

SENTENCING FOR ASSAULT AND OTHER OFFENCES AGAINST THE PERSON

The Panel's Advice to the Sentencing Guidelines Council

FOREWORD BY THE CHAIRMAN

This latest Advice from the Sentencing Advisory Panel to the Sentencing Guidelines Council proposes guidelines on sentencing adult offenders for assaults and other offences against the person.

The Panel's Advice covers offences characterised primarily by the infliction of permanent or temporary harm on a victim by the direct action of an offender, or by an offender's intention to cause harm to a victim, even if such harm is not actually caused. Offences resulting in the death of the victim are not included. The offences covered in the Advice, ranging from common assault to attempted murder, are those which come before the courts in relatively high volumes; the Panel did not consult on the less common statutory offences in relation to which guidelines are not urgently needed. Although the Advice does not cover attempts in general, attempted murder was included on the basis that it is an offence that raises a number of significant issues for a sentencing court.

Although the degree of harm suffered by a victim will often influence the offence charged, and may be a fundamental factor in the assessment of offence seriousness in any individual case, there is potential for a significant imbalance between culpability and harm in relation to this group of offences; this imbalance is likely to be greatest in relation to attempted murder. The proposals in the Advice are designed to strike the right balance between culpability (both inherent in an offence and specific to an individual offender) and harm (whether sustained, intended or foreseeable).

The Advice identifies a number of aggravating and mitigating factors of particular significance for these offences and, in relation to provocation and the use of a weapon, suggests that the approach adopted should principally be the same as in

the Council Guidelines on *Manslaughter by Reason of Provocation* and *Domestic Violence*.

The Advice pays particular attention to sentencing for offences involving child victims. The Panel specifically chose to consult in relation to the offence of Cruelty to a Child because it raises some difficult issues for sentencers, not least how to assess the relative seriousness of the many different types of offending behaviour captured by this offence and how to judge the psychological impact of an offence on an individual victim. Our sentencing proposals are designed to reflect the abuse of power and the likelihood of psychological harm inherent in this offence.

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Chairman of the Sentencing Advisory Panel

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INTRODUCTION

1. Following a request from the Sentencing Guidelines Council, the Sentencing Advisory Panel has produced Advice on sentencing for assault and other offences against the person. Details of the consultation process, including a list of those who responded, are set out in Annex E.

2. The Panel's Advice covers offences that can be considered to be an assault, or a similar type of offence against the person, which do not result in the death of the victim. Such offences are characterised primarily by the infliction of permanent or temporary harm on a victim by the direct action of an offender, or by an offender's intention to cause harm to a victim, even if such harm is not actually caused. The offences covered in this Advice are those with which the courts have to deal in relatively high volumes. Legislative references, statutory definitions, maximum penalties and guidance from the Crown Prosecution Service (CPS) Charging Standard¹ as to the types of injury and other factors that may be considered to constitute each of the offences, are listed at Annex A.²

3. The Panel's Advice does not cover the offences of murder or manslaughter by reason of provocation, on which separate guidance already exists; it also excludes the numerous less common statutory offences (such as 'administering poison with intent to endanger life' and 'assault on a person preserving a wreck'), which come before the courts very rarely and in relation to which there is no pressing need for guidelines.

4. An attempt to commit a criminal offence, generally charged under the Criminal Attempts Act 1981, provides that the attempted offence shall attract the same maximum penalty as the substantive offence. As the courts face particular legal and sentencing issues when dealing with cases of attempt, the Panel chose not to consult on sentencing for an attempt to commit each of the individual offences covered in this Advice. We did, however, consult on the offence of

¹ *The Charging Standard on Offences Against the Person*; www.cps.gov.uk/legal/section5/index.html

attempted murder, which raises a number of issues that are significantly different from those raised by the offence of murder.

5. As the legislative provisions relating to the sentencing of young offenders are very different from those for adult offenders, with a different range of sentencing options for young offenders and a greater emphasis on rehabilitation, we have decided to consult separately at a later date on general principles relating to the sentencing of youths. Therefore, this Advice is restricted to the sentencing of adult offenders.

6. In light of the diversity of offences against the person and the overlap in the factors that can legitimately be viewed as amounting to a particular offence, we have sought to propose principles and sentencing starting points that will bring a sense of coherence and proportionality to this area of sentencing practice. Our proposals take into account the new sentencing framework introduced by the Criminal Justice Act 2003, to the extent that this has been implemented.

7. Section One of the Advice makes proposals about the relative seriousness of the various offences and identifies pertinent aggravating and mitigating factors; Section Two sets out the Panel's proposed sentencing guidelines. The offence of child cruelty, primarily used to prosecute cruelty and neglect against a child over a period of time, is covered separately in Section Three.

8. As can be seen from the list at Annex E, a large number of groups and individuals responded to the Panel's consultation on this topic. Overall there was general support for the Panel's proposals but, in relation to some issues, especially those raised by the offence of child cruelty, opinions were more divided. The Panel has given careful consideration to all of the views expressed.

² Please note that, for the purposes of this Advice, the term 'common assault' is used to cover both assault and battery.

SECTION ONE: PRINCIPLES OF SENTENCING - SERIOUSNESS

9. The Criminal Justice Act 2003 (the Act) establishes seriousness as the key determinant of the appropriate sentence for an offence: a community order can be imposed only if the court considers that the offence is serious enough to justify it³ and a custodial sentence can be imposed only if the court considers that a community order or a fine alone cannot be justified in view of the seriousness of the offence.⁴ The Sentencing Guidelines Council has published a definitive guideline on seriousness that guides sentencers on determining whether the respective sentencing thresholds have been crossed.⁵

10. The Act states that, when assessing the seriousness of any offence, the court must consider the offender's culpability and any harm which the offence caused, was intended to cause or might foreseeably have caused.⁶

Culpability and Harm

11. The Council guideline⁷ advises that “the culpability of the offender in the particular circumstances of an individual case should be the initial factor in determining the seriousness of an offence.” The guideline identifies four levels of criminal culpability for sentencing purposes – intention; recklessness; knowledge and negligence.⁸

12. Attempted murder and a section 18 offence (wounding or grievous bodily harm (GBH) with intent) both involve, by definition, the highest level of culpability - intention. Culpability for other assault offences can be at the level of either intention or recklessness but, assuming the same level of harm, the offence will be more serious if the offender intended to cause the harm than if the offender was reckless. According to the Council guideline:⁹ *“the worse the harm intended, the greater the seriousness.”* Following this principle, an attempted murder, which involves the intention to kill, generally will be more serious than a section 18

³ Criminal Justice Act 2003, s.148(1)

⁴ *ibid.*, s.152(2)

⁵ *Overarching Principles: Seriousness* published on 16 December 2004; www.sentencing-guidelines.gov.uk

⁶ Criminal Justice Act 2003, s.143(1)

⁷ *Overarching Principles: Seriousness*, published on 16 December 2004, page 5; www.sentencing-guidelines.gov.uk

⁸ *ibid.* page 4, section B

⁹ *ibid.*

offence, which involves the intention to wound or cause GBH (but see the discussion at paragraph 14). A section 20 offence (unlawful wounding/GBH) involves a lower level of culpability. Where intention is not an inherent element of an offence, the assessment of seriousness will need to take into account all the circumstances of the individual offence.

13. All offences against the person have the potential to involve an imbalance between culpability and harm as the same act can, in different circumstances, produce varied levels of harm. The Council guideline states: *“harm must always be judged in the light of culpability. The precise level of culpability will be determined by factors such as motivation, whether the offence was deliberately planned or spontaneous, (or) whether the offender was in a position of trust.”*¹⁰

14. The potential for imbalance between culpability and harm is at its greatest in relation to an offence of attempted murder, especially if the victim escapes injury altogether. Where the degree of harm actually caused to the victim of an attempted murder is negligible, it is inevitable that this will impact on the overall assessment of offence seriousness. It is possible in such cases that the offence might be assessed as less serious than an offence of GBH with intent that involves extensive injuries. However, although the degree of (or lack of) physical harm suffered by a victim may generally influence sentence for offences against the person, the broad statutory definition of harm (see paragraph 9) encompasses not only the harm actually caused by an offence but also any harm that the offence was intended to cause or might foreseeably have caused; thus an offence of attempted murder will always involve, in principle, the most serious level of harm.

15. Offences against the person are primarily distinguished in statute by the gravity of the injury caused, or intended to be caused, and the CPS Charging Standard follows that statutory hierarchy when deciding which offence should be charged. In general terms, offences of common assault, assault on a PC and assault with intent to resist arrest involve the lowest level of harm; an offence of actual bodily harm (ABH) involves a more serious level of harm; section 18 and section 20 offences involve really serious harm.

16. However, it is impossible, in practice, to indicate a precise level of harm that corresponds neatly with the statutory definition of each offence, especially in

¹⁰ *ibid.* paragraph 1.17; www.sentencing-guidelines.gov.uk

relation to the less serious offences of common assault and ABH. This is a difficulty acknowledged in the CPS Charging Standard,¹¹ which states: “*where battery results in injury a choice of charge is available*” and that, technically, “*any injury can be classified as actual bodily harm.*”

17. Although the Charging Standard attempts to describe offences in terms of certain injuries, it is inevitable that this approach cannot cover every conceivable situation and the Code for Crown Prosecutors recognises that “there will be factors which may properly lead to a decision not to prefer or continue with the gravest possible charge.”¹²

18. An offender can be sentenced only for the offence of which he is convicted and the court is bound by the maximum penalty for that offence even if it considers that the harm caused was sufficient, in principle, to have merited a more serious charge. It is important that the severity of an injury is not used as a means to secure a sentence for an offence that has not been proved but the court must take account of the actual degree of harm caused or intended when assessing the seriousness of an offence. The sentencer may legitimately sentence on the basis of the harm caused within the maximum available for the offence, even though that level of harm could have justified a more serious charge. This principle was supported by the majority of those who responded to the Panel’s consultation paper and was expounded by the Divisional Court in *Nottingham Crown Court, ex parte DPP*.¹³

Recommendation 1

The severity of an injury must not be used as a means to secure a sentence for an offence that has not been proved but the court must take account of the actual degree of harm caused or intended when assessing the seriousness of an offence.

¹¹ *The Charging Standard on Offences Against the Person*, paragraph 1(vii); www.cps.gov.uk/legal/section5

¹² *ibid.* paragraph 1(vii); www.cps.gov.uk/legal/section5

¹³ [1996] 1 Cr App R (S) 283

Aggravating and Mitigating Factors

19. The Council guideline on seriousness¹⁴ includes a list of aggravating and mitigating factors, some of which are enshrined in statute, that are generally regarded as indicating higher or lower degrees of culpability and harm; these are reproduced, for ease of reference, at Annex B. Bearing in mind that the courts must have regard to this complete list when assessing the seriousness of any offence, the Panel does not intend to consider in detail the degree to which each individual factor might or might not be relevant to the offences on which it is producing Advice.

20. However, it seems prudent to highlight the most common factors that are likely to aggravate an offence against the person. These are:

- *Planning of an offence;*
- *Offenders operating in groups or gangs;*
- *Deliberate targeting of vulnerable victim(s);*
- *Offence is committed against those working in the public sector or providing a service to the public;*
- *Use of a weapon to frighten or injure victim;*
- *A sustained assault or repeated assaults on the same victim; and*
- *Location of the offence (for example, in an isolated place).*

21. The Panel is aware of a growing concern about the number of assaults committed against persons providing a public service. We understand that such assaults can cause more than immediate harm to an individual; they can result in reduced, delayed or cancelled services and often involve additional costs to replace or provide cover for victims who are unable to work. They can also discourage people from working in certain professions and can undermine public confidence. The Panel does not intend to produce a list of persons who might be considered to be providing a service to the public, as failure to include an occupation (even in a list clearly stated to be non-exhaustive) might be accorded

¹⁴ *ibid.* paragraphs 1.22-1.25

an inappropriate significance. We prefer to rely on the courts to assess the circumstances of an individual case and to increase sentence in all cases where the victim was particularly vulnerable (whether because of his or her occupation or otherwise), where the offender deliberately targeted a vulnerable victim or a victim working in the public sector or where the victim was providing a service to the public when assaulted. All these situations are adequately covered by the list of aggravating factors in the Council guideline on seriousness.

22. Where a number of aggravating factors are present together and form an integral part of the offence, for example in the quite recent phenomenon commonly referred to as “happy slapping”, the courts will need to consider the combined aggravating effect of these factors.

23. The extent to which the prevalence of this, or any other type of assault, should influence sentence must be determined in accordance with the Council guideline,¹⁵ which states that *“it is legitimate for the overall response to sentencing levels for particular offences to be guided by their cumulative effect”* but adds that *“enhanced sentences should be exceptional”* and that *“sentencers must sentence within the sentencing guidelines once the prevalence has been addressed.”*

24. The Panel has carefully considered the additional aggravating factors suggested by those who responded to the consultation paper but takes the view either that they are already captured by other factors in the list in the Council guideline or that their inclusion would be inappropriate.

25. One group that responded to the consultation suggested that an offence should be deemed more serious if it was committed in the context of an attempted honour killing or if threats to kill were made in an effort to force a victim into an arranged marriage. The Panel considers that motive does not, of itself, justify mention as a separate category of aggravating factor. In cases of this kind, the aggravating factors abuse of trust and/or abuse of power will invariably be present and will be taken into account when assessing the seriousness of an individual offence.

26. We consulted specifically on whether the fact that an assault took place at night should be identified as a particular aggravating factor for assault offences. It

is to be noted that the Council's definitive guideline on robbery¹⁶ makes specific reference to the enhanced degree of fear likely to be experienced by a victim if an offence is committed at night or during the hours of darkness and refers to the victim's increased vulnerability in such circumstances. Offences against the person are inherently different in nature from robbery. In the case of some of the less serious offences – brawls outside public houses, for example - the fact that they are committed at night or in the hours of darkness is largely generic and cannot be said to make them more serious. The Panel agrees with those who responded to the effect that the relevant issue in assault cases is the *isolation* of the victim, rather than the time of day at which the offence is committed. This is already included in the Council's generic list of aggravating factors (see paragraph 20 above), but we consider that both the *location* of an offence and the *timing* of it can be relevant to the assessment of seriousness of an offence. Where it is clear that the offender chose to commit an offence in an isolated spot or at a chosen time, or both, with the intention that this would render the victim more vulnerable and reduce the chances of discovery during the crime, this should be treated as an aggravating factor.

Recommendation 2

Where the timing and/or location of an offence were designed to increase the vulnerability of the victim and/or to reduce the chances of discovery, this should be treated as an aggravating factor.

27. With the exception of provocation (see Recommendation 3, which follows), the Panel has not sought to identify mitigating factors that are particularly relevant to offences against the person; we do not think that any of the mitigating factors in the Council guideline stands out as likely to be more relevant than any other. Any single mitigating factor or combination of factors from the list in the guideline might be present in an individual offence; a court must always have regard to the complete list in the Council guideline, whilst also taking into account any other mitigating factors that may be peculiar to the case in question and which cannot be predicted in a generic guideline. Many of the mitigating factors suggested by those who responded to the Panel's consultation would actually amount to

¹⁵ *Overarching Principles: Seriousness*, paragraphs 1.36 and 1.37, published 16 December 2004; www.sentencing-guidelines.gov.uk

¹⁶ *Robbery*, page 7, published 25 July 2006, www.sentencing-guidelines.gov.uk

personal mitigation, a separate matter that is properly taken into account after assessing the seriousness of an offence.

Provocation

28. The Panel has submitted advice to the Council on the impact that provocation will have on sentencing for the offence of manslaughter by reason of provocation (where provocation will have been accepted as a partial defence to a charge of murder) and on sentencing for offences involving domestic violence. The Council has published a definitive guideline on manslaughter by reason of provocation¹⁷ and a draft guideline on domestic violence.¹⁸

29. The Panel takes the view that the principles established in those guidelines should be taken into account whenever provocation is put forward as a mitigating factor in relation to offences against the person. Where evidence relating to the offender's personal circumstances - such as a history of domestic violence or abuse suffered at the hands of the victim; threats made by the victim; or fear generated by the victim's actions (for example, stalking) - is entered in mitigation, the court will need to give careful consideration to the degree to which this can be said to have provoked the offence. In particular, where the offence charged was the result of excessive force used in self defence, the degree of provocation should be recognised in mitigation.

30. One body that responded to the Panel's consultation suggested that provocation should *never* be treated as a mitigating factor where the victim is a child. Although it is important to recognise that frustration with the behaviour of a child does not amount to provocation, the Panel cannot agree with such a blanket statement. The younger the victim, the less likely it is that the provocation will have been intentional – there is a world of difference, for example, between the incessant crying of a baby and an older child pestering or taunting an elderly neighbour – and the degree to which the behaviour of the victim can be said to have provoked the violent response of the offender will vary according to the particular circumstances of the case.

Recommendation 3

¹⁷ *Manslaughter by Reason of Provocation*, published 28 November 2005; www.sentencing-guidelines.gov.uk

¹⁸ *Overarching Principles: Domestic Violence*, published 11 April 2006; www.sentencing-guidelines.gov.uk

When sentencing an offender who claims to have been provoked into committing an offence against the person, the court must have regard to the nature and duration of the provocation and any fear, threat or violence generated by the actions of the victim. Where the offence charged was the result of excessive force used in self defence, the degree of provocation should be recognised in mitigation. For more guidance, a court should refer to the Council guidelines on Manslaughter by Reason of Provocation and Domestic Violence.

Use of a weapon

31. Generally, use of a weapon will be seen as an aggravating factor in relation to any offence against the person, although it tends to be a particular issue in many section 18 offences (see paragraph 72). Where an offender acquires a weapon with the express intention of using it, culpability will be at its highest and the offence will be more serious;¹⁹ where an offender was carrying a weapon without intending to use it but used it during the course of an unplanned dispute, culpability will be lower and the offence may be considered less serious. It is still, of course, a serious offence to carry an item such as a knife or knuckle duster in public as, in so doing, an offender appears to be anticipating the possibility of using it. Where a weapon comes to hand during the course of a dispute this may indicate a lower degree of culpability.

32. The degree to which a weapon should influence the assessment of offender culpability is addressed in the Council guideline *Manslaughter by Reason of Provocation*,²⁰ which makes it clear that the use of a weapon “*should not automatically move a case into another sentencing bracket.*” It also states that “*the issue of key importance is whether the weapon was to hand or carried deliberately to the scene, although the circumstances in which the weapon was brought to the scene will need to be considered carefully.*”

33. The Panel considers that a similar approach should be adopted with regard to assaults and other offences against the person and considers that culpability is more likely to be determined by the circumstances in which a weapon was used rather than the fact that it was used.

¹⁹ *Attorney-General's Reference (No.4 of 1998)* [1998] 2 Cr App R (S) 388

Recommendation 4

The use of a weapon in the course of an offence against the person does not necessarily aggravate an offence. The issue of key importance is whether the weapon was to hand or was carried deliberately to the scene, although the circumstances in which the weapon was brought to the scene will need to be considered carefully.

Aggravated Assaults

34. The Crime and Disorder Act 1998²¹ provides a maximum penalty of seven years' imprisonment for a racially or religiously aggravated unlawful wounding, GBH or ABH (rather than five years for an offence that is not so aggravated) and a maximum penalty of two years' imprisonment for a racially or religiously aggravated common assault (rather than six months'). It also provides that racially or religiously aggravated common assault shall be triable either way, whereas common assault is a summary-only offence.

35. The Criminal Justice Act 2003²² provides that racial or religious aggravation shall be statutory aggravating factors in relation to all other criminal offences and it also extends the list of statutory aggravating factors to include hostility based on the sexual orientation or disability of the victim. It does not, however, introduce any increased maximum penalties for offences so aggravated.

36. The question of how a court should decide the appropriate increase in sentence for racial aggravation was addressed by the Panel in its Advice to the Court of Appeal published in 2000.²³ The Panel's Advice was largely adopted in *Kelly and Donnelly*,²⁴ when the Court said that a sentencer should first of all determine the appropriate sentence for the offence without taking account of the element of racial aggravation and then make an addition to the sentence. The

²⁰ *Manslaughter by Reason of Provocation*, published November 2005, page 7; www.sentencing-guidelines.gov.uk

²¹ s.29

²² s.146

²³ *Racially Aggravated Offences*, published on 29 August 2000; www.sentencing-guidelines.gov.uk. The Panel's Advice did not cover religiously aggravated offences because these were created, after its publication, by the Anti-Terrorism, Crime and Security Act 2001 which amended the Crime and Disorder Act 1998.

²⁴ [2001] 2 Cr App R (S) 73

extent to which the sentence is increased will depend on the seriousness of the racial aggravation and the judgment gives guidance on how to assess this.

37. The Panel takes the view that this principle can be applied to offences aggravated by any one of the four statutory aggravating factors (hostility based on race, religion, sexual orientation and disability) now identified in the Criminal Justice Act 2003. Where the offence does not attract a higher maximum penalty, the increase in sentence will, of course, be limited by the maximum penalty for the offence.

38. The Panel considers that the following factors, if proved to the requisite standard, could be taken to indicate a high level of aggravation whether based on the victim's race or on his or her religion, disability or sexual orientation:

The offender's intention:

- the aggravated element was a planned part of the offence;
- the offence was part of a pattern of offending by the offender;
- the incident was deliberately set up to be offensive or humiliating to the victim or to the group of which the victim is a member.

The impact on the victim or others:

- the nature, timing or location of the offence was calculated to maximise the harm or distress it caused;
- the offence is shown to have caused fear and distress throughout a local community.

At the lower end of the scale, the aggravated element might be considered as less serious if:

- it was limited in scope or duration;
- the motivation for the offence was not hostility based on the victim's race, religion, disability or sexual orientation, and the element of hostility or abuse based on prejudice was minor or incidental.

Assaults on Children

39. Where there is evidence of a pattern of offending behaviour against a child under 16 over a period of time, but insufficient evidence of a specific assault, the normal charge will be one of 'child cruelty.' Sentencing proposals for this offence are in Section Three.

40. Where there is evidence of an isolated assault on a child, the CPS Charging Standard²⁵ suggests that an offence of assault should be charged and that the specific charge should be determined by the particular nature of the offence. Where there is evidence of separate assaults against the same child, committed on specific occasions, a separate charge for each assault can be preferred - for example, four counts of ABH. Child cruelty and individual assault offences may also be charged together in cases where there is evidence of a pattern of offending behaviour that includes an assault.

41. The fact that the victim is a child will almost inevitably mean that the offence involves a particularly vulnerable victim. This, and other factors identified in the Council guideline on seriousness (see Annex B), will be particularly relevant to an offence of assault committed against a child.

42. The Panel considers that, especially in cases where the defendant has caring responsibilities for a child victim, the most relevant aggravating factors, as listed in the Council guideline *Overarching Principles: Seriousness*, are likely to be:

- Victim is particularly vulnerable;
- Abuse of power;
- Abuse of position of trust;
- An especially serious physical or psychological effect on the victim, even if unintended;
- Presence of others e.g. relatives, especially other children;
- Additional degradation of the victim; and
- Location of the offence (for example, if committed in the home).

²⁵ *Child Cruelty: Charging Practice*, www.cps.gov.uk/legal/section7

Additional aggravating factors are:

- Sadistic behaviour;
- Failure to seek medical help; and
- Threats to prevent the victim reporting the offence.

43. Most offences committed by adults against children will involve an abuse of power and many also will include an abuse of a position of trust. Some offences are committed by carers with the specific intention of causing distress to a third party, such as the child's other parent or siblings; others are committed by defendants who have been given a particular position of responsibility involving the care of children, for example foster carers or members of staff at a school or nursery. The Education Act 1996²⁶ abolished the right of teachers and other school staff to administer corporal punishment.²⁷

44. The location of the offence, for example the fact that an offence takes place in the child's home, and the particular circumstances, such as the fact that the victim is isolated - common aggravating factors in cases of child cruelty - may also be present in relation to individual offences of assault against children. However, these factors are not inherent and are less likely to be present where the offender is another child or where there is a very small disparity in age between the offender and the victim (for example where the offender is sixteen and the victim is fifteen).

45. The Court of Appeal has dealt with a number of cases involving assaults committed by adults against children, many of which have involved some of the aggravating factors described above. In considering these issues, the Court has given a consistent message that an assault against a child will normally merit a custodial sentence.²⁸ We have given careful consideration to the competing arguments put by those who responded to the Panel's consultation, some of whom expressed fears that parents seeking to discipline their children would be sent to custody unnecessarily. They called for the courts to "retain a sense of proportion" and for the best interests of the child and other children to be paramount. The

²⁶ These provisions were extended to cover all independent schools in 1998 – see s.131, School Standards and Framework Act 1998

²⁷ s.548

Panel can see no reason to differ from the Court of Appeal and we agree that, where an adult is found guilty of an assault against a child, the normal starting point (assuming no aggravating or mitigating factors, no previous convictions and a plea of not guilty) should be a custodial sentence.

Recommendation 5

Where the victim of an assault or other offence against the person is a child under 16, the normal sentencing starting point for an adult offender should be a custodial sentence.

46. An offender might seek to argue that any harm caused to the child amounted only to lawful chastisement and a court might form the view that the offender held a genuine belief that his or her actions amounted to no more than a legitimate form of physical punishment. However, the combined effect of section 58, Children Act 2004 and the repeal of section 1(7), Children and Young Persons' Act 1933 is that the old common law defence of lawful chastisement is available only in relation to a charge of common assault. Consequently if a defence of lawful chastisement is not available, or, in relation to a charge of common assault, such a defence has failed, the offence must be punished in the same way as any other assault even though the offender was motivated only to correct the child.

47. There is, however, one exception to this general rule. It arises where the defendant has been charged with an assault occasioning actual bodily harm and the court finds the following facts:-

- a) The defendant only intended to administer lawful chastisement to the child, and
- b) The injury that was inflicted was neither intended nor foreseen by him.

Although the defendant would have intended nothing more than lawful chastisement (as currently allowed by the law), he or she would have no defence to such a charge because an assault occasioning actual bodily harm does not require the offender to intend or even foresee that his act will result in any physical

²⁸ See *Broady* (1988) 10 Cr App R (S) 495, *O'Gorman* [1999] 2 Cr App R (S) 280 and *Brown* [2001] 2 Cr App R (S) 14 (at 83)

harm; it is sufficient that it did. It is the view of the Panel that such a finding of fact should result in a substantial reduction in penalty and should not result in a custodial sentence. In an extreme case, where not only was the injury neither intended nor foreseen, but was not even reasonably foreseeable, then an absolute discharge might be appropriate, for then what would have been intended as a lawful act would, by pure chance, have been converted into an unlawful one.

Recommendation 6

Where a defendant is convicted of an assault-based offence on a child in respect of which the defence of lawful chastisement is not available, the fact that the offender believed the conduct was an acceptable form of correction shall not operate to reduce the sentence, except where the offence charged is one of an assault occasioning actual bodily harm and the offender neither intended nor foresaw that the act would result in any physical harm. In those limited circumstances, the belief would amount to substantial mitigation.

Compensation

48. When sentencing for an offence of assault the court also must consider making a compensation order;²⁹ should it decide not to order compensation, it must give its reasons.³⁰ A magistrates' court may award compensation of up to £5000 for each offence³¹ and the Magistrates' Court Sentencing Guidelines³² suggest amounts to be used as starting points based on the seriousness of the injury. There is no limit to the amount of compensation that may be awarded in the Crown Court.

49. In *Inwood*,³³ the Court of Appeal stated that the purpose of making a compensation order was to provide victims of crime "with a convenient and rapid means of avoiding the expense of resorting to civil litigation, when the criminal clearly has means which would enable the compensation to be paid." This

²⁹ Powers of Criminal Courts (Sentencing) Act 2000, s. 130

³⁰ *ibid.* section 130(3)

³¹ *ibid.*, section 131(1)

³² published 2003, page 90

³³ (1974) 60 Cr App R 70

principle was upheld in *Barney*³⁴ when the Court stated that, because the power to make a compensation order exists as an alternative to civil litigation, it is to be considered as a procedure independent of the sentencing exercise and that the payment of compensation should have no bearing on the choice of sentence.

50. In most cases of assault, the extent of injury sustained by the victim will be an essential part of the evidence and the offender's responsibility for inflicting those injuries will also be clear from the facts of the offence. Requiring an offender to pay compensation sits well with the increased emphasis on reparation as one of the five purposes of sentencing identified in the Criminal Justice Act 2003³⁵ and the Panel would encourage sentencers to make compensation orders wherever possible.

51. In certain circumstances, a requirement to pay compensation can be imposed as a sentence in its own right.³⁶ Statistics show that, from a total of 44,343 offences against the person in 2004, orders for compensation were made in 28,265 cases (56%). A compensation order was imposed as a sentence in its own right in only 804 cases (2%), 752 of which were tried in a magistrates' court. Compensation was least likely to be imposed ancillary to a custodial sentence and most likely to be imposed in conjunction with a community order, especially in a magistrates' court. The Panel takes the view that a court should always give careful consideration to imposing a compensation order even where the disposal is a custodial sentence, provided that the custodial period is short enough not to hinder the offender's ability to comply with the order.

52. Where a court decides that a financial penalty is the most appropriate sentence, the Panel would emphasise the legal requirement that, where there are limited financial resources, higher priority should be given to imposing a sentence of compensation than to imposing a fine, so that any monies the offender can afford to pay are directed to the victim rather than to the State. Where the seriousness of the offence justifies a community order or a custodial sentence, an ancillary order for compensation should be given higher priority over costs. *A court must always give serious consideration to imposing a compensation order ancillary*

³⁴ (1991) 11 Cr App R (S) 448

³⁵ Criminal Justice Act 2003, s. 142(1)

to another disposal. Compensation should be given higher priority than a fine where the appropriate sentence for an assault is a financial penalty. It should always be given priority over any order for costs.

³⁶ Powers of Criminal Courts (Sentencing) Act 2000, s.130

SECTION TWO: THE PANEL'S PROPOSALS

53. In formulating its proposals for sentencing guidelines, the Panel has sought to define sentencing starting points according to the seriousness of the offence and to establish where the sentencing thresholds should lie by reference to the specific nature of each type of offending behaviour. The Panel has been mindful of existing Court of Appeal guidelines and has had regard to current sentencing practice as evidenced by the statistics that were annexed to the consultation paper. We have also taken into account the many helpful comments and suggestions made by those who responded to the consultation.

54. In accordance with statute and established principle, the primary determinant of sentence will be the seriousness of the offence committed and the seriousness of the offence will be indicated by levels of culpability and harm. The level of culpability will depend on the assessment of a number of different features of the offence and the circumstances in which it was committed. Culpability should normally carry the greater weight and the most serious offences with the highest maximum penalties – attempted murder, and section 18 and section 20 offences – are distinguished primarily by different levels of culpability. However, the rest of the offences covered by this Advice are primarily distinguished by the nature and degree of injury, with higher maximum penalties generally, but not exclusively, being accorded to more serious injury. For some offences, such as assault occasioning actual bodily harm, it is difficult to identify which particular types of injury would amount to greater harm, except where the degree of harm caused is very slight or extremely serious. Some of the aggravating factors identified by the Council (see Annex B) will serve to indicate an unusually high degree of harm.

55. Sentencing starting points are suggested according to the type of offence committed; each starting point is based on the highest level of culpability (intention) assuming no aggravating or mitigating factors, no previous convictions and a plea of not guilty. The Panel has identified the features that are likely to indicate a sentence within a particular range for an adult first time offender; when assessing the seriousness of an individual offence, the courts must always take into account any additional aggravating and mitigating factors that have not been used to justify the sentencing starting point or range. The meaning of “range”,

“starting point” and “first time offender” within Sentencing Guidelines Council guidelines can be found at Annex C.

56. The Panel's proposals are based on the sentencing framework as at August 2006, and do not take into account the provisions relating to increased maximum sentences for certain offences³⁷ and to custodial sentences of less than 12 months,³⁸ the implementation dates for which are uncertain.

Sentences for Public Protection

57. The Criminal Justice Act 2003 introduced new sentences for public protection to be used in cases where offenders are considered to raise a “significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences”. The type of sentence available depends on whether or not the offence is a “serious offence” (specified offence with a maximum penalty 10 years’ imprisonment or more).³⁹

58. The provisions in the Criminal Justice Act 2003 relating to sentences for public protection apply to offences against the person as follows:

Serious offences with a maximum penalty of life imprisonment:

- Attempted murder
- GBH / Wounding with Intent (section 18 offence)

Serious offences with a maximum sentence of 10 years or more:

- Cruelty to a Child

Specified offences:

- Unlawful Wounding / GBH (section 20 offence)
- Racially or Religiously Aggravated Unlawful Wounding / GBH
- ABH
- Racially or Religiously Aggravated ABH

³⁷ Criminal Justice Act 2003, ss. 280-282 and sch.26

³⁸ *ibid.* s.181

³⁹ Criminal Justice Act 2003, ss.224-236

- Assault with Intent to Resist Arrest and
- Racially or Religiously Aggravated Common Assault.

These distinctions are made clear in the proposed sentencing guidelines for each offence.

Attempted murder

59. Attempted murder requires an intention to kill. Therefore, this offence is at the highest level of seriousness. The level of injury sustained by the victim will impact upon the assessment of seriousness of an individual offence⁴⁰ although, as discussed earlier (see paragraph 14), in some cases there may be no injury at all. The Council guideline on seriousness⁴¹ makes it clear that, where there is low harm and high culpability (as there may be in cases of attempted murder), culpability is more significant. Thus, even in cases where a low level of injury or no injury has been caused, an offence of attempted murder will be extremely serious.

60. The availability of a life sentence for attempted murder allows a court the widest possible range when passing sentence. Although a substantial custodial sentence is almost inevitable for this offence, guidance from the Court of Appeal has recommended a broad range within that threshold. The Panel has taken this into account when formulating its proposals.

61. In the recent case of *R v Ford*,⁴² the Court of Appeal considered what impact, if any, the statutory minimum terms for murder (introduced by the Criminal Justice Act 2003) should have on sentencing for the offence of attempted murder. It commented that “*Any right-thinking member of the public would consider there was an objectionable disparity between the new levels of sentence for murder and the existing levels of sentence for attempted murder.*”

62. However, the Court also noted that most categories of attempted murder are unlikely to call for increased levels of sentence, citing the judgment in *R v Sullivan, Gibbs, Elener and Elener*⁴³ which states that “*the increases in the minimum terms for murder under the new regime are introduced for cases at the*

⁴⁰ See *Ellis* (1995) 16 Cr App R (S) 773

⁴¹ *Overarching Principles: Seriousness*, published on 16 December 2004, paragraph 1.19; www.sentencing.guidelines.gov.uk

⁴² [2006] 1 Cr App R (S) 36

⁴³ [2005] 1 Cr App R (S) 67 (p. 308)

top of the range for the most serious crimes.” It noted also that, although attempted murder is always a serious offence, *“the range of culpability for the offence is nevertheless wide.”* The partial defences of provocation and diminished responsibility are not available but *“there is a proportion of cases in which a defendant is convicted of attempted murder and in which, had the victim died, he would have been convicted of manslaughter. Thus, in such cases, the basis for comparison in terms of proportionality when sentencing for attempted murder would be the sentence appropriate not for murder but manslaughter”*. The issue of diminished responsibility is discussed further at paragraph 67.

63. The Court in *Ford* concluded *“It follows that it is only in the correspondingly graver cases of attempted murder that (an) increased level of sentencing is likely to be required.”* In cases where, if the attempt had been successful, the murder would have fallen within the category of murders of “particularly high” seriousness then, except where a sentence of imprisonment for public protection is required,⁴⁴ it would be appropriate to pass a *“determinate sentence which would maintain the proportion between the time served under the sentence for attempted murder and the time which would have been served on conviction for murder.”*

64. When calculating sentence, the Court suggested that the sentencer should bear in mind the provisions of section 244 of the Criminal Justice Act 2003, which requires release at the half-way point for offenders serving a determinate sentence.

65. Earlier case law has been helpful in creating a rationale for defining a hierarchy of seriousness for attempted murders depending on the motivation of the offender. In *Comer*,⁴⁵ the Court of Appeal noted that the highest sentences are imposed for attempts at political assassination and contract killing, which involve an extremely high level of premeditation and planning. In *Al-Banna and others*,⁴⁶ for example, sentences of 30 and 35 years’ imprisonment had been upheld for an attempted political assassination and in *Powell*,⁴⁷ a sentence of 20 years’ imprisonment was upheld for an attempted contract killing.

⁴⁴ S.225 Criminal Justice Act 2003

⁴⁵ [2002] 2 Cr App R (S) 102

⁴⁶ (1984) 6 Cr App R (S) 426

⁴⁷ [1998] 1 Cr App R (S) 84

66. An attempted murder will be more serious if the attempt at killing is prolonged or involves a level of violence over and above that which is inherent in the commission of an offence of its type. In relation to *Attorney-General's Reference (Nos. 15 and 16 of 2002)*,⁴⁸ which involved an assault perpetrated over a period of two hours, the Court stated that the sentencing range for this type of "repeated sustained sadistic attack" should generally be between 14 and 18 years' imprisonment for an adult offender following a trial.

67. Although an attempted murder often will involve an element of calculation and planning, this will not always be the case; as always, the offender's intention and motivation when committing the offence and the degree of harm caused to the victim will need to be taken into account when determining the seriousness of an individual offence. Thus, attempts to kill during the course of another crime in order to avoid detection will normally be regarded as more serious but the fact that such attacks may be unplanned and instinctive will need to be taken into account. The Panel takes the view that planned attempts to kill should be regarded as being of the same level of seriousness as spontaneous attempts that result in a permanent disability or necessitate intensive medical treatment. This is reflected in our proposed sentencing ranges and largely reflects current sentencing practice. In *R v Gouldthorpe*,⁴⁹ for example, where the appellant attempted to murder an ex-girlfriend after she ended their relationship, the Court commented on the fact that this "*was not a spur of the moment offence. This was a well thought out and well prepared attempt to murder.*" A sentence of 12 years' imprisonment after trial was upheld. And in *R v Bryan*⁵⁰ a sentence of 17 years' imprisonment after trial was upheld for an offence involving a determined and repeated effort to kill, using a shotgun carried to the scene for this purpose.

68. In *R v Suckley*⁵¹ where the offender knocked down the victim with his car and then repeatedly ran over him, inflicting serious injuries requiring intensive care and long-term rehabilitation, the Court upheld a sentence of 11 years' imprisonment after trial for the 75 year old appellant, commenting that the appropriate sentence for a younger man would have been 15 years. In *R v*

⁴⁸ [2003] 1 Cr App R (S) 35

⁴⁹ [2003] EWCA Crim 2331

⁵⁰ [2005] EWCA Crim 3444

⁵¹ [2001] EWCA Crim 125

*Kesseidou*⁵² a sentence of 14 years' imprisonment after trial was upheld for what was described by the Court as a "murderous" attack that resulted in very serious injury and deep psychological trauma; the only reason the attack stopped was because of the intervention of a third party.

69. The Court of Appeal has also considered a number of cases involving spontaneous attempts to kill that have arisen during disputes within a relationship⁵³ but the Panel takes the view that it would be inappropriate to recommend specific starting points for such offences in this Advice; this is an issue that is covered separately in the Council guideline relating to offences committed in a domestic setting.

70. In some cases, the mental state of the offender has led to sentences being reduced to a significantly lower level. In *Nixon*⁵⁴ a sentence of six years' imprisonment after trial was reduced to four in light of the Court of Appeal's view that, had the offence been one of murder, the defence of diminished responsibility would have been well-founded. The Panel agrees with this approach and considers that, as diminished responsibility is a partial defence to murder, it is logical to regard this as a mitigating factor in relation to attempted murder.

⁵² [2005] EWCA Crim 2931

⁵³ See *Davis* [2001] 1 Cr App R (S) 189, *Gibson* [1997] 2 Cr App R (S) 292 and *Wooton* [1998] 1 Cr App R (S) 296

⁵⁴ (1994) 15 Cr App R (S) 429

Attempted Murder: Criminal Attempts Act 1981 (section 1(1))

Maximum Penalty: Life imprisonment.

Mode of trial: Indictable only.

This is a serious offence for the purposes of section 224 of the Criminal Justice Act 2003.

The starting point in the guideline applies to a first-time adult offender convicted after a trial where a sentence for public protection is not required.

The meaning of “range”, “starting point” and “first time offender” within Sentencing Guidelines Council guidelines is explained in Annex C.

Only additional aggravating and mitigating factors specifically relevant to this offence are included in the guideline. When assessing the seriousness of any offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness.⁵⁵

Nature of Offence	Sentencing range
Attempted political assassination	Starting point – 30 years’ imprisonment Sentencing range – 26 to 35 years’ imprisonment
Attempted contract killing	Starting point 20 years’ imprisonment Sentencing range – 18 to 25 years’ imprisonment
Planned attempt to kill OR Spontaneous attempt to kill and victim suffers permanent disability OR Spontaneous attempt to kill and victim required intensive medical treatment	Starting point - 15 years’ imprisonment Sentencing range - 12 to 20 years’ imprisonment
Spontaneous attempt to kill where no serious permanent injury is sustained	Starting point - 10 years’ imprisonment Sentencing range - 8 to 12 years’ imprisonment
Additional Aggravating Factors	Additional Mitigating factors
<ol style="list-style-type: none">1. Sustained sadistic attack2. Attack in order to escape detection for another offence	<ol style="list-style-type: none">1. Mental disorder that would have amounted to a defence of diminished responsibility in relation to a charge of murder and would have reduced the offence to one of manslaughter2. Provocation

⁵⁵ *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

Causing Grievous Bodily Harm with Intent / Wounding with Intent to do Grievous Bodily Harm (section 18)

71. Conviction for a section 18 offence requires proof that the offender inflicted a wound or caused serious harm to the victim whilst having the intention to cause grievous bodily harm; as intent will have been proved, the level of culpability is high and a significant custodial sentence should be expected. It could be argued that, because the offender did not intend to kill the victim, the offence is less serious than attempted murder. However, as has been pointed out by the Court of Appeal,⁵⁶ in very serious cases of GBH it is often a matter of chance that the victim does not die and, in some cases, it is only because of surgical intervention that the victim survives. In cases such as this a sentence of life imprisonment may very well be the appropriate penalty. If an offender were acting in self-defence originally but then went on to use an unreasonable degree of force this might mitigate sentence, but the offence is still at the higher end of the seriousness scale and, depending on the degree of harm caused, a lengthy custodial sentence would normally still be justified.

72. As stated in paragraph 31, generally, use of a weapon (e.g. a firearm, knife, broken bottle, baseball bat) will be taken as an aggravating factor in relation to a section 18 offence. Usually, the type of weapon used will have an impact on the nature and severity of the injury caused, although it has to be recognised that equally serious injuries can sometimes be inflicted using bare fists, biting or kicking, especially if the offender is wearing heavy boots. It could be argued that the level of harm resulting from an assault is a better indicator of offence seriousness than the way in which that harm was caused but the CPS Charging Standard points out that the use of a weapon may indicate specific intent and, as such, may often be a feature of section 18 offences. Injuries not resulting from the use of a weapon may indicate that the offender lacked the premeditation usually shown by a defendant who has armed him or herself with a dangerous weapon.

⁵⁶ *Thomas* (1985) 7 Cr App R (S) 87

Causing GBH with intent to do GBH/ wounding with intent to do GBH: Offences Against the Person Act 1861 (section 18)

Maximum sentence: Life imprisonment.

Mode of Trial: Indictable only.

This is a serious offence for the purposes of section 224 of the Criminal Justice Act 2003.

The starting point in the guideline applies to a first-time adult offender convicted after a trial where a sentence for public protection is not required.

The meaning of “range”, “starting point” and “first time offender” within Sentencing Guidelines Council guidelines is explained in Annex C.

Only additional aggravating and mitigating factors specifically relevant to this offence are included in the guideline. When assessing the seriousness of any offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness.⁵⁷

Nature of Offence	Sentencing Range
Pre-meditated wounding or GBH involving the use of a weapon acquired prior to the offence and carried to the scene with specific intent to injure the victim AND Victim suffered life-threatening injury or permanent disability	Starting point 13 years' imprisonment Sentencing range – 10 to 16 years' imprisonment
Pre-meditated wounding or GBH involving the use of a weapon acquired prior to the offence and carried to the scene with specific intent to injure the victim (but not resulting in a life threatening injury or permanent disability) OR Victim suffered life-threatening injury or permanent disability (where the offence was not pre-meditated)	Starting point - 8 years' imprisonment Sentencing range – 7 to 10 years' imprisonment
Pre-meditated wounding or GBH OR Spontaneous wounding or GBH involving the use of a weapon that came to hand at the scene OR Victim suffered a very serious injury or permanent disfigurement	Starting point - 5 years' imprisonment Sentencing range – 4 to 6 years' imprisonment
Spontaneous wounding or GBH	Starting point - 4 years' imprisonment Sentencing range – 3 to 5 years' imprisonment
Additional Aggravating Factors	Additional Mitigating Factors
	Provocation

⁵⁷ *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

Inflicting Grievous Bodily Harm/Unlawful Wounding (section 20)

73. Conviction for a section 20 offence requires proof that the offender inflicted a wound or caused serious harm to the victim; it follows that the nature and degree of harm caused by a section 20 offence can be the same as that for a section 18 offence. However, an intention to cause harm is not part of the definition of a section 20 offence: recklessness as to inflicting some harm is sufficient. As a result, an offence of *GBH / Wounding* is less serious in overall terms than an offence of *GBH / Wounding with intent* and the maximum penalty is significantly lower (5 years' as opposed to life imprisonment). The sentencing ranges proposed below reflect that significant difference.

74. Some of those who responded to the Panel's consultation commented on transmission of HIV which is generally charged as a section 20 offence. They noted that the sexual activity from which section 20 charges stem is consensual and suggested that there should be shared responsibility for transmission in today's society. They also put forward a wide range of factors that should be taken into account as personal mitigation, including fear of the adverse consequences of revealing the condition to a sexual partner and efforts taken to minimise the risk of transmission. Persons with HIV are classed as disabled under the Disability Discrimination Act 2005 and the Panel was asked to consider whether custodial sentences are appropriate for offenders with this infection. Arguments put forward included the fact that prisons are places where there is an increased risk of HIV transmission, where there are high levels of HIV stigma, discrimination and abuse, where condoms are hard to obtain and where support to prevent re-offending is unlikely to be provided.

75. There is a wide range of circumstances in which an offence of HIV transmission could be proved. If a section 18 offence (GBH with intent) were proved, that would involve wilful transmission with intent and a custodial sentence at the top end of the range could be expected. Where it is proved that an offender found guilty of a section 20 offence deliberately withheld information that he or she was carrying an infection that was likely to be transmitted, this is likely to fall at the most serious level of that offence category. The Panel is aware that the CPS has recently consulted on a draft policy statement relating to the way in which it deals with cases involving the intentional or reckless sexual transmission of infections

that cause GBH (published 1 September 2006; closing date 3 November 2006). The draft statement covers the factors that are likely to indicate intentional or reckless transmission; mitigating factors; consent as a defence; and the medical evidenced required. It proposes that all decisions to prosecute must be made by the Principal Legal Adviser.

76. The Disability Discrimination Act 1995 makes it unlawful for a public body to discriminate against a disabled person in carrying out its functions.⁵⁸ However, the legislation provides an exemption for a judicial act (whether done by a court, tribunal or other person).⁵⁹ The Panel has considered the judgment in the case of *R v Bernard*,⁶⁰ where the Court summarised the principles emerging from previous case law. These are (i) *a medical condition which may at some unidentifiable future date affect either life expectancy or the prison authorities' ability to treat a prisoner satisfactorily may call into operation the Home Secretary's powers of release by reference to the Royal Prerogative of mercy or otherwise but is not a reason for this Court to interfere with an otherwise appropriate sentence;*⁶¹ (ii) *the fact that an offender is HIV positive, or has a reduced life expectancy, is not generally a reason which should affect sentence;*⁶² (iii) *a serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate;*⁶³ and (iv) *an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate.*⁶⁴

77. The Panel agrees with these principles and can see no justification for making special provision for the sentencing of offenders with HIV. Section 20 and section 18 offences are extremely serious and a significant custodial sentence is to be expected; the fact that an offender is suffering from HIV should not, of itself or by way of general principle, militate against the imposition of a custodial sentence for GBH. The starting points proposed by the Panel for GBH assume the highest level of culpability for this offence; the sentencing court will take any lesser degree of culpability and any matters of personal mitigation, including any advanced

⁵⁸ s.21B(1)

⁵⁹ s. 21C(1)(a)

⁶⁰ [1997] 1 Cr App R (S) 135

⁶¹ *R v Archibald Moore* (1990) 12 Cr App R (S) 384

⁶² *ibid.* and *R v Richard Moore* (1994) 15 Cr App R (S) 97

⁶³ *R v Wynne* (unreported, C.A. April 18, 1994)

⁶⁴ *R v James Moore* (unreported, C.A. June 27, 1994)

medical condition, into account and may reduce sentence in an individual case accordingly.

Inflicting Grievous Bodily Harm/Unlawful Wounding: Offences Against the Person Act 1861 (section 20)

Maximum Penalty: Five years' imprisonment.

Mode of trial: Triable either way.

This is a specified offence for the purposes of section 224 of the Criminal Justice Act 2003.

The starting point in the guideline applies to a first-time adult offender convicted after a trial where a sentence for public protection is not required.

The meaning of "range", "starting point" and "first time offender" within Sentencing Guidelines Council guidelines is explained in Annex C.

Only additional aggravating and mitigating factors specifically relevant to this offence are included in the guideline. When assessing the seriousness of any offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness.⁶⁵

Nature of Offence	Sentencing Range
Pre-meditated assault EITHER where a weapon has been used OR where really serious injury or permanent disfigurement results	Starting point - 3 years' imprisonment Sentencing range 2 - 5 years' imprisonment
Pre-meditated assault OR Spontaneous assault EITHER where a weapon has been used OR where serious injury results	Starting point - 18 months' imprisonment Sentencing range – 12 months' – 2 years' imprisonment
Spontaneous assault	Starting point – 36 weeks' imprisonment Sentencing range – 24 weeks' to 18 months' imprisonment
Additional Aggravating Factors	Additional Mitigating Factors
	Provocation

⁶⁵ *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

Assault Occasioning Actual Bodily Harm (section 47)

78. Conviction for an offence under section 47 requires proof of actual bodily harm (ABH), defined as “any hurt or injury calculated to interfere with the health or comfort of the victim, including psychiatric harm or injury” (see annex A). The level of culpability for an offence of ABH is the same as that for an offence of common assault: all that the prosecution must prove is that force was intentionally or recklessly used on another. What distinguishes the two offences is the nature of the injury caused to the victim and this will be the key factor for the CPS to consider when deciding which offence to charge. Injuries consistent with an offence of ABH are likely to be of a type listed in the CPS Charging Standards (see Annex A).

79. The planning of an offence, the degree of harm caused, whether harm was intended, the number and nature of blows inflicted by the defendant, the level of provocation, if any, that might have triggered a violent response, the targeting of a particular victim or group of victims and the fact that the victim was performing a public service at the time of the offence are all factors that are routinely taken into account when assessing the seriousness of an offence. In this regard, the Panel has taken into account views expressed by the Court of Appeal in cases such as *Audit*,⁶⁶ *Blewitt*⁶⁷ and *Mellor*.⁶⁸ These give a helpful indication of sentencing principles and the placing of the custodial threshold and have informed the Panel’s sentencing proposals.

⁶⁶ (1993) 15 Cr App R (S) 36

⁶⁷ (1994) 15 Cr App R(S) 132

⁶⁸ (1995) 16 Cr App R (S) 230

Assault Occasioning Actual Bodily Harm: Offences Against the Person Act 1861 (section 47)

Maximum Penalty: Five years' imprisonment.

Mode of Trial: Triable either way.

This is a specified offence for the purpose of section 224 of the Criminal Justice Act 2003.

The starting point in the guideline applies to a first-time adult offender convicted after a trial where a sentence for public protection is not required.

The meaning of "range", "starting point" and "first time offender" within Sentencing Guidelines Council guidelines is explained in Annex C.

Only additional aggravating and mitigating factors specifically relevant to this offence are included in the guideline. When assessing the seriousness of any offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness.⁶⁹

Nature of Offence	Sentencing Range
Pre-meditated assault EITHER resulting in injuries just falling short of GBH OR involving the use of a weapon	Starting point – 30 months' imprisonment Sentencing range – 2 – 5 years' imprisonment
Pre-meditated assault resulting in relatively serious injury	Starting point - 12 months' imprisonment Sentencing range – 36 weeks' to 2 years' imprisonment
Pre-meditated assault resulting in minor, non-permanent injury	Starting point – 24 weeks' imprisonment Sentencing range – 12 to 36 weeks' imprisonment
Spontaneous assault resulting in minor, non-permanent injury	Starting point – 12 weeks' imprisonment Sentencing range – Community Order (MEDIUM) to 26 weeks' imprisonment
Additional Aggravating Factors	Additional Mitigating Factors
	1. Provocation 2. Unintended injury

⁶⁹ *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

Assault with Intent to Resist Arrest

80. The expectation is that this offence will involve little or no physical harm (it is anticipated that more serious injuries would be charged as ABH) and so sentencing will largely be guided by the level of offender culpability. The element of intent inherent in this offence does not relate to the assault itself but to the attempt to resist arrest and so the level of culpability will be variable. The offence does, however, involve an inherent element of aggravation in that it is committed against a victim (whether the victim is a police officer or a member of the public carrying out a citizen's arrest) who is acting to protect the public by enabling an offender to be brought to justice.

Assault with Intent to Resist Arrest: Offences Against the Person Act 1861 (section 38)

Maximum Penalty: Two years' imprisonment.

Mode of Trial: Triable either way.

This is a specified offence for the purposes of section 224 of the Criminal Justice Act 2003.

The following guideline is based on the assumption that more serious injuries would be charged as ABH.

The starting point applies to a first-time adult offender convicted after a trial where a sentence for public protection is not required.

The meaning of "range", "starting point" and "first time offender" within Sentencing Guidelines Council guidelines is explained in Annex C.

Only additional aggravating and mitigating factors specifically relevant to this offence are included in the guideline. When assessing the seriousness of any offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness.⁷⁰

Nature of offence	Sentencing Range
Persistent attempt to resist arrest OR Use of force or threats of force over and above that inherent in the offence	Starting point - 36 weeks' imprisonment Sentencing Range – 24 weeks' to 2 years' imprisonment
Spontaneous assault - defined as including spitting - resulting in minor, non-permanent injury	Starting point – 24 weeks' imprisonment Sentencing range – Community Order (HIGH) to 36 weeks' imprisonment
Spontaneous assault, no injury caused	Starting point – Community Order (LOW) Sentencing range – Fine to Community Order (HIGH)
Additional Aggravating Factors	Additional Mitigating Factors
<ol style="list-style-type: none"> 1. Escape 2. Head butting, kicking or biting 3. Picking up an item to use as a weapon, even if not used 	Genuine belief that the arrest was unlawful where this does not found a defence to the charge

⁷⁰ ibid.

Assault on a Police Constable in Execution of his Duty

81. Again, this offence will generally involve a low level of physical harm, with an expectation that more serious injuries would be charged as ABH, and varying levels of culpability. In common with assault with intent to resist arrest, it involves an inherent element of aggravation in that it is committed against a victim who is striving to uphold the law.

82. It could be argued that sentencing for this offence should mirror that for the offence of assault with intent to resist arrest on the basis that the offences are likely to be committed in similar circumstances and that, generally, the levels of harm and culpability will be comparable; that is an approach that would have been favoured by the Panel. However, pending the introduction of enhanced sentencing powers in a magistrates' court⁷¹ (the implementation date for which is uncertain) the maximum penalty for this offence is only six months' imprisonment. This has necessarily influenced the sentencing ranges we have proposed.

⁷¹ Criminal Justice Act 2003, s.154

Assault on a Police Constable in Execution of his Duty: Police Act 1996 (section 89)

Maximum Penalty: 6 months' imprisonment

Mode of Trial: Summary only.

The following guideline is based on the assumption that more serious injuries would be charged as ABH.

The starting point applies to a first-time adult offender convicted after a trial.

The meaning of “range”, “starting point” and “first time offender” within Sentencing Guidelines Council guidelines is explained in Annex C.

Only additional aggravating and mitigating factors specifically relevant to this offence are included in the guideline. When assessing the seriousness of any offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness.⁷²

Nature of Offence	Sentencing Range
Sustained assault resulting in minor, non-permanent injury	Starting point – 16 weeks' imprisonment Sentencing range – Community Order (HIGH) to 26 weeks' imprisonment
Sustained assault – no injury OR Spontaneous assault - defined as including spitting - resulting in minor, non-permanent injury	Starting point – 8 weeks' imprisonment Sentencing range – Community Order (MEDIUM) to 16 weeks' imprisonment
Spontaneous assault, no injury caused	Starting point – Community Order (LOW) Sentencing range – Fine to Community Order (MEDIUM)
Additional Aggravating Factors	Additional Mitigating Factors
<ol style="list-style-type: none"> 1. Escape 2. Head butting, kicking or biting 3. Picking up an item to use as a weapon, even if not used 	Genuine belief that the officer's action was unlawful, where this does not found a defence to the charge

⁷² *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

Common Assault

83. Common assault is slightly different from the other offences covered in this Advice in that there is no need for injury to have been sustained or intended for the offender to be convicted. An offence is committed when a defendant intentionally or recklessly causes a victim to apprehend immediate unlawful force, or when such force is used. Although harm may include injuries, the seriousness of the offence depends on the surrounding circumstances. There is a wide range of relevant factors. The Panel has decided to define the sentencing thresholds by reference to the number of relevant aggravating factors. This approach found favour with the majority of those who responded to the Panel's consultation.

84. It is recognised that not all aggravating factors carry the same weight and that courts need flexibility to avoid an over-prescriptive approach to when the custody threshold is passed. For that reason, the word "normally" has been used in relation to the point at which the sentencing thresholds are crossed.

Common Assault: Criminal Justice Act 1988 (section 39)

Maximum Penalty: 6 months' imprisonment.

Mode of Trial: Summary only.

The starting point in the guideline applies to a first-time adult offender convicted after a trial.

The meaning of “range”, “starting point” and “first time offender” within Sentencing Guidelines Council guidelines is explained in Annex C.

Only the most common aggravating and mitigating factors specifically relevant to this offence are included in the guideline. When assessing the seriousness of any offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness.⁷³

Nature of Offence	Starting Point
The custody threshold normally is passed where two or more aggravating factors are present	Custody
The community sentence threshold normally is passed where one aggravating factor is present	Community order
Spontaneous assault resulting in no injury	Fine
Common Aggravating Factors	Common Mitigating Factors
<ol style="list-style-type: none"> 1. Injury 2. Victim is particularly vulnerable or providing a service to the public 3. Use of a weapon to frighten or harm the victim 4. Offence was planned or sustained 5. Head-butting, kicking, biting or attempted strangulation 6. Offence motivated by, or demonstrating, hostility to the victim on account of his or her sexual orientation or disability 7. Offence motivated by hostility towards a minority group, or a member or members of it 8. Abuse of a position of trust 9. Offence part of a group action 10. Additional degradation of the victim 11. Offence committed in the presence of a child 12. Forced entry to the victim's home 13. Offender prevented the victim from seeking or obtaining help 14. Previous violence or threats to same victim 	<ol style="list-style-type: none"> 1. Provocation 2. Single push, shove or blow

⁷³ *ibid.*

SECTION THREE: CRUELTY TO A CHILD

The Offence

85. The Children and Young Persons Act 1933 creates an offence of cruelty to a person under 16 to cover situations where a person aged 16 or over “having responsibility for a child under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement).”⁷⁴ For these purposes, ‘neglect’ can mean physical and/or emotional neglect. A defence of ‘lawful chastisement’ is not available for this offence.

86. In recognition of the difficulties faced by the prosecution in proving which of two co-defendants committed an offence against a child or vulnerable adult, the Domestic Violence, Crime and Victims Act 2004 introduced a new offence of causing or allowing the death of a child or vulnerable adult which applies whether the defendant personally caused the death of the victim or failed to take reasonable steps to protect the victim; the defendant’s precise role does not have to be proved and the penalty is the same. Although this offence might apply in cases where child cruelty was previously charged, it relates only to cases where the victim has died. The Panel did not, therefore, consult on this offence.

87. As is clear from the definition in paragraph 85, the offence of child cruelty covers a variety of types of conduct that can compendiously or separately amount to child cruelty. The four generally accepted categories on which we consulted were (i) assault and ill-treatment; (ii) failure to protect; (iii) neglect; and (iv) abandonment.

88. With regard to assaults, the CPS Charging Standard⁷⁵ suggests that an assault charged as child cruelty will differ in nature from that which is generally charged as an offence against the person and notes that “the offence is

⁷⁴ Section 1(1). In addition to the Children and Young Persons Act 1933 the UN Convention on the Rights of the Child may be particularly relevant when dealing with this offence. Article 19 obliges States Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

particularly relevant in cases of cruelty over a period of time.” As such, it is more likely to apply to offences where there is evidence that a child was assaulted by someone with caring responsibility during a certain period but where there is no clear evidence of any particular incidents, the extent of those incidents or the specific time of the incidents. In *Hatton*,⁷⁶ the Court of Appeal advised that “the words ‘in a manner likely to cause such child unnecessary suffering or injury to his health’ clearly govern ‘wilfully assaults’” and that “what is contemplated is something more than an ordinary assault.”

89. Conversely, the CPS Charging Standard advises that a charge of child cruelty will not be appropriate where a serious assault has been committed and that the most appropriate offence against the person should be charged in such circumstances.⁷⁷ Issues relating to offences against a child that are charged as individual assaults or as a series of assaults are discussed earlier in paragraphs 39 to 47.

Harm

90. In order to assist a court in assessing the exact nature and seriousness of an offence of child cruelty, the CPS Charging Standard⁷⁸ advises that “it may be preferable to have two or more alternative allegations in order that conduct complained of is appropriately described” and this certainly seems to be of benefit to sentencers. Where an offender has been convicted of an offence of child cruelty and the indictment clearly states the nature of the offender’s conduct - neglect for example - the sentencer can be clear about the nature of the conduct for which the offender is to be sentenced.

91. However, even if the nature of the offending behaviour can be identified, statute is silent as to the relative seriousness of the different types of child cruelty identified in paragraph 87 above, creating obvious difficulties for the sentencing court. In some cases there will be physical injury, whether resulting directly from an assault or ill-treatment or resulting from a period of abandonment or neglect,

⁷⁵ *ibid.* section 7

⁷⁶ *Hatton* [1925] 2 KB 322

⁷⁷ *Child Cruelty: Charging Practice*; www.cps.gov.uk/legal/section7

⁷⁸ *ibid.*

but in other cases the harm occasioned may be lack of proper care, attention or supervision or exposure to the risk of harm. In the recent case of *J and M*⁷⁹ the Court noted that there is “a significant distinction between cases of wilful ill-treatment and cases of neglect.” It would be helpful, clearly, if a sentencing guideline could create more certainty about the inter-relationship between the various types of child cruelty.

92. As explained in *Child Abuse and Neglect*,⁸⁰ there might appear to be a practical difference between positive acts of abuse, usually associated with physical violence, and acts of neglect, which are typified by the absence of actions. As to whether one form of cruelty is worse than another will depend not only on the degree to which the victim suffers as a result but also on the motivation and culpability of the offender, which can range from inadequate parenting skills and an inability to cope, or constantly prioritising the needs of the offender or the offender’s partner over those of the child, through to purposeful, sadistic and systematic abuse (see also the discussion at paragraphs 94 to 100).

93. In our consultation we asked a number of questions about how the harms arising from each category could be gauged, how they should be assessed in terms of relative severity and whether there were specific aggravating and mitigating factors specific to this offence. Questions were also included about the potential long-term psychological harm suffered by victims of child cruelty and how the likelihood that this might blight the victim’s future life should be taken into account in sentencing guidelines. The responses we received revealed a very mixed range of views, which was not, perhaps, surprising bearing in mind the emotive and complex nature of the issues under discussion.

⁷⁹ [2005] Cr App R(S) 63

⁸⁰ ‘The Effects of Physical Abuse and Neglect’ in Wendy Stanton Rogers et al ed, *Child Abuse and Neglect*, The Open University 1992 page 203

The Comparative Seriousness of Different Types of Offending Behaviour

94. In *Adams and Sherrington*,⁸¹ the Court of Appeal considered sentences that had been imposed for offences of cruelty by assault, cruelty by failing to prevent ill-treatment and cruelty by failing to seek medical treatment. Inter alia, it imposed two sentences of the same length for the offences of cruelty by assault and cruelty by failing to act, seemingly observing the principle that, although these are separate acts, they are equivalent in terms of seriousness.

95. In line with the principles established in *J and M* and in *Adams and Sherrington*, we tentatively produced for consultation three categories of child cruelty and ranked them, in descending order of seriousness, as (i) assault (including failure to protect a child from violence); (ii) abandonment; and (iii) neglect. In practical terms, this assessed so-called “sins of commission” as being more serious than “sins of omission.” Some respondents agreed with this suggestion, others suggested that abandonment was less serious than neglect but the majority of those who responded took the view that it is neither possible nor desirable to rank the offences in this way. The Panel agrees.

96. In the case of *Banu and Ali*,⁸² where the offenders pleaded guilty to the charge of child cruelty on the basis that they had neglected, but not physically attacked, the child, the Court of Appeal, in upholding sentences of three years imprisonment, said:

“The maximum sentence for this offence, as has already been said, is 10 years. The increase from two years [which was enacted in 1988] reflected profound public concern at not only the prevalence, but also the disturbing nature of offences of this sort, even if they involve only neglect and not the positive infliction of ill-treatment.”

97. The Panel takes the view that it is not appropriate to identify one category of child cruelty as being automatically more serious than another; clearly, there will be a multitude of scenarios, some of which will involve more than one type of

⁸¹ [1999] 1 Cr App R (S) 240

⁸² (1995) 16 Cr App R (S) 656

cruelty, in which the seriousness of the types of cruelty judged one against another will vary markedly. A long period of neglect, for example, could, in some circumstances, be more harmful to a child than a short period of violence. What is clear is that, in order to assess properly the seriousness of an offence, the courts will need to establish the precise nature of the offence before considering a range of contingent factors, including the defendant's intent, the length of time over which the cruelty took place, and the degree of physical and psychological harm suffered by the victim.

Recommendation 6

The types of offending behaviour that can be charged as child cruelty – assault; failure to protect; ill-treatment or neglect; and abandonment – cannot be ranked in terms of seriousness.

Aggravating factors

98. Those who responded to the Panel's consultation suggested a wide range of additional factors that might aggravate an offence of child cruelty. The majority of these would already fall within the generic list in the Council guideline, in light of which all offences must be judged; others are common to the factors identified as particularly relevant in relation to the assault of a child (see paragraph 39).

99. Of the suggestions received, the Panel considers that the following additional factors will aggravate offences of child cruelty:

- Targeting one particular child from the family
- Sadistic behaviour
- Threats to prevent the victim from reporting the offence

Mitigating factors

100. Many of the mitigating factors suggested in relation to an offence of child cruelty in fact amount to matters of personal mitigation, which are discussed later at paragraphs 119 to 120. A concern frequently raised was that an offender's

ability to provide proper care for a child may be seriously diminished by the dominance of an overbearing or violent partner; this would certainly impact upon the assessment of the offender's culpability and should be treated as personal mitigation at the point of deciding sentence.

101. The Panel takes the view that the following additional factor will mitigate offences of child cruelty:

- Seeking medical help or bringing the situation to the notice of the authorities

Long-term psychological harm

102. As we reported in the consultation paper, there is very little reliable research material available in relation to the nature and long-term consequences of the physical abuse and neglect of a child, largely because any study needs to look at the differential impacts on the victim relative to the severity, nature and duration of abuse, the gender of the abuser and the age of the child. The innate resilience of children and the presence of protection from another adult or the wider environment are also important factors that will influence the impact of the offence upon the child. It follows that there is no immediately predictable link between a type of offending behaviour and the impact it may have on the victim, either in the immediate or long term.

103. The majority of those who responded to the consultation paper, however, agreed that victims of child cruelty will normally suffer psychological as well as physical harm. The evidence of emotional and behavioural consequences of child abuse is frequently presented by the following characteristics:⁸³

- Impaired capacity to enjoy life – abused children often appear sad, preoccupied and listless;
- Psychiatric or psychosomatic stress symptoms, for example, bed-wetting, tantrums, bizarre behaviour, eating problems etc;

⁸³ 'The Effects of Physical Abuse and Neglect' in Wendy Stanton Rogers et al ed, *Child Abuse and Neglect*, The Open University 1992 page 206, citing a study by Martin, H.P. and Beezley, P., 'Behavioural observations of abused children', *Developmental Medicine and Child Neurology*, Vol 19 (1977), pages 373-87

- Low self-esteem – children who have been abused often think they must be worthless to deserve such treatment;
- School learning problems, such as lack of concentration;
- Withdrawal – many abused children withdraw from relationships with other children and become isolated and depressed;
- Opposition/defiance – a generally negative, uncooperative attitude;
- Hyper-vigilance – typified in the ‘frozen watchfulness’ expression;
- Compulsivity – abused children sometimes compulsively carry out certain activities or rituals;
- Pseudo-mature behaviour – a false appearance of independence or being excessively ‘good’ all the time or offering indiscriminate affection to any adult who takes an interest.

The Panel notes that abuse can also be evidenced by ‘learned behaviour aggression’ and a tendency for a victim of child cruelty to inflict violence on others. Victims may also mature into adults with poor parenting skills who perpetrate similar acts of cruelty on their own children.

104. It is clear that expert testimony will be vital in order to demonstrate the known impact on a victim in any given case and this will properly influence the assessment of the seriousness of an individual offence or group of offences; this evidence will often be available from concurrent care proceedings in the Family Court. However, respondents to the Panel’s consultation were divided both over the degree to which the (as yet unknown) long-term effects of an offence could be predicted at the point of sentence and also over the validity of assuming such an outcome either in relation to an individual offence or when recommending generic sentencing starting points. Some respondents also pointed to the fact that a victim may be traumatised by, or suffer as a result of, the punishment of the offender, especially if he or she is the victim’s main carer, an issue which is discussed later at paragraphs 116 to 118. They felt that this should be weighed against the harm arising from the offence itself and also cautioned against inflating sentences on the basis of speculation rather than fact.

105. There is an accepted general principle that the sentence imposed for an offence can be based both on what is known about the harm caused to an individual victim and, in some cases, what is known about the harm caused to society as a whole. The draft Council guideline on sexual offences, published on 7 June 2006, includes higher starting points for the offence of sexual abuse of a child family member (an offence not wholly dissimilar to that of child cruelty) on the basis that such offences are necessarily aggravated by the abuse of trust involved. In that guideline, the Council has also established that the starting point for trafficking offences should be a custodial sentence on the basis that this is offending behaviour that society as a whole finds repugnant.

106. Following these precedents, and in light of the revulsion of society as a whole for this type of offending behaviour, we take the view that sentencing starting points for child cruelty offences should reflect an inherent abuse of trust or power and that these should not be regarded as additional aggravating factors.

107. A distinction can be drawn between inherent factors that do not need further assessment and both physical and psychological harm, which will vary enormously from case to case. However, whilst objective evidence about the degree of physical harm should be available to the court at the point of sentence, psychological harm, especially that which may or may not manifest itself in the future, will be extremely difficult, and often impossible, to assess at the point of sentence. We, therefore, take the view that the likelihood of psychological harm should also be reflected in the sentencing starting points for sentencing. To avoid double counting, this means that psychological harm could not be treated as an aggravating factor. However, where, at the point of sentence, there is powerful objective expert evidence about the particularly severe psychological trauma suffered by an individual victim, which indicates a more than usually serious degree of harm, this would be captured by the generic aggravating factor in the Council guideline - *“An especially serious physical or psychological effect on the victim, even if unintended”*.⁸⁴ We are satisfied that applying this approach will achieve the right outcome in terms of sentencing for child cruelty offences.

Recommendation 7

The sentencing starting points for the offence of child cruelty have been calculated to reflect the inherent abuse of trust or power and the likelihood of psychological harm; these cannot be treated as aggravating factors. However, where there is an especially serious physical or psychological effect on the victim, even if unintended, this should increase sentence.

Culpability

108. Although the nature and degree of harm that was caused, was intended or was reasonably foreseeable will impact on the seriousness of an offence of child cruelty, the Council guideline⁸⁵ clearly establishes that culpability should be the initial factor in determining the seriousness of an offence. In child cruelty offences, where there is such a wide variation in the nature and degree of harm that can be caused to a victim, there will similarly be a considerable variation in levels of culpability.

109. As discussed in paragraph 93, child cruelty may be the consequence of a wide range of factors including sadism; violence resulting from any number of causes; a reduced ability to protect a child in the face of aggression from an overbearing partner; indifference or apathy resulting from low intelligence or induced by alcohol or drug dependence; immaturity or social deprivation resulting in an inability to cope with the pressures of caring for children; and psychiatric illness. In the short term, an offence might arise as the result of a momentary lack of control by an otherwise responsible and loving carer. The extent to which any of these factors might have contributed to the commission of an offence will be important in determining the culpability of the offender. The extent to which remorse should influence sentence will always have to be judged in the light of all the circumstances surrounding the case.

⁸⁴ *Overarching Principles: Seriousness*, page 7, published 16 December 2004, www.sentencing-guidelines.gsi.gov.uk

⁸⁵ *ibid.* page 5

110. In *Andrew*,⁸⁶ the Court of Appeal noted that:

“A court must strike a balance between the need to reflect the serious view which society takes of the ill-treatment of very young children and the need to protect those children, and also the pressures upon immature and inadequate parents attempting to cope with the problems of infancy.”

111. Although sentencers must strike this balance and may make allowances for the inadequacy of parents, the Court has maintained a clear message that child cruelty manifested by assault should usually be considered as deserving of a custodial sentence.⁸⁷ The length of that sentence will be influenced, however, by the circumstances in which the offence took place.

112. In view of the seriousness with which society as a whole regards child cruelty, we take the view that the normal sentencing starting point for any offence of child cruelty should be a custodial sentence.

Recommendation 8

The normal sentencing starting point for an offence of child cruelty should be a custodial sentence.

The adverse effect of the sentence on the victim

113. Imposing a custodial sentence for an offence of child cruelty is the most appropriate outcome in most cases in that it properly reflects society’s view of the seriousness of this type of offending behaviour and protects victims from further harm and anguish. In addition, it is not unreasonable to suppose that some children will be less traumatised once they are no longer living with an abusive carer. However, there is a counter argument that, as the imprisonment of the offender may deprive a child victim of his or her sole or main carer and may result in the child being taken into care, a custodial sentence effectively punishes and re-

⁸⁶ (1995) 16 Cr App R (S) 899

⁸⁷ see *R v Faruk Ahmed* [2003] 1 Cr App R (S) 40 and *Attorney General’s Reference (No.81 of 2004)* [2004] EWCA Crim 3315

victimises the child and, it is argued, should only be considered in the most serious of cases. As the Court of Appeal said in *S*.⁸⁸

“By curious irony those who were the victims of the offence are likely to suffer most by the penalty which has been imposed upon its perpetrator.”

114. In some cases, even though a child may be distressed by separation from a parent or carer, imposing a custodial sentence on the offender may be the only option in view of the seriousness of the offence committed and the risk of further harm to the victim or other children. However, where sentencing options remain open, it would seem sensible for the court to take into account the impact that a custodial sentence for the offender might have on the victim. In many cases the child victim will be the subject of concurrent care proceedings and, indeed, the child’s future care arrangements may well have been determined by the time the offender is sentenced. Both the sentencing court and the Family Court need to be aware of the progress of any concurrent proceedings. An argument may well be advanced, particularly in less serious cases, in favour of imposing a non-custodial sentence in order to maintain family stability. The offender’s availability as a suitable carer will be one factor within the care proceedings that will determine the child’s future, in the light of the need to protect the child from the risk of further physical and emotional harm.

115. As mentioned earlier, that risk, together with the seriousness of the offence, may determine that a custodial sentence is inevitable. In other cases, the seriousness of the offence may cross the custody threshold but there is an issue as to whether the welfare of the child would be best met by the imposition of a non-custodial sentence. In those cases the sentencer should have clear, objective evidence from either the child’s guardian in the care proceedings, a social worker or a probation officer as to the progress of the care proceedings and whether there is a realistic hope of keeping the family together as well as the effect on the child of being separated from his or her carer. The sentencer must remember that decisions about the long term care of the child are ultimately for others to decide.

⁸⁸ [1996] 2 Cr App R (S) 256

Recommendation 9

In considering whether a custodial sentence is the most appropriate disposal for an offence of child cruelty, the courts should take into account any available information concerning the future care of the child.

Offenders who have primary care responsibilities

116. The Panel's consultation reported that, according to Home Office statistics over the last decade, child cruelty is an offence more commonly committed by females than males. However, research shows that the very same factor that may lead to the commission of an offence – sole or primary responsibility for the care of children - may also be the main reason for imposing a more lenient sentence, with the courts seemingly unwilling to separate children from their mothers and with sentencers adopting a 'welfare' approach when sentencing women.⁸⁹

117. The Panel's view, unanimously supported by those who responded to the consultation, is that the gender of an offender is irrelevant for sentencing purposes and the important factor for consideration is the offender's role as sole or primary carer of the victim or other children or dependants. The sentencing of parents for child cruelty offences creates a dilemma for the sentencing court that cannot be underestimated.⁹⁰ It has to be recognised that an offender's children may no longer be the responsibility of the offender by the time the court is considering sentence, as they are likely to have been taken into care or other suitable arrangements will have been made, often at the direction of the Family Court. Nonetheless, the Panel has taken into account the view of many of those who responded to the consultation that a victim of child cruelty may be harmed more than the offender by a decision to impose a custodial sentence.

118. In cases where an immediate custodial sentence of less than 12 months is justified, it is possible that an intermittent custody order⁹¹ or a suspended sentence order might be the most appropriate sentence. This could enable the offender, subject to the necessary risk assessment being made, to resume care

⁸⁹ Hedderman, C and Gelsthorpe, L (eds), *Understanding the sentencing of women*, Home Office, RDS, 1997

⁹⁰ Baroness Corston is currently conducting a review of the sentencing of women and the Panel awaits her report with interest

for, or at least have regular contact with, the child and could also open up opportunities for imposing requirements to rehabilitate and support an offender in need. In practice, this principle is likely to benefit more women than men, firstly because women commit the larger proportion of offences and secondly because men are less likely to be the sole or primary carers of children but the principle is established on the grounds of carer status and not gender.

Recommendation 10

Where the offender is the sole or primary carer of the victim or other dependants, this potentially should be taken into account for sentencing purposes, regardless of whether the offender is male or female. In such cases, an immediate custodial sentence may not be appropriate.

Personal mitigation

119. There may, of course, be other factors that should legitimately influence the nature and length of the sentence passed in child cruelty cases. Depression or other mental disorders, lack of support, or fear of a violent partner are all factors that might impact on an offender's behaviour towards children in his or her care and might be regarded as personal mitigation.

120. The Panel considers that the most relevant areas of personal mitigation are likely to be:

- Mental illness/depression
- Inability to cope with the pressures of parenthood
- Lack of support
- Sleep deprivation
- Offender dominated by an abusive or stronger partner
- Extreme behavioural difficulties in the child, often coupled with a lack of support

⁹¹ Following a pilot, the Home Office has decided to withdraw this sentencing option for the time being

- Inability to secure assistance or support services in spite of every effort having been made by the offender

121. It must be noted, however, that some of the factors identified above, in particular sleep deprivation, lack of support and an inability to cope could be regarded as an inherent part of caring for children, especially when a child is very young. Thus, such factors could be put forward in mitigation by most carers charged with an offence of child cruelty. It follows that, before being accepted in mitigation, there must be evidence that these factors were present to a high degree and had an identifiable and significant impact on the offender's behaviour.

The Panel's proposed guideline

122. The Panel has considered the complex issues raised by the different elements of child cruelty, particularly in terms of assessing seriousness in a way that enables the courts to take a consistent and coherent approach to the different types of conduct that can be covered by this offence. The same starting point and sentencing range, designed to take into account the fact that the victim is particularly vulnerable, assuming an abuse of trust or power and the likelihood of psychological harm, and designed to reflect the seriousness with which society as a whole regards these offences, is proposed for an offence in each category (assault; ill-treatment or neglect; and abandonment). The proposed guideline is intended to be read in conjunction with the generic list of aggravating and mitigating factors in the Council guideline, but it identifies additional aggravating and mitigating factors that may need to be taken into account in child cruelty cases. The meaning of “range”, “starting point” and “first time offender” within Sentencing Guidelines Council guidelines can be found at Annex C. Our proposed starting points relate to sentencing on conviction for a first offence after a plea of not guilty and they take account of changes to the sentencing framework introduced by the Criminal Justice Act 2003.⁹²

⁹² *New Sentences: Criminal Justice Act 2003*, paragraph 2.1.10, published 16 December 2004

Cruelty to a Child: Children and Young Persons Act 1933 (Section 1(1))

Maximum penalty: Ten years imprisonment

Mode of trial: Triable either way.

This is a serious offence for the purposes of section 224 of the Criminal Justice Act 2004.

The starting point in the guideline applies to a first-time adult offender convicted after a trial where a sentence for public protection is not required.

The meaning of “range”, “starting point” and “first time offender” within Sentencing Guidelines Council guidelines is explained in Annex C.

Only additional aggravating and mitigating factors specifically relevant to this offence are included in the guideline. When assessing the seriousness of any offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness.⁹³

Nature of offence	Sentencing range
(i) Serious cruelty over a period of time (ii) Serious long-term neglect (iii) Failure to protect a child from either of the above	Starting point – 6 years’ imprisonment Sentencing range – 5 to 10 years’ imprisonment
(i) Series of assaults (the more serious the individual assaults and the longer the period over which they are perpetrated, the more serious the offence) (ii) Protracted neglect or ill-treatment (the longer the period of ill-treatment or neglect and the longer the period over which it takes place, the more serious the offence) (iii) Failure to protect a child from either of the above	Starting point – 3 years’ imprisonment Sentencing range – 2 to 5 years’ imprisonment
(i) Assault(s) resulting in injuries consistent with ABH (ii) More than one incident of neglect or ill-treatment (but not amounting to long-term behaviour) (iii) Single incident of long-term abandonment OR regular incidents of short-term abandonment (the longer the period of long-term abandonment or the greater the number of incidents of short-term abandonment) the more serious the offence) (iv) Failure to protect a child from any of the above	Starting point – 36 weeks’ imprisonment Sentencing range – 26 weeks’ to 2 years’ imprisonment
(i) Momentary loss of control resulting in injuries that would be no more than a common assault (ii) Short term neglect or ill-treatment (iii) Single incident of short-term abandonment	Starting point – 12 weeks’ imprisonment Sentencing range – Community Order (LOW) to 26 weeks’ imprisonment

⁹³ *Overarching Principles: Seriousness*, published 16 December 2004, www.sentencing-guidelines.gov.uk

(iv) Failure to protect a child from any of the above	
Additional Aggravating Factors	Additional Mitigating Factors
<ol style="list-style-type: none"> 1. Targeting one particular child from the family 2. Sadistic behaviour 3. Threats to prevent the victim from reporting the offence 	<ol style="list-style-type: none"> 1. Seeking medical assistance. 2. Mental illness/depression 2. Inability to cope with the pressures of parenthood 3. Lack of support 4. Sleep deprivation 5. Offender dominated by an abusive or stronger partner 6. Extreme behavioural difficulties in the child, often coupled with a lack of support 7. Inability to secure assistance or support services in spite of every effort having been made by the offender

Statutory Provisions and CPS guidance relating to offences covered in the advice

Offence	Statutory provision creating offence	Statutory definition	Maximum custodial term available in Crown Court	Maximum custodial term available in Magistrates' Court
Attempted Murder	Criminal Attempts Act 1981 Section 1(1)	If with intent to unlawfully kill another...a person does an act...which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit murder.	Life	N/A
Causing grievous bodily harm with intent or wounding with intent to cause grievous bodily harm	Offences Against the Person Act 1861 Section 18	Unlawfully and maliciously by any means whatsoever wounding or causing any grievous bodily harm to any person, with intent to do some grievous bodily harm or to resist or prevent the lawful apprehension or detention of any person.	Life	N/A
Unlawful wounding /causing grievous bodily harm	OAPA Section 20	Unlawfully and maliciously wounding or inflicting any grievous bodily harm upon any other person, either with or without a weapon.	5 years	6 months
Assault occasioning actual bodily harm	OAPA Section 47	Any assault occasioning actual bodily harm.	5 years	6 months
Assault with intent to resist	OAPA section 38	Assaulting any person with intent to resist or prevent the lawful apprehension or detention of	2 years	6 months

arrest		himself or of any other person for any offence.		
Assault on a police constable in execution of his duty.	Police Act 1996 section 89	An assault on a police officer in the execution of his duty, or someone assisting a police officer in execution of his duty. ⁹⁴	N/A	6 months
Common assault	Criminal Justice Act 1988 section 39	Intentionally or recklessly causing the complainant to apprehend or sustain immediate unlawful personal violence.	N/A	6 months
Cruelty to a Child	Children and Young Persons Act 1933 section 1(1)	A person of 16 years or over, and having responsibility for a child under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health. ⁹⁵	10 years	6 months

CPS Guidance

1. The individual circumstances of assaults vary widely and the statutory definitions allow a wide interpretation as to what constitutes a particular offence. The CPS Charging Standard provides a practical interpretation of the statutory definitions and includes a helpful list of the types of injuries and other factors that may be considered as constituting a particular offence. The following paragraphs provide a description of each offence covered in the advice, based on the wording in the Charging Standard.

Attempted Murder

2. An offence of murder is committed where it is proven that the defendant unlawfully killed the victim having had the intention to kill or to cause grievous bodily harm. According to the CPS Charging Standard, evidence of the following factors may assist in proving an intention to kill:⁹⁶

- calculated planning;
- selection and use of a deadly weapon;

⁹⁴ This definition has been abridged.

⁹⁵ *ibid.*

- threats;
- severity or duration of attack;

Wounding with Intent to do Grievous Bodily Harm or Causing Grievous Bodily Harm with Intent to do Grievous Bodily Harm (section 18)

3. Grievous bodily harm has the meaning of really serious bodily harm⁹⁷ and can include psychological harm, usually referred to by the courts as psychiatric injury.⁹⁸ Wounding means the breaking of the continuity of the outer skin. The CPS Charging Standard advises that the following injuries usually amount to really serious bodily harm:⁹⁹

- injury resulting in permanent disability or permanent loss of sensory function;
- injury which results in more than minor permanent, visible disfigurement; broken or displaced limbs or bones, including fractured skull;
- compound fractures, broken cheek bone, jaw, ribs, etc;
- injuries which cause substantial loss of blood, usually necessitating a transfusion;
- injuries resulting in lengthy treatment or incapacity;
- psychiatric injury (appropriate expert evidence is essential to prove the injury).

4. In addition to showing that the offence resulted in grievous bodily harm, the prosecution must prove that the offender had a specific intent to cause that level of harm. The CPS suggests that factors which may indicate a specific intent include:¹⁰⁰

- a repeated or planned attack;

⁹⁶ *The Charging Standard on Offences Against the Person*, paragraph 7(vii); www.cps.gov.uk/legal/section5/index.html

⁹⁷ *Brown; Stratton* [1998] Crim LR 485

⁹⁸ *Burston; Ireland* [1998] A.C 147

⁹⁹ *The Charging Standard on Offences Against the Person*, paragraph 5(v); www.cps.gov.uk/legal/section5/index.html

¹⁰⁰ *ibid.*, paragraph 6(vii)

- deliberate selection of a weapon or adaptation of an article to cause injury, such as breaking a glass before an attack;
- making prior threats;
- using an offensive weapon against, or kicking, the victim's head.

Unlawful Wounding or Inflicting Grievous Bodily Harm (section 20)

5. The level of harm involved in a section 20 offence is the same as that for a section 18 offence and the types of injury that may constitute either offence are the same (see paragraph 3). However, the Charging Standard¹⁰¹ advises that, while the definition of wounding “*may encompass injuries that are relatively minor in nature, for example a small cut or laceration, an assault resulting in such minor injuries should more appropriately be charged contrary to section 47*” (ABH – see below). “*An offence contrary to section 20 should be reserved for those wounds considered to be serious (thus equating the offence with the infliction of grievous or serious bodily harm under the other part of the section).*”

6. The prosecution does not need to prove that the defendant either intended or foresaw that the unlawful act might cause physical harm amounting to grievous bodily harm, but only that some harm was either intended or could have been foreseen.¹⁰²

Assault Occasioning Actual Bodily Harm (ABH)

7. Bodily harm is any hurt or injury calculated to interfere with the health or comfort of the victim¹⁰³ (including psychiatric harm or injury¹⁰⁴).

8. The CPS Charging Standard states that the following injuries should lead to a charge of assault occasioning actual bodily harm:¹⁰⁵

- loss or breaking of a tooth or teeth;

¹⁰¹ *ibid.*, paragraph 5(iv)

¹⁰² *ibid.*, paragraph 5(vii)

¹⁰³ *Donovan* [1994] 2 KB 498, 25 Cr App R 1, CCA

¹⁰⁴ *Burston; Ireland* [1998] A.C 147

¹⁰⁵ *The Charging Standard on Offences Against the Person*, paragraph 4(ii); www.cps.gov.uk/legal/section5/index.html

- temporary loss of sensory functions (which may include loss of consciousness);
- extensive or multiple bruising;
- displaced broken nose;
- minor fractures;
- minor, but not merely superficial, cuts of a sort probably requiring medical treatment (e.g. stitches);
- psychiatric injury that is more than mere emotions such as fear, distress or panic. (Where psychiatric injury is relied upon, as the basis for an allegation of assault occasioning actual bodily harm, and the matter is not admitted by the defence, expert evidence must be called by the prosecution.)

Assault With Intent to Resist Arrest.¹⁰⁶

9. This assault may be committed against persons other than police officers - for example store detectives who may be trying to apprehend or detain an offender. The CPS Charging Standard¹⁰⁷ advises that, if an assault is committed against a police officer, a charge of assaulting a police constable (see paragraph 10) may be more appropriate unless there is clear evidence of an intention to resist arrest.

Assault on a Police Constable in Execution of his Duties

10. The CPS Charging Standard¹⁰⁸ advises that this offence should be charged where the injuries sustained are equivalent to those for common assault (see paragraph 11) and that *“when the injuries are such that an offence contrary to section 47 (ABH) would be charged in relation to assault on a member of the public, section 47 will be the appropriate charge for an assault on a constable.”*

¹⁰⁶ Offences Against the Person Act 1861, s.38

¹⁰⁷ *The Charging Standard on Offences Against the Person*, paragraph 3(iv); www.cps.gov.uk/legal/section5/index.html

¹⁰⁸ *ibid*, paragraph 2(iv)

Common Assault

11. An offence of common assault is committed where it is proven that the defendant assaulted the victim or committed a battery. An assault is committed when a person intentionally or recklessly causes another to apprehend the immediate infliction of unlawful force.¹⁰⁹ A battery is committed when a person intentionally and recklessly applies unlawful force to another.¹¹⁰ For the purposes of this consultation paper the term 'common assault' is used to cover both assault and battery.

12. The broad definition of common assault covers conduct that does not result in any injury but which puts the victim in fear of violence. Such conduct can include an attempted blow which is not competently executed and acts such as spitting. Where an injury has occurred, the CPS Charging Standard advises that the following injuries justify a charge of common assault:¹¹¹

- grazes;
- scratches;
- abrasions;
- minor bruising;
- swellings;
- reddening of the skin;
- superficial cuts;
- a black eye.

¹⁰⁹ Archbold 19-166

¹¹⁰ *ibid.* 19-166a

¹¹¹ *The Charging Standard on Offences Against the Person*, paragraph 1(vii); www.cps.gov.uk/legal/section5/index.html

**Generic list of aggravating and mitigating factors taken from the Council
guideline *Overarching Principles: Seriousness***

Aggravating factors

Factors indicating higher culpability:

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

Factors indicating a more than usually serious degree of harm:

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable
- Location of the offence (for example, in an isolated place)
- Offence is committed against those working in the public sector or providing a service to the public
- Presence of others e.g. relatives, especially children or partner of the victim
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

Mitigating factors

Factors indicating significantly lower culpability:

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

Offender mitigation

- Genuine remorse
- Admissions to police in interview
- Ready co-operation with authorities

**MEANING OF
“RANGE”, “STARTING POINT” AND “FIRST TIME OFFENDER” WITHIN
SENTENCING GUIDELINES COUNCIL GUIDELINES**

A Council guideline is generally for a *first time offender* convicted after a trial. It commonly provides a *starting point* based on an assessment of the seriousness of the offence and a *range* within which sentence will normally fall for most cases.

Assessing the seriousness of the offence

1.
 - a) A typical Council guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a **first time offender** who has been convicted after a trial. Within the guidelines, a **first time offender** is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.
 - b) As an aid to consistency of approach, a guideline will describe a number of types of activity which would fall within the broad definition of the offence. These will be set out in a column generally headed “type/nature of activity”.
 - c) The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the *offence* (beyond those contained within the column describing the type or nature of offence activity) to reach a **provisional sentence**.
 - d) The range is the bracket into which the **provisional sentence** will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the provisional sentence falls outside the range.
2. Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the **provisional sentence** beyond the **range** given particularly where there are significant other aggravating factors present.

Personal Mitigation

3. Once the **provisional sentence** has been identified by reference to those factors affecting the seriousness of the offence, the court will take into account any relevant factors of personal mitigation.

Reduction for guilty plea

4. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the **range** provided.

SUMMARY OF RECOMMENDATIONS**Recommendation 1**

The severity of an injury must not be used as a means to secure a sentence for an offence that has not been proved but the court must take account of the actual degree of harm caused or intended when assessing the seriousness of an offence.

Recommendation 2

Where the timing and/or location of an offence were designed to increase the vulnerability of the victim and/or to reduce the chances of discovery, this should be treated as an aggravating factor.

Recommendation 3

When sentencing an offender who claims to have been provoked into committing an offence against the person, the court must have regard to the nature and duration of the provocation and any fear, threat or violence generated by the actions of the victim. Where the offence charged was the result of excessive force used in self defence, the degree of provocation should be recognised in mitigation. For more guidance, a court should refer to the Council guidelines on Manslaughter by Reason of Provocation and Domestic Violence.

Recommendation 4

The use of a weapon in the course of an offence against the person does not necessarily aggravate an offence. The issue of key importance is whether the weapon was to hand or was carried deliberately to the scene, although the circumstances in which the weapon was brought to the scene will need to be considered carefully.

Recommendation 5

Where the victim of an assault or other offence against the person is a child Under 16, the normal sentencing starting point for an adult offender should be a custodial sentence.

Recommendation 6

Where a defendant is convicted of an assault-based offence on a child in respect of which the defence of lawful chastisement is not available, the fact that the offender believed the conduct was an acceptable form of correction shall not operate to reduce the sentence, except where the offence charged is one of an assault occasioning actual bodily harm and the offender neither intended nor foresaw that the act would result in any physical harm. In those limited circumstances the belief would amount to substantial mitigation.

Recommendation 7

The types of offending behaviour that can be charged as child cruelty – assault; failure to protect; ill-treatment or neglect; and abandonment – cannot be ranked in terms of seriousness.

Recommendation 8

The sentencing starting points for the offence of child cruelty have been calculated to reflect the inherent abuse of trust or power and the likelihood of psychological harm; these cannot be treated as aggravating factors. However, where there is an especially serious physical or psychological effect on the victim, even if unintended, this should increase sentence.

Recommendation 9

In considering whether a custodial sentence is the most appropriate disposal for an offence of child cruelty, the courts should take into account any available information concerning the future care of the child.

Recommendation 10

In considering whether a custodial sentence is the most appropriate disposal for an offence of child cruelty, the courts should take into account the care arrangements for the child.

Recommendation 11

Where the offender is the sole or primary carer of the victim or other dependants, this potentially should be taken into account for sentencing purposes, regardless of whether the offender is male or female. In such cases, an immediate custodial sentence may not be appropriate.

THE CONSULTATION

In accordance with the duty imposed by 171(3) of the Criminal Justice Act 2003, the Panel issued a consultation paper on 1 September 2005. The Panel's provisional views on sentencing guidelines for offences against the person and child cruelty were set out.

Copies of the consultation paper were sent to 356 individuals and organisations including the Panel's 33 regular consultees, Chairmen of Youth Panels and Resident Judges at each Crown Court Centre in England and Wales. It was also published on the Panel's website and in the Justice of the Peace journal.

Responses were received from the following:

Dr. Gwen Adshead – Psychotherapy Department, Broadmoor Hospital

Commission for Racial Equality

Council of Her Majesty's Circuit Judges

Alan Craft – President, Royal College of Paediatrics and Child Health

Crown Prosecution Service

Professor Jane Fortin - Kings College, London

Professor Judith Harwin – Director, Interdisciplinary Child Focused research Centre, Brunel University

Denise Hevey – Lecturer in Health and Social Welfare, The Open University

Justices' Clerks' Society

Law Society

Legal Committee of Society of District Judges (Magistrates' Courts) for England and Wales

London Criminal Courts Solicitors' Association

Magistrates' Association

National Offender Management Service

National Probation Service

NSPCC

Police Federation of England and Wales

Police Superintendents' Association

Prison Reform Trust

Royal College of Psychiatrists

United Kingdom Association of Women Judges

Victim Support

Responses were also received from:

Anthony Edwards – Defence solicitor and member of the Sentencing Guidelines Council

John Deft - St. Brendan's Sixth Form College, Bristol

James E. Petts, Barrister

George Tranter – former Justices' Clerk

Christine Reay - Magistrate

Rail Personal Security Group

Go-Ahead Rail, Head of Security

Bob Davies - Magistrate

Tracey Morgan, Network for Surviving Stalking

Brian James - Magistrate

Ann McLaughlin - Magistrate

British Psychological Society

Graham Hooper - Justices' Clerk

Bernard Youngs - Magistrate

Gwynedd Branch of the Magistrates' Association

South West Trains

Dr Matthew Weait - Keele University

Lawyers' Christian Fellowship

Northampton Branch of the Magistrates' Association

N.E. London Branch of the Magistrates' Association

Justice for Women

Brian Carter- Magistrate Justices of the Wandsworth Local Justice Area

London*lines*

One (train operator for the East of England)

NHS Counter Fraud and Security Management Service

National Aids Trust and Terrence Higgins Trust

British Association of Social Workers

Tony Drake – Magistrate

Family Education Trust

Transport for London

Children are unbeatable! Alliance

Wessex Trains

Four anonymous responses were also received.