

# **Miscellaneous amendments to sentencing guidelines**

## **Consultation**

September 2021

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Published on 9 September 2021

The consultation will end on 2 December 2021

# About this consultation

- To:** This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.
- Duration:** From 9 September 2021 to 2 December 2021
- Enquiries (including requests for the paper in an alternative format) to:** Office of the Sentencing Council  
Royal Courts of Justice  
(full address as below)  
Tel: 020 7071 5793  
Email: [info@sentencingcouncil.gov.uk](mailto:info@sentencingcouncil.gov.uk)
- How to respond:** Please send your response by 2 December 2021 to:  
Ruth Pope  
Office of the Sentencing Council  
Room EB20  
Royal Courts of Justice  
Strand  
London WC2A 2LL  
Email: [consultation@sentencingcouncil.gov.uk](mailto:consultation@sentencingcouncil.gov.uk)
- Additional ways to feed in your views:** You can respond using an online questionnaire which can be found at:  
[www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)
- Response paper:** Following the conclusion of this consultation exercise, a response will be published at: [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)
- Freedom of information:** We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.  
In addition, responses may be shared with the Justice Committee of the House of Commons.  
Our [privacy notice](#) sets out the standards that you can expect from the Sentencing Council when we request or hold personal information (personal data) about you; how you can get access to a copy of your personal data; and what you can do if you think the standards are not being met.



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# Introduction

## What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines which courts in England and Wales must follow when passing a sentence. The Council consults on its proposed guidelines before they come into force and on any proposed changes to existing guidelines.

## What is this consultation about?

The Sentencing Council has been in existence for over ten years and has built up a large body of sentencing guidelines that are in use in courts throughout England and Wales. There are inevitably issues that arise with existing guidelines over time and the Council has decided to hold an annual consultation on miscellaneous amendments to guidelines. This is the first of these annual consultations in which the Council seeks the views of guideline users to proposals to make amendments to existing guidelines.

The proposed changes relate to magistrates' courts and the Crown Court.

## Which offences and guidelines are covered by the proposed changes?

The proposals 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 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) guidelines.
- 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 do not apply to guidelines for sentencing children and young people.

## Responding to the consultation

Through this consultation process, the Council is seeking views on the usefulness, accuracy and clarity of the proposed changes and anything else that you think should be considered.

In the following sections the proposed changes are outlined in detail and you will be asked to give your views. You can give your views by answering some or all of the questions

below either by email to [consultation@sentencingcouncil.gov.uk](mailto:consultation@sentencingcouncil.gov.uk) or by using the online consultation at <https://consult.justice.gov.uk/>.

**What else is happening as part of the consultation process?**

This is a 12 week public consultation. As this is a relatively limited consultation in terms of its scope, the Council has not planned any consultation meetings but would be happy to arrange a meeting to discuss any of the issues raised if this would be helpful. Once the results of the consultation have been considered, the updated guidelines will be published and used by all courts.

***Question 1: What is your name?***

***Question 2: What is your email address?***

***Question 3: What is your organisation?***

# Breach of a sexual harm prevention order

## The issue

In the case of *R v McLoughlin* [2021] EWCA Crim 165, the Court of Appeal (Criminal Division) noted that a judge at first instance had fallen into error by purporting to vary a sexual harm prevention order (SHPO) when dealing with a breach of that order. The court stated:

For an existing sexual harm prevention order to be amended an application has to be made to the appropriate court for an order. The people who can make such an application are strictly defined within the Sexual Offences Act 2003. For our purposes, the relevant person is the Chief Officer of Police for the area in which the defendant resides. No such application was made. The judge, for what we can see were entirely understandable reasons given the way in which the trial had developed, in effect made the amendments on his own motion. He had no power to do so.

The Council felt that while the [Breach of a sexual harm prevention order guideline](#) did not suggest that such a power existed, a clear statement at step 6 would avoid others falling into a similar error.

## The proposed new wording (additional wording highlighted)

### 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.

In 2019 around 930 adult offenders were sentenced for breaching orders to which this guideline would apply.<sup>1</sup> The change that is proposed will not affect sentence levels, the only impact it may have is to prevent courts falling into error.

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<sup>1</sup> Unless stated otherwise, figures quoted within the paper are sourced from the Ministry of Justice Outcomes by Offence tool 2020, found here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/987715/outcomes-by-offence-2020.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987715/outcomes-by-offence-2020.xlsx)

***Question 4: Do you agree with the proposed change to the Breach of a sexual harm prevention order guideline? If not, please provide any alternative suggestions.***

# Compensation

## The issue

An article in the New Law Journal (171 NLJ 7927, p19) referred to the provisions regarding making compensation orders consolidated (with minor amendments) into the Sentencing Code. The author noted 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 considers that this is an omission that should be rectified and therefore proposes to add a reference to that duty to all relevant guidelines.

## The proposed new wording (additional wording highlighted)

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](#)).**

In 2019, around 131,400 adult offenders received a compensation order. The additional wording 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 rather than as a result of the change to guidelines.

***Question 5: Do you agree with the proposal to add a reference to the duty to give reasons where compensation is not awarded? If not, please provide any alternative suggestions.***

# Confiscation

## The issue

Consultation responses and research with sentencers during the development of the recently published 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 (see the list below) and the wording used in these guidelines varies.

[Production of a controlled drug/ Cultivation of cannabis plant](#)

[Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug](#)

[Importing or exporting a psychoactive substance](#)

[Permitting premises to be used](#)

[Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another](#)

[Supplying, or offering to supply, a psychoactive substance/ Possession of psychoactive substance with intent to supply](#)

[Individuals: Unauthorised or harmful deposit, treatment or disposal etc of waste/ Illegal discharges to air, land and water](#)

[Organisations: Unauthorised or harmful deposit, treatment or disposal etc of waste/ Illegal discharges to air, land and water](#)

[Fraud](#)

[Benefit Fraud](#)

[Bribery](#)

[Possession of articles for use in frauds/ Making or supplying articles for use in frauds](#)

[Money laundering](#)

[Revenue fraud](#)

[Abstracting electricity](#)

[Going equipped for theft or burglary](#)

[Handling stolen goods](#)

[Making Off Without Payment](#)

[Theft – general](#)

[Theft from a shop or stall](#)

[Corporate offenders: fraud, bribery and money laundering](#)

## The proposed new wording

The Council decided that the following wording should be used in all relevant guidelines:

Where the offence has resulted in personal injury, loss or damage the court must consider whether to make a **compensation order** and must give reasons if it does not do so ([section 55 of the Sentencing Code](#)).

**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](#).

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.

***Question 6: Do you agree with the proposed change to the wording on confiscation orders in guidelines? If not, please provide any alternative suggestions.***

# 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 considered that existing guidelines should be amended to create a separate step in the same way.

## The proposal

In the following guidelines 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.

[Criminal damage \(other than by fire\) value not exceeding £5,000/ Racially or religiously aggravated criminal damage](#)

[Criminal damage \(other than by fire\) value exceeding £5,000/ Racially or religiously aggravated criminal damage](#)

[Threatening behaviour – fear or provocation of violence/ Racially or religiously aggravated threatening behaviour – fear or provocation of violence](#)

[Disorderly behaviour with intent to cause harassment, alarm or distress/ Racially or religiously aggravated disorderly behaviour with intent to cause harassment, alarm or distress](#)

[Disorderly behaviour/ Racially or religiously aggravated disorderly behaviour](#)

[Harassment/ Stalking/ Racially or religiously aggravated harassment/stalking](#)

[Harassment \(fear of violence\)/ Stalking \(fear of violence\)/ Racially or religiously aggravated harassment \(fear of violence\)/stalking \(fear of violence\)](#)

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

In 2019 around 4,600 adult offenders were sentenced for racially or religiously aggravated offences covered by these guidelines. The proposals will not make a substantive change to the guidelines but creating a separate step will improve clarity and transparency.

***Question 7: Do you agree with the proposal to create a separate step for the uplift for racially or religiously aggravated offences? If not, please provide any alternative suggestions.***

# Domestic abuse – overarching principles

## The issue

The [Domestic Abuse Act 2021](#) creates a statutory definition of domestic abuse for the purposes of that Act. At the time of writing the definition is in force in relation to some, but not all, purposes in the Act. Section 1 of the Act states:

### Definition of “domestic abuse”

- (1) This section defines “domestic abuse” for the purposes of this Act.
- (2) Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if—
  - (a) A and B are each aged 16 or over and are personally connected to each other, and
  - (b) the behaviour is abusive.
- (3) Behaviour is “abusive” if it consists of any of the following—
  - (a) physical or sexual abuse;
  - (b) violent or threatening behaviour;
  - (c) controlling or coercive behaviour;
  - (d) economic abuse (see subsection (4));
  - (e) psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

- (4) “Economic abuse” means any behaviour that has a substantial adverse effect on B’s ability to—
  - (a) acquire, use or maintain money or other property, or
  - (b) obtain goods or services.
- (5) For the purposes of this Act A’s behaviour may be behaviour “towards” B despite the fact that it consists of conduct directed at another person (for example, B’s child).
- (6) References in this Act to being abusive towards another person are to be read in accordance with this section.
- (7) For the meaning of “personally connected”, see section 2.

### 2 Definition of “personally connected”

- (1) For the purposes of this Act, two people are “personally connected” to each other if any of the following applies—
  - (a) they are, or have been, married to each other;
  - (b) they are, or have been, civil partners of each other;
  - (c) they have agreed to marry one another (whether or not the agreement has been terminated);
  - (d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);
  - (e) they are, or have been, in an intimate personal relationship with each other;
  - (f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));
  - (g) they are relatives.

(2) For the purposes of subsection (1)(f) a person has a parental relationship in relation to a child if—

- (a) the person is a parent of the child, or
- (b) the person has parental responsibility for the child.

(3) In this section—

“child” means a person under the age of 18 years;

“civil partnership agreement” has the meaning given by section 73 of the Civil Partnership Act 2004;

“parental responsibility” has the same meaning as in the Children Act 1989 (see section 3 of that Act);

“relative” has the meaning given by section 63(1) of the Family Law Act 1996.

The [Domestic abuse – overarching principles guideline](#) currently states:

1. This guideline identifies the principles relevant to the sentencing of cases involving domestic abuse. There is no specific offence of domestic abuse. It is a general term describing a range of violent and/or controlling or coercive behaviour.

2. A useful, but not statutory, definition of domestic abuse presently used by the Government is set out below. The Government definition includes so-called ‘honour’ based abuse, female genital mutilation (FGM) and forced marriage.

Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to: psychological, physical, sexual, financial, or emotional.

3. 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.

4. 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.

5. 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.

6. 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 proposal

The Council considered that changes should be made to the 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 is as follows (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. 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 Ministry of Justice does not hold sentencing volumes for offences that involve domestic abuse. Figures published by the Crown Prosecution Service indicate that domestic abuse was a factor in around 47,500 convictions in the year ending March 2020 and although different counting rules apply, this indicates that the Domestic abuse guideline may be relevant to a similar number of sentences per year.<sup>2</sup> The changes proposed 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 is unlikely to be common. Any changes in sentencing practice that may result would be attributable to legislation and case law.

***Question 8: Do you agree with the proposed changes to the Domestic Abuse guideline? If not, please provide any alternative suggestions.***

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<sup>2</sup> Figures quoted here are from the CPS Violence against women and girls (VAWG) annual publication (year ending March 2020), more information can be found here: <https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2019-2020>

# Equalities and impact

## Equalities

Most of the proposals within this consultation are for relatively minor or technical changes which are unlikely to have any bearing on equality issues. We would welcome comments on any equality issues relating to the proposals that we have missed.

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.

***Question 9: Are there any equalities issues relating to the proposals that should be addressed?***

## Impact

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

***Question 10: Do you have any comments on the likely impact of the proposals on sentencing practice?***

## General observations

We would also like to hear any other views you have on the proposals that you have not had the opportunity to raise in response to earlier questions.

***Question 11: Are there any other comments you wish to make on the proposals?***



