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**Sentencing Guideline for Sexual Violation Offences: Assessing
Vulnerability of Victim and Breach of Trust**

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Abstract

The sentencing guideline judgment established by the Court of Appeal in R v AM provides a crucial tool for judges faced with the task of establishing sentences for sexual violation offences. Judges must consider the presence of aggravating factors, including vulnerability of the victim and breach of trust. Given the diverse nature of sexual violation offending, comprehensive and clear guidance is imperative. The overall issue this paper considers is the lack of consistency and transparency across cases applying the guideline judgment in R v AM. In the examination of R v AM and the inconsistencies arising in the cases applying it, this paper argues that, in order to attain a higher degree of consistency and transparency, the Court of Appeal must provide more specific and precise guidance pertaining to the identification, application of, and relationship between the aggravating factors of vulnerability of the victim and breach of trust. This paper argues that a structured and systematic analysis is required to identify aggravating factors and their degree of seriousness. Once this assessment is complete, judges should step back and undertake a holistic analysis. This is required for each individual case to ensure the Judge's assessment of the aggravating factors, as increasing the offender's culpability, is proportionate to the overall seriousness of the offending. When the Court of Appeal reviews R v AM, provision of this further guidance will result in subsequent consistent and transparent sentences for sexual violation offences.

Keywords: "Sexual Violation", "Sentencing Guideline Judgment", "Aggravating Factors", "Vulnerability of Victim", "Breach of Trust".

Word length

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I Introduction

This paper argues that when the Court of Appeal reviews its sentencing guideline judgement for sexual violation offences set out in *R v AM*, it must provide further guidance on the identification, application of, and relationship between the aggravating factors of vulnerability of the victim and breach of trust. This is to create consistency and transparency when establishing the culpability of the offender for sentencing for sexual violation offences.¹

AM advises judges on sentencing process for sexual violation cases,² particularly regarding aggravating and mitigating factors outlined in s 9 of the Sentencing Act and as developed in case law.³ This includes vulnerability of the victim and breach of trust (the factors).⁴ I argue that in cases applying *AM*, the factors are inconsistently identified and applied, and the overlapping nature of the factors leads to issues and inconsistencies across cases.

First, I argue the Court of Appeal should provide further guidance to assist sentencing judges in identifying whether a factor is present and to what degree. I propose detailed guidance based on the areas of inconsistency identified from the cases. Second, I argue that specific direction is required detailing how sentencing judges should assess circumstances of the offending that are relevant to both factors. I suggest only once all relevant features of the offending have been assigned to the appropriate factor(s), and the degree to which the factor is present is established, should judges step back and undertake a holistic analysis required to ensure that features are not being unfairly double-counted and the starting point is proportionate to the overall seriousness of the offending. Providing this further guidance will result in more consistent and transparent sentences for sexual violation offences.

In Part II I outline the current sentencing guideline judgment for sexual violation offences, as per *AM*. Part III examines case application of *AM*'s guideline, focusing on inconsistencies

¹ *Adams on Criminal Law* (online ed, Westlaw) at [SA8.06].

² *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [29].

³ At [29] and [35]; and Sentencing Act 2002, s 9.

⁴ *R v AM*, above n 2, at [42]-[44] and [50].

during factor identification and application, including overlap issues. Part IV offers recommendations to address identified inconsistencies and issues from Part III.

II Current Sentencing Guideline for Sexual Violation Offences

This part outlines the current guideline judgment for sexual violation offences, *AM*. *AM* gives guidance on the application of aggravating factors stated in s 9 of the Sentencing Act and those specific to sexual violation that have been developed in case law.⁵ I will only discuss the two factors outlined, however overall, *AM* discusses nine aggravating factors.⁶

For vulnerability of the victim, *AM* states:⁷

“Section 9(1)(g) of the Sentencing Act applies. The section treats as an aggravating factor the vulnerability of the victim because of age or health or any other factor known to the offender. The United Kingdom guidelines refer to extreme youth or old age of the victim as increasing the seriousness of the offending and suggest that offending will be more serious the younger the child and the greater the age gap between the victim and the offender. Disparity in age between the victim and the offender may well be a factor in assessing the extent of vulnerability.

The other situations in which a victim may be considered vulnerable are varied: mental impairment or physical frailty are two examples, a victim who is the subject of a protection order to protect him or her from the offender is another.”.

For breach of trust, *AM* states:⁸

“Breach of trust is recognised in s 9(1)(f) of the Sentencing Act as a factor which increases the culpability of the offender. Offending within the familial relationship involves a breach of trust and offending by a parent against his or her child is particularly serious. Other relationships of trust may arise where a person has assumed

⁵ At [35].

⁶ At [34]-[62].

⁷ At [42] and [43].

⁸ At [50].

some responsibility in relation to the victim, for example, the neighbour who regularly babysits the child or the school sports coach.”.

AM outlines how presence of the factors, whether to a limited, moderate, or high degree, indicates which rape or unlawful sexual connection (USC) band the offence falls. This includes where in the band the offence sits - bottom, middle, top. This enables the court to find a starting point for the sentence:⁹

<i>Band</i>	<i>Offence type</i>	<i>Starting point</i>	<i>Description</i>
Band 1	Rape	6-8 years	Offending with no or minimal aggravating factors present. ¹⁰
	USC	2-5 years	
Band 2	Rape	7-13 years	Offending involving two or three aggravating factors present to a moderate degree. ¹¹
	USC	4-10 years	
Band 3	Rape	12-18 years	Relatively serious offending, involving two or more aggravating factors to a high degree, or a moderate degree of more than three aggravating factors. ¹²
	USC	9-18 years	Most serious offending, involving two or more aggravating factors to a high degree, or a moderate degree of more than three aggravating factors. ¹³
Band 4	Rape	16-20 years	Similar to Band 3, but also involving multiple instances of offending over extended periods, particularly involving children and/or family members. ¹⁴

⁹ At [84].

¹⁰ At [93] and [114].

¹¹ At [98] and [117].

¹² At [105].

¹³ At [120].

¹⁴ At [108].

AM emphasises that establishing which band the offence falls, where in that band the offence sits, and thus the starting point, is not a mechanical exercise:¹⁵ “we emphasise that what is required is an evaluative exercise of judgement. We see judges as having a reasonable degree of latitude in this exercise.”¹⁶ The bands are not designed to be “straightjackets”.¹⁷ Despite this, the sentencing process established in *AM* is intended to be structured and systematic, as it requires counting aggravating factors and rating their seriousness. In the following sections, I identify sentencing process and analysis issues arising in cases seeking to apply *AM*. What should judges do when “features” of the offending apply across multiple factors? I use the term “features” in this paper to describe the facts and circumstances present in a case. Should judges count each feature multiple times to establish each factor? Or, should there be a holistic assessment of the overall features of the offending, regardless of how many factors would be established if applying each feature separately? In part IV I propose specific guidance on how to resolve the issues identified.

III Application of Aggravating Factors in Cases Applying AM

In this part, I discuss how the courts have applied the sentencing guidance from *AM* in sexual violation cases, with specific reference to the factors, and the inconsistencies and issues arising when comparing their identification, application and relationship.

A Research Method

I have looked at sexual violation sentencing judgments and appeals from between June 2021 and June 2022 which apply *AM*. This sample includes 41 cases, consisting of 1 sentence indication, 18 first instance decisions and 22 appellate decisions. This sample includes all cases which apply *AM*, and is not limited to cases where one or more of the factors were identified. By necessity, my sample is not representative of all sentencing decisions in the

¹⁵ At [36].

¹⁶ At [79].

¹⁷ Joshua Grainger and Tania Singh “Sentencing for low culpability rape: *Crump v R* [2020] NZCA 287” [2020] NZLJ 290 at 84; and *Adams on Criminal Law*, above n 1, at [SAC9.01].

timeframe identified, as most District Court sentencing decisions are not accessible through research databases. For many of the sentence appeals in my sample, I am unable to access the first instance decision. I have included cases in which preventive detention was considered, because the methodology for establishing the starting point is the same as regular sentencing.

B Vulnerability of Victim

There are multiple circumstances and features arising in the cases which make a victim vulnerable. I broadly categorised these as: age; level of consciousness; location; physical ability to defend themselves or escape; vulnerable due to a different circumstance; and dependent on the offender. It is necessary to define what vulnerability of the victim means within the context of a judge's task in determining how serious an offence is for the purpose of sentencing. I define vulnerability of the victim as the presence of circumstances and features which make a victim more susceptible to the attack of the sexual violation by the offender - increasing the harm suffered by the victim and/or increasing the offender's culpability.

1 Age

The victim's age is a significant circumstance which affects vulnerability. *AM* states that disparity in age between the victim and the offender may contribute to the level of vulnerability of the victim.¹⁸ This guidance is either not applied or applied inconsistently.¹⁹ My sample did not include any cases involving elderly victims.

¹⁸ *R v AM*, above n 2, at [42].

¹⁹ *R v Rapana* [2021] NZHC 3407 at [18]; *R v Taylor* [2022] NZHC 1471 at [51]; *Hart-Dehar v R* [2021] NZHC 2684 at [18]; *R v Robertson* [2021] NZHC 3484 at [26]; *Taylor v R* [2021] NZCA 605 at [10]; and *Attwell v R* [2021] NZHC 1833 at [14].

When a victim is 14-15 years old or younger, the courts consistently identify vulnerability due to age.²⁰ When a victim is aged 14-15 years old or younger, and the offender is an adult, the courts inconsistently identify age disparity as contributing to vulnerability. There are sixteen cases with a young victim and adult offender.²¹ Only four out of these sixteen identify both the victim's young age and the large age disparity as contributing to the victim's vulnerability.²² It could be inferred that age disparity is inconsistently applied where the victim is young, because vulnerability to a high degree will be identified as a factor based on the fact that the victim is young, regardless of whether there is large age disparity or not. In other words, the vulnerability and its seriousness arises from the young age of the victim, and is therefore not affected by the age of the offender. While it is true a victim may be vulnerable to the highest degree due to their age, regardless of the offenders age, I agree proper assessment of the victim's age in relation to the offender's age is always necessary when establishing vulnerability, as it speaks directly to the offender's culpability. Specifically, in part IV I argue judges must consider all features of the offending, regardless of whether it ultimately affects the presence or degree of a factor.

Inconsistencies and issues arise when the victim is 15-16 years old or above. In three different cases which all had a 17-year-old victim with an age disparity with the offender,

²⁰ *R v Taylor* [2022] NZHC 1471 at [51]; *F (CA691/2021) v R* [2022] NZCA 217 at [41]; *Mines v R* [2022] NZCA 113 at [16]; *Rose v R* [2022] NZHC 585 at [7]; *R v Black* [2021] NZHC 2626 at [46]; *R v Black* [2022] NZHC 140 at [43]; *R v Te Maane Beattie* [2022] NZHC 94 at [21]; *R v G* [2021] NZHC 3527 at [48]; *Solicitor-General v Wiwarena* [2021] NZHC 844 at [28]; *R v Graham* [2021] NZHC 3326 at [17]; *R v Rihari* [2021] NZHC 3334 at [64]; *R v Turanga Tahi Pari* [2021] NZHC 3127 at [29]; *McDonald v R* [2021] NZCA 531 at [32]; *R v Chadwick* [2021] NZHC 3038 at [17]; *R v Hall* [2021] NZHC 3033 at [14]; *Hart-Dehar v R* [2021] NZHC 2684 at [18]; *R v Connor* [2021] NZHC 2285 at [15]; *Solicitor-General v Rawat* [2021] NZHC 2129 at [18] and [27]; *R v Stevens* [2021] NZHC 2026 at [14]; and *R v Opetaiia* [2021] NZHC 1503 at [15].

²¹ *R v Taylor* [2022] NZHC 1471 at [51]; *F (CA691/2021) v R* [2022] NZCA 217 at [41]; *Rose v R* [2022] NZHC 585 at [7]; *R v Te Maane Beattie* [2022] NZHC 94 at [21]; *R v G* [2021] NZHC 3527 at [48]; *R v Graham* [2021] NZHC 3326 at [17]; *R v Rihari* [2021] NZHC 3334 at [64]; *R v Turanga Tahi Pari* [2021] NZHC 3127 at [29]; *McDonald v R* [2021] NZCA 531 at [32]; *R v Chadwick* [2021] NZHC 3038 at [17]; *R v Hall* [2021] NZHC 3033 at [14]; *Hart-Dehar v R* [2021] NZHC 2684 at [18]; *R v Connor* [2021] NZHC 2285 at [15]; *Solicitor-General v Rawat* [2021] NZHC 2129 at [18] and [27]; *R v Stevens* [2021] NZHC 2026 at [14]; and *R v Opetaiia* [2021] NZHC 1503 at [15].

²² *R v Turanga Tahi Pari* [2021] NZHC 3127 at [25]; *R v Chadwick* [2021] NZHC 3038 at [19]; *R v Hall* [2021] NZHC 3033 at [14]; and *R v Opetaiia* [2021] NZHC 1503 at [15].

the courts followed different approaches, resulting in inconsistent and problematic outcomes. In *R v Robertson*, the victim was found to be vulnerable to a moderate degree due to the 47 year age gap with the offender.²³ In *R v Rapana*, the High Court held the victim was vulnerable due to her age (alongside the fact that she was alone in public - the Court did not state to what degree this factor was present), and her 8 year age gap with the offender was not discussed.²⁴ In contrast, the High Court on appeal in *Attwell v R* disagreed with the indication decisions finding that vulnerability of the victim was a factor, by reference to the victim and offender's age:²⁵

“The victim was 17 years old and had been drinking. She was not comatose. [The offender] was 24 years old. There were two other women in the house, one or both of whom interrupted the offending more than once. I do not consider the victim was vulnerable to the degree contemplated by *R v AM* as amounting to an aggravating factor”.

I argue that the Judge in *Attwell* was wrong here. Specifically in regards to age, the Judge implies that 17-years-old is not young enough to create vulnerability in its own right, and therefore other features must be present (such as a comatose level of intoxication), or not present (the presence of the other women) to create vulnerability. Further, by stating the offender's age, it is implied that a 7-year age difference between the victim and the offender is not enough to establish vulnerability. I argue that the question of whether the victim is vulnerable as a 17-year-old must be properly analysed alongside the 7-year age difference with the offender. The assessment undertaken in *Attwell* lacks integral analysis on this point. In part IV I recommend that victims under the age of 18 should always be considered vulnerable to some extent, and if the extent is not enough to establish vulnerability based on age alone, then age disparity and other features will be particularly relevant. Age disparity should always be considered as relevant until a victim is 18 years old, and in some cases will be more relevant at this age, because age alone may not be enough to establish vulnerability.

²³ *R v Robertson* [2021] NZHC 3484 at [26].

²⁴ *R v Rapana* [2021] NZHC 3407 at [18].

²⁵ *Attwell v R* [2021] NZHC 1833 at [14].

Where a victim is 14-15 years old or younger, and the offender is also young, the courts inconsistently discuss and apply age disparity, either omitting to discuss it at all, discussing it to discredit arguments that the offender also being young makes the victim/s less vulnerable, or applying a lack of large age disparity to decrease the severity of vulnerability as a factor. See case examples:

Victims age	Vulnerable due to young age?	Age gap with offender	Age disparity discussed?
8-9 years old and 8-11 years old. ²⁶	Yes.	5 – 6 years (offender was 13-16 years old).	The Court of Appeal did not explicitly discuss the offender’s age in relation to the victim’s ages. ²⁷
Multiple victims under 12 years old. ²⁸	Yes.	5-10 years (offender was between 12-19 years old).	“There was a distinct age gap with [the offender] being between five and 10 years older than each victim”. ²⁹
7-9 years old. ³⁰	Yes.	7 years (offender was 14-16 years old).	“[The] victims were vulnerable despite [the offender’s] youth. It is obvious that a primary school aged girl is seriously vulnerable to a teenage boy.” ³¹
11/12-13/14 years old. ³²	Yes.	Approximately 5-6 years (offender was 14/15-17 years old).	The Court of Appeal accepted the appellant’s overall submission that the aggravating factors were only present to a moderate degree at most (not to a significant degree as was found at first instance), stating

²⁶ *Mines v R* [2022] NZCA 113 at [16].

²⁷ At [16].

²⁸ *R v Black* [2021] NZHC 2626 at [46].

²⁹ At [46].

³⁰ *Solicitor-General v Wiwarena* [2021] NZHC 844 at [31].

³¹ At [31].

³² *Pere v R* [2021] NZCA 407 at [9] and [22].

			specifically in reference to vulnerability: “both offender and complainant were adolescents and there was no significant age disparity.” ³³
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The cases above display the courts difficulty in consistently assessing vulnerability based on age where both the victim and offender are young. I argue here that the victim’s vulnerability must be viewed within the context of the harm they have suffered (as a young person who has been sexually violated) as increasing the offender’s culpability, rather than within the context that the offender has not chosen to offend against someone significantly younger than themselves (because the offender themselves are also young) as not affecting the offender’s culpability.

Overall, inconsistencies arise where the victim is 15-16 years old or above, suggesting that judges are limiting vulnerability, solely based on the victim's age, to approximately 17 years old. I argue this is too young. There are further inconsistencies relating to age disparity as a feature of the offending. How much of an age disparity must be present for the victim to become vulnerable? Does this change depending on how young the victim is? Or how young the offender is? I argue that these questions require a focused assessment of all the features of the offending in relation to the victim’s age, to establish whether vulnerability is present as a factor.

2 *Level of consciousness*

The victim's level of consciousness during the commission of an offence, whether due to being asleep or intoxicated, will affect the victim’s vulnerability. There is inconsistency as to whether the victim being asleep/unconscious is a feature that makes them vulnerable. In three cases this was identified as a reason the victims were vulnerable.³⁴ In five other cases,

³³ At [9] and [22].

³⁴ *Crowley-Lewis v R* [2022] NZCA 235 at [13]; *R v Nicol* [2021] NZDC 12713 at [7]; and *Hawkins v R* [2022] NZHC 283 at [15].

however, it was not.³⁵ In *Taylor* and *Chadwick*, some of the victims were asleep when the offending took place, but this was not discussed in relation to identifying vulnerability of the victims as a factor.³⁶ In *Pere v R*, the victim was asleep during one of the offences.³⁷ At first instance the Judge considered the victim was vulnerable to a significant degree.³⁸ However, on appeal, the Judge held that vulnerability was present to a moderate degree at most, and omitted the fact the victim was asleep from their discussion of this factor.³⁹ In *Winchcomb v R*, the offender hit the victim's head and she became momentarily unconscious, and the Court of Appeal did not identify vulnerability as a factor (this was not disturbed on appeal).⁴⁰

The courts in four cases identified intoxication as making a victim vulnerable (alongside other circumstances).⁴¹ However, in two other cases, the courts failed to identify vulnerability of the victim where intoxication was present.⁴² In *Sherratt v R*, the victim was naked, asleep, and intoxicated when she awoke to find the offender lying on top of her, who proceeded to rape her.⁴³ Vulnerability of the victim was not identified as a factor.⁴⁴ In *Attwell*, the Court of Appeal ultimately disagreed with the first instance decision that the victim was vulnerable, and specifically in relation to intoxication stated: “[t]he victim was 17 years old and had been drinking. She was not comatose”⁴⁵. I argue that the Judge in *Attwell* was grossly wrong to imply that a victim must be “comatose” to be vulnerable from intoxication.⁴⁶

³⁵ *R v Taylor* [2022] NZHC 1471; BC202261706 at [8], [23], [29], [34]; *R v Chadwick* [2021] NZHC 3038 at [6] and [17]; *Pere v R* [2021] NZCA 407 at [5] and [22]; and *Sherratt v R* [2021] NZHC 1901 at [5] and [38].

³⁶ *R v Taylor* [2022] NZHC 1471; BC202261706 at [8], [23], [29], [34]; and *R v Chadwick* [2021] NZHC 3038 at [6] and [17].

³⁷ *Pere v R* [2021] NZCA 407 at [5].

³⁸ At [5] and [22].

³⁹ At [5] and [22].

⁴⁰ *Winchcombe v R* [2021] NZCA 439 at [4].

⁴¹ *Abeyweera Arachchi Patabedige Amal Edirisooriya v R* [2022] NZCA 135 at [74]; *Hawkins v R* [2022] NZHC 283 at [15]; *Hart-Dehar v R* [2021] NZHC 2684 at [18]; and *R v Nicol* [2021] NZDC 12713 at [7].

⁴² *Sherratt v R* [2021] NZHC 1901 at [5] and [38]; and *Attwell v R* [2021] NZHC 1833 at [14].

⁴³ *Sherratt v R* [2021] NZHC 1901 at [5].

⁴⁴ At [38].

⁴⁵ *Attwell v R* [2021] NZHC 1833 at [14].

⁴⁶ See definition of “Intoxication” Sale and Supply of Alcohol Act 2012, s 5(1).

I argue that the courts are wrong in the cases discussed which omit to assess vulnerability in circumstances of altered consciousness. A victim who is asleep/unconscious is inherently susceptible to attack compared with someone who is awake/conscious. Similarly, a victim who's mind and body are affected by alcohol are more susceptible to attack than someone who is sober. While the harm suffered by a victim in both situations may not be affected, an offender's culpability is increased when they choose to offend against someone in a heightened vulnerable state. I recommend in part IV that the correct guidance is that victims who are asleep when the offending begins are inherently vulnerable, and victims do not need to be comatose to be considered intoxicated for the purposes of establishing vulnerability.

3 Location

The location of where the offending takes place may affect a victim's vulnerability. There were nine cases in which the offence occurred in a public, isolated or unknown location.⁴⁷ In four cases, the courts treated that feature as relevant to the vulnerability of the victim, including: staying at the offenders house away from their family;⁴⁸ being followed down a public walking track;⁴⁹ being attacked on a public street at night;⁵⁰ and driving away and parking on a cul-de-sac in the offenders car.⁵¹ However, in five cases, location was not considered when establishing the victim's vulnerability, including: being taken to an isolated public path;⁵² being inside an uber;⁵³ being taken to a caravan on a remote rural property;⁵⁴ being taken to a restaurant after hours (the offenders workplace);⁵⁵ being at the offenders

⁴⁷ *Mines v R* [2022] NZCA 113 at [16]; *R v Bridgeman* [2022] NZHC 450 at [28]; *R v Rapana* [2021] NZHC 3407 at [19]; *R v Robertson* [2021] NZHC 3484 at [26]; *R v Taylor* [2022] NZHC 1471; BC202261706 at [16] and [51]; *Abeyweera Arachchi Patabedige Amal Edirisooriya v R* [2022] NZCA 135 at [5] and [74]; *R v Undersen* [2022] NZHC 141 at [25] and [40]; *Solicitor-General v Rawat* [2021] NZHC 2129 at [4], [7] and [20]; and *Winchcombe v R* [2021] NZCA 439 at [3] and [12].

⁴⁸ *Mines v R* [2022] NZCA 113 at [16].

⁴⁹ *R v Bridgeman* [2022] NZHC 450 at [28].

⁵⁰ *R v Rapana* [2021] NZHC 3407 at [19].

⁵¹ At [4] and [19].

⁵² *R v Taylor* [2022] NZHC 1471 at [16] and [51].

⁵³ *Abeyweera Arachchi Patabedige Amal Edirisooriya v R* [2022] NZCA 135 at [5] and [74].

⁵⁴ *R v Undersen* [2022] NZHC 141 at [25] and [40].

⁵⁵ *Solicitor-General v Rawat* [2021] NZHC 2129 at [4], [7] and [20].

house (the victim had never been there before – vulnerability was not established in this case at all).⁵⁶

A distinction must be drawn between public locations and isolated or unknown locations within the context of vulnerability. When a victim is in an isolated or unknown location, vulnerability arises from the fact that there is an absence of others around to observe or help, and because it is harder for victim to get away, which enables the offender to take advantage of this vulnerability, making them more culpable. On the other hand, in a public place, a victim is entitled to be there and to be safe, but isn't necessarily more vulnerable just for being there, thus the offender's culpability would be linked to making the victim feel less free to enjoy public spaces. This raises the question whether location as contributing to making the victim feel less safe should be included within vulnerability (or as its own aggravating factor entirely). Observe the Judge in *R v Rapana* including this conceptualisation in their assessment, stating: “[the victim was] walking in a public area where she thought she was and should have felt safe.”⁵⁷ This question is also relevant when observing the fact that the courts do not discuss offending happening in the victim's home in relation to vulnerability. Instead, offending taking place in the victim's home is discussed in relation to breach of trust.⁵⁸ Similarly to being in public, the victim is entitled to feel safe at home, and to not be offended against by strangers breaking in, or by someone within the house whom they trust to not offend against them.

I argue that, within the context of the definition of vulnerability, any location from which circumstances are present which make the victim more susceptible to the attack of the offender, must be included in a vulnerability assessment. So, for public locations, this would require the victim to perhaps be alone, or for it to be at night, for the location itself to make the victim vulnerable. For within the victim's home, this would require the offender to be in a position within the victim's home which means they have access to the victim, thus making the victim more susceptible to the attack.

⁵⁶ *Winchcombe v R* [2021] NZCA 439 at [3] and [12].

⁵⁷ *R v Rapana* [2021] NZHC 3407 at [19].

⁵⁸ *R v Graham* [2021] NZHC 3326; *Solicitor-General v Wiwarena* [2021] NZHC 844; and *R v G* [2021] NZHC 3527.

4 *Physical ability to defend themselves or escape*

When a victim is physically unable to defend themselves or escape, the courts sometimes discuss this in relation to vulnerability as a factor. This is applied inconsistently. In four cases the courts discuss the victim's inability to defend themselves or escape when identifying vulnerability.⁵⁹ In one of those cases, where the victim was taken to a caravan and violently beaten and tied up, the High Court identified vulnerability because the victim was "unable to defend herself or leave".⁶⁰ However, in a different case where the offender violently physically overpowered the victim, including causing her to momentarily lose consciousness, the victim's inability to defend themselves or escape was not discussed, as vulnerability was not identified as a factor.⁶¹

I argue this feature should be carefully discussed within the context of vulnerability through increasing the offender's culpability by taking advantage of the victim's vulnerable state. It is inherent in violation offending that the offender physically overpowers the victim to some extent. So, types of features which should be included under this category are those which increase the offender's culpability beyond that which is inherent. This will often overlap with features already discussed, such as the victim being particularly young (and therefore physically weaker and smaller), being physically disabled, being physically restrained, or being rendered unconscious through violence. An example of incorrect analysis is in *Hawkins v R*, where the Judge discussed the victim's vulnerability in relation to the fact that he was unable to move from beneath the offender.⁶² In that case the victim was vulnerable because he was asleep and intoxicated.⁶³ His inability to move from beneath the offender should not have, within itself, been discussed as applying to vulnerability, thus increasing the offenders culpability, as this type of overpowering was inherent to the sexual offence itself. Judges should also be careful to not discuss whether the victim *could* defend

⁵⁹ *Hawkins v R* [2022] NZHC 283 at [15]; *R v Hall* [2021] NZHC 3033 at [15]; *R v Undersen* [2022] NZHC 141 at [40]; and *Craven v R* [2021] NZCA 630 at [76].

⁶⁰ *R v Undersen* [2022] NZHC 141 at [40].

⁶¹ *Winchcombe v R* [2021] NZCA 439 at [4] and [12].

⁶² *Hawkins v R* [2022] NZHC 283 at [15].

⁶³ At [15].

themselves or escape, as this shifts the onus to victim to fight back or escape if they are physically able.

Overall, the victim's inability to defend themselves or escape is discussed inconsistently. I argue it must be consistently assessed, however, it should be limited to situations in which the victim's circumstances renders them overpowered by the offender, more than that which is inherent in sexual violation offending.

5 *Vulnerable due to a different circumstance*

There may be different circumstances known to the offender which make a victim vulnerable. These are identified and applied on an ad-hoc basis by the courts. Some circumstances which have been identified include when the victim: has an intellectual disability,⁶⁴ was a female walking alone at night,⁶⁵ was a foreigner travelling in Aotearoa,⁶⁶ was new to living in Aotearoa,⁶⁷ was vulnerable for "other reasons",⁶⁸ and was vulnerable due to their background and because they have already suffered abuse.⁶⁹

AM states that vulnerability may be found due to "any other factor known to the offender", giving judge's discretion to include in their assessment anything that in their mind makes the victim vulnerable. Whilst this enables a broad inclusion of diverse features which may arise in a sexual violation case, it can also create inconsistency between cases, as it allows judges to overlook features which may add to a victim's vulnerability. Statements such as the victim being vulnerable for "other reasons" are ambiguous and should be better spelt out by a Judge. In part IV I recommend how the guideline can be improved with better detail and specification as to what "any other factor" should include.

⁶⁴ *F (CA691/2021) v R* [2022] NZCA 217 at [34] and [41].

⁶⁵ *R v Rapana* [2021] NZHC 3407 at [18].

⁶⁶ *R v Bridgeman* [2022] NZHC 450 at [28].

⁶⁷ *Solicitor-General v Rawat* [2021] NZHC 2129 at [35]; and *R v Warner* [2021] NZHC 1618 at [11] and [40].

⁶⁸ *R v Stevens* [2021] NZHC 2026 at [14].

⁶⁹ *R v Opetaiia* [2021] NZHC 1503 at [15].

6 *Dependent on the offender*

The courts inconsistently discuss when the victim is dependent on the offender in relation to vulnerability as a factor, and instead more consistently address them when assessing breach of trust.

Four cases in my sample discuss the victim's dependency on the offender as contributing to vulnerability.⁷⁰ This feature fits within my definition of vulnerability, as it gives the offender access to the victim, making the victim more susceptible to attack. Conceptually, any case which involves an offender who has some level of care over the victim involves a victim who is vulnerable due to their dependency on the offender. However, the majority of cases where the offender has some level of care over the victim do not discuss the victim's reliance or dependence on the offender as contributing to the factor of vulnerability (as vulnerability will usually already be established due to age and/or other features). This is instead discussed in relation to breach of trust. I argue that being dependent on the offender will likely be inherent in offending which involves a young victim and an offender who is taking care of them. In these situations, the court should still discuss dependence in relation to establishing vulnerability, regardless of the ultimate effect this will have on the factor's seriousness. However, situations where identification and application of dependence will become particularly relevant is when vulnerability cannot be established based on the victim's age or some other feature. This would include situations involving an intimate relationship, where the facts show that the victim's dependence on the offender renders them susceptible to the offender's attack. This may be particularly relevant where the victim is financially reliant on the offender, or suffers from battered woman's syndrome or emotional abuse.

Overall, vulnerability of the victim is a broad factor which is identified and applied inconsistently by the courts, and is encapsulated by features including: age; level of consciousness; location; victim's physical ability to defend themselves or escape; vulnerable due to a different circumstance, and; dependent on the offender. I have identified areas which may overlap with breach of trust, and will now discuss this factor.

⁷⁰ *R v Te Maane Beattie* [2022] NZHC 94 at [21]; *Munn v R* [2021] NZHC 1574 at [174]; *R v Opetaita* [2021] NZHC 1503 at [15], and; *R v Hall* [2021] NZHC 3033 at [14].

C Breach of Trust

There are multiple circumstances and features related to the relationship between the victim and the offender where breach of trust may arise. I have broadly categorised these as: when the offender is related to the victim; when the offender is entrusted with some level of care over a non-related victim; when the victim and offender are, or were, in an intimate relationship; when the victim and offender are, or were, close friends; and when the offender is entrusted to be in the victim's home. There is some overlap within these categories, as well as significant overlap with vulnerability as a factor.

1 When the offender is related to the victim

The courts consistently identify breach of trust when there are intrafamilial relationships, including when the offender is related to the victim in some way, or is a step-parent or step-relative.⁷¹ Where the offender is a blood relative of the victim, the victim is thus entitled to trust the offender.⁷² This is especially serious when the offender is the parent/caregiver, or if the relative is entrusted to care for the victim.⁷³ A breach of trust may be less serious where the relative is not the parent or caregiver, or only holds a small amount of care over the victim (i.e. is temporarily babysitting them).⁷⁴

Overall, breach of trust where the offender is a relative to the victim is identified consistently by the courts, and the degree of breach of trust will lessen if the relative is not in a position of care over the victim.

⁷¹ *F (CA691/2021) v R* [2022] NZCA 217 at [41]; *Rose v R* [2022] NZHC 585 at [7] and [27]; *R v Black* [2021] NZHC 2626 at [46]; *R v Black* [2022] NZHC 140; *R v G* [2021] NZHC 3527 at [49]; *Solicitor-General v Wiwarena* [2021] NZHC 844 at [28]; *R v Turanga Tahi Pari* [2021] NZHC 3127 at [25]; at [17] and [27]; *R v Hall* [2021] NZHC 3033 at [14]; *Munn v R* [2021] NZHC 1574; and *R v Te Maane Beattie* [2022] NZHC 94 at [21].

⁷² *R v Turanga Tahi Pari* [2021] NZHC 3127 at [25].

⁷³ *R v Hall* [2021] NZHC 3033 at [14]; *Rose v R* [2022] NZHC 585 at [7], [27] and [33]; *R v Te Maane Beattie* [2022] NZHC 94 at [21]; and *R v G* [2021] NZHC 3527 at [49].

⁷⁴ *R v Black* [2021] NZHC 2626 at [46] and [57]; and *Solicitor-General v Wiwarena* [2021] NZHC 844 at [28].

2 *When the offender is entrusted with some level of care over a non-related victim*

Where the offender and victim are not connected through a familial relationship, the courts identify breach of trust where the offender is entrusted with some level of care over the victim. This is consistently identified by the courts across various relationships in which the offender exercises a position of responsibility over the victim, including where: the offender is the foster caregiver;⁷⁵ the offender is taking temporary care of/babysitting the victim;⁷⁶ the victim is staying with the offender;⁷⁷ the offender is a friend living with the victim's family and helps put the victim to bed;⁷⁸ the offender has a higher position of authority than the victim in the kainga;⁷⁹ and the offender is an uber driver for the victim.⁸⁰

In *Solicitor-General v Rawat*, where the offender was young and not in a position of direct responsibility, breach of trust was present only to a limited degree.⁸¹ However, in *Mines v R*, the Court of Appeal found a significant breach of trust where the offender was 14 years old, and offended against young victims who he would stay with during holidays.⁸² The Court did not explain why, and it is implied the offender was not taking care of the victim's. This decision is inconsistent with the pattern in other cases where the greater the level of responsibility the offender has over the victim, the more serious the breach of trust will be.

Age disparity may be relevant in breach of trust. The greater an age disparity between a victim and offender, the more significant a breach of trust may be, as an older offender is able to command respect from, and exert power over, the victim.⁸³

⁷⁵ *R v Opetaiia* [2021] NZHC 1503 at [15].

⁷⁶ *R v Chadwick* [2021] NZHC 3038 at [17]; *R v Hall* [2021] NZHC 3033 at [14]; and *R v Connor* [2021] NZHC 2285 at [15].

⁷⁷ *Smith v R* [2022] NZHC 1211 at [28].

⁷⁸ *R v Connor* [2021] NZHC 2285 at [15].

⁷⁹ *R v Rihari* [2021] NZHC 3334 at [64].

⁸⁰ *Abeyweera Arachchi Patabedige Amal Edirisooriya v R* [2022] NZCA 135 at [74].

⁸¹ *Solicitor-General v Rawat* [2021] NZHC 2129 at [35].

⁸² *Mines v R* [2022] NZCA 113 at [4], [5] and [16].

⁸³ *R v Rihari* [2021] NZHC 3334 at [64] and [71].

3 *When the victim and offender are, or were, in an intimate relationship*

The courts inconsistently identify a current or previous relationship between the victim and the offender as creating breach of trust. The courts identified breach of trust in the context of a relationship where: the victim and offender are partners who share the same bed;⁸⁴ the victim and offender are married, and;⁸⁵ the victim and offender had been in an “on-and-off” relationship for 9 years, with the District Court stating breach of trust is implicit within relationship offending.⁸⁶ However, there are cases where the victim and offender are, or were, in a relationship, but breach of trust is not identified as a factor, including cases involving: a past relationship of 3 years;⁸⁷ “on-and-off” relationships of 10 and 18 years,⁸⁸ and offending within a current relationship (length of relationship not discussed).⁸⁹

Overall, I argue where the victim and offender are, or were, in a relationship, the courts must always identify breach of trust as a factor.

4 *When the victim and offender are, or were, close friends*

Close friendship as creating breach of trust is infrequent in cases, however, has been identified occasionally, and applied inconsistently by the courts.

In two cases, both involving victims and offenders who were close friends/had been friends for years, the High Court stated breach of trust was a “prime element” of the offending, and the District Court stated: “clearly and most obviously this was a breach of trust”.⁹⁰ However, two other cases which involved offenders maintaining long-term friendships with the victims, did not identify breach of trust, and instead identified premeditation as a factor.⁹¹

⁸⁴ *Crowley-Lewis v R* [2022] NZCA 235 [20] and [21].

⁸⁵ *Matamaki-Omao v R* [2021] NZHC 1399 at [1] and [7].

⁸⁶ *Pahi v R* [2021] NZCA 348 at [5] and [56].

⁸⁷ *Singh v R* [2022] NZCA 140 at [6] and [14].

⁸⁸ *Williams v R* [2021] NZCA 535 at [97]; and *Craven v R* [2021] NZCA 630 at [76].

⁸⁹ *R v Undersen* [2022] NZHC 141 at [3] at [40].

⁹⁰ *Sherratt v R* [2021] NZHC 1901 at [3], [12] and [40]; and *R v Nicol* [2021] NZDC 12713 at [6].

⁹¹ *R v Stevens* [2021] NZHC 2026 at [14]; and *R v Warner* [2021] NZHC 1618 at [40].

Furthermore, in *Hawkins v R*, the first instance decision did not identify breach of trust where the victim and offender were longstanding childhood friends, and instead discussed the betrayal the victim felt under harm as a factor.⁹² The Court of Appeal stated that the first instance decision approached this issue with care as to: “not elevate the seriousness of the offending by identifying breach of trust as a discrete aggravating factor.”⁹³ The Court noted there was disagreement between counsel as to whether friendship amounts to the type of breach of trust as contemplated in *AM*, and ultimately agreed with the indication decision’s assessment of the issue.⁹⁴

Overall, it is problematic to not include close/personal friendships as a feature of offending which creates breach of trust. Like intimate relationships, close/personal friendships are relationships built on trust, thus capable of creating a breach of trust if the offender attacks the victim. A second issue demonstrated in the cases is whether a feature of the offending, being the friendship between the victim and the offender, should be applied to identify multiple factors, or whether it is limited to establishing one factor? I give guidance on this issue in part IV.

5 *When the offender is entrusted to be in the victim’s home*

Offending taking place in a family home, or where the victim is staying, is occasionally a feature mentioned when discussing breach of trust. In three cases, the courts apply breach of trust where the offender was entrusted to be in the victim’s home;⁹⁵ where the victim is “entitled to feel, and be, safe”.⁹⁶ However, five cases did not discuss the offender being entrusted to be in the victim’s home, or where they were staying, in relation to breach of

⁹² *Hawkins v R* [2022] NZHC 283 at [5].

⁹³ At [20].

⁹⁴ At [18].

⁹⁵ *Solicitor-General v Wiwarena* [2021] NZHC 844 at 28 as cited in *Solicitor-General v Hutchison* [2018] NZCA 162, [2018] 3 NZLR 420 at [27]; *R v Graham* [2021] NZHC 3326; at [17]; and *R v Turanga Tahiri Pari* [2021] NZHC 3127 at [29].

⁹⁶ *Solicitor-General v Wiwarena* [2021] NZHC 844 at 28 citing *Solicitor-General v Hutchison* [2018] NZCA 162, [2018] 3 NZLR 420 at [27]; and *R v Graham* [2021] NZHC 3326 at [17].

trust.⁹⁷ Furthermore, in *Craven v R*, despite the offending taking place in the victim's home, breach of trust was not identified as a factor.⁹⁸

This feature may overlap with vulnerability of the victim – the victim may be vulnerable to the offender when in their own home, thus, there will be a breach of trust if the offender takes advantage of this vulnerability by offending against them. This links to the key sentencing process and analysis issue facing judges when one feature of the offending overlaps multiple factors. I discuss this further in part IV.

D Overlap Between Vulnerability of Victim and Breach of Trust

There is considerable overlap between the aggravating factors of vulnerability of the victim and breach of trust. This issue has already been discussed in the sections above, and will be further demonstrated in the following cases.

In *R v Taylor*, the High Court combines vulnerability and breach of trust by accepting the Crown's submission of the aggravating factors, stating: “there was a considerable degree of breach of trust and of vulnerability of the victims given their age and their relationship to you”.⁹⁹ The Court does not place any significance on the identification of each factor and its degree of seriousness in determining which rape band the offence falls. Rather, the Court holistically discusses the unique features of the case (multiple victims which had varying relationships to the offender, taking place at different times) in relation to similar cases, to establish that the case falls within rape band 4, with a starting point of 18 years.¹⁰⁰ I argue that this approach is inconsistent with the guidance in *AM*, which states that Judges must establish each factor, to what degree a factor is present, and thus which part of the band the offence falls.

⁹⁷ *R v Rihari* [2021] NZHC 3334; *McDonald v R* [2021] NZCA 531; *R v Connor* [2021] NZHC 2285; *R v Nicol* [2021] NZDC 12713; and *Pere v R* [2021] NZCA 407.

⁹⁸ *Craven v R* [2021] NZCA 630 at [76].

⁹⁹ *R v Taylor* [2022] NZHC 1471 at [51].

¹⁰⁰ At [50-56].

The Court of Appeal in *McDonald v R* ultimately found that although the Judge in the District Court was correct in their placement of the offending in USC band three, they were incorrect in finding a starting point of 12 years by taking an “overly individualistic approach”.¹⁰¹ The Court stated the factors present were the scale of the offending, the age of the victims and the familial relationship with the offender.¹⁰² The Court stated: “We have not separately recognised the vulnerability of the victims or the breach of trust involved because these are matters that are already encompassed by their young ages and their relationship with [the offender].”.¹⁰³ This assessment of the features in relation to the factors sets confusing precedent for judges tasked with sentencing. The Court’s statement that they have not individually recognised breach of trust and vulnerability is confusing, as they have implicitly identified the factors when identifying the age of the victim (which establishes vulnerability) and the familial relationship (which establishes breach of trust).

The overlap between vulnerability and breach of trust has been explicitly acknowledged in some cases. In *Munn v R*, the offender was the victim’s grandfather.¹⁰⁴ Both the first instance decision and the High Court on appeal noted there was overlap between vulnerability and breach of trust, as there was vulnerability of the victim because she would stay alone with the offender and wanted to make him happy, and there was also breach of trust because the offender had been entrusted with the care of the victim as his granddaughter.¹⁰⁵ The High Court ultimately stated that although vulnerability overlapped with breach of trust, both factors were present.¹⁰⁶ Similarly in *R v Opetaiia*, the High Court identified both vulnerability and breach of trust as factors, but noted that breach of trust overlapped with vulnerability “somewhat”.¹⁰⁷

It is crucial that further guidance is given on this issue so that judges faced with this difficult problem have specific direction available to them to make consistent and transparent sentences. I outline my recommendations on the identified inconsistencies and issues next.

¹⁰¹ *McDonald v R* [2021] NZCA 531 at [27] and [31].

¹⁰² At [32].

¹⁰³ At [32].

¹⁰⁴ *Munn v R* [2021] NZHC 1574 at [174].

¹⁰⁵ At [174].

¹⁰⁶ At [186].

¹⁰⁷ *R v Opetaiia* [2021] NZHC 1503 at [15].

IV Recommendations

In this part, I give recommendations on how the Court of Appeal can improve its guideline judgment set out in *AM* to mitigate the issues and inconsistencies I have identified. Specific guidance is required on the identification, application of, and relationship between the factors.

A Identification and Application of the Factors

How does a judge identify a relevant aggravating factor in the first place? How does a judge decide how serious that factor is once it has been identified? *AM* states that sentencing judges not only need to identify the relevant aggravating factors, but must also establish the seriousness of each factor.¹⁰⁸ Despite some specific guidance and examples, much of the identification process is left to judge's discretion in terms of how they perceive certain features or circumstances of the offending to either create or increase a factor.¹⁰⁹ This can lead to general inconsistencies when judges fail to discuss a feature of the offending. This is problematic because it can affect both the identification of a factor and the overall seriousness of a factor when identified by a different feature.

I argue that *AM* should give more specific detail on all potential features and circumstances relevant to both vulnerability and breach of trust, listing specific features which should be considered. If the facts of the case outline a circumstance or feature which may be relevant to one of the aggravating factors, a judge must discuss why that feature does or does not create or increase an aggravating factor.¹¹⁰ This is inline with the Court's statement in *AM*:

¹⁰⁸ *R v AM*, above n 2, at [78].

¹⁰⁹ Sean J Mallett "Judicial Discretion in Sentencing: A Justice System that is No Longer Just?" (2015) 46 *VUWLR* 533 at 6 as cited in Geoff Hall *Sentencing Law and Practice* (LexisNexis, Wellington, 2004) at [2.1], n 28.

¹¹⁰ Sean J Mallett "Judicial Discretion in Sentencing: A Justice System that is No Longer Just?" (2015) 46 *VUWLR* 533 at 6 citing James Spigelman, Chief Justice of New South Wales "Consistency and Sentencing" (Keynote address to Sentencing 2008 Conference, National Judicial College of Australia, Canberra, 8 February 2008), n 79.

“The development of guidelines has been associated with an increased emphasis on structured sentencing.”¹¹¹

I give specific suggestions and recommendations – these are not exhaustive. They are aimed at creating consistency and transparency between sentencing decisions.

1 Vulnerability Guideline

Vulnerability arises from features personal to the victim, and circumstances in which the offending occurred, which make the victim more susceptible to the attack by the offender.¹¹² Overall, the courts must adopt better consistency when identifying vulnerability by considering all appropriate circumstances and features. More specific guidance from the Court of Appeal will enable and encourage this. Adams on Criminal Law observes that many victims will be vulnerable to some extent, and that: “A fact-specific inquiry needs to be undertaken into features of the victim and the circumstances at the time of the offence”.¹¹³ This observation is helpful as it demonstrates the importance of considering all circumstances and features when assessing vulnerability, whether or not the feature will actually amount to an aggravating level of vulnerability.¹¹⁴

Suggested guidance on how to identify vulnerability as a factor:

<i>Circumstance</i>	<i>Feature</i>	<i>Impact on Vulnerability</i>
Age	Victims under 18 years old will always be vulnerable to some extent.	The younger the victim is, the greater the degree of vulnerability may be.
	Victim is Elderly*	

¹¹¹ *R v AM*, above n 2, at [13] and [15].

¹¹² *Adams on Criminal Law*, above n 1, at [SA9.12].

¹¹³ At [SA9.12] as cited in *Graham v R* [2011] NZCA 131 at [13].

¹¹⁴ At [SA9.12] as cited in *Graham v R* [2011] NZCA 131 at [13].

	Age disparity between the victim and the offender.	The larger the age disparity the greater the degree of seriousness. Age disparity will be particularly relevant when establishing vulnerability where vulnerability does not necessarily arise from the victim's age alone. A small age disparity does not decrease vulnerability.
Level of Consciousness	Victim is intoxicated.	Victim does not need to "comatose" to be vulnerable due to intoxication. However, the level of intoxication may affect the degree of seriousness.
	Victim is asleep/unconscious.	Victim will always be vulnerable if the commission of the offence begins when the victim is asleep/unconscious.
Location	Offence takes place in an isolated or unknown place.	May create or increase vulnerability.
	Offence takes place in public or within the victim's home.	May create or increase vulnerability, however circumstances relevant to the location must be present that make the victim more susceptible to the attack.
A different circumstance	Victim has a disability or health issue.	May create or increase vulnerability.
	Victim is new to Aotearoa.	

	Victim has a traumatic background and/or has already suffered abuse.	
	Victim is vulnerable due to any other circumstance which makes them more susceptible to the attack.	
Physical ability to defend themselves or escape	Applicable when features are present which make the victim unable to defend themselves or escape to an extent which is more than inherent within the offending itself. Examples: being physically disabled; being physically restrained; being rendered unconscious through violence.	
Dependent on the offender	Particularly relevant in situations where vulnerability does not arise from another feature (such as age). Examples: an emotionally abusive relationship or a financially reliant relationship.	

*my research does not involve any elderly victims.

2 Breach of Trust Guideline

Breach of trust most commonly arises from relationships.¹¹⁵ Suggested guidance on how to identify breach of trust:

<i>Relationship circumstance</i>	<i>Feature</i>	<i>Impact on breach of trust</i>
Offender is related to the victim	Parent/caregiver, including foster or step parents.	Especially serious, is the highest level of breach of trust.
	Other relative such as grandparent, uncle or cousin.	Seriousness is increased if that relative is caring for the victim in some way.
Offender has level of care over a non-related victim	Care over the victim when the offender is temporarily taking care of/babysitting the victim, or the victim is staying with the offender.	May be highest level of breach of trust.
	Offender holds an implied position of responsibility over victim. Example: uber driver, sports coach.	Seriousness depends on level of responsibility offender has over victim.
	Offender is in a position of trust arising from relationship with victim. Example: close neighbour, family friend.	Seriousness depends on level of responsibility offender has, or has had, in relation to the victim. Age disparity may be relevant here.
Offender and victim are, or were, in an intimate relationship	Existence or history of an intimate relationship.	Creates a breach of trust.

¹¹⁵ At [S9.11].

Offender and victim are, or were, close friends	Existence or history of close/personal friendship	May be less serious than a intimate relationship, however, not necessarily.
Offender is entrusted to be in the victim's home	Based on the relationship which creates the trust for the offender to be in the home.	Seriousness depends on level of responsibility or power imbalance offender has over victim.

The intention is not to create a straitjacket exercise for judges, and these tables are not exhaustive – there will be features which fall outside of the circumstances and features I have identified. My intention is to create a mechanism for consistency between sentencing decisions by giving judges a more detailed guideline on how to identify the factors, and subsequently establish a starting point.¹¹⁶ However, a process without flexibility and judicial discretion would result in problematic outcomes: “Consistency is not an absolute end; sentencing remains an evaluative exercise and guideline judgments must not be applied in a mechanistic way”.¹¹⁷ Thus, a balance must be struck. By adopting a structured and systematic approach to this step in the sentencing analysis, judges can then “step back” and consider the seriousness of the offence holistically.

B Relationship Between the Factors

When a circumstance or feature of offending crosses over both factors, the identification of factors and their seriousness may overlap. This could result in “double-counting” of features of the offending, thus, holding the offence to be more serious than it actually is.¹¹⁸ So, what is the correct process and analysis to follow and implement when there are overlapping factors due to the same feature of offending applying to more than one factor? Throughout my findings, I have outlined the various and differing ways courts have dealt with the issue

¹¹⁶ At [SA8.06(3)].

¹¹⁷ Tania Singh “STEALTHING – AN ANALYSIS OF CAMPOS V R [2022] NZCA 311” [2022] NZLJ 395 at 399 as cited in *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [28].

¹¹⁸ Danica McGovern "Assessing Offence Seriousness at Sentencing: New Zealand's Guideline Judgment for Sexual Violation" (2014) 26 NZULR 243 at 261; and *Hall's Sentencing* (online ed, LexisNexis) at [I.4.2(e)].

of overlapping features. Notably, for offences where features of offending overlap substantially across both factors, the courts tend to deviate from the direction in *AM* by applying a holistic and discretionary analysis of the factors.¹¹⁹

The Court of Appeal has discussed sentencing process and analysis extensively in the past. In the guideline judgment *Zhang v R* they stated: “Sentencing must achieve justice in individual cases. That requires flexibility and discretion in setting a sentence notwithstanding the guidelines expressed in this and similar judgments.”¹²⁰ This emphasis on flexibility was again endorsed by the Court of Appeal in *Orchard v R*. The Court expressed the view that when applying guideline judgments, it is preferable to approach sentencing holistically:¹²¹

“Flexibility in applying a guideline judgment is essential to achieving justice in an individual case. Aggravating factors, duly evaluated for seriousness, may be used to establish location within a sentencing band. But the judge must then step back and consider the justice of the indicative guideline outcome in that case, compared to other cases.”

The assertion here is for sentencing, judges must assess the seriousness of the case holistically, considering interconnected aggravating factors as a whole instead of tallying them separately. This suggests a possible solution to any double-counting of features which overlap across multiple factors, is that after each factor and its seriousness has been established, the judge may “step back” and consider the seriousness of the case holistically and in comparison to similar cases. This stepping back approach is favourable across multiple sentence guideline decisions.¹²²

¹¹⁹ See *McDonald v R* [2021] NZCA 531; *R v Taylor* [2022] NZHC 1471,; and *Hawkins v R* [2022] NZHC 283; *Munn v R* [2021] NZHC 1574; *R v Opetaita* [2021] NZHC 1503; and *Pahi v R* [2021] NZCA 348.

¹²⁰ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [10(a)].

¹²¹ *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [33].

¹²² Luke Elborough “Standing back in *Martin v R*” [2023] NZLJ 35 at 36 as cited in *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750; *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648; and *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37.

The double-counting issue is conceptualised slightly differently by Danica McGovern in the context of prior consensual sex as a mitigating factor: “Retaining prior consensual sex as a separate mitigating factor risks double-counting the same features of the offending to arrive at a starting point that is too low.”¹²³ The argument here is that consensual sexual activity prior to the offence as a feature is already encapsulated as evidence establishing the lack of planning and premeditation as an aggravating factor, thus, to apply it as its own mitigating factor would be to double-count it, and “artificially” reduce the starting point.¹²⁴ On the flip side, it may be a feature used to establish vulnerability and breach of trust as aggravating factors, thus artificially increasing a starting point: “This may be the case when the offender abuses the vulnerability and trust involved in having consensual sex in order to sexually violate the victim, in turn also increasing the harm experienced by the victim”.¹²⁵ Applying this conceptualisation to the relationship between vulnerability and breach of trust as aggravating factors, it is arguable that a feature of offending which may overlap across both should not be counted twice to establish or enhance both factors individually, as this would artificially increase the starting point.

My argument is that a process and analysis can be implemented where judges are able to structurally and systematically consider all factors which may arise from the features of the offending, regardless of whether they are overlapping, and then implement a holistic stepping back exercise to address any potential overlap and double-counting. This would retain the integrity of both factors, whilst not artificially inflating the seriousness of the offence. As Adams asserts: “The question is always whether the starting point adopted is within an acceptable range by reference to the judge’s assessment of the particular culpability factors”.¹²⁶ If a stepping back approach is implemented too soon in the process, the risk is that judges will miss the important step of identifying the factors and their seriousness based on the features of the case. This initial structured and systematic approach is important as it creates consistency and transparency in the identification and application of factors.

¹²³ Danica McGovern “Consensual Sexual Activity Before a Sexual Violation is not Mitigating” (2022) 53 VUWLR 611 at 615.

¹²⁴ At 615.

¹²⁵ At 615-616.

¹²⁶ *Adams on Criminal Law*, above n 1, at [SA8.06] as cited in *Arnott v R* [2015] NZCA 236 at [12]; and *Smith v R* [2021] NZCA 169 at [41].

C Structure Proposal

To reflect my analysis, this is my proposed sentencing process and analysis guideline structure:

1. Identify all circumstances and features of offending relevant to aggravating factors. Some circumstances and features may be relevant to more than one aggravating factor.
2. Identify to what degree of seriousness each aggravating factor is present.
3. Once all aggravating factors and their seriousness are identified, implement a holistic assessment of the offending, considering any overlapping features which may unjustly and artificially increase seriousness through double-counting. Compare to similar cases.
 - a. Identify which band, and where in that band, the offence falls within.
 - b. Identify an appropriate starting point.

V Conclusion

The sentencing guideline set out by the Court of Appeal in *AM* is a crucial tool for judges tasked with sentencing for sexual violation offences. Due to the complex and diverse nature of this offence, comprehensive and detailed direction is needed, while simultaneously encouraging judges to approach individual cases holistically. When reviewing *AM*, I argue that to achieve consistency and transparency, the Court of Appeal must provide clearer and more specific guidance on the identification, application of and relationship between the aggravating factors of vulnerability of the victim and breach of trust. A structured and systematic analysis is required to identify aggravating factors and their seriousness. Then, judges must step back and consider the seriousness of the offence holistically, having regard to any double-counting of features or overlapping factors which may artificially inflate the seriousness of the offending. This will result in consistent and transparent sentencing decisions and sentence starting points which reflect the culpability of the offender accurately.

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