



Rights of Women Response: Consultation Paper on Overarching Principles of Sentencing

About Rights of Women

Rights of Women aims to achieve equality, justice and respect for all women. Rights of Women advises, educates and empowers women by:

- Providing women with free, confidential legal advice by specialist women solicitors and barristers¹.
- Enabling women to understand and benefit from their legal rights through accessible and timely publications and training.
- Campaigning to ensure that women's voices are heard and law and policy meets all women's needs.

Rights of Women provides specialist legal advice to women who have experienced domestic and sexual violence as well as to those who support them. The issues we raise in this consultation come directly from the experiences of the women we support.

Rights of Women also produces publications to assist women who are or have experienced domestic or sexual violence, including our **Domestic Violence DIY Injunction Handbook** (2nd edition). Rights of Women has recently revised and reprinted **From Report to Court: A handbook for adult survivors of sexual violence**, 10, 000 copies of which will be distributed to survivors of sexual violence and support organisations as part of the Government's **Cross-Government Sexual Violence and Abuse Action Plan**².

In this response we will be answering only those questions that are directly relevant to our work and the women we support. For more detailed information about our views on the sentencing of sexual offences please see **Rights of Women Response to SGC Sexual Offences Act 2003 Consultation Guidelines** which is available to download from our website³.

¹ For advice on family law, domestic violence and relationship breakdown telephone 020 7251 6577 (lines open Tuesday to Thursday 2-4pm and 7-9pm, Friday 12-2pm). For advice about sexual violence, immigration or asylum law telephone 020 7251 8887 (lines open Monday 11am -1pm and Tuesday 10am -12noon).

² Dave Gee MBE, Rape Advisor to ACPO and Home Office has said that "From Report to Court is an essential guide for victims of rape or sexual assault. It provides clear and accessible information which will assist survivors who are going through the criminal justice system and represents a major step forward towards gaining victim confidence in this difficult area." For further information about From Report to Court visit our website at www.rightsofwomen.org.uk.

³ Please see www.rightsofwomen.org.uk.

Question 1: Do you consider that any of the statutory purposes of sentencing is more important than another? If so, how should this influence the approach to sentencing?

The purposes of sentencing are listed under the **Criminal Justice Act 2003** (CJA 2003) as follows:

“142 Purposes of sentencing

(1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.”

Rights of Women believes that purposes (c) and (d) are more important than the other purposes listed because of the Courts’ role as a public authority under the **Human Rights Act 1998** (HRA 1998). Under the HRA 1998 judges and courts have positive obligations to protect certain fundamental rights, including the right to life, the right to be free from torture, inhuman and degrading treatment and the right to private and family life. Some of these rights place positive obligations on the courts and other public authorities.

Rights of Women acknowledges that sentencing will often involve balancing the rights of both the defendant and the victim. However, Rights of Women believes that sentencing decisions must start from a rights-based approach before going on to consider broader social objectives (such as punishment or deterrence). Rights of Women believes that the adoption of such an approach would also deal with some of the issues raised in section three of the consultation which focuses on women offenders.

Rights of Women submits that the revised guidelines should specifically refer to the protection of the victim(s) in the consideration of the protection of the public (subsection (d) above) as part of a rights-based approach to sentencing. Rights of Women agrees with the points raised in the consultation that question the efficacy of short custodial sentences. However, Rights of Women believes such sentences are valuable to some victims because they offer them protection (for a limited amount of time at least) from further criminal offending. In cases of domestic violence, for example, short custodial sentences may offer the victim a ‘breathing space’; an opportunity to seek legal advice and to take steps that may protect her (and any children) from further violence, such as through the application for a non-molestation order or occupation order under Part IV of the **Family Law Act 1996**. The adoption of a rights-based approach to sentencing would require the courts to take factors, such as victim safety, into account when reaching a decision on sentence in order to discharge their positive obligations under the HRA 1998.

Question 2: Do you agree that culpability should be redefined, in descending order of severity, as:

(i) intention and/or knowledge; and

(ii) recklessness and/or negligence?

If not, how should the varying levels of offender culpability be categorised?

Whilst Rights of Women supports the re-definition of culpability, as suggested, we believe that the varying levels of offender culpability may have to differ according to the nature of the offence in question, particularly in relation to non-consensual sexual offences.

The **Sexual Offences Act 2003** overturned previous case law so that an unreasonable belief in consent to sexual activity is no longer a defence. This places an obligation on the suspect / defendant to show the steps he took to ascertain that the victim consented to sexual activity. Consequently, offenders in sexual offences may be found guilty because the jury (or tribunal of fact) did not find that their belief in consent was reasonable under the circumstances. It is not clear how offending in these circumstances would fit within the proposed re-definition of culpability. Rights of Women believes that offenders should be treated as being as culpable in cases where the offender intended to commit an offence, as when he is found not to have a reasonable belief consent.

Rights of Women agrees with paragraph 32 of the consultation which makes clear that offences that cause direct harm to victims should carry higher sentences than those which do not (such as offences that involve dishonesty or property offences). However, Rights of Women is concerned that this principle is not sufficiently articulated in the sentencing guidelines for sexual offences and domestic violence. For example, Rights of Women believes that 5 years imprisonment as a starting point for rape and assault by penetration is woefully inadequate. According to the sentencing guidelines for sexual offences 14% of sentences for rape in 2003 were for **less than 4 years**. Rights of Women believes that this is unacceptable and that such sentencing decisions serve to undermine victim confidence in the criminal justice system.

Question 4: To what extent and in what circumstances do you consider that the presence of previous convictions should impact on the sentence imposed?

Rights of Women believes that previous convictions, as well as previous 'bad character' are relevant in sentencing, particularly where the previous convictions are for similar and / or recent offences. Rights of Women also agrees that previous convictions should not have a disproportionate effect on the sentence imposed or that they should automatically result in an increase in the sentence imposed. Rights of Women believes that previous convictions for like offences should be taken into account where they reveal a pattern of offending. This is particularly relevant in domestic and sexual violence cases where perpetrators may have re-offended on numerous occasions, with either the same or different victims. Following the rights-based approach advocated

in response to question 1, Rights of Women believes that previous offences will also be relevant when considering victim safety.

However, Rights of Women is of the view that when considering previous convictions the court should also have regard to issues that may be referred to as the offender's 'bad character.' This could include, but is not limited to, taking into account:

- The fact that protective orders have been made against the offender, whether by the family or criminal courts (such as a restraining order, non-molestation order or occupation order).
- The fact that the offender has breached a protective order (whether or not breach of that order is a criminal offence).
- The fact that the offender had been subject to warnings in relation to his behaviour (e.g. harassment warnings).
- The fact that the police have been called out to a particular address on a number of occasions in the past because of the offender's conduct.

Rights of Women believes that the courts should be able to take such examples of 'bad character' into account in the same way that they would previous convictions, so that the more recent and similar the behaviour in question to the offence, the more relevant it would be to sentencing.

Rights of Women understands that such information may not be available to sentencing judges and that sentencing must be based on the established criminal conduct of the offender. However, Rights of Women believes that such information, if it is available to the court (for example, because it is referred to in a victim impact statement) should be information that the court is able to consider, along with previous convictions, when deciding sentence.

Question 5: Do you think that any of the suggested approaches to assessing the impact of aggravating factors would be helpful? Do you have any other suggestions?

Rights of Women believes that part of the sentencing process should involve making the offender aware of the harm that he or she has caused. However, Rights of Women is concerned that any consideration of harm does not become an examination of the victim and her or his response to the offence.

In the guidance on sexual offences the Sentencing Guidelines Council acknowledges that all non-consensual offences that involve the violation of the victim's sexual autonomy and will result in harm. It also acknowledges that the effects of sexual offending may be physical and/or psychological and that the psychological effects may be equally or even more serious, but much less obvious (even unascertainable) at the time of sentencing. Consequently, Rights of Women submits that when considering 'harm' in sentencing in certain cases, such as those that involve sexual violence or domestic violence, the court should start from the position that harm is caused, rather than attempting to ascertain whether or not it is, and if so how much, something that a Court is not equipped to do. Rights of Women also takes the view that such an approach would increase victim confidence by protecting

victims from ill-informed speculation as to how, or even if, they have been effected by the offence in question⁴.

Question 6: Are respondents aware of any more recent research into the deterrent effect of sentencing?

At a meeting of the Violence Against Women External Consultation Group of the CPS, recent research carried out by the Home Office on investigating, prosecuting and sentencing in prostitution cases was referred to, with specific mention being made of the positive deterrent effect of imposing driving bans on offenders convicted of curb-crawling. Whilst further details of the research were not revealed at the meeting, it appears to have been commissioned and carried out by the Violent Crime Unit of the Home Office.

Question 7: Do you agree that there should be a presumption of a custodial sentence where the factors identified above are present? If not, why not?

Rights of Women agrees there should be a presumption that the offender receive a custodial sentence where:

- (i) serious physical, psychological, financial or social harm was intended, whether or not the harm was actually inflicted; or
- (ii) death or serious physical, psychological or social harm was caused by an offender who acted with a callous disregard as to whether such harm was likely to be occasioned or not.

Following the rights-based approach advocated in response to question 1 of this consultation, Rights of Women is not convinced that there should be a presumption that a custodial sentence be imposed on public policy grounds where the above two factors are not present. This is particularly relevant in relation to immigration offences, where public perceptions about immigration offenders may be influenced by racist or other irrational views.

Whilst it is not possible to examine this issue in detail, Rights of Women would like to draw the Panel's attention to the case of **R v O [2008]**⁵ where a custodial sentence was imposed on a child victim of trafficking by a Crown Court because it was mistakenly believed that she was an immigration offender. Rights of Women believes that this case illustrates the dangers posed by the existence of a presumption that a custodial sentence be imposed in certain types of cases.

⁴ See for example:

- **R v Shaw [1997] 2 Cr App R (S) 206** where a sentence premised on the fact that women working in prostitution who are raped do not suffer as much as other survivors was found to be unduly lenient.
- A recent case in Reading Crown Court where pictures of the victim of rape on Facebook were used to support the defendant's claim in mitigation that she had not suffered any harm <http://www.dailymail.co.uk/news/article-1076965/Rape-victim-upset-Well-shes-smiling-Facebook-said-lawyer.html>.

⁵ See <http://business.timesonline.co.uk/tol/business/law/reports/article4863830.ece> the full judgement is expected before the end of the year.

Question 8: Do you have any comments on the Panel's assessment of offender mitigation factors and their potential impact on sentence selection?

Rights of Women agrees with the assertion in paragraph 130 of the consultation that previous good character cannot be relied upon when the offender has used status or position to commit or conceal offences or to make it difficult for a victim's case to be believed. As discussed in paragraph 131, this is particularly relevant in cases of domestic and sexual violence. However, Rights of Women believes that it is essential that this is clearly articulated in the revised guidance as mitigation along these lines continues to be advanced by defence advocates and relied on by sentencing judges⁶.

Similarly, with regards to expressions of remorse by the offender and whether such remorse is genuine, Rights of Women believes that further guidance should be given on this point, particularly where there is no evidence of remorse other than from the defendant in mitigation (e.g. where the offender has not pleaded guilty or behaved in a way that indicates an awareness of his/her behaviour and the harm caused).

Rights of Women agrees with issues raised in paragraph 137 of the consultation and submits that the fact that an offender has experienced violence or abuse should be considered to be a mitigating factor. Rights of Women has advised many women who have been coerced into criminal activity (such as benefit fraud or theft) by a violent partner. Similarly, Rights of Women believes that there are causal links between experiencing domestic and/or sexual violence and committing offences because of the devastating and long-term effect that such abuse can have. Rights of Women also agrees with paragraph 142 which states that where the offender has a mental health problem, such as depression, that this should be considered to be a relevant factor in sentencing.

Given the prevalence of the sexual abuse of children, the barriers that many survivors have in reporting such offences and that fact that such offences may not be reported and investigated until the victim is an adult, Rights of Women is not of the view that the fact that an offender is of advanced years should be considered a mitigating factor. In these offences, where the offender has concealed his behaviour for a number of years, if not decades, it does not appear just to allow his age to mitigate the sentence he receives.

Rights of Women believes that where the offender has the primary responsibility for the care of young children or responsibility for other seriously ill or vulnerable family members, this should be a strong factor against the imposition of a custodial sentence (unless the seriousness of the offence

⁶ For example, Roger Took, who was sentenced in February 2008 to an indeterminate sentence for 17 crimes that related to the sexual exploitation of children, called three character witnesses to give evidence at his sentencing hearing one of whom was a Vicar. Mr Took also provided the Court with 23 supporting letters. The sentencing judge in Mr Took's case appears to have been influenced by this evidence and the police have expressed concern that the evidence of the victims did not play such a significant role in the sentencing judge's reasoning. See <http://www.spectator.co.uk/the-magazine/features/826056/the-establishment-paedophile-how-a-monster-hid-in-high-society.shtml> for further details.

makes such a sentence unavoidable). Taking a rights-based approach, Rights of Women believes that when sentencing the Court should consider the effect of any sentence on the whole family and not just the offender⁷.

Question 9: Do you agree with the Panel's assessment of the factors that are likely to influence the choice of disposal for offences where custody is justified but not essential?

Yes, although, following our answers to questions 1 and 4, Rights of Women believes that the safety of the victim is also a factor that should be taken into consideration when considering what type of sentence is appropriate.

Question 10: In what circumstances, if any, and to what degree, should requests for leniency from the victim (or victim's family) influence the sentence imposed?

Rights of Women does not have a view about whether the views of victims should be taken into account in this area or not. However, Rights of Women would be concerned if the views of victims were to be extrapolated from facts like the victim's perceived unwillingness to support a prosecution or give evidence (see paragraph 166 of the consultation) given the numerous possible reasons for this and the manipulation that may be present in domestic or sexual violence cases.

Question 13: Do you agree with the Panel's assessment of the circumstances in which a community order is likely to be the most appropriate starting point for sentence?

Yes, although, following our answers to questions 1, 4 and 9, Rights of Women believes that the safety of the victim is also a factor that should be taken into consideration when considering what type of sentence is appropriate.

Question 17: Do you agree with the principles relating to the sentencing of women offenders identified by the Panel?

Rights of Women agrees that the principles summarised at paragraph 262 of the consultation are particularly relevant in the sentencing of women. We would add that taking a rights-based approach to sentencing would particularly benefit women and other disadvantaged groups in the criminal justice system whose needs may not currently be adequately addressed.

Rights of Women urges the Sentencing Advisory Panel to consider the issues outlined.

**Rights of Women ©
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⁷ Following Baroness Hale's observations in **Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department [2008] UKHL 39**.