

## Findings – ABH road testing

### Aims

This research was conducted to understand how harm is assessed using the draft guidelines for ABH. Previous testing indicated that this step may allow for a wide range of outcomes, depending on the sentencer’s interpretation.

### Methodology

Three ABH scenarios (see Annex A) were tested with six Crown Court judges. One of the scenarios was adapted by adding a guilty plea, and this version was also tested with five magistrates.<sup>1</sup> An alternative harm model was developed (see Annex B), to understand how this might impact on assessment of harm and was tested at a slightly later date. The second model used different wording for each of the categories, including changing category 2 (medium level) of harm in both offences to: ‘Harm falling between categories 1 and 3.’

A sample of magistrates and judges was taken from the OSC’s research pool. The scenarios used were similar to those used in a previous road testing exercise, so any previous participants were deselected, as were any sentencers who had taken part in OSC research in the last year. Sentencers were approached by email, and the draft guidelines were sent to those who said they would like to take part. Interviews were conducted on Microsoft Teams and scenarios were sent to participants shortly before the interviews.

In total, five magistrates and six Crown Court judges were interviewed about the ABH guideline. There was a lower response rate in the second round, after the second harm model was developed, so this model was tested with fewer participants.

	Harm model 1	Harm model 2
Magistrates	4	1
Crown Court judges	3	3

Participants were asked to sentence up to three scenarios using the draft guideline. Responses were collated in an Excel grid and tables with individual sentencing outcomes are set out below. Where participants were given the second harm model, their responses are highlighted in green in the tables.

### Key findings on harm

- Scenario A, involving **hitting with a photo frame**, was sentenced by both magistrates and Crown Court judges, most of whom (10 out of 11) placed harm in category 2.
- For scenario B, involving **punching to the face**, sentencers were divided between categories 1 and 2 for harm (one placed it on the cusp of the two categories). Those who placed harm in category 1 focussed on the damage to the victim’s front tooth.
- For scenario C, which was a **prolonged attack with a piece of wood**, sentencers were again divided between categories 1 and 2 for harm (and three were undecided). Some said they would need to see photographs of the injury or a Victim Personal Statement (VPS) to make their assessments.

<sup>1</sup> The research took place alongside road testing of the common assault guideline and these magistrates were also interviewed about common assault scenarios.

- There were no significant differences identified where sentencers were using the second harm model. However, it is not possible to draw conclusions due to the very small number of sentencers interviewed.
- In a number of interviews, sentencers said they would want to see the VPS and/or photographs of injuries before assessing the harm.
- One judge reasoned that ABH cases would almost always fall into category 2 for harm, because a less significant injury would be charged as common assault, and a more significant injury would be charged as GBH.

### Summary findings on harm

#### Scenario A – hitting with a photo frame (5 magistrates)

All five sentencers placed the harm in category 2. Two noted that the victim required stitches.

*Two inch gash on his forehead which needed stitches so that's quite nasty... when you think about someone having an arm broken or a leg broken, a gash on your forehead seems medium, but then it's a gash on your forehead* (placed in category 2)

One said it had caused a wound and that there had also been a verbal altercation. One sentencer, who used the second model of harm, said they placed it in category 2 because it was not serious harm.

#### Scenario A – hitting with a photo frame (6 Crown Court judges)

5 out of 6 sentencers placed the harm in category 2, and one placed it in category 3, describing it as a 'low level of injury.' Of those who placed harm in category 2, one said it was a serious offence for ABH, and one thought the gash could have amounted to GBH s20.

*I can't describe a 2 inch gash which requires stitches as low level... a wound like that could have been charged as a s20 not that the sentence is any different* (placed in category 2)

One sentencer thought it came between categories 1 and 2 and chose a starting point of 12-15 months, in between these two ranges.

*There would be photographs of the injury and I would be better able to make an assessment... a 2 inch gash is quite a big cut so I might go towards the upper end of category 2 or the bottom end of category 1* (placed in category 2)

Another said they would need a VPS to fully assess the harm.

One judge reasoned that ABH cases would almost always fall into category 2 for harm, because a less significant or transient injury would be charged as common assault, and a more significant injury would be charged as GBH. They noted that they thought this was due to charging policies of the CPS, with which they disagreed.

#### Scenario B – (6 Crown Court judges)

Sentencers were divided between placing harm in categories 1 or 2. Three placed harm in category 1, one said it was either 1 or 2, and two placed it in category 2. Those who placed it in category 1 referenced damage to the victim's front tooth, which was described as a serious physical injury and would have an ongoing impact on the victim, including damage to long-term appearance.

*Although the black eye is transient, it's damage to his front tooth which becomes loose, nerve damage and permanent discolouring, and of course that's to his teeth and therefore his face and long-term appearance* (placed in category 1)

One sentencer who placed harm in category 2 did not think the broken tooth was as serious.

*By the sound of it there's probably not a great deal of damage... broken tooth* (placed in category 2)

#### Scenario C – (5 Crown Court judges)

Again, sentencers were divided between placing harm in categories 1 or 2. One said it was in category 1, one said it was in category 2, and three thought it was borderline between categories 1 and 2,

*A nasty cut to his face requiring five stitches, again I'm not told whether they would be permanent scarring, but it's a very visible facial injury with five stitches so it's clearly going to be around for a while and in the context of ABH – and this could very well be charged as a s20 – I think this is serious physical injury* (placed in category 1)

Sentencers who thought it was borderline said they would need more information to assess the harm.

*I would want to have a look at photographs to see whether or not that's going to produce scarring and if so is it to a prominent part of the face* (placed between categories 1 and 2)

*Depending on what the impact statement is, it would be category 2 tending to category 1 if there'd been... you know he's attacked with a blunt [piece of] wood...* (placed between categories 1 and 2)

## ABH

## Scenario A – hitting with a photo frame – magistrates

	<b>Culp</b>	<b>Factors</b>	<b>Harm</b>	<b>SP</b>	<b>Aggravating factors</b>	<b>Mitigating factors</b>	<b>Final sentence (before GP)</b>
1	B	• Use of weapon	2	high level community order	• Domestic context • Alcohol	• Remorse • Previous good character • Degree of provocation	low level community order
2	B	• Use of weapon	2	36 weeks	• Alcohol	• Previous good character	high level community order
3	A	• Use of highly dangerous weapon	2	1 year 6 months	• Alcohol • Presence of others	• Remorse • Previous good character	to Crown Court
4	B	• Use of weapon	2	36 weeks	• Presence of others	• Funeral setting • Remorse • Previous good character	high level community order
5	B	• Use of weapon	2	36 weeks	• Domestic context • Alcohol	• Previous good character	community order

## Scenario A – hitting with a photo frame – Crown Court judges

	<b>Culp</b>	<b>Factors</b>	<b>Harm</b>	<b>SP</b>	<b>Aggravating factors</b>	<b>Mitigating factors</b>	<b>Final sentence</b>
1	B	• Use of weapon	2	36 weeks	• Alcohol	• Previous good character	community order
2	B	• Use of weapon	2	36 weeks	• Alcohol	• Previous good character	36 weeks, suspended
3	B	• Use of weapon	2	12-15 months	• Alcohol		15-18 months
4	B	• Use of weapon	3	medium level community order	• Domestic context • Alcohol		medium level community order
5	B	• Use of weapon	2	36 weeks	• Alcohol	• Previous good character	high level community order
6	B	• Use of weapon	2	36 weeks	• Alcohol • Presence of others	• Previous good character	high level community order

Responses highlighted in green signify where sentencers used Harm Model 2.

## Scenario B – punching to the face

	<b>Culp</b>	<b>Factors</b>	<b>Harm</b>	<b>SP</b>	<b>Aggravating factors</b>	<b>Mitigating factors</b>	<b>Final sentence</b>
1	C	• No weapon used	1/2	36 weeks	• Alcohol • Repeated punching		suspended sentence or community order
2	B/C	• No weapon used	2	high level community order		• No previous convictions	community order
3	C	• No weapon used	1	36 weeks	• Alcohol		12 months custody
4	B	• Falls between A and C	1	18 months			18 months custody
5	C	• No weapon used	2	high level community order	• Domestic context		medium level community order
6	B	• Falls between A and C	1	18 months	• Alcohol		community order or suspended sentence

## Scenario C – prolonged attack with a piece of wood

	<b>Culp</b>	<b>Factors</b>	<b>Harm</b>	<b>SP</b>	<b>Aggravating factors</b>	<b>Mitigating factors</b>	<b>Final sentence (before GP)</b>
1	A	• Use of weapon • Prolonged	1 or 2	18 months	• Use of weapon • Prolonged	• Previous good character	15 months (due to Covid)
2	A	• Prolonged	1 or 2	2 years 6 months		• Provocation • Previous good character	2 years
3	B	• Use of weapon	1 or 2	12 months		• Provocation • Previous good character	10 months
4	B	• Use of weapon • Kicking	2	36 weeks	• Presence of others	• Provocation • Previous good character	6 months, suspended 2 years (after guilty plea)
5	B	• Use of weapon • Sustained	1	18 months	• Presence of others	• Previous good character • Excessive self-defence	Suspended sentence

Responses highlighted in green signify where sentencers used Harm Model 2.

## Annex A – scenarios

### Scenario A – hitting with a photo frame – magistrates

J was at the funeral of her mother-in-law when her estranged husband, N, arrived with his new partner, K. J was very upset as she suspected he had been having an affair with K during the marriage. She got drunk at the wake, and confronted N for bringing K, and embarrassing her. N told her she was making a scene and embarrassing herself. J became angry and picked up a photo frame, hitting him over the head with it. The glass in the frame broke causing a two-inch gash to N's forehead which required stitches.

J was extremely upset and embarrassed after the incident, and numerous character references expressed shock at such out of character behaviour. J pleaded guilty at the first hearing.

### Scenario A – hitting with a photo frame – Crown Court judges

J was at the funeral of her mother-in-law when her estranged husband, N, arrived with his new partner, K. J was very upset as she suspected he had been having an affair with K during the marriage. She got drunk at the wake, and confronted N for bringing K, and embarrassing her. N told her she was making a scene and embarrassing herself. J became angry and picked up a photo frame, hitting him over the head with it. The glass in the frame broke causing a two-inch gash to N's forehead which required stitches.

J was found guilty after trial.

### Scenario B – punching to the face

R was living in a shared house with V. Tension had arisen as R was leaving communal areas in a mess which had led to arguments with his housemates. One night, V returned to find R had gone out and left the kitchen and shared bathroom in a mess. When R returned home drunk later in the evening, V confronted him, and an argument began. V rose his voice and told R his behaviour was unacceptable and that the housemates all wanted him to leave. R punched V in the face 3 times, causing a black eye and damaging one of his front teeth which became loose and suffered nerve damage and permanent discolouring.

R was found guilty after a trial.

### Scenario C – prolonged attack with a piece of wood

D had bought a car from a neighbour, V, and the car had developed a very expensive fault. D was telling another neighbour of the problem with the car, when the neighbour said that V had told him the car had a serious problem a few weeks before and he was going to 'get shot of it.' D was furious and went to V's house and confronted him, asking for his money back. A nasty argument ensued; V became very aggressive and told D he 'wasn't giving him a fucking penny' and 'to get out of my fucking face before I do you'. D refused to leave so V then pushed D and punched him in the face. D was enraged, grabbed a heavy piece of wood which was leaning against the wall of V's house and swung it at V, hitting him around the head. V fell to the floor and D continued to hit him with the piece of wood and kick him to the face and body until other neighbours intervened and pulled him off. V sustained numerous cuts and bruises, including swelling to his head and eyes, and a nasty cut to his face requiring 5 stitches.

D is of previous good character and pleaded guilty on the day of trial.

## Annex B – harm models

## Model 1 (as in the draft guideline)

<b>Harm</b>	
To assess the level of harm caused by the offence, the court must consider;	
<ul style="list-style-type: none"> <li>• The range of injuries (including physical and psychological injury) that can occur in cases of assault occasioning actual bodily harm</li> <li>• Where in <b>that range</b> of injuries the injury caused falls</li> </ul>	
<b>Category 1</b>	High level of physical or psychological harm
<b>Category 2</b>	Medium level of physical or psychological harm
<b>Category 3</b>	Low level of physical or psychological harm

## Model 2

<b>Harm</b>	
<b>Category 1</b>	Serious physical injury or serious psychological harm and substantial or ongoing impact upon victim
<b>Category 2</b>	Harm falling between categories 1 and 3
<b>Category 3</b>	Low level of physical injury or psychological harm with no ongoing impact upon victim

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