

Miscellaneous amendments to sentencing guidelines

Response to consultation

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Foreword



Now that the Sentencing Council has been in existence for over ten years and has built up a large body of sentencing guidelines, there are inevitably issues that arise with existing guidelines. These issues may be as a result of errors, omissions or a lack of clarity in guidelines, or they may arise from changes in legislation or case law.

To make it easier for guideline users to notify us of problems with guidelines, we have introduced a feedback facility on all of our digital guidelines and we are grateful to all those who have already used that means to alert us to potential issues.

To ensure that guidelines are kept up-to-date the Council has decided to hold an annual consultation on miscellaneous amendments to guidelines.

Some matters that are brought to our attention can be remedied immediately without the need for consultation (such as correcting typographical errors or updating a legislative reference), others may require a full review of a guideline or suite of guidelines and these will be added to the Council's work plan. It is those matters that fall between an obvious correction and a complete review that are in scope of the annual miscellaneous amendments consultation.

On behalf of the Sentencing Council I would like to thank all those who responded to the first of these annual consultations. As is always the case with Sentencing Council consultations, the responses have led us to make changes to the proposals, the full details of which are set out in this document.

Lord Justice Holroyde
Chairman, Sentencing Council

Introduction

Background

The Sentencing Council has published over 180 sentencing guidelines that are in use in courts throughout England and Wales. In order to address any issues that arise with guidelines, the Council has decided to hold an annual consultation on miscellaneous amendments to guidelines. The first of these annual consultations was held from 9 September 2021 to 2 December 2021. The [consultation](https://www.sentencingcouncil.org.uk/consultation) is available on the Council's website: www.sentencingcouncil.org.uk.

The changes consulted on relate to guidelines used in magistrates' courts and the Crown Court.

The proposals consulted on can be summarised as follows:

- Breach of a sexual harm prevention order (SHPO): adding a note to this guideline to make clear that it is not open to the court to vary the SHPO or make a fresh order of its own motion for breach.
- Compensation: in all relevant guidelines adding wording relating to giving reasons if compensation is not awarded.
- Confiscation: providing fuller information on confiscation in all relevant guidelines.
- Racially or religiously aggravated offences: making the uplift for racial/ religious aggravation a separate step in the guidelines for criminal damage (under £5,000) and criminal damage (over £5,000); section 4, section 4A and section 5 Public Order Act offences; harassment/ stalking and harassment/ stalking (with fear of violence).
- Domestic Abuse overarching guideline: revising the definition of domestic abuse to align with the Domestic Abuse Act 2021 and expanding it to include a wider range of relationships.

The proposals did not apply to guidelines for sentencing children and young people.

Summary of responses

There were 20 responses to the consultation. Some of the responses were from groups or organisations, and some from individuals.

Breakdown of respondents

Type of respondent	Number of responses
Academic	1
Charity	1
Judiciary	3
Legal professional	3
Magistrate	9
Member of the public/ unknown	1
Police	1
Government	1

Overview

Most responses were broadly in support of the proposals (with the notable exception of one respondent who answered every question with an assertion that guidelines should be scrapped) but some respondents disagreed with individual proposals or suggested where the changes could go further.

Details of the responses to each issue are detailed below.

Breach of a sexual harm prevention order

The issue

The Council consulted on adding a note to this guideline to clarify that a court dealing with a breach of a sexual harm prevention order (SHPO) does not have a power to make a fresh order or vary an existing order – the wording proposed in the consultation is shaded grey below:

Step 6 – Ancillary orders

In all cases the court should consider whether to make compensation and/or ancillary orders.

- [Ancillary orders – Magistrates' Court](#)
- [Ancillary orders – Crown Court Compendium](#)

Note: when dealing with a breach of a sexual harm prevention order, the court has no standalone power to make a fresh order or to vary the order. The court only has power to do so if an application is made in accordance with sections 103A and 103E of the Sexual Offences Act 2003.

The responses and subsequent changes

Most respondents broadly agreed with the proposal. The Legal Committee of HM Council of District Judges (Magistrates' Courts) noted:

The legislation providing the power to vary a SHPO upon application now depends on whether the SHPO was imposed after conviction or upon application on complaint. Section 345 of the Sentencing Code now provides for SHPO upon conviction and section 103A of the SOA 2003 has been amended accordingly.

Hence, the proposed amendment should also make reference to section 350 of the Sentencing Code, which provides for applications to vary a SHPO made on conviction.

The Council agreed that this was a valid point. Section 103A of the Sexual Offences Act 2003 (SOA 2003) only applies to the making of SHPOs other than on conviction. The power to make a SHPO on conviction is in section 345 of the Sentencing Code (SC). The power to vary orders is in section 103E SOA 2003 and section 350 SC.

The Council also noted that the wording consulted on uses the phrase 'only has the power to do so' without perhaps making it clear if that refers to varying an existing order, making a new order or both. To avoid any misunderstanding the Council decided to word it as follows:

Note: when dealing with a breach of a sexual harm prevention order, the court has no standalone power to make a fresh order or to vary the order.

The court only has the power to vary an order if an application is made in accordance with section 103E of the Sexual Offences Act 2003 or section 350 of the Sentencing Code.

The court only has the power to make an order in the circumstances set out in section 103A of the Sexual Offences Act 2003 or section 345 of the Sentencing Code.

There were a few other suggestions for changes (for example including more information about the permitted length and conditions of a SHPO) but, since the main message is that the court should not be making or varying an order, the Council considered that this was not the appropriate place to include such information.

The changes to the [Breach of a sexual harm prevention order](#) guideline will be made on or soon after 1 April 2022.

Impact

The change will not affect sentence levels, the only impact it may have is to prevent courts falling into error.

Compensation

The issue

It was drawn to the Council's attention that sentencing guidelines do not include a specific reference to the duty to give reasons if a compensation order is available but is not made.

The Council considered that this was an omission that should be rectified and therefore proposed to add a reference to that duty to all relevant guidelines. The wording proposed in the consultation is shaded grey below:

In all cases, the court should consider whether to make [compensation](#) and/or other ancillary orders. Where the offence has resulted in personal injury, loss or damage the court must give reasons if it decides not to order compensation ([Sentencing Code, s.55](#)).

The responses and subsequent changes

Most respondents were in favour of this proposal. One magistrate disagreed saying that there were too many situations where it is complex, inappropriate or impossible to pay compensation and the duty to give reasons should apply to the whole of the sentence and not just to one part of it. Other magistrates commented on the practical difficulties of awarding compensation in cases where the offender has limited means. One magistrate suggested that compensation should be awarded according to the loss suffered and not take account of the means of the offender, and a magistrates' bench noted that awarding a low sum may give the impression that the impact on the victim has not been appreciated.

The Council noted these points and acknowledged that it can be difficult for courts to award an appropriate amount of compensation in cases where the offender's means are limited and that there is a danger in such cases of giving the impression that the impact on the victim has not been fully appreciated. The Council concluded that these difficulties do not justify failing to refer to the statutory duty in guidelines, rather that they make it all the more important that courts should give reasons when not awarding compensation in relevant cases.

The Council has therefore decided to use the wording proposed in the consultation.

The changes to the wording on compensation will be made to all relevant guidelines on or soon after 1 April 2022.

Impact

The change is not expected to affect the number of compensation orders made or the amounts awarded, however, if it did, it would be a result of courts carrying out a statutory duty.

Confiscation

The issue

Consultation responses and research with sentencers during the development of the guidelines for the offence of unauthorised use of a trade mark showed that the wording used in guidelines relating to confiscation was not always as clear as it could be.

There are 21 other guidelines that mention confiscation and the wording used in these guidelines varies. The Council consulted on using the following wording in all relevant guidelines:

Confiscation orders under the Proceeds of Crime Act 2002 may only be made by the Crown Court. The Crown Court must proceed with a view to making a **confiscation order** if it is asked to do so by the prosecutor or if the Crown Court believes it is appropriate for it to do so.

Where, following conviction in a magistrates' court, the prosecutor applies for the offender to be committed to the Crown Court with a view to a confiscation order being considered, the magistrates' court must commit the offender to the Crown Court to be sentenced there (section 70 of the Proceeds of Crime Act 2002). Where, but for the prosecutor's application under s.70, the magistrates' court would have committed the offender for sentence to the Crown Court anyway it must say so. Otherwise the powers of sentence of the Crown Court will be limited to those of the magistrates' court.

Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).
(See Proceeds of Crime Act 2002 sections 6 and 13)

The court should also consider whether to make [ancillary orders](#).

The responses and subsequent changes

Most respondents supported the suggestion. One magistrates' bench queried whether the power to make a confiscation order could be extended (or re-introduced) to magistrates' courts. This would be a matter for government (section 97 of the Serious Organised Crime and Police Act 2005 confers a power on the Secretary of State to make provision for magistrates' courts to impose confiscation orders but, to date, no such order has been made).

A barrister suggested that mention should be made of the power in relation to summary offences. The Council noted that under section 70 of the Proceeds of Crime Act 2002 magistrates' courts can commit a case to the Crown Court with a view to confiscation, including for a summary only offence, and agreed that the wording should make this clear.

Several respondents mentioned the importance of stressing that magistrates' courts must make it clear if they would have committed an either-way offence anyway. The Council felt that it would be helpful to break up the text so that this part of the wording appears in a separate paragraph.

Taking into account these points, the following wording relating to confiscation was agreed for all relevant guidelines:

Confiscation orders under the Proceeds of Crime Act 2002 may only be made by the Crown Court. The Crown Court must proceed with a view to making a **confiscation order** if it is asked to do so by the prosecutor or if the Crown Court believes it is appropriate for it to do so.

Where, following conviction in a magistrates' court, the prosecutor applies for the offender to be committed to the Crown Court with a view to a confiscation order being considered, the magistrates' court must commit the offender to the Crown Court to be sentenced there (section 70 of the Proceeds of Crime Act 2002). This applies to summary only and either-way offences.

Where, but for the prosecutor's application under s.70, the magistrates' court would have committed the offender for sentence to the Crown Court anyway it must say so. Otherwise the powers of sentence of the Crown Court will be limited to those of the magistrates' court.

Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).
(See Proceeds of Crime Act 2002 sections 6 and 13)

The changes to the wording on confiscation will be made to all relevant guidelines on or soon after 1 April 2022.

Impact

The consultation document stated:

There are no published figures for the number of confiscation orders made but the proposed changes to wording in guidelines is unlikely to influence the making of confiscation orders – the changes simply seek to aid clarity and transparency.

The Prison Reform Trust questioned this assertion, saying: 'we are concerned that there are currently insufficient measures to enable effective monitoring of this change. Yet despite this admission consultees are being asked to take on trust that this amendment will not lead to a change in their use.'

The Council is of the view that while the lack of available data relating to confiscation orders is regrettable, it is not a justification for failing to make changes which will aid clarity and transparency in sentencing guidelines.

Racially or religiously aggravated offences

The issue

In the new assault guidelines (in force from 1 July 2021) a separate step has been created for the uplift for racially or religiously aggravated/ emergency worker offences (see for example [Assault occasioning actual bodily harm / Racially or religiously aggravated ABH](#)). This has given the uplift process prominence and made it easier to signpost the process at the beginning of the guideline.

The Council consulted on amending relevant existing guidelines to create a separate step in the same way.

A new step 3 would be created to contain the information on the process for applying an uplift for the racially or religiously aggravated versions of the offences. Subsequent steps would be renumbered. The following would be added at the beginning of the guideline to signpost the uplift step:

For racially or religiously aggravated offences the category of the offence should be identified with reference to the factors below, and the sentence increased in accordance with the guidance at Step 3

The guidelines it would apply to are:

- criminal damage (under £5,000) and criminal damage (over £5,000)
- s4, s4A and s5 Public Order Act offences
- harassment/ stalking and harassment/ stalking (with fear of violence)

The responses and subsequent changes

Respondents were overwhelmingly in favour of this proposal and there were no suggestions for changes.

The Council therefore agreed to make the changes consulted on.

The changes outlined above will be made to all relevant guidelines on or soon after 1 April 2022.

Impact

The proposals will not make a substantive change to the guidelines but creating a separate step will improve clarity and transparency.

Domestic abuse – overarching principles

The issue

The [Domestic Abuse Act 2021](#) creates a statutory definition of domestic abuse for the purposes of that Act.

The Council considered that changes should be made to the Domestic abuse overarching principles guideline to align it with the new statutory definition and that the definition of domestic abuse should be widened (for the purposes of the guideline) to cover situations such as that in [AG Ref R v Tarbox \[2021\] EWCA Crim 224](#). This would make clear that the guideline may apply in situations where there is no ‘personal connection’ as defined in the Act.

The proposed new wording was as follows (paragraphs 2, 3 and 4 were new or revised):

1. This guideline identifies the principles relevant to the sentencing of cases involving domestic abuse. Domestic abuse is a general term describing a range of violent and/or controlling or coercive behaviour.

2. A statutory definition of domestic abuse is provided by [Part 1 of the Domestic Abuse Act 2021](#). In summary domestic abuse is defined for the purposes of that Act as:

Behaviour (whether a single act or a course of conduct) consisting of one or more of:

- physical or sexual abuse;
- violent or threatening behaviour;
- controlling or coercive behaviour;
- economic abuse (any behaviour that has a substantial adverse effect on the victim’s ability to acquire, use or maintain money or other property, or obtain goods or services);
- psychological, emotional or other abuse

between those aged 16 or over:

- who are, or have been married to or civil partners of each other;
- who have agreed to marry or enter into a civil partnership agreement one another (whether or not the agreement has been terminated);
- who are, or have been, in an intimate personal relationship with each other;
- who each have, or have had, a parental relationship in relation to the same child; **or**
- who are relatives.

This definition applies whether the behaviour is directed to the victim or directed at another person (for example, the victim’s child). A victim of domestic abuse can include a child who sees or hears, or experiences the effects of, the abuse, and is related to the primary victim or offender.

3. For the purposes of this guideline domestic abuse includes so-called ‘honour’ based abuse, female genital mutilation (FGM) and forced marriage.

4. The principles in this guideline will also apply to persons living in the same household whose relationship, though not precisely within the categories described in para 2 above, involves a similar expectation of mutual trust and security.
5. Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capabilities for personal gain, depriving them of the means needed for independence, resistance and escape and/or regulating their everyday behaviour.
6. Coercive behaviour is an act or pattern of acts of assault, threats, humiliation (whether public or private) and intimidation or other abuse that is used to harm, punish, or frighten the victim. Abuse may take place through person to person contact, or through other methods, including but not limited to, telephone calls, text, email, social networking sites or use of GPS tracking devices.
7. Care should be taken to avoid stereotypical assumptions regarding domestic abuse. Irrespective of gender, domestic abuse occurs amongst people of all ethnicities, sexualities, ages, disabilities, religion or beliefs, immigration status or socio-economic backgrounds. Domestic abuse can occur between family members as well as between intimate partners.
8. Many different criminal offences can involve domestic abuse and, where they do, the court should ensure that the sentence reflects that an offence has been committed within this context.

The responses and subsequent changes

The majority of respondents were in favour of the proposals and one specifically welcomed the new paragraph 4. The Justices' Legal Advisers and Court Officers' Service, however, expressed concern about the inclusion of paragraph 4:

Whilst appreciating the comments in the Tarbox case (para 21), we do not agree that the guideline should be expressly applicable to the situation described above. We are concerned that to apply the guideline to this type of situation is to significantly extend the concept of 'domestic abuse', a concept which Parliament has already specifically defined in wide terms in Part 1 Domestic Abuse Act 2021.

In Tarbox the Court of Appeal found that the killing of the victim represented a violation of the trust and security which, in the circumstances of the case, the victim could reasonably have expected to exist between her and the defendant. However, and notwithstanding the fact that the defendant and victim had twice previously had sexual relations, the Court was satisfied that the nature of their relationship did not fall within the ambit of the existing Domestic Abuse guideline. In view of these observations, we would suggest that a violation/breach of trust and/or security should be regarded as an aggravating feature to the specific offence being sentenced, and should not be used to effectively extend the very clearly defined statutory definition of 'domestic abuse'.

The Council carefully considered this submission but remained of the view that the principles outlined in the guideline should properly apply in a wider range of situations than the definition of domestic abuse in the Domestic Abuse Act 2021. In reaching this view the Council noted that the definition in the Act is expressly for the purposes of the Act only and that all other respondents were content with the inclusion of paragraph 4.

The Legal Committee of HM Council of District Judges (Magistrates' Courts) suggested that the guideline should make it clear if it is adopting the definition of domestic abuse in the Domestic Abuse Act rather than just stating how it is defined for the purposes of that Act.

The Council agreed that this could be made clearer and has amended the wording of paragraph 2 to include: 'This guideline applies (but is not limited) to cases which fall within the statutory definition of domestic abuse as defined by Part 1 of the Domestic Abuse Act 2021.' Paragraph 3 has been amended to include the word 'also' to make it clear that so-called 'honour' based abuse, female genital mutilation (FGM) and forced marriage are included whether or not they fall within the statutory definition at paragraph 2.

One respondent sought further guidance on what precise circumstances were covered by the guideline. Another suggested that the guideline should also apply to offenders under the age of 16.

The Council considered that any attempt in the guideline to define further what circumstances are or are not covered by the guideline would be unhelpful. The guideline is applicable to offenders aged 16 and over – the Council had not consulted on any change to the applicability of the guideline and did not feel that this would be a change that could be contemplated without consultation.

Taking account of all the points raised the Council agreed the following wording (paragraphs 2, 3 and 4 are new or revised):

1. This guideline identifies the principles relevant to the sentencing of cases involving domestic abuse. Domestic abuse is a general term describing a range of violent and/or controlling or coercive behaviour.

2. This guideline applies (but is not limited) to cases which fall within the statutory definition of domestic abuse as defined by [Part 1 of the Domestic Abuse Act 2021](#). In summary domestic abuse is defined for the purposes of that Act as:

Behaviour (whether a single act or a course of conduct) consisting of one or more of:

- physical or sexual abuse;
- violent or threatening behaviour;
- controlling or coercive behaviour;
- economic abuse (any behaviour that has a substantial adverse effect on the victim's ability to acquire, use or maintain money or other property, or obtain goods or services);
- psychological, emotional or other abuse

between those aged 16 or over:

- who are, or have been married to or civil partners of each other;
- who have agreed to marry or enter into a civil partnership agreement one another (whether or not the agreement has been terminated);
- who are, or have been, in an intimate personal relationship with each other;
- who each have, or have had, a parental relationship in relation to the same child; **or**
- who are relatives.

This definition applies whether the behaviour is directed to the victim or directed at another person (for example, the victim's child). A victim of domestic abuse can include a child who sees or hears, or experiences the effects of, the abuse, and is related to the primary victim or offender.

3. For the purposes of this guideline domestic abuse also includes so-called 'honour' based abuse, female genital mutilation (FGM) and forced marriage.
4. The principles in this guideline will also apply to persons living in the same household whose relationship, though not precisely within the categories described in para 2 above, involves a similar expectation of mutual trust and security.
5. Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capabilities for personal gain, depriving them of the means needed for independence, resistance and escape and/or regulating their everyday behaviour.
6. Coercive behaviour is an act or pattern of acts of assault, threats, humiliation (whether public or private) and intimidation or other abuse that is used to harm, punish, or frighten the victim. Abuse may take place through person to person contact, or through other methods, including but not limited to, telephone calls, text, email, social networking sites or use of GPS tracking devices.
7. Care should be taken to avoid stereotypical assumptions regarding domestic abuse. Irrespective of gender, domestic abuse occurs amongst people of all ethnicities, sexualities, ages, disabilities, religion or beliefs, immigration status or socio-economic backgrounds. Domestic abuse can occur between family members as well as between intimate partners.
8. Many different criminal offences can involve domestic abuse and, where they do, the court should ensure that the sentence reflects that an offence has been committed within this context.

The changes set out above will be made to the Domestic abuse overarching guideline on or soon after 1 April 2022.

Impact

The changes which incorporate the statutory definition of domestic abuse are not expected to have an impact on sentence levels. The addition of wording to expand the application of the guideline to situations where there is no familial or intimate personal relationship could result in a slight uplift in sentence levels for such cases. There is no data on how often this definition would apply, but it is unlikely to be common. Any changes in sentencing practice that may result would be attributable to legislation and case law.

Equalities and impact

Equalities

Most of the proposals set out above are for relatively minor or technical changes which are unlikely to have any bearing on equality issues. Only three respondents responded to a question in the consultation paper asking if there were any equality issues relating to the proposals and none identified any issues.

The Council is currently undertaking work to consider how sentencing in general and sentencing guidelines in particular may have an impact on protected characteristics in relation to both offenders and victims. Any recommendations from that work resulting in changes to guidelines will be consulted on separately.

Impact

The Council believes that any impact on prison and probation resources from the changes set out above will be negligible. In view of the nature of the changes, a separate resource assessment has not been produced but a brief discussion on impact has been included in relation to each proposal.

Conclusion and next steps

As a result of the consultation the Council will make the changes set out in the sections above. The amended versions of the guidelines will be published on the Council's website (<https://www.sentencingcouncil.org.uk>) on or soon after 1 April 2022 and come into force on publication.

It is customary for the Council to publish new guidelines in advance of them coming into force, but as these are all modifications to existing guidelines, it has not been possible to do this (without causing unnecessary confusion by having two versions of the same guideline in existence at once). The Council has given prior notice of the changes to the Judicial College so that they can update any relevant training materials.

The consultation included a general question inviting comment on the proposals. Some respondents used this to make suggestions for future changes to guidelines. The Council welcomes these and will consider them and other matters that have come to its attention as part of the next annual miscellaneous amendments consultation which is expected to take place in the autumn of 2022.

Consultation respondents

Amanda Coneley
Anon
Bruce Woodhouse
Chief Magistrate
Consultation Committee at Highbury Corner (North London bench)
Council of Her Majesty's Circuit Judges
David S King JP
Gary Knight
Justices' Legal Advisers and Court Officers' Service
Jonathan Turner
Julia Hurrell
Legal Committee of HM Council of District Judges (Magistrates' Courts)
Louis Groves
Met Police
Ministry of Justice
Neil Corre, Redbourne Chambers
Peter Wilson
Prison Reform Trust
Prof Alisdair A. Gillespie JP
West London Magistrates' Bench

