

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

## **Scottish Sentencing Council written submission, 6 June 2025**

In its [submission of 18 December 2024](#) the Council drew the Committee's attention to the provisions of section 246 of the Criminal Procedure (Scotland) Act; advised that both the High Court and the Sheriff Appeal Court (SAC) have indicated that a case should only be disposed of by way of an absolute discharge in exceptional circumstances; and noted that as each case is unique and turns on its own facts and circumstances, it is not possible for the Council to be specific about what exceptional circumstances might amount to in respect of any particular offence.

That remains the Council's position. It has not given specific consideration to the use of absolute discharges for sexual offences or any other offences. Therefore, beyond reiterating the statutory provisions, the Council is not in a position to offer its own views on the circumstances when this disposal might, or might not, appropriately be used for sexual offences, and it is important that this submission is not misunderstood as doing so. There is also a risk that, were it to do so, this would be incorrectly regarded as a form of guidance for the judiciary and others.

In addition, as the SAC has recently observed, as an absolute discharge is an exceptional disposal, previous cases are at best of limited assistance when a sentencing court is considering whether to impose one.

However, it might be helpful for us to draw the Committee's attention to some instances when appellate courts have considered the question of the imposition of an absolute discharge, in order to give some idea of what these courts regard as appropriate or not.

In the 2014 case of *HMA v KH*<sup>1</sup>, which might be of particular interest to the Committee in this context as it concerns an offence of sexual assault, the High Court sitting as an appeal court allowed a Crown appeal on the basis that the original sentence, an absolute discharge, was unduly lenient. The offender, aged 16, pled guilty to sexually assaulting a 15-year-old classmate. The High Court, "not without hesitation", took the view that the court at first instance had "placed undue weight upon the personal circumstances of the respondent when balanced against the offence... (which was) sufficiently serious as to require some punitive element in the form of a conviction." The High Court imposed a one year community payback order with the associated supervisory requirement. This, of course, meant that the accused was subject to the notification requirements of the Sexual Offences Act 2003.

The High Court also examined the issue in the case of *Rae v HMA*<sup>2</sup>, where a sentence of imprisonment for the offence of rape of a young child was being appealed by the offender. Although an absolute discharge was not imposed by the

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<sup>1</sup> 2014 SCCR 485

<sup>2</sup> [2021] HCJAC 13

court at first instance or by the High Court sitting as an appeal court, the High Court said that it would be “rare indeed” for an absolute discharge to be imposed for this offence. It went on to agree with the original sentencing judge who said, of the possibility of an absolute discharge for this offence, that “other than in truly exceptional circumstances, I would be concerned about taking a course which might be considered to come close to decriminalising [the] offence”.

In two more recent cases - the 2023 case of [\*SB v Procurator Fiscal, Aberdeen\*](#)<sup>3</sup>, which was a Crown appeal against sentence, and the 2024 case of [\*Kane v Procurator Fiscal, Kilmarnock\*](#)<sup>4</sup>, an appeal against sentence by the offender - the SAC gave further consideration to what factors might be relevant when considering whether an absolute discharge is an appropriate disposal. Neither appeal dealt with a sexual offence, and in both the court emphasised that precedent is of limited value in considering whether, in any given case and set of facts and circumstances, an absolute discharge will be appropriate.

In *Kane* the court observed that “there require to be exceptional circumstances before the court may order absolute discharge” and that the test is “a high one”. The court went on to note that “unsurprisingly, given the exceptional nature of the disposal, there are a limited number of reported cases. Each case will turn on its own facts and it is neither helpful nor desirable to compare one set of facts with another.”

Finally, the Council is currently developing sentencing guidelines for the courts on certain sexual offences including rape and sexual assault, and recently consulted on draft rape guidelines which proposed sentencing ranges for offences under section 1 (rape) and 18 (rape of a young child) of the Sexual Offences (Scotland) Act 2009. Taking into account the Council’s understanding of current sentencing practice, and its research and engagement work, all of the sentencing ranges provide for long term prison sentences. The guidelines make no provision for an absolute discharge as a disposal within the proposed sentencing ranges for either offence. Accordingly any court which wished to impose one would be taking a decision not to follow a guideline, and in terms of the relevant legislation would require to state its reasons for that decision. The Council is currently considering the responses to the consultation before finalising the draft guidelines. It is also at the early stages of developing guidelines on sexual assault, which will be publicly consulted upon in due course.

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<sup>3</sup> [2023] SAC (Crim) 9

<sup>4</sup> [2024] SAC (Crim) 7