Sentencing Council

CONSULTATION RESPONSE

Assault Guideline

Response to Consultation

March 2011

Contents

Foreword

On behalf of the Sentencing Council, I would like to express my sincere thanks to everyone who responded to our consultation on the sentencing guideline for offences of assault and who attended our consultation events. I was personally very pleased by the number of people who showed an interest in, and knowledge of, the complexities of sentencing for these offences.

This has been the Council's first consultation and we expressly sought to make our consultation as accessible as possible. We published two documents: the professional version intended for members of the judiciary, legal practitioners and individuals and organisations involved in the criminal justice system; and a shorter version for members of the public with an interest in the criminal justice system and sentencing, including victims and their families. We also developed an online questionnaire to broaden our reach further. We were impressed by the quality as well as quantity of responses which were analysed and considered in depth by the Council, many of which provoked discussion and reflection, and enabled us to make improvements to the published draft guideline.

The Council developed its guideline with the intention of producing for each offence a self-contained document which contained all necessary information within three sides and was as clear as possible, both for those using it to advise offenders and to pass sentence, but which was also accessible to a wider audience. I hope that it will encourage a consistent approach to sentencing and, for that reason, the same guideline will, for the first time, be applicable to both the Crown Court and magistrates' courts. While we have improved some of the detail of the guideline in response to comments in the consultation, we received broad support for the overall structure and step-by-step decision-making process and we intend to use this structure for the guidelines which we develop in future.

I am committed to ensuring that the publication of this definitive guideline is the start of a new approach that is useful not only to sentencers and criminal justice practitioners but also to members of the wider public.

The Rt Hon Lord Justice Leveson
Chairman of the Sentencing Council

Introduction

The Sentencing Council, set up in April 2010, is the new, independent body responsible for developing sentencing guidelines and promoting greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary.

Section 125 (1)(a) of the Coroners and Justice Act 2009 provides that:
"Every court –

(a) must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender's case, and
(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function

unless the court is satisfied that it would be contrary to the interests of justice to do so".
(This applies to all offences committed after 6 April 2010. When sentencing offences committed prior to 6 April 2010, courts will continue to 'have regard' to the guidelines.)

In October 2010, in accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council published a consultation on its first draft sentencing guideline, on the sentencing for offences of assault. The Coroners and Justice Act 2009 set out the following matters for the Council to have regard to when preparing sentencing guidelines:-

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

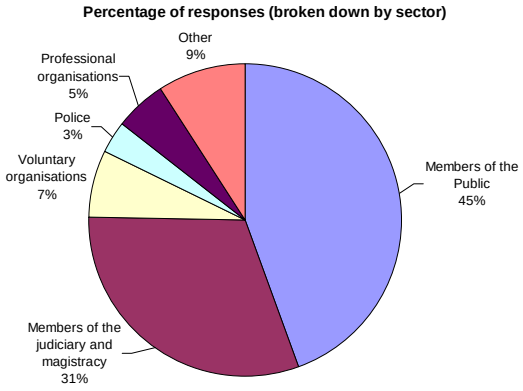
As the guideline will be the principal point of reference in all assault cases both in the Crown Court and magistrates' courts, the Council sought views on the draft guideline from as wide an audience as possible, including members of the judiciary, legal practitioners and individuals and organisations involved in the criminal justice system. A consultation document was developed specifically for members of the public with an interest in the criminal justice system and sentencing, including victims and their families. Additionally, the Council developed an online questionnaire for those wishing to access the Council's proposals on the web only. It also organised three consultation events in November and December 2010 with a range of interested organisations, representative groups and interested parties.

At the same time as publishing its consultation papers, the Council also published a draft guideline, a draft resource assessment and an equality impact assessment. The Consultation period closed on 5 January. This report summarises the responses to the questions asked in the consultation documents as well as those expressed during the consultation events, and sets out the Sentencing Council's decisions on key points raised and the next steps for the guideline.

Summary of responses

1. The consultation sought responses to specific questions on the Council's proposals for the draft guideline including its structure, the new decision making process and the sentencing ranges and starting points contained within each offence specific guideline.

2. A total of 394 responses to the consultation paper were received. Of these, 171 were emailed or sent in hard copy and 223 were made online. The respondents included individuals, members of the judiciary, the magistracy and associated bodies. Other respondents replied representing voluntary organisations, unions, the police and some in an individual capacity. A specific sector breakdown of responses follows:



3. A further breakdown showing actual numbers of responses can be found below. Detail of those who provided hard copy responses is at annex A:

Category	**Number of responses**
Academics	5
Members of the public	158
Central Government	2
Individuals	39
Judges	24
Legal professionals	6
Pub licensees	4
Local Authorities	2
Magistrates	85
Non-Departmental Public Bodies	2
Justice Select Committee	1
Police	12
Probation	1
Professional Organisations	18
Transport companies	3
Unions	2
Voluntary organisations	25
Youth Panels/YOTs	5
Total Responses	**394**

4. Consultation events with magistrates, victims groups and those with an interest in mental health issues and young adults have all provided the Sentencing Council with much to consider and also helped to provide a number of consultation responses.

5. The responses have been overwhelmingly positive about the approach taken by the Sentencing Council to a number of the key elements of the draft guideline including the proposed decision making process and the harm and culpability model. The Justice Select Committee of the House of Commons heard oral evidence and received written submissions from a number of organisations which 'broadly endorsed the Council's approach'. Their response welcomed a move away from the use of pre-meditation to determine the seriousness of the assault; the retention of starting points for each offence category and starting points being applicable to all offenders, not just to first-time offenders who plead not guilty.

6. Some respondents raised concerns about the proposed removal of compensation and ancillary orders and of the distinctions between levels of community orders. Others questioned the positioning of dangerousness within the decision making process and the adaptability of the guideline for use in magistrates' courts. There was some concern about the fact that the introduction of this guideline on assault would mean that within the Crown and magistrates' courts, there would be two different approaches to sentencing operating simultaneously. The Justice Select Committee advised that there would need to be careful management of the transition to the new approach for sentencing. It was suggested by other respondents that having a different approach for only one set of offences was not desirable; that magistrates had become adept at using the set of magistrates' court guidelines issued in 2008 and that the introduction of a new process would require significant training. This view was also raised in the consultation events.

7. The Council considered in some depth at an early stage of its work how to minimise difficulties arising from the co-existence of Sentencing Council guidelines with SGC guidelines. The Council has considered the practical issues of having two sets of guidelines, given that Sentencing Council guidelines adopt different assumptions such as the basis for starting points. However, the Council has a statutory duty to consult on its guidelines as it develops them and therefore considered that issuing new guidelines from time to time would enable fuller consultation than replacing all existing guidelines. Over time, the existing guidelines will be phased out as the Sentencing Council revises them and issues new guidelines. The Council recognises that sentencers will be required to manage the two sets of guidelines until such time as all are replaced and intends to support sentencers through this change by working with the relevant training providers. The Council is confident of the ability of the judiciary to manage the process.

8. The Council also recognises that there is a challenge to get the balance right between the detail of guidance required for magistrates, for district judges and for Crown Court judges. The Council's intention is for the guideline to be accessible for all sentencers and acknowledges that the significant differences between the Crown and magistrates' courts make this a complex task. However, it is firmly of the view that having a guideline for use in both jurisdictions delivers significant advantages. Primarily, it will engender a greater consistency of approach across

all courts, regardless of the severity of the offence, which is particularly important when sentencing those cases which are 'triable-either-way'. In informal discussions with sentencers from both courts, it was apparent that there was little understanding of how the other court sentences. Having one guideline for both courts enables each to become more aware and have a greater understanding of what the other is doing. Additionally, the Council takes its responsibility to victims very seriously and considers that having one guideline will ensure that it is as clear as possible to any member of the public, irrespective of which court is involved in making the decision.

9. The Council has worked closely with the Judicial Studies Board (JSB) in the development of training for sentencers on the new guideline. It is working with the JSB's judicial and magisterial trainers to plan training and with other organisations such as the Justices' Clerks Society to enable their members to apply the new approach with confidence. The Council decided to set an implementation period of three months in order to ensure that there is sufficient time for training and awareness-raising which will be provided through a number of channels from the date of publication of the guideline.

10. The next section discusses the responses to the specific questions and sets out the decisions reached by the Council following their deliberations on the many informed views expressed during the consultation process.

Responses to specific questions

1. Do you agree that the proposed structure of the draft guideline incorporating an individually tailored sentencing process for each offence is the right approach?

91% of all respondents broadly agreed with the Sentencing Council's proposed approach to set out the applicability of the guideline and then provide an individually tailored offence specific decision making process. The clarity of the structure was generally welcomed for providing a logical process which allowed sufficient flexibility to consider the facts in each individual case and was less prescriptive than the existing assault guideline. One academic applauded the decision by the Council to move in the direction of a structured decision making process. Other respondents urged that improving familiarity with this process should form a central part of training of sentencers. The guidelines were considered by some to be well presented and readable and that the document represented an improvement on its predecessor.

"*This is sensible. Generic approaches are often unhelpful and sometimes result in injustice*." Council of HM Circuit Judges

"*The new guideline provides a clearer structure… which will be welcomed by sentencers*." A magistrate

"*It is important in maintaining public confidence in sentencing that the decisions that are made in reaching a sentence are clear and can be explained, and this process should help to make this possible. The clear structure of the guideline should also help to promote consistency in sentencing*." Criminal Justice Alliance

However, a minority of respondents suggested that the guideline was not clear nor an improvement on the existing guideline. There were some concerns expressed about the length of the document in comparison to the existing Magistrates' Court Sentencing Guidelines (MCSG) and a more fundamental questioning of the rationale for changing the existing framework. Some respondents suggested that guidance would be necessary on different guideline structures. Broadly, magistrates were less convinced of the new approach than judges or groups representing members of the public and victims.

Having taken into account the responses to the consultation, the Council considered that there are significant benefits of the guideline having a self-contained structure that would be useable by practitioners from every part of the criminal justice system. Whilst it was aware that there may be some practical difficulties arising from magistrates managing the application of two sets of approaches to sentencing, the Council is confident that they will meet these challenges successfully, having demonstrated considerable resilience and adaptability in managing the regular changes to the criminal justice system. It was asserted by a representative of the magistracy in the public consultation that much time and effort has already been put into explaining sentencing guidelines to the public and that to change them at this stage would lose the confidence of the magistracy. With these comments in mind, the Council has decided on a three month implementation period in order to allow for training and awareness-raising, and the Office of the Sentencing Council is working

with the Judicial Studies Board and others to ensure that the training in the new process is comprehensive.

2. Do you agree that compensation and ancillary orders should not be included in the new assault guideline or any future specific offence guidelines?

The Council was interested in views on whether inclusion of the statutory provisions on compensation and ancillary orders was necessary in the guideline. A significant number of respondents agreed that it was not necessary for these orders to be included in the guideline including the majority of judges. However, those that put forward the opposing view made a very convincing case that the presence of a prompt for sentencers would be helpful. Magistrates were more broadly of the view that these orders should be included and this view was put forward at a consultation event held with magistrates in December. The Council concluded that, as a core part of sentencing, it was of benefit to include a reference as both an aide-memoire and to provide clarity on the stage at which compensation should be considered in the process. Therefore, it decided that the guideline would incorporate this information at a new step 7 of the sentencing process.

3. Do you agree with the Council's recommendation that there should be three offence categories for all assault offences? If not, how many would be appropriate?

The vast majority of respondents agreed with the proposal for three offence categories as set out in the draft guideline. There was almost universal agreement that the four offence category alternative set out in the consultation paper had little to commend it over the three category model because the difference between the two middle categories would be insufficiently clear.

An academic respondent proposed an alternative approach to the two categories of greater and lesser harm in order to incorporate an option for those cases of medium level harm and culpability. This alternative suggested three categories in relation to levels of harm, leaving the court to reflect the degree of culpability within the category range, as below:

Category 1: greater harm, high to low culpability
Category 2: medium harm, high to low culpability
Category 3: lesser harm, high to low culpability

The Council considered this in some detail. It considered that this alternative model gives undue primacy to harm and relegates culpability to a lesser consideration. While the Council recognised the difficulty in not having a medium harm category, it considered that the sentencer is best placed to determine where on the gradient of greater or lesser harm or culpability the offence would fall. Where possible, the Council would want to give equal weight to harm and culpability and considered it appropriate to do so for offences of assault. Some respondents commented favourably that placing both harm and culpability on an equal weighting was likely to result in a fairer outcome for victims.

Many magistrates and some other respondents expressed their preference for concrete examples, as in the existing SGC guidelines and the MCSG, rather than what they considered the abstract terms of high/low harm/culpability. One magistrate commented: "the use of phraseology such as "greater" and "lesser" is too fluid and emotive in context". By contrast, other sentencers highlighted difficulties in matching

examples in a guideline to real-life situations and some suggested that this could result in examples being ignored during the sentencing process. The Council wanted to move away from setting out prescriptive descriptors as it considered that every case is unique and cannot be adequately reflected in examples. Defining parameters too tightly through examples could also result in sentencers feeling that they needed to depart from the guideline when the case did not fit given examples. The Council's overall ambition is consistency of approach and believes that sentencers should have the discretion to use their experience in determining whether harm and culpability is to be judged as being high or low.

4. Are there any other factors determining harm and culpability that should be taken into account at step 1 of the decision making process?

The Council developed a decision making process whereby the factors identified at step 1 were those most essential in determining the crucial elements of the offence from which the category of offence is defined. The factors at step 2 set out the context of the offence including the offender's personal circumstances and enable movement up or down within the category. While some respondents proposed a number of additional factors for inclusion at step 1 of the decision making process, others considered the list to be comprehensive. Some respondents suggested amendments to the existing factors in order to clarify the guideline's intention.

The Council also considered representations from a number of groups who recommended including a reference to offences motivated by, or demonstrating, hostility to the victim based on discriminatory factors such as transgender status to step one of the decision making process. The Council decided to include the following broad aggravating factor at step 1 of the process to cover all aspects of hate crime: 'offence motivated by, or demonstrating, hostility based on the victim's age, sex, gender identity (or presumed gender identity)'.

The Council considered suggestions that it should be made clear in the guideline that injury included disease transmission and psychological harm. It concluded that the guideline should reflect these potential consequences of an offence of assault and has amended the guideline accordingly.

There were a number of responses which dealt with the issue of offenders operating in groups or gangs which urged a clearer distinction be drawn between those who participated in a leading role and those who took a lesser role. The Council recognised the value of this and has now amended the wording at step 1 to reflect this.

Some respondents suggested that the step 1 factors could be laid out more clearly on the pages and the Council has tried to provide this wherever possible, subject to the constraints of space. The Council wished to present both steps 1 and 2 on two facing pages to enable the sentencer to have as much of the necessary information as possible in a self-contained place.

5. Do you agree with the revised approach to premeditation as an aggravating or mitigating factor proposed to be included in the new assault guideline?

Many respondents welcomed the Council's proposed approach to premeditation as it provides sentencers with the discretion to assess the degree of premeditation when determining the level of culpability, and acknowledges that there is a sliding scale of premeditation. In giving evidence to the Justice Select Committee, Professor Andrew

Ashworth commented: ‘Clearly the idea of bringing premeditation in on a sliding scale and as one of the issues that the court looks at when it is considering culpability must be right’.

A number of respondents proposed alternative wording to the inclusion of ‘lack of premeditation’ as a mitigating factor. One suggestion was to include a factor of ‘recklessness’ instead of ‘lack of premeditation’. The Council considered this suggestion but concluded that it had the potential to cause confusion. This is because of the legal concept of recklessness used to establish the *mens rea* of an offence which is different to premeditation.

Some respondents considered ‘planning’ to be a better word than premeditation, and others said that they would be concerned if too much credit were given in mitigation for a lack of premeditation, as many assaults are not premeditated but are nevertheless intentional (or reckless) acts. The Council recognised that the level of planning could vary and that there was a clear distinction between a spontaneous assault and a significant degree of premeditation and sought to provide guidance on the extent to which premeditation indicates a higher level of culpability. The Council has amended the factors to clarify this, setting out that ‘a significant degree of premeditation’ indicates higher culpability and “lack of premeditation” indicates lower culpability.

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

A range of views were expressed on this issue, with some respondents in firm agreement that it should be considered at step 1 of the process and others that it should be considered at step 2. There was majority support for the inclusion of a mitigating factor at step 1 where it related clearly to the commission of the offence but that a distinction should be made in cases where mental illness did not contribute to the offence. Others considered that in cases where a mental illness or disability is directly responsible for the commission of the offence, it would be unlikely that the matter (other than in very serious cases) would be considered suitable for prosecution. Those who disagreed with the inclusion at step 1 were of the view that mental illness should be considered as an issue of personal mitigation and that there would be a risk of double counting.

Some magistrates at the consultation event in December considered that mental health issues should be considered at step 2 of the process rather than in step 1, because doing so at step 1 could result in a downgrading of culpability such that the most appropriate sentence would no longer be available.

Some respondents made suggestions regarding the appropriate wording of the factor to ensure the correct terminology and appropriate breadth of application. Representatives of mental health groups advocated including ‘learning difficulties/disabilities’ where linked to the commission of an offence.

'*The CJA fully agrees that consideration for mental illness should be included at Step 1 of the process as a factor indicating lower culpability*.' Criminal Justice Alliance

'*I suspect that it is almost universal practice that judges would consider it appropriate to consider the impact of a material mental illness or disability at Step 1 of the process. It can often be a causal feature of the offending in the first place by reason of reducing the ability to reason or react lawfully, and may often lead to a sentence focused upon that disability through professional intervention.*' UK Circuit Judge

While the Council wanted to ensure that it did not propagate any notion of a causative link between mental illness and violence, the Council considered that in cases where it has been proven that an offender has a mental illness or learning disability which was wholly or partly responsible for the commission of the offence, it should be taken into account at step 1 in the process as a factor indicating lower culpability and should influence the choice or severity of sentence. Where it is not linked, it should be considered as a step 2 factor because of its relevance to an offender's circumstances.

With regard to terminology, the Council has adopted the terms 'mental disorder' and 'learning disability' as defined in the Mental Health Act 2007.

7. Do you agree with the extent of the guidance and the extent of discretion that is proposed in step 1 for determining the offence category?

Most respondents were content with the guidance and the extent of discretion proposed at step 1. Generally respondents agreed that rather than specifying how many factors would be required to indicate a high level of culpability, it should be left to judicial discretion to determine how many factors are required to be present in order to determine the levels of harm and culpability, and how much weight to give to each of the factors present.

There was a degree of concern that greater flexibility at this stage of sentencing could lead to more inconsistency. One magistrate noted that "the draft guidance indicates that the starting point can be moved before further adjustment for aggravating and mitigating factors if there is a particular gravity about the offence… this could provide awkward possibilities for disparate approaches to sentencing and a risk that the factors could be "double-counted". However, the Council considered that the fact that step 1 factors are exhaustive would minimise any risk of double-counting at step 2. If there is an additional factor which the court considers should be included at step 1 because it is so significant to the culpability of the offender or the harm caused, the court is likely to be justified in departing from the guideline. The Council considers that this situation would only arise in a small number of cases.

8. Do you agree that the starting point and category ranges should be applicable to all offenders, not just first time offenders, and regardless of plea entered?

The proposed change of applicability of starting points in the draft guideline was met with approval by most respondents who welcomed the move away from starting points and ranges based on first time offenders pleading not guilty, as the majority of offenders appearing in court have some form of previous convictions and many plead guilty. A number of respondents said that this approach better reflects the reality of sentencing practice than the current guidelines. In evidence to the Justice Select Committee, Professor Neil Hutton commented that he considered this 'a sensible change and it does allow judges to go below the guideline if someone has a clean record'. Dr Nicola Padfield said that she considered it to be 'very sensible that the Council has moved away from saying this is a guideline based on a first-time offender pleading not guilty, because you don't very often see a first-time offender pleading not guilty'. However, both academics did suggest there could be some practical difficulties around the extent to which a sentence could be aggravated or mitigated by either previous convictions or a clean record.

A proportion of respondents did not agree with this approach and said it could undermine existing guidelines and be confusing for magistrates and their legal advisers. One respondent commented that the change would make the task of legal advisers difficult and also require significant training for them. They also suggested that the lack of clarity about the extent to which any previous convictions might aggravate the offence could possibly lead to greater inconsistency, as different courts might attach different weight to the fact of having previous convictions. This view was also expressed by some at the consultation meeting with magistrates held in December 2010.

The Council considered all of these comments and maintained its view that the guideline starting point should be applicable to all offenders and not just the minority who have no previous convictions. It wanted to move away from the existing approach which focuses on an atypical offender (one with no previous convictions) as it was not clear to what extent sentences were moved up or down from the current starting point in this respect.

The Council is committed to ensuring that the training which will be provided to magistrates during the guideline implementation period will help to minimise any confusion around the new approach.

One respondent asked for a point of clarification as to whether there is a duty within the Coroners and Justice Act 2009 on the court to impose a sentence within a particular category range within the guideline. The court is under a statutory duty to follow the relevant guideline unless the court is satisfied that it would be contrary to the interests of justice to do so. Where a court is following guidelines, there is a duty to impose on the offender a sentence which is within the offence range and to decide which of the categories most resembles the offender's case in order to identify the starting point. Section 125 (3)(b) of the Act states that there is no separate duty to impose a sentence within the category range.

9. Do you agree that starting points should be set out in the assault guideline?

This was an issue which the Council discussed at some length. It concluded that starting points were required in order to assist sentencers and that they did not fetter

judicial discretion. The Council was pleased that almost every respondent agreed that starting points should be incorporated into the guidelines on the basis that they are likely to aid consistency.

10. Are there other additional aggravating and mitigating factors that should be included at step 2 of the decision making process?

Step 2 of the decision making process is the second stage of assessing seriousness after identifying the relevant starting point. This is the point at which the court should identify where there are any further aggravating or mitigating factors which could result in a provisional sentence that is lower or higher than the suggested starting point. Many respondents had suggestions for additional factors to be added to the step 2 assessment of seriousness. Others suggested amendments to existing factors in order to clarify the guideline's intention.

A number of respondents made the point that it should be clear that the list at Step 2 was not exhaustive. The Council had intended this to be clear and has made a formatting amendment to the updated guideline for further clarification. There were some responses querying the Council's decision to include both offence and offender related factors at step 2 of the decision making process as it was commented that this could confuse the way that sentencers look at each in turn. The Council sought to make it clear that step 2 sets out factors that place the offence in context; this must include offender related factors, such as the presence or absence of previous convictions.

The Council considered the list of factors suggested by respondents and made a number of changes to the draft guideline.

Factors increasing seriousness:

In order to meet the concerns of several consultation respondents who suggested that offences committed in breach of restraining, non-molestation or occupancy orders should be aggravated at step 2, the Council changed the factor from "failure to comply with previous court orders" to "failure to comply with current court orders".

There were some requests to clarify that the aggravating factor 'offence committed against those working in the public sector or providing a service to the public' encompasses workers in any form of employment, such as shop workers and those working as bar staff or involved in work providing security in pubs and clubs. The Council considered this, but concluded that the existing wording provides sufficient clarity for sentencers and that it was clear to sentencers that those workers providing any form of service to the public would be covered by this factor.

The Council considered that it was important in terms of cases of domestic violence to include the factor "previous violence or threats towards the same victim" in step 2, particularly as a significant proportion of these kinds of offences are repeat crime.

It also considered whether to include "forced entry" as a separate factor but Council members felt that this would be covered by the existing factor of "location" in step 2 and therefore did not need to be added separately.

In order to reflect the impact that an offence of assault can have an effect on a community, it was agreed to include an aggravating factor "established (proven) community impact".

During the consultation period, the Council also considered the role of offences taken into consideration and considered that they should be a factor taken into account at step 2. This is because they place the conviction offence into a wider context and help the court determine seriousness. In addition, sections 128 and 152 of the Criminal Justice Act 2003 both provide that associated offences should be taken into account when determining whether to impose a custodial or community sentence.

Factors reducing seriousness or reflecting personal mitigation:

Prior to issuing the draft guideline, the Council considered carefully the issue of offender mitigation in the sentencing process. The Council were aware that there had been some suggestions that guidelines per se undermined the impact of personal mitigation. The Council expressed a clear view that, where appropriate, personal mitigation could and should be taken into account when considering movement from the starting point. The Council equally recognised that personal mitigation did not make the *offence* less serious and for that reason split the table into "factors reducing seriousness or reflecting personal mitigation".

The Council also considered representations around the impact of dependents on available sentencing options as this was raised in responses to both the public and the professional consultation and also at a consultation event with campaign groups representing youths and victims in November 2010. The Council considered the issue and decided to include "sole or primary carer for dependent relatives" as a factor reflecting personal mitigation.

11. Do you agree that the court should take account of an assault offence covered by section 29 of the Crime and Disorder Act 1998 regarding racial or religious aggravation, and increase the severity of the sentence accordingly, only after having reached an initial sentence for the offence?

The vast majority of respondents were content with the Council's proposal to continue the current practice of increasing the sentence for section 29 offences after having reached an initial sentence at the end of step 2 in the decision making process. It was commented that this is consistent with good practice laid down in case law. However, there were a number of responses which called for the Council to consider producing separate guidelines for section 29 offences. Other respondents called for the Council to extend the powers to cover all aspects of hate crime with statutory factors. However, this is beyond the scope of the Sentencing Council as it would require legislation to effect such a change.

The Council considered the merits of producing separate guidelines for the section 29 offences. It concluded that this was not necessary and instead to add a note of further guidance to step 2: 'it may be appropriate to move outside the identified category range, taking into account the increased statutory maximum'. Therefore, this will make it clear for section 29 offences that the maximum has increased. This continues the existing practice of aggravating at the stage of deciding the provisional sentence.

One important point raised for the Council to consider was where the offence charged is not a section 29 offence, but where a degree of racial or religious aggravation is present. In such a case, the court has a statutory duty[1] to treat that as

[1] Section 145 Criminal Justice Act 2003

an aggravating factor. A respondent highlighted that this was only permissible for those offences which are not capable of being charged as section 29 offences (section 18 GBH/Wounding, assault with intent to resist arrest and assault on a police constable). It did not apply to the other offences because they can be charged in their racially aggravated form. The Council therefore agreed to remove "offence racially or religiously aggravated" from offences which can be charged under section 29 (section 20 GBH/Wounding, ABH and common assault).

12. Do you agree with the Council's proposed change to include lack of maturity and/or is there any further role for the guideline to play in addressing the specific issue of offenders aged 18-24?

There was a variety of responses to the Council's proposal to include the mitigating factor of youth or age. A number of groups were clear that the evidence on different rates of the development of maturity provided good reason as to why this proposal should be strongly endorsed and some considered that this should be a factor for consideration at step 1 of the decision making process rather than step 2. Others felt strongly that it should be considered at both steps. A few respondents felt that there was no reason to depart from the general principle of a person aged over 18 being treated as an adult and that age does not reduce culpability. Representatives of victims groups at a consultation meeting in December questioned how maturity is defined and judged and were concerned that this should not lead to more lenient sentences.

Some respondents felt that immaturity should affect the choice of sentence but that it should not affect the severity of sentence. Additionally, there was concern that lack of maturity should not lessen severity in cases of, for example, domestic or homophobic violence. It was proposed that the wording of the existing guideline should be continued, which makes it clear that in cases where there is more than one defendant, the issue of age/maturity needs to be considered on an individual basis. The Council considered all of these views and decided to retain the factor at step 2. The draft guideline referred to "youth and lack of maturity" as it was intended to recognise the fact that an offender who is just over 18 has moved into the adult sentencing regime, which is more punitive than the youth regime. Additionally, it was intended as recognition that offenders who are young adults may still lack sufficient maturity to fully understand the consequences of their offending behaviour. It has altered the wording to "age and/or lack of maturity where it affects the responsibility of the defendant" as it considers that this provides more appropriate scope for discretion and judgement.

The reference to youth caused some respondents to query whether the guideline applied to those under 18. The guideline only applies to adult offenders aged 18 and above. The general principles to be considered when sentencing youths are contained in the definitive guideline Overarching Principles – Sentencing Youths. The Council has considered whether it would be useful for the assault guideline to be used in conjunction with the Youth guideline, as a point of reference to assist the court in its determination of seriousness. The Council considers that it would be undesirable to promulgate this as a policy as it could lead to confusion given that the sentencing legislation and principles for youth are different to adults.

'*The T2A Alliance advocates the recognition of young adults as a distinct group within the criminal justice system, including in sentencing, due to their levels of maturity and the economic, social and structural factors that specifically impact upon them*.' Transition to Adulthood Alliance

'*The Probation Service works with many offenders who have a level of maturity well below their chronological age. The Probation Chiefs' Association therefore supports the proposal to include lack of maturity as a potential mitigating factor*.' Probation Chiefs' Association

'*For all other purposes, a person over 18 is treated as an adult and we see no reason to depart from that as a general principle. Maturity is not always concomitant with age*.' Criminal Sub Committee of the Council of HM Circuit Judges

13. Do you agree with the eight-step proposed decision making process?

It should be noted that the process now includes nine-steps because of the inclusion of a separate step to deal with compensation and ancillary orders.

The vast majority of respondents (89%) agreed with the Council's proposed decision making process. Many judges were supportive as well as other organisations such as the Criminal Justice Alliance who commented 'that the [then] eight-step decision making process proposed in the draft guideline is clear and logical". While most considered the process to be a welcome development, some magistrates, as well as the National Bench Chairmen's Forum, expressed the view that the new process would increase the time taken to sentence. The Council does not agree with this assessment given that each of the steps are already present in existing sentencing practice in some form or other. The proposed decision making process simply sets them out differently.

There were different views on what stage in the process dangerousness should be considered. Some groups welcomed consideration at a later stage of the process whereas others considered that it should be addressed at an earlier point in proceedings. The Council considered that the assessment of dangerousness should take place towards the end of the decision making process (after seriousness and relevant reductions for guilty pleas and police assistance). This is because the assessment of seriousness at steps 1 and 2 will inform the assessment of dangerousness - in order to establish whether the offender is dangerous, the court has to take into account information about the offender and the offence. The decision making process assists the court to obtain this information and consider it in a structured way. It provides information about the nature of the harm caused, the attitude of the offender and previous offending history. The factors contained at steps 1 and 2 are clearly relevant to the assessment of dangerousness and as such, it is important that the courts have regard to these factors.

If the assessment of dangerousness took place at an earlier stage of the process (before the assessment of seriousness) there is a risk that the court might aggravate the seriousness of the offence, in order to support a conclusion of dangerousness. Assessing dangerousness after establishing seriousness will also help to ensure that minimum terms are appropriate.

However, the Council did consider that dangerousness might better be assessed before totality, to allow the court to have considered all factors before considering whether the overall sentence is just and appropriate. This has resulted in the

assessment of dangerousness being positioned at step 5 of the guideline rather than at step 6.

It was noted that sections 73 and 74 of the Serious Organised Crime and Police Act do not apply in magistrates' courts and therefore the new magistrates' court guideline will reflect this.

There was a query from magistrates as to how time spent on electronically monitored curfew should be measured in relation to the final sentence. Section 240A Criminal Justice Act 2003 has been considered in recent case law and as it is the subject of detailed regulations it is not appropriate to include detailed guidance in this offence-specific guideline. There is however a reminder to consider it at step 9.

Other magistrates sought a view on at what point a bench should adjourn for a pre-sentence report after a finding of guilt and how the guidelines apply pre and post adjournment. Where sentencing adults to custodial or community sentences, courts must generally obtain and disclose a written pre-sentence report to assist in determining whether the relevant seriousness thresholds have been crossed, the length of the sentence and the suitability for community order requirements. The Council considers that the timing of an adjournment is an administrative matter for the court and its legal advisors. The guideline will contain a section on the applicability of the guidelines and sets out the statutory duties of the court to follow guidelines which are relevant to an offender's case or to the exercise of a sentencing function.

14. Do you think that the range for category 3 GBH (section 20) cases should include custody at its upper limit or recommend only non-custodial disposals?

Generally respondents considered it to be essential to retain custody at the upper limit for category 3 GBH/Wounding (section 20) cases. However, a number of respondents queried the setting of all GBH/Wounding (section 20) category ranges and starting points. Many respondents felt that the proposed ranges and starting points for these GBH/Wounding cases were not sufficiently greater than those for ABH to reflect the difference in harm resulting from each offence. In cases of higher culpability, harm could be defined as greater if charged as an offence of ABH but lesser if charged as an offence of GBH/Wounding (section 20). This would result in a selection of category 1 for ABH (starting point 2 years 6 months) but a selection of category 2 for GBH/Wounding (section 20) (starting point 12 months). With regard to this, one judge suggested that "the charge, rather than the substance, may have a dramatic effect on the sentence without the sentencer appreciating it". However, sentencers can only sentence for the offence of which the offender has been convicted. In future, it is intended that the Crown Prosecution Service will review their charging standards after the publication of every guideline.

One respondent helpfully suggested that "the starting point for an offence involving the lowest degree of GBH harm (category 3) should be no lower than that for an offence involving the highest degree of ABH harm (category 2) with equal degrees of culpability". The Council considered this in some detail and concluded that these two categories should reflect each other as the same facts and circumstances could give rise to either charge. The Council took on board the comments of respondents and increased the starting point for category 2 GBH/Wounding (section 20) to 18 months' custody and reduced the starting point for category 1 ABH to 18 months'

custody. It also amended the range for both to 12 months to 3 years' custody. The alteration of the starting point for GBH/Wounding (section 20) was felt appropriate because it covers 2 offences - wounding and GBH. The new range and starting point for category 2 section 20 takes into account the fact that the harm caused in a section 20 wounding could be less than that required for a section 20 GBH. The label on both section 18 and section 20 offences has been amended to include "wounding" in order to reinforce the fact that they encompass two forms of the offence.

15. Do you agree that the starting point for common assault should be a community order?

The Council's proposal to change the starting point for the most serious forms of common assault from custody to a community order was considered by a majority of respondents to be broadly right.

However, there were a number of concerns expressed about those cases which come before the court which are domestic violence cases and it was suggested that this represents a significant proportion of common assault offences. Representations were made about this point both from groups representing victims of domestic violence and from sentencers in both magistrates' courts and the Crown Court. There was concern that the removal of custody as a starting point for serious examples could lead to a reduction in the number of victims coming forward. The Council has been informed by the Sentencing Guidelines Council's guideline 'Overarching Principles: Domestic Violence' in developing the factors which increase seriousness for common assault and has included, for example: 'Ongoing effect upon the victim'; 'Presence of others including relatives, especially children of the victim'; and; 'Abuse of power and/or position of trust'. The Council would expect that those cases of domestic violence which are charged as common assault and involve a degree of injury, would be a category 1 or 2 offence and that the sentence would be moved up within those categories due to the presence of these aggravating factors.

The Council is clear that it considers custody to be an option for the most serious cases and the Council has reflected this view by setting the top of the range for category 1 offences at the statutory maximum of 6 months' imprisonment.

16. Do you agree with the proposed offence ranges, category ranges and starting points?

Responses to the draft guideline ranges and starting points were generally positive. 70% of written responses broadly agreed with those set across the full set of offences, with the exception of the points made at question 14 regarding sentencing for GBH/Wounding and ABH. It was considered that the proposed ranges and starting points preserve the hierarchy of the various assault offences and are proportionate.

Some responses to the public consultation were less favourable and considered some of the sentences to be lenient. There were particular concerns about the sentences for assault with intent to resist arrest and assault on a police constable in execution of his duty. The Council considered that the sentences for these offences should be proportionate to those of common assault as the nature of the injuries sustained will be the same for all the offences. Where the injury is more than minor, the CPS charging standards recommend that an offence reflecting the nature of the injury should be charged, for example, ABH.

Several respondents expressed concern that there is no guidance on sentencing between the top of the offence range and the statutory maximum, where they are not the same. One judge commented: "I regard many previous convictions of the offender as a particularly potent aggravating factor, which might mean that a sentence at the top end of the bracket is suitable [the statutory maximum]". For most offences, the Council sought to provide the ability for sentencers to be able to depart from the guideline up to the statutory maximum in exceptional cases. However, the offences of common assault and of assaulting a police constable have a relatively low statutory maximum sentence of six months and therefore a case would not need to be exceptional for the statutory maximum to be reached.

17. Do you agree with removing the distinction between a high, medium and low community order from the offence ranges?

The Sentencing Council considered whether to exclude guidance on whether a community order should be high, medium or low in order to remove constraints upon sentencers to impose certain requirements where more or fewer may be deemed preferable, and to ensure that courts felt able to impose the most appropriate order for the individual. While a majority of respondents agreed to the proposed removal of the distinction in order to increase flexibility in the application of the order, a significant number of representative bodies disagreed with the proposal.

One respondent commented that "the proposed category ranges look strange, particularly where 'community order' appears as both the starting point and the bottom (or top) of the range… there is surely a need for some differentiation between the relative onerousness of the community orders imposed".

There was also a concern expressed that the removal of this differentiation "may result in an increased use of short custodial sentences. If sentencers see a starting point of a community penalty and then recognise an aggravating factor, the tendency may be to move into the custody bracket rather than to increase the severity of the community order."

The Council looked closely at how the guidelines operate practically and the utility of retaining the distinctions. The Council considered that the arguments put forward for reinstating the distinction between high, medium and low community orders in the definitive guideline were persuasive as they would help improve consistency, transparency and proportionality. The Council has decided to include distinctions for both the starting point and the category range of the community order in the definitive guideline.

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

The Council was grateful for the opportunity during the consultation period to discuss these issues in some detail with representatives of victims groups and with the Victim's Commissioner. The clear focus on culpability and harm was welcomed by these groups. Many respondents agreed that the aggravating and mitigating factors included in the guideline at steps 1 and 2 allow the court to take full account of the suffering of victims from physical injury, damage to health or psychological distress. However, some considered that the guideline would be stronger from the point of view of victims if victim impact statements were referenced in the guideline. The

Council considered that existing guidance in the Consolidated Criminal Practice Direction and the decision of the Court of Appeal in Perks[2] covers the use of these statements in court. Therefore, it is not necessary to replicate this in the guideline.

> '*The aggravating and mitigating factors in relation to harm (at Step One of the process) are right to assess the harm upon the victim by focusing on the seriousness of injury and the number and duration of assaults upon the victim.*'
> Victim Support

[2] [2001] 1 Cr App R (S) 66

19. Do you agree that the proposed decision making process will increase transparency and therefore public confidence in the sentencing process? Are there any other ways in which the proposed guideline could increase public understanding and confidence?

'*The proposals, in our view, do provide a transparent and logical process for arriving at an appropriate sentence in cases of assault. Members of the public who appraise themselves of this process are likely to be reassured that there is a fair and uniform system in place*.' The Law Society of England and Wales

'*We do not believe that the decision making process per se will increase transparency. What is important to achieve transparency is a clear explanation to offender, victim and the public generally of why the sentence is as it is*.' Panel of Magistrates

There was broad support for the Council's aim of the guideline improving consistency and transparency. While there was ambiguity as to whether this would translate into improved public confidence in sentencing, it was generally considered that this guideline was a step in the right direction. Others considered that the guideline was neither radically different nor substantially clearer than the existing guideline, particularly as the existing guideline describes offending behaviour in ways which are more easily understandable to most members of the public than the broader concepts of culpability and harm. Some magistrates were concerned that the sentencing process in the magistrates' court would become slower than current practice. Another respondent commented that there was no clear link to evidence-based literature on public protection, rehabilitation and reparation.

It was suggested that the guideline would be difficult for members of the public unfamiliar with the sentencing process to read. Representatives of victims groups at a consultation event in December raised a concern that the guideline was not accessible to the public and that it would be hard for them to understand some of the central issues. However, there was general endorsement for the factors which addressed issues affecting victims. A significant number of respondents were unsure of the potential impact that one sentencing guideline alone could have on public confidence in sentencing and the suggestion of this ambition coloured many of the responses. This was because some believed that such an aspiration was unachievable for an organisation with a limited remit within the criminal justice system and that the media's handling of sentencing was most influential. The majority of members of the public who responded to the online questionnaire were on the whole more positive about the potential impact of the new process on public confidence.

Suggestions about other ways in which public understanding and confidence could be increased through the proposed guideline were provided and of these the most common, such as producing guidelines using clearer language, maintaining a proactive media strategy and looking for wider opportunities for public engagement are already within our general communication plans for the Council.

Other more specific suggestions for public engagement included collaborative work with other bodies like the Magistrates' Association and HMCS. Again we have already started to work with organisations in this way but the suggestions have

confirmed and informed our plans for future consultations and further engagement with the public. We intend to continue these approaches as well as exploring the new ideas put forward.

Conclusion and next steps

1. The consultation was extremely useful in gathering a wide range of views on the proposed guideline for sentencing for the offence of assault. It highlighted a number of key issues and practical matters that the Sentencing Council took into account when considering the views in relation to each specific question and in making its final decision while considering these in turn. The views informed considerable debate on several aspects of the guideline and through these deliberations, enabled the Council to finalise its definitive guideline on assault.

2. The consultation also sought views in relation to a new decision making process. The responses received have enabled the Council to confirm the structure and approach which will inform future guidelines.

3. The definitive assault guideline is being implemented in June 2011. A full implementation plan has been worked up in conjunction with the Judicial Studies Board and other organisations, including the Justices' Clerks' Society, the Magistrates' Association and the National Bench Chairmen's Forum. The Council is grateful to those individuals and organisations who have given practical advice on ensuring that implementation is successful.

4. The Equality Impact Assessment Initial Screening is available on the Sentencing Council website. No evidence was provided during the consultation period which suggested that the guideline will have any adverse impact on equalities issues warranting a full Equality Impact Assessment. Following implementation of the definitive guideline, the Council will monitor the impact of the guideline.

Annex A

Consultation Responses

Hard copy responses were received from the following organisations:

Against Violence and Abuse
Birmingham City Council
British Psychological Society
British Transport Police
Cheshire Constabulary
Cleveland Police
Commissioner for Victims and Witnesses
Corston Independent Funders' Coalition
Council of HM Circuit Judges
Crown Prosecution Service
Criminal Bar Association
Criminal Justice Alliance
Derbyshire Constabulary
Essex Police
HM Council of District Judges
Justice for Women
Justices' Clerks' Society
Justice Select Committee
Knifecrimes.org
Lancashire Police
London Criminal Courts Solicitors' Association
Leeds City Council
Lincolnshire Police
Magistrates' Association
Ministry of Justice
National Appropriate Adult Network
The National AIDS Trust
National Bench Chairmen's Forum
National Pubwatch
National Trans Police Association
Network Rail Infrastructure Ltd and the Association of Train Operating Companies
NHS Counter Fraud and Security Management Service
North Wales Police
Northamptonshire Police
Northern Rail Ltd
Nottinghamshire Police
National Society for the Prevention of Cruelty to Children
Prison Officers Association
Police Federation of England and Wales
Probation Association
Probation Chiefs' Association
Prison Reform Trust
RADAR: The Disability Network
Refuge
Respect
South Wales Police
Stonewall

Survive
Terrence Higgins Trust
The Howard League for Penal Reform
The Law Society
Transition to Adulthood Alliance
Transport for London
Unite the Union
Victim Support
West Yorkshire Police
West Yorkshire Probation Trust
Western Boys Support Group for Trans Men
Witness Confident
Women's Aid
Women's Justice Taskforce

Responses were also received from:

His Honour Judge Bing	Snaresbrook Crown Court
His Honour Judge Jeremy Carey	Maidstone Combined Court
Geraldine Clark	Recorder, London and South Eastern Circuit
His Honour Judge Patrick Curran	Cardiff Crown Court
His Honour Judge Simon Davis	Inner London Crown Court
His Honour Timothy Fancourt	Harrow Crown Court
His Honour Judge Jonathan Geake	Manchester Crown Court
His Honour Judge Clement Goldstone	Manchester Crown Court
Mr Justice Hedley	Royal Courts of Justice
His Honour Judge Merfyn Hughes	Chester Crown Court
His Honour Graham Knowles	Preston Combined Court
Mr Justice Langstaff	Royal Courts of Justice
His Honour Judge Howard Morrison	UN International Criminal Tribunal
His Honour Judge Daniel Pearce-Higgins	Worcester Combined Court
Her Honour Judge Alice Robinson	Basildon Combined Court
His Honour Judge John Samuels	Blackfriars Crown Court
His Honour Judge Murray Shanks	Snaresbrook Crown Court
Mr Justice Silber	Royal Courts of Justice
District Judge Somjee	Tower Bridge Magistrates' Court
His Honour Judge Simon Tonking	Stafford Combined Court
His Honour Judge John Wait	Derby Combined Court
His Honour Judge Robert Warnock	Liverpool Crown Court
His Honour Judge Hilary Watson	Wolverhampton Combined Court
His Honour Judge Charles Wide	Northampton Combined Court
Professor Andrew Ashworth	University of Oxford
Elizabeth Hill	University of York
Hilary Abrahams	University of Bristol
Dr Nicky Padfield	University of Cambridge
Peter Hungerford-Welch	City University London

Consultation Co-ordinator contact details

If you have any comments about the way this consultation was conducted you should contact the Sentencing Council Consultation Co-ordinator at: consultation@sentencingcouncil.gsi.gov.uk

Alternatively you may wish to write to:

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CONSULTATION RESPONSE