

Consultation Stage Resource Assessment

Assault Offences

Introduction

This document fulfils the Sentencing Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services.¹

Rationale and objectives for new guideline

In June 2011, the Sentencing Council's Assault guideline came into force, covering most of the assault offences regularly sentenced by courts in England and Wales. In October 2015, the Council published an evaluation of the impact of the Assault guideline on sentencing outcomes. Following this, the Council decided that the guideline should be revised, to address some of the issues raised in the evaluation.

In July 2009, the Council's predecessor body, Sentencing Guidelines Council's (SGC) Attempted murder guideline came into force. The Sentencing Council has drafted a new guideline for this offence alongside the revision of the Assault guideline.

The Assaults on Emergency Workers (Offences) Act 2018 introduced a higher statutory maximum sentence of 12 months' custody for common assaults on those specified as emergency workers, and the Council has now developed a draft guideline for this offence. The existing guideline for assault on a PC, which includes a lower statutory maximum sentence, has not been included in the revised guideline.

The Council is consulting on the draft sentencing guidelines for these offences, for use in all courts in England and Wales.

The Council's aim in developing these guidelines is to provide sentencers with a structured approach to sentencing assault offences that will ensure that sentences are proportionate to the offence committed and in relation to other offences, and to address some of the issues raised in the Assault guideline evaluation.

¹ Coroners and Justice Act 2009 section 127: www.legislation.gov.uk/ukpga/2009/25/section/127

Scope

As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the guideline on the prison service, probation service and youth justice services. Any resource impacts which may fall elsewhere are therefore not included in this assessment.

This resource assessment covers the following offences:

- Common assault;
- Assaults on emergency workers;
- Assault with intent to resist arrest;
- Assault occasioning actual bodily harm;
- Inflicting grievous bodily harm / unlawful wounding;
- Causing grievous bodily harm with intent to do grievous bodily harm / wounding with intent to do grievous bodily harm;
- Racially / religiously aggravated common assault, racially religiously aggravated assault occasioning actual bodily harm, racially / religiously aggravated grievous bodily harm / unlawful wounding; and
- Attempted murder.

The *Assault Offences* guideline applies to sentencing adults only; it will not directly apply to the sentencing of children and young people.

Current sentencing practice

To ensure that the objectives of the guideline are realised, and to understand better the potential resource impacts of the guideline, the Council has carried out analytical and research work in support of it.

The Council intends for the draft guideline to encourage consistency of sentencing; however, for some of the offences, the Council also intends to change sentencing practice. This is either to address some issues identified through the evaluation of the existing Assault guideline, or to increase sentences to more appropriate levels where the Council has determined that sentences are currently too low. In order to develop a guideline that leads to the Council's intended categorisations of culpability and harm, and consequently the intended sentence levels, knowledge of recent sentencing was required.

Sources of evidence have included the analysis of transcripts of judges' sentencing remarks, sentencing data from the Court Proceedings Database^{2,3} and the Crown

² The Court Proceedings Database (CPD) is an administrative database managed by the Ministry of Justice (MoJ), containing data on defendants proceeded against, convicted and sentenced at court. Every effort is made by MoJ and the Sentencing Council to ensure that the figures presented are accurate and complete. However, it is important to note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used. Further details of the processes by which the Ministry of Justice validate the records in the Court Proceedings Database can be found within the guide to their Criminal Justice Statistics publication which can be downloaded via the link: <https://www.gov.uk/government/collections/criminal-justice-statistics>

³ The data presented in this resource assessment only include cases where the specified offence was the principal offence committed. When a defendant has been found guilty of two or more offences this is the

Court Sentencing Survey,⁴ and references to case law and news articles. Knowledge of the sentences and factors used in previous cases, in conjunction with Council members' experience of sentencing, has helped to inform the development of the guideline.

Research has also been conducted with sentencers to explore whether the draft guideline would work as anticipated. This research has provided some further understanding of the likely impact of the guideline on sentencing practice, and the subsequent effect on the prison population and probation resources.

Detailed sentencing statistics for assault offences covered by the draft guideline have been published on the Sentencing Council website at the following link:

<http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=statistical-bulletin&topic=&year.>

Common assault

Common assault is the highest volume offence covered by the draft guideline, with around 36,900 adult offenders sentenced in 2018. The most frequently used sentence outcome in 2018 was a community order, comprising 41 per cent of offenders sentenced. A further 17 per cent of offenders received a fine, 14 per cent received a discharge and 12 per cent were given a suspended sentence order. Fourteen per cent of offenders were sentenced to immediate custody, and the average (mean)⁵ final⁶ custodial sentence length (ACSL) was around three months.

Assaults on emergency workers

Between 13 November 2018 and 31 December 2018, around 290 adult offenders were sentenced for assaults on emergency workers. During the first three quarters of 2019, a further 6,400 offenders were sentenced for this offence.^{7,8} During the first three quarters of 2019, 38 per cent of offenders sentenced received a community order, and 23 per cent received a fine. A further 17 per cent were sentenced to immediate custody, 10 per cent were given a suspended sentence order, and 8 per

offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe. Although the offender will receive a sentence for each of the offences that they are convicted of, it is only the sentence for the principal offence that is presented here. The average custodial sentence lengths presented in this resource assessment are mean average custodial sentence length values for offenders sentenced to determinate custodial sentences, after any reduction for guilty plea. Further information about this sentencing data can be found in the accompanying statistical bulletin and tables published here:

<http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

⁴ During the period 1 October 2010 to 31 March 2015, the Sentencing Council conducted a data collection exercise called the Crown Court Sentencing Survey (CCSS). The CCSS recorded details on the factors taken into account by the judge when determining the appropriate sentence for an offender (such as harm and culpability factors, and aggravating and mitigating factors), and the final sentence given. For further information see <http://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/>.

⁵ All averages presented in this paper are calculated as the mean.

⁶ All statistics on sentence lengths presented in this section are final sentences, after any reduction for guilty plea.

⁷ This offence came into force on 13 November 2018. As less than two months of data were available for this offence for 2018, statistics provided in this resource assessment have been extended to include data up until the end of September 2019 (the latest data currently available).

⁸ The Ministry of Justice (MoJ) published ad hoc statistics on this offence alongside their latest 'Criminal Justice Statistics Quarterly' publication, available here: <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-september-2019>. The figures in this document differ from those published by the MoJ, as these figures relate to adult offenders only, whereas the MoJ figures also include juvenile offenders.

cent received a discharge. In the first three quarters of 2019, the ACSL was around three months.

Assault with intent to resist arrest

In 2018, around 150 offenders were sentenced for assault with intent to resist arrest. Just under a third of offenders received a community order (31 per cent), and 26 per cent were sentenced to immediate custody. A further 22 per cent received a fine, and 10 per cent were given a suspended sentence order. The ACSL in 2018 for this offence was around four months.

Assault occasioning actual bodily harm

Around 5,600 offenders were sentenced for assault occasioning actual bodily harm in 2018, and the majority were sentenced in the Crown Court (66 per cent). Most offenders received custodial sentences (44 per cent immediate, 32 per cent suspended), and a further 19 per cent received a community order. The ACSL in 2018 was 1 year 2 months.

Inflicting grievous bodily harm / unlawful wounding

In 2018, 2,700 offenders were sentenced for inflicting grievous bodily harm/unlawful wounding, and the vast majority were sentenced in the Crown Court (97 per cent). Most offenders sentenced in 2018 received either an immediate custodial sentence (58 per cent) or a suspended sentence order (34 per cent). An additional five per cent of offenders received a community order. The ACSL in 2018 was 1 year 11 months.

Causing grievous bodily harm with intent / wounding with intent to inflict grievous bodily harm

Around 1,100 offenders were sentenced for this offence in 2018. The vast majority were sentenced to immediate custody (88 per cent), and 11 per cent were otherwise dealt with.⁹ The ACSL in 2018 was 7 years 2 months.

Racially / religiously aggravated common assault, racially religiously aggravated assault occasioning actual bodily harm, racially / religiously aggravated grievous bodily harm / unlawful wounding

In 2018, around 800 offenders were sentenced for racially/religiously aggravated common assault. Thirty-seven per cent of offenders received a community order, 25 per cent were sentenced to immediate custody, 18 per cent received a suspended sentence order and 13 per cent received a fine. The ACSL in 2018 was around four months.

Around 40 offenders were sentenced for racially/religiously aggravated actual bodily harm in 2018, and most offenders received a custodial sentence, either immediate or

⁹ Due to a data issue currently under investigation, there are a number of causing grievous bodily harm/wounding with intent cases of immediate custody which are incorrectly categorised in the CPD as 'Otherwise dealt with'. The figures shown for 'Immediate custody' and 'Otherwise dealt with' should therefore be treated with caution.

suspended (35 per cent and 42 per cent, respectively). The ACSL in 2018 was 1 year 2 months.

Racially/religiously aggravated grievous bodily harm/unlawful wounding is a particularly low volume offence, with around 10 offenders sentenced in 2018. Almost all offenders were sentenced to immediate custody (89 per cent), and the remainder were given a community order. The ACSL was 2 years 9 months.¹⁰

Attempted murder

In 2018 around 80 offenders were sentenced for attempted murder. The vast majority of offenders were sentenced to immediate custody (93 per cent) and all of the rest were otherwise dealt with. The ACSL was 16 years 6 months.

Key assumptions

To estimate the resource effect of a new guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is based on the objectives of the draft guideline, and draws upon analytical and research work undertaken during guideline development as well as findings from the evaluation of the guideline. However, some assumptions must be made, in part because it is not possible precisely to foresee how sentencers' behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the draft guideline are therefore subject to a large degree of uncertainty.

Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural change. The assumptions therefore have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the proposed draft guideline, and an assessment of the effects of changes to the structure and wording of the guideline where a previous guideline existed.

The resource impact of the draft guideline is measured in terms of the change in sentencing practice that is expected to occur as a result of it. Any future changes in sentencing practice which are unrelated to the publication of the draft guideline are therefore not included in the estimates.

In developing sentence levels for the different guidelines, existing guidance and data on current sentence levels has been considered, alongside findings from the evaluation of the existing guideline, and transcripts of judges' sentencing remarks for offenders sentenced at the Crown Court.

Data from the Crown Court Sentencing Survey (CCSS) were used to understand how offenders sentenced at the Crown Court may be spread across the different levels of culpability and harm under the revised guideline.¹¹ However, the data were collected

¹⁰ The proportion and ACSL shown should be treated with caution, due to the low number of offenders sentenced for this offence.

¹¹ Data from the CCSS were used to inform the resource impacts for the offences of assault occasioning actual bodily harm, inflicting grievous bodily harm / unlawful wounding and causing grievous bodily harm with intent /

on the factors and levels in the existing guideline. As the draft revised guideline captures some different factors and is structured differently to the existing guideline, some assumptions have been made about how data from the CCSS may translate to sentencing under the revised guideline. Additionally, as the CCSS data are only available up to March 2015, and sentencing outcomes have changed slightly since then, some assumptions have been made about how the changes to sentences may affect the estimated impact for each guideline.

It remains difficult to estimate with any precision the impact the guideline may have on prison and probation resources. To support the development of the guideline and mitigate the risk of the guideline having an unintended impact, research interviews have been undertaken with sentencers, and transcripts of Crown Court judges' sentencing remarks have been analysed, and these have provided more information on which to base the resource assessment.

Resource impacts

This section should be read in conjunction with the draft guideline available at: <http://www.sentencingcouncil.org.uk/consultations/>.

Summary

The expected impact of each guideline is provided in detail below.

For common assault, recent changes in charging guidance and limited information from magistrates' courts about the types of offences coming before the courts¹² have meant that it has not been possible to estimate the impact of the revised common assault guideline on sentencing outcomes. However, the Council is exploring other ways of obtaining data to inform the final resource assessment.

For assaults on emergency workers, limited data are currently available to understand current sentencing practice and how the guideline may impact sentence outcomes, as this is a relatively new offence (it came into force in November 2018). However, the guideline has been developed taking into account the new statutory maximum sentence for this offence, and as a result, it is expected that sentences will increase from current sentence levels.

For assault with intent to resist arrest, there may also be increases in sentence levels, but as this is a low volume offence, and statistics indicate that the revised guideline is reflective of sentencing practice for the highest sentences, any impact is likely to be minimal.

For assault occasioning actual bodily harm (ABH), inflicting grievous bodily harm / unlawful wounding (GBH s20), and causing grievous bodily harm with intent (GBH s18), the revised guidelines have been drafted to address some the issues that had been raised in the evaluation of the existing guideline. The description and placement of some guideline factors which were found to have had an inflationary impact upon

wounding with intent to do grievous bodily harm. For the other offences covered by this guideline, the volume of data available was too low to produce meaningful analysis.

¹² Transcripts of sentencing remarks are not available for offenders sentenced at magistrates' courts.

offence categorisation have been revised. The Council's analysis suggests that this could lead to decreases in sentence outcomes for these offences (compared to current levels), with reductions in average custodial sentence lengths (for all three offences), and reductions in the use of immediate custody and suspended sentence orders with consequent increases in the use of community orders (for ABH). In total across the three offences, a central estimate (half way between no impact and the highest estimated impact) suggests that these changes could lead to a need for around 500 fewer prison places¹³ per year. More details of the analysis and the reasons why the actual impact is likely to be lower than the impacts estimated through the analysis are provided later.

For racially / religiously aggravated common assault, due to the uncertainty around the possible impact for the basic offence, it is not possible to determine the impact at the consultation stage. However, the Council is exploring other ways of obtaining data to inform the final resource assessment. For racially / religiously aggravated assault occasioning actual bodily harm, and racially / religiously aggravated grievous bodily harm / unlawful wounding, it is expected that the uplift approach for the racial / religious aggravation may cause increases to sentences, which may offset some of the expected decreases for the basic offences of ABH and GBH s20. However, it has not been possible at the consultation stage to assess the impact for these offences robustly.

For attempted murder, it is expected that there will be increases in sentence levels, with a requirement for around 200 additional prison places.

Common assault

The existing guideline for common assault, which came into force in June 2011, was expected to cause a decrease in sentences. The guideline evaluation showed that when the guideline came into force, it caused a decrease that was broadly consistent with the impact anticipated – a decrease in the use of community orders, and an increase in the use of fines and discharges. However, while the resource assessment anticipated a decrease in custodial sentences, the evaluation showed that there was no change in the use of custodial sentences when the guideline came into force.

The existing guideline has two levels of culpability and two levels of harm, leading to three offence categories: a combination of higher culpability and greater harm leads the sentencer to placing the offender in category 1, a combination of lower culpability and lesser harm leads to category 3, and a combination of higher culpability and less harm, or lower culpability and greater harm, leads to category 2. The draft revised guideline has two levels of culpability and three levels of harm, leading to six offence categories (a two by three table). The three levels of harm in the revised guideline provides sentencers with a medium harm level for the first time.

The Council's intention with the revised guideline is not to change sentences significantly and considers the starting points and ranges in the existing guideline to be proportionate to the lowest level assault offence. The revised structure and factors

¹³ All impacts on prison places presented in this resource assessment are rounded to the nearest 100 prison places.

have been drafted so that cases should fall within the appropriate categories, but without any substantial changes to sentencing outcomes.

During the development of the revised guideline, 23 interviews were conducted with magistrates and district judges to understand how the guideline might be implemented in practice and whether there may be an impact on average sentences. The research suggested that the introduction of a medium category of harm may lead to some changes in sentencing outcomes.

For common assaults that are of average/middling seriousness (i.e. not the most or least serious types of common assaults), there is some indication that sentences may increase, with shifts in some cases in the level of starting point fines.¹⁴ There is also a possibility of increases in the starting point levels of community orders (from medium to high), although the evidence was less clear on this, and it is also possible that there may be shifts from fines to community orders, although this is based on a comparison of the guidelines and is not backed-up by the research specifically.

At the more serious end of offending, there is some indication of the reverse trend, with possible decreases in the levels of community orders, decreases in the levels of fines, and shifts from community orders to fines.

One specific type of assault for which sentences may increase is where the new factor 'Intention to cause fear of serious harm, including disease transmission' is taken into account. This factor has been included in high culpability, and will capture situations where an offence causes a victim to fear they will suffer serious harm or contract a disease. It is not known how the seriousness of such offences would be assessed using the existing guideline, although analysis of sentences recently imposed for threats of Covid-19 transmission indicates that the presence of this factor is already providing for a higher offence seriousness assessment and sentence. However, as the guideline will not apply to offences committed in the current epidemic the number of offences to which it applies are likely to be lower in volume.

Despite the fact that common assault is a high-volume offence – meaning that any impact that the guideline has on sentences has the potential to have a considerable subsequent impact on prison and probation services - there is very little evidence available for this offence:

- Although we conducted interviews with sentencers during the development of the guidelines, we were only able to test three specific scenarios. It is therefore not clear what proportion of cases these scenarios represent.
- No detailed data on factors taken into account at magistrates' courts are currently available for common assault, and transcripts of judges' sentencing remarks are only available for Crown Court cases. Therefore, there is no reliable evidence on the types of offences coming before the courts or how offenders might be spread across the different levels of culpability and harm under the revised guideline.

¹⁴ The research suggests that there may be a decrease in Band A fines and an increase in Band B fines. The starting point for a Band A fine is 50% of the offender's relevant weekly income, and the starting point for a Band B fine is 100% of the offender's relevant weekly income.

- The nature of offences of common assault and ABH is likely to have changed recently. In November 2018, the Crown Prosecution Service (CPS) issued updated charging guidance for common assault and ABH. This means that the types of offences coming before the courts (and therefore counted within the data) for each of these offences may be different now compared to the offences under the previous charging guidance. For example, an assault leading to a particular type of injury may previously have been charged as a common assault, but now may be more likely to be charged as an ABH. This may then lead to a different mix of offending within each offence. As data on sentencing outcomes are only available up to the end of 2018, this means that most of the data available are based on offenders prosecuted under previous charging guidance, and so the sorts of offences currently being charged as common assaults are likely to have changed since then. This makes it even more difficult to estimate the impact of the guideline.

With only basic information about sentencing outcomes, it is therefore very difficult to estimate the impact that the guideline might have.

For all of these reasons, it has not been possible at the consultation stage to deduce the likely impact of the guideline. However, in mid to late 2020, the Council plans to explore other data collection options. The data obtained should provide a much more detailed picture of the types of common assaults being seen by the courts, including under the new charging guidance. Data for 2019 will also be available by that point. Therefore, this should allow a clearer picture of the impact of the guideline for the resource assessment to accompany the definitive guideline.

Assaults on emergency workers

The Assaults on Emergency Workers (Offences) Act 2018 introduced a higher statutory maximum sentence of 12 months' custody for common assaults on those specified as emergency workers. It is expected that those who previously would have been convicted of assault on a police officer (with a statutory maximum of six months) will now instead be convicted of this new offence.¹⁵ It is also expected that other emergency workers, who previously might have been charged with common assault (with a statutory maximum of six months) will also now be convicted of this new offence.

The Act came into force on 13 November 2018. Sentencing data up to the end of September 2019 are currently available for this offence, covering ten and a half months of sentencing practice for this offence. Therefore, only a limited amount of data have been available on which to base the development of the guideline and any estimate of its impact on sentences.

The statistics on sentencing outcomes available to date suggest that the sentences imposed for this offence have been considerably lower than the statutory maximum, with a large proportion of offenders sentenced during the first three quarters of 2019 receiving either a community order (38 per cent), fine (23 per cent) or discharge (8

¹⁵ The existing guideline for assault on a PC which includes a lower statutory maximum sentence has not been included in the revised guideline.

per cent). Of the 17 per cent who received an immediate custodial sentence, no offenders received a sentence of over six months.

The Council has drafted the guideline with the higher statutory maximum sentence in mind, with sentence levels that it deems appropriate for the different levels of seriousness of offending. As a result, it is expected that sentences will increase under the draft guideline, with a shift from fines and discharges towards community orders, and from community orders towards custodial sentences (immediate and suspended). Therefore, it is expected that there will be an increase in the use of custodial sentences (immediate and suspended) and a substantial decrease in the use of fines and discharges (particularly as the sentencing range for this offence does not include discharges). It is not possible to tell whether, overall, the use of community orders will increase or decrease, and it may be that the increases and decreases cancel each other out so that there is no impact on community orders.

It is also expected that the average custodial sentence length (ACSL) for this offence will increase.

A significant reason for the majority of sentences being towards the lower end of the statutory maximum could be the limited powers of magistrates' courts, who would usually deal with these offences, in only being able to impose six months' custody. There is potential that magistrates may be reluctant to commit offences to the Crown Court for sentence, and in the absence of guidance are considering proportionality of sentence in respect of basic common assault offences, as well as overarching guidelines such as *Allocation* and the *Imposition of community and custodial sentences* guideline. The draft guideline may lead sentencers to higher starting point sentences and encourage them to commit offences to the Crown Court, where higher sentences are available, therefore leading to an overall increase in sentencing outcomes.

However, if sentences increase following the introduction of the guideline, it is considered that this increase would be in line with the intention of Parliament to increase sentences, with that change being reflected in the new guideline.

It should also be noted that there is a possibility that sentences may increase for this offence as a result of the new factor 'Intention to cause fear of serious harm, including disease transmission'. In the same way as for common assault, this factor has been included in high culpability, and will capture situations where an offence causes a victim to fear they will suffer serious harm or contract a disease. It is not known how the seriousness of such offences would be assessed using the existing guideline, although analysis of sentences recently imposed for threats of Covid-19 transmission indicates that the presence of this factor is already providing for a higher offence seriousness assessment and sentence. However, as the guideline will not apply to offences committed in the current epidemic the number of offences to which it applies are likely to be lower in volume.

With only a limited amount of data available on sentencing outcomes to date, and with no information on the levels of seriousness of the cases coming before the courts, it has not been possible to estimate the impact that the guideline may have on sentencing outcomes at the consultation stage. However, by the time the definitive guideline is developed, more data will be available and it may be possible to estimate the impact at that point.

Assault with intent to resist arrest

The existing guideline for this offence was expected to decrease sentences slightly. However, it was not possible to evaluate the guideline's impact, as the number of offenders sentenced per year was too low to produce any meaningful analysis.

When developing the revised guideline, the Council was alert to the relationship between this offence (with a statutory maximum of two years' custody) and the offence of assault on an emergency worker (with a statutory maximum of 12 months' custody) in that an assault with intent to resist arrest will be an assault on a particular category of emergency worker with the added element of resisting arrest, and so sentences were revised to ensure relativity with the guideline developed for assault on an emergency worker.

The existing guideline has two levels of culpability and two levels of harm, leading to three offence categories. The draft revised guideline has two levels of culpability and three levels of harm, leading to six offence categories.

Under the existing guideline, the starting point in the lowest category of seriousness is a Band B fine, whereas in the draft revised guideline the starting point in B3, the lowest category, is a medium level community order. As a result of this, there may be an increase in the use of community orders and a subsequent decrease in the use of fines and discharges.

In the existing guideline, the starting point in the medium category of seriousness is a medium level community order, whereas in the draft guideline, the medium categories have starting points of a high level community order (B2) and 26 weeks' custody (A2). There could therefore be a slight shift towards an increased use of custody (both immediate and suspended) and a decreased use of community orders.

In the existing guideline, the starting point in the highest category of seriousness is 26 weeks' custody, whereas in the draft guideline the starting point in A1, the highest category, is 9 months' custody. As a result of this, there may be a slight increase in the ACSL. However, statistics show that some offenders already receive sentences above the existing starting point: in 2018, 16 per cent of adult offenders sentenced to immediate custody for this offence received a final sentence of over 6 months, suggesting there was already a substantial proportion of offenders in this higher category. This suggests that any increase in the ACSL may be minimal.

Overall, this means that there may be an increased used of custody (both immediate and suspended), a decreased use of fines and discharges, and a possible small increase in the ACSL. It is not clear what the impact on community orders might be, and it might be that the increases and decreases balance out and therefore that there is no impact on community orders, but it is not possible to determine this from the evidence available.

As the number of offenders sentenced for this offence is fairly low (around 150 in 2018), and sentencing outcomes fluctuate slightly from year to year, it is not possible to estimate with any precision the likely impact of the draft guideline. However, it has been estimated that even if the proportion of offenders sentenced to immediate custody doubled under the revised guideline (from 26 per cent in 2018 to 52 per cent under the draft revised guideline), and the ACSL increased by around 2 months (from

around 4 months in 2018 to around 6 months under the revised draft guideline), only around 10 additional prison places would be required. As it is unlikely that proportion sentenced to immediate custody would increase to the point of being doubled under the revised guideline, the actual impact of the guideline is likely to be smaller than this. It is therefore expected that only minimal additional prison places will be required.

Assault occasioning actual bodily harm (ABH), Inflicting grievous bodily harm / unlawful wounding (GBH 20), Causing grievous bodily harm with intent / wounding with intent to inflict grievous bodily harm (GBH s18)

The existing guideline for ABH was expected to cause a decrease in sentences. However, the evaluation of the impact of the guideline showed that the expected decrease did not occur. There was some evidence of a small increase in sentence severity, but this increase could not be directly attributed to the guideline. Sentences then continued to increase steadily and by 2018, the proportion of offenders receiving an immediate custodial sentence was at its highest level in the past decade (44 per cent), and the ACSL was at its second highest level over the same period (13.7 months, after peaking in 2017 at 13.9 months).

For GBH s20, the evaluation found that the existing guideline had not had any unintended impacts.

The existing guideline for GBH s18 was expected to cause increases to sentences, but the evaluation of the impact of the guideline showed that it caused increases in excess of those anticipated. Since then, sentences have continued to increase almost year-on-year, and by 2018, the ACSL for this offence was at its highest level in the past decade (7 years 2 months).

The Council's intention when developing the revised guidelines is to revise the structure of, and factors within culpability and harm to ensure that offenders are categorised appropriately and proportionate sentences are imposed. This should then have the effect of bringing sentences down for GBH s18, for which sentences increased beyond the level expected under the existing guideline, and also for ABH, where decreases were not observed as intended by the existing guideline. The GBH s20 existing guideline was not found to have had any unintended impact on sentencing outcomes; however, as the Council's intention is to address the issues found with the existing guidelines for GBH s18 and ABH, and to maintain the relationship between the guideline structures and sentences across the three guidelines, it is likely that sentences for GBH s20 will also decrease.

Analysis of transcripts of judges' sentencing remarks, research with sentencers and data from the CCSS for this offence suggest that categorisations, and consequently sentences, are likely to decrease under the revised guidelines for these offences. These decreases are primarily expected to affect cases of medium seriousness. Sentences are not expected to change notably for the most or least serious types of cases. The two main reasons for the decreases found through the analysis were:

- the removal of the factors of 'Sustained or repeated attack' and 'Victim is particularly vulnerable because of personal circumstances' from the categorisation of harm – under the existing guideline, the analysis suggests that there are often cases where these two factors are present and therefore

sentencers categorise these offenders at the 'greater harm' level within the guideline. However, in many of these cases, the analysis suggests that the injuries were not serious. Therefore, under the draft revised guideline, where harm is determined based only on the physical or psychological harm caused, the analysis suggests that sentencers would place these offenders at a lower level of harm, and,

- the addition of medium levels of harm and culpability – previously cases were more likely to be placed in greater harm/higher culpability than in lesser harm/lower culpability, so the addition of medium levels for each of these is more likely to lead to decreases in categorisation than increases, therefore ensuring that cases of medium seriousness are placed towards the middle of the sentencing table and are not unintentionally pushed up, as it seems has been occurring for some cases under the existing guideline.

Based on the analysis alone, it is estimated that the guidelines could lead to the impacts provided below.¹⁶ However, there are several key reasons why the actual impact of the guidelines is likely to be lower than estimated (i.e. that sentences will decrease, but not to the extent that the analysis has suggested), and these are given below the impacts.

For ABH, the analysis suggests that the revised guideline could lead to:

- Decreases in the use of immediate custody and suspended sentence orders and an increase in the use of community orders, equating to (each year) up to around 600 more offenders sentenced to community orders, up to around 200 fewer offenders given suspended sentence orders and up to around 300 fewer offenders sentenced to immediate custody¹⁷,
- A decrease of up to around 3 months to the average final¹⁸ custodial sentence length (from 14 months to 11 months), and,
- A requirement for up to around 400 fewer prison places per year.

For GBH s20, the analysis suggests that the revised guideline could lead to:

- A decrease of up to around 3 months to the average final custodial sentence length (from 1 year 11 months to 1 year 8 months), and,
- A requirement for up to around 200 fewer prison places per year.

For this offence, there may also be a small shift from immediate custodial sentences to suspended sentence orders, for offenders who now receive a custodial sentence of two years or less where previously the sentence may have been above two years,

¹⁶ For these estimates, it has been assumed that those serving a determinate sentence would be released half-way through their sentence and those serving an EDS would be released after serving 90% of their sentence (based on analysis of MoJ data). For GBH s18, life sentences have been excluded from the estimates, as no reliable information on minimum terms were available on which to base any estimates of sentence length or time served in prison. However, as only 10 offenders received a life sentence for this offence in 2018 (around 1 per cent of all adult offenders sentenced for this offence), and offenders who have committed the most serious types of this offence are expected to continue to receive similar sentences under the new guideline, it is not expected that there will be any impact on these offenders under the revised guideline.

¹⁷ These estimates have been rounded to the nearest 100, and so the increases and decreases may appear not to cancel each other out.

¹⁸ Final sentences are provided here instead of pre-guilty plea sentences, because final sentences relate more directly to the length of time an offender would serve and therefore to the resource impact.

and therefore these offenders may now be eligible to have their sentence suspended.¹⁹

There may also be a small decrease in the use of community orders, with some offenders now receiving custodial sentences or suspended sentence orders instead. However, as only around 140 offenders were given community sentences in 2018, and it is expected that some offenders will continue to receive community sentences under the revised guideline, it is expected that if this change occurs, the impact will be small.

For GBH s18, the analysis suggests that the revised guideline could lead to:

- A decrease of up to around 9 months to the average final custodial sentence length (from around 7 years and 2 months to around 6 years and 5 months), and,
- A requirement for around 400 fewer prison places per year.

However, **these figures are very likely to be overestimates** of the decreases to sentence severity, and as such, **the actual impact is expected to be smaller.**

Reasons why these are likely to be overestimates include the following:

- The types of cases coming before the courts are likely to have changed since 2014 (the period on which the estimates are partly based). The average custodial sentence length has increased for each of these three offences since 2014, suggesting that the cases coming before the courts now may be more serious than they were during the period of CCSS data used in this analysis. For example, police recorded crime data suggest that there has been an increase in offences involving the use of knives and sharp objects.²⁰ If cases are more serious, and are serious enough to be appropriately categorised at the higher ends of both culpability and harm (both under the existing and revised guidelines) then the proportion of cases categorised at the higher levels of culpability and harm are likely to be greater than estimated through the analysis. This would mean that the analysis has underestimated the proportion of high sentences, and sentences are therefore likely to decrease to a lesser degree overall.
- The Crown Prosecution Service charging guidance for assault offences recently changed, and it is expected that some offenders who might have been charged with common assault during the period for which most of the data and other evidence have been available, would now be charged with ABH. This means that the revised ABH guideline would apply to a larger proportion of cases that are likely to be categorised at the lowest levels of culpability and harm, both under the existing and revised guidelines, and consequently that our analysis has underestimated the proportion of low sentences and that the decrease caused by the revised guideline would be likely to be smaller than estimated.

¹⁹ A custodial sentence can be suspended if it is between 14 days and 2 years in length.

²⁰ See the Office for National Statistics 'Crime in England and Wales' statistics bulletin for the year ending June 2019, section 7:
<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingjune2019#rise-in-offences-involving-knives-or-sharp-instruments-and-firearms-offences>

- The analysis has predominantly been based on sentencing remarks and CCSS data, both of which cover only Crown Court sentencing practice. Offenders sentenced at magistrates' courts for ABH (around one third in 2018) are likely to have committed offences that are less serious overall than those sentenced at the Crown Court, and therefore will be more likely to be placed at the lower levels of culpability and harm and be less affected by the causes of the decreases (which are expected to affect the medium seriousness cases more than those at the top and bottom ends of seriousness). Therefore, for ABH, the decreases in sentences are likely to be smaller than estimated.
- In April 2018, the previous Chairman of the Council issued communications to all members of the judiciary to emphasise the need for sentencers to follow the *Imposition of Community and Custodial Sentences* guideline, as there was evidence that the guideline had not had the intended impact to date. Previously, evidence suggested that suspended sentence orders were sometimes being imposed as a more severe version of a community order, where cases had not necessarily crossed the custody threshold and therefore a custodial sentence was not fully intended. The *Imposition* guideline came into force in February 2016, but early evidence of its impact suggested that the expected decreased use of SSOs and increased use of COs had not been observed. Since the letter was distributed, if the imposition of COs has increased and the imposition of SSOs has decreased, then the *Imposition* guideline may now be having the intended effect. Therefore, if more offenders are receiving COs now than during the period that the data analysis is based on, it is thought that some offenders would already be receiving the sentence that the new ABH guideline should lead to, and so the impact of the guideline in decreasing sentences may be smaller than estimated. Findings from an evaluation of the impact of the *Imposition* guideline, determining whether this impact has occurred, will be available in due course.
- The estimates of sentences under the revised guidelines do not take into account any adjustment for aggravating and mitigating factors, as this would be difficult to measure robustly, and so it has been assumed that the impact of these balance each other out. However, it is known that aggravating factors tend to outweigh mitigating factors, and so there is a possibility that estimated sentences could be slightly higher, and therefore that the decrease is likely to be lower than estimated.

Overall, this suggests that the estimated impacts outlined above are likely to be over-estimates. It is not possible to tell how much smaller the actual impact might be, but it is expected that there would still be at least some decrease in sentence severity overall. Assuming that the impact on prison places is likely to be greater than zero, but less than the estimated levels, it may be sensible to assume a central estimate, leading to:

- Around 200 fewer prison places required per year for ABH,
- Around 100 fewer prison places required per year for GBH s20,
- Around 200 fewer prison places required per year for GBH s18, and therefore,
- A total reduction of around 500 prison places per year for these offences.

By the time the final resource assessment is produced, data covering sentencing practice in 2019 will be available, as well as other data options that the Council are

exploring. This will provide more recent evidence on sentencing volumes and outcomes, which should help to inform the final resource assessment.

Racially / religiously aggravated common assault, racially religiously aggravated assault occasioning actual bodily harm, racially / religiously aggravated grievous bodily harm / unlawful wounding

For the racially / religiously aggravated offences of common assault, ABH and GBH s20, the Council has adopted the same model as used for some of its other recent guidelines, including racially / religiously aggravated harassment (fear of violence) racially / religiously aggravated criminal damage, and several public order offences such as racially or religiously aggravated disorderly behaviour with intent to cause harassment, alarm or distress. Sentencers are first asked to reach a starting point sentence for the base offence and adjust for any aggravating or mitigating factors, then apply an uplift for the racial / religious aggravation. The uplift depends on whether the level of racial / religious aggravation was high, medium or low.

Research conducted for this model previously (for other offences) suggested that it may lead to a slight increase in sentences compared with current sentencing practice.

For common assault, the lack of data on current sentencing practice and the uncertainties around the possible impact of the draft revised guideline make it difficult to estimate with any certainty the impact of the guideline on sentencing for the racially / religiously aggravated offence. However, data that the Council are exploring should provide a clearer indication of the likely impact of the guideline for the final resource assessment.

For ABH and GBH s20, the guidelines for the base offence are expected to cause decreases in sentences, as outlined earlier. For the racially / religiously aggravated offences, it may be that any small increases observed as a result of the uplift approach somewhat offset the expected decreases for the base offences. Therefore, there may still be decreases in sentences, but it is expected that these decreases might be to a lesser extent than for the base offences, or that the increases and decreases balance out, with no subsequent impact on sentence outcomes. However, without information on the levels of aggravation seen by the courts, and with the uncertainties about the impacts for the base offences, it is not possible to estimate the impact of these guidelines at the consultation stage. Further work will be conducted for the final resource assessment.

Attempted murder

The existing guideline for attempted murder, produced by the Sentencing Guidelines Council (SGC), contains three categories of seriousness reflecting the nature of the offence. There are three levels of harm within each category: serious and long term physical or psychological harm, some physical or psychological harm and little or no physical or psychological harm. Starting points and sentence ranges within each category vary according to the level of harm found.

The draft revised guideline for attempted murder adopts the Sentencing Council's standard approach, based on four levels of culpability and three levels of harm, with a sentencing range from 3 to 40 years' custody.

Revisions to provisions for murder offences increasing minimum sentences in particular circumstances have led to some concerns that sentences in the existing guideline for attempted murder are too low. The Council therefore decided that sentences in this guideline should be revised to ensure the gravity of this offence is properly reflected. Sentences in the draft revised guideline have been tested against a sample of transcripts of judges' sentencing remarks, to ensure that appropriate sentences are imposed for this very serious offence. Research with sentencers was also conducted with an earlier draft of the guideline to assess whether the guideline would be used as expected.

Transcripts of Crown Court judges' sentencing remarks for attempted murder cases have also been used to assess how sentences might change under the draft revised guideline.²¹ The analysis found that the majority of sentences would be likely to increase under the draft guideline. Sentences are expected to increase by different amounts depending on the exact details of the case, but it is anticipated that on average there will be a similar impact across most offence categories (e.g. A1, A2, B1, etc). This is expected to lead to an overall increase of around 5 years to the average final custodial sentence length (from around 15 years 8 months to around 20 years 8 months).²² Based on this analysis it is expected that the draft guideline will result in a requirement for around 200 additional prison places.^{23,24}

Risks

In attempting to estimate the likely resource impacts of this guideline, there are two main risks to consider:

Risk 1: The Council's assessment of current sentencing practice is inaccurate

An important input into developing sentencing guidelines is an assessment of current sentencing practice. The Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Inaccuracies in the Council's assessment could cause unintended changes in sentencing practice when the new guideline comes into effect.

This risk is mitigated by information that is gathered by the Council as part of the guideline's development. This includes research interviews that have been undertaken with sentencers, where case scenarios were used to test whether the guideline has the intended effect. However, there were limitations on the number of scenarios which could be explored, so the risk could not be fully eliminated. The

²¹ This analysis was based on a representative sample of attempted murder cases sentenced in 2015. This sample included cases categorised at culpability levels A, B and C and harm levels 1, 2 and 3 (none of the cases were categorised at culpability level D). The Council is aware that sentences have increased slightly since 2015, and so intends to conduct further research using more recent cases in time to inform the final resource assessment.

²² The ACSL calculations for attempted murder have been based on the transcript analysis undertaken. This differs from the ACSL calculations for other offences shown in this document, which are based on CPD data.

²³ To calculate the expected resource impact, volumes of sentences have been adjusted in line with 2018 volumes. It has also been assumed that those serving a determinate sentence would be released half-way through their sentence, those serving an EDS would be released after serving 90% of their sentence (based on analysis of MoJ data), and those serving a life sentence would serve the minimum term given (no data are available on the actual length of time served by offenders on life sentences).

²⁴ Estimates have been rounded to the nearest 100.

Council will seek views on the draft revised sentences during the consultation and will decide if further revisions are necessary.

Risk 2: Sentencers do not interpret the new guideline as intended

If sentencers do not interpret the guideline as intended, this could cause a change in the average severity of sentencing, with associated resource effects.

The Council takes a number of precautions in issuing a new guideline to try to ensure that sentencers interpret it as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Transcripts of Crown Court sentencing remarks for assault cases have also been studied to ensure that the guideline is developed with current sentencing practice in mind. Research carried out with sentencers has also enabled issues with implementation to be identified and addressed prior to the publication of the guideline.

Consultees can also feed back their views of the likely effect of the guideline, and whether this differs from the effects set out in the consultation stage resource assessment. The Council also uses data from the Ministry of Justice to monitor the effects of its guidelines to ensure any divergence from its aims is identified as quickly as possible. Additionally, the Council is exploring other data options that should provide a clearer picture of current sentencing practice.