

DOMESTIC VIOLENCE

**THE PANEL'S ADVICE TO THE
SENTENCING GUIDELINES COUNCIL**

FOREWORD BY THE CHAIRMAN

In this, its sixth Advice to the Sentencing Guidelines Council, the Sentencing Advisory Panel invites the Council to consider the Panel's proposals for guidelines on sentencing for offences committed within a domestic context.

In presenting its advice, the Panel endorses the overall approach stated by the Court of Appeal that, as a starting point for sentence, offences committed in a domestic context should be regarded as being of equivalent seriousness to offences committed in a non-domestic context. This should be the principal basis for sentencing.

The Panel's main proposal is that where the court is satisfied that the offender genuinely intends to reform his/her behaviour, it may be appropriate to impose a sentence that will allow the offender to be rehabilitated – this may mean imposing a suspended sentence order or a community order with a requirement to attend a domestic violence programme, rather than imposing a short custodial sentence.

The Panel's advice includes proposals for sentencing for breach of a restraining order and a non-molestation order. The latter is a new offence under the Domestic, Violence, Crime and Victims Act 2004. The starting points proposed for the breach of protective orders take into consideration the nature of the contact, if one or more breach has occurred and the level of harm inflicted.

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Chairman of the Sentencing Advisory Panel

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INTRODUCTION

1. The Sentencing Advisory Panel proposes to the Sentencing Guidelines Council that a guideline should be issued on the sentencing of domestic violence. The Panel received a reference from the Home Secretary under section 81(3) of the Crime and Disorder Act 1998¹ to consider sentencing in cases of domestic violence. For the purposes of this advice, domestic violence is:

“any incident of threatening behaviour, violence or abuse [psychological, physical, sexual, financial or emotional] between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”²

2. There is no specific offence of domestic violence, and not every activity that falls within this definition amounts to a criminal offence. Most incidents of domestic violence can, however, be charged as one of a wide range of offences (see paragraph 5). This advice covers issues which are relevant across the range of offences that might be committed in a domestic context. Provisional guidelines for breach of non-molestation and restraining orders are also provided. Under the Domestic Violence, Crime and Victims Act 2004 (DVCVA 2004) a breach of a non-molestation order will become a criminal offence subject to a maximum penalty of 5 years imprisonment.³
3. As there is no specific offence of domestic violence, the Panel is not able to propose sentence starting points as such but, instead, sets out principles to be applied where offences have taken place within a domestic context. One exception is in part 2 of the advice, where starting points are given for sentencing for breach of non-molestation orders and restraining orders. Starting points are provided here as we are dealing with breach as a specific criminal offence.
4. The Panel has consulted on its proposals and a list of those who responded is set out in Annex B.

¹ This has been superseded by Criminal Justice Act 2003, s.170(2).

² This is the government definition of domestic violence agreed in 2004 taken from CPS *Policy on Prosecuting cases of Domestic Violence*, 2005.

³ Home Office officials advise that implementation of this section is likely to be on 5th December 2005, if resources and training permit.

THE CURRENT LAW

5. There is a range of criminal offences that may be committed in the context of domestic violence. These include physical assault (with or without a weapon), harassment, threats to cause injury or to kill, destroying or damaging property, false imprisonment (locking the victim in a room or preventing that person from leaving the house), and sexual offences. Domestic violence may also be associated with putting pressure on the victim, or a witness, not to report the matter or not to give evidence. Analysis of domestic violence case files in an evaluation of specialist domestic violence courts shows that the offences most frequently charged are common assault (45%), assault occasioning actual bodily harm (32%) and criminal damage (14%).⁴ The Panel will be issuing consultation papers on sentencing for these specific offences.⁵
6. The Protection from Harassment Act 1997 (PFHA 1997) makes it an offence to behave in a way which a person knows, or ought to know, causes someone else harassment (section 2) or fear of violence (section 4). This makes abuse of a psychological nature a criminal offence and can include conduct which takes place in a domestic context. Under this Act, a *restraining order* is available which is designed to regulate the offender's future behaviour. In 1999, just over half of all convictions under the PFHA 1997 were accompanied by a restraining order.⁶ A breach of the restraining order can result in imprisonment for up to five years. The DVCVA 2004⁷ contains powers to impose restraining orders on conviction of any offence, or even after acquittal.
7. The DVCVA 2004 also amends the Family Law Act 1996 (FLA 1996) and, for the first time, makes a breach of a *non-molestation order* under Part IV FLA 1996 a criminal offence subject to a maximum penalty of 5 years imprisonment. Under the DVCVA 2004, the FLA 1996 is amended to include section 42A, which will state that "a person who without reasonable excuse does anything he is prohibited from doing by a non-molestation order is guilty of an offence". Nonetheless, a breach of a non-molestation order can still be dealt with as a contempt of court.
8. In practice, victims may instigate civil proceedings at the same time as criminal proceedings are being pursued.⁸ Where this happens, civil and criminal courts should share information, as decisions in one court may impact on decisions in the other. Recent investigation into court procedures has shown, however, that information sharing between courts is weak and requires development.⁹ The Family-Criminal Interface Steering Committee has been set up to tackle this issue.

⁴ CPS/DCA, *An Evaluation of Specialist Domestic Violence Courts/Fast Track Systems*, 2004.

⁵ These are due for publication later in 2005 and will be available at www.sentencing-guidelines.gov.uk

⁶ J. Harris, *The Protection from Harassment Act 1997 – An evaluation of its use and effectiveness*, 2000. Home Office Research Finding No. 130.

⁷ Section 4 of the DVCVA (2004) creates a new offence of 'causing or allowing the death of a child or vulnerable adult' which falls within the domestic violence definition which is not specifically covered in this advice.

⁸ Part IV FLA provides for civil orders dealing with non-molestation and with the occupation of the family home.

⁹ CPS, *Evaluation of Domestic Violence Pilot Sites at Gwent and Croydon 2004/5 – Interim report*, 2004.

PART 1

CURRENT SENTENCING APPROACH

9. Sentencers are sometimes faced with difficult decisions to make in domestic violence cases when there is a discrepancy between what is known generally about the nature of these cases and the facts of the specific incident as presented in court. Current training for magistrates, for instance, highlights research which shows that domestic violence is rarely a one-off incident (see Annex A).
10. The sentencer cannot pass sentence on the basis that the violence has occurred frequently where the other incidents were not reported or charged, or have not been proved or admitted. While it is recognised that victims of domestic violence may have suffered abuse over a considerable period of time, the courts can sentence on the basis of continuing abuse only if the offender is convicted of separate offences arising from different incidents (or clearly admits them), or is convicted of harassment on the basis of persistent abuse, or if the offender has a criminal record of violence against the victim or other family members. Section 101 of the Criminal Justice Act 2003 provides greater opportunity for the prosecution, in a contested case, to draw attention to previous unreported violent incidents as evidence of the defendant's bad character. This raises a question over the extent to which this evidence could then form the basis for sentencing.
11. The Divisional Court has said that a sentencer may take into account the full extent of the harm caused to the victim even if the offence of which the person has been convicted does not truly reflect the degree of violence involved.¹⁰ This is of course subject to all other considerations including the maximum penalty for the offence of which the person has been convicted and the need to give an appropriate reduction for a plea of guilty. CPS policy in prosecuting cases of domestic violence (February 2005)¹¹ states that, if a defendant offers to plead guilty to a lesser offence, the prosecution should only accept the plea if the court will still be able to pass a sentence which properly reflects the seriousness of the offence. Further discussion of this issue may be found in the Panel's consultation paper on assault and other offences against the person.

FACTORS INFLUENCING SENTENCE

¹⁰ *Nottingham Crown Court, ex parte DPP* [1996] 1 Cr App R (S) 283

¹¹ *CPS Policy on Prosecuting cases of Domestic Violence*, 2005. See also the *CPS Code - Code for Crown Prosecutors*, Nov 2004. Both can be found at www.cps.gov.uk

Assessing seriousness

12. The Court of Appeal has considered the general issue of sentencing in cases of domestic violence on a few occasions, and its message has been that the domestic context does not make an offence any less serious. This principle is stated clearly in *R v McNaughten*¹² where the Court of Appeal dismissed an appeal against a sentence of nine years imprisonment for eleven counts of violence by an offender against his live-in partner. The court stated that:

“...we must firmly emphasise that the seriousness of an incident of violence is not diminished merely because it takes place in a “domestic environment”. Whenever and wherever it happens, an offence of violence is an offence of violence.”

13. The Panel endorses this approach. This principle was also applied in the Panel’s advice to the Court of Appeal on sentencing for rape (2002),¹³ where it was stated that the starting point for sentence in cases of ‘relationship rape’ and ‘acquaintance rape’ should be the same as in cases of ‘stranger rape’, with the sentence increased or reduced, in each case, by the presence of specific aggravating or mitigating factors.¹⁴

Aggravating factors

(i) Abuse of trust and abuse of power

14. The Sentencing Guidelines Council’s guideline on seriousness lists the abuse of a position of trust and/or an abuse of power as factors that indicate higher culpability.¹⁵ The Magistrates’ Courts Sentencing Guidelines (2003) identify an abuse of trust (domestic setting) as an aggravating factor of the types of offences that are committed in a domestic context. Those who responded to our consultation paper took the view that both an abuse of trust and an abuse of power were inherent in many (but not all) offences involving domestic violence.

Trust in a relationship implies a mutual expectation of conduct that shows consideration, honesty, care and responsibility. An *abuse of trust*, whether through direct violence or emotional abuse, represents a violation of this understanding. An *abuse of a position of trust* deals specifically with an offender exploiting his or her professional status when committing an offence.

An *abuse of power* in a relationship involves restricting an individual’s right to freedom – a specific characteristic in some domestic violence cases. It involves a perpetrator trying to gain control over an individual by means which may be physical, psychological, emotional or financial. In same-sex

¹² [2003] EWCA Crim 3479

¹³ This is available at www.sentencing-guidelines.gov.uk

¹⁴ The Court of Appeal endorsed that approach in the guideline case on sentencing for rape, *Millberry and others* [2003] 2 Cr App R (S) 31

¹⁵ SGC, *Overarching Principles: Seriousness – Guideline*, Dec 2004. This is available at www.sentencing-guidelines.gov.uk

relationships, it may take the form of 'outing', or threatening to 'out', a partner to family, friends or employers.

15. Some of those who responded to our consultation paper argued that, as an abuse of trust and/or an abuse of power will almost certainly exist in domestic violence cases, the starting point for sentencing should always be higher than for cases of violence in other settings.
16. It should not be overlooked that offences committed by a former partner or spouse will fall within the definition of domestic violence and there will be circumstances where the abuse of trust and/or abuse of power may be a very minor feature of an offence or may be deemed no longer to exist – for example where the offender and victim have been separated for a long period of time. Consequently, the Panel's view is that where an abuse of trust or abuse of power is present it will aggravate the seriousness of an offence but that the potential for such aggravating factors to exist must not automatically influence the sentencing starting point for all domestic violence cases.
17. The starting point for sentencing should be the same, irrespective of whether the offender and the victim are known to each other (whether by virtue of being current or former intimate partners or family members or friends or acquaintances) or unknown to each other. Each case may be aggravated by a wide range of factors, some of which - such as the factors discussed below - may be more common in a domestic violence situation.

As a starting point for sentence, offences committed in a domestic context should be regarded as being of equivalent seriousness to offences committed in a non-domestic context.

(ii) Vulnerability of the victim

18. The Panel is aware that, for cultural, religious or language reasons, some victims of domestic violence may be more vulnerable than others. For example, for some individuals leaving a violent relationship may not be an acceptable path:
 - in some communities, to leave one's husband would bring dishonour and shame to the family leading to a woman being ostracised by her family and community¹⁶
 - an inability to speak English may make victims more vulnerable as they are unable to access services¹⁷
 - while those who come to the UK for settlement (as a result of marriage or their relationship with a British Citizen or person who has indefinite leave to remain¹⁸) may apply for settlement in their own right if they can provide evidence of domestic violence, they have no recourse to public funds until they have been granted indefinite leave

¹⁶ Justice for Women, *Why do Women Stay with Violent Men?*: www.jfw.org.uk/leave.htm

¹⁷ *ibid*

¹⁸ Indefinite leave to remain removes all the conditions/restrictions imposed by the person's previous leave to enter or remain

to remain and, as a result, may find it difficult to get access to a refuge.

19. There will be circumstances where a perpetrator will exploit this vulnerability. Most consultees agreed that an offence is more serious where the victim is faced with cultural and language barriers. However, a significant minority felt that it was wrong to say that a situation was worse because of a victim belonging to a particular culture and it was the nature and extent of the specific controlling behaviour that should be assessed.

Where a perpetrator has exploited a victim's vulnerability (for instance, when the circumstances have been used by the perpetrator to prevent the victim from seeking and obtaining help), an offence will warrant a higher penalty.

(iii) Impact on children

20. There is overwhelming support among consultees for an offence to be considered more serious where children have been exposed to violence. A considerable body of research points to the damaging long-term effects on children, including psychological and physical illnesses. Children can be affected not only by directly witnessing violence or other abuse but also by being aware of it taking place while they are elsewhere in the home.¹⁹ Consultees cited the worrying, long term, adverse effect on attitudes to violence, particularly among boys, who themselves are substantially more likely to become abusers as adults.

Exposure of children to an offence (either directly or indirectly) should be an aggravating feature.

(iv) Other aggravating factors

21. In addition to the aggravating factors mentioned above, the Panel proposes that the factors below are particularly relevant as aggravating factors in relation to an offence arising from an incident that meets the definition of domestic violence. This list, which is not intended to be exhaustive, should be read alongside the Council's guideline on seriousness²⁰ which includes a list of general aggravating and mitigating factors.

Specific examples of aggravating factors in domestic violence situations:

- a proven history of violence or threats by the offender in a domestic setting
- using contact arrangements with a child to instigate an offence when the parties are separated²¹

¹⁹ J. Morgan, and L. Zedner, *Child Victims: Crime, Impact and Criminal Justice*, 1992, Oxford.

²⁰ SGC, *Overarching Principles: Seriousness. Guideline*, Dec 2004. This is available at: www.sentencing-guidelines.gov.uk.

²¹ See Annex A, paragraph A6, which shows that women can remain in danger of domestic violence even after separation from a violent partner.

- victim was pregnant
- victim forced to leave home (living in temporary accommodation or shelter)
- commission of the offence in breach of a non-molestation order imposed in civil proceedings
- commission of the offence in breach of a sentence (such as a conditional discharge) imposed for similar offending, or while subject to an ancillary order, such as a restraining order

Mitigating factors

(i) Positive good character

22. As a general principle of sentencing, a sentencer will take account of a defendant's positive good character. Some of our consultees pointed out that it was the ability of a perpetrator to have two personae that allows domestic violence to continue unnoticed for lengthy periods of time and, accordingly, a perpetrator's good behaviour in public should not be used to diminish the seriousness of an offence committed in private. The Panel agrees with this view.

An offender's good character in relation to conduct outside the home should be of no more than minor relevance in respect of an offence of violence in a domestic context.

(ii) Provocation

23. Domestic violence takes place within the context of a current or past relationship. It may be alleged that the victim's own behaviour has provoked an assault. The Panel's advice on manslaughter by provocation²² discusses in detail the types of behaviour that might amount to low, substantial, or high levels of provocation. The form and degree of the provocation is set against the length of time over which the provocation took place. We take the view that the approach set out in the manslaughter advice is generally applicable in the present context.
24. In its draft guideline, based on the Panel's advice, the Sentencing Guidelines Council has proposed that "actual (or anticipated) violence from the victim will generally be regarded as involving a higher degree of provocation than provocation arising from abuse, infidelity or offensive words unless that amounts to psychological bullying".²³ The draft guideline states that "the offender's violent response to provocation is likely to be less culpable the shorter the time gap between the provocation (or the last provocation) and the killing". This guideline relates to a circumstance where an offender has been

²² Sentencing Advisory Panel, *Manslaughter by Provocation* - Advice to the Sentencing Guidelines Council No.4, 2005. Available at www.sentencing-guidelines.gov.uk

²³ SGC, *Manslaughter by Reason of Provocation - Draft Guideline*, 2005. Paragraphs 3.2c and 3.4. Available at www.sentencing-guidelines.gov.uk

found to have lost self control as a result of the provocation. That is not the case in most cases of domestic violence but the general principle remains valid.

For provocation to be a mitigating factor, it will need to involve actual or anticipated violence including psychological bullying. Provocation is likely to have more of an effect as mitigation if it has taken place over a significant period of time.

Other factors influencing sentence

(i) Wishes of the victim

25. Sometimes victims ask the court to impose a more lenient sentence on the offender. Court of Appeal guidance, in the context of victim personal statements, is that sentencers should be very cautious in paying attention to pleas for mercy.²⁴ The majority of consultees believed that very little weight should be given to the views of the victim in domestic cases, and that sentencing should be a matter for the court mainly because pleas for mercy may be influenced by the defendant or other family members, and the victim should not be made to feel responsible for the sentence imposed.

In accordance with general sentencing principle, little weight should normally be given to pleas by the victim to reduce the sentence considered appropriate by the court.

(ii) Effect of the sentence

26. Sentencers may take the view that it is counter-productive to impose a sentence of imprisonment, which is otherwise justified for the offence, where the burden will fall upon the victim (and other family members) as well as upon the offender. In some cases, for example, the offender may be the principal wage earner. In *R v Roche*²⁵ it was stated that the court may moderate a sentence to some degree only where a severe sentence on the offender would increase the victim's distress. Our consultees felt that this was appropriate although they argued that a victim could be put under considerable pressure if it was seen that the court would take account of the adverse impact of the sentence on the victims. Sentencers must be aware of this and exercise caution in reducing a sentence where this is the case.
27. Given that reform and rehabilitation of the offender is one of the purposes of sentencing,²⁶ the state of the relationship between the offender and victim may be a legitimate factor influencing the type of sentence in domestic cases. In those cases where, despite the offence, the offender and victim genuinely wish to continue their relationship, sentencers are more likely to pass a sentence which enables that to happen while trying to prevent the violence

²⁴ Consolidated Practice Direction [2002] 1 WLR 2870, para 28, *R v Perks* [2001] 1 Cr App R (S) 66

²⁵ *R v Roche* [1999] 2 Cr App R (S) 105

²⁶ Criminal Justice Act 2003, s.142 (1) (c)

continuing. This is particularly the case in magistrates' courts where the offence is not so serious as to justify the higher penalties of the Crown Court.

28. We asked our consultees whether a victim and offender wishing to continue their relationship should influence the type of sentence passed. Responses were equally divided. Those who believed that it should said it was important to consider the views of victims and even the longer term effect on the victim in terms of any repetition of violence and/or financial hardship. The main argument put forward against this proposition was the concern that a victim may be under great pressure to continue in an abusive relationship for a number of reasons including loss of the home, isolation, financial hardship and adverse impact on children. The victim may be intimidated or coerced by the offender or other family members to give the impression of reconciliation with the offender.
29. The Panel has considered the arguments carefully. A court must be mindful that a victim and an offender may wish to remain together, but in this situation the protection of the victim, and the prevention of further violence, must be paramount. The court may want to consider action that will help to promote a safer relationship. Courts will be dependent upon accurate and up-to-date information, especially in the pre-sentence report and victim personal statement, in deciding upon the best course.

There will be circumstances where the importance of preserving the relationship may properly influence the type of sentence passed.

The Panel's proposal

30. Offences involving serious violence will, in the majority of cases, clearly warrant a custodial sentence. A large proportion of cases in the domestic context, however, are common assault or assault occasioning actual bodily harm (see paragraph 5 above) where injuries sustained may be minor and cases are mainly sentenced in a magistrates' court. The Panel's forthcoming paper on sentencing in cases of assault and other offences against the person will consider starting points for a range of violent offences.
31. The Panel proposes that, in circumstances where the custody threshold has been passed and a short custodial sentence is being considered, a sentencer should consider imposing a suspended sentence order, or a community order, in either case with a requirement to attend a domestic violence programme. Where the defendant is willing to address his behaviour, attending a domestic violence programme may result in a more effective sentence and one that may increase the chance of the victim and defendant preserving their relationship within a safe environment.
32. Since March 2004, the Probation Service has been offering nationally the Integrated Domestic Abuse Programme and, to a more limited extent, the Community Domestic Violence Programme. Both programmes have been accredited by the Correctional Services Accreditation Panel. It is too early to evaluate the effectiveness of these programmes, but other research has shown a link between attendance on a programme and a reduction in re-offending.²⁷

²⁷ R. Lewis, 'Making Justice Work – Effective Legal Interventions for Domestic Violence', 2004. *British Journal of Criminology*, 44, pp.204-224. According to a sample of 134 female victims of domestic violence in the study,

33. The circumstances that might warrant this approach will include those where:
- the preservation of the relationship is an important consideration;
 - the offender shows genuine signs of remorse and wishes to address his behaviour; and
 - the offender pleads guilty
34. The Council has issued a guideline on reduction in sentence for a guilty plea and stated that, where an offence crosses the threshold for imposition of a community or custodial sentence, application of the reduction in sentence for a guilty plea may legitimately form the basis for imposing a lesser sentence, that is, a fine or discharge rather than a community sentence, or an alternative to an immediate custodial sentence.²⁸ In many domestic violence cases, for a variety of reasons, victims withdraw their consent from the trial process making it difficult to secure a conviction. Applying the reduction so that a community order may be imposed instead of a custodial sentence is likely to increase the number of guilty pleas and so save more victims from having to give evidence whilst allowing offenders to address their behaviour through attending a domestic violence programme.

Where the court is satisfied that the offender genuinely intends to reform his/her behaviour, it may be appropriate to impose a sentence that will allow the offender to be rehabilitated – this may mean imposing a suspended sentence order or a community order with a requirement to attend a domestic violence programme, rather than imposing a short custodial sentence.

PART 2

BREACH OF A PROTECTIVE ORDER

one third of men (33%) who completed an abuser programme and 70% of men who were given a traditional sanction, such as a fine or imprisonment, committed a subsequent violent act against their partner in the 12 months after sentencing. Gondolf (1997) has also reviewed research in North America and found that there appears to be a cessation in violence among a substantial proportion of completers. He concludes that studies indicate that participation, motivation, programme structure and linkages and social context may all contribute to outcome. There is no evidence that one programme is better than another.

²⁸ SGC, *Reduction in Sentence for a Guilty Plea – Guideline*. Page 3, published August 2004. Available at www.sentencing-guidelines.gov.uk

35. In this part of its advice, the Panel considers guidelines for sentencing for a breach of a non-molestation order (a new offence under the Domestic Violence, Crime and Victims Act 2004) or a restraining order (offence under the Protection from Harassment Act 1997). Both offences have a maximum penalty of 5 years imprisonment. Until the commencement of the provisions of the 2004 Act (see footnote 3 above), breach of a non-molestation order is dealt with by way of proceedings for breach of a court order. Criminalising the breach of a non-molestation order increases the sentencing options available to include, for example, a community order. All our consultees who responded on the point said they saw no reason why guidelines for breach of a non-molestation order and restraining order should not be considered together.
36. The majority of our consultees agreed with the Panel's view that a breach of these protective orders should be considered more serious than a breach of a conditional discharge. As well as being an offence in its own right, it was felt that a breach of the protective order was more serious because it undermines a specific prohibition imposed by the court whereas breach of a conditional discharge amounts to an offender failing to take a chance that has been provided by the court.

Breach of a protective order is more serious than breach of a conditional discharge.

37. There are three possibilities when sentencing for breach of an order:
- (i) where the conduct involved in the breach amounts to a criminal offence, it can be charged without separately charging the breach. The fact that the offence was committed in contravention of a court order will be taken as an aggravating factor. In such circumstances, the breach is subsumed within the offence
 - (ii) where the conduct involved in the breach amounts to a criminal offence, the breach and criminal offence may both be charged. Here, the sentences should be concurrent since the fact of the breach aggravates the seriousness of the offence
 - (iii) where the conduct involved in breach is not a criminal offence, the breach alone will be charged and sentenced on its own.

A defendant should be sentenced once only for the conduct that amounts to the breach.

Factors influencing sentence

38. The Panel's consultation paper drew attention to current guidance from the Court of Appeal on sentencing for breach of restraining orders in domestic

cases under the PFHA 1997 in *Liddle and Hayes*.²⁹ The judgment indicates that the sentencing for breach will be influenced by the seriousness of the original offence leading to an order being made, the seriousness of the conduct leading to the breach, whether the defendant had a history of disobeying court orders, the level of risk posed by the defendant, the mental health of a defendant and his willingness to undergo treatment or accept help from the probation service. Those who responded to our paper broadly agreed with the factors identified in *Liddle and Hayes*.³⁰

Violence as a starting point for custody

39. We sought views in the consultation paper on whether the starting point for a breach of order should be custody if it involves actual violence. The proposition was based on the statement in *Liddle and Hayes*³¹ that violence or direct contact is likely to be more serious than non-violent or indirect contact (such as writing letters or making calls of an unpleasant nature).
40. As these orders are designed to protect the victim from abuse, it was felt that the use of violence in breach was so serious that the starting point must be custody. Consultees also stated that the impact of indirect contact, such as intrusive/threatening calls, should not be underestimated. There would be circumstances in which non-violent behaviour, such as visits to a victim's home or workplace, might warrant a custodial sentence. The Panel agrees that it is important to recognise the seriousness of some non-violent breaches of protective orders. The conduct needs to be seen in the context of the original conduct or offence that led to the original order being made.

Where violence is used to breach a non-molestation order or restraining order, custody must be the starting point for sentence.

Non-violent conduct in breach may cross the custody threshold where a high degree of harm or anxiety has been caused to the victim.

Nature of the original conduct or offence

41. *Liddle and Hayes* identified the provision under which the original restraining order was made (section 2 or 4) as a factor in determining the approach to breach, suggesting that the relative seriousness of the original offence should influence the approach to any breach. However, orders are designed to promote future compliance rather than to be a punishment for past conduct, and it may be that the seriousness of the breach and the potential seriousness of future breaches is more significant than the conduct that led to the order being made. Under the DVCVA 2004, there will be circumstances where there is no original offence, because the order was made in civil proceedings, or because it was made following acquittal.
42. Most of our consultees argued that it is not possible to understand the seriousness of the breach without understanding the context of the original

²⁹ [2000] 1 Cr App R (S) 131

³⁰ Since our consultation, a guideline has been issued in *R v Pace* [2005] 1 Cr App R (S) 74

³¹ [2000] 1 Cr App R (S) 131

conduct or offence. If the original offence was very serious, such as a wounding or sexual assault, merely driving past a victim's house may have severe effects on the victim. Nonetheless, the sentence for the original offence and the sentence for the breach need to be kept in proportion, and the offender should not be punished twice for the original offence. In civil proceedings the purpose of the original order may have been to get the perpetrator to modify his behaviour, rather than to imply that the conduct was especially serious. If so, it would seem disproportionate to pass a custodial sentence for a breach of the order.

The nature of the original conduct or offence is relevant to sentencing for the breach in so far as it allows a judgement to be made on the level of harm caused to the victim by the breach, and the extent to which that harm was intended by the offender.

Future compliance

43. Consultees were asked what were the relevant factors in balancing the goals of future compliance and punishment for breach of an order. Most said that the welfare and safety of the victim was paramount, and many said that punishment should be a secondary aim to ensuring future compliance.

When sentencing for a breach of order the main aim should be to achieve future compliance with that order.

Panel's proposed starting points

44. The Court of Appeal in *Liddle and Hayes*³² provided guidance on sentencing levels. It was said that a short custodial sentence might be appropriate for a first offence although the court would need to consider 'repetition and breach of orders and the nature of the misconduct'. For a second offence, a starting point of 15 months (on a plea of guilty) was suggested. More recently, in *R v Pace*,³³ where no reference was made to *Liddle and Hayes*, the court noted that sentences of between 12 months and 2 years had been upheld for a breach of a restraining order.
45. Given the discussion and principles described above, it is clear that the nature of the conduct in a breach (whether direct or indirect contact) and securing future compliance are two key factors that should influence sentencing. In order to enable a consistent approach to be developed the Panel therefore proposes starting points in the table below.
46. As is usual in the Panel's advice, the starting points are those prior to any reduction for a guilty plea.

Nature of offence

Sentence – starting points

³² *ibid.*

³³ *R v Pace* [2005] 1 Cr App R (S) 74

Non-custodial:

- Single breach involving no / minimal direct contact - LOW range community order
- More than one breach involving no / minimal contact or some direct contact - MEDIUM range community order

Custody:

- Single breach involving some violence and / or significant physical or psychological harm to the victim - 20 weeks
 - More than one breach involving some violence and / or significant physical or psychological harm to the victim - 40 weeks
 - Breach (whether one or more) involving considerable violence and / or serious physical or psychological harm to the victim - Should be charged as a separate offence. See Panel's forthcoming consultation paper on assaults and other offences against the person.
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47. While in principle consecutive sentences may be imposed for each breach of which the offender is convicted, the overall sentence should reflect the totality principle.
48. A list of the requirements that might be appropriate for low and medium range community sentence bands can be found in the Sentencing Guidelines Council's guideline on new sentences.³⁴ The guideline states that, "in general terms, the lowest range of community sentence would be for those offenders whose offence was relatively minor with the community sentence band. Such offenders would merit a 'light touch' approach, for example, normally a single requirement such as a short period of unpaid work, or a curfew, or a prohibited activity requirement or an exclusion requirement (where the circumstances of the case mean that this would be an appropriate disposal without electronic monitoring)".
49. The guideline further states that "there may be other requirements of a rehabilitative nature, such as a treatment requirement or an accredited programme, which might be appropriate depending on the specific needs of the offender and assessment of suitability. Given the intensity of such interventions, it is expected that these would normally only be appropriate at medium and high levels of seriousness, and where assessed as having a medium or high risk of re-offending". These principles apply to the sentencing of breach of protective orders.

³⁴ SGC, *New sentences: Criminal Justice Act 2003 - Guideline*, 2004. See paragraph 1.1.18-1.1.32. This is available at www.sentencing-guidelines.gov.uk.

50. Where the custody threshold has been crossed the Panel's approach set out in paragraphs 30 to 34 above will apply. That is, that where a perpetrator meets the criteria set out in paragraph 32, it will be appropriate to impose a suspended sentence order or a community order with a requirement to attend a domestic violence programme, rather than a short custodial sentence.
51. The aggravating features identified in paragraph 21 would apply equally to the breach of a protective order. The following three additional factors will aggravate a breach of an order:
- offence is a further breach, following earlier breach proceedings
 - offender has a history of disobedience to court orders
 - the breach was committed immediately or shortly after the order was made.

FACTS ON DOMESTIC VIOLENCE

Prevalence

- A1. Getting a true picture of the extent and nature of domestic violence is somewhat problematic. It is an area that suffers from under reporting for a number of complex reasons not least because some victims perceive it as a private family matter to be kept within the home. In many cases, given the broad definition of domestic violence to include non-physical behaviour - abuse that is psychological, emotional or financial - many victims may not recognise that a criminal offence has occurred. There may be a fear that police involvement could result in the situation getting worse, with further abuse or violence taking place, or the victim suffering embarrassment if the police presence brings the abuse to the attention of neighbours or others. The controlling behaviour of the perpetrator of violence may also create barriers to reporting.
- A2. The most accurate estimates of the prevalence of domestic violence are available through the 2001 British Crime Survey (BCS)³⁵ which included a self-completion module on domestic violence.³⁶ Defining domestic violence as abuse, threats or force of a non-sexual form, the survey shows that 26% of women and 17% of men, aged 16-59, have experienced at least one incident of domestic violence since they were 16. Younger people are most at risk of domestic violence, particularly women aged between 16-25. In the year prior to interviews for the survey, there were an estimated 1.01 million victims of domestic violence and 15.4 million incidents of domestic violence acts in England and Wales (threats or force). The number of incidents would be even greater if the many sexual assaults that take place within the domestic context are included.³⁷

Nature of domestic violence

- A3. Domestic violence occurs across society, regardless of age, gender, race, sexuality, wealth and geography and often involves a pattern of abusive and controlling behaviour through which the abuser seeks to exercise power over the victim. The behaviour can take a variety of forms. Some are directly or indirectly physical such as assault, indecent assault, rape, destruction of property and threats. Some are non-physical, such as criticism, pressure tactics, belittling, breaking trust, isolation, oppressive control of finances and harassment.³⁸ At its most serious, violent domestic incidents can lead to death. Nearly half of all female murder victims (116 females in 2001/2) are killed by their partners or ex-partners.³⁹ Even when women kill their partners it

³⁵ S. Walby and J. Allen, *Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey*, 2004. Home Office Research Study 276.

³⁶ A nationally representative sample of 22,463 adults aged 16-59 were asked whether they had been subject to domestic violence since the age of 16 and during the preceding year via self-completion questionnaire. Those subject to incidents were asked further questions.

³⁷ It is not possible to obtain figures for the broader definition of domestic violence.

³⁸ Home Office, *Domestic Violence: Break the Chain Multi-Agency Guidance for Addressing Domestic Violence*, 1999.

³⁹ C. Flood-Page and J. Taylor (eds) *Crime in England and Wales 2001/2002: Supplementary Volume*, 2003. Home Office.

is not uncommon for this to occur following a long period of being the victims of violence at the hand of their partners.

- A4. The BCS provides figures on the type of abuse, threats or force that are experienced by victims. It shows that experiences of domestic violence differ significantly between men and women. The rate of domestic violence (threats or force) experienced by men is around half of that for women and women are also more likely to be the victims of more serious types of violence. Fifteen per cent of women said they had been subject to being pushed, held down or slapped (since age 16) compared with 5.1 per cent of men. One-tenth as many men as women reported the potentially life threatening form of violence of being choked or attempted strangulation. In addition, substantially more women (11.3 per cent) than men (1.4 per cent) reported frightening threats either towards them or someone close to them – an important element in understanding domestic violence and the exertion of control.
- A5. A factor that distinguishes domestic violence from other forms of violence is that it is rarely just a one-off incident. Domestic violence has the highest rate of repeat victimisation of any violent crime. In the BCS, two-thirds of female victims in the survey had experienced more than one incident of domestic violence in the form of threats or force. Among those experiencing domestic violence in the year prior to being interviewed, the average number of incidents per woman was nearly 20 or, if confined to incidents in which force was used, 16. This includes a small number of women who experienced a very high number of incidents.
- A6. The survey also showed that while leaving a violent partner brings an end to the violence for the majority of women (63%), for a very significant minority (18%) it was replaced with other forms of harassment such as stalking. Of female victims who had been in contact with the perpetrator since the separation, because of access to their child(ren), 29% had been threatened, 13% abused in some way, 2% had had their children threatened and in one per cent of cases the perpetrator had hurt the children. This suggests that protection (e.g. through a restraining order) at the point of leaving can be very important to some victims.

Sentencing patterns

- A7. A breakdown of sentences passed, from the limited research available on sentencing patterns, shows that non-custodial sentences are the most common disposals given in domestic violence cases. An analysis of cases where sentences were passed in specialist domestic violence courts (see table below) shows that a financial penalty is most often given followed by a conditional discharge and community rehabilitation order.

Sentence	Evaluation of cases in 5 specialist domestic violence courts (Aug-Oct 2003) ⁴⁰	Evaluation of cases at West London Magistrates' Court (Oct 2002 – Oct 2003) ⁴¹
Imprisonment	9 (4%)	14 (14%)
Conditional discharge	21 (30%)	12 (12%)
Fine/compensation	41 (59%)	42 (43%)
Community Rehabilitation order	20 (29%)	31 (32%)
Community Rehabilitation & Punishment order	-	4 (4%)
Community Punishment Order	7 (10%)	6 (6%)
Total sentenced	69	97

Note:

1. Columns do not add up to 100 as compensation is likely to have been given in addition to another sentence
2. Common assault, assault occasioning actual bodily harm and criminal damage were the most common charges brought in cases at the 5 specialist courts
3. Common assault and harassment were the most common charges brought in cases at WLMC
4. In the WLMC cases, 26 offenders were ordered to attend a violence prevention programme

⁴⁰

ibid

⁴¹

One Year On, The First Annual Review of the Specialist Domestic Violence Court at West London Magistrates Court, 2004

CONSULTATION

In accordance with the duty imposed by section 173(3) of the Criminal Justice Act 2003, the Panel issued a consultation paper on 19 July 2004. The Panel's provisional views on sentencing guidelines for offences committed in a domestic context were set out.

Copies of the paper were sent to over 300 individuals and organisations, including the Panel's 28 statutory consultees, Chairmen of Youth Panels and Resident Judges at each Crown Court Centre throughout England and Wales. It was also published on the Panel's website, and in the Justice of the Peace journal.

A total of 45 responses were received.

Responses were received from the following consultees:

Association of Chief Police Officers
Association of District Judges
Association of Women Barristers
Council of District Judges (Magistrates' Courts)
Council of Her Majesty's Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Justice for Women
Justices' Clerks' Society
London Criminal Courts Solicitors' Association (LCCSA)
Magistrates' Association
Respect
Rights of Women
Standing Together Against Domestic Violence
Sylvia Walby, Professor of Sociology, University of Leeds
Victim Support
Women's Aid

The following also chose to respond to the public consultation exercise. In addition two victims of domestic violence provided responses.

Apna Ghar Community Links, London ("Apna Ghar" = Our house)
Arlie Loughnan, Law Department, London School of Economics
Bexley Domestic Violence Forum
Bradford District Domestic Violence Partnership
Dave Hicks, Liverpool College

Crown Prosecution Service, Durham
George Tranter (former Justices' Clerk)
Greater London Domestic Violence Project
Greenwich Multi-Agency Domestic Violence Forum
East Kent Children's Services
His Honour Judge David Radford
His Honour Judge Findlay Baker QC
His Honour Judge Ronald Moss
Ian Griffiths, Domestic Violence Co-ordinator (Crown Prosecution Service)
John Probert (Crown Prosecution Service)
Julie Sullivan (Domestic Violence Strategic Co-ordinator for Sandwell)
Kentra Beasley (Home Group)
Lincolnshire Police
Luton Multi-Agency Domestic Violence Forum
Michelle Brown (Crown Prosecution Service)
Solicitors' Family Law Association (Domestic Abuse Committee)
Swindon Women's Refuge
Peterborough Domestic Violence Forum
Tivoli Wallington (Crown Prosecution Service)
Wearside Domestic Violence Forum
Women's National Commission