MAGISTRATES
ASSOCIATION

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Response to	**Reform of Offences Against the Person: A Scoping Consultation Paper**
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General position

The MA supports the principles of clarity, simplicity and consistency. This helps all parties have a full understanding of what constitutes an offence and the maximum sentence if found guilty. It also aids the public's understanding of offences against the person and the perception that justice is being seen to be done.

There are a number of questions of social policy and legislative preference within this consultation which are not within the MA's remit. However, the MA can comment on the practical experience of magistrates in the courtroom and the impact of proposed changes from that perspective.

Problems in the 1861 Act (ABH, GBH, GBH with intent, assault with intent to resist arrest)

1. Do consultees agree that the number and level of detail of the offences in the 1861 Act is unsatisfactory? In their experience, does this cause problems in practice?

The Offences Against the Person Act 1861 contains a large number of offences distinguished by specific type and individual circumstance. Some will be known to the public, usually by their abbreviated forms such as GBH and ABH, but without a clear understanding of the differences in law. It also contains offences rarely used in the modern court such as assaulting a magistrate in the exercise of his duty preserving a wreck. Finally, the language used is sometimes archaic, referring to penal servitude, felonies and misdemeanours.

The current offences do not adopt the structured approach which is considered more normal in more recently-legislated offences and there is an inconsistent approach to both harm and culpability across a number of offences within the Act. At present, the Magistrates' Courts' Sentencing Guidelines provide starting points for sentencing, having identified the harm caused and culpability, for the principal offences. The MA believes that a clearer statute could make this more transparent.

2. Do consultees consider that the grading of offences in the 1861 Act is illogical? In their experience, are there practical problems associated with the grading of the offences?

There does not appear to be a clear hierarchy of offences based on seriousness, the harm caused, culpability or the maximum sentence. This lack of clarity is exacerbated by the illogical section numbers for each offence. Furthermore, the considerable overlap in the sentences under section 39 of the Criminal Justice Act 1988 and section 47 of the Offences Against the

Person 1861 offences can give the perception that charging decisions are based on CPS views on appropriate venue.

3. Do consultees consider that, in principle, it is desirable that offences of violence to the person should be defined in such a way that the offender must intend or foresee the type and level of harm specified in the external elements of the offence? Or should the mental element of offences be set in accordance with a different principle?

The MA's main focus here would be on clarity in statute and using the modern terminology of 'intentional' and 'reckless' rather than terms such as 'malicious', so that whatever decision is taken on the wider principle, the legislative intention is clear to all. A bench or a judge would take the gap between a defendant's intention and the actual outcome into consideration in sentencing; the intention to commit more serious harm than actually resulted from the offence is an aggravating factor within the current MCSG. However, the MA believes that a more consistent approach to the question of intent within the statute would be beneficial.

The low threshold for liability for ABH, in particular, produces a wide range of seriousness of behaviour covered by the offence, with a correspondingly wide range in the recommended sentences – from a Band A fine up to sending cases to the Crown Court. In the Magistrates' Court Sentencing Guidelines (MCSG), Categories 1 and 2 of common assault overlap with Categories 2 and 3 of causing actual bodily harm (though Category 2 goes up to 51 weeks and thus beyond magistrates' current powers). This suggests that in day-to-day sentencing, the interests of justice are seen to require considerable overlap between the offences as currently structured. Some degree of overlap is always required, but this amount between two offences where the maximum penalties are so different might well be considered at odds with the aim of a structured and consistent hierarchy of offences.

4. Do consultees consider that the offences under sections 20 and 47 of the 1861 Act are unsatisfactory because they do not require intention or foresight of the type and level of harm that must occur? In their experience, does this give rise to problems in practice?

The MA would support the principle of a consistent approach to culpability, both to improve transparency and to ensure that individuals understand the elements to be proved if they are to be convicted.

The public perception is that the offence of GBH is more serious than ABH based on the actual harm caused, and the MCSG clearly accords greater seriousness to GBH, but both offences have the same maximum sentence of five years. The culpability and harm caused will be the basis for determining allocation of the case and whether it should remain in the magistrates' court or be sent to the Crown Court and therefore uniformity of approach is recommended.

5. Do consultees consider that there is benefit in pursuing reform of the law of offences against the person including offences of endangering others?

The MA takes no view on this question.

6. If so, should these offences be general or restricted to specific fields of activity?

The MA takes no view on this question.

7. Do consultees consider that the language of the 1861 Act is in need of updating?

The MA supports clear unambiguous wording and a consistent terminology. The language contained within the Act is unclear for a modern audience and the inconsistent approach to the use and definition of terms such as 'wounding' and 'inflicting' is confusing.

8. Do consultees consider that the language of the 1861 Act is obscure and contains redundancies, and would there be benefits in making it more explicit?

See above. Clearer language would also remove the need to explain the exact meaning of archaic expressions to unrepresented defendants, in particular. Consistent wording for offences also helps to ensure the right guideline is being followed.

9. Do consultees consider that legal references in any statute governing offences against the person should be updated to reflect the current state of the law to which they refer?

Yes. The law should be clear and transparent so that all parties can understand how the law applies to them, and the language used should be consistent. For instance, using both assault and battery in the same indictment can be confusing for defendants, witnesses and victims, as can the use of 'grievous' to indicate seriousness of injury or 'malicious' to indicate intention or recklessness. Furthermore, it can only be a good thing if the law in this area is made clearer for the public, with a clear hierarchy of offences.

10. We consider that there are serious problems in the drafting of the 1861 Act, and that there would be substantial benefit in pursuing reform of the offences now contained in that Act. Do consultees agree?

See above: the MA agrees there would be benefit from reform.

11. Are consultees aware of further theoretical or practical problems in connection with the 1861 Act other than those addressed above?

The everyday usage of the term 'assault' to describe an attack where actual contact occurred, even if no injury was sustained, continues to cause confusion in court. Defendants who are not legally represented can plead 'not guilty' based on that misunderstanding, which can create delays in court while the legal definitions are explained.

Reform: general principles

12. We consider that there would be benefit in pursuing reform of the law of offences against the person in the form of a modern statute replacing all or most of the Offences Against the Person Act 1861. Do consultees agree?

The MA agrees that there are obvious benefits in having legislation that has a logical, clear and consistent structure indicating the seriousness of the offence, harm caused and the maximum sentence which is drafted in language that is accessible and unambiguous.

13. We consider that any comprehensive statutory reform of offences against the person should involve consideration of the previous proposals, and specifically the Home Office's 1998 draft Bill. Do consultees agree?

The MA would agree that, given the scale of the reform involved, it would appear sensible to take account of work undertaken previously.

14. We consider that there would be benefit in pursuing reform with a modern statute that included a definition of injury, subject to further consideration of:

(1) the breadth of "mental injury";
(2) the exclusion of disease (see Chapter 6).

Do consultees have any views on this?

The MA recognises that offences categorised as 'less serious' can still have a lasting impact on the victims of crime and would support reform to include psychological and psychiatric harm when considering mental injury. The MA believes that sentencers would be able to evaluate the extent of the harm caused with appropriate guidance. The ongoing effect upon the victim is already identified as an aggravating feature within the MCSG.

If the decision is taken to include a separate offence of causing minor injury (see below), the MA would caution against an overly-prescriptive approach to defining minor and non-minor injury, while supporting the principle of a clear hierarchy of offences and an indication of appropriate levels of seriousness. Any new statutory framework would be followed by guidelines from the Sentencing Council in due course, which would address criteria for harm and culpability, along with aggravating and mitigating factors. There is a balance to be struck here between improving clarity and ensuring there is appropriate judicial flexibility, and scope for allowing an approach to these offences which is comparable to that taken elsewhere in the criminal law.

15. We consider that there would be benefit in pursuing reform with a modern offences against the person statute which included a definition of the term "intention". However, we consider that a formula similar to that in our report on Murder, Manslaughter and Infanticide would be preferable to that in the 1998 Bill.

Do consultees have any views on this?

The Sentencing Council's overarching principles on seriousness identify four levels of culpability for sentencing purposes: intention, recklessness, knowledge and negligence. The starting point is that culpability is at the highest applicable to the offence, which would usually be intention. Clearly, therefore, all parties should be clear about the meaning and definition of intention and recklessness as this would influence the sentence.

The MA has no definitive view on the ideal wording, but recommends that it is written in clear, easy to understand terms and maintains a consistent approach across all offences within the legislation. The MA would agree that it is possible for someone to intend to do something without having any particular result in mind, and that the Law Commission has therefore correctly identified a loophole in the 1998 draft Bill's wording.

16. We consider that there would be benefit in pursuing reform with a modern offences against the person statute including a definition of "recklessness" similar to that in the draft Bill. Do consultees agree?

The MA supports the principle of a clear, unambiguous definition of recklessness, used consistently throughout the statute, so that all parties have a clear understanding of the basis for sentence. It is worth noting that magistrates are used to dealing with the very similar use of the word 'recklessness' in the Criminal Damage Act 1971.

Assault and battery

17. We consider that there would be benefit in pursuing reform of psychic assault and battery. Do consultees agree?

Yes. The current position is confusing for the public, as the term 'assault' is widely understood to mean actual contact. The term 'psychic assault' is no less confusing, and whatever term is ultimately used, it should better reflect modern use of language. A simpler approach to identifying offences where a person apprehended imminent violence, as opposed to those where they were the victim of actual violence, could be beneficial. It will be important, with any new offence or offences, to ensure that any focus on concerns about undercharging at present does not in its turn lead to a degree of overcharging for behaviour which should not really come before a court.

18. Do consultees consider that it would be preferable to pursue reform based on:

(1) a single offence covering the scope of both of the present offences, as in clause 4 of the 1998 draft Bill; or
(2) separate offences (under whatever names) of psychic assault and physical attack?

The MA does not have strong views on these options. At present, the MA is not aware of magistrates having difficulty using the current single guideline to sentence both offences. The confusion lies predominantly with the public's perception about what constitutes an assault.

However, the MA would be inclined to the view that two separate offences, under whatever names, would benefit overall clarity for the public. As mentioned previously, unrepresented defendants can often plead 'not guilty' to an assault because of a lack of understanding about the legal meaning of the turn. Of course, such an approach would require careful consideration of the appropriate maximum sentences for each offence.

Offences of causing injury

19. We consider that there would be benefit in pursuing reform consisting of a modern statute with a hierarchy of offences based on causing injury, similar to that in the draft Bill. Do consultees agree?

The MA agrees that the current hierarchy of offences is neither logical nor sequential. A clear hierarchical structure based on a consistent approach with regard to the harm caused and culpability would be beneficial. The dividing line between minor injury and physical impact would need to be carefully considered. However, the number of proposed offences here is rather large and, as per the MA's response to question 20, this framework could be simplified.

20. We consider that there would be benefit in pursuing reform in which the scheme of the 1998 draft Bill would be modified to include a summary offence of causing minor injury. Do consultees agree?

The MA notes that the Law Commission proposes that the new offence of causing injury would cover all offences which minor injury could cover, and that it could add a layer of complexity in statute.

There is also an oddity in creating a separate offence with a maximum penalty equivalent to the maximum magistrates can impose, while also making allowance for offences of injury to be tried in the same venue. Any new statute would, of course, be followed with sentencing guidelines, which would also assist decisions on allocation. It is also worth questioning

whether, if the intention is to reduce perceptions of undercharging, labelling an injury as 'minor' is necessarily helpful in that regard.

However, the MA remains open to the arguments on both sides and would consider any detailed proposals for reform with interest.

21. Do consultees have views on the way in which an offence of causing minor injury should be incorporated into the hierarchy of offences?

While the MA has no fixed view about how any change should be incorporated, in order to maintain a consistent but flexible approach to sentencing, it would be preferable to allow the threshold to be recklessness or intent, not solely intent to cause minor injury.

It would also be helpful if the definition of a minor injury was clarified in more detail than being trifling or transient, including whether it included physical and mental injury. The impact on the mental state of a victim of violent crime, even where the result was only minor physical injury, should not be underestimated and the current definition does not extend to depression.

22. We consider that there would be benefit in pursuing reform of offences against the person in which it is specified in what circumstances offences of causing injury can be committed by omission. Do consultees have views on whether any of these offences should include causing injury by omission?

The MA has no comment on the principle of such a reform. If the Law Commission is minded to pursue this, it may be worth considering other areas of law where acts of omission are currently considered, such as neglect of a child.

Particular assaults

23. Do consultees consider that there would be benefit in pursuing reform in which it is specifically provided that conduct in England and Wales causing injury abroad falls within the offences of causing injury?

The MA has no comment.

24. We consider that there would be benefit in pursuing reform including offences of assaulting a police constable, causing serious injury while resisting arrest and assault while resisting arrest in the form contained in the draft Bill, subject to consideration being given to:

(1) the maximum sentence for the offence of causing serious injury while resisting arrest (life imprisonment);
(2) the possibility of introducing a requirement that D knew that or was reckless as to whether V was a police constable, as in the 1993 report.

Do consultees agree?

The MA agrees that any such offences should be treated consistently with more general offences of injury in a reformed statute. The MA believes it would be helpful, and more consistent across the new statute, if the requirement that D knew that or was reckless as to whether V was a police constable were included.

25. Do consultees consider that there would be benefit in considering the abolition of the offences of assaulting or obstructing clergy and of assaulting magistrates and others preserving a wreck?

The MA has no strong view, but the nature of these particular offences mean they are unlikely to appear regularly before a modern court. In assaults where a particular occupation is at special risk or is targeted, the appropriate use of aggravating factors in sentencing could ensure cases are treated with appropriate gravity.

26. We consider that there would be benefit in pursuing reform including revised offences of racially and religiously aggravated violence, based on the offences of assault and causing injury defined in the draft Bill. Do consultees agree?

The current guidelines are based on the index offence and while the aggravated offences are contained within the Crime and Disorder Act 1998, there is no separate guideline for the racially and religiously aggravated offences. If the offences of violence were to be reformed as defined by the draft Bill and there is no wider review of aggravated offences (which would obviously cut across offences against the person and public order offences), it would appear sensible at that time to apply the same approach to the racially aggravated offences. The MA notes the Law Commission's previous report on hate crime, which identified a number of problems with the operation of aggravated offences and stated the need for a wider review, and reiterates the point that hostility needs to be dealt with effectively in guidelines.

27. Do consultees consider that there is benefit in examining whether reform of offences against the person should include specific offences of domestic violence?

The MA is unclear what benefit would arise from separate offences, as opposed to including domestic abuse as an aggravating factor. Magistrates currently identify domestic abuse as an aggravating feature and the history of the relationship, the abuse of power and a particularly vulnerable victim would all be relevant in assessing the gravity of the offence. The overarching principles on domestic violence provide guidance for sentencing a range of offences committed in a domestic context and state that offences committed within a domestic context should be regarded as being no less serious than offences committed within a non-domestic context. They also state that because an offence has been committed in a domestic context, there are likely to be aggravating factors present that make it more serious.

While recognising the serious nature of domestic abuse and the possible benefits of having an offence of domestic violence identified on a record of convictions, having a separate specific offence of domestic violence would place the focus back onto offences of violence and undermine the move to extend the approach to recognise both physical and mental abuse and coercive and controlling behaviour.

Domestic circumstances should, of course, be identified as an aggravating feature of the offences of injury, which increases their gravity and thus the sentence imposed. It would also be unhelpful to draft the approach indicating that offences in the domestic setting were limited to family members unless this definition was extended to reflect a range of partnerships and domestic settings. A clearer and more transparent framework for offences against the person more generally should assist with appropriate charging and sentencing decisions.

Other offences under the 1861 Act

28. Do consultees consider that there would be benefit in pursuing reform including a revised and clarified offence of encouraging murder?

The MA has no comment.

29. We consider that there would be benefit in pursuing reform including an offence of threatening to kill or cause serious injury, in the form given in clause 10 of the 1998 Bill, amended to cover the case where the threat is conditional. Do consultees agree?

The MA would support a review of the current offence to reflect changes in the use of technology and the way it interacts with provisions in the Malicious Communications Act 1988 and the Communications Act 2003. The use of social media to make threats to kill, particularly in a domestic abuse and harassment context has added an additional complexity in determining the impact on the victim and their belief as to the likelihood of any threat being carried out and by whom. The increase in 'trolling' to incite or encourage others to kill or cause serious injury has broadened the potential threat to the victim. The MA would also support clarifying the law in cases where threats are conditional and removing any loophole created by use of the word 'believe'.

30. We consider that there would be benefit in considering whether reform of the law of offences against the person should include an offence of administering a substance capable of causing injury, similar to that in clause 11 of the draft Bill.
Do consultees have views about such an offence?

The MA has no comment.

31. We consider that there is benefit in pursuing reform including offences relating to explosives and dangerous substances, in the form given in the draft Bill. Do consultees agree?

This offence is indictable-only in the adult court.

Alternative verdicts

32. We consider that there would be benefit in pursuing reform including a provision about included offences, similar to clause 22 of the draft Bill, amended to take account of the offence structure decided upon. Do consultees agree?

The MA has no objection to the principle of codifying the law on included offences and extending the ability to do this in the case of offences against the person to the magistrates' courts. A similar ability exists in the case of dangerous driving offences, which means this would not be unprecedented. In the context of a reformed and clarified set of offences against the person, this would also be a simpler task. Training and appropriate guidance would of course be required to facilitate this.

Transmission of disease

The MA has no comments to make in this area of the consultation.