Action Against Stalking

# Response to Scottish Sentencing Council Draft Domestic Abuse Sentencing Guideline Consultation


**Summary**

We welcome the creation of a sentencing guideline for domestic abuse. A clear and robust guideline has the potential to provide meaningful assistance to courts, promote greater consistency in sentencing, and improve broader public understanding of how sentencing decisions are reached. However, we consider that these benefits can only be fully realised if the draft guideline is restructured appropriately.

In particular, the current structure does not follow the usual three step adopted in other offence-specific Scottish Sentencing Council guidelines. We suggest that the guideline should adopt the three-step process used to arrive at the headline sentence, consistent with other guidelines:

- Assessing seriousness through clearly defined harm and culpability, delineated to a specific category level
- Identifying the appropriate sentencing range based on the category level identified in the assessment of seriousness
- Considering aggravating and mitigating factors

In its current form, the draft is too vague and places significant reliance on sentencer discretion, limiting its practical utility and its ability to promote consistency and public understanding.

We are also concerned that post-separation abuse, including stalking, is not adequately recognised. These behaviours should be expressly included as features of harm and culpability when assessing seriousness and determining the headline sentence. Failing that, post-separation abuse should be included as an aggravating factor. Without this, there is a real failure to recognise the lived experiences of many victims, the nature and impact of post-separation abuse, and the significance of post-separation abuse and stalking as indicators of escalating risk, including the risk of further serious violence and homicide.

The effective application of any guideline will also depend upon sentencers having a comprehensive understanding of domestic abuse, including coercive control, post-separation abuse, stalking, trauma responses and relevant risk factors. A trauma-informed approach is particularly important. Victims respond to trauma in myriad ways, and assessments of harm should not depend upon particular emotional presentations or assumptions about how a victim should respond to abuse.

Our full response is set out below.

**Response**

1. **Is the structure of the guideline appropriate?**

We do not believe that the structure is appropriate, as it does not clearly set out the steps that sentencers should take, in line with other Scottish Sentencing Council guidelines on rape, rape of a young child, and statutory offences of causing death by driving. These SSC guidelines are structured in the form of three steps used to arrive at the headline sentence: (1) Assess the seriousness of the offence; (2) Select the sentencing range; and (3) Identify aggravating and mitigating factors. Under Step 1, a number of features are set out to determine a category level of seriousness, which is used to identify the sentencing range in step 2. We believe that the domestic abuse guideline should follow the same approach.

In particular, the section on seriousness does not provide a further list of features of culpability or harm that should be considered in an assessment of seriousness, justified on the basis that the wide scope of offending behaviour would necessitate a lengthy list of features that would not be of practical use to the court. Likewise, the guideline does not include sentencing ranges as a second step, justified on a similar basis that the wide scope of offending behaviour would render any sentencing ranges too broad to provide real assistance to the court. Although it is true that there is a wide scope of offending behaviours involved in domestic abuse, we reject the premise that this prevents more detailed guidelines. We contend that relevant harm and culpability features can be succinctly defined, and delineated into levels that can be used to identify appropriate sentencing ranges, as outlined in our responses to questions 10 and 11. Indeed, the Sentencing Council for England & Wales guideline for sentencing intimidatory offences, including coercive control offences, takes this approach, which we consider to be clear and practicable. In its current form, the draft guideline is too vague and relies highly on sentencer discretion, which we belief circumvents the purpose and utility of the guideline. We have real concerns around sentencing consistency without greater clarity and structure.

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

The four behaviours listed in paragraph 4 are appropriate, each covering common forms of domestic abuse.

3. **Should any behaviours be added?**

We do not believe any behaviours should be added, as the current behaviours reflect the most common forms of domestic abuse.

4. **Should any behaviours be removed?**

None of the behaviours should be removed.

5. **Is the footnote discussing coercive control appropriate?**

The examples of coercive control set out in the footnote are appropriate, capturing behaviours that commonly form part of a course of conduct in the context of domestic abuse. However, we suggest that post separation abuse, including stalking, should be added as a further example. Separation often triggers an escalation in abuse, as the perpetrator's control over the victim is threatened, and so they may make efforts to regain that control. In particular, there is evidence to suggest that stalking is significant predictor of further violence and homicide. Stalking behaviours represent a continuing pattern of coercive control, and should be included as an example to better reflect the lived experiences of many victims.

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

We believe that that the example of "controlling the victim's finances by restricting access to money and/or concealing money" is too narrow. Economic abuse encompasses any form of control over a victim's money, including their spending and borrowing. In addition, we suggest that "denial of access to debit or credit cards" should be expanded to include denial of access to bank accounts.

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

Paragraph 5 could be clearer on how the domestic abuse guideline is meant to interact with other sentencing guidelines. We suggest that a short summary of the principle and purposes sentencing guideline and sentencing process guideline should be added, to facilitate public understanding. The wording included in the consultation document would suffice: "The principles and purposes of sentencing guideline provides that the core principle of sentencing is fairness and proportionality. The sentencing process guideline makes it clear that this should be considered throughout the sentencing exercise."

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'?**

We agree that the premise is appropriate.

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

The guidance set out in paragraphs 7 and 8 is appropriate. However, we suggest that paragraph 9 should be amended to include some further information on the, albeit limited, role of the victim in sentencing, specifically that victims will usually have the opportunity to make a victim statement. We believe this will help to facilitate public understanding about the nature of the role of the victim at sentencing.

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

It is our view that the guidance relating to assessing seriousness is far too vague to be of any meaningful value. As indicated in our response to question 1, it does not reflect the approach used in other SSC guidelines, which more clearly set out the steps involved in sentencing. We suggest that, in line with other guidelines, this section should be reframed as "Step 1: Assess the seriousness of the offence", with the additions we set out in question 11.

11. **Should any guidance be added?**

We believe that the guidance provided in relation to assessing seriousness is too vague and should include a further list of culpability and harm features, in line with other SSC guidelines. While the range of offending behaviours involved in domestic abuse offences is wide, we are of the view that harm and culpability features can be captured succinctly to establish categories used to determine sentencing ranges, in a manner that is of practical use to the court. For example, rather than drilling down into specific offending behaviours, culpability features should focus on the frequency, duration and variety of offending behaviours. Likewise, harm could be assessed based on the level, frequency and impact of physical violence and psychological distress.

We suggest an approach similar to that taken by the Sentencing Council for England & Wales for sentencing coercive control offences, with some additions. Factors indicating higher culpability could include conduct intended to maximise fear or distress, persistent action over a prolonged period, use of multiple methods of controlling or coercive behaviour, sophisticated offence, conduct intended to humiliate and degrade the victim, and post-separation abuse, including stalking. Factors indicating a high level of harm could include fear of violence on many occasions, very serious alarm or distress which has a substantial adverse effect on the victim, significant psychological harm, and necessitated changes to the victim's lifestyle or daily routine, such as changing jobs. We suggest that using this kind of approach would be prudent, practicable and of benefit to the court.

In addition, we suggest that further guidance should be added to highlight that victims of domestic abuse respond to trauma in myriad ways, and that coping strategies can vary significantly. While some victims may experience a pronounced emotive response and high levels of distress, others may become emotionally numb or withdrawn, neither of which is inherently more nor less indicative of the level of harm caused. It should be made clear that, in assessing harm, the focus should not be on policing the specifics of the victim's trauma response, but rather on whether, and the extent to which, it can reasonably be concluded that the victim would be caused harm or distress.

12. **Should any guidance be removed?**

None of the guidance should be removed.

13. **Are the statutory aggravations appropriate?**

Yes, the statutory aggravations are appropriate.

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

No further statutory aggravations should be added.

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

None of the statutory aggravations should be removed.

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

Yes, the non-statutory aggravating factors, including in relation to children, are appropriate.

17. **In particular, is the aggravating factor 'cultural violation' appropriate?**

We agree that an aggravating factor of this nature is appropriate. However, we suggest that "cultural violation" should be reframed as "religious, cultural or philosophical violation" to recognise the variety of harms that may fall under this category. Not only do we consider it important to specifically name religious violations, we also note that other philosophical violations can also cause considerable distress to victims as part of a pattern of coercive and controlling behaviours. Perpetrators of domestic abuse seek to control all aspects of their victim's life, and this can extend to control over areas of philosophical beliefs or practices.

18. **Is the footnote discussing 'cultural violation' appropriate?**

In line with our comments in question 17, we believe that the footnote should also include reference to philosophical beliefs or practices that are intended, or likely to have a particular impact on the victim. For example, a perpetrator may enforce a particular diet that either forces or prevents their victim from meeting dietary choices that align with their beliefs (such as ethical veganism), which could cause the victim to experience significant distress.

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

If post separation abuse is not added as a culpability feature, in the initial assessment of seriousness, we suggest it should be added as a non-statutory aggravating factor. Abuse can often escalate at separation, as this represents a significant threat to the perpetrator's control over the victim. Consequently, perpetrators may take action to regain control, including stalking their ex-partner. In particular, research suggests that stalking represents a significant risk of escalation of violence in the context of domestic abuse, including homicide (e.g. as set out in Jane Monckton-Smith's homicide timeline). Post separation abuse, such as stalking, amounts to a prolonged and ongoing campaign of coercion and control, which can result in further physical and psychological harm to the victim. Stalking involves patterns of fixated, obsessive, unwanted and repeated behaviours persisting over long periods of time. Victims may experience feelings of powerlessness and fear over their safety, which can result in them making changes to lifestyles and daily routine in order to protect themselves.

In addition, we suggest that previous convictions, particularly those relating to domestic abuse, stalking and other forms of gender-based violence, should be added to the list of aggravating factors. Previous convictions, particularly for similar offences, indicate a pattern of behaviour persisting over time, often across multiple victims, and sometimes represent an escalation in the level and intensity of behaviours, which are indicators that the perpetrator is a high-risk offender.

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

None of the non-statutory aggravating factors, including in relation to children, should be removed.

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

We do not believe any additional mitigating factors should be added to the guideline.

22. **Is the section of the guideline addressing non-harassment orders at paragraphs 19 – 23 appropriate?**

The section of the guideline addressing non-harassment orders is appropriate. However, it is our view that where the court concludes that there is no need for the victim or child to be protected from harassment or further harassment by such an order, that the court should provide justifications for this decision in writing, in order to demonstrate accountability and increase victim confidence in the sentencing process.

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

We believe that, in its current form, the guideline is too vague to meaningfully influence sentencing practice in Scotland.

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

We believe that, in its current form, the guideline will have no meaningful impact on public understanding of how sentencing decisions for domestic abuse are made. As indicated in previous questions, we contend that the guideline is too vague to increase public understanding, and that this could only be achieved in any tangible sense by restructuring the guideline to set out the three steps used to arrive at the headline sentence, in line with other SSC guidelines.

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

We do not see any negative effects from the introduction of this guideline. However, we suggest that any benefits from introducing the guideline, specifically utility to the court, consistency of sentencing approach, and increases in public understanding, can only be realised where the structure is amended in line with other SSC guidelines. Specifically, culpability and harm features should be set out for assessments of seriousness, mapped clearly to categories used to determine sentencing ranges. Sentencing ranges should also be provided, based on the levels of harm and culpability established in the assessment of seriousness.

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

We are not in a position to comment on whether the introduction of the guideline might impact some groups of people more than others in a disproportionate way.

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

We are not in a position to comment on whether any costs will arise from the introduction of this guideline.

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

As highlighted in previous responses, we believe that sufficient regard must be given at sentencing to post separation abuse, including stalking. Stalking represents a clear escalation of abuse, and is a significant risk factor of further, more serious violence, including homicide.

In addition, we draw attention to the importance of non-harassment orders for the safeguarding of victims. We note that courts are required to make an NHO where there is a domestic abuse conviction, including offences with domestic abuse aggravators, unless it is concluded there is no need for the victim or child to be protected from harassment or further harassment by such an order. While this indicates a presumption in favour of NHOs, NHO statistics from a published Scottish Government FOI request demonstrate that NHOs are frequently not being issued in these circumstances, particularly in Sheriff Summary courts. As we set out in question 22, we believe that courts should be required to provide justifications for such decisions in writing.

**For Further Information**

**Contact**
**Shannon Russell**
Head of Policy and Campaigns
**Shannon.Russell@actionagainststalking.org**

**Contact Us**

**Enquiries:** enquiries@actionagainststalking.org
**Press:** press@actionagainststalking.org

**Support Us**

Help us make a difference and improve the lives of those affected by stalking.
Support Action Against Stalking today.
**www.actionagainststalking.org**

action against stalking

© Action Against Stalking is a Scottish Charitable Incorporated Organisation (SCIO No: SC044905)
Registered office: Room 2.071, University of the West of Scotland, University Avenue, Ayr, KA8 0SX