



# Domestic abuse

## Draft sentencing guideline

Effective from [date]

DRAFT

## Applicability

1. This guideline applies to all offenders who are sentenced on or after [DATE], and who have been convicted of an offence involving domestic abuse.
2. For the purposes of this guideline, an offence involving domestic abuse is any offence that is intended to cause (or where the perpetrator is reckless as to whether it causes) a partner or ex-partner to suffer physical or psychological harm.
3. Someone is a person's partner if they are:<sup>1</sup>
  - a spouse or civil partner;
  - living with them as if a spouse or civil partner; or
  - in an intimate personal relationship with that person.

Whether someone is a person's ex-partner is to be determined accordingly.

4. Abusive behaviour in the context of a domestic abuse offence can include, but is not limited to:<sup>2</sup>
  - physical abuse
  - sexual abuse
  - psychological abuse
  - economic abuse<sup>3</sup>

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<sup>1</sup> [Domestic Abuse \(Scotland\) Act 2018, section 11.](#)

<sup>2</sup> The items on this list may be aspects of, or form part of, a course of coercive control. This might take the form of, for example, behaviour which has the effect of: making the victim dependent on, or subordinate to, the offender; isolating the victim from friends, relatives or other sources of support; controlling, regulating, or monitoring the victim's day-to-day activities; depriving the victim of, or restricting, their freedom of action; or frightening, humiliating, degrading, or punishing the victim.

<sup>3</sup> Economic abuse may form part of a course of coercive control and might take the form of, for example, the offender controlling the victim's finances by restricting access to money and/or concealing money; denial of access to debit or credit cards; forcing the victim to give up, or preventing the victim from pursuing, work, education or training; or coercing the victim into debt, for example by running up debts in the victim's name.

## How to use this guideline

5. This guideline should be read alongside the Council's guidelines '[Principles and purposes of sentencing](#)' and '[The sentencing process](#)'. It should also be read along with any other guidelines which apply to the case, or to the offender. Details of guidelines in force can be found on the [Council's website](#).
6. If a court decides not to follow an applicable guideline it must state the reasons for that decision.

## Sentencing a domestic abuse offence

7. Domestic abuse offences represent a significant violation of the trust and security that normally exists between individuals who are, or who have been, in a relationship as partners. Such offences can cause particularly damaging harm to the victim and to children<sup>4</sup> affected by the abuse, and can inflict lasting trauma.
8. When sentencing for an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018, or an offence that is aggravated under section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, the court must have particular regard to the aim of ensuring that the victim is not the subject of a further such offence committed by the offender.<sup>5</sup>
9. 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. This is because:
  - no victim is responsible for the sentence imposed on an offender;
  - a plea for more lenient treatment for an offender made by a victim may, as part of a course of coercive control, be induced by threats made by the offender, or by fear of the offender. This risk may be increased if it is generally believed that the severity of the sentence may be affected by the wishes of the victim; and
  - the court is sentencing on behalf of the wider public.

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<sup>4</sup> For the purposes of this guideline a child is a person under the age of 18.

<sup>5</sup> [Criminal Procedure \(Scotland\) Act 1995, section 210AB](#).

## Seriousness

10. The court should assess the seriousness of the offence by evaluating the level of culpability<sup>6</sup> of the offender, and the level of harm caused to the victim and others affected by the case. As either or both culpability and harm increase, so may the seriousness of the offence.
11. Harm includes the impact on any victim or victims. It can be the result of the cumulative effect of abusive or violent behaviour, and is likely to increase in line with any increase in the severity or frequency of the abuse or violence over a prolonged period.
12. Where children are the victims of, or adversely affected by, a domestic abuse offence, the court should ensure prior to sentencing that it has, insofar as reasonably practicable, sufficient and reliable information to assess the harm caused to them.
13. When assessing the level of seriousness, reluctance on the part of the victim to engage with the criminal justice process should not be regarded as indicative of a lower level of seriousness.

## Aggravating and mitigating factors

14. Cases may have both aggravating and mitigating factors. Whether, and the extent to which, any factor has an aggravating or mitigating effect will depend on all of the circumstances of the case.
15. When an offender is convicted of an offence which includes a statutory aggravation the court must, when sentencing, take that aggravation into account.
16. Factors which have been included in the initial assessment of seriousness should not also be considered as aggravating or mitigating factors.
17. The following are non-exhaustive lists of additional factual elements which may apply to the offence and the offender. The court should consider which, if any, of these factors apply, together with any other aggravating or mitigating factors.

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<sup>6</sup> Further information on the assessment of culpability can be found in paragraph 10 of the Council's guideline '[The sentencing process](#)'.

18. Regard should also be had to annexes A, B, and C to the Council's guideline '[The sentencing process](#)', which include further examples of aggravating and mitigating factors.

### Statutory aggravations

- the aggravation under [section 1 of the Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#) (aggravation of offence where abuse of partner or ex-partner)
- where the offence is a contravention of [section 1\(1\) of the Domestic Abuse \(Scotland\) Act 2018](#), any of the aggravations in relation to a child under [section 5 of that Act](#)
- breach of a condition of bail, under [section 27\(1\)\(b\) of the Criminal Procedure \(Scotland\) Act 1995](#)

### Aggravating factors (non-statutory)

- victim is particularly vulnerable. All victims of domestic abuse are potentially vulnerable, but some may be more vulnerable than others, for example if they experience physical or mental health issues, are pregnant, or are particularly dependent upon the offender. This includes where the actions of the offender are intended to increase the vulnerability of the victim. This could be, for example, by causing or intending to cause restriction, limitation or control of, or interference with, the victim's rights to or needs for freedom of movement (including travel or transport), food, medication, healthcare, finances, or access to personal documents
- steps taken to prevent the victim reporting an incident
- steps taken to prevent the victim obtaining assistance
- victim forced to leave home, or steps having to be taken to exclude the offender from the home to ensure the victim's safety
- a history of violence or threats by the offender in a domestic context
- a history of failing to comply with court orders (such as, but not limited to, bail conditions and non-harassment orders)
- cultural violation<sup>7</sup>

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<sup>7</sup> For example, where the victim is being prevented from following cultural or religious practices they wish to follow; being forced to follow cultural or religious practices they do not wish to follow; or other behaviour which is intended, or likely, to have a particular impact on the victim due to religious or cultural beliefs or practices.

### **Aggravating factors in relation to children (non-statutory)**

These should only be considered as aggravating factors when they are not being considered as a statutory aggravation under [section 5 of the 2018 Act](#).

- the offending behaviour is directed at a child, or there is harm or a risk of harm to a child as a result of the offending behaviour
- using contact arrangements with a child to facilitate offending behaviour
- making use of a child in directing offending behaviour at the victim

### **Mitigating factors**

- Mitigating factors may also be present. Some examples of mitigating factors can be found in annex C to the Council's guideline '[The sentencing process](#)'.

## Non-harassment orders

19. The court must make a non-harassment order (NHO) in cases where there is a conviction under [section 1\(1\) of the 2018 Act](#), and in cases to which the aggravation in [section 1\(1\)\(a\) of the 2016 Act](#) applies, unless it concludes that there is no need for any of the following people to be protected from harassment or further harassment by such an order:<sup>8</sup>
- the victim
  - in addition to the victim:
    - a child usually residing with the offender, or the victim, or both the offender and the victim
    - where the offence is one under [section 1\(1\) of the 2018 Act](#), and aggravated as described in [section 5\(1\)\(a\) of that Act](#), a child to whom the aggravation refers
20. In other cases involving domestic abuse, on the application of the prosecutor the court may make an NHO if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from harassment or further harassment by such an order.<sup>9</sup>
21. An NHO may have effect for a specified or indeterminate period, and will require the offender to refrain from such conduct in relation to the victim, or any child named in the order, as is specified in the order.
22. An NHO can be made in addition to, or instead of, any other disposal.
23. In reaching a conclusion in respect of the matters in paragraphs 19 or 20 and 21-22 the court may have regard to the expressed views of the victim, but the final decision remains entirely one for the court.

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<sup>8</sup> [Criminal Procedure \(Scotland\) Act 1995, section 234AZA](#).

<sup>9</sup> [Criminal Procedure \(Scotland\) Act 1995, section 234A](#), which generally requires an offender to be convicted of an offence involving misconduct towards another person before the making of a non-harassment order can be considered. 'Misconduct' is defined as including 'conduct that causes alarm or distress'.

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