

Sentencing Council meeting:
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SC(21)DEC03 – Miscellaneous guideline amendments

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1 ISSUE

1.1 In order to ensure that guidelines are kept up-to-date and accurate the Council has a policy of holding an annual consultation on overarching issues and miscellaneous minor updates to guidelines. The first consultation ran from 9 September to 2 December this year.

1.2 This is the first meeting to consider responses to the consultation. The plan is to sign off the changes at the January meeting with changes coming into effect from 1 April 2022. The annual process will then begin again.

2 RECOMMENDATION

2.1 That the Council considers the responses to the consultation and agrees on any changes to be made.

3 CONSIDERATION

3.1 There are 19 responses to the consultation. The majority support the proposals but there is some disagreement and suggestions for where the changes could go further.

Breach of a sexual harm prevention order (SHPO)

3.2 The Council consulted on adding 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 wording proposed 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.

3.3 With the exception of one respondent who answered every question with an assertion that guidelines should be scrapped, all 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.

3.4 This is a valid point. Section 103A 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 s103E SOA 2003 and s350 SC.

3.5 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. On reflection it might be clearer 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 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.

3.6 One magistrate respondent suggested adding a reference to the relevant person for making an application being the Chief Officer of Police. However, this is not necessarily the case so it is preferable just to refer to the relevant legislation.

3.7 The Met Police suggested adding more information about the permitted length and conditions of a SHPO. Since the main message here is that the court should not be making or varying an order it does not seem the appropriate place to give further information of the type suggested.

3.8 The Justices' Legal Advisers and Court Officers' Service (JCS) suggested;

In order to make the position even clearer, especially to lay Justices, we would suggest that the following wording is considered;

"When dealing with a breach of a sexual harm prevention order, the court cannot, of its own motion, make a fresh order or vary the existing order.....".

3.9 The Council had considered using this wording initially but thought that it might be **less** clear to lay magistrates than the wording consulted on. There were 10 responses to the

consultation from individual lay magistrates or on behalf of lay benches and all approved of the proposed wording so no further change is recommended.

Question 1: Should the breach of SHPO guideline be amended as proposed at para 3.5?

Compensation

3.10 The Council consulted on adding a reference in all relevant guidelines to the statutory duty to give reasons if not awarding compensation where injury, loss or damage is suffered. The proposed additional wording is highlighted 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](#)).**

3.11 Most respondents were in favour of this proposal. One magistrate disagreed:

Compensation should not be a default option. There are too many scenarios where it is complex, inappropriate or just impossible to pay compensation.

Giving reasons should not be mandated as they should be part of the entire sentencing announcement rather than specific

3.12 Other magistrates agreed with the proposals but commented on the practical difficulties of awarding compensation in cases where the offender has limited means. One individual magistrate suggested that compensation should be awarded according to the loss suffered and not take account of means, a magistrates' bench noted that awarding a low sum may give the impression that the impact on the victim has not been appreciated.

3.13 A barrister suggested that mention should also be made of offences taken into consideration (TICs). There is guidance in the [explanatory materials](#) for magistrates and in the Compendium (at S3.4) for judges in the Crown Court on the making of compensation orders. The magistrates' court guidance does include a reference to TICs, the Compendium does not. TICs are only relevant in a small proportion of cases typically including theft, burglary and criminal damage offences. Where TICs are likely to be relevant, the offence specific guideline will have this as an aggravating factor and the expanded explanation for the factor includes a reference to compensation orders. It therefore is probably not particularly useful to add a reference to TICs to the wording on compensation in every guideline.

Question 2: Should any changes be made to the wording consulted on regarding compensation?

Confiscation

3.14 In addition to the wording on compensation, the Council consulted on using the following wording relating to confiscation 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](#).

3.15 Again, 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. We can explain in the response to consultation document that 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' court to impose confiscation orders but, to date, no such order has been made).

3.16 A barrister suggested that 'mention should be made of the power in relation to summary offences'. Under section 70 of the Proceeds of Crime Act 2002 (POCA) magistrates' courts can commit a case to the Crown Court with a view to confiscation, including for a summary only offence. Although the wording consulted on does not contradict this, neither does it make it clear. Some extra wording could be added to the second paragraph as shown highlighted below:

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.

3.17 Three respondents mentioned the importance of stressing that magistrates' courts must make it clear if they would have committed an either-way offence anyway. If it was felt to be helpful the text could be split so that the sentence beginning 'Where' starts a new paragraph.

Question 3: Should any changes be made to the wording on confiscation as consulted on?

Uplift for racially or religiously aggravated offences

3.18 The Council consulted on amending existing guidelines 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 \(with fear of violence\)](#)

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

Domestic abuse – overarching principles

The Council consulted on proposals to amend this guideline to align it with the new statutory definition of domestic abuse introduced by the Domestic Abuse Act 2021 (DAA) and to widen the definition of domestic abuse (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.

3.20 The majority of respondents were in favour of the proposals and one specifically welcomed para 4. The JCS, however, expressed concern about the inclusion of para 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'.

3.21 In the light of all other respondents being content with the inclusion of para 4, no change is proposed.

3.22 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 DAA rather than just stating how it is defined for the purposes of that Act. This is a valid point – while it is implicit that the guideline is adopting the definition (without being limited by it) it is not categorically stated. One solution could be to amend para 3 to read:

3. This guideline applies to domestic abuse as defined in para 2 above and to so-called 'honour' based abuse, female genital mutilation (FGM) and forced marriage.

3.23 There were other points raised by respondents:

What about actions taken by a person at the instructions of the DA perpetrator? For example getting someone else to send a text. Is that covered? In respect of parental responsibility are Foster Carers and other carers "appointed" by a local authority included? *Magistrate*

We agree with the proposed new wording, but not the assumption that such behaviour can only arise "between those aged 16 or over" as members of this committee have, sadly, encountered both domestic and sexual abuse involving under-16s. We strongly recommend that specific reference should be made in the guidelines to the sentencing of youths in such cases. *Magistrates' bench*

3.24 The Council may feel that any attempt in the guideline to further define what circumstances are or are not covered by the guideline would be unhelpful. The guideline is applicable to offenders aged 16 and over – any change to that would require further consideration and consultation.

Question 4: Should the Domestic abuse guideline be amended as suggested at 3.22 above?

Question 5: Should any other changes be made to the Domestic abuse guideline?

4 EQUALITIES

4.1 The consultation did not include any proposals expressly relating to equalities. No issues were identified in response to a question in the consultation paper asking if there were any equality issues relating to the proposals.

5 IMPACT AND RISKS

5.1 In view of the nature of the consultation, no resource assessment was produced but the consultation document briefly addressed the potential impact of each proposal. There were only a few comments relating to the impact of the changes and these generally welcomed the clarity that the changes would bring.

5.2 The Prison Reform Trust expressed concern that there are currently insufficient measures to monitor any effect of the changes in relation to confiscation orders. This can be discussed at the January meeting.

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