

Rights of Women Response to Sentencing Guidelines Council Sexual Offences Act 2003 Consultation Guidelines

Background

Rights of Women is an Industrial and Provident Society, which was founded in 1975 to promote the interests of women in relation to the law. Rights of Women works to attain justice and equality by informing, educating and empowering women on their legal rights. We are a membership organisation and our activities include producing publications, organising conferences and training courses and undertaking policy and research work. We run two national confidential legal advice lines for women provided by women, one general advice line specialising in family law issues, including domestic violence, and another on criminal law and procedures in relation to sexual violence.¹

As a feminist organisation dedicated to providing services and resources for women by women, including legal advice to women who have experienced sexual violence, we welcome the opportunity to be part of this consultation exercise. Our comments have focused on non-consensual sexual offences, although we make several general points in regard to sexual violence, to which we would like to draw to the attention of the Sentencing Guideline Council (SGC).

Starting points

Rights of Women is very concerned by the SGC proposed starting point for non-consensual sexual offences committed by adults against adults. We understand that these are in line with *R v Millberry*,² in which the SGC provided the Court of Appeal with advice on the structure of approaching rape cases. However, we believe that a 5 year starting point for imprisonment is woefully inadequate. This is particularly so where mitigating factors may take the sentence even lower than this.

Harm

We welcome the SGC's acknowledgment that all non-consensual offences involve the violation of the victim's sexual autonomy and will result in harm. We also welcome the acknowledgment 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.

We welcome the SGC guideline that where a victim personal statement has not been produced, the court should enquire whether the victim has been

¹ Sexual Violence Legal Advice Line: 020 7251 8887 (open Mondays 11am-1pm and Tuesdays 10am-12pm). General Legal Advice Line: 020 7251 6577 (open Tuesdays, Wednesdays and Thursday 2-4pm and 7-9pm and Friday 12-2pm).

² [2003] 1 Cr App R 25.

given the opportunity to make one. Rights of Women, further suggests, that the absence of a victim personal statement should not have a negative impact on the sentence. We believe that the victim personal statement is important in sentencing decisions. However, it is also important that sentencing reflects the seriousness with which the criminal justice system views sexual violence in general.

Rights of Women also welcomes the SCG's recommendation that the existence of any relationship between the offender and victim should not effect the starting points for sentencing. We strongly believe that it is correct that starting points should not depend on whether sexual offences are committed by a partner, by an acquaintance or by a stranger. This is important to dispel myths around sexual violence, particularly, the incorrect stereotype that rape is committed by strangers, when in fact evidence suggests that it committed by a person known to the victim.³

Culpability

Rights of Women are very concerned that the SGC has not taken to opportunity to condemn the principle set out in *Millberry* that culpability for rape committed following consensual sexual activity is 'somewhat less' than in cases where the offender had set out with the intention of committing rape. Worryingly, the SGC has gone further and suggested that the same principle should also apply to assault by penetration and sexual assault. We believe that this position is at odds with the SGC position on offences committed in the context of varying degrees of familiarity between the offender and the victim should not be treated differently.

Rights of Women strongly urges the SGC to withdraw the following two paragraphs from the guidelines:

'2.18 In *Millberry*, the Court of Appeal established that the offender's culpability in a case of rape would be 'somewhat less' in cases where the victim had consented to sexual familiarity with the offender on the occasion in question than in cases where the offender had set out with the intention of committing rape.

2.19 The same principle should apply to the generic offences of 'assault by penetration' and 'sexual assault'. Save where there is close proximity of age between the offender and the victim, it should not apply to the equivalent offences relating to victims who are under 13 or who have a mental disorder impeding choice, given the presumption inherent in these offences that the victim cannot in law consent to any form of sexual activity.'

³ For example Home Office research has found that women are most likely to be sexually attacked by men they know in some way, most often partners (32%) or acquaintances (22%). In addition 'current partners' (at the time of the attack) were responsible for 45 per cent of rapes reported to the 2002 British Crime Survey. See Myhill, A. and J. Allen 'Rape and sexual assault of women: the extent and nature of the problem Findings from the British Crime Survey' (Home Office Research Study 237, 2002)

These paragraphs suggest that once consent is given for one activity that it subsists for all other subsequent activities. This is clearly the kind of reasoning that was rejected by the House of Lords in relation to marital rape,⁴ and the kind of reasoning that is inappropriate in the context of sexual violence and the reformulation of offences under the Sexual Offences Act 2003.

Rights of Women strongly urges the SGC to revise its position in relation to consent to previous sexual activity. All sexual activity, irrespective of the relationship between the parties, and irrespective of any previous consensual activity, requires free and active consent.

Aggravating factors

Rights of Women calls on the SGC to clarify the situation with regard to sexual violence in the context of domestic violence. The aggravating factors specific to non-consensual offences include a history of intimidation or coercion and of previous assaults on the same victim. In our experience, and that of many others in the voluntary sector, sexual violence can often occur in the context of domestic violence. Where this happens, we believe that that domestic violence should be included within the aggravating factor of a history of intimidation or coercion and of previous assaults on the same victim.

Mitigating factors

Rights of Women is concerned that the SGC ensure that the personal mitigation which the court can consider, under section 166(1) Criminal Justice Act 2003, is used in a very limited manner.

We are also concerned at the role that positive good character will play in mitigating sentences for sexual violence. Rights of Women strongly believe that the Court of Appeal in *Millberry* correctly stated the position that an offender's previous good character does not justify a substantial reduction of sentence. We suggest that this is explicitly stated in the guidelines.

Rights of Women notes that the draft guidelines refer to the final guidelines *Overarching Principles: Seriousness* (December 2004) when discussing mitigating factors. We are concerned at the role the provocation factor set out in those guidelines will play. We are strongly of the opinion that the victim's actions and the sentencer's interpretation of these should not form the basis of provocation or a reduction in the sentence. We further believe that the SGC should take the opportunity to state that the concept of 'contributory negligence' has no role to play in sentencing sexual offences.

Late guilty pleas

Rights of Women is concerned about reductions in sentences for entering late guilty pleas. We understand that the SGC has recently consulted on whether the 10% reduction should be increased for late guilty pleas.⁵ In its consultation on plea reduction the SGC stated that an increase could

⁴ R v R 1991

⁵ Revision of guideline on the reduction of a sentence for a guilty plea, May 2006.

encourage more offenders to enter guilty pleas, highlighting that in serious sexual offences victims would be 'spared the anxiety of giving evidence.' In our experience, an unduly lenient sentence can also cause considerable anxiety for the victim. Further, avoiding giving evidence treats the symptoms rather than the underlying problems with the system. The whole process of giving evidence and the way the criminal justice system responds to the needs of victims of sexual violence needs to be reformed to ensure that the run up to the trial and giving evidence does not cause such anxiety.

Orders under the SOA

Rights of Women welcomes the SGC stating that when passing sentence for a sexual offence the court must always consider whether or not it would be appropriate to make a sexual offences prevention order, an order disqualifying the offender from working with children, or any other order. However, we urge the SGC to clarify that where an offender has been sentenced to a term of imprisonment, this should not mean that such orders are deemed not "necessary" to protect the victim from future serious physical or psychological and injury. This should be the case irrespective of the length of offender's sentence, including whether he has been sentenced to life imprisonment.

Conclusion

We urge the SGC to seriously consider the issues we have raised before finalising the guidelines on sentencing under the Sexual Offences Act 2003.

**Rights of Women ©
July 2006**