



FACULTY OF ADVOCATES

Response to the Scottish Sentencing Council's Public Consultation on draft Sentencing Domestic Abuse Guidelines

Approach and structure

1. Is the structure of the guideline appropriate?

Yes. The structure of the draft guideline is broadly appropriate and follows logically from the framework established by the Council's sentencing process guideline. The sequential arrangement, applicability, how to use the guideline, sentencing for the offence, seriousness, aggravating and mitigating factors, and non-harassment orders, mirrors the steps a sentencer must work through and should be easy to navigate in a court setting.

We note that the guideline addresses steps 1 (seriousness), 3 (aggravating and mitigating factors), and 7 (ancillary orders/NHOs) of the sentencing process, leaving the intermediate steps to the general sentencing process guideline. This approach is appropriate given the wide range of offending behaviour covered and avoids unnecessary duplication.

One structural consideration is whether a short introductory note, possibly within the guideline itself, might assist in contextualising the guideline for members of the public. The consultation paper provides valuable context on the nature and prevalence of domestic abuse; some of that context (particularly around coercive control as a pattern of behaviour rather than a series of discrete incidents) might usefully be distilled into the guideline without lengthening it significantly.

Definition of domestic abuse (paragraph 4)

2. Are the four behaviours listed in paragraph 4 of the guideline appropriate?

Yes. The four categories reflect the principal forms of domestic abuse recognised in the legislative framework and in research and align with the provisions of the Domestic Abuse (Scotland) Act 2018. The non-exhaustive framing ('can include but is not limited to') is important because it ensures the list does not artificially restrict the types of conduct that courts may consider.

We support the inclusion of economic abuse as an explicit category alongside physical, sexual and psychological abuse. Economic abuse is often invisible and underweighted by courts; its explicit identification in the guideline should assist sentencers in appreciating its significance. All too often, circumstances involving financial control or monetary dispute are written-off as 'civil' matters – particularly when 'consent' (in the loosest meaning of the word) has been given (through, for example, digital authority) by the victim. Bringing 'economic abuse' more definitively into the criminal sphere allows the full circumstances through the prism of domestic abuse.

3. Should any behaviours be added?

Yes. We suggest that consideration be given to adding the following, whilst also acknowledging there may be scope for adding additional categories in future, and that the list is not exhaustive

- Technology-facilitated abuse such as monitoring of communications, non-consensual sharing of intimate images, and the weaponisation of social media and online platforms against a victim represent a rapidly growing and distinct category of abusive behaviour. While some of these may fall within psychological or economic abuse, they are sufficiently prevalent and distinct to merit explicit recognition.

4. Should any behaviours be removed?

No. All four categories are appropriate and should be retained.

5. Is the footnote discussing coercive control appropriate?

Yes. Footnote 2 provides an accessible explanation of the mechanisms of coercive control, drawing directly on the language of the Domestic Abuse (Scotland) Act 2018. The examples given appropriately reflect the range of controlling behaviours that courts may encounter.

We suggest one enhancement: the footnote might additionally note that the cumulative effect of coercive control can be, and frequently is, more harmful than the sum of its individual constituent acts. Sentencers may encounter cases where individual incidents appear relatively minor in isolation; the footnote could assist courts in understanding why the overall pattern of behaviour must be assessed.

Use of the phrase “might take the form of” allows a non-exhaustive list to follow. The behaviours outlined in the footnote are encompassing of abusive behaviours. They are open and not unnecessarily restrictive.

6. Is the footnote providing examples of economic abuse appropriate?

Yes. Footnote 3 provides a useful illustration of economic abuse.

How to use this guideline (paragraphs 5-6)

7. Is it clear from paragraph 5 how the domestic abuse guideline is meant to interact with other sentencing guidelines?

Paragraph 5 is adequate but could be clearer in one respect. The instruction to read the guideline 'alongside any other guidelines which apply to the case, or to the offender' is correct but general. In particular, the interaction with the guidelines on rape offences is of practical significance given the frequency with which sexual offences arise in domestic abuse contexts. Where both guidelines apply, sentencers must understand which elements of seriousness and aggravation are addressed by each guideline, and how to avoid double-counting.

We suggest that paragraph 5 might include a brief cross-reference to this specific interaction, for example, noting that where a sexual offence is committed in a domestic abuse context, the relevant rape or sexual assault guideline and this guideline should each be applied to their respective aspects of the offending, with care to avoid double-counting of aggravating factors.

We are satisfied that paragraph 6 (the obligation to give reasons for departing from a guideline) is appropriately concise.

Sentencing a domestic abuse offence

8. **Do you agree or disagree that the premise set out in paragraph 9 of the guideline is appropriate: 'A sentence imposed in respect of a domestic abuse offence should not be informed by any expressed wishes of the victim as to what the sentence should be'?**

With one caveat, we agree. The three reasons set out in paragraph 9 (i) that no victim is responsible for the sentence (ii) that a victim's plea for leniency may be induced by coercion, and (iii) that the court sentences on behalf of the wider public, are sound. To provide otherwise would create a fundamental unfairness across the justice system. Current practice, however, is for Victim Information and Advice to ascertain the views of victims on the possibility of an NHO. These views are then routinely conveyed to the sentencer by the prosecutor. The terms of paragraph 9 do not appear to leave room for this practice as, on the premise as formulated, this would be irrelevant information. We comment further on this below, at paragraph 22.

9. **Is the rest of the guidance provided in relation to 'sentencing a domestic abuse offence' appropriate?**

Yes. Paragraph 7 correctly identifies domestic abuse as a significant violation of trust that can cause lasting harm to victims and children. We support this framing strongly.

Paragraph 8 correctly highlights the statutory obligation under section 210AB of the Criminal Procedure (Scotland) Act 1995 to have particular regard to the aim of preventing further offending.

Seriousness(paragraphs 10-13)

10. **Is the guidance provided in relation to assessing seriousness appropriate?**

Yes, broadly. Paragraphs 10 to 13 provide a foundation for assessing seriousness in domestic abuse cases.

At paragraph 10 we would support the removal of "and others" as being too broad. We believe this phrase might be a reference to children of parties but would welcome further specification as to what it means. We consider this term to read too broadly in its current format.

We particularly welcome:

The explicit recognition in paragraph 11 that harm can result from the cumulative effect of abusive behaviour and is likely to increase with severity or frequency over time.

The requirement in paragraph 12 to obtain sufficient information about harm to children before sentencing. This will assist courts in giving appropriate weight to child welfare in cases where children are affected.

The direction in paragraph 13 that a victim's reluctance to engage with the criminal justice process should not be treated as indicative of lower seriousness. This reflects the well-documented dynamics of coercive control and prevents a perverse outcome whereby a victim's fear of her abuser is used to reduce the weight given to the offence.

We would, however, suggest one enhancement to paragraph 11 – that the guidance expressly state that psychological and emotional harm may be as serious as, or more serious than, physical harm. Making this explicit in the guideline itself would reinforce this important principle for courts at all levels.

11. Should any guidance be added?

Yes. We suggest the following addition:

While paragraph 12 addresses the need to gather information about harm to children, it does not explicitly direct the court to treat harm to children as a factor increasing the overall seriousness of the offence. We suggest a direction to this effect be included, consistent with the recognition in paragraph 7 that children can be particularly damaged by domestic abuse.

12. Should any guidance be removed?

No. We do not consider that any of the existing guidance in paragraphs 10 to 13 should be removed.

Aggravating and mitigating factors (paragraphs 14-18)

13. Are the statutory aggravations appropriate?

Yes. The three statutory aggravations identified (i) the domestic abuse aggravation under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (ii) the child aggravation under section 5 of the Domestic Abuse (Scotland) Act 2018, and (iii) the bail breach under section 27(1)(b) of the Criminal Procedure (Scotland) Act 1995, are all correctly identified as being of

particular relevance to domestic abuse cases. The inclusion of bail breach as a statutory aggravation is especially important. Bail conditions in domestic abuse cases frequently include conditions prohibiting contact with the complainant, and their breach can itself constitute further abusive behaviour. Courts should be alert to this connection.

The guidance in paragraph 15 that where an offender is convicted of an offence with a statutory aggravation the court must take it into account correctly reflects the statutory obligation. The reminder in paragraph 16 about double-counting is also appropriately placed.

14. Should any statutory aggravations be added to the guideline?

No additional statutory aggravations can be created by the guideline. We encourage the Council to commit to keeping the guideline under review in light of any legislative developments and to update it as may be required.

15. Should any statutory aggravations be removed from the guideline?

No. All three statutory aggravations are appropriate and should be retained.

16. Are the non-statutory aggravating factors, including in relation to children, appropriate?

Yes. The 7 non-statutory aggravating factors and the three child-specific factors capture many of the most significant features of domestic abuse offending. We are particularly supportive of:

The factor concerning a 'particularly vulnerable victim', including the examples of actions by the offender intended to increase that vulnerability (such as interference with medication, finances, freedom of movement, healthcare, and access to personal documents).

The recognition of 'a history of violence or threats in a domestic context' and 'a history of failing to comply with court orders'. These factors reflect the pattern-based nature of domestic abuse and will assist courts in treating persistent offending with appropriate seriousness.

The three child-specific aggravating factors, which complement the statutory child aggravation under section 5 of the 2018 Act and correctly direct that they should only be applied where the section 5 aggravation is not already being taken into account.

17. In particular, is the aggravating factor ‘cultural violation’ appropriate?

Yes. Cultural violation is a form of harm that is not adequately captured by the other listed factors. Its inclusion gives courts explicit permission to recognise and respond to behaviour that targets the victim's cultural or religious identity as a means of control, humiliation, or harm. This factor is of particular importance in cases involving so-called honour-based abuse, forced marriage, and the exploitation of cultural norms of obedience or family loyalty to perpetrate or conceal abuse.

We note that the Council is actively seeking evidence on the prevalence and relevance of this factor. We support its inclusion based on available evidence and on the principled ground that absence from the list risks signalling that courts need not consider it.

18. Is the footnote discussing ‘cultural violation’ appropriate?

Yes, but we suggest it could be broadened. Footnote 7 currently focuses on the prevention or compulsion of cultural or religious practices. We suggest the following additional examples for consideration:

- Isolation from community or extended family networks as a means of cultural and social control.
- Exploitation of cultural norms of family honour to prevent a victim from reporting abuse or seeking help, including threats about the impact on wider family members.

19. Should any non-statutory aggravating factors, including in relation to children, be added to the guideline?

No. We do not consider that any non-statutory aggravating factors, including in relation to children, ought to be added to the guideline. However, that is something that should be kept under review.

20. Should any non-statutory aggravating factors, including in relation to children, be removed from the guideline?

No. We do not consider that any of the existing non-statutory aggravating factors should be removed.

21. Should any mitigating factors be added to the guideline?

We do not consider it appropriate for this guideline to identify specific mitigating factors particular to domestic abuse offences, and accordingly we do not propose that any be added. We support the Council's approach of leaving the identification of relevant mitigating factors to the general list in Annex C to the sentencing process guideline.

Non-harassment orders (paragraphs 19-23)

22. Is the section of the guideline addressing non-harassment orders at paragraphs 19 – appropriate?

Yes, with the exception of one proposed amendment highlighted below, paragraphs 19 to 23 accurately reflect the legal framework for NHOs and consolidate the relevant provisions in an accessible form for both practitioners and members of the public. We welcome the clear explanation of when NHOs are mandatory (paragraph 19) and when discretionary (paragraph 20), and the reminder that the final decision rests with the court (paragraph 23).

The amendment we would propose is in relation to the second bullet point (“in addition to the victim”) in paragraph 19. At present, the “appropriateness” test which applies in such circumstances, is not mentioned. We would propose the following amendment to rectify the current wording:

adding the following “(in circumstances where the Court considers it appropriate that the child be protected by the NHO)” after the words “in addition to the victim” so that the second bullet now reads:

“in addition to the victim (in circumstances where the Court considers it appropriate that the child be protected by the NHO):...”

We offer the following observations:

Conditions of NHOs: The guideline could usefully note that courts should actively consider whether the conditions of an NHO are tailored to the specific risks identified in the particular case. While the drafting of specific conditions is a matter for the court in each case, a direction that conditions should be proportionate to the specific risk and should include all locations relevant to the victim's daily life where there is a risk of further contact, would be valuable.

Duration of NHOs: Paragraph 21 notes that an NHO may have effect for a specified or indeterminate period. The guideline might assist sentencers further

by noting that in cases of serious or persistent offending, or where there is an assessed risk of continued harm, an indeterminate NHO should be the default consideration, subject to the circumstances of the case.

We support the thinking underlying paragraph 23, to the effect that the final decision on sentence is one for the court. However, as we have observed above in relation to paragraph 9, there may be some difficulty in reconciling the absolute nature of the expressed premise with the taking into account by the sentencer of the victim's expressed views on the NHO. It is difficult to provide both that the Court is to have regard to these views, and that the sentence cannot be informed by any expressed wishes of the victim, (unless, perhaps, it is made clear that the "sentence" referred to in paragraph 9 does not include a NHO).

Potential impacts of the guideline

23. Do you think the guideline will influence sentencing practice in Scotland?

Yes, for the following reasons:

The explicit recognition of cumulative harm (paragraph 11) and the direction on victim reluctance (paragraph 13) address known gaps in current practice and should improve consistency across court levels.

The identification of cultural violation as an aggravating factor should prompt courts to give explicit consideration to forms of harm that may previously have been underweighted or overlooked.

The prominent treatment of NHOs, including the clarification of when they are mandatory, should increase their consistent use in appropriate cases, addressing the concern reflected in the consultation paper and in the research that NHOs are not always imposed where they should be.

We note, however, that the absence of sentencing ranges is a significant limitation on the guideline's ability to promote consistency in outcomes. While we understand and accept the Council's reasoning (that ranges applicable to such a wide variety of offences would be too broad to be useful), the consequence is that the guideline provides limited assistance in calibrating the level of the sentence, as opposed to identifying relevant factors. We encourage the Council to consider whether, in time, it would be possible to develop more targeted guidance that might include indicative ranges.

24. Do you think the guideline will lead to an increase or decrease in public understanding of how sentencing decisions are made?

We consider that the guideline will likely increase public understanding of how sentencing decisions in domestic abuse cases are made. The guideline is written in accessible language, avoids unnecessary jargon, and explains the principal considerations that courts must address.

We would encourage the Council to give consideration to how the guideline is disseminated beyond the legal profession for example, through support organisations and victim-facing information materials to maximise its public benefit.

25. Do you see any benefits or negative effects arising from the introduction of this guideline?

Benefits:

Greater consistency in sentencing across court levels.

Increased recognition of the full range of abusive behaviours, including economic abuse, coercive control, and cultural violation.

Greater confidence for victims that the court system understands the nature and impact of domestic abuse.

A clearer framework for prosecutors and defence agents when making submissions at sentencing.

Improved public understanding of how domestic abuse sentencing decisions are made.

Potential negative effects:

As noted above, the absence of sentencing ranges may limit the guideline's practical utility in achieving consistent outcomes, as opposed to consistent processes.

26. Do you feel that the introduction of the guideline might impact some groups of people more than others in a disproportionate way?

We have no view.

27. What costs (financial or other) do you see arising from the introduction of this guideline, if any?

We have no view.

- 28. Please provide details about anything else you feel is of importance regarding sentencing for domestic abuse offences.**

We wish to make the following proposal:

That the Council commit to a structured post-implementation review to examine sentencing patterns across court levels; the use of NHOs and their conditions; the application of the cultural violation aggravating factor; and broader consistency of outcomes. Such a review would enable the Council to assess whether the guideline is achieving its objectives and the potential for sentencing ranges to be introduced.