

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**26 January 2024**  
**SC(24)JAN06 – Assault (Harm)**  
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## **1 ISSUE**

1.1 This meeting is to update the Council on work undertaken to identify if any issues are apparent with the approach to assessing harm in the Assault guidelines; specifically, whether a lack of provision for assessing harm risked rather than caused is leading to disproportionately low harm assessments and sentences for ABH and GBH S20 offences.

## **2 RECOMMENDATION**

2.1 That the Council agrees to maintain the approach to assessing harm in the Assault guidelines and clarify the assessment relates to harm caused.

## **3 CONSIDERATION**

3.1 At the July 2023 Council meeting the Council considered a paper in relation to the harm assessment in the Assault guidelines. Specifically, the question raised was whether the harm assessment should provide for foreseeable harm as provided for by section 63 of the Sentencing Act.

3.2 Section 63 of the Act provides:

Assessing seriousness

Where a court is considering the seriousness of any offence, it must consider—

(a) the offender's culpability in committing the offence, and

(b) any harm which the offence—

(i) caused,

(ii) was intended to cause, or

(iii) might foreseeably have caused.

3.4 In summary it was noted that the intention in drafting the original guidelines was that the Assault guidelines should assess harm actually caused, given that the offence charged would be informed by the injury caused by the offence. In developing the revised guidelines

the Council considered that the culpability factors assess an offender's intention to cause harm and include foresight of the level of potential harm in a specific offence by factors such as the level of force, type of weapon used or duration of an attack.

3.5 The revision to the guidelines specifically sought to clarify issues identified in the evaluation of the guideline which had led to some unintended impacts, which included categorisation and sentence increases for GBH offences. The revision intended to ensure proportionate seriousness categorisations, and factors and sentences were developed to ensure these were suitably high in the most serious cases. Council members present during the development may recall that considerable work was undertaken to ensure relativity of sentences, and to ensure proportionality of sentences in comparison to similar or related offences such as Manslaughter. As an example, the starting point for a reckless culpability unlawful act manslaughter offence (which could be a GBH s20 offence if death does not occur) would be 6 years custody. The Council considered it important to ensure that sentences were properly calibrated to ensure that there is an appropriate distinction in the sentence reflecting harm caused in such offences.

3.6 It was highlighted that the potential conflation of culpability and harm was discussed recently in the case of R v Dixon, which in considering a GBH S18 sentence, interpreted the guideline correctly in its assessment of harm relating to actual harm rather than foreseeable or risked. In that case reference was made to the Seriousness guideline which stated that harm foreseen or intended may be relevant to the culpability of the offender:

" If much more harm or much less harm has been caused by the offence than the offender intended or foresaw, the culpability of the offender, depending on the circumstances, may be regarded as carrying greater or lesser weight as appropriate " para. D 1.19 Overarching Principles: Seriousness Guideline.

3.7 While the Council agreed that the harm assessment for GBH s18 should relate to actual harm given the intention in the offence, it agreed work should be undertaken to assess if this approach was leading to unjustified seriousness assessments for assault offences which may be committed recklessly.

3.8 Transcripts are not available for common assault cases so analysis of 31 GBH s20 and 30 ABH transcripts has been undertaken. In terms of findings, there was an issue noted with the harm assessment in ABH cases involving non-fatal strangulation, with most assessed as category 2 harm due to a lack of serious physical injury or ongoing impacts. However, these predated the Cook judgement, and the Council is in the process of developing a separate guideline for this offence which will ensure appropriate categorisations of harm in these offences. In other cases; specifically, 4 ABH cases and 9 GBH cases; there were offences in which the risk of harm was higher than the harm caused,

either due to the type of weapon used or good fortune that an injury was not more severe. Details of those cases, and the relevant harm assessments, have been provided below:

ABH Harm assessment

<b>Harm</b>	
<b>Category 1</b>	Serious physical injury or serious psychological harm and/or substantial impact upon victim
<b>Category 2</b>	Harm falling between categories 1 and 3
<b>Category 3</b>	Some level of physical injury or psychological harm with limited impact upon victim

<b>ABH: Offence and Injury description</b>	<b>Harm categorisation</b>	<b>Final sentence</b>
1) V hit with a car used as a weapon (assessed as highly dangerous weapon) – driven at intentionally and knocked off feet. Cuts and grazes and soft tissue injury only but pain affected V for a number of weeks.	Cat 2	28 mths imp, reduced to 21 mths for plea
2) D used a broken bottle to hit V (one of his co-d's) to head in fight, cut to ear, left small scar. Weapon assessed as highly dangerous. Judge says could have been charged as unlawful wounding and sentence would have been higher.	Cat 2.	20 mths YOI reduced to 15 mths for plea
3) Savage attack on V while he was drunk and passed out. D bashed V's head on kerb and punched repeatedly. Witnesses described it as relentless and vicious. Head wound needing steri strips. Culp A as prolonged and persistent. Judge says injuries could have been more serious and does not suspend sentence as only immediate custody marks seriousness.	Cat 2.	18 mth SP reduced to 16mths imp with mitigation, reduced to 12 mths with credit for plea.
4) DA; D knocked V to the ground, kept coming back. There were stamps, there were kicks. Judge says 'Does not come into category one because the injuries are not as severe as category one demands; that is your good fortune. Very fortunate you are not standing there facing a murder charge, because those of us who regularly sit in these courts have seen people killed with one punch. I mean, it is a miracle the injuries were not far more severe'.	Cat 2.	2 years, reduced to 14 mths for plea and mitigation. Immediate custody.

## GBH Harm assessment

<b>Harm</b>	
All cases will involve 'really serious harm', which can be physical or psychological, or wounding. The court should assess the level of harm caused with reference to the impact on the victim	
<b>Category 1</b>	<p>Particularly grave and/or life-threatening injury caused</p> <p>Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment</p> <p>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 their normal day to day activities or on their ability to work</p>
<b>Category 2</b>	<p>Grave injury</p> <p>Offence results in a permanent, irreversible injury or condition not falling within category 1</p>
<b>Category 3</b>	<p>All other cases of really serious harm</p> <p>All other cases of wounding</p>

<b>GBH S20: Offence and Injury description</b>	<b>Harm categorisation</b>	<b>Final sentence</b>
1.) V kicked and punched and D plunged knife at her – V grabbed blade and it cut her hand. She was stabbed and kicked in head. Injuries healed but lasting psychological impacts. Pregnant female lead offender (aged 17 at time of offence) charged with s18 not s20. After plea, Petherick and Art 8 considerations 3 yrs 8 mths custody. Co-ds charged with s20 for assaults during attack	Cat 2 towards 3.	D2- 2 yrs 9mths immediate custody; D3 - (aged 16yrs 9mths at time of offence) 18 mths reduced to 10mths YOI (Manning relevant)
2.) V and D on a fishing trip and had argument; D stabbed V with knife being used to gut fish. Stabbed in thigh. Serious injury. Culp A. J said fortunate not more serious – may have resulted in fatality if artery had been cut.	Cat 2 – grave injury	3 yrs reduced to 27mths immediate custody for plea
3.) V attacked by 3 others. Extensive injuries; stab wounds which went in one side and exited other; required surgery and physiotherapy, left with limp and depression – Judge said it	Cat 2 (top of range)	4 years reduced to 3years (for pleas) for all 3 offenders

changed his life. Culp A. J said 'whilst the injuries sustained by Mr King in this case were, indeed, grave and have an impact on his life, they are not so significant as to fall into the particular grave or life-threatening section.'		
4.) Punch outside pub, v head hit ground. V fractured skull, bleeding and bruising to his brain. Lasting impacts, dizziness, slurred speech, psychological effects, can no longer run as makes him dizzy. Judge mentions potential for worse outcome if no medical intervention but in context that he left V there only. V could not work for 3 months.	Cat 2 (nb. This could potentially have been categorised as Category 1 due to lasting impacts, or top of cat 2 as previous case and higher SP).	2 years reduced to 16 mths for mitigation and 12 mths immediate custody for plea
5.) D suffering mental health issues; stabbed brother; single stab wound to abdomen that punctured small bowel; made a full recovery, which Judge said was lucky.	Cat 3	24 mths, reduced to 16mths immediate custody for plea
6.) Shaken baby. Bleeding on brain; unresponsive and floppy. Normal development, no ongoing harm.	Cat 3.	2 yrs reduced to 18 mths immediate custody for plea
7.) D glassed victim in face. Cuts requiring stitches, three to eyebrow four to neck. Some smaller cuts and some permanent scars but not as bad as could have been. Judge says extremely fortunate not to cause loss of eye or cut an artery. Says risk of harm very high.	Cat 2	2 years 6 months reduced to 22 months immediate custody for plea
8.) Punched female in jaw causing her to fall to ground. Broken jaw and small brain bleeds; required surgery for jaw. Judge says brain bleed could have been potentially life threatening but no evidence of that.	Cat 2.	2 years reduced to 21 months immediate custody for plea
9.) Very few facts but car was weapon and D lost temper. Ongoing impacts for V- headaches; loss of vision in one eye so lost driving licence; panic attacks. Judge says some potential harm foreseen and significant caused. Jury had not convicted of s18 and D pleaded to s20. Car was used as a weapon but only assesses as Culp B.	Cat 2.	3 years immediate custody (10 mths concurrent for other offences of dangerous driving and DWD so Judge aggregates criminality)

3.9 It should be noted that in some cases the harm categorisation did not appear to be as high as it should have been. However, this appeared to be due to the interpretation and

application of the harm assessment by the Judge rather than the factors not providing for a higher categorisation.

3.10 While some Judges did mention harm risked and foreseen and the good fortune that harm was not more serious in some cases, categorisations were based on the harm caused. However, in those (and indeed all) cases where risk was higher than actual harm, immediate custody was imposed and the offences all considered too serious to consider suspending the custodial sentence. It was agreed when this matter was last considered that work would be undertaken to estimate the impact of any change in approach to assessing harm; specifically if foresight or risk of harm is assessed.

### Analysis

3.11 Some analysis was undertaken to illustrate what the impacts could be of amending the harm model for ABH and s20 offences if sentencers were to assess harm as higher than currently. This analysis considered the impact of a movement from harm category 3 to 2 and from harm category 2 to 1, for cases falling into culpability A or B. Any cases categorised as culpability C were not considered in scope for this analysis.

3.12 The guideline starting points for offence categories A1 to B3 were taken as purely indicative sentences and the proportion of offenders within each of the six offence categorisations were estimated from the most recent data collection. Three different scenarios were modelled for each offence: a high, medium and low scenario in terms of movement between harm categories (assuming that assessing risk or foresight of harm rather than actual harm would elevate harm categorisations above their current harm category). The findings and the scenarios are summarised in Table 1 below.

3.13 **Table 1: Estimated additional prison places a year**

Offence	Prison place estimates		
	High scenario (40% movement)	Medium scenario (25% movement)	Low scenario (10% movement)
ABH	800	500	200
GBH S20	300	200	100

3.14 These additional prison place impacts are rounded to the nearest 100 places and are indicative only. The three scenarios have been generated to show the potential for impacts arising from a change to the harm model resulting in sentencers increasing the harm category, for cases falling into culpability A or B. For example, if one quarter of offenders (medium scenario) sentenced for GBH S20 and categorised as culpability A or B moved

from either harm category 3 to 2 or from harm category 2 to 1, the impact on the prison estate has been estimated to be up to 200 additional prison places a year.

3.15 It is not recommended that the harm assessment be revised to provide for assessment of harm risked or foreseen, not only because of the potential impact of doing so. As discussed previously, the offender's intention and foresight of harm likely to be caused is assessed by the method of the assault or vulnerability of the victim. Use of a more dangerous weapon is highly indicative that the offender intends to cause a higher degree of harm, even where an offence is committed recklessly. There is a risk that any foresight will be double counted if the harm assessment is broadened to include risk of harm. A further concern is the subjectivity which would be introduced into the harm assessment, and the difficulty of defining how risk should be assessed. While some risks are obvious, others are remote, and risk assessments would likely be inconsistent potentially leading to unjust sentences and increased appeal volumes.

**Question 1: Does the Council agree the harm assessment should be clarified as relating to harm caused, or should harm risked be assessed?**

#### **4 IMPACT AND RISKS**

4.1 As noted, there is a risk that providing for harm foreseen in an assault offence will have an inflationary impact upon sentences, which were developed to ensure proportionality of sentence and address some of the inflationary aspects found in the evaluation of the original guideline.

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