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Introductory comments

Further on in this paper we have responded to the specific questions posed in the consultation document. However, our detailed responses should be read in the context of the following introductory comments.

Firstly, we question if it is genuinely possible to produce individual offence guidelines — such as are currently used by magistrates — which can be used by magistrates and Crown Court judges. We understand from attendance at the Sentencing Council seminar on 9 December that it has been acknowledged that the Council would like to see all members of the judiciary taking a uniform approach to the application of guidelines — but we remain to be convinced if the needs of both judges and magistrates can be met in one set of guidelines. From a purely practical point of view, magistrates have been used to having all relevant offence information and guidance in one place.

Further, we are not convinced that using the offence of assault is the right starting point from which to develop the new framework. We understand that the Council focussed on assault because the existing guideline for this offence was not being followed in the higher courts — but it might be argued that this could be better addressed by revising the specific offence guideline.

Finally, we accept that the aim is for a greater consistency of approach whilst maintaining judicial independence. However, the consultation papers provide no clear rationale for changing the current structured decision making process in which the elements of the offence are considered before any offender factors. Sentencer confidence is as vital as public confidence and there could be a risk of the one affecting the other if the proposed framework is overly prescriptive and complicated. Accordingly — although we accept that the existing framework may have room for improvement, and we are not resistant to change and evolution — it is important that the new framework is a genuine improvement to what is in use at the present time. If more time is required to develop the new framework — then more time should be found. It should also be remembered that if there is a significant change in the format of the guidelines, as suggested here, that will bring with it training and cost implications.

Comments on the resource assessment document

This document assumes all offences are correctly charged. However, in our view this is not always the case and, for example, the use of common assault as the charge often causes particular concern. The view on page 2 that 'current sentencing practice ... common assault is disproportionate to the level of harm' does not take this point into account.

It also fails to consider that in recent years many police forces have used common assault for domestic violence cases and that needs to be taken into account when considering the new guidelines since common assault may be more easily proved than ABH where the partner is reluctant to come to court.

We have concerns about the phrase 'Because strong assumptions had to be made' on page 3 paragraph 2. This suggests the reliability of the estimates is subject to considerable uncertainty. This must raise issues about the nature and purpose of the exercise.

We question the statement that 'it has been assumed that there will be no change of behaviour with respect to out of court disposals' on page 3, paragraph 3. How is this assumption arrived at when — as far as we are aware — no one is monitoring out of court disposals?

The data used is for 2008. The revised Magistrates' Courts Sentencing Guidelines (MCSGs) were issued in May 2008 to take effect from 4 August 2008 and to replace those which came into effect on 1 January 2004. Accordingly, the data is skewed by using both former and present guidelines. This is not helpful when estimating sentencing in magistrates' courts. The assumption in the last paragraph on page 3 must, therefore, be false. The 2009 sentencing statistics were published in late 2010 at <http://www.justice.gov.uk/sentencing-stats2009.pdf>

In the 2009 statistics magistrates' courts sent 15.7% of violence against the person into custody compared with 16.2% in 2008, the year used by the Sentencing Council for this review (Table 2.4 of Sentencing Statistics 2009). This suggests that the 2008 revision to MCSGs has already brought down custody levels for these offences. However, the sharp rise between 2007 and 2008 may reflect the twin effects of increased domestic violence cases being prosecuted and the increased common assault /ABH resulting from the 2003 Licensing Act being introduced in 2005.

It is not clear on pages 4 onwards whether the figures quoted are for all sentences or just custodial sentences — but in 2009 there were 48,389 custodial sentences handed out in magistrates' courts compared with 64,913 in 2002 (Table 2.2 of Sentencing Statistics 2009). This is a decline of 3.9% between 2008 and 2009 and 16.5% between 1999 and 2009. Only 1.7% of summary offences result in a custodial sentence. Common assault is a summary only offence.

The various figures quoted in the resource paper do not state whether any of the offences were dealt with concurrently with other offences as may be the case with section 38 assault

resist arrest. We believe that concurrent sentencing is much more common than the consultation document appears to assume. This might reduce the suggested saving in prison places that seems high in terms of the overall total.

We note that there is a section entitled 'Impact of the new guideline on the resources required for the provision of youth justice services (offenders aged under 18)', despite the fact that the guideline 'applies only to the sentencing of offenders aged 18 and older.' This apparent ambiguity suggests that the Sentencing Council needs to clarify its position in sentencing youths, in all its future guidelines. The cost estimate is also incorrect as the YJB only pays about 40% of YOT costs, whereas the text assumes that all youth sentencing costs are paid by the YJB.

On page 12 there is a reference to the lack of data about guilty pleas and the effect on sentencing. We assume, as it is not mentioned, that the Council has ignored the effect of remands in custody on sentence lengths as the recent PQ shows that there is no data available on the reasons for remands in custody.

We note on page 12 that no work has been done on breaches and their resource implications.

On page 16 for common assault, under 0-13 weeks' custody, half in the 'low' range go to community order whereas for 'high' all seem to go to community order. This seems odd. The formula is also the only one where the top number is higher than the bottom number in one of the fractions.

Comments on the professional consultation document

Page 4, paragraph 5 'evidence from case law ..' The cited case R v Morgan is a Crown Court case for ABH. There is no evidence from magistrates' courts that the prescribed scenarios are difficult to follow. They may be, but we have not heard of any.

Page 4, paragraph 6 'Feedback from sentencers...' – the basis of this statement is not supported by any evidence.

Page 5, paragraph 2 'current sentencing does not always reflect the guideline' – as the MCSGs changed during 2008 the use of 2008 sentencing statistics renders this statement meaningless.

We feel that there is some confusion over the use of the guideline for youths. On page 32, for example, it is stated that 'This guideline applies only to the sentencing of offenders aged 18 and older. General principles to be considered in the sentencing of youths are contained in the Sentencing Guidelines Council's definitive guideline, Overarching Principles - Sentencing Youths.' But magistrates in the youth court will undoubtedly refer to the guidelines when sentencing cases of assault.

Response to the questions in terms of general structure and specific guidelines

1. *Do you agree that the proposed structure of the draft guideline incorporating an individually tailored sentencing process for each offence is the right approach?*

With reservations. The proposed structure incorporating an individually tailored sentencing process has merit, and adopting the same decision making process for all offences is the right approach. The fundamental structure for decision making has to be the same for every offence to create consistency — but, at the same time, individually tailored sentencing could fit within this structure.

However, the change in the numbering of the offence category to higher → lower, which is the opposite of the approach in the current guidelines where the offences are ranged from lower → higher could cause complications. In the current MCSG sentencers work numerically upwards in terms of seriousness and, in the *Povey* guidance, level 1 is least serious and level 3 the most serious. Moreover, fine levels work upwards. We recommend that the category 1, 2 and 3 approach should be inversely numbered, with 3 as the most serious.

Moreover, the inclusion of the offender factors within the offence factors is untried and could cause difficulties. The current process which involves (i) consideration of the seriousness of the offence and (ii) consideration of factors about the offender is certainly more intuitive and, in the view of some respondents, should be retained. See also our comments in response to other questions.

2. *Do you agree that compensation and ancillary orders should not be included in the new assault guideline or any future offence specific guidelines?*

The majority do not agree. It is vital to include an explicit reference to compensation and ancillary orders. Compensation and ancillary orders are an essential component of the sentencing process in that there is a clear demonstration to the public that the courts do treat reparation as an equally important purpose of sentencing. Leaving this out of the guideline will lead to possible omissions and therefore inconsistencies, as well as contributing to a feeling of loss of confidence in the general public.

There is an alternative view — that these orders are always considered separately and so, to make them part of the specific guidelines is unnecessary. New guidelines could be included specifically for compensation and ancillary orders, making it clear that these should be considered in each case.

3. *Do you agree with the Council's recommendation that there should be three offence categories for all assault offences? If not, how many would be appropriate?*

Yes. The three offence category system has proven to be effective in the existing sentencing guidelines and as there does not appear to be a better model available at

present, this should be retained. There is ample room for fine-tuning within these bands and a greater number would make the process over-complicated.

4. *Are there any other factors determining harm and culpability that should be taken into account at step 1 of the decision making process?*

In the current approach to seriousness (overarching principles, seriousness) sentencers are told that harm must be judged in the light of culpability. In the proposed new version the word harm comes first and it may be felt that this is a deliberate change of principle. We therefore urge the Council to ensure that ‘culpability’ and ‘harm’ are systematically restored throughout the guidelines to their proper statutory order.

The instruction for step 1 states that ‘the court should determine...culpability and harm...by reference only to the factors identified in the table...’. There is a danger that this approach is too prescriptive, and therefore unjust. The present process allows for offence specific factors as well as generic ones to be considered when determining the starting point (category).

The factors listed at table 3 (page 16) alone determine the category. The secondary factors (table 4, page 20) move the offence up and down within a tightly drawn range of sentence. There is limited provision to move outside the category ranges. The table 3 factors are therefore critical and there is a view that there are two omissions here: the first suggestion is that previous convictions for similar offences should be taken as adding to culpability; and the second is consideration of potential harm as opposed to actual harm caused. Not all our respondents agreed with the inclusion of previous convictions at this point — but it is a majority view.

This is particularly important if this format is to be used as to template for future guidelines. For example, persistent shoplifting increases culpability very significantly; and in dangerous driving cases it is often the potential harm which is the factor to consider if no collision occurred or was narrowly avoided.

Although charging is not within the remit of the Sentencing Council, the inclusion in the guideline for common assault of serious aggravating factors does not seem to make sense. It would seem strange – maybe perverse – if a charge of common assault were to be brought if one or more of the following aggravating factors were present: use of weapon, acid or animal.

However if the offender had a minor role in such a serious assault, his lower culpability automatically takes him out of Category 1 and therefore out of a range which includes custody. To assist in sentencing such a case we think that the statement under Step 2: *‘A case of particular gravity, reflected by multiple features of culpability in Step 1, could merit an upward adjustment from the starting point before adjusting further for aggravating or mitigating features as set out below’* should be modified so that not only the starting point but also the range could be adjusted upward. The effect of this

proposal would be that a minor role in a very serious assault could still incur a custodial sentence.

There would appear to be no mention of an offender being 'reckless', only whether they intended or deliberately caused more harm, etc. It might be useful to include reference to this, within the factors determining both harm and culpability. We accept that this may be covered by 'lack of premeditation;' but recklessness is easier to understand.

Add: Forced entry to victim's home (as per existing guideline).

'Victim serving the public' should feature in table 3 under step 1 rather than being relegated to step 2. It is analogous to 'vulnerable victim' which appears both under higher culpability and higher harm.

5. *Do you agree with the revised approach to premeditation as an aggravating or mitigating factor proposed to be included in the new assault guideline?*

Yes. The revised approach to premeditation will be of assistance in determining the offence category. However, it might be useful for some guidance to be given as to the 'sliding scale of premeditation', mentioned in the consultation, perhaps by way of examples in accompanying notes. Mention could also be made of recklessness here.

6. *Do you agree that consideration for mental illness should be included at step 1 of the process and/or do you think that it should be built into the guideline in any other way?*

Yes. The consideration for mental illness as a factor in the offence should be included in Step 1 subject to the proviso identified in the paper, namely that the mental illness/disability must be proven to be wholly or partly responsible for the commission of the offence'.

7. *Do you agree with the level of guidance and the extent of discretion that is proposed in step 1 for determining the offence category?*

Partly. The existing guidelines where a numeric rather than a weighted approach is used in determining the offence category, can lead to ambiguities. The proposed guidance offered is an improvement and the new approach, whilst a little prescriptive, does provide a better structure for 'bench marking' the start of the process, thus providing a greater consistency in sentencing. The practical difficulty that sentencers face is that sometimes the factors can fall in step one or two and the problem will be to ensure that the factors are only considered once.

8. *Do you agree that the starting point and category ranges should be applicable to all offenders, not just first time offenders, and regardless of plea entered?*

There is a minority view that the sentence start point should continue to be aimed at a first time offender, because it is clear and unambiguous.

The majority view is that the starting point and category ranges should be applicable to all offenders, not just first time offenders, and regardless of plea entered. However, we are not clear how this will work as previous convictions are apparently still to be considered as an aggravating factor at step 2.

However, we do not accept that this, in itself, is a shift to an offence, rather than an offender based approach — as this is essentially what happens under the current system.

Additional guidance may be required to guide some sentencers in making the guideline applicable to all offenders and to understand that one can adjust the guideline up or down, depending upon the details of the case

Others argue that a practical difficulty comes in putting together the offence factors and the offender factors but if these can be drawn apart as suggested in the response to question one above, then the new approach would be supported.

9. *Do you agree that starting points should be set out in the assault guideline?*

Yes. Starting points should be set out in the assault guideline — we need to provide consistency of approach.

10. *Are there other additional aggravating and mitigating factors that should be included at step 2 of the decision making process?*

No. As these lists are not exhaustive and any other factors present should be taken into account by the court, there is no need to extend the list. However it must be made clear that the list is not exhaustive, and other factors can be taken into account — sentencing benches must retain the flexibility in determining if there are additional factors which should be taken into consideration.

With specific reference to the ‘single blow’, in ‘factors reducing seriousness or reflecting personal mitigation’ it might be better to retain the wording in the current guideline for common assault, ie. ‘single blow, push or shove’. This would reflect many of the cases regularly heard in the magistrates’ court, both for common assault and assault on a police constable.

The factors should be more specific towards police officers in assault on a police constable.

11. *Do you agree that the court should take account of an assault offence covered by section 29 having been racially or religiously aggravated, and increase the severity of the sentence accordingly, only after having reached an initial sentence for the offence?*

Yes. The court should take account of an assault offence covered by section 29 having been racially or religiously aggravated, and increase the severity of the sentence accordingly, only after having reached an initial view on the sentence for the offence.

12. *Do you agree with the Council's proposed change to include lack of maturity and/or is there any further role for the guideline to play in addressing the specific issue of offenders aged 18–24?*

The Youth Courts Committee of the Magistrates' Association believes that youth should always be considered a mitigating factor in an offence. We recognize that different individuals mature at different rates and that any specific dividing line in terms of chronological age is purely arbitrary. However, we believe that it is unrealistic and, indeed, impossible to quantify this in a technical or mathematical way. We believe that judges and magistrates should always take youth and lack of maturity into consideration in determining the appropriate sentence, but the extent of the mitigation must be a matter of judgement rather than a matter of calculation. Such judgement will depend upon information obtained from advocates and from the pre-sentence report, and also from direct engagement with the young person in court.

Youth Courts Committee members do not believe that offenders aged 18-24 should be considered in a different category, although the comments made above regarding lack of maturity may obviously apply and this would need to be taken into account in deciding the appropriate sentence.

It may be sensible to include a phrase such as, 'In the case of a youth, age and maturity should be taken into account when deciding the appropriate sentence' in every individual guideline. However, guidance is needed on how lack of maturity is to be measured and validated.

It should be noted that immaturity does not really affect the harm done but only the culpability.

13. *Do you agree with the eight-step proposed decision making process?*

The eight step decision process appears quite logical. However in step 8 mention needs to be made of how time spent on electronically monitored curfew is to be measured in relation to final sentence. NB. The time spent on remand, including the use of electronic curfew, has been clarified recently by the Senior Presiding Judge (Judicial Intranet: Update 17 September 2010) and should be followed.

There is a view that there should be an additional step to allow for consideration of separate offence factors and offender factors — see comments in response to question 1 above.

We welcome the inclusion in step 2 of the questions as to whether the custody threshold has been passed, whether custody is inevitable and whether it can be suspended. This is much better placed here than in 'notes for guidance'.

One important question arises in relation to this decision making process. At what point should the bench adjourn for a report? The 'merging' of offence and offender factors could result in more prolonged mitigation being offered before a report had even been requested. This could create difficulties regarding legitimate expectations as to sentencing, particularly when taken in conjunction with the dropping of any indication of low, medium or high community orders, and in 'cusp of custody' cases.

14. *Do you think that the range for category 3 GBH (section 20) cases should include custody at its upper limit or recommend only non-custodial disposals?*

Yes. The range for category 3 GBH offences should include custody at its upper end, in line with the argument put forward in the text on page 24, ie. to ensure that sentencers will be more likely to sentence within range.

15. *Do you agree that the starting point for common assault should be a community order?*

Yes. The starting point for common assault should be a community order. However, we do have concerns about undercharging ABH as common assault. In addition, there are concerns that the guideline suggests a fine or discharge at the bottom of the range. The courts have the power to mitigate down that far if they feel that it would be appropriate in special circumstances but this should not be on the face of the guideline.

16. *Do you agree with the proposed offence ranges, category ranges and starting points for all of the offences in the draft guideline?*

The current guideline for s.20 GBH/Racially aggravated GBH, has a range of level 5 fine to 7 years custody. This proposal reduces custody to 4 years. How does this fit the argument for extending the range? Some of the more serious offences could warrant a maximum sentence of more than 4 years.

It would therefore seem logical to maintain similar range for ABH s.47/s.29, but with a lower maximum penalty of 4 years custody as proposed.

17. *Do you agree with removing the distinction between a high, medium and low community order from the offence ranges?*

Some respondents are quite clear that the distinction can be removed. However, others have said that this level of guidance is helpful and should not be removed. On balance, we support the retention of the distinctions.

18. *Do you think that the aggravating/mitigating factors of harm within the draft guideline sufficiently allow the court to take into account consideration of victims, or are there other ways in which victims could be considered?*

No. As the lists of aggravating and mitigating factors are not exhaustive, they are not in themselves, sufficient to take into account consideration of victims. Victim Impact Statements, Compensation and ancillary orders all form part of the approach to victim care, and therefore should be included in the guidelines.

19. *Do you agree that the proposed decision making process will increase transparency and therefore public confidence in the sentencing process? Are there any other ways in which the proposed guideline could increase public understanding and confidence?*

The proposed decision making process will increase transparency and improve consistency. However, whether this will significantly increase public confidence in the sentencing process is unlikely. Sentencers already give reasons for their decisions, including, for example, the purposes of the sentence; why the custody threshold has been passed; the reason for imposing a community order; the reason for the level of fine imposed (taking account of the defendant's income or means) etc. What might have more effect on public confidence is education and information — public confidence is controlled by the media and until they have a fuller understanding of what the process is, then there is little hope of changing perceptions. Greater assistance to and confidence in the Association's Magistrates in the Community project would help.

On the question of terminology, if the guidelines are to be made more accessible to members of the general public, as is the Council's specific intention, there needs to be some form of glossary, since a great deal of the terminology used might not be immediately understood by those unused to the judicial process. One such example is the term 'culpability'.