

**CBA Response to the Sentencing Council's Assault Sentencing Consultation  
from 16<sup>th</sup> April 2020 to 15<sup>th</sup> September 2020**

**Introduction**

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

**The need for review - background**

4. The Sentencing Guidelines Council ("SGC")'s Assault Definitive Sentencing Guideline came into force in 2011 and its impact and implementation was

evaluated by the SGC in 2015. It considered that overall sentence severity had decreased due to the high volume of Common Assault offences, however sentences for GBH with intent (Section 18) and ABH (Section 47) had increased in excess of those anticipated.. Sentencing for Assault PC (Section 89) sentences were less severe and there were minor increases which had been anticipated for GBH (Section 20). The delay in reviewing the Guideline was due to consideration by the Law Commission of reforms to offences against the person and the SGC did not wish to revise the guideline only for it to become outdated. When reforms were not pursued the SGC began the review. The SGC also decided to review the Attempted Murder Definitive Guideline at the same time. Legislation has recently been introduced to increase sentences for Assaults on Emergency Workers so this is reflected in the proposed revision.

5. Assault offences count for a significant number of criminal offences in the Magistrates and Crown Court (55,300). In 2018 83 per cent of adult offenders were sentenced in the Magistrates' court and 17 per cent in the Crown Court (Court Proceedings Database, MoJ).
  
6. The SGC's expressed aim is to provide guidance to assist with achieving consistent sentencing and transparency for the public regarding penalties for this type of offending.
  
7. The offences covered by the proposed revised guidelines are:

Common assault – section 39 Criminal Justice Act 1988; Racially/religiously aggravated Common assault - section 29 Crime and Disorder Act 1998

Common assault of an emergency worker - section 1 Assaults on Emergency Workers (Offences) Act 2018

Assault with intent to resist arrest – section 38 Offences Against the Person Act 1861 (Note: the CPS has indicated that given the new Assault on Emergency Workers offence it is unlikely that they will continue to charge the Section 38 offence and therefore this offence has not been revised.)

Assault occasioning actual bodily harm - section 47 Offences Against the Person Act 1861; Racially/religiously aggravated ABH - section 29 Crime and Disorder Act 1998

Inflicting grievous bodily harm/Unlawful wounding - section 20 Offences Against the Person Act 1861; Racially/religiously aggravated GBH/Unlawful wounding - section 29 Crime and Disorder Act 1998

Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm - section 18 Offences Against the Person Act 1861

Attempted murder - s1(1) Criminal Attempts Act 1981

8. The SGC has requested views on the following:

the principal factors that make any of the offences included within the draft guidelines more or less serious;

the additional factors that should influence the sentence;

the approach taken to structure the draft guidelines;

the types and lengths of sentence that should be passed;

differences between the current guidelines and these new, revised guidelines;  
and

anything else that we think should be considered.

## Views expressed by sentencers and practitioners informing the review

9. The SGC were informed by sentencers and practitioners of the following issues with the Assault Definitive Guideline:

Interpretation and application of the step one factors of *'injury which is serious in the context of the offence'* and *'injury which is less serious in the context of the offence'*, across all the assault offences.

Risk of differing interpretations of the step one factors *'sustained or repeated assault on the same victim'* and *'significant degree of premeditation'*.

Possible double counting of victim vulnerability in the guideline (victim vulnerability is a factor in both harm and culpability in the guideline).

The model and structure of the guidelines, and changing to the format of more recent Guidelines.

It was noted that the existing guideline cannot accommodate cases of 'medium' harm: harm that is neither the most or the least serious, which may lead to an inaccurate categorisation of harm.

Whether *'spitting'* should be explicitly referenced as a factor increasing offence seriousness.

Whether the starting points/ranges within the GBH s18 guideline are too high, particularly the starting point in category one of 12 years.

Whether the sentence ranges in ABH s47 cases are too low (the ranges were lower than those in the preceding SGC guideline) possibly causing some sentencers to be outside the category range.

## Common Assault

10. Given that common assault is nearly always sentenced in magistrates' courts, a feedback exercise with magistrates gathered views on three aspects of the existing guideline. Broad findings were:
  - Factors which were problematic corresponded with views in the evaluation of the guideline. A number of responses also expressed concern at the factor 'deliberately causes more harm than is necessary for commission of offence', and potential interpretation issues. For the factor relating to injury in the context, the 'context' aspect was questioned and examples given of how this could be inconsistently interpreted.
  - The majority of respondents thought the sentence starting points were too low, particularly for a category 3 offence. Some of these responses related to the guideline factors not providing for medium harm cases adequately, resulting in a low categorisation of an offence where a high threshold of harm could not be demonstrated.
  - In other comments, a number of responses mentioned charging of offences. It was noted that under past sentencing practice, an offence resulting in injury which could amount to ABH may have been charged as common assault in order to expedite proceedings in the magistrates' courts, which was thought to be preferable for victims. Since then, the CPS have revised their charging guidance and are clear that common assault should not be preferred as an alternative charge where the offence can be properly assessed as ABH.
  
11. The conclusion drawn from sentencer comments and in considering the unanticipated decrease in sentences is that the existing guideline is causing a higher proportion of offences to be captured at category 3 than had been anticipated.

## The revised guideline – Step One - Culpability

12. The proposed changes to the Common Assault Guideline with respect to Culpability are shown in the table below:

### Culpability demonstrated by one or more of the following

#### A - High culpability

- Intention to cause fear of serious harm, including disease transmission
- Targeting of vulnerable victim, where victim vulnerable by personal characteristics or circumstances
- Prolonged assault
- Use of substantial force
- Strangulation
- Threatened or actual use of weapon or weapon equivalent\*
- Leading role in group activity

#### B - Lesser culpability

- Lesser role in group activity
- Mental disorder or learning disability, where linked to the commission of the offence
- All other cases not captured by category 1 factors

\*Examples of a weapon equivalent can include but are not limited to; a shod foot, use of acid, use of animal in commission of offence

*Question 1: Do you have any comments on the proposed culpability factors?*

13. In response to Question 1 the CBA have considered the proposed revisions to Culpability factors for common assault and whilst largely being in agreement

with the proposals, are concerned regarding the first “High Culpability” factor which includes “*spitting or coughing*”.

14. In the consultation the SGC have expressed that *“The Council considers that where an offender intends to cause a victim to fear they will ...contract a disease, this represents a high level of culpability which should be assessed at the upper end of seriousness. This would include ... offences ... by offenders coughing and spitting at victims with a **direct or implied** threat of Covid-19 or other disease transmission. Public facing workers are particularly at risk from this type of offence, and a number of successful prosecutions have recently taken place. **Where an offender intentionally spits or coughs at a victim, in situations such as the current epidemic, an intention to cause fear of transmission could be inferred even where there is no explicit assertion that an offender has a disease capable of transmission.**”*

15. Firstly the CBA remind the SGC that where offences including common assault are committed against public facing workers these would be almost certainly dealt with under Section 1 Assaults on Emergency Workers (Offences) Act 2018 given the expressed intention of the CPS. Therefore offences falling outside this provision, caught by this Guideline, would be those more likely to be against members of the public. Whilst equally serious to victims the SGC must recognize that there is a potential for unfairness where it is easier to allege spitting and/or coughing as opposed to other forms of battery.

16. Whilst it is accepted that there need not be any evidence that an offender has a disease capable of transmission, there must be evidence of an intention to cause a victim to fear they will contract a disease. Mere spitting or coughing during a pandemic would not be enough. The CBA would recommend that the wording

make clear that in order for spitting or coughing to be categorized as higher culpability there must be an intention to cause fear of transmission, mere spitting or coughing which lands on or near a person in a pandemic would not be sufficient on its own to satisfy the higher culpability criterion although it would be common assault.

**The revised guideline – Step One - Harm factors**

17. The proposed changes to the Common Assault Guideline with respect to Harm are shown in the table below:

Harm	
The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.	
Category 1	More than minor physical or psychological harm/distress
Category 2	Minor physical or psychological harm/distress
Category 3	No/very low level of physical harm and/or distress

*Question 2: Do you agree with the revised approach to assessing harm, and with the factors included?*

18. In response to Question 2 the CBA have considered the proposed revisions to Harm factors for common assault and are in agreement that the three categories allow for sentencers to assess the level of harm, both physical and psychological on a case by case basis. This addresses the criticism regarding interpretation of “serious in the context of the offence” and with respect to the existing guidelines not being sufficient for “medium” level offences.

**The revised guideline – Step two – Starting point and sentencing Ranges**

19. The SGC have not proposed revisions to the existing Starting point and Category ranges which are:

<b>Culpability</b>		
<b>Harm</b>	<b>A</b>	<b>B</b>
	<b>Starting point</b>	<b>Starting point</b>
<b>Category 1</b>	High level Community Order	Medium level Community Order
	<b>Range</b>	<b>Range</b>
	Low level Community Order – 26 weeks’ custody	Low level Community Order – 16 weeks’ custody
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>
	Medium level Community Order	Band B Fine
	<b>Range</b>	<b>Range</b>
	Low level Community Order – 16 weeks’ custody	Band A Fine – Low level Community Order
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>
	Band B Fine	Band A Fine
	<b>Range</b>	<b>Range</b>
	Band A Fine – Low level Community Order	Discharge – Band C Fine

*Question 3: Do you have any comments on the proposed sentence levels?*

20. The CBA do not have any comments regarding the sentence levels and recognizes the SGC’s expressed intention to address re-distribution of sentences through revising factors within the guideline rather than sentences themselves.

**The revised guideline – aggravating and mitigation factors**

21. The revised aggravating and mitigating factors are set out below:

**Factors increasing seriousness**

**Statutory aggravating factors:**

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: disability, sexual orientation or transgender identity.

#### **Other aggravating factors:**

- Spitting or coughing
- Offence committed against those working in the public sector or providing a service to the public or against a person coming to the assistance of an emergency worker
- Offence committed in prison
- Offence committed in domestic context
- Presence of children
- Gratuitous degradation of victim
- Abuse of power and/or position of trust
- Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from supporting the prosecution
- Commission of offence whilst under the influence of alcohol/drugs
- Offences taken into consideration (TICs)
- Offence committed on licence or post sentence supervision
- Failure to comply with current court orders

#### **Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions or no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Significant degree of provocation
- Age and/or lack of maturity
- Mental disorder or learning disability where not linked to the commission of the offence
- Sole or primary carer for dependent relatives

- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment

*Question 4: Do you have any comments on the proposed aggravating and mitigating factors?*

22. The CBA note the SGC's intention to add "spitting or coughing" as a factor aggravating the offence. The CBA understand the SGC's and sentencers' concerns regarding the risk to the public from transmission of disease, particularly during the current Co-Vid19 pandemic and appreciate the need to address the risks with respect to expelling of droplets from the mouth. The CBA recognize that there may be circumstances where the offender does not intend to transmit disease and is not suffering from disease however offenders may not know this at the time and victims may suffer additional psychological harm by having to be tested and potentially being quarantined following being spat/coughed on.
23. The CBA consider that greater guidance should be given to sentencers regarding spitting/coughing to ensure offences are not elevated to those involving intention and to promote consistency in sentencing.
24. The CBA have considered the existing aggravating factor of '**Offence committed against those working in the public sector or providing a service to the public**' which provides for increased sentences for offences against, among others, shop workers, security staff and traffic wardens. We refer to paragraph 15 above and the appropriate charging of Section 1 Assaults on Emergency Workers (Offences) Act, 2018. The CBA do however agree that the widening of this factor to include offences committed towards a person coming to the assistance of an emergency worker should be recognized as aggravating any sentence.

25. The CBA agree with the SGC that mitigating factors should include a '**significant degree of provocation**'. In this country provocation is not a defence but it should be recognized that where offences are committed in circumstances of a "significant" degree of provocation this should be a mitigating factor. The CBA agree that this factor should be applied as a mitigating feature rather than reducing culpability.

*Question 5: Do you have any other comments on the Common assault guideline?*

26. The CBA have nothing further to add.

**Assaults on emergency workers**

27. The Assaults on Emergency Workers (Offences) Act 2018 introduced offences of common assault towards those specified as emergency workers. It is triable either way and has a statutory maximum sentence of 12 months' imprisonment. Between 13 November – 31 December 2018, around 290 adult offenders were sentenced for this offence. During the first three quarters of 2019, 6,400 offenders were sentenced for this offence (MoJ).

28. The definition of emergency workers is contained within s3(1) of the Act. As well as frontline staff such as police officers, prison officers, fire fighters, search and rescue personnel, NHS medical and support staff are also provided for, which can include doctors' receptionists and NHS administrative staff whose activities involve face to face interaction with the public.

29. More serious injuries would be charged as ABH or GBH. The legislation has not increased maximum sentences for these more serious offences, but instead makes

the commission of an ABH or GBH against an emergency worker a statutory aggravating factor, to provide for an uplift to be applied to the sentence in the same way in which other statutory aggravating factors, such as previous convictions of an offender, provide for an increased sentence.

### **The revised guideline – culpability and harm factors**

30. As the offence is essentially common assault, the factors are the same as for the basic common assault offence. The exception is the culpability factor relating to vulnerable victims, which is not included in order to avoid double-counting. However, the SGC considers that there are circumstances where emergency workers may be more vulnerable to assaults and have provided for specific situations where emergency workers are at greater risk of attack and their vulnerability may be increased as an aggravating factor, which is discussed below in the aggravating factors section.

31. The proposed culpability factors are as follows (The proposed harm factors are the same as the basic common assault offence, as potential injuries are the same):

#### **Culpability demonstrated by one or more of the following**

The level of culpability is determined by weighing up all the factors of the case. Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

#### **A - High culpability**

- Intention to cause fear of serious harm, including disease transmission
- Prolonged assault
- Use of substantial force
- Threatened or actual use of weapon or weapon equivalent\*
- Strangulation
- Leading role in group activity

#### **B - Lesser culpability**

- Lesser role in group activity

- Mental disorder or learning disability, where linked to the commission of the offence
- All other cases not captured by category A factors

\*Examples of a weapon equivalent can include but are not limited to; a shod foot, use of acid, use of animal in commission of offence

## Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

<b>Category 1</b>	More than minor physical or psychological harm/distress
<b>Category 2</b>	Minor physical or psychological harm/distress
<b>Category 3</b>	No/very low level of physical harm and/or distress

*Question 6: Do you agree with the approach to assessing culpability and harm, and with the factors included?*

32. The CBA agree that this format ensures compatibility with the basic common assault offences and that the status of the victim is reflected as an aggravating feature after Culpability and Harm with vulnerability removed to avoid double-counting.

### The revised guideline – increased Sentences

33. The SGC have set out its reasons for increased sentences in line with the intention of Parliament to increase sentences for assaults on those designated as emergency workers. The proposed starting points and ranges for sentence are set out in the table below:

<b>Culpability</b>		
<b>Harm</b>	<b>A</b>	<b>B</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>
	8 months' custody	16 weeks' custody
	<b>Range</b>	<b>Range</b>
	26 weeks' – 12 months' custody	High level Community Order – 26 weeks' custody
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>
	16 weeks' custody	High level Community Order
	<b>Range</b>	<b>Range</b>
	High level Community order – 26 weeks' custody	Low level Community Order – 16 weeks' custody

<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>
	High level Community Order	Medium level Community Order
	<b>Range</b>	<b>Range</b>
	Low level Community Order – 16 weeks’ custody	Band B Fine – High level Community Order

**Question 7: Do you have any comments on proposed sentence levels?**

34. The CBA recognize the need to protect emergency workers, particularly during the current pandemic but also would wish to point out that it is frequently the most vulnerable, including the mentally ill, who come into contact with emergency workers the most often . Whilst emergency workers deserve protection, those who are the most vulnerable also need appropriate treatment and care in circumstances where funding has increasingly been withdrawn rather than simply longer prison sentences.

**Aggravating and mitigating factors**

35. Duplicated aggravating factors have been removed. An additional aggravating factor has been added to include emergency workers who may be isolated and unable to escape an assault. This would capture offences such as medical staff who are assaulted when isolated whilst treating an individual. The SGC considers that this type of situation represents a specific vulnerability on the part of the victim which aggravates the offence and should be reflected in an increased sentence. The SGC has also included spitting or coughing as an aggravating factor. The factor of a ‘significant degree of provocation’ is not available as the SGC do not consider that emergency workers would provoke an assault on them. The proposed aggravating and mitigating factors are:

**Factors increasing seriousness**  
**Statutory aggravating factors:**

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.

**Other aggravating factors:**

- Spitting or coughing
- Victim isolated and/or had no opportunity to escape situation
- Presence of children
- Gratuitous degradation of victim
- Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from supporting the prosecution
- Commission of offence whilst under the influence of alcohol/drugs
- Other offences taken into consideration (TICs)
- Offence committed on licence or post sentence supervision
- Failure to comply with current court orders

**Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Age and/or lack of maturity
- Mental disorder or learning disability where not linked to the commission of the offence
- Sole or primary carer for dependent relatives
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment

***Question 8: Do you agree with the proposed aggravating and mitigating factors?***

36. The inclusion of an additional aggravating feature relating to the victim's circumstances properly reflects those circumstances where an emergency worker finds themselves isolated or goes to a person's aid unaccompanied. The CBA agree that it should be an aggravating feature where an offender takes advantage of an isolated emergency worker to assault them.

37. For the same reasons as enunciated in paragraph 22 the CBA agree that "spitting and coughing" should be a separate aggravating feature where it has not already been considered under Culpability. We repeat that greater guidance should be given to sentencers regarding spitting/coughing to ensure offences are not

elevated to those involving intention and to promote consistency in sentencing where spitting and coughing are involved.

*Question 9: Do you have any other comments on the Assault on emergency workers guideline?*

38. The CBA have nothing further to add.

**Assault with intent to resist arrest**

39. Assault with intent to resist arrest (Section 38 of the Offences Against the Person Act 1861) is triable either way and has a maximum sentence of 2 years' imprisonment. The evaluation of the existing guideline did not include assault with intent to resist arrest due to low numbers of offences, but the offence is included in the revised guideline. Although this can be charged where an assault is committed against any individual seeking to apprehend or detain an offender, the most likely victims would be police officers assaulted in the course of their duty. Given that the offence is effectively assault on an emergency worker with the additional element of intending to resist arrest, the SGC decided that the same culpability and harm factors for the *Assault on emergency workers* guideline should apply. The SGC also considered that the resisting arrest element of the offence would be reflected in the higher statutory maximum sentence and increased starting points. The offence will still be common assault as a more serious offence would otherwise be charged; it is the circumstances in which the assault is committed which differs. The Culpability, Harm, Aggravating and Mitigating factors are therefore not repeated here.

*Question 10: Do you agree with the approach to assessing culpability and harm, and with the factors included?*

40. The CBA agree that Assault with intent to resist arrest is for practical purposes most likely to be treated more seriously as an assault on emergency workers.

**The revised guideline – increased Sentences**

41. Around 150 adult offenders were sentenced for this offence in 2018. The highest starting point in the existing guideline is 26 weeks’ custody, although the highest category range provides for a sentence of up to 51 weeks’ custody. As the proposed highest starting point in the draft *Assault on emergency workers* guideline is 8 months’ custody, the SGC decided that the starting point for the resist arrest offence should be higher to reflect its higher statutory maximum sentence. It is proposed the highest starting point for the most serious offences is 9 months’ custody. While this is considerably lower than the statutory maximum sentence, this does represent a 50 per cent increase on the existing guideline sentences in this category and the SGC considers that it would be disproportionate to the overall seriousness of the offence to increase this further. The proposed Starting points and sentence ranges are set out in the table below:

	<b>Culpability</b>	
<b>Harm</b>	<b>A</b>	<b>B</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>
	36 weeks’ custody	26 weeks’ custody
	<b>Range</b>	<b>Range</b>
	26 weeks’ – 15 months’ custody	High level Community Order – 36 weeks’ custody
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>
	26 weeks’ custody	High level Community Order
	<b>Range</b>	<b>Range</b>
	High level Community Order – 36 weeks’ custody	Low level Community Order – 26 weeks’ custody
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>
	High level Community Order	Medium level Community Order
	<b>Range</b>	<b>Range</b>
	Low level Community Order – 26 weeks’ custody	Band B Fine- High level Community Order

***Question 11: Do you have any comments on the proposed sentence levels?***

42. The CBA recognize the potential conflict between the offences of Assault on emergency workers and Assault with intent to resist arrest. The CPS have published guidance to the effect that police and prosecutors should cease charging assaulting a police officer in the execution of their duty and other

similar offences where the complainant is an emergency worker and charge under the 2018 Act. The CBA consider that to give a higher starting point for Assault with intent to resist arrest than Assault on an emergency worker creates an inconsistency that is unnecessary and contradicts the intention of Parliament and the CPS in dealing with cases against police officers as emergency workers. The CBA would suggest that the sentencing starting points and ranges should be the same regardless of the statutory maximum and the fact of resisting arrest should be included in the aggravating features of the 2018 Assault on an emergency worker offence in order to achieve parity. Therefore a sentencer dealing with an offender under either of the offences will be able to take into account the circumstances of arrest and would achieve the appropriate and consistent sentence whichever offence has been charged.

43. The CBA would anticipate that, over time, the Assault with intent to resist arrest offence, with its higher statutory maximum should either be repealed so as not to conflict with the 2018 Act or is reserved for those offences that fall outside the Guidelines and are far more serious than can be dealt with by a maximum 12 months' custody. Therefore having a starting point of 9 months' custody does not assist in this regard.

44. The SGC's proposed aggravating and mitigating factors are the same as for the assault on emergency workers offence.

*Question 12: Do you agree with the proposed aggravating and mitigating factors?*

45. The CBA suggest that an aggravating feature to include circumstances where the offender is under arrest or is resisting arrest should be added. This would allow parity between the offences of Assaulting an emergency worker (who is a police officer) and Assault on a police officer with intent to resist arrest. We refer to paragraphs 41 and 42 above.

46. An expressed objective of the SGC is to promote greater consistency in sentencing and the CBA would therefore suggest parity between the offences in sentencing guidance is essential in order to achieve consistency. The fact that Assaulting with intent to resist arrest has a higher statutory maximum does not prevent this since cases falling outside the guidelines and charged under the OAPA, 1861 can be preferred in specific cases.

*Question 13: Do you have any other comments on the Assault with intent to resist arrest guideline?*

47. The CBA have nothing further to add.

**Assault occasioning actual bodily harm – Section 47 OAPA, 1861**

48. Assault ABH is an either way offence carrying a maximum penalty on indictment of five years' imprisonment, or seven years' imprisonment for the racially aggravated offence. The number of adult offenders sentenced for ABH has generally decreased over the last decade. In 2018 there were around 5,600 offenders sentenced for ABH, two thirds of offenders in the Crown Court. In 2018 around 40 adult offenders were sentenced for racially/religiously aggravated ABH.

49. The existing guideline includes the same seriousness assessment as other Assault guidelines and the same culpability and harm factors. The assessment of the impact and implementation of the ABH guideline highlighted the following as areas for particular consideration:

- Analysis showed a shift towards more serious disposal types - an increase in custodial sentences (immediate and suspended) and a decrease in community orders. This was in contrast to the prediction in the resource assessment of a drop in the severity of sentencing, due to the decrease in the sentencing range in the

new Sentencing Council guideline. A possible cause is that the types of injury being charged as ABH involved injuries more akin to GBH, which was evidenced in analysis of cases;

- A regression analysis using CCSS data was carried out and showed that “injury which is serious in the context of the offence” was the most important factor for ABH and added 26 per cent (0.2 years) to the length of immediate custodial sentences. It was noted that this was suggestive of a higher level of injury than may be expected in ABH cases;
- Sentencer perceptions were broadly that the sentences in the guideline were too low. This was largely thought to be attributable to the decrease in the sentencing range in the guideline when compared to the previous SGC guideline, although it was noted that the types of cases being charged as ABH may have been a contributory factor.

50. Crown Court Sentencing Survey 2013-2015 data showed around 40% of offenders in the lowest category of seriousness under the existing guideline received a custodial sentence even though this category does not provide for a custodial sentence. This indicated sentencers did not believe existing guideline sentences were adequate. A case of lower seriousness ABH, likely to be more serious than a high category Common Assault, currently attracts a lower starting point than the most serious Common Assault offence.

51. The SGC propose to revise the ABH guidelines to follow the new format with culpability factors in line with Section 20 GBH and to remove and rephrase those factors which have the potential for inconsistent interpretation.

### **The revised guideline – Culpability factors - High culpability**

52. The factor of “a significant degree of premeditation” has been retained at high culpability as analysis of transcripts suggested it may be a factor in revenge attacks and domestic violence where offenders plan and lay in wait to attack ex-partners. Currently “deliberate targeting of vulnerable victim” increases the

seriousness in the common assault guideline but has been reworded for ABH to avoid too high a threshold where a victim cannot be described as deliberately targeted. Proposed wording is “**victim obviously vulnerable by age, personal characteristics or circumstances**” which addresses an offender’s awareness of a victim’s vulnerability.

53. The existing guideline includes the same factor relating to weapons as common assault. However, analysis of cases identified that the phrasing and placement of the factor is leading to sentences which may not reflect the seriousness of the weapon used. This was significantly more of an issue in GBH cases, but the SGC decided that culpability factors in the ABH and GBH (s20) guidelines should be the same and that seriousness assessment should provide for a distinction between highly dangerous weapons and other weapons or weapon equivalents. It is therefore proposed that a high culpability factor be included of ‘**use of a highly dangerous weapon or weapon equivalent.**’ (Note: the wording has been largely replicated from the bladed articles guideline where a distinction between weapons is made. Explanatory wording to assist in identifying the nature of the weapon is included in the guideline).

54. The other high culpability factors are as included in the common assault guideline: strangulation, leading role in group activity and prolonged assault.

#### **The revised guideline – Culpability factors - Medium culpability**

55. This category provides for weapons not assessed as highly dangerous and a lesser role in group activity. The category includes a factor providing for cases falling between high and low culpability, as in other SGC guidelines where competing factors may be present.

## The revised guideline – Culpability factors - Lesser culpability

56. This category includes factors which includes no weapon used, excessive self-defence and where the offender is experiencing a mental health disorder or learning disability linked to the commission of the offence.

### **Culpability demonstrated by one or more of the following**

The level of culpability is determined by weighing up all the factors of the case. Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics giving appropriate weight to relevant factors to reach a fair assessment of the offender's culpability.

#### **A - High culpability**

- Significant degree of planning or premeditation
- Victim obviously vulnerable due to age, personal characteristics or circumstances
- Use of a highly dangerous weapon or weapon equivalent\*
- Strangulation
- Leading role in group activity
- Prolonged assault

#### **B – Medium culpability**

- Use of a weapon or weapon equivalent which does not fall within category A
- Lesser role in group activity
- Cases falling between category A or C because:
  - - Factors in both high and lesser categories are present which balance each other out; and/or
  - - The offender's culpability falls between the factors as described in high and lesser culpability

#### **C - Lesser culpability**

- No weapon used
- Excessive self defence
- Mental disorder or learning disability, where linked to the commission of the offence

\* A highly dangerous weapon includes weapons such as knives and firearms. Weapon equivalents can include corrosive substances (such as acid), whose dangerous nature must be substantially above and beyond the legislative definition of an offensive weapon which is; *'any article made or adapted for use for causing injury, or is intended by the*

*person having it with him for such use*'. The court must determine whether the weapon or weapon equivalent is highly dangerous on the facts and circumstances of the case.

***Question 14: Do you agree with the approach to assessing culpability and with the factors included?***

57. The CBA agree with the SGC proposals regarding Culpability factors and in keeping them in line with Section 20 GBH.

**The revised guideline - Harm factors**

58. The range of injuries described as ABH are broad so that the previous SGC guideline focused on describing injuries as a more serious common assault with lesser harm and just short of GBH with high harm. However, the SGC consider that this has caused significant issues with sentence development for more serious ABH offences, as an 'injury just short of GBH' meant relativity was required with GBH (s20) sentences with the offences sharing the same statutory maximum sentence of 5 years. So, they argue that if an injury just short of GBH represented the highest level of harm in the ABH guideline, the sentence for a similar injury which would fall within the lowest harm category of the GBH (s20) guideline could be significantly lower. Potentially, significant deflation would occur in ABH cases or GBH (s20) sentences would need to significantly increase, and the SGC also noted that comparing sentences in guidelines could encourage 'guideline shopping' to try to secure a sentence within a particular category of either guideline.
59. The SGC has decided that these issues were unresolvable, and that as ABH and GBH (s20) share the same statutory maximum sentence they must be treated as separate and distinct offences, and the guidelines should not treat them as a continuum of each other or refer to other offences in assessing seriousness. Given the breadth of injuries which may be present in an ABH offence and the consideration required of the extent and impact of injuries, the Council decided that it is not possible or desirable to include descriptions of injuries within the harm assessment. The harm model therefore includes three categories of harm;

high, medium and low. Additional wording accompanies the harm assessment to clarify how sentencers should assess the level of harm present within an offence. Views are sought on the proposed harm model, taking into account the limitations and difficulties explained with including injury descriptive factors.

<b>Harm</b>	
<b>To assess the level of harm caused by the offence, the court must consider</b>	
<ul style="list-style-type: none"> <li>• <b>the range of injuries (including physical and psychological injury) that can occur in cases of assault occasioning actual bodily harm and</b></li> <li>• <b>where in that range of injuries the injury caused falls</b></li> </ul>	
<b>Category 1</b>	<b>High level of physical or psychological harm</b>
<b>Category 2</b>	<b>Medium level of physical or psychological harm</b>
<b>Category 3</b>	<b>Low level of physical or psychological harm</b>

*Question 15: Do you agree with the approach to assessing harm?*

60. The CBA appreciates the situation which the SGC must grapple with regarding the interplay between Assault ABH and GBH (Section 20) and can understand the SGC’s view that sentencers should consider only ABH cases when assessing harm rather than relating it to GBH. Harm or level of injury is in practical terms the difference between the offences and therefore warrants separate consideration. The CBA do not think that the current proposal of high, medium and low level harm provides sufficient guidance to counteract the inclination of sentencers to compare harm to GBH. The CBA consider that it is inevitable that sentencers will compare the two offences to establish levels of harm because between the them there is considerable overlap. It should also be remembered that the fact that ABH and Section 20 GBH have the same statutory maximum merely allows sentencers a broad range of sentence for both offences.

61. The CBA suggest that further guidance should be given as to examples of what types of offence fall into each level of harm. This would also perhaps assist those responsible for charging ABH.

### **The revised guideline – increased Sentences**

62. The evaluation highlighted that contrary to expectations ABH sentences increased on the introduction of the current guideline. The SGC has identified through statistical analysis that rather than sentences increasing as a result of the new guideline, a more accurate assessment is that sentences did not decrease as anticipated. Statistics illustrated that although the highest starting point in the existing guideline is 1 year 6 months' custody, a high proportion of sentences were imposed in excess of that.
63. To better understand current sentencing practice the SGC considered a number of transcripts covering a range of ABH offences. They identified that the existing guideline is designed to be applied more flexibly than more recent guidelines. Only three starting points are included and additional guidance provides for upward adjustment from the starting point in cases where multiple features of culpability are present. Transcript analysis highlighted that in accordance with the guidance included, the relevant offence category range is more influential than the sentence starting point in more serious cases, and starting points towards the top of the highest category range of three years custody are imposed, before adjustment for any aggravating features.
64. As the revised guideline model provides for nine starting points rather than three the Council decided that the category ranges in the existing guideline should be distributed across the revised guideline starting points, although the top of the highest category better reflects the statutory maximum sentence of 5 years custody. The Council intends that the structure of the revised guideline and factors included will provide for a proportionate seriousness assessment and for appropriate sentences to be imposed.

Comparison of existing and proposed Guideline for Assault ABH Sentences

Previous SGC Assault ABH Guidelines

Type/nature of activity	Starting point	Sentencing range
Premeditated assault  EITHER  resulting in injuries just falling short of GBH  OR  involving the use of a weapon	30 months' custody	2-4 years' custody
Pre-meditated assault resulting in relatively serious injury	12 months' custody	36 weeks' – 2 years' custody
Pre-meditated assault resulting in minor, non-permanent injury	24 weeks' custody	12 – 36 weeks' custody
Other assault resulting in minor, non-permanent injury	Community Order (HIGH)	Community Order (MEDIUM) – 26 weeks' custody

Existing ABH Guideline sentences

Offence Category	Starting point (applicable to all offenders)	Category range (applicable to all offenders)
Category 1	1 year 6 months' custody	1-3 years' custody
Category 2	26 weeks' custody	Low level Community Order – 51 weeks' custody
Category 3	Medium level Community Order	Band A Fine – High level Community Order

Proposed revised SGC Guideline

Culpability			
Harm	A	B	C
Category 1	Starting point	Starting point	Starting point
	2 years 6 months' custody	1 year 6 months' custody	36 weeks' custody
	Range	Range	Range

	1 year 6 months' – 4 years' custody	36 weeks' – 2 years 6 months' custody	High level Community order – 1 year 6 months' custody
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	1 year 6 months' custody	36 weeks' custody	High level Community Order
	<b>Range</b>	<b>Range</b>	<b>Range</b>
	9 months' – 2 years 6 months' custody	High level Community order – 1 year 6 months' custody	Low Level Community Order – 36 weeks' custody
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	36 weeks' custody	High level Community Order	Medium level Community Order
	<b>Range</b>	<b>Range</b>	<b>Range</b>
	High level Community Order – 1 year 6 months' custody	Low level Community Order – 36 weeks' custody	Band B Fine – 26 weeks' custody

*Question 16: Do you have any comments on the proposed sentence levels?*

65. The CBA is concerned that far from the anticipated reduction in sentences for ABH the SGC is revising the Guideline upwards to reflect increasing sentences which may have been affected by other factors including the under-charging of Section 20 or acceptance of a lesser plea to ABH. Because of the broad range of injuries that can be covered by both ABH and Section 20 there is considerable overlap and the CBA are aware of charging decisions and lesser pleas being accepted in circumstances where the harm/injury would justify a Section 20 disposal.

66. The CBA do not agree with the increased sentence starting points and ranges for ABH. Assault ABH offences cover a wide array of injuries in contrast to common assault, from a break in the skin to injuries that could be charged as GBH such as broken bones. The Guidelines should allow for this broad range to be appropriately sentenced including non-custodial sentences in many cases of limited injury. The revised guidelines' focus on increased custodial sentences do not provide sufficient capacity for sentencing those offences by first time

offenders who suffer a sudden loss of temper and cause injury just short of a common assault.

67. The proposed increase in sentences comes at a time when there have never been more prisoners in England & Wales and the prison system is under extreme pressure. It must be remembered that Assault ABH should reflect harm levels beneath those of serious harm and GBH and the CBA is extremely concerned as to the upward trajectory in prison sentences which the SGC are advocating.

68. The CBA note that for a Category 2 B offence, which may be described as a Medium level Assault ABH offence for a first time offender a non-custodial sentence is unlikely. The CBA would suggest that lower starting points are taken at every level in line with the existing Guideline and advocate recognition of the “short sharp shock” effect of custody rather than longer and longer prison sentences that have been shown not to reduce offending and recidivism. The CBA suggested levels of starting points and ranges are in red in the below table:

<b>Culpability</b>			
<b>Harm</b>	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	2 years 6 months' custody <b>2 years (mid-way according to the existing range)</b>	1 year 6 months' custody <b>1 year</b>	36 weeks' custody <b>26 weeks</b>
	<b>Range</b>	<b>Range</b>	<b>Range</b>
	1 year 6 months' – 4 years' custody <b>1 – 3 years (mirrors existing range)</b>	36 weeks' – 2 years 6 months' custody <b>26 weeks to 2 years</b>	High level Community order – 1 year 6 months' custody <b>High level Community Order to 1 year's custody</b>
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	1 year 6 months' custody <b>1 year's custody</b>	36 weeks' custody <b>26 weeks custody</b>	High level Community Order <b>Medium level Community Order</b>
	<b>Range</b>	<b>Range</b>	<b>Range</b>
	9 months' – 2 years 6 months' custody <b>26</b>	High level Community order – 1 year 6	Low Level Community Order – 36 weeks'

	weeks – 2 years’ custody	months’ custody Medium level Community Order – 1 year’s custody	custody Low level Community Order to 26 weeks’ custody
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	36 weeks’ custody High level Community Order (one level up from existing guideline)	High level Community Order Medium Level Community Order (existing Category 3 starting point)	Medium level Community Order Low Level Community Order
	<b>Range</b>	<b>Range</b>	<b>Range</b>
	High level Community Order – 1 year 6 months’ custody Medium level Community Order to 26 weeks’ custody	Low level Community Order – 36 weeks’ custody Band B Fine – High level Community Order	Band B Fine – 26 weeks’ custody Band A Fine – Medium Level Community Order

**Aggravating and mitigating factors**

69. As well as statutory aggravating factors already in existence, the revised ABH guideline includes the new statutory aggravating factor ‘**Offence was committed against an emergency worker acting in the exercise of functions as such a worker**’. As discussed earlier, the Assaults on Emergency Workers (Offences) Act 2018 makes an assault on an emergency worker a statutory aggravating factor for an ABH offence, but as with other statutory aggravating factors the level of uplift which should be applied to the sentence is discretionary.
70. Other aggravating factors are as for common assault offences, although some additional factors are included which transcript analysis highlighted are particularly relevant to this offence. An additional aggravating factor ‘**history of violence or abuse towards victim by offender**’ is included. An additional mitigating factor ‘**history of significant violence or abuse towards the offender by the victim**’, provides for cases where offenders are themselves victims of long term or severe abuse and the offence arises in relevant circumstances.

## Factors increasing seriousness

### Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: disability, sexual orientation or transgender identity.
- Offence was committed against an emergency worker acting in the exercise of functions as such a worker.

### Other aggravating factors:

- Spitting or coughing
- Offence committed against those working in the public sector or providing a service to the public or against a person coming to the assistance of an emergency worker
- Offence committed in prison (where not taken into account as a statutory aggravating factor)
- Offence committed in domestic context
- History of violence or abuse towards victim by offender
- Presence of children
- Gratuitous degradation of victim
- Abuse of power and/or position of trust
- Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from supporting the prosecution
- Commission of offence whilst under the influence of alcohol/drugs
- Offences taken into consideration (TICs)
- Offence committed on licence or post sentence supervision
- Failure to comply with current court orders

## Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Significant degree of provocation
- History of significant violence or abuse towards the offender by the victim
- Age and/or lack of maturity
- Mental disorder or learning disability where not linked to the commission of the offence
- Sole or primary carer for dependent relatives

- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment

*Question 17: Do you agree with the proposed aggravating and mitigating factors?*

71. The CBA repeat its agreement to “spitting or coughing” being added as an aggravated feature in the current circumstances and ask that greater guidance be given to sentencers regarding spitting/coughing to ensure offences are not elevated to those involving intention and in order to promote consistency in cases involving spitting and coughing.

*Question 18: Do you have any other comments on the ABH guideline?*

72. The CBA have nothing further to add.

**Grievous Bodily Harm offences**

73. Section 18 of the OAPA, 1861 provides for a maximum sentence of life imprisonment for offenders convicted of causing grievous bodily harm with intent to do grievous bodily harm or wounding with intent to do grievous bodily harm. In 2018, around 1,100 adult offenders were sentenced for this offence. Section 20 of the OAPA provides for a maximum sentence of five years’ imprisonment for anyone convicted of inflicting grievous bodily harm/unlawful wounding. Around 2,700 adult offenders were sentenced for this offence in 2018. Section 29 of the Crime and Disorder Act 1998 provides for a racially/religiously aggravated version of the Section 20 offence which has a seven year maximum sentence of imprisonment. This offence is very low volume, with around 10 adult offenders sentenced in 2018.

## The existing GBH guidelines

74. For GBH (s20) offences it was noted that there were minor increases in sentencing severity, but these had been anticipated by the SGC who considered that they were within the bounds of historic fluctuations in sentencing levels. As a result there was no strong statistical evidence that the guideline caused a change in sentencing practice for these offences.
75. However, evaluation of the guideline found for GBH with intent (s18) that the guideline resulted in sentences increasing in excess of that estimated in the resource assessment which was published alongside the guideline. Evaluation of CCSS data indicated that the factor in the new guideline which had the greatest effect was the step 1 factor **“injury which is serious in the context of the offence”**. This factor added around 29 per cent (1.7 years) to the average custodial sentence. In addition, an increase in the use of the most serious offence category in the new guideline was seen (from 17 per cent before the guideline to 33 per cent after), when compared to the old guideline. Also amongst the category 1 cases under the new guideline, the most frequent step 1 factor was **“injury which is serious in the context of the offence”**, which was present in 76 per cent of cases. Some participants in the data felt that for higher end cases the factor relating to greater harm may lead to double counting and an inflation in sentences (because, for GBH with intent (s18), a high level of harm is required in all instances for the defendant to have been charged with this offence in the first place). For others, it may be that the factor relating to lesser injury (within lesser harm) is not applied when it should be for the same reason. Transcript and statistical analysis identified additional implementation issues. This found that the factor **‘Threatened or actual use of weapon or weapon equivalent’** was cited in a 78 per cent of Section 18 cases and as use of a weapon or weapon equivalent is a higher culpability factor in the existing guideline this would explain why an increase occurred in the proportion of offenders placed in category 1 seriousness, which has a starting point of 12 years’ custody. As for ABH and GBH (s20)

offences, analysis of cases illustrated that a range of weapons were treated as equivalent for the purposes of assessing offence seriousness.

76. The existing guideline includes the same culpability and harm factors for both GBH offences and the same approach to assessing seriousness as in other Assault guidelines. Due to the evaluation findings and issues identified with application of factors, the SGC has revised factors in the guideline and its structure. The approach taken to revising the guidelines is discussed separately, as there are differences between the two in the revised guideline.

### The revised guidelines - Section 20 offence - Culpability

77. The SGC has removed or rephrased factors which the evaluation identified had the potential for inconsistent interpretation. Revisions agreed to culpability factors for GBH (s20) offences are as for ABH offences.

### High Culpability

78. The SGC has decided that to achieve proportionate sentences the guideline should distinguish between different weapons.
79. The factor 'targeting of vulnerable victim' has been substituted for '**victim obviously vulnerable due to age, personal characteristics or circumstances**', this would include 'baby shaking' cases where a victim could not necessarily be targeted but is particularly vulnerable, highly relevant to the seriousness assessment.
80. '**Prolonged assault**' replaces the factor 'sustained and repeated assault' in the existing guideline given issues with interpretation and application which were noted in the evaluation.

## Medium and lesser culpability

81. The medium and lesser culpability factors are as for the ABH guideline:

### Culpability demonstrated by one or more of the following

#### A - High culpability

- Significant degree of planning or premeditation
- Victim obviously vulnerable due to age, personal characteristics or circumstances
- Use of a highly dangerous weapon or weapon equivalent\*
- Strangulation
- Leading role in group activity
- Prolonged assault

#### B - Medium culpability

- Use of a weapon or weapon equivalent which does not fall within category A
- Lesser role in group activity
- Cases falling between category A or C because:
  - - Factors in both high and lesser categories are present which balance each other out; and/or
  - - The offender's culpability falls between the factors as described in high and lesser culpability

#### C - Lesser culpability

- No weapon used
- Excessive self defence
- Mental disorder or learning disability, where linked to the commission of the offence

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

***Question 19: Do you agree with the approach to assessing culpability for s20 offences and with the factors included?***

82. The CBA agree with the proposed revisions to the assessment of culpability in Section 20 GBH offences.

### Culpability – Section 18 offence

83. All factors relevant to section 20 offences are relevant to s18 offences, and are included in the guideline. However, some additional factors relevant to culpability in a s18 offence differ from a s20 offence. Analysis of cases identified that where there are multiple high culpability factors or there are extreme examples of a factor, the sentence should be higher than the existing category range may provide for, and that very serious cases could merit exceptional sentences. The SGC considered adding an additional category of culpability but decided to leave this to judicial discretion in determining the appropriate sentence, including life sentences. Additional wording is included to reflect this. This wording reads *'For category A1 offences the extreme nature of one or more high culpability factors or the extreme impact caused by a combination of high culpability factors may attract a sentence higher than the offence category range'*.

### Additional culpability factors – Section 18 offence

84. An additional culpability factor of '**Revenge**' is included at high culpability, as this was a feature of a number of offences analysed. The SGC considers that this increases the culpability of the offender.

85. At lesser culpability, the SGC considered cases where had the victim died and the offence resulted in a conviction for murder a partial defence to murder may apply. Legislation provides for partial defences only in cases of murder, where the intention required is to cause death or serious injury. In cases where a partial defence to murder applies an offender may instead be convicted of the relevant form of manslaughter. In particular, the SGC considered cases of **loss of control manslaughter**, and offences where had a death occurred an offender could avail themselves of the partial defence, but where GBH was caused they could not. The SGC considered its Manslaughter guideline and noted that an offender could potentially receive a high culpability assessment and higher sentence for GBH

with intent (s18) than they would had they caused death. The SGC considered that recent cases have recognised the responsibility of an offender may be affected where they have been a victim of sustained or extreme abuse but did not wish to reference loss of control given it is a very specific partial defence with qualifying features set out in legislation and applicable only to murder. The factor has been worded as '**offender acted in response to prolonged or extreme violence or abuse by the victim**', and is intended to ensure all relevant factors can be balanced to produce a proportionate sentence.

86. The proposed step one culpability assessment for GBH with intent (s18) offences is as follows:

#### **A - High culpability**

- Significant degree of planning or premeditation
- Victim obviously vulnerable due to age, personal characteristics or circumstances
- Use of a highly dangerous weapon or weapon equivalent\*
- Strangulation
- Leading role in group activity
- Prolonged assault
- Revenge

#### **B - Medium culpability**

- Use of a weapon or weapon equivalent which does not fall within category A
- Lesser role in group activity
- Cases falling between category A or C because:
  - - Factors in both high and lesser categories are present which balance each other out; and/or
  - - The offender's culpability falls between the factors as described in high and lesser culpability
- No weapon used
- Excessive self defence
- Offender acted in response to prolonged or extreme violence or abuse by the victim
- Mental disorder or learning disability, where linked to the commission of the offence

#### **C - Lesser culpability**

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

***Question 20: Do you agree with the approach to assessing culpability for s18 offences and with the factors included?***

87. The CBA agree with the proposed revision to culpability factors for Section 18 offences.

**The revised guideline – GBH offences - Harm**

88. The SGC have decided to include descriptive features of harm for GBH offences and considered other guidelines including its Health and Safety guideline which requires consideration of the impact of any injuries on a victim. While some GBH injuries have lasting impacts (disease transmission and injuries causing permanent disability), others are very serious but have no lasting impact. Crown Court Judges preferred the more descriptive harm factors to the 'in the context' approach to assessing harm in the existing guideline.

89. Three harm categories are included:

<b>Harm</b>	
<b>All cases of GBH will involve 'really serious harm', which can be physical or psychological or wounding. The court should assess the level of harm caused with reference to the impact on the victim.</b>	
<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Particularly grave and/or life-threatening injury caused</li> <li>• Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment</li> <li>• Offence results in a permanent, irreversible injury or condition which has a substantial and long term</li> </ul>

	effect on the victim's ability to carry out normal day to day activities or on their ability to work
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Grave injury</li> <li>• Offence results in a permanent, irreversible injury or condition not falling within category 1</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• All other cases of really serious harm</li> <li>• All other cases of wounding</li> </ul>

***Question 21: Do you agree with the approach to assessing harm for GBH offences and with the factors included?***

90. The CBA agree with the approach taken by the SGC to assessing harm for GBH offences and with the factors included however are of the view that guidance needs to be given as to what "permanent, irreversible injury or condition not falling within category 1" would include by way of example. This would assist sentencers in avoiding the problems that arose from consideration of "injury in the context of the offence" for Assault ABH offences.

**Sentences – S20 offences**

91. The SGC undertook analysis of current sentencing practice and whilst they did not find unintended impacts, a high proportion of sentences using the existing guideline were in excess of the highest starting point. The SGC found that the existing guideline model is designed and applied more flexibly than more recent guidelines. In more serious cases or those involving multiple culpability factors starting points towards the top of the highest category range of three years custody are imposed, before adjustment for any aggravating features.

92. The revised guideline model provides for nine starting points rather than three distributed across the revised guideline starting points. The SGC considers that the range maximum for the most serious offence better reflects the statutory maximum sentence. No category includes a non-custodial starting point as the

SGC considered statistics illustrated the majority of sentences are custodial (immediate and suspended). Three category ranges provide for a non-custodial sentence.

**Previous SGC Guidelines – Section 20 offences**

<b>Offence Category</b>	<b>Starting point (applicable to all offending)</b>	<b>Category Range (Applicable to all offenders)</b>
<b>Category 1</b>	3 years' custody	2 year 6 months – 4 years' custody
<b>Category 2</b>	1 year 6 months' custody	1 – 3 years' custody
<b>Category 3</b>	High level Community Order	Low level Community Order – 51 weeks' custody

**Proposed SGC Guidelines – Section 20 offences**

<b>Culpability</b>			
<b>Harm</b>	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b> 4 years' custody	<b>Starting point</b> 3 years' custody	<b>Starting point</b> 2 years' custody
	<b>Category range</b> 3 years' – 4 years 6 months' custody	<b>Category range</b> 2-4 years custody	<b>Category range</b> 1-3 years' custody
<b>Category 2</b>	<b>Starting point</b> 3 years' custody	<b>Starting point</b> 2 years' custody	<b>Starting point</b> 1 years' custody
	<b>Category range</b> 9 months' – 2 years 6 months' custody	<b>Category range</b> 1 – 3 years' custody	<b>Category range</b> High level Community Order – 2 years' custody
<b>Category 3</b>	<b>Starting point</b> 2 years' custody	<b>Starting point</b> 1 year's custody	<b>Starting point</b> 26 weeks' custody
	<b>Category range</b> 1 – 3 years' custody	<b>Category range</b> High level Community order – 2 years' custody	<b>Category range</b> Medium level Community order – 1 years' custody

**Question 22: Do you have any comments on the proposed sentence levels for GBH s20?**

93. The CBA are concerned that the proposed starting points represent increased sentences for Section 20 offences which were not anticipated or intended under the previous Guideline. The CBA considers that sentences for Section 20 should not be substantially increased across the board by the Guidelines. Whilst the CBA appreciates the need to bring more cases within the Guidelines this should not be to the detriment of all Section 20 cases. Where currently one third of starting points (the lowest Category) are all non-custodial the proposal is to remove all of them. This does not allow for those cases at the very bottom end where there is significant mitigation and injury is just beyond that of ABH.

94. The CBA also consider that the new proposed increased sentences are too far from the proposed increased sentences for ABH (including those proposed by the CBA). The maximum sentences for ABH and Section 20 are both 5 years' imprisonment. This reflects the wide range of both types of offence where the only difference as to which offence is charged is the level of harm. In some cases the difference between the offences of ABH and Section 20 is marginal. Currently the most serious ABH starting point is 2 years 6 months' imprisonment which places it between categories B and C in the Section 20 guideline. The CBA consider that this should be much more in the middle of the range of the Section 20 Guideline. The CBA consider that the starting points and sentencing ranges proposed for Section 20 offences should be reduced as indicated in red below:

<b>Culpability</b>			
<b>Harm</b>	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<b>Starting point</b> 4 years' custody <b>3 years 6 months'</b>	<b>Starting point</b> 3 years' custody <b>2 years 6 months'</b>	<b>Starting point</b> 2 years' custody <b>1 year 6 months'</b>

	<b>custody</b>	<b>custody</b>	<b>custody</b>
	<b>Category range</b> 3 years' – 4 years 6 months' custody <b>2 years 6 months – 4 years</b>	<b>Category range</b> 2-4 years custody <b>1 year 6 months' – 3 years 6 months' custody</b>	<b>Category range</b> 1-3 years' custody <b>36 weeks' to 2 years' 6 months' custody</b>
<b>Category 2</b>	<b>Starting point</b> 3 years' custody <b>2 years' 6 months' custody</b>	<b>Starting point</b> 2 years' custody <b>1 year 6 months' custody</b>	<b>Starting point</b> 1 years' custody <b>36 weeks' custody</b>
	<b>Category range</b> 9 months' – 2 years 6 months' custody <b>26 weeks' – 3 years' custody</b>	<b>Category range</b> 1 – 3 years' custody <b>High level Community order – 2 years' custody</b>	<b>Category range</b> High level Community Order – 2 years' custody <b>Medium level Community order – 1 year's custody</b>
<b>Category 3</b>	<b>Starting point</b> 2 years' custody <b>1 year's custody</b>	<b>Starting point</b> 1 year's custody <b>6 months' custody</b>	<b>Starting point</b> 26 weeks' custody <b>High level Community Order</b>
	<b>Category range</b> 1 – 3 years' custody <b>High level Community Order to 1 year 6 months' custody</b>	<b>Category range</b> High level Community order – 2 years' custody <b>Medium level Community order – 9 months' custody</b>	<b>Category range</b> Medium level Community order – 1 years' custody <b>Low level Community Order to 26 weeks' custody</b>

### Sentences – s18 offences

95. The existing guideline includes the following sentences:

<b>Offence Category</b>	<b>Starting point (applicable to all offenders)</b>	<b>Category range (applicable to all offenders)</b>
<b>Category 1</b>	12 years' custody	9-16 years' custody
<b>Category 2</b>	6 years' custody	5-9 years' custody
<b>Category 3</b>	4 years' custody	3-5 years' custody

96. The sentences in the preceding SGC guideline were as follows:

<b>Type/nature of activity</b>	<b>Starting point</b>	<b>Sentencing range</b>
Victim suffered life-threatening injury or particularly grave injury	<b>13 years' custody</b>	<b>10 – 16 years' custody</b>

from a 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		
Victim suffered life-threatening injury or particularly grave injury (where the offence was no pre-meditated)  <b>OR</b>  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 life-threatening injury or particularly grave injury)	<b>8 years' custody</b>	<b>7-10 years' custody</b>
Victim suffered a very serious injury or permanent disfigurement  <b>OR</b>  Pre-meditated wounding or GBH  <b>OR</b>  Other wounding or GBH involving the use of a weapon that came to hand at the scene.	<b>5 years' custody</b>	<b>4 - 6 years' custody</b>
Other wounding or GBH	<b>4 years' custody</b>	<b>3 – 5 years' custody</b>

97. The SGC considered that as sentences were not markedly different from the SGC guideline, with starting points actually lower, it is highly likely that the impact of factors on seriousness categorisations in the existing guideline were the cause of sentence increases. The SGC have decided not to revise sentences up or down but propose 9 starting points instead of 4. They consider that revision of culpability and harm factors, and particularly the distinction between weapons in the revised guideline and descriptive harm factors should ensure proportionate seriousness assessments and achieve greater balance in distribution of seriousness categorisation.

98. Whilst some sentences may appear particularly low this is to take into account consideration of the loss of control manslaughter guideline. The starting points for lesser culpability therefore are the same as or close to the loss of control manslaughter guideline starting points in relevant categories. There is re-distribution of sentences in the existing guideline across more categories.

99. The proposed sentencing structure is:

Harm	Culpability		
	A	B	C
Category 1	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	12 years' custody	7 years' custody	5 years' custody
	<b>Range</b>	<b>Range</b>	<b>Range</b>
	10 – 16 years' custody	6 – 10 years' custody	4 – 7 years' custody
Category 2	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	7 years' custody	5 years' custody	4 years' custody
	<b>Range</b>	<b>Range</b>	<b>Range</b>
	6 – 10 years' custody	4 – 7 years' custody	3 – 6 years' custody
Category 3	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	5 years' custody	4 years' custody	3 years' custody
	<b>Range</b>	<b>Range</b>	<b>Range</b>
	4 – 7 years' custody	3 – 6 years' custody	2 – 4 years' custody

*Question 23: Do you have any comments on the proposed sentence levels for GBH s18?*

100. The CBA recognizes the SGC's proposal to relate sentences of GBH Section 18 to Manslaughter cases and agrees with the proposals with respect to this Guideline.

## The revised guideline – Section 18 - aggravating and mitigating factors

101. The SGC propose the following Statutory aggravating and mitigating factors:

### Factors increasing seriousness

#### Statutory aggravating factors:

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: disability, sexual orientation or transgender identity. (*s20 offences only*)
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: disability, race, religion, sexual orientation or transgender identity. (*s18 offences only*)
- Offence was committed against an emergency worker acting in the exercise of functions as such a worker.

#### Other aggravating factors:

- Offence committed against those working in the public sector or providing a service to the public or against a person coming to the assistance of an emergency worker
- Offence committed in prison (where not taken into account as a statutory aggravating factor)
- Offence committed in domestic context
- History of violence or abuse towards victim by offender
- Presence of children
- Gratuitous degradation of victim
- Abuse of power and/or position of trust
- Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from supporting the prosecution
- Commission of offence whilst under the influence of alcohol/drugs
- Offences taken into consideration (TICs)
- Offence committed on licence or post sentence supervision
- Failure to comply with current court orders

### Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Significant degree of provocation

- History of violence or abuse towards the offender by the victim
- Age and/or lack of maturity
- Mental disorder or learning disability where not linked to the commission of the offence
- Sole or primary carer for dependent relatives
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment

*Question 24: Do you agree with the proposed aggravating and mitigating factors?*

102. The CBA agree with the SGC's proposed aggravating and mitigating factors.

*Question 25: Do you have any other comments on the s20 GBH guideline?*

*Question 26: Do you have any other comments on the s18 GBH guideline?*

103. The CBA have nothing further to add.

### **Attempted Murder**

104. The SGC Attempted Murder Guideline was not evaluated by the SGC as it is currently not part of the Assault Guideline. However the SGC decided it should be revised and updated at the same time to ensure relativity of sentences as the most serious non-fatal assault offence.

105. The offence of Attempted Murder is provided for by s1(1) Criminal Attempts Act 1981. The maximum sentence is life imprisonment. Schedule 15B Part 1 of the Criminal Justice Act 2003 provides that attempted murder is an offence for which an automatic life sentence must be passed where specified criteria are met, and in other cases a life sentence or an extended sentence may be passed. In 2018, around 80 adult offenders were sentenced for attempted murder.

106. For the offence of attempted murder it must be proved that the offender intended to kill the victim, it therefore involves the very highest level of culpability. As the statutory definition of harm provides for harm caused or intended, even attempted murder with little or no impact upon a victim will always be treated extremely seriously.

### **The existing guideline**

107. The existing guideline and sentences are heavily influenced by sentences for murder, which would be charged were the attempt successful. Murder carries a mandatory sentence of life imprisonment and guidance on the minimum term to be served before consideration for release by the Parole Board is provided in Schedule 21 of the Criminal Justice Act 2003. Starting points set out in Schedule 21 for Murder offences range from whole life orders, to minimum terms of 30 years, 25 years, 20 years and 15 years depending on the features of the case.

108. The existing attempted murder guideline provides for an offence which, had the charge been murder falling within paragraph 4 or 5 of Schedule 21 (the most serious categories), to be assessed as category 1 seriousness. Category 2 provides for other planned attempts to kill and category 3 other spontaneous attempts to kill. Starting points vary according to the level of harm. Since the existing guideline was developed Parliament introduced paragraph 5A of Schedule 21 for offences where a knife or other weapon is taken to a scene and used in an offence. For murder this offence carries a starting point of a 25 year minimum term. This has rendered the existing guideline outdated as such an offence would currently be assessed as either planned or spontaneous. The SGC also took into account view of Crown Court judges prior to being finalized.

## **The revised guideline - Culpability**

109. The SGC consider that the existing guideline is restrictive as categorisation reflects Schedule 21 criteria at the highest level of seriousness. The SGC decided that the revised guideline should take into account factors in Schedule 21, but not be as prescriptive. This is because an attempted murder will always involve the highest level of intent, higher than that required for murder. However, the SGC noted a distinction may still be present in attempted murder offences, for example where carried out for financial gain or where it involves sexual or sadistic conduct compared to an offence which is carried out to end the suffering of a victim, or where an abused individual attempts to kill their abuser. The SGC recognises that the distinction in motivation of offenders is an important aspect of culpability.

### **Culpability factors - Very high culpability**

110. Very high culpability factors include features of offences included in paragraphs 4 and 5 of Schedule 21, and which attract the highest sentences for Murder. Such offences may involve firearms or explosives, attempted murder of police or prison officers. However, the factors in this category are not identical to those in the Schedule, and includes factors the SGC considers would demonstrate the highest level of culpability, such as use of fire in attempting to murder.

### **High culpability**

111. The high culpability category includes a factor which reflects the minimum term that would apply for knives and other weapons taken to a scene in a murder offence, and for offences involving planning.

### **Medium culpability**

112. Medium culpability includes offences involving weapons not included in the very high and high culpability categories and offences with a lack of premeditation. In revising the other assault guidelines lack of premeditation was

not included as a lesser culpability factor, as a spontaneous offence could be as serious as a planned assault. However, in attempted murder the SGC thought planning, or a lack of, is highly relevant to the culpability of the offender given the intention to kill.

### Lesser culpability

113. As the guideline reflects Schedule 21 factors, the SGC considered whether the guideline should reflect the partial defences applicable to murder. This was also considered in developing the s18 GBH guideline, and the SGC decided the lesser culpability category should allow culpability to be balanced against other factors in appropriate cases. Lesser culpability therefore includes the same factors proposed for the s18 GBH guideline, with the exception of 'no weapon used'. This has not been included to avoid offences involving strangulation or suffocation being captured when this may not be appropriate. In the other assault guidelines, strangulation is specifically provided for in the high culpability factors because it gives rise to an inference that the offender intended to cause a high level of harm.

114. A further slight change the SGC have made is to the wording of the mental disability factor, which is taken from the manslaughter guideline. However, this does not include maturity as a factor reducing responsibility at step one, rather this is at step two; the factor is intended to capture cases analogous to diminished responsibility in murder.

115. An additional factor included is a mitigating factor from the diminished responsibility manslaughter guideline; '**genuine belief by the offender that the offence was an act of mercy**'. The motivation in these offences are very different, but these cases are likely to involve planning which would be assessed as high culpability. The existing attempted murder guideline states that it 'is not

intended to provide for an offence found to be based on a genuine belief that the murder would have been an act of mercy.’ The SGC decided that rather than exclude these offences from the scope of the guideline, a lesser culpability factor should be included.

116. The proposed revised Guideline for Culpability for attempted murder is as follows:

### **Culpability demonstrated by one or more of the following**

The characteristics below are indications of the level of culpability that may attach to the offender’s conduct. Where there are characteristics present which fall into both higher and lower categories, the court must carefully weigh those characteristics to reach a fair assessment of the category which best reflects the offender’s overall culpability in all the circumstances of the case. The court may then adjust the starting point for that category to reflect the presence of characteristics from another category.

#### **A – Very High culpability**

- Abduction of the victim with intent to murder
- Attempted murder of a child
- Offence motivated by or involves sexual or sadistic conduct
- Offence involves the use of a firearm or explosive or fire
- Offence committed for financial gain
- Attempted murder of a police officer or prison officer in the course of their duty
- Offence committed for the purpose of advancing a political, religious, racial or ideological cause
- Offence intended to obstruct or interfere with the course of justice
- Offence racially or religiously aggravated or aggravated by sexual orientation, disability or transgender identity

#### **B - High culpability**

- Offender took a knife or other weapon to the scene intending to commit any offence or have it available to use as a weapon, and used that knife or other weapon in committing the offence.
- Planning or premeditation of murder

#### **C – Medium Culpability**

- Use of weapon not in category A or B
- Lack of premeditation/spontaneous attempt to kill

## **D - Lesser culpability**

- Excessive self defence
- Offender acted in response to prolonged or extreme violence or abuse by victim
- Offender's responsibility substantially reduced by mental disorder or learning disability
- Genuine belief by the offender that the offence was an act of mercy

### *Question 27: Do you agree with the approach to assessing culpability for Attempted murder and with the factors included?*

117. The CBA agree with the proposed revised Guideline for assessment of culpability in attempted murder and with the factors included.

### **Attempted Murder - Harm**

118. Harm in attempted murder offences is broad, may result in life changing and devastating injuries or little or no physical injury. The existing guideline includes three categories of harm; serious and long term physical or psychological harm, some physical or psychological harm and little or no physical or psychological harm.

119. Analysis of transcripts identified that level 3 harm in the existing guideline for cases involving little or no physical or psychological harm were rarely applicable, as even where no physical injury results a victim would be highly likely to suffer psychological harm. The SGC also identified that there was potential for inconsistent application of serious harm in the existing guideline, with some cases involving serious injuries being assessed as category 1 harm if there were no long term effects, indicating that harm does not necessarily have to have a long term impact to be assessed as the most serious level.

120. The SGC considered the appropriate harm categorisation where an injury would have resulted in death but for timely and skilled medical intervention. In such cases had the victim died an offender would be likely be sentenced to a life

sentence with a minimum term of 25 years. The SGC considered whether almost fatal injuries should result in the highest harm categorization but decided that the very highest category of harm should be reserved for cases where life changing injuries such as permanent disability are caused. To assess injuries which are serious but a full recovery is made in the same category would be to conflate culpability and harm.

Harm	
Category 1	Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out normal day to day activities or on their ability to work
Category 2	Serious physical or psychological harm not in category 1
Category 3	All other cases

*Question 28: Do you agree with the approach to assessing harm for attempted murder offences and with the factors included?*

121. The CBA agree with the SGC's approach to assessment of harm for attempted murder and with the factors included. Perhaps the word "OR" could be put between the two factors in Category 1.

**Sentences**

122. The existing sentence guidelines are as follows:

Nature of offence	Starting point	Sentencing range
<p><b>Level 1</b></p> <p><i>The most serious offences including those which (if the charge had been murder) would come within para. 4 or para. 5 of Schedule 21 to the Criminal Justice Act, 2003</i></p> <ul style="list-style-type: none"> <li>Serious and long term physical or psychological harm</li> </ul>	<p><b>30 years' custody</b></p>	<p><b>27- 35 years' custody</b></p>

<ul style="list-style-type: none"> <li>• Some physical or psychological harm</li> <li>• Little or no physical or psychological harm</li> </ul>	<p><b>20 years' custody</b></p> <p><b>15 years' custody</b></p>	<p><b>17 – 25 years' custody</b></p> <p><b>12 – 20 years' custody</b></p>
<p><b>Level 2</b></p> <p><i>Other planned attempt to kill</i></p> <ul style="list-style-type: none"> <li>• Serious and long term physical or psychological harm</li> <li>• Some physical or psychological harm</li> <li>• Little or no physical or psychological harm</li> </ul>	<p><b>20 years' custody</b></p> <p><b>15 years' custody</b></p> <p><b>10 years' custody</b></p>	<p><b>17 – 25 years' custody</b></p> <p><b>12 – 20 years' custody</b></p> <p><b>7 – 15 years' custody</b></p>
<p><b>Level 3</b></p> <p><i>Other spontaneous attempt to kill</i></p> <ul style="list-style-type: none"> <li>• Serious and long term physical or psychological harm</li> <li>• Some physical or psychological harm</li> <li>• Little or no physical or psychological harm</li> </ul>	<p><b>15 years' custody</b></p> <p><b>12 years' custody</b></p> <p><b>9 years' custody</b></p>	<p><b>12 – 20 years' custody</b></p> <p><b>9 – 17 years' custody</b></p> <p><b>6 – 14 years' custody</b></p>

123. For some time, and since the inclusion of paragraph 5A into Schedule 21, the SGC believes that there concerns that some sentences in the existing guideline for attempted murder are too low and are in some cases very much lower than a same facts murder offence would have been even though the intention was to cause death. The SGC decided that sentences should be revised to ensure the gravity of the offence is properly reflected. Sentences do not directly read across between categories in the existing guideline, due to the differing harm model in the revised guideline. This means a proportion of cases which would fall within level 1 harm of the existing guideline will fall within category 2 of the revised,

and some cases currently falling within category 2 (some harm) of the existing guideline will now fall within the revised category 3. This impacts upon the sentence starting point. The SGC considered the types of offences which should attract the highest sentences and extensive testing of sentences against cases has been undertaken.

124. Life and extended sentences are available for this offence and a number of legislative provisions require a judge to consider such a sentence. The SGC decided that life sentences should not be included in the sentencing table, as these require careful consideration of particular circumstances. The guideline includes guidance for when a life or extended sentence may be appropriate, and highlights that these are considered at a later step of the guideline. Where a life sentence is imposed, the notional determinate sentence arrived at by application of the guideline will be used as the basis for setting the minimum term.

**For offences involving an extreme nature of one or more very high or high culpability factors a sentence higher than the offence category range or an extended or life sentence may be appropriate. Extended and life sentences are dealt with at Step 5 of the guideline.**

125. The SGC highlights the steep drop in sentence starting points between offences in category C and category D, which is unusual. This is because category D provides for very particular categories of cases involving lesser culpability, and in order for sentences not to exceed sentences imposed for a similar facts manslaughter offence.

<b>Culpability</b>				
<b>Harm</b>	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	35 years' custody	30 years' custody	25 years' custody	14 years' custody
	<b>Range</b>	<b>Range</b>	<b>Range</b>	<b>Range</b>
	30 – 40 years'	25 – 35 years'	20 – 30 years'	10 – 20 years'

	custody	custody	custody	custody
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	30 years' custody	25 years' custody	20 years' custody	8 years' custody
	<b>Range</b>	<b>Range</b>	<b>Range</b>	<b>Range</b>
	25 – 35 years' custody	20 – 30 years' custody	15 – 25 years' custody	5 – 12 years' custody
<b>Category 3</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	25 years' custody	20 years' custody	10 years' custody	5 years' custody
	<b>Range</b>	<b>Range</b>	<b>Range</b>	<b>Range</b>
	20 – 30 years' custody	15 – 25 years' custody	7 – 15 years' custody	3 – 6 years' custody

***Question 29: Do you have any comments on the proposed sentence levels?***

126. The CBA agree that life or extended sentences should fall outside the revised guidelines, however do not agree with increasing sentences for attempted murder to match those relative to murder offences. Firstly this has not been evaluated properly or at all as it falls outside the Assault Guideline and has not been considered alongside a review or revision of the Guidelines for Murder.
127. The CBA consider that it is vital to remember that despite the intent to kill in attempted murder which increases culpability, assessment of actual harm, rather than that which might have been the case in Murder, must mean that harm is significantly less, irrespective of whether this is due to medical intervention alone.
128. The starting point of 35 years for Murder in appropriate cases reflects both the culpability of going to a scene armed with the knife as well as the most serious harm of killing. The significant impact on victims' families when a loved

one is killed must be reflected in sentencing for Murder and the CBA consider that raising the sentences for Attempted murder to the same level will undermine Murder sentences. Death is the most significant harm that a deceased, their loved ones and family can suffer and therefore demands a distinction is made with Attempted murder.

129. Without further analysis of the interplay between Murder and Attempted Murder and in the absence of evaluation the CBA would suggest the following in red text in order to reflect the current Guideline:

<b>Culpability</b>				
<b>Harm</b>	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>Category 1</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	35 years' custody	30 years' custody	25 years' custody	14 years' custody
	30 years' custody	25 years' custody	20 years' custody	
	<b>Range</b>	<b>Range</b>	<b>Range</b>	<b>Range</b>
	30 – 40 years' custody	25 – 35 years' custody	20 – 30 years' custody	10 – 20 years' custody
	25 – 35 years' custody	20 - 30 years' custody	15 – 25 years' custody	
<b>Category 2</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>	<b>Starting point</b>
	30 years' custody	25 years' custody	20 years' custody	8 years' custody
	25 years' custody	20 years' custody	15 years' custody	
	<b>Range</b>	<b>Range</b>	<b>Range</b>	<b>Range</b>
	25 – 35 years'	20 – 30 years'	15 – 25 years'	5 – 12 years' custody

	custody  20 – 30 years' custody	custody  15 – 25 years' custody	custody  10 – 20 years' custody	
<b>Category 3</b>	<b>Starting point</b>  25 years' custody  20 years' custody  <b>Range</b>  20 – 30 years' custody  15 – 25 years' custody	<b>Starting point</b>  20 years' custody  15 years' custody  <b>Range</b>  15 – 25 years' custody  10 – 20 years' custody	<b>Starting point</b>  10 years' custody  8 years' custody  <b>Range</b>  7 – 15 years' custody  6 – 12 years' custody	<b>Starting point</b>  5 years' custody  4 years' custody  <b>Range</b>  3 – 6 years' custody

### Aggravating and mitigating factors

130. The SGC propose that aggravating and mitigating factors reflect factors included in other assault guidelines, as well as including factors in the Manslaughter guideline provided for by Schedule 21 in offences of murder.

#### **Statutory aggravating factors:**

- Previous convictions, having regard to a) nature of the offence to which condition **conviction** relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.

#### **Other aggravating factors:**

- Offence committed against those working in the public sector or providing a service to the public

- Offence committed in prison
- Offence committed in domestic context
- History of violence or abuse towards victim by offender (where not taken into account at step one)
- Abuse of position of trust
- Gratuitous degradation of victim
- Others put at risk of harm by the offence
- Use of duress or threats against another person to facilitate the commission of the offence
- Actions after the event (including but not limited to attempts to cover up/conceal evidence)
- Steps taken to prevent the victim from seeking or receiving medical assistance
- Commission of offence whilst under the influence of alcohol/drugs
- Offence committed on licence or post sentence supervision
- Failure to comply with

### **Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions **or** no relevant or recent convictions
- Significant degree of provocation (including due to prolonged and/or excessive stress linked to circumstances of offence)
- History of violence or abuse towards the offender by the victim (where not taken into account at step one)
- Attempt by offender to give assistance/summon help when the attempted murder failed
- Remorse
- Good character and/or exemplary conduct
- Age and/or lack of maturity
- Mental disorder or learning disability where not linked to the commission of the offence
- Sole or primary carer for dependent relatives
- Serious medical conditions requiring urgent, intensive or long-term treatment

*Question 30: Do you agree with the proposed aggravating and mitigating factors?*

131. The CBA agree with the proposed aggravating and mitigating factors.

*Question 31: Do you have any other comments on the Attempted murder guideline?*

132. The CBA have nothing further to add.

## Equality and diversity

*Question 32: Do you consider that any of the factors in the draft guidelines, or the ways in which they are expressed could risk being interpreted in ways which could lead to discrimination against particular groups?*

*Question 33: Are there any other equality and diversity issues the guidelines should consider?*

133. The CBA requests sight of the modelling that has been done to show the impact of these proposed increased sentences on the prison population, BAME and young defendants in particular and the wider population.

134. The CBA would also like to know whether in the data for Assault ABH, Section 20 and Attempted Murder offences, cases where sentencers sentenced “outside the Guidelines” were included and if so whether and how this affected the data showing increased sentences.

135. The CBA would raise with the SGC the likelihood in the current circumstances of increased sentences impacting more adversely on the BAME population which data suggests are treated more harshly by the courts than their white counterparts. Data suggests that black males in particular are more likely to be sentenced to imprisonment for a first offence. Increasing sentences for assault cases does nothing to address this imbalance.

136. Assaults, from common assault to attempted murder are significant offences that affect communities and families and occur in a variety of circumstances. Increasing sentences so widely as these proposed revisions do is likely to have a significant impact on society, including BAME citizens, emergency workers and those dealing with offenders including prison officers. We consider that the SGC should take a more measured approach at this point. Consolidating guideline formats, reflecting the current circumstances of Co-

Vid19 risk of transmission and amending wording is welcome and necessary. However, increasing sentences at this time is unnecessary and not appropriate without full analysis on the effects across an underfunded and crumbling criminal justice system.

**Prepared on behalf of the Criminal Bar Association**

**Tana Adkin QC & Libby Anderson**

**4<sup>th</sup> September 2020**