

Sexual offences involving rape

Literature Review

Submitted to the Scottish Sentencing Council in July 2020

Published February 2021

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Literature review prepared for the consideration of the Scottish Sentencing Council.
The views expressed are those of the authors and do not necessarily represent
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The remit of this research, as set by the Scottish Sentencing Council, was to offer a review of the sentencing of rape (under sections 1 and 18 of the Sexual Offences (Scotland) Act 2009 and common law equivalents) in Scotland and in other jurisdictions. 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 rape 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 rape, an extended discussion of the problems pertaining to low conviction rates in this area or the feminist framework which situates rape 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 rape 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With additional thanks to Elaine Ferguson of the University of Glasgow for sharing her unpublished data relating to Orders of Lifelong Restriction and offering her expertise and views on their use.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 rape in Scotland

Following “public, professional and academic”¹ concern over the legal definition of rape in Scotland², the Scottish Law Commission was set the following remit from Scottish Ministers in 2004:

“To examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences and to make recommendations for reform.”³

What followed was a series of recommendations which offered comprehensive reform of the law of sexual offences in Scotland, underpinned by a desire to promote and protect sexual autonomy. The resulting Sexual Offences (Scotland) Act 2009 came into force in December 2010, adopting most of the Scottish Law Commission’s proposals whilst also addressing many “of the anomalies and difficulties experienced in defining the crime of rape at common law”⁴.

1.1 Definition of rape under Scots law

Under criminal law, offences are traditionally understood as being constituted by the *actus reus* (an act or omission) and *mens rea* (the mental fault⁵). For result crimes⁶ such as rape, it is further required that a causal link can be established between the act or omission and the consequences. Causation in criminal law has been the subject of philosophical consideration amongst legal theorists. Within the Scottish courts, causation has tended to be the subject of explicit discussion in the context of homicide cases, but the concept has not invited the same level of discussion in other offences, including rape. For the purposes of this review, causation should be taken to mean

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

² Particularly in reference to *Lord Advocate’s Reference (No. 1 of 2001)*, 2002 S.L.T. 466 where rape was defined as a man having sexual intercourse with a woman without her consent. It was also clarified that force was not a required element of the offence, contrary to earlier decisions such as *Charles Sweeney* (1853) 3 Irv 109. As per the *Lord Advocate’s Reference*, the *mens rea* of rape required knowledge that a woman was not consenting or recklessness as to whether she was consenting. The consequence of such a definition was that honest belief in consent, even if not reasonable, could result in an acquittal as per *Jamieson v HM Advocate*, 1994 J.C. 88.

³ Scottish Law Commission., 2006. (n1) at p 1 para 1.1.

⁴ Jones, T.H., and Taggart, I., 2018. *Criminal Law*. Edinburgh: W.Green. at p 262 para 9-103.

⁵ *Mens rea* is the individual’s state of mind at the time of the offence and must be established in order for a crime to be constituted under common law as per *King v Webster* [2011] HCJAC 109. Scots law generally recognises two categories of *mens rea*: intention and recklessness, both of which are assessed objectively. Because *mens rea* is an internal mental state, it is often proved by inference from surrounding evidence.

⁶ In criminal law, a distinction is drawn between conduct and result crimes. Where conduct crimes can be carried out through conduct alone, result crimes require that a result must occur in order for the offence to be constituted.

that two tests have been satisfied⁷: the “but for” test (factual causation) and proximity (legal causation). Proximity relates to the connection between the resulting criminal act (or omission) and the factors which led to it. The requirement that proximity be established between the results and the contributing factors which led to it provides that a safeguard exists against attaching criminal liability to an individual whose actions are too remote from the ultimate outcome or have contributed only minimally to it. The legal principles which have been used by the Scottish Court of Criminal Appeal in the past to analyse proximity include: the characteristics of the victim (including their psychological characteristics), the conduct of the victim, and whether or not there was a *novus actus interveniens* (an event which serves to ‘interrupt’ or break the chain of causation).

The structure of the Sexual Offences (Scotland) Act 2009 is such that it presents two types of offences: those which are consent-based and those which are non-consent-based. Non-consent-based offences are 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. The categories of persons are children, persons with a mental disorder, and persons over whom others hold a position of trust. 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 (for example older children or persons over whom others hold a position of trust or authority). 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.”⁸

Part 1 of the Sexual Offences (Scotland) Act 2009 sets out a number of consent-based offences: rape, sexual assault by penetration, sexual assault, sexual coercion, coercing a person into being present during sexual activity, coercing a person into looking at a sexual image, communicating indecently, sexual exposure, voyeurism, and administering a substance for sexual purposes. Under section 1, rape is defined in the following terms:

(1) If a person (“A”), with A’s penis—

⁷ This is the established test for causation set out in *McDonald v HM Advocate*, 2007 S.C.C.R. 10.

⁸ Scottish Law Commission., 2006. (n1) at p 16 para 2.6.

- (a) without another person (“B”) consenting, and
- (b) without any reasonable belief that B consents,

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

The *actus reus* of the offence is, therefore, constituted by non-consensual penetration of the vagina, anus or mouth. Significantly, this is an extension of the *actus reus* from that under common law and importantly one which serves to include male victims within the remit of the offence. Under common law, the relevant conviction for the non-consensual penetration of a male’s anus or mouth would have been indecent assault or sodomy.⁹

The *mens rea* of rape is the absence of consent or reasonable belief in consent. The offence can be carried out either intentionally or recklessly. Part 2 of the Act further defines the concepts of 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.” Typically, assessments

⁹ The common law offences of rape, clandestine injury to women, lewd, libidinous practice or behaviour, and sodomy were abolished by section 52 of the 2009 Act. The common law crime of indecent assault remains in place, but with limited application given the introduction of the offence of ‘sexual assault’ under section 3 of the 2009 Act.

of *mens rea* are based on objective assessments in law. Unusually, section 16 presents a 'mixed test' which contains both objective and subjective elements of assessment.

Part 4 of the Act relates to offences against children, largely replicating Part 1, but without the centrality of the absence of consent. Rape of a young child is defined in the following terms under section 18:

If a person ("A"), 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 has not attained the age of 13 years, then A commits an offence, to be known as the offence of rape of a young child.

There is no equivalent offence in relation to an older child. Instead there is the 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.

1.2 Alternative verdicts to charges of rape

The 2009 Act further provides the framework for which alternative verdicts can be considered appropriate for each offence charged. For rape, the relevant alternative verdicts are: sexual assault by penetration, sexual assault, having intercourse with an older child, and assault at common law (which may include the intention to commit rape).

Relevant alternative verdicts for the offence of rape of a young child are: sexual assault on a young child by penetration, sexual assault on a young child, having intercourse with an older child, engaging in penetrative sexual activity with or towards an older child, engaging in sexual activity with or towards an older child, engaging while an older child in sexual conduct with or towards another older child, and assault at common law.

Relevant alternative verdicts for the offence of having intercourse with an older child are: engaging in penetrative sexual activity with or towards an older child, engaging in sexual activity with or towards an older child and engaging while an older child in sexual conduct with or towards another older child.

2.0 Sentencing framework

This section considers the sentencing framework for the offences included within the scope of this review: sections 1 and 18 of the 2009 Act and their common law equivalents. In particular, the statutory sentencing penalties will be outlined. Following from this, data pertaining to proceedings and convictions in Scotland with the limitations of this data being made clear. Lastly, there will be a review of sentencing decisions in the Scottish Court of Criminal Appeal.

2.1 Statutory sentencing penalties

Schedule 2 of the Sexual Offences (Scotland) Act 2009 provides the maximum penalties which can be imposed for each offence. Under sections 1 and 18, rape can only be tried on indictment. The maximum sentence prescribed by Parliament for these offences is life imprisonment¹⁰ and an unlimited fine. 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.¹¹ 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.¹²

The offence of having intercourse with an older child can be tried under solemn or summary procedure¹³. The maximum penalty on summary conviction is 12 months' imprisonment or a fine not exceeding the statutory maximum (or both). Where there is

¹⁰ In practical terms this means an Order for Lifelong Restriction (OLR) for offences the proceedings in respect of which began on or after 20th June 2006. Discretionary life sentences are no longer competent, *MacIntosh v HM Advocate* 2016 S.C.L. 923, and the Criminal Justice (Scotland) Act 2003 (Commencement No. 9) Order 2006/332 (SSI), art. 2(1) and (2).

¹¹ It is competent for a punishment part to be imposed which exceeds the natural life expectancy of the offender (see for example *Sinclair v HM Advocate* [2016] HCJAC 24).

¹² 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, Sentencing Council., 'Life sentences'. Available at:

<<https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/life-sentences/#:~:text=About%20sentencing-.Life%20sentences,eligible%20to%20apply%20for%20parole.>> [Accessed 6 July 2020].

¹³ There are several differences between these two types of criminal procedure in Scotland. Summary trials are heard by a Sheriff of Justice or the Peace without a jury and generally the maximum prison sentence which can be imposed is one year. Solemn trials are heard before a jury in either a sheriff court or High Court, with the maximum sentence available being one of life imprisonment.

a solemn conviction under section 24 (communication indecently with a young child), the maximum term of imprisonment is 10 years, and this can also be accompanied by an unlimited fine.

In addition to imprisonment or community sentencing, those convicted of a sexual offence may be subject to sex offender notification requirements. Such requirements are governed by the UK-wide Sexual Offences Act 2003. Where there is a conviction for the offence of rape, the offender is automatically subject to notification requirements.¹⁴

Under the Sexual Offences Act 2003, the offender must notify the police of relevant personal details, in person at a prescribed police station.¹⁵ This initial notification will subsequently be followed by notification of any changes to these details, periodic (annual) notification and notification of foreign travel. Failure to comply with notification requirements is an offence in itself.¹⁶

The length of the notification requirement is dependent on the sentence. Where an offender is sentenced to 30 months' imprisonment or more, the notification period will be indefinite. Where the sentence imposed is between more than 6 but less than 30 months' imprisonment, notification requirements will be in place for a period of 10 years.¹⁷ Where the offender is subject to a sexual offences prevention order¹⁸ (which must have effect for a minimum of five years), they will be eligible to apply for a review of their notification requirements. In Scotland, where an offender has been placed on the register indefinitely, there will be an automatic review after 15 years if they were an adult at the time the offence was committed, and eight years if they were under the age of 18 when the offence was committed. This is slightly different practice to that in England and Wales, where an offender must apply for review (again, after a period of 15 years or eight depending on their age at the time the offence was committed).

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

¹⁴ Sexual Offences Act 2003, s 80 and schedule 3.

¹⁵ 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].

¹⁶ 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.

¹⁷ All under Sexual Offences Act 2003, s 82.

¹⁸ In England and Wales this would pertain only to a Sexual Harm Prevention Order. Sexual Harm Prevention Orders have been introduced to Scotland recently through the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 but at the time of writing, are not yet in force. Currently, Police Scotland's involvement in the management of sexual harm prevention orders is restricted to offenders who were convicted in England or Wales and subsequently relocated to Scotland.

activity. Being subject to notification requirements is also likely to have a significant impact upon employment. It is, therefore, a significant aspect of sentencing.

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.¹⁹ Those offenders subject to an OLR can be returned to prison if they commit a further crime upon their release into the community.²⁰ Offenders on an OLR are also 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. A breach of licence conditions is sufficient to warrant recall (that breach does not have to amount to an offence). OLR offenders are subject to multi-agency public protective arrangements (MAPPA).

2.2 Proceedings and convictions

The Scottish Government's *Criminal Proceedings* publication provides general data on the number of people proceeded against for rape (and attempted rape²¹). The total number of people proceeded against between 2009-10 and 2018-19 was 1,955. The annual breakdown is shown in Table 1 below:

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

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

²¹ The conjunction 'and' is used to present figures on rape/attempted rape in the Scottish Government's *Criminal Proceedings* publication but it seems likely that these would be alternatives, meaning 'or' would be more appropriate descriptor and as such this has been adopted in the tables presented in this section of the report.

Table 1: Numbers of people proceeded against for rape or attempted rape during the period 2009-10 and 2018-19.²²

2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
117	80	93	138	219	271	216	251	246	324

In March 2020 a Freedom of Information (FOI) request was made to the Scottish Government for specific data pertaining to convictions involving rape. The Justice Analytical Services provided the following on convictions involving rape and other offences under the 2009 Act:

²² As calculated from Scottish Government., 2020. *Criminal Proceedings in Scotland 2018-19*. at table 4(a). Available at: < <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/10/> > [Accessed 8 July 2020].

To clarify, one 'person' here is counted by separate proceedings (e.g. on indictment) - so a person proceeded against more than once will be counted multiply. See Annex C: Available at: < <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/48/> > [Accessed 8 July 2020].

Table 2: Offences involving rape and another offence under the 2009 Act

Sections ²³	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
1	-	-	4	31	26	46	34	36	38	54
18	-	-	2	8	8	13	8	6	7	11
18, 19 & 20	-	-	-	1	1	4	3	4	3	2
18 & 20	-	-	1	-	3	3	3	3	1	1
1, 2 & 3	-	-	-	1	-	3	3	-	1	2
1 & 2	-	-	-	1	-	-	1	-	-	5
1 & 3	-	-	2	4	2	-	6	5	3	4
18 & 19	-	-	-	-	-	-	-	1	-	1
1 & 11	-	-	-	-	2	1	-	-	-	1
18, 20 & 21	-	-	-	-	-	-	1	-	-	-
1, 9 & 4	-	-	-	-	-	-	-	-	1	-
18, 19, 20 & 21	-	-	-	-	-	-	-	-	1	-
18, 20 & 22	-	-	-	-	-	-	-	-	-	1
1, 2, 3, 4, 5 & 9	-	-	-	-	-	-	-	-	-	1
18, 20 & 22	-	-	-	-	-	-	-	-	-	2

Further data was also made available on those offences involving rape and common law offences:

²³ The relevant offences are as follows: s1 (Rape); s2 (Sexual assault by penetration); s3 (Sexual assault); s4 (Sexual coercion); s5 (Coercing a person into being present during a sexual activity); s9 (Voyeurism); s11 (Administering a substance for sexual purposes); s18 (Rape of a young child); s19 (Sexual assault on a young child by penetration); s20 (Sexual assault on a young child); s21 (Causing a young child to participate in a sexual activity); s22 (Causing a young child to be present during a sexual activity); s23 (Causing a young child to look at a sexual image).

Table 3: Offences involving rape and common law offences

Offences	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Rape	26	11	19	18	19	24	20	19	18	12
Rape & abduction	1	-	1	-	-	-	1	1	-	-
Rape & assault to severe injury	1	1	-	-	-	1	-	-	-	-
Rape, assault & abduction	3	-	-	-	-	-	-	-	-	-
Rape, assault to severe injury & to danger of life & abduction	-	-	-	-	1	-	-	-	-	-
Rape & assault to injury	6	5	1	3	5	7	2	10	9	5
Rape & lewd, indecent & libidinous practices & behaviour	-	-	-	-	1	-	-	-	1	2
Rape resulting in the birth of a child	-	-	-	1	-	-	-	-	-	-
Rape & assault to severe injury & danger of life	-	-	1	-	-	-	-	-	-	-
Rape & assault to injury & danger of life	-	-	-	1	-	-	-	-	-	-
Rape to injury & indecent assault	-	-	-	-	-	-	-	-	-	2
Rape & indecent assault	-	-	-	-	-	-	-	1	3	5
Rape to injury, assault & threats	-	-	-	-	-	-	-	-	-	1
Rape to injury & assault	-	-	-	-	-	-	-	-	-	1

For attempted rapes, they were able to advise the following breakdown:

Table 4: Offences involving attempted rape and other offences under the 2009 Act

Sections	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
1	-	-	-	5	1	1	2	1	2	8
18	-	-	-	-	-	1	1	-	-	1
1 & 2	-	-	-	-	1	-	-	-	-	-
3	-	-	-	4	1	2	1	1	-	-
1, 3 & 8 ²⁴	-	-	-	-	-	-	-	1	-	-
1, 2 & 3	-	-	-	-	-	-	1	1	-	-
18, 20 & 23	-	-	-	-	-	-	1	-	-	-
19, 20 & 21	-	-	-	-	-	-	1	1	-	-
1, 2, 3, 4 & 9	-	-	-	-	-	-	-	-	-	1
Assault with intent to rape (post 2009 Act)	-	-	-	-	-	-	-	-	-	1

²⁴ s8 (Sexual exposure).

Further data was also made available on those offences involving attempted rape and common law offences:

Table 5: Offences involving attempted rape and common law offences

Offences	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Assault & attempted rape	1	2	3	1	-	1	-	2	1	2
Assault with intent to rape	6	10	3	1	2	1	2	1	2	1
Attempted rape	3	2	5	1	2	3	5	-	1	-
Lewd, indecent and libidinous practices & behaviour and intent to rape	-	-	1	-	-	-	-	-	-	-
Assault to injury & attempted rape	2	-	1	1	-	-	-	-	-	-

The total number of people convicted of rape or attempted rape between 2009-10 to 2018-19 was 788. The annual breakdown for conviction during this period is shown in Table 6 below:

Table 6 Numbers of people convicted of rape or attempted rape during the period 2009-10 and 2018-19.²⁵

2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
57	36	49	77	91	125	105	99	106	152

This represents an average conviction rate of 46.9% which, it must be noted, is significantly lower than other offences recorded as Table 7 illustrates:

²⁵ As calculated from Scottish Government., 2020. *Criminal Proceedings in Scotland 2018-19*. at table 4(b). Available at: < <https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/11/> > [Accessed 7 July 2020].

Table 7: Conviction rates between 2009-10 and 2018-19.²⁶

	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
All crimes and offences	89	88	87	87	87	86	86	86	87	87
All crimes	86	86	85	84	84	85	85	85	86	85
Non-sexual crimes of violence	72	71	72	67	68	67	67	67	70	68
Homicide	82	84	83	78	82	73	76	83	79	81
Robbery	79	77	79	78	77	76	74	70	75	71
Rape or attempted rape	49	45	53	56	42	46	49	39	43	47

Burman and Brooks-Hay discuss conviction rates associated with rape cases.²⁷ They note that, in Scotland, the number of rapes reported to the police has generally increased in recent years, but that despite this conviction rates remain low. This landscape is not unique to Scotland, with Burman and Brooks-Hay noting that the conviction rates reported in Scotland in 2017 were similar to those in England and Wales. However, they recognise that there are challenges which are particular to Scotland: the requirement that the *facta probanda* or essential facts (*mens rea*, *actus reus* and identification of the accused) must be corroborated, and issues pertaining to the use of sexual history evidence in court.

Section 274 of the Criminal Procedure (Scotland) Act 1995 prohibits the leading of evidence in sexual offence trials which tends to show that the complainer is not of good character, has engaged in sexual behaviour not forming part of the charge, or engaged in behaviour which might found the inference that they are not a credible or reliable witness, or have consented to the acts with which the accused has been charged.²⁸ This provision was added by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 following recognition that complainers in sexual offences required additional protection during trials. Also added to the 1995 Act by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 was section 275 which contains exceptions to the restrictions under section 274. Under section 275, such evidence can be admitted, following application, if the court is satisfied that such evidence relates to a specific occurrence or occurrences which demonstrate the

²⁶ As calculated from Scottish Government., 2020. *Criminal Proceedings in Scotland 2018-19*. at table 4(c). Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/12/>> [Accessed 7 July 2020].

²⁷ Burman. M., and Brooks-Hay. O., 2018. Victims are more willing to report rape, so why are conviction rates so woeful? *Conversation*, 8 March.

²⁸ At subsection 1.

complainer's character or a predisposition to which the complainer is or has been subject, provided this is relevant and the probative value outweighs any risk of prejudice to the proper administration of justice, including the complainer's dignity or privacy.

Following the introduction of section 274 and 275 into the Criminal Procedure (Scotland) Act 1995, Burman et al. conducted an evaluation study for the Scottish Government.²⁹ This study found that, in fact, more sexual history and character evidence was being led, suggesting that the aims of the 2002 Act had not been achieved.

Writing in the *Edinburgh Law Review* more recently, Cowan presents data gathered from a three-month period in 2016 on applications under section 275 of the Criminal Procedure (Scotland) Act 1995. This data shows that 84% of applications to include sexual history evidence were accepted (either partly or in full) and only 16% were rejected. Ninety per cent of these applications were unopposed by the Crown.³⁰ One reading of this could be that given so few applications are opposed, the statutory test contained within sections 274 and 275 has excluded inappropriate evidence which might otherwise have gone before the court; that is to say, it is working.³¹ However, such an argument is undermined by cases such as *CJW*³² which illustrate that the evidence which has been allowed under section 275 applications is not the type of evidence that the Scottish Court of Criminal Appeal considers to be admissible or within the spirit of the statutory provisions. Indeed, the Scottish Court of Criminal Appeal itself has made clear its disapproval of the manner in which complainers are sometimes questioned in sexual offence trials, noting that one trial judge's questions were tantamount to cross-examination.³³ More recently, in considering the correct application of sections 274 and 275, the Scottish Court of Criminal Appeal referred to the repeated failure of trial courts to adhere to these "rape shield" provisions, further commenting:

"This trial was conducted in a manner which flew in the face of basic rules of evidence and procedure, not only the rape shield provisions but also the common law. It ignored a number of principles which have been laid down and emphasised in several recent decisions of this court. If justice is to prevail in the prosecution of sexual offences, it is imperative that those representing parties

²⁹ Burman. M., Jamieson. L., Nicholson. J., and Brooks, O., 2007. *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study*. Project Report. Scottish Executive Social Research.

³⁰ Cowan. S., 2019. Sense and sensibilities: A feminist critique of legal interventions against sexual violence. 23 *Edinburgh Law Review* 22.

³¹ McPherson. R., 2019. *Donegan v HM Advocate*: A step in the right direction for female complainers in sexual offences? 23 *Edinburgh Law Review* 406.

³² *HM Advocate v CJW* [2016] HCJAC 111.

³³ *Donegan v HM Advocate* [2019] HCJAC 10.

abide by these basic rules. If they do not do so, the judge or sheriff must intervene to remedy the matter. During her cross-examination, this complainer was subjected to repetitive and at times irrelevant questioning. She became extremely distressed and rightly so. The court did nothing to intervene. Were this to be repeated, the situation in sexual offences trials would be unsustainable.”³⁴

At the time of writing, Lady Dorrian, the Lord Justice Clerk, is chairing a review which will examine how sexual offences cases are conducted by Scottish courts and consider how the experiences of complainers can be improved without compromising the rights of the accused.

2.3 Penalty types

The overwhelming penalty for those convicted of rape or attempted rape was a custodial sentence, as Table 8 shows below:

Table 8: People convicted of rape or attempted rape who received custodial sentences between 2008-9 and 2017-18³⁵

	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
%	93	94	94	92	92	93	90	94	96	93
Number	53	34	46	71	84	116	95	93	102	142

This is significantly higher than the percentage of offenders who receive custodial sentences for other offences, as might be expected. From 2009-10 to 2017-18. Therefore, although conviction rates are low for cases involving rape, amongst those who are convicted, custodial sentences are highly likely, more so than for any other offence.

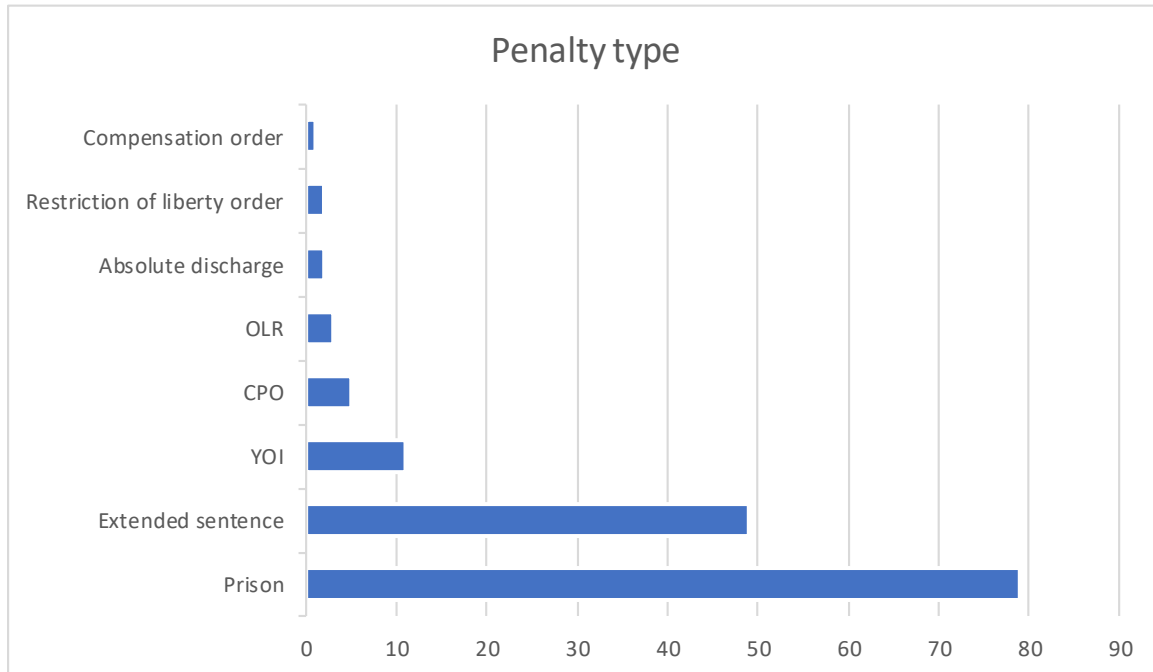
For the period 2018-19 specifically, the breakdown of the main penalty type received is specified in Figure 1 below³⁶:

³⁴ *Watson v HM Advocate* [2020] HCJAC 21 at para 47.

³⁵ 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 7 July 2020].

³⁶ To clarify, prison, YOI (Young Offender Institute), extended sentences and OLRs are all types of custodial sentences. CPO is a Community Payback Order and can include unpaid work, compensation or other activity including treatment.

Figure 1: Main penalty type for those convicted of rape or attempted rape 2018-19³⁷



For those who did receive custodial sentences, the length of these sentences are shown in Table 9 below. It is worth noting that this data 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.

³⁷ 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].

Table 9: Number of people receiving custodial sentence for rape or attempted rape by length of custodial sentence 2018-19³⁸

Up to 3 months	-
Over 3 months to 6 months	-
Over 6 months to 1 year	1
Over 1 year to 2 years	7
Over 2 years to less than 4 years	9
4 years and over (including life sentences)	125

A FOI request made to the Risk Management Authority (RMA) in December 2019 by Elaine Ferguson of the University of Glasgow provided data on the numbers of OLRs passed in Scotland for all offences over a 12-year period and the average punishment part of the sentence (in months). This is shown in Table 10 below:

Table 10: Numbers of OLRs passed in Scotland for all offences between the period 2006 and 2018

Year	Number of OLRs	Average punishment part (months)
2006	1	96
2007	4	101
2008	13	58
2009	25	70
2010	17	59
2011	19	56
2012	17	44
2013	18	43
2014	19	71
2015	18	66
2016	12	56
2017	9	51
2018	17	51

The RMA confirmed that none of these OLRs related to female offenders. Fifteen offenders under the age of 21 were subject to an OLR during this period (12 if considering age at the time of sentencing). A limitation of this data is that it does not

³⁸ 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 7 July 2020].

further disaggregate by offence. The limitations of available sentencing data are discussed further in section 2.4 below.

Similarly, some information was available of the numbers of offenders subject to notification requirements, but this was not disaggregated by index offence. The Violent and Sex Offender Register (ViSOR) database used by the police holds data on those offenders subject to notification requirements, extracts of which are presented in Table 11 below:

Table 11: Numbers of Registered Sex Offenders in Scotland, 2018 to 2019³⁹

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 ⁴⁰	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.⁴¹ First, no distinction is made in the published data on criminal proceedings between rape and attempted rape or between section 1 and section 18 offences (or those under common law). Indeed, the data drawn from official data sources and presented in the preceding tables not only fails to distinguish between cases of rape and attempted rape, but also indeed between cases where there were charges / convictions for *both* rape *and* attempted rape as opposed to merely one of those.

Second, current 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.⁴² Multi-conviction cases are likely to attract higher sentences. A further complication is the fact that sentences may be passed consecutively, concurrently or

³⁹ Scottish Government., 2019. *Multi-agency public protection arrangements (MAPPA) in Scotland: national overview report 2018 to 2019*. Edinburgh: Scottish Government. at Appendix B.

⁴⁰ Group 1 relates to non-sexual crimes of violence and group 2 to sexual crimes.

⁴¹ Tata, C., 2020. *Sentencing: A Social Process. Re-thinking Research and Policy*. Cham: Palgrave.

⁴² See McPherson, R., and Tata, C., 2018. *Causing death by driving offences: Literature Review*. Edinburgh: Scottish Sentencing Council.

in cumulo (covering all offences in a single sentence)⁴³. 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. 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. 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.”⁴⁴

Thirdly, it is worth noting that the data presented in the Scottish Government’s *Criminal Proceedings* bulletin does not include discretionary life sentences due to difficulties in how to represent these in contrast with determinate sentences. This may be important in describing sentencing practices in respect of grave crimes such as rape and attempted rape.

These limitations present fundamental issues to those governmental bodies responsible for collecting and publishing such data. However, while intricate in nature,

⁴³ Elaine Ferguson notes that this is a particular problem in OLR cases because an offender can still be sentenced in cumulo, meaning all offences on the indictment are reflected in the punishment part of the sentence. Yet, the punishment part of the sentence is calculated by working backwards from the notional determinate sentence (most likely an extended sentence under section 210A of the Criminal Procedure (Scotland) Act 1995). This is exacerbated further by the problem that national datasets do not generally disaggregate data by offence type. Her own interrogation of data relating to OLRs has shown that in the first few years of the OLR’s operation, OLRs were recorded in Scotland as being *less* than a custodial sentence meaning any concurrent/consecutive prison sentence was listed as the headline penalty. In some cases, this resulted in the punishment part being recorded as a determinate custodial sentence. The outcome was that Scottish Government data dramatically under-estimated the number of OLRs made in the early years.

⁴⁴ *Ibid*, at p 8.

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.⁴⁵

2.5 Review of sentencing in the Scottish Court of Criminal Appeal

As evidenced above, sentencing in cases involving rape can include a range of options from non-custodial sentences such as community payback orders (with specific requirements), to life imprisonment and lifelong restriction orders. As seen, custodial sentences are most likely.

Sentences of 5 years' imprisonment or less are typically given to young offenders. Sentences involving 10 years' imprisonment or more typically involve significant aggravating factors such as the rape of young children by adults; cases of multiple rape; the use of violence; and abuses of trust. The majority of sentencing appeals in rape cases have been brought by the offender on the basis of unduly excessive punishment, though the Crown has been successful in a number of cases where the original sentence was considered unduly lenient.

In *Currie*,⁴⁶ the Crown unsuccessfully appealed a sentence of 3 years' probation and 200 hours community service.⁴⁷ The offender, who was 17 at the time of the offence, had engaged in consensual but unlawful⁴⁸ sexual intercourse with a 13 year old complainant who had lied about her age. He was also convicted of a separate offence of attempted rape. The trial judge reasoned that in her opinion custody would "harden" the respondent, likely increasing longer term risks as a result.⁴⁹ In rejecting the Crown's appeal, the Scottish Court of Criminal Appeal accepted the trial judge's

⁴⁵ Tata, C., 1997. Conceptions and representations of the sentencing decision process. 24(3) *Journal of Law and Society* 395; Tata, C., 2020. (n39).

⁴⁶ *HM Advocate v Currie* [2008] HCJAC 67.

⁴⁷ This would not be a sentence available now following the introduction of the Sexual Offences (Scotland) Act 2009.

⁴⁸ Contrary to the Criminal Law (Consolidation) (Scotland) Act 1995, s5(3). This has now been replaced by the Sexual Offences (Scotland) Act 2009.

⁴⁹ *HM Advocate v Currie* [2008] HCJAC 67 at para 12.

assessment of the risk of re-offending whilst also taking into account the age of the respondent.

The offender's age has been considered a mitigating factor in a number of cases of child rape heard after the introduction of the Sexual Offences (Scotland) Act 2009. In both *Tough*⁵⁰ and *E*,⁵¹ which involved the rape of young children,⁵² the offenders successfully appealed their sentences as being unduly excessive. The Scottish Court of Criminal Appeal substituted custodial sentences in each case⁵³ on the basis of the offenders' age and relative maturity of the complainer and offender. The appellant in *Tough* was 23 at the time of the offence, but his very low IQ of 66 was used to demonstrate his immaturity and justify a reduced sentence. The offender in *E* was 14 at the time of the offence. More recently, the Scottish Court of Criminal Appeal have had to consider the effect of the offender's age on sentencing in the high-profile case of *Campbell* in which a punishment part of 27 years was substituted for one of 24 years.⁵⁴ Here the "appalling" nature of the crime in question was recognised (the rape and murder of a 6 year old child) but balanced against the need not to rule out the capacity for change an individual of such an young age (16 at the time of the offence).

Similarly, the courts have imposed lower sentences on those adult offenders who committed their offence as a child. In *Greig*,⁵⁵ the offender (aged 14-15 at the time of the offences) raped two younger female relatives while babysitting them in the mid-1970s. The Scottish Court of Criminal Appeal rejected the submission that the sentence should be the same as if he was being sentenced as a child, but equally rejected the argument that the sentence should be like that of an adult raping a child. The appellant's sentence was reduced from 8 to 5 years' custody, and the passage of 37 years without further criminal conduct was also taken into account. Such reasoning can also be found in the later case of *Barbour*,⁵⁶ where the Court refused a Crown appeal against a cumulo 4-year sentence. The offender had, among other sexual offences, raped a child on various occasions between 1984 and 1986. Although he was a young adult at the time of the offences (aged 18-20) the passing of 30 years without further criminality in part justified this lower-end, but appropriate, sentence.⁵⁷ The rationale in *Tough*, *E*, *Greig* and *Barbour* can be traced back to at least the 2003 case of *HJL*,⁵⁸ in which an appeal against an unduly excessive sentence was allowed,

⁵⁰ *Tough v HM Advocate* [2012] HCJAC 119.

⁵¹ *E v HM Advocate* [2018] HCJAC 12.

⁵² Contrary to the Sexual Offences (Scotland) Act 2009, s 18.

⁵³ In *Tough* a sentence of six years and nine months was substituted for four years and three months. In *E*, a sentence of six years was substituted for one of three years and nine months.

⁵⁴ *Campbell v HM Advocate* [2019] HCJAC 58.

⁵⁵ *Greig v HM Advocate* [2012] HCJAC 127.

⁵⁶ *Barbour v HM Advocate* [2018] HCJAC 36.

⁵⁷ The passage of 23 years since the offending in *M v HM Advocate* [2013] HCJAC 20 also resulted in a 14-year sentence being quashed and substituted for one of 12 years.

⁵⁸ *HJL v HM Advocate* 2003, S.C.C.R. 120.

reducing the sentence from 8 to 5 years' custody. The appellant had raped his sisters on various occasions between 1972 and 1982, but the length of time since his last sexual offence, his age at the time of the offences, and his level of intelligence were all factors which made the original sentence excessive.

Sentencing appeals in rape cases where the sentence falls in the mid-range (5-10 years) provide most of the judicial discussion about sentencing considerations. In *B*,⁵⁹ the Crown successfully appealed a 3-year sentence for the oral rape of a 14 year old girl as being unduly lenient.⁶⁰ In substituting a 5-year sentence, the Court had regard to: the level of violence used; the relationship between the offender and complainer; the degree of psychological and physical harm sustained; the age, convictions and character of the offender; and the degree of remorse. The Court also had regard to the Sentencing Guidelines for England and Wales which indicated that the starting point for this offence would have been 6-9 years. The Court stated that it "would be unusual if the sentence in Scotland were half of the minimum applicable in England".⁶¹ In *H*,⁶² which involved, *inter alia*, the rape of a 3 year old child by a friend of the child's father, the Crown's appeal against an unduly lenient sentence of 3 years was allowed and a 6-year sentence substituted. The Court had regard to the cumulative effects of: the child's youth, isolation and vulnerability; the accused's ejaculation; the locus of the offence being the child's home; the presence of another child; the accused being under the influence of drugs; and the video recording of the rape. However, as the video recording was separately libelled,⁶³ the Court stressed the need to avoid double counting. Thus, the 2-year sentence for this latter offence was made to run concurrently with the 6-year sentence for rape. *Graham*⁶⁴ provides further judicial discussion of sentencing reasoning in adult rape cases. Here, a 7-year sentence for rape was held not to be excessive due to the aggravating factors of the proximity in time (2 days) to the other sexual offences which occasioned the other charges in the libel, the offender's motivation to punish the complainer, and the offender's breach of the bail order designed to protect the complainer.

Prior to the introduction of the 2009 Act, familiarity between the offender and victim was considered if not mitigatory, then lacking in aggravation. In the 1999 case of *Ramage*,⁶⁵ the offender successfully appealed a 5-year sentence as being unduly excessive on the basis that the offender and victim knew each other, and that the severity of the offence was not comparable to stranger rape. The revised sentence

⁵⁹ *HM Advocate v B* [2015] HCJAC 106.

⁶⁰ Contrary to the Sexual Offences (Scotland) Act 2009, s1.

⁶¹ *HM Advocate v B* [2015] HCJAC 106, at para 9.

⁶² *HM Advocate v H* [2017] HCJAC 82.

⁶³ Sexual Offences (Scotland) Act 2009, s 52(1)(a).

⁶⁴ *Graham v HM Advocate* [2018] HCJAC 69.

⁶⁵ *Ramage v HM Advocate*, 1999 SCCR 592.

was one of 3 years and six months. In the 2011 case of *Petrie*,⁶⁶ a 7-year sentence was quashed and substituted with one of 5 years on similar grounds. Obiter remarks in *Cooperwhite*⁶⁷ indicated judicial discomfort with such reasoning, although the 6-year sentence for the multiple rapes of the offender's wife and partner was held to be reasonable, albeit lenient. However, in *K*,⁶⁸ the Crown successfully appealed as unduly lenient an extended sentence of 7 years with 2 years' supervision for the anal rape of two of the offender's former partners and other sexual offences involving the former partners' children. The Court had regard to the remarks in *Cooperwhite* and found the arguments of the New Zealand Court of Appeal persuasive, namely that there ought to be 'no separate regime for sexual violation of a spouse or partner'. Additionally, the Court in *Shearer*⁶⁹ allowed a 2003 Crown appeal, raising an 18-month sentence to 3 years and six months for the rape of a sleeping/intoxicated woman, disregarding notions that the use of force or otherwise 'overcoming the will' of the complainant was necessary for a higher sentence.⁷⁰

Prior to the introduction of the Sexual Offences (Scotland) Act 2009, rape of young child by an adult has resulted in some of the highest sentences in rape cases. In *T* (2005),⁷¹ a 5-year sentence for the rape of a child under 5 by a 43 year old was held to be unduly lenient despite factors such as the offender's guilty plea, remorse, and low risk of future offending. It was substituted with a sentence of 13 years, comprised of a custodial period of 8 years and extension period of five years. In *T* (2014),⁷² a 10-year headline sentence was upheld as not excessive for 4 charges of child rape, although it was claimed to be at the upper end of reasonable as the offender had been a child during some of the offences. Multiple instances of child rape have unsurprisingly continued to attract higher sentences of rape following the introduction of the 2009 Act. In *M* (2013),⁷³ an offender successfully appealed his 14-year sentence for abusing both his children and raping his daughter, but it was only reduced to 12 years. In *M* (2016),⁷⁴ a sentence of 13 years' custody with a 3-year extension was upheld for a father who had raped and sexually abused his daughter and niece for over a decade. Additionally, in *Petch*,⁷⁵ while an offender's appeal against his discretionary life sentence for the rape of 3 girls aged 8-10 was allowed, the Court stated that the discretionary life sentence itself was not excessive, and merely reduced the mandatory custodial part from 12 to 8 years.

⁶⁶ *Petrie v HM Advocate* [2011] HCJAC 1.

⁶⁷ *HM Advocate v Cooperwhite* [2013] HCJAC 88.

⁶⁸ *HM Advocate v K* [2015] HCJAC 114.

⁶⁹ *HM Advocate v Shearer* 2003 SLT 1354

⁷⁰ This has now been codified in the Sexual Offences (Scotland) Act, s14.

⁷¹ *HM Advocate v T* 2005 1 J.C. 86.

⁷² *T v HM Advocate* [2014] HCJAC 31.

⁷³ *M v HM Advocate* [2013] HCJAC 20.

⁷⁴ *M v HM Advocate* [2016] HCJAC 80.

⁷⁵ *Petch v HM Advocate* 2011 [HCJAC] 50.

Use of serious threats of violence also attract sentences at the higher end of the range: in *McC*,⁷⁶ a 14-year sentence for the rape of two 16 year olds at knifepoint was held to be severe but not excessive. Major breaches of trust, such as in *Murray*⁷⁷, can also provide sufficient aggravation to result in the high end of sentences. Here, a former care home employee appealed his 7-year sentence for a number of sexual offences, including the rape of an uncommunicative 65 year old with severe dementia who was in his care, on the basis that the trial judge had incorrectly applied his guilty plea discount. His appeal was refused, and the Court decided that the 9-year headline sentence was in fact unduly lenient, substituting a 9½-year sentence (based on a 12-year headline sentence) instead.

Some appeals have related to OLRs specifically. In *GWS*⁷⁸, the appellant had been convicted of both attempted rape and rape (carried out at knifepoint). Here the OLR itself was not contested but the punishment part of the calculation was. The Court confirmed that:

“Upon expiry of the punishment part fixed by the court, the subject of the sentence is not released. What occurs is that the jurisdiction to determine the necessity for incarceration of the subject of the sentence passes from the court to the Parole Board, sitting as a judicial tribunal. The release of the subject of the order will occur only if and when that body conclude that that is consistent with the maintenance of an acceptable level of risk to the public. Such a state of affairs may never come into being; alternatively, if it does come into being, that may only happen at some distant point in the future, until when the subject will remain incarcerated.”⁷⁹

Later in *Laird*⁸⁰, which involved a conviction for multiple rapes and sexual assaults of the same victims over a period of 18 years, the court recognised the difficulty which exists in assessing an offender’s willingness and ability to engage in rehabilitation where there are no previous convictions. Here it was commented that it is for the sentencing judge to make their own assessment, based on knowledge and experience of whether such interventions are likely to succeed.⁸¹ Other cases in which appeals against the punishment part of an OLR were refused include *Byrne*⁸² where the offender appealed near the end of his punishment part, but after further risk assessment was still considered to be ‘high risk’.

⁷⁶ *McC v HM Advocate*, 2001 S.C.C.R. 576.

⁷⁷ *Murray v HM Advocate* [2013] HCJAC 3

⁷⁸ *GWS v HM Advocate* [2011] HCJAC 45.

⁷⁹ *Ibid*, at para 9.

⁸⁰ *Laird v HM Advocate*, 2016 S.C.L. 62.

⁸¹ *Ibid*, at para 12.

⁸² *Byrne v HM Advocate* [2016] HCJAC 84.

3.0 Culpability

In all cases, there are recognised factors which the courts may look to in determining a sentence. These 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. For example, harm may be caused to a victim through physical and psychological injury. The harm (whether physical or psychological) inflicted upon victims by an act will be influenced by the unique traits of the victims, and some may be more vulnerable than others. General factors which indicate a higher degree of harm include but are not limited to: the number of victims involved, sustained or repeated attacks on the same victim, victim vulnerability, the location of the offence, the presence of other witnesses (such as children) and additional degradation of the victim (such as taking photographs).⁸³ Additionally, in the case of sexual offences, there is the potential harm of a sexually transmitted disease⁸⁴ or causing pregnancy. In assessing the harm inflicted upon an individual, the court may be aided by victim statements.⁸⁵

Culpability is also assessed based on several factors such as whether: the offender was in a position of trust, the offender's previous convictions, the offender's intentions, whether the offence was recorded,⁸⁶ etc. The guidelines in England and Wales note that culpability may be affected by:⁸⁷

- 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

⁸³ Sentencing Council, 'Aggravating and mitigating factors'. Available at: <<https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/>> [Accessed 7 July 2020].

⁸⁴ In various jurisdictions this has been deemed to be an aggravating factor, see *R. v Baker (Carl)* [2004] EWCA Crim 715.

⁸⁵ Criminal Justice (Scotland) Act 2003, s 14.

⁸⁶ *HM Advocate v H* [2017] HCJAC 82.

⁸⁷ The Sentencing Council for England and Wales, *Sexual Offences: Definitive Guidelines*. Available at: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Sexual-offences-definitive-guideline-Web.pdf>> [Accessed 29 March 2020].

- 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)

In the past, it seems that rape against a partner (so-called “relationship rape”) was considered less serious.⁸⁸ However, this is no longer the case. In Scotland, it is now well established that most rapes are committed by men against women known to them⁸⁹ with the relationship between rape and domestic abuse now widely recognised.

3.1 Consent and culpability

Levels of culpability are often determined by the offender’s *mens rea*. In criminal law, it is typically the case that crimes of intention are considered to have the highest level of culpability. Crimes carried out recklessly (with “utter disregard” for the consequences⁹⁰) will generally be regarded as having less culpability. When discussing recklessness, the Scottish courts have sometimes referred to the term “gross negligence”⁹¹, but negligent conduct alone cannot attract criminal liability under Scots law. Although the concept of negligence is closely related to that of recklessness in that “it requires an individual to have engaged in risk-creating conduct that deviates from the standards of the reasonably careful man”⁹², the degree of carelessness offered by the individual is different. Negligent actions may still form the basis of delictual liability and can be the basis of statutory offences which rely on the concept of negligence, but the common law does not consider negligent conduct to be significant enough to invoke the sanctions of the criminal law.

Offences under Part 1 of the Sexual Offences (Scotland) Act 2009 can be committed where the *mens rea* is either intention or recklessness as to the issue of consent or reasonable belief in consent. However, the 2009 Act sought to remove the normative idea that an intentional offender is more culpable than a reckless one. Instead, what

⁸⁸ For example, in *R v Berry* (1988) 10 Cr App R (S) 13 the Court of Appeal noted that: “the violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a longstanding sexual relationship.”

⁸⁹ The Scottish Crime and Justice Survey found that 83% of those who had experienced serious sexual assault since the age of 16 knew the offender in some way, and 54% reported that the perpetrator was their partner, Scottish Government., 2014. *Scottish Crime and Justice Survey 2012-13: Sexual Victimisation and Stalking*, at ‘Serious Sexual Assault statistics’. Available at: <<https://www2.gov.scot/Publications/2014/06/3479> Accessed 29> [Accessed 29 March 2020].

⁹⁰ As defined in *Transco PLC v HM Advocate*, 2004 J.C. 29.

⁹¹ See for example *Paton v HM Advocate*, 1936 J.C. 19 at para 22.

⁹² Jones, T.H., and Taggart, I., 2018. (n4) at p 69 para 3-35.

is relevant is the fact that the offender did not establish consent. In this regard, it is the lack of consent which renders an offender morally blameworthy.

Discussing the potential failure of the proposed draft of the Sexual Offences Bill 2003, Power recommended the *mens rea* of rape should be defined in terms of three degrees of culpability: first degree rape would require knowledge as to the absence of consent, whilst second degree rape would need proof of recklessness as to whether the victim consents. Third degree—i.e. negligent—rape would be subject to a defence of mistaken belief in consent, provided it could be shown that the mistake was neither procedurally nor substantively negligent.⁹³

Prior to the Sexual Offences Act 2003, the *mens rea* of rape in England and Wales was intention or subjective recklessness as to the victim's lack of consent with a defence of genuine belief in the victim's consent being available to a defendant. In his PhD thesis on the assessment of *mens rea* in England and Wales, Furey cites Clarkston and Keating on the issue of "action-intention", noting that in the context of assessing *mens rea* in sexual offences, it will be unlikely that there will be difficulty in establishing that penetration was intentional:

"Accordingly, the use of action-intention alone does not render the mens rea in sexual offences as 'subjective'. The effect is that all that is required is that A did not reasonably believe that B consented. There is no longer any requirement that [A] knew that [B] did not consent nor that A was aware of the risk of B's non-consent. The mens rea for these serious offences therefore appears to be one of mere negligence. Therefore, although expressed rather differently from the offences discussed above, negligence is a sufficient ground of criminal liability, where consent is an issue; the defendant is liable where he does not reasonably believe that the victim consented."⁹⁴

In Scotland, convictions under the 2009 Act will not typically involve the attribution of a specific *mens rea*. However, at sentencing stages, intention can be an aggravating factor with regards to premeditation.⁹⁵

The Act makes clear that it is incumbent upon each party to ensure the other has given valid consent. Of course, while many adults may be generally capable of consenting,

⁹³ Power, H., 2003. Towards a redefinition of the mens rea of rape. 23(3) *Oxford Journal of Legal Studies* 379.

⁹⁴ Furey, J.R., 2010. *A consistent approach to Assessing Mens Rea in the Criminal Law of England and Wales*. PhD thesis: University of Exeter. at p 60. Available at:

<<https://ore.exeter.ac.uk/repository/bitstream/handle/10036/117790/FureyJ.pdf?sequence=2>>

[Accessed 29 March 2020].

⁹⁵ *Moynihhan v HM Advocate* [2016] HCJAC 85.

others will not. Section 17⁹⁶ makes special provision for adults who are “deemed to be incapable of consent.”⁹⁷ This provision aims to protect while not infringing autonomy.

Where there is no legally valid consent, then a criminal offence may be committed. 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 as seen in the recent case of *Cieslak*⁹⁸, discussed below.

3.2 Culpability and strict liability

Daniel Cieslak was charged and convicted of the rape of a 12-year-old contrary to section 18 of the 2009 Act. A critical difference between section 18 and section 28 (having intercourse with an older child) is the defences which are available to the accused. Section 39(2)(a)(1)) provides a one-time defence for an accused who reasonably believed the victim was over 16. The purpose of this “is to give legal significance to a charge by the police as a ‘shot across the bow.’”⁹⁹ Such a defence is not available for Part 2 offences and section 27 states that “it is not a defence to a charge in proceedings under any of sections 18 to 26 that A believed that B had attained the age of 13 years.” However, while there is no statutory defence, the court may determine that there are mitigating factors and that the offender’s culpability is very low.

Cieslak was exceptional in that the offender was considered to have good reason to believe that the victim was over the age of 16. Indeed, police officers and a taxi driver who spoke to the victim on the night of the offence did not seem to suspect she was under 18 (the latter being of the belief that the victim was about 20 years old).

As such, Cieslak was convicted of the offence on the basis that it was one of strict liability. However, in sentencing it was noted that a wide range of disposals are open to the court and that statutory offences may encompass wide ranges of culpability. As a consequence, it was considered that an absolute discharge was appropriate in the circumstances: the effect being that Cieslak did not acquire a criminal record and was not subject to the notification requirements of the 2003 Act. In the sentencing statement, the aspects that may affect culpability were discussed:

⁹⁶ 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 health problem.

⁹⁷ *W v HM Advocate* [2016] HCJAC 83, at para 26.

⁹⁸ *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].

⁹⁹ *O'Rourke v HM Advocate* [2017] HCJAC 70. Where there is no “shot across bow” then the restriction on the s 39 defence may violate Article 8, *AB v Her Majesty's Advocate* [2017] UKSC 25.

“At your detention and interview, when the issue of age was raised by police officers and they you told her age, the fact that you spontaneously became distressed – crying and holding your head in your hands – are circumstances which support the fact that your belief she was 16 was genuine.

You are a first offender, you are still relatively young and on the information before me there is nothing to suggest you would offend in the future.

I am satisfied that you have been subject to considerable pressure and distress from the burden of this prosecution over the last 19 months and by publicity about it. So much so, you have had to cease your college course and suspend plans for a university course. It was the impression of the social worker at your interview that you may need professional assistance to deal with this distress.

Your criminal culpability here is wholly restricted to the application of strict liability within this offence.

That is in marked distinction to other reported cases under this statutory provision, which have involved conduct involving assault or recklessness or force, or the absence of consent or have resulted in distress to the victim – all of which are factors which raise the need for punishment. In addition, there is no suggestion here of predatory conduct or grooming or manipulation or deception.

Absent such factors I do not consider there is any need for, or public interest in, punishment. To do so would in my view be disproportionate given the nature of the criminal culpability here.¹⁰⁰

Loosely, the factors identified as mitigating Cieslak’s culpability could be characterised as: a genuine and (in the exceptional circumstances) a reasonable error of the facts; genuine and deeply felt remorse (and a plea of guilty); the lack of a previous record and negligible risk of recidivism; the young age of the offender; that the sexual acts were consensual and the victim was not distressed; and the distress endured from being prosecuted.

A case such Cieslak’s is difficult to predict, and it seems unlikely that the drafters of the 2009 Act (for obvious reasons) would have been able to foresee these unlikely events. However, the lack of mandatory minima enabled the court to deliver what it considered to be a just outcome.

¹⁰⁰ *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].

3.3 Offender's characteristics and background

Within sentencing discourse, it is generally recognised that distinction should be made between the offence and the harm caused on the one hand and the personal characteristics of the offender on the other.¹⁰¹ However, Tata points to the practical difficulty in operating this binary distinction between 'offence' and 'offender'. In his empirical research, he observed that such an abstract distinction is often blurred in practice, and as such, problems are likely to arise in the implementation of 'two-dimensional' policy approaches (e.g. numerical guidelines) which require such abstraction.¹⁰²

Personal characteristics of the offender are likely to include personal circumstances and previous convictions. Under Scots law, sentencing stages are normally the first point at which previous convictions of the accused will become known. Under solemn procedure, as per section 101(1) Criminal Procedure (Scotland) Act 1995, previous convictions will not be made known to the jury before a verdict is returned. This is an important protection to the accused since knowledge of previous convictions is likely to have a significant prejudicial effect. There are, however, a number of exceptions to this rule, including where the accused seeks to lead evidence of their own good character or evidence of the bad character of a witness (including the complainer). In the context of sexual offences, where the accused seeks to lead evidence of the complainer's sexual history, and this is allowed, any relevant convictions (that is to say those relating to sexual offences) may be put before the court before sentencing.¹⁰³ Where no exceptions to the rule prohibiting the leading of character evidence exist, it will only be at the sentencing stage that previous convictions are made known to the court (and these will, if analogous or otherwise relevant, generally be regarded as an aggravating factor for the purposes of sentencing).

Relevant characteristics of the offender will also include age. Generally speaking, age is considered as a key mitigating factor in youth justice. Often this is specifically linked to the opportunity for rehabilitation which exists for young offenders. Additionally, sections 207 and Section 208 of the 1995 Act make provisions for sentencing under 21's to imprisonment and sentencing children convicted on indictment, respectively. In Scotland, 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 2011.¹⁰⁴ Moreover, where an adult is sentenced for offences committed while young,

¹⁰¹ Berman, D.A., 2005. Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reform. 58(1) *Stanford Law Review* 272.

¹⁰² Tata, C., 2007. Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process. 16 *Social & Legal Studies* 425; C. Tata., 2020. (n39).

¹⁰³ Criminal Procedure (Scotland) Act 1995, s 275A.

¹⁰⁴ See *HM Advocate v O'D* [2019] HCJAC 3.

that sentence must take into account his age, and hence relative immaturity, at the time of the offences.¹⁰⁵

3.4 Apologies, remorse and guilty pleas

Remorse has been widely recognised as personal mitigation, in all cases. The importance of apologies for both the victim and the community as a whole has also been recognised.¹⁰⁶ This can, of course, be especially difficult in the context of sexual offences where often the defence position will be denial, and specifically denial based on the assertion that the complainer consented to the sexual activity.

Where guilt has been accepted, mitigation will be recognised at an institutional level through the early submission of a guilty plea.¹⁰⁷ An acceptance of guilt, however, does not necessarily equate to remorse nor can we assume that 'genuine' remorse is always easy to identify¹⁰⁸

In Zhong's US study¹⁰⁹, whilst judges recognised the significance of remorse in terms of sentencing, they also acknowledged their own difficulty in assessing genuine remorse and the fact that there may be a role for forensic psychiatric experts to play in assisting with this. Murphy also recognises this, arguing that offering credit (through a sentencing discount) for the expression of remorse poses particular practical problems.¹¹⁰ For him, if remorse is to be considered, it should be at a later stage, such as parole, when enough time has elapsed to provide reliable evidence of remorse.¹¹¹ This, however, does not assist when the sentencing judge must make a decision as to whether a prison sentence should be administered or whether an alternative means of disposal is appropriate in the circumstances¹¹².

In his examination of a range of domestic and international settings¹¹³, Weisman argues that the showing of remorse is a key determinant of the quantum of punishment

¹⁰⁵ *Greig v HM Advocate* [2012] HCJAC 127, para 11.

¹⁰⁶ Padfield, N., 2015. Publication Review. 74(3) *Cambridge Law Journal* 627.

¹⁰⁷ See Criminal Procedure (Scotland) Act 1995, s 76.

¹⁰⁸ For example, see S Bandes, 'Remorse and Judging', in *Remorse in Criminal Justice: Multi-Disciplinary Perspectives*, M. Proeve, K. Rossmanith, S. Tudor and R. Weisman, (eds), Taylor & Francis Group, 2020.

¹⁰⁹ Zhong, R., 2013. *So You're Sorry? The Role of Remorse in Criminal Law*. Yale Medicine Thesis Digital Library. at p 1. [pdf] Available at: <<https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1852&context=ymtdl>>. [Accessed 29 March 2020].

¹¹⁰ Murphy, J.G., 2006. Well Excuse Me- Remorse, Apology and Criminal Sentencing. 38 *Arizona State Law Journal* 371. at 379.

¹¹¹ *Ibid*, at p. 382.

¹¹² McPherson, R., and Tata, C., 2018. (n40).

¹¹³ Weisman, R., 2014. *Showing Remorse: Law and the Social Control of Emotion*. New York: Routledge.

thought to be deserved. Acknowledging the difficulties of distinguishing between sincere or genuine remorse and that which may be less so, Weisman shows that the demonstration of convincing signs of remorse is what legal professionals, including judicial sentencers, as well as the wider community, tend to look for. More broadly, it is the attitude of the person (including remorse) to his or her offending which is, he argues, the central organising lens through which judgements about the seriousness of the case as a whole appear to be interpreted. This, in turn, raises the question of the practical feasibility of a sharp distinction between ‘offence’ as opposed to ‘offender’ characteristics.

4.0 Public perceptions of sentencing in cases involving rape

This section considers public perceptions of sentencing in cases involving rape and explores the factors and attitudes driving sentencing expectations. Attention is given to the public’s views of the purposes of sentencing, aggravating/mitigating factors and the relative weight that should be attached to these factors, general sentencing practice in rape cases, and suggested case-specific appropriate sentences. Victim perceptions of the sentencing process are also considered.

It is important to note that, generally speaking, research into public perceptions of sentencing has found that there is a widespread perception that criminal sentences are too lenient. 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, strong support for proportionality in sentencing, and also for the possibility of rehabilitation.

4.1 Scottish studies on public perceptions of sentencing

A number of Scottish surveys have been conducted in relation to attitudes towards violence against women, in an attempt, in particular, to examine what are sometimes seen as problematic conviction rates. The 2014 Scottish survey of attitudes towards violence against women indicated that 95% and 93% of people thought that both rape by a stranger and rape within a marriage were seriously wrong, respectively.¹¹⁴ However, a significant minority of participants in the 2014 social

¹¹⁴ I.e., ‘Meriting a score of 5 or more on the 7-point scale where 1 meant “not wrong at all” and 7 meant “very seriously wrong”’: Reid S., McConville S., Wild A., Burman M., and Curtice J., 2015. *Scottish Social Attitudes Survey 2014: Attitudes to Violence Against Women in Scotland*. Scottish Government. at p 5. Available at: <<https://www.gov.scot/publications/scottish-social-attitudes-survey-2014-attitudes-violence-against-women-scotland/>> [Accessed 7 July 2020].

attitudes survey thought that rape victims/survivors are at least partially to blame if they were very drunk (60% said the woman was not at all to blame) or wearing revealing clothing on a night out (58% said the woman was not at all to blame).¹¹⁵

In 2019, the Scottish Sentencing Council published research report by Ipsos Mori and Prof Cyrus Tata on public perceptions of sentencing.¹¹⁶ In descending order of importance, respondents said that public protection, rehabilitating offenders and punishing crime should be the priority of sentencing. However, when sentencing young offenders, the most important consideration was rehabilitating offenders, followed by public protection and punishing crime. Over a third of respondents thought 16 was the appropriate age at which an offender should be sentenced as an adult.¹¹⁷ Rehabilitative instincts were shared by respondents to the 2017/18 Scottish Crime and Justice Survey, who generally thought that custodial sentences should facilitate prisoners in addressing problem behaviours.¹¹⁸

Respondents in the Scottish Sentencing Council report indicated that significant previous convictions; the involvement of multiple victims/survivors or incidents; and premeditation should generally result in an increased sentence. When asked about offenders convicted of rape specifically, drugging the victim's drink and a lack of remorse were regarded as aggravating factors.¹¹⁹ Conversely, over three quarters thought that an offender's genuine remorse should not alter the sentence,¹²⁰ and over half felt that a guilty plea should make no difference to sentences generally.¹²¹ Reservations surrounding guilty plea sentence discounts for offenders convicted of rape had also been found amongst participants in a 2012 YouGov poll of 1664 people.¹²² More recently, together with academics Rachel McPherson and Cyrus Tata, Scotcen conducted research in Scotland into public perceptions of sentencing in cases involving all sexual offences.¹²³ The aim of this research was to explore, in depth, public perceptions of sexual offences sentencing in

¹¹⁵ Ibid, at p 6.

¹¹⁶ 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].

¹¹⁷ Ibid.

¹¹⁸ Scottish Government., 2019. *The Scottish Crime and Justice Survey 2017-2018*. at p 84. Available at: <<https://www.gov.scot/news/scottish-crime-and-justice-survey-2017-18/>> [Accessed 21 March 2020].

¹¹⁹ Black, C., Warren, R., Ormston, R., and Tata, C., 2019. (n114).

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² YouGov., 2012. *Rape and Sexual Assault*. Available at: <<https://yougov.co.uk/topics/politics/articles-reports/2012/03/06/rape-and-sexual-assault>> [Accessed 9 July 2020].

¹²³ Reid, S., Biggs, H., Attygalle, K., Vosnaki, K., McPherson, R., and Tata, C., *Public Perceptions of Sentencing in Scotland: Qualitative research involving sexual offences*, forthcoming, Edinburgh: Scottish Sentencing Council.

Scotland, including the perceptions of victims/survivors 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 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 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 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 which could exist between cases which seemed to them to be 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 Studies in England and Wales of public perceptions of sentencing in cases involving rape

In 2012, the Sentencing Council for England and Wales published a report on attitudes to sentencing sexual offences. Participants in this study considered the purposes of sentencing to include public protection; punishment; acknowledgement of the harm/seriousness of the offence; censure (denunciation) of the conduct; and rehabilitation/the prevention of repeat offending.¹²⁴ 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.¹²⁵

Aggravating factors in this report reflected those in the Scottish Sentencing Council report, but also included the age/vulnerability of the victim (including young, elderly and disabled victims); illness risked or caused by sexually transmitted infections/ejaculation; the use of weapons/torture;¹²⁶ abduction/detention; and the

¹²⁴ McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. *Attitudes to Sentencing Sexual Offences*. Sentencing Council of England and Wales. at p iv. Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Attitudes_to_Sentencing_Sexual_Offences_web1.pdf> [Accessed 21 March 2020].

¹²⁵ Ibid, at p 29.

¹²⁶ Although it was felt that violence which resulted in grievous bodily harm should be sentenced separately and served consecutively.

production/distribution of images of the offence.¹²⁷ Participants considered that rape by a previous sexual partner should actually be considered an aggravation due to the abuse of trust.¹²⁸ Participants also held the view that the absence of aggravating factors should not mitigate.¹²⁹

However, those included in the 2012 study were reluctant to suggest what mitigating factors might be. They thought that the offender's good character and youth should not reduce the sentence, except where a young offender was acting under duress.¹³⁰ Popular opinion in the USA appears to be that juveniles (i.e., those aged between 16 to 18) convicted of rape should be treated as adults.¹³¹ The only mitigation with broad support in the report published by the Sentencing Council for England and Wales 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.¹³²

In both reports, respondents attached far more weight to aggravating factors than to mitigating factors. This was also observed in an Australian study of juror sentencing perceptions.¹³³ However, in contrast to the findings of the study in 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. In the context of England and Wales, Ellison and Munro's seminal work with mock jurors found that concerns regarding public understanding of a 'normal' reaction to a sexual attack were well founded with assumptions being made about delayed reporting, fighting back against an attack and the demeanour of the witness - all of which impacted upon juror deliberations.¹³⁴ This research is further supported by recent work carried out by Chalmers, Leverick and Munro in Scotland.¹³⁵ In recognition of such problems, the Abusive Behaviour and Sexual Harms (Scotland) Act 2016 inserted into the Criminal Procedure (Scotland) Act 1995 section 288D and 288DB which provide that judicial direction must be given

¹²⁷ McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n122) at pp 50-54.

¹²⁸ Ibid, at pp 54-55.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ See generally: Miller, R.N., and Applegate, B.K., 2015. Adult Crime, Adult Time? Benchmarking Public Views on Punishing Serious Juvenile Felons. 40(2) *Criminal Justice Review* 151.

¹³² McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n122).

¹³³ 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.

¹³⁴ Ellison, L., and Munro, V.E., 2009. Reacting To Rape: Exploring Mock Jurors' Assessment of Complaint Credibility. 49(2) *British Journal of Criminology* 202.

¹³⁵ Leverick refers to the findings of this research when discussing problematic views expressed by jurors regarding what 'real' rape' and 'real victims' look like, Leverick, F., 2020. What do we know about rape myths and juror decision making? 24(3) *International Journal of Evidence and Proof* 255.

about a lack of communication about the offence (by the complainer) and a lack of physical resistance to a sexual attack.

4.3 The appropriateness of current sentencing

When asked in general, abstract terms, the majority-held public perceptions in Scotland,¹³⁶ the wider UK,¹³⁷ the USA¹³⁸ and Australia¹³⁹ are that judges are too lenient. Studies also indicate that public perceptions of judicial leniency are even more pronounced in rape 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 Scottish Sentencing Council study this figure was 31% of respondents.¹⁴⁰ However, only 21% of participants in the Scottish Sentencing Council report thought that the offender in a hypothetical example would get an appropriate sentence.¹⁴¹ Similarly, 70% of respondents in an English and Welsh survey thought sentences are generally too lenient, and 76% thought that rape sentences are too lenient.¹⁴² In the 2011 Crime Survey for England and Wales, only 21% of respondents accurately estimated the custody rate following rape convictions as being 85-100%; the actual custody rate for rape was 99%.¹⁴³

Respondents in the study carried out by the Sentencing Council for England and Wales in 2012 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.¹⁴⁴ Public (i.e. non-victim) respondents also regarded both grievous

¹³⁶ Black, C., Warren, R., Ormston, R., and Tata, C., 2019. (n110); Reid, S., Biggs, H., Attygalle, K., Vosnaki, K., McPherson, R., and Tata, C., (n114).

¹³⁷ 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> [Accessed 21 March 2020].

¹³⁸ See generally: Cohen, M.A., Rust, R.T., and Steen, S., 2002. *Measuring Public Perceptions of Appropriate Prison Sentences*. NCJRS.

¹³⁹ 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.

¹⁴⁰ Scottish Government., 2019. (n112) at p 82.

¹⁴¹ Black, C., Warren, R., Ormston, R., and Tata, C., 2019. (n114).

¹⁴² 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].

¹⁴³ Hough, M., Radford, B., Jackson, J., and Roberts, R.J., 2013. (n135) at p 20.

¹⁴⁴ *Ibid*, at pp 45-60.

bodily harm inflicted by a stranger and selling heroin as being almost as serious as rape.

Restriction orders (which prevent sexual offenders from approaching or having contact with their victim) were supported in the Sentencing Council of England and Wales' report.¹⁴⁵ 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.¹⁴⁶ For rape, custodial sentences are the only sentences with essentially consensus support,¹⁴⁷ though (when surveyed in the abstract) there appears to be significant public support in the USA for the capital punishment of those convicted of rape.¹⁴⁸

4.4 Participant responses to case studies

When asked to consider sentencing in specified cases, public perceptions of appropriate sentencing 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.”¹⁴⁹

Notwithstanding this overwhelming perception of leniency, there is evidence that when presented with concrete case scenarios (or vignettes), people tend to propose preferred sentences which are, in fact, far more aligned with the actual sentences passed in such a scenario. For example, the Scottish Sentencing Council report notes that when presented with a detailed vignette of a rape, respondents most commonly proposed a preferred sentence that was in line with actual rape sentencing practice (although 40% felt a lower sentence would be appropriate and 26% thought a tougher sentence would be appropriate).¹⁵⁰ Similarly, participants in the Sentencing Council report were given a vignette which described the rape of a woman by a stranger in a park. A 'recurrent suggestion' was a custodial sentence of 10-20 years,

¹⁴⁵ Ibid, at p 30.

¹⁴⁶ Ibid; King, L., and Roberts, J., 2017. The Complexity of Public Attitudes Towards Sex Crimes. 12(1) *Victims and Offenders* 71 at p 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.

¹⁴⁷ Black, C., Warren, R., Ormston, R., and Tata, C., 2019. (n114); McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n122) at p iv.; 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.

¹⁴⁸ Mancini, C., and Mears, D.P., 2010. To Execute or Not to Execute? Examining Public Support for Capital Punishment of Sex Offenders. 38(5) *Journal of Criminal Justice* 959.

¹⁴⁹ Marsh, N., McKay, E., Pelly, C., and Cereda, S., 2019. (n140) at pp 24-25.

¹⁵⁰ Black, C., Warren, R., Ormston, R., and Tata, C., 2019. (n114) at p 29.

which is in largely line with current guidelines for rape of 5 years to life.¹⁵¹ In the aforementioned English and Welsh survey where 76% of respondents thought rape sentences were too lenient, this figure dropped to 41% after respondents were provided with a specific case study.¹⁵² The Australian study of juror sentencing perspectives provides similar insights. This study had the advantage of anchoring respondents who had a strong claim to representing the community into real sentencing exercises: in rape/aggravated sexual assault cases, jurors tended to prefer sentences which were in line with or lower than those actually imposed by judges.¹⁵³ These studies suggest grounds for believing that while people overwhelmingly tend 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.

4.5 Victim/survivor perceptions of sentencing

The Sentencing Council for England and Wales study included focus groups (comprised of members of the public) and also victims/survivors of rape and other 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 themselves:¹⁵⁴ they felt that these factors should be taken into account during sentencing.¹⁵⁵ Victim/survivor satisfaction was often increased where victims/survivors were well-informed throughout the process; sentencing expectations were managed from the outset; and the judge's comments referenced the seriousness of the offence.¹⁵⁶ As mentioned above, victims/survivors thought concurrent sentences failed to take into account the harm inflicted upon each victim on each occasion.¹⁵⁷ While there was general support for victim personal statements (which

¹⁵¹ McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n122).

¹⁵² Marsh, N., McKay, E., Pelly, C., and Cereda, S., 2019. (n140) at pp 24-25.

¹⁵³ 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 189.

¹⁵⁴ For example, the parents of child victims.

¹⁵⁵ McNaughton, C., Nicholls., Mitchell, M., Simpson, I., and S. Webster, S., 2012. (n122) at p 21.

¹⁵⁶ *Ibid*, at pp 24-35.

¹⁵⁷ *Ibid*, at pp 45-46.

allow victims/survivors to express the effect of the offence to the judge), there was a view that they should not necessarily influence the sentence given.¹⁵⁸

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.¹⁵⁹ A Scottish Government consultation on widening the use of victim statements in all serious crimes was launched in September 2019.¹⁶⁰ While the consultation does not ask questions relating to the use of victim statements in sentencing specifically, the results of this consultation, once published, may provide updated evidence in relation to their use in sentencing.

5.0 Other commonwealth jurisdictions

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

5.1 England and Wales

The Sentencing Council for England and Wales has published a definitive guideline for sentencing in sexual offence cases including rape in 2014. Rape is an offence triable only on indictment, carries a maximum sentence of life imprisonment, and has a range between 3-19 years' custody.¹⁶¹ As mentioned, the guidelines in England and Wales prescribe starting point sentence ranges following a 9-step process, unlike those in Australia which instead list guideline judgements. Firstly, judges must determine the alphanumerical offence category: categories 1-3 involve decreasing levels of harm, based on factors such as severe physical or psychological harm; consequential pregnancy or sexually transmitted infection; abduction; humiliation; violence; forced entry into the victim's home; and prolonged duration. Categories A and B relate to the offender's culpability, based on the degree of planning; the number

¹⁵⁸ Ibid, at p 25.

¹⁵⁹ Leverick, F., Chalmers, J., and Duff, P., 2007. *An Evaluation of the Pilot Victim Statement Schemes in Scotland*. at p 42. Available at: <<https://www.webarchive.org.uk/wayback/archive/20170701074158/http://www.gov.scot/Publications/2007/03/27152727/0>> [Accessed 21 March 2020].

¹⁶⁰ Scottish Government, 2019. *Widening the Scope of the Current Victim Statement Scheme: Scottish Government Consultation*. Available at: <<https://www.gov.scot/publications/consultation-widening-scope-current-victim-statement-scheme/>> [Accessed 7 July 2020].

¹⁶¹ Sentencing Council for England and Wales., 2013. *Sexual Offences: Definitive Guideline*. at p 9. Available at: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Sexual-offences-definitive-guideline-Web.pdf>> [Accessed 9 July 2020].

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.¹⁶²

Secondly, a starting point and category range is identified. The most serious instances (category 1A) attract a starting point of 15 years with a 13-19 year range, whereas the least serious (category 3B) carry a starting point of 5 years with a 4-7 year range.¹⁶³ The guidelines provide a further, non-exhaustive list of aggravating/mitigating factors which judges can consider when adjusting the headline sentence.¹⁶⁴ Aggravations include, *inter alia*, recent and relevant previous convictions; committing the offence on bail; ejaculation; the presence of children; and steps taken to prevent the victim reporting the incident. 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'.¹⁶⁵ 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 guidelines relating to the rape of children under 13 involve the same 9-step process. However, sentences are generally higher than for adult rape: highest-level seriousness offences attract a 16-year headline sentence with a 13-19 year range, and lowest-level seriousness offences have an 8-year headline sentence with a 6-11 year range.¹⁶⁶ However, the guidelines also state that "offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate".¹⁶⁷

The Sentencing Council published an impact assessment of the Sexual Offences Definitive Guideline in 2018¹⁶⁸ When the guideline was introduced, prescribed sentences generally conformed to sentencing practice at the time, but it was expected

¹⁶² *Ibid*, at p 10.

¹⁶³ *Ibid*, at p 11.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid*, at p 12.

¹⁶⁶ *Ibid*, at p 30.

¹⁶⁷ *Ibid*, at p 28.

¹⁶⁸ 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].

that the guideline would lead to ‘a moderate increase to sentencing levels in some [rape cases]’.¹⁶⁹ The research found that sentencing severity for sexual offences had been increasing over the preceding decade, ‘[occurring] in the context of high-profile coverage of sexual offences and increased reporting of sexual offending’, and that this trend continued following the introduction of the guidelines in 2014.¹⁷⁰ However, the research found ‘no strong statistical evidence that the guideline [itself] caused a change in sentencing severity for rape’.¹⁷¹ In 2005, the average custodial sentence for rape was 8 years 6 months. This increased to 10 years 2 months in 2013, and 11 years in the 12 months after the guideline came into force.¹⁷² However, the estimated proportion of offenders receiving a sentence over 13 years remained largely unchanged,¹⁷³ and the average custodial sentence for the rape of a child under 13 did not increase post-2013.¹⁷⁴ Judges were ‘generally positive about the guideline’, and thought the requirement to consider psychological harm was a major influence on perceptions that sentencing severity had increased.¹⁷⁵ However, concerns were raised about the difficulty of establishing what constitutes sufficient psychological harm,¹⁷⁶ and, in the context of offences involving the rape of a child under 13, how to define ‘abuse of trust’.¹⁷⁷ The research concluded that the evidence ‘suggests the guideline is being implemented as anticipated’ in adult rape cases.¹⁷⁸

5.2 Canada

In Canada, criminal offences are regulated by the Criminal Code, which states that the fundamental purposes of sentencing are to promote public protection, censure crimes, deter and rehabilitate offenders, and provide proportionate and consistent punishments.¹⁷⁹ When sentencing young offenders, the least restrictive sentence capable of rehabilitating the offender and achieving the purposes of sentencing must be employed.¹⁸⁰ 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.¹⁸¹

¹⁶⁹ Ibid, at p 4.

¹⁷⁰ Ibid, at p 10.

¹⁷¹ Ibid, at p 11.

¹⁷² Ibid.

¹⁷³ Ibid, at p 12.

¹⁷⁴ Ibid, at p 18.

¹⁷⁵ Ibid, at p 13.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid, at p 19. See also *R v Forbes* [2016] EWCA Crim 1388.

¹⁷⁸ Ibid, at p 14.

¹⁷⁹ Canadian Criminal Code s 718.

¹⁸⁰ Youth Criminal Justice Act 2003 (Canada) s 38(2)(e).

¹⁸¹ Ibid, s 64.

Furthermore, the sentences for sexual offences involving child victims have been increased relatively recently.¹⁸²

There are numerous differences between Canada and Scotland in the sentencing of rape cases. Canada does not have a specific offence of rape. Rather, the Criminal Code defines rape 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;¹⁸³ this definition is also employed in the definition of sexual assault.¹⁸⁴ However, the Criminal Code further provides three severity-based gradations of sexual assault. Rape can be tried under any of these three gradations.

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.¹⁸⁵ 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.¹⁸⁶ This is illustrated in Table 12 below:

Table 12: Sentencing in simple sexual assault cases in Canada:

Proceedings	Age of Complainant	Minimum Sentence	Maximum Sentence
Indictment	Over 16	N/A	10 Years
Indictment	Under 16	1 Year	14 Years
Summary	Over 16	N/A	18 Months
Summary	Under 16	6 Months	2 Years

The second tier of sexual assault cases comprises 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.¹⁸⁷ 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.¹⁸⁸ 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

¹⁸² Tougher Penalties for Child Predators Act 2015 (Canada) ss 14-15.

¹⁸³ Canadian Criminal Code s 265.

¹⁸⁴ *Ibid*, s 265(2).

¹⁸⁵ *Ibid*, s 271(a).

¹⁸⁶ *Ibid*, s 271(b).

¹⁸⁷ *Ibid*, s 272(1).

¹⁸⁸ *Ibid* at s 272(2)(a.2). Note that s 745(d) deals with life sentences, and provides that 'in respect of a person who has been convicted of any [life imprisonable offence other than high treason or murder], that the person be sentenced to imprisonment for life with normal eligibility for parole', i.e., with no fixed statutory non-parole terms.

organisation, or if it was a second or subsequent offence.¹⁸⁹ 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.¹⁹⁰

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’.¹⁹¹ 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.¹⁹² 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 actually reduce proportionality in sentencing.¹⁹³ Numerous academic works have criticised Canadian mandatory minima sentencing as being unpopular among judges, eroding public confidence by disallowing judicial derogation from the minima even in exceptional cases, and encouraging sentences which are discriminatory towards Aboriginal people.¹⁹⁴

5.3 Australia

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

5.3.1 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

¹⁸⁹ Ibid, ss 272(2)(a)-(a.1).

¹⁹⁰ Ibid, s 272(3).

¹⁹¹ Ibid, s 273.

¹⁹² 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].

¹⁹³ 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]

¹⁹⁴ For a list of works, see *ibid*, at pp 38-43.

judgements.¹⁹⁵ Like Canada, rape in NSW is described as 'sexual assault'.¹⁹⁶ The Crimes (Sentencing Procedure) Act 1999 (NSW) lays down, in general terms, relevant aggravating and mitigating factors,¹⁹⁷ the law relating to victim impact statements,¹⁹⁸ and also factors which must be taken into account when sentencing child sexual offences.¹⁹⁹ 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: for example, while penile-vaginal penetration may sometimes be taken to be more serious than oral rape, the nature of some oral rape cases (e.g., an early-hours home invasion where the offender ejaculated in the victim's mouth in front of the victim's children)²⁰⁰ may attract higher sentences than some penile-vaginal penetration cases.²⁰¹ Also similarly to Canada, NSW has 3 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.²⁰² Unlike Canada, however, exceptional circumstances may allow for non-custodial sentences.²⁰³ The second-highest gradation is termed 'aggravated sexual assault', which attracts 20-year maximum sentences and non-probation periods of 10 years.²⁰⁴ 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.²⁰⁵ The most serious, top-tier, form of sexual assault makes the offender liable to life imprisonment, which in NSW means the offender must spend the remainder of their natural life in prison.²⁰⁶ This is in cases of forced sexual intercourse 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.²⁰⁷

¹⁹⁵ Edney, R., and Bagaric, M., 2007. *Australian Sentencing: Principles and Practice*. Port Melbourne: Cambridge University Press. at p 38.

¹⁹⁶ Crimes Act 1900 (NSW) s 61I.

¹⁹⁷ 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.

¹⁹⁸ *Ibid*, s 30E

¹⁹⁹ *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.

²⁰⁰ *R v Oloitoa* 2007 NSWCCA 177.

²⁰¹ NSW Sentencing Guidelines [20-630].

²⁰² *Ibid*, [20-640].

²⁰³ *Sabapathy v R* 2008 NSWCCA 82.

²⁰⁴ NSW Sentencing Guidelines [20-660].

²⁰⁵ Crimes Act 1900 (NSW) s 61J.

²⁰⁶ *Ibid*, s 61JA.

²⁰⁷ NSW Sentencing Guidelines [20-670].

The maximum sentence for sexual intercourse with a child under 10 in NSW is life, with a 15-year non-probation period.²⁰⁸ 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 aggravated).²⁰⁹ 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).²¹⁰

5.3.2 Victoria

In Victoria, crimes are defined in the Crimes Act 1958,²¹¹ and penalties are set according to a 9-level scale for imprisonable offences per the Sentencing Act 1991.²¹² 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 offences²¹³ 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.²¹⁴ The purposes of sentencing are to promote a fair and consistent approach in deterring, rehabilitating and punishing offenders,²¹⁵ to denunciate offensive conduct and to promote community protection.²¹⁶ 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.²¹⁷

Rape is a level 2 offence, which carries a maximum 25-year sentence with a standard sentence of 10 years.²¹⁸ These maximum and standard sentences are the same for the sexual penetration of a child under 12.²¹⁹ However, sexual penetration of a child between 12 and 16 is a level 4 offence, with maximum and standard sentences of 15

²⁰⁸ Crimes Act 1900 (NSW) s 66A.

²⁰⁹ *Ibid*, s 66C(1) and (2).

²¹⁰ *Ibid*, s 66C(3) and (4).

²¹¹ Crimes Act 1958 (Vic).

²¹² Sentencing Act 1991 (Vic). Level 1 crimes are the most serious (e.g., murder and trafficking large commercial quantities of drugs) and carry a maximum term of life imprisonment, which in the absence of a set non-parole period means imprisonment for the offender's natural life.

²¹³ Including rape and the sexual penetration of children: *ibid* s 3(1) 'Serious Offence' (c)iii-vi

²¹⁴ *Ibid*, s 18A-B.

²¹⁵ *Ibid*, s 1.

²¹⁶ *Ibid*, s 5.

²¹⁷ *Ibid*, s 6D.

²¹⁸ Crimes Act 1958 (Vic) s 38(2) and (3).

²¹⁹ *Ibid*, s 49A.

and 6 years respectively.²²⁰ Victoria also has a crime of sexually penetrating a 16 or 17 year old child who is under the care, supervision, or authority of the offender. This is a level 5 crime, with maximum 10 years' custody.²²¹ There is no hierarchy of penetration e.g., digital or penile etc.²²²

Standard sentences (which are in practice broadly similar to starting points in the English and Welsh sentencing guidelines) are set around 40% of the maximum sentence and represent mid-level seriousness;²²³ judges have to explain what factors influenced their decision to derogate from the standard.²²⁴ 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.²²⁵ 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.²²⁶ Courts may be influenced by victim impact statements when sentencing offenders,²²⁷ and 'instances where the [rape] victim supports or forgives the offender may ... justify the imposition of a suspended, non-custodial, or substantially reduced term'.²²⁸ 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.²²⁹ The psychological harm of sexual offences including rape 'cannot be overlooked or undervalued' by sentencing judges,²³⁰ and 'sexual offences that involve a breach of trust or which occur in the victim's home ... are particularly egregious'.²³¹ 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.²³²

²²⁰ Ibid, s 49B.

²²¹ Ibid, s 49C.

²²² Victoria Sentencing Manual para 24.2.2.

<<https://resources.judicialcollege.vic.edu.au/article/669236>> [Accessed 26 March 2020].

²²³ Sentencing Act 1991 (Vic) s 5A(1)(b).

²²⁴ Ibid, s 5B(4)(a).

²²⁵ Ibid, s 5(2)(a)-(g).

²²⁶ Ibid, s 5AA.

²²⁷ Ibid, s 8K(1).

²²⁸ Victoria Sentencing Manual at 24.1.8.2.

²²⁹ Crimes Act 1958 (Vic) s 46.

²³⁰ Victoria Sentencing Manual at 24.2.1.

²³¹ Ibid, 24.2.2.

²³² Ibid, 24.2.2.1.

By way of example, a 24-year headline sentence with a 17-year non-probation period was imposed for the very violent rapes of one 63 year old and three 16 year old victims in three incidents over three days.²³³ A standard (headline) sentence of 10 years was imposed for the digital, oral and penile-vaginal rape 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.²³⁴ Finally, a non-custodial 12-month youth attendance order²³⁵ with additional conditions was imposed following the vaginal and oral rapes of a 15 year old girl by a 17 year old offender.²³⁶ They had been drinking together prior to the incident, and the offender had no prior convictions, pled guilty, had been going through a period of instability in his life at the time of the offence and was depressed.

6.0 Conclusions

Legal responses to and the treatment of cases involving rape are a matter of international concern. In Scotland, various reforms have taken place which impact upon legal responses to rape: the codification of sexual offences (which includes prescribed maxima sentences), restrictions on the use of character evidence in relation to complainers, and ongoing reviews of the requirement to corroborate essential facts in order to meet a sufficiency of evidence. There continues to be review of how practices may be reformed in such a way that improves the experiences of complainers and witnesses whilst also safeguarding the rights of the accused.

Although it has been recognised that Scotland, like other jurisdictions, experiences low conviction rates for rape, the evidence available on sentencing indicates that where a conviction for rape arises, imprisonment is likely. There are also additional far-reaching restrictions which may be placed on an offender through notification requirements or OLRs, the impact of which should not be underestimated.

The factors which influence assessment of culpability in cases involving rape include those relevant to assessments of culpability generally, but psychological harm to the victim is likely to be greater than that experienced in other offences. In addition to the violation of sexual autonomy that accompanies rape, there are further risks such as sexually transmitted disease and pregnancy, which are unique to this type of offending. Although mitigating factors are recognised by the courts in sentencing rape, concepts such as remorse and admissions of guilt do not have the same application

²³³ *The Queen v Hakeem* [2009] VSCA 131.

²³⁴ *Cao v The Queen* [2018] VSCA 98.

²³⁵ Youth attendance orders are an alternative to detention for children aged over 15. Offenders must attend youth justice units at set dates and times for up to 12 months. Educational activities, counselling and community service may be required.

²³⁶ *Webster (A Pseudonym) v The Queen* [2016] VSCA 66.

as they do in other contexts given that consent is commonly introduced as a defence. This fact in itself may additionally harm the complainer.

Public perception research underlines that members of the public harbour an overwhelming sense of excessive leniency in sentencing, including for rape. However, in-depth research also suggests that such perceptions of leniency may, in fact, be wide of the mark. Furthermore, it seems that 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 implies that sentencing may not in fact be 'out of touch' with public preferences as is widely assumed, but that people are simply not aware of it. It also may imply the need to inform the general public about the reality of sentencing practices: what sorts of sentences are passed for what sorts of cases. However, before drawing any firm conclusions, it should also be noted that the ability in Scotland (and elsewhere) firmly to establish such a finding is hampered by the limitations of currently available information about sentencing.

In the other jurisdictions considered in this review, sentencing is guided by statutory maxima and minima. The Sentencing Council for England and Wales have developed a guideline for sentencing in this area. Sentencing severity for sexual offences has increased in England and Wales over the last ten years, but it has been suggested that this trend cannot be located in the introduction of sentencing guidelines alone. Although OLRs are unique to Scotland, comparable indeterminate sentences are available in England and Wales for long term public protection. In the other jurisdictions examined, the framework of sexual offences differs significantly, offering less specificity. In such jurisdictions, the communicative role of sentencing becomes especially significant.

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ISBN: 978-1-912442-23-2