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**The Right Hon. The Lord Phillips,
The Lord Chief Justice,
Royal Courts of Justice
Strand
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Dear Nicholas

THE SGC'S CONSULTATION ON THEIR DRAFT GUIDELINE ON SEXUAL OFFENCES

I am writing in response to your letter of 11 April 2006 about the Sentencing Guidelines Council's draft guideline on sexual offences. The following comments represent not only my own views but also those of Charlie Falconer and Peter Goldsmith (who will not be replying separately).

I am concerned that the draft guideline at paragraphs 2.20 - 2.22 and the views of the SAP and HAC on the somewhat reduced culpability of an offender where consensual sexual activity takes place immediately before rape may be misinterpreted. It is arguable, that in circumstances where there was a previous sexual relationship, this might actually constitute a breach of trust, and so not reduce the offender's culpability at all. If the guideline is to be included it should also include this countervailing view. It may be easier if para 2.21 and the text box shortly afterwards repeating the same point was omitted.

We suggest that you add to the list of aggravating factors on page 24 where the offender uses the fact that the victim is voluntarily intoxicated as an opportunity to offend.

We agree with the stance taken by the SAP that there should be an explicit starting point of 15 years for offenders who commit multiple rape or rape the same victim repeatedly over a period of time and ask that you add this into the final guideline in the table on page 27. Indeed, sentences should be significantly higher where the victim or victims are children.

On page 28, as part of the “Factors to take into consideration” for rape, it is asserted that, “brief penetration with fingers, toes or tongue may result in a significantly lower sentence where no physical harm is caused to the victim”. We consider that the key issue is whether harm of any kind has been caused and would prefer that you delete this sentence.

The draft guideline departs from the SAP advice on the starting points for assault by penetration (page 29), and the starting points do not follow those for rape. On the other hand, the starting points for aggravated penetration match those for aggravated rape. We would be interested to hear the explanation for this apparent inconsistency.

There is also an inconsistency in how the use of drugs or alcohol is regarded as aggravating rape and assault by penetration respectively. In relation to the latter, it brings the offence into a higher starting point, whereas for the former it is simply an additional aggravating factor but no specific higher starting point is reached. This should be remedied.

“Proved abduction or detention” features both in the type/nature of activity box and as an additional aggravating factor. This is confusing and unhelpful. “Ejaculating or causing the victim to ejaculate” is included as an additional aggravating factor in rape but omitted from this list for assault by penetration. This inconsistency should be remedied.

In the rape (page 27) and assault by penetration guidelines (page 29), the nature/type of activity box includes “proved abduction or detention (unless separately charged)”. The insertion of the phrase in parentheses is unhelpful; these words should be deleted. The effect could be a reduced sentence for the assault (say 3 years instead of 8) where the abduction is charged separately, which might in turn result in inconsistent charging practices. Sentencers have regard to totality; this is where the effect of separate sentences should come into play.

In relation to rape of a child under 13, the guideline does not address the question of ostensible consent. Where, for example, the defendant honestly believed the victim to be over 16 and the prosecution accepts that ostensible consent was present, this might be regarded as a mitigating factor and the sentencer would benefit from guidance on how to handle this for sentencing purposes. If consent is in issue, a Newton will need to be held to resolve it in view of the relevance to sentence. This should be flagged in the guideline.

The starting points for sexual assault of a child under 13 (page 33) do not reflect the increase in culpability which Parliament must have had in mind in increasing the maximum penalty from 10 to 14 years imprisonment. A starting point of 5 years is too low; it would be hard for sentences to rise much above 8 years, even with a number of aggravating factors, which is too far below the maximum of 14 years.

In the lowest category of offending for this offence, an additional activity is missing – i.e. contact between part of the offender’s body (other than the

genitalia) and the clothed genitalia of the victim, e.g. offender rubbing with his hand over clothes but in genital area. This should merit a custodial sentence. There will also be other cases which merit custody – e.g. rubbing a young girl's chest or the buttocks of either girls or boys if done sexually.

Finally on sexual assault, in the additional aggravating factors box (page 33), causing physical harm is omitted and should be added.

In the section on Indecent Photographs, under "Factors to take into consideration" at page 105, we consider that point 8 should be strengthened to say that courts "should consider making" (as opposed to "have discretion to make") an order disqualifying an offender (adult or juvenile) from working with children regardless of the sentence imposed. An additional factor could usefully be added, as follows: "The courts should consider making an order forfeiting any possessions (for example, computers or cameras) used in connection with the commission of the offence."

We consider that a starting point of 8 or 12 months Detention and Training Order for a 17 year old first time offender showing pornography to a 15 year old in the absence of any aggravating factors (page 125) is too high. We would prefer a community order as a starting point for such youngsters.

I hope these comments are helpful. If it would be helpful to clarify any of this, please do not hesitate to contact me, or alternatively Christine Stewart, who follows the Council's work on my behalf.

Best wishes ever
Priscilla

BARONESS SCOTLAND QC