

Assault Guideline

Public Consultation



harm...aggr
factors...ser
pre-me
victim...unlawful.
weapon racial...abu
offenders...
conviction

Assault Guideline

Public Consultation

Published on 13 October 2010
The consultation will end on 5 January 2011

A consultation produced by the Sentencing Council.
This information is also available on the Sentencing Council's website:

www.sentencingcouncil.org.uk

About this consultation

To:

This public consultation is primarily aimed at members of the public who have an interest in the criminal justice system and sentencing, including victims and their families.

Duration:

From 13 October 2010 to 5 January 2011

Enquiries:

(including requests for the paper in an alternative format)

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Additional ways to feed in your views:

This consultation exercise is accompanied by a full consultation paper intended for criminal justice professionals, a draft guideline, a resource assessment, an equality impact assessment, and an online questionnaire, all of which can be found at: www.sentencingcouncil.org.uk

A series of consultation meetings is also taking place. For further information please use the 'Enquiries' contact details above.

Response paper:

Following the conclusion of this consultation exercise, a response will be published at: www.sentencingcouncil.org.uk

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Contents

Introduction	4
Section one: Background	5
Section two: Development of guideline	6
Section three: Aggravating and mitigating factors	9
Section four: Assault offences, sentencing ranges and starting points	14
Annex A: Glossary	19
Annex B: Summary of consultation questions	20

Introduction

The Sentencing Council is the new independent body responsible for developing sentencing guidelines and promoting consistency in sentencing. The Sentencing Council was created to bring together the functions of the two previous bodies, the Sentencing Guidelines Council (SGC) and Sentencing Advisory Panel (SAP), which were disbanded. The Sentencing Council also has a key role to play in promoting public awareness and confidence in sentencing.

The creation of the new Sentencing Council presents an opportunity to take a fresh approach to sentencing guidelines and to reconsider the structure and format of guidelines.

The Council has considered how to ensure that the structure of the draft guideline is as clear and user friendly as possible. The Sentencing Council proposes a different format for its first guideline, on assault, which will become the model for future guidelines. The proposed draft guideline reflects the fact that the Council believes that consistency can be promoted through a clearer and more coherent decision making process.

The Council went back to first principles in relation to crimes of violence in developing this guideline with the principal aim of promoting greater consistency of sentencing and thereby increasing public confidence in sentencing. This approach to the guideline was taken to ensure that sentences are relative to the offence within the context of all violent offences as well as the wider sentencing framework.

The draft guideline reflects the Council's aim to increase proportionality in sentencing across the range of assault offences. The draft guideline maintains the availability of the existing sentences for the most serious offenders while ensuring that sentencing for less serious offences is proportionate.

This is a 12 week public consultation and the Council is keen to hear your views on some of the most important aspects of this new guideline. Following the conclusion of this consultation exercise, a definitive guideline will be published and sent to all courts. A glossary of terms used in this paper is at Annex A and a summary of the consultation questions can be found at Annex B.

Section one: Background

The Council has decided to develop this assault guideline, as its first guideline, to replace the existing Sentencing Guidelines Council guideline, *Assault and Other Offences against the Person*, which was published in February 2008. All of the offences that feature in the existing assault guideline will be revised and it is proposed that this guideline will be applicable to all offences irrespective of the date of the offence. Revising this guideline will impact on a large number of cases – in 2008, there were 84,000 offenders sentenced for assault offences covered in this guideline.¹ In sentencing under-18s, courts should have regard to *Overarching Principles – Sentencing Youths*, published by the SGC in November 2009.

These proposals are especially important because they could potentially affect and apply to all guidelines on specific offences in future, and not just this assault guideline.

Alongside this draft guideline the Council has produced a consultation stage resource assessment, which sets out the potential impact of the changes, and an equality impact assessment. These include the resources required for the provision of prison places, probation and youth justice services.²

In producing this draft assault guideline, the Council has had regard to the purposes of sentencing which are defined as:

- the punishment of offenders;
- the reduction of crime (including its reduction by deterrence);
- the reform and rehabilitation of offenders;
- the protection of the public; and,
- the making of reparation by offenders to persons affected by their offences.³

The Council has also had regard to the following matters set out in statute:

- the sentences imposed by courts in England and Wales for offences;
- the need to promote consistency in sentencing;
- the impact of sentencing decisions on victims of offences;
- the need to promote public confidence in the criminal justice system;
- the cost of different sentences and their relative effectiveness in preventing re-offending; and,
- the results of monitoring the operation and effect of its sentencing guidelines.⁴

1 Unpublished data, Ministry of Justice 2008

2 s. 127(3) Coroners and Justice Act 2009

3 s. 142 Criminal Justice Act 2003

4 s. 120(11) Coroners and Justice Act 2009

Section two: Development of guideline

The Council has considered case law on assault, evidence on current sentencing practice and drawn on members' own experience of sentencing practice. The intention is for the decision making process in the proposed guideline to provide a clear structure, not only for sentencers, but also for the victims and the public, so that they too can have a better understanding of how a sentence has been reached.

The decision making process

The Council is proposing to base the structure of the revised guideline on a new decision making process. In creating this proposed decision making process, the Council has considered research and evidence on the psychology of decision making. This new decision making process has been used to shape the format of the draft guideline and could be used in future offence specific guidelines.

The draft guideline sets out a step by step decision making process for sentencers to follow. The Council has taken into account the fact that sentencers are required by law to pass a sentence that is commensurate with the seriousness of the offence and the Council is proposing a new method of determining seriousness.

The proposed decision making process is explained below.

STEP ONE

Determining the offence category

The proposed process includes two steps at which the seriousness of the offence is to be assessed. Step 1 is where the court should determine the offence category by assessing the offender's culpability in committing the offence and the harm caused, or intended to be caused. Further details of how the court should determine harm and culpability are set out in Section Three of this consultation paper.

STEP TWO

Starting point and category range

After determining the offence category, the court should identify the relevant starting point and determine a sentence within the category range. This is the point at which the court should identify factors which could result in a sentence that is lower or higher than the suggested starting point. Details of the proposed category ranges and starting points are set out in Section Four of this consultation paper.

STEP THREE

Consider whether there are any factors which indicate a reduction in sentence, such as assistance to the prosecution

By law, an offender may receive a discounted sentence as a result of assistance given (or offered to be given) to the prosecutor or investigator of an offence.⁵

STEP FOUR

Reduction for guilty pleas

The court needs to take account of any potential reduction for a guilty plea in accordance with law and the existing guilty plea guideline.⁶ The Sentencing Council is required to prepare a new guideline about the reduction in sentence for guilty pleas and will also be consulting on this in due course.⁷

STEP FIVE

Totality principle

Many offenders are sentenced for a number of offences at the same time. When a court is sentencing an offender for more than one offence, it then needs to decide whether the total sentence is appropriate to the offending behaviour and balanced. The latter is known as the 'totality' principle. The Sentencing Council has a duty to prepare guidelines about the application of the totality principle and will consider whether to incorporate the totality guideline into guidelines (including assault) in the future.⁸

5 s. 73 and 74 Serious Organised Crime and Police Act 2005

6 s. 144 Criminal Justice Act 2003

7 s. 120(3)(a) Coroners and Justice Act 2009

8 s. 120(3)(b) *ibid*

STEP SIX**Dangerousness**

At this step, where the case is a serious violent offence, the court must apply certain criteria set out in law and decide if the offender is a danger to the public.⁹ If they are, the court deals with them differently. The court fixes a minimum term of imprisonment that they must actually spend in prison before they can be considered for release. The court will use the guideline to help it to fix this minimum term.

STEP SEVEN**Reasons**

At this step of the process, the court should give reasons for the sentence being passed, and explain its effect.¹⁰

STEP EIGHT**Consideration of remand time**

Sentencers should take into consideration any remand time served in relation to the final sentence at this final step. The court should consider whether to give credit for time spent on remand in custody or on bail in accordance with sections 240 and 240A of the Criminal Justice Act 2003.

Public confidence

The Council's intention is that the proposed decision making process will be clearer for the public to understand and increase public confidence in the guideline. The Council would welcome views on the clarity of the proposed decision making process and its public accessibility.

Q1

Do you think that the proposed decision making process will increase public understanding of, and confidence in, the sentencing process?

⁹ Chapter 5 Criminal Justice Act 2003

¹⁰ s. 174 ibid

Section three: Aggravating and mitigating factors

Aggravating and mitigating factors are circumstances connected with the offence and/or offender which can be judged to increase or reduce the seriousness of the offence. The existing guideline includes a generic list of aggravating and mitigating factors which is not tailored to assault offences. The Sentencing Council's intention is to provide a comprehensive, but not exhaustive, list of aggravating and mitigating factors specifically for assault offences, designed to help the court assess the level of seriousness. This approach could be replicated in future offence specific guidelines.

Determining harm and culpability

At step 1 of the decision making process, the court is required to assess the harm and culpability. Harm can be defined as the injury caused, physical and/or psychological. Culpability can be defined as the offender's intent and/or motive, and the circumstances in which the offence was committed. In assessing these two dimensions, the court should use the factors listed in the table overleaf (the lists have been tailored for each offence and therefore not all of these factors appear for every offence within the draft guideline). The Council believes that this list of factors comprising the principal factual elements of the offence are the most important in an assessment of seriousness. Therefore, it is these principal factors which should be taken into account when determining the offence category which has the most significant bearing on the sentence length and/or disposal type.

TABLE 1

Factors indicating greater harm	Injury which is serious in the context of the offence (must normally be present)	
	Victim is particularly vulnerable because of personal circumstances	
	Sustained or repeated assault on the same victim	
Factors indicating lesser harm	Injury which is minor in the context of the offence	
Factors indicating higher culpability	<i>Statutory aggravating factors:</i>	
	Offence racially or religiously aggravated	
	Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)	
	Offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)	
	<i>Other aggravating factors:</i>	
	Degree of premeditation	
	Use of weapon or weapon equivalent (for example, shod foot, headbutting, use of acid, use of animal)	
	Intention to commit more serious harm than actually resulted from the offence	
	Deliberately causes more harm than is necessary for commission of offence	
	Deliberate targeting of vulnerable victim	
	Offender operating in group or gang	
	Factors indicating lower culpability	Minor role
		A greater degree of provocation than normally expected
Lack of premeditation		
Mental illness or disability where linked to commission of offence		
Excessive self defence		

The Council proposes that the court should use the presence or absence of these factors to determine the levels of harm and culpability as either high or low. The court should only use this list of factors at this step as all other factors should be taken into account at step 2.

Q2

Do you think that there is anything else which courts should take into account when considering harm and culpability at step 1 of the decision making process?

Mental illness or disability

The Council believes that in cases where it is proved that an offender has a mental illness or disability which was wholly or partly responsible for the commission of the offence, it should be taken into account at step 1 in the process as a factor indicating lower culpability as it could influence the choice or severity of sentence.

Q3

Do you agree that consideration for mental illness should be included at step 1 of the process and/or do you think that it should be built into the guideline in any other way?

Determining a sentence

Having assessed harm and culpability, the court is then required to identify the relevant starting point and determine a sentence within the appropriate category range. In order to avoid the risk of courts double counting any factors, the guideline provides the list of factors to be taken into account only at step 1 and then another list of factors to be taken into account only at step 2.

Table 2 overleaf contains a list of further additional factual elements providing the context of the offence that the Council recommends should be considered at step 2 in the process. They also include factors relating to the offender. These lists are not intended to be exhaustive and any other factors present should be taken into account by the court at this step (as at the previous step, not all of these factors appear for every offence within the draft guideline). The court should identify whether any combination of these factors should result in a sentence that is lower or higher than the starting point. The Council believes that in some cases, having considered these factors, it may be appropriate for a court to move outside the identified category range.

TABLE 2

Factors increasing seriousness*Statutory aggravating factors:*

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors include:

Location of the offence

Timing of the offence

Ongoing effect upon the victim

Offence committed against those working in the public sector or providing a service to the public

Presence of others including relatives, especially children or partner of the victim

Additional degradation of victim

In domestic violence cases, victim forced to leave their home

Failure to comply with previous court orders

Offence committed whilst on licence

An attempt to conceal or dispose of evidence

Failure to respond to warnings or concerns expressed by others about the offender's behaviour

Commission of offence whilst under the influence of alcohol or drugs

Abuse of power and/or position of trust

Exploiting contact arrangements with a child to commit an offence

Any steps taken to prevent the victim reporting an incident or obtaining assistance

Factors reducing seriousness or reflecting personal mitigation

No previous convictions **or** no relevant/recent convictions

Single blow

Remorse

Good character and/or exemplary conduct

Determination to address addiction or offending behaviour

Serious medical conditions requiring urgent, intensive or long-term treatment

Isolated incident

Youth/lack of maturity or age

Lapse of time since the offence where this is not the fault of the offender

Q4

Do you think that there are any other aggravating and mitigating factors that should be included at step 2 of the process?

Youth/lack of maturity

The Council has considered youth as a mitigating factor and recommends changing the wording in the new guideline to incorporate an assessment of maturity as well as simply the actual age of the offender.

It has been argued that youth should be a mitigating factor in sentencing on the basis that: offending by a young person can be a phase which passes fairly rapidly; a criminal conviction may have a disproportionate impact on the ability of a young person to gain meaningful employment and play a worthwhile role in society; and, young people may be more receptive to changing their conduct and may be able to respond more quickly to interventions.¹¹

The Council is interested in views about whether and how sentencers should take youth and lack of maturity into account as a mitigating factor in the decision making process.

Q5

Do you agree with the Council's proposed change to encourage the court to take account of a lack of maturity and/or is there any further role for the guideline to play in addressing the specific issues of younger offenders?

Impact of sentencing decisions on victims

The Council must have regard to the impact of sentencing decisions on victims.¹² The draft guideline includes a number of aggravating and mitigating factors which allow the court to take account of victims.

It is important that victims, and the wider public, gain a better understanding of sentencing through the new guideline. To this end, the Council proposes that new guidelines should better manage the expectations of victims ahead of any sentence being passed. The clarity of the sentencing process needs to help victims in understanding what considerations were taken into account and how the final sentence was reached.

The Council would welcome views from victims and representative bodies of victims as to whether more needs to be done in relation to the impact on victims within the assault guideline and future guidelines.

Q6

Do you think that the aggravating/mitigating factors of harm within the draft guideline sufficiently allow the court to take into account consideration of victims, or are there other ways in which victims could be considered?

¹¹ Sentencing Advisory Panel, Consultation paper on principles of sentencing for youths, 2008

¹² s. 120(11)(c) Coroners and Justice Act 2009

Section four: Assault offences, sentencing ranges and starting points

Brief descriptions of each assault offence are set out in this section together with the corresponding statutory maximum penalties and the proposed category ranges and starting points. Most offence ranges allow for movement between the top of the range and the statutory maximum for cases of particular gravity.

Category ranges and starting points

In proposing the guideline sentencing ranges and starting points, the Council's aim is for increased proportionality in sentencing across the range of assault offences. The result is a draft guideline which aims to maintain the availability of the existing sentences for the most serious offenders while ensuring that sentencing for less serious offences is proportionate.

In preparing this draft guideline the Council has had regard to its statutory duties. When setting the new category ranges, the Council considered data relating to the sentences imposed in the Crown Court for offences in the assault guideline.¹³ In examining current sentencing practice for assault offences the Council recognised two key features: that current sentencing does not always reflect the existing guideline; and, that there has been a significant change in sentencing practice unrelated to the issuing of existing guidelines.

The data suggests that sentences currently outside the recommended sentencing ranges tend to be lower than the current guideline. Extending the flexibility around the lower end of category ranges could result in fewer sentences outside the category range, thus increasing consistency of sentencing as well as confidence in the guidelines and the sentences passed.

Data also shows that there has been a general trend towards longer sentences for all of the assault offence types covered in the existing assault guideline. In particular, between 1999 and 2008, the average custodial sentence length for ABH offences increased by 39% and there have been pronounced declines in sentences of less than six months' imprisonment.¹⁴ The proposed category ranges for ABH in the draft guideline reflect the fact that the Council wants to address the recent increase in custodial sentence length. There have also been marked increases in average custodial sentence lengths for GBH (section 20) offences and common assault offences, over the same period, of 17% and 11% respectively. The Council has had regard to this evidence in setting the proposed category ranges across the assault offences.

¹³ Justice Statistics – Analytical Service, Ministry of Justice, Sentences and average custodial sentence length for assaults and other offences against the person, 2008. The data relates to persons aged 18 and over.

¹⁴ Unpublished data, Ministry of Justice 2008

Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm

This offence occurs when an offender intentionally wounds or causes grievous bodily harm (GBH) to any person. GBH is serious physical harm or psychological harm and wounding is a cut or breaking of the skin. The types of injuries inflicted can include permanent disability, disfigurement, broken bones and injuries requiring lengthy treatment.

For this offence to have been committed the offender must have intended to cause the GBH or wounding. Factors that may indicate intent include a repeated or planned attack, the deliberate selection of a weapon or adaptation of an article to cause injury, such as breaking a glass before an attack, or making prior threats.

The statutory maximum for this offence is life imprisonment. The suggested category ranges and starting points for each offence category are set out below.

TABLE 3		
Offence Category	Starting Point	Category Range
Applicable to all offenders		
Category 1	12 years' custody	9–16 years' custody
Category 2	6 years' custody	5–9 years' custody
Category 3	4 years' custody	3–5 years' custody

Inflicting grievous bodily harm/Unlawful wounding

This offence occurs when an offender wounds or causes grievous bodily harm (GBH) to any person. The level of harm is the same for this offence as in the previous offence; therefore, the type of injuries inflicted are the same. These can include permanent disability, disfigurement, broken bones and injuries requiring lengthy treatment.

However, there is no need for the offender to have intended to inflict GBH to the victim, which is the difference between this offence and the previous one.

The statutory maximum for this offence is five years' imprisonment or seven years' imprisonment if the offence is racially or religiously aggravated. The suggested category ranges and starting points for each offence category are set out below.

TABLE 4		
Offence Category	Starting Point	Category Range
Applicable to all offenders		
Category 1	3 years' custody	2–4 years' custody
Category 2	12 months' custody	6 months – 2 years' custody
Category 3	Community order	Community order – 6 months' custody

Assault occasioning actual bodily harm

This offence occurs when an offender causes actual bodily harm (ABH) to any other person, which affects the victim's health or wellbeing. The harm caused would not be as serious as for the offences above. The types of injury inflicted for this offence include: loss or breaking of tooth or teeth; temporary loss of consciousness; extensive or multiple bruising; displaced broken nose; minor fractures; cuts probably requiring medical treatment (for example, stitches) and psychiatric injury not including mere emotions, such as fear, distress or panic.¹⁵

The statutory maximum for this offence is five years' imprisonment or seven years' imprisonment if the offence is racially or religiously aggravated. The suggested category ranges and starting points for each offence category are set out below.

TABLE 5		
Offence Category	Starting Point	Category Range
	Applicable to all offenders	
Category 1	2 years 6 months' custody	2–4 years' custody
Category 2	6 months' custody	Community order – 2 years' custody
Category 3	Community order	Fine – Community order

Assault with intent to resist arrest

This offence occurs when an offender assaults any person with the intention to resist or prevent arrest. The victim can be a police officer but can also be any person carrying out a public service, such as a store security officer. The expectation is that this offence will involve little or no physical harm as more serious injuries would fall under ABH, so it is the intention of the offender which is the most important consideration.

The statutory maximum for this offence is two years' imprisonment and/or an unlimited fine. The suggested category ranges and starting points for each offence category are set out below.

TABLE 6		
Offence Category	Starting Point	Category Range
	Applicable to all offenders	
Category 1	6 months' custody	3–12 months' custody
Category 2	Community order	Community order
Category 3	Fine	Fine

Assault on a police constable in execution of his duty

This offence occurs when an offender assaults either a police officer acting in the execution of their public duty or a person assisting a police officer in the execution of their duty. The assault does not usually result in serious physical harm and can include acts such as spitting. The injuries sustained are equivalent to those for common assault; where the injuries suffered are serious enough, the offence will fall under ABH.

The statutory maximum for this offence is six months' imprisonment and/or a fine. The suggested category ranges and starting points for each category level are set out below.

TABLE 7		
Offence Category	Starting Point	Category Range
Applicable to all offenders		
Category 1	3 months' custody	Community order – 6 months' custody
Category 2	Community order	Community order
Category 3	Fine	Fine

Common assault

For the purposes of this consultation paper and draft guideline, the term 'common assault' is used to cover the offences of assault and battery. Unlike ABH, it is not necessary for the victim to have been injured or harmed for common assault to be proved. A victim's fear of injury is enough for common assault to have been committed. If injury is caused, the type of injury is usually relatively minor, such as a graze, scratch, abrasion, minor bruising, swellings, reddening of the skin, a superficial cut or a 'black eye'.¹⁶

The statutory maximum for this offence is six months' imprisonment or two years' imprisonment if the offence is racially or religiously aggravated. The suggested category ranges and starting points for each offence category are set out below.

TABLE 8		
Offence Category	Starting Point	Category Range
Applicable to all offenders		
Category 1	Community order	Community order – 6 months' custody
Category 2	Community order	Fine – Community order
Category 3	Fine	Discharge – Fine

Public confidence

Public attitudes to sentencing show that people overestimate the leniency of the courts but research indicates that when presented with sentencing exercises, they award the same, if not lower, sentences. The public also believes that the courts do not place sufficient weight on punishment as a sentencing goal.¹⁷ Therefore, if the proposed rationale for the category ranges and starting points is clear then public confidence in the guideline may also be increased.

Q7

Do you agree with the proposed category ranges and starting points?

Q8

Are there any other ways in which you think that the proposed guideline could increase public understanding and confidence?

¹⁷ Public attitudes to the principles of sentencing by Hough, Roberts, Jacobsen ICPR, Moon and Steel GfK NOP, June 2009

Annex A: Glossary

Seriousness	The seriousness of an offence is determined by the two main elements of harm and culpability.
Harm	The injury caused, physical and/or psychological.
Culpability	The offender's intent and/or motive, and the circumstances in which the offence was committed.
Aggravating factor	A feature of the offence which indicates an increased seriousness.
Mitigating factor	A feature of the offence which indicates a decreased seriousness.
Offence range	The range of sentences proposed that may be appropriate for a court to impose on an offender convicted of that offence.
Offence category	The different categories of case which illustrate varying degrees of seriousness within one type of offence.
Category range	Within the offence range, the range of sentences proposed that may be appropriate for a court to impose on an offender in a case which falls within the category.
Starting point	The position within category ranges from which the court starts to calculate the provisional sentence. It is proposed that they apply to all offenders, in all cases.
Statutory	As set out in law: statutory factors are those which the court must take into account; statutory maximum penalties are those which cannot be exceeded by law.

Annex B: Summary of consultation questions

- Q1 Do you think that the proposed decision making process will increase public understanding of, and confidence in, the sentencing process?
- Q2 Do you think that there is anything else which courts should take into account when considering harm and culpability at step 1 of the decision making process?
- Q3 Do you agree that consideration for mental illness should be included at step 1 of the process and/or do you think that it should be built into the guideline in any other way?
- Q4 Do you think that there are any other aggravating and mitigating factors that should be included at step 2 of the process?
- Q5 Do you agree with the Council's proposed change to encourage the court to take account of a lack of maturity and/or is there any further role for the guideline to play in addressing the specific issues of younger offenders?
- Q6 Do you think that the aggravating/mitigating factors of harm within the draft guideline sufficiently allow the court to take into account consideration of victims, or are there other ways in which victims could be considered?
- Q7 Do you agree with the proposed category ranges and starting points?
- Q8 Are there any other ways in which you think that the proposed guideline could increase public understanding and confidence?

