

**Sentencing Council meeting:**  
**Paper number:**

**30 July 2021**  
**SC(21)JUL07 – Miscellaneous guideline  
amendments**

**Lead Council member:**  
**Lead official:**

**Jo King**  
**Ruth Pope**

## **1 ISSUE**

1.1 The Council agreed in May to have an annual consultation on overarching issues and miscellaneous minor updates to guidelines and that the first consultation would run from September this year. A number of issues were considered for inclusion and a provisional list was drawn up.

1.2 A working group met in June to discuss the detail of the proposals and to make recommendations to the full Council. The aim is to sign off the project for consultation at this meeting.

1.3 The plan is for the consultation to run from September to November. Responses can then be considered at the December and January meetings with changes coming into effect from 1 April 2022.

## **2 RECOMMENDATION**

2.1 That the Council agrees to consult on the following amendments to guidelines:

- i. [Breach of SHPO](#): Adding a note 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.
- ii. Compensation and confiscation: Adding wording relating to giving reasons if compensation is not awarded and providing fuller information on confiscation
- iii. Racially or religiously aggravated offences: making the uplift for racial/ religious aggravation a separate step
- iv. [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.
- v. Adding an interim note to the [Animal cruelty guideline](#) relating to the increase in the maximum sentence [**subject to any decision made to proceed with revising the guideline**].

2.2 The Council will also be asked to confirm that no action should be taken at present in relation to

- i. The expanded explanation for the mitigating factor 'Involved through coercion, intimidation or exploitation'
- ii. The [Vehicle licence/registration fraud guideline](#)

2.3 Finally the Council will be asked to confirm that the [Identity documents – possess false/ another's/ improperly obtained guideline](#) can be deleted from the MCSG without consultation.

### 3 CONSIDERATION

#### *Breach of a sexual harm prevention order*

3.1 The Council agreed to add a note to this guideline to clarify that a court dealing with a breach of a SHPO does not have a power to make a fresh order or vary an existing order. The issue that remained to be resolved was the wording of that note – the proposed wording is highlighted 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.

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

#### **Question 1: Should the breach of SHPO guideline be amended as proposed?**

##### *Compensation and confiscation*

3.3 The Council agreed to use the following wording in at the ancillary orders step of all relevant guidelines (additional wording highlighted):

---

<sup>1</sup> Figures on volumes presented in this paper are based on 2019 data instead of 2020. This is because volumes of offenders sentenced in 2020 are generally lower and are likely to have been affected by the pandemic.

In all cases, the court should consider whether to make [compensation](#) and/or other ancillary orders. **The court must give reasons if it decides not to order compensation ([Sentencing Code, s.55](#)).**

3.4 In 2019, around 130,000 offenders were sentenced to pay compensation. The additional wording is not expected to effect 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.

3.5 Consultation responses for the forthcoming Trade mark guideline showed that there was some confusion (particularly among magistrates) about confiscation. To address this the Council agreed the following wording relating to confiscation and compensation:

**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.

Where the offence has resulted in 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](#)).

If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).

3.6 The Council agreed that it would be useful to review the wording on confiscation in other guidelines and to consult on using similar wording.

3.7 There are 21 other guidelines that mention confiscation:

Guideline	Existing wording
<a href="#">Production of a controlled drug/ Cultivation of cannabis plant</a>  <a href="#">Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug</a>	<p>In all cases, the court is required to consider confiscation where the Crown invokes the process or where the court considers it appropriate. It should also consider whether to make ancillary orders.</p>

<p><a href="#">Importing or exporting a psychoactive substance</a></p> <p><a href="#">Permitting premises to be used</a></p> <p><a href="#">Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another</a></p> <p><a href="#">Supplying, or offering to supply, a psychoactive substance/ Possession of psychoactive substance with intent to supply</a></p>	
<p><a href="#">Individuals: Unauthorised or harmful deposit, treatment or disposal etc of waste/ Illegal discharges to air, land and water</a></p> <p><a href="#">Organisations: Unauthorised or harmful deposit, treatment or disposal etc of waste/ Illegal discharges to air, land and water</a></p>	<p>Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate. Confiscation must be dealt with before any other fine or financial order (except compensation).</p> <p>(See sections 6 and 13 Proceeds of Crime Act 2002)</p>
<p><a href="#">Fraud</a></p> <p><a href="#">Benefit Fraud</a></p> <p><a href="#">Bribery</a></p> <p><a href="#">Possession of articles for use in frauds/ Making or supplying articles for use in frauds</a></p> <p><a href="#">Money laundering</a></p> <p><a href="#">Revenue fraud</a></p> <p><a href="#">Abstracting electricity</a></p> <p><a href="#">Going equipped for theft or burglary</a></p> <p><a href="#">Handling stolen goods</a></p> <p><a href="#">Making Off Without Payment</a></p> <p><a href="#">Theft – general</a></p> <p><a href="#">Theft from a shop or stall</a></p>	<p>The court must proceed with a view to making a confiscation order if it is asked to do so by the prosecutor or if the court believes it is appropriate for it to do so.</p> <p>Where the offence has resulted in loss or damage the court must consider whether to make a compensation order.</p> <p>If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).</p> <p>The court may also consider whether to make ancillary orders.</p>
<p><a href="#">Corporate offenders: fraud, bribery and money laundering</a></p>	<p>Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate. 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)</p>

3.8 The working group considered that the fullest wording should be used in all guidelines:

Where the offence has resulted in 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](#).

3.9 There are no published figures for the number of confiscation orders made, but the best information we have suggests that around 2,200 offenders were sentenced to a confiscation order in 2019 (we would not be able to quote that figure in any published document). The proposed changes to wording in guidelines is unlikely to affect the number of confiscation orders made – the changes simply seek to aid clarity and transparency.

#### **Question 2: Is the Council content to consult on using the above wording in all relevant guidelines?**

##### *Uplift for racially or religiously aggravated offences*

3.10 The Council previously agreed that existing guidelines should be amended to create a separate step for the uplift for racial/ religious aggravation as has been done with the new assault guidelines. 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 \(with fear of violence\)](#)

3.11 In 2019 around 4,600 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.

### *Victims of modern slavery*

3.12 During the consultation on the modern slavery guidelines, a magistrate provided some valuable input related to academic research he had undertaken on different types of modern slavery victim. He wanted to ensure that sentencing guidelines generally took into account the possibility of offenders themselves being the victims of modern slavery/coercion. This point was echoed in a response to the 'What Next for the Sentencing Council' consultation by another magistrate, who cited modern slavery as well as domestic coercion and control as matters magistrates should be aware of.

3.13 Since 2019, we have had an expanded explanation for the mitigating factor 'Involved through coercion, intimidation or exploitation' which states:

- Where this applies it will reduce the culpability of the offender.
- This factor may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts.
- Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.
- This factor **may** indicate that the offender is vulnerable and would find it more difficult to cope with custody or to complete a community order.

3.14 The Council previously agreed to explore whether there was anything in the academic research referred to above to indicate that changes should be made to the expanded explanation. In the limited time available, we have looked at the research and it appears that the expanded explanation covers the relevant points albeit without going into great detail or giving a comprehensive list of examples. It is not immediately apparent without more evidence what changes could be made that would address the concerns raised.

3.15 An evaluation of the expanded explanations will be undertaken in 2022, and the working group agreed that it was preferable to await evidence from that before making changes.

**Question 3: Does the Council agree that any changes to the expanded explanation should await the evaluation to be conducted in 2022?**

### *The Domestic Abuse Act*

3.16 The [Domestic Abuse Act 2021](#) creates a statutory definition of domestic abuse; we understand that this will be commenced this summer.<sup>2</sup> The [Domestic abuse – overarching principles guideline](#) currently states:

---

<sup>2</sup> The definition is in force from 5 July 2021 for the purposes of: sections 75 (strategy for prosecution and management of offenders), 76 (polygraph conditions for offenders released on licence) and 83

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.

3.17 The definition in the legislation is:

### **1 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;

---

(report on the use of contact centres in England) of the Act; and [sections 177](#) (whether it is reasonable to continue to occupy accommodation), [179](#) (duty of local housing authority in England to provide advisory services), [189](#) (priority need for accommodation) and [198](#) (referral of case to another local housing authority) of the [Housing Act 1996](#) and [article 6](#) of the [Homelessness \(Priority Need for Accommodation\) \(England\) Order 2002](#).

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.

3.18 The working group considered changes that could be made to the guideline to align it with the new statutory definition. The working group also recommended consulting on a slightly wider definition of domestic abuse 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.

3.19 The proposed new 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. 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. This guideline may also apply to persons who are in the same household whose relationship, while not one of those described in paragraph 2 above, could be described as domestic.

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.

3.20 While we do not have sentencing volumes for offences that involve domestic abuse within MoJ figures, figures from the CPS indicate that domestic abuse was a factor in around 48,000 convictions in the year 2019/2020 and although different counting rules apply, it is indicative that the Domestic abuse guideline may be relevant to a similar number of sentences per year. 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. Additionally, this change reflects case law and so any changes in sentencing practice would be attributable to legislation and case law.

**Question 4: Does the Council agree to consult on the proposed changes to the domestic abuse guideline?**

*Animal Cruelty*

3.21 The Animal Welfare (Sentencing) Act 2021 increases the maximum sentence for some offences covered by the [Animal cruelty guideline](#) (in the MCSG) from six months to five years. The guideline covers offences under sections 4, 8 and 9 of the Animal Welfare Act 2006. The 2021 Act which came into effect on 29 June increases the maximum sentence for sections 4 to 8 but not section 9. This means that ultimately there would need to be two guidelines to replace the existing one.

3.22 The Council agreed that when the changes come into effect to add a note to the existing guideline saying that the sentence levels no longer apply to offences under sections 4 and 8 and, as part of this consultation, to consult on an interim note that suggests how the existing guideline should be adapted pending revised guidelines.

3.23 A meeting has been held with officials from Defra and the Welsh Government to establish the rationale behind the change. The chief motivation for the change appears to be that current sentencing powers are insufficient in the most serious cases and that sentencing powers in England and Wales are significantly lower than elsewhere in the UK and Europe. **Annex A** contains a summary of some background information on the Act.

3.24 According to officials, the expectation was that there would not necessarily be more offenders sentenced to prison for these offences, but that prison sentences would be longer in the worst cases. However, it was acknowledged that sentencing could not be a 'cliff edge' whereby most offenders received non-custodial sentences but those who did go into custody would receive sentences of several years.

3.25 An analysis of 2019 sentencing data shows that the majority of cases covered by the guideline (around 550 offenders accounting for 80 per cent) were sentenced under section 4 (causing, permitting or failing to prevent unnecessary suffering), the remaining 20 per cent were sentenced for section 9 offences. For section 4 offences in 2019, 36 per cent of offenders received a community order, 27 per cent received suspended sentence orders and 11 per cent were sentenced to immediate custody.

3.26 The following note was added to the guideline in the MCSG on 30 June:

**Note**

For offences under section 4 (unnecessary suffering) and section 8 (fighting etc) **committed on or after 29 June 2021** the maximum penalty is five years' custody. The sentence levels in this guideline are therefore unlikely to apply to these offences and very serious cases should be committed to the Crown Court for sentence.

3.27 The working group agreed to consult on adding the following interim guidance to the MCSG and the Crown Court sentencing guidelines:

**Interim guidance – offences committed on or after 29 June 2021.**

The maximum penalty for the following offences increased from six months to five years from 29 June 2021:

- Causing unnecessary suffering (section 4, Animal Welfare Act 2006);
- Carrying out a non-exempted mutilation (section 5, Animal Welfare Act 2006);
- Docking the tail of a dog except where permitted (section 6(1) and 6(2), Animal Welfare Act 2006);
- Administering a poison to an animal (section 7, Animal Welfare Act 2006); and
- Involvement in an animal fight (section 8, Animal Welfare Act 2006).

The offences listed above **committed on or after 29 June 2021** will be triable either way (they can be dealt with in magistrates' courts or the Crown Court).

Currently offences contrary to section 4 (causing unnecessary suffering) and section 8 (involvement in an animal fight) are covered by a Sentencing Council guideline.

The guideline also applies to offences contrary to section 9 (breach of duty of person responsible for animal to ensure welfare) – the maximum sentence for the section 9 offence remains six months' custody and the guideline therefore remains in force for that offence.

The Sentencing Council will develop and consult on a revised guideline for the offences with a five year maximum. Until that revised guideline is available, courts may continue to refer to the [existing guideline](#) to assist in the assessment of the level of seriousness of a case, but the sentence table will be of limited use in determining the sentence.

Information from the passage of the legislation in Parliament indicates that the increase in the maximum sentence was designed to provide for higher penalties for the most serious offences. It was not intended to increase significantly the number of offenders who receive custodial sentences.

Examples of what **may** constitute the most serious cases can include, but are not limited to:

- Deliberate, calculating and sadistic behaviour
- The use of dog fighting to fuel organised crime
- Other organised or systematic cruelty

If considering a community or custodial sentence, courts **must** follow the [Imposition guideline](#). For cases of lower seriousness, a fine may continue to be the most appropriate sentence.

**Question 5: Subject to any decision to prioritise a revision of the Animal Cruelty guideline does the Council agree to consult on the proposed interim guidance?**

*Vehicle licence/registration fraud*

3.28 In July 2018 the Council decided, subject to checking with key stakeholders, to remove the [Vehicle licence/registration fraud guideline](#) in the MCSG. The decision was made because the guideline was one of the few remaining Sentencing Guidelines Council (SGC) guidelines for an either way offence in the MCSG and data at the time showed that the offence was rarely sentenced. The number of cases had dropped from around 860 in 2006 to around 40 in 2016. This was assumed to be because of changes to the legislation in 2014 which reflected the removal of the requirement to display a 'tax disc' and less reliance being placed on paper documents generally.

3.29 Contact was made with DVLA in 2018 and we were told that they had no objection to the removal of the guideline, provided that it was not a barrier to the offence being prosecuted. Despite this the guideline was not removed. Looking at it again recently with a view to possibly consulting on removing it as part of this exercise, it appears that volumes have increased back up to 2011 levels (around 100 per year) and so the rationale for removing it is less clear. The guideline on the website was viewed around 8,700 times in the last year.

3.30 The working group considered that the guideline should be retained and consideration be given to revising it at a later date.

**Question 6: Does the Council agree that the Vehicle registration fraud guideline should be retained pending revision at a later date?**

*Identity documents*

3.31 We recently received an email from a district judge suggesting that the [Identity documents – possess false/ another's/ improperly obtained guideline](#) should be removed. He said as follows:

It is concerned with the offence contrary to s.6 of the Identity Documents Act 2010. Strictly, there is no guideline for that offence, but there remains a guideline for the

offence that it repealed and replaced in section 25(5) of the Identity Cards Act 2006. That guideline states that it was effective from 4 August 2008 (which was when the first iteration of the MCSG issued by the then Sentencing Guidelines Council had effect). I do not know whether there was a corresponding guideline in the Magistrates Association Guidelines that had been in effect from 1 January 2004 and replaced by the MCSG. I also note that there is no corresponding guideline in the Crown Court Guidelines.

The reason that I raise this is not just because the guideline refers to the repealed offence. I do so mainly because the levels of sentence in the guideline are very much lower than those identified by the Court of Appeal in a number of cases. It probably suffices simply to refer you to §§ 22-57 and following in Archbold Crown Court. The guideline makes no differentiation between different types of document (false passports etc being more serious for example than a false gym membership card). The case of Zenasni [2007] EWCA Crim 2165; [2008] 1 Cr. App. R.(S.) 94 for instance makes the point that simple possession of a false passport will ordinarily result in an immediate custodial sentence. Applying the guideline, in my view, could lead to a very different outcome. In theory, magistrates' court should be applying the guideline instead of the decisions of the Court of Appeal. This is problematic, because it creates different sentencing outcomes between magistrates' courts and the Crown Court.

I have a working theory that the guideline was not prepared with false passport cases particularly in mind, that it has been superseded by the various decisions of the Court of Appeal, and that it has existed largely forgotten in the MCSG. I am supported in that view, I think, by the fact that it refers to the repealed offence.

If I am right about that, my suggestion, ultimately, is that this particular guideline should simply be removed from the MCSG. It would, of course, be helpful for all if there was a new guideline for all offences in the 2010 Act; but I recognise that the Council has many other competing priorities.

3.32 The point made is a good one. The timing of a project to produce a suite of immigration offences guidelines has been considered separately but pending that work, in view of the potential for the existing guideline (which was viewed around 5,000 times on the website in the last year) to be misleading, the working group considered that it should be removed and that there is no need to consult on that. If it is removed that fact will be logged on our minor revisions and corrections log which is published on the [website](#) and sent to publishers.

**Question 7: Does the Council agree to delete this guideline without consulting?**

## **4 EQUALITIES**

4.1 As noted at the May meeting, the consultation does not include any proposals expressly relating to equalities. Any suggestions for changes to guidelines specifically related to issues of equality and diversity are being considered separately by the Equality and Diversity working group.

4.2 Most of the proposals within this paper are for relatively minor or technical changes which are unlikely to have any impact on equality issues. A question can be included in the consultation paper asking if there are any equality issues relating to the proposals that we have missed

## **5 IMPACT AND RISKS**

5.1 The impact on prison and probation resources from the changes proposed in this consultation would be negligible. Any increase in sentence levels for animal cruelty offences would be due to the change in legislation rather than any action taken by the Council. In view of the nature of the consultation, no resource assessment will be produced but the consultation document will contain a section on impact which will briefly address the potential impact of each proposal.

5.2 As the number of guidelines and associated material produced by the Council has increased, there is increasingly a risk that guidelines may contain errors or become out of date. The rationale for conducting an annual consultation on miscellaneous issues is to ensure that the guidelines remain current, accurate and useful. It is possible that by carrying out an annual consultation on miscellaneous changes to guidelines the Council will create unrealistic expectations of what changes can be brought about in this way, but this can be addressed in the consultation document and the communications that we issue.

**Question 8: Is this an appropriate way to address impact and risks?**

## Annex A – background to the increase in the maximum sentence for animal cruelty offences

The text of the [Animal Welfare \(Sentencing\) Act 2021](#) is as follows:

### **1 Mode of trial and maximum penalty for certain animal welfare offences**

(1) [Section 32](#) of the [Animal Welfare Act 2006](#) (post-conviction powers: imprisonment or fine) is amended as follows.

(2) In [subsection \(1\)](#) (penalty for offence under any of [sections 4, 5, 6\(1\) and \(2\), 7 and 8](#) of the [Animal Welfare Act 2006](#)), for the words from "on summary conviction" to the end substitute

"—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both."

(3) After [subsection \(4\)](#) insert—

"(4A) In relation to an offence committed before the commencement of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020, the reference in subsection (1)(a) to 12 months is to be read as a reference to 6 months."

(4) In [subsection \(5\)](#), omit "(1)(a)".

A [Commons Library Briefing of 10 March 2021](#) sets out the background to and the history of the legislation. It gives the following information on sentencing trends:

In 2018, 633 people were sentenced for offences under sections 4 to 8 of the Animal Welfare Act 2006 in England and Wales. Of these, 65(10%) were sentenced to immediate custody. In each of the past 10 years, between 6% and 11% of people convicted of these offences were sentenced to immediate custody.

Sentencing guidelines for animal cruelty were reviewed in April 2017 with the aim of ensuring "that the most serious cases of animal cruelty receive appropriate severe sentences, within the available maximum penalty".

## Custodial Sentences for Offences Under Sections 4-8 of the Animal Welfare Act 2006

England and Wales

	2010	2011	2012	2013	2014
Proceeded against	1,095	1,306	1,429	1,295	1,039
Found guilty	874	1,028	1,132	1,022	814
Sentenced	875	1,027	1,132	1,021	815
<i>of which:</i>					
Total Immediate Custody	52	87	108	84	82
% of total sentenced	6%	8%	10%	8%	10%
<i>of which:</i>					
Less than 3 months	29	47	39	32	33
3 months to less than 6 months	22	38	66	47	48
6 months	1	2	3	5	1
<b>Continued...</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Proceeded against	800	768	744	799	717
Found guilty	622	585	607	635	567
Sentenced	624	585	608	634	570
<i>of which:</i>					
Total Immediate Custody	58	63	50	65	63
% of total sentenced	9%	11%	8%	10%	11%
<i>of which:</i>					
Less than 3 months	22	27	18	21	23
3 months to less than 6 months	33	33	30	43	36
6 months	3	3	2	1	3

Source: Ministry of Justice, Outcomes by Offence Data Tool, May 2020

**Second Reading** took place on 23 October 2020. Introducing the Bill, its sponsor, Chris Loder MP (Con), set out how it would amend the sentencing currently available to courts under the under the Animal Welfare Act 2006.

I am pleased to say that the Bill introduces one of the toughest punishments in the world and will bring us into line with the maximum penalties available in other Commonwealth countries, including those in Australia, Canada, New Zealand and India, which are all at five years' imprisonment. With this Bill, we will lead the way in Europe on animal sentencing, where the average custodial sentence for animal welfare offences is currently just two years. It is a simple, yet vital measure that will ensure perpetrators who harm an animal by, for example, causing unnecessary suffering, mutilation or poisoning, face the full force of the law. That includes cases of systematic cruelty, such as the deliberate, calculating and callous behaviour of ruthless gangs who use dog fighting to fuel organised crime. The Bill will mean that the courts will have sentences at their disposal commensurate with the most serious cases, so that the punishment fits the crime. This will send a clear signal.

Shadow Secretary of State, Luke Pollard (Lab), moved amendment 1 in clause 127 which would require the seriousness of an offence to be increased in cases where a person found guilty had also filmed the offence or posted a video online of themselves committing the offence. He explained that the reason was to stop encouraging others from repeating similar acts. This simple amendment would make it a more serious animal cruelty offence for the



purpose of sentencing if the guilty person had filmed themselves committing the abuse. In a digital age, we see more and more cases of people filming abuse of animals, partly for their own perverse enjoyment, partly because they want to share the film on social media, and partly because they fail to recognise that in so doing they encourage others to do the same.

Luke Pollard went on to give examples of specific cases of animal cruelty that had been posted online and highlighted research from the RSPCA that showed “at least 46% of young people have witnessed animal cruelty: 28% have seen it on TV or in a film, and 18% have witnessed it on social media.”

In response, Victoria Prentis (Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs) commented that the sentencing guidelines, drawn up by the Sentencing Council had been reviewed in 2017 after public consultation. She went on to say that they include guidelines on the “the use of technology to publicise or promote cruelty” which is already considered to be an aggravating factor. She also highlighted Section 127(1) of the Communications Act 2003 which, “creates a specific offence of sending grossly offensive, indecent, obscene or menacing messages over a public electronic communications network.” In her concluding remarks the Minister stated that:

...there are existing options to ensure that the offenders who film and upload or distribute footage of their animal cruelty are met with an appropriate response. This is a horrific crime, and filming it to share with others is beyond comprehension. We will discuss this matter further with the Sentencing Council, and when it reviews the guidelines we will ensure that this point is raised during the public consultation. On that basis, I ask the hon. Gentleman not to press the amendment.

Luke Pollard withdrew the amendment explaining that the opposition would be seeking to explore it further on Report.

**The Explanatory Notes state as follows:**

### **Overview of the Bill**

1. The Bill increases the maximum penalty for specific offences related to animal welfare in England and Wales. It does so by extending the current maximum penalty, specified under the Animal Welfare Act 2006, of six months and/or an unlimited fine to a penalty of five years and/or an unlimited fine. These offences therefore become triable either way, and may be heard in a magistrates' court or the Crown Court.

### **Policy background**

2. This Bill amends the Animal Welfare Act 2006 (“the Act”). The Act sets out a maximum penalty of six months imprisonment and/or an unlimited fine for the more serious 'prevention of harm' offences. There are five such offences under section 32(1) of the Animal Welfare Act 2006:
  - a. causing unnecessary suffering (section 4, Animal Welfare Act 2006);
  - b. carrying out a non-exempted mutilation (section 5, Animal Welfare Act 2006);
  - c. docking the tail of a dog except where permitted (section 6(1) and 6(2), Animal Welfare Act 2006);
  - d. administering a poison to an animal (section 7, Animal Welfare Act 2006); and
  - e. involvement in an animal fight (section 8, Animal Welfare Act 2006).
3. There have been a number of recent cases related to these offences in which judges have expressed a desire to impose a higher penalty than that currently provided for under the Animal Welfare Act 2006. There is a particular desire to increase the

penalties available in the case of crimes that relate to deliberate, calculating and sadistic behaviour.

4. Members of Parliament, wider stakeholders and the public have also sought to increase maximum penalties for animal welfare offences so that they exceed the current European average of 2.04 years. The Bill meets both of these needs by increasing the maximum penalties for the most serious offences under the Animal Welfare Act 2006 to five years and/or an unlimited fine.
5. The increase in maximum penalties will not apply to those offences listed in section 32(2) of the Animal Welfare Act 2006: not taking reasonable steps to ensure welfare (section 9); breach of a licence condition (section 13(6)); and breach of a disqualification order (section 34(9)). These offences are generally considered less serious, and rarely receive the existing maximum penalty. Moreover, the level of fine applied to these offences has recently been increased since the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which converted existing level 5 fines into unlimited fines.
6. The draft sentencing clauses were published for public consultation and pre-legislative scrutiny on 12 December 2017 as part of the Government's Animal Welfare (Sentencing and Recognition of Sentience) Bill. The consultation closed on 31 January 2018 and the summary of responses document published on 7 August 2018. Defra received 9,084 direct responses to the consultation. 70% of respondents agreed with the new maximum penalties. In the summary of responses document, Government committed to bring forward the sentencing clauses in a separate Bill as recommended by the EFRA Committee's scrutiny report on the Bill.
7. On 26 June 2019, the Animal Welfare (Sentencing) Bill was introduced to Parliament in the House of Commons. Passage of the Bill beyond Committee Stage was disrupted due to Parliamentary activity at this time where it fell following prorogation and then later dissolution of Parliament.
8. Chris Loder MP introduced the Animal Welfare (Sentencing) Bill as a Private Member's Bill on 5th February 2020.

## **Legal background**

9. The majority of the relevant legal background is explained in the policy background section of these Notes. Two additional legal issues are raised below, one in relation to the current drafting of section 32(1) of the Animal Welfare Act 2006, and the second in relation to the requirement to change the mode of trial.
10. The current drafting of section 32(1) of the Animal Welfare Act 2006 lists the maximum penalty as imprisonment for a term not exceeding 51 weeks or a fine, as opposed to the maximum imprisonment for a term not exceeding six months as discussed above. This is explained by section 32(5) of the Animal Welfare Act 2006. Section 32(5) provides that in relation to an offence committed before the commencement of section 281(5) of the Criminal Justice Act 2003, the reference in section 32(1)(a) to 51 weeks is to be read as a reference to six months. As at the date of the publication of the Bill, section 281(5) of the Criminal Justice Act 2003 has not been commenced. The maximum imprisonment term for offences under section 32(1) of the Animal Welfare Act 2006 therefore remains six months.
11. Magistrates' courts do not have the power to impose penalties greater than six months.<sup>1</sup> As a result of increasing the maximum penalty available for the offences under section 32(1) of the Animal Welfare Act 2006 to a period of five years it is necessary for the Bill to make these offences triable either way.

## **Territorial extent and application.**

12. Clause 2 sets out the territorial extent of the Bill, that is the jurisdictions which the Bill forms part of the law of. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect. This Bill both extends and applies to England and Wales. The commentary on individual provisions (or groups of provisions) of the Bill includes a paragraph explaining their extent and application.
13. There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned. Issues concerning animal welfare in Wales are considered to be within the legislative competence of the National Assembly for Wales. The Bill requires a Legislative Consent Motion from the National Assembly for Wales. See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

## **Commentary on provisions of Bill**

### Clause 1: Mode of trial and maximum penalty for certain animal welfare offences

14. Section 32(1) of the Animal Welfare Act 2006 provides that particular offences should carry a maximum penalty of 51 weeks imprisonment and/or a level 5 fine.
15. In practice, this is as a maximum penalty of 6 months and an unlimited fine. This is because section 32(5) specifies a maximum penalty of 6 months for offences committed before the commencement of section 281(5) of the Criminal Justice Act 2003. To date, this section has not been commenced.
16. This clause changes the maximum penalty available for the following offences only:
  - a. Causing unnecessary suffering (section 4, Animal Welfare Act 2006);
  - b. Carrying out a non-exempted mutilation (section 5, Animal Welfare Act 2006);
  - c. Docking the tail of a dog except where permitted (section 6(1) and 6(2), Animal Welfare Act 2006);
  - d. Administering a poison to an animal (section 7, Animal Welfare Act 2006);
  - and
  - e. Involvement in an animal fight (section 8, Animal Welfare Act 2006).
17. The existing maximum penalty, outlined above, is retained if the offender is summarily convicted. However offenders may now receive a higher penalty of up to 5 years imprisonment and/or an unlimited fine if they are convicted on trial by indictment.
18. Magistrates' courts do not have the power to impose penalties greater than six months. Section 154(1) of the Criminal Justice Act 2003 was to increase the maximum custodial sentence imposable by a magistrate's court to 12 months. Section 154(1) will be repealed by the Sentencing Act 2020 but an equivalent provision is contained in paragraph 24(2) of Schedule 22 to the 2020 Act. Section 32(4A) of the Animal Welfare Act 2006 inserted by this clause ensures that the appropriate penalties are available to magistrate's courts until the relevant provisions are commenced.

### Clause 2: Extent, Commencement and Short Title

19. This clause provides for the Bill to extend to England and Wales; that the Bill will come into force two months after Royal Assent; and that the application of revised

maximum penalties is not retrospective and does not apply to offences committed before the Bill comes into force. The clause also specifies the short title of the Bill.

### **Commencement**

20. The Bill is due to commence two months after Royal Assent.