

Does Gender Affect Judges' Perceptions of Sexual Assault Cases?

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Corinna Burgstedt, MSc,¹  Amy Beeby, MSc,²
Harlene Hayne, PhD,^{3,4} Linda Hobbs, MSc,² 
Julien Gross, PhD,³ and Tess Patterson, PhD,^{2,5}

Abstract

There is growing recognition that females engage in harmful sexual behaviour that is similar in severity and type to males. Existing research, however, suggests that there is a bias towards leniency in judicial systems for female sexual offenders (FSOs) in comparison to male sexual offenders (MSOs). Specifically, FSOs receive shorter sentences than do MSOs and are less likely to be sentenced to prison. The majority of research examining disparity in sentence outcomes for FSOs have been analysed through a quantitative lens. Qualitative methodology is also needed to understand any subjective differences in the way that judges perceive case-relevant factors and whether these perceptions differ as a function of the offender's gender. The present study is a qualitative study that examined judges' perceptions and descriptions of FSO compared to MSO in 10 matched cases of sexual offending. The study found that although there were many similarities in how judges perceived FSO compared to MSO, there were also unique differences that could explain more lenient sentences for FSOs (i.e. the vulnerability, poor mental health and

¹Department of Psychology, Technische Universität Braunschweig, Braunschweig, Germany

²Department of Psychological Medicine, University of Otago, Dunedin, New Zealand

³Department of Psychology, University of Otago, Dunedin, New Zealand

⁴School of Population Health, Curtin University, Perth, WA, Australia

⁵Optentia Research Focus Area, North-West University, Potchefstroom, South Africa

Corresponding Author:

Tess Patterson, Department of Psychological Medicine University of Otago PO Box 56 Dunedin 9054, New Zealand.

Email: tess.patterson@otago.ac.nz

adverse backgrounds of FSOs). Other unique differences found were that judges' perception of FSOs behaviour was described as depraved and cruel, whereas MSOs similar behaviour was not described in such an emotive way. The present study provides additional insight into the reasons for a bias towards leniency for FSOs. In particular, it points towards judicial focus on particular personal circumstances that are seen as relevant in sentencing FSOs but not for MSOs.

Keywords

female sexual offending, male sexual offending, gender disparity, sentencing, judges' perceptions

Current reported prevalence rates indicate that females commit approximately 4%–5% of all sexual offences worldwide (Colson et al., 2013; Cortoni et al., 2017). Although the rate for female sexual offending is appreciably below the rate for their male counterparts (95%–96%), it still corresponds to a significant number of cases (Cortoni & Gannon, 2013; see also Stemple et al., 2017). Over the last decade, researchers have compared the characteristics of female sexual offenders (FSOs) and male sexual offenders (MSOs) (Oliver, 2007; Tsopelas et al., 2011). Based on this body of research, there is a consensus that similar to MSOs, FSOs commit a wide range of harmful sexual behaviours (e.g. self-exposure, fondling of genitalia, oral contact and vaginal and anal penetration; Cortoni et al., 2017; Faller, 1987; Peter, 2009; Pflugradt & Allen, 2012; Saradjian & Hanks, 1996), and that the impact of these behaviours on the victim are just as harmful as sexual offending perpetrated by males (Colson et al., 2013; Gambardella et al., 2020; Gannon & Rose, 2008; Peter, 2009; Saradjian, 2010).

Despite evidence that sexual offences committed by females have similar physical as well as psychological short- and long-term sequelae for the victim (Kaufman, 2010), sexual offending by women is often perceived as less harmful (Denov, 2001). Moreover, in terms of sentencing outcomes, researchers in the UK and USA have found that FSOs are less likely to be sentenced to prison (Blackwell et al., 2008; Rodriguez et al., 2006; Sandler & Freeman, 2011; Shields & Cochran, 2020) than are MSOs, and that FSOs receive shorter sentences than do their male counterparts (Blackwell et al., 2008; Shields & Cochran, 2020; Weinsheimer et al., 2017). Consistent with these findings, there is evidence that in New Zealand, FSOs are also less likely to receive a prison sentence (Beeby et al., 2020) and when they do receive a prison sentence, the sentence is shorter than that for MSOs (Patterson et al., 2019).

Research demonstrating this disparity in sentencing outcomes for FSOs compared to MSOs have led to concerns that there is an underlying gender bias in favour of FSOs (see e.g. Beeby et al., 2020; Damiris et al., 2021; Deering & Mellor, 2009; Faller, 1995; Henning, 1995; Sandler & Freeman, 2011; Shields & Cochran, 2020; Weinsheimer et al., 2017). The mechanisms underlying any such bias are not well understood. Two theories have been proposed to account for gender bias in sentencing, double deviance theory or chivalry theory. According to the double deviance theory (or evil woman hypothesis), women who engage in serious crimes (i.e. their first deviant behaviour) are seen as having also deviated from their expected gendered feminine social roles (i.e. their second deviant behaviour) of being caring and law-abiding citizens (Deering & Mellor, 2009; Kirkwood, 2003; Nagel & Hagan, 1983; Spohn & Spears, 1997; Shields & Cochran, 2020); therefore, female offenders who appear before the courts are more likely to be punitively sanctioned than males who have been sentenced for the same crime. To date, researchers who have examined sentencing outcomes for female and male criminal offenders have found little evidence of harsher outcomes and therefore little or no support for the double deviance perspective (Embry & Lyons, 2012; Mustard, 2001; Rodriguez et al., 2006; Shields & Cochran, 2020; Steffensmeier et al., 1993).

The chivalry theory, on the other hand, has received more support. The chivalry theory, in its purest sense, suggests that women who engage in crimes are treated in a more 'chivalrous' way in court, resulting in more lenient outcomes, because their motives are traditionally viewed as more communal and caring and not regarded as criminal (Allen, 1987; Deering & Mellor, 2009; Goethals et al., 1997; Griffin & Wooldredge, 2006; Nagel & Hagan, 1983). For example, Allen (1987) noted that throughout court trial processes, female offenders who committed serious violent crimes were frequently described with respect to their mental health and internal experiences, leading to doubts about their criminal intentions as well as mitigating moral responsibility. Allen considered that the final consequences of medicalisation or psychologisation of female violent offenders may lead to lesser or lower sentencing outcomes.

In support of the chivalry theory, there is empirical evidence that judges attribute unlawful violent or sexual behaviour committed by females to individual internal factors such as mental health problems, personal background or a history of (sexual) abuse, or with external environmental factors such as the behaviour of the victim or the influence of a co-offender (Daly & Bordt, 1995; Deering & Mellor, 2009; Faller, 1995; Fehrenbach & Monastersky, 1988; Henning, 1995; Johnson, 1989; Mayer, 1983; Steffensmeier et al., 1993; Wolfers, 1992). In contrast, MSOs tend to be considered as rational during the commission of their offences and are described as motivated by sexual desire. Other researchers have found that FSOs are much less likely

than MSOs to receive a diagnosis of paedophilia based on the supposition that FSOs are generally not considered to have sexual arousal or sexual motivation towards children (Nathan & Ward, 2001). Taken together, research findings suggest that MSOs and FSOs may be perceived differently within the legal system and support the assumptions of a chivalry theory perspective, with FSOs seemingly perceived as more worthy of sympathy or less culpable and in receipt of more lenient sentence outcomes compared to MSOs.

Chivalry theory is not seen as the only explanation for leniency towards females (Goethals et al., 1997). Social expectations of females that are based on a number of scripts, cognitive frameworks and social stereotypes are likely to play a role in how we think about FSOs (e.g. females seen as mothers, family carers, nurturing; Denov, 2003; Ellemers, 2018; Goethals et al., 1997). Furthermore, traditional gender stereotypes are often learnt via sexual scripts, which outline the framework for normative sexual behaviour, and are acquired through socialisation processes (Byers, 1996; Ryan, 2011; Wiederman, 2005). Sexual scripts make various assumptions about normative sexual behaviour. Many of these assumptions directly relate to perceptions of harmful sexual behaviour and of the kinds of people who perpetrate such behaviour. In a number of studies, researchers have demonstrated that males are thought of as oversexed and females as undersexed (Byers, 1996); that males' worth and status is increased by sexual experience and females worth and status is decreased by sexual experience (Byers, 1996; Masters et al., 2013); that males are the initiators of sexual behaviour and females are the recipients of these requests (Byers, 1996); and females are depicted as emotional, sensitive and nurturing in their relationships (Byers, 1996; Jozkowski & Peterson, 2013; LaPlante et al., 1980; Masters et al., 2013; O'Sullivan & Byers, 1992), while males are depicted as unemotional, insensitive, and self-focused (Byers, 1996; Clark & Hatfield, 1989; Denov, 2003; Jozkowski & Peterson, 2013; Masters et al., 2013; Wiederman, 2005). Traditional gender stereotypes based on these sexual scripts make it inherently difficult for women to be viewed as instigators and perpetrators of sexual harm (Denov, 2001; Ellemers, 2018) and provide a potential explanation as to why female sexual offending is either discounted or otherwise explained.

The existing research in relation to FSOs and leniency has a number of gaps. It has not yet been systematically identified the reason for leniency to FSOs in judicial settings and instead, it has only been hypothesised as to why it occurs (Damiris et al., 2021; Deering & Mellor, 2009). Furthermore, establishing that there is a bias in favour of FSOs has not yet been conclusively demonstrated in the research literature because the majority of research demonstrating judicial leniency for FSOs in sentence outcomes has not taken into account or controlled for factors that could possibly mediate sentencing outcomes (Blackwell et al., 2008; Rodriguez et al., 2006; Sandler & Freeman, 2011; Weinsheimer et al., 2017). Specifically, there may be systematic

differences between FSOs and MSOs in case-relevant factors that may explain the longer or harsher sentences for MSOs compared to FSOs. In only three studies to date have researchers examined sentencing outcomes for FSOs compared to MSOs while also controlling for mitigating or aggravating factors that are likely to impact on sentencing outcomes (Beeby et al., 2020; Deering & Mellor, 2009; Shields & Cochran, 2020).

Deering and Mellor (2009) examined gender differences in sentencing of FSOs compared MSOs in seven carefully-matched cases in Australia. Cases were matched on the severity and frequency of the crime, the age of the victim, and the relationship of the offender to the victim, thereby ensuring that the seriousness of offences were similar for both the female and male cases. Using a qualitative analysis approach, Deering and Mellor examined court transcripts, sentencing comments, sanctions imposed by the judges and the type and application of mitigating factors stated in the documents. Even though all offenders received a prison sentence, FSOs received shorter sentences and shorter non-parole periods than did MSOs. In the FSO cases, judges also attended more to mitigating and situational circumstances such as psychological illness, personal hardship and substance abuse compared to the MSO cases. Deering and Mellor concluded that attention to these mitigating factors in the FSO cases was the reason for more lenient outcomes. This qualitative study was the first to provide preliminary evidence that there is a tendency towards leniency for FSOs in the criminal justice system, even when controlling for the seriousness of the crime. However, although Deering and Mellor could identify themes related to the mitigating factors that may have contributed to gender differences in sentencing, they did not consider aggravating or other potentially confounding case-relevant factors that may have impacted on the disparity in outcomes.

Shields and Cochran (2020) and Beeby et al. (2020) used a quantitative-research approach to examine whether there was a disparity in sentencing outcomes for FSO compared to MSO cases whilst considering a wide number of case-relevant factors that may have impacted on sentence outcomes. For example, Shields and Cochran (2020) used precision matching (a variable-by-variable matching technique) to analyse 15 years of data on all felony sex offenders sentenced in a single United States of America state (Florida). This procedure ensured that they could match FSOs to MSOs on a number of observed dimensions, including demographic variables (e.g. age, racial and ethnic status), prior record (e.g. indicator of whether a given case went to trial along with court-designated sentencing score components based on the Florida sentencing guidelines database), court (e.g. number of prior convictions and seriousness of prior convictions for any offence committed as a juvenile or adult) and offence characteristics (e.g. offence severity based on the guidelines database, indicator of whether a given offence included a victim under the age of 18, type of offence as one of six felony-level statute violation

types). They found a gender disparity in favour of FSOs across all sex offence types: FSOs were less likely to be sentenced to prison and were given shorter sentences compared to MSOs. Although Shields and Cochran's study had a number of strengths (e.g. matched a number of offence and offender variables, large sample size), it did not take into account case-relevant factors that may increase or decrease the culpability of the offender (e.g. mental health problems, previous good character and conduct). Hence, it remains unclear if there were any quantitative differences in other mitigating or aggravating factors that may explain the disparity observed.

Similarly, in the [Beeby et al. \(2020\)](#) study, case-relevant factors were matched for FSO to MSO cases on a number of important variables; the type of sexual offending, the characteristics of the offending, victim factors, and the severity of the offence. They also matched on potential aggravating factors (e.g. the number of previous offences, previous sexual offending or group offending (see [Beeby et al., 2020](#) for full details of methodology)). Beeby et al. obtained full court sentencing notes for the matched cases ($n = 10$ cases of FSO and 10 cases of MSO) and quantitatively analysed all case-relevant factors noted as present in the cases (including mitigating factors such as poor mental health), sentence outcome (length, prison vs. non prison sentences) and whether there were quantitative differences in the underlying case-relevant factors for the female compared to the male cases. In Beeby et al.'s study, FSOs were less likely to receive a prison sentence even though the start point for all cases (i.e. the female and male cases) was a prison sentence. They found no difference between the female and male matched cases in terms of the case-relevant factors identified, and the mitigating or aggravating factors identified and applied by judges. They concluded that their study indicated a disparity in sentencing outcomes for FSOs compared to MSOs as they had found no explanation in terms of the case-relevant factors that would otherwise explain the disparity.

The Present Study

With the exception of the Deering and Mellor study, research examining disparity in sentence outcomes for FSOs compared to MSOs have been analysed through a solely quantitative lens. It has long been recognised that qualitative methodology is also needed to understand any subjective differences in the way that judges perceive and describe case-relevant factors and whether these perceptions differ as a function of the offender's gender ([Embry & Lyons, 2012](#)). In the present study, we make a unique contribution to this research field by conducting a descriptive qualitative analysis of [Beeby et al.'s \(2020\)](#) matched cases to determine if there were differences in the way the judges subjectively perceived or described the sexual offending, or in the way in which judges selectively focused on case-relevant factors for FSOs

compared to MSOs. Our aim was not to measure the frequency of specific factors stated and applied by the judges, but rather to examine how FSOs and their offences were subjectively perceived and described during sentencing judgements compared to MSOs. To do this we used qualitative content analysis with inductive category development, a method often used to complete or revise previous theoretical claims (Braun & Clarke, 2006; Mayring, 2014). We aimed to achieve an empirically-founded understanding of possible differences in terms of judges' descriptions, explanations and discussions, as stated during sentencing, between FSOs and MSOs even when the case-relevant factors identified were similar. Specifically, we pose the following research questions: are there differences in the descriptions of (1) sentencing and (2) case-relevant factors for FSOs compared to MSOs? (3) Is the sexual offending committed by FSOs perceived as less harmful than the sexual offending committed by MSOs? and (4) Do judges' explanations of why offending has been committed differ for FSOs compared to MSOs?

Any differences found in judges' subjective descriptions or perceptions may provide some explanation for the leniency in sentencing that Beeby et al. found. Due to the limited amount of research on this subject, the present study is predominantly exploratory in nature and presents finding in a descriptive manner.

Method

Case Selection and Matching

For the current qualitative study, sentencing notes of the cases identified and matched by Beeby et al. (2020) were used. Sentencing notes were extracted from the Westlaw NZ (Thomson Reuters) online database via a search of all cases of convictions for sexual offending in New Zealand between 2011 and 2018. Each FSO case was matched with a MSO case in terms of the characteristics and severity of the offending (e.g. penetrative, touching/fondling and frequency of harm), characteristics of the offender (e.g. age, prior offending) and victim factors (e.g. age, relationship with the offender). See Beeby et al., 2020 for full methodology. A total of $N = 20$ sentencing notes were analysed with $n = 10$ FSO (age range 18 to 28 years at time of sentencing) cases closely matched to $n = 10$ MSO (age range 25 to 53 years at time of sentencing) cases (see Appendix A). Offender ethnicity was not explicitly stated and therefore not reported. Offences ranged from possessing an objectionable publication to sexual violation by rape. The sentencing notes ($N = 20$) were judgements from 16 unique Judges across New Zealand district and high courts.

Sentencing Notes

Prior to analysis, sentencing notes were modified to ensure gender neutrality and confidentiality of the content. The primary coder of the sentencing notes was unaware of the gender of the offenders. The sentencing notes for each case provided demographic information and other case-related factors (e.g. level of court, sex of judge, reports presented in sentencing and starting point for sentencing); the judge's summary of offence-related information; the reports that were presented (e.g. victim impact statement, character report, pre-sentence report and psychologist's report); submissions by the Crown (prosecution) and defence counsels; references to prejudgements and the judge's assessment of these factors as well as the sentencing decision. Only the judge's statements from the sentencing notes for each case were analysed. Submissions or comments by the counsels for the Crown or for the defence were not subject to the investigation unless the judge directly stated agreeing with these remarks.

Analytic Approach

We took a qualitative analysis approach in the present study. For that purpose, sentencing notes were carefully read and phrases that contained meaningful content about the case that went beyond the summary of evidence from the judge were subject to analysis (e.g. '[...] you appear to have lived a very positive and productive life and have been justifiably regarded as trustworthy and an inspiring leader within your family and your community and amongst many people with whom you have come into contact in the course of your life, work and activities'). In the context of a second reading, these statements were initially summarised using corresponding notes (e.g. 'stating that the offender can be seen as a person having lived an exemplary, positive and productive life'). After a further reading, final summaries of the contents were made in the form of codes for each relevant section (e.g. 'description of the offender as a person with a previous exemplary conduct'). Hereafter, codes with similar contents were grouped into 'categories' (e.g. 'description of the offender's general character and previous conduct as difficult' or 'description of the offender's general character and previous conduct as good'). Where categories referred to similar topics, they were sorted into higher categories that describe these general 'topics' (e.g. 'description of the offender's general character and previous conduct'). To enhance the credibility of the analysis, categories and topics were discussed with a second researcher who had also read the sentencing notes, and in total, they identified 24 topics consisting of 108 categories. In this paper, however, we only considered the topics and categories that were relevant to our research questions. For the purpose of the current analysis, a cluster of 12 topics consisting of 72 categories was used (see [Appendix B](#)). [Appendix B](#) sets out the number of FSO and MSO cases in

which topics and categories were mentioned by the judges. For each category, an exemplary quote is listed in [Appendix C](#). For purpose of comparing FSOs to MSOs the gender of each case was then revealed to the primary coder and the 72 categories were further classified as either (1) described in a similar fashion for FSOs and MSOs or (2) described in a different fashion for FSOs compared to MSOs. The similarities and differences are described here.

Results

Question 1: Are There Differences in the Descriptions of Sentencing for Female Sexual Offenders Compared to Male Sexual Offenders?

Explanations and Justifications for Sentencing Outcomes in Female Sexual Offender and Male Sexual Offender Cases. Judges focused on and described sentencing outcomes in eight FSO cases (FSO 1, FSO 2, FSO 3, FSO 4, FSO 5, FSO 7, FSO 9 and FSO 10) and in seven MSO cases (MSO 2, MSO 3, MSO 4, MSO 6, MSO 8, MSO 9 and MSO 10). Categories that were similar for FSOs and MSOs included the nature of offending where an association between the nature of the offending and a harsh sentence was made by the judge (FSO 3, MSO 3 and MSO 6); a deterrent to denounce the offending (FSO 3, FSO 10, MSO 4, MSO 8 and MSO 10); and in many cases (FSO 1, FSO 7, FSO 10, MSO 6 and MSO 10), the judge drew a connection between the sentencing outcome and the impact of the sentence on the offender and the offender's family (e.g. 'as the parents [...] the imprisonment of you both at the same time will have a harmful effect on your children'). Moreover, the need for rehabilitative measures was used as a justification for sentence outcomes in five FSO (FSO 1, FSO 2, FSO 5, FSO 7 and FSO 9) and three MSO cases (MSO 2, MSO 4 and MSO 9). The risk of re-offending, specifically a need for the protection of others, was discussed when setting a specific sentencing outcome (FSO 4, FSO 7, FSO 9, FSO 10, MSO 2, MSO 4 and MSO 10). Besides a low risk of re-offending, the absence of a relevant criminal history was defined as a reason for imposing a more lenient outcome (FSO 5, FSO 10 and MSO 10). In both FSO and MSO sentencing notes, judges made a link between the interests of the public and imposing a certain, supposedly more lenient, sentence (FSO 7, MSO 4 and MSO 9) (see [Appendix D](#) for a summary).

Despite the similarities of explanations and justifications for sentencing outcomes for FSOs and MSOs, one difference was noted. In two FSO cases (FSO 4 and FSO 9), the judge made a direct link between the sentencing outcome and the offender's personal characteristics, specifically the FSO's own vulnerability. Although both FSOs and MSOs were considered to have a number of similar personal characteristics (e.g. personal deficiencies and vulnerabilities, [Beeby et al., 2020](#)), personal characteristics were not explicitly connected to specific sentencing outcomes for MSOs.

Applied Mitigating Factors in Female Sexual Offender and Male Sexual Offender Cases. Judges described applying (i.e. imposing an increase or decrease in sentence) similar mitigating factors for both FSO and MSO cases.¹ For example, judges used mitigating factors to decrease a sentence length in seven FSO (FSO 2, FSO 3, FSO 5, FSO 6, FSO 8, FSO 9 and FSO 10) and in seven MSO cases (MSO 1, MSO 2, MSO 4, MSO 5, MSO 6, MSO 8 and MSO 10). The mitigating factors applied for a decrease were described in a similar manner between the FSO and the MSO cases. That is, when reducing the sentence length, judges acknowledged categories such as previous good character and conduct (FSO 9, FSO 10, MSO 6, MSO 5, MSO 8 and MSO 10); a non-criminal history (FSO 8 and MSO 1) and an offender's good general, social and living circumstances (FSO 8, FSO 10 and MSO 10); a guilty plea (FSO 2, FSO 3, FSO 7, MSO 1, MSO 2, MSO 4 and MSO 5); personal hardships (FSO 3 and MSO 2); mental health difficulties (FSO 5, MSO 4 and MSO 5) and having already served a prison sentence (FSO 6 and MSO 4).

There were two categories, expression of remorse and minor role as an accomplice, where a difference for FSOs cases compared to MSOs was noted. That is, although remorse that was expressed by the offender was applied as a mitigating factor for FSOs as well as for MSOs, it was only applied as a reduction in sentence in one FSO case compared to in four MSO cases (MSO 1, MSO 2, MSO 4 and MSO 5). Furthermore, FSOs were more likely to co-offend than were MSOs (Beeby et al., 2020) and the judge applied a decrease in sentence for two FSO cases (FSO 8, FSO 10), compared to none of the MSO cases, due to the FSOs' role being seen as more minor as they were an accomplice (see [Appendix D](#) for summary).

Question 2: Are There Differences in the Descriptions of Case-Related Factors for Female Sexual Offenders Compared to Male Sexual Offenders?

Identified Mitigating Factors in Female Sexual Offender and Male Sexual Offender Cases. Judges described a number of case-relevant factors that could be considered as mitigating or aggravating factors, but were not applied as such. Descriptions of these identified mitigating and aggravating factors were additionally analysed (i.e. the aggravating and mitigating factors that did not result in an applied increase or decrease in sentence). Differences in descriptions were found for none of the categories identified as mitigating factors but two of the categories (breach of trust and high degree of violence, cruelty or depravity) identified as aggravating factors.

Specifically, judges explicitly described a number of similar identified mitigating factors for eight FSO (FSO 2, FSO 3, FSO 5, FSO 6, FSO 7, FSO 8, FSO 9 and FSO 10) and seven MSO cases (MSO 1, MSO 2, MSO 4, MSO 5, MSO 6, MSO 8 and MSO 10). That is, offender characteristics such as young age (FSO 7 and MSO 1); previous good character and conduct (FSO 7, FSO 9, FSO 10, MSO 6, MSO 5, MSO 8 and MSO 10); positive reaction to treatment

(FSO 7, MSO 4); non-criminal history (MSO 1, FSO 7, FSO 8, FSO 10 and MSO 10); and additionally, the offenders' good general, family and living circumstances (FSO 7, FSO 8, MSO 8, FSO 10, MSO 10) and mental health difficulties (FSO 5, MSO 4, MSO 5 and FSO 7) were all identified as mitigating factors and described in a similar fashion for MSOs and FSOs (see [Appendix E](#) for summary).

Identified Aggravating Factors in Female Sexual Offender and Male Sexual Offender Cases

Judges explicitly described a number of similar identified aggravating factors for five FSO (FSO 3, FSO 5, FSO 6, FSO 8 and FSO 10) and five MSO cases (MSO 1, MSO 3, MSO 4, MSO 6 and MSO 10). The identified aggravating factors described by the judge for both MSOs and FSOs included the categories of premeditation and planning (FSO 3, FSO 5 and MSO 3); home invasion (FSO 6 and MSO 6); an involvement of multiple offenders in the offence (FSO 8, FSO 10, MSO 3, MSO 4 and MSO 10); use of a weapon (FSO 3 and MSO 6); and the significant scale and extent of offending (FSO 5, FSO 8, MSO 1, MSO 3 and MSO4). Judges also considered that a large age disparity between the offender and the victim (FSO 8, MSO 1 and MSO 4); the victim's vulnerability in general (FSO 3, FSO 5 and MSO 3); and the serious impact on the victim (FSO 3, FSO 5 and MSO 1) were aggravating features for FSOs and MSOs.

In contrast to these similarities, in FSO cases, but not in MSO cases, a breach of trust (FSO 5 and FSO 9), and the high degree of violence, cruelty or depravity were described (FSO 3 and FSO 6) by the judges as identified aggravating factors. Given that the FSO and MSO cases were matched and factors of cruelty, level of violence were similar for both, it is interesting to note that these issues were only commented on in relation to FSOs and not MSOs (see [Appendix E](#) for summary).

Description of the Offender's Background in Female Sexual Offender and Male Sexual Offender Cases

In the sentencing notes of five female offenders (FSO 2, FSO 3, FSO 4, FSO 7 and FSO 8) and in the remarks about three male offenders (MSO 2, MSO 6 and MSO 8), the judge referred to the offender's individual contextual background which the offender faced in his or her childhood or in the course of his or her developmental history. This individual contextual background could be either positive or negative. For example, in two FSO (FSO 7 and FSO 8) and two MSO cases (MSO 6 and MSO 8), the judge regarded the offender's current general, social and family living circumstances as good. In another two FSO cases (FSO 2 and FSO 4) and in the case of MSO 2, the upbringing of the

offenders was considered difficult. In addition, for both FSO 3 and MSO 2, their upbringing was portrayed as very difficult.

Despite these similarities in both positive and negative backgrounds being described for both female and male sexual offenders, judges appeared to focus on the past experiences of personal grief in more FSO cases than MSO cases. For example, whilst the history of four female offenders (FSO 2, FSO 3, FSO 7 and FSO 8) was described as containing experiences of adversity, only one male offender (MSO 2) was described as a person who had faced such hardship. This uneven focus on female compared to male adverse background occurred in the context of many of the MSOs also having experienced traumatic or adverse experiences (MSO 4, MSO 5, MSO 6 and MSO 8) (see [Appendix E](#) for summary).

Description of the Offender's General Character, Previous Conduct and Reasoning Ability in Female Sexual Offender and Male Sexual Offender Cases.

In seven FSO (FSO 2, FSO 3, FSO 4, FSO 5, FSO 7, FSO 9 and FSO 10) and six MSO cases (MSO 2, MSO 4, MSO 6, MSO 7, MSO 8 and MSO 10), judges described and considered the offender's general character and previous conduct. Previous character and conduct were described as good in four of the FSO (FSO 5, FSO 7, FSO 9 and FSO 10) and three of the MSO cases (MSO 6, MSO 8 and MSO 10). For some cases of FSO and MSOs, however, the judge focused on and described internal deficiencies and vulnerabilities (FSO 2, FSO 4, MSO 4 and MSO 7) or that there were no such deficiencies in reasoning (FSO 3 and MSO 8). For example, FSO 3 and MSO 8 were described as being sufficiently able to reason and understand the consequences of their offending. In this way, there were a number of similarities in judges' description of female and male general character.

In spite of these similarities, the judges' descriptions of FSOs differed from descriptions of MSOs for two categories. FSOs (FSO 4, FSO 5 and FSO 10) were characterised as persons with no general threatening traits, whereas none of the MSOs were directly described as a person with no general threatening traits. Whilst similar numbers of the FSOs (FSO 3, FSO 4, FSO 5 and FSO 7) and MSOs (MSO 2, MSO 4, MSO 5 and MSO 6) had mental health difficulties, judges, for the most part, only focused on the mental health difficulties related to FSOs (FSO 3, FSO 4, FSO 5 and FSO 7) and not MSOs (with the exception of MSO 2) (see [Appendix E](#) for summary).

Description of the Offender's Behaviour During the Offence in Female Sexual Offender and Male Sexual Offender Cases

Judges rarely made additional descriptions about the offender's behaviour during the offence other than summarising the facts. Only one additional description was noted, the judge described two of the male offenders as having taken advantage of the victim's situation (MSO 5 and MSO 8) (see [Appendix E](#) for summary).

Description of the Offence in Female Sexual Offender and Male Sexual Offender Cases

Descriptions of the offence itself were given in eight FSO (FSO 2, FSO 3, FSO 5, FSO 6, FSO 7, FSO 8, FSO 9 and FSO 10) and eight MSO (MSO 2, MSO 3, MSO 5, MSO 6, MSO 7, MSO 8, MSO 9 and MSO 10) cases. Many similarities in descriptions of the offence were noted for both FSOs and MSOs. That is, the offence was described as unusual offending (FSO 5 and MSO 9) or as an abnormality within the offender's life (FSO 9, FSO 10 and MSO 10). Moreover, the judge described the offending as serious (FSO 5, FSO 7, MSO 2, MSO 3 and MSO 7, MSO 8) and emphasised that the offence was a breach of trust (FSO 2, FSO 5, FSO 7, FSO 8, FSO 9, MSO 2, MSO 5 and MSO 8). A number of other common themes across gender were identified, including cruelty and depravity (FSO 3, FSO 6, MSO 3 and MSO 7); devastation to the victim (FSO 3, FSO 6, MSO 2, MSO 3 and MSO 6); violence (FSO 3, FSO 6 and MSO 6) and planning and premeditation (FSO 3, FSO 5, FSO 7, FSO 8, MSO 2, MSO 3 and MSO 7). Thus, although factors like cruelty and depravity were considered in male cases (MSO 3 and MSO 7), they were not labelled as aggravating. Furthermore, the offences committed by three female (FSO 5, FSO 9 and FSO 10) and two male offenders (MSO 8 and MSO 10) were described with a relatively moderate scale and frequency of offending compared to other cases. In addition, the judge stressed that the offence was neither premeditated nor planned in two FSO (FSO 6 and FSO 10) and two MSO cases (MSO 8 and MSO 10).

Despite the large range of similarities between the descriptions of offences committed by both female and male offenders, judges additionally described the offences by FSOs as selfish (FSO 5 and FSO 7) and clearly condemned the offence (FSO 7 and FSO 8). Judges did not make comment on MSOs' offences in a similar pejorative way. Furthermore, in two FSO cases (FSO 5 and FSO 8), the judge described the scale and frequency of the offending as significant. The significant scale and frequency of the offending was not commented on for MSOs, despite the scale and frequency of the offending being matched (see [Appendix E](#) for summary).

Description of the Victim's Conduct During the Offence in Female Sexual Offender and Male Sexual Offender Cases.

In only three cases (FSO 1, FSO 10 and MSO 10) were comments made by the judge on the victim's conduct during the offence. Whilst the victim's behaviour was characterised on two occasions in the FSO cases (e.g. for FSO 1 as consenting, and for FSO 10 as initially consenting and then subsequently non-consenting), the conduct of the victim was, with one exception, not considered for the MSO cases. That is, the case of FSO 10 and MSO 10, who committed the sexual assault together, is the only MSO case in which the victim's conduct was described by the judge. In terms of MSO 10's actions, the victim's conduct was explicitly seen as not consenting (see [Appendix E](#) for summary).

Question 3: Is the Sexual Offending Committed by Female Sexual Offenders Perceived as Less Harmful Than the Sexual Offending Committed by Male Sexual Offenders?

Description of the Impact of the Offence in Female Sexual Offender and Male Sexual Offender Cases. The sentencing notes for eight FSO (FSO 2, FSO 3, FSO 5, FSO 6, FSO 7, FSO 8, FSO 9 and FSO 10) and eight MSO cases (MSO 1, MSO 2, MSO 3, MSO 5, MSO 6, MSO 7, MSO 8 and MSO 10) provide information about whether the judge perceived sexual offending committed by FSOs as less harmful than the sexual offending committed by MSOs. Focussing on the impact of the offence, judges referred to many categories that were similar for both FSOs and MSOs, including general harm to the victim (FSO 5, FSO 7, FSO 8, FSO 9, MSO 2, MSO 3, MSO 7 and MSO 8); psychological harm to the victim (FSO 3, FSO 5, FSO 6, FSO 7, FSO 9, FSO 10, MSO 1, MSO 2, MSO 5, MSO 6, MSO 8 and MSO 10) and physical harm to the victim (FSO 3, FSO 6 and MSO 6). In another two cases in which the offender and the victim were related (FSO 2 and MSO 8), the judge assessed the impact as harm to their mutual family. The case of FSO 10 and MSO 10 (co-offenders) in which there was no familial relation to the victim, harm was linked to the offenders' family. More generally, one FSO (FSO 5) and two MSOs (MSO 7, MSO 8) were presented as having caused harm to the wider community or society. Harm to the victim's family was taken into account for four FSOs (FSO 3, FSO 5, FSO 7 and FSO 9), but only for one MSO (MSO 2) (see [Appendix F](#) for summary).

Question 4: Do Judge's Explanations of Why Offending Has Been Committed Differ for Female Sexual Offenders Compared to Male Sexual Offenders?

Explanations for the Offence in Female Sexual Offender and Male Sexual Offender Cases. In some cases, judges explained the offending by linking it to certain external circumstances or internal characteristics of the offender (FSO 1, FSO 2, FSO 3, FSO 7, MSO 4, MSO 5 and MSO 10). There were no clear gender-specific differences found for the topic 'explanations of the offending' or

associated categories, internal problems (FSO 3, FSO 7, MSO 5 and MSO 10), and external difficulties (FSO 1, FSO 2, FSO 7 and MSO 4) (see [Appendix G](#) for summary).

Discussion

Using a qualitative approach, the overriding objective of the current study was to investigate whether there were differences in judges' subjective descriptions and perceptions of FSOs compared to MSOs. Any differences noted could then account for the leniency in sentencing outcome that Beeby et al. (2020; see also [Patterson et al., 2019](#)) found. The present study extends the Beeby et al. study. The Beeby et al. study quantified relevant case factors and mitigating/aggravating factors stated by judges and conducted statistical analyses to show that the matched cases of FSOs and MSOs were similar on all of these factors despite leniency towards females in sentencing outcomes. The present study differs as it directly and qualitatively examined judges' perceptions and descriptions that went beyond facts of the case.

In the present study, judges, overall, perceived male and female sexual offenders more similarly than differently. There were, however, some points of difference. Specifically, in sentencing, the judges commented on and took into account personal characteristics of the FSO. The judges commented on the vulnerability of the FSO, and they focused on the adverse developmental backgrounds or poor mental health of the FSOs, even though MSOs also had such adverse backgrounds and poor mental health. Furthermore, females were described as having no general threatening traits (e.g. sexual deviancy), and as they were sometimes an accomplice in the offending, their role in the offending was discussed as minor. Also, for some of the FSOs, the victim's conduct during the offence was described as consenting, whereas MSOs were perceived as taking advantage of the victim's situation and the victim was characterised as non-consenting. Judges' perception of females as being more vulnerable and less threatening, as well as less responsible if there was a co-offender or if the victim was perceived as consenting, may explain the lighter sentence outcomes for FSOs that were found in the Beeby et al. study. Such findings support the chivalry theory that females are treated in a more chivalrous way by the courts and that chivalry may occur due to psychologisation of the FSO and them being seen as having less criminal deviant intent (see [Allen, 1987](#); [Deering & Mellor, 2009](#) for similar conclusions).

In contrast, however, only in FSO cases were case-relevant factors such as a breach of trust and a high degree of violence, cruelty, or depravity described as aggravating factors. Moreover, judges described the female sexual offending as selfish, and condemned the offending but did not condemn or label the offending similarly for MSOs. The negative effect of the offence on the victim's family was also clearly taken into account for more FSOs than MSOs.

In this way, judges' perception of FSOs was more harsh than for MSOs on some case-relevant factors and vilified the FSOs. Typically, we would expect that judges' perceptions of female sexual offending as depraved and cruel would result in harsher sentences for FSOs. In the present study, however, females were given more lenient sentences despite being considered more heinous than MSOs. As described above, only in FSO cases did judges make a clear link between the offender's personal characteristics and the sentencing outcome. The personal characteristics that were taken into account for sentencing these FSOs may have outweighed the aggravating features that were seen as pertinent to these FSOs. Even though researchers have not found support for the double deviance theory in terms of harsher sentencing outcomes for FSOs, the present study indicates that serious female offending compared to serious male offending was at least perceived as more despicable by judges. These additional noted differences (e.g. females viewed as more depraved or cruel) fit with the double deviance or evil woman theory (Embry & Lyons, 2012; Kirkwood, 2003; Mustard, 2001; Nagel & Hagan, 1983; Rodriguez, et al., 2006; Spohn & Spears, 1997; Steffensmeier et al., 1993). A recent study by Damiris, et al., (2021) also reported similar findings in relation to violent female sexual offenders being described by judges in an emotive way and FSOs being seen as particularly heinous. Judicial outcomes for FSOs may not simply be due to an influence of either the chivalry or double deviance theories but factors related to both these theories may contribute (see Nagel & Hagan, 1983, for a discussion of these theories as complementary rather than contradictory).

The findings of the present study are in line with previous research findings that suggest that judges pay more attention to individual internal factors (e.g. mental health problems or a history of (sexual) abuse), or with external environmental factors (e.g. the behaviour of the victim), in FSO compared to MSO cases (Daly & Bordt, 1995; Deering & Mellor, 2009; Faller, 1995; Fehrenbach & Monastersky, 1988; Henning, 1995; Johnson, 1989; Mayer, 1983; Steffensmeier et al., 1993; Wolfers, 1992). In the cases being considered in the current study, more women who committed sexual or violent crimes had their crimes or actions medicalised or psychologised during the sentencing trial than did men. Even when controlling for confounding variables, certain adversities were discussed in more FSO than MSO cases – whilst explicitly excluding the possibility that the offender had generally threatening traits such as sexual deviancy. This finding is also consistent with Nathan and Ward's (2001) finding that FSOs are much less likely than are MSOs to receive a diagnosis of paedophilia. In the present study, the qualitative finding that judges place a greater focus on the individual characteristics of FSOs in terms of mental health difficulties and past grief, may account for the leniency in sentencing outcomes observed by Beeby et al. (2020).

It is important to note, however, that in the current study most of the judges' perceptions related to the sexual offending were not gender specific, but rather belonged to both FSOs and MSOs. That is, in terms of judges' descriptions of sentencing (explanations and justifications for sentencing outcomes, application of mitigating and aggravating factors), and the case-relevant factors mentioned, most categories were similar for FSOs and MSOs. For example, the need for rehabilitative measures was stressed for both FSOs and MSOs equally (see [Deering & Mellor, 2009](#), for differing findings) and sentencing outcomes as a deterrent to denounce the offending and protect the community was reported as applicable to both FSOs and MSOs. Furthermore, judges' explanations for the reason why the person offended were similar for both FSOs and MSOs and female sexual offending was seen as just as harmful to the victim as was male sexual offending. The considerable number of similarities in how judges perceived FSOs in comparison to MSOs indicates that judges were systematically oriented towards similar factors for FSOs and MSOs within the decision-making process rather than generally operating from a gender-biased viewpoint. In [New Zealand, the Sentencing Act 2002](#), s9 calls on judges to take into consideration any circumstances about the offender, his or her background, or about the crime that might increase or decrease the severity of the offending or the culpability of the offender. When sentencing sexual offenders, judges are also required to consider case law, particularly [R v AM \[2010\] 2 NZLR 750](#). Using [R v AM \[2010\] 2 NZLR 750](#) as a guideline, the findings of the present study supports the idea that judges in New Zealand may be relatively objective in their approach to decision-making in relation to sexual offences and in their consideration and application of case-relevant factors.

Overall, the present study adds to the existing literature that examines leniency to FSOs and provides further evidence as to why there may be a bias towards leniency for FSOs. In particular, it points to judicial focus on particular personal circumstances that are seen as relevant in sentencing for FSOs compared to MSOs. As with any study, the current study has limitations. That is, the sample size of sexual offenders within a specified time frame (2011–2018) was relatively small (see also [Deering & Mellor, 2009](#); [Rodriguez et al., 2006](#)). Small sample sizes are a common problem in the research literature surrounding FSOs as there are relatively few FSOs in comparison to MSOs, and there are difficulties in obtaining full sentencing notes from databases and courts ([Beeby et al., 2020](#)). The limited sample size may have prevented finding further differences between FSOs and MSOs being noted, but it may also have led to an overvaluation of some alleged gender-specific topics and categories. For example, a link between the offender's personal characteristics and the sentencing outcome was made for only two FSOs, but a larger sample size may have provided more

clarity as to whether this comes up as an issue for both FSO and MSO cases. At the same time, the topics and categories presented in this study constitute only an excerpt of a large range of topics and categories that came up in the sentencing notes. Even though topics and categories described in this paper were selected to be most suitable to answer the research questions, the excluded topics and categories (e.g. description of the offenders' behaviour since being charged) could have contributed to a more comprehensive picture in terms of judges' perceptions of all factors in FSO and MSO cases. The current study would also have further been strengthened by the availability of psychological and medical reports about the defendants; and access to pre-sentence reports would have given a deeper insight into the background of the offenders and other case-relevant factors. Moreover, it cannot be ruled out that the number of factors used for case matching was still not exhaustive enough and that there remain unconsidered case-relevant factors that may account for disparities in sentencing outcomes. In the future, researchers will need to tackle challenges concerning sample size and the availability of detailed case information to identify all potential case-relevant factors that may impact on outcomes, as well as how to access sentencing notes to extract the decision relevant themes. Moreover, all the cases included in this study were from New Zealand and therefore subjected to country specific sentencing regulations ([New Zealand Sentencing Act 2002](#)). This limits the generalisability of these findings to other countries and regions where sentencing regulations may differ. It is important for researchers to consider specific country or regional sentencing laws and guidelines in order to evaluate gender-bias influences and mediators on judicial outcomes.

Finally to be considered, leniency for FSOs in judicial systems has a number of implications for policy and practice as it may result in negative outcomes for victims, offenders, and the community in the following ways: First, leniency for FSOs may directly impact the victim psychologically, the victim may feel that he or she was not believed ([Saradjian, 2010](#)), or that the harm of the offending is minimised or not acknowledged ([Hetherington, 1999](#)). Furthermore, the general lack of understanding and recognition of females as sexual offenders is seen as contributing to many victims not reporting sexual abuse committed by a female ([Frazier & Haney, 1996](#); [Kunst et al., 2015](#); [Saradjian & Hanks, 1996](#)). For example, victims of FSOs have sometimes argued that they are fearful of not being believed by healthcare and criminal justice professionals if they reveal that the perpetrator is a female ([Hetherington, 1999](#)). Victims also report that professionals minimise the harm that victims have suffered if the perpetrator is a female ([Hetherington, 1999](#); [Stemple et al., 2017](#); [Vandiver & Walker, 2002](#)). These concerns may contribute to non-disclosure of sexual abuse perpetrated by a FSO, and

consequently, the victim not having his or her treatment needs to be met (Sgroi & Sargent, 1993; Stemple et al., 2017).

Second, leniency towards FSOs may hide or minimise the risk that FSOs present to our communities (Hetherton, 1999; Vandiver & Walker, 2002). Minimising the risk or harm generated by FSOs can directly impact on community safety via recidivism (i.e. additional victims via re-offending) and non-provision of gender-responsive treatment for FSOs. Research demonstrates that sexual-offender-specific rehabilitative measures rather than penalties without treatment have the potential to reduce recidivism in cases of MSOs (Friendship et al., 2003; Hanson et al., 2009; Lösel & Schmucker, 2005; Mpofu et al., 2018; Walton & Chou, 2015). For example, Lösel and Schmucker's (2005) meta-analysis reported sexual recidivism rates of 11.1% versus 17.5% for treated offenders versus controls. At first glance, this absolute difference may seem small. However, given the low base rate of sexual recidivism, this equals a reduction of nearly 37%. Researchers and clinicians argue that there is also a need for specific sexual offender intervention to reduce female sexual recidivism and that this intervention needs to be developed and gender responsive (i.e. not applying intervention and assessment that has been developed and tested on MSOs only; Ashfield et al., 2013). Researchers have documented that assessment and treatment resources developed for MSOs are not suitable for FSOs (Cortoni & Gannon, 2013). It is also recognised that FSOs' assessment and treatment needs differ on a number of important factors, such as specific offence-supportive cognitions (Beech et al., 2009; Gannon et al., 2012), relationship problems (e.g. intimacy deficits and male dependency; Gannon & Rose, 2008; Vandiver, 2006), emotional and coping problems (Gannon & Rose, 2008; Nathan & Ward, 2002), and sexual arousal patterns (Cortoni & Gannon, 2013). While MSOs may also require treatment in some of these areas, researchers have found that these issues manifest themselves differently between MSOs and FSOs, resulting in different treatment needs and required levels of treatment (Cortoni et al., 2010; Cortoni & Gannon, 2013; Gannon & Rose, 2008). There is, therefore, a need to recognise at the societal level that females sexually offend and that they need specific gender-responsive sexual offender treatment, so that the relevant

Appendix A

Matching Criteria for FSOs and MSOs.

Pair	Offender Age	Number of Victims	Victim Age	Victim Sex (Male/Female)	Relation to Victim	Intrusiveness	Assaultive	Frequency	Overriding Factor	Band Severity
FSO 1	18	1	32	M	Daughter ^a	Penetrative	No	Long-term	Sexual interaction	1
MSO 1	22	1	13	F	Living in same house ^{b,c}	Penetrative	No	Multiple	was agreed upon	1
FSO 2	22	1	1	M	Mother	Penetrative	No	One time	Filming the assault	3
MSO 2	27	1	4	M	Father	Penetrative	No	One time		3
FSO 3	43	1	19	F	Enemy	Penetrative	Yes	One time	Group assault	1
MSO 3	29	1	^c	F	Stranger	Penetrative	Yes	One time		1
FSO 4	^c	1	14	F	Mother	^c	No	Multiple	Intellectual	^a
MSO 4	47	1	15	F	^c	Penetrative	No	One time	disability	1
FSO 5	31	1	10	M	Teacher	Penetrative	No	Long-term	Teacher/student	1
MSO 5	30	1	15	F	Teacher	Penetrative	No	Multiple		1
FSO 6	48	2	^c	M and F	Ex-partner	Penetrative	Yes	One time	Home invasion	1
MSO 6	43	2	^c	M and F	Ex-partner	Penetrative	Yes	One time		1
FSO 7	18	2	7 and 9	2 F	Babysitter	Touching	No	Multiple	None	1
MSO 7	25	2	^c	2 F	Strangers	Touching	No	Twice		1
FSO 8	33	1	15	F	Aunt	Penetrative	No	Multiple	Victim was in	2
MSO 8	54	1	13	F	Uncle	Penetrative	No	Multiple	their care	2

(continued)

(continued)

Pair	Offender Age	Number of Victims	Victim Age	Victim Sex (Male/Female)	Relation to Victim	Intrusiveness	Assaultive	Frequency	Overriding Factor	Band Severity
FSO 9	23	1	12	M	Sports coach	Touching	No	One time	Coach/student	2
MSO 9	35	1	8	F	Sports coach	Touching	No	One time		2
FSO 10	32	2	18	2 F	Strangers	Penetrative	No	Twice	None	2
MSO 10	38	2	18	2 F	Strangers	Penetrative	No	Twice		2

^aFSO 1 was charged and convicted of having a consensual incestuous relationship with her formally estranged father. The daughter knew of the biological relationship before beginning the sexual relationship and her father reportedly considered himself the victim. The daughter was post-pubescent at time of sexual interaction.

^bMSO 1 was charged and convicted of having a consensual sexual relationship with a 13-year-old female living in the same home. The 13-year-old was post-pubescent at time of sexual interaction.

^cInformation is not stated or is deleted in sentencing notes received from relevant court.

assessment and treatment services for FSOs can be developed and empirically tested in future research. Currently, FSOs often do not receive specific standardised treatments (Brayford, 2012; Gannon & Rose, 2008).

In conclusion, the findings of the present study highlight the way in which gender of the offender impacts on judicial judgements and how the offender is perceived. Disparities in judicial outcomes for FSOs and MSOs, based on gendered perceptions, matter and have far-reaching effects for not only the sexual offenders and their victims but also on community safety (Deering & Mellor, 2011; Dube et al., 2005; Hetheron, 1999; Saradjian, 2010).

Appendix B

Number of Sentencing Notes (and Percentages) That Include Topics and Categories Related to the Research Questions

(1) Are there qualitative differences in the descriptions of sentencing between FSOs and MSOs?

Topics and categories	FSOs	MSOs
Explanations and justifications for sentencing outcomes in FSO and MSO cases	8 (80%)	7 (70%)
Nature of offending	1 (10%)	2 (20%)
Deterrent to denounce the offending	2 (20%)	3 (30%)
Impact of the sentence on the offender's family	3 (30%)	2 (20%)
Need for rehabilitative measures	5 (50%)	3 (30%)
Risk of re-offending	4 (40%)	3 (30%)
Absence of relevant criminal history	2 (20%)	1 (10%)
Public's interest	1 (10%)	2 (20%)
Offender's personal characteristics	2 (20%)	–
Applied mitigating factors in FSO and MSO cases	7 (70%)	7 (70%)
Previous good character and conduct	2 (20%)	4 (40%)
Non-criminal history	1 (10%)	1 (10%)
Good general, family and living circumstances	2 (20%)	1 (10%)
Guilty plea	3 (30%)	4 (40%)
Personal hardships	1 (10%)	1 (10%)
Mental health difficulties	1 (10%)	2 (20%)
Already served sentence	1 (10%)	1 (10%)
Minor role as an accomplice	2 (20%)	–
Expression of remorse	1 (10%)	4 (40%)
Applied mitigating factors in FSO and MSO cases	–	–

(continued)

(continued)

(2) Are there qualitative differences in the descriptions of case-related factors between FSOs and MSOs?

Topics and categories	FSOs	MSOs
Identified mitigating factors in FSO and MSO cases	8 (80%)	7 (70%)
Young age	1 (10%)	1 (10%)
Previous good character and conduct	3 (30%)	4 (40%)
Positive reaction to treatment	1 (10%)	1 (10%)
Non-criminal history	3 (30%)	2 (20%)
Good general, family and living circumstances	3 (30%)	2 (20%)
Mental health difficulties	2 (20%)	2 (20%)
Identified aggravating factors in FSO and MSO cases	5 (50%)	5 (50%)
Premeditation and planning	2 (20%)	1 (10%)
Home invasion	1 (10%)	1 (10%)
Involvement of multiple offenders	2 (20%)	3 (30%)
Use of a weapon	1 (10%)	1 (10%)
Significant scale and extent of offending	2 (20%)	3 (30%)
Large age disparity between the victim and the offender	1 (10%)	2 (20%)
Victim's vulnerability in general	2 (20%)	1 (10%)
Serious impact on the victim	1 (10%)	1 (10%)
Breach of trust	2 (20%)	–
High degree of violence, cruelty or depravity	2 (20%)	–
Description of the offender's background in FSO and MSO cases	5 (50%)	3 (30%)
Good general, social and family living circumstances	2 (20%)	2 (20%)
Difficult general, social and family living circumstances	2 (20%)	1 (10%)
Difficult upbringing	1 (10%)	1 (10%)
Past experiences of personal grief	4 (40%)	1 (10%)
Description of the offender's general character, previous conduct and reasoning ability	7 (70%)	6 (60%)
Previous good character and conduct	4 (40%)	3 (30%)
Internal deficiencies and vulnerabilities	2 (20%)	2 (20%)
Sufficient capability of reasoning consequences	1 (10%)	1 (10%)
No general threatening traits	3 (30%)	–
Mental health difficulties	4 (40%)	1 (10%)
Description of the offender's behaviour during the offence in FSO and MSO cases	–	2 (20%)
Taking advantage of the victim's situation	–	2 (20%)
Description of the offence in FSO and MSO cases	8 (80%)	8 (80%)
Unusual offending	1 (10%)	1 (10%)
Abnormality within the offender's life	2 (20%)	1 (10%)
Serious offending	2 (20%)	4 (40%)

(continued)

(continued)

Breach of trust	5 (50%)	3 (30%)
Cruelty and depravity	2 (20%)	2 (20%)
Devastation to the victim	2 (20%)	3 (30%)
Violence	2 (20%)	1 (10%)
Planning and premeditation	4 (40%)	3 (30%)
Relatively moderate scale and frequency of offending	3 (30%)	2 (20%)
Not planned and premeditated offence	2 (20%)	2 (20%)
Selfish offence	2 (20%)	–
Condemnation of the offence	2 (20%)	–
Significant scale and frequency of offending	2 (20%)	–
Description of the victim's conduct during the offence in FSO and MSO cases	2 (20%)	1 (10%)
Not consenting	1 (10%)	1 (10%)
Consenting	2 (20%)	–

(3) Is the sexual offending committed by FSOs perceived as less harmful than the sexual offending committed by MSOs?

Topics and categories	FSOs	MSOs
Description of the impact of the offence in FSO and MSO cases	8 (80%)	8 (80%)
General harm to the victim	4 (40%)	4 (40%)
Psychological harm to the victim	6 (60%)	6 (60%)
Physical harm to the victim	2 (20%)	1 (10%)
Harm to the mutual family	1 (10%)	1 (10%)
Harm to the offender's family	1 (10%)	1 (10%)
Harm to the community and society	1 (10%)	2 (20%)
Harm to the victim's family	4 (40%)	1 (10%)

(4) Are there differences in the judge's explanations of the why of the offending for FSOs compared to MSOs?

Topics and categories	FSOs	MSOs
Explanations for the offence in FSO and MSO cases	4 (40%)	3 (30%)
Internal problems linked to the offender	2 (20%)	2 (20%)
External circumstances linked to the offender	3 (30%)	1 (10%)

Appendix C

Examples for Each Category: Quotes Taken from the Judges' Sentencing Notes

(1) Are there qualitative differences in the descriptions of sentencing between FSOs and MSOs?

Topics and categories	Quote
<i>Explanations and justifications for sentencing outcomes in FSO and MSO cases</i>	
Nature of offending	'Given the scale and nature of the offending [...], a minimum sentence is required to hold you all accountable for the harm that you have done to the victim'. (Judge – FSO 3)
Deterrent to denounce the offending	'I have considered, as your counsel has requested, whether it is appropriate to impose any sentence short of imprisonment. I do not think that I can. To do so would not adequately denounce the offending and hold you accountable for it'. (Judge – MSO 4)
Impact of the sentence on the offender's family	'[FSO 10 and MSO 10], the sentences I have reached I consider to be the least restrictive sentences I can impose upon you in accordance with the law. I realise that as the parents of four children, the imprisonment of you both at the same time will have a harmful effect on your children'. (Judge – FSO 10 and – MSO 10)
Need for rehabilitative measures	'Turning back for now, though, to the sentence I am going to impose on you, the most significant factor is A.McF.'s view that the long and intensive therapy that you need is best met in the community and the concern A.McF. has expressed about your current treatment being disrupted'. (Judge – FSO 7)
Risk of re-offending	'I am not satisfied it is necessary to impose preventive detention <<to protect the community from [a person who poses] a significant and ongoing risk to the safety of its members>>'. (Judge – MSO 4)

(continued)

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Absence of relevant criminal history	'Your criminal history shows that neither of you are a criminal recidivist, nor do either of you pose such a risk to the community that a minimum period of imprisonment is warranted'. (Judge – FSO 10 and – MSO 10)
Public's interest	'I am satisfied in this case that your interests and the interests of the public generally are much more likely to be well served by a sentence of home detention than a sentence which involved imprisoning you'. (Judge – MSO 9)
Offender's personal characteristics	'The only other alternative to an order under the IDA [intellectual Disability (Compulsory Care and Rehabilitation) Act 2003] is an order that offender be immediately released. That would leave the offender in some difficulty because of the problems the offender faces'. (Judge – FSO 4)
<i>Applied mitigating factors in FSO and MSO cases</i>	
Previous good character and conduct	'I reduce that because of your previous good character [...]. That would take the end sentence down to 18 months imprisonment'. (Judge – FSO 9)
Non-criminal history	'I consider that mitigating features, including [...] your lack of previous convictions [...], warrant a discount of three months from the sentence starting point'. (Judge – MSO 1)
Good general, family and living circumstances	'But I consider some recognition needs to be given for [...] your good family circumstances. I propose to adopt a sentencing discount of five per cent to reflect this'. (Judge – MSO 10)
Guilty plea	'I have also accepted B's submission that although the sentencing indication and therefore your guilty plea came comparatively late, that was because of the need first to obtain the psychologist's report, which, as I have indicated, has played an important role in your sentencing. I therefore consider a further discount of 25 per cent for that plea is justified, which would result in an effective end sentence of imprisonment of two years and three months'. (Judge – FSO 7)

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(continued)

Personal hardships	'I am, however, prepared to accept that your very traumatic upbringing and your personal adversity and experiences are factors to be considered, particularly in terms of your rehabilitation. I am therefore prepared to afford a discrete discount of five months for this factor'. (Judge – FSO 3)
Mental health difficulties	'I make a reduction of nine months for the mental health background issues'. (Judge – MSO 4)
Already served sentence	'I allow a further credit of two months to represent the time you have spent in custody and on restrictive terms of bail'. (Judge – MSO 4)
Minor role as an accomplice	'I consider, therefore, that it is appropriate that there be some reduction to recognise your more minor role as an accomplice. I would, therefore, reduce the starting point to one of five and a half years' imprisonment'. (Judge – FSO 10)
Expression of remorse	'I add 5% to reflect what I now regard as genuine remorse and the best you can actually do to empathise with your victim. I round that credit to 14 months'. (Judge – MSO 4)
Applied mitigating factors in FSO and MSO cases	'It is also relevant that you were acquitted [...] on charges of unlawful sexual connection. [...] Although those offence were more than ten years ago, the fact that they were of the same nature means that I must take them into account and I would uplift the starting point by a year to recognise that offending'. (Judge – MSO 2)

(2) Are there qualitative differences in the descriptions of case-related factors between FSOs and MSOs?

Topics and categories

Identified mitigating factors in FSO and MSO cases

Young age	'But there are a number of significant mitigating factors personal to you that are in my view relevant. These are that: You were only 17 at the time of the offending [...]'. (Judge – FSO 7)
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Previous good character and conduct	'But there are a number of significant mitigating factors personal to you that are in my view relevant. These are that: [...] You are of previous good character and have no criminal history [...]' (Judge – FSO 7)
Positive reaction to treatment	'In mitigation, I can take account of your efforts at rehabilitation [...]' (Judge – MSO 4)
Non-criminal history	'But there are a number of significant mitigating factors personal to you that are in my view relevant. These are that: [...] You are of previous good character and have no criminal history [...]' (Judge – FSO 7)
Good general, family and living circumstances	'I now turn to the factors personal to you which may warrant a reduction in the starting point of four years. [...] You come from a large and well respected family and you have previously enjoyed success in business [...]' (Judge-SO 8)
Mental health difficulties	'I make a reduction of nine months for the mental health background issues'. (Judge – MSO 4)
<i>Identified aggravating factors in FSO and MSO cases</i>	
Premeditation and planning	'I turn now to identify the aggravating features of the offending. In my view these are [...] Premeditation: the offending in this case was not opportunistic, and you constantly sought more opportunities to offend against the victim'. (Judge – FSO 5)
Home invasion	'However, it is also my view that an aggravating aspect of this offending is the fact that there was a home invasion'. (Judge – MSO 6)
Involvement of multiple offenders	'Another very significant aggravating feature is the fact that there were two of you acting in concert. This was, in essence, group activity'. (Judge – FSO 8)
Use of a weapon	'The main aggravating features are the facts that you employed a large kitchen knife in your attack on the complainant's partner [...]' (Judge – MSO 6)
Significant scale and extent of offending	'The aggravating features of the offending – those are the features which make it more serious – are, first, the extent of the offending. There was full sexual intercourse on at least four separate occasions'. (Judge – MSO 1)

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Large age disparity between the victim and the offender	‘The aggravating features of the offending are really self-evident. Here there was a very significant age disparity between you both and the complainant [...]’. (Judge – MSO 4)
Victim’s vulnerability in general	‘Another aggravating feature is the vulnerability of the victim’. (Judge – MSO 3)
Serious impact on the victim	‘[...] the aggravating features of the present offending are [...] the injuries sustained by the victim were life-threatening’. (Judge – FSO 3)
Breach of trust	‘I turn now to identify the aggravating features of the offending. In my view these are breach of trust: I consider the breach of trust here to be very high’. (Judge – FSO 5)
High degree of violence, cruelty or depravity	‘[...] the aggravated features of the offending which guide the Court [...] the degree of violation was quite severe given the injuries that had been suffered’. (Judge – FSO 6)
<i>Description of the offender’s background in FSO and MSO cases</i>	
Good general, social and family living circumstances	‘As I understand it, you have been well supported by your parents and, in particular, by your father, with whom you live, so you are very fortunate in that’. (Judge – FSO 7)
Difficult general, social and family living circumstances	‘You have a dysfunctional family situation, virtually no social support outside the family [...]’. (Judge-MSO 2)
Difficult upbringing	‘Your upbringing was very unstable [...]’. (Judge – FSO 3)
Past experiences of personal grief	‘I am, however, prepared to accept that your very traumatic upbringing and your personal adversity and experiences are factors to be considered [...]’. (Judge – FSO 3)
<i>Description of the offender’s general character, previous conduct and reasoning ability</i>	
Previous good character and conduct	‘[...] you appear to have lived a very positive and productive life and have been justifiably regarded as trustworthy and an inspiring leader within your family and your community and amongst many people with whom you have come into contact in the course of your life, work and activities’. (Judge – MSO 8)

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Internal deficiencies and vulnerabilities	‘[...] my own impression at the trial that you are ‘a child in adult’s clothing’ with ‘the intellect of [the] two complainants most probably way ahead of you’. (Judge – MSO 4)
Sufficient capability of reasoning consequences	‘[...] you were obviously aware that what you were doing was harmful to the complainant and of course entirely improper’. (Judge – MSO 8)
No general threatening traits	‘Although it is difficult to determine given your lack of engagement in psychological treatment, your offending does not appear to be pathological or highly likely to be repeated’. (Judge – FSO 5)
Mental health difficulties	‘[...] your profile exhibits the presence of anxiety, depression, alcohol, drug dependency and post-traumatic stress disorder’. (Judge – FSO 3)
<i>Description of the offender’s behaviour during the offence in FSO and MSO cases</i>	
Taking advantage of the victim’s situation	‘I accept that the complainant was vulnerable, both by virtue of age and the limited support the complainant was receiving from other family members, and you were well aware of the complainant’s vulnerability and took advantage of it’. (Judge – MSO 8)
<i>Description of the offence in FSO and MSO cases</i>	
Unusual offending	‘[...] your offending has some very unusual features [...]’. (Judge – FSO 5)
Abnormality within the offender’s life	‘You have no previous convictions and from what you have just read to me, you are a person of otherwise good character. So this particular incident appears to be something of an aberration’. (Judge – FSO 9)
Serious offending	‘[...] your behaviour was serious [...]’. (Judge – FSO 5)
Breach of trust	‘You committed a gross breach of trust in offending against the complainant’. (Judge – MSO 8)
Cruelty and depravity	‘[...] the offending was particularly cruel [...]’. (Judge – FSO 3)
Devastation to the victim	‘This [...] must have been a harrowing experience for the victim [...]’. (Judge – FSO 3)
Violence	‘[...] the degree of violation was quite severe given the injuries that had been suffered [...]’. (Judge – FSO 6)

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Planning and premeditation	'The motel offending was the result of planning and conscious decision-making on your part to find a way to continue your offending'. (Judge – FSO 5)
Relatively moderate scale and frequency of offending	'I accept that the scale of your offending is moderate'. (Judge – MSO 8)
Not planned and premeditated offence	'I also accept that your offending did not involve any extensive premeditation or preparation'. (Judge – MSO 8)
Selfish offence	'What you did was incredibly selfish [...]'. (Judge – FSO 7)
Condemnation of the offence	'It was also terribly wrong'. (Judge – FSO 7)
Significant scale and frequency of offending	'After the victim first attempted to break off your relationship, you contacted the victim again and sought further opportunities to offend. The scale in that sense is significant'. (Judge – FSO 5)
<i>Description of the victim's conduct during the offence in FSO and MSO cases</i>	
Not consenting	'[...] it seems that the victim engaged in sexual activity with [FSO 10] without objection [...] The conduct of the victim is a relevant factor. Whatever may have been the willingness of the victim in count 6 to engage in a consensual sexual encounter of oral sex with [FSO 10]; I consider that the victim's later conduct in resisting [MSO 10], and the fact that [FSO 10] became involved and helped hold the victim down, would have demonstrated to you that the victim was not consenting'. (Judge – FSO 10 and – MSO 10)
Consenting	'While I accept that the relationship between you and your child may have been mutual and consenting [...]'. (Judge – FSO 1)

(3) *Is the sexual offending committed by FSOs perceived as less harmful than the sexual offending committed by MSOs?*

Topics and categories

Description of the impact of the offence in FSO and MSO cases

General harm to the victim	'The offending has had a profound effect on the victim'. (Judge – FSO 8)
Psychological harm to the victim	'[...] there is apparently ongoing emotional harm'. (Judge – MSO 6)

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Physical harm to the victim	'The overt, or physical, injuries to [the victim] were quite horrific [...]'. (Judge – FSO 6)
Harm to the mutual family	'Your offending has had the effect of creating a deep division within the family'. (Judge – MSO 8)
Harm to the offender's family	'The consequences of the offending have already had a serious detrimental impact on you and your children'. (Judge – FSO 10 and – MSO 10)
Harm to the community and society	'It is appropriate in my view that you give something back to the community for the harm that your offending represents to the community not just to the victims in this case'. (Judge – MSO 7)
Harm to the victim's family	'It has taken a toll on the victim's family, who have all felt the strain and stress of these proceedings, especially the victim's mother'. (Judge – FSO 5)

(4) *Are there differences in the judge's explanations of the why of the offending for FSOs compared to MSOs?*

Topics and categories

Explanations for the offence in FSO and MSO cases

Internal problems linked to the offender	'Your profile exhibits the presence of anxiety, depression, alcohol, drug dependency and post-traumatic stress disorder. It is also tolerably clear that these factors, in particular excessive drug abuse, contributed to your offending'. (Judge – FSO 3)
External circumstances linked to the offender	'You have been victimised by this person (co-offender), you have been victimised by your upbringing and what has happened is almost a direct result of that upbringing'. (Judge – FSO 2)

Appendix D

Summary Results Relating to Question 1: Are There Differences in the Descriptions of Sentencing for FSOs Compared to MSOs?

Categories Described in a <i>Similar</i> Fashion for FSOs and MSOs	Categories Described in a <i>Different</i> Fashion for FSOs Compared to MSOs
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Explanations and justifications for sentence

- | | |
|---|--|
| <ul style="list-style-type: none"> • An association between the nature of the offending and harshness of sentence. The sentence as a deterrent to denounce the offending. • The impact of the sentence on the offender and the offender's family. • The need for rehabilitative measures as a justification for sentence. • A need for the sentence to consider the protection of others by consideration of risk of re-offending with a low risk of re-offending defined as a reason for imposing a more lenient sentence. • The absence of a relevant criminal history defined as a reason for imposing a more lenient sentence. • Interests of the public defined as a reason for imposing a certain, supposedly more lenient, sentence. | <ul style="list-style-type: none"> • Personal characteristics of offender. The judge made a direct link between the sentencing outcome and the FSOs personal characteristics, specifically the FSO's own vulnerability. Although both FSOs and MSOs were described as having a number of personal characteristics, personal characteristics were not explicitly connected to specific sentencing outcomes for MSOs. |
|---|--|

Described mitigating factors that resulted in reduction of sentence length^a

- | | |
|--|---|
| <ul style="list-style-type: none"> • Good character and conduct. • A non-criminal history. • An offender's good general, social and living circumstances. • A guilty plea. • Personal hardships. • Mental health difficulties. • Having already served partial sentence time. | <ul style="list-style-type: none"> • Expression of remorse. Although remorse expressed by the offender was applied as a mitigating factor for FSOs as well as for MSOs, it was only applied as a reduction in sentence in one FSO case compared to in four MSO cases. • Minor role as an accomplice. The judge applied a decrease in sentence for two FSO cases compared to none of the MSO cases, due to the FSOs' role being seen as more minor as they were an accomplice (FSOs were more likely to co-offend than were MSOs, see Beeby et al., 2020). |
|--|---|

^aThere are no aggravating factors applied to sentence for either FSOs or MSOs.

Appendix E

Summary Results Relating to Question 2: Are There Differences in the Descriptions of Case-Related Factors for FSOs Compared to MSOs?

Categories Described in a <i>Similar</i> Fashion for FSOs and MSOs	Categories Described in a <i>Different</i> Fashion for FSOs Compared to MSOs
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Described mitigating factors not applied to sentence

The offenders': None

- Young age.
- Previous good character and conduct.
- Positive reaction to treatment.
- Non-criminal history.
- Good general, family and living circumstances.
- Mental health difficulties.

Described aggravating factors not applied to sentence

- | | |
|--|--|
| <ul style="list-style-type: none"> • Premeditation and planning. • Home invasion. • Involvement of multiple offenders. • Use of a weapon. • Scale and extent of offending. • Large age disparity between the offender and the victim. • The victim's vulnerability in general. • The impact on the victim. | <ul style="list-style-type: none"> • Breach of trust. • High degree of violence, cruelty or depravity. <p>The judge described these categories in FSO cases but not MSO cases.</p> |
|--|--|

Described background of offender

- | | |
|--|--|
| <ul style="list-style-type: none"> • Good general, social and family living circumstances. • Difficult general, social and family living circumstances. • Difficult upbringing. | <ul style="list-style-type: none"> • Past experiences of personal grief. Focused on by Judges in more FSO cases than MSO cases. |
|--|--|

Described general character, previous conduct and reasoning ability of offender

(continued)

(continued)

 Categories Described in a *Similar* Fashion for FSOs and MSOs

 Categories Described in a *Different* Fashion for FSOs Compared to MSOs

- Previous good general character and conduct.
- Internal deficiencies and vulnerabilities.
- Sufficient capability of reasoning consequences.

- No general threatening traits. FSOs were characterised as persons with specifically no general threatening traits, whereas none of the MSOs were directly described as a person with no general threatening traits.
- Mental health difficulties. Whilst similar numbers of the FSOs and MSOs in fact faced mental health difficulties, judges, for the most part, only focused on the mental health difficulties related to FSOs and not MSOs.

Described behaviour of offender during the offence

None

- Taking advantage of the victim's situation. Described by Judges in two MSOs cases but none of the FSOs.

Description of the offence

- Unusual offending.
- An abnormality within the offender's life.
- Seriousness.
- Involved a breach of trust.
- Included cruelty and depravity.
- Resulted in devastation to the victim.
- Included violence.
- Involved planning and premeditation.
- A relatively moderate scale and frequency of offending compared to other cases.
- Not premeditated nor planned.

- Selfish offence. Judges described the offences by FSOs as selfish and not those by MSOs.
- Condemnation of the offence. Judges clearly condemned the offence by FSOs and not those by MSOs.
- Significant scale of frequency of offending significant. Judges described the scale and frequency of offending by FSOs as significant but did not comment on this for offending by MSOs.

Described victim conduct during the offence

None

- Not Consenting.
 - Consenting. For some of the FSOs, the victim's conduct during the offence was described as consenting, whereas MSOs were perceived as taking advantage of the victim's situation and the victim was characterised as non-consenting.
-

Appendix F

Summary Results Relating to Question 3: Is the Sexual Offending Committed by FSOs Perceived as Less Harmful Than the Sexual Offending Committed by MSOs?

Categories Described in a <i>Similar</i> Fashion for FSOs and MSOs	Categories Described in a <i>Different</i> Fashion for FSOs Compared to MSOs
<p><i>Described impact of the offence</i></p> <ul style="list-style-type: none"> • General harm to the victim. • Psychological harm to the victim. • Physical harm to the victim. • Harm to mutual family. • Harm to offender's family. • Harm to wider community or society. • Harm to victim's family. 	None

Appendix G

Summary Results Relating to Question 4: Do Judges' Explanations of Why Offending Has Been Committed Differ for FSOs Compared to MSOs?

Categories Described in a <i>Similar</i> Fashion for FSOs and MSOs	Categories Described in a <i>Different</i> Fashion for FSOs Compared to MSOs
<p><i>Explanations for the offence</i></p> <ul style="list-style-type: none"> • Internal problems linked to the offender. • External circumstances linked to the offender. 	None

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ORCID iDs

Corinna Burgstedt  <https://orcid.org/0000-0002-9491-2574>

Linda Hobbs  <https://orcid.org/0000-0002-4214-9829>

Note

1. Judges did not apply any aggravating factors for both MSOs and FSOs.

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Author Biographies

Corinna Burgstedt, MSc, is Research Fellow in the Institute of Psychology in the Division of Developmental, Personality and Forensic Psychology, Technische Universität Braunschweig, Germany. Her research interests cover delinquency, antisocial behaviour, prison and the penal system, offender treatment and crime prevention.

Amy Beeby, MSc, is Programme Facilitator in the Department of Corrections, New Zealand. She runs therapeutic programmes that are designed to help offenders understand the factors that led to their offending. Her research interests cover areas of harmful sexual behaviour, including those who perpetrate the harm, the perception of harm, and risk and protective factors in treatment.

Harlene Hayne holds a PhD in Behavioural Neuroscience from Rutgers University. She joined the University of Otago in 1992 following 3 years at Princeton University as a postdoctoral fellow. She was awarded a personal chair in psychology at the University of Otago in 2002 and she was Head of the Psychology Department for 3 years before being appointed as the Deputy

Vice-Chancellor (Research & Enterprise). She is the co-director of the New Zealand Innocence Project and was the Vice-Chancellor of the University of Otago from 2011 to 2021. She is now Vice-Chancellor at Curtin University in Western Australia.

Linda Hobbs, MSc, is Assistant Research Fellow in the Department of Psychological Medicine, University of Otago, New Zealand. Her research interests cover areas of child developmental psychology including children's memory and eye-witness testimony, adolescent sexual development, pathways to sexual offending and issues of sexual abuse.

Julien Gross, PhD, is Senior Research Fellow in the Department of Psychology at the University of Otago. She supervises graduate students on a range of research topics including juror decision-making, mood and false memory, the use of purakau (indigenous myths, legends and stories) in therapeutic settings with children, avatars as interview aids and interventions to reduce smartphone use. She also conducts evaluations of drug and alcohol addiction treatment programmes for programme providers.

Tess Patterson, PhD, Dip Clin Psych, is Senior Lecturer in the Department of Psychological Medicine, University of Otago, New Zealand and is an Extraordinary Professor in the Optentia Research Focus Area, North-West University, South Africa. Her research focuses on harmful sexual behaviour, both in terms of those who perpetrate the harm and also in relation to those who are victims of the harm.