

NEW ASSAULT SENTENCING GUIDELINES

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INTRODUCTION

On 1st July 2021, new sentencing guidelines came into effect for assault offences.¹ The new guidelines cover some of the most frequently sentenced offences (common assault) and the most serious (attempted murder).

The six new guidelines now in force apply to sentencing of the following **offences**:

- 1) **Common assault** – section 39 Criminal Justice Act 1988; **Racially/religiously aggravated Common assault** – section 29 Crime and Disorder Act 1998; **Assault on Emergency Worker** – section 1 Assaults on Emergency Workers (Offences) Act 2018
- 2) **Assault with intent to resist arrest** – section 38 Offences Against the Person Act 1861
- 3) **Assault occasioning actual bodily harm (ABH)** – section 47 Offences Against the Person Act 1861; **Racially/religiously aggravated ABH** – section 29 Crime and Disorder Act 1998

¹ <https://www.sentencingcouncil.org.uk/news/item/revised-guidelines-for-assault-offences-and-attempted-murder-come-into-force/>.

- 4) **Inflicting grievous bodily harm/Unlawful wounding (GBH)** – section 20 Offences Against the Person Act 1861; **Racially/religiously aggravated GBH/Unlawful wounding** – section 29 Crime and Disorder Act 1998
- 5) **Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm (GBH with intent)** – section 18 Offences Against the Person Act 1861
- 6) **Attempted murder** – section 1 (1) Criminal Attempts Act 1981

HISTORY OF SENTENCING GUIDELINES

Since 2010, the Sentencing Council has been responsible for the preparation of ‘guidelines relating to the sentencing of offenders’ in Magistrates’ Courts and Crown Courts in England and Wales. These sentencing guidelines can be ‘general in nature or limited to a particular offence, particular category of offence or particular category of offender’ as indicated by the two categories of (1) offence and (2) overarching guidelines.² Additionally, a *General Guideline* came into force on 1st October 2019 for sentencing where there is no existing guideline for an offence.

Prior to the Sentencing Council, sentencing guidelines were judicially created – for example in the form of guideline judgments in the Court of Appeal. For assault offences, these were judgments such as *R v McNally* (assault occasioning ABH) in which the Court of Appeal detailed relevant considerations.³ Some of these judgments resembled the aggravating and mitigating factors set out in current guidelines, others provided more ambiguous guidance such as a ‘short sharp sentence’ for a first offence.⁴

Judicial responsibility for sentencing guidelines ended in 2003 with the establishment of the Sentencing Guidelines Council – the immediate predecessor to the current Sentencing Council. When sentencing an offender, every court is under a statutory obligation to follow any relevant sentencing guideline unless it is satisfied that it would be contrary to the interests of the justice to do so.⁵

² Coroners and Justice Act 2009, s.120(1) and (2).

³ [2000] 1 Cr.App.R.(S) 535.

⁴ https://www.sentencingcouncil.org.uk/wp-content/uploads/web_case_compendium.pdf; *R v Liddle and Hayes* [2000] 1 Cr.App.R.(S) 131.

⁵ Sentencing Act 2020, s.59(1).

HISTORY OF ASSAULT GUIDELINES

The six new sentencing guidelines revise the Sentencing Council's *Assault Definitive Guideline* and the *Attempted Murder* guideline developed by the Sentencing Guidelines Council (the Sentencing Council's predecessor body).

The *Assault Definitive Guideline* is significant in the history of sentencing guidelines, since it was the first guideline developed by the Sentencing Council. It came into force in June 2011 and covered **GBH with intent**- Section 18 OAPA 1861; **GBH** - Section 20 OAPA 1861; **ABH** - Section 47 OAPA 1861; **Assault with intent to resist arrest** - Section 38 OAPA 1861; **Assault on a police constable in the execution of their duty** - Section 89 Police Act 1996 and **Common Assault** - Section 39 Criminal Justice Act 1988.

In 2015, the Sentencing Council assessed the *Assault Definitive Guideline* and identified a number of impact and implementation issues with the existing guideline.

The assessment found that whilst overall the severity of sentences had decreased under the guideline as intended, this was not the case for GBH with intent (s.18) and ABH (s.47). Sentences of increasing severity for these offences were considered to be 'impacts different to those expected'.⁶

In 2020 the Sentencing Council conducted a five month consultation of proposed revised guidelines to address both the issues identified in the assessment and also to incorporate new legislation that increased maximum sentences for the assault on emergency worker offence.⁷ This consultation culminated in the publication of six new guidelines on 27th May 2021, which took effect on 1st July 2021.

WHAT'S NEW?

1. **9 STARTING POINTS** - the new guidelines revise the structure of step 1 and 2 of the *Assault Definitive Guideline* bringing the structure into line with the model employed in more recent guidelines. At Step 1 – determining the offence category - there are now 3 culpability categories (A-C), and an additional 'middle' harm category has been introduced (categories 1-3). Therefore, the new guidelines provide a range of 9 starting points at step 2 where aggravating and mitigating factors are considered.
2. **EMERGENCY WORKER UPLIFT** – the new guidelines include the first specific guidance for sentencing assault of an emergency worker.
 - a. The definition of emergency worker for the purpose of this offence includes prison staff, search and rescue workers and NHS workers.

⁶ <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-assessment-synthesis-report.pdf>.

⁷ Assaults on Emergency Workers (Offences) Act 2018.

- b. *Campbell v CPS* confirmed the broad remit of the offence to emergency workers by virtue of their status: 'It is...the status of being an emergency worker which attracts the added protection provided the worker is acting in that role, not whether some duty is being performed at the time'.⁸
- c. The guidelines incorporate the higher maximum sentence of 12 months' imprisonment for common assault where the victim is an emergency worker with an 'uplift' approach at stage 3. This is the same approach adopted for racially and religiously aggravated common assault.
- d. The uplift may exceed the offence category to ensure sentencers can reflect the statutory maximum. This approach also removes the need to revise guidelines should the maximum sentence increase in the future.

3. ATTEMPTED MURDER GUIDELINE - this is the first Sentencing Council guideline for attempted murder. It establishes 4 categories of culpability, reflecting factors included in Sentencing Act 2020, Schedule 21 for murder offences – for example higher culpability factors reflect factors in s.2 and s.3, Schedule 21; lesser culpability factors reflect the Schedule 21 partial defences to murder and aggravating/mitigating factors reflect the factors in s.9, Schedule 21.

4. NEW FACTORS

HIGHER CULPABILITY

- a. **Prolonged/persistent assault** – replacing 'sustained or repeated', *all guidelines except attempted murder*
- b. **Strangulation/suffocation/asphyxiation** - an issue in particular focus since the Government legislated specifically on strangulation in the Domestic Abuse Act 2021, *all guidelines except attempted murder*
- c. **Victim obviously vulnerable** due to age, personal characteristics or circumstances, *all guidelines except attempted murder*
- d. **Use of a highly dangerous weapon/weapon equivalent** - Under the old guidelines, weapons ranging from knives and firearms to household objects such as chairs were given the same culpability assessment. This new factor specifies that a highly

⁸ *Campbell v Crown Prosecution Service* [2020] EWHC 3868 (Admin) per Popplewell LJ at [21].

dangerous weapon (e.g. a firearm) or highly dangerous weapon equivalent (e.g. acid) is a higher culpability factor. New explanatory guidance on highly dangerous weapons is included in the guideline.⁹ *ABH, GBH (s.20), GBH with intent (s.18) guidelines*

- e. **Intention to cause fear of serious harm, including disease transmission** – this addresses concerns about assaults where transmission of Covid-19 – and any other disease – is threatened, *common assault & ABH guidelines*
- f. **Use of substantial force** *common assault, assault with intent to resist arrest guidelines*
- g. **Revenge** – *GBH with intent (s.18) guideline only*

LOWER CULPABILITY

- h. **Offender acted in response to prolonged or extreme violence or abuse by the victim** – this intends to capture the type of incident where manslaughter by loss of control would have been appropriate if death rather than GBH had been caused, *GBH with intent (s.18) & attempted murder guidelines*

AGGRAVATING/MITIGATING FACTORS

- i. **Offence motivated by, or demonstrating hostility based on disability, sexual orientation or transgender identity** – no longer a factor demonstrating higher culpability (except for attempted murder where it remains a culpability & aggravating factor), *all guidelines*
- j. **Significant degree of provocation** - ‘A greater degree of provocation than normally expected’ has been removed as a lower culpability factor at step 1 and ‘significant degree of provocation’ has been added as a mitigating factor at step 2, *all guidelines except assault with intent to resist arrest*
- k. **Deliberate coughing/spitting** - an aggravating factor for *common assault, assault with intent to resist arrest & ABH*. This applies regardless of inference/threat of disease transmission and ‘where not taken into account at step one’ as a higher culpability factor (for common assault/assault with intent to resist arrest), to avoid double counting, *common assault, assault with intent to resist arrest & ABH guidelines*.

⁹ ABH Sentencing Guideline, Explanatory Guidance: A highly dangerous weapon can include weapons such as knives and firearms. Highly dangerous weapon equivalents can include corrosive substances (such as acid), whose dangerous nature must be substantially above and beyond the legislative definition of an offensive weapon which is; ‘any article made or adapted for use for causing injury, or is intended by the person having it with him for such use’. The court must determine whether the weapon or weapon equivalent is highly dangerous on the facts and circumstances of the case’.

IMPACT – SAME OLD, OR SOMETHING NEW?

The guidelines apply to all individual offenders aged 18 and older who are sentenced on or after the 1st July 2021 for assault offences regardless of the date of commission or conviction.

Date of commission remains relevant to the maximum sentence that applies, which is determined by that date, regardless of subsequent increases. This may become relevant to sentencing for assaults on emergency workers. The Police, Crime, Sentencing and Courts Bill – which currently awaits a second reading before the House of Lords – proposes to increase the maximum sentence (currently 12 months' imprisonment) to 2 years' imprisonment.¹⁰

The guidelines are largely revisions rather than entirely new guidance, though there are a number of new elements that are likely to make a difference. These additions include the structural changes to the starting points and categories of harm, new culpability factors and entirely new guidance for assault of an emergency worker and attempted murder offences.

Given that these guidelines now apply, it is important for practitioners to be alert as to how an offence may be considered differently – for example if a weapon used now falls within the definition of 'highly dangerous' thus increasing culpability.

¹⁰ Assault on Emergency Workers (Offences) Act 2018, s.1; Police, Crime, Sentencing and Courts HL Bill 40 (2021-22) cl.2.