

PE2102/H: Require anyone found guilty of rape or sexual assault to be registered as a sex offender

Cabinet Secretary for Justice and Home Affairs written submission, 6 June 2025

Thank you for your letter of 9 May about the above petition which calls for a change in the law to abolish absolute discharge as a sentence for a person convicted of rape or sexual assault and so ensure that any person convicted of these offences will always be made subject to the sex offender notification requirement (SONR).

In your letter, you say that the Committee are interested in the circumstances that could warrant a sentence of absolute discharge for rape or sexual assault. I hope you will acknowledge the Scottish Government cannot speak for the judiciary in terms of when such a sentence might be used in the exercising of the court's discretion when sentencing. However, you will be aware the use of absolute discharge for crimes of sexual assault and, especially, rape, is very unusual and as always with the sentencing discretion a court has, a decision to issue an absolute discharge will very much depend on the exact facts and circumstances of a case.

In order to aid the Committee's consideration, you may wish to be aware of a particular rape conviction case where an absolute discharge was issued by the High Court. As you will see when considering the detail, this is very much an exceptional case where use of an absolute discharge was made. This clearly is not a disposal used without extremely careful consideration by the independent court of the specific facts and circumstances of a case.

The case in question is that of HMA v. Daniel Cieslak where the High Court judge published a detailed statement setting out why she considered an absolute discharge was appropriate in this particular case. This included an explanation as to why she did not think that it was necessary to make the offender subject to the SONR: <https://www.scottishlegal.com/articles/man-guilty-of-raping-12-year-old-girl-given-absolute-discharge-in-exceptional-case>.

The Committee is aware of the petitioner's concern that those who receive an absolute discharge are not made subject to SONR. It is worth being aware that sentencing judges will be aware that a consequence of giving an individual an absolute discharge is that the offender will not be subject to SONR and this is a factor that they will consider in determining the appropriate sentence.

Within the wider context of the use of absolute discharge and the relevance for SONR, it may be helpful to provide further information in relation to the purpose of SONR.

Individuals become subject to the Sex Offender Notification Requirements (SONR) if they are convicted of certain offences listed in Schedule 3 of the Sexual Offences Act 2003. This means that an individual must attend in person at a prescribed police station within 3 days of either conviction for the relevant offence or of being released from custody, to provide certain information to the police. Being subject to SONR

also means that the individual will be monitored under Scotland's multi-agency public protection arrangements (MAPPA).

Those convicted of an offence listed in Schedule 3 are automatically subject to SONR. The courts have no discretion in the application of SONR in these instances. SONR requirements form part of a series of public protection measures that support risk management and reintegration to the community upon release from prison.

An absolute discharge is, for all but very limited purposes, not regarded as a conviction, and as such, a person receiving an absolute discharge is not subject to SONR. It may well be the case that by imposing an absolute discharge, the sentencing judge, having examined all the facts in a particular case, does not believe that the individual poses a risk of further offending and therefore does not require to be managed under SONR (as illustrated in *HMA v Daniel Cieslak*). Courts do have the option to admonish, rather than absolutely discharge, where they consider that no punishment is warranted, but the crime should be recorded as a conviction and the offender should be made subject to SONR requirements.

You may already be aware that the independent Scottish Sentencing Council is in the process of developing sentencing guidelines in relation to rape. Further information can be found on the Council's website: [Rape | Scottish Sentencing Council](#). It is also planned for the Council to develop guidelines in relation to sexual assault. My understanding is that the Scottish Sentencing Council will likely be writing with additional information in respect of this petition.

Finally, it may be helpful to confirm that COPFS have a power to appeal against any sentence including absolute discharge if they consider that it is unduly lenient. This provides a formal mechanism by which the imposition of an absolute discharge can be appealed by the prosecution in any given case.

The decision about whether to appeal a sentence in any given case is entirely a matter for COPFS, which is independent of the Scottish Ministers. Where COPFS appeal against a sentence on grounds of undue leniency, it is then for the Appeal Court to determine if the sentence is legally unsound or inappropriate in all the circumstances.

I hope this information is helpful to the Committee in considering this petition.

Yours sincerely,

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