

## Research to support the development of a revised sexual offences sentencing guideline

### Introduction

To support the development of a revised guideline for sexual offences, the Sentencing Council put in place a number of strands of research, based around two phases of guideline development:

- Qualitative research to explore views on an *early draft* of a revised guideline, to assess any behavioural implications of the proposals and ascertain whether the guideline might affect sentencing practice. This was informed by an earlier small survey of Crown Court judges to establish how they would currently sentence certain sexual offences, and content analysis of a small number of sentencing transcripts for cases involving rape of a child under 13 years; and,
- Qualitative research to explore views on a *consultation draft* of the potential new guideline and to assess any behavioural implications of the proposals and any potential changes to sentencing practice; this was informed by content analysis of a small number of sentencing transcripts involving adult rape cases.

This work was supplemented by two pieces of external research undertaken by Natcen Social Research: a report on attitudes to sexual offences (published in March 2012) and a review of current evidence relating to the efficacy of sex offender treatment programmes (May 2012).

**Note:** This report makes significant reference to the consultation document on sentencing sexual offences which can be found at: <http://sentencingcouncil.judiciary.gov.uk/get-involved/consultations-closed.htm>. It should also be read alongside the early versions of the pre-consultation guidelines, and the offence scenarios presented in the accompanying appendices to this bulletin (at <http://sentencingcouncil.judiciary.gov.uk/facts/research-and-analysis-publications.htm>)<sup>1</sup>.

### Background

The development of a draft guideline to replace the existing Sentencing Guidelines Council (SGC) guideline involved a number of stages: consideration of case law and current sentencing practice, discussions with stakeholders and experts in the area, and research and analysis. As part of this, a package of social research was put in place to provide evidence on specific key guidelines that were under revision: rape, rape of a child under 13, sexual assault and indecent photographs of children. A number of issues were of interest:

- current sentencing practice;
- judicial reasoning and decision-making regarding sexual offences;
- views on an early draft of the guideline, an assessment of behavioural and practical implications of the guideline proposals and whether they may produce any changes to sentencing practice;
- the context surrounding some sentences for specific offences (e.g. rape of a child under 13); and,
- any other issues judges felt were relevant to revising a sentencing guideline in this area.

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<sup>1</sup> Step 1 of all draft guidelines examined are contained in Appendix 1 and 2.

## Methodology

### ***Phase 1: development of an initial revised sexual offences guideline (January to May 2012)***

This phase involved three different types of data collection:

- a small-scale email survey of Crown Court judges (n=27<sup>2</sup>),
- face-to-face semi-structured qualitative interviews with Crown Court judges (n=20) and;
- content analysis of eight sentencing transcripts relating to cases of a rape of a child under 13 where the defendant had received a non-custodial sentence.

Crown Court judges were recruited to participate in the survey and interviews, with the help of the Council of HM Circuit Judges<sup>3</sup>. Judges from different regions were invited to take part and for both exercises, they were asked to consider and sentence offence scenarios<sup>4</sup>; in the survey they were asked to indicate a sentence for the offence using the SGC guideline in this area and their reasons for this sentence. In the interviews, they were asked to indicate how they would currently sentence the offender using the SGC guideline and then using the guideline proposals (sent to them in advance). This enabled a discussion about the sentences elicited through the two different guidelines and any views on these, along with a general discussion about the guidelines (content, format, structure, etc).

Sentencing transcripts relating to rape of a child under 13 were obtained for relevant cases selected from the Ministry of Justice (MoJ) Court Proceedings Database (CPD); approximately half of the cases in 2010 that received a non-custodial sentence were reviewed.

### ***Phase 2: development of a final definitive version of a revised sexual offences guideline (November 2012 to April 2013)***

Having fed the findings from phase 1 into policy development, further research was conducted later in 2012/2013 to provide feedback and evidence on a consultation version of the guideline. This version had been revised since the previous round of the research on the basis of the evidence generated through this and further policy work in the area.

Analysis of the content of sentencing transcripts of adult rape cases was undertaken (n=28), as well as further face-to-face semi-structured interviews with Crown Court judges (n=44<sup>5</sup>). Again, transcripts were sourced using the MoJ CPD and recruitment of judges facilitated as for phase 1. Some additional judges who have sentenced high profile sexual offences cases were also contacted to participate<sup>6</sup>, as were four part-time Recorders in order to balance the sample slightly more evenly on the issue of experience in sentencing<sup>7</sup>.

### ***Limitations of the research***

Due to the limitations outlined below, the research findings presented in this bulletin should only be regarded as **indicative** and not conclusive:

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<sup>2</sup> 39 judges in total were invited to take part; 27 judges took part but due to two judges responding jointly, there were 26 individual responses.

<sup>3</sup> Specifically HHJ Atherton and HHJ Goymer to whom we are extremely grateful.

<sup>4</sup> Three scenarios from a possible six in the survey and one or two in the interviews, depending on the guideline under consideration.

<sup>5</sup> Fourteen of these were judges who had originally taken part in the phase 1 interviews. In addition, in two sessions, two judges took part, so there are 42 recorded interviews in total.

<sup>6</sup> These judges were sourced from relevant news articles.

<sup>7</sup> This was facilitated via liaison with HHJ Picton and the course administrators for the Judicial College's Serious Sexual Offences seminar, and was designed to gain some views from newly "ticketed" sexual offences sentencers. Recorders are part-time judges.

- Small sample sizes: only a small number of judges took part, thus representing only a small proportion of all Crown Court judges. Those who took part were also largely self selecting<sup>8</sup>. Likewise, only a small number of sentencing transcripts were examined;
- To reduce the burden on individual judges, not all scenarios were considered by all participants. This means that individual scenarios were only considered by a sub-sample of the total;
- The research concentrated on a small subset of offences contained within the guidelines and on specific issues associated with these offences that were of interest; and,
- Often only a small subgroup of judges mentioned some issues. In addition, issues that were raised were likely to be partly attributable to the scenarios that were chosen and the types of factors participants were drawn to consider.

## Key findings

The following covers the main issues identified in each phase of the research. Most emerged through the interviews with judges and so this is the main focus; where other issues emerged through other strands of research, this is noted.

### Phase 1 interviews

These focused on scenarios of rape, rape of a child under 13 and indecent photographs of children<sup>9</sup>. These were chosen for discussion either because they are sentenced in high volumes, are sufficiently complex or sensitive, or because there were specific issues to explore<sup>10</sup>.

The scenarios were considered using the existing SGC guidelines on rape (which covers both adult and child victims) and indecent photographs of children; for the draft proposals, the guidelines for rape and indecent photographs of children were used, as well as sexual activity with a child (SAWC; at this stage in the development of the guideline, for rape of a child under 13, sentencers could choose to use either the rape guideline or the SAWC guideline)<sup>11</sup>.

### Sentencing the scenarios

There was variation in sentences given for each scenario. This is not surprising given that a range of different judges were sentencing. However the variation was also related - for at least the two rape guidelines - to differing interpretations of how to categorise offences (under both current and draft guidelines) and, for rape of a child under 13, differing opinions on which of the draft guidelines to use. For example, amongst those using the draft SAWC guideline, there was a split (fairly even) between this being a 1A or 1B case<sup>12</sup>, reflecting varying interpretations of what constituted a “*significant disparity in age of parties at the time of the offence*”<sup>13</sup>, a culpability factor at that time. Judges also differed on which draft guideline they chose to use (three-quarters chose SAWC)<sup>14</sup>.

The choice of guideline or offence category for the rape scenarios led to variation from the outset due to the fact that different guidelines and categories have different sentencing starting points - e.g. under the SGC guideline, the middle category for adult rape has a starting point of eight years, whereas under the draft guideline, although a middle B category offence had a starting

<sup>8</sup> Although judges from a number of different courts and regions were invited to take part, not all were able to do so.

<sup>9</sup> See Appendix 3 and 4 for details of the actual scenarios.

<sup>10</sup> As a result, two scenarios were discussed for indecent photograph offences: one looking at how to sentence offenders who had mixed collections of images and another looking at issues of volumes of photographs.

<sup>11</sup> At this time, there was a note in the rape guideline instructing that “*If the victim is under 13 the starting point for category 2A should be used save where it has been shown the offence is more akin to penetrative sexual activity with a child in which case the guideline on sexual activity with a child should be used*” (see Appendix 1).

<sup>12</sup> At step 1 of the guidelines, harm is split into categories 1, 2 and 3 (with category 1 being the most serious) and culpability into categories A and B (with A being the highest culpability). The combination of the two categories at step 1 leads to a specific starting point and range to consider at step 2 of the process.

<sup>13</sup> In this scenario, the victim was aged just under 13 and offender 18.

<sup>14</sup> There was also apparent confusion over when the choice between the two guidelines could be made.

point of 8 years, a middle A category offence had a starting point of 10 years. Further variation occurred through differences in the aggravating and mitigating factors identified by different judges as relevant to the scenarios and the way in which they applied these to the sentence at step 2<sup>15</sup>.

Although there was still some variation in sentences imposed for the indecent photographs scenarios, there was slightly more consistency in categorisation suggesting that there were generally less interpretational issues. Indeed for scenario 1, all judges who expressed a view, put the offence into category 1 using the draft guideline. For scenario 2, categorisation was again largely consistent (most applying category 1), but there was some slight variation in sentences (which included community orders and custodial sentences). This variation is more likely to be attributable to differing opinions on the use of sex offender treatment programmes with these types of offenders<sup>16</sup>.

### Comparing the two guidelines

When comparing sentences, it was found that just over half of those for the rape scenario increased when using the draft guideline (the remainder did not change); eight decreased for the rape of a child under 13 scenario (three made no change<sup>17</sup>). For both the indecent photographs scenarios, there was a mix of changes: around half did not change, a few increased and a few decreased.

Again, the differing categorisations with their differing starting points, combined with the new structure of Sentencing Council guidelines, contributed to this. In addition, any lack of change may reflect judges' experience in this area and their views on appropriate sentences for different offences (see pages 7 and 8 for a fuller discussion). It should also be noted that as specific issues were chosen for exploration, any changes in sentences only apply to the specific scenarios considered and not necessarily to the whole range of offences within this category.

### Guideline issues

The following section outlines views on the draft guidelines at this stage of development.

#### Step 1

Issues regarding varying interpretations of different categories and factors not only emerged through sentencing the scenarios, but also when judges were directly asked for their views. Key issues tended to centre on the structure of the two guidelines dealing with rape, where severity is assessed by the two dimensions of harm and culpability at step 1:

- *The overall approach to culpability*: some judges were concerned with this and the fact that just a single culpability factor would elevate a case to category A. With the wide disparity of sentence ranges, just one factor “*could be the difference between 7 years custody and community order*”<sup>18</sup>. Likewise, some mentioned issues regarding how many factors would elevate an offence from harm category 3 to 2 or 1.
- *Issues of weighting*, and how the number of factors related to starting points: if there was more than one would the starting point be pushed up? Although there was text provided

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<sup>15</sup> For example, for the rape scenario, judges varied in the number and type of aggravating factors they identified, which included “*any steps taken to prevent the victim reporting an incident, obtaining assistance and/or assisting or supporting the prosecution*” as well as issues such as the use of force, intimidation/coercion, lack of use of a condom, ejaculation, etc).

<sup>16</sup> In discussion, some judges explicitly mentioned that they were in favour of community sentences for some defendants convicted of these types of offences as they felt these could be of more value long-term as there would be a chance of them receiving treatment.

<sup>17</sup> In one case, the information was missing.

<sup>18</sup> For example, using the SAWC guideline, if an offence fell into category 1B, the sentencing starting point was a high level community order. Just one factor could then take the offence into culpability A; for a 1A offence, the starting point was seven years' custody for a victim under 13.

to alert judges to the possibility of adjustment from the starting point for multiple features of culpability, it seemed that this was largely overlooked<sup>19</sup>;

- *What would constitute “extreme violence” in category 1 harm in the rape guideline? How does this differ from the factor on violence (“use of violence above and beyond that needed to undertake rape”) listed as part of harm category 2?*
- *What constitutes “significant disparity in age of parties at the time of the offence” for offences of rape of an under 13? Some judges questioned whether five years was “significant” but also how other factors (such as maturity of the victim/lack of maturity of the offender, vulnerability of the victim or reasonable belief the offender thought the victim was over 16) should be taken into account.*

There were also issues with specific factors in the harm and culpability categories. In some instances this involved a perceived overlap or similarity between factors (both within harm and culpability and between them)<sup>20</sup>, confusion over what the factor should cover<sup>21</sup>, and suggestions for additional or revised wording for some factors<sup>22</sup>.

The approach in step 1 set out in the guideline for indecent photographs of children was different, consisting of a matrix combining different levels of seriousness of images alongside the activity involved in the offence (possession, distribution or production of photographs). The guideline noted that where an offence did not fall squarely into one category, weighting should be applied to determine where to place it. The judges reported finding it fairly straightforward to use this matrix, although some did comment that where there was a mixed collection this would require some thought in terms of weighting. For most judges, the approach to weighting was found to be on the basis of the most serious image in the collection (unless these constituted just one or two)<sup>23</sup>.

For rape of a child under 13 years, where two different guidelines were offered<sup>24</sup>, judges differed regarding whether this was a useful approach. Some favoured this for the flexibility it offered and felt it was sensible, given the range of factual scenarios that could be involved: it allowed them to depart from the guidelines in a more justified manner. However, several felt the wording around when to use the SAWC guideline was unclear and needed refining<sup>25</sup>. One also commented that there could be much debate about what constitutes “*more akin to penetrative sexual activity*” in the signposting to the SAWC guideline within rape. Other judges had strong concerns with this approach and felt the flexibility should be built into an overarching rape guideline. The main concerns over using an alternative guideline seemed to be the message this could give out – that these forms of rape are not serious and are to be treated differently.

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<sup>19</sup> The guidelines stated “a case of particular gravity, reflected by multiple features of culpability in step 1, could merit upwards adjustment from the starting point before further adjustment for aggravating and mitigating features”.

<sup>20</sup> For example, “forced entry into victim’s home” and “use of a weapon to frighten and injure”; “abduction/detention” and “deliberate isolation of victim”.

<sup>21</sup> For example, what would be included as part of “context of habitual sexual abuse”; what type of individual would be covered as part of “abuse of position of trust”, etc.

<sup>22</sup> For example, there were comments relating to “pregnancy or STI as a consequence of rape or significant fear thereof” in the rape guideline and use of the word *fear* which it was felt rendered this factor applicable to almost every rape; there were suggestions that issues such as bribes/grooming/coercion, children being targeted on the basis of specific issues and preplanning should be included in the rape of a child under 13 guideline.

<sup>23</sup> A few judges also felt there should be more definition in terms of the distinction between possession, distribution and production at step 1.

<sup>24</sup> At this time, there was a note in the rape guideline instructing that “If the victim is under 13 the starting point for category 2A should be used save where it has been shown the offence is more akin to penetrative sexual activity with a child in which case the guideline on sexual activity with a child should be used” (see Appendix 1).

<sup>25</sup> In the interviews, it was apparent there was some confusion over the text on the rape guideline directing judges to the SAWC guideline.

## Step 2

Judges tended to focus more on aggravating than mitigating factors and particularly on those contained within the scenarios<sup>26</sup>. As with step 1, comments tended to centre on whether any factors overlapped, could be misinterpreted or should be in a different step:

- A common issue concerned “*severe psychological harm to the victim*”, where several judges felt this should be a part of harm at step 1 given that physical injury appeared there. What was meant by “*severe*” was also questioned.
- Examples of potentially overlapping factors included: “*extent of injury to the victim*” and “*extreme violence*” (rape guideline); “*any steps taken to prevent the victim reporting an incident, obtaining assistance and/or assisting or supporting the prosecution*” and “*threats to kills or threats of violence*” (rape guideline); “*timing of the offence*” and “*location of the offence*” and “*abduction/detention*”.
- There was discussion around “*large volume of images possessed, shared or created*” which was an aggravating factor in the indecent photographs of children guideline. Views were split on whether this should be at step 1 or 2; those who felt it was a step 2 factor felt that it was the nature of the material, rather than quantity that was the important issue<sup>27</sup>. There were also varying opinions around “*collection includes moving images*”; a few felt moving images were worse than stills (which was also an issue in the earlier survey of judges) and should aggravate an offence, whereas others did not or were unsure.
- Other factors judges felt should be moved to step 1 included: “*presence of others, especially children*” in the rape guideline; “*any steps taken to prevent the victim reporting an incident, obtaining assistance and/or assisting or supporting the prosecution*”.

Additional factors for consideration arose as part of the discussion on the indecent photographs of children guideline; several judges felt that sending images to young girls/ grooming/ distribution to those who are vulnerable by age or otherwise, should be reflected. Other factors mentioned included the age of the children depicted, especially when under 13 or babies, whether children show signs of distress, and humiliation and degradation.

## **Phase 2 interviews**

The information generated through the first phase of research helped inform revisions to the draft guideline which then went on to be issued for public consultation in December 2012. Two of the individual guidelines (rape and rape of a child under 13) were then explored again with judges in a second phase, as well as the consultation version of the sexual assault guideline.

Some of the main changes that were made to the guidelines for sentencing rape and rape of a child under 13 at this stage were:

- To refine some of the wording in category 1 harm<sup>28</sup>;
- To refine some of the wording in category 2 harm and remove some factors<sup>29</sup>;

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<sup>26</sup> For mitigating factors, comments included the possible need to reflect issues such as: reasonable belief the child was over 16; offenders with low IQs; suitability of the offender for treatment in the community, etc.

<sup>27</sup> It was also felt that it could often be a matter of luck how many images are downloaded.

<sup>28</sup> This relates to bullet point 2 in category 1 harm in the guideline: “*the extreme nature of, or combination of, category factors may elevate a rape to category 1*”, where the factor had been simplified.

<sup>29</sup> The wording “*significant fear thereof*” was removed from the factor relating to pregnancy and STI; “*repeated rape in course of incident*” was removed; and “*above and beyond that needed to undertake rape*” was removed from the factor on violence in category 2.

- To remove the signposting to the SAWC guideline;
- To introduce a new guideline for rape of a child under 13, which largely mirrored the adult rape guideline in terms of structure and factors, but included a narrative indicating that some circumstances may warrant different sentencing options;
- To refine some of the wording in culpability A<sup>30</sup>;
- To remove some of the factors in culpability A<sup>31</sup>; and,
- To add a factor to culpability A<sup>32</sup>.

### Sentencing the scenarios

Three scenarios of rape were used in this phase, three for sexual assault and two for rape of a child under 13 (see Appendix 4). These scenarios were informed by the content analysis of rape sentencing transcripts undertaken at the end of 2012.

Again, there was variation in categorisation and sentences between different judges under both the existing and draft guidelines<sup>33</sup>. As with phase 1, differences in offence categorisation at step 1 in the draft guideline influenced final sentences as the different categories attract differing starting points. For example, in the first rape scenario, which involved a sleeping deaf girl, the choice of categorisation under the draft guideline rested on whether or not the victim was regarded as “vulnerable”, a factor that would influence whether the offence was placed into culpability A or B and which sentencing starting point to use. Likewise, for sexual assault, the main issues came about in scenario 3, involving the assault of a mature student by her college lecturer and whether this was an abuse of position of trust<sup>34</sup>.

For rape of child under 13, variation was found to largely relate to contextual issues; in particular, in scenario 1, whether it was appropriate to go outside of the range for offences where the defendant had a reasonable belief the victim was over 16 and a belief they were engaging in lawful sexual activity. In the second scenario, involving much older males and multiple offenders, judges were agreed that sentencing should stay within the range.

### Comparing the two guidelines

For the rape guideline, as in the previous phase, there were some increased sentences using the draft guideline, although this had reduced to around a third of the sample, rather than just over half previously<sup>35</sup>. Depending on the scenario, these increases varied, but most were in the region of 1 year. Only two sentences decreased and just under two thirds remained the same.

For rape of a child under 13, there was no change in half of the sentences. The remainder were split fairly evenly between increases and decreases. For sexual assault, around half of sentences did not change. Others increased, with only a small number decreasing. More sentences increased for scenario 2<sup>36</sup>.

There are a number of potential reasons for the changes observed in sentences (applicable to both phases of research):

- *Changes in the starting points between guidelines for seemingly corresponding categories:* Where there were changes, this may be partly explained by different starting points for the same offence under the two different guidelines – for example, if sentencing using the bottom

<sup>30</sup> The factor on groups and gangs was amended to make clear this applied during commission of the offence.

<sup>31</sup> These were “blackmail threatened”, “deliberate isolation of victim” and “threats to kill and threats of violence”.

<sup>32</sup> “Offence committed in course of burglary”.

<sup>33</sup> Although the degree of variation depended on the scenario in question.

<sup>34</sup> There were also some issues regarding “touching of genitalia” and what this encompasses in the draft guideline as in this scenario the touching was over clothing.

<sup>35</sup> Although note that sample sizes varied and were small, particularly in phase 1.

<sup>36</sup> Again, it should also be noted that as specific issues were chosen for exploration, any changes in sentences only apply to the specific scenarios considered and not necessarily to the whole range of offences within this category.

category of the existing SGC rape guideline and then 3A in the draft guideline, the starting point would be two years higher (seven years as opposed to five years). The same effect would happen if moving from the middle category of the existing guideline to 2A in the draft guideline<sup>37</sup>. The converse may, however, happen in the rape of a child under 13 guideline, leading to decreases in sentences: for example, if moving from a bottom category currently to 3B in the draft guideline (starting points of 10 years and of eight years, respectively).

This movement to different starting points is a potential issue under the new structure of some of the Sentencing Council sexual offences guidelines which provide two different levels for culpability, with all factors being in the higher, A, culpability category, and no factors being in the lower category, B (see Appendix 1 and 2). So, whilst judges have a choice of which culpability category to choose, the absence of factors in B means that it is arguably less likely that offences will fall into this category.

- *Different interpretations of some issues:* in particular, the judges considering the rape of a child under 13 scenario differed in how they felt different circumstances should be dealt with. Whilst some sentenced within the draft guideline ranges, others felt that the draft guidelines could not fully accommodate these types of scenarios; they therefore either slightly adjusted the starting point downwards in step 1<sup>38</sup> or moved completely outside of the range (below the bottom of the range). For these types of offences, some judges also varied in how they considered issues such as reasonable belief the victim was over the age of 16 and young defendants (issues not specifically listed in either guideline).
- *Judges considering factors that are new to the draft guideline:* in particular the factor of “severe psychological harm” which was noted by many judges. This may serve to slightly increase some sentences as the sheer presence of this factor may have drawn more judges to take it into account than previously.

It should also be noted that in some cases where there was no change in sentence, this may be related to judges already having settled on the appropriate sentence, irrespective of the guideline they were considering. This may be the case where there is strong case law in the area<sup>39</sup>. There is also a possibility that the research process encouraged this by asking participants to sentence twice, one after the other: having decided on an appropriate sentence, the sentencer may have wished to stay with this, regardless of the guideline in question.

### Guideline issues

Judges were asked for their general views on the proposals contained within the consultation guidelines. They were generally well received, with some judges specifically saying they were an improvement. Judges noted the guidelines were more detailed and methodical than currently and were seen as clear, comprehensive and logical. In particular, judges felt the draft sexual assault guideline was an improvement, primarily because of the broader focus beyond body parts found in the existing guideline:

*“I know what you have done in sexual assault in the new guideline is what we have been saying: that the touching of naked genitalia is not what really constitutes the harm and the upset and the distress in the offence”.*

There were, however, differences of opinion over the extent to which the draft guidelines allowed sufficient flexibility and discretion. Some judges acknowledged they were more prescriptive, but felt they retained sufficient flexibility. However, a small minority were more concerned and felt the draft guidelines were more restrictive and could encourage an inflexible ‘tick box’ approach. Some also felt they were too complex and long.

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<sup>37</sup> Starting points of eight and 10 years, respectively.

<sup>38</sup> This has also been observed with sexual assault cases.

<sup>39</sup> For example, in cases of rape, the judgement of Milberry: R v Milberry [2002] EWCA Crim 2891.



## Step 1

The following issues emerged from the phase 2 interviews:

- *The overall approach to harm:* Judges were generally supportive of the position adopted in the draft guidelines that there is always a baseline of harm, although a small number were slightly uncomfortable with this for rape offences<sup>40</sup>. For rape, judges found the absence of factors in category 3 harm sensible and several said they could envisage scenarios that would fall into this category. However, for sexual assault, there was a sense from some judges that category 3 harm would not be used very much.
- *The type of factors contained within harm:* Some felt that harm (specifically category 2) mixed actions which could *cause* harm (use of violence, abduction/detention) with harm-type *consequences* (STIs and pregnancy in the rape guideline).
- *Specific factors in harm:* Comments were raised over determining when category 1 would be appropriate – for example, specifying the level of violence that would constitute “*extreme violence*”<sup>41</sup>; some also felt the wording of ‘*the extreme nature of category 2 factors...*’, could be improved. “*Use of violence*” in category 2 was felt to be problematic as an individual victim’s response may affect the level of violence used: “*The use of violence or not may depend entirely on the nature of the victim and her response...if she... submits to avoid harm, no violence is required*”. “*Touching of genitalia*” in the sexual assault guideline also caused some debate, with judges divided on how important nakedness was<sup>42</sup>.
- *Possible additional harm factors:* A small number of judges suggested potential additional factors, including moving “*severe psychological harm*” and “*significant physical injury to the victim*” from step 2. One judge also felt that ejaculation should be included as a harm factor in sexual assault, as this is the “*ultimate humiliation*”; another felt that verbal abuse, which can be quite extreme and damaging, should be considered.
- *The overall approach to culpability:* Some judges felt that the approach to culpability (a two category structure with all the factors in category A) was appropriate. Despite the absence of factors in category B, they felt it was important to include this, and could envisage scenarios which would fall into this category (i.e. in which no culpability A factors listed were present)<sup>43</sup>.
- *Issues of weighting:* Where culpability A factors were present, it was observed and explicitly confirmed by many judges that they would adopt a “*weighting*” approach to place the offence within the sentencing range (rather than using exactly the same starting point for all offences regardless of the number of culpability factors). A few judges also suggested weighting would be affected by the type of factors, some being regarded as more serious than others: “*It’s not really a question of how many factors there are, but the gravity of the factors that exist*”.

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<sup>40</sup> This was because of perceived inconsistency with other guidelines and because they felt it could downplay the fact that there are gradations of seriousness in rape.

<sup>41</sup> Category 1 in the two rape guidelines. Several also noted that if extreme violence was used, this was likely to be a separate count on the indictment.

<sup>42</sup> Those who believed touching of naked genitalia was worse than touching over clothing felt the factor should specify whether clothed or unclothed. In addition, one judge felt that this factor should be listed in category 1 because it implied a “*semi-penetrative*” act which would be altogether more serious and one also suggested this should be a culpability rather than harm factor.

<sup>43</sup> Indeed, in sexual assault, several judges used the culpability B category in their decision-making for scenario 3 (see Appendix 2), depending on whether they regarded the lecturer-mature student relationship as an abuse of trust or not. Similarly, in rape, judges commonly used culpability B in relation to scenarios 1 and 3, depending largely on their views around “*vulnerable victim targeted*”.

- *Specific factors in culpability:* Some judges raised issues with specific factors such as “vulnerable victim targeted”<sup>44</sup> (some judges also seemed to overlook the word “targeting” and focus primarily on “vulnerable victim”). “Stalking/harassment of victim” was also found to be ambiguous (the degree and timescale for following someone to constitute stalking possibly being open to argument), as well as “significant degree of planning” (again based on the timescale involved). Others noted the absence of anything regarding what was done with the image if “recording of the offence” was applicable (e.g. whether it was shared or disseminated). A few judges looking at the rape of a child under 13 also questioned what type of situation “member of group or gang during commission of offence” would cover.
- *Overlap between factors:* Examples of where this might occur include the factor “use of violence” in harm and perceived overlap with “threats of violence/threatening or violent sexual language” (culpability)<sup>45</sup> and “use of a weapon to frighten or injure” (culpability)<sup>46</sup>; also “forced entry into victim’s home” (harm) and “offence committed in the course of burglary” (culpability)<sup>47</sup>; “use of gifts/bribes to coerce the victim” (culpability) and “use of alcohol/drugs to facilitate the offence” (culpability)<sup>48</sup>; “additional degradation/humiliation” (harm) and “recording of the offence” (culpability).

In response to the rape of a child under 13 guideline, flexibility was included through providing some text on the circumstances in which a community order might be justified<sup>49</sup>. This was informed by work examining the circumstances of a small number of cases from 2010 where the defendant received a non-custodial sentence. Amongst these, issues such as a defendant’s learning difficulties (affecting understanding of issues of age and vulnerability) were pertinent.

Some judges felt this text would be sufficient to depart from the guideline ranges; for others it was not, or was too far removed from the bottom of the range (at six years) for them to feel comfortable using it. It was also noted by interviewers that none of the judges spontaneously noticed the sentence about “...a campaign of rape...” above step 1 in the rape guideline<sup>50</sup>.

## Step 2

As with phase 1, judges tended to focus more on aggravating, rather than mitigating factors, although there were comments on the factor of “previous good character and/or exemplary conduct”, with most agreeing with the asterisked point here<sup>51</sup>. However, a few thought good character should not mitigate at all<sup>52</sup> and two judges that in the context of mitigation, good

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<sup>44</sup> They felt the victims in the rape scenarios chosen were taken advantage of rather than targeted and there were different opinions on whether the victim was in fact vulnerable.

<sup>45</sup> Sexual assault guideline only, although rape of an under 13 included “use of threat (including blackmail)” as a culpability factor.

<sup>46</sup> This latter factor itself was also thought to potentially overlap with “use of threat (including blackmail)” (culpability – rape of a child under 13 only).

<sup>47</sup> Rape and rape of a child under 13 guideline only.

<sup>48</sup> Rape of a child under 13 guideline only.

<sup>49</sup> The note read: “The guideline is designed to deal with the majority of offending behaviour which deserves a significant custodial sentence;... There may however be a relatively small number of cases where a lengthy community order with a requirement to participate in a sex offender treatment programme may be the best way of changing the offender’s behaviour and of protecting the public by preventing any repetition of the offence, for example where the offender is himself young and particularly vulnerable”.

<sup>50</sup> The note read: “Offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate”.

<sup>51</sup> The note read: “In the context of this offence, generally good character and/or exemplary conduct should not be given significant weight and will not justify a substantial reduction of what would otherwise be the appropriate sentence”.

<sup>52</sup> Either because it was almost worse if an “upstanding” member of the community commits the offence, or because most offenders who commit sex offences are of good character, and the guideline should assume this.

character should only mean “positive” good character<sup>53</sup>; two judges also felt previous good character and no previous convictions were interchangeable, potentially encouraging double-counting. A few judges also suggested additional mitigating factors for consideration. This was particularly the case with the rape of a child under 13 guideline, where a small number felt that issues such as reasonable belief the victim was over the age of 16 and a small age disparity between victim and offender should be reflected.

On aggravating factors:

- “*Severe psychological harm to the victim*”: As in the first phase, judges felt that this factor should be included in step 1. However, they differed over the severity that would be needed to invoke this factor – “*severe*” or “*significant*”- or whether psychological harm per se would be sufficient. Some judges, particularly those considering sexual assault, also felt it might be difficult to prove the level of harm, or that this was attributable to the offence and they questioned what evidence would be needed to qualify this.
- There were also some factors that judges felt were potentially ambiguous and subjective, e.g. “*location of offence*” and “*timing of offence*”. On “*commission of offence whilst under the influence of alcohol or drugs*”, the small number of judges commenting on this had mixed views. Several felt this was ambiguous, sometimes being cited in aggravation, sometimes mitigation. Several said it may be “worse” to commit a sexual offence when sober and one that alcohol should not be an aggravating factor, since the offender’s drunkenness is “*no consolation*” to the victim.

A number of judges also identified potential overlapping between factors in step 1 and 2, for example:

- Several judges noted the scope for double counting between general issues of planning and specific aspects of sexual offences which may also have been planned e.g. which victim to target, the location and timing of the offence and the need to groom a victim<sup>54</sup>; and,
- One judge felt there was a potential overlap between factors that all involve a child being targeted<sup>55</sup>.

## Conclusions

Along with other information gathered as part of the guideline development process, these interviews contributed vital evidence to finalising the definitive sexual offences guideline, issued in December 2013. They particularly helped to refine the number and type of factors included in harm and culpability in step 1 (and thus some of the interpretational and categorisation issues) and informed the Council’s understanding of how the draft guidelines may affect sentencing practice for certain sexual offences. This understanding has been fed into the Council’s resource assessment accompanying the definitive guideline, which can be found at:

<http://sentencingcouncil.judiciary.gov.uk/facts/research-and-analysis-publications.htm>.

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<sup>53</sup> For example, someone who has made a contribution to society (i.e. has served in the Armed Forces and saved a number of lives for his country).

<sup>54</sup> Therefore, potential overlap was highlighted between “*significant degree of planning*”; (culpability); “*vulnerable victim targeted*” (culpability); “*location of offence*” (aggravating factor); “*timing of offence*” (aggravating factor) and “*evidence of grooming by offender*” (culpability – rape of a child under 13 guideline).

<sup>55</sup> For example, in the rape of a child under 13 guideline: “*vulnerable child targeted*” (culpability); “*victim compelled to leave their home, school etc*” (aggravating factor) and “*victim’s education disrupted*” (aggravating factor).

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**Emma Marshall**

**APPENDIX 1: STEP 1 (DETERMINING THE OFFENCE CATEGORY) IN GUIDELINES USED IN PHASE 1**

**RAPE**

The court should determine which category of harm the offence falls into by reference only to the table below. The court should then determine whether any level A culpability factors are present in order to ascertain the starting point.

**A case may be of such severity, for example involving a campaign of rape, where sentences of 20 years and above may be appropriate**

HARM	
Category 1	<ul style="list-style-type: none"> <li>• Extreme Violence</li> <li>• The extreme nature of, or combination of, category 2 factors may elevate a rape to category 1.</li> </ul>
Category 2	<ul style="list-style-type: none"> <li>• Pregnancy or STI as a consequence of rape or significant fear thereof</li> <li>• Additional degradation/humiliation</li> <li>• Repeated rape in course of incident</li> <li>• Abduction/detention</li> <li>• Prolonged/sustained incident</li> <li>• Use of violence above and beyond that needed to undertake rape</li> <li>• Context of habitual sexual abuse</li> <li>• Forced entry into victims home</li> <li>• Victim under 16*</li> </ul> <p><b>*If the victim is under 13 the starting point for category 2A should be used save where it has been shown the offence is more akin to penetrative sexual activity with a child in which case the guideline on sexual activity with a child should be used.</b></p>
Category 3	Factor(s) in categories 1 and 2 not present

CULPABILITY	
A	B
<ul style="list-style-type: none"> <li>• Significant degree of planning</li> <li>• Member of group or gang</li> <li>• Use of alcohol/drugs on the victim to facilitate the offence</li> <li>• Blackmail threatened</li> <li>• Abuse of position of trust</li> <li>• Recording of the rape</li> <li>• Vulnerable victim targeted</li> <li>• Stalking/harassment of victim</li> <li>• Previous violence against victim</li> <li>• Deliberate isolation of victim</li> <li>• Threats to kill or threats of violence</li> <li>• Use of a weapon to frighten or injure</li> <li>• Offence racially or religiously aggravated</li> <li>• Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)</li> <li>• Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)</li> </ul>	Factor(s) in category A not present

## SEXUAL ACTIVITY WITH A CHILD

The court should determine which category of harm the offence falls into by reference only to the table below. The court should then determine whether any level A culpability factors are present in order to ascertain the starting point.

HARM	
Category 1	<ul style="list-style-type: none"> <li>Penetration of vagina or anus (using body or object)</li> <li>Penile penetration of mouth</li> </ul> <p>In either case by, or of, a child</p>
Category 2	<ul style="list-style-type: none"> <li>Masturbation by, or of, a child</li> </ul>
Category 3	None of the factors in categories 1 and 2 are present

CULPABILITY	
A	B
<ul style="list-style-type: none"> <li>Use of gifts/bribes to coerce the child</li> <li>Use of threat (including blackmail)</li> <li>Use of alcohol/drugs on child to facilitate the offence</li> <li>Abuse of position of trust</li> <li>Sexual images of child recorded, retained, solicited or shared</li> <li>Significant disparity in age of parties at the time of the offence</li> <li>Vulnerable child targeted</li> <li>Offender lied about age</li> <li>Member of group or gang</li> </ul>	Factor(s) in category A not present

## INDECENT PHOTOGRAPHS OF CHILDREN

The court should determine the offence category using the table below

	Possession	Distribution*	Production
<b>Category 1</b>	Possession of images involving penetrative sexual activity	Sharing of images involving penetrative sexual activity	Creating images involving penetrative sexual activity
<b>Category 2</b>	Possession of images involving non-penetrative sexual activity	Sharing of images involving non-penetrative sexual activity	Creating images involving non-penetrative sexual activity
<b>Category 3</b>	Possession of images of erotic posing	Sharing of images of erotic posing	Creating images of erotic posing
* Distribution includes possession with a view to distributing or sharing images			

Where an offence does not fall squarely into one category, because for example a collection involves different levels of image, the collection may require a degree of weighting before making an overall assessment and determining the appropriate offence category.

**APPENDIX 2: STEP 1 (DETERMINING THE OFFENCE CATEGORY) IN GUIDELINES USED IN PHASE 2**

**RAPE**

The court should determine which category of harm the offence falls into by reference **only** to the table below. The court should then determine whether any level A culpability factors are present in order to ascertain the starting point.

**Offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate.**

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

CULPABILITY	
A	B
<ul style="list-style-type: none"> <li>• Significant degree of planning</li> <li>• Member of group or gang during commission of offence</li> <li>• Use of alcohol/drugs on the victim to facilitate the offence</li> <li>• Abuse of position of trust</li> <li>• Recording of the offence</li> <li>• Vulnerable victim targeted</li> <li>• Stalking/harassment of victim</li> <li>• Previous violence against victim</li> <li>• Offence committed in course of burglary</li> <li>• Use of a weapon to frighten or injure</li> <li>• Offence racially or religiously aggravated</li> <li>• Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)</li> <li>• Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)</li> </ul>	Factor(s) in category A not present

## **RAPE OF A CHILD UNDER 13**

The court should determine which category of harm the offence falls into by reference **only** to the table below. The court should then determine whether any level A culpability factors are present in order to ascertain the starting point.

When dealing with the statutory offence of rape of a child under 13, the court may be faced with a wide range of offending behaviour.

Sentencers should have particular regard to the fact that these offences are not only committed through force or fear of force but may include exploitative behaviour towards a child which should be considered to indicate high culpability.

The guideline is designed to deal with the majority of offending behaviour which deserves a significant custodial sentence; the starting points and ranges reflect the fact that such offending merits a significant custodial sentence. There may however be a relatively small number of cases where a lengthy community order with a requirement to participate in a sex offender treatment programme may be the best way of changing the offender's behaviour and of protecting the public by preventing any repetition of the offence, for example where the offender is himself young and particularly vulnerable.

Sentencers are reminded that if moving outside the guideline they must be satisfied that it would be contrary to the interests of justice to follow the guideline.

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

<b>CULPABILITY</b>	
<b>A</b>	<b>B</b>
<ul style="list-style-type: none"> <li>• Significant degree of planning</li> <li>• Member of group or gang during commission of offence</li> <li>• Use of alcohol/drugs on the victim to facilitate the offence</li> <li>• Use of gifts/bribes to coerce the victim</li> <li>• Evidence of grooming by offender</li> <li>• Use of threat (including blackmail)</li> <li>• Abuse of position of trust</li> <li>• Recording of the offence</li> <li>• Vulnerable child targeted</li> <li>• Previous violence against victim</li> <li>• Offence committed in course of burglary</li> <li>• Use of a weapon to frighten or injure</li> <li>• Offence racially or religiously aggravated</li> <li>• Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)</li> </ul>	Factor(s) in category A not present



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<ul style="list-style-type: none"> <li>• Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)</li> </ul>	
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**SEXUAL ASSAULT**

The court should determine which category of harm the offence falls into by reference **only** to the table below. The court should then determine whether any level A culpability factors are present in order to ascertain the starting point.

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

CULPABILITY	
A	B
<ul style="list-style-type: none"> <li>• Significant degree of planning</li> <li>• Member of group or gang during the commission of the offence</li> <li>• Use of alcohol/drugs on the victim to facilitate the assault</li> <li>• Abuse of position of trust</li> <li>• Recording of the offence</li> <li>• Vulnerable victim targeted</li> <li>• Stalking/harassment of victim</li> <li>• Previous violence against victim</li> <li>• Offence committed in course of burglary</li> <li>• Use of weapon to frighten or injure</li> <li>• Threats of violence/threatening or violent sexual language</li> <li>• Offence racially or religiously aggravated</li> <li>• Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)</li> <li>• Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)</li> </ul>	Factor(s) in category A not present

## **APPENDIX 3: OFFENCE SCENARIOS USED IN PHASE 1**

### **RAPE**

#### **Scenario 1**

D started chatting to V in a coffee shop. V told him she was looking for a job and D said he owned a firm and could get her work. They exchanged numbers. D phoned that evening and they arranged to meet and go to a restaurant to discuss job opportunities. When they met V got into D's car and D drove her to his flat as he said he needed to get changed. V suggested she stay in the car but D persuaded her to go into the flat.

Once inside D guided V to a bedroom and told her to undress. V refused but D said that if she didn't he would be strong with her and that his friend was in the flat and he would call him in too. D started to undress V and she tried to push him away but he was too strong. D pushed V down onto the bed climbed on top of her and penetrated her vaginally without using a condom. Afterwards he said that he had dangerous and influential friends and V shouldn't mess with him. He said that if she did not stay with him he would find her and her parents and kill her. She was genuinely fearful he would kill her.

V was afraid and so accompanied him to a restaurant where he threatened her again. When V went to the lavatory she asked a waiter to get her a taxi – but couldn't find a means to get away from D so went with him to a bar. At the bar she managed to enlist the help of a woman who got her a taxi and she got away. D phoned her and because she was scared and didn't want him to think she had run away she agreed to meet him the following day. When she got home a friend took her to the hospital and called the police. V made a victim impact statement indicating that she continued to be fearful in every day situations.

D said that sexual activity was consensual and was convicted following trial. He has 2 previous convictions for theft offences.

### **RAPE OF A CHILD UNDER 13**

#### **Scenario 1**

V was aged 12 at date of offence (turning 13 in 2 months time). She was in a park with a group of older female teenagers. They had all been drinking throughout the afternoon and the V was visibly worse for wear. D (18 years old) turned up with two of his male friends at the same park.

D shouted to the group of girls and asked for a cigarette. V went over and gave them a cigarette and then took one for herself. V asked D if he was single and said that she had been drinking. Talk turned to sexual matters and V seemed relaxed with this. She kissed D and they found a patch of grass and went off from the rest of the group and had sex. The act was fully "consensual" but by reason of her age the act was rape.

When V got home her mother observed she was distressed. She told her mother what had happened and her mother told the police. The police found D and he pleaded guilty at the earliest opportunity. He was of good character.

D said that by her general behaviour: drinking and smoking, appearance and the fact that she took the lead in the sexual activity, he thought she was over 16. There was a dispute as to whether V had ever told D her age but the prosecution accepted that D had not been told V's age by her.

### **INDECENT PHOTOGRAPHS OF CHILDREN**

#### **Scenario 1**

Police executed a search warrant at D's address and seized a laptop that contained 51 images of erotic posing, and 2 images of non penetrative sexual activity. When the computer was examined the police also found that D had been using his computer to distribute images of what appeared to be the same child to 12 different people on 23 occasions. 14 of the images distributed were erotic posing or non-penetrative sexual activity and 9 were of penetrative sexual activity with a child.

Some of the people that D had sent the images to were young girls; before sending the images D enquired about their age sex and location and engaged in explicit sex chat with them about anal sex and expressed a graphic wish to engage in this activity.

D made immediate admissions to the police when interviewed and pleaded guilty at the earliest opportunity. He was of previous good character.

### **Scenario 2**

As a result of intelligence, police searched D's home and seized his computer. They found 453 indecent images of children aged between 2 and 14. 347 were of erotic posing, 51 were non-penetrative sexual activity, 44 of penetrative activity and 11 involving sadism or penetration of or by an animal. They also found 48 indecent movies: 3 of erotic posing, 8 of non penetrative activity, 21 of penetrative activity and 8 of sadism or bestiality. There were also 8 extreme pornographic images that did not involve children but involved sexual activity with animals.

In an e-mail they found from D he described a sexual preference for young girls. When interviewed D said he was addicted to adult pornography and it was through that he had started to look at child pornography. He stated he had downloaded the images over a long period of time.

D pleaded guilty and was of previous good character.

## **APPENDIX 4: OFFENCE SCENARIOS USED IN PHASE 2**

### **RAPE**

#### **Scenario 1**

D and V (who is deaf) knew each other through mutual friends and D knew that V had a boyfriend.

D and V were staying in the same house and whilst V was asleep D vaginally raped her. V woke up as D was penetrating her and pushed him off.

V was extremely upset by what had happened and shortly thereafter her relationship with her boyfriend broke down. D pleads not guilty and is convicted after trial.

#### **Scenario 2**

D1 was a student and out with fellow students D2 and D3. All three had been drinking heavily on an evening out when they met fellow student V, who was already very drunk, at the halls of residence bar. Whilst at the bar D1 suggested taking V back to his room with D2 and D3. By this stage V was inert through drink but D1, D2 and D3 all took it in turns to rape V. D1 also filmed some of the activity on his iPhone and at certain intervals V can be heard trying to talk and say no. Encouraged by each other the three D's continued with the attacks on V over a number of hours.

The film of the attack was shown to certain individuals around campus which further humiliated V and D1 told her that it would be shown to more people if she went to the police and reported it and that would just result in more embarrassment for her. No physical injury was sustained by V but the psychological impact was great and she suffered from depression and feelings of worthlessness and it has affected her studies. V comes from a very strict and religious family and feels a great sense of shame over what has happened.

The defendants all plead guilty at the first reasonable opportunity. All were of previous good character and there were a number of testimonies about the bright future they had ahead of them, their achievements as students and sportsmen and the fact that they had acted totally out of character.

#### **Scenario 3**

D is drinking at a bar and finds V slumped outside the ladies toilet of the bar at 1am, in a state of complete inebriation. D agrees with staff that are closing the bar for the evening that he will drive V home.

On the way to V's home, she says she is going to be sick and D stops his car. It is at this time that D takes advantage of V and has sexual intercourse with her on the bonnet of the car. D then deposits V at her front door.

The judge accepts that there was no initial malice in D's intentions when he offered to ensure that V got home safe. D is of otherwise good character and pleads guilty on the day of trial. V has very little recollection of what happened.

### **RAPE OF A CHILD UNDER 13**

#### **Scenario 1**

V was aged 12 at date of offence (turning 13 in 2 months time). She was in a park with a group of older female teenagers. They had all been drinking throughout the afternoon and the V was visibly worse for wear. D (18 years old) turned up with two of his male friends at the same park.

D shouted to the group of girls and asked for a cigarette. V went over and gave them a cigarette and then took one for herself. V asked D if he was single and said that she had been drinking. Talk turned to sexual

matters and V seemed relaxed with this. She kissed D and they found a patch of grass and went off from the rest of the group and had sex. The act was fully “consensual” but by reason of her age the act was rape.

When V got home her mother observed she was distressed. She told her mother what had happened and her mother told the police. The police found D and he pleaded guilty at the earliest opportunity. He was of good character.

D said that by her general behaviour: drinking and smoking, appearance and the fact that she took the lead in the sexual activity, he thought she was over 16. There was a dispute as to whether V had ever told D her age but the prosecution accepted that D had not been told V’s age by her.

## **Scenario 2**

D, a 30 year old male, lives near V, a 12 year old girl, and has often seen her walking in the neighbourhood and around the local shops. D has talked to V and given her gifts of sweets and cigarettes on occasion. D knows V has recently moved to the area and lives with a local foster family.

One evening, D, whilst drinking outside with two other males (aged approximately 20 and 40 years’ old), sees V. D and the other men approach her. She seems upset and D gives her a cigarette and, when asked, also alcohol. He then invites V to his house and although reluctant at first, she agrees to go along.

When inside, the men give V more alcohol and, without saying anything, D removes V’s trousers and underwear, stands behind her, and has vaginal sex with her. At the same time, the older man stands in front of V and whilst holding her head, puts his penis in V’s mouth. V notices that the younger man is filming on his mobile phone. When it is over D asks V if she has had a nice time and V says “yes”. V then leaves and goes home and says nothing to her foster family. The offences come to light after the film is brought to her foster family’s attention, having been sent around the local neighbourhood and posted on the internet.

D says he thought V was 16 and she fully consented. D is convicted following trial. He has previous convictions for dishonesty and violence but none for sexual offences. The two other men are never apprehended.

The pre-sentence report reveals that V has become depressed and more withdrawn and has moved foster families.

## **SEXUAL ASSAULT**

### **Scenario 1**

D, a male aged 40, whilst standing on a busy, evening commuter train, assaults V, a 30 year old woman, who is standing in front of him. He stares into her eyes whilst he touches her thighs and vagina over her trousers. The assault lasts for about 20 seconds and D does not say anything. V feels scared, especially when she notices D is also holding his mobile phone pointing it towards her. V says nothing and no-one else appears to notice. As soon as the assault is over, D moves away and leaves the train at the next stop. V then alerts police and he is arrested on the same day. His phone contains a short video in which the assault can be seen. He makes admissions to police and pleads guilty at the PCMH.

D has no previous convictions. The court accepts the offence was not planned. V feels less confident following the assault and feels scared when she leaves her home.

### **Scenario 2**

V, a 40 year old woman, was walking home with a friend following a night out. They pass D, a large man, who had been drinking all night. On reaching V’s friend’s home, V continues walking alone. She notices the same man, D, following her and tells him to stop. He continues to follow her. She confronts him and threatens to call the police. D then walks off. She notices him again moments later but then D disappears.

As she approaches her street, she hears footsteps and heavy breathing behind her and on turning, sees D. She starts to run away but D chases her, saying, "I'm going to hurt you now." He repeats this a number of times. D catches up with her and grabs V's shoulders, spins her round and pulls her to the ground. D pulls V's dress up and tries to pull V's tights and underwear down in a frenzy, ripping V's tights, which causes bruising around V's thighs and groin area. V kicks D repeatedly and screams for help. Neighbours come to her aid and D runs off. D is picked up by police later and once he has sobered up denies the assault. He is convicted following trial.

D, 35, has previous convictions for theft and handling (1995) but none for sexual offences. V was terrified during the assault and traumatised by it. V suffers nightmares and rarely leaves home after dark following the assault. Sentence is taking place 12 months after the offence.

### **Scenario 3**

V, a 28 year old woman, is in the pub with her fellow mature students after their weekly evening class. D, her male lecturer, 40 years old, is there too. The group are drinking alcohol and, later, most of the group move to another area in the pub, leaving D and V together. D tells V how much he likes her. V is surprised and, before she says anything, D starts to touch her thighs. V tells D to remove his hand. D ignores her and tells V he knows she likes it and moves his hand higher and starts to touch V's genital area over her jeans. V pushes D away and shouts at him to get off. D holds his hands up and says he didn't do anything, although shortly after tells V that he's sorry, pleading with her not to tell anyone.

D has no previous convictions and is generally of good character. He makes no comment during the police interview. He pleads guilty at the PCMH. The court is told that D was dismissed from his employment. V says that she was shocked and embarrassed by the incident.