Sentencing Council

Assault Offences Guidelines

Response to consultation

Assault offences

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Foreword

Development of the revised Assault guidelines has involved a major revision of the existing guideline, which came into effect in January 2012 and was the first guideline published by the Sentencing Council. It was undertaken in order to address the findings of an evaluation which identified a number of issues and unintended impacts following the introduction of the guideline. The Council considered that these should be addressed. At the same time the Council decided to revise the SGC Attempted Murder guideline, which had become outdated due to changes to legislation and in offending trends. This is also another step towards the Council's commitment to revise and update the guidelines of its predecessor body, the Sentencing Guidelines Council.

These revised guidelines represent the culmination of an extensive and complex project which required consideration of a wider range of evidence than development of a guideline would usually require. As well as undertaking research to identify the causes of any unintended impacts that may have been attributable to the guideline, it has also been necessary to have regard to recent changes in the law and the current landscape and trends in assault offending, and to reflect associated legislative changes introduced in recent years.

The revised guidelines will ensure that appropriate sentences are imposed for the wide range of assault offences. This consultation response document explains changes that have been made to the draft guidelines, many of which were based on important points raised by consultation respondents. On behalf of the Sentencing Council I would like to thank all those who responded to this consultation and to the judges and magistrates who took part in research during the development of the guidelines. This has been crucial to ensuring that the revised guidelines equip courts to deal with these offences appropriately.

Lord Justice Holroyde

Chairman, Sentencing Council

Introduction

From 16 April 2020 to 15 September 2020 the Sentencing Council consulted on proposed revised guidelines to replace The Sentencing Council's *Assault Definitive Guideline* which came into force in 2011.

The existing definitive guideline was the first guideline developed by the Sentencing Council. The Council carried out an evaluation of the guideline and published its assessment in 2015. The evaluation assessed the impact of the guideline on sentencing outcomes and whether there were any implementation issues, and a number of issues and unintended impacts were identified. Two offences in particular – GBH with intent (s18) and ABH (s47) – were found to have impacts different from those expected on the introduction of the guideline. For GBH with intent, the guideline resulted in sentences increasing in excess of that estimated. For ABH, despite the estimate that the guideline would result in less severe sentences they did not decrease as anticipated. Discussions with sentencers and practitioners also identified issues with interpretation of some of the factors included, and with the structure of the guideline.

The consultation document explained that as a result of the evaluation findings, the Council decided to review the current *Assault Definitive Guideline* and identify the causes of the unintended impacts of the guidelines and any action which may be required to address these. This work was due to commence shortly after the evaluation was published, but around that time the Law Commission published recommendations for legislative reforms to offences against the person. The Council did not wish to revise the guideline if there were to be a risk that it would become quickly outdated, so awaited the outcome of the proposals. When it became apparent that the reforms would not be implemented in the foreseeable future, work commenced to revise the guideline. The Council also decided to revise the *Attempted Murder Definitive Guideline* developed by its predecessor body the Sentencing Guidelines Council, and included this in the revised assault offences guideline as it represents the most serious non-fatal assault offence.

The consultation sought views on seven draft guidelines for the following offences;

- Common assault – section 39 Criminal Justice Act 1988; Racially/religiously aggravated Common assault - section 29 Crime and Disorder Act 1998
- Common assault of an emergency worker - section 1 Assaults on Emergency Workers (Offences) Act 2018
- Assault with intent to resist arrest – section 38 Offences Against the Person Act 1861
- Assault occasioning actual bodily harm - section 47 Offences Against the Person Act 1861; Racially/religiously aggravated ABH - section 29 Crime and Disorder Act 1998
- Inflicting grievous bodily harm/Unlawful wounding - section 20 Offences Against the Person Act 1861; Racially/religiously aggravated GBH/Unlawful wounding - section 29 Crime and Disorder Act 1998

- Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm - section 18 Offences Against the Person Act 1861

- Attempted murder - s1(1) Criminal Attempts Act 1981

The Council invited views on the revised guidelines, and in particular comments on the following;

- the principal factors that make any of the offences included within the draft guidelines more or less serious;
- the additional factors that should influence the sentence;
- the approach taken to structuring the draft guidelines;
- the types and lengths of sentence that should be passed;
- differences between the current guidelines and these new, revised guidelines; and
- anything else respondents thought should be considered.

Summary of analysis and research

During the consultation period, a number of research exercises were undertaken. The research provided valuable information on how the guidelines might work in practice. However, there are limitations to the work (the sample size was small and not necessarily representative, and the scenarios used contained limited information) and as a result the research findings were treated as indicative only and not conclusive.

A survey was conducted with sentencers to understand how specific elements of the ABH and GBH (s18) guidelines may impact on sentencing outcomes. 26 judges responded to the survey, which included one scenario for each offence.

Research was also carried out to understand more about how sentencers assess harm in ABH and common assault cases to inform revised harm models. Previous research indicated that this step may allow for a wide range of outcomes, depending on the sentencer's interpretation. For the common assault guideline, the research also sought to understand how magistrates treat biting and spitting, in two separate scenarios. In total, 12 magistrates and six Crown Court judges were interviewed.

Three scenarios were used for each offence. Common assault scenarios were used with magistrates and ABH scenarios with Crown Court judges. One ABH scenario was adapted by adding a guilty plea, and this version was also used with magistrates. An alternative harm model was also developed for each guideline, to understand how this might impact on assessment of harm and was used at a slightly later date. The second model used different wording for each of the categories, including changing category 2 (medium level) of harm in both offences to: 'Harm falling between categories 1 and 3.' There were no significant differences identified where sentencers were using the second harm model, for both common assault and ABH.

Following the interviews, a further survey was conducted with sentencers to assess how a revised harm model for ABH offences would be applied to specific injuries. Participants were asked to assess the harm for 25 brief descriptions of a range of injuries. 207 responses were received, and these helped the Council to understand how the revised model would be applied in practice.

Additionally, eight interviews were conducted with Crown Court and High Court judges to understand how the draft guideline for attempted murder would be used in practice. Each judge was asked to sentence two out of three hypothetical scenarios, using the draft guideline. These scenarios were previously used with sentencers at the Serious Crime Seminar in 2019, and the aim was to find out whether issues identified during the early version exercise had been resolved.

By using the scenarios, the aim was to understand how judges used the explanatory text to balance the high and lesser culpability factors, and how features of offences were assessed. The scenarios included cases where significant planning and pre-meditation was a factor for an offender acting in response to prolonged or extreme violence; a weapon being taken to the scene without the intention of committing an offence; and an offence involving a genuine belief that the offence was an act of mercy. Assessments of seriousness were more consistent and the sentence range was smaller than it had been in

the early version exercises, suggesting revisions to the guideline to address the issues identified at the Serious Crime Seminar had been effective.

Summary of responses

There were 67 responses to the consultation. A breakdown of responses is as follows:

Breakdown of respondents	
Charity / not for profit organisations	5
Government	1
Members of Parliament or Parliamentary bodies	3
Judiciary/Judicial bodies	9
Legal professional	6
Magistrate	21
Police/ Law enforcement	3
Prosecutor	1
Public and private sector bodies	16
Academic	2

Overview

Details of the responses to each guideline and suggestions made are detailed below.

Cross cutting factors and issues

Culpability factors

Given that the distinction between the range of assault offences relates predominantly to the type and level of harm involved in an offence, a number of culpability factors in the existing guidelines and the proposed revised guidelines were identical and included in all guidelines. The evaluation highlighted some issues with interpretation and application of some factors, so it was proposed some of these were rephrased in the revised guidelines. Responses raising points relevant to factors common across the revised guidelines are discussed below.

Prolonged assault

The higher culpability factor ‘prolonged assault’ was proposed for inclusion for all offences except for attempted murder. This factor replaced ‘sustained or repeated’ in the existing guidelines, as the evaluation highlighted issues with interpretation of sustained and repeated, particularly with how many blows would constitute ‘repeated’. The Council considered that an assault which is prolonged in duration would increase the culpability of an offender and replaced ‘sustained and repeated’ with ‘prolonged assault’. Some respondents suggested that repeated blows would not be captured by the revised factor;

> The aggravation springs from either the prolonged duration of the assault, and/or its repetitive character. An offender could kick the victim five times within a few seconds. This would not constitute a prolonged assault. This factor should include repetition: ‘prolonged or repeated assault’. – Sentencing Academy

The Magistrates’ Association made the same point:

> We welcome the revised wording of ‘sustained and repeated assault’ to ‘prolonged assault’, given the difficulties that sentencers have had interpreting and applying it. However, we note that ‘prolonged’ and ‘repeated’ could be interpreted as meaning different things, with the former meaning an attack which lasts for a long time, and ‘repeated’ meaning that someone was attacked more than once in a single incident. We suggest that it may be better for the wording to say ‘prolonged or repeated assault’, to cover both situations.’

Given that the evaluation had highlighted an issue with inconsistent interpretation and application of the term ‘repeated’ and how many blows constituted ‘repeated’ to amount to higher culpability the Council did not wish to include the term in the revised guideline. The Council considered two Court of Appeal authorities which had considered the wording ‘sustained and repeated’. In one of these, the Court of Appeal said that ‘*sustained or repeated imports some degree of persistent repetition*’, and in confirming this approach in another case it stated the factor required ‘*a sustained or repeated assault that was so prolonged or persistent as to take it out of the norm’*. The Council considered that these

observations accurately reflected the threshold appropriate for an offence to be assessed as high culpability, and the factor has been rephrased as 'prolonged/persistent assault' in the definitive guideline.

Premeditation

In the existing Assault guidelines 'lack of premeditation' is included as a factor indicating lower culpability, while 'significant degree of premeditation' is a higher culpability factor. In the revised guideline significant planning was retained at higher culpability, but the Council did not include 'lack of premeditation' as it was felt that offences involving a lack of planning could be as serious as planned attacks. The Sentencing Academy agreed with the removal of 'lack of premeditation':

> 'Lack of premeditation' has been removed. We agree. If the absence of premeditation mitigates, and premeditation aggravates, wherein lies the base offence?

The Criminal Law Solicitors' Association (CLSA) disagreed and thought that 'lack of premeditation' should be retained at lesser culpability for both ABH and GBH:

> Impulsive/spontaneous and short lived assault should lessen culpability. If Medium culpability includes a balancing of A and C then there should be counterpoints to A in C to avoid an escalation in prison sentences.

The removal of lack of premeditation was also disapproved of by a few other respondents, including the Prison Reform Trust, although this was specifically in respect of the Common assault guideline. Their response stated that lack of premeditation is often highly relevant in common assault offences which are committed by young people whose decision making may be impacted by their immaturity, and that its removal disadvantages this group:

> We are unclear why the Council has removed "lack of premeditation". This is particularly confusing given that common assault offences are by definition less serious in nature, and do not require any injury to be caused. We are particularly concerned that this could potentially disadvantage young adults, with lower levels of maturity and whom may act on impulse without thinking through the consequences of their actions. This is further reason why age and / or lack of maturity should be recognised as a factor indicating lower culpability.

The Council carefully considered the points raised. On the one hand it was thought that lack of premeditation did not necessarily reduce the culpability of an offender, as the intention to commit the assault was not necessarily less serious if the intention was formed shortly before an attack as opposed to a longer period of planning. Domestic incidents in particular were considered, as these may commonly occur without planning, but a view was that an offender should not necessarily benefit from a reduced culpability assessment in such cases. The alternative view was also considered, and it was agreed there is merit in the argument that if planning and premeditation increases the culpability in an offence, then an unplanned, spontaneous offence should reduce culpability.

The Council ultimately decided that there was force in the CLSA point that lack of premeditation should be included if planning is, to provide fairly for balancing of factors. They also considered the CLSA description of the types of incident which should attract a lesser culpability assessment, and thought the phrasing was preferable to referring to an absence of a feature. The ABH and GBH s20 guidelines therefore include a lesser culpability factor of 'Impulsive/spontaneous and short-lived assault'. However, this factor has not been

included in the common assault guidelines due to the potential for this to capture a higher proportion of cases given that many incidents of common assault could fall within this category, particularly incidents of domestic violence. It has also not been included in the GBH s18 or attempted murder guidelines, as these offences are more serious and other lesser culpability factors are included for those offences to provide for balancing of factors.

Strangulation

The inclusion of strangulation as a high culpability factor met with approval from most respondents including the Council of Her Majesty's Circuit Judges ("the Circuit Judges") who noted:

> the inclusion of strangulation as a factor increasing an offender's culpability is to be welcomed.

The Sentencing Academy response disapproved of specific conduct being referenced as a factor:

> We oppose the insertion of specific conduct as a factor, as it can lead to anomalies. If the offender places his hands momentarily around the victim's throat this assault may, or may not, be more serious than a powerful punch in the face. Let the court decide on the level of culpability, or harm. An alternative approach would be to employ a culpability factor to describe the use of an item or a tactic to inflict a greater degree of harm, e.g. a shod foot, a headbutt, an elbow, or strangulation. Each of these would fall within this general description without the need to be prescriptive (and thus suggest that other behaviour not included is deliberately omitted by the Council and is thus regarded as less serious).

As noted in the consultation document, the Council included the factor as a result of compelling research which highlighted the seriousness of strangulation as a method of assault, particularly as it often occurs in the context of domestic abuse and many victims are females assaulted by physically superior males. This is an issue gathering focus across the criminal justice system, and since the draft guidelines were published the Government has legislated specifically for strangulation offences in the Domestic Abuse Act 2021. The Council has retained the factor in the definitive guideline as strangulation may occur as part of an offence charged as Assault, and it has been expanded following the response from the Crown Prosecution Service:

> We further welcome the inclusion of strangulation in the list of high culpability factors, following the Council's consideration of research highlighting the seriousness of this method of assault. Both strangulation and suffocation are used in offending relating to domestic abuse as a method of exerting power and control. An offender's intention is likely to cause a high degree of fear and distress. Because of this the Council may wish to consider broadening this high culpability factor across the range of assault offences to include suffocation as well as strangulation.

The definitive guideline includes the factor 'strangulation/suffocation/asphyxiation' at high culpability across all guidelines with the exception of attempted murder.

<u>Provocation</u>

In the existing guidelines 'a greater degree of provocation than normally expected' is provided for at lesser culpability. This was removed from the culpability assessment and 'significant degree of provocation' provided for at step two of the revised guidelines. The East Kent Bench response thought it should be retained at lesser culpability:

> The issue of self-defence has been rebadged as 'significant provocation' in common assault. There are occasions in ABH where self-defence may not indicate lesser culpability but significant provocation would e.g. where someone's partner has been attacked to provoke a reaction, it could not be said that they acted in self-defence but were provoked by the deliberate attack on their partner. Consideration should therefore be given to including significant degree of provocation in lesser culpability.

The Council considered this point but agreed that the decision to remove provocation from the culpability assessment should not be revised, as it could appear to provide a concession to those who may act out of revenge. At step 2 the factor can be applied where sentencers consider it appropriate.

<u>Lack of maturity</u>

'Age and/or lack of maturity' is a mitigating factor included in most Council guidelines and provides for the sentence to be adjusted where it is identified as a relevant factor. The Prison Reform Trust response thought that lack of maturity should be provided for at lesser culpability rather than as a mitigating factor:

> Age and / or lack of maturity should be included as a factor indicating lower culpability at step one. We appreciate that the Council has recognised the importance of maturity in mitigation at stage two. However, it is important to recognise the impact that maturity has in assessing the level at which a person is culpable for their actions. Where maturity is linked to the commission of an offence, it should be recognised as a factor indicating lower culpability. For assault offences, the case for recognising age and/or lack of maturity as a factor indicating lower culpability is compelling. Neurological and psychological evidence shows that the development of the frontal lobes of the brain does not cease until around 25 years old. It is this area of the brain which helps to regulate decision-making and the control of impulses that underpins criminal behaviour. In terms of brain physiology, the development of traits such as maturity and susceptibility to peer pressure appear to continue until at least the mid-twenties. We note that this approach to include maturity as a relevant factor in both step 1 and step 2 has already been accepted by the Council in its child cruelty offences sentencing guidelines, and recommend that this is adopted within assault guidelines as well.

In child cruelty the lesser culpability factor 'offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity' was designed to capture cases where an offender is not capable of fully caring for the victim in the appropriate manner due to such considerations. It was included in that guideline as the scope of child cruelty offences is wide and can involve failures to act and include ill-treatment, neglect, abandonment and failure to protect, as well as assault. It is also provided for in some manslaughter guidelines where the offence may involve a failure to act which may be relevant to an offender's responsibility being substantially reduced due to lack of maturity. These differ from assault offences which require a positive intention or act rather than an omission. While the Council

recognises the impact of maturity on decision making and judgement, it considers that for assault offences it is appropriate for an offender's maturity to be considered at step two and not when undertaking the step one seriousness assessment.

Other issues raised

Assaults on individuals providing a service to the public

A significant proportion of responses were from representatives of workers not covered by the recent statutory provisions relating to emergency workers, who argued that higher sentences should be applicable to non-emergency workers in public facing roles. This would already be possible with the existing guideline which provides for an assault on a person providing a service to the public to be treated as an aggravating factor of the offence and provides for the sentence to be increased with the factor: '*Offence committed against those working in the public sector or providing a service to the public or against a person coming to the assistance of an emergency worker*'.

The draft guideline proposed retaining this factor and approach. The Council had also issued interim guidance to sentencers in April 2020 to confirm that common assault offences involving threats or activity relating to transmission of Covid-19 should be treated as an aggravating feature of the offence, which became a particular issue for public facing workers during the pandemic.

The response from Chris Philp, Parliamentary Under-Secretary of State for Justice, acknowledged the existing factor provides for increased sentences for such offences and requested the Council consider expanding it to include examples of public workers:

> As you may be aware, there have been calls to increase protection for retail workers against assault, which have intensified since the onset of the Covid-19 pandemic. The Government has been clear that the Assault Guideline requires the court to treat the fact that an offence was committed against those providing a service to the public as an aggravating factor, making the offence more serious. We welcomed the Council's expanded explanation on this in 2019 and the recent interim guidance published in April for sentencers on sentencing common assault offences involving threats or activity relating to transmission of Covid-19. We would welcome, however, consideration by the Council of whether the guideline could include explicitly reference to retail workers as an example of those providing a service to the public. We believe this would make it clearer that retail workers are covered by the aggravating factor in the Assault Guideline.

The Justice Select Committee also noted the current aggravating factor had been expanded in the revised guideline to also capture individuals assaulted when coming to the assistance of an emergency worker, and supported this approach;

> The revised guideline has expanded the factor to read as follows: "Offence committed against those working in the public sector or providing a service to the public or against a person who coming to the assistance of an emergency worker". Assaults against those working in public facing roles is a matter of increasing public concern, especially during the Covid-19 pandemic. The Committee recognises that this is a pressing issue and support this aggravating factor. The Committee also wishes to note that the Sentencing Council may need to revise this guideline if and when the Assaults on Retail Workers (Offences) Bill has been enacted. An individual guideline dealing with offences under the relevant Act will be valuable to sentencers.' Justice Select Committee.

A number of respondents (including the All Party Parliamentary Group on Retail Crime (APPG on Retail Crime), British Retail Consortium (BRC), Union of Shop Distributive and Allied Workers, The Co-op Group, and the Association of Convenience Stores went further and called for increased sentences for offences against retail workers:

> Shopworkers are in a vulnerable situation, sometimes being alone in a store or with only one other colleague, perhaps late at night, facing intimidation from someone potentially carrying a knife or other dangerous implement. They are also in a different situation from many other victims in that their job requires them to return to exactly the same situation day after day and thus to fear that the next customer might be yet another attacker. More than that, some members report growing instances of threats such as – we know where you are and when you leave work and will come for you; and in similar vein others note increases in 'mental abuse' of stalking shopworkers when they leave the premises at lunchtime in order to intimidate them. - BRC

The APGG response highlighted that shop worker attacks are often related to them enforcing their legal duty to refuse restricted product sales without identification:

> 'A significant trigger for attacks on those working in newsagents and convenience stores is the refusal to sell age restricted products to customers who are known or believed to be under age or who are unwilling or unable to prove their age in a manner required by law. Thirty percent of instances of violence arise when shop workers request proof of I.D on age-restricted products, such as alcohol, tobacco and lottery products…. Having placed duties upon retailers to ensure that they do not sell to underage customers, it is the very least the justice system can do it to recognise the fact if a retailer is attacked as a result of doing what the law requires' – APPG

The APPG response also included the following quote from a shopworker:

"Receiving abuse after asking for ID is a weekly occurrence for me. I'm very often told they will be waiting for me outside when I finish my shift, which is very intimidating. I feel sorrier for my staff having to put up with the abuse. We are only doing our job and the implications of failing to get it right can cost us our job".

Similar submissions were made by non-retail sector public service representatives including the Security Industry Authority, the Football Association and the Referees' Association.

The Referees' Association requested the aggravating factor relating to assaults on public workers be moved to step one across the guidelines, to ensure high or medium culpability assessments for these offences:

> Factors indicating higher culpability should include 'The victim is a person acting on duty in the exercise of lawful authority or coming to the assistance of an emergency worker'. Examples should be included: sports match officials and referees, schoolteachers, public transport staff, NHS staff, shop workers, security staff, traffic wardens etc. This would automatically place such assaults into Category 1 or 2. It is not sufficient that such an assault might be treated as having a factor increasing seriousness within any of Categories 1-3 as an 'Offence committed against those working in the public sector or providing a service to the public or against a person coming to the assistance of an emergency worker'.
> \- The Referees' Association

Other respondents, including Nationwide Building Society, thought that the concept of a public worker was not widely understood and that the factor should be defined as by the Government during the pandemic to include all those designated as key workers.

It was anticipated by the Council that the introduction of higher sentences for emergency workers would result in requests for sentences to be increased for other groups vulnerable to attacks. The Council considered this issue carefully, and concluded that it would not be possible or fair to list groups or individuals at risk of attack, as by defining groups in an exhaustive list this could unintentionally have the effect of excluding others to whom the factor should be relevant, such as bus or taxi drivers who also provide an important public service and are vulnerable to attack due to lone working and working late at night. The factor as worded is very broad and captures any individual providing a service to the public, and the Council is confident that sentencers are able to apply this factor to the broad range of victims to whom it is relevant. The Sentencing Council's General Guideline and expanded explanation of the factor further clarifies the wide scope of the factor's application and states the following:

The factor reflects:

- *the fact that people in public facing roles are more exposed to the possibility of harm and consequently more vulnerable and/or*
- *the fact that someone is working in the public interest merits the additional protection of the courts.*

This applies whether the victim is a public or private employee or acting in a voluntary capacity.

The Council has also ensured that any offence committed against a victim who is vulnerable by circumstances, which would include lone shop workers and many of the other examples cited by respondents, is assessed at the highest level of culpability by the factor '*Victim obviously vulnerable due to age, personal characteristics or circumstances'*. This is in addition to the provision of the aggravating factor that provides for any offence committed against an individual providing a service to the public to be increased at step two, where it allows for an increased sentence in any offence category.

The Council considers that all categories of public workers in all circumstances are provided for by these factors within the guidelines and ensures courts are able to impose sentences which properly reflect the abhorrent nature of attacks on those who are assaulted during the course of providing important services to the public.

Common Assault

The assessment of seriousness in the existing Common assault guideline includes factors indicating higher culpability, lower culpability, greater harm and lesser harm. A combination of the factors will result in one of three potential seriousness assessments and starting points. The revised guideline proposed adopting the model used in more recent Council guidelines, which provides for a wider range of starting points and a more nuanced seriousness assessment.

Culpability factors

The proposed revised culpability factors were as follows;

A - High culpability

- Intention to cause fear of serious harm, including disease transmission
- Targeting of vulnerable victim, where victim vulnerable by personal characteristics or circumstances
- Prolonged assault
- Use of substantial force
- Strangulation
- Threatened or actual use of weapon or weapon equivalent*
- Leading role in group activity

B - Lesser culpability

- Lesser role in group activity
- Mental disorder or learning disability, where linked to the commission of the offence
- All other cases not captured by category 1 factors

*Examples of a weapon equivalent can include but are not limited to; a shod foot, use of acid, use of animal in commission of offence

As already noted in relation to cross cutting factors the factors prolonged assault and strangulation have been revised in the definitive guideline as ‘prolonged/persistent assault’ and ‘strangulation/asphyxiation/suffocation’.

The consultation document explained that the factor ‘Intention to cause fear of serious harm, including disease transmission’ would include (but not be limited to) situations where common assault offences have been committed by offenders coughing and spitting at victims with a direct or implied threat of Covid-19 or other disease transmission. This met with broad approval and has been retained in the definitive guideline.

A number of respondents, including the Circuit Judges and a number of magistrate respondents, thought that spitting - even without an inference of disease transmission - should be provided for at step one. The Council debated at length whether to include

spitting at step one or two during the guideline development, but ultimately decided to include it as an aggravating factor and include the high culpability factor 'Intention to cause fear of serious harm, including disease transmission' to capture cases where an offence includes spitting or any activity where there is an inference of potential disease transmission. In the definitive guideline spitting has been retained at step two where it will provide for an increased sentence in any category of offence (except where it has already been taken into account at step one).

The relationship between the high culpability disease transmission factor and the aggravating factor of spitting was queried by the Justice Select Committee:

> The Committee suggests that it is not clear whether this additional aggravating factor is intended to (A) specifically capture spitting or coughing in the context of disease transmission only, or (B) whether it is also intended to capture spitting as a stand-alone aggravating factor, without fear of disease transmission. If it is the latter, the Council might feel that it is more appropriate that this factor is split into two separate aggravating factors. In respect of disease transmission element only, it might be beneficial for the factor to be unambiguous that it is intended to capture actions that cause fear of disease transmission. Further it might be useful if the factor captured other actions that might have such an effect, i.e breathing over someone in an aggressive manner. The factor could be re-drafted as follows: "spitting, coughing or otherwise acting in a manner, that would cause fear of disease transmission". It would be useful for further guidance to be provided in relation to both the culpability factor and aggravating factor relating to disease transmission. It would appear that there is a risk of double counting and elevating the offence to one that requires intention (causing fear of disease transmission and actually intending to transmit disease are distinct).

The intention of the two factors is that any activity, including but not limited to spitting or coughing, with an inference or threat of disease transmission would be captured at step one, whereas any spitting or coughing at a victim without an inference or threat would be captured at step two. In the definitive guideline the aggravating factor has been retained as 'spitting or coughing' and qualified with 'where not taken into account at step one' to avoid the risk of double counting.

A number of respondents questioned the phrasing of the factor '*Targeting of vulnerable victim, where victim vulnerable by personal characteristics or circumstances*. The Justices' Legal Advisers and Court Officers' Service (formerly the Justices' Clerks' Society) agreed that targeting of a vulnerable victim increases culpability, but thought an additional higher culpability factor should be 'victim obviously vulnerable due to age, personal characteristics or circumstances', which is included in the ABH and GBH guidelines. A related point was raised by the West London Bench, who thought 'targeting' was not necessary as the vulnerability of the victim is sufficient to assess the offence as high culpability. This point was also made by the Circuit Judges, who noted that "it is the targeting of the victim because of their vulnerability that raises the offender's culpability". The phrasing of the vulnerable victim factor was different in the ABH and GBH guidelines to ensure cases where a victim was vulnerable but not necessarily targeted, such as baby shaking cases, could be captured at high culpability. However, the Council agreed with respondents who stated that it was the vulnerability of the victim rather than the targeting of them that increased culpability in the offence. The targeting aspect of the factor has therefore been removed in the definitive guideline and the factor has been worded as in

the ABH and GBH guidelines as 'victim obviously vulnerable due to age, personal characteristics or circumstances.

A small number of respondents questioned the factor 'use of substantial force':

> 'Substantial force is unclear. What is substantial?' – Birmingham Law Society

> 'We are not sure what is meant by "substantial force". Almost by definition there will not be "substantial force" in a Common Assault case as if there were then ABH injuries would be used. We feel that the intention behind this element is dealt with in the Harm part of the guideline.' - Criminal Law Solicitor's Association

However, the East Kent Bench response recognised that use of substantial force would reflect the culpability of an offender in committing an offence:

> Sensible to have these as culpability rather than harm factors as they are more a measure of intent than effect.

This factor is also included in the definitive guidelines for s4 Threatening Behaviour and s4A offences, which share some similarity with common assault offences. Common assault can involve no physical force as a victim need only apprehend the infliction of unlawful force, or a low level of force may be used such as a minor slap or push. The Council considers that substantial force would represent a higher level of culpability by an offender to inflict harm, and it has been retained in the definitive version of the guideline.

Excessive self-defence is included at lesser culpability in the existing guideline but the Council proposed this be moved to step two in the revised guideline for common assault, although it remains at step one for ABH and GBH offences. A number of respondents disapproved of this and thought it should be retained at lesser culpability:

> Excessive self-defence should be retained as lessening culpability - CLSA

> We take issue with the removal of "excessive self-defence" as a mitigating factor because it is in our view a factor that can and should be properly be taken into account when assessing the overall seriousness of the offence. - London Criminal Courts Solicitors' Association

> Excessive self-defence has been moved to Step 2. We disagree. Many assaults arise as a result of an excessive response to mild or moderate provocation or even assault, and this may be a compelling claim for diminished culpability. When the assault arises out of an excessive, criminal response to provocation, the assault carries an element of 'but for' of the provocation. This is an important reduced culpability factor which should be located at Step 1. We note that analyses of the Council's own Crown Court Sentencing Survey data show this to be a very significant factor, much more predictive of seriousness than 'subordinate role' although that factor remains at Step 1.2 So theoretically and empirically there appears little reason to consign excessive self-defence to Step 2, where its influence will be greatly constrained. – Sentencing Academy

The Council considered there was merit in the argument that the factor is highly relevant to the motivation of an offender and culpability in committing an offence, and where the factor is relevant offenders may be disadvantaged by its removal from step one. It has therefore been included as a lesser culpability factor in the definitive common assault guideline.

Harm

A significant issue identified by the evaluation was the harm model in the existing guidelines which only provide for lesser or greater harm, and no middle harm category. The revised guideline proposed three harm categories, as follows:

Harm The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.	
Category 1	More than minor physical or psychological harm/distress
Category 2	Minor physical or psychological harm/distress
Category 3	No/very low level of physical harm and/or distress

While almost all respondents approved of the revised harm model providing for three categories of harm, a number of respondents questioned the factors within the model, and in particular how to distinguish between category 2 and 3 harm. Philip Davies MP wrote to the Chairman of the Council with the following question, which it was agreed should be considered as a consultation response:

> I would be very grateful if you could let me know what the difference is meant to be between "minor" and "very low level" in this context and what the rationale is for making this particular distinction. I am concerned that those using the guidelines in future may be asking the same question and would urge you to look again at this wording. Is there a reason that the wording in category 3 could, for example, not simply read "No physical harm and/or distress" especially given the fact that generally lower level assaults are charged under this offence anyway and not ones where there are more serious injuries which should be charged as more serious kinds of assaults?

In developing the guideline the Council did consider phrasing the lowest harm category as 'no physical harm/distress', but there were concerns that very few cases would be charged which would fall within this category, so the factor was worded as 'no/very low level of physical harm or distress'.

Other respondents raised concerns regarding a lack of distinction between categories and the potential for inconsistent harm categorisations. Some suggested how the harm assessment could be improved:

> It is felt that the proposed changes are better than the existing guidelines which are hopelessly vague, and the addition of a middle category is an improvement. However, level of harm assessed from various injuries always causes debate amongst a bench and the example of the black eye is a relevant and valid example, usually relying on bench

members understanding of injuries and their impact. The graduated levels of harm, when read in conjunction with the explanation in the consultation exercise, make sense, but without this explanation there will still be very wide variations on what different sentencers consider to be minor physical and psychological harm. It would be helpful to have guidance along the lines of the current explanation included in this consultation, along with a note that this is not a harm tariff list. Some more explanation of what constitutes psychological harm would also be helpful to ensure more consistency in sentencing. Is psychological harm: Nervousness? Scared to go out? Unease? Need to see a counsellor to help overcome the experience? – East Kent Bench

As the SC has mentioned, there could be a range of harm within specific physical injuries (like for example a scratch, a bruise or a small cut) depending on factors such as the location, severity and pain suffered. We agree that this is very difficult to do within a guideline, and we have no suggestions to make as to how this could be accomplished. We agree that it should be left to the sentencers as to how to take factors such as the location, severity and the pain suffered into account, as they will be very offence specific. But we recommend that these factors should be mentioned in the guidelines, to assist setting the harm category. This could be done by modifying the note to the harm category table, so that this now reads: "The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim. When assessing the level of harm, consideration should be given to the number of injuries, injury location(s), injury severity and pain caused, and the time span of any harm or distress caused." - West London Bench

As noted by the West London Bench response, the Council had explained in the consultation document that descriptions of injuries could not be included due to the difficulty in categorising injuries which can vary in severity; for example, a black eye could involve minor or severe bruising, and differing psychological impacts. However, the Council considered the suggestion of the West London Bench to include factors relevant to the assessment to be an improvement on the draft model. The definitive guideline harm model therefore retains the factors in the draft guideline but includes additional guidance as follows:

Harm

In assessing the level of harm, consideration should be given to:

- the number of injuries
- the severity of injury and pain suffered and
- the duration or longevity of any psychological harm or distress caused.

Some respondents, including the CLSA, had concerns regarding how psychological harm is provided for in the guideline:

We don't agree that psychological harm/distress should ever take this into Category 1. If there is serious psychological harm/distress evidenced by medical evidence then the case can be charged as ABH. Our concern is that the current draft will put too many cases with no physical injuries into Category 1 – based solely on victim statement. Our suspicion is that

victims are prone to overstate distress in Victim Impact Statements and this amended guideline will lead to an increased number of cases attracting custody. – CLSA

While the Council acknowledges concerns relating to harm assessments where no visible evidence is available, an integral aspect of harm in assault cases will require assessment of any distress or psychological harm suffered. Other guidelines require assessments of psychological harm, and sentencers are experienced in assessing such injuries and are assisted by medical reports where these are available.

Sentence levels

A number of respondents considered sentences too low, particularly in the categories B2/A3 and B3 where starting points of fines were proposed:

In my view, the starting-points and ranges are too low, certainly at the Category 2B and below levels. The current levels are leading magistrates to impose fines out of all proportion to the effect of violence on victims and society generally. For example, a person on benefits, convicted of battery and placed in Category 2B, will be fined less than he would be for using a vehicle without insurance. Other comparisons would also serve. An offence deemed to fall into Cat 3B would receive a fine of a derisory amount - and that is happening now. I would respectfully suggest that the starting-points should be higher - certainly for Categories 2B and below, and probably above that too'. - Magistrate

I do not think a fine is an appropriate sentence to any assault offence, this does not feel proportionate to any level of harm caused to a victim of assault and in particular a domestic abuse survivor. One of my team made the comment that in every circumstance where she has informed a survivor of domestic abuse that their abuser had received a fine as a sentence, the survivor was unhappy with the outcome, finding this insulting and offensive given their traumatic experience – Leeds Womens Aid

If I were victim of an assault, I do not think I would be happy with the giving of a low level fine – Magistrate

We agree that the amended wording concerning harm may put more cases into a higher category. We are concerned that there is not sufficient distinction between the starting points and ranges for grid 2B, 3A and 3B. We also observe that a starting point of a Band A & B for these assaults does not distinguish the severity of such offences from victimless strict liability offences such as failure to pay for TV licence. Nevertheless, a Band A starting point for any common assault seems unjustly low, when considering that this is the minimum fine a person can receive in the guidelines for any offence whatsoever. – Justices' Legal Advisers and Court Officers' Service

The existing guideline includes 3 categories and starting points of a high level community order, medium level community order and a Band A fine, within a range of 26 weeks custody to a discharge. The sentences included were intended to reflect the existing starting points and ranges. However, the Council considered these points and agreed that for all categories other than the lowest culpability and harm category the starting point

should be a community order. The Council also increased the starting point fine band in the lowest category to reflect the concern that the proposed fine band did not distinguish the severity of assault offences from victimless strict liability offences.

Aggravating factors

As noted earlier in this paper, a number of respondents thought that spitting should be provided for at step one of the common assault guideline. The Council debated this at some length in developing the guideline, and ultimately decided that the seriousness of spitting is increased where this is undertaken with the intention of causing the victim to believe they will contract a disease. Other respondents noted and approved of this approach which has been maintained in the definitive guideline.

The Sentencing Academy response thought that spitting and coughing should not be included as an aggravating factor:

> 'Spitting/ coughing' is a particularly unpleasant form of assault; it is not an aggravating way of committing the offence. All other aggravating factors are enhancements to an act of assault. Spitting may well cause more harm and distress than, say, a slap in the face. Or it may not. For example, if the offender spits on a clothed limb of the victim. The offender's level of culpability should be left to the court to determine. As a general rule, the form of the offence should not be construed as an aggravation. The effects of spitting can be placed within the guideline, such as exposure to the transmission of disease, which can encompass spitting and coughing without the need to specify the nature of the behaviour.

The addition of coughing specifically as an aggravating factor raised some concerns. The Criminal Law Committee of the Birmingham Law Society response stated:

> Coughing should not be included. This would lead to higher sentences for the many poor, ill and homeless clients convicted of these offences. Many are in bad health and cough intermittently anyway. It would be regrettable if the new Guidelines were to impose a higher sentence on someone because they are ill, and involuntarily cough.

Other respondents thought the 'spitting/coughing' factor should be clarified as deliberate, to avoid such concerns. The Council agreed with this and have qualified the factor as '*deliberate spitting or coughing (where not taken into account at step one)*' in the definitive guideline.

A few respondents believed biting should also be included as an aggravating factor:

> We strongly recommend that biting be included as an aggravating factor along with spitting and coughing. – Restore Justice

> I would also be grateful if you could let me know what consideration the Sentencing Council has given to the issue of biting - in terms of harm, culpability and/or as an aggravating factor. I note that the intention to cause fear of serious harm, including disease transmission, is something currently indicating higher culpability in the new guideline but if there was a bite without the intention element what would the Council envisage would be the situation in relation to the guideline as it stands.- Philip Davies MP

The Council did consider including biting in developing the guideline, but it was thought that the high culpability factor 'use of substantial force' would capture forceful incidents of biting. Research was undertaken to confirm this, and it was identified that this may not necessarily be the case. The Council agrees with respondents that biting is a particularly unpleasant method of assault and have included it as an aggravating factor in the definitive guideline.

Some respondents suggested the factor 'presence of children' should be expanded to 'offence committed in presence of others'. The existing guideline includes the factor 'presence of others including relatives, especially children or partner of victim'. The general guideline includes a factor 'Offence committed in the presence of other(s) (especially children)' and the factor as worded currently is included in the Manslaughter and overarching Domestic Offences guidelines. The Council considered if the factor should be expanded to include other family members, and while recognising it would be particularly distressing for a victim for their family members or loved ones to witness an assault on them, it considers that children are particularly vulnerable to witnessing offences involving violence. As step two factors are non-exhaustive, a sentencer would be able to take the presence of a relative or loved one of a victim into account where appropriate.

Mitigating factors

There were no new mitigating factors suggested, and comments were predominantly focused on matters which should not be taken into account as mitigation. These related to factors such as remorse and good character which are standard mitigating factors included in guidelines. The proposed mitigating factors have been retained in the definitive guideline.

Assault on an Emergency worker

The consultation document explained that while legislation provides for a higher maximum sentence for offences of common assault where the victim is an emergency worker, the offence is common assault and the elements of the offence are the same. Common assault involves causing another to apprehend the immediate infliction of unlawful force or application of unlawful force, and the level of injury which will be involved is likely to be low. The draft guideline therefore proposed the same factors as for the standard common assault offence guideline, and included higher sentences to reflect the higher statutory maximum sentence for the aggravated offence of assault on an emergency worker.

The draft guideline included custodial starting points in the highest three categories of seriousness, and custodial sentences were included in the range for five of the six offence categories. The consultation highlighted that proportionality was an important aspect of considering sentences, as even the most serious offences will involve a high culpability factor and an injury which is of a temporary nature, such as bruising or more than minor distress. Any more serious injury would be charged as a more serious assault offence and not as the aggravated offence of common assault on an emergency worker. The consultation sought views on factors and sentences within the draft guideline. While factors broadly met with approval, views were split on the sentences with some respondents believing them to be too low, while others considered them disproportionately high in comparison to the basic common assault offence.

The Police Federation response highlighted a number of examples of assaults suffered by its members in the course of duty, and anticipated the further increase to the statutory maximum sentence being considered by the Government:

> The Federation supports a maximum tariff of 24 months and not 12 months because of the likelihood of offenders being released before the completion of their sentences. We therefore support the Government’s proposal to increase the maximum tariff. However, the sentencing guidelines must now ensure that the upper tariff is used, rather than simply threatened in order to produce a guilty plea. - The Police Federation

> The starting point must be custody regardless. This was the aim of the Assaults on Emergency Workers Act, and is what is continually pressed home by the government, yet here a person can be found guilty and escape prison. This should not be the case. This has to change if we are to address the continual and rising issue of assaults on emergency workers. As a minimum, this should start at 3 months imprisonment, moving up through the categories to 12 months for category 1. Again, any injury over minor should be treated as AOABH and aggravated further there if against an emergency worker. There really should be no exception whereby a person found guilty of assaulting an emergency worker does not receive a custodial sentence. I personally am very disappointed to see this being even considered here as it is completely at odds with the spirit of the Act which was put in to try and reduce these types of offences. This is the opportunity to send a clear message and really show that emergency workers are valued and should not, in any circumstances, be assaulted whilst at work. This is an opportunity to really demonstrate that these

assaults are socially and morally repugnant and will always attract a custodial sentence. – Representative of Yorkshire Ambulance Service

The consultation document had highlighted that the Council recognised Parliament's clear intention to increase sentences for assaults on emergency workers with the introduction of the increased statutory maximum sentence for aggravated offences. However, the Council also had to have regard to s152(2) of the Criminal Justice Act 2003 (now s230(2) of the Sentencing Code) which provides a general restriction on the imposition of discretionary custodial sentences and directs that "the court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence." This is also a key principle underpinning the Imposition guideline which sentencers must have regard to in determining whether a community or custodial sentence is appropriate. This principle would be undermined and sentencers would not be able to fulfil their statutory duty to have regard to the purposes of sentencing if every sentence imposed had to be a custodial sentence, which is not the case for any other offence with such a low statutory maximum sentence.

Other respondents agreed with the sentences, but thought that sentences for the standard offence should also be increased:

I agree with the proposed starting points. I think the range for Cat 3B starts too low, but I think that the Starting-Points and Ranges are otherwise 'spot-on'. They do, however, put a sharp focus on the proposed Starting-Points and Ranges for assaults on non-emergency workers. In my respectful view, the SPs and Ranges here show that the SPs and Ranges for assaulting non-emergency workers are too low and should be adjusted upwards. I think everyone would agree that the SPs and Ranges for assaulting emergency workers should be higher (although the police nowadays often charge the offence even where some minor, reckless, contact took place during an arrest); but the effect on members of the public of violence being used against them unlawfully needs to attract higher penalties than will follow from the suggested guideline for those assaults. – Magistrate

The Council considered the standard offence sentences in developing the guideline and agreed that these should not be increased to achieve relativity with the aggravated offence. While sentence starting points for the basic offence have been slightly increased in some categories in the definitive guideline, to increase to the degree which would be required to achieve relativity with aggravated emergency worker sentences would result in sentences for the basic offence which are disproportionate to the overall offence seriousness. This would undermine other sentencing principles which, as noted above, must be reflected in sentences in accordance with statute. This would also result in sentences needing to be increased for every other more serious assault offence to ensure relativity with those, which would involve significant and unjustified resource impacts.

Other respondents raised concerns regarding the severity of the sentences and whether these were proportionate to the offence seriousness given that it relates to the lowest level assault offence, and again questioned the fairness of the standard offence sentences in comparison:

The sentencing starting points and ranges seem to be high when considering the maximum sentence is twelve months, and when compared to the starting points for common assault simpliciter. Nor do they differentiate between different emergency workers. There is a notable practical difference between an assault on an off-duty paramedic, neither armed nor protected by personal equipment, and that on a police

officer in full uniform on patrol with a colleague. Comparing this proposed guideline with the revised common assault guideline is likely to cause members of the public and complainants of domestic abuse to feel aggrieved that their complaints are treated less seriously when it comes to sentence than offences against emergency workers.
This can be illustrated by an example. Take a category A1 assault by strangulation on a partner, the starting point is a high-level community order for an offender of good character after a trial. Now consider an A1 offence being committed against a police officer in uniform. The proposed guideline in the latter case suggests a starting point of an eight-month sentence which is greater than even the statutory maximum in cases where the victim is not a member of the emergency services.- Former Chief Magistrate

If the victim is an emergency worker, the starting point jumps to eight months, well above the common assault guideline and above the midpoint of the guideline's sentence range. We do not believe the occupational status of the victim justifies such a jump in severity. As a general observation, category starting points are usually set just below the midpoint of the category range. In this case that would result in a starting point of 4-5 months. This convention should apply here. In addition, the guideline range itself is problematic: it spans the statutory range, an anomaly in Council's guidelines. – Sentencing Academy

All the category starting points here are significantly higher when compared with the guideline for common assault. We are doubtful as to whether this is proportionate. There is such a large difference here in starting points. We agree that a custodial sentence should be the starting point for the more serious cases being charged under this offence, but looking at the Culpability A/Category 1 Harm in particular, a Starting Point of 8 months appears to us excessive. In particular: a. We do not consider that the one significant difference (the job / profession of the victim) with all other factors being equal should justify such a large difference in Starting Points. b. We do not consider that the Starting Point should be in excess of that available in the magistrates' court. - West London Bench

The West London Bench also highlighted the contrast in the approach proposed for sentencing racially or religiously aggravated common assault offences compared to the aggravated offence of assaults on emergency workers, when legislation provides in the same way for them to be aggravated forms of the same offence and the statutory maximum for the latter is lower. Referring to statistical information included in the consultation the West London Bench highlighted the following:

We thought it interesting to compare the available sentencing data for this offence to the racially / religiously aggravated common assault (section 29, Crime and Disorder Act 1998) offence sentencing. This is because they are both essentially common assault offences, but both have single aggravating features (inherent in the offence itself), taking their seriousness beyond the sentences for common assault per se, although their maximum sentences are different. a. There are many more custodial sentences for the section 29 offence (43%) than for the assault on emergency workers offence (27%). This would perhaps be expected, given the higher statutory maximum sentence for the section 29 offence. b. Community disposals are very similar between the two offences, which is also perhaps to be expected. c. The average custodial sentence length for the section 29 offence is not that much higher than that for assault on emergency workers. Given that the maximum sentence is double, we might expect the average custodial sentence to be higher. Does this indicate that these offences should be aligned further in some way, or should they continue to be considered separately, without any attempt to draw any

> comparisons or equivalences between the two? We leave any further consideration of this point to the Sentencing Council. – West London Bench

The Suffolk Magistrates' Bench noted the same point:

> We wonder why an uplift to common assault guideline in respect of an emergency worker could not be applied rather than a separate guideline?

In developing the guideline the Council had considered applying an uplift approach for this offence as for racially and religiously aggravated common assaults, but were aware of demand from sentencers to have a full guideline for sentencing emergency worker offences. In developing other guidelines with racially and religiously aggravated versions of offences the Council had previously consulted on and tested full guidelines with separate sentencing tables. For racially and religiously aggravated offences the standard offence seriousness is assessed at step one and the aggravation is then assessed at a separate stage based on the level and proportion of racial or religious motivation and its impact on the victim and the wider community. However, in trying to separate the elements of the offence it was found that in many cases it was almost impossible for the aggravated elements to be considered as separate from the standard offence and appropriate weight apportioned to each element, which increased the risk of factors being double counted and unjust sentences. This was not an issue for emergency worker common assaults offences as these do not include the same complexities as a racially or religiously aggravated common assault offence, as aggravation in the common assault of an emergency worker offence relates only to the profession of the victim. The Council had therefore considered that a full sentencing table could be developed for the offence without the risk of double counting elements of the offence.

However, the Council considered the point regarding contrasting approaches carefully and had concerns that it is difficult to justify different approaches to sentencing where legislation creates more than one aggravated form of an offence, particularly in the context of increased awareness and acknowledgment of racial disparity in society. It considered as a matter of principle that it would be inappropriate and undesirable for sentencing guidelines to appear to apportion more importance to one type of aggravation over another by providing a full guideline for one offence, but not for the other. The Council also notes that legislative changes may soon result in parity between the statutory maximum sentences for each type of aggravation. If legislation will treat the offences equally by providing for the same statutory maximum sentence for each type of aggravation this would further legitimise concerns that the approaches for assessing the uplift, and the degree of uplift, should be consistent.

After considerable debate the Council has decided that the definitive guideline will include an uplift approach for both aggravated offences of assaults on emergency workers and for racially and religiously aggravated offences. This will ensure consistency of approach to sentencing aggravated offences and will ensure sentencers continue to be able to apply the Imposition guideline in determining appropriate sentences.

Both aggravated offences will be provided for at step three of the definitive guideline. The starting point of the sentence will be determined by the step one seriousness assessment and adjusted for aggravating and mitigating factors at step two before further adjustment at step three. For aggravated assaults on emergency workers the uplift will relate to the offence category. The uplift guidance provides for the Imposition guideline to be properly applied while also being clear that any uplift imposed may exceed the offence category range, to ensure that sentencers are able to reflect the increased statutory maximum

sentence Parliament has deemed appropriate for these offences. This will also remove the need to revise sentences further should the statutory maximum sentence be increased in the future.

Assault with Intent to Resist Arrest

Assault with intent to resist arrest is an offence in its own right and is included in the existing guideline. The consultation document explained that although this offence can be charged where an assault is committed against any individual seeking to apprehend or detain an offender, the most likely victims would be police officers assaulted in the course of their duty. It also explained that the level of assault is not specified by the legislation but it is likely that it would only be charged in common assault type cases, as any ABH or GBH type injury caused by an assault in these circumstances would be charged as the relevant, more serious offence. The consultation sought views on factors and sentences.

Culpability

Culpability factors were as for the draft Assault on Emergency Workers guideline which were the same as factors included for Common assault, with the exception of the vulnerable victim factor. No separate views were expressed by respondents in relation to application of the factors to assault with intent to resist arrest, other than those considered in relation to factors included for common assault. However, in the draft guideline the Council did not include the vulnerable victim factor given that its phrasing required targeting of the victim which would be unlikely to occur in this offence, and because the Council considered the vulnerability of the victim was provided for by the increased statutory maximum sentence. As the Council has now removed the targeting aspect of the vulnerable victim factor in common assault the factor has been included in the definitive version of the guideline. The lesser culpability factor 'excessive self-defence' has not been included, as it would be inappropriate to suggest an offender had a need to defend themselves against a lawful arrest.

Harm

The harm factors are the same as for the standard common assault offence as the basis of the assault is the same. The same amendments to the harm model for the standard common assault offence have been included for the resist arrest guideline to assist in determining the appropriate harm categorisation.

Sentences

In the draft guideline sentences for this offence were increased considerably from the existing guideline levels to achieve relativity with sentences in the draft emergency worker guideline. Respondents who commented noted the reason for the increase, but some considered it unnecessary and thought that the proposed emergency workers sentences should be reduced, and the existing sentences maintained.

The Council considered sentences in light of its decision to revise the approach for sentencing aggravated emergency worker offences. However, it decided that although the definitive common assault guideline does not specify sentences for emergency worker assaults the increased statutory maximum sentences do provide for and will result in higher sentences. The sentences consulted on have been retained in the definitive guideline to provide for relativity between sentences which may be imposed for the aggravated offence and for assault with intent to resist arrest.

Aggravating and mitigating factors

Aggravating and mitigating factors were the same as for emergency worker offences, with slight differences to the standard common assault aggravating and mitigating factors. No views were expressed specifically in relation to the factors proposed, but given that the definitive guideline will provide for victims who are vulnerable by circumstances at step one, the aggravating factor ‘victim isolated and/or had no opportunity to escape situation’ has not been included in the definitive guideline.

Assault occasioning Actual Bodily Harm (ABH)

Culpability

The draft revised ABH guideline proposed including the same factors as for GBH s20 offences. Respondents were asked for views on the suitability of proposed factors and if any others should be considered. The first section of this document explains changes made to cross cutting factors. For ABH offences these changes relate to the high culpability factor of 'strangulation' which has been expanded to 'strangulation/suffocation/asphyxiation', and the high culpability factor 'prolonged assault' which has been amended to 'prolonged/persistent assault'. The lesser culpability factor of 'Impulsive/spontaneous and short-lived assault' has also been included.

Specific points were raised in relation to the change in approach to assessing the seriousness of weapons in the revised guideline.

The consultation paper explained that the existing guideline provides for use of any weapon in an offence to achieve a high culpability assessment, and following evaluation of the guideline and analysis of cases it was identified that weapons ranging from knives to household objects such as chairs achieved the same culpability assessment with the existing guideline. The Council decided that the seriousness assessment should provide for a distinction between highly dangerous weapons and other weapons or weapon equivalents and proposed that a high culpability factor be included of 'use of a highly dangerous weapon or weapon equivalent' and medium culpability should capture other weapons used in an offence.

The majority of respondents expressing views approved of the revised approach to assessing the seriousness of weapons:

We welcome the clarification provided between highly dangerous weapons and other weapons and the reflection of culpability based on this distinction. – CPS

We are pleased to see a distinction introduced between "highly dangerous weapons and weapon equivalents" (which includes knives, firearms and corrosive substances) and other weapons. We support this development to reflect the increased concern and harm to the community from the prevalence of these weapons and the risk of death or very serious injury whenever these weapons are used as part of a violence incident. For more serious violent offences, such as this, when the chance of a custodial sentence is higher, it is right that there should be three levels of culpability, by introducing a medium level and avoid a big disparity between offences that would, under the previous guidelines, either be deemed high or low. Allowing seriousness and so sentencing to be more responsive to issues such as the type of weapon used and the role of offender within the group should allow the guidelines to more accurately reflect these types of offences than span the custody threshold and allow careful consideration of whether the use of custody is justified. – MOPAC (Mayor of London Office for Police and Crime).

We agree that the assessment of seriousness should provide for a distinction between highly dangerous weapons and other weapons or weapon equivalents. So we agree with the inclusion of a high culpability factor of ‘use of a highly dangerous weapon or weapon equivalent’, as long as there is guidance as to what is intended by a “highly dangerous weapon”. We note there is a table note to that effect. - West London Bench

Dissenting responses were received from a small number of magistrates and the Circuit Judges:

Although we recognise that the distinction between the use of a “highly dangerous weapon or weapon equivalent” and “use of a weapon or weapon equivalent which” is not “highly dangerous” seeks to reflect in sentencing the seriousness of the weapon used as well as echoing the terminology used in the bladed articles guidelines however there is real concern that seeking to over categorise in this way will lead to endless debate in sentencing as to what is, or is not, a “highly dangerous” weapon. We suggest that it is preferable to refer to weapon alone and leave it to sentencer’s judgment regarding the exact nature of the weapon – if necessary by treating the type of weapon as an aggravating factor as opposed to one of culpability.

The Council did not agree that the type of weapon should be assessed at step 2 as this could impact proportionality of sentence starting points which are informed by the step one seriousness assessment. As noted by some respondents the guideline includes explanatory wording to assist in the assessment of the status of the weapon. Very minor amendments were made to the explanatory wording to avoid the weapons referenced appearing to present an exhaustive list of highly dangerous weapons and their equivalents. The revised explanatory guidance is as follows:

* A highly dangerous weapon can include weapons such as knives and firearms. Highly dangerous weapon equivalents can include corrosive substances (such as acid), whose dangerous nature must be substantially above and beyond the legislative definition of an offensive weapon which is; ‘any article made or adapted for use for causing injury, or is intended by the person having it with him for such use’. The court must determine whether the weapon or weapon equivalent is highly dangerous on the facts and circumstances of the case.

Harm

The consultation explained that the range of injuries within ABH offences are broad: from an injury slightly more serious than a common assault injury to injury falling just short of the really serious harm required for GBH. Given the breadth of injuries which may be present in an ABH offence and the consideration required of the extent and impact of injuries, the Council decided that it was not possible or desirable to include descriptions of injuries within the harm assessment. The draft harm model therefore included three categories of harm; high, medium and low. Additional wording was proposed to accompany the harm assessment to clarify how sentencers should assess the level of harm present within an offence. Views were sought on the proposed harm model, taking into account the limitations and difficulties explained with including injury descriptive factors. The draft ABH harm model was as follows:

Harm **To assess the level of harm caused by the offence, the court must consider** • **The range of injuries (including physical and psychological injury) that can occur in cases of assault occasioning actual bodily harm** • **Where in that range of injuries the injury caused falls**	
Category 1	High level of physical or psychological harm
Category 2	Medium level of physical or psychological harm
Category 3	Low level of physical or psychological harm

While there was broad approval of removal of 'injury serious in the context of the offence' which the evaluation highlighted as problematic in the existing guideline, some respondents considered the new approach to assessing ABH harm was not a significant improvement on the existing guideline harm assessment and that clearer guidance on the types of injury in each category should be provided:

The removal of the 'injury serious in the context of offence' harm factor is to be welcomed. This led to unattractive arguments about how much worse it could have been. The preamble to the three categories is not helpful. It will add to the time of sentencing hearings by submissions from advocates on the range of the harm that can be caused. This is in danger of being 'injury serious in the context of the offence' but another name. – Birmingham Law Society

We agree with the high, medium, low approach to assessing harm and believe it is clear. However, we think further explanation is needed to define the range of injuries that can occur in cases of "assault occasioning actual bodily harm" (as in the header above). Whilst we understand the Council's desire not to give examples of injuries, our concern is that the court will have to have in its mind such examples of injuries and then in its judgement allocate this case into a low, medium or high category. That will be problematic, certainly for lay Benches. It leaves it very open to personal views and therefore inconsistent sentencing. - Justices' Legal Advisers and Court Officers' Service

The currently used ABH guidance provides marginally more help when trying to assess harm than the proposed guidance does. The proposed guidance makes no mention of the victim or their vulnerability, repeat attacks, disease transmission, etc.

This looks like a complete cop out in term of the 'additional wording accompanying the harm assessment', it does nothing to clarify how sentencers should assess the level of harm present within the offence. Not every Bench will contain medical experts who would have the expertise to assess injury harm. Is it expected a sentence should be based on a subjective view of high, medium, or low harm based on individual experiences, or an objectively measured view?- East Kent Bench

The relatively open wording on the definitions of harm in this section may raise concerns about consistency of assessment across cases. When assessing the level of physical and psychological harm reference could be made to the expected period of recovery and

treatment that would be needed according to the harm caused (along similar, but less serious lines, to the categorisation used for GBH offences). This would be on a general basis, rather than based on the specific effects on the actual victim. On this basis cuts and bruises given in a relatively less traumatic incident would qualify as lesser harm and more serious injuries, requiring longer term treatment in hospital or counselling, with some possible permanent effects or likely to cause longer lasting trauma would be seen as more harmful. – MOPAC

The Council had already discounted including descriptive injuries in developing the guideline as it would not be possible to grade the broad range of potential ABH injuries by seriousness. However, some consultation respondents suggested the harm factors should focus on the level of injury and impact upon the victim in broad terms as in the GBH harm model. Based on these responses, and on research which had identified underuse of the lowest harm category, a revised ABH harm model was drafted. Research was undertaken to identify if more descriptive factors of the level of injury and its impact influenced consistency of harm assessments. The alternative factors were as follows:

Category 1:	Serious physical injury or serious psychological harm and/or substantial impact upon victim
Category 2:	Harm falling between categories 1 and 3.
Category 3:	Some level of physical injury or psychological harm with limited impact upon victim

The research identified that the revised model was preferred to the draft consultation approach to assessing harm, and all categories were used in undertaking harm assessments of a range of physical and psychological injuries. The Council has included the revised factors in the definitive ABH guideline.

Sentences

The consultation document explained that only three starting points are included in the existing guideline, and additional guidance provides for upward adjustment from the starting point in cases where multiple features of culpability are present. Transcript analysis highlighted that in accordance with the guidance included the relevant offence category range in the existing guideline is more influential than the sentence starting point in more serious cases, and starting points towards the top of the highest category range of three years custody are imposed, before further adjustment for any aggravating features.

As the revised guideline model provides for nine starting points rather than three the category ranges in the existing guideline were distributed across the revised guideline starting points, although the top of the highest category better reflects the statutory maximum sentence of 5 years custody. The Council intended that the structure of the revised guideline and factors included will provide for a proportionate seriousness assessment and for appropriate sentences to be imposed.

A number of respondents recognised and approved of the greater range of starting points, while others did not as they thought sentences were being increased. The Council has ensured the sentences included reflect analysis and statistical data on current sentencing practice. Sentences have not been revised from the consultation proposals, as the Council considers that these, along with revisions to factors within the guideline, will achieve proportionate sentences which reflect the seriousness of offences.

Aggravating and mitigating factors

The Justices' Legal Advisers and Court Officers' Service thought guidance should be included on the level of uplift which should be applied if the aggravating factor for an assault against an emergency worker was present:

> We note that ABH committed against an emergency worker requires an uplift, the level of which is at the court's discretion. We would propose specific guidance be included, perhaps within explanatory materials, on the extent of the uplift. Similar guidance has already been included to assess the uplift required for racially aggravated offences, within those guidelines.

The legislation has not increased maximum sentences for these more serious offences, but instead makes the commission of an ABH or GBH against an emergency worker a statutory aggravating factor. This provides for an uplift to be applied to the sentence in the same way in which other statutory aggravating factors, such as previous convictions of an offender, provide for an increased sentence. The Council does not specify the level of uplift which should be applied for aggravating factors, including statutory aggravating factors. Enhanced guidance is provided for common assault of an emergency worker and racially and religiously aggravated offences as legislation specifies a higher sentence for these aggravated offences, but does not do so for ABH and GBH offences.

No changes were made to aggravating and mitigating factors in the ABH guideline.

Grievous Bodily Harm (GBH) offences

The consultation document explained that the existing GBH guidelines include the same culpability and harm factors for Section 18 and Section 20 offences and the same approach and factors for assessing seriousness as in other Assault guidelines. Based on the evaluation findings for each guideline and issues identified with application of factors, the Council decided the factors should differ in the revised guidelines to reflect the distinction in the intention of the offender in committing the respective offences. The proposed GBH s20 guideline culpability factors were the same as for the revised ABH guideline, while the proposed revised s18 guideline included some factors which are in the attempted murder guideline given the potential for alternative charging between offences. Views were sought on factors included in both GBH guidelines and on sentences.

Culpability

S20 Offences
Revisions made based on responses were as for ABH culpability factors which are discussed in the preceding section of this document: the high culpability factor of ‘strangulation’ which has been expanded to ‘strangulation/suffocation/asphyxiation; the high culpability factor ‘prolonged assault’ has been amended to ‘prolonged/persistent assault’ and; a lesser culpability factor of ‘Impulsive/spontaneous and short-lived assault’ has been included. As for ABH, the guideline provides for highly dangerous weapons and their equivalents to be assessed at high culpability and other weapons to be captured at medium culpability.

S18 Offences

The s18 offence high culpability factors also include the same changes in respect of expanding the strangulation and prolonged assault factors, and weapons are provided for as in ABH and GBH s20. The lesser culpability factor of ‘impulsive/spontaneous and short-lived assault’ has not been included in this guideline given the intention required for a s18 offence.

Two additional factors were proposed to reflect features which may be relevant to a s18 offence; ‘Revenge’ at high culpability and ‘Offender acted in response to prolonged or extreme violence or abuse by the victim’ at lesser culpability. The latter ‘abused offender’ factor was included to capture cases where loss of control manslaughter may have been the appropriate verdict if death rather than GBH was caused. The revenge factor was included to address concerns that such offenders who act out of vengeance rather than in circumstances analogous to a loss of control should not automatically achieve a lesser culpability assessment. An example considered was one of an offender who sees their childhood abuser in the street years after suffering abuse and attacks them as an act of revenge. Respondents approved of both factors, and they have been retained in the definitive version of the guideline.

Harm

Respondents broadly approved of the revised GBH harm factors. Based on research findings a very minor amendment was made to the highest harm factor which relates to the impact of any injuries in preventing the victim to carry out normal day to day activities. A very minor revision was made to the highest harm factor to include the word ‘their’ before ‘day to day activities’ to clarify that the assessment should be based on the victim’s activities rather than generic activities.

Sentence levels

As for the ABH guideline, some respondents thought sentences were being increased as the existing guideline category ranges have been distributed across nine starting points. As for ABH, the Council has ensured the sentences included reflect analysis and statistical data on current sentencing practice, and transcript analysis has provided for identification of appropriate culpability and harm categorisations to ensure sentences are proportionate and reflect the seriousness of offences. Sentences have not been revised from the consultation proposals and the resource assessment confirms that revision to the placement and phrasing of factors is expected to address the finding of the existing guideline evaluation that the s18 guideline had an inflationary impact which was not anticipated on its introduction.

Aggravating and mitigating factors

The majority of respondents were content with the aggravating and mitigating factors and no revisions were made to consultation versions of the factors.

Attempted Murder

There were fewer responses to the Attempted Murder revised guideline proposals, due to this being an offence outside of the experience of many respondents. Those who did submit responses included the Circuit Judges, Birmingham Law Society, Criminal Law Solicitors' Association (CLSA), Criminal Bar Association (CBA), Crown Prosecution Service (CPS), Prison Reform Trust (PRT), Mayor of London Office for Crime and Policing (MOPAC) and The Sentencing Academy. As well as considering responses, additional research into the potential application of the attempted murder guideline was undertaken.

Culpability

The draft guideline included four culpability categories which reflect Schedule 21 offences for offences of murder as well as other factors the Council considered relevant to the culpability assessment. The culpability assessment also includes explanatory text to confirm that the court should weigh any relevant factors to ensure a fair overall assessment of culpability. Consultation respondents broadly approved of the structure and content of the guideline and with the factors included:

> We agree that the revised culpability factors provide greater flexibility by incorporating factors from schedule 21 while adding other factors which are relevant to attempted murder cases. We support not having a lesser culpability factor of 'no weapon used'. We agree that if such a factor is included then there would be a risk that offences involving suffocation or strangulation would then be considered as lesser culpability in inappropriate circumstances. We welcome the lesser culpability factor that recognises those rare cases where there was a genuine belief that the attempted murder was due to an act of mercy. These cases can involve very difficult sentencing exercises that will benefit from the additional guidance which is provided by the guideline. - CPS

> Yes, it is right that the guidelines should now be updated to reflect the legislative change whereby increased sentences are passed for offences where a knife was taken to the scene in the attempted murder offence. – MOPAC

> We welcome the addition of new relevant factors indicating lesser culpability where a defendant has "acted in response to prolonged or extreme violence or abuse by the victim' and providing mitigation where there is a 'history of significant violence or abuse towards the offender by the victim - PRT

The Sentencing Academy response did not approve however, preferring the existing guideline model. They suggested there should be only three categories of culpability with significant planning assigned to the highest category; 'evidence of planning' to the second tier; and 'spontaneous assault' at the lowest level of culpability. They suggested taking weapons to the scene could also be provided for in the highest culpability category and suggested the lesser culpability factors should be provided for at step two.

The Council did not agree with this suggestion. Retaining the existing approach to assessing the seriousness of an offence was considered as an option in developing the guideline, but the Council decided that planning, or a lack of, should not be the only consideration in

assessing culpability and that the highest culpability category factors should reflect factors included in Schedule 21 for murder offences. In an early draft ‘substantial planning’ was included at very high culpability and ‘some planning’ at high culpability. These were tested in an extensive research exercise during the guideline development and inconsistent assessments were found of ‘substantial’ and ‘some’ planning. The Council decided that the highest culpability category should be reserved for cases reflecting Schedule 21 factors and other serious features identified in transcript analysis, and that planning should be provided for in other categories. The Council also considers that the lesser culpability factors should be assessed at step one and not at step two as these recognise the very different motivation of offenders and circumstances of offences where they are present. For example, an abused offender or genuine act of mercy case may involve significant planning, and if planning is the only consideration in assessing culpability these cases would achieve a high culpability categorisation and sentence, which may not be adequately mitigated at step two.

As well as respondents approving of the more nuanced approach to assessing culpability in the revised guideline, in research Judges broadly approved of the culpability factors, particularly lesser culpability factors which reflect Schedule 21 partial defences to murder. They also approved of the flexibility the guideline provides in weighing factors to achieve an appropriate culpability categorisation.

The consultation model and factors have been retained in the definitive guideline, with the exception of a minor amendment to the phrasing of the very high culpability factor ‘Offence racially or religiously aggravated or aggravated by sexual orientation, disability or transgender identity’. In the definitive guideline this has been rephrased as ‘Offence motivated by racial or religious hostility or hostility related to victim’s sexual orientation, disability or transgender identity’ as this reflects the intention required where the factor is relevant.

Harm

The harm factors included in the guideline met with approval by respondents and during research and have been retained as in the draft version, save for one minor amendment. This relates to the highest harm category which included the same GBH harm factor relating to impacts upon a victim’s day to day activities. The same revision was made to this factor as in the GBH harm model, by inserting the word ‘their’ to clarify these are activities subjective to the victim and not general activities.

Sentence levels

The consultation paper highlighted that it was important to note in considering starting points that sentences do not directly read across between categories in the existing guideline, due to the differing harm model included in the revised guideline. While the existing guideline has serious and long term; some; little or no harm, the revised draft guideline included very serious life changing injuries; serious; other harm. This effectively means a proportion of cases which would fall within level 1 harm of the existing guideline will fall within category 2 of the revised, and some cases currently falling within category 2 (some harm) of the existing guideline will now fall within the revised category 3. This naturally impacts upon the sentence starting point. Some respondents still thought sentences were too high, as the difference in

the thresholds of harm compared to the existing guideline and the effect this will have upon offence categorisations was not fully appreciated;

> We fear that the ramping up of the top starting point will lead, on average, to an overall increase in sentence lengths. – CLSA

> They seem a little too high. - Birmingham Law Society

Other respondents thought the sentences were too closely aligned with sentences for murder:

> Do not agree with increasing sentences to match sentences for murder offences – this has not been properly evaluated, falls outside the assault guideline, and the murder guidelines have not been considered. Increasing attempted murder sentences to the level of murder sentences will undermine the latter. – CBA

The guideline does not increase sentences to the level of murder sentences, which attract mandatory life sentences, which the guideline does not include at any starting point. While the determinate sentences included are high this reflects that the culpability in attempted murder is of the highest level, even higher than required for offences of murder. The consultation document explained that for some time, and particularly since the inclusion of paragraph 5A into Schedule 21, there have been concerns that some sentences in the existing guideline for attempted murder are too low, and are in some cases very much lower than a same facts murder offence would have been even though the intention was to cause death. The Council decided that sentences should be revised to ensure the gravity of the offence is properly reflected. Very careful consideration was given to the types of offences which should attract the highest sentences. Extensive testing of sentences against cases was undertaken in the development of the guideline and during the consultation period, and the Council is satisfied that the descriptions and placement of factors relevant to the seriousness assessment will ensure appropriate sentences are imposed for this very serious offence.

The Sentencing Academy also thought the sentences too high, and highlighted the differences in proposed GBH s18 sentences compared to attempted murder:

> Take the starting point for a Culpability A, Harm Category 1 section 18 offence (12 years) and compare this with the same category starting point for attempted murder (35 years). Whilst an intention to kill is clearly more serious than an intention to cause serious injury, it is difficult to see that it merits a starting point almost three times the length in cases where the harm caused is identical. – Sentencing Academy

The Council considered this point but noted that the comparison is flawed as the culpability factors in the two guidelines are not identical, and while the highest level of harm is the same in both guidelines, a category A1 GBH s18 offence would not involve the same culpability factors or intention as a category A1 attempted murder offence, save for offences involving firearms which the Council considers should attract a high sentence in either offence.

Another point made by the Sentencing Academy was that the sentences place too great a weight on culpability:

> Greater consideration might be given to differentiating between a case where ‘Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment’ and a case in which perhaps the victim suffers no injury whatsoever. The starting point gap between 35 years and 25 years seems inadequate to fully account for the differing levels of gravity between these offences. - Sentencing Academy

The Council carefully considered the sentences and that those in the existing guideline are considered too low to reflect the seriousness of some offences. Again, it is important to note that the revision to the harm categories will mean offences currently in the highest category of the existing guideline of ‘long term and serious harm’ will now be distributed between the top and middle harm categories of the existing guideline. The Council considers that where an offender intends to kill a victim and the victim is left with life changing injuries or lifelong dependency upon third party care or medical treatment the sentences should be of a high level. Where an offender does not cause serious harm the sentence reflects that their intention was to kill their victim, and the guideline ensures the protection of the public from those who would form such an intention, as protection of the public is an important purpose of sentencing.

The Prison Reform Trust were concerned that the adequacy and availability of prison resources would be further strained by an increased demand for prison places:

> People are spending longer in prison, with increases in tariff lengths imposed by courts; and in the legislation determining when people are eligible to be considered for release by the Parole Board. By cementing an inflation in sentence lengths from recent history rather than taking the longer view, the proposed guideline confirms a significant additional resource requirement which no government to date has been prepared to meet, and which has resulted directly in a dramatic decline in prison conditions. The decline in those conditions, quite apart from putting the government in breach of basic human rights norms, also prevents prisons from meeting one of the core purposes of sentencing, to rehabilitate. - PRT

While the resource assessment is an important part of the Council’s duty in developing sentencing guidelines, the provision of prison places is not a matter which should influence its determination of appropriate sentences. Guidelines seek to address broad aims of sentencing which include consideration of victims and the protection of the public as well as rehabilitation and reform.

Aggravating and mitigating factors

The Sentencing Academy suggested that the guideline should include an aggravating factor of offence committed in the presence of others:

> Recent years have witnessed a number of cases of murder (and attempted murder) in which the offence took place in the presence of other people, often the victim's friends or family. Witnessing a murder will be a highly traumatic experience for members of the public who happen to be at the scene; for the victim’s relatives, the experience will be lastingly traumatic. On harm alone, this circumstance elevates the offence significantly, but an offender choosing to commit or attempt murder in front of others is demonstrating a wilful indifference to others which bespeaks a higher level of moral blameworthiness. The courts have recognised the aggravating effect of this circumstance even if it is not incorporated into Schedule 21. This factor should therefore be included in the attempted murder guideline.

The Council considered this, but as noted earlier in relation to considering the point across all guidelines, decided that step two factors are non-exhaustive and a sentencer would be able to take the presence of relatives of a victim into account where appropriate.

The Sentencing Academy also thought that good character should not be a relevant mitigating factor in attempted murder, and questioned how it could be when it is not taken into account for offenders convicted of sexual offences:

The anomalous result is that an offender convicted of intending and attempting to kill (with a maximum of life imprisonment) benefits from good character which is denied to an offender convicted of a sexual offence with a maximum penalty of seven years.

In sexual offences the factor is not taken into account for very specific reasons, such as to prevent those in positions of trust where they may have good community standing or respected professions from benefiting from a good character assertion. The Council's expanded explanation on this factor included in the general guideline states:

'*This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character through, for example, charitable works may reduce the sentence. However, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor*.'

This would apply in the same way to attempted murder offences. Research identified that good character was a highly relevant factor taken into account by sentencers, particularly where lesser culpability factors impact an offender's motivation, and it has been retained in the definitive guideline.

Impact of the changes

Resource impact

This is explored in more detail in a resource assessment published by the Council.

Equality and diversity

As a public body the Council is subject to the Public Sector Equality Duty (PSED) which means it has a legal duty to have due regard to:

- the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010;
- the need to advance equality of opportunity between those who share a "protected characteristic" and those who do not;
- the need to foster good relations between those who share a "protected characteristic" and those who do not;

Under the PSED the relevant protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

Alongside the draft guidelines the Council published information on the demographic makeup (specifically age, ethnicity and sex) of offenders for assault offences, this analysis has subsequently been updated for the definitive guideline. It is important to note that the data used at the consultation stage related to the ethnicity of the offender as perceived by a police officer and was presented as White, Black, Asian, Other and Not recorded/not known. The data relating to ethnicity published alongside the definitive guideline relates to the self-identified ethnicity of the offender, presented as White, Black, Asian, Mixed, Chinese or Other and Not recorded/not known.[1]

The consultation sought suggestions from respondents as to how issues of equality and diversity could be addressed by the guidelines.

The Birmingham Law Society response thought that alcoholism may be considered an illness and that the aggravating factor 'offence committed while under the influence of alcohol' could therefore be discriminatory. This factor is included in nearly all guidelines, and the general guideline includes the following in the expanded explanation of the factor which is linked to relevant guidelines;

In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has sought help or engaged with any assistance which has been offered or made available in dealing with the addiction.

Dr.Lightowlers, an academic who has published research related to alcohol related violence and sentencing, raised concerns that female offenders may be at risk of higher sentences

[1] More information about this change can be found in the note published alongside the Sexual Offence consultation stage data tables and statistical bulletin.

as they are considered 'doubly deviant' for engaging in violent offences. Dr.Lightowlers highlighted statistics for assaults against emergency workers, noting that 3 per cent of offenders sentenced for this offence are female. However, statistics on sentencing outcomes for female offenders confirm that while 30 per cent of offenders (where sex was known) for the emergency workers offence in 2019 were female, only 8 per cent received an immediate custodial sentence compared to 21 per cent of male offenders which does not suggest that female offenders are treated more severely when sentenced for this offence.

The Council would highlight that guidelines are intended to apply equally to demographics of offenders which reflects the principle that offenders are treated equally. Where a female offender commits an offence in the context of being a victim responding to abuse or in self-defence, the guidelines include factors which provide for such circumstances to reduce culpability or to mitigate. The Imposition guideline also requires sentencers to consider broader issues, some of which may be more relevant to females such as the impact of custody on any dependants, in considering the most appropriate sentence to impose on an offender.

Evidence of disparity in sentencing

Apparent disparity in sentencing outcomes between different demographic groups is an issue that the Council takes very seriously across all offences and is taking steps to obtain more evidence and explore possible causes and remedies. A number of respondents noted the statistical information on sentence outcomes for differing demographics of offenders, noting higher sentences are currently imposed for some offences for ethnic minority offenders.

In the context of the offences covered by these guidelines, the Council has undertaken a further review of sentence outcomes across different demographic groups. The analysis was based on sentence outcomes taken from the Ministry of Justice Court Proceedings Database and does not take account of the features of individual cases.

The full data tables are published on the Council's website.

While there may be many legitimate reasons why individual cases may be dealt with more severely than others, the published data provides clear evidence of disparities between the ethnicities for some assault offences. The disparities present vary between these offences with not all offences exhibiting the same disparities between the same groups. However, they generally suggest that Black, Mixed, Asian and Chinese or Other ethnicity offenders are more often dealt with more severely than White offenders, both in terms of the proportion receiving an immediate custodial sentence and the length of that sentence

As noted in the consultation document, all guidelines contain the following reference to the Equal Treatment Bench Book (ETBB):

> Guideline users should be aware that the **Equal Treatment Bench Book** covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

The Council has agreed in relation to this point to hyperlink directly to particular sections of the ETBB in the future.

The Council noted the disparity in outcomes varies across different offences and considered that a tailored reference to the evidence of disparities in sentencing and to the ETBB should be added to those guidelines where there was sufficient evidence of disparity in sentence outcomes. The general reference is retained in the header to the guideline and a second more specific reference has been added above the sentence table to draw attention to it as an integral part of the sentencing process. These new sections are listed below.

Assault with intent to resist arrest:

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Mixed ethnicity offenders receive an immediate custodial sentence than White, Asian and Chinese or Other ethnicity offenders. There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the Equal Treatment Bench Book

Assault occasioning Actual Bodily Harm:

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Mixed ethnicity offenders receive an immediate custodial sentence than White, Asian and Chinese or Other ethnicity offenders. There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the Equal Treatment Bench Book.

GBH s20:

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black, Mixed and Chinese or Other ethnicity offenders receive an immediate custodial sentence than White and Asian offenders. There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the Equal Treatment Bench Book.

GBH s18:

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that for Black and Asian offenders immediate custodial sentence lengths have on average been longer than for White, Mixed and Chinese or Other ethnicity offenders. There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the Equal Treatment Bench Book.

Attempted Murder:

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that for Black and Asian offenders custodial sentence lengths have on average been longer than for White offenders. There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the Equal Treatment Bench Book.

Conclusion and next steps

As a result of the consultation the Council has made the changes set out in the sections above. The amended versions of the guidelines and explanatory materials are published on the Council's website (https://www.sentencingcouncil.org.uk) on 27 May 2021 and come into force on 1 July 2021.

The final resource assessment is published on 27 May 2021 on the Council's website.

Following the implementation of the definitive guidelines, the Council will monitor their impact.

Consultation respondents

Justices' Legal Advisers and Court Officers' Service (formerly the Justices' Clerks' Society)

Criminal Sub-Committee of the Council of Circuit Judges

HM Council of District Judges (Magistrates' Courts)

Magistrates' Association

West London Bench

Suffolk Magistrate Bench

East Kent Bench

West Yorkshire Bench

Former Chief Magistrate

Justice Select Committee

Chris Philp MP, Parliamentary Under Secretary of State, Ministry of Justice

Philip Davies MP

Peter Buckley - Solicitor Advocate

Hallinan Blackburn Gittings & Nott LLP

Birmingham Law Society,

Criminal Law Solicitors' Association

Criminal Bar Association

London Criminal Courts Solicitors' Association

Crown Prosecution Service

Mayor of London Office for Crime and Policing (MOPAC)

The Police Federation

Prison Reform Trust

Revolving Doors

Restore Justice

The Sentencing Academy

Dr.Carly Lightowlers

Nationwide Building Society

The Health and Care Professions Council

GMB Union

Union of Shop Distributive and Allied Workers

British Retail Consortium

Security Industry Authority

Co-op Group

All Party Parliamentary Group on Retail Crime (APPG on Retail Crime)

Association of Convenience Stores

West Herts NHS Trust

Yorkshire Ambulance Service / West Yorkshire Police

Surrey and Borders Partnership NHS Foundation Trust

Kent and Medway NHS and Social Care partnership Trust

Football Association

The Referees' Association

Shrewsbury and Shropshire Referees Association

Middlesex Referees Association

Safer Places

Leeds Womens Aid

Individual Magistrate response (x 21)

www.sentencingcouncil.org.uk