

Public Order Offences Crown Court Judges Road Testing

Introduction

Twelve interviews were conducted with Crown Court judges to test the *Affray* draft guideline. These interviews were conducted either by telephone or face to face with judges across England and Wales. Each judge considered either one or two scenarios (details on the scenarios can be found in table 1), sentencing the scenario as if they were in court today (without the draft guideline) and then sentencing using the draft guideline. The research has provided valuable information on how the guideline might work in practice to support development of the *Public Order* guideline. However, there are limitations to the work¹, and as a result the research findings presented below should be regarded as **indicative** only and not conclusive.

Table 1. Scenarios used in interviews and the number of judges sentencing each scenario

Scenario	No. of judges
<p>D was leaving a nightclub where he worked as a security officer when he was attacked by a man he had ejected earlier in the evening. The assailant punched D to the side of the head and wielded a bottle towards him. Others intervened to stop the attack, but D did not take the opportunity to extricate himself from the situation. He attacked the man while he was being restrained and a fight ensued between D and the assailant, which was stopped on the arrival of the Police. Neither party was badly injured, although both suffered bruising and torn clothing. D pleaded guilty on the first day of trial, but in mitigation said he acted in self-defence and was provoked. He was of previous good character.</p>	7
<p>D had an ongoing dispute with neighbours over parking and regularly blocking his drive, and much animosity existed between them. On returning home drunk at 1.00am one morning he found their vehicle parked partly across his driveway and decided to confront them. He went round to knock on the door. On receiving no answer he shouted 'move your fucking car or I will smash it up'. He then tried the handle of the door which was unlocked, entered their property and went upstairs and entered the bedroom where they were asleep. He made loud and violent threats towards them, throwing their television at the wall beside their bed. The victims were terrified, staying in the bed and hiding under the duvet until other neighbours who had seen him enter the property ran in and overwhelmed him.</p> <p>D admitted the offence immediately and was extremely remorseful. He said he had snapped and due to the ongoing issues with his neighbours was suffering from and on medication for depression. He had recently received a police caution for threatening behaviour towards his neighbour in relation to the parking issue, and the neighbours had also been advised not to exacerbate the tension and be more considerate with their parking. He pleaded guilty at the first opportunity.</p>	6

¹ Limitations include: this is a small sample which is not necessarily representative; the guidelines were out for consultation at the time of the research which means judges may have seen the guideline before this exercise (biasing the 'pre-guideline' sentence); and the scenarios only include limited detail of the actual case, which makes comparison with the sentence given by the judge in the actual case difficult.

Summary of key findings

- Generally most judges were content with their final sentences, and the starting points and ranges using the draft guideline. The draft guideline generally led to more consistency in the final sentences for the second scenario compared to the sentences given pre-guideline.
- There were a few issues raised, which Council may wish to consider:
 - There were some issues in distinguishing the ‘level of violence’ at the culpability stage which led to inconsistent culpability categorisation amongst some judges, mostly for scenario one (bouncer) but also to a lesser extent for scenario two (neighbour’s house).
 - Similarly for harm, judges sometimes found it difficult to distinguish the ‘level of serious injury’, which could lead to inconsistent categorisation. However, this was identified only as an issue for the less serious scenario (1 - bouncer) when deciding between harm categories 2 and 3. It should be noted that there was limited information on the harm caused in scenario 1.
 - Most judges considered provocation to be an important consideration when sentencing. For scenario 1 (bouncer), when sentencing the scenario pre-guideline (as if it came before them in court today) a few judges used provocation as a mitigating factor. Accordingly, some judges felt the lack of a factor on provocation in the new draft guideline was an omission.

General Findings

- There was variability in how often judges saw affray offences. One judge dealt with affray at least once a week compared with others who said every couple of months, and one who said a few times a year. This may be due to the location where the judges in this sample sit (the judge who saw more cases was based in a city centre where there are many clubs around).
- When asked to spontaneously specify important factors to consider when sentencing affray offences, most factors the judges suggested were already covered in the guideline. However, one judge did suggest specifically including the offence being committed on business premises at some point in the guideline, for example, whether the incident occurred in a shop premises or nightclub.

Scenario one (bouncer)

- The first scenario found that the judges were inconsistent when categorising the culpability of the offender. All three culpability categories were applied to the offender, although most chose B (4 judges chose B, 2 judges chose C and 1 judge chose A). This was largely due to difficulties in interpreting the level of violence as defined in the guideline, with some judges considering the violence

as 'minimal' (C), some considering the violence as 'falling between A and C' (culpability B), and one judge considering the violence to be 'sustained' (culpability A). This was further supported by judges querying what was meant by terms such as 'sustained' and 'minimal' in the context of the violence.

- Similarly, judges were inconsistent when categorising harm for this scenario. Just over half of the judges applied category 3 to the offender and the remaining judges applied category 2 to the offender. Again, this was due to differing perceptions of physical injury and whether it fell 'between categories 1 and 3' (harm 2) or 'little or no' (harm 3). However, as mentioned above, there was limited harm information provided on this particular scenario.
- Because of the inconsistency with culpability and harm there was variation in the final sentences, ranging from a medium level community order to eight months' custody, suspended. Just over half of the sentences stayed the same pre-and post-guideline and the remaining sentences decreased. Overall this resulted in more community orders being given post guideline compared with pre-guideline for this particular scenario.

Scenario two (neighbours)

- There was greater consistency in the sentencing of this, the more serious affray scenario. Most judges placed the defendant in category A1 due to the 'intention to cause fear of very serious violence' factor, as expected by policy. However, a couple of judges categorised the offender as culpability B (although one was on the cusp of A/B) which identified a small inconsistency based on whether the judge interpreted the offender as using 'serious or sustained violence' or 'intention to cause fear of very serious violence' (culpability A) or 'violence falling between levels in categories A and C' (culpability B) in the scenario. As all judges placed the offender in harm 1 this suggests that judges found it relatively straightforward to distinguish the level of physical injury/fear and distress for the more serious cases.
- For this scenario the guideline led to more consistency in the final sentences compared to the sentences given pre-guideline. There was a slight increase (three to five months) on sentences given pre-guideline on a couple of occasions, but the remaining sentences were similar pre-and post-guideline.

Overall

- Across both scenarios most judges were content with their final sentences, and the starting points and range table.
- Most judges mentioned the importance of provocation when sentencing the first scenario (bouncer) pre-guideline: "*the mitigating features are there's been provocation*". However, they then did not mention provocation as a factor when

sentencing the offender using the guideline. Some judges felt the lack of a factor on provocation in the new draft guideline was an omission.

“It doesn’t mention provocation which normally does appear as a potential mitigating feature, especially in offences of violence. So, I would have expected that to be present and I’ve of taken that into account”.

“There’s nowhere in the guideline that allows me to allow for provocation but I would allow for provocation”.