

ABH and Common Assault road-testing findings

Introduction

Twelve interviews were conducted with magistrates and district judges to discuss the potential *Common Assault* and *Actual Bodily Harm (ABH)* draft guidelines. The ABH interviews covered both step one and step two, but were primarily focused on discussing revised approaches to assessing harm. The common assault interviews only focused on step one and starting points, but again focused on the new draft harm model.

The interviews were conducted either over the phone or face-to-face. Each sentencer looked at two scenarios (one each on ABH and common assault, see Table 1), sentencing the scenarios as if they were in court today (using the current assault guideline) and then sentencing using the new draft guideline. The guideline was also discussed in a group setting with around 15 magistrates at a Regional Magistrates' Leadership event.

The research will provide valuable information on how the guideline might work in practice to support development of the draft guideline. However, it should be noted that as there are limitations to this work¹, the research findings presented below should be regarded as **indicative** only and not conclusive. Further research on the draft *Assault* guideline is also being conducted over the forthcoming months and will encompass any further changes to the model in the guideline. This will include two further common assault scenarios which are currently being tested.

Table 1. ABH and common assault scenarios used in road-testing

ABH scenario – 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 photoframe, hitting him over the head with it causing a small cut which required gluing. 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.

(The objective was to identify how the level of injury was assessed and if the harm model provided for clear understanding and a consistent assessment among sentencers.)

¹ Limitations include: this is a small sample which is not necessarily representative;; scenarios only include limited detail of the actual case, potentially undermining how realistic the sentencing exercise is; and these findings are based on testing from one group of sentencers - further research is taking place with magistrates to understand their views on the draft assault guideline.

Common assault scenario – T and M were on a night out and waiting in line to get into a nightclub for some time. On arriving at the end of the queue the doorman, B, informed them the venue was full and no further entry could be admitted. M became very angry and abusive, shouting that she was cold and needed the toilet and had queued for 45 minutes and was not leaving. This continued for 5 minutes. B then advised her that due to her behaviour and bad language she would definitely not be allowed to enter and told her to leave the premises. M refused and tried to push past B, who held her back. M bit B's hand hard, causing him to let her go. Teethmarks were visible in his skin for some time, and the skin remained red until the following morning. In B's statement he said while the bite was painful it was par for the course in his job. M pleaded guilty at the first hearing and was full of remorse and regretted her behaviour.

(The objective was to identify how the level of injury was assessed and also to explore how a bite was assessed, i.e; was it treated as a weapon.)

Key Findings

ABH

- Most sentencers preferred the new guideline when compared with the current guideline. They found the new guideline simpler and more flexible, particularly with regard to the harm model where the 'low', 'medium' and 'high' levels were seen to give more discretion and open up the discussion between sentencers about the degree of psychological and physical harm caused and where the sentencing should fall. Other reasons for preferring the draft guideline included: removing perceived problematic culpability factors ('intention to commit more serious harm than actually resulted from the offence' and 'deliberately causes more harm than is necessary for commission of the offence'²), including 'spitting' as an aggravating factor and the inclusion of psychological harm. A couple of sentencers, however, preferred the current guideline as they felt it was more comprehensive and one sentencer felt that the 'low', 'medium' and 'high' harm levels in the new guideline were difficult to interpret.
- When sentencing the ABH scenario with the new guideline most sentencers categorised the culpability as expected (high culpability - A) as they considered the photo frame to be a weapon. However, a few sentencers did not consider this to be a weapon and therefore placed the offender in culpability B (lesser).
- Most sentencers categorised the offender as harm category 3 ('low level of physical harm'), as expected. A few sentencers, however, felt that this was 'medium level of physical harm' (category 2) which suggests that there may be some inconsistency when interpreting 'medium' and 'low' harm.

² A few sentencers mentioned having issues with interpreting these factors and as a result were reluctant to use them in their sentencing decisions.

- Alongside the scenarios sentencers were also asked to hypothetically describe the type of injuries that would be classified in the different harm categories. This revealed more consistency, with sentencers generally in agreement about what type of injuries would be placed in each level of harm. High levels of physical harm injuries were seen as broken bones, severe bruising, injuries that required hospital treatment, longer-term injuries, multiple injuries, deep scratches, concussion and, in some cases, leaving scars. Low levels of physical harm injuries were seen as cuts and light bruising that did not require hospital treatment, and a shove or a slap. High psychological harm was having an impact on the way an individual lived their life (e.g. not being able to go out alone) and low psychological harm was being 'upset' at the time of the incident but not causing longer term distress.
- Sentencers were asked to look at two different harm models, one with some additional information about the context of ABH injuries³ and one without this additional information. Most sentencers preferred the harm model which included the additional information, stating that it was a '*helpful introduction*' and '*gives useful context*'. One District Judge who demonstrated that they understood the 'context of the offence' factor in the current guideline recognised that the additional information would be useful for lay colleagues. It should be noted, however, that one Bench Chair person in the group discussion was not in favour of this version, feeling that the additional of this information could be seen as "*patronising*". Despite having a preference for a more detailed version, road-testing found there were no differences in sentence outcomes for this scenario when using either version.
- Using the new guideline most sentencers gave the offender a community order. Just under half of the sentencers gave a sentence lower than the starting point in the guideline, even though in most cases the aggravating and mitigating factors balanced each other out. For the offenders placed in A3 this was just a case of dropping from a high level community order to a medium level or low level community order. However, for offenders placed in A2 this included dropping from 26 weeks' custody to a medium level community order, 6 weeks' custody and to a fine (although this sentencer was undecided between harm 2 and 3). This suggests that sentencers are comfortable with using the full sentencing range available and going outside of this range when necessary. However, this also illustrates that that the starting point may be seen to be too high, particularly as findings from the Leadership event identified that some magistrates felt high level community orders could be too high for this scenario.

³ 'Assault occasioning actual bodily harm causes injury which is more serious than in cases of common assault, but which falls below the really serious injury in cases of grievous bodily harm'.

- Final sentences generally stayed the same when comparing the current guideline with the new guideline. A few sentences increased (from a fine to community order and then between community order levels) and one sentencer went from custody using the current guideline to a community order in the new guideline. This suggests that whilst the new guideline is not going to widely change sentence outcomes, it may result in some higher level community orders.

Common Assault

- Again, sentencers generally preferred the new guideline when compared with the current guideline. They suggested that the new guideline was easier to use and they were particularly content with the structure of the new harm model, with its inclusion of a middle category that allows more room for interpretation by using terms such as ‘more than minor’ and ‘minor’ (although there was some discussion at the magistrates’ event around what is actually meant by “minor” and “more than minor”). Only a couple of sentencers preferred the current guideline (the same sentencers who preferred the current ABH guideline) as they felt this version was more comprehensive.
- Most sentencers categorised culpability and harm as expected by policy (A2). The main reason for not placing the offender in the expected category was due to either not seeing teeth as a weapon (culpability) or the bitemark as a ‘minor’ physical injury (harm). This suggests that different people may have different views on how serious biting is, rather than the guideline per se not working for this type of offence. However, it does also mean that there is a risk that the guideline is not clear on how to assess biting.
- When using the new guideline sentences were generally consistent between sentencers, depending on where the offender was placed in culpability and harm. Most sentencers who placed the offender in A2 gave a starting point⁴ of a medium level community order as outlined in the guideline (one low level community order was also given). The offender who was placed in A1 was given a high level community order as outlined in the guideline and those who placed the offender in A3 or B2 gave a starting point of a fine, as outlined in the guideline.
- Starting point sentences were mostly consistent when comparing the current guideline and the new guideline. However, in a few instances the sentencer ended up giving a lower level of community order or dropping down to a fine

⁴ The common assault fieldwork only asked sentencers to test the current and new guideline for culpability, harm and starting points as this was the main concern in the development of the guideline.

when using the new guideline. This suggests that whilst the new guideline may not widely alter sentence outcomes, it may result in some lower level community orders or more fines being given.

- Of the sentencers who gave lower sentences when using the new guideline most of them felt that this sentence was too low, particularly for the couple of sentencers who dropped from a community order to a fine. There was a similar finding at the magistrates' Leadership event, with the magistrates who gave a starting point of a band B fine stating that this was too low. However, it should be noted that this road-testing only focused on step one of the guideline and the scenario was to test how biting is assessed. Therefore, the opportunity to aggravate or mitigate the sentence using the full sentencing range was not given.

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