Offences (Scotland) Act 2009 s 2.

<sup>214</sup> Including rape and the sexual penetration of children: *ibid* s 3(1) 'Serious Offence' (c)iii-vi

<sup>215</sup> *Ibid*, s 18A-B.

<sup>216</sup> *Ibid*, s 1.

<sup>217</sup> *Ibid*, s 5.

<sup>218</sup> *Ibid*, s 6D.

<sup>219</sup> Crimes Act 1958 (Vic) s 38(2) and (3).

<sup>220</sup> Victoria Sentencing Manual at para 24.2.2. Available at: <https://resources.judicialcollege.vic.edu.au/article/669236> [Accessed 26 March 2020].

<sup>221</sup> Crimes Act 1958, s 49A. Cf Sexual Offences (Scotland) Act 2009, s 19.

<sup>222</sup> Crimes Act 1958 (Vic), s 49B. Cf Sexual Offences (Scotland) Act 2009, s 29.



authority of the offender. This is a level 5 crime, with maximum 10 years' custody.<sup>223</sup> Sexual assault is also a level 5 offence, with a maximum 10 years' custody.<sup>224</sup>

Standard sentences are around 40% of the maximum sentence and represent mid-level seriousness;<sup>225</sup> judges have to explain what factors influenced their decision to derogate from the standard.<sup>226</sup> The court must generally have regard to: the nature and gravity of the offence; the offender's culpability; whether the offence was motivated by hatred towards a particular group; the impact of and personal circumstances of the victim; the injury, loss or damage resulting from the offence; guilty pleas; the offender's previous character; and any other relevant aggravating/mitigating factors.<sup>227</sup> However, when sentencing an offender who was 18 or over at the time of a child sexual offence, the offender's previous good character is irrelevant where that good character assisted in the commission of the offence.<sup>228</sup> Courts may be influenced by victim impact statements when sentencing offenders,<sup>229</sup> and 'instances where the victim supports or forgives the offender may ... justify the imposition of a suspended, non-custodial, or substantially reduced term'.<sup>230</sup> In contrast to other jurisdictions, the administering of intoxicating substances for sexual purposes is not regarded as an aggravation in Victoria, but is a standalone offence.<sup>231</sup> The psychological harm of sexual offences 'cannot be overlooked or undervalued' by sentencing judges,<sup>232</sup> and 'sexual offences that involve a breach of trust or which occur in the victim's home ... are particularly egregious'.<sup>233</sup> Further aggravating factors include premeditation, multiple offenders, multiple/long duration offending, the use of weapons or violence, the degree of pain suffered, the lack of a condom (except where there is no risk of pregnancy or infection), degradation/humiliation of the victim, the victim's vulnerability (including being asleep), and the victim/offender relationship where the sexual offence was intended to punish a former partner.<sup>234</sup>

By way of example, a standard (headline) sentence of 10 years was imposed for the digital, oral and penile-vaginal rape/penetration of a 19 year old female following a home invasion by a 30 year old male who tendered an early guilty plea, had no prior convictions and had a history of drug and alcohol abuse.<sup>235</sup> There is a list of sexual

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<sup>223</sup> Crimes Act 1958 (Vic), s 49C.

<sup>224</sup> Crimes Act 1958 (Vic), s 40. Cf Sexual Offences (Scotland) Act 2009, s 3.

<sup>225</sup> Sentencing Act 1991 (Vic), s 5A(1)(b).

<sup>226</sup> Ibid, s 5B(4)(a).

<sup>227</sup> Ibid, s 5(2)(a)-(g).

<sup>228</sup> Ibid, s 5AA.

<sup>229</sup> Ibid, s 8K(1).

<sup>230</sup> Victoria Sentencing Manual at para 24.1.8.2.

<sup>231</sup> Crimes Act 1958 (Vic), s 46.

<sup>232</sup> Victoria Sentencing Manual at para 24.2.1.

<sup>233</sup> Ibid, at para 24.2.2.

<sup>234</sup> Ibid, at para 24.2.2.1.

<sup>235</sup> *Cao v The Queen* [2018] VSCA 98.



offence case summaries that the Victorian judiciary use when considering appropriate sentencing.<sup>236</sup>

## 6.0 Conclusions

The Sexual Offences (Scotland) Act 2009 altered the law of sexual offences significantly, offering greater specificity than that experienced at common law. The 2009 Act also made a clear distinction between consent-based offences and non-consent-based offences, with culpability of the offender being directly related to the victim's capacity to consent. Due to the reporting of historical sexual offences, offences under common law remain relevant. The data which has been presented in this review offers more detail on conviction rates for both common law offences and specific offences under the 2009 Act than that which is currently available through *Criminal Proceedings in Scotland* publications. This data shows that indecent assault still has significance amongst convictions for sexual offences. It also shows that there are a higher number of convictions for offences against older children than for those against young children. However, despite the usefulness of this data, the limitations of information about sentencing should be recognised.

There is a wide variety of sentences for sexual assault and other sexual offences (excluding rape and attempted rape). The current data on disposals suggests that CPOs appear to be used most commonly in sentencing, followed by custodial sentences. The wide variety of sentences may reflect the wide range of behaviours and offences that can be captured by the data category of 'other sexual offences' in particular. The factors which influence assessment of culpability in sexual offences include those relevant to assessments of culpability generally, but psychological harm to the victim/survivor is likely to be greater than in other offences. In addition to the violation of sexual autonomy, there are additional risks such as sexually transmitted disease which are unique to this type of offending.

Public perception research has tended to examine attitudes towards sexual offences more broadly and without making distinction between specific sexual offences. The research which is available points to the fact that members of the public overwhelmingly consider that there exists excessive leniency in sentencing. However, when people are asked to propose a sentence in a specific case scenario their preferences in fact align much more closely with the actual sentence which was passed in that case than they might imagine. This could imply that sentencing may not in fact be 'out of touch' with public preferences as is widely assumed, but rather that people are simply not aware of the reality of normal sentencing practices. It also may imply the need to inform the general public about the reality of sentencing practices:

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<sup>236</sup> Victoria Sentencing Manual – Case Summaries  
<<https://resources.judicialcollege.vic.edu.au/article/679573>> [Accessed 28 March 2020].

what sorts of sentences are passed for what sorts of cases. However, it is also important to emphasise that the ability to compare public perceptions and preferences with the reality of sentencing practices is hampered by the ability to collect and present meaningful sentencing information about sentencing practices in different types of cases.

Three common law jurisdictions were analysed in this review. The Canadian landscape can be distinguished from that in Scotland and the rest of the UK because of the lack of specificity in offences. Instead, a wide range of behaviours are covered by the umbrella offence of 'sexual assault'. This places more significance on the communicative role of sentencing. Furthermore, Canada proscribes minimum sentences, which have proved to be unpopular amongst the judiciary. Australia is less proscriptive in its sentencing of sexual offences than Canada and the UK but assessments of seriousness are based on similar assessments of harm and culpability and the factors which serve to aggravate an offence.



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