

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

**28 January 2022**  
**SC(22)JAN04 – Miscellaneous guideline amendments**

**Lead Council member:**  
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## **1 ISSUE**

1.1 The annual consultation on overarching issues and miscellaneous minor updates to guidelines ran from 9 September to 2 December 2021. At the December meeting the Council considered the responses to the consultation and agreed some changes.

1.2 At this meeting the Council is asked to sign off the changes which will come into effect on 1 April 2022. The annual process will then begin again.

## **2 RECOMMENDATION**

2.1 That the Council signs off the changes for publication.

## **3 CONSIDERATION**

3.1 To briefly recap the changes that have been agreed:

*Breach of a sexual harm prevention order (SHPO)*

3.2 The additional wording agreed upon for this guideline 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 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.

### *Compensation*

3.3 The additional wording agreed for inclusion in all relevant guidelines 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](#)).**

### *Confiscation*

3.4 The following wording relating to confiscation was agreed for all relevant guidelines:

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

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

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

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

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

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

3.5 It was agreed to amend 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 \(with fear of violence\)](#)

### *Domestic abuse – overarching principles*

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

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

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

between those aged 16 or over:

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

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

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

4. The principles in this guideline will also apply to persons living in the same household whose relationship, though not precisely within the categories described in para 2 above, involves a similar expectation of mutual trust and security.

5. Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capabilities for personal gain, depriving them of the means needed for independence, resistance and escape and/or regulating their everyday behaviour.

6. Coercive behaviour is an act or pattern of acts of assault, threats, humiliation (whether public or private) and intimidation or other abuse that is used to harm, punish, or frighten the victim. Abuse may take place through person to person contact, or through other methods, including but not limited to, telephone calls, text, email, social networking sites or use of GPS tracking devices.

7. Care should be taken to avoid stereotypical assumptions regarding domestic abuse. Irrespective of gender, domestic abuse occurs amongst people of all ethnicities, sexualities, ages, disabilities, religion or beliefs, immigration status or socio-economic backgrounds. Domestic abuse can occur between family members as well as between intimate partners.

8. Many different criminal offences can involve domestic abuse and, where they do, the court should ensure that the sentence reflects that an offence has been committed within this context.

### *Publication of the changes*

3.7 As these are minor changes to existing guidelines it is not practicable to publish the changes ahead of them being live on the Council's website. The plan is to publish the response to consultation on 1 April and to make the changes to the guidelines on or soon after that date.

### **Question 1: Is the Council content to sign off the above changes for publication on 1 April?**

#### **4 EQUALITIES**

4.1 The consultation did not include any proposals expressly relating to equalities. Only three respondents responded to a question in the consultation paper asking if there were any equality issues relating to the proposals and none identified any issues.

#### **5 IMPACT AND RISKS**

5.1 No resource assessment was produced at the consultation stage, but the consultation document briefly addressed the potential impact of each proposal. The same approach is proposed for the published changes – the response to consultation document will address the impact of each change.

5.2 There were only a few comments relating to the impact of the changes and these generally welcomed the clarity that the changes would bring. The exception was the Prison Reform Trust who stated:

We understand that proposed changes to the guidelines are to aid clarity and consistency between a broad range of guidelines for offences which can attract a confiscation order. We also recognise that similar wording on the use of confiscation orders is already used in a number of existing guidelines.

However, we are concerned that there are currently insufficient measures to enable effective monitoring of this change. Yet despite this admission consultees are being asked to take on trust that this amendment will not lead to a change in their use.

We welcome any changes that improve clarity and that ultimately deliver greater consistency, however we question how the council can make such a declaratory statement, given that it has no way of monitoring the impact of such a change?

Should the change be made, we would recommend that the council sets out what actions they would take to ensure that this does not lead to a change in their use—as stated.

5.3 The consultation document stated: '*There are no published figures for the number of confiscation orders made but the proposed changes to wording in guidelines is unlikely to*

*influence the making of confiscation orders – the changes simply seek to aid clarity and transparency.* The Ministry of Justice does not publish data on the imposition of confiscation orders. We have access to some unpublished figures from the MoJ Courts Proceedings Database (CPD) on the volumes of confiscation orders made, but these figures are not considered to be reliable and so would not assist in monitoring any impact of the changes. The consultation response document can acknowledge that the lack of reliable data is regrettable but say that it is not a justification for failing to make changes which will aid clarity and transparency.

**Question 2: Is the Council content that there are no further issues relating to the impact of the changes?**

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