

Sentencing Council meeting: 28 September 2018
Paper number: SC(18)SEP03 – Assault
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1 ISSUE

1.1 This paper includes feedback and findings from the recent road testing on a previously agreed revised common assault guideline and step one factors for a revised Actual Bodily Harm (ABH) guideline. Based on the road testing findings and the evaluation findings for the existing guidelines, decisions will be sought at the meeting on the appropriate harm models for ABH and Grievous Bodily Harm (GBH.) Approval of sentences for ABH offences will also be sought.

2 RECOMMENDATION

That the Council:

- considers the findings from the recent road testing of a revised common assault guideline and ABH step one factors;
- considers options for revised harm models for ABH and GBH; and
- considers and agrees sentence levels for ABH.

3 CONSIDERATION

3.1 At the last meeting the Council agreed a revised draft guideline for common assault and considered factors for a revised guideline for the offence of actual bodily harm (ABH). Culpability factors for ABH were agreed. These were broadly similar to the factors agreed for common assault, as the only factors that distinguish Common Assault from Assault occasioning Actual Bodily Harm are the degree of injury that results and that ABH may be tried in the Crown Court and attract a significantly higher sentence. Annex A includes the agreed draft common assault guideline and

Annex B a draft revised ABH guideline including agreed culpability factors. Proposed ABH harm models and sentence levels are discussed further in this paper.

3.2 Discussion also took place regarding the evaluation findings and how findings may be addressed by a revised guideline. In particular extensive discussion regarding the harm model for ABH offences took place. Based on decisions made at the last meeting further work has been undertaken to progress or explore points discussed. It was agreed that some early road testing of the common assault guideline and ABH agreed culpability factors and harm models should be undertaken, to achieve early identification of areas for improvement prior to consultation and to assist in developing the approach to harm throughout the revised guidelines.

3.3 As a reminder, a summary of the evaluation findings highlighted three important areas of consideration in revising the ABH guideline;

- i) Analysis showed that there was a shift towards more serious disposal types– an increase in the use of custodial sentences (immediate and suspended) and a corresponding decrease in the use of community orders. This was 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. It was suggested that some of this may have been attributable to the types of injury being charged as ABH (as cases analysed included a number of ABH cases involving a degree of injury more akin to GBH). This is supported by the following evaluation evidence;
- ii) 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. It was noted that this was suggestive of a higher level of injury than may be expected in ABH cases.
- i) Sentencer perceptions were broadly that the sentences in the guideline were too low. This was largely thought to be attributable to the decrease in the sentencing range in the guideline when compared to the previous SGC guideline, although it was noted that the types of cases being charged as ABH may have been a contributory factor.

Road testing of common assault and ABH

3.4 The road testing findings for common assault and ABH are included at Annex C. The draft common assault guideline met with broad approval and no specific issues with factors were identified, although some of the sentence levels were considered too low. Testing is ongoing but findings so far are provided to give early indication of issues which may require further consideration once testing is complete. The predominant focus of this paper is on harm models, as two models were tested to inform the approach which may be appropriate for assessing harm in a revised guideline.

ABH - Harm

3.5 At the last meeting extensive discussion took place regarding harm factors. It was noted that as for common assault, the harm factors in the existing guideline are the biggest concern as they do not provide for cases of medium harm, and interpretation of the term 'within the context of the offence' has proved problematic. The existing guideline harm factors for ABH are as for common assault, save for the greater harm factor relating to the context of the offence specifying that such harm includes disease transmission and/or psychological harm.

3.6 A revised harm model was proposed at the last meeting which included three harm categories. The proposed model sought to provide a continuum from the common assault harm model, and recognise that low level ABH cases may involve minor harm (in the context of an ABH offence);

Harm	
The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.	
Category 1	Serious physical or psychological harm
Category 2	Cases falling between categories 1 and 3
Category 3	Minor physical or psychological harm

3.7 This model was not agreed as use of the word 'serious' to describe harm in an ABH was considered problematic, as 'serious' is used to define GBH type harm. It was agreed that descriptions of injuries to define harm was not appropriate, as the impact of a similar injury may be significantly different. Comparisons between GBH

offences and ABH were also discussed, and the point made that although the legal elements of ABH are more akin to common assault, the harm involved is more akin to GBH in many cases. It was agreed that harm models for common assault and ABH would be tested and findings reported to Council before a harm model was finalised.

3.8 Given the issues discussed in defining harm without describing the injuries involved, it was considered at the last meeting that the 'in the context' approach to assessing harm should be retained but further guidance provided on what should be considered in undertaking this assessment. Discussion took place outside of Council with judicial Council members as to how this guidance should be phrased. It was agreed that for common assault the agreed model would be tested, and that two harm models would be tested for ABH. The ABH harm models it was agreed should be tested are included at Annex D. These models sought to retain the 'in the context' approach to assessing harm, but provide improved guidance as to what is relevant in considering the level of harm present in an offence.

3.9 Road testing of the harm models identified that of the two models tested participants preferred Model B, which included additional explanatory guidance that ABH harm fell between the serious harm in GBH and lower harm in common assault. The majority of magistrate participants preferred a clearer distinction of what should be considered in the harm assessment. Road testing findings also highlighted that sentencers approved of the 'high, medium and low' categorisations of harm, as they believed this provided for flexibility in the harm assessment.

3.10 While the approaches tested seemed to improve on understanding of 'in the context' factor, there are concerns that they may not fully address issues identified in the evaluation of the guideline. The assessment still retains a high degree of subjectivity in requiring sentencers to consider the range of injuries which may be present in the offence, when sentencers' experience or evaluation of injuries may differ. This is supported by the road testing which resulted in differing categorisations of harm when sentencing offence scenarios, although sentencers did appear to consistently assess the same injury types in the same category when asked in a more hypothetical way. It is therefore important to consider the impact of a model which retains a fairly high level of subjectivity.

3.11 The assault guideline evaluation found that the step one factor which had the strongest influence on sentence severity for ABH was "Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence", which added 0.2 years to the average custodial sentence length. In

addition, analysis of data from the Crown Court Sentencing Survey (CCSS) shows that in 2014, this factor was present on 22 per cent of survey forms for ABH (in contrast with just 12 per cent of forms containing the lesser harm equivalent “Injury which is less serious in the context of the offence”). Qualitative research undertaken with sentencers as part of the evaluation found that this greater harm factor was “difficult to interpret in ABH cases as these cover such a wide range of injuries”.¹

3.12 Some of the evaluation findings regarding sentence increases could be attributable to no middle category of harm being available in the existing guideline, which will not be an issue in the revised guideline. However, it is still important to note the interpretation issues with a less descriptive factor which will also mean it is much more difficult to assess the impact of a guideline if it provides for greater inconsistency in the harm assessment. The models tested could be seen to be not much of an improvement on the existing approach, given the degree of subjectivity and flexibility provided.

3.13 As the ‘in the context factor’ is considered to be a contributor to sentence increases, it will be important that the revised guideline adequately addresses this. This is important both in respect of the Council being seen to be responsive to addressing problems highlighted in the evaluation, and to ensure the guideline provides for consistent assessments of harm and relative sentences.

3.14 It has already been agreed that reference to a description of injuries is not an appropriate way to assess harm, as while an injury may be of the same type, the impact may differ. In considering options for harm models for ABH, the previous SGC Assault guideline has been reviewed. SGC guidelines combined culpability and harm in the offence seriousness assessment, but this guideline addressed harm factors using the following descriptions;

¹ <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-assessment-qualitative-research.pdf> (p7)

SGC ABH guideline

Type/nature of activity	Starting point	Sentencing range
Pre-meditated assault EITHER resulting in injuries just falling short of GBH OR involving the use of a weapon	30 months custody	2 – 4 years custody
Pre-meditated assault resulting in relatively serious injury	12 months custody	36 weeks – 2 years custody
Pre-meditated assault resulting in minor, non-permanent injury	24 weeks custody	12 – 36 weeks custody
Other assault resulting in minor, non-permanent injury	Community Order (HIGH)	Community Order (MEDIUM) – 26 weeks custody

3.15 In considering the way other guidelines have defined or described harm it is noted that the SGC guideline did refer to injuries just short of GBH for a high level offence, and used the word ‘serious’ in the description of an injury (although this was qualified as ‘relatively serious’ which is similar to an ‘in the context’ consideration). The clearer definition of injuries or the benchmark for an injury would be likely to provide for more consistent harm assessments. While the models road tested do provide for a higher degree of subjectivity, the reference to other offences in the models tested was broadly found to be useful. It may therefore be possible to provide for a more consistent harm assessment of ABH by reference to harm in other offences being included within factors rather than in additional guidance. A way to address this could be for the lowest ABH harm category to be phrased as ‘low level of injury comparable to injury in a high level common assault.’ This reflects the point made at the last meeting that an ABH injury is not necessarily always more serious than a common assault, and that it is possible for a serious common assault to be as or more serious than a low level ABH. This approach would provide for less subjectivity in assessing a low level of harm while still providing a ‘benchmark’ for this category.

3.16 A further advantage to this approach is that it could also address sentencers perceptions and concerns regarding sentence levels. One of the evaluation findings was that sentencers consider the sentences in the existing ABH guideline are too low. The evaluation noted “*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 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)"

3.17 This finding was supported by evidence considered at the last meeting which illustrated a marked trend of higher sentences above the category range in the lowest category of ABH seriousness. The data illustrated a high proportion (around 40%) of custodial sentences were imposed in this category, which does not even provide for a custodial sentence to be imposed. The Council decided at the last meeting that existing sentence starting points should not be revised to address this, as increasing them may seem to be an unjustified inflationary step. However, if the lowest category is defined to capture a low level (comparable to a common assault) ABH, this may provide for a community order starting point in the lowest categories of seriousness to be considered a proportionate sentence. This would also support the decision at the last meeting to have parity between the high level common assault starting point and the low level ABH starting point.

3.18 An alternative approach would be to include reference to GBH in the highest category as did the previous SGC guideline. However, the existing guideline starting point for a high level ABH is 1 year 6 months custody and for a low level GBH a high level community order. As was noted at the last meeting, any revisions to the guideline need to guard against creating a perverse incentive for an offender to plead to a more serious offence to receive a lower sentence, and it would require significant revision to existing starting point categories to avoid this should GBH be referenced within the highest category of ABH. The difficulty with the two offences having the same statutory maximum sentence is that it will be unavoidable that there be some overlap in the sentences if the Council do not wish to increase sentences for GBH S.20. For this reason and to recognise that ABH offences will contain the broadest range and scale of injuries than other assault offences, it may be preferable to provide a benchmark for the lower level offences but provide more flexibility in categorising the mid and top range of offences.

3.19 Based on the discussion above, a proposed revised model for ABH is included below for consideration. This retains the high and low approach in the tested models, and references common assault to provide a benchmark within the lowest category. This is proposed as an alternative to tested Model B at Annex D, which

sentencers preferred in road testing. Both are included below to provide for comparison of approaches;

3.20 It is also important to note that testing of the ABH harm model with Crown Court Judges is still to be undertaken. Subject to Council consideration of the options both could be tested to explore which is preferred by these sentencers and which achieves greater consistency in harm categorisations.

ABH – proposed harm models

Option 1)

Harm The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.	
Category 1	High level of physical or psychological harm
Category 2	Cases falling between categories 1 and 3
Category 3	Low level of physical or psychological harm where level of injury is comparable to harm in a high level common assault

Option 2)

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

Question 1: Does the Council prefer Option 1 or Option 2 as a revised ABH harm model?

Question 2: Should one or both harm models be tested with Crown Court judges in the ongoing toad testing?

GBH - Harm

3.21 The approach to assessing harm and the potential impact on sentences will be even more important for GBH offences, particularly s.18 offences which carry a statutory maximum life sentence and where sentence increases were most pronounced.

The evaluation of the existing guideline identified that “Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence” was the most influential factor on sentences for both GBH and GBH with intent. This factor was present on around a third of CCSS forms for each offence in 2014, and added 0.3 years and 1.7 years on to the average custodial sentence length for these offences, respectively. As mentioned previously, qualitative research undertaken during the evaluation highlighted that sentencers experienced significant difficulties with this factor: “Crown Court judges, 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”.²

3.22 As with ABH offences, some of the findings are likely to be attributable to no middle category of harm being available in the existing guideline which will not be an issue in the revised guideline. However, given that all harm in a GBH offence is serious, it is even more important to consider if clearer defined factors would be appropriate in the revised guideline rather than more subjective guidance. There could otherwise be an increased risk of high and medium categorisations of harm, as sentencers may not wish to be seen to describe harm as low in these cases. This is already an issue within the existing guideline, which was highlighted by one sentencer in the evaluation commenting “*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).

3.23 In considering how GBH type harm could be defined, reference has been made to the previous SGC GBH guidelines, and to the Health and Safety guideline

² <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-assessment-qualitative-research.pdf> (p7)

which requires consideration of the impact of any injuries on a victim. Extracts from these guidelines are included below. Again, it should be noted that the SGC guidelines combined culpability and harm in the offence seriousness assessment.

SGC GBH S.20

Type/nature of activity	Starting point	Sentencing range
Particularly grave injury or disfigurement results from a pre-meditated assault where a weapon has been used	3 years custody	2 – 4 years custody
Pre-meditated assault where a weapon has been used OR Other assault where particularly grave injury results or a weapon has been used	18 months custody	12 months – 3 years custody
Pre-meditated assault where no weapon has been used	36 weeks custody	24 weeks – 18 months custody
Other assault where no weapon has been used	24 weeks custody	Community Order (High) – 36 weeks custody

SGC GBH S.18

Type/nature of activity	Starting point	Sentencing range
Victim suffered life-threatening injury or particularly grave injury from a pre-meditated wounding or GBH involving the use of a weapon acquired prior to the offence and carried to the scene with specific intent to injure the victim	13 years custody	10 – 16 years custody
Victim suffered life-threatening injury or particularly grave injury (where the offence was not pre-meditated) OR Pre-meditated wounding or GBH involving the use of a weapon acquired prior to the offence and carried to the scene with specific intent to injure the victim (but not resulting in a life threatening injury or particularly grave injury)	8 years custody	7 – 10 years custody
Victim suffered a very serious injury or permanent disfigurement OR Pre-meditated wounding or GBH OR Other wounding or GBH involving the use of a weapon that came to hand at the scene	5 years custody	4 – 6 years custody
Other wounding or GBH	4 years custody	3 – 5 years custody

Health and Safety guideline

Seriousness of harm risked		
Level A <ul style="list-style-type: none"> • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy 	Level B <ul style="list-style-type: none"> • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition 	Level C <ul style="list-style-type: none"> • All other cases not falling within Level A or Level B

3.24 For GBH offences it is less difficult to define harm as reference can be made to the impact of the injuries on the victim. While the SGC guidelines s.18 and s.20 guidelines differed due to the conflation of harm with culpability in those guidelines, it is considered that harm in a GBH offence will be of the same type and it is proposed that the same harm model could be used for both s.18 and s.20 offences. While GBH type harm is wide and varied, some injuries have lasting impacts – such as disease transmission and brain injuries – while others are lower level injuries which are recovered from with no lasting impact. A proposed revised harm model for GBH offences is included below;

GBH – proposed descriptive model

Harm	
All cases of GBH will involve 'really serious harm', which can be physical or psychological. The court should assess the level of harm caused with reference to the impact on the victim	
Category 1	Injury results in physical or mental impairment resulting in lifelong dependency on third party care or medical treatment Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out normal day to day activities or on their ability to work Particularly grave and life-threatening injury caused
Category 2	Offence results in a permanent, irreversible injury or condition but no substantial and long term effect on victim's ability to carry out normal day to day activities or on their ability to work Grave but non life-threatening injury caused
Category 3	All other cases

3.25 As the recent testing of harm model proposals was undertaken with magistrates and District Judges only, it is proposed that harm models agreed today be tested with Crown Court Judges in the ongoing road testing. It is proposed that this seeks to identify if the ABH and GBH models provide for consistent harm assessments by providing a range of injury descriptions and asking for these to be categorised.

3.26 Subject to the GBH harm model being approved, testing of a less descriptive GBH model including high, medium, and low categories of harm could also be undertaken to identify if this promotes consistency of categorisation. An example of a less descriptive model is provided below;

Harm	
All cases of GBH will involve ‘really serious harm’, which can be physical or psychological. To assess the level of harm caused by the offence, the court must consider;	
<ul style="list-style-type: none"> • The range of injuries (including physical and psychological injury) that can occur in cases of grievous bodily harm • Where in that range of injuries the injury caused falls 	
Category 1	High level of physical or psychological harm
Category 2	Medium level of physical or psychological harm
Category 3	Low level of physical or psychological harm

Question 3: Does the Council prefer the descriptive factors or high medium and low factors GBH harm model?

Question 4: Should one or both harm models discussed be tested with Crown Court judges in the ongoing toad testing?

Actual Bodily Harm - sentences

3.27 Existing sentence starting points and ranges for ABH are illustrated below;

Offence Category	Starting Point <i>(Applicable to all offenders)</i>	Category Range <i>(Applicable to all offenders)</i>
Category 1	1 year 6 months' custody	1 – 3 years' custody
Category 2	26 weeks' custody	Low level community order – 51 weeks' custody
Category 3	Medium level community order	Band A fine – High level community order

3.28 At the last meeting the Council were asked to consider a number of questions to inform sentence level development for ABH.

3.29 The Council considered evidence in relation to the existing guideline, such as the evidence noted earlier that 40% of sentences imposed in the lowest category of ABH were custodial even though the category range does not provide for custodial sentences. As was discussed earlier, it was submitted that this reflects the evaluation finding that some sentencers do not believe the existing guideline sentences are adequate, and that the types of case found to be at the lower end of seriousness in the guideline are considered too serious for the sentencing options available. As noted earlier, if sentence ranges are not to be adjusted revised factors will need to provide for appropriate categorisation of offences and sentence ranges.

3.30 It was also noted at the last meeting that the lowest starting point for an ABH offence was lower than the highest starting point for a common assault, which sentencers may consider does not reflect ABH. However as noted earlier a serious common assault may be comparable to a low level ABH offence. The Council agreed that there should be parity between the highest starting point in the common assault guideline and the lowest starting point in the ABH guideline with each attracting a starting point of a high level community order. As noted earlier in this paper, the proposed ABH harm model (option 1) may support this decision.

3.31 Given that the Council did not wish to adjust sentences significantly, proposed sentences for ABH have been based on the existing guideline sentence starting points and ranges. The proposed sentence levels are included at Annex B. Annex E includes statistics on sentence distribution for this offence.

3.32 The data illustrates the findings from the assessment of the impact and implementation of the ABH guideline which noted the following;

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.

3.33 The proposed sentences include a balance of custodial and community order starting points. While the starting points are the same as for the existing guideline, a new middle category of harm and revised factors are intended to address the unintended inflationary impact of the original guideline which saw an increase in more serious disposal types and sentence lengths.

3.34 The proposed sentences were tested in the recent road testing exercise to provide an indication of whether they represented a change in current sentencing practice. On the one ABH scenario tested some sentencers felt the sentence arrived at was too high. However, this could be attributable to the characteristics of the offender and the circumstances which led to the offence in the scenario. Sentence levels will be tested further with Crown Court sentencers and during the consultation stage.

3.35 Overall the objective of revising sentences is to provide for a higher level of community orders to be imposed and a shift away from the unanticipated increase in custodial disposals, although as noted in the road testing summary there may be an increase in higher level community orders given the revision to the starting point in an A3 offence. However, lower culpability lesser harm cases would still attract a medium level community order, and if factors are revised appropriately the overall impact should be more proportionate sentences and to address issues highlighted in the evaluation.

Question 5: Does the Council agree with the proposed ABH sentence levels?

4 IMPACT /RISKS

4.1 It will be important reputationally to ensure decisions made in revising the guideline are based on evidence of issues identified in the evaluation, to ensure the Council are seen to be responsive to issues with the guideline. Proposals seek to address inflationary issues by revising factors rather than sentences where possible.

4.2 Early testing of the guidelines with sentencers will continue to be undertaken to identify potential issues and impact prior to sign off and consultation on revised guidelines.

STEP ONE
Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of culpability is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

Culpability demonstrated by one or more of the following:

A - High culpability:

- Targeting of vulnerable victim, where victim vulnerable by personal characteristics or circumstances
- Prolonged assault
- Use of substantial force
- Threatened or actual use of weapon or weapon equivalent*
- Leading role in group activity

B – Lesser culpability

- Lesser role in group activity
- Mental disorder or learning disability, where linked to the commission of the offence
- All other cases not captured by category 1 factors

*Examples of a weapon equivalent can include but are not limited to: a shod foot, use of acid, use of animal in commission of offence.

Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

Category 1	More than minor physical or psychological harm
Category 2	Minor physical or psychological harm
Category 3	No physical injury No/very low level of distress

STEP TWO

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Where the offence is committed in a domestic context, consideration must be given to the definitive guideline 'Overarching Principles: Domestic Abuse' and any aggravating features appropriately reflected in the sentence starting point.

HARM	CULPABILITY	
	A	B
Harm 1	<p>Starting point High level Community Order</p> <p>Category Range Low level Community Order - 26 weeks' custody</p>	<p>Starting point Medium level Community Order</p> <p>Category Range Low level Community Order - 16 weeks' custody</p>
Harm 2	<p>Starting point Medium level Community Order</p> <p>Category Range Low level Community Order - 16 weeks' custody</p>	<p>Starting point Band B fine</p> <p>Category Range Band A Fine - low level Community Order</p>
Harm 3	<p>Starting point Band B fine</p> <p>Category Range Band A Fine - Low level Community Order</p>	<p>Starting point Band A Fine</p> <p>Category Range Discharge – Band C Fine</p>

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

Factors increasing seriousness

Statutory aggravating factors:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

Other aggravating factors:

Spitting

Offence committed against those working in the public sector or providing a service to the public

Offence committed in prison

Presence of children

Gratuitous degradation of victim

Abuse of power and/or position of trust

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Commission of offence whilst under the influence of alcohol/drugs

Other offences taken into consideration (TICs)

Offence committed whilst on licence or subject to post sentence supervision

History of failure to comply with court orders

Factors reducing seriousness or reflecting personal mitigation

No previous convictions or no relevant/recent convictions

Remorse

Good character and/or exemplary conduct

Significant degree of provocation

Age and/or lack of maturity

Mental disorder or learning disability, where not linked to the commission of the offence

Sole or primary carer for dependent relative(s)

Determination and/or demonstration of steps taken to address addiction or offending behaviour

Serious medical conditions requiring urgent, intensive or long-term treatment

STEP ONE
Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of culpability is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

Culpability demonstrated by one or more of the following:

A - High culpability:

- Targeting of vulnerable victim, where victim vulnerable by personal characteristics or circumstances
- Prolonged assault
- Use of weapon or weapon equivalent*
- Leading role in group activity

B – Lesser culpability

- Lesser role in group activity
- Mental disorder or learning disability, where linked to the commission of the offence
- All other cases not captured by category 1 factors

*Examples of a weapon equivalent can include but are not limited to: a shod foot, use of acid, use of animal in commission of offence.

******HARM MODEL TO BE AGREED******

Category 1

Category 2

Category 3

STEP TWO

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Where the offence is committed in a domestic context, consideration must be given to the definitive guideline ‘Overarching Principles: Domestic Abuse’ and any aggravating features appropriately reflected in the sentence starting point.

HARM	CULPABILITY	
	A	B
Harm 1	<p>Starting point 1 year 6 months’ custody</p> <p>Category Range 1 – 3 years custody</p>	<p>Starting point 26 weeks’ custody</p> <p>Category Range HL CO – 1 years custody</p>
Harm 2	<p>Starting point 26 weeks’ custody</p> <p>Category Range HL CO – 1 years custody</p>	<p>Starting point HL CO</p> <p>Category Range LL CO – 26 weeks custody</p>
Harm 3	<p>Starting point HL CO</p> <p>Category Range LL CO – 26 weeks custody</p>	<p>Starting point ML CO</p> <p>Category Range Band C Fine – HL CO</p>

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

Factors increasing seriousness

Statutory aggravating factors:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

Other aggravating factors:

Offence committed against those working in the public sector or providing a service to the public

Offence committed in prison

Presence of children

Gratuitous degradation of victim

Abuse of power and/or position of trust

Spitting

Threatened with weapon

Significant planning

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Commission of offence whilst under the influence of alcohol/drugs

Other offences taken into consideration (TICs)

Offence committed whilst on licence or subject to post sentence supervision

History of failure to comply with court orders

Factors reducing seriousness or reflecting personal mitigation

No previous convictions or no relevant/recent convictions

Remorse

Good character and/or exemplary conduct

Significant degree of provocation

Age and/or lack of maturity

Mental disorder or learning disability, where not linked to the commission of the offence

Sole or primary carer for dependent relative(s)

Determination and/or demonstration of steps taken to address addiction or offending behaviour

Serious medical conditions requiring urgent, intensive or long-term treatment

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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ABH - Harm Model A

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

ABH - Harm Model B

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

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Sentencing trends for ABH, 2007-2017^{1,2}

Proportion of adult offenders sentenced for ABH, by sentence outcome, all courts, 2007-2017

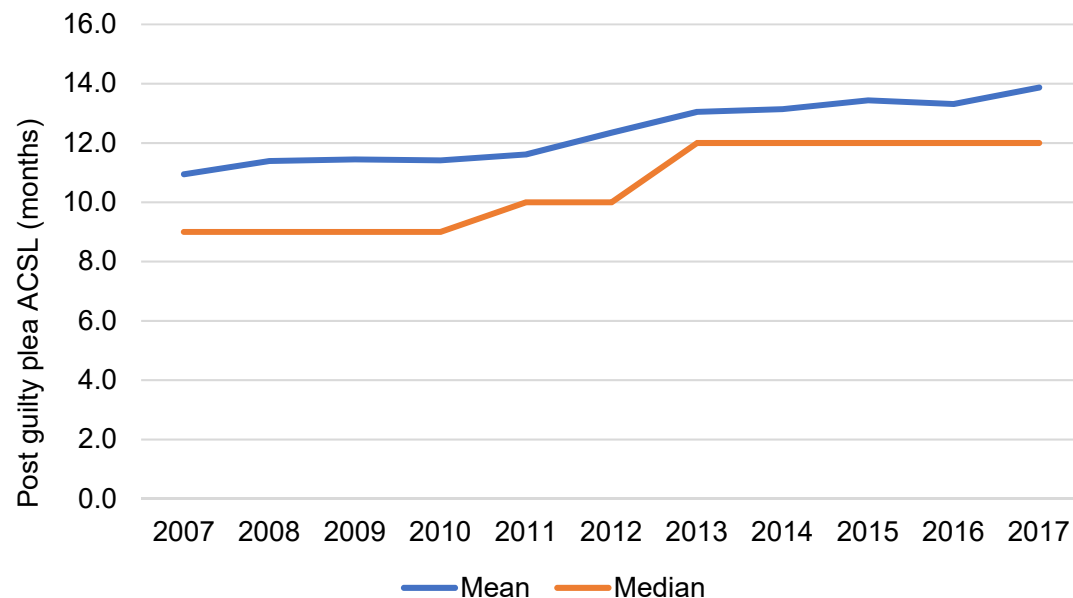
Outcome	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Absolute and conditional discharge	4%	3%	2%	2%	2%	2%	1%	1%	1%	1%	1%
Fine	3%	2%	2%	1%	2%	2%	1%	1%	1%	1%	1%
Community sentence	32%	32%	31%	32%	30%	23%	20%	17%	16%	15%	15%
Suspended sentence	28%	30%	31%	31%	31%	34%	36%	38%	41%	39%	38%
Immediate custody	29%	31%	32%	31%	34%	38%	40%	41%	39%	40%	42%
Otherwise dealt with	4%	3%	2%	2%	2%	1%	2%	2%	2%	2%	2%

¹ Source: Court Proceedings Database, Ministry of Justice

² Excludes youths, section 29 offences (racially/religiously aggravated), and custodial sentences of over 5 years (the statutory maximum sentence for this offence)

ABH sentence lengths

Post guilty plea average custodial sentence lengths (ACSLs) received by adult offenders sentenced to immediate custody for ABH, all courts, 2007-2017

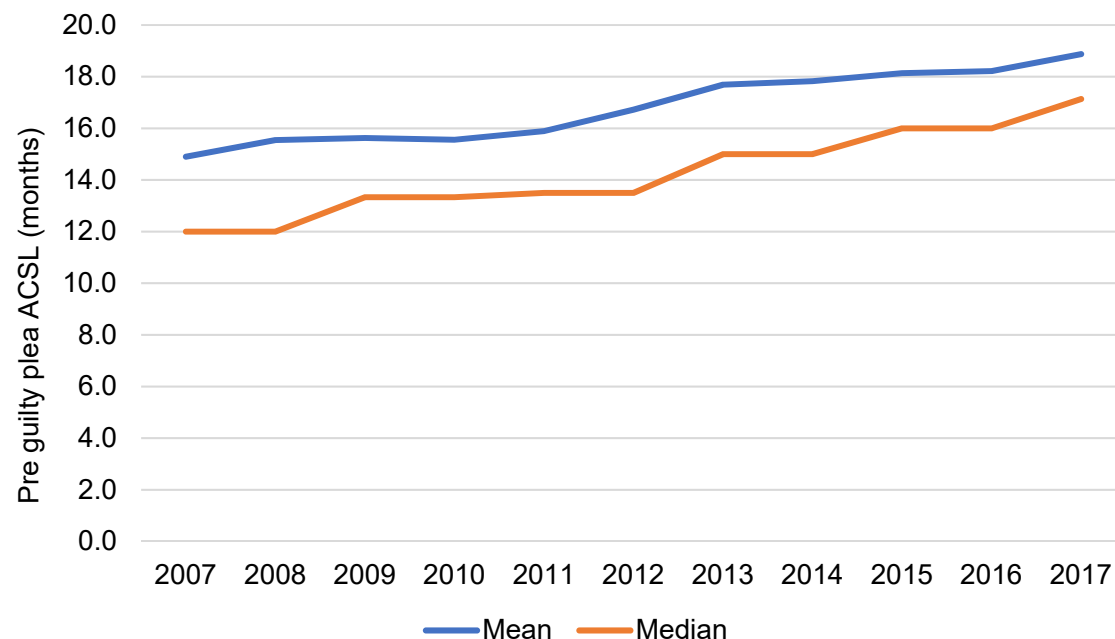


Post guilty plea sentence length bands received by adult offenders sentenced to immediate custody for ABH, all courts, 2007-2017³

Sentence length band	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
1 year or less	71%	70%	69%	70%	69%	65%	60%	59%	58%	57%	55%
Between 1 and 2 years	24%	25%	25%	26%	26%	29%	33%	34%	35%	35%	36%
Between 2 and 3 years	4%	5%	5%	4%	4%	5%	6%	6%	6%	7%	8%
Between 3 and 4 years	1%	1%	1%	1%	1%	1%	1%	1%	1%	1%	1%
Between 4 and 5 years	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%

³ Sentence length bands do not include the lower bound, but do include the upper bound sentence length. For example, the category '1 year or less' includes sentence lengths less than and equal to 1 year, and 'Between 1 and 2 years' includes sentence lengths over 1 year, and up to and including 2 years.

Estimated pre guilty plea average custodial sentence lengths (ACSLs) received by adult offenders sentenced to immediate custody for ABH, all courts, 2007-2017



Estimated pre guilty plea sentence length bands received by adult offenders sentenced to immediate custody for ABH, all courts, 2007-2017⁴

Sentence length band	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
1 year or less	51%	50%	49%	48%	46%	43%	38%	38%	37%	37%	37%
Between 1 and 2 years	34%	33%	35%	37%	38%	40%	43%	42%	42%	42%	38%
Between 2 and 3 years	12%	12%	12%	12%	12%	13%	15%	15%	17%	15%	19%
Between 3 and 4 years	2%	3%	3%	2%	2%	3%	4%	4%	4%	5%	5%
Between 4 and 5 years	1%	2%	1%	1%	1%	1%	1%	2%	1%	1%	1%

⁴ Sentence length bands do not include the lower bound, but do include the upper bound sentence length. For example, the category '1 year or less' includes sentence lengths less than and equal to 1 year, and 'Between 1 and 2 years' includes sentence lengths over 1 year, and up to and including 2 years.

Crown Court Sentencing Survey data for ABH offences, 2013 - 2015 (Q1)^{5,6}

Sentence table in Sentencing Council ABH definitive guideline

Offence Category	Starting Point (<i>Applicable to all offenders</i>)	Category Range (<i>Applicable to all offenders</i>)
Category 1	1 year 6 months' custody	1 – 3 years' custody
Category 2	26 weeks' custody	Low level community order – 51 weeks' custody
Category 3	Medium level community order	Band A fine – High level community order

Proportion of offenders placed in each offence category, Crown Court Sentencing Survey

Offence category	2013	2014	2015 Q1
	(n=3,422)	(n=3,781)	(n=932)
Level 1 (most)	37%	39%	42%
Level 2	54%	53%	50%
Level 3 (least)	9%	9%	8%
Total	100%	100%	100%



Around half of offenders sentenced in the Crown Court are placed within the middle category of seriousness. Over time there's been a shift towards more offenders being placed in the highest category.

Proportion of offenders receiving each sentence outcome: Offence category 1 (most serious), Crown Court Sentencing Survey

Sentence outcome	2013	2014	2015 Q1
	(n=1,263)	(n=1,457)	(n=392)
Immediate custody	73%	68%	61%
SSO	25%	30%	36%
CO	2%	2%	3%
Conditional discharge	0%	0%	0%
Other	0%	0%	0%
Total	100%	100%	100%

⁵ Source: Crown Court Sentencing Survey, 2011-2015 (Q1)

⁶ Excludes youths, section 29 offences (racially/religiously aggravated), and custodial sentences of over 5 years (the statutory maximum sentence for this offence)

Proportion of offenders receiving each sentence outcome: Offence category 2 (middle category), Crown Court Sentencing Survey

Sentence outcome	2013	2014	2015 Q1
	(n=1,847)	(n=1,997)	(n=464)
Immediate custody	34%	36%	30%
SSO	49%	49%	53%
CO	16%	14%	16%
Fine	0%	0%	0%
Conditional discharge	0%	0%	0%
Absolute discharge	0%	0%	0%
Other	0%	1%	1%
Total	100%	100%	100%

Proportion of offenders receiving each sentence outcome: Offence category 3 (least serious), Crown Court Sentencing Survey

Sentence outcome	2013	2014	2015 Q1
	(n=312)	(n=327)	(n=76)
Immediate custody	12%	17%	13%
SSO	23%	30%	30%
CO	54%	42%	39%
Fine	4%	5%	5%
Conditional discharge	6%	6%	12%
Absolute discharge	0%	1%	0%
Other	1%	0%	0%
Total	100%	100%	100%



On average, around 40% of offenders in category 3 received a custodial sentence (immediate custody or SSO), which isn't in this category range.

Post guilty plea mean ACSLs for offenders sentenced to immediate custody, Crown Court Sentencing Survey

	ACSL in years		
Offence category	2013	2014	2015 Q1
Level 1 (most)	1.5	1.5	1.5
Level 2	0.8	0.8	0.8
Level 3 (least)	0.7	0.6	0.6

Estimated pre guilty plea mean ACSLs for offenders sentenced to immediate custody, Crown Court Sentencing Survey

	ACSL in years		
Offence category	2013	2014	2015 Q1
Level 1 (most)	2.0	2.0	2.0
Level 2	1.1	1.1	1.0
Level 3 (least)	0.9	0.7	0.8