

Findings – common assault road testing

Aims

This research was conducted to understand how harm is assessed using the draft guidelines for common assault. Previous testing indicated that this step may allow for a wide range of outcomes, depending on the sentencer's interpretation. In testing the common assault guideline, we also sought to understand how magistrates treat biting and spitting, in two separate scenarios.

Methodology

Three common assault scenarios (see Annex A) were tested with 12 magistrates. An alternative harm model was also developed for each guideline (see Annex B), to understand how this might impact on assessment of harm and was tested at a slightly later date. The second model used different wording for each of the categories, including changing category 2 (medium level) of harm to: 'Harm falling between categories 1 and 3.'

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

In total, 12 magistrates were interviewed. There was a lower response rate in the second round, after the second harm model was developed, so this model was tested with fewer participants.

	Harm model 1	Harm model 2
Magistrates	9	3

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

Key findings on harm

- For the scenario involving **biting**, most sentencers (9 out of 11) placed harm in category 2. The remaining two sentencers placed harm in category 3.
- There were more mixed results for the scenario involving **spitting**, though most sentencers (7 out of 11) still placed the harm in category 2, with the remainder split between category 1 and 3. The element of spitting was also considered by most sentencers as part of their assessments of culpability or aggravation. Assessments of harm focussed on distress to the victim, while some identified 'Intent to cause fear of serious harm' (by disease transmission) in the assessment of culpability.
- For the scenario involving **strangulation**, most sentencers (8 out of 9) placed harm in category 1, citing the fact that the victim was in fear for her life, and one sentencer placed harm in category 2.

- There were no significant differences identified where sentencers were using the second harm model. However, it is not possible to draw conclusions due to the very small number of sentencers interviewed.
- In a number of interviews, sentencers said they would want to see the VPS and/or photographs of injuries before assessing the harm.

Summary findings on harm

Scenario A – biting (11 magistrates)

Most sentencers (9 out of 11) placed harm in category 2, and the remaining two placed it in category 3. The three sentencers using the second harm model all placed it in category 2.

A number of sentencers who placed harm in category 2 highlighted the fact that there were markings and redness from biting, but the skin was not broken. Some sentencers added that there was little indication of psychological distress.

Teeth marks were visible for some time and skin was red until the following morning... so there weren't any long-lasting injuries but I thought it was minor rather than more than minor... I don't think there's much psychological distress in this incident

(placed in category 2)

One sentencer who placed harm in category 3 identified that there were marks on the hand but little distress, and the other did not give reasons for their assessment. However, this sentencer included biting as an aggravating factor which increased their sentence from the starting point.

Biting was also considered by one sentencer in the assessment of culpability, and they placed the offence in higher culpability because of the use of teeth. Most sentencers (8 out of 11) placed the offender in lesser culpability, and three placed the offender in higher culpability.

Scenario B – spitting (11 magistrates)

7 out of 11 sentencers placed harm in category 2. Two placed it in category 1 and two placed it in category 3. There was mixed opinion about this assessment and several sentencers thought it was a borderline case, either between categories 1 and 2 or between categories 2 and 3. One sentencer stated they would need a VPS to determine whether there had been lasting psychological damage.

Of the sentencers using the second harm model, two placed it in category 2 and one placed it in category 3. The first two both thought it was borderline between categories 1 and 2. One stated that the fact the victim decided to have a shower quickly indicated that the harm did not last long, while the other thought that her taking a shower showed that the harm was more than minor.

Most sentencers identified that the spitting had caused psychological harm or distress. One sentencer who placed harm in category 1 thought there was substantial distress caused by the spitting.

There was a substantial element of distress caused by the incident

(placed in category 1)

Of the two who placed harm in category 3, one stated there was no real physical harm and that the distress caused by spitting would be applied as an aggravating factor.

I think that will come in later as spitting is very nasty... it's a bit borderline... category 3 and aggravate it up a bit

(placed in category 3)

The other, using the second harm model, stated there was no injury and little indication of distress.

There's no injury and she was deeply embarrassed... that's it... it doesn't say she was still bothered about it the next day (placed in category 3)

Spitting was also a factor drawn upon when assessing culpability and aggravation. 5 out of 11 sentencers placed in the offender in higher culpability: four identified 'Intent to cause fear of serious harm' (of disease transmission) as a culpability factor (two of whom also listed spitting as a culpability factor), and one identified spitting as a weapon equivalent. Eight sentencers identified spitting as an aggravating factor of the offence. In their final comments, a few sentencers highlighted the fact that spitting could be seen as a culpability and an aggravating factor.

One sentencer also referred to the fear of disease transmission in their assessment of harm.

Category 2 because there doesn't seem to be any prolonged physical or psychological harm or distress... some sentencers would probably opt for category 1 because of the [Covid-19] context

(placed in category 2)

Scenario C – strangulation (9 magistrates)

8 out of 9 sentencers placed harm in category 1, and one placed it in category 2. Most sentencers highlighted that the victim was in fear for her life and said this amounted to more than minor psychological distress.

It's not much physical harm but she said she was in fear of her life and thought she would pass out (placed in category 1)

One sentencer questioned whether magistrates are qualified to assess psychological harm.

I don't know whether somebody's suffering from psychological harm or not... If someone has a letter from a doctor to say they've been prescribed anti-depressants as a result of that... then that is evidence of psychological harm, but if someone just says I've been very upset and I haven't been sleeping very well, I don't know if that's true or not, I haven't got evidence for that. You have to go with instinct and I don't like doing that, I don't think it's a very good way of doing it (placed in category 1)

Another sentencer who placed harm in category 1 said their decision was led by the physical harm, although acknowledged there had also been psychological harm.

One sentencer who placed harm in category 2 said there was evidence of serious distress, but they were unsure if it was more than minor.

No lasting physical injuries, evidence of immediate serious distress, fear of becoming unconscious so... certainly not category 3... unsure as to whether we're talking more than minor... high category 2 but bearing in mind as we carry on that it's nearer 1 than 3

(placed in category 2)

(placed in category 2)

ANNEX B

Common assault

Scenario A – biting

	Culp	Factors	Harm	SP	Aggravating factors	Mitigating factors	Final sentence (before GP)
1	B	<ul style="list-style-type: none"> No high culpability factors 	2	low level community order	<ul style="list-style-type: none"> Service to the public 	<ul style="list-style-type: none"> Remorse Previous good character 	Band B fine
2	B	<ul style="list-style-type: none"> No high culpability factors 	2	Band B fine	<ul style="list-style-type: none"> Service to the public 	<ul style="list-style-type: none"> Remorse 	Band B fine
3	B	<ul style="list-style-type: none"> No high culpability factors 	2	fine		<ul style="list-style-type: none"> Remorse 	Band B fine
4	B	<ul style="list-style-type: none"> No high culpability factors 	2	Band B fine	<ul style="list-style-type: none"> Angry and abusive 	<ul style="list-style-type: none"> Remorse Previous good character 	Band A fine
5	A	<ul style="list-style-type: none"> Leading role in group activity 	2	medium level community order	<ul style="list-style-type: none"> Service to the public 	<ul style="list-style-type: none"> Remorse Previous good character 	low level community order with UPW
6	B	<ul style="list-style-type: none"> No high culpability factors 	3	Band A fine	<ul style="list-style-type: none"> Service to the public Took place at night Verbal abuse 	<ul style="list-style-type: none"> Remorse 	Band B fine
7	B	<ul style="list-style-type: none"> No high culpability factors 	3	Band A fine	<ul style="list-style-type: none"> Bite marks 	<ul style="list-style-type: none"> Remorse Previous good character Lack of maturity 	Band B or C fine
8	A	<ul style="list-style-type: none"> Use of teeth 	2	medium level community order	<ul style="list-style-type: none"> Service to the public 	<ul style="list-style-type: none"> Remorse 	medium level community order
9	A	<ul style="list-style-type: none"> Intent to cause fear of serious harm 	2	medium level community order	<ul style="list-style-type: none"> Deliberate 	<ul style="list-style-type: none"> Remorse 	low level community order
10	B	<ul style="list-style-type: none"> No high culpability factors 	2	Band B fine	<ul style="list-style-type: none"> Service to the public Presence of others 		low level community order
11	B	<ul style="list-style-type: none"> No high culpability factors 	2	Band B fine	<ul style="list-style-type: none"> Service to the public 	<ul style="list-style-type: none"> Remorse Previous good character 	Band C fine

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

ANNEX B

Scenario B – spitting

	Culp	Factors	Harm	SP	Aggravating factors	Mitigating factors	Final sentence (before GP)
1	A	<ul style="list-style-type: none"> • Prolonged • Intent to cause fear of serious harm 	1	medium level community order	<ul style="list-style-type: none"> • Domestic context • Alcohol • Prolonged 		medium level community order
2	B	<ul style="list-style-type: none"> • No high culpability factors 	2	Band B fine	<ul style="list-style-type: none"> • Spitting • Domestic context 		Band C fine
3	B	<ul style="list-style-type: none"> • No high culpability factors 	1	community order	<ul style="list-style-type: none"> • Spitting 		high level community order
4	B	<ul style="list-style-type: none"> • No high culpability factors 	2	Band B fine	<ul style="list-style-type: none"> • Domestic context 		Band C fine
5	A	<ul style="list-style-type: none"> • Intent to cause fear of serious harm 	2	high level community order	<ul style="list-style-type: none"> • Spitting • Domestic context 	<ul style="list-style-type: none"> • Provocation 	12 weeks custody
6	B	<ul style="list-style-type: none"> • No high culpability factors 	3	band A fine	<ul style="list-style-type: none"> • Spitting • Domestic context • Alcohol 		Band B fine
7	A	<ul style="list-style-type: none"> • Spitting • Intent to cause fear of serious harm 	2	medium level community order	<ul style="list-style-type: none"> • Spitting 	<ul style="list-style-type: none"> • Provocation 	low level community order
8	A	<ul style="list-style-type: none"> • Spitting as weapon equivalent 	2	medium level community order	<ul style="list-style-type: none"> • Spitting (not double counted) • Domestic context • Alcohol 		medium/high level community order
9	A	<ul style="list-style-type: none"> • Spitting • Intent to cause fear of serious harm • Not prolonged but a build-up 	2	medium level community order	<ul style="list-style-type: none"> • Domestic context 		medium level community order
10	B	<ul style="list-style-type: none"> • No high culpability factors 	2	Band B fine	<ul style="list-style-type: none"> • Spitting • Domestic context • Presence of others 	<ul style="list-style-type: none"> • Previous good character 	low level community order
11	B	<ul style="list-style-type: none"> • No high culpability factors 	3	Band A fine	<ul style="list-style-type: none"> • Spitting • Domestic context 	<ul style="list-style-type: none"> • Previous good character 	Band B fine

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

ANNEX B

Scenario C – strangulation

	Culp	Factors	Harm	SP	Aggravating factors	Mitigating factors	Final sentence (before GP)
1	A	<ul style="list-style-type: none"> • Intent to cause fear of serious harm • Strangulation 	2	medium level community order	<ul style="list-style-type: none"> • Domestic context • Alcohol 		high level community order
2	A	<ul style="list-style-type: none"> • Prolonged • Substantial force • Strangulation 	1	18 weeks custody	<ul style="list-style-type: none"> • Domestic context • Alcohol • Strangulation 		18 weeks custody
3	A	<ul style="list-style-type: none"> • Intent to cause fear of serious harm • Strangulation 	1	high level community order	<ul style="list-style-type: none"> • Domestic context • Abuse of power • Alcohol 		high level community order
4	A	<ul style="list-style-type: none"> • Intent to cause fear of serious harm • Strangulation 	1	high level community order	<ul style="list-style-type: none"> • Domestic context 	<ul style="list-style-type: none"> • Previous good character 	high level community order
5	A	<ul style="list-style-type: none"> • Intent to cause fear of serious harm • Substantial force • Strangulation 	1	high level community order	<ul style="list-style-type: none"> • Domestic context • Alcohol 		12 weeks
6	A	<ul style="list-style-type: none"> • Substantial force • Strangulation 	1	high level community order	<ul style="list-style-type: none"> • Domestic context • Alcohol 		12 weeks
7	A	<ul style="list-style-type: none"> • Prolonged • Substantial force • Strangulation 	1	high level community order	<ul style="list-style-type: none"> • Domestic context • Alcohol 		12 weeks, suspended for 12 months
8	A	<ul style="list-style-type: none"> • Intent to cause fear of serious harm • Strangulation 	1	high level community order	<ul style="list-style-type: none"> • Domestic context • Gratuitous degradation • Abuse of power • Alcohol 		high level community order
9	A	<ul style="list-style-type: none"> • Strangulation 	1	high level community order	<ul style="list-style-type: none"> • Domestic context • Alcohol 	<ul style="list-style-type: none"> • Previous good character 	high level community order

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

ANNEX B

Annex A – scenarios

Scenario A – biting

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. Teeth marks 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.

Scenario B – spitting

H was at a family party and had an argument with his stepmother, S, whom he disliked and had a bad relationship with. S was slightly drunk and was telling H he needed to learn some manners and change his attitude as he had ignored her all evening. H told her to 'fuck off you bitch and don't speak to me.' S continued to berate H and shouted at him that he was 'a rude little bastard', waving her finger in his face. A nasty verbal argument ensued. H decided to leave and, as he pushed past S, spat in her face. S was very upset and tearful and left the party, feeling deeply embarrassed and needing to have a shower and wash her hair. H pleaded guilty but stated that she shouldn't have kept on at him and refused to apologise for the incident.

Scenario C – strangulation

V and her partner D had been to an engagement party. They had both been drinking and, on returning home, D accused V of flirting with someone at the party. She told him to stop being stupid and that she was going to bed and he could sleep on the sofa. As she went to pass him, he threw her against the wall and shouted in her face that he had seen her flirting and she had made him look like a twat. She tried to push him away and go upstairs, and he grabbed her by the throat and held her against the wall with his hand around her neck. V was crying and distressed, and D only let her go once she had gone red in the face and was gasping for air. In her statement, V said she had been unable to breathe, thought she was going to pass out and had been in fear for her life. There were no lasting physical injuries or any bruising, although reddening of her neck was visible in police photographs. D pleaded guilty on the day of trial.

Annex B – harm models

Model 1 (as in the draft guideline)

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/distress
Category 2	Minor physical or psychological harm/distress
Category 3	No/very low level of physical harm and/or distress

Model 2

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	Harm falling between categories 1 and 3
Category 3	No physical injury No/very low level of distress

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