



House of Commons
Home Affairs Committee

Draft Sentencing Guideline: Sexual Offences Act 2003

Sixth Report of Session 2005–06

*Report, together with formal minutes, and
written evidence*

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Home Affairs Committee

The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Home Office and its associated public bodies; and the administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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Committee staff

The current staff of the Committee are Dr Robin James (Clerk), Mr Mark Etherton (Second Clerk), Kate Akester (Adviser (Sentencing Guidelines)), Martha Goyder (Committee Specialist), Ms Arabella Thorp (Immigration Control Inquiry Manager), Mr Ian Thomson (Committee Assistant), Jenny Pickard (Secretary) and Alison Forrester (Senior Office Clerk).

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Footnotes

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1 Introduction

1. The draft guideline on the Sexual Offences Act 2003 was published by the Sentencing Guidelines Council (“the Council”) on 7 June 2006. It is a long, detailed and complex consideration of all the offences in the legislation. The Act itself came into force in May 2004; and the Council has consulted the Committee on the guidelines that should operate within the newly established framework.

2. The Committee has been severely limited in its ability to consult on and consider this very important draft guideline. The Council originally agreed that we would always have two months in which to respond to draft guidelines, but in view of the complexity and length of this one, we had been promised three months. In practice, the time allowed has been approximately six weeks.

3. We have therefore had to be very selective in our scrutiny of the draft guideline; and **the shortness of our own consultation period has prejudiced both our investigations, and the number and length of responses received. We seek an assurance from the Council that consultation periods will not be so curtailed in the future.**

4. The Council took into account advice it had received from the Sentencing Advisory Panel (also published on 7 June 2006) based on wide consultation initiated by two consultation papers of February and April 2004. There were 55 responses altogether. We received our own responses (see List of Written Evidence) to the draft guideline after publication, and are extremely grateful to those who supplied them, given the serious time constraint involved.

5. We express our thanks to Ken MacDonald QC, Director of Public Prosecutions, Deputy Assistant Commissioner John Yates of ACPO, Jo Lovett of the Child and Woman Abuse Studies Unit, London Metropolitan University, and Nicole Westmarland of Rape Crisis, for giving us an informal briefing on 20 June in relation to the general background to rape cases.

6. In the last Parliament our predecessor Committee agreed to a request from the Government that it should undertake regular scrutiny of draft sentencing guidelines issued by the Sentencing Guidelines Council. Our predecessors produced a report on the initial draft guidelines.¹ This described the Committee’s role, which is consultative, as follows:

“We do not envisage our function as being to give or withhold formal approval of each guideline, or to provide extended analysis of its contents, but to focus on particular issues of concern or interest to Parliament or the public. Where we consider that a draft guideline raises major issues, we will make a report to the House on these. In the case of other guidelines we will supply our comments to the Council

¹ Home Affairs Committee, Fifth Report of Session 2003–04, *Draft Sentencing Guidelines 1 and 2* (HC 1207), published on 4 November 2004. The guidelines were on *Reduction in sentence for a guilty plea* and *Overarching principles: Seriousness/New Sentences: Criminal Justice Act 2003*.

in the form of a letter from the Chairman which we will also published on our web site”.²

7. In the present Parliament we have produced reports on the *Robbery* and *Domestic Violence* draft guidelines, and have written to the Lord Chief Justice, Chairman of the Sentencing Guidelines Council, with our response to the *Custody Plus* draft guideline.³

8. Looking to the future, we wish to take this opportunity to welcome the recent consultation paper issued by the Sentencing Advisory Panel, reviewing the earlier draft guideline on reduction in sentence following a guilty plea. We look forward to considering a revised guideline in draft in due course. We feel that sex offences is one area where reductions at their present level may not be acceptable to the public.

2 The draft guideline on the Sexual Offences Act 2003

9. We do not summarise the entire draft guideline, since it is a long and complex document dealing with 57 separate offences, and starting points and additional aggravating and mitigating factors for each are set out clearly in individual charts throughout. We do, however, summarise below the sections on general principles and general aggravating and mitigating factors.

2 *Ibid* para 9

3 Home Affairs Committee, Second Report of Session 2005–06, *Draft Sentencing Guideline: Robbery* (HC 947), published on 7 Mar 2006; Third Report of Session 2005–06, *Draft Sentencing Guidelines-Overarching Principles: Domestic Violence and Breach of a Protective Order*; letter dated 16 May 2006 from the Chairman of the Committee to the Lord Chief Justice giving the Committee’s response to the draft guideline on *Custodial Sentences of Less Than 12 months: Criminal Justice Act 2003* (published on the Committee’s web site). The Committee did not make substantive comments on the draft guidelines on *Manslaughter* (which was issued when the Committee was unappointed following the General Election of 2005) or *Allocation*.

Summary

The following summarises the section in the draft guideline covering General Principles.

Introduction

It is essential that there be flexibility for these types of offence, where circumstances can vary so widely. The sentencing ranges are not designed to be rigid, and movement between them may occur, depending on the aggravating and mitigating factors in each case.

Courts may sensibly suggest interventions that could be useful, either during the custodial period or on release, as a helpful guide for the probation service, rather than a part of the sentence.

Seriousness

The seriousness of an offence is determined by the culpability of the offender and the harm caused, or risked, by the offence, including the impact on the victim (Section 143 Criminal Justice Act (CJA) 2003). The Guideline on seriousness⁴ states that it is the relative impact of the culpability of the offender and the actual or foreseeable harm caused to the victim that will determine seriousness. Where there is “an imbalance between culpability and harm”, culpability will be the primary factor.⁵ (This is particularly important in sex offences, where many perpetrators do not intend or foresee harm.)

The Court of Appeal in *Millberry and others* ruled that:

“there are, broadly, three-dimensions to consider in assessing the gravity of an individual offence of rape. The first is the degree of harm to the victims; the second is the level of culpability of the offender; and the third is the level of risk posed by the offender to society”.⁶

This forms the basis for sentencing for other serious sexual offences.

Harm

Non-consensual, coercive, or exploitative sexual offending inevitably results in physical and/or psychological harm; and the same applies where victims ostensibly consent, but cannot do so in an informed way because of their youth or mental disorder. The draft guideline lists some of the possible effects:

- Violation of sexual autonomy
- Fear or humiliation
- Shame, degradation or embarrassment

4 Overarching Principles: Seriousness published 16 Dec 2004

5 Sentencing Advisory Panel’s Advice on the Sexual Offence Act 2003, page 1

6 (2003) 2 Cr App R (S) 31

- Inability to trust, or to form relationships in the future
- Self harm or suicide.

Culpability

The Seriousness guideline indicates that culpability is measured in line with the intention to cause harm. Sexual offending may be motivated by the desire to obtain sexual gratification, financial gain, or some other objective, rather than to harm. Nevertheless, culpability will be high where there is non-consensual, coercive or exploitative activity, because of its inherent harmfulness. This will be the primary factor in determining seriousness; and harm and risk will be integral to the sentence.

The culpability of young offenders

Youth is always relevant to sentencing. In those offences involving “ostensible consent” there are lower maximum sentences for under 18-year-olds (five years as opposed to 14 years for adults).

In non-consensual offences, such as rape or sexual assaults, there are no separate provisions; but youth and immaturity are always potential mitigating factors, in accordance with the welfare principle set out in Section 44 (1) of the Children and Young Person’s Act 1933.⁷ A conviction for raping an under 13-year-old attracts a maximum of life imprisonment, but where the offender is very young and the disparity in age very small, this should be taken into account.

The “child on child” offences attract lower maxima.⁸ Some of these will be committed to the Crown Court, as especially grave offences, and may result in extended or indeterminate sentences in some cases. The sentencing framework that applies to young offenders under 18-years-old is different from that for adults. The main features are:

- the principal aim of the youth justice system is to prevent offending⁹
- courts imposing sentences on young people must have regard to their welfare¹⁰
- where a youth pleads guilty for the first time, courts must impose a referral order unless either an absolute discharge or a custodial sentence is warranted
- 12, 13, or 14-year-olds may not be sentenced to custody unless they are “persistent offenders” or have been convicted of a “grave crime” justifying detention for more than two years¹¹
- custodial sentences are not available in the youth court for 10 or 11-year-olds

7 Section 44(1) CYPA requires every court dealing with a child or young person, as an offender or otherwise, “shall have regard to the welfare of the child or young person”.

8 See draft guideline, Part 7, page 121

9 Section 37 Crime and Disorder Act 1998

10 Section 44 Children and Young Persons Act 1933

11 Powers of the Criminal Courts (Sentencing) Act 2000, Section 100

- Detention and Training Orders (sentences imposed by youth courts) can only be for 4/6/8/10/12/18 or 24 months
- Crown Courts may impose DTOs or detention for a period up to the maximum.

The nature of the sexual activity

Sentences will need to reflect the precise nature of the activity, and take account of the impact on the victim, as well as the relationship, if any, between victim and offender. Penetrative acts are more serious, as is partial or total nakedness (especially that of the victim). Where the victim's ability to consent is impaired by youth or mental incapacity, the offence becomes more serious.

Aggravating and mitigating factors

There is a long list of general aggravating factors, and a shorter list of mitigating factors reproduced below. More specific factors are suggested in relation to each offence in the individual charts in the draft guideline.

Factors indicating higher culpability:

Offence committed whilst on bail for other offences

Failure to respond to previous sentences

Offence was racially or religiously aggravated

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

Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)

Previous conviction(s), particularly where a pattern of repeat offending is disclosed

Planning of an offence

An intention to commit more serious harm than actually resulted from the offence

Offenders operating in groups or gangs

'Professional' offending

Commission of the offence for financial gain (where this is not inherent in the offence itself)

High level of profit from the offence

An attempt to conceal or dispose of evidence

Failure to respond to warnings or concerns expressed by others about the offender's behaviour

Offence committed whilst on licence

Offence motivated by hostility towards a minority group, or a member or members of it

Deliberate targeting of vulnerable victim(s)

Commission of an offence while under the influence of alcohol or drugs

Use of a weapon to frighten or injure victim

Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence

Abuse of power

Abuse of a position of trust

Factors indicating a more than usually serious degree of harm:

Multiple victims

An especially serious physical or psychological effect on the victim, even if unintended

A sustained assault or repeated assaults on the same victim

Victim is particularly vulnerable

Location of the offence (for example, in an isolated place)

Offence is committed against those working in the public sector or providing a service to the public

Presence of others e.g. relatives, especially children or partner of the victim

Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)

In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

Factors indicating significantly lower culpability:

A greater degree of provocation than normally expected

Mental illness or disability

Youth or age, where it affects the responsibility of the individual defendant

The fact that the offender played only a minor role in the offence

Personal mitigation

Section 166(1) CJA 2003 makes provision for a sentencer to take account of any matters that 'in the opinion of the court, are relevant in mitigation of sentence'.

When the court has formed an initial assessment of the seriousness of the offence, then it should consider any offender mitigation. The issue of remorse should be taken into account at this point along with other mitigating features such as admissions to the police in interview.

The risk of re-offending

Part 2 of the Sexual Offences Act 2003 strengthens the system of registration of sex offenders, and introduces a number of new orders, some of which are available on conviction, and others by application to the magistrates' court. The arrangements for the registration of sex offenders follow automatically on conviction, and are not part of the sentence, although sentencers are expected to explain the implications of the sentence in line with their general duty to give reasons for, and explain the effects of, sentencing.¹²

Pre-sentence reports should be prepared for any sexual offences, as they may contain useful information about any sexually deviant tendencies, as well as assessing the likelihood of re-offending. Psychiatric reports may also be appropriate; and courts must ensure that victims have been given the opportunity to make personal statements. These are clearly in the interests of public protection, as is effective treatment of sex offenders at the earliest opportunity.

Dangerous offenders

Most offences under the Act will be "specified" offences, coming within the ambit of the dangerousness provisions:¹³ and thus potentially attracting discretionary life sentences, indeterminate sentences of imprisonment of public protection, or extended sentences. Courts will have to consider whether there is a significant risk of serious harm in the event of further "specified" offences being committed.¹⁴ (There is a list of "specified" offences at Schedule 15 CJA 2003.)

"Specified" offences which are not "serious", but where the risk criterion is met, will result in extended sentences, involving an extended period of licence to ensure public protection. "Serious" offences (punishable with 10 years' imprisonment or more) must result in life or indeterminate sentences if the risk criterion is met.

¹² Section 174 CJA 2003

¹³ Section 224 CJA 2003

¹⁴ Section 225 CJA 2003

Other orders

Schedule 1 requires the inclusion of offenders' names on a sex offenders' register, and it follows conviction or caution for a sexual offence involving children.¹⁵ It is used for risk management where individuals are thought to pose an ongoing risk to children.

Notification orders impose a registration requirements on offenders in the UK who have been convicted of a sexual offence overseas.¹⁶ These are available on application to a magistrates' court.

Sexual offences prevention orders may be made either at the time of sentence, or by complaint to a magistrates' court in respect of someone already convicted of a sexual offence, where behaviour suggests the possibility of re-offending.

Disqualification orders must be imposed on offenders convicted of offences against children unless the court is satisfied that further offences are unlikely. They disqualify the offender from working with children

Courts have a duty to consider prevention or disqualification orders when sentencing for sexual offences.

Community orders

Sex offender treatment programmes are now available in the community as well as in prison, and where courts impose community orders, they should also consider imposing a requirement to attend such programmes.

Curfews and electronic monitoring may be used to restrict offenders' movements at sensitive times, and can be combined with the residence requirements—in approved accommodation, for example—where behaviour and compliance can be monitored.

Financial orders

Courts should consider making confiscation orders to recover the proceeds of crime; and deprivation orders to take possession of property used, or intended to be used, in connection with offending. For example, a camera or computer used to make or store sexual material, or a car used to convey prostitutes to their "patch". Restraint orders may be made prohibiting offenders from dealing with any realisable property where they are believed to have benefited from criminal conduct.

Compensation orders

Victims' views must be obtained on compensation, as it may cause additional humiliation, degradation and distress in the context of sexual offending. Courts should respect such views, and acknowledge them at the time of sentencing, if appropriate.

¹⁵ Children and Younger Persons Act 1933, Schedule 1

¹⁶ Section 97 Sexual Offences Act 2003

3 Specific Issues

10. We welcome the draft guideline, recognising both its flexibility and the way it reflects the spirit of the Sexual Offences Act 2003—a piece of legislation based on extensive research, which was supported by a solid consensus in both Houses of Parliament. We acknowledge and approve of the increased recognition of the necessity to protect children, vulnerable people, and the public. One response we received called the draft guideline “a first rate piece of work”.¹⁷ A number of other responses pointed up several issues for discussion, and we turn now to consider these suggestions. As noted in paragraph 2 above, the time available to us for consideration of the draft guideline was inadequate, and our concentration on these issues has necessarily been limited. There might have been other points to debate, had we and our consultees had more opportunity to consider the wider issues.

Sexual familiarity as a mitigating factor

11. The draft guideline proposes that, in rape cases, where the victim is 16 or over and has been engaged in consensual sexual activity with the offender immediately before the offence, this could be a mitigating factor.

12. This was the subject of some controversy, both among those who responded to the Panel’s consultation paper and among our consultees. Views were mixed: some arguing, as the Court of Appeal did in the *Millberry* case, that in some cases “it would be contrary to common sense to treat such a category of rape (in a continuing close relationship) as equivalent to stranger rape”; but that “given the inherent gravity of the offence of rape, the sentence adjustment in such a case should, we think, be relatively small”.¹⁸ It was suggested that such a situation is capable of amounting to mitigation.¹⁹

13. Arguments against this proposal were: that it may undermine the establishment of the principle that relationship rape is as serious as stranger rape; and that it may minimise the seriousness of rape, undermining the right to withdraw consent at any point, a fundamental principle of the right to autonomy.²⁰ Furthermore, it was said that it would encourage the ‘sexual incontinence’ view of male sexuality;²¹ and that it may dissuade victims from coming forward for fear of being blamed for contributing to the assault.²² Finally, that research had shown that the harm experienced is at least equal to where the perpetrator is a stranger, because of the abuse of trust involved.²³

14. The DPP told us, in an informal briefing session on 20 June, that he felt this proposal may have been imperfectly drafted; and that the draft guideline ought perhaps to make

17 Ev 5

18 (2003) 2 Cr App R (S) 31, para 26

19 Ev 4

20 Ev 4, Ev 5

21 Ev 2

22 Ev 5

23 Ev 4, Ev 5

clearer that what was referred to was sexual activity immediately preceding – meaning on the same occasion—the offence.

15. We considered these various arguments carefully. **We welcome the Court of Appeal’s approach in the *Millberry* case,²⁴ emphasising the seriousness of all types of rape. We endorse the view that relationship rape is as serious as stranger rape; but agree with the Panel that the culpability of the offender might be slightly reduced in circumstances where the rape was “perpetrated by someone known to the offender and ... it was immediately preceded by mutually agreed sexual activity”.²⁵ We conclude that consensual sexual familiarity immediately preceding rape is *capable* of being a mitigating factor, and recommend that it remain in the guideline. But we stress that any reduction in sentence should be small, and may not apply in all such circumstances.**

Drugs and alcohol

16. The Committee does not believe that drug or alcohol misuse should be a mitigating factor. **We recommend that drug or alcohol misuse should not mitigate offending.**

Provocation as a mitigating factor in rape

17. The Fawcett Society commented that the list of general mitigating factors which could be applicable to offences includes “a greater degree of provocation than normally expected”; and that this should never be considered in the sexual offences context. The Society thought it should be made clearer that not all general factors will be relevant.²⁶

18. The informal briefing on rape to the Committee on 20 June confirmed this view; and therefore, **we recommend that the draft guideline should make clear that provocation should not be a mitigating factor in rape cases, and that not all general aggravating and mitigating factors may be relevant.**

Additional aggravating factors

19. It was pointed out to us that psychological damage to children who have suffered long-term abuse and been caught up in a web of deceit is likely to be particularly grave. NAPO’s experience has shown that such deceit may be far more damaging to the child than the physical offence itself. It can affect other family relationships, and leads to poor self-image and esteem.²⁷ We accept this view.

20. Other suggestions were that filming/photographing assaults on mobile phones, and buying/selling another person for trafficking should be added to the additional aggravating factors in relation to the relevant offences.²⁸ Again, we agree that such factors should be seen as aggravating.

24 (2003) CR App Rep

25 Panel’s Advice para 61

26 Ev 4

27 Ev 6

28 Ev 2

21. **We recommend that grave psychological damage to children—especially as a result of long-term abuse and enforced complicity with deceit—should be an additional aggravating factor. So also should filming/photographing assaults on mobile phones, and buying/selling another person for trafficking.**

Restorative Justice

22. Quaker Peace and Social Witness started the first “Circles of Support and Accountability” for sex offenders, learning from similar arrangements in Canada. These are now spreading from Thames Valley and Hampshire to other parts of the country. While recognising that restorative justice may not be appropriate to the most serious offending, they argue that the possibility of restorative justice approaches should be acknowledged in all sentencing guidelines.

23. The draft guideline indicates that sentencing is an occasion where the court may sensibly suggest interventions that could be useful, either during the custodial period or on release. Circles aim to reduce offending, and to break the cycle of criminality. The absence of effective support increases the likelihood of reoffending; and evidence is very strong that a high proportion of victims want restorative justice processes, and achieve satisfaction from them.²⁹

24. **We recognise that restorative justice has a place in interventions following sentence, drawing on the support for sex offender circles to monitor released offenders, and hold them to account. In this context we refer only to accredited restorative justice programmes, as we are aware that a number of programmes are being offered which have not achieved a satisfactory level of accreditation. We recommend that restorative justice be specifically mentioned in the guideline as a possible option for consideration in appropriate cases after sentence, depending on interim progress. We do not believe, however, that restorative justice is an alternative rather than an addition to normal sentencing options.**

Extended licence periods

25. David Middleton, Head of Sex Offender Strategy and Programmes at the National Offender Management Service (NOMS) and the National Probation Directorate, argued that there were advantages in courts imposing relatively short custodial sentences (say, for one year) followed by longer licence periods (say three years). Such sentences enable treatment provision and monitoring, and may be more effective than either a (relatively) short custodial sentence with a shorter licence period, or a community order with a longer licence period.³⁰ He was unsure whether the extended sentences (part of the new ‘dangerousness’ provisions) introduced by the new sentencing structure in the Criminal Justice Act 2003 would fulfil the same function; because the interpretation of these provisions may make this result more difficult to achieve. However, at this stage it is too early to know how the new sentences are being used—in theory they could produce the desired result. **We recommend to the Government that the ‘dangerousness’ provisions**

29 Ev 2

30 Ev 6

be kept under review: to promote the effectiveness of sentences, by ensuring that custodial periods and continuing treatment needs may be appropriately balanced.

Sex Offender Prevention Orders

26. We received evidence that Sex Offender Prevention Orders are applied inconsistently, and that some courts routinely impose multiple conditions, often more than ten. This “reduces the significance of the orders”, and makes them difficult to enforce and monitor. A smaller number of conditions that are more targeted and proportionate (such as residence, work and contact conditions) may be more effective. Additionally, these orders should run in parallel with licence conditions, and there is a need for better liaison with the Probation Service.³¹ **We recommend to NOMS that sex offender prevention orders be tailored to individual risk, rather than routinely imposed; and that there should be better liaison with the Probation Service about concurrent licence conditions.**

Research

27. Knowledge about sex offending, and its treatment and prevention, is expanding. Research continues, and the expansion in training, programmes, and greater understanding is to be welcomed. A recent editorial in *The British Medical Journal* called for further research, arguing that “better understanding of the outcomes of treatments—either controlling and moderating or harming and worsening behaviour—could at least focus resources on the most beneficial and cost-effective interventions.”³² **We recommend to the Government that more research be undertaken to investigate treatment outcomes, so that resources can be allocated accordingly.**

Key principles

28. While the individual charts in the draft guideline showing starting points and additional aggravating and mitigating factors are easy to refer to, and clearly set out, the Fawcett Society urged that there should be a summary of key principles at the beginning, to promote its accessibility generally.³³ We appreciate the importance of accessibility, while recognising that guidelines are primarily written for judges. **We recommend that the Council considers inserting a summary of key principles in the final guideline.**

31 Ev 6

32 *British Medical Journal* 2006; 333:5–6 (1 July 2006).

33 Ev 3

Conclusions and recommendations

1. The shortness of our own consultation period has prejudiced both our investigations, and the number and length of responses received. We seek an assurance from the Council that consultation periods will not be so curtailed in the future. (Paragraph 3)
2. We welcome the Court of Appeal’s approach in the *Millberry* case, emphasising the seriousness of all types of rape. We endorse the view that relationship rape is as serious as stranger rape; but agree with the Panel that the culpability of the offender might be slightly reduced in circumstances where the rape was “perpetrated by someone known to the offender and ... it was immediately preceded by mutually agreed sexual activity”. We conclude that consensual sexual familiarity immediately preceding rape is capable of being a mitigating factor, and recommend that it remain in the guideline. But we stress that any reduction in sentence should be small, and may not apply in all such circumstances. (Paragraph 15)
3. We recommend that drug or alcohol misuse should not mitigate offending. (Paragraph 16)
4. We recommend that the draft guideline should make clear that provocation should not be a mitigating factor in rape cases, and that not all general aggravating and mitigating factors may be relevant. (Paragraph 18)
5. We recommend that grave psychological damage to children— especially as a result of long-term abuse and enforced complicity with deceit—should be an additional aggravating factor. So also should filming/photographing assaults on mobile phones, and buying/selling another person for trafficking. (Paragraph 21)
6. We recognise that restorative justice has a place in interventions following sentence, drawing on the support for sex offender circles to monitor released offenders, and hold them to account. In this context we refer only to accredited restorative justice programmes, as we are aware that a number of programmes are being offered which have not achieved a satisfactory level of accreditation. We recommend that restorative justice be specifically mentioned in the guideline as a possible option for consideration in appropriate cases after sentence, depending on interim progress. We do not believe, however, that restorative justice is an alternative rather than an addition to normal sentencing options. (Paragraph 24)
7. We recommend to the Government that the ‘dangerousness’ provisions be kept under review: to promote the effectiveness of sentences, by ensuring that custodial periods and continuing treatment needs may be appropriately balanced. (Paragraph 25)
8. We recommend to NOMS that sex offender prevention orders be tailored to individual risk, rather than routinely imposed; and that there should be better liaison with the Probation Service about concurrent licence conditions. (Paragraph 26)
9. We recommend to the Government that more research be undertaken to investigate treatment outcomes, so that resources can be allocated accordingly. (Paragraph 27)

10. We recommend that the Council considers inserting a summary of key principles in the final guideline. (Paragraph 28)

Formal minutes

Tuesday 25 July 2006

Members present:

Mr John Denham, in the Chair

Mr Richard Benyon	Margaret Moran
Mr Jeremy Browne	Bob Russell
Ms Karen Buck	Martin Salter
Mr James Clappison	Mr Gary Streeter
Mrs Ann Cryer	Mr David Winnick
Mrs Janet Dean	

Draft Report (*Draft Sentencing Guideline: Sexual Offences Act 2003*), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 28 read and agreed to.

Resolved, That the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the Appendices to the Report be reported to the House.

[Adjourned till Tuesday 10 October at Ten o'clock.]

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5 Child & Women Abuse Studies Unit, London Metropolitan University	Ev 4
6 Professor Don Grubin	Ev 5
7 NAPO	Ev 5
8 David Middleton, Home Office	Ev 6

Written evidence

1. Memorandum submitted by Quaker Peace and Social Witness

1. Quaker Peace and Social Witness is part of the central organisation of the Religious Society of Friends (Quakers) in Britain. Its Crime and Community Justice Group supports and represents Quakers in the area of crime and community justice.

2. We direct the Thames Valley & Hampshire pilot of Circles of Support and Accountability, working closely with staff and the statutory agencies involved.

2.1 Circles of Support and Accountability is a restorative justice scheme which supports the re-integration of released sex offenders into the community, while holding them accountable for their actions. It aims to prevent further crimes, protecting the community. In Canada, where the idea began, they have evidence that a Circle of Support and Accountability can dramatically reduce the chance of a sex offender re-offending. Our experience is showing the same.

2.2 In the Thames Valley (Oxfordshire, Berkshire, Buckinghamshire) and Hampshire, we run one of the three pilot projects in Britain, in partnership with the police, probation and prison services. It started in 2002, is funded by the Home Office, and has five staff. They are also encouraging and supporting the development of Circles projects around the country including Somerset, Yorkshire, Norfolk, Manchester, Bedfordshire and Scotland.

3. Our major area of concern with this submission is with the reduction of offending and of re-offending.

3.1 Perpetrators of sexual offences have often themselves come from dysfunctional families or been abused themselves. Ideally help should be offered to them before they become adult offenders. Intervention, including sentencing, should seek to break the cycle of criminality.

3.2 We endorse the general principle in the guidelines that sentencing for a sexual offence is an occasion where the court "may sensibly suggest interventions that could be useful, either during the custodial period or upon release".

3.3 Sex offenders do damage, but they need healing too. Identifying offenders in the community without concerned support could further alienate them and increase the likelihood of re-offending. Specifically we recommend:

4. GREATER USE OF PRE-SENTENCING REPORTS

4.1 Pre-sentencing reports, referred to in the Guidance in relation to the new offences, should be made prior to all sentencing for sexual offences. And they should be written by professionals with the specialist training and experience relevant to sexual offenders.

5. CLEAR STATEMENT OF PURPOSE OF SENTENCE

5.1 All sentencing should say what its aim is: the expected outcome, and the actions needed to achieve it. This needs to apply to prison, probation, community punishment orders, or any other sentencing condition, and to the person being sentenced. We feel such a statement of purpose, with the provision of necessary support to achieve the outcome, is more valuable than tariffs for particular crimes.

6. WIDER AVAILABILITY OF SEX OFFENDER TREATMENT PROGRAMMES

6.1 Although these are available both in prisons and in the community not all sex offenders may have access to them, sometimes due to lack of resources. We believe sex offender treatment programmes should always be made available and delivered to a high standard of effectiveness. Ready availability and effectiveness should be set as performance targets for all providers of these programmes. Sentencers should be in a position to indicate their expectations about completion of such a programme.

6.2 Currently treatment programmes are usually made available only to offenders receiving custodial sentences of four or more years. This is not an argument for an increase in the length of custodial sentences, but for greater use of alternatives.

6.3 For example, a three year Community Punishment Order with treatment as a condition plus a full package of registration and supervision as necessary is a far more rigorous and effective response than imprisonment without treatment. Or, a mixed order, which would allow the programme to be delivered partly in prison and partly in the community, enables a more realistic risk assessment of the offender than may be possible during imprisonment.

7. USE OF RESTORATIVE JUSTICE PROCESSES

7.1 Restorative justice seeks to balance the concerns of the victim and the community with the need to reintegrate the offender into society. The processes provide the opportunity for an holistic view of the needs of all those harmed by the offence. Not just the immediate victim and the perpetrator, but their families and other significant people who are all affected (and sometimes devastated) by the commission of the offence.

7.2 Research indicates that most victims want recognition of the harm done to them, restitution from the offender, and a commitment that further crime will not be perpetrated by the offender. Evidence is very strong that the proportion of victims wanting restorative justice processes when they are available is very high, and their satisfaction with its outcomes is considerable. Restorative justice processes give victims the opportunity to have their harm acknowledged and amends made. The process is designed to empower all participants, and in the context of this specific consultation should be seen as potentially more helpful to victims than making a personal statement to the court.

7.3 We would add that compensation figures are agreed often through restorative justice processes, and thus of more relevance to both parties than when imposed externally.

7.4 The restorative justice approach can lead to the determination of effective steps for healing of offenders too, and reduce the likelihood of re-offending. Offenders have the opportunity to acknowledge the impact of what they have done and to make reparation. It can have particular value in the category of “preparatory offences” as early intervention to prevent escalation of offences.

7.5 This is also a reassurance for the public that steps are being taken to address the seriousness of the offence and reduce further risk.

7.6 We recognise that restorative justice may not be seen as an appropriate response to the most serious of sexual offences. Nevertheless, we would wish to see a reference to the possibility of restorative justice approaches (for example through victim/offender mediation) in all sentencing guidelines. Working on harm-awareness during an order served in the community or during a prison sentence, for instance, as part of a sex offender treatment programme, would always be valuable.

7.7 We are convinced that restorative approaches to working with the trauma of any crime and its resolution is the right way to proceed, both for the good of community building and because of the respect for human value that it reflects. It is good to see these approaches increasingly included in the Government’s proposals for operating the criminal justice system. We hope to see them taken into account in guidance for sentencing sex offenders.

June 2006

2. Memorandum submitted by Professor Liz Kelly

1. I am not convinced at all by the rationale for it being mitigating that there was consensual sexual activity immediately prior. To me it reinforces the “sexual incontinence” view of male sexuality, which is not helpful in light of new consent standards. It also implicitly plays on this idea that women give confused signals, which is much rarer than supposed, and anyway have to be interpreted as “signals” anyway. We all know that these things are invitations to lawyers to invoke them, and could have unintended spin offs with respect to sexual history, with increased claims to (invented) prior relationship/sexual contact.

I also raise the following for consideration:

1. The implications for child contact in cases where the offender is a family member of sex offender prevention orders.

2. The problematic use of “sexual deviance”, given that most experts do not view offenders through this lens.

3. Including filming/photographing assaults on mobile phones as an aggravating factor.

4. p48 including buying/selling another person in aggravating factors for trafficking.

June 2006

3. Memorandum submitted by the Fawcett Society

THE FAWCETT SOCIETY

The Fawcett Society is the UK's leading gender equality organisation. Since 2001, we have been contracted by the Home Office to provide gender expertise on criminal justice policymaking. We also run the Commission on Women and the Criminal Justice System, a unique inquiry which brings together experts from all parts of the system to examine the way women are treated as victims, as defendants and offenders, and as practitioners.

GENDER EQUALITY DUTY

The Equality Act 2006 introduces a new duty on public bodies to have due regard to the need to eliminate unlawful sex discrimination and to promote equality of opportunity between women and men. All public bodies, including the Sentencing Advisory Panel and the Sentencing Guidelines Council, will be subject to the duty from April 2007.

It is the Equal Opportunity Commission's recommendation that both the Council and the Panel are listed for the specific duties, in which case they would be legally obliged to undergo the specific steps. However, even if not listed, in order to meet their obligations under the general duty, it is best practice that they assess the impact of the policies and guidelines that are developed to ensure that they do not have a disproportionately negative impact on women or men. This will be especially important for guidelines on offences that affect or are committed by larger numbers of one gender. It would be good practice, prior to the duty coming into force in April 2007, for the Council to assess the impact of the guidelines on victims of sexual assault through consultation with a wide range of relevant stakeholders, including Sexual Assault Referral Centres, victim support groups and counselling organisations.

Consultation with external organisations is a key part of the gender equality duty. A considerable amount of work has been carried out on these guidelines, both by the Sentencing Advisory Panel and the Sentencing Guidelines Council, and they are very detailed and complex. Many organisations who have expertise on these issues, such as small under-funded sexual violence services, would find the Panel's advice and the draft guidelines inaccessible and would struggle to respond. We suggest, therefore, that a summary of key principles should be provided for complex guidelines such as these.

FACTS ABOUT SEXUAL OFFENCES

- Around 47,000 women are victims of rape/attempted rape and there are around 190,000 incidents of serious sexual assault in a year.¹
- In the vast majority of rapes the victim knows the perpetrator. The most common group of perpetrators are husbands and partners.²
- Victims of rape are far more likely to suffer from post-traumatic stress disorder than victims of other crimes.
- The conviction rate for rape has been steadily declining and in 2004 just 5.29% of reported rapes resulted in conviction.³
- There are significant variations in the treatment of rape across the country. The conviction rate in Gloucestershire is less than 1% of reported cases.⁴

SEXUAL OFFENCES DRAFT GUIDELINES

The vast majority of rapes are not reported to the police and attrition is a serious problem at each stage of the process resulting in a national conviction rate for reported rape of just 5.29%. The Sexual Offences Act 2003 clarifies the law around rape and sexual offences and a considerable amount of work has been carried out by both the Sentencing Advisory Panel and the Sentencing Guidelines Council. We broadly welcome the draft guidelines and have limited our response to a few key areas.

The relationship between the victim and the offender

We warmly welcome the confirmation that relationship and acquaintance rape should be treated as seriously as stranger rape (para 2.6).

The offender's culpability in non-consensual offences

We have concerns about the proposal that an offender's culpability would be lessened where the victim had consented to sexual activity immediately before the offence took place (para 2.18). We note that the wording in *Millberry* and in the Panel's advice (page 17) that culpability would be "somewhat less" has become "less" in the guidelines leaving significant discretion to the judge to interpret how much less.

¹ S Walby and J Allen, *Domestic violence, sexual assault and stalking: Findings from the British Crime Survey*, HORS 276, 2004.

² Ibid.

³ Source: Home Office.

⁴ Ibid.

The experience of those who work with victims of rape shows that many rapes occur after initial consensual sexual activity or intercourse and can be as serious, or more so, as cases where there has not been consensual sexual activity. Furthermore, consensual sexual activity does not, per se, demonstrate a lack of planning. This guideline contradicts the clear statement that acquaintance rape is as serious as stranger rape. It minimises the seriousness of rape in these circumstances and undermines a woman's right to withdraw consent at any point, which is a fundamental principle of the right to autonomy. This proposal could also be in conflict with abuse of trust as a factor indicating higher culpability.

AGGRAVATING AND MITIGATING FACTORS

The draft guidelines set out aggravating and mitigating factors that apply to a wide range of cases on pages 12 and 13. It would be helpful to make it clearer that not all these factors are relevant to sexual offences and in particular that "a greater degree of provocation than normally expected" should never be considered when sentencing for these offences.

June 2006

4. Memorandum submitted by His Honour Judge John Samuels

My analysis is that rape is rape: ie sexual intercourse without the consent of the person penetrated (who of course can be male or female). Thus the starting point when non-consensual penetration has occurred is logically the same, whether the parties were previously known to one another or not. But I am very troubled by the reference to "immediately before the offence took place". Why is there this emphasis on immediacy? What does it mean?

However a starting point is just that: and all kinds of factors will govern where the judge finally pitches the sentence, by reference to the established facts. The Guidelines illustrate some but by no means all the criteria a sentencer should at this point consider. One of those criteria will necessarily be the extent to which the parties have engaged in acts of sexual familiarity in the past on a consensual basis. "In the past" in this context can mean minutes, hours, days, weeks or years ago. Leaving women's groups on one side for the moment, as a vociferous lobby, what is logically or morally wrong with that analysis? The reference to immediacy in fact obscures rather than clarifies this point.

This consideration is not a "charter for rapists"; because the consideration of sentence is necessarily proceeding against the background that a jury has concluded that the relevant penetration occurred without consent. Had they not so concluded, the offender would have been entitled to an acquittal.

I can see no major problem for the judge in applying guidance along these lines: viz that prior consensual sexual activity is capable of amounting to mitigation. It will not bother juries at all; because the directions of law which they will receive from the judge will not impinge on this issue. The jury will only be concerned with the factual issue of whether the complainant consented to the relevant penetration on the occasion(s) charged; and it is for the Crown to prove consent, not for the defendant to disprove it.

28 June 2006

5. Memorandum submitted by Jo Lovett, Child & Woman Abuse Studies Unit, London Metropolitan University

POINT 62, PAGE 14

"An offender's culpability for a sexual offence shall be somewhat less if the offender and victim were engaged in consensual sexual activity immediately before the offence took place."

This proposal appears to be at odds with the spirit of the Sexual Offences Act (SOA) 2003 and many of the general principles the Panel seeks to uphold. Furthermore, no rationale in support of it is presented, making it hard to see why and from where it has emerged.

As recalled by the Panel, one of the stated aims of the Sex Offences Review (SOR) is to ensure that penalties better reflect the seriousness of the crimes committed. Since there are no gradations of rape offences in terms of seriousness, and following the lifting of the marital and male rape exemptions in the 1990s, all non-consensual penile penetration is treated as rape in English law. However, the suggestion of differentiating cases where there has been prior consensual sexual contact seems to detract from this, creating, by implication, a second-tier offence. This idea has been extensively debated and rejected, for example, in the Sex Offences Review which informed the SOA 2003.

This recommendation plays into the hands of myths about uncontrollable male sexual urges, "miscommunication" between the parties or misreading of "cues" about women's sexual availability and the idea that because a woman has consented on one occasion there is a greater likelihood that she will

consent again. It also flies in face of attempts to promote understanding of communicative sexuality and the protection of sexual autonomy enshrined in the SOA 2003 and the recent Home Office campaign on consent. Consent to one form of sexual intimacy does not entail or imply consent to another and, equally, consent to sex itself can be withdrawn at any time should the woman change her mind, regardless of her reasons. Indeed, violation of sexual autonomy is one of the cornerstones of the Panel's framing of the "harm" of sexual offences, yet this proposal begs the question of whose sexual autonomy is to be protected.

It is also well known that sexual offence cases are disproportionately under-reported compared with other crimes and that stigma and self-blame feature strongly in the responses of victims who do not report. If the notion is upheld that consent to some level of intimacy on the same occasion lessens the offender's culpability, victims will be further dissuaded from coming forward for fear of being blamed for contributing to the sexual assault and that their assault will be treated less seriously.

With regard to culpability and harm, in cases of sexual assault by intimates (an obvious category where there will have been prior sexual contact, potentially including immediately before the alleged assault), numerous research studies show that the harm experienced by the victim is often equal or even greater to that experienced when the perpetrator is a stranger. Such evidence was presented as part of the SOR, and almost certainly informed the Panel's 2002 guidance that rape by an acquaintance or partner should be treated as seriously as rape by a stranger. This is due to the abuse of trust involved and, especially where there is a history of domestic violence, the fact that sexual assaults can be particularly brutal. Conversely, the current proposal implies a lesser degree of harm.

June 2006

6. Memorandum submitted by Professor Don Grubin

Thanks for sending me the advice and draft guideline, which I read with much interest. It is in my view a first rate piece of work, and I have little in the way of substantive comment to make. I have, however, attached a recent article by David Finklehor (*not printed*) about the decline of sexual abuse cases in the United States which may be relevant for you (you will see it is in something called Nota News as I was unable to extract it on its own).

The only comment I have relates to offences involving indecent images. As you probably know, the Copine Scale was not developed as a risk tool, nor as a "severity" one, but simply to enable the Copine researchers to classify the images they were taking from the internet. It was subsequently used by the Courts as a guide to sentencing, which remains in the guidelines. My concern is the automatic association with Level 3 images with imprisonment. In the absence of aggravating factors, I'm not sure of the justification for this, particularly as, at least in my view, many of these offenders are more appropriately managed on probation.

July 2006

7. Memorandum submitted by NAPO

NAPO welcomes the opportunity to comment on the Panel's advice. NAPO found the advice comprehensive, thorough, and believes it will be of great assistance to those working within the Probation Service in the field of public protection, particularly with sex offenders. The Probation Service has developed a range of expertise in this work, including multi-agency arrangements, and provides a variety of treatment programmes in and outside prison. The Service is also involved in intensive 1-2-1-supervision, and employees and number of effective risk assessment tools.

In addition, the Probation Service now has a duty to consult and notified victims about the release arrangements of all those serving 12 months imprisonment or more for a sexual or violent offence. Victims have a right to be consulted and to be involved in all peace stages of sentence including applications for parole, temporary release or a move to a lower security establishment. This work is integral to the Probation Service's public protection work and has a vital impact on the fence focused work with a prisoner as well as providing protection, via additional licence conditions, where necessary for a victim.

NAPO would wish to comment on two specific issues:

A. SEX OFFENDER PREVENTION ORDERS

These orders were introduced under the Sex Offences Act 2003 and are civil preventative orders which can be made either at the point of sentence or in respect of somebody previously convicted of a sexual offence, whether person's behaviour is a high risk and there is a strong likelihood of reoffending.

NAPO has a number of concerns about how Sex Offender Prevention Orders are being used by the courts. The early evidence suggests that there is inconsistency between courts in terms of conditions and the inappropriate issuing of the orders to persons who are at best assessed as medium risk. NAPO believes that the orders should be specific to an individual's level of risk and used solely for those who pose a high risk.

The orders must also be enforceable and the conditions should be such that they prevent actions that might lead to the individual becoming involved in further offending. The conditions should not be offences in themselves. It is also NAPO's view that the orders must be proportionate to the original offence and be the subject of a detailed assessment of current risk. There is evidence that some courts have routinely imposed multiple conditions, often more than 10. NAPO believes this reduces the orders' significance, makes them unenforceable and means that it is more difficult for the police to monitor them effectively. NAPO believes that the courts need to be advised to consider where possible a small number of conditions that are sensible and proportionate to the risk, such as a residence, work and restricted contact with target victims and their age group.

Probation staff also find it useful when the order is run in parallel with license conditions and this also assists the aims of a supervision order. Assuming the orders are targeted at high risk offenders, they are helpful to supervising probation officers when discussed at MAPPA meetings, either after sentencing or on release from prison. However, NAPO further believes that there is evidence to suggest that some orders on not "fit for purpose" in that they are contradictory, for example, a prohibition on an address where a close relative resides such as mother or father. In these circumstances exemptions have to be negotiated with the police. It is also worrying that orders are often made at the sentencing stage on the recommendation of the police. They clearly need to be better liaison with the Probation Service prior to orders being made to avoid any conflict with the court report.

B. SIGNIFICANCE OF FAMILY RELATIONSHIPS (PARAGRAPH 87 DRAFT GUIDELINE)

In NAPO's view it is important that the courts recognise the balance between legal definitions of sexual abuse and the long-term impact on victims. Currently the law categorises sexual abuse in a variety of ways, including the degree of physical intrusion. NAPO believes that judges should also take into account when sentencing that offences committed against children over a long period of time involve drawing those children into a web of deceit. Often this experience is far more damaging to the child than the physical offence itself. The level of deceit often impacts on a child's life in virtually every way including their relationships with other members of the family and poor self-image, and this can cause long lasting damage.

July 2006

8. Extract from email from David Middleton, Home Office

Since the 2003 Act we have lost the ability for Courts to make short prison sentence followed by long licence on sex offender cases unless they are "serious risk of harm" cases. This has thrown up some cases where, without a long (3 year) licence we can't do treatment and monitoring which may help stop them becoming serious risk cases in the future. Some of the internet cases fall into this category.

David Middleton

Head of Sex Offender Strategy and Programmes (NOMS and National Probation Directorate)

July 2006

Reports from the Home Affairs Committee

The following reports have been produced by the Committee since the start of the 2002–03 Session. Government Responses to the Committee's reports are published as Special Reports from the Committee or as Command Papers by the Government. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2005–06

First Report	Draft Corporate Manslaughter Bill (First Joint Report with Work and Pensions Committee)	HC 540 (Cm 6755)
Second Report	Draft Sentencing Guideline: Robbery	HC 947
Third Report	Draft Sentencing Guidelines— <i>Overarching Principles: Domestic Violence and Breach of a Protective Order</i>	HC 1231
Fourth Report	Terrorism Detention Powers	HC 910
Fifth Report	Immigration Control	HC 947
First Special Report	Memorandum from the Home Office: Progress in implementing accepted Committee recommendations 2001–05	HC 1007

The following reports were produced by the Committee in the previous Parliament.

Session 2004–05

First Report	Rehabilitation of Prisoners	HC 193 (Cm 6486)
Second Report	Work of the Committee in 2004	HC 280
Third Report	Home Office Target-Setting 2004	HC 320 (Cm 6592)
Fourth Report	Police Reform	HC 370 (Cm 6600)
Fifth Report	Anti-Social Behaviour	HC 80 (Cm 6588)
Sixth Report	Terrorism and Community Relations	HC 165 (Cm 6593)

Session 2003–04

First Report	Asylum and Immigration (Treatment of Claimants, etc.) Bill	HC 109 (Cm 6132)
Second Report	Asylum Applications	HC 218 (Cm 6166)
Third Report	The Work of the Home Affairs Committee in 2003	HC 345
Fourth Report	Identity Cards	HC 130 (Cm 6359)
Fifth Report	Draft Sentencing Guidelines 1 and 2	HC 1207 (HC 371)

Session 2002–03

First Report	Extradition Bill	HC 138 (HC 475)
Second Report	Criminal Justice Bill	HC 83 (Cm 5787)
Third Report	The Work of the Home Affairs Committee in 2002	HC 336
Fourth Report	Asylum Removals	HC 654 (HC 1006)
Fifth Report	Sexual Offences Bill	HC 639 (Cm 5986)