

**Sentencing Council meeting:** 18 May 2018  
**Paper number:** SC(18)MAY04 – Assault  
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## 1 ISSUE

1.1 In March 2015 the Council decided to revise comprehensively the existing assault guideline, following consideration of early findings from the assessment of the guideline. A number of issues have since caused delays, but work on revising the guideline is now ready to commence.

## 2 RECOMMENDATION

That the Council:

- considers and agrees the scope of revising the assault guideline and;
- considers and notes the approach to be taken in the policy development of the guideline.

## 3 CONSIDERATION

### Background

3.1 On 22 October 2015 the full assessment of the assault guideline was published on the Council's website;<sup>1</sup> the synthesis is attached at **Annex A**. Work was due to commence on revising the guideline in the Summer of 2016, but this was paused pending the outcome of the Law Commission review on assault offences which was published on 3 November 2015, and was anticipated to result in legislative changes to assault offences. In summary, the Commission carried out a project, at the request of the Ministry of Justice (MOJ), to look at modernising and restating the main offences of violence. It recommended the adoption of a modified version of the Home Office's 1998 draft Bill to replace the outdated Offences Against the Person

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<sup>1</sup> <http://www.sentencingcouncil.org.uk/publications/item/assault-offences-assessment-of-guideline/>.

Act of 1861, which would include a logical hierarchy of offences and a requirement that the defendant must have foreseen the level of harm caused. In addition, they proposed including within the new legislation a new summary only offence of aggravated assault, carrying a maximum sentence of 12 months' custody. This new offence would be intended to bridge the gap between the existing offences of common assault and Actual Bodily Harm (ABH). The Council has been informed since that date that the Government has no current plans to revise legislation following the proposals, and agreed to commence work on revising the guidelines in the absence of potential legislative changes. This was due to commence in Autumn 2016, but this timescale was reviewed due to the need to expedite work on the guideline for Terrorism offences.

3.2 There is now sufficient capacity within the Council's workplan to commence the revision.

### Scope

3.3 In November 2015, the Council considered other offences which could potentially be considered for inclusion in the assault guideline, including domestic violence, child cruelty offences and threats to kill. Since that date other projects have been undertaken to develop guidelines for these offences. It is proposed that the scope of the guideline is therefore the existing offences covered within it, as well as attempted murder, which it was agreed would be more appropriately covered in the assault guideline than in the manslaughter guideline.

3.4 The guideline would therefore cover the following offences;

- Attempted murder (no existing guideline)
- Causing grievous bodily harm (GBH) with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm (s18)
- Inflicting grievous bodily harm/Unlawful wounding (s20) and racially/religiously aggravated GBH/Unlawful wounding (s 29)
- Assault occasioning actual bodily harm (ABH) (s47) and racially/ religiously aggravated ABH (s 29)
- Assault with intent to resist arrest (s38)
- Assault on a police constable in execution of his duty (s89)
- Common assault (s39) and racially/religiously aggravated common assault

- Assaults on Emergency workers (potentially)

3.5 During the development of the guideline officials will closely monitor the development of the Private Members Bill on Assaults on Emergency Workers which is currently in its final stages of transition through Parliament. If, as expected, it becomes an offence, it will be necessary to consider whether there is likely to be any wider impact on other assault offences that the guideline should provide for. Should it be enacted prior to the consultation on the revised guidelines a draft guideline is likely to be required to complete the package of assault offences provided for by the guideline.

**Question One: Does the Council agree with the proposed scope of the guideline?**

#### Issues with existing guidelines

3.6 The assault guideline was the first definitive guideline the Sentencing Council published, in 2011. The evaluation highlighted an overall decrease in sentence severity, which is largely thought to be attributable to sentences for common assault which are high volume. Despite this, two offences, Grievous Bodily Harm (GBH) with intent s18 and ABH s47 were found to have impacts different to those expected. For GBH with intent, the guideline resulted in sentences increasing in excess of that estimated. For ABH sentences increased, despite the estimate that the guideline would result in less severe sentences.

3.7 The assessment of the guideline showed that while most users were positive about the guideline, the following issues will also merit consideration as part of revision of the guideline:

- There was general confusion on how to interpret and apply the step one factors of *'injury which is serious in the context of the offence'* and *'injury which is less serious in the context of the offence'*, across all the assault offences.
- The potential for differing interpretations of the step one factors *'sustained or repeated assault on the same victim'* and *'significant degree of premeditation'*.

- Whether there is potential to double count victim vulnerability in the guideline (victim vulnerability is a factor in both harm and culpability in the guideline).
- The model and structure of the guidelines, and changing to the format we have progressed to since early guideline development. This could address an issue in the existing guideline which cannot currently accommodate cases of 'medium' harm: harm that is neither the most or the least serious, which may lead to an inaccurate categorisation of harm when using the guideline.
- Whether '*spitting*' should be reintroduced as a factor increasing seriousness, particularly within the assault on a police officer (s89) cases, where there has been a shift towards less severe disposal types (although this was anticipated).
- Whether the starting points/ranges within the GBH s18 guideline are too high, particularly the starting point in category one of 12 years.
- Whether the sentence ranges in ABH s47 cases are too low (the ranges were lower than those in the preceding SGC guideline) possibly causing some sentencers to go outside the category range.

**Question Two: Does the Council agree that these are the key issues that require addressing? Are there any other issues that ought to be considered?**

#### Approach to revising guideline

3.8 Work undertaken in relation to revising the guideline will be much more extensive and resource intensive than standard guideline development. As well as considering current sentencing practice and the policy landscape such as CPS charging guidance, offending trends and the original evaluation findings, evidence of sentencing practice both pre and post guideline will need to be considered in a much more detailed way than was the case for the evaluation.

3.9 The A&R team will be undertaking significant work to explore evidence from the Crown Court Sentencing Survey (CCSS), including analysis of the prevalence of sentencing factors; changes in offence categorisation; and changes in sentence outcomes and average custodial sentence lengths (ACSLs) within offence categories. This detailed analysis will help to supplement the earlier findings on overall trends, with more specific information on which aspects of the guideline/s may be causing any of the changes seen in sentencing severity, and will provide a robust evidence base to inform Council decisions in the guideline revision.

3.10 Due to the wider range of evidence and additional work required to revise an existing guideline effectively, it is possible that developing each guideline may take longer than usual. Officials will consider how to best present the evidence outlined above to inform the Council's consideration of the extent and scope of the revised guidelines.

**Question Three: Is the Council content with the proposed approach?**

#### **4 IMPACT /RISKS**

4.1 As this is the first evaluation based revision of a guideline, it will be important reputationally to ensure a thorough assessment of the evidence available and for principled decisions regarding sentencing practice to be made and reflected in the revised guidelines. There are risks to the timescale of the guideline due to the additional work involved, and the potential for other factors, such as the Private Members Bill, to delay work. This will be mitigated by regularly reviewing the priority of revisions and available evidence.

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## Assessing the impact and implementation of the Sentencing Council's Assault Definitive Guideline

### Summary

- A 3-staged approach was undertaken to assess the impact of the Sentencing Council's Assault Definitive Guideline on sentencing outcomes and whether there were any implementation issues.

- The assumption was that where impacts occur that differ from those expected, sentencers may be implementing the guideline in a way not anticipated by the Council.

- Looking at assault offences as a whole, the guideline has slightly decreased sentencing severity. This is likely to be as a result of the downward impact of the guideline on common assault, which makes up the largest group of assault offences.

- However, despite this overall decrease in sentence severity, two offences in particular – GBH with intent (s18) and ABH (s47) – were found to have impacts different to those expected. For GBH with intent, the guideline resulted in sentences increasing in excess of that estimated. For ABH, sentences increased, despite the estimate that the guideline would result in less severe sentences. For both, issues with applying the step 1 factors in the guideline *“injury which is serious in the context of the offence”/ “injury which is less serious in the context of the offence”* may be one explanation for this.

- For assault on a police officer (s89) offences, there was a shift towards less severe disposal types, as anticipated. Sentencers attributed this to the removal of “spitting” as a factor increasing seriousness. The offence range has also slightly decreased. Likewise, for common assault (s39) offences, sentencing severity decreased and was broadly consistent to that anticipated.

- For GBH (s20) offences, there were minor increases in sentencing severity, but these had been anticipated and were within the bounds of historic fluctuations in sentencing levels; as a result there is no strong statistical evidence that the guideline has caused a change in sentencing practice for these offences.

- In interview, sentencers and lawyers were positive about the guideline and cited many benefits it had brought about. However, the evaluation suggests that there are areas where issues with implementation exist and to support this, sentencers and lawyers highlighted a number of areas that may need clarifying.

- The areas for further consideration include:

\* when to apply the factor of *“injury which is serious in the context of the offence”/ “injury which is less serious in the context of the offence”*;

\* what constitutes *“sustained or repeated assault on the same victim”* and *“a significant degree of pre-meditation”*;

\* whether there is the potential to double count victim vulnerability in the guideline and how this should be interpreted in a domestic context;

\* whether “spitting” should be reintroduced as a factor increasing offence seriousness.

## Introduction

The Sentencing Council was set up in 2010 and produces guidelines for use by all members of the judiciary who sentence criminal offences. The first guideline to be issued was the Assault Definitive Guideline which came into force in June 2011.<sup>1</sup>

One of the Sentencing Council's statutory duties under the Coroners and Justice Act 2009 is to monitor the operation and effect of its sentencing guidelines and to draw conclusions from this information.<sup>2</sup> Research and analysis was therefore undertaken to assess the impact of the guidelines on sentencing outcomes and whether there were any implementation issues.

A staged approach to evaluation was undertaken in order to ensure that the work covered all aspects necessary and to provide the flexibility needed to tailor resources to these areas. The work therefore comprised:

- Stage 1: Assessment of the resource implications of the assault guideline;<sup>3</sup>
- Stage 2: A descriptive analysis and time series analysis of changes in sentencing outcomes before and after the guideline came into effect;<sup>4</sup>
- Stage 3: Collection and analysis of qualitative data to explore some of the potential reasons for the issues found in stage 2.

## Approach

In conducting this assessment, a distinction has been made between ***impact*** and ***implementation*** issues. The Council's resource assessments are concerned with anticipating any *impact* on sentencing practice that is expected to occur as a result of the guideline, over and above any changes caused by unrelated issues (e.g. changes in the volume and nature of cases coming before the courts).

In this sense, some of the observed impacts of the guideline outlined below were expected and were identified in the resource assessment. Where this is the case, the evaluation has therefore gone no further in investigating these. Likewise, where the guideline has had no impact and none was expected, no further work has been conducted.

However, in cases where either an impact has occurred that was not expected in the Council's resource assessment, or no impact has occurred where one was expected, further work has been conducted; the assumption is that where impacts differ from those expected, this is as a result of sentencers *implementing* the guideline in a way not anticipated by the Council.<sup>5</sup>

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<sup>1</sup> See <http://www.sentencingcouncil.org.uk/publications/item/assault-definitive-guideline/>

<sup>2</sup> The Council must (a) monitor the operation and effect of its sentencing guidelines, and (b) consider what conclusions can be drawn from the information obtained by virtue of paragraph (a) (*Coroners and Justice Act 2009, Section 128*).

<sup>3</sup> The resource assessment associated with the definitive assault guideline can be found at:

<http://www.sentencingcouncil.org.uk/publications/item/assault-final-resource-assessment/>

<sup>4</sup> All offences in the guideline except assault with intent to resist arrest, due to the low volume of these offences.

<sup>5</sup> This assessment did not explore the issue of consistency in sentencing in any quantitative way. Previous research on this issue has been published (Pina-Sanchez, J. and Linacre, R. (2013) *Sentence Consistency in England and Wales*, British Journal of Criminology; Pina-Sanchez, J. and Linacre, R.



## Methodology

### Stage 1

A resource assessment to accompany the publication of the assault definitive guideline was issued in March 2011. This was undertaken as part of guideline development work and to fulfil the Sentencing Council's statutory duties under s.127 of the Coroners and Justice Act 2009 to consider the likely effect of its guidelines on prison, probation and youth justice resources.

To do this, an analytical model was developed to estimate the change in sentencing practice which might result from the new sentencing guideline. As part of this, the aims and objectives of the new guideline were taken into account.<sup>6</sup> Assumptions were also made about how sentencers would respond to, and interpret, the new guideline and what sentencing practice would be in the absence of a new guideline. The outcomes were then combined with information on the costs of sentencing to produce an estimation of likely resource impact.

More detail on the methodology employed for this resource assessment can be found at: <http://www.sentencingcouncil.org.uk/publications/item/assault-final-resource-assessment/> and for resource assessments in general at: <http://www.sentencingcouncil.org.uk/publications/item/the-sentencing-council-resource-model/>.

### Stage 2

The second stage of the work initially used the Ministry of Justice's Court Proceedings Database<sup>7</sup> to produce descriptive statistics to observe changes in the type of disposals being imposed for different types of assault offences and the Average Custodial Sentence Length (ACSL)<sup>8</sup> for each offence, in the 12 months before and the 12 months after the guideline came into effect.

However, this does not account for any fluctuations in the average severity of sentencing over time due to changes in sentencing practice which are unrelated to guidelines – e.g. the changing number and seriousness of cases coming before the courts, changing in charging practice etc. The data was therefore used to produce time series models to help distinguish between the normal fluctuations which are inherent in all sentencing data, and changes in sentencing that, statistically speaking, within the model parameters can be attributed to the new assault guideline. This was designed to assess whether it was likely that the observed changes to sentencing practice would have occurred if no guideline had been released.<sup>9</sup>

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(2014) *Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales*, Journal of Quantitative Criminology.

<sup>6</sup> The principal aims were to promote greater consistency in sentencing and increase public confidence in sentencing; sentences should also relate appropriately to the differing degrees of gravity within the specific offence, the context of other offences of violence and the wider sentencing framework relating to other offences.

<sup>7</sup> Data covers sentences in all courts, for offenders aged 18 or over. Data has been adjusted to account for potential differences in the rate of guilty pleas between the periods. This adjustment was made using guilty plea rates and reductions from the Crown Court Sentencing Survey database, to estimate pre-guilty plea sentences, to make the figures presented comparable to the sentence ranges in the guideline.

<sup>8</sup> The average custodial sentence length (ACSL) is the average (mean) sentence length for determinate custodial sentences only. It therefore excludes indeterminate sentences (life or Imprisonment for Public Protection, IPPs). This approach for calculating ACSL is consistent with that used for sentencing statistics produced by the Ministry of Justice. Finally, the ACSLs have been adjusted using data from the CCSS to provide estimates of the sentence length *before* the application of a reduction for any guilty plea. These estimates allow a better assessment of the use of sentencing guidelines as the category ranges specified in the guidelines are those before any guilty plea reduction is applied.

<sup>9</sup> Additional analyses were also undertaken to ascertain whether the guideline consultation period, beginning on 13 October 2010, affected actual sentencing practice.

The type of time series models which were used required sentencing data to be comparable - but the data was a mix of sentences comprising different sentence types and sentence lengths. To overcome this, sentences were converted into a continuous “severity scale” with scores ranging from 0 to 100, representing the full range of sentence outcomes from a discharge (represented by 0) to 20 years’ custody (represented by 100); this allowed the creation of a consistent and continuous measure of sentencing severity that could be used to evaluate changes in sentencing. However, the scale should **not** be interpreted as an absolute objective measure of sentencing severity.<sup>10</sup>

Several time series models were created in order to forecast the likely range of values, and size of average changes, that sentencing severity could take for 18 months after the guideline came into force (the period June 2011 to December 2012), assuming no guideline had been released. These estimates are represented on the graphs in this document as the “*forecasted severity region*”. The actual trend in sentence severity is represented by the red line; by comparing the two, the difference between actual and expected sentencing changes can be seen. This can then be referenced back to the changes (or absence of changes) estimated in the resource assessment. Where differences were found between actual practice and that estimated, regression analysis of Crown Court Sentencing Survey (CCSS)<sup>11</sup> data relating to these offences was undertaken to explore whether any of the guideline factors might have been influencing these outcomes.<sup>12</sup>

### Stage 3

The third stage of the assessment comprised qualitative research, conducted by Opinion Research Services (ORS), to gather evidence about the operation and perceived effectiveness of the assault definitive guideline and to explore some of the issues emerging from the earlier strands of work.<sup>13</sup> 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.<sup>14</sup> Interviewees came from all seven court regions in England and Wales and had varying degrees of experience in their role.

Around half (14) of the Crown Court judges were recruited from the Office of the Sentencing Council’s existing ‘research pool’ and the remainder 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. Six magistrates were accessed via the Magistrates’ Association e-bulletin, and the remainder via a sample of magistrates’ court clerks in each judicial region asking for volunteers (five) and then ‘snowballing’ from these individuals.

To stimulate discussion, participants were presented with a scenario – either representing a case of grievous bodily harm with intent (Crown Court judges only),

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<sup>10</sup> The sentencing severity scale was created with reference to previous sentencing guidelines to try to ensure it had an empirical basis. However, there is no single, straightforward way to do this, so there is no guarantee of its robustness.

<sup>11</sup> See <http://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/> for further information on the Crown Court Sentencing Survey.

<sup>12</sup> This analysis used unadjusted CCSS data (see footnote 8).

<sup>13</sup> Some data collection was also undertaken in the magistrates’ courts in January 2015 to complement the CCSS data from the Crown Court and examine some of the factors taken into account by sentencers when sentencing common assault, actual bodily harm, assault on a PC and assault with intent to resist arrest. The methodology largely followed that of the CCSS. In total, 339 sentencing forms were returned, of which 82 per cent (278) related to common assault offences. Due to the low volume of forms returned, it has not been possible to undertake any detailed analysis on this data; however, the findings are available on request.

<sup>14</sup> The individual depth discussions typically lasted between 30 and 45 minutes and the group sessions for around an hour.

actual bodily harm (all interviewees) or assault on a police officer (magistrates and district judges only).<sup>15</sup> They were then asked to outline which offence category they would have placed the defendant into and why, and what harm and culpability factors would have influenced their decision. Participants' more general views on the guideline were also discussed and noted.<sup>16</sup>

## Overall findings

In the 12 months after the guideline came into force, there was a slight increase in the use of some less severe sentencing options, compared to the 12 months before; discharges increased from 10 per cent to 12 per cent and fines from 9 per cent to 12 per cent. On the other hand, community orders reduced (from 38 per cent to 36 per cent) as did suspended sentence orders (from 17 per cent to 15 per cent) while the use of immediate custody remained unchanged at 22 per cent. The adjusted average custodial sentence length also remained broadly unchanged at 2.7 years.

Looking at assault offences as a whole, the guideline has slightly decreased sentencing severity. This is likely to be as a result of the downward impact of the guideline on common assault, which makes up the largest group of assault offences.

## Offence specific findings

Despite the overall effect of the guideline being a slight decrease in sentencing severity, different outcomes were found when specific assault offences were analysed. The following outlines the key findings relating to individual assault offences,<sup>17</sup> followed by some general issues highlighted through the qualitative work with sentencers.

### **Causing grievous bodily harm with intent (GBH with intent)**<sup>18</sup>

Almost all sentences imposed for causing GBH with intent are immediate custody. It was found that adjusted average custodial sentence lengths (ACSLs) rose by 17 per cent between the 12 months before and 12 months after the definitive guidelines came into force (from 5.9 years to 6.9 years).<sup>19</sup> This was substantially in excess of the small increase anticipated by the resource assessment (a rise of 2 per cent and a requirement for between 20 and 60 additional prison places). In addition, the proportion of sentences greater than seven years increased. The increase in ACSLs occurred in June 2011, and coincided very closely with the guideline coming into force.

There was also an increase in severity of sentences in the month after the guideline came into force<sup>20</sup> (see figure 1). The "forecasted severity region" indicates the range of values the sentencing severity might have taken in the absence of the guideline, taking into account the general increase in sentencing severity since 2008. As can be seen, the actual increase in sentencing severity was in excess of that predicted in the resource assessment and may therefore indicate that the guideline is not being implemented in the way anticipated.

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<sup>15</sup> 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.

<sup>16</sup> More information on the methodology, including the scenarios used, and the findings, can be found at <http://www.sentencingcouncil.org.uk/analysis-and-research/>

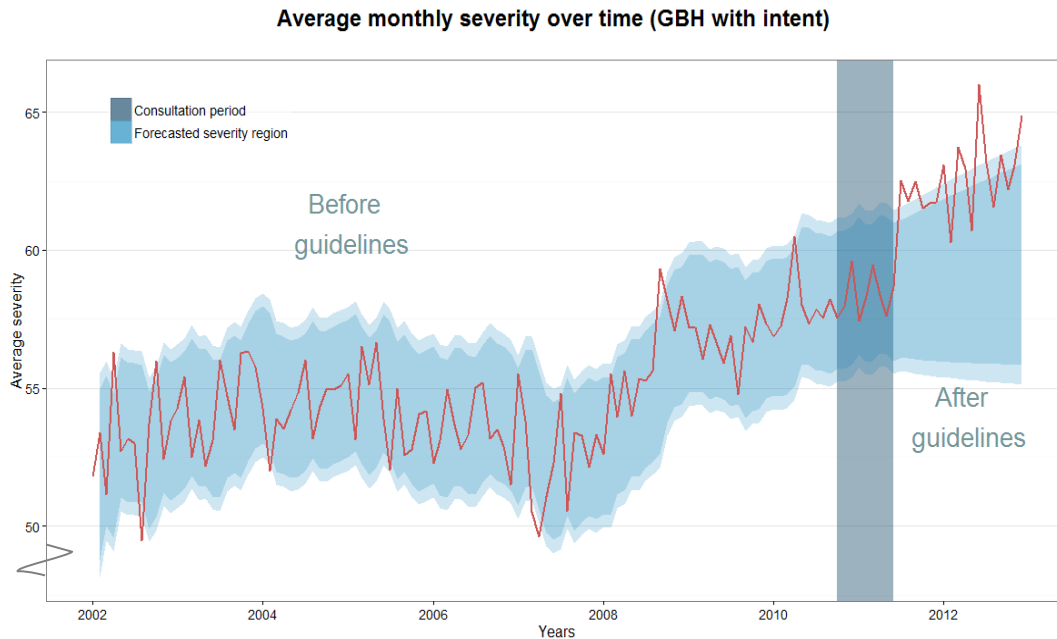
<sup>17</sup> It was not possible to undertake an evaluation of the impact and implementation of the assault with intent to resist arrest guideline. This was due to the small number of sentences for this offence.

<sup>18</sup> 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).

<sup>19</sup> During this period the use of IPPs for this offence declined by around 2.4 per cent. This could have caused some of the observed changes in sentence lengths. However, further investigation showed that a substantial difference in ACSLs persists even after including the minimum terms for IPPs in average sentence length calculation.

<sup>20</sup> There was no equivalent increase during the consultation period for the guideline.

Figure 1



A regression analysis of CCSS data was undertaken to examine why this might have occurred. This indicated that the factor in the new guideline which had the greatest effect on sentences was the step 1 factor “*injury which is serious in the context of the offence*”. The presence of this factor added around 29 per cent (1.7 years) to the average custodial sentence length.

In addition, it was found that there had been an increase in the use of the most serious offence category in the new guideline (from 17 per cent before the guideline to 33 per cent after), when compared to the old guideline. Furthermore, amongst the category 1 cases under the new guideline, the most frequent step 1 factor was “*injury which is serious in the context of the offence*”, which was present in 76 per cent of cases. Again, this suggests that this factor may be the reason for the increase in sentence levels for GBH with intent cases.

The data from the quantitative analysis was supplemented by the qualitative research which further indicated that application of the step 1 factors “*injury which is serious in the context of the offence*” and “*injury which is less serious in the context of the offence*” could be an issue.<sup>21</sup> Some participants felt that for higher end cases the factor relating to greater harm may lead to double counting and an inflation in sentences (because, for GBH with intent, a high level of harm is required in all instances for the defendant to have been charged with this offence in the first place). For others, it may be that the factor relating to lesser injury (within lesser harm) is not applied when it should be for the same reason:

*Under section 18, I'm not quite clear...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)*

Crown Court judges also felt that sentences might have risen due to the increased starting points and ranges in the guideline. Although some thought this was appropriate, others felt the starting points were too high, particularly in relation to category 1:

<sup>21</sup> Sentencers reported being unclear about when they should apply the factor in general.

*I think the level of sentencing has gone up immensely because of the guidelines (Crown Court judge)*

*The starting point in category 1 is quite high at 12 years (Crown Court judge)*

Some judges admitted that they will often go outside the category range to reduce a sentence for GBH with intent.<sup>22</sup>

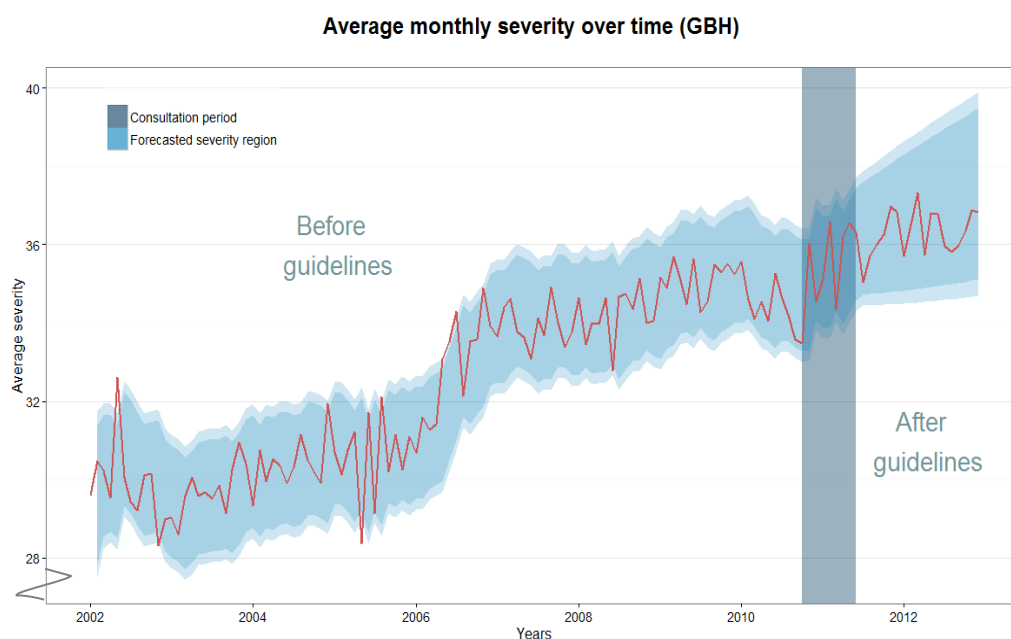
### **Grievous bodily harm (GBH):<sup>23</sup>**

There was a small increase in adjusted ACSLs, from 2.1 years in the 12 months before June 2011 to 2.3 years in the 12 months after June 2011. There was also a 2.7 per cent increase in the use of immediate custody, alongside a decrease in the use of community orders and suspended sentences.

Sentence severity also increased, but this was well within the bounds of historic fluctuations in sentencing levels (the “forecasted severity region”) as shown in figure 2. Therefore there is no strong statistical evidence that the guideline caused a change in sentencing practice for GBH. Analysis also indicated that the consultation period did not appear to have a statistically significant effect on sentencing.

This is broadly consistent with the minor changes to sentencing practice anticipated in the resource assessment which estimated increases in ACSLs of 3 per cent, (the result of rises in sentences at the most severe end of the sentencing scale) and a requirement for between 10 and 20 additional prison places.<sup>24</sup>

**Figure 2**



Further analysis using CCSS data to explore whether the factor “*injury which is serious in the context of the offence*” was influencing outcomes in a similar way to GBH with

<sup>22</sup> See Lock, K. (2015). *Assault Definitive Guideline: Findings from discussions with sentencers and practitioners*.

<sup>23</sup> Inflicting grievous bodily harm/unlawful wounding; Offences against the Person Act 1861 (section 20); Racially/religiously aggravated GBH/Unlawful wounding; Crime and Disorder Act 1998 (section 29).

<sup>24</sup> It should be noted, however, that the resource assessment also indicated overall, fewer custodial sentences and more community orders, which has not been observed.

intent showed it added 20 per cent (0.3 years) to the length of immediate custodial sentences.

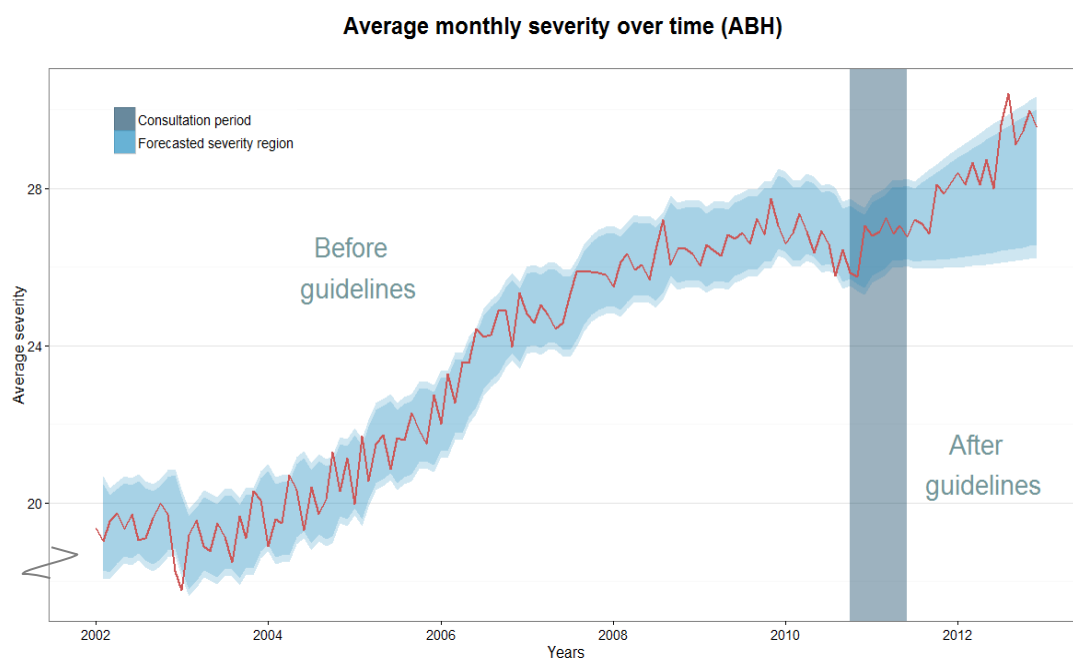
### **Actual Bodily Harm (ABH):<sup>25</sup>**

Analysis showed that there was a shift towards more serious disposal types being given – an increase in the use of custodial sentences (immediate and suspended) and a corresponding decrease in the use of community orders. The distribution of sentence lengths for immediate custody also changed, with relatively fewer shorter sentences (half a year or less) and an increase in the proportion in the range 0.5 to two years.

A regression analysis using CCSS data was carried out and showed that “*injury which is serious in the context of the offence*” was the most important factor for ABH and added 26 per cent (0.2 years) to the length of immediate custodial sentences.

These findings are in contrast to the prediction in the resource assessment which envisaged a drop in the severity of sentencing, due to the decrease in the sentencing range in the Sentencing Council guideline when compared to the previous guideline.<sup>26</sup> This equated to an estimate of between 400 and 900 fewer custodial sentences and 400 to 1,000 community orders becoming fines. The fact that the actual increase in sentence severity was almost entirely within the bounds of that expected if no guideline had come into force (see figure 3), indicates that there is no strong evidence that the guideline had an impact, despite the expectations that it would.

**Figure 3**



In contrast to the data showing no strong evidence that the guideline had an impact on sentence severity, the perceptions of the sentencers who were interviewed was that sentences had decreased, particularly for the lower level ABH offences. This view may reflect participants’ awareness that the sentencing range had decreased; many felt these were now too low and in interviews, several Crown Court judges said that they

<sup>25</sup> Assault occasioning actual bodily harm; Offences against the Person Act 1861 (section 47); Racially/religiously aggravated ABH; Crime and Disorder Act 1998 (section 29).

<sup>26</sup> The range was previously a community order to 4 years’ custody and is now a fine to 3 years’ custody.

often go outside the category range to increase a sentence for an actual bodily harm offence:

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

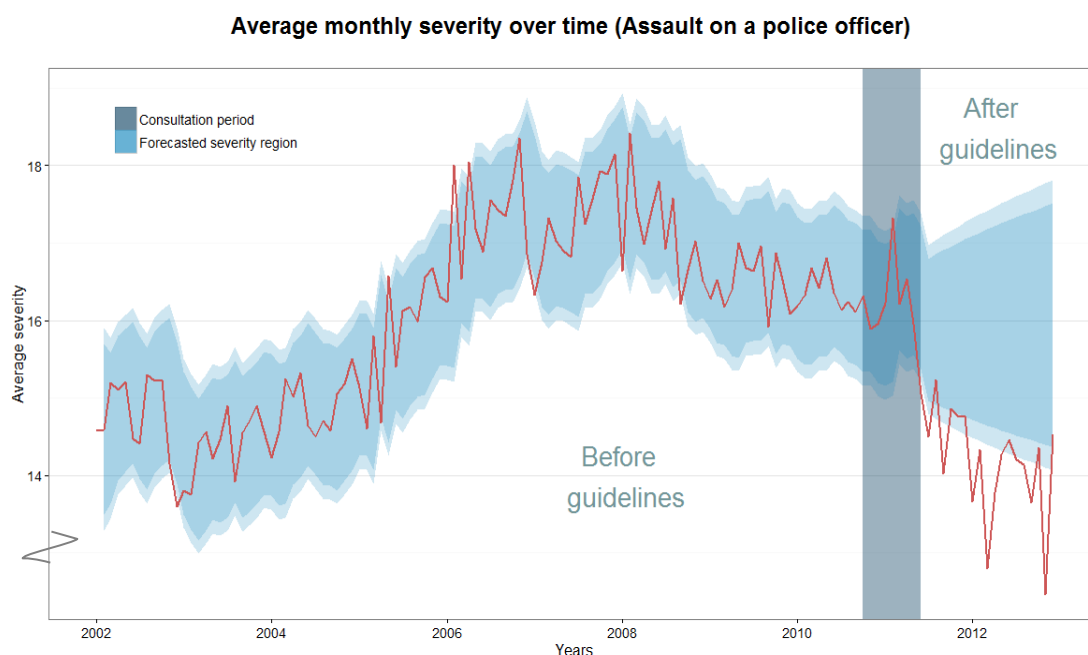
The factors of “injury which is serious in the context of the offence” and “injury which is less serious in the context of the offence” were also again cited<sup>27</sup> as factors that may be open to interpretation, due to the wide range of injuries that can be covered within this offence. This could therefore be a potential source of variation in the application of step 1 factors.

### **Assault on a police officer:**<sup>28</sup>

There was a shift towards less severe disposal types for assault on a police officer after the release of the guideline, with a smaller proportion of custodial sentences and community orders being imposed. The adjusted average custodial sentence length was 0.3 years in the 12 months prior to the guideline and just under 0.3 years in the 12 months afterwards.

Statistical analysis showed that this decrease in sentencing severity was unlikely to have occurred if the definitive guideline had not been released – as can be seen in figure 4, the actual decrease was considerably below that which might have been expected just taking into account historical changes in sentencing.

**Figure 4**



This impact is broadly consistent with that anticipated in the resource assessment – of between 200 and 600 fewer custodial sentences per year and a shift of some community orders to fines – and so indicates that the guideline is likely to have been implemented in the way anticipated by the Council.<sup>29</sup>

<sup>27</sup> Lock, K. (2015).

<sup>28</sup> Assault on a police constable in execution of his duty; Police Act 1996 (section 89).

<sup>29</sup> It would not be possible currently to explore the reasons for any changes quantitatively, as this offence is triable only summarily, and it has not been possible to collect data from the magistrates' courts.

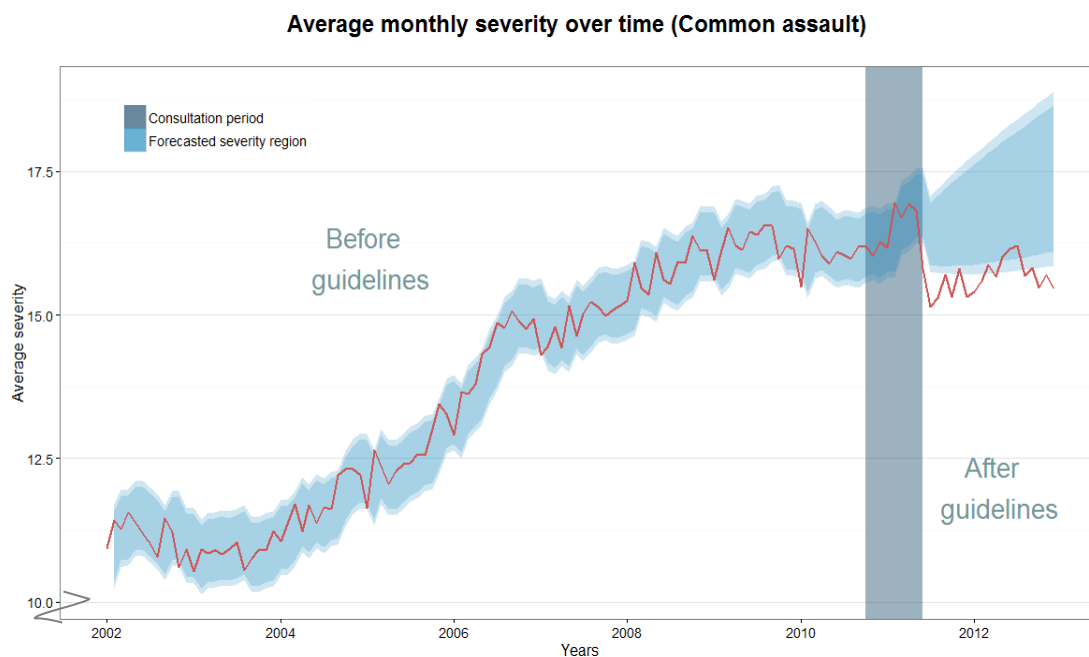
The pattern of changes in sentencing also aligns with the perceptions of the impact of the guideline raised in the interviews with sentencers. However, these perceived reductions in sentences were not always welcomed and the removal of spitting as a factor increasing offence seriousness in the Sentencing Council's guideline was seen by some to contribute to this reduction:<sup>30</sup>

*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 (district judge)*

**Common assault:<sup>31</sup>**

For common assault, there was a shift away from suspended sentences and community orders, and towards fines and discharges. The use of immediate custody was broadly similar before and after the guideline came into force, as was the adjusted ACSL of 0.3 years. Figure 5 shows that sentence severity also decreased, despite the overall trend of a steady increase since 2004. Analysis suggests these changes were caused by the new guideline, with actual sentencing going outside the “forecasted severity region”.

**Figure 5**



This impact of the guideline in decreasing sentence severity is broadly consistent with the impact anticipated in the resource assessment – which included between 400 to 900 fewer community orders and additional fines and conditional discharges (between 1,200 and 2,900, and 400 and 900, respectively). However, while the resource assessment anticipated between 1,300 and 3,000 fewer custodial sentences,<sup>32</sup> analysis shows there was no change in the use of custodial sentences before and after the guideline came into force. It was also broadly in line with sentencers' perceptions that sentences have decreased for common assault, which was attributed to the

<sup>30</sup> The slight decrease in the sentencing range for this offence may also contribute to this.

<sup>31</sup> Common Assault; Criminal Justice Act 1988 (section 39); Racially/religiously aggravated common assault; Crime and Disorder Act 1998 (section 29).

<sup>32</sup> Overall it was anticipated that between 150 and 350 fewer prison places would be needed.



difficulty in establishing injury in cases of common assault, especially “*in the context of the offence*”:<sup>33</sup>

*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 (magistrate)*

## Other issues

Other issues relating to the guideline emerged in the interviews with sentencers and practitioners, which provide useful information relating to the drafting of the guideline and the way in which it might be interpreted.<sup>34</sup>

Overall, most participants felt that the three category approach in step 1<sup>35</sup> was sensible, intuitive and provided flexibility. This was welcomed and most were not in favour of any further categories. However, a very small minority of Crown Court judges and magistrates considered the offence categories to be overly restrictive and prescriptive, thus curbing judicial discretion. These participants suggested that a fourth category might allow them more flexibility in this regard.

Despite the general feeling that three categories were sufficient, a significant number of Crown Court and district judges also 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).

*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)*

Again, most did not desire an extra category to accommodate this inclusion, the inference being that the wording of existing categories could be amended to cater for this.

The actual step 1 harm and culpability factors were generally considered appropriate by the majority of participants and there was no general call for further factors to be added; however, issues with the interpretation of some of the factors were raised and included:

- Significant difficulties with the harm factors “***injury that is serious in the context of the offence***” and “***injury which is less serious in the context of the offence***”; many Crown Court and 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:

*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's such a nebulous issue (magistrate)*

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<sup>33</sup> It is not possible currently to explore the reasons for any changes quantitatively, as common assault is triable only summarily, and it has not been possible to collect data from the magistrates' courts. Whilst section 29 offences are triable either way, volumes for this offence are low.

<sup>34</sup> See Lock, K. (2015).

<sup>35</sup> Category 1: Greater harm (serious injury must normally be present) **and** higher culpability; Category 2: Greater harm (serious injury must normally be present) **and** lower culpability; or lesser harm **and** higher culpability; Category 3: lesser harm **and** lower culpability. There had been four categories in the previous SGC guideline.

*I think that's probably the biggest issue with the guidelines...it's the one that causes the most amount of discussion at court (Crown Court judge)*

This was supported by the findings of the exercise using offence scenarios which indicated disagreements between participants regarding whether the injuries outlined in the scenarios were more or less serious in the context of the offence.

- The potential for differing interpretations of “**sustained or repeated assault on the same victim**” in greater harm:

*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 or 30 minutes? (Crown Court judge)*

*Some people will call two punches a sustained assault...to me the terms 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)*

More explicit guidance was desired on what exactly is meant by both “sustained” and “repeated” to reduce the subjectivity with which it is applied.

- General satisfaction 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.
- Concerns from some participants over the potential to double-count **victim vulnerability** 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.
- Difficulties reported from a small number of judges 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)*
- The wish from many participants to see **domestic violence** – and its psychological effects – referenced more explicitly within the guideline. However, a minority disagreed and felt that domestic violence could be adequately covered by current (albeit mostly non-domestic violence specific) step one and two factors.<sup>36</sup>

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<sup>36</sup> ‘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’.

- The potential to interpret the phrase “**a significant degree of premeditation**” in different ways; it was suggested that the word ‘pre-planning’ may be more suitable for situations when the defendant has planned the assault well in advance of perpetrating it.
- The wish from several participants 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 one.

*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)*

*It can be one of the most distressing things that victims experience...most say they would rather be punched. It needs to be highlighted (Prosecution lawyer)*

- Further consideration (raised by a small number only) of culpability factors such as “a greater degree of **provocation** than normally expected” – “how can being provoked ever justify GBH?” (Crown Court judge) and anything referencing a **group or gang** as the number making this up can be interpreted differently.

In terms of views on the impact of the assault definitive guideline, participants were generally positive, especially in relation to the consistency they felt it has brought to the sentencing process while still allowing a degree of judicial discretion and flexibility. It should, however, be noted that some responses to the scenario exercise<sup>37</sup> indicated that some variation in approach remains. This seemed to be due to the wording and differing interpretation of certain factors, for example, “injury that is more or less serious in the context of the offence”; “sustained or repeated assault”; and “use of weapon or weapon equivalent”, as outlined above.

Participants also felt that the guideline enabled more structured, logical sentencing; gave judges and magistrates confidence in their ‘instinct’; helped guide and build the confidence of inexperienced sentencers; helped mitigate against the potential for overly harsh or lenient sentences; and ensured better transparency in terms of explaining sentencing.

There was also a general view that the guideline allowed judges and magistrates to reach fair and proportionate outcomes, although as already highlighted some participants felt that some of the starting points and ranges were not appropriate. In addition, 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.

## Conclusion

This exercise has enabled an assessment of the impact and implementation of the Sentencing Council’s assault guideline. By estimating any changes to sentencing practice that are likely to have occurred without the guideline and then comparing this to what actually happened in practice after the guideline came into force in June 2011, it has been possible to ascertain if there has been any change to sentencing

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<sup>37</sup> Participants were presented with a scenario - either representing a case of grievous bodily harm with intent, actual bodily harm or assault on a police officer - and asked to outline which offence category they would have placed the defendant into and why.

outcomes.<sup>38</sup> This has then been compared to the impact estimated as part of producing the resource assessment for the guideline.

Where an impact has been observed but was anticipated, this indicates that the guideline is being implemented in the way anticipated by the Council. However, where an impact/scale of impact has been observed *but was not anticipated* (e.g. GBH with intent and ABH), this suggests there may be an issue with implementation. The further quantitative and qualitative data outlined in this document highlights potential reasons for this, which includes differing interpretation of some factors in the guideline and changing starting points and ranges. Where this leads to outcomes that some sentencers do not regard as appropriate, it may encourage some to go outside of the guideline range and not adhere to it.

This indicates the need to revisit the guideline and consider whether any changes are needed. Although those interviewed tended to view the guideline positively and highlighted a number of benefits it had brought about, some aspects are worthy of consideration, both to address some of the issues highlighted here and also to bring the guideline up-to-date with later guidelines produced by the Sentencing Council. Consequently, the Council has committed to reviewing the guideline again as part of its 2015-2018 work plan.

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<sup>38</sup> However, it is not statistically possible to attribute any changes observed to the guideline.