Sentencing Council

Assault Definitive Guideline: Findings from discussions with sentencers and practitioners

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Research conducted by Opinion Research Services

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Opinion Research Services (ORS) is pleased to have worked with the Sentencing Council for England and Wales on this important review of its assault definitive guideline.

We thank the Sentencing Council for commissioning the project and are particularly grateful to Emma Marshall and Trevor Steeples for their helpful and positive liaison throughout the detailed preparation of this report.

Most importantly, we are grateful to all the judges, magistrates and lawyers who took part in the interviews (and their colleagues who helped us arrange them). They all entered positively into the spirit of open discussions, engaged with the issues under consideration and discussed their ideas readily.

At all stages of the project, ORS's status as an independent organisation consulting as objectively as possible was recognised and respected. We are grateful for the trust, and hope this report will contribute usefully to the Sentencing Council's thinking about its assault definitive guideline.

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1. Executive summary

1.1 The assault definitive guideline

The assault definitive guideline was introduced in 2011 and has since been the definitive sentencing guideline for use in courts in England and Wales on assault offences.
It takes a two-step approach: during step 1, users are asked to determine the culpability and harm caused, or intended, by reference only to the factors listed in the guideline[1]. These factors comprise the principal factual elements of the offence and should determine the offence category and the associated sentence range. The categories are as follows:

- category 1: greater harm and higher culpability;
- category 2: greater harm and lower culpability or lesser harm and higher culpability; and
- category 3: lesser harm and lower culpability.

Each offence category has a 'starting point', which is used in step 2 of the guideline to reach a sentence within the category range. This is done via a non-exhaustive list of additional factual elements[2] which provide the context of the offence and factors relating to the offender. Sentencers are expected to identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

1.2 This research

Opinion Research Services (ORS) was commissioned by the Sentencing Council for England and Wales (henceforth the Sentencing Council) to gather evidence about the operation and perceived effectiveness of its current assault definitive guideline in advance of considering whether or not to revise. The focus of the study was very much on the former - the way in which the guideline is currently used - as opposed to its efficacy as a sentencing tool[3].
The primary aim of the research was to establish the views of guideline users on[4]:

- its structure;
- the wording of the factors used to determine levels of harm and culpability;
- whether any additional factors should be considered (and at what step in the guideline);
- any perceived problems with the guideline; and
- how, in practice, it is perceived to have affected sentence outcomes for the range of offences contained in it[5].

[1] See http://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf for the list of factors.
[2] As above.
[3] See also '*Assessing the impact and implementation of the Sentencing Council's Assault Definitive Guideline',* Office of the Sentencing Council, 2015: http://www.sentencingcouncil.org.uk/analysis-and-research/
[4] Please see Annex 2 for the topic guides used for the study.

The emphasis throughout was on step 1 of the guideline as this is the stage at which the offence category - and hence the starting point - is determined, and it has a far more significant impact on the final sentence than does step 2, which determines where in the category range the final sentence outcome is placed.

This executive summary seeks to give a balanced assessment of the discussion outcomes, but readers are referred to the detail of the full report for a more comprehensive account of the views expressed – in particular, for an account of people's priorities, assumptions and reasons for these views.

1.3 Methodology

The research took a qualitative approach. Sixty nine individual depth telephone interviews and three small group discussions were conducted with 30 Crown Court judges, 28 magistrates, 14 district judges, six prosecution lawyers and six defence lawyers. The individual depth discussions typically lasted between 30 and 45 minutes and the group sessions (one with four Crown Court judges in the Midlands, one with six Crown Court judges in Wales and one with five magistrates, also in Wales) for around an hour. The latter were held at participants' courts to ensure the sessions were as convenient as possible for them.

Around half (14) of the Crown Court judges were recruited from the Office of the Sentencing Council's existing 'research pool' and the remainder (16) through a 'snowballing' approach whereby those already interviewed were asked to nominate fellow judges to take part. For district judges, a member of the Sentencing Council facilitated recruitment which yielded the required number of participants. To access magistrates, a link to register interest in the research was placed in the Magistrates' Association e-bulletin, which yielded six interviews. The remainder were achieved via an email from ORS to a sample of magistrates' court clerks in each judicial region asking for volunteers (five) and also via a similar 'snowballing' approach to that outlined above (17).

All discussions covered the issues outlined above, and to stimulate discussion, participants were presented with a scenario – either representing a case of section 18 Grievous Bodily Harm with intent[6] (GBH with intent; Crown Court judges only), section 47 Actual Bodily Harm[7] (ABH; all interviewees) or section 89 Assault on a Police Officer[8] (magistrates and district judges only)[9].

[5] While acknowledging that sentencing is also impacted by pre-trial procedures.
[6] Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm; Offences Against the Person Act 1861 (section 18).
[7] Assault occasioning actual bodily harm; Offences Against the Person Act 1861 (section 47).
[8] Assault on a police constable in execution of his duty; Police Act 1996 (section 89).
[9] Short scenarios were used to reduce the burden on participants; however it is recognised that the details provided were restricted for this reason and that they will thus have some limitations as a research tool.

They were then asked to outline what offence category they would have placed the defendant into and why, and what harm and culpability factors would have influenced their decision. Participants were not asked to give a sentence as well as their categorisation – though many did so as part of their deliberations.

Interviewees came from all seven judicial regions in England and Wales and had varying degrees of experience in their role. The majority, though, had been in post for over five years' and so were able to comment on the situation pre- and post-implementation of the guideline in 2011. Most participants sentence assault cases on a routine basis and so had good familiarity with the document.

1.4 Key findings

The offence categories

Beginning with the appropriateness of the three offence categories, most interviewees were positive, describing them as sensible, intuitive and flexible. This flexibility was generally considered vitally important, with most rejecting the idea of further categories to allow discretion, minimise complexity and prevent sentencing becoming a 'tick-box' exercise. A very small minority of Crown Court judges and magistrates considered the offence categories to be overly restrictive and prescriptive though, leaving little room for judicial discretion. These participants suggested that a fourth category might allow them more flexibility in this regard.

Importantly, a significant number of Crown Court judges and district judges felt the guideline should be amended to accommodate cases of 'neutral' or 'middling' harm (where the injury is neither more nor less serious in the context of the offence) - though most did not desire an extra category to accommodate this inclusion since categories 2 and 3 were considered sufficiently flexible to cater for it. Although not explicitly suggested, the inference was that the wording of these two categories could be amended to read as follows: *'greater harm and lower culpability; or lesser/neutral harm and higher culpability'* (category 2); and *'lesser/neutral harm and lower culpability'* (category 3).

Step 1 factors

Appropriateness of the factors

The step 1 factors were considered generally appropriate by the majority of interviewees (though there were some strong issues around semantics).

'Harm' factors

- There are significant difficulties with the phrase ***'injury that is serious in the context of the offence'/ 'injury which is less serious in the context of the offence'****:* many

Crown Court judges, district judges and magistrates admitted to not knowing exactly what it means or what types of injuries should take a case into greater or lesser harm.

Many of the Crown Court judges and some prosecutors had particular issues with the phrase in the context of GBH with intent offences, given that greater harm must be present for an offence to be charged at that level in the first place. It was also said that judges can run the risk of 'double-counting' if they reach a conclusion of greater harm in a GBH with intent case for the same reason.

The phrase can apparently also be difficult to interpret in ABH cases as these cover such a wide range of injuries and *"because so few ABH cases go to trial in the magistrates' court, the seriousness of the injury in the context of the offence is sometimes difficult for them to balance…"* (district judge). In addition, district judges, magistrates and prosecutors said that interpreting the phrase in the context of a common assault[10] offence can be 'tricky' insofar as "*usually there's not a serious injury involved…"* (magistrate).

- ***'Sustained or repeated assault on the same victim'*** was another factor that some interviewees across all groups felt could be (and is) open to different interpretations – and more explicit guidance was desired on what exactly is meant by both 'sustained' and 'repeated' to reduce the subjectivity with which it is applied.

'Culpability' factors

- The vast majority of sentencers were satisfied that a shod foot or head should be considered a ***'weapon equivalent'*** – though a small minority felt the latter is not (certainly no more than a fist would be). It was also said that the premeditated act of bringing a weapon to the scene of an offence should be considered more seriously than lashing out during the course of a fight.

- ***'Victim vulnerability'*** was raised by some Crown Court judges, district judges and magistrates as an area where sentencers must be careful not to double-count insofar as it is included in both greater harm *('victim is particularly vulnerable because of personal circumstances'*) and higher culpability *('deliberate targeting of a vulnerable victim')* – albeit with a different emphasis. Further, a couple of Crown Court judges and district judges highlighted the difficulties involved in interpreting vulnerability, particularly in a

[10] Common Assault; Criminal Justice Act 1988 (section 39).

domestic violence context where it seems there are differing views as to which victims should be considered vulnerable and which should not.

- A few Crown Court judges and district judges also felt that the phrase ***'a significant degree of premeditation'*** could be interpreted differently - and suggested that the word 'pre-planning' may be better in conveying what they thought the Sentencing Council has in mind in terms of this particular factor (that is, that the defendant has planned the assault well in advance of perpetrating it).

Step 2 and additional factors

Most interviewees suggested that adding more factors at either step 1 or 2 would introduce too much complexity and remove judges' discretion to an unacceptable degree. However, many wished to see domestic violence - and its psychological effects - referenced more explicitly within the guideline (or even the amalgamation of the assault definitive guideline and some parts of the 'Overarching Principles – Domestic Violence definitive guideline'[11]). A minority disagreed and felt that domestic violence could be adequately covered by current (albeit mostly non-domestic violence specific) step 1 and 2 factors[12].

Several district judges, magistrates and prosecutors were keen to see 'spitting' reintroduced as an important consideration within the guideline (particularly in the context of assault on a police officer offences). Most felt it should be a greater harm or higher culpability factor at step 1.

Impact of the assault definitive guideline

Impact on sentencing practice

Interviewees were generally positive about the assault guideline, especially the consistency it has brought to the sentencing process while still allowing a degree of judicial discretion and flexibility. It should be noted here though that some responses to the scenario exercise (whereby interviewees were presented with a scenario - either representing a case of GBH with intent, ABH or assault on a police officer - and asked to outline what offence category they would have placed the defendant into and why) indicate that some variation in approach remains. This is seemingly due to the wording of certain factors, especially: *'injury that is serious in the context of the offence'/ 'injury which is less serious in the context of the offence'; 'sustained or repeated assault'*; and *'use of weapon or weapon equivalent'*. This exercise is fully reported in Annex A.

[11] http://www.sentencingcouncil.org.uk/publications/item/overarching-principles-domestic-violence-definitive-guideline/

[12] *'Deliberate targeting of vulnerable victim', 'location of the offence', 'gratuitous degradation of victim', 'ongoing effect upon the victim';* and *'in domestic violence cases, victim forced to leave their home'.*

Other perceived benefits of the guideline were that it:

- enables more structured, logical sentencing;
- gives judges and magistrates confidence in their 'instinct';
- helps guide and build the confidence of inexperienced sentencers;
- helps mitigate against the potential for overly harsh or lenient sentences; and
- ensures better transparency in terms of explaining sentencing.

There was also a general view that the guideline allows judges and magistrates to reach fair and proportionate outcomes – though there were some issues around sentence length (see below). Many Crown Court judges felt that the guideline has led to increased sentences for GBH with intent offences – especially at category 1 level. This was considered appropriate by some (who felt under-sentencing was an issue previously) whereas many others felt the starting points are too high. Conversely, it was said that sentences for ABH offences have decreased: many participants felt that the ABH range is too narrow and the starting points too low.

District judges and magistrates also suggested that sentences have decreased for common assault and assault on a police officer. The former was considered attributable to the difficulty involved in establishing injury in cases of common assault and the starting points and ranges available – whereas in terms of the latter it was said that "*20 years ago if you slapped a police officer you would go to prison…now you'd be looking at a fine"* (district judge). Also, a couple of district judges viewed the absence of any reference to spitting within the guideline as a significant contributory factor to decreased sentence lengths for assault on a police officer.

Going outside the sentencing range

All sentencers said they feel able and are willing to go outside the guideline's sentencing ranges - and said that this is acceptable providing they offer a clear explanation as to why they have done so. The issues above in relation to the 'too high' sentences for GBH with intent offences and the 'too low' sentences for ABH offences are relevant here too: several Crown Court judges said that they often go outside the category range to reduce a GBH with intent sentence or increase one for ABH.

Furthermore, it was said that while the stated maximum sentence for an ABH offence is five years, the range for a category 1 offence is one to three years' custody. Though this was a purposive decision, there was a sense from some participants that this is an anomaly that, if changed, could prevent cases being sentenced outside the category range.

Impact on escalation from the magistrates' to the Crown Court

Several Crown Court judges felt that the guideline has resulted in more cases being escalated from the magistrates' court to the Crown Court, primarily due to the way it is being used by magistrates. The latter are apparently apt to look at a case at category level only (step 1) - and will escalate those that, according to the category range, fall outside their jurisdiction without looking at the mitigating factors (step 2) that might bring them down to within the six months sentencing limit. This was echoed by one district judge and a couple of magistrates.

However, most district judges, magistrates and lawyers disagreed that greater escalation is an issue and it was felt that the clarity and logic of the guideline gives magistrates more confidence to retain cases they may have previously sent to Crown Court.

1.5 Conclusion

This research generated much in-depth information regarding the implementation the assault definitive guideline and what participants (Crown Court judges, district judges, magistrates, defence and prosecution advocates) perceive to be its main impact. Overall, most interviewees were positive about the guideline and the positive implications they felt it has had for sentencing consistency. Indeed, the quotation that most appropriately sums up the majority view is that *"there are one or two factors that could be tidied up, but the way that it is written and structured helps sentencers come to a decision"* (magistrate).

1. Introduction

1.1 The assault definitive guideline

The assault definitive guideline was introduced in 2011 and has since been the definitive sentencing guideline for use in courts in England and Wales on assault offences. It takes a two-step approach: during step 1, users are asked to determine the culpability and harm caused, or intended, by reference only to the factors listed in the guideline[13]. These factors comprise the principal factual elements of the offence and should determine the offence category and the associated sentence range. The categories are as follows:

- category 1: greater harm (injury or fear of injury must normally be present) and higher culpability;
- category 2: greater harm (injury or fear of injury must normally be present) and lower culpability; or lesser harm and higher culpability;
- category 3: lesser harm and lower culpability.

Each offence category has a 'starting point', which is used in step 2 of the guideline to reach a sentence within the category range. This is done via a non-exhaustive list of additional factual elements that provide the context of the offence and factors relating to the offender. Sentencers are expected to identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

1.2 Background

ORS was commissioned by the Sentencing Council for England and Wales (henceforth the Sentencing Council) to gather evidence about the operation and effectiveness of its current assault definitive guideline in advance of considering whether or not to revise it. The focus of the study was very much on the former - the way in which the guideline is currently used - as opposed to its efficacy as a sentencing tool[14].

The aim of the research was to establish the views of guideline users on:

- its structure;
- the wording of the factors used to determine levels of harm and culpability;
- whether any additional factors should be considered (and at what step in the guideline);
- any perceived problems with the guideline; and

[13] See http://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf for the list of factors.

[14] See also '*Assessing the impact and implementation of the Sentencing Council's Assault Definitive Guideline'*, Office of the Sentencing Council, 2015: http://www.sentencingcouncil.org.uk/analysis-and-research/

- how, in practice, it is perceived to have affected sentence outcomes for the range of offences contained in it[15].

1.3 Methodology

The research took a qualitative approach. Sixty nine individual depth telephone interviews and three small group discussions were conducted with 30 Crown Court judges, 28 magistrates, 14 district judges, six prosecution lawyers and six defence lawyers – though two of the latter were also prosecutors and so able to speak about the guideline from both perspectives. The individual depth discussions typically lasted between 30 and 45 minutes and the group sessions (one with four Crown Court judges in the Midlands, one with six Crown Court judges in Wales and one with five magistrates, also in Wales) for around an hour. The latter were held at participants' courts to ensure the sessions were as convenient as possible for them.

In terms of the recruitment process approaches to this were mixed; around half (14) of the Crown Court judges were recruited from the Office of the Sentencing Council's existing 'research pool' via an initial email approach from the Office. Following confirmation of their willingness to take part, a follow-up from ORS was sent to confirm a date and time for the interview or group discussion. The remainder (16) were 'new' participants recruited through a 'snowballing' approach whereby those already interviewed were asked to nominate fellow judges - either within or outside their own area - to take part. Both approaches proved fruitful and all of the judges approached were very helpful and interested in the process and its eventual outcomes.

For district judges, a member of the Council facilitated recruitment by sending an initial email asking for volunteers for the study. This was extremely successful and yielded the required number of participants, some of whom had participated in research for the Council previously and some who had not. In order to access magistrates, a link to register interest in taking part in the research was placed in the Magistrates' Association e-bulletin; this yielded six interviews. The remainder were 'new' recruits achieved via an email from ORS to a sample of magistrates' court clerks in each judicial region asking for volunteers (five) and also via a similar 'snowballing' approach to that outlined above (17).

Interviewees came from all seven judicial regions in England and Wales and had varying degrees of experience in their role. The majority, though, had been in post for over five years' and so were able to comment on the situation pre- and post-implementation of the guideline in

[15] While acknowledging that sentencing is also impacted by pre-trial procedures.

2011. Most sentence assault cases on a routine basis and so had good familiarity with the guideline.

All discussions covered the issues outlined in section 1.2. Annex 2 contains the interview topic guides, which were designed to elicit not only interviewees' spontaneous views on the guideline and its practical operation, but also their opinions on issues about which the Council had received anecdotal evidence of potential difficulties[16].

To stimulate discussion, participants were presented with a scenario – either representing a case of section 18 grievous bodily harm with intent[17] (GBH with intent; Crown Court judges only), section 47 actual bodily harm[18] (ABH; all interviewees) or section 89 assault on a police officer[19] (magistrates and district judges only)[20]. They were then asked to outline what offence category they would have placed the defendant into and why, and what harm and culpability factors would have influenced their decision. For ABH, district judges and magistrates were additionally asked whether they would have accepted or declined jurisdiction – i.e. sentenced the case themselves or committed the case to the Crown Court for sentencing. Participants were not asked to give a sentence as well as their categorisation – though many did so as part of their deliberations[21].

The interviews and small discussion groups, selected as a practical means of obtaining opinions from a broad range of participants[22], both worked well – the former allowing interviewees to speak in significant depth about the guideline and the latter allowing them to debate the issues with each other. Both methodologies have merits (and limitations in the sense that the former does not afford any interaction with others and the latter does not allow one single person to go into as much depth on a subject as perhaps they would like) and the research has thus benefited from using the two in a complimentary way.

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[16] For example the wording of specific factors (such as *'injury which is serious in the context of the offence'*, *'injury which is less serious in the context of the offence'*, *'sustained or repeated assault on the same victim'*, and *'use of a weapon or weapon equivalent'*) and whether the guideline causes more cases to be escalated from the magistrates' court to the Crown Court for trial.

[17] Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm; Offences Against the Person Act 1861 (section 18).

[18] Assault occasioning actual bodily harm; Offences Against the Person Act 1861 (section 47).

[19] Assault on a police constable in execution of his duty; Police Act 1996 (section 89).

[20] Short scenarios were used to reduce the burden on participants; however in limiting the details provided the scenarios therefore have some limitations as a research tool.

[21] In the group discussions, some participants did come to the same conclusion but they tended to make their sentencing decisions on an individual basis rather than collectively.

[22] Although a face-to-face individual interview approach may have been beneficial in terms of analysing 'non-verbal' information (such as body language), the practicalities of speaking to a wide range of judges, magistrates and lawyers across England and Wales in person would have been prohibitive within the project timescale. Undertaking interviews by telephone had a number of practical benefits, e.g. the flexibility they offered in terms of scheduling interviews at a convenient time without placing an undue burden on participants.

1.4 Analysis and reporting

With permission, all depth interviews and group discussions were recorded and subsequently written up. Analysis was then undertaken using Microsoft Excel, whereby a code frame was devised for each question and each quotation relevant to a particular 'code' or theme inputted next to it within a spreadsheet. Different spreadsheets were used for each participant type (Crown Court judge, district judge, magistrate and lawyer) so that differences in their views could be compared.

Verbatim quotations have been selected from this analysis and are used for their vividness in capturing recurrent points of view. However, the report is not a verbatim transcript of the interviews and group sessions, but an interpretative summary of the issues raised by participants in free-ranging discussions.

2. Using the guideline

2.1 Introduction

This section reports the overall findings from the interviews and discussion groups while also revealing the reasoning of participants. Different participants shared considerable common ground so findings are mainly reported overall - but where there were real differences in opinion the groups are compared and contrasted.

2.2 Main findings

Using the guideline

Participants were asked to describe how they use the current guideline: most Crown Court judges said they look at it both in court and beforehand (time permitting or when trying a particularly complex case), while district judges said they tend to only look at it in court because of time constraints. The majority of magistrates said that they look at it prior to court and in the retiring room when considering their sentence. In terms of preferred format, most use hard copies but a few prefer to access the guidelines digitally – either online or (in the case of magistrates) via an iPad app.

The guideline is used systematically during the sentencing process by most interviewees: they will typically read any relevant papers and listen to the facts of the case before turning to the guideline to make an initial assessment of the step 1 factors and determine an offence category. It is then used again to establish the impact of aggravating and mitigating factors on sentence length. However, some (albeit a minority) tended to see sentences more 'in the round' – and many more said that they tend to use it to confirm their gut feeling about where a case should fall. The general sense was that their experience as sentencers means their instinct is usually correct.

The majority of participants across all groups agreed that prosecution and defence counsel now refer to the guideline in opening and/or summing up of cases – most of the time of their own volition but sometimes at the behest of the judge. As would be expected, the former tend to focus on the aggravating features of a case, and the latter on the mitigating features.

The offence categories

When asked about the appropriateness of the three offence categories[23], most interviewees across all groups were typically positive, describing them as sensible, intuitive and flexible. Indeed, this flexibility was generally considered vitally important, with most rejecting the idea of

[23] The previous SGC guideline contained four categories.

further categories to allow discretion, minimise complexity and prevent sentencing becoming a 'tick-box' exercise. Some of the many typical comments were:

> *Three categories is the right approach. I can't think of a better way of doing it. Any system is bound to produce anomalies and it's up to the judge to get his way around those…* (Crown Court judge)

> *As a sentencer the more categories you have, the more of a tick-box exercise it is rather than an exercise of judgement. I'm happy with the three* (Crown Court judge)

> *It would be difficult to have more than three categories without placing unfair or inappropriate restrictions on a judge's discretion…* (district judge)

> *I think three is about right. I think if there were four then we'd have more difficulties in deciding what the offence category is. If there were only two it'd be too simplistic. I find them clear and unambiguous* (magistrate)

> *I think it's a good number and a good structure to work with. Any more than three and there'd be a lot more disagreement. The guidelines would become a lot more prescriptive if you had five or six categories. The ranges would then be smaller, so the court would have less discretion* (prosecutor)

However, a very small minority of Crown Court judges and magistrates considered the offence categories to be overly restrictive and prescriptive, leaving little room for judicial discretion. These participants thus suggested that a fourth category might allow them more flexibility in this regard:

> *I think sometimes it is quite hard to fit them within the three categories because they are like tramlines. I think sometimes…that it would be nice to be able to have another option* (magistrate)

Importantly, a significant number of Crown Court judges and district judges felt that the guideline should be amended to accommodate cases of 'neutral' or 'middling' harm (that is, where the injury is neither more nor less serious in the context of the offence). A selection of the many comments made on this issue can be seen below:

> *There's the argument that if a case isn't greater harm then it has to be lesser harm. However, there is a whole spectrum of injury between greater and lesser harm… How do you appropriately fit a case that has medium harm?* (Crown Court judge)

Everyone recognises that the guideline has got an omission. If I say a case is neutral, not more serious or less serious in the context of the offence, people don't tell me not to do that as it's not in the guidelines…and I think that omission is the key problem (Crown Court judge)

There are difficulties with the categorisation…there seems to be a situation that if you don't have any of the factors that appear in greater harm or lesser harm then you have sort of neutral harm. Injury which is serious in the context of the offence is greater harm; injury that is less serious in the context of the offence is lesser harm; injury which is standard in the offence is neutral. Where does that fit in? (district judge)

It is clear then that the absence of an 'ordinary' or 'neutral' harm bracket within step 1 of the guideline is an issue that can cause practical difficulties for sentencers, many of whom commented in line with the following:

I think there ought to be greater harm, ordinary harm, and lesser harm. Currently you have to draw a line and say whether it's above or below (Crown Court judge)

Most of those who commented on this issue did not, however, desire an extra category to accommodate the inclusion of 'ordinary harm'. Indeed, as noted above, the vast majority of interviewees were satisfied with the existing three with categories 2 and 3 considered sufficiently flexible to cater for it. Although not explicitly suggested, the inference was that the wording of these two categories could be amended to read as follows: 'greater harm and lower culpability; or lesser/neutral harm and higher culpability' (category 3); and 'lesser/neutral harm and lower culpability (category 3). Indeed, only a very small minority made suggestions like the following:

A category to allow us to fit in 'neutral' harm or injury appropriate to the context of the offence would be helpful. While in principle the fewer categories the better, it wouldn't be overcomplicating things to introduce a greater range of categories to include neutral harm (Crown Court judge)

Step 1 factors

Appropriateness of the factors

The step 1 factors were considered generally appropriate by the majority of interviewees (though there were some strong issues around semantics as discussed later):

I think with assaults, harm and culpability work pretty well as basic factors (Crown Court judge)

I don't think in any cases that I've sentenced that I felt there should be other factors at step 1 that aren't there. Those are key factors which identify harm and culpability (district judge)

I think the step 1 factors are absolutely appropriate…and I like that we have other factors that increase seriousness afterwards. I find it all extremely helpful (magistrate)

What's good about the step 1 factors is that they're quite concise. Greater and lesser harm really is quite clear...nobody really has any issues with that (prosecutor)

Balancing the factors

Most participants said they consider it fairly straightforward to balance the various factors to determine the offence category. This, it was felt, comes with experience and is part of what was described on several occasions as 'judge craft'. Bench discussions are also seemingly very important for magistrates in this regard.

However, a few participants (Crown Court judges, district judges and magistrates) described some difficulty in weighting the factors against each other and coming to a decision in complex cases – though they accepted this as an inevitable consequence of the guideline and recognised that the decision-making process would be even more difficult without it:

Some of the factors for higher culpability and lower culpability impact each other[24], which can make it difficult to make a decision. The main difficulty is based on the time-constraints and the pressure of the courtroom (magistrate)

I sometimes struggle when I have both greater harm and lesser harm factors, for example sustained assault with no injury. It's the same with culpability…for example, if someone took a leading role in the gang but there was a lack of premeditation (district judge)

[24] This magistrate was suggesting that it is often difficult to balance the factors as some of the higher and lower culpability factors can appear to 'cancel each other out' to some extent. Some examples are: *'use of weapon or weapon equivalent'* versus any of the lower culpability factors; and *'leading role in group or gang'* versus *'a greater degree of provocation than normally expected'* or *'lack of premeditation'*.

As for how such difficulties are overcome, it would seem that where there are greater and lesser harm factors and/or higher and lower culpability factors, the former are more influential in terms of categorising the offence:

> *Does a greater harm automatically cancel out a lesser one? Usually it will* (district judge)

> *If there were culpability factors pointing in each direction, at that stage I would take the higher culpability factor as being more important in determining the initial category...at that stage I'd be looking to put it in the higher category* (district judge)

> *Instinctively the higher culpability factor of, say, the use of a weapon trumps the lower culpability factors. I'd put it into higher culpability and it would take a lot for the defence to convince me otherwise* (magistrate)

The lawyers tended to agree that judges in particular rarely have difficulties balancing the step 1 factors and coming to a just decision:

> *I don't really think that sentencers struggle to balance the factors. I've never had any experience of judges struggling with higher or lower culpability* (prosecutor)

> *If you're sitting you've listened to the prosecution and the defence, you've read the probation report and you're looking at the guidelines. You're trying to digest four different sources of material, which is always the way it's going to be...but they're all pretty adept* (defence lawyer)

In relation to magistrates though, one prosecutor said that: "*I don't think there is consistency among sentencers when there are both higher and lower culpability factors… One bench could come to one conclusion and another bench could come to another one on the same set of facts…"* (prosecutor).

Most influential 'harm' factors

It was reported that all 'harm' factors *('injury that is serious in the context of the offence'/'injury which is less serious in the context of the offence', 'sustained or repeated attack on the same victim'* and *'victim is particularly vulnerable because of personal circumstances'*) are frequently used in determining how to categorise a case, suggesting that they are appropriate for most circumstances. The possible exceptions to this are cases involving domestic violence and, specifically in relation to assault on a police officer where spitting is involved (many interviewees suggested that domestic violence and spitting be included as step 1 greater harm factors).

Difficulties with 'harm' factors

Participants were asked to outline any particular issues they had with the step 1 harm factors – particularly around language, ambiguity and clarity. It was found that:

1. *'Injury that is serious in the context of the offence'/ 'injury which is less serious in the context of the offence'* appears to present significant difficulties, with many of the Crown Court judges, district judges and magistrates admitting to not knowing exactly what they mean or what types of injuries should take a case into greater or lesser harm:

> *One issue that always comes up is the injury which is serious in the context of the offence. I've never fully understood that and I've never had any colleagues explain it to my satisfaction. Why don't they just say injury which is serious? I don't understand the second part of it!* (district judge)

> *I don't understand what they mean by in the context of the offence. I honestly don't know what it means* (magistrate)

> *Injury more or less serious in the context of the offence is inherently ambiguous. It seems to me like a bit of a catch all. What element of the offence? What about the offence is it getting at? It's such a nebulous issue* (magistrate)

In particular, a few district judges and prosecutors reported it being generally difficult for lay magistrates to interpret; indeed, some magistrates and lawyers were keen for some *"examples of injuries that take it to the greater harm category"* (magistrate).

This was supported by the scenario exercises for GBH with intent, ABH and assault on a police officer[25], where there was disagreement amongst participants regarding whether the injuries suffered in the scenario were more or less serious in the context of the offence (see Annex 1 for full details).

Many Crown Court judges and some prosecutors had particular issues with the phrase in the context of section 18 GBH with intent offences, given that greater harm must be present for an offence to be charged at that level in the first place. On the whole they did not consider this factor to be particularly helpful in such cases:

[25] Whereby interviewees were presented with a scenario representing one of these assault types and asked to outline what offence category they would have placed the defendant into and why.

Under section 18, I'm not quite clear at how the injury can be less serious in the context of the offence where the alleged injury has to be a very serious bodily injury… (Crown Court judge)

GBH is serious stuff. Section 18 potentially carries life imprisonment so talking about GBH in the context of more or less seriousness is missing the point (Crown Court judge)

Time after time we have exactly the same problem of trying to work out harm that is serious in the context of the offence. You get that almost inevitably in section 18 and 20[26] *cases, where you've got to have started with a basic premise that it is serious bodily harm*… (Crown Court judge)

I think that's probably the biggest issue with the guidelines...it's the one that causes the most amount of discussion at court. If for example it's a GBH case, the injury by definition must be serious, so what is it that would make it more serious in the context of a case? Have you got to be almost dead? That's the biggest flaw (prosecutor)

It was also said that judges can run the risk of 'double-counting' if they reach a conclusion of greater harm in a GBH with intent case (and indeed section 20 GBH/unlawful wounding) for the same reason:

If you have a section 20 or 18 GBH then serious injury must be present…and when you've already got a threshold to cross before the categorisation of GBH is invoked it can create difficulties. What is serious injury if you're already seriously injured in order to be a victim of GBH anyway? You will reach serious injury, but are you not then double-counting? (Crown Court judge)

The phrase can also apparently be somewhat difficult to interpret in ABH cases as these cover such a wide range of injuries:

There is so much scope for argument I can see how it is interpreted differently (Crown Court judge)

Section 47 ABH poses more difficulty, because there are no easily identifiable features that are commonly understood (Crown Court judge)

[26] Inflicting grievous bodily harm/unlawful wounding; Offences Against the Person Act 1861 (section 20).

Further, it was said that:

> *In the magistrates' court, serious assaults are only charged as common assault, whereas they could quite easy be charged as ABH. Because so few ABH cases go to trial in the magistrates' court, the seriousness of the injury in the context of the offence is sometimes difficult for them to balance out. It might be difficult for them to tell if it's more or less serious than the standard ABH* (district judge)

Finally with regard to this particular factor, district judges, magistrates and prosecutors said that interpreting it in the context of a section 39 common assault can also be 'tricky' insofar as:

> *It doesn't require an injury so injuries can be fairly minor and still serious in context of a common assault* (district judge)

> *There is difficulty with a greater type of injury in relation to the offence. If it's a common assault usually there's not a serious injury involved…*
> (magistrate)

> *You're talking about minor injuries in common assault so injury that's more serious in the context of the offence is something that can be quite difficult to explain. It can be problematic. Perhaps the guideline should indicate some examples to give both practitioners and the court some reference point for someone to compare to. The concept needs to be better defined*
> (prosecutor)

There thus appears to be a need for the guideline (or indeed a supplementary explanatory booklet) to clarify exactly what is meant by serious in the context of the offence in common assault, ABH, GBH and GBH with intent cases – perhaps in the latter instance through *"something in the paragraph below the category boxes saying 'when dealing with an offence of inflicting GBH, to put the offence in the top category the harm has to be very significant'"* (Crown Court judge).

2. 'Sustained or repeated assault on the same victim' is another factor that some interviewees felt could be (and is) open to widely different interpretations insofar as what might be sustained or repeated for one sentencer - and indeed lawyer - might not be for another:

> *I genuinely have no idea what that means! Is that saying it's more than one punch or does it have to go on for 20 minutes or 30 minutes? For example: guys coming out of the pub and something kicks off and three of them hit one; they each hit him two or three times, he goes to the ground and then*

one of them kicks him. I have trouble concluding if that's sustained or repeated (Crown Court judge)

With regard to wording of sustained or repeated, my personal view is that if it's a single blow that happens then that is not sustained but anything else is. For example, if you're being kicked in the head for thirty seconds, then that's sustained. That view wasn't shared by everybody at a training session I went to (district judge)

I can envisage some confusion as to whether two or three blows is sustained or repeated assault. There is bound to be a grey area (prosecutor)

Some people will call two punches a sustained assault which seems to be misusing language. To me, the term sustained or repeated assault means that it goes on for a long time; even three or four punches is not sustained to me (defence lawyer)

Again, the scenario exercises - especially for GBH with intent and assault on a police officer - supported this finding as some participants considered the offences outlined to be sustained and repeated assaults, whereas others did not (see Annex 1).

As such, there was a definite sense that more explicit guidance is required in relation to what exactly is meant by both 'sustained' and 'repeated' to reduce the subjectivity with which this particular factor is currently applied:

Sustained and repeated assault is difficult to interpret for some people. Some might think two hits is repeated assault, but I wouldn't say it was. Some kind of guidance would be nice (magistrate)

Some things are too subjective. Some of the wording should be changed, especially for sustained and repeated assault. Things should be made more explicit (magistrate)

Conversely though, a minority of Crown Court judges, magistrates and prosecutors were satisfied with the 'fuzziness' of this phrase, suggesting that it offers sentencers a degree of flexibility and discretion and allows them to exercise their judgement:

We use it to utilise our discretion… I'm not entirely sure what it means, but I'm also not keen on a restricted jurisprudential definition, because you've got to let judges make a judgement (Crown Court judge)

Repeated is quite difficult to interpret for sentencers…does sustained and repeated mean an assault that carried on for eight minutes or a series of less serious assaults? I think the subjectivity is a good thing though; it gives flexibility (prosecutor)

Most influential 'culpability' factors

Moving on to culpability, it was said that the factors that push cases into the higher or lower brackets are: *'use of a weapon or weapon equivalent'*; a *'significant degree or lack of premeditation'*; a *'greater degree of provocation than normally expected'*; and *'leading or subordinate role in a group or gang'*.

Difficulties with 'culpability' factors

The same question was asked as above in relation to the step 1 culpability factors – with participants particularly invited to comment on any issues around language, ambiguity and clarity.

1. In considering the ***'use of a weapon or weapon equivalent'***, most comments centred on the inclusion of a shod foot in the bracketed list of examples – with the vast majority of interviewees across all groups considering this to be appropriate (including those responding to the ABH scenario exercise reported in Annex 1):

I don't believe that any judge that is used to trying crime would regard the use of a foot or a head as anything less than a weapon. Shod feet and head-butts are bad and they are weapons. As far as I and my experienced judge colleagues are concerned there's a presumption that this should lead to prison (Crown Court judge)

The weapon is the key factor: a head-butt; a kick; a bottle; a knife. People think that a weapon has to be a gun or a knife. It can be a shod food too. We've seen some horrific damage done with a foot, where people kick to the head (magistrate)

This was corroborated by the lawyers, most of whom said something along the lines of:

I've never had any problems with sentencers interpreting the use of a foot or a head as a weapon differently. A foot is a weapon; a head is a weapon… (prosecutor)

Sentencers show readiness to interpret a foot or a head as a weapon (defence lawyer)

In fact, a few district judges and magistrates even argued that a non-shod foot - and indeed a fist - should be considered a weapon equivalent:

> *You can cause tremendous injury if you kick in the head with a non-shod foot* (district judge)

> *A punch can be lethal depending on where it lands or where it was meant to land. I have no doubt that punches and head-butts should be included as weapons. I have no problem with calling a closed fist a weapon...* (magistrate)

Some, though, felt there should be some differentiation in seriousness according to the parts of the body targeted; others sought clarity as to exactly what is meant by a 'shod' foot, and a couple of district judges argued that distinctions should be made between the type of footwear being worn by the assailant:

> *I would like to see some differentiation between a kick to the body and a kick to the head; a kick to the head is life-threatening. It's not very far from a manslaughter case sometimes* (Crown Court judge)

> *A little more clarity would be useful. Wearing a shod foot is automatically a weapon now. Wearing steel cap toe boots is obviously a weapon, and if you're attacking someone with a heel of stiletto of course it's a weapon. If you kick someone with your slippers on it's not a weapon, but it is according to the guidelines!* (district judge)

A minority of sentencers said they do not consider a head-butt to be a weapon equivalent (certainly no more than a fist would be), which was also reflected in the responses to the GBH with intent scenario exercise, where Crown Court judges disagreed on this issue. Further, a couple of judges - one Crown Court and one district - drew a distinction between a shod foot and other weapons, arguing that the premeditated act of bringing something like a hammer to the scene of an offence should be considered more seriously than lashing out with a kick (or indeed a head-butt) during the course of a fight:

> *I would be reluctant to count a head-butt as a weapon even though it's in the guidelines. A head is no more a weapon than a fist is* (Crown Court judge)

> *I'm not so comfortable regarding feet and heads as weapons. If somebody uses their head during the assault which then breaks the nose or uses shod feet in heavy shoes to kick somebody…calling that a weapon isn't quite*

right. I would prefer to refer to weapons as an implement of some sort which adds to your ability to inflict damage (district judge)

I personally draw a distinction between a shod foot and a weapon. A factor judges commonly use is whether someone's brought the weapon to the scene. If you brought a hammer to the scene it…not only suggests premeditation, but also shows that you've planned to attack someone. It's invariably worse than using your head or your foot during the course of a fight… My view is that taking a weapon to a scene makes whatever you do when you get there much worse (Crown Court judge)

2. 'Victim vulnerability' was raised by some Crown Court judges, district judges and magistrates as an area where sentencers must be careful not to double-count insofar as it is included in both greater harm *('victim is particularly vulnerable because of personal circumstances'*) and higher culpability *('deliberate targeting of a vulnerable victim'*) – albeit with a different emphasis:

The idea of a 'victim being particularly vulnerable due to personal circumstances' does trouble me as it comes up in harm. However, deliberate targeting of a vulnerable victim comes into culpability. You have to be careful not to double-count (Crown Court judge)

You've got that factor where the victim is particularly vulnerable, you've got deliberate targeting of a vulnerable victim and people working in the public service. They all tend to get blurred together so you've got the potential for double counting (district judge)

It's a double-whammy: vulnerable victim is greater harm; and deliberate targeting of a vulnerable victim is higher culpability. Sometimes you can get a very high category for someone who hasn't got a bruise... (magistrate)

Moreover, a couple of Crown Court judges and district judges highlighted the difficulties involved in interpreting vulnerability, particularly in a domestic violence context where it seems there are differing views as to which victims should be considered vulnerable and which should not:

The guidelines are quite vague when it comes to victims who are vulnerable. I'm not entirely sure what a 'victim who is particularly vulnerable' means. For example, is a woman in a domestic violence case who has fought back particularly vulnerable? (Crown Court judge)

Some magistrates think the victim is automatically vulnerable if it's domestic. Does this mean every woman is vulnerable? Unless the woman is vulnerable for other reasons - like learning difficulties - I don't think domestic violence should automatically mean vulnerability (magistrate)

3. A few Crown Court judges and district judges felt that the phrase *'**a significant degree of premeditation'*** could be interpreted differently - and suggested that *'a significant degree of pre-planning'* may be better in conveying what they thought the Sentencing Council has in mind in terms of this particular factor (that is, that the defendant has planned the assault well in advance of perpetrating it):

A significant degree of premeditation lacks clarity. For example, if there is a fight in the pub and one of them goes to his car to get a weapon, is that a degree of significant premeditation? It depends how you think about it (Crown Court judge)

I wouldn't use the phrase premeditation, I would use pre-planned instead. If you walk up to someone and hit them that's premeditation. The violence that you use is contemplated before the blow is struck. However I think the Sentencing Council are thinking about pre-planning…which means that before you went out that night you already had it in mind (Crown Court judge)

4. Other culpability factors with which a minority of those interviewed have difficulty with are: ***'a greater degree of provocation than normally expected'*** insofar as *"how can being provoked ever justify GBH?"* (Crown Court judge); ***'deliberately causes more harm than is necessary for the commission of the offence'***, which was considered 'meaningless' and difficult to interpret; and anything referencing a ***group or gang*** in that the number required to make up such a gathering can be - and is being - interpreted differently:

There is lack of clarity in the word 'group'. The Court of Appeal has recently said that two people can be a group. That could be clearer in the guidelines (Crown Court judge)

People argue about what a group or gang actually is. Some people submit that it's a gang of about 10 yobs rampaging down the street; and others will say it's a group if there's two people. That causes problems (Crown Court judge)

Step 2 and additional factors

While step 1 of the guideline was the focus of this research, interviewees were also offered the opportunity to briefly comment on step 2. Aside from some issues around starting points and category ranges (see later), some factor-specific issues were raised as follows:

1. Most interviewees saw no need for additional factors at either step 1 or step 2: they suggested that adding more would introduce too much complexity and remove judges' discretion to an unacceptable degree:

> *I think the guidelines go as far as they can to help judges without removing discretion. You simply cannot sentence people by tick boxes. It's not an exact science; it's part art. You have to trust the sentencer to exercise their discretion and not keep adding more and more* (Crown Court judge)

> *If you made it more comprehensive you'd end up with such a vast tome that people would be sitting there turning pages in the magistrates' court rather than listening to what's going on* (magistrate)

2. However, many Crown Court judges, district judges, magistrates and prosecutors wished to see domestic violence - and its psychological effects - referenced more explicitly within the guideline (or even the amalgamation of the assault definitive guideline and some parts of the 'Overarching Principles - Domestic Violence definitive guideline'[27]). Some of the many typical comments were:

> *I would like to see something in there that says domestic violence puts common assault in both greater harm and higher culpability. Some practitioners don't look at all the other features like prolonged emotional and psychological impact; the way in which physical abuse is usually the tip of the iceberg after the crushing of the self-esteem. In another context it might have been a relatively minor assault but because of the context in my view it makes it far more serious* (district judge)

> *It says for domestic violence cases 'victim forced to leave their home'. I think that's too narrow. I think it should be if the victim feels unsafe whether they leave or not. It's the psychological harm as well as physical harm...and that's absent from the guidelines* (district judge)

[27] http://www.sentencingcouncil.org.uk/publications/item/overarching-principles-domestic-violence-definitive-guideline/

I would put domestic violence into step one, into the culpability area. We've got race and disability in there, but I think DV [domestic violence] is equal to those or more serious (magistrate)

Under higher culpability there is targeting of a vulnerable victim. I think that should be flagged in the context of domestic violence. Domestic violence needs to be moved into step 1 (prosecutor)

There is overlap between this guideline and the Overarching Principles for Domestic Violence. You often have to refer to two guidelines as a huge proportion of assault offences are also domestic violence…so perhaps bringing them together may make more sense (Crown Court judge)

A minority of others disagreed and felt that domestic violence is adequately covered by the current step 1 and 2 factors[28]. However, it was said that: "*given the prevalence of domestic violence, the list of aggravating factors for this are scattered and it would make more sense to group these together"* (district judge).

3. Several district judges, magistrates and prosecutors were also keen to see 'spitting' reintroduced as an important consideration within the guideline (particularly in the context of assault on a police officer). Most felt it should be a greater harm or higher culpability factor at step 1, whereas others suggested it as an explicit aggravating factor at step 2:

Spitting used to be an aggravating factor; it's gone and I don't know why. It's serious enough to justify a custodial sentence in my view, but it's absent (district judge)

One thing they don't have that used to be in older guidelines is spitting. I know it's not physical, but I've had police officers who have been spat at in their face; that's nasty! (magistrate)

If the defendant spits in a police officer's face for me, in 99% of cases, it's custody. Most police officers will tell you that they'd rather be punched in the jaw than spat in the face. There should be some guidance on it in the guidelines. I think spitting should be greater harm (district judge)

[28] *'Deliberate targeting of vulnerable victim', 'location of the offence', 'gratuitous degradation of victim', 'ongoing effect upon the victim';* and *'in domestic violence cases, victim forced to leave their home'.*

Spitting doesn't fit into use of a weapon. It can be one of the most distressing things that victims experience…most say they would rather be punched. It needs to be highlighted (prosecutor)

It could be argued that *'gratuitous degradation of victim'* incorporates an act such as spitting, but the aforementioned participants considered it sufficiently serious to warrant inclusion as a standalone factor (or at least as a specific example of gratuitous degradation).

4. Other suggested additional aggravating factors related to: *'the prevalence of the offence within the locality'* (i.e. deterrent sentencing); *'bullying, threats and/or intimidation'*; and *'an inability to work as a result of the offence'*[29]:

What's gone out of the issue relating to sentencing is the ability to impose a deterrent...if there's an area where there are a lot of burglaries then I think it's a legitimate policy for people to be deterred so you could ramp up the seriousness… (Crown Court judge)

There is a huge amount of late night drinking in pubs on the weekends, and there ends up being lots of fights. This is something that needs to be stamped on through harsher sentencing because people need to feel safe when they go on a night out (defence lawyer)

There might be scope for the difference in size between a defendant and a victim. Vulnerability is recognised in all sorts of ways, but it isn't recognised when someone large, strong and fit is attacking someone who doesn't have that sort of physique. That sort of vulnerability is often dismissed, but it's often at the root of the violence that we see. I think that the 'bullying' is an aggravating feature… (Crown Court judge)

5. One minority suggestion was that *'previous convictions', 'location of the offence', 'ongoing effect upon the victim', 'gratuitous degradation of victim' and 'commission of the offence whilst under the influence of alcohol or drugs'* should be moved to step 1:

Previous convictions are a statutory aggravating feature, but it would help if it was a factor in indicating greater harm. Someone who has repeatedly assaulted in the past is not someone you can just write off as "having previous convictions". If he's a violent person - and has been persistently

[29] Again, the current factor *'location of the offence'* could incorporate *'the prevalence of the offence within the locality'* and *'ongoing effect upon the victim'* could incorporate *'an inability to work as a result of the offence'.*

violent - it should automatically throw a case into greater harm… (Crown Court judge)

I would put previous convictions as a step 1 factor, repetitive offending patterns (district judge)

A slightly odd thing is that one of the most serious factors in these sorts of offences is people being attacked in their own homes. There's a good argument for saying that should be in the culpability or harm section rather than the aggravating factors... (Crown Court judge)

I think gratuitous degradation of the victim could be better placed in factors indicating higher culpability, because it shows a particularly unpleasant motive for committing the offence – it increases culpability and blameworthiness. It makes the offence more serious (prosecutor)

I think being under the influence of alcohol or drugs should be a step 1 feature (defence lawyer)

6. Another comment was that steps 1 and 2 should be combined as "*I do wonder if there actually is a need for two steps. In practice we probably work it all out. I'm sure the practical outcome would be the same if steps 1 and 2 were combined"* (Crown Court judge).

7. One district judge also suggested that harm should only have one factor attached to it - injury - and that the other two *('sustained and repeated assault'* and *'victim is particularly vulnerable because of personal circumstances'*) should be moved to culpability.

8. Finally, a couple of district judges felt that the statutory aggravating factors under higher culpability are so rarely seen that they should come below the other aggravating factors because "*it's almost a disproportionate leaning towards those issues in terms of the number of cases that come up that feature them"* (district judge).

Borderline cases

It was reported that borderline cases (i.e. those that are perceived to fall between two offence categories) are fairly frequent occurrences which are, it was said, generally accommodated within the guideline through overlapping category ranges:

The guidelines cater for this. If it's borderline, the categories meet. As you go to the top of the lower category, then you come to the bottom of the higher category (Crown Court judge)

There is quite a lot of flexibility...judges can say it belongs at the bottom or the top of a certain category which gives them a wider range [of] sentencing options and discretion (prosecutor)

It's inevitable to come across borderline cases as you can't take every factor into account. This is why we have sentencers and in order to dispense justice they need discretion, which the guideline allows (defence lawyer)

In terms of how borderline cases that are not covered by an overlap are managed, most of the Crown Court judges and district judges said the guideline is again invaluable in that they refer back to it in an attempt to balance all the factors - including those at step 2 - and come to a just decision using their judicial discretion (this, it was said, is often done in collaboration with counsel):

Generally you manage to reach the appropriate sentence by saying it's the lower category and there [are] all these aggravating features; or it's the upper category and there [are] all these features which permit me to put it at the bottom of that category (Crown Court judge)

You have to use the guidelines as a starting point and assess it judicially as best you can and justify it. The borderline ones are ones where we have to express our judicial discretion (district judge)

Others said they will go with their 'gut feeling' as to where a case should fall – and several will give the benefit of the doubt to the defendant in such cases and opt for the lower category. It is important though that, however it is reached, the final decision must be explained to the courtroom.

Magistrates said that they find bench discussions helpful in determining where a borderline case should be placed – and often take advice from their legal advisers in such circumstances:

I would have those discussions with my colleagues and I may even take legal advice from the advisors. They can't make the decision for us, but they do help (magistrate)

In terms of using the concept of borderline cases in mitigation, it was generally agreed that defence counsel will do so - evidently pushing for the lower category. Further, the prosecutors said that they too will use the concept in pushing for a higher category:

> *They say things like 'if it's borderline it's going to be the lower category, isn't it Your Honour?' They will say why they think the category should be lower and give their reasons. It all depends on the evidence. If it's well-presented and you believe it you'll accept it. It works well* (magistrate)

> *When I mitigate I try my best to use borderline cases…if there is proper personal mitigation then you can try to deploy that…* (defence lawyer)

> *We'd usually say it's borderline and go for the higher category; and the defence will say it's borderline and go for the lower category; it's then up to the judge to make a decision…* (prosecutor)

3. Impact of the assault definitive guideline

3.1 Impact on sentencing practice

Interviewees were generally positive about the assault guideline, especially the consistency they felt it has brought to the sentencing process (in terms of both individual judges' practice and across the judiciary as a whole) while still allowing a degree of judicial discretion and flexibility. Indeed, this was considered to be the singularly most important benefit of developing a standardised approach in the form of the guideline. Some of the very many typical comments were:

> *I'm sure the guideline has promoted consistency. In the years I've been sitting the consistency has increased year on year to the point where, even though you'll get some debate, the diversity of sentencing has greatly diminished* (Crown Court judge)

> *It helps make the process more transparent, less arbitrary and there is going to be less difference between sentences. I don't think it leads to absolute consistency of outcome (and I don't think that's desirable) but we should be able to agree broadly on what category it falls into…* (district judge)

> *I remember when there were no guidelines…We used to make decisions that we felt were appropriate but a bench somewhere else might have come up with something completely different. Now we have guidelines we are coming at things in about the same way...* (magistrate)

> *Without the guidelines, judges and magistrates have a huge amount of discretion in terms of the sentences...there would potentially be a wide variation between different sentencers in different courts on different days* (prosecutor)

> *Obviously sentencers are human beings so there will be differences, but I feel that the guidelines have put their sentences within a similar ballpark* (defence lawyer)

It should, however, be noted here that, despite the almost universal praise of the guideline in promoting uniformity, some responses to the scenario exercise indicate that some variation in approach remains, seemingly due to the wording of certain factors, especially: *'injury that is serious in the context of the offence'/ 'injury which is less serious in the context of the offence';*

'sustained or repeated assault'; and *'use of weapon or weapon equivalent'*. This exercise is fully reported in Annex 1.

In terms of whether the guideline allows judges and magistrates to reach fair and proportionate outcomes, the general consensus was that it does – though there were some issues around sentence length for section 18 GBH with intent offences, section 47 ABH, section 39 common assault and section 89 assault on a police officer.

Section 18 GBH with intent

A consistent view among the Crown Court judges interviewed was that the guideline has led to increased sentences for GBH with intent offences – especially at the 'top end'. This was considered appropriate by some (who felt under-sentencing was an issue previously) whereas many others felt the starting points are too high, particularly in relation to category 1:

> *I think the level of sentencing for section 18 has gone up immensely because of the guidelines...This is for things that fifteen years ago would have got a perfectly tough sentence of six to eight years but we're now sending people away for 15 years. It's quite extraordinary…* (Crown Court judge)

> *For categorisation in section 18…sentences are now higher for the more serious assault cases. The starting point in category 1 is quite high at 12 years. The drop from 12 years to six years at the starting points for category 1 and 2 is actually quite a big difference…* (Crown Court judge)

The results from the GBH with intent scenario exercise also reflect this in that a few of the judges who placed the stated offence in category 2 said that if they were to follow the guideline 'to the letter' they would have chosen category 1, but that a 'too high' starting point of 12 years led them to reconsider.

Furthermore, this was said to be compounded by the fact that more offences may be being placed in category 1 in the first instance due to the issues reported earlier – particularly that the phrase *'injury that is serious in the context of the offence'* can lead to 'double-counting' as serious injury must normally be present anyway in GBH with intent cases.

Section 47 ABH

Conversely, it was said that sentences for section 47 ABH have decreased - especially for cases in the lower categories. Possible reasons for this are explained by two Crown Court judges and focus on choosing arguably more constructive sentences that they feel will allow a greater

chance of rehabilitation for the defendant; related to this, they also felt that the guideline's mitigating factors count for much more – proportionally - in ABH cases than for, say, section 18 GBH with intent (again borne out by the ABH scenario exercise, where mitigating factors were discussed far more prominently than for GBH with intent and assault on a police officer, and were, in fact, the source of some disagreement as to the bearing they should have on the case):

> *For category 2 and category 3, when you've got a starting point of six months custody, judges are reluctant to impose those sentences as it's four months with a guilty plea. That means they'll do about six weeks in prison which is no good to anyone. Judges are tempted to put in a more constructive sentence* (Crown Court judge)

> *When you get to ABH where there isn't much harm, all the personal mitigations count for a lot more and tend to produce more swings in results. Mitigating factors dominate the scene for ABH, but not for section 18* (Crown Court judge)

That is not to say that this was acceptable to interviewees: many were of the view that the ABH range is too narrow and the starting points too low.

Section 39 common assault and section 89 assault on a police officer

Many district judges and magistrates suggested that sentences have decreased for common assault and assault on a police officer offences. The former was considered attributable to the difficulty involved in establishing injury in cases of common assault (especially *'in the context of the offence'* as noted above) and the starting points and ranges available for this offence[30].

> *It's often hard to get into category 1 because there really has to be some injury…and common assault doesn't usually involve injury* (district judge)

> *We find that if you follow the guidelines properly that a lot of common assaults end up category 3...if there is no injury then you are automatically down a category. You can only fine people, even if they've pushed somebody over...* (magistrate)

> *I think magistrates are sentencing less to custody than we did in the past. To some extent it's down to the guidelines and the starting points and ranges, especially for common assault* (magistrate)

[30] These points were made in relation to perceived correctly charged cases of common assault as opposed to ABH cases that are now apparently charged as common assault.

In terms of assault on a police officer it was said that:

> *Twenty years ago if you slapped a police officer you would go to prison, previous convictions or not. Now you'd be looking at a fine* (district judge)

> *I think they've gone softer with assault on a police officer because in the old guidelines it used to be always custody. I feel that the range has been extended with the guidelines; before it used to be more black and white…you didn't have anything like all the categories. You didn't even have a range from a fine to prison for an assault on a police officer before* (magistrate)

In relation to the point made above about the need to reintroduce spitting as an aggravating factor, a couple of district judges were of the view that its absence has been a significant contributory factor in decreasing sentence length for assault on a police officer offences:

> *I think it must have reduced sentencing in terms of assault on a police officer because a spit in the face can't be identified as a sustained or repeated assault for greater harm. Yet in my view it is one of the most serious ways of assaulting. As a starting point if you don't have greater harm you can't get higher than a category 2 and the range is low level community order to high level community order* (district judge)

> *It used to be that if you spat in the face of a policeman then you went to prison whoever you were. There has been a real reduction in tariff as far as assaults on police officers go. In my view it should go in the factors that increase culpability at the very least...* (district judge)

Further, a prosecutor suggested that this may be contributing to inconsistent sentencing insofar as *"I've prosecuted in some courts that hold spitting as a weapon; and some courts that haven't"*.

Finally in terms of the guideline's impact on sentencing practice, a small minority of interviewees felt this has been negative by introducing too many restrictions on judges' and magistrates' flexibility and making it more of a tick-box exercise than previously. A couple of defence lawyers also alleged that it may have introduced too much of a focus on greater harm and higher culpability factors, leading sentencers to somewhat neglect those indicating lesser harm and lower culpability which must then be stressed by the defence to prevent over-categorisation:

I don't find the guidelines very helpful; I find they are very restrictive and simplistic. They attempt to fit a vast array of different factual circumstances onto two pages and instead of judges and the counsel explaining the aggravating and mitigating features, you have counsel running down the shortlist of these features; it's rather like a tick-box exercise (Crown Court judge)

They've become more tramlines than guidelines…it has become more rigid and I don't think that's a good thing. The way these guidelines are written implies that we have to follow them whatever happens (magistrate)

I can't remember a time when a sentencer mentioned a lower culpability factor (defence lawyer)

I had a case where the victim had….stitches from one punch. It's very easy for a sentencing tribunal to focus on the injury rather than the fact it was only one punch not a flurry of punches or a head-butt. We sometimes have to persuade them to take that into account (defence lawyer)

3.2 Other perceived benefits

Other perceived benefits of the guideline reported by participants included the fact that it:

- enables judges and magistrates to sentence in a more structured, considered and logical way (as opposed to simply 'having a feel' for what a sentence should be);
- allows sentencers to verify their 'instinct';
- helps direct and focus magistrates' bench discussions;
- helps guide and build the confidence of inexperienced sentencers; and
- ensures better transparency in terms of explaining sentencing, which is beneficial more widely and for defendants and victims to know in advance what the former's sentence is likely to be.

Some typical comments were:

The guidelines mean that you aren't plucking a sentence out of thin air; you really have to think about all the factors (Crown Court judge)

Having a structure is an appropriate way of delivering justice… (district judge)

Going through the guidelines is a more efficient way of getting the best result for clients; it can bypass prejudices (defence lawyer)

I have been grateful to have the guidelines because it reinforces my instinct, it gives me confidence. If I am sentencing for an offence I haven't met before, or an offence that I don't sentence for frequently I can know whether my instinct is true or not (Crown Court judge)

The structure of the guideline is what works best overall, particularly for those who might not have much experience (magistrate)

You can explain sentences to the victim now in a much more structured way than you could previously. Before the guideline came in you'd just have to tell them that's what the judge thought was the appropriate sentence; they didn't quite understand that (defence lawyer)

The guidelines are useful in that they can help us to explain things to our clients. Just yesterday I explained to my client how the various factors of the case would make it likely to be Category 2, which is what it did end up as (defence lawyer)

Importantly, the guideline was thought to help mitigate against the potential for appeal against overly harsh or lenient sentences – and also in explaining to those who are sentencing incorrectly where they may have 'gone wrong':

The guidelines rein in some of the more erratic sentence options - both for overly-heavy sentencers and unduly lenient sentencers (Crown Court judge)

Back in the day we had a judge who fined someone XXX for hitting someone over the head with an axe. Now no judge would do that, because the guidelines are there... (defence lawyer)

It's particularly good for the magistrates as if they are sentencing too leniently you can ask them why…I find the guideline helpful to explain to them where they've gone wrong (district judge)

Further, one defence lawyer said that the guideline assists them in drafting their arguments for the Court of Appeal and *"means the high court judge that picks it up on the other end - who*

might not be a criminal lawyer - can then go to the same materials that I do easily" (defence lawyer).

3.3 Going outside the sentencing range

All judges and magistrates reported that they feel able and are willing to go outside the guideline's sentencing ranges if they deem it appropriate to do so – and said that this is acceptable providing they offer a clear explanation as to why they have done so and do not go so far as to risk being taken to the Court of Appeal:

> *The Court of Appeal tell us that as long as we've regarded the guideline and demonstrated that regard, then you can take the case outside the guidelines if it's justified* (Crown Court judge)

> *I'd go outside if there were an overwhelming number of* [step 2] *factors. I'd rather see justice done than be a guideline slave. But you need to explain why, which is the safeguard* (magistrate)

Indeed, in the words of one district judge: "*they are guidelines and I treat them very much like guidelines. I see them as the area the Sentencing Council would like us to be. Where you have a case that doesn't fit the guideline you then have to use your common sense and experience".* The most common phrase used in relation to this issue was that 'they are guidelines, not tramlines'.

The issues above in relation to 'too high' sentences for GBH with intent and 'too low' sentences for ABH offences are also relevant here: several Crown Court judges said that they often go outside the range to reduce a GBH with intent sentence or increase one for ABH:

> *Section 47…I will probably go outside the guidelines between 20% and 25% of the time because the ranges aren't appropriate in my opinion; they are too low* (Crown Court judge)

One particular issue raised in relation to this point was that while the stated maximum sentence for a section 47 ABH is five years, the range for a category 1 offence is one to three years' custody. Though this was a purposive decision, there was a sense from some participants that this is an anomaly that, if changed, could prevent cases being sentenced outside the category range:

> *On ABH there's greater chance of going outside because the top of the range is significantly below the maximum for the offence. If you've got a really serious offence with a lot of greater harm or higher culpability factors then you will go out and up to the five years* (district judge)

If you take ABH it has a maximum sentence of five years, but the maximum sentence the sentencing guideline will let you impose is three years imprisonment for category 1. The offence range for section 47 should be a conditional discharge to 54 months imprisonment. This would encompass all the extremely exceptional cases at either end of the range (Crown Court judge)

3.4 Impact on escalation from the magistrates' to the Crown Court

Several Crown Court judges felt that the guideline has resulted in more cases being escalated from the magistrates' court to the Crown Court, primarily due to the way it is being used by magistrates. It was alleged that the latter are apt to look at a case at category level only (step 1) - and will escalate up cases that, according to the category range, fall outside their jurisdiction without looking at the mitigating factors (step 2) that might bring them down to within the six months sentencing limit (including a guilty plea, which can reduce a sentence by a third). As a few interviewees said:

I think the magistrates have been saying 'this could be category 1 and could be more than six months, therefore we've got to send it to Crown Court' rather than approaching it in a way that considers category 1 and 2 factors…it's a problem that's already been identified…there's been an input in magistrate training days that tells them not to take the case at its highest, but to take it at its real position..." (Crown Court judge)

If you take the category 2 guideline for ABH, the magistrates' court will see that the maximum category range is 51 weeks imprisonment and will send the case up to Crown Court. If 51 weeks is the maximum for category 2, it's likely that it's not going to be the top, so it will be about nine months. It's likely the defendant has also pleaded guilty, so it might be six months. The magistrates have the power to deal with it (Crown Court judge)

This was echoed by one district judge and a couple of magistrates:

With ABH, if you end up with something that goes into category 1, the guideline says Crown Court. It might rightly belong there but equally…why would you send them up to Crown Court if that third puts you into a sentencing range you can deal with? If you'd be satisfied with six months custody you may as well keep it (magistrate)

I think the guidelines can cause more cases to get escalated up to Crown Court. You have to step back and take the factors as a whole rather than getting overwhelmed by it being category 1. It's so easy to put an offence in the top category, but you have to take everything into account; that's why it's called a starting point (magistrate)

Indeed, the response of one magistrate to the question '*does the guideline cause more cases to be escalated to Crown Court?'* is illustrative of the fact that the situation outlined above does happen in practice:

You've got the category there and if the words 'Crown Court' are there you're going to go along with it; that's the guidelines. If we felt it was greater harm and higher culpability and the category indicates to send it to Crown Court then we would send it to Crown Court (magistrate)

The above may be a training issue – but equally the guideline could make it more explicit that any case must be looked at in the round (by taking account of the features in step 2) prior to making the definitive decision to send it to Crown Court, even if the initial categorisation indicates that it is outside the jurisdiction of a magistrates' court.

The ABH scenario exercise reported in Annex 1 suggests that at least some magistrates are already working in this way: several said this is what they would have done before deciding that the sentencing range would allow them to retain jurisdiction and sentence themselves. In addition, most of the district judges, magistrates and lawyers interviewed disagreed that greater escalation is an issue and it was said that the guideline gives magistrates more confidence to retain cases that they may have previously sent to Crown Court, again resulting in less escalation:

I actually think the guidelines are much clearer. It makes me feel more confident to keep things at the magistrates' court. The guidelines are more specific and the way the categories are split up makes it more logical... (magistrate)

The guidelines are fairly extensive and robust. It probably assists us in not sending it to Crown Court more (magistrate)

4. Summary and conclusions

This research generated much in-depth information regarding the implementation of the assault definitive guideline and what participants (Crown Court judges, district judges, magistrates, defence and prosecution lawyers) perceive to be its main impact. Amongst the key findings emerging were:

- General support for the three offence categories in step 1 which allow some flexibility; however, there were comments that the guideline should be amended to accommodate cases of 'neutral' or 'middling' harm.

- Difficulties in interpreting and applying the harm factors that refer to the injury being either '*serious in the context of the offence'* or *'less serious in the context of the offence'*. Likewise '*sustained or repeated assault on the same victim'* was felt to be open to interpretation.

- It was felt by some that there was a risk of double counting *victim vulnerability* as the issue of vulnerability is included in both harm and culpability.

- For culpability, many agreed that an injury caused by a shod foot or head should be regarded as equivalent to a weapon, although a minority felt the latter is not.

- Although most participants did not advocate adding additional factors to the guideline, many wished to see domestic violence and its psychological effects referenced more explicitly within the guideline. Some also wished to see "spitting" reintroduced, particularly for the offence of assault on a police officer.

- Participants were generally positive about the guideline and felt it brought about consistency in sentencing, whilst allowing judicial discretion and flexibility. However, variation in approach was observed when participants were asked to sentence offence scenarios using the guidelines.

- Many Crown Court judges felt the guideline has increased sentences for section 18 GBH with intent offences, especially at category 1 level. Conversely it was said that section 47 ABH sentences had decreased.

- District judges and magistrates also felt that sentences had decreased for common assault and assault on a police officer.

Overall, most interviewees were positive about the guideline and the positive implications they felt it has had for sentencing consistency. Indeed, the quotation that most appropriately sums up the majority view is that *"there are one or two factors that could be tidied up, but the way that it is written and structured helps sentencers come to a decision"* (magistrate).

Annex 1: scenario exercise

In order to establish the consistency with which the guideline is being applied, Crown Court judges, district judges and magistrates were presented with a scenario – either representing a case of section 18 GBH with intent (Crown Court judges only), section 47 ABH (all interviewees) or section 89 assault on a police officer (magistrates and district judges only).

After being given the applicable scenario, participants were asked to outline what offence category they would have placed the defendant into and why - that is, what harm and culpability factors would have influenced their decision. For ABH, district judges and magistrates were additionally asked whether they would have declined jurisdiction, committed for sentencing or sentenced the case themselves. Participants were not asked to give a sentence as well as their categorisation - though many did so as part of their deliberations. The results of this exercise are below (though it should be noted that, while short scenarios were used to reduce the burden on participants, the details provided were restricted for this reason and they will thus have some limitations as a research tool).

Section 18 GBH (Crown Court judges only)

The offender K, aged 26, was with a group of three friends drinking on the street. R who was known to K, walked by with two others and made a disparaging comment to one of the group. A fight broke out between the two groups during which K went over to R and put him in a headlock and then head-butted him in the face. K continued to assault R by punching him in the jaw, head and back. K then ran off. The incident lasted approximately two minutes. R was taken to hospital. His jaw was broken in two places. He had facial injuries and general bruising. He underwent corrective surgery for his broken jaw. K pleaded guilty at the first opportunity to section 18.

Of the 19 Crown Court judges who discussed this offence, 12 placed it as a low-end category 2 case (based either on greater harm and lower culpability or lesser harm and higher culpability) and a further five as a high-end category 3 case (based on lesser harm and lower culpability).

Section 18 GBH with intent (Crown Court judges only)		
Category 1	**Category 2**	**Category 3**
2 Crown Court judges	**12 Crown Court judges**	**5 Crown Court judges**

The factors on which many were agreed were: a lack of premeditation; a greater degree of provocation than normally expected; and subordinate role in a group or gang. However, there was disagreement as to whether: the injury was more or less serious in the context of the offence; it was a sustained or repeated assault; and whether a head-butt should be considered a weapon equivalent. This echoes the findings reported above insofar as these were the three factors that appear to cause most difficulties during the categorisation process.

Furthermore, one judge used the exercise to again emphasise the need for the guideline to accommodate cases of 'neutral' or 'middling' harm (where the injury is neither more nor less serious in the context of the offence):

> *This case illustrates the problem with the guidelines; they don't tell you what to do if the injury is neither less serious nor more serious in the context of the offence. What you describe is no doubt serious harm, but it could have been much worse. I'd regard that as a neutral factor (Crown Court judge)*

A few judges stated that if they were to follow the guideline 'to the letter', they would have placed the offence in category 1. However, a starting point of 12 years was considered too high for this particular case, which was their main driving force for placing as a high-end category 2 – again reinforcing the views reported earlier in the report and the possible need to re-examine the category 1 starting point:

> *If we are following the guidelines, you'd have to put it into category 1 as there is sustained and repeated assault with the use of a weapon. I'm not comfortable with that (Crown Court judge)*

> *If I had treated the head-butt as a weapon that would have brought it to category 1 where the starting point is 12 years. I think that's too much (Crown Court judge)*

> *You could argue that's a sustained attack. However, if you say it's sustained it's going to be category 1 when it isn't! (Crown Court judge)*

The table above shows that only two judges placed the offence in category 1. They were of the view that greater harm and higher culpability was reached because: the injury was more serious in the context of the offence; the head-butt was a weapon equivalent; and it was a sustained or repeated assault. Despite this though, one said that:

> *This is where I would do what I could to work down. That would be a starting point of 12 years and as he pleaded guilty I would reduce that to nine. Then I would look to see what the personal circumstances were...I would assume it was isolated and he had no previous convictions. That would allow me reduce by a third to six years. I would try and [achieve] a sentence of between four and five years (Crown Court judge).*

This would bring it into the category 2 or 3 range and in line with most of the other judges.

Section 47 Actual Bodily Harm (All interviewees)

B, aged 27, had moderate learning difficulties and lived with his father who was small and frail. Following an argument with his girlfriend, B was in a bad mood and had been drinking. The girlfriend phoned B's father and B became angry, accusing his father of laughing at him. B grabbed his father and set about punching him around the head. One blow cut the father above the right eye. The father went to the ground and the appellant carried on kicking him. His father curled up in a ball begging for his son to stop, but the assault went on for some minutes. Then the appellant desisted, hugged his father, apologised and asked to be forgiven. The father left the house and called 999. He was bruised and sore all over his body, as well as having a cut over the eye. B pleaded guilty at the first opportunity, he had no previous convictions for violence and was remorseful. His father did not support the prosecution.

ABH proved to be the most difficult for interviewees to categorise, as the table below shows.

Section 47 ABH (All interviewees)	
Category 1	**Category 2**
11 Crown Court judges **5 district judges *(all would have declined jurisdiction)*** **2 magistrates *(1 would have retained jurisdiction and 1 would have declined)***	**9 Crown Court judges** **6 district judges *(all would have retained jurisdiction)*** **11 magistrates *(10 would have retained jurisdiction, 1 would have declined)***

Of the 20 Crown Court judges that discussed this scenario, 11 placed it in category 1 (considering it *"entirely appropriate"* as a Crown Court case). The remaining nine placed it in category 2 on the grounds that there are both higher and lower culpability factors - though four of the latter said it was 'technically' a category 1 and a further two placed it at the very top end of category 2:

> *It's greater harm with middling culpability, as you have higher and lower culpability factors. As a technical exercise it's a category 1 where you step out* (Crown Court judge)

The factors typically used to place the offence in category 1 were: injury which is serious in the context of the offence; sustained or repeated assault on the same victim; victim is particularly vulnerable because of personal circumstances and use of a weapon or weapon equivalent (in

the form of a shod foot). In terms of bringing the case down to category 2, there was some feeling that the injury was less serious in the context of the offence and that the defendant's moderate learning disability should be taken into account - though one Crown Court judge said that this was "*not linked to the commission of the offence so, strictly speaking, it's not a factor indicative of lower culpability in step one…*".

Five district judges considered this to be a category 1 offence and all would have committed for sentencing insofar as none of the step 2 mitigating factors (the learning disability, the remorse and the lack of previous convictions) nor the guilty plea would take it down to category 2:

> *He will be given credit for his guilty plea, his remorse and no previous of violence but those things don't pull it out of category 1. Learning difficulties would be taken into account on sentence but it doesn't pull it down into a lower level. It's outweighed in terms of the decision as to where sentence should be passed by the huge number of aggravating features* (district judge)

The other six district judges opted for category 2 on the same grounds as the Crown Court judges and felt that the mitigating factors noted above are so strong that they would have retained jurisdiction and sentenced the case themselves. One, though, admitted that they would not have undertaken the two stage process encouraged by the guideline in this instance: rather they would have taken the step 1 and 2 factors together to determine the category:

> *It would start as category 1 but I'd bring it down to category 2 because of the remorse, good character and mental condition of the defendant. And the injuries weren't the most serious...* (district judge)

Only two of the 13 magistrates that discussed this scenario placed it in category 1. The remaining 11 opted for category 2 and the vast majority would have sentenced themselves as opposed to decline jurisdiction and commit for sentencing. Indeed, in the section discussing the impact of the guideline on escalation from magistrates' court to Crown Court above, magistrates were encouraged to look at a case 'in the round' before deciding to escalate it – and several said that this is indeed what they would have done in this instance before deciding that the sentencing range would allow them to retain jurisdiction and sentence the case themselves:

> *I would have sentenced myself because he's remorseful and has good character. The likelihood is that he would get a community order, which is within our sentencing power* (magistrate)

If the CPS knew it was going to be a guilty plea I think we'd keep it. The guilty plea is one of the factors that stops something being escalated to Crown Court (magistrate)

This was echoed by one district judge who said *"because of the guilty plea the maximum imprisonment would be six months…why send him to the Crown Court with the extra expense for only a two month difference in sentencing (as you could give him six months in the magistrates' court, and a guilty plea in the Crown Court would mean that the sentence would only be eight months.) You have to try to be pragmatic about it"* (district judge)

Overall, the issue of injury is again a contentious one – and the findings echo the point made earlier about mitigating factors being more prevalent for section 47 ABH than they would be for section 18 GBH with intent.

Assault on a police officer (district judges and magistrates only)

D was drinking with his son in a pub. They went outside for a cigarette and his son got into an argument with another customer and there was some shouting and shoving. The landlord called the police. D moved his son away and the situation appeared to have calmed down. The police arrived and spoke to D's son who became agitated and started swearing at the police officer. The police officer warned D's son that he could be arrested and at this point D pushed the police officer. The officer turned towards him and D swung at her with the bottle he was holding in his hand. The officer took evasive action and stumbled and fell. She suffered a sprained wrist. D pleaded guilty at the first reasonable opportunity.

The six district judges who discussed this scenario were split as to which category the offence should be placed in: three opted for category 1 and three for category 2. Twelve of 16 magistrates opted for the latter and just four for the former.

Assault on a police officer (district judges and magistrates only)	
Category 1	**Category 2**
3 district judges **4 magistrates**	**3 district judges** **12 magistrates**

Generally speaking, those who placed the offence in category 1 did so on the basis that: it was either a sustained and repeated assault or an injury was caused (despite the fact that the latter is not an explicit greater harm factor for assault on a police officer, suggesting that the guideline

may not be being strictly adhered to in relation to this particular offence); a weapon equivalent was used; and there was an intention to commit more serious harm than actually resulted from the offence.

Those who placed it in category 2 typically did so on the grounds of lesser harm because they did not consider it to be a sustained and repeated assault and there was no significant injury. Once again then, though this time there was consensus on the issue of a weapon equivalent, many interviewees disagreed on the issue of injury and sustained or repeated assault as illustrated by the following two responses to the scenario:

> *In this case there was a push and blow; therefore, I'd be happy to put that in sustained or repeated. There was more than one. Even if it's repeated for a second time it's still repeated* (magistrate)

> *The attack wasn't really sustained even though it was a push and a swing* (magistrate)

Annex 2: topic guides

SENTENCERS

Introduction

Thank for participation

We have been commissioned by the Sentencing Council to undertake research to explore the operation and effectiveness of the current assault definitive guideline. The qualitative research needs to:

> *Obtain evidence from sentencers, and other users, of the guideline as to how in practice it affects the sentence outcomes*
>
> *Explore issues such as wording which affect the effectiveness of the document in terms of practical application*
>
> *Determine whether the outcomes achieved are in line with the practitioners' expectations and if not why.*

Request permission to record interview – stressing that Sentencing Council will not hear any of the recordings and that they will be for the purpose of writing up only.

Stress that ORS is bound by the MRS Code of Conduct and the Data Protection Act and that any information provided will be treated confidentially and anonymously.

About you and your role

Please could you explain a little about your role?

> Role and location
>
> How many years have you worked in your role?
>
> How many times have you sentenced assault cases in the past year?

Using the sentencing guideline

Please could you explain how you currently use the guideline?

> Do you look at it beforehand or in court?
>
> Do you look at it when you retire to consider the sentence (lay magistrates)?
>
> Is it referred to by the Crown Prosecution Service in opening/summing up and by the defence in mitigation/summing up?
>
> > Do they ask questions about it? What, if any, factors do they tend to focus on?

Step 1: Determining the offence category

Scenario exercise

Section 18 GBH with intent (Crown Court judges only)

I'm going to give you a scenario and I'd like you to tell me into what offence category you would have placed the defendant, and what factors would have prompted you to do so. The scenario outlines an incident of GBH with intent (Section 18)…could you confirm the starting point of the category range for such an offence please?

The offender K, aged 26, was with a group of three friends drinking on the street. R who was known to K, walked by with two others and made a disparaging comment to one of the group. A fight broke out between the two groups during which K went over to R and put him in a headlock and then head-butted him in the face. K continued to assault R by punching him in the jaw, head and back. K then ran off. The incident lasted approximately 2 minutes.

R was taken to hospital. His jaw was broken in two places. He had facial injuries and general bruising. He underwent corrective surgery for his broken jaw.

K pleaded guilty at the first opportunity to s18.

Using the information provided, in what offence category would you have placed the defendant?

Why would you have chosen this category (i.e. what harm and culpability factors would have influenced your decision)?

Which, if any, of these factors would have been more influential than others?

Section 47 ABH (Crown Court judges, district judges and magistrates)

I'm going to give you a scenario and I'd like you to tell me into what offence category you would have placed the defendant, and what factors would have prompted you to do so. The scenario outlines an incident of ABH…could you confirm the starting point of the category range for such an offence please?

B, aged 27, had moderate learning difficulties and lived with his father who was small and frail. Following an argument with his girlfriend, B was in a bad mood and had been drinking. The girlfriend phoned B's father and B became angry, accusing his father of laughing at him. B grabbed his father and set about punching him around the head. One blow cut the father above the right eye. The father went to the ground and the appellant carried on kicking him. His father curled up in a ball begging for his son to stop, but the assault went on for some minutes. Then the appellant desisted, hugged his father, apologised and asked to be forgiven. The father left the house and called 999. He was bruised and sore all over his body, as well as having a cut over the eye.

B pleaded guilty at the first opportunity, he had no previous convictions for violence and was remorseful. His father did not support the prosecution.

CROWN COURT JUDGES: Using the information provided, in what offence category would you have placed the defendant?

Why would you have chosen this category (i.e. what harm and culpability factors would have influenced your decision)?

Which, if any, of these factors would have been more influential than others?

Do you consider it appropriate that this case was tried in Crown Court or could/should it have been dealt with at magistrates' court? Why do you say this?

DISTRICT JUDGES AND MAGISTRATES: In this case, would you have declined jurisdiction, committed for sentencing or sentenced yourself?

Why would you have chosen to do this? (i.e. what harm and culpability factors would have influenced your decision)?

Which, if any, of these factors would have been more influential than others?

ALL: To what extent does the guideline cause more cases to be escalated from magistrates' court to Crown Court for trial?

Which, if any, particular factors cause this to happen and why?

What is the impact of this?

Section 89 assault on a police officer (district judges and magistrates only)

I'm going to give you a scenario and I'd like you to tell me into what offence category you would have placed the defendant, and what factors would have prompted you to do so. The scenario outlines an incident of assault on a police officer…could you confirm the starting point of the category range for such an offence please?

D was drinking with his son in a pub. They went outside for a cigarette and his son got into an argument with another customer and there was some shouting and shoving. The landlord called the police. D moved his son away and the situation appeared to have calmed down. The police arrived and spoke to D's son who became agitated and started swearing at the police officer. The police officer warned D's son that he could be arrested and at this point D pushed the police officer. The officer turned towards him and D swung at her with the bottle he was holding in his hand. The officer took evasive action and stumbled and fell. She suffered a sprained wrist.

D pleaded guilty at the first reasonable opportunity.

Using the information provided, in what offence category would you have placed the defendant?

Why would you have chosen this category (i.e. what harm and culpability factors would have influenced your decision)?

Which, if any, of these factors would have been more influential than others?

MORE GENERALLY…

To what extent do you feel the three offence categories are appropriate? Why?

To what extent do you feel the Step 1 factors are appropriate? Why?

What factors would typically push a case into greater or lesser harm?

Do you have any difficulties deciding whether a case should be pushed into greater or lesser harm?

What factors are typically used to place a defendant into higher or lower culpability bands?

Do you have any difficulties when deciding whether to place a defendant into higher or lower culpability bands?

How easy or difficult is it to balance the various factors when determining the offence category?

How do you decide where to place a case when there are both higher and lower culpability factors to consider?

To what extent do practitioners deal with this in different ways?

How often do you come across borderline cases (i.e. a case that falls between two categories)?

What factors will lead to this?

What happens if a case is considered borderline?

To what extent defence solicitors/counsel use this concept in mitigation? What, if any, effect does this have?

Impact of the assault definitive guideline

In what ways, if any, has the guideline affected sentence outcomes?

To what extent do you think it has … ? Why do you say this?

Supported you to reach fair and proportionate outcomes

Changed outcomes (i.e. have sentences increased or decreased?)

Led to more consistent sentences

How often do you go outside the sentencing range?

Do you feel able to do so? What factors make you do so?

IF NOT ASKED PREVIOUSLY: To what extent does the guideline cause more cases to be escalated from the magistrates' court to the Crown Court for trial?

Which, if any, particular factors cause this to happen and why?

What is the impact of this?

Overall impact

Overall, what has been the impact of the guideline on your/sentencers' practice?

To what extent has your approach to sentencing changed as a result?

What, if anything, has worked well?

What, if anything, needs improving?

How does the guideline compare to other Sentencing Council guidelines?

Is it more or less helpful? In what ways?

Any other issues?

What, if any, other comments do you have about the guideline?

PRACTITIONERS

Introduction

Thank for participation

We have been commissioned by the Sentencing Council to undertake research to explore the operation and effectiveness of the current assault definitive guideline. The qualitative research needs to:

> *Obtain evidence from sentencers, and other users, of the guideline as to how in practice it affects the sentence outcomes*
>
> *Explore issues such as wording which affect the effectiveness of the document in terms of practical application*
>
> *Determine whether the outcomes achieved are in line with the practitioners' expectations and if not why.*

Request permission to record interview – stressing that Sentencing Council will not hear any of the recordings and that they will be for the purpose of writing up only.

Stress that ORS is bound by the MRS Code of Conduct and the Data Protection Act and that any information provided will be treated confidentially and anonymously.

About you and your role

Please could you explain a little about your role?

> Role and location
>
> How many years have you worked in your role?
>
> How many times have you worked on assault cases in the past year?

Using the sentencing guideline

Please could you explain how you currently use the guideline?

> Do you look at it beforehand or in court?
>
> Prosecution – do you refer to it in your opening/summing up?
>
> Defence – do you refer to it in mitigation/summing up?
>
> > Do you ask questions about it?
> >
> > What, if any, factors do you tend to focus on?

Thinking particularly about Step 1 of the guideline (determining the offence category)…

To what extent do you feel the three offence categories are appropriate? Why?

To what extent do you feel the Step 1 factors are appropriate? Why?

In your experience, what factors typically push a case into greater or lesser harm?

Do sentencers have any difficulties deciding whether a case should be pushed into greater or lesser harm?

In your experience, what factors are typically used to place a defendant into higher or lower culpability bands?

Do sentencers have any difficulties when deciding whether to place a defendant into higher or lower culpability bands?

In terms of determining the offence category when there are both higher and lower culpability factors to consider, to what extent is there consistency in the way sentencers deal with this?

How often do you come across borderline cases (i.e. a case that falls between two categories)?

How do sentencers tend to deal with this? Is there consistency?

Defence solicitors/counsel – to what extent do you use this concept in mitigation? What, if any, effect does this have?

Impact of the assault definitive guideline

In what ways, if any, has the guideline affected sentence outcomes?

To what extent do you think it has … ? Why do you say this?

Supported sentencers to reach fair and proportionate outcomes

Changed outcomes (i.e. have sentences increased or decreased?)

Led to more consistent sentences

IF NOT ASKED PREVIOUSLY: To what extent does the guideline cause more cases to be escalated from magistrates' court to Crown Court for trial?

Which, if any, particular factors cause this to happen and why?

What is the impact of this?

Overall impact

Overall, what has been the impact of the guideline?

To what extent has your approach to sentencing changed as a result?

What, if anything, has worked well?

What, if anything, needs improving?

How does the guideline compare to other Sentencing Council guidelines?

Is it more or less helpful? In what ways?

Any other issues?

What, if any, other comments do you have about the guideline?