

Sentencing assault offences

Literature review

Submitted to the Scottish Sentencing Council in March 2022

Published October 2022

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This literature review was prepared for the consideration of the Scottish Sentencing Council. The views expressed are those of the authors and do not necessarily represent those of the Council.

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1 Executive summary

The offence of assault encompasses a wide range of actions and behaviours provided for in common law and statute in Scotland. For example, common assault may be perpetrated directly or indirectly and can range from threatening behaviour through to wounding. Whilst the common law conceptualises assault as a single crime, it allows for gradations in severity. This also permits a significant degree of discretion in sentencing, with disposals ranging from admonition through to life imprisonment.

At present there are no offence specific guidelines in Scotland concerning the sentencing of assault offences. Rather sentencing is informed by considerations as set out in the general Sentencing Process Guideline (which details several features in assessing offence seriousness and aggravating/mitigating factors that are likely to be of relevance in considering assault offences) and guided by case law and appeal judgements.

A review of case law highlighted considerable variation in judgments on sentencing outcomes for cases of assault mirroring the considerable range of behaviours (from verbal threat of harm to severe assault with permanent disfigurement and threat to life).

While formally published criminal proceeding statistics make it difficult to tease out trends in the sentencing of assault offences as they are defined in this review, in general, assaults comprise a large volume of the proceedings brought before court and although the *number* of convictions has reduced in the last decade, conviction *rates* remain high. Mirroring offence severity, custodial sentences were more common for attempted murder and serious assault offences (compared to less serious assaults). And attempted murder and serious assault offences have also seen the largest increase in average custodial sentence length over the last ten years (when compared to less serious assaults).

Across anglophone guideline-based jurisdictions, approaches to sentencing and punishment severity varies for assault offences. And, whilst punishment severity also ranged across the jurisdictions, most allow the severity of sentences to be distinguished based the severity of harm inflicted or intended through assault, the status of the victim and weapon use as well as provisions for considering aggravation on the basis of protected characteristics, amongst others.

Consideration of (violent) offending history was also a key feature considered in sentencing assault offences in some jurisdictions. And, whilst a defendant's voluntary intoxication is assumed to aggravate offending according to sentencing guidelines for assault offences in England and Wales as well as in the general Scottish Sentencing Process Guideline, this approach has received opposition in Australia.

Consideration of mitigating factors for assault offences were fewer in number across all anglophone guideline-based jurisdictions and comprised mostly mitigation associated with provocation and evidence of self-defence. Although also variously allowed for consideration of age, addiction, mental illness and a defendant's health and good character/exemplary conduct as well as where the assault was deemed to be an isolated incident.

Public perception of the sentencing of offences (including assaults) highlights how knowledge of crime rates and sentencing is generally poor. Still, public opinion appears for assault offences to favour retributive or denunciative reasons/purposes for sentencing, even though studies show that there is a willingness to consider multiple sentencing philosophies

simultaneously. Assault offences are generally perceived to be serious, although the public envisions gradations of severity and culpability. Previous relevant convictions influenced public perceptions on appropriate sentences and aggravating factors were given a stronger influence on the length of sentence than personal mitigating factors.

2 Assault offences in Scotland

In Scotland, assault offences are based on the common law and statute-based crimes. The common law of assault is generally defined to include an attack on another person with evil intent.¹ The *mens rea* of assault requires intent to do bodily harm or an intent to place someone in a state of fear of bodily harm.² Common law assault may be perpetrated directly or indirectly (such as by ordering a dog to attack a human).³ The offence encompasses a wide range of actions, but does not require that touching of the body of another or that bodily injury actually occur.^{4,5} And there has been “no precedent in Scotland for an assault to injury recognising any mental harm or distress.”⁶

While the common law of assault conceptualises it as a single crime, gradations of severity are recognised and may be so formally charged. The most common forms of aggravations are as follows:

- The mode of attack may be of greater severity (e.g., knife, firearm, explosive device).
- The result of the attack may be specified as an aggravation, including (among hundreds of variations recorded by the Crown Office & Procurator Fiscal Service)⁷ “assault to injury,” “assault to severe injury,” “assault to severe injury, permanent disability and permanent disfigurement,” or “assault to the danger of life.”
- The offender’s ultimate intention may be distinguishable (e.g., assault with intent to kill, intent to rob, or intent to ravish).
- The place of the attack is relevant (e.g., in one’s own home⁸ or the supreme courts of justice).
- The special character of the victim can be used as an aggravator (e.g., an infirm person, one’s parents, a child).

Three statutory assault-based offences are also covered herein:

- The Police and Fire Reform (Scotland) Act 2012 criminalises the assault of certain members of police forces.
- The crime of assaulting emergency workers is provided for in the Emergency Workers (Scotland) Act 2005.

¹ Macdonald, J., 1867. *A Practical Treatise on the Criminal Law of Scotland*. Edinburgh: W. Paterson.

² *Atkinson v. HM Advocate* [1987] SCCR 534. *The common law offence of assault cannot be committed recklessly, negligently, or accidentally*. Lord Advocate’s Reference (No. 2 of 1992) [1993] JC 43.

³ *Kay v. Allan* (1978) SCCR Supp 188.

⁴ Scottish law does not differentiate assault from battery, as is recognised in some other common law countries.

⁵ Indeed, around half of common assaults involve little or no physical injury whilst the other half incurred some degree of physical injury (or multiple injuries). Scottish Government, 2016. *Recorded Crime in Scotland, 2015-16*. [online] Available at: <https://www.gov.scot/publications/recorded-crime-scotland-2015-16/pages/10/> [Accessed 1 March 2022]

⁶ Forbes, E., 2018. The Domestic Abuse (Scotland) Act 2018: the whole story? *Edinburgh Law Review*, 22(3), pp.406-411.

⁷ Crown Office & Procurator Fiscal Service, 2018. Letter from Crown Office & Procurator Fiscal Service. [pdf] Available at:

https://www.whatdotheyknow.com/request/476668/response/1143126/attach/2/FOI%20request%20John%20Maguire%20R018273.pdf?cookie_passthrough=1 [Accessed 20 January 2022].

⁸ The traditional name for assaulting a person in their own home is hamesucken.

- The third statutory offence concerns the crime of threatening or abusive behaviour under the Criminal Justice and Licensing (Scotland) Act 2010 s.38, in force since 6 October 2010. The elements of this crime (in which the offender is referred to as 'A') are that "(a) A behaves in a threatening or abusive manner, (b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and (c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm."⁹

Police Scotland for recording purposes now distinguishes between what it calls *common assault* from *severe assault*. While such a distinction does not alter the common crime of assault, a serious assault is thereby defined in its reports as:

"An assault or attack in which the victim sustains injury resulting in detention in hospital as an inpatient, for the treatment of that injury, or any of the following injuries whether or not detained in hospital:

- Fractures (the breaking or cracking of a bone. Note – nose is cartilage not bone, so a 'broken nose' should not be classified unless it meets one of the other criteria)
- Internal injuries
- Severe concussion
- Lacerations requiring sutures which may lead to impairment or disfigurement
- Any other injury which may lead to impairment or disfigurement."¹⁰

The common law of assault allows significant discretion in sentencing, ranging from an admonishment¹¹ to life imprisonment, depending on whether the proceedings are summary or solemn, and the level of the type of court in which they occur (justice of the peace courts, sheriff courts, or High Court).¹² The Council's table in this respect is copied here for context (Figure 1).

⁹ This offence "effectively deals with any lacunae created by the recent common law development of the crime of breach of the peace. The statutory offence need only be directed at the victim and includes no threat of serious disturbance to the community element in its definition, which is essential to constitute breach of the peace, *Smith v Donnelly* [2002] JC 65. Nor need the conduct be repeated to constitute the offence." Justiciary: crime - breach of the peace Case Comment SCL [2011] 54. The offence of threatening or abusive behaviour has overlap with those suffering domestic violence. See Case Comment *Hatcher v Harrower* SCL [2011] 114

⁹ See Case Comment *Hatcher v Harrower* SCL [2011] 114.

¹⁰ Scottish Government, 2021. *Recorded Crime in Scotland, 2020-2021*. Annex 1, note 7.17. [online] Available at: <<https://www.gov.scot/publications/recorded-crime-scotland-2020-2021/pages/35/>> [Accessed 7 January 2022].

¹¹ An admonition is where a person is warned not to offend again, and the crime is recorded on their criminal record.

¹² The selection of the forum at which a case is heard is entirely at the Crown's discretion asides a selection of serious offences deemed only suitable to be heard at High Court.

Figure 1: The Scottish Courts¹³

	Justice of the Peace Court	Sheriff Court (summary)	Sheriff Court (solemn)	High Court
Who decides the verdict?	Justice of the Peace	Sheriff	Jury	Jury
Who sets the sentence?	Justice of the Peace	Sheriff	Sheriff	Judge
What is the maximum fine?	Up to £2,500	Up to £10,000	Unlimited	Unlimited
What is the maximum length of imprisonment?	Up to 60 days	Up to 1 year	Up to 5 years	Up to life

The assault of a police officer under Section 90 of the Police and Fire Reform (Scotland) Act 2012 or of an emergency worker under the Emergency Workers (Scotland) Act 2005 carries a maximum penalty on summary conviction not to exceed 12 months' in prison. The offence of threatening and abusive behaviour under the Criminal Justice and Licensing (Scotland) Act 2012 carries a maximum penalty under summary conviction of 12 months imprisonment, or with a conviction upon indictment a maximum five years in prison.

This review focuses on literature relating to the aforementioned assault offences in Scotland as well as comparable offences in England and Wales where these are perpetrated by adults (as opposed to juveniles). Other relevant jurisdictions with policies and guidelines in sentencing assault that may be of interest are discussed herein, including England and Wales the USA (federal and states), Australia (federal and states), Northern Ireland, and the Republic of Ireland. This review specifically excludes domestic assaults, sexual assaults, acts that otherwise constitute child abuse, assaults resulting in death (or attempts thereof¹⁴), or offences with a *mens rea* not requiring intention. The review provides an overview of the evidence on the principles and purposes of sentencing as applied to assault offences as well as how this is borne out in practice. It also reviews statistics on sentencing in Scotland and case law establishing common thinking in sentencing assault.

¹³ Scottish Sentencing Council. *What the Law Says*. [online] Available at: <<https://www.scottishsentencingcouncil.org.uk/about-sentencing/what-the-law-says/>> [Accessed 7 January 2022].

¹⁴ Whilst there is some overlap between assaults and attempted crimes such as attempted murder and assaults with the intent to rape, rob, extort, abduct etc, these are not the focus here.

3 Case law in Scotland

3.1 Threatening and Abusive Behaviour

Examples of sentences from case law for the crime of threatening or abusive behaviour under Section 38(1) under the Criminal Justice and Licensing (Scotland) Act 2010 include the following examples. A term of two years' imprisonment was given a defendant sentenced on five counts of this crime for approaching different young women in public places to try to establish (unwelcome) liaisons with them.¹⁵ An 18 year old was given a six month sentence in which the indictment alleged in that the accused:

“did, while acting along with others, behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did shout, swear, utter threats of violence, act in an aggressive manner, brandish pieces of wood or similar implements, repeatedly strike windows with pieces of wood or similar implements causing damage to same and place the lieges in a state of fear or alarm.”¹⁶

A sentence of six months' imprisonment was given to an individual (with a criminal history and charged with an additional offense) who acted in a threatening and abusive manner by shouting derogatory and racially offensive names at police officers.¹⁷ An accused was given 12 months' imprisonment for threatening or abusive behaviour (three months of which due to the aggravating factor of being on bail at the time) for brandishing a broken bottle in an aggressive manner and thus frightening an elderly woman.¹⁸ A three year sentence of imprisonment was given for threatening or abusive behaviour involving following the victims in a vehicle, wearing a mask (the events occurred prior to the Covid pandemic), and brandishing what appeared to be a firearm.¹⁹

Examples exist of non-prison sentences for the statutory offence of threatening or abusive behaviour. For instance, a sentence was deferred for good behaviour when the threatening or abusive behaviour involved aggressively and verbally harassing parking attendants who had ticketed the defendant's car.²⁰ In another case, the defendant (along with his mother) for a prolonged period pressed the buzzer to the victim's residence and talked at her through the intercom even after being denied entry, with the initial sentence of a community payback order with supervision and a 250 hour unpaid work requirement; on appeal this was substituted with a level 1 community payback order of three months and 100 hours of unpaid work, with the reason given for the revised penalty vaguely referring to the “nature of the index offence.”²¹

¹⁵ *Ahmed v HM Advocate*, [2020] HCJAC 37, 2020 Scot (D) 14/9.

¹⁶ *Cadle v HM Advocate* [2013] HCJAC 74, [2013] SCL 776.

¹⁷ *Dewar and McLean v HM Advocate* [2021] HCJAC 28, 2021 Scot (D) 3/5.

¹⁸ *Thomson v HM Advocate* [2020] HCJAC 49. The conviction was quashed for reasons other than the penalty in that the jury should have been able to consider self-defence.

¹⁹ *Rodger v HM Advocate* [2017] HCJAC 65.

²⁰ *Baig v Procurator Fiscal, Glasgow* [2015] HCJAC 109.

²¹ *Hussain (Muzzafar) v Procurator Fiscal, Glasgow* [2017] SAC 1; [2017] SCL 421.

3.2 Assault of Police and Emergency Workers

Few published case opinions are available regarding sentencing for assaulting police or emergency workers under the statutory offences of Police and Fire Reform (Scotland) Act 2012 the Emergency Workers (Scotland) Act 2005, likely because of the lower likelihood of appeal with the maximum penalty for each of 12 months. In a notable case, though, of an individual who has repeatedly been convicted of such offences, a recent appeal notes prior penalties between two and eight months' in prison.²² Other available opinions mention previous sentencings, namely a prior three month sentence for assaulting a police officer²³ and a deferred sentence for assaulting emergency workers.²⁴

3.3 Common Law Offences

Case law contains examples of some sentences with, more or less, contextual facts where the penalty was not the particular issue being litigated. Yet these provide more examples of individual penalties that judicial officials have given. For example, the crime of assault to severe injury, permanent disfigurement and danger to the life of a fellow inmate committed while the appellant was incarcerated following domestic violence convictions received four years further imprisonment.²⁵ Causing "seven significant stab wounds" after trespassing into the victim's home attracted a penalty of six and a half years' imprisonment.²⁶ Attacking a stranger with a hatchet to the chest and arm of the victim received an extended sentence of six years (four years' custodial) for an accused with a prior criminal history.²⁷ In another repeated knifing case, the defendant received 30 months' imprisonment for assault to severe injury and to the danger of life and for a weapons offence.²⁸ As another illustration, a defendant was sentenced to nine years and six months on a charge of assault with a knife on one person and assault of another with these additional facts: events began inside the first victim's home when such victim discovered the defendant stabbing a wall with a large kitchen knife, the victim reacting by punching the defendant in the face, who then retaliated to an unreasonable degree by stabbing the victim eight times in various parts of the body, whereas the second victim, a neighbour who heard the commotion, intervened and was physically assaulted by the defendant.²⁹

A sentence of 30 months' imprisonment was upheld for assault to severe injury involving repeated punches and kicks to the victim's head and body.³⁰ The High Court of Justiciary upheld rather similar prison sentences for three defendants of 45 months (for one defendant) and 60 months (for two defendants) for assault to severe injury, permanent impairment and danger to life where they repeatedly punched and kicked the victim's head and body, causing brain injury.³¹ A much longer sentence of 5 years and 4 months was issued in a

²² *HM Advocate v Lindsay* [2020] HCJAC 26.

²³ *Green v HM Advocate* [2019] HCJAC 76.

²⁴ *Barrett v HM Advocate* [2012] HCJAC 78.

²⁵ *McKinlay v HM Advocate* [2019] HCJAC 15.

²⁶ *Kindness v HM Advocate* [2014] HCJAC 5, [2014] SCCR 205.

²⁷ *McNeely v HM Advocate* [2015] HCJAC 45.

²⁸ *Orr v HM Advocate* [2021] HCJAC 42, [2021] Scot (D) 10/9.

²⁹ *Telford v HM Advocate* [2018] HCJAC 73, [2018] GWD 39.

³⁰ *Findlay v HM Advocate* [2016] HCJAC 59, [2016] SC 731.

³¹ *HM Advocate v McManus* [2010] HCJAC 3, [2010] SCL 619.

case also involving punching and stamping on the victim's head that caused an intracranial bleed.³²

Still, aggravated forms of assault do not always attract a sentence of incarceration. In one case, the defendant was sentenced to a Restriction of Liberty Order, Community Payback Order, and unpaid work of 150 hours for assault to severe injury and permanent impairment for punching and kicking the victim in the head and torso after falling to the ground and then throwing a bottle at him.³³

In select cases, the appellate court discusses potentially mitigating factors. A sentence of 54 months' imprisonment for assault to severe injury, permanent disfigurement and permanent impairment was upheld on appeal despite the appellant's claim about suffering from a heart condition, in part because of his having a previous criminal history.³⁴ A sentence of two years' imprisonment for assault to severe injury by punching the victim who later died (defendant being acquitted of culpable homicide) was upheld despite arguments about depression, a good work history, and an ill wife, because the defendant had retaliated against the victim out of anger, failed to render assistance to the injured victim and due to the existence of multiple prior violent crime convictions.³⁵

In comparison to the cases upholding prison sentences for punching and kicking victims on the ground, in another case with a conviction for assault to severe injury and permanent disfigurement for repeatedly kicking the complaining on the head and body, a custodial sentence (of unspecified amount) was overturned and replaced with a community payback order because, even though the panel assumed the offence was serious, the appellant was of young age (19 years), had a previous good character, was a first offender with a good work record, and on the day of the event had drunk too much alcohol after attending the funeral of a friend who had committed suicide.³⁶

At other times, as well, original penalties were substituted on appeal. In the case of *Cadle v HM Advocate*, the 18 year old male was convicted of assaulting an elderly man to his severe injury and permanent disfigurement and originally sentenced to a custodial term of four years and six months with an extension of three years.³⁷ On appeal, the High Court of Justiciary acknowledged that a substantial custodial sentence was proper given the severity of the injuries and the defendant's violent history, but more weight should have been given to *Cadle's* young age, relatively short record, the fact he had not previously incurred a custodial sentence, evidence of rehabilitative progress in prison, and that the sentence given was originally imposed to be consecutive to a prison term for a previous conviction. The *Cadle* court thereby substituted a custodial sentence of three years and six months and a supervised release order of 12 months.

In several cases, the high court has reduced a sentence rather than quashed the conviction where there appeared to be some evidence of provocation that the jury was not fully informed about. As an illustration, a combined sentence on two charges (threatening or

³² *HM Advocate v Gilmour* [2019] HCJAC 74, [2019] Scot (D) 12/11.

³³ *McCarroll v HM Advocate* [2019] HCJAC 83, [2019] Scot (D) 28/11.

³⁴ *Fairley v HM Advocate* [2011] HCJAC 64.

³⁵ *Gay v HM Advocate* [2017] HCJAC 62, [2017] SCL 913.

³⁶ *Finnegan v HM Advocate* [2016] HCJA 88, [2016] SCL 1003.

³⁷ [2013] HCJAC 74, [2013] SCL 776.

abusive behaviour and assault to severe injury and permanent disfigurement) of five years' imprisonment was substituted for four years and six months because the jury should have been better instructed on the elements of provocation.³⁸ In the case of *Dempsey v HM Advocate*, the sentence of seven years' imprisonment was substituted with 4 years for assault to severe injury and permanent disfigurement, permanent impairment and the danger to life by stabbing because the appellant had been provoked in his own home by the victim.³⁹ In a similar vein, an extended sentence of eight years (five years' custodial) was substituted for a custodial sentence of three years with a year of supervised release for assault with a sharp object to the head and body to severe injury, permanent disfigurement and to the danger of life because the appellate court acknowledged some evidence of provocation.⁴⁰

In the consolidated case of *Dewar and McLean v HM Advocate*, the appellants won new sentences for crimes involving assaults on police.⁴¹ For *Dewar*, a sentence of 22 months imprisonment was substituted for 12 months for assaulting a police officer by spitting on her face where, even though the crime was more heinous in the context of the Covid pandemic, the appellate court felt that the initial sentence was too high considering prior case precedents. For *McLean*, an initial sentence of three years' imprisonment was substituted for 18 months for multiple charges involving threatening, assaulting by spitting, and struggling with police because the higher court thought it unreasonable that the original sentence was the sum of consecutive penalties imposed on multiple charges; as the acts were part of the same course of conduct, the court ruled that concurrent penalties were more reasonable.

In contrast, the appeal may be based on a governmental argument of undue leniency when the original penalty is replaced with a more severe punishment. Similar to some of the other cases reviewed above, a common mode of attack involves punching and kicking the victim in the head and torso during a drunken altercation. With such a fact pattern, the offender in *HM Advocate v Booth* pled guilty to assault to severe injury and danger of life and another assault to injury and was sentenced to 300 hours community service, which was replaced with a sentence of three and a half years imprisonment.⁴² *Booth* argued he was a serving soldier of good character, yet the appellate decision justified the prison term because of the severity of the attack and the injuries as reflected in the CCTV footage of the events, plus the lack of mitigating circumstances. Similarly, the court in *HM Advocate v Trainer* quashed a disposal order in favour of a custodial sentence of four years and three months where the perpetrator had severely hit and kicked the helpless victim, thrown his unconscious body over a wall in freezing conditions in an area he was unlikely to be easily discovered, had a long history of violence, and was judged as high risk.⁴³

In another case, the defendant's sentence of four and a half years was replaced with an extended sentence of eight years and nine months (six years and nine months' custodial) for multiple charges of assault by stabbing with severe injury and permanent disfigurement, with one charge also danger to life.⁴⁴ The higher tribunal justified the higher sentence because a

³⁸ *Ferguson v HM Advocate* [2015] HCJAC 89, [2015] SCL 972.

³⁹ [2012] HCJAC 77.

⁴⁰ *Duffy v HM Advocate* [2015] HCJAC 29, [2015] SCCR 205.

⁴¹ [2021] HCJAC 28, [2021] Scot (D) 3/5.

⁴² [2005] HCJAC 8, [2005] SCCR 6.

⁴³ *HM Advocate v Trainer* [2010] 10 WLUK 66.

⁴⁴ *HM Advocate v Cossar* [2010] HCJAC 83, [2010] SCCR 818.

knife was used, these were separate incidents (rather than a course of conduct), severe injuries were caused, no provocation was evident, and the violence was committed while the defendant was under a supervised release order for a prior crime.

Then, the Crown appealed a case of assault to severe injury, permanent impairment, permanent disfigurement and to the danger of life for repeatedly striking the victim in the neck with a glass tumbler where an initial penalty was three years' imprisonment, which was substituted for six years where, despite all agreeing the assailant was remorseful, the attack was vicious and unprovoked, and he continued to strike even when the glass broke.⁴⁵

The term "custodial threshold" has a longstanding acceptance in English law, but has been questioned as to its appropriateness in Scottish law.⁴⁶ Nonetheless, this term has on occasion been used in Scottish sentencing opinions, even as recently as 2021.⁴⁷ In any event, its application here is that several cases have agreed with the maxim that assault with a weapon, such as a knife, causing serious injury is sufficient to breach the custody threshold.⁴⁸

At the same time, while the use of a weapon in assault to severe injury may justify a custodial sentence, there are exceptional circumstances for which a noncustodial sentence may be justified. In *Gilmour*, the High Court of Justiciary, with a dissenting opinion, found a probation sentence, which it agreed was highly unusual, was nonetheless justified as the individual was highly respected, had been under great stress with family illnesses, was a faithful employee, and the victim himself was high provocative, all of which led to the defendant snapping under the pressures.⁴⁹ Further, the use of a knife as the stabbing weapon was explained as not premeditated but a tool that the defendant commonly carried for use in the normal course of his job duties to open boxes.

⁴⁵ *HM Advocate v Hegarty* [2002] SCCR 1022.

⁴⁶ Brown, B., 2021. The Concept of the "Custody Threshold" in Scottish Sentencing Practice. *Criminal Law Bulletin*, 173, pp.2-7.

⁴⁷ *HM Advocate v JB* [2021] HCJAC 16, [2021] SLT 753.

⁴⁸ *HM Advocate v Jamieson* [1997] SLT 955; *HM Advocate v Mullen* [2007] HCJ 6.

⁴⁹ *HM Advocate v Gilmour* [2004] SCCR 117.

4 Statistics on criminal offence proceedings for assault

In line with trends in other jurisdictions, such as England and Wales and other high-income countries, there has been a decrease in violent crime in Scotland over the last decade.⁵⁰ However, some populations experience a disproportionate amount of violence, for example those of lower socio-economic status and living in deprived areas. Violence is also clustered in repeat perpetrators as well as repeat victims.⁵¹

The Scottish Government publishes the number of people proceeded against and convicted of crimes in the *Criminal Proceedings in Scotland* statistical bulletin (which is derived from the central Criminal History System (CHS) database). In the most recent release, a total of 85,726 people were proceeded against in Scottish criminal courts in 2019-20 across all types of crime.⁵² The bulletin also presents information on the outcomes of court proceedings, including a breakdown of convictions by crime categories. However, the published data are limited in what statistics they provide on assault-based crimes because this data series parses categories in ways that do not permit us to discreetly identify assault in all cases (see limitations below for further detail).

The presentation of criminal proceedings statistics mirrors groupings of crime types as deployed in the publication of police recorded crime statistics to ensure continuity when referring to crime groups.⁵³ Therein crimes are broken down into seven groups. The offences of interest in this review do not neatly map onto these; rather assault offences are represented across a range of groups and subcategories therein. Within the statistical bulletin 'non-sexual crimes of violence'⁵⁴ is a term used to encompass a wide range of violent activity which includes homicide, attempted murder & serious assault, Domestic Abuse (Scotland) Act, robbery, and other violent crime.

A sub-category of 'attempted murder and serious assault' distinguishes 'serious' assaults⁵⁵ from 'common' assaults – which are captured elsewhere – and combines these with

⁵⁰ STV News, 2021. *Violent crime 'down by two fifths in just over a decade'*. [online] Available at: <<https://news.stv.tv/scotland/violent-crime-down-by-two-fifths-in-just-over-a-decade>> [Accessed 2 March 2022].

⁵¹ Bachelor, S.A., Armstrong, S. and MacLellan, D., 2019. *Taking Stock of Violence in Scotland* (Scottish Centre for Crime and Justice Research (SCCJR), August 2019). [pdf] Available at: <https://www.sccjr.ac.uk/wp-content/uploads/2019/09/Taking-Stock-of-Violence-in-Scotland_2019.pdf> [Accessed 20 January 2022].

⁵² "The figures given in this bulletin reflect the details of court proceedings as recorded on the CHS, that were concluded on or by 31st March 2020, and as provided to the Scottish Government up to the end of August 2020." Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/49/>> [Accessed 7 January 2022].

⁵³ Scottish Government, 2019. *Presenting official statistics on recorded crime and related topics: consultation*. [online] Available at: <<https://www.gov.scot/publications/consultation-official-statistics-present-information-recorded-crime-related-topics/>> [Accessed 7 January 2022].

⁵⁴ "The Scottish Government has implemented a crime code classification framework to ensure consistent and comparable reporting between criminal justice statistical outputs. Please see Annex B4 - B5 and Annex D for full details." Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/47/>> [Accessed 7 January 2022].

⁵⁵ "An assault is classified as serious if the victim sustained an injury resulting in detention in hospital as an in-patient or any of the following injuries whether or not he/she was detained in hospital: fractures, internal injuries, severe concussion, lacerations requiring sutures which may lead to

incidents of attempted murder. And, under the wider grouping of Miscellaneous Offences, the offence of ‘threatening or abusive behaviour’ is subsumed alongside several other offences in the aggregate category of ‘breach of the peace etc.’⁵⁶ Under the same grouping of Miscellaneous Offences⁵⁷ ‘common assaults’ are also represented in a distinct category alongside the aggravated offence of common assault on an emergency worker. Information on proceedings and convictions from the available offence groupings is summarised and discussed below to give a sense of their prevalence as are details of the penalties given.

4.1 Proceedings

Common assaults and breaches of the peace (which includes offences of threatening or abusive behaviour) represent volume offences with 10,531 and 12,999 people proceeded against for such offences, respectively, in 2019-20; the lowest number for both offences since 2010-11 (see Figure 2). Attempted murders and serious assaults are comparatively fewer with 1,954 such offences brought in 2019-20; yet this represents a 10% increase on the year before.⁵⁸ However, 2019-20 had already seen an increase of 11% in the number of people convicted for attempted murder and serious assault (rising from 1,166 in 2018-19 to 1,298 in 2019-20). This brings the numbers of convictions for attempted murder and serious assault offences in 2019/20 to the highest they have been since 2011-12.⁵⁹

impairment or disfigurement or any other injury which may lead to impairment or disfigurement.” Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/49/>> [Accessed 7 January 2022].

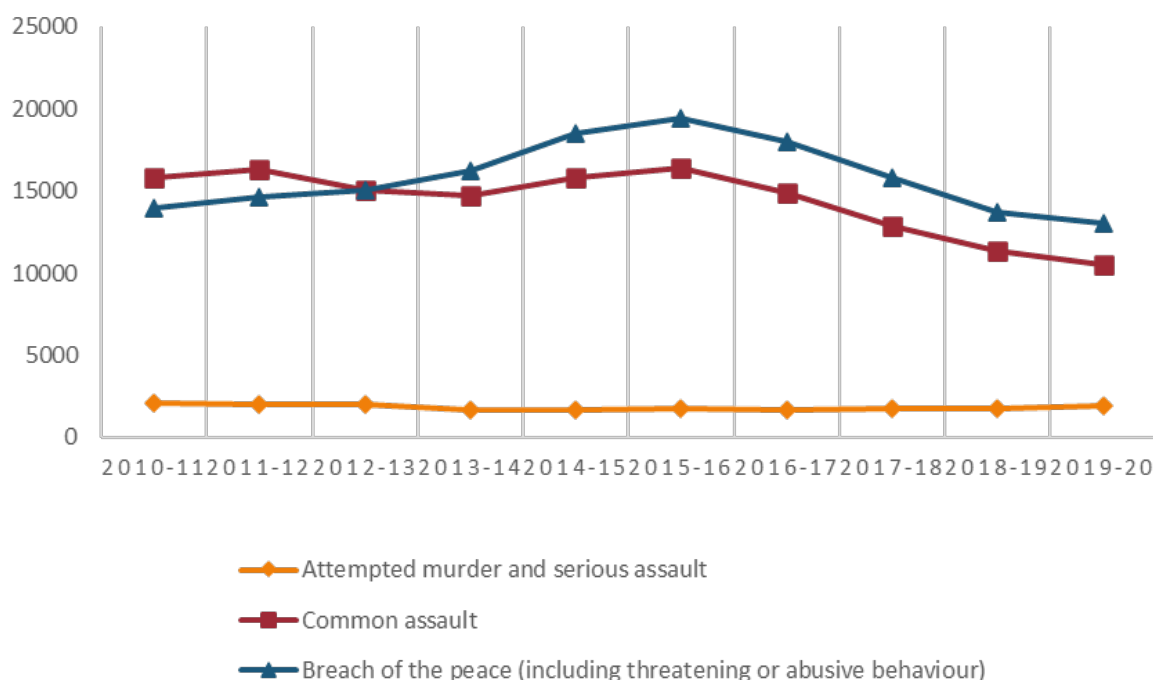
⁵⁶ This category includes the following offences: Breach of the peace, Threatening or abusive behaviour, Offence of stalking, Offensive behaviour at football and Threatening communications. See Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/49/>> [Accessed 7 January 2022].

⁵⁷ Offences that are more minor tend to be grouped together as miscellaneous where they are not serious enough to have been included in the main crime category and driving offences.

⁵⁸ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. Table 4a. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/10/>> [Accessed 7 January 2022].

⁵⁹ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/4/>> [Accessed 7 January 2022].

Figure 2: Criminal proceedings 2010-11 to 2019-20⁶⁰



4.2 Convictions

In 2019-20, both offences for common assaults and breaches saw decreases in convictions – 5% and 4% respectively - when compared to the previous year (2018-19; see Figure 3), bringing these to their lowest levels over the last ten years.⁶¹ However, conviction rates⁶² remain high for assault offences. They are highest for those offences in the breach of the peace etc. category (88%), followed by common assaults (79%) and attempted murders and serious assaults (66%).⁶³

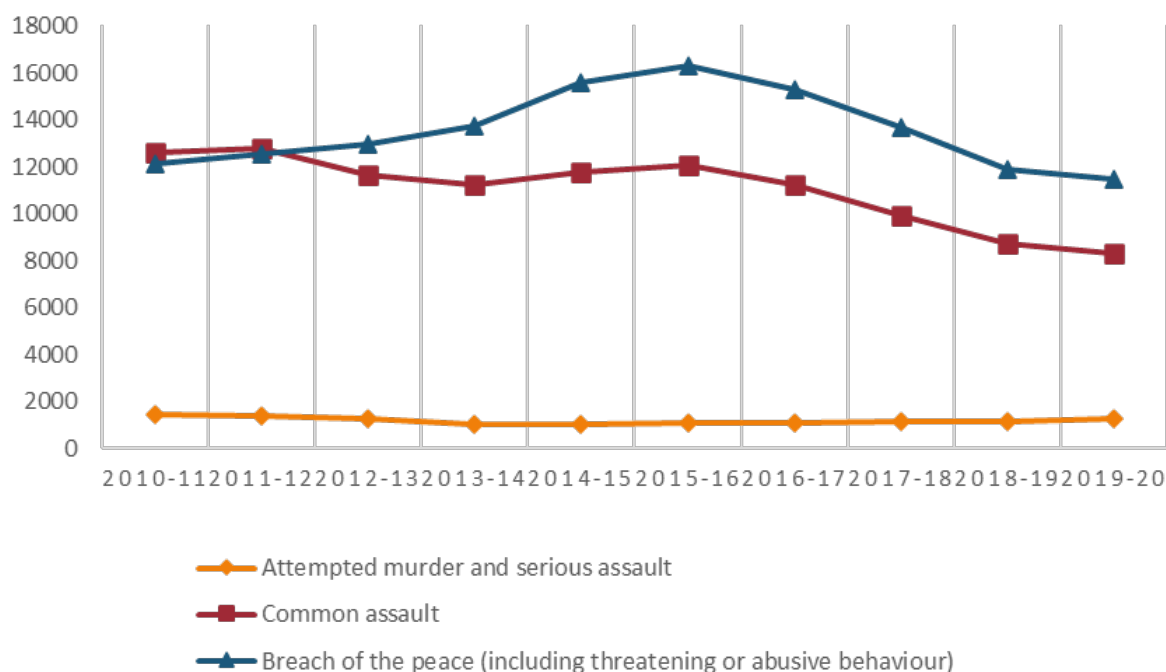
⁶⁰ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. Table 4a. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/10/>> [Accessed 7 January 2022].

⁶¹ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. Table 4a. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/10/>> [Accessed 7 January 2022].

⁶² Conviction rates are calculated as the proportion of people with charge proved as a proportion of people proceeded against for a specific crime type.

⁶³ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/12/>> [Accessed 7 January 2022].

Figure 3: Number of criminal convictions 2010-11 to 2019-20⁶⁴



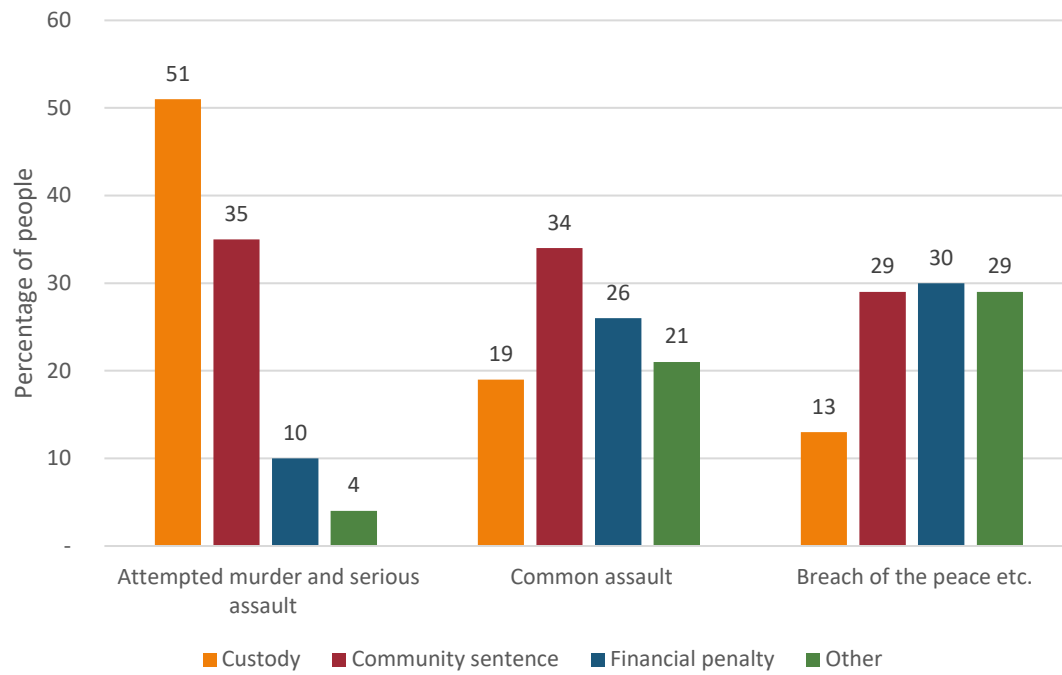
4.3 Penalties / sentencing outcomes

Mirroring offence severity, custodial sentences were most common for attempted murder and serious assault combined (52%) followed by common assault (19%) and breach of the peace etc. (13%) in 2019/20 (see Figure 4).⁶⁵ On the whole Figure 5 shows a decrease in the number of people who received a custodial sentence for common assault over the last ten years. The number of people who received a custodial sentence for breach of the peace offences has also fallen, since a high in 2015-16. And whilst the number of those receiving custodial sentences for attempted murder and serious assaults has, overall, declined over the past decade, there has been an increase since 2017-18 (see Figure 5). However, as Figure 6 illustrates, the percentage of people convicted who received a custodial sentence over the last ten years has remained relatively stable for both common assault and breach of the peace offences. Although the percentage of people convicted receiving a custodial sentence for common assault has been at its highest since 2018-19 (19%). Whilst there has been some fluctuation in the percentage of people convicted receiving a custodial sentence for attempted murder and serious assault over the past ten years (with a high of 62% in 2011-12; see Figure 6), levels in 2019-20 are at 51% and so back down to just below average over the last decade.

⁶⁴ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. Table 4b. [online] Available at: < <https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/11/> > [Accessed 7 January 2022].

⁶⁵ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: < <https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/24/> > [Accessed 7 January 2022].

Figure 4: Percentage of people convicted by main crime/offence and main penalty, 2019-20⁶⁶



⁶⁶ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. Table 8b. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/22/>> [Accessed 7 January 2022].

Figure 5: Number of people convicted receiving custodial sentences by main crime/offence, 2010-11 to 2019-20⁶⁷

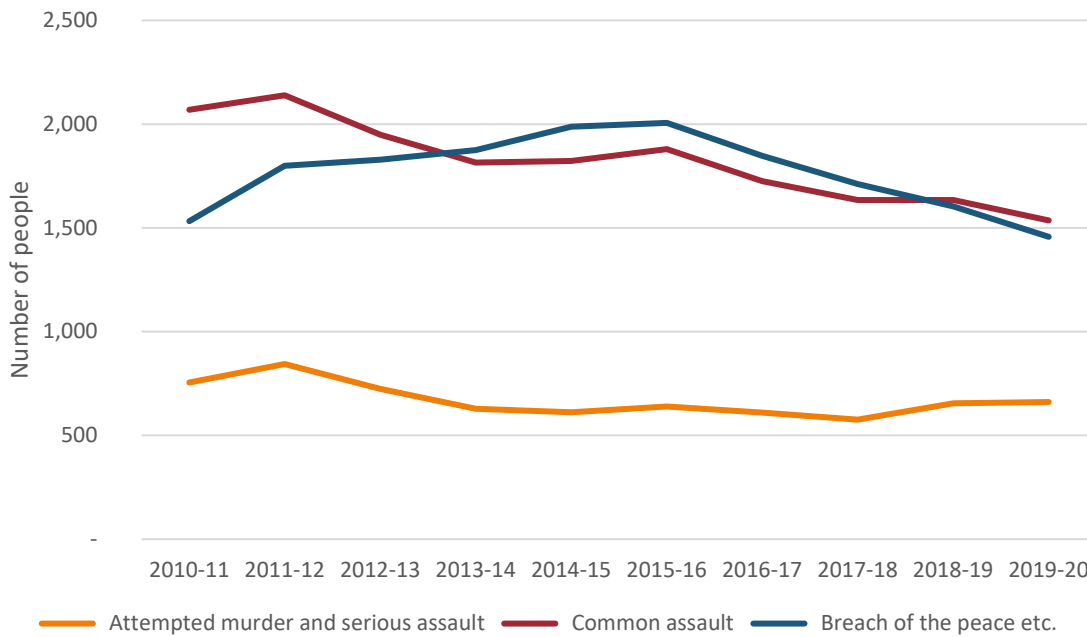
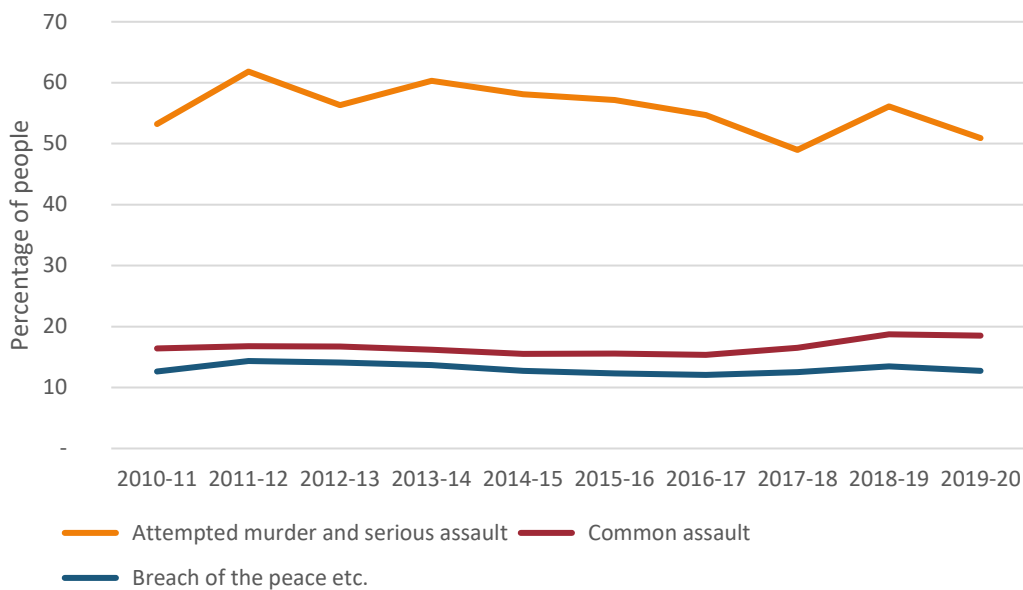


Figure 6: Percentage of people convicted receiving custodial sentences by main crime/offence, 2010-11 to 2019-20⁶⁸



⁶⁷ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. Table 9. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/24/>> [Accessed 7 January 2022].

⁶⁸ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. Table 9 [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/24/>> [Accessed 7 January 2022].

An average custodial sentence length of 1,074 days (or approx. three years) was given in 2019-20 for attempted murder and serious assault combined. This represents a 16% increase on the previous year (2018/19, when the average length was 927 days – or two and a half years).⁶⁹ The average custodial sentence length in 2019-20 for common assault and breach of the peace etc. respectively was 249 (or approx. 8.3 months) and 165 (or approx. 5.5 months).⁷⁰ “Other sentences” – comprising mostly admonitions (95% in 2019-20), admonitions were commonly given for breach of the peace etc. (27% or 3,109 convictions) and common assault (19% or 1,586 convictions).⁷¹

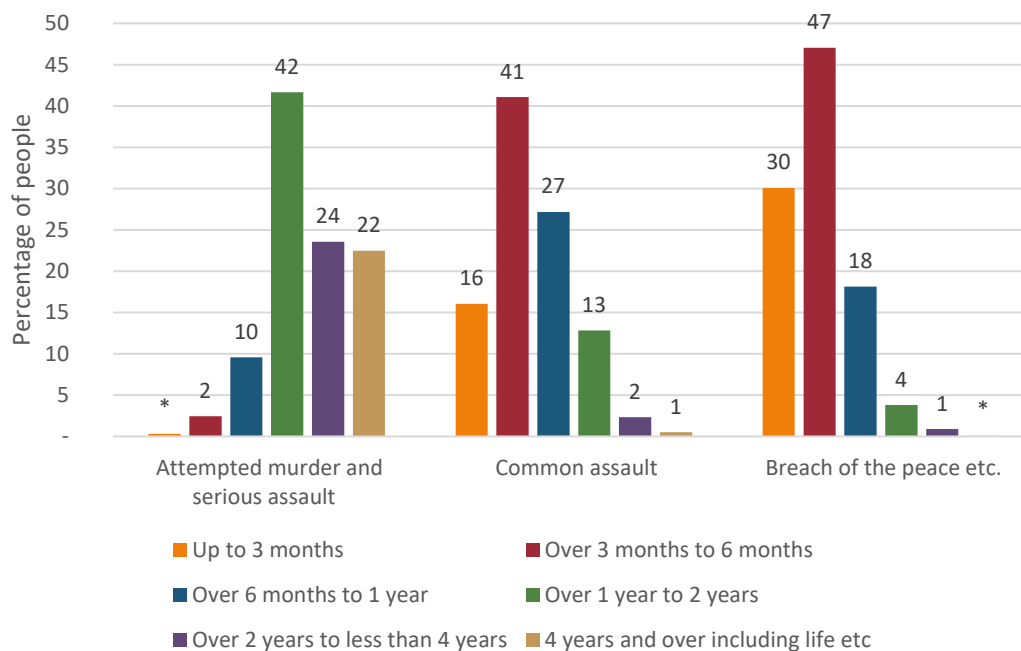
The percentage of people receiving a custodial sentence by offence type is broken down by length in Figure 7 below. This highlights that most people receiving a custodial sentence for attempted murders and serious assaults (88%) receive a custodial sentence length over one year. And around two in five (42%) receive a custodial sentence of between one and two years for such offences. The most common custodial sentence lengths for offences of common assault and breach of the peace were between three and six months (41% and 47% respectively).

⁶⁹ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/4/>> [Accessed 7 January 2022].

⁷⁰ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. Table 10a. online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/26/>> [Accessed 7 January 2022].

⁷¹ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/4/>> [Accessed 7 January 2022].

Figure 7 Percentage of people receiving a custodial sentence by main crime/offence and length of sentence, 2019-20⁷²

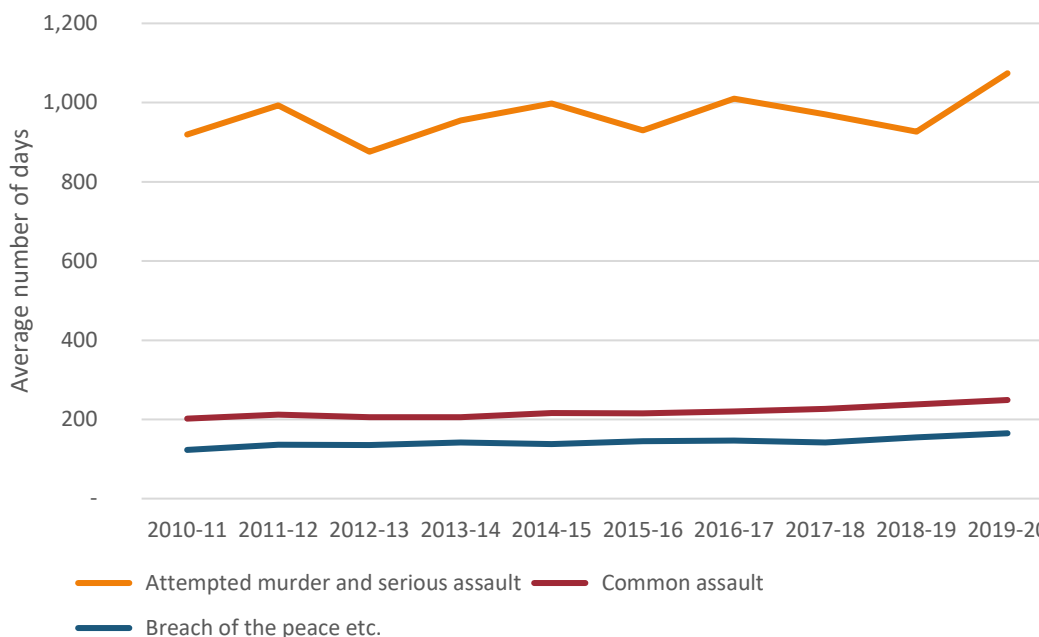


A ten-year time-series for average sentence lengths by offence type is given in Figure 8 below. The average custodial sentence length for Scotland has been increasing almost every year from 2010-11 (9.1 months) to 11.7 months in 2019-20, representing a 29% increase in the average length of custody over a ten-year period.⁷³ From Figure 8, we can see that for assault offences, the largest percentage change from 2018-19 to 2019-20 was for attempted murder and serious assault (16%) when compared with breach of the peace etc. (6%) and common assault (5%).

⁷² Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. Table 10a [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/26/>> [Accessed 7 January 2022].

⁷³ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-2020*. Table 10c. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/28/>> [Accessed 20 January 2022].

Figure 8: Average length of custodial sentence in days, by main crime/offence, 2010-11 to 2019-20⁷⁴



4.4 Convictions by sex⁷⁵ and age

The number of females convicted is consistently much lower than for males across all crime/offence categories. Attempted murder and serious assault convictions comprised mostly males (92%, n=1200) and only 8% females (n=98). Common assault convictions comprised 80% male defendants (n=6,613) and 20% female (n=1,668). Breach of the peace etc. convictions comprised 86% males (n=9,840) and 14% females (n=1,609).⁷⁶

In terms of age, across all assault types most convictions were for those aged 21-30 followed by those aged 31-40 and then those over 40. With those under the age of 21 representing the smallest proportions of convictions by age group for each crime type (see Figure 9).⁷⁷ However, “compared to older people, a larger proportion of convictions for people under 21 are for crimes against public justice and common assault. For example, about a quarter of convictions (26%) for females under 21 were for common assault with the

⁷⁴ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-2020*. Table 10c. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/28/>> [Accessed 20 January 2022].

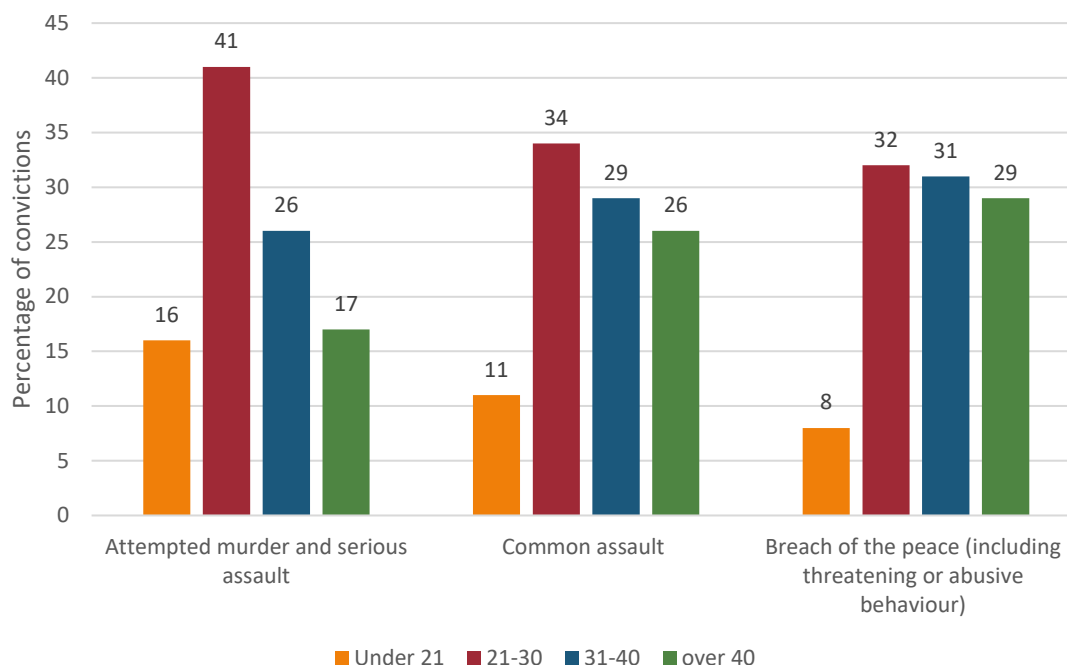
⁷⁵ Based on a person's physiology as perceived by a police officer, rather than self-identified gender.

⁷⁶ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/16/>> [Accessed 7 January 2022] and Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/17/>> [Accessed 7 January 2022].

⁷⁷ Demographic information is divided into age categories to restrict the ability to identify individuals.

corresponding figure for males being 13%.”⁷⁸ Figure 9 below highlights how most convictions across all assault offence types were for those over the age of 21 and that the proportion of 21-30 year-olds being convicted was highest amongst attempted murder and serious assaults.

Figure 9: Percentage of convictions by crime type and age group⁷⁹



4.5 Limitations of official statistical data

Criminal proceedings statistics are tip of iceberg as many more assaults are not recorded/reported to the police,⁸⁰ let alone proceeded against. Criminal proceedings statistics report on cases which have concluded in court that year. The crimes/offences themselves may have occurred or been reported to the police in previous years. “In addition, a person may be proceeded against for more than one crime, or a set of crimes with more than one victim, in a proceeding, but only the main charge is counted in these court proceedings statistics. There is also the possibility that the crime recorded by the police may be altered in the course of judicial proceedings”.⁸¹ The Crown Office and Procurator Fiscal

⁷⁸ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/4/>> [Accessed 7 January 2022].

⁷⁹ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-2020*. Table 6c. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/18/>> [Accessed 20 January 2022].

⁸⁰ Reiner R., 2007. *Law and order: an honest citizen's guide to crime and control*. Malden: Polity Press; Bachelor, S.A., Armstrong, S. and MacLellan, D., 2019. *Taking Stock of Violence in Scotland*. [pdf] Available at: <https://www.sccjr.ac.uk/wp-content/uploads/2019/09/Taking-Stock-of-Violence-in-Scotland_2019.pdf> [Accessed 20 January 2022].

⁸¹ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/48/>> [Accessed 7 January 2022].

Service (COPFS) have identified a small number of court proceedings being erroneously recorded as separate court cases – thus overestimating the number of court cases. However, work to investigate the impact of this recording discrepancy is forthcoming/in the pipeline.⁸²

In deriving the demographic information, statistics at the person level are generated and “where a person is proceeded against for more than one crime or offence in a single proceeding, only the main charge is counted”.⁸³ Namely the charge that would, if proven, attract the most severe penalty.⁸⁴ The result of this choice is that official statistics may undercount offences in multiple charge cases that do not qualify as the main charge.⁸⁵

Unfortunately, no breakdown of convictions and/or people proceeded against by ethnicity is published with which to examine disparities in sentence outcomes across ethnic groups. Disparities in sentence outcomes by ethnic group are known to exist in other jurisdictions such as England and Wales.⁸⁶ In England and Wales, those from non-White ethnic groups are more likely to receive custodial sentences and longer average custodial sentence lengths.⁸⁷ However, in the absence of reported figures on sentencing and ethnicity, the nature and extent of the problem in Scotland is unknown.

The crime groupings in sentencing data also warrants a mention as it was not possible to get an accurate picture of all assault offences from the published criminal proceedings statistics. A consultation in 2019 sought feedback on the statistical classifications and presentation of information, as an earlier (2015) consultation on Police Recorded Crime Statistics had

⁸² Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/47/>> [Accessed 7 January 2022].

⁸³ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/47/>> [Accessed 7 January 2022].

⁸⁴ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/48/>> [Accessed 7 January 2022].

⁸⁵ N.B. “In some cases, although the publication focuses on the main charge, one sentence can be given for all charges, or multiple charges can be served consecutively or concurrently. For example, a single ‘In Cumulo’ prison sentence can be given for multiple offences that arose from the same incident; an eighteen month sentence could consist of twelve months given for the main charge, and six months for a separate charge.”

Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/48/>> [Accessed 7 January 2022].

⁸⁶ Roberts JV. and Bild J., 2022. *Ethnicity and custodial sentencing: A review of the trends, 2009-2019*. [pdf] Available at: <<https://sentencingacademy.org.uk/wp-content/uploads/2021/06/Ethnicity-and-Custodial-Sentencing-1.pdf>> [Accessed 20 January 2022].

⁸⁷ Ministry of Justice, 2019. *Statistics on race and the criminal justice system 2018: A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991*. [pdf] Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849200/statistics-on-race-and-the-cjs-2018.pdf> [Accessed 20 January 2022]; Lammy D. 2017., *Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*. [pdf] Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf> [Accessed 20 January 2022]

acknowledged that there was “room for improvement in the 'non-sexual crimes of violence' category, particularly around serious and minor (common) assault.”

Specifically separating out the serious and common assaults was raised as the latter does not currently feature in figures for 'non-sexual crime of violence'. However, redesignating common assault in this way, rather than retaining its current classification as a 'miscellaneous offence', would have compromised trend analyses as the existing classification had been established for many years. Amending statistical presentation of these data in this way was also thought to “decrease the statistical visibility of more serious incidents (such as attempted murder and serious assault)”. An alternative approach of presenting a further crime group to cover 'Common assault and other violence' was considered. However, this would have included “some crimes from the 'Other' non-sexual crimes of violence sub-category” having knock-on effects for this category too.⁸⁸

⁸⁸ Scottish Government, 2019. *Presenting official statistics on recorded crime and related topics: consultation*. [online] Available at: <<https://www.gov.scot/publications/consultation-official-statistics-present-information-recorded-crime-related-topics/>> [Accessed 20 January 2022].

5 Sentencing framework

There are three main court types that deal with criminal cases in Scotland- the High Court, sheriff courts and justice of the peace courts – as detailed in section 1. The main types of penalty or sentence given to those found guilty in Scottish Courts are custodial sentences, community sentences and financial penalties.⁸⁹

[The Criminal Justice and Licensing \(Scotland\) Act 2010](#) established the Scottish Sentencing Council (in 2015) to promote consistency in sentencing, develop sentencing policy and promote greater awareness and understanding of sentencing. Its Sentencing Process Guideline – for offenders who are sentenced on or after 22 September 2021 - prescribes a series of eight ‘steps’ to be taken by the sentencer in arriving at a final decision (as detailed in Figure 10 below). It also highlights some of the key factors that ought to be considered in so doing. Ensuring consistency of the sentencing process in this way aims to ensure that the sentence to be imposed is fair and proportionate.⁹⁰

Figure 10: The Scottish Sentencing Process⁹¹

The sentencing process
Arriving at the headline sentence (steps 1 - 4)
Step 1. Assess the seriousness of the offence
Step 2. Select the sentencing range
Step 3. Identify aggravating and mitigating factors
Step 4. Determine the headline sentence
Other considerations (steps 5 - 7)
Step 5. Take into account a plea of guilty
Step 6. Consider time spent in custody
Step 7. Consider ancillary orders
Imposing sentence (step 8)
Step 8. Impose sentence and give reasons

⁸⁹ Scottish Government, 2021. *Criminal Proceedings in Scotland, 2019-20*. [online] Available at: <https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/4/> [Accessed 07 January 2022].

⁹⁰ Scottish Sentencing Council, 2022. *The sentencing process: Sentencing guideline*. [pdf] Available at: <https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf> > [Accessed 07 January 2022].

⁹¹ Scottish Sentencing Council, 2021. *The sentencing process: Sentencing guideline*. [pdf] Available at: <https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf> > [Accessed 07 January 2022], p4.

According to the Scottish Sentencing Process Guideline, the court first considers the seriousness of the offence, which has two prongs. One prong is the culpability, or blameworthiness, of the offender. This Process Guideline provides some primary examples, each of which is relevant to assault offences:

- an intent to cause harm
- recklessness as to causing harm
- planning or premeditation
- even if harm was not intended, whether the offender knew, or should have known, of the risks that their actions might cause
- the offender's age, or level of maturity, at the time of committing the offence.

The next consideration is the harm caused, with greater harm indicating a more serious offence. The Process Guideline highlights certain considerations that appear most relevant to assault crimes:

- the degree of injury inflicted
- creating a risk of harm even if no actual harm results
- if a risk of harm, the gravity of the potential harm
- if the harm caused was greater than intended, whether the offender ought to have foreseen such a harm
- deliberate degradation or humiliation of a victim
- the existence of multiple victims
- a sustained offence or repeated offences against the same victim
- an especially serious physical or psychological effect on a victim, even if unintended.

For assault-based offences, severe injury is considered more serious than (non-severe) injury. Permanent disfigurement, permanent impairment, and danger to life are higher gradations of harm.

The court also can subsequently consider aggravating and/or mitigating factors, which render the offence more or less serious for sentencing purposes, before arriving at a headline sentence.

At the time of writing, no formal sentencing guidelines exist specifically for assault offences in Scotland. Rather, sentencing is informed by considerations set out in the general Sentencing Process Guideline⁹² and practice is guided by case law and appeal judgments as reviewed in section 2).

⁹² Scottish Sentencing Council, 2021. *The sentencing process: Sentencing guideline* [pdf] Available at: [the-sentencing-process-guideline-d.pdf \(scottishsentencingcouncil.org.uk\)](https://www.scottishsentencingcouncil.org.uk/the-sentencing-process-guideline-d.pdf) [Accessed 07 January 2022].

6 Aggravating factors

Some of the aggravators considered at step 3 of the sentencing process may appear to overlap with considerations of the initial seriousness of the offence (culpability and harm). The Process Guideline warns that 'double-counting' the same factors in seriousness again as aggravating should be avoided.

Various pieces of legislation in Scotland provide for statutory aggravators, which are beyond the scope of this literature review in terms of discussion. Examples most relevant to assault crimes include these: motivated by animus regarding race, religion, sexual orientation, or disability; or commission of a crime while subject to an antisocial behaviour order.

The guidelines' based general aggravators per the Process Guideline that appear most relevant to assault offences are these:

- the presence of others
- the offender was operating in a group or gang
- abuse of power or a position of trust
- the deliberate targeting of a victim who is vulnerable or perceived to be vulnerable.
- steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution
- an attempt to conceal or dispose of evidence
- commission of the offence for financial gain
- an offence against a public official which arises out of the victim's status as a public official
- the offence was committed whilst the offender was on licence or subject to another order of the court
- any relevant previous conviction(s) which the offender has, particularly where they disclose a pattern of repeat and/or similar offending
- the offence was committed whilst under the influence of alcohol or drugs which were consumed voluntarily.

From the case law section in this review (see Section 3), judges appeared to conceptualise a variety of other specific factors as aggravating factors, even if they did not expressly use this terminology:

- causing the victim to fear or alarm
- repeated assaultive behaviour (e.g., punching, kicking, stabbing)
- continuing to assault after the victim was struck to the ground or otherwise rendered helpless
- targeting the victim's head (presumably because of its acute vulnerability).

As discussed in Section 9 further below, across jurisdictions, the use of a weapon is commonly considered an aggravating factor.⁹³ Sentencing opinions in Scotland carry

⁹³ For example, in the federal system in the United States, the use of a dangerous weapon is a listed aggravating factor under its guidelines for aggravated assaults. United States Sentencing Commission (2021). *2021 Guidelines Manual Annotated*. [pdf] Available at <<https://www.ussc.gov/guidelines/2021-guidelines-manual-annotated>> [Accessed 5 March 2022].

connotations that the use of guns (or what is perceived by the victim to be a gun)⁹⁴ and knives⁹⁵ constitute a form of aggravation in justifying a more serious punishment. In Scottish caselaw, judges have referred to various tools as if they amounted to a weapon in terms of increasing the severity of the crime, such as these: pieces of wood,⁹⁶ a broken bottle,⁹⁷ or a hatchet⁹⁸. Other jurisdictions likewise recognise certain implements act as an aggravating factor, such as in New South Wales in Australia which explicitly identifies the use of glass as an aggravating factor in the context of assault offences⁹⁹.

In other jurisdictions, there are ongoing debates about what constitutes a weapon for sentencing purposes.¹⁰⁰ For example, in England and Wales headbutting, biting and kicking a prone victim have been considered akin to weapon use, as has repeatedly striking the complainant to the face using his knee.¹⁰¹ Similarly, biting with teeth in an assault has been considered akin to weapon use in England.¹⁰²

The Scottish Sentencing Process Guideline includes an aggravating factor of perpetrating the crime with a group or gang. It is noted here that the term “gang” may have unfortunate racialised connotations. The Sentencing Council for England & Wales in its new 2021 guidelines for assault offences purposely adopted less racialised terminology in favour of inviting consideration of a defendant’s “leading role in group activity” as a higher culpability in assessing offence seriousness.¹⁰³

The role of intoxication in sentencing is contested.¹⁰⁴ However, the Scottish Sentencing Process Guideline specifically cites an offence having been committed whilst under the influence of alcohol or drugs which were consumed voluntarily as an aggravating factor. And Scottish statute specifically precludes the voluntary intoxication by alcohol to be considered as a mitigating factor.¹⁰⁵ Additional comments are provided here concerning the aggravating element of the offender’s voluntary intoxication. Those studying the way in which the aggravation of intoxication impacts upon sentences for assault offences in the English and

⁹⁴ *Rodger v HM Advocate* [2017] HCJAC 65.

⁹⁵ *Telford v HM Advocate* [2018] HCJAC 73, [2018] 11 WLUK 550; [2018] GWD 39-481.

⁹⁶ *Cadle v HM Advocate* [2013] HCJAC 74, [2013] SCL 776.

⁹⁷ *Thomson v HM Advocate* [2020] HCJAC 49; *HM Advocate v Hegarty* [2002] SCCR 1022.

⁹⁸ *McNeely v HM Advocate* [2015] HCJAC 45.

⁹⁹ Judicial Commission of New South Wales, 2021. Sentencing Bench Book. [online] Available at: <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/assault_wounding_offences.html#d5e56087> [Accessed 1 March 2022].

¹⁰⁰ Brown, B., 2019. On wounding - Terminology, pathology and sentencing issues. *Criminal Law Bulletin*, 158, pp.1-4.

¹⁰¹ *R. v JDL* [2018] 2 Cr App R (S) 45 [27] (following *R. v Smith* [2014] EWCA Crim 2606 [7])

¹⁰² Brown, B., 2014. The decision in *Muirhead*. *Criminal Law Bulletin*, 132, pp.5-7.

¹⁰³ For example, in the guideline for assault occasioning actual bodily harm. Sentencing Council (2021). Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline. [online] Available at: <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>> [Accessed 25 February 2022].

¹⁰⁴ Lightowlers C., 2022. *Intoxication and Sentencing: A review of policy, practice and research*. [pdf] Available at <<https://sentencingacademy.org.uk/wp-content/uploads/2022/01/Intoxication-and-Sentencing.pdf>> [Accessed 19 January 2022].

¹⁰⁵ Criminal Justice and Licensing (Scotland) Act 2010 s.26. This limitation thus does not apply to involuntary use of alcohol or to the voluntary or involuntary use of other intoxicants.

Welsh context¹⁰⁶ have found, that since its explicit citation as an aggravating factor in offence specific guidelines, in practice judges seem to take this seriously and have increased penalties as a result.¹⁰⁷ However, there is limited research which examines the impact of intoxication across a range of offence types and subsections of the population or how it is used alongside the mitigation of addiction.¹⁰⁸ One study's findings highlighted how being female increased the aggravation applied owing to intoxication compared to being male,¹⁰⁹ raising concerns about the equality with which such aggravations are applied and how these may be used to reinforce myths and biases about substance use and/or their use by certain populations. Indeed, there remain ongoing challenges associated with how to practically determine how intoxication contributed to offending and distinguishing between intoxication arising from legal and illegal substances (amongst others) when it comes to applying the aggravation of intoxication.¹¹⁰ Notably, the approach of uniformly prescribing voluntary intoxication as an aggravating factor is contested and has received opposition in the Australian context.¹¹¹

¹⁰⁶ In England and Wales "intoxication can be considered by courts in sentencing; both as part of the context of the offending behaviour and in terms of the treatment needs of the offender." Lightowlers C., 2022. *Intoxication and Sentencing: A review of policy, practice and research*. [pdf] Available at <<https://sentencingacademy.org.uk/wp-content/uploads/2022/01/Intoxication-and-Sentencing.pdf>> [Accessed 19 January 2022].

¹⁰⁷ Lightowlers, C., 2019. Drunk and doubly deviant? Gender, intoxication and assault. *British Journal of Criminology*, 59,3, pp.693-717; Lightowlers, C. and Pina-Sánchez, J., 2017. Intoxication and assault: an analysis of Crown Court sentencing practices in England and Wales. *British Journal of Criminology*, 58,1, pp.132-154; Lightowlers, C., Pina-Sánchez, J. and Watkins, E., 2020. Contextual culpability: How drinking and social context impact upon sentencing of violence. *Criminology & Criminal Justice*. <https://doi.org/10.1177%2F1748895820972160>

¹⁰⁸ Lightowlers C., 2022. *Intoxication and sentencing: A review of policy, practice and research*. [pdf] Available at <<https://sentencingacademy.org.uk/wp-content/uploads/2022/01/Intoxication-and-Sentencing.pdf>> [Accessed 19 January 2022].

¹⁰⁹ Lightowlers, C., 2019. Drunk and doubly deviant? Gender, intoxication and assault. *British Journal of Criminology*, 59,3, pp. 693-717.

¹¹⁰ Lightowlers C., 2022. *Intoxication and Sentencing: A review of policy, practice and research* [pdf] Available at: <<https://sentencingacademy.org.uk/wp-content/uploads/2022/01/Intoxication-and-Sentencing.pdf>> [Accessed 19 January 2022].

¹¹¹ The Law Society of NSW 'Alcohol and drug fuelled violence' (Submission by The Law Society of NSW, 2015)

7 Mitigating factors

Potential mitigating factors are fewer in number than aggravators in the Scottish Sentencing Process Guideline, with the following relating to assault offences:¹¹²

- mental illness or disability, especially where linked to the commission of the offence
- physical disability or infirmity
- the likely effect of the sentence on the offender or their family: for example, the offender is the primary or sole carer of any dependants, and a sentence of imprisonment would result in the offender's children being looked after away from home
- cooperation with authorities: such as, voluntary surrender or assistance to the police or prosecution
- the offender is remorseful, and/or has been or will be affected significantly by the offence
- the offender has demonstrated a willingness to address their personal problems and to change their offending behaviour, including addressing any drug, alcohol, or mental health issues
- previous otherwise good character; no previous, or recent, relevant convictions; otherwise exemplary conduct
- the offender had been provoked at the time of committing the offence.

Those mitigating factors from the above list that are most frequently cited by other jurisdictions covered in this review (see Section 9) are commented upon below (e.g. provocation). As are others that feature in the literature and guidelines reviewed but not explicitly mentioned in the Scottish Sentencing Process Guideline (e.g. age/youth).¹¹³

Addiction and the willingness to address this also features as a mitigating factor in assault sentencing guidelines (alongside the aggravation of voluntary intoxication) in England and Wales. Therein consideration of any 'determination and/or demonstration of steps taken to address addiction or offending behaviour' is invited in arriving at a suitable sentence. Recent expanded definitions the Sentencing Council of England and Wales¹¹⁴ which feature in the guidelines suggest that in cases "where offending is driven by or closely associated with drug or alcohol abuse"¹¹⁵ a commitment to address the underlying issue may justify a

¹¹² Although acknowledging the list provided by the Scottish Sentencing Council is not exhaustive and referred to as a list of 'possible' mitigating factors. Scottish Sentencing Council, 2021. *The sentencing process: Sentencing guideline*. [online] Available at <<https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf>> [Accessed 07 January 2022] Annex C, p16

¹¹³ Although the sentencing of those under the age of 25 is the focus of a standalone guideline in Scotland – 'Sentencing young people'. See Scottish Sentencing Council, 2021. *Sentencing young people: Sentencing guideline*. [pdf] Available at: <<https://www.scottishsentencingcouncil.org.uk/media/2171/sentencing-young-people-guideline-for-publication.pdf>> [Accessed 25 February 2022].

¹¹⁴ Sentencing Council, 2019. *Expanded explanations in guidelines*. Available at <https://www.sentencingcouncil.org.uk/blog/post/expanded-explanations-in-guidelines/>

¹¹⁵ For example, in the guideline for assault occasioning actual bodily harm. Sentencing Council, 2021. *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline*. [online] Available at: <<https://www.sentencingcouncil.org.uk/offences/crown->

reduction in sentence especially where the court is considering a sentence that focuses on rehabilitation.¹¹⁶

Mental illness is the topic of a separate review commissioned by the Scottish Sentencing Council and so outside the scope of this review, except to highlight that assault offences are often gradated by intent of the offender. And some jurisdictions allow for consideration of mental illness. For example, in the English and Welsh guidelines there is provision to consider ‘Mental disorder or learning disability, where not linked to the commission of the offence’.¹¹⁷ Other scholars have highlighted how underlying mental health disorders and brain disease may interact the interaction of mental health with other sentencing factors such as intoxication and addiction.¹¹⁸ Sentencing guidance is rarely explicitly issued on how sentencers ought to navigate these complexities, rather legal responses have a tendency to oversimplify such clinical complexities.¹¹⁹

In some assault guidelines, consideration of a defendant’s health more generally is permitted. For example, in England and Wales sentencers are invited in the assault guidelines to consider any ‘serious medical conditions requiring urgent, intensive or long-term treatment’ as a reason for reducing the length of the sentence.¹²⁰ This is permitted “either on the ground of the greater impact which imprisonment will have on the offender, or as a matter of generally expressed mercy in the individual circumstances of the case”, although this is not an automatic entitlement given the need to balance the gravity of the offence and harm to victims as well as punishment for serious offending being in the public interest alongside any physical disability or a serious medical condition on the part of the defendant.¹²¹ After all, “the court must impose a sentence that properly meets the aims of sentencing” although there are separate provisions for those with terminal prognoses likely facing death imminently.¹²² As an illustration, in *Fairley v. HM Advocate* the defendant’s

court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/> [Accessed 25 February 2022].

¹¹⁶ E.g., Sentencing Council, 2021. *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline*. [online] Available at:

<<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>> [Accessed 25 February 2022].

¹¹⁷ Further information can be found here <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/>

¹¹⁸ Crombag, H.S., Child, J.J., and Sullivan, G.R., 2020. Drunk, dangerous and delusional: how legal concept-creep risks overcriminalization. *Addiction*, 115. Pp. 2200– 2207; Sinclair-House, N., Child, J.J., & Crombag, H.S. (2020). Addiction is a brain disease, and it doesn’t matter: Prior choice in drug use blocks leniency in criminal punishment. *Psychology, Public Policy and Law*, 26, pp.36-53.

¹¹⁹ Koehler J., 2020. Legal concept-creep and scientific imprecision. *Addiction*, 115, pp.2208–2209.

¹²⁰ E.g., Sentencing Council, 2021. *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline*. [online] Available at:

<<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>> [Accessed 25 February 2022].

¹²¹ E.g., Sentencing Council, 2021. *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline*. [online] Available at:

<<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>> [Accessed 25 February 2022].

¹²² This will be considered by the prison authorities and the Secretary of State under the early release on compassionate grounds procedure (ERCG).

health was raised as potential mitigation on appeal, however the sentence was upheld (in part because of a previous criminal history).¹²³

Previous good character and (otherwise) exemplary conduct is a contested mitigating factor as it is somewhat subjective. Consideration thereof is provided for in the general Scottish Sentencing Process Guideline as well as in the English and Welsh assault guidelines.¹²⁴ In the latter further guidance as to how this ought to be applied is given, suggesting this factor may apply “whether or not the offender has previous convictions”. However, it is also noted that “this factor is less likely to be relevant where the offending is very serious” and that any abuse of a defendant good character or status to facilitate or conceal offender can in fact be treated as aggravation.¹²⁵

Many guidelines consider a defendant’s previous offending or offending history in the context of assault offences. Explicit consideration of having ‘no previous convictions or no relevant/recent convictions’ is provided for as an explicit mitigating factor in the English and Welsh assault sentencing guidelines on the basis that “first time offenders usually represent a lower risk of reoffending” and may be considered less blameworthy, as it is in the general Scottish Sentencing Process guideline.¹²⁶

The consideration of offending history has some overlap with the concept of an offence being an isolated incident, for which there are provisions in the English and Welsh Sentencing Guideline for assault in terms of lesser culpability¹²⁷ and the general Scottish Sentencing Process Guideline. In the English and Welsh context mitigation of an assault being an isolated incident was found to moderate the probability of receiving a custodial or severe sentence for assaults by intoxicated defendants.¹²⁸

Provocation is a commonly recognised mitigating factor in assault offences. The Scottish general Sentencing Process Guideline provides for consideration as to whether “the offender had been provoked at the time of committing the offence.” Whereas in the English and Welsh assault guidelines a ‘significant degree of provocation’ is underscored as a factor reducing seriousness or reflecting personal mitigation.¹²⁹ Provocation also features in

¹²³ [2011] HCJSC 64.

¹²⁴ E.g., Sentencing Council, 2021. *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline*. [online] Available at: <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>> [Accessed 25 February 2022].

¹²⁵ E.g., Sentencing Council, 2021. *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline*. [online] Available at: <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>> [Accessed 25 February 2022].

¹²⁶ E.g., Sentencing Council, 2021. *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline*. [online] Available at: <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>> [Accessed 25 February 2022].

¹²⁷ E.g., Sentencing Council, 2021. *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline*. [online] Available at: <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>> [Accessed 25 February 2022].

¹²⁸ Lightowlers, C. & Pina-Sánchez, J., 2018. Intoxication and assault: An analysis of Crown Court sentencing practices in England and Wales. *The British Journal of Criminology*, 58,1, pp.132–154.

¹²⁹ E.g., Sentencing Council (2021). *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline*. [online] Available at:

several appeal cases.¹³⁰ For example, a lower sentence was substituted on appeal in *Dempsey v HM Advocate*, as the defendant had been provoked in his own home by the victim.¹³¹ In *HM Advocate v Gilmour*, the sentence was upheld on account of the victim having been highly provocative, alongside the defendant being a good employee and under a lot of stress on account of family illness.¹³² Reference to cases comprising unprovoked attacks are also made in sentencing remarks suggesting the lack of provocation can also serve to aggravate sentence outcomes.¹³³

Likewise, ‘excessive self-defence’ features as a lesser culpability factor for assault offences in England and Wales (apart from assault with intent to resist arrest). Self-defence can overlap with considerations of weapon use in assessing the proportionality of an action or force. For example, a case of assault (with glass in hand) and defence of self-defence successfully argued, that in these circumstances, this did not constitute unlawful use of the glass as a weapon in the assault in *Carr v HM Advocate*.¹³⁴ However, on the whole weapon use is frequently cited as aggravation for assault offences (see section 3).

Considering remorse as personal mitigation is also provided for in some guidelines. Indeed, remorse was the most frequently cited mitigating factor in assault offences in England and Wales and was cited in around a third of assault cases in 2011.¹³⁵ As with good character, whilst this factor may be a legitimate sentencing consideration, it is also subject to ongoing debate as it can be difficult to assess¹³⁶ or establish as genuine¹³⁷. Moreover, it has been subject to variability in judicial and theoretical interpretations, “particularly in the context of the most serious forms of offending”.¹³⁸

Other offender characteristics such as age, have been provided as mitigating factors in some assault guidelines on the basis that younger persons are still developing and so less able to limit impulsivity and risk taking or evaluate the consequences of their actions. A reduced sentence is thus permitted in so far as it may impact upon the defendant’s responsibility for the offence and/or based on consideration of the impact the sentence may have on the defendant. Indeed, custodial sentences for assault have previously been successfully appealed in favour of lesser sentences (see section 3) with the court referring to

<<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>> [Accessed 25 February 2022].

¹³⁰ *Ferguson v HM Advocate* [2015] HCJAC 89, [2015] SCL 972; *Dempsey v HM Advocate* [2012] HCJAC 77; *HM Advocate v Gilmour* [2004] SCCR 117; *Duffy v HM Advocate* [2015] HCJAC 29, [2015] SCCR 205; *HM Advocate v Cossar* [2010] HCJAC 83, [2010] SCCR 818.

¹³¹ [2012] HCJAC 77.

¹³² [2004] SCCR 117.

¹³³ For example, *Advocate v Cossar* [2010] HCJAC 83, [2010] SCCR 818 and *HM Advocate v Hegarty* [2002] SCCR 1022.

¹³⁴ [2013] HCJAC 87.

¹³⁵ Maslen H. and Roberts J.V., ‘Remorse and sentencing: An analysis of sentencing guidelines and sentencing practice’ in *Sentencing guidelines: Exploring the English model*, Ashworth A. and Roberts J.V. (eds) Oxford University Press, Oxford, 2013, pp. 122–139.

¹³⁶ *Justiciary: procedure - sentence - discounting* [2012] SCL 385.

¹³⁷ Jacobson J. and Hough, M. ‘Personal Mitigation: An Empirical Analysis in England and Wales’ in *Mitigation and Aggravation at Sentencing*, J.V. Roberts (ed), Cambridge University Press, Cambridge, 2011, Table 8.4, p.153

¹³⁸ Maslen H. and Roberts J.V., ‘Remorse and sentencing: An analysis of sentencing guidelines and sentencing practice’ in *Sentencing guidelines: Exploring the English model*, Ashworth A. and Roberts J.V. (eds), Oxford University Press, Oxford, 2013, p.139.

an “appellant’s youth, his difficult upbringing, his attempts to secure employment, the provocation by the complainer, and the focus for rehabilitation” as was the case in *LM v HM Advocate* [2019] HCJAC 82, for example. However, the sentencing of those under the age of 25 is the focus of one of the early standalone guidelines in Scotland – ‘Sentencing young people’.¹³⁹

As section 3 highlights, the appellate court considers potentially mitigating factors. Whilst cases have successfully been upheld on the basis of a defendant’s young age and provocation, these are not always guaranteed (as cases are also dismissed and sentences upheld). Indeed, it is often the combinations of contextual case characteristics, mitigations, and aggravations upon which the outcome depends. For example, the original sentence was upheld despite arguing mitigation on grounds of mental health, a good work history and ill wife, where there was evidence of a relevant offending history, retaliation and a failure to render assistance for the victim in *Gay v HM Advocate*.¹⁴⁰ Indeed, a more severe penalty was substituted in *HM Advocate v Hegarty* where despite remorse being shown, the assault was vicious, unprovoked and prolonged/repeated.¹⁴¹ To date, there is limited research which has examined how mitigating and aggravating factors may interact to arrive at sentencing decisions for assault offences in the Scottish context. Further research on how mitigating and aggravating factors are deployed by sentencers, which mixes thereof are drawn upon, and how these interact with socio-demographic factors would help illuminate further the common patterns and understandings drawn upon the instinctive synthesis of sentencing and establish whether the guidance issued to sentencers is operating in the intended ways or whether disparities exist (for example, based on protected characteristics).

¹³⁹ Scottish Sentencing Council, 2021. *Sentencing young people: Sentencing guideline*. [pdf] Available at: < <https://www.scottishsentencingcouncil.org.uk/media/2171/sentencing-young-people-guideline-for-publication.pdf> >Accessed 4 March 2022].

¹⁴⁰ [2017] HCJAC 62, [2017] SCL 913.

¹⁴¹ [2002] SCCR 1022.

8 Public perceptions of sentencing for assault

This section reviews the available evidence from English language reports in recent years that are relevant to public perceptions on appropriate sanctions for assault offending.

8.1 The public's knowledge about actual sentencing practices

Western societies are known for their publics' desires for harsh penalties for criminal offending.¹⁴² However, the public desire for more punitive sentencing outcomes may be based on erroneous beliefs about actual sentencing practices. A recent study of public attitudes in Scotland found that respondents typically overestimated the actual use of prison sentences across cases sentenced by judges: the estimate of the percentage of the convicted who would be sentenced to prison was twice the actual rate of prison sentences issued.¹⁴³

This inaccurate projection of the likelihood of custodial punishments is not unique to Scotland as experts suggest caution is needed in interpreting findings from surveys of public perceptions of sentencing practices.¹⁴⁴ General knowledge of lay citizens of actual crime rates and sentencing outcomes tend to be poor, and they tend to misestimate the severity of sentences actually issued, such as the rate in which penalties include incarceration.¹⁴⁵ A population survey in Finland provides a confirmatory finding: a negative linear relationship existed between, on the one hand, the level of knowledge about crimes and the penal system, and on the other hand, punitive attitude.¹⁴⁶ In other words, those who had greater knowledge (judged by the accuracy of responding to factual queries about levels of crime and sentencing laws) were less likely to advocate harsh sentences. One explanation for this is the role of emotions in punitive attitudes. A survey of United States residents found evidence that the more they feared person-based crime (defined as murder, sexual assault, robbery, and burglary), the more punitive criminal justice policies they advocated.¹⁴⁷

¹⁴² De Soto, W., Wiener, K., Tajalli, H. & Brookman, R. 2022. A comparison between Australian and US populations on attitudes to criminal behaviours. *Psychology, Crime & Law*, 28:2, pp.115-131.

¹⁴³ Black, C., Warren, R., Ormston, R. & Tata C, 2019. *Public perceptions of sentencing: National survey report* [pdf] Available at: <<https://www.scottishsentencingcouncil.org.uk/media/1996/20190902-public-perceptions-of-sentencing-report.pdf>> [Accessed 19 January 2022].

¹⁴⁴ Roberts, J.V., Bild, J., Pina-Sánchez, J. & Hough, M., 2022. Public knowledge of sentencing practice and trends. [pdf] Available at: <<https://sentencingacademy.org.uk/wp-content/uploads/2022/01/Public-Knowledge-of-Sentencing-Practice-and-Trends.pdf>> [Accessed 19 January 2022].

¹⁴⁵ Warner, K., Davis, J., Spiranovic, C. & Cockburn, H., 2017. Measuring jurors' views on sentencing: Results from the second Australian jury sentencing study. *Punishment & Society*, 19,1, pp. 180-202; Hough, M. Bradford, B., Jackson, J. & Roberts, J.V. (2013). *Attitudes to sentencing and trust in justice: exploring trends from the crime survey for England and Wales*. Ministry of Justice, London.

¹⁴⁶ Kääriäinen, J., 2019. Knowledge, punitive attitudes and punitive gap: Finnish findings. *European Journal of Criminal Policy Research*, 25, pp. 409-425.

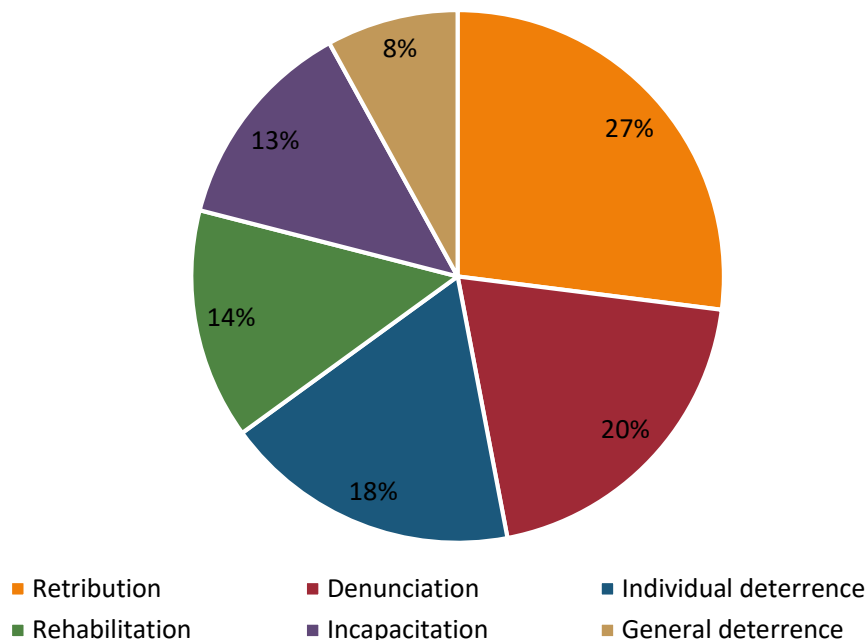
¹⁴⁷ Shi, L., 2021. Crime trend perceptions, negative emotions, and public punitiveness: A survey experiment of information treatment. *Journal of Experimental Criminology* <<https://doi.org/10.1007/s11292-020-09454-7>>

8.2 Perceptions on primary purpose of sentencing

A recent survey of adult residents of Scotland investigated various aspects of public perceptions on sentencing as a general matter.¹⁴⁸ When queried about the most important factor Scottish courts should consider in sentencing, 56% of respondents indicated protecting the public, 33% rehabilitating offenders, and 23% punishing the crime committed.¹⁴⁹ A nationally-representative sample of UK residents on their primary consideration for sentencing across types of crime likewise revealed a significant split: 47% promoted the key objective when sentencing was to punish, while 40% thought that rehabilitation should be the primary motive.¹⁵⁰

Other studies have enquired about punishment philosophies more directly toward assault-based offenders. A study of individuals who had served as jurors in criminal jury trials in Victoria (Australia) enquired about their favoured purpose of sentencing in cases involving serious assault, with results showing the proportions indicated in Figure 11.¹⁵¹

Figure 11: Most important purpose of sentencing for serious violent offences (percentage of respondents)¹⁵²



¹⁴⁸ Black, C., Warren, R., Ormston, R. & Tata, C., 2019. *Public perceptions of sentencing: National survey report*. [pdf] Available at:

<<https://www.scottishsentencingcouncil.org.uk/media/1996/20190902-public-perceptions-of-sentencing-report.pdf>> [Accessed 19 January 2022].

¹⁴⁹ The percentages do not add up to 100%, likely due to rounding.

¹⁵⁰ Rao, S., 2015. Public attitudes towards criminal punishment, rehabilitation and reform. [online] Available at: <<https://onepoll.com/public-attitudes-towards-criminal-punishment-rehabilitation-and-reform/>> [Accessed 19 January 2022].

¹⁵¹ Warner, K., Davis, J., Spiranovic, C., Cockburn, H. & Freiberg, A., 2019. Why sentence? Comparing the views of jurors, judges and the legislature on the purposes of sentencing in Victoria, Australia. *Criminology & Criminal Justice*, 19,1, pp.26-44. The study did not provide any details to further contextualise the serious assault.

¹⁵² Warner, K., Davis, J., Spiranovic, C., Cockburn, H. & Freiberg, A., 2019. Why sentence? Comparing the views of jurors, judges and the legislature on the purposes of sentencing in Victoria, Australia. *Criminology & Criminal Justice*, 19,1, pp.26-44.

The Victoria juror study thus shows that, for serious violent offenders, almost half (47%) preferred an expressive sentence for purposes of retribution and denunciation. This suggests that the public tends to favour penalties for violent offending which provide strong symbolic value to denounce acts of interpersonal violence. Still, consequentialist purposes (individual and general deterrence, rehabilitation, and incapacitation) altogether represented the slight majority of cases (53%), though there was not strong agreement on which utilitarian goal was preferred. Individual deterrence and rehabilitation were more popular (18% and 14% respectively), with incapacitation (13%) and general deterrence (8%) being the least favourite preferences. In combination, 45% promoted a more individualised approach in terms of either deterring, rehabilitating, or incapacitating the specific offender (here, excluding general deterrence which concerns discouraging others from offending).

An earlier survey of the Australian public also measured public sentiment on the purpose of sentencing for a serious assault case, with variations dependent upon the age and criminal history of the purported offender.¹⁵³ Results indicated that, again, there were at least some respondents who cited each of the given purposes as the most important for each serious assault scenario (retribution, incapacitation, individual deterrence, general deterrence, and rehabilitation). General deterrence ranked within the least two cited across the scenarios (with agreement ranging from 4 to 8%). Rehabilitation was most commonly cited if there were no prior convictions, whether the offender was young (53% of respondents) or adult (40%). In contrast, when the hypothetical offender was given three prior convictions, retribution was (instead of rehabilitation) the likeliest most important purpose (whether young or adult offender) at just over 40%, with incapacitation being the second most common cited purpose (30% for young offenders and 38% for adult offenders). Overall, for serious assault offenders with no priors (young and adult), incapacitation was rarely cited as the most important (at 5% or less). In sum, this study provides evidence that preferred sentencing philosophy, at least in cases of serious assault, may rely on offender age or criminal history.

The results of the foregoing Australian studies might appear unhelpful considering nontrivial proportions agreed with every sentencing purpose offered. However, this could perhaps be due to the design which asked for a single preference. Other research suggests that the public may believe a sentence should strongly be influenced by multiple purposes simultaneously. As an illustration, researchers using a sample of university students in the United States enquired about sanctioning subgroups of violent offenders (i.e., violent drug offenders, violent offenders with mental health issues, violent offenders who were veterans, and domestic violent offenders) and found that almost half endorsed a balanced approach involving both retribution and rehabilitation, with the exception that a lesser percentage (one-third) endorsed a balanced approach specifically for the domestic abusers.¹⁵⁴

¹⁵³ Spiranovic, C.A., Roberts, L.D., Indermaur, D., Warner, K., Gelb, K. & Mackenzie G., 2011. Public preferences for sentencing purposes: What difference does offender age, criminal history and offence type make? *Criminology & Criminal Justice*, 12,3, pp.289-306.

¹⁵⁴ Atkin-Plunk, C.A., 2020. Should all violent offenders be treated equally? Perceptions of punishment and rehabilitation for violent offenders with varying attributes, *Victims & Offenders*, 15,2, pp.218-242.

8.3 Perceptions on Violent Crime Compared to Other Types of Offences

A study of public perceptions using samples in Australia and the United States found that both female and male respondents were more likely to rate as overall more serious those offences which had some violent element (e.g., robbery, rape, child molestation) than those that did not (e.g., burglary, drugs), even after controlling for respondents' age and education, level of confidence in the courts, and fear of crime.¹⁵⁵

A general population survey in Belgium explored public perceptions on crime severity by comparing several types of offending, including physical assaults, and by distinguishing between several measures thereof.¹⁵⁶ In a ranking of ten crime types, physical assault ranked fourth on two measures, one for seriousness and the other for wrongfulness (below murder, terrorism, and sexual assault, while greater than assorted property crimes and drug crimes). However, physical assault ranked ninth in perceived severity of harm caused by the crime, below the other types of violence as well as corporate fraud, theft, burglary, vandalism and cocaine trafficking; the only offense type rated as causing less harm was marijuana trafficking. Further analysis indicated that ratings were more heavily influenced by moral judgements about, and the perceived wrongfulness of, the crime, rather than its potential consequences. These results suggest that, at least for this sample, retributive philosophies were more salient than utilitarian ideologies that focus heavier on harms caused.

An online survey concluded that subjects perceived that violent street crimes were more serious and should be treated more punitively than white collar crimes that endangered lives.¹⁵⁷

8.4 Perceptions on Specific Sentences for Assault

A postal survey of public attitudes on punishment in Finland which included a vignette involving an adult male assaulting another man outside a bar at night, suggests attitudes to punishment vary based on offender attributes.¹⁵⁸ The aforementioned vignette also specified that the victim received injuries in the form of cuts and bruises to the head (no permanent injury), which would appear to qualify in Scottish law as assault to injury. In this Finnish survey, 48% of respondents assigned an unconditional prison sentence (similar to what is

¹⁵⁵ De Soto, W., Wiener, K., Tajalli, H. & Brookman, R., 2021. A comparison between Australian and US populations on attitudes to criminal behaviours, *Psychology, Crime & Law*, 28,2, pp.115-131.

¹⁵⁶ Adriaenssen, A., Paoli, L., Karstedt, S., Visschers, J., Greenfield, V.A. & Pleysier S., 2020. Public perceptions of the seriousness of crime: Weighing the harm and the wrong, 17(2) *European Journal of Criminology*, 17,2 pp.127-150.

¹⁵⁷ Michel, C., 2016. Violent street crime versus harmful White-collar crime: A comparison of perceived seriousness and punitiveness. *Critical Criminology*, 24, pp.127-143. (Defining violent street crime to include homicide and forcible rape and harmful white-collar crimes as consumer safety violations endangering children, illegal toxic waste disposal, and a workplace exposing employees to toxic contamination).

¹⁵⁸ Kääriäinen, J., 2018. Attitudes and public punishment preferences: Finnish results of Scandinavian sense of justice research. *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 19,2, pp.152-169.

referred to in other countries as a suspended custodial sentence) for this hypothetical assault offender.¹⁵⁹

Another study of the Finnish population asked lay respondents about the length of a prison sentence they would assign to a hypothetical individual who committed an aggravated assault¹⁶⁰ involving stab wounds to the abdomen and leg.¹⁶¹ The responses were diverse, whereby between 12-19% agreed with a term within every one of the six ordinal categories from 1-4 months to the highest group of 3 years or more.¹⁶² Still, respondents who had a greater and more accurate knowledge about crime rates and sentencing policies were less punitive in the severity of punishment recommendations for this hypothetical offender.¹⁶³

A survey of voters in the state of Wisconsin in the United States found that a far higher percentage endorsed a sentence that included prison time for violent offending (69%) compared to property offending (24%).¹⁶⁴ Further, 38% endorsed lifetime prison sentences for violent offenders who had previously been convicted of two or more violent offences.

Another study surveyed undergraduate students at an American university using a hypothetical fact scenario of what was termed an “ambiguous assault case,” whereby there was at least some reasonable claim by the defendant of self-defence.¹⁶⁵ When asked what the appropriate sentence would be if the defendant were adjudicated guilty, and given a minimum of 2 years and a maximum of 20 years in prison, the responses were quite mixed: 67% selected the minimum 2 years while 10% chose the maximum 20 years. On average, the respondents sentenced the hypothetical defendant to four years when the case was portrayed as involving a female defendant or a male victim, and five years when a male defendant or a female victim was employed in the scenario. These latter results suggest differential judgment of punitiveness based on gender.

A study in Tasmania (Australia) queried jurors about appropriate sentences in the actual violent crime cases on which they served.¹⁶⁶ When jurors were asked to select a sentence before being informed of the penalty given by the judge in the specific case, jurors would have given a less severe sentence (than was actually issued) in 49% of cases, a more

¹⁵⁹ Kääriäinen, J., 2018. Attitudes and public punishment preferences: Finnish results of Scandinavian sense of justice research. *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 19,2, pp.152-169.

¹⁶⁰ Kääriäinen, J., 2019. Knowledge, punitive attitudes and punitive gap: Finnish findings. *European Journal of Criminal Policy Research*, 25, pp.409-425

¹⁶¹ Kääriäinen, J., 2018. *Seven criminal cases: Comparing Finnish punishment policies and Finns' punishment preferences*. [pdf] Available at: <https://helda.helsinki.fi/bitstream/handle/10138/232414/Katsauksia_27_K%c3%a4%c3%a4ri%c3%a4inen_2018.pdf?sequence=1&isAllowed=y> [Accessed 4 January 2022].

¹⁶² Kääriäinen, J., 2019. Knowledge, punitive attitudes and punitive gap: Finnish findings. *European Journal of Criminal Policy Research*, 25, pp.409-425.

¹⁶³ Kääriäinen, J., 2019. Knowledge, punitive attitudes and punitive gap: Finnish findings. *European Journal of Criminal Policy Research*, 25, pp.409-425.

¹⁶⁴ O'Hear, M. & Wheelock, D., 2020. Violent crime and punitiveness: An empirical study of public opinion. *Marquette Law Review*, 103,3, pp.1035-1071.

¹⁶⁵ Meaux, L.T., Cox, J. & Kopkin, M.R., 2018. Saving damsels, sentencing deviants and selective chivalry decisions: Juror decision-making in an ambiguous assault case. *Psychiatry, Psychology and Law*, 25,5, pp.724-736.

¹⁶⁶ Warner, K., Davis, J., Walter, M., Bradfield, R. & Vermey, R., 2011. Public judgement on sentencing: Final results from the Tasmanian jury sentencing study. *Trends & Issues in Crime and Criminal Justice*, 407.

severe sentence in 46% of cases, and similar to the judge in 5% of cases. But then when jurors were informed of the sentences actually issued by judges in the violent cases on which they served and asked whether these were reasonable, the vast majority (92%) perceived the judicial results as very appropriate or fairly appropriate. The jurors who did not rate the judges' sentence as very appropriate were then asked about their perception of the penalties given to the violent offenders, with about two-thirds believing them to be too lenient. Unfortunately, the study does not provide information on the sentences issued, and thus, conclusions on the severity of penalties are limited. But it appears that the public may perceive judicial sentencing for violent crimes as tending toward too light, at least in this jurisdiction.

Perhaps the reason for such wide variations in sentencing judgements is that research provides some evidence that public perceptions of appropriate penalties for violent crimes are not singular. The public envisions gradations of severity and culpability. For instance, focus groups held in Boston, Massachusetts (U.S.) were given a scenario of a simple assault involving a bar fight.¹⁶⁷ Even given these case facts, some of the focus group members believed there was still a need to judge things on a case-by-case basis. One respondent explained:

'Yeah because every situation is different. Every fight, every bar fight, you need to really just, just look at the situation, the people, and then make good judgment and not every situation will be the same, you know? You try to make hopefully the right judgment call.'¹⁶⁸

8.5 Perceptions on Aggravating and Mitigating Factors

Studies have tested the public's attitude toward specific factors that might be perceived as aggravating or mitigating in penalty decisions. A survey of Scottish residents, though not specific to assault offences, found that participants tended to believe that while pleading guilty should have no consequence to the penalty given, a lack of remorse and repeat offending should be aggravating circumstances.¹⁶⁹

The potential for aggravators and mitigators more directly connected to assault-based crimes have been the focus of other research. An English study using a small sample of members of the public tested whether their judgements on penalties for a crime of inflicting grievous bodily harm (similar to assault to severe injury in Scotland) would vary based on certain aggravating factors or personal mitigating factors regarding the hypothetical defendant.¹⁷⁰ Regardless of the different scenarios given, the average length of a custodial sentence given for the crime of inflicting grievous bodily harm was 30 months. Overall, the

¹⁶⁷ Wozniak, K.H., 2020. Public discussion about critical Issues in criminal justice reform. *Journal of Quantitative Criminal Justice & Criminology*, 8,4.

¹⁶⁸ Wozniak, K.H., 2020. Public discussion about critical Issues in criminal justice reform. *Journal of Quantitative Criminal Justice & Criminology*, 8,4. p.17.

¹⁶⁹ Black, C., Warren, R., Ormston, R. & Tata, C., 2019. *Public Perceptions of Sentencing: National Survey Report*. [pdf] Available at: <https://www.scottishsentencingcouncil.org.uk/media/1996/20190902-public-perceptions-of-sentencing-report.pdf> [Accessed 4 January 2022].

¹⁷⁰ Belton, I.K., 2018. *The Role of Personal Mitigating Factors in Criminal Sentencing Judgments: An Empirical Investigation*. Thesis, Middlesex University.

aggravating factors given had a stronger influence on the length of sentence than the personal mitigating factors. In total, 77% of respondents would increase the length of sentence for a defendant with previous convictions, 52% for being on bail at the time of offending, and just 10% for being under the influence of intoxicants. All three personal mitigating factors reduced the sentence given in less than a majority of cases, but still influential to many, whereby taking measures to address an alcohol or drug addiction was significant for 48% of respondents, expressing remorse for 45%, and good character for 26%.

In the Finnish survey of public opinions, the vignettes about aggravated assault offenders contained variations with attributes of the hypothetical offenders. The percentage recommending an unconditional prison sentence did not significantly differ whether the offender purportedly suffered from a serious drinking problem (or not) or whether he had social issues (defined as either a difficult childhood, mental health issues, or employment problems).¹⁷¹ However, there was a greater likelihood of a prison sentence if the offender had a prior violent crime conviction.

Representative population samples in Germany and France did not find the offender's level of intoxication to be relevant to the severity of the sentence suggested for a factual scenario involving the offender punching another man twice in the face causing a jaw fracture.¹⁷²

While not specific to assault crimes, other research on public perceptions provides some relevant knowledge. A study in Tasmania found that jurors gave greater weight to aggravating factors relating to the offense (e.g., abuse of a position of trust, substantial injury caused) than those tied to the offender (e.g., offender on bail or parole).¹⁷³ Still, some offender-related mitigators were salient, such as evidence of good rehabilitative prospects, first time offending, and a show of remorse.¹⁷⁴

A study of jurors serving in actual criminal cases in Victoria, Australia, offered the following conclusions: (a) overall, jurors generally gave more weight to aggravating factors than they did to mitigating factors; (b) jurors were significantly likely to place a lot of weight on the aggravating factors of breach of trust (85%), vulnerable victim (75%), and substantial injury (73%); (c) jurors were less influenced, but still to a large degree likely to place a lot of weight on the defendant's prior convictions (49%) and breach of parole or court orders (60%); (d)

¹⁷¹ Still, the effect of social issues differed by gender of the respondent. The presence of one of the hypothesised social issues led to females being more likely to sentence to prison compared to males. Kääriäinen, J., 2018. Attitudes and Public Punishment Preferences: Finnish Results of Scandinavian Sense of Justice Research. *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 19,2, pp.152-169.

¹⁷² Bègue, L., Zerhouni, O. & Jobard, F., 2020. The Role of Intoxication on Sentencing by Judges and Laypersons: Findings from a Binational Experiment in Germany and France. *International Criminal Justice Review*, doi: 10.1177/1057567720953874.

¹⁷³ Warner, K., Davis, J., Spiranovic, C. & Cockburn, H., 2017. Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study. *Punishment & Society*, 19,1, pp. 180-202.

¹⁷⁴ Warner, K., Davis, J., Spiranovic, C. & Cockburn, H., 2017. Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study. *Punishment & Society*, 19,1, pp. 180-202.

regarding potential mitigating factors, a minority of jurors would place a lot of weight on rehabilitation prospects (30%), first offender status (20%), and good character (15%).¹⁷⁵

A recent study of public perceptions of sexual assault sentencing in Scotland also provides some relevant information. Analogous to the assault category covered herein, sexual assault as a crime is also broad in terms of the variety of types and relative seriousness of harms. Yet participants in this study could envision gradations of harm across sexual assault crimes, thus justifying significant differences in penalties within the larger umbrella regarding sexual assault offending.¹⁷⁶ The study also queried about the impact of personal characteristics on sentencing judgements. Participants had mixed views about whether evidence of prior good character or personal/family circumstances should be viewed as relevant mitigating factors. Still, the study subjects who also identified as sexual assault survivors were far less accepting of these as mitigating factors compared to general focus group members.¹⁷⁷ Perhaps because of acknowledging the wide range of acts that could be considered within the sexual assault category, participants also endorsed the adoption of sentencing guidelines to achieve greater consistency, while at the same time believing in a healthy measure of judicial discretion to consider relevant facts in the individual case.¹⁷⁸

¹⁷⁵ Warner, K., Davis, J., Freiberg, A., Spiranovic, C. & Cockburn, H., 2021. Aggravating and Mitigating Factors in Sentencing: Comparing the Views of Judges and Jurors. [pdf] Available at: <https://www.utas.edu.au/__data/assets/pdf_file/0005/1223834/Aggravating-and-Mitigating.pdf> [Accessed 4 January 2022].

¹⁷⁶ Biggs, H., Reid, S., Attygalle, K., Vosnaki, K., McPherson, R. & Tata, C., 2021. Public Perceptions of Sentencing in Scotland: Qualitative Research Exploring Sexual Offences. [pdf] Available at: <<https://www.scottishsentencingcouncil.org.uk/media/2122/public-perceptions-of-sentencing-qualitative-research-of-sexual-offences-final-july-2021.pdf>> [Accessed 4 January 2022].

¹⁷⁷ Biggs, H., Reid, S., Attygalle, K., Vosnaki, K., McPherson, R. & Tata, C., 2021. Public Perceptions of Sentencing in Scotland: Qualitative Research Exploring Sexual Offences. [pdf] Available at: <<https://www.scottishsentencingcouncil.org.uk/media/2122/public-perceptions-of-sentencing-qualitative-research-of-sexual-offences-final-july-2021.pdf>> [Accessed 4 January 2022].

¹⁷⁸ Biggs, H., Reid, S., Attygalle, K., Vosnaki, K., McPherson, R. & Tata, C., 2021. Public Perceptions of Sentencing in Scotland: Qualitative Research Exploring Sexual Offences. [pdf] Available at: <<https://www.scottishsentencingcouncil.org.uk/media/2122/public-perceptions-of-sentencing-qualitative-research-of-sexual-offences-final-july-2021.pdf>> [Accessed 4 January 2022].

9 Other anglophone guideline-based jurisdictions

Originating in the USA, sentencing councils or commissions have been established in several other jurisdictions to help structure and/or guide sentencing to bring about consistency therein. Despite similar aims to constrain judicial discretion and promote consistency in sentencing, approaches vary across jurisdictions with some being more prescriptive and others focusing on consistency of approach permitting a degree of judicial discretion. Some jurisdictions have guidelines specifically relating to assault in place, whilst some have more general guidance spanning a range of offence types. Those anglophone jurisdictions which have assault guidelines in place in anglophone guideline-based jurisdictions are reviewed here. Namely, England and Wales, the USA, Northern Ireland, the Republic of Ireland and Australia.

9.1 United States of America (USA)

At the federal level the U.S. Sentencing Commission includes guidelines on assault offences in its *Guidelines Manual*.¹⁷⁹ Therein It assigns Base Offense Levels (severity) for assault (§2A2.3.) and aggravated assaults (§2A2.2.) and describes offense-specific characteristics present in a case that may increase or decrease to the sentence. It also details adjustments for aggravating and mitigating factors that ought to be factored in when arriving at a suitable sentence. These include role in the offense, terrorism, hate crimes, obstruction of justice, and acceptance of responsibility, among others.

Distinctions are made in determining the sentence severity for assault offences based on factors such as:

- whether the assault involved physical contact and whether the victim sustained bodily injury
- whether this was substantial injury¹⁸⁰ to a spouse, intimate partner, or dating partner, or an individual under the age of sixteen years, and
- weapon use or the threat thereof.

All of which serve to increase the recommended sentence. The federal guidelines tend to have more aggravating factors in offense-based guidelines than mitigating. However, they do identify certain aggravating and mitigating factors that tend to apply across offenses in other general guidelines. These include:

- having minimal participation in the offense,
- accepting responsibility,
- mental and emotional conditions of the defendant,
- physical condition, or

¹⁷⁹ United States Sentencing Commission, 2021. *2021 Guidelines Manual Annotated*. [pdf] Available at: <<https://www.ussc.gov/guidelines/2021-guidelines-manual-annotated>> [Accessed 4 February 2022].

¹⁸⁰ “Substantial bodily injury” means “bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.” See 18 USC § 113(b)(1) 2.

- providing substantial assistance to authorities.

Consideration of the most appropriate sentence for aggravated assaults – defined as “assaults that are more serious than other assaults because of the presence of an aggravating factor, i.e., serious bodily injury; the involvement of a dangerous weapon with intent to cause bodily injury; strangling, suffocating, or attempting to strangle or suffocate; or the intent to commit another felony”¹⁸¹ - is guided by considerations as to whether the assault involved:

- more than minimal planning
- the violation of a court protection order
- the use of a dangerous weapon¹⁸² or firearm or brandished/threatened¹⁸³
- whether the victim sustained bodily injury
- and the degree/seriousness of the injury based on three levels: bodily injury, serious bodily injury and permanent or life-threatening bodily injury.

There are also provisions to consider the use of strangulation or suffocation.¹⁸⁴ Additional aggravators include:

- motivated by money or other item of value
- offense involved the violation of a court protection order, and
- if the assault was against an officer or employee of the US government or involves federal officials as victims.

Laws on assault vary across states in the USA. Some states have specific guidelines relating to assault offences. Three –Minnesota, Pennsylvania and Virginia - are reviewed below as illustrations. They represent a selection which range from very prescriptive sentencing guidelines (in Minnesota) to those that have greater discretion (in Virginia).

The Minnesota Sentencing Guidelines Commission (MSGC) provides guidance for assault offences through its Sentencing Guidelines grid,¹⁸⁵ allowing the sentencer to consider the severity of the assault and the prior criminal history of the defendant in identifying a presumptive sentence range based on a range of pre-established tariffs, before deciding upon the most appropriate sentence.

¹⁸¹ United States Sentencing Commission, 2021. *2021 Guidelines Manual Annotated*. [pdf] Available at: <<https://www.ussc.gov/guidelines/2021-guidelines-manual-annotated>> [Accessed 4 February 2022].

¹⁸² This includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick).

¹⁸³ “An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury.” United States Sentencing Commission, 2021. *2021 Guidelines Manual Annotated*. [pdf] Available at: <<https://www.ussc.gov/guidelines/2021-guidelines-manual-annotated>> [Accessed 4 February 2022].

¹⁸⁴ Or attempts to strangle or suffocate a spouse, intimate partner, or dating partner.

¹⁸⁵ Minnesota Sentencing Guidelines Commission, 2021. *Sentencing Guidelines and Commentary: Standard Grid*. [online] Available at: <https://mn.gov/sentencing-guidelines/assets/2021Sept15SentencingGuidelinesGridSection4AMinnSentencingGuidelinesCommentary_tcm30-497687.pdf> [Accessed 18 February 2022].

The guidelines recommendation in Minnesota would vary by the severity of the assault and the individual's criminal history. Assuming no criminal history, the Minnesota approach would gradate harms as indicated in Table 1 below.

Table 1: Presumptive sentence length by assault type in Minnesota Sentencing Guidelines, 2021¹⁸⁶

	Description	Presumptive sentence length in months
Assault, 1 st degree	Assault with great bodily harm	86
Assault, 2 nd degree	Assault with a dangerous weapon	21
Assault, 3 rd degree	Assault with substantial bodily harm	12
Assault, 4 th degree	Assault of first responders or criminal justice officials	12

For Minnesota, the sentence for first degree assault is a recommended prison sentence, while for the lesser degrees of assault the recommendation is the length of a stayed (i.e., suspended) prison term. In this state, there are no specific aggravating or mitigating factors otherwise assigned to assault offenses (other than the severity factor within the statute that distinguishes the degrees of assault).

In the Pennsylvania Commission on Sentencing (PSC) guidelines severity and previous offending dominate as considerations for arriving at a minimum sentence.¹⁸⁷ Although amendments can subsequently be made by considering enhancements— such as possession of a deadly weapon during the offence, if offender committed crime in association with a criminal gang, and/or it was a crime of domestic violence - as well as aggravating and mitigating circumstances before arriving at a final sentence.

The Pennsylvania guidelines system likewise operates from a perspective of offense severity and criminal history. Severity is built on a system of Offense Gravity Scores ranging from 1 (least severe) to 14 (most severe). For various types of simple assault, the guidelines recommend a restorative sanction, such as one year probation for these: simple assault causing bodily injury, assault with a deadly weapon and negligently causing bodily injury, or simple assault causing fear of serious bodily injury. More serious assaults carry a recommended prison sentence. The guidelines do not explicitly apply aggravating or mitigating factors to assault offenses, the more generally recognizes factors may serve to increase (aggravating) or decrease (mitigating) by a suggested range.

¹⁸⁶ Minnesota Sentencing Guidelines Commission, 2021. *Sentencing Guidelines and Commentary: Standard Grid*. [online] Available at: <https://mn.gov/sentencing-guidelines/assets/2021Sept15SentencingGuidelinesGridSection4AMinnSentencingGuidelinesCommentary_tcm30-497687.pdf> [Accessed 18 February 2022].

¹⁸⁷ 204 *Pennsylvania Code* Chapter 303.

Aggravated assault causing bodily injury with a deadly weapon carries a recommended prison sentence of 9-16 months with a possible additional or reduced 9 months for aggravating or mitigating reasons, respectively. Attempted aggravated assault to cause serious bodily injury carries a 22-36 months' penalty recommendation (plus or minus 12 months for aggravating or mitigating factors). Then, aggravated assault causing serious bodily injury carries a recommendation of 36-54 months (plus or minus 12 months).

The Virginia Criminal Sentencing Commission issues discretionary sentencing guidelines, including those for assault offences. Therein the nature and severity of the assault is first scored using pre-set tariffs, alongside any additional counts of assault or other offences. Scores are then added if the offence involved the following aggravating factors:

- use of a weapon
- life-threatening injury
- and whether they were legally restrained at the time of the offence.

Before considering the defendant's offending history – namely, their prior convictions as both an adult and juvenile – and the nature of these.¹⁸⁸

The Virginia Criminal Sentencing Commission uses sentencing worksheets returns to report on sentencing statistics. Outcomes for assault are summarised in Table 2 with reference to the year 2019-20, in which there were 2,991 sentencing events for assaults. From this table, it is clear that most (89.3%) receive a sentence of imprisonment, with the average sentence lengths for each standing at seven months and 2.2 years respectively.

Table 2: Felony sentencing events for assaults by disposition in Virginia, 2019-20¹⁸⁹

Probation/No Incarceration	10.70%
Jail up to 12 months	37.40%
Median Jail Sentence	7.0 months
Prison 1 year or more	51.90%
Median Prison Sentence	2.2 years

Judicial Reasons for departing from Sentencing Guidelines for assault offences are given and mitigation is mostly owing to the following (only those cited in more than 10% of cases listed):¹⁹⁰

- plea agreement (54.2%)

¹⁸⁸ Virginia Criminal Sentencing Commission, 2021. *Sentencing Guidelines Cover Sheet: Assault*. [pdf] Available at: <<http://www.vcsc.virginia.gov/worksheets2021/Assault.pdf>> [Accessed 18 February 2022].

¹⁸⁹ Virginia Criminal Sentencing Commission, 2020. *Felony Sentencing Events by Most Serious Offense Type & Dispositions (FY19-20)*. [pdf] Available at: <[http://www.vcsc.virginia.gov/Felony%20SG%20Sentencing%20Events%20by%20Offense%20Type%20FY19-20%20\(Site%20Version\).pdf](http://www.vcsc.virginia.gov/Felony%20SG%20Sentencing%20Events%20by%20Offense%20Type%20FY19-20%20(Site%20Version).pdf)> [Accessed 18 February 2022].

¹⁹⁰ Virginia Criminal Sentencing Commission, 2021. *2021 Annual Report* [pdf]. Available at: <<http://www.vcsc.virginia.gov/2021AnnualReport.pdf>> [Accessed 18 February 2022]. Appendix 2, p82-3.

- judicial discretion (e.g., time served, consistent with co-defendant etc.) (16.1%)
- offender's health (13%)
- on request of the victim (12.5%)
- mitigated facts of the offence (11.5%)
- on recommendation by the Attorney of the Commonwealth (10.9%)
- victims cannot or will not testify (10.9%).

Whist aggravation is most commonly on account of (only those cited in more than 9.5% of cases listed) (p83);

- plea agreement (34.6%)
- aggravated facts of the offence (33.7%)
- degree of victim injury (physical, emotional etc.) (24%)
- multiple counts, offenses or violations in the event (prosecuted or not) (17.3%)
- offender has extensive prior record or same type of prior offence (9.6%).

9.2 England and Wales

After the USA, England and Wales was one of the first jurisdictions to implement sentencing guidelines. Initially issued in 2011,¹⁹¹ the offence specific assault sentencing guidelines were updated in 2021 to address unintended impacts attributable to the earlier guideline as well as changes in the law¹⁹². The assault guidelines map out the specific considerations to be given when sentencing assault offences, which are explored here.

In England and Wales there are six separate assault guidelines based on each of the offences provided for in statute. These are listed below (in graduated order) alongside the suggested sentence ranges for each type of offence offered in the sentencing guidelines.¹⁹³

- Common assault / Racially or religiously aggravated common assault/ Common assault on emergency worker:¹⁹⁴
 - For common assault, the maximum sentence is six months custody. [The guideline provides an offence range of a discharge to 26 weeks custody].
 - If the assault is racially or religiously aggravated (contrary to s.29 of the Crime and Disorder Act), the maximum sentence is two years' custody.

¹⁹¹ Sentencing Council, 2021. *Assault: Definitive Guideline*. [pdf] Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf> [Accessed 13 January 2022].

¹⁹² Sentencing Council, 2021. *Sentencing Council publishes revised guidelines for assault offences and attempted murder*. [online] Available at: <<https://www.sentencingcouncil.org.uk/news/item/sentencing-council-publishes-revised-guidelines-for-assault-offences-and-attempted-murder/>> [Accessed 13th January 2022].

¹⁹³ Sentencing Council, 2022. *Assault*. [online] Available at: <<https://www.sentencingcouncil.org.uk/outlines/assault/>> [Accessed 13th January 2022].

¹⁹⁴ Assaults on Emergency Workers (Offences) Act 2018, s 1; Crime and Disorder Act 1998, s 29; Criminal Justice Act 1988, s 39.

- Assault on emergency worker:¹⁹⁵
 - The maximum sentence is 12 months custody. [The guideline provides an offence range of a discharge to 26 weeks custody as per the common assault guideline which is to be followed. However, at step 3 therein there is the ability to uplift the sentence to exceed the basic category range on the basis the offence was aggravated in being directed at an emergency worker.¹⁹⁶]

- Assault with intent to resist arrest:¹⁹⁷
 - The maximum sentence is two years custody. [The guideline provides an offence range of a fine to one year and three months custody.]

- Assault occasioning actual bodily harm / Racially or religiously aggravated ABH:¹⁹⁸
 - The maximum sentence is five years custody. [The guideline provides an offence range of a fine to four years custody.]
 - If the assault is racially or religiously aggravated, the maximum sentence is seven years custody.¹⁹⁹

- Inflicting grievous bodily harm/ Unlawful wounding/ Racially or religiously aggravated GBH/ Unlawful wounding²⁰⁰
 - The maximum sentence is five years custody. [The guideline provides an offence range of a fine to four years custody.]
 - If the assault is racially or religiously aggravated, the maximum sentence is seven years custody.²⁰¹

- Causing grievous bodily harm with intent to do grievous bodily harm / Wounding with intent to do GBH:²⁰²
 - The maximum sentence is life imprisonment. [The guideline provides an offence range of 2 to 16 years custody]

¹⁹⁵ Assaults on Emergency Workers (Offences) Act 2018, s 1.

¹⁹⁶ Harris L. and Walker S., 2022. *Sentencing Principles Procedure and Practice*. 2nd Edition. London: Sweet and Maxwell. p.1235.

¹⁹⁷ Offences against the Person Act 1861, s 38.

¹⁹⁸ Crime and Disorder Act 1998, s 29; Offences against the Person Act 1861, s 47.

¹⁹⁹ Crime and Disorder Act 1998, s 29.

²⁰⁰ Crime and Disorder Act 1998, s.29; Offences against the Person Act 1861, s 20.

²⁰¹ Crime and Disorder Act 1998, s.29.

²⁰² Offences against the Person Act 1861, s 18.

- If the assault is racially or religiously aggravated, the maximum sentence is seven years' custody.²⁰³

Across all assault offences the guidelines ask practitioners to consider harm and culpability factors.²⁰⁴ Common higher culpability factors included:

- Intention to cause fear of serious harm, including disease transmission
- Victim obviously vulnerable due to age, personal characteristics or circumstances
- Prolonged or persistent assault
- Use of substantial force
- Strangulation, suffocation, or asphyxiation
- Threatened or actual use of weapon or weapon equivalent²⁰⁵
- Significant degree of planning or premeditation
- Strangulation, suffocation, or asphyxiation
- Leading role in group activity

Revenge is also uniquely provided for as a higher culpability factor for GBH with intent offences.

Common lower culpability factors included:

- Lesser role in group activity
- Mental disorder or learning disability, where linked to the commission of the offence
- Excessive self defence.
- No weapon used
- Impulsive or spontaneous and short-lived assault

Harm factors for the lesser forms of assault (common assaults, assaults on emergency workers and assaults with intent to resist arrest) included:

- the number of injuries
- severity of injury and pain suffered (e.g., more than minor, minor, none or very low level)
- duration or longevity of any psychological harm or distress caused.

For specific offences for ABH and GBH offences, tailored categories of harm and factors for consideration relating to these offences is issued in the bespoke guidelines. However,

²⁰³ Crime and Disorder Act 1998, s 29.

²⁰⁴ There are up to three categories of each depending on the type of assault offence. Where culpability is assessed against a list of factors and "harm is principally assessed by reference to the impact on the victim" and distinguishes between the "gravity of the injury, and whether it was permanent or irreversible" Harris L. and Walker S., 2022. *Sentencing Principles Procedure and Practice*. 2nd Edition. London: Sweet and Maxwell, pp.1225-6.

²⁰⁵ Defined to include an item made or adapted for use to cause injury that is substantially dangerous in nature, such as firearms, knives, and potentially corrosive substances such as acid.

broadly speaking the relevant guidelines allow for the consideration of harm based on the degree/severity and permanence of any injury sustained. For ABH, the highest category of harm is serious physical injury or serious psychological harm and/or substantial impact on the victim, the lowest being some level of physical injury or psychological harm with limited impact upon the victim, and the middle falling in between.²⁰⁶ For GBH, the highest harms are those that are particularly grave, involve life-threatening injury, result in lifelong dependency on care, or otherwise results in permanent injury.²⁰⁷

As in Scotland, there are both statutory and non-statutory aggravations to consider. Statutory aggravations in the English and Welsh assault guidelines include:²⁰⁸

- previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- offence committed whilst 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 (where this is not a feature of the offence itself).

Other common aggravating factors²⁰⁹ which may increase the sentence severity include:²¹⁰

- deliberate spitting or coughing
- presence of children
- gratuitous degradation of victim
- any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution
- the assault was committed under the influence of alcohol or drugs
- the assault involved an abuse of power or took advantage of a position of trust
- offence committed whilst on licence or subject to post sentence supervision

²⁰⁶ Sentencing Council, 2021. *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH Sentencing Guideline*. [online] Available at: <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-occasioning-actual-bodily-harm-racially-or-religiously-aggravated-abh/>> [Accessed 25 February 2022].

²⁰⁷ Sentencing Council, 2021. *Inflicting Grievous Bodily Harm/ Unlawful Wounding/ Racially or Religiously Aggravated GBH/ Unlawful Wounding Sentencing Guideline* (2021). [online] Available at: <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/inflicting-grievous-bodily-harm-unlawful-wounding-racially-or-religiously-aggravated-gbh-unlawful-wounding/>> [Accessed 25 February 2022].

²⁰⁸ See e.g., Sentencing Council, 2021. *Inflicting Grievous Bodily Harm/ Unlawful Wounding/ Racially or Religiously Aggravated GBH/ Unlawful Wounding Sentencing Guideline*. [online] Available at: <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/inflicting-grievous-bodily-harm-unlawful-wounding-racially-or-religiously-aggravated-gbh-unlawful-wounding/>> [Accessed 25 February 2022].

²⁰⁹ Additional factual elements providing the context of the offence and factors relating to the offender that may increase the sentence severity.

²¹⁰ Sentencing Council, 2022. *Assault*. [online] Available at: <<https://www.sentencingcouncil.org.uk/outlines/assault/>> [Accessed 13th January 2022].

- failure to comply with current court orders.

There are also aggravating factors which can be considered for all offences, besides assaults with intent to resist arrest. These are the offence is:

- 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
- committed in prison
- comprises an abuse of power and/or position of trust
- committed in a domestic context.

A history of violence or abuse towards victim by offender can also be considered as an aggravating factor for ABH and GBH offences.

While not contained in all of the assault guidelines, the following present some of the mitigating factors which may decrease sentence severity, such as if the offender:²¹¹

- has a history of being a victim of significant violence or abuse by the victim
- was significantly provoked
- has no previous (relevant) convictions
- has shown remorse
- is of good character and/or has displayed exemplary conduct
- has a serious medical condition
- lacks maturity (and/or age)
- has a mental health problem or learning disability
- is the sole or primary carer for dependent relatives
- shows determination and/or can demonstrate steps taken to address addiction or offending.

As evidenced in submissions to the consultation on the development of the 2021 assault guidelines in England and Wales, there are divergent opinions as to which features of an offence ought to comprise higher or lower culpability factors as opposed to being considered aggravating or mitigating factors later (for example, in the case of age and/or lack of maturity and spitting). There are also divergent opinions on whether specific features of assault offences such as spitting and strangulation should be specifically singled out.²¹² In contrast, biting was not included as it was suggested this could be considered under the higher culpability factor of 'use of substantial force'.²¹³

²¹¹ Sentencing Council, 2022. *Assault*. [online] Available at: <<https://www.sentencingcouncil.org.uk/outlines/assault/>> [Accessed 13th January 2022].

²¹² In the case of the latter, this has since been legislated for in the Domestic Abuse Act 2021. However, it has also been retained by the Sentencing Council owing to the fact that it may feature as part of an assault charge, especially in incidents of domestic violence.

²¹³ Sentencing Council, 2021. *Assault offences: Response to consultation*. [pdf] Available at: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-Consultation-Response-Final-Website-.pdf>> [Accessed 23 March 2022].

Understanding about the effectiveness of the assault guideline is mostly based upon analyses of the English and Welsh Sentencing Council's Crown Court Sentencing Survey (CCSS) which launched in 2010²¹⁴ to monitor the impact of their guidelines.

Research examining consistency in sentencing assault offences highlights a substantial degree of consistency in sentencing overall²¹⁵ and the level of compliance with the guidelines is high,²¹⁶ with the guidelines improving consistency in the sentencing of assault offences since their implementation.²¹⁷ However, differences have been identified in the range of sentences awarded for assault offences in different courts across the country (beyond legitimate difference on account of case characteristics), likely reflecting variation in court culture.²¹⁸ Moreover, some case characteristics of assault offences have also been explicitly examined – notably intoxication (prescribed as an aggravating factor in the English and Welsh guidelines).²¹⁹

The Scottish courts at times have expressly found certain of Sentencing Council for England and Wales sentencing guidelines to be useful starting points, but not with respect to assault. In the case of *HM Advocate v McManus*, for example, the court ruled that the England and Wales guidance would not be helpful to sentencing on the Scottish common law of assault “because it is apparent that English law catalogues offences against the person in various, different ways.”²²⁰

9.3 Republic of Ireland

Sentencing guidelines have been issued by the Judicial Council for the Republic of Ireland pertaining to Assault causing serious harm offences. Therein they distinguish between three

²¹⁴ The CCSS served as a sentencing census between 1 October 2010 and 31 March 2015. Judges were asked to complete a paper-based survey upon passing sentence in the Crown Court, which captured not only details of the sentence and defendant characteristics but also factors considered in determining the appropriate sentence. Sentencing Council, 2014. *Crown Court Sentencing Survey*. [online] Available at: <<https://www.sentencingcouncil.org.uk/research-and-resources/data-collections/crowncourt-sentencing-survey/>> [Accessed 2 March 2022].

²¹⁵ Pina-Sánchez, J., & Linacre, R., 2013. Sentence consistency in England and Wales: Evidence from the crown court sentencing survey. *British Journal of Criminology*, 53,6, pp.1118-1138; Pina-Sánchez, J., & Linacre, R., 2014. Enhancing consistency in sentencing: Exploring the effects of guidelines in England and Wales. *Journal of Quantitative Criminology*, 30,4, pp.731-748.

²¹⁶ Pina-Sánchez, J., Brunton-Smith, I., & Li, G., 2020. Mind the step: A more insightful and robust analysis of the sentencing process in England and Wales under the new sentencing guidelines. *Criminology and Criminal Justice*, 20,3, pp.268-301.

²¹⁷ Pina-Sánchez, J., & Linacre, R., 2014. Enhancing consistency in sentencing: Exploring the effects of guidelines in England and Wales. *Journal of Quantitative Criminology*, 30,4, pp.731-748. x

²¹⁸ Brunton-Smith, I., Pina-Sánchez, J., & Li, G., 2020. Re-assessing the consistency of sentencing decisions in cases of assault: Allowing for within-court inconsistencies. *British Journal of Criminology*, 60,6, pp.1438-1459.

²¹⁹ Lightowlers, C. and Pina-Sánchez, J., 2017. Intoxication and assault: an analysis of Crown Court sentencing practices in England and Wales. *British Journal of Criminology*, 58,1, pp.132-154; Lightowlers, C., 2019. Drunk and doubly deviant? Gender, intoxication and assault. *British Journal of Criminology*, 59,3, pp.693-717.

²²⁰ *HM Advocate v McManus* [2010] HCJAC 3, [2010] SCL 619, 624.

levels of seriousness and assign sentence ranges using a tripartite approach for assault causing serious harm:

- low range of seriousness - 2 to 4 years imprisonment
- mid range of seriousness - 4 and 7 and a half years imprisonment
- high range of seriousness - 7 and a half to twelve and a half years imprisonment.

These are intended as headline sentences before allowance is made for mitigating factors. They also note “there may be exceptional cases which warrant a higher sentence, including in wholly exceptional cases, life imprisonment.”²²¹

In arriving at the most appropriate sentence factors such as the severity or level of viciousness of the assault, the level of injury sustained, level of culpability or blame²²² and the general circumstances of the assault are considered. The latter includes consideration as to whether the offences was carried out as part of wider criminality, and whether or not a weapon was used.

9.4 Northern Ireland

In Northern Ireland some direction for sentencing violence offences is offered in Guideline judgements.²²³ However, specific sentencing guidelines for assault offences – comprising Assault Occasioning Actual Bodily Harm, Assault on Police, Common Assault and Wounding or inflicting Grievous Bodily Harm - has also be issued for use in Magistrates' Court.

The guidance sets out sentencing ranges and provisional starting points for sentences for each gradation of offence as detailed in Table 3 below.

²²¹ The Judicial Council, 2022. *Sentencing judgments guidance for the general public*. [pdf] Available at:
<<https://judicialcouncil.ie/assets/uploads/Sentence%20Information%20the%20General%20Public.pdf>
> [Accessed 11 February 2022] p.6.

²²² N.B. "An entirely unprovoked attack is treated more seriously than one arising from an incident which may not have been instigated by the accused. Provocation may be taken into account." The Judicial Council (2022). *Sentencing judgments guidance for the general public*. [pdf] Available at:
<<https://judicialcouncil.ie/assets/uploads/Sentence%20Information%20the%20General%20Public.pdf>
> [Accessed 11 February 2022] p.6.

²²³ Judiciary NI, undated. *Sentencing Guidelines - Violent Offences*. [online] Available at:
<<https://www.judiciaryni.uk/judiciary-decision-types/violent-offences>> [Accessed 11 February 2022].

Table 3: Sentence starting points and ranges by assault type in Northern Ireland

Nature of offence	Starting point	Sentencing Range
Common assault²²⁴		
Assault where no injury is caused or where injury is minor and nonpermanent (e.g. bruising)	Community Order* + Compensation Order	Fine to Community Order** + Compensation Order
Assault resulting in more serious injury but not amounting to actual bodily harm	2 months Custody* + Compensation Order	Community Order to 6 months Custody + Compensation Order
Assault involving gratuitous violence (e.g. kicking or stamping victim when on the ground) OR Assault was motiveless	4 month Custody* + Compensation Order	Community Order to 6 month Custody + Compensation Order
Assault on police²²⁵		
Assault where no injury is caused or where injury is minor and nonpermanent (e.g. bruising)	Community Order + Compensation Order	Fine to Community Order + Compensation Order
Assault resulting in more serious injury but not amounting to actual bodily harm	2 months Custody + Compensation Order	Community Order to 6 months Custody + Compensation Order
Assault involving gratuitous violence (e.g. kicking or stamping victim when on the ground) OR Assault was motiveless	4 month Custody + Compensation Order	Community Order to 6 month Custody + Compensation Order
Assault occasioning actual bodily harm²²⁶		
Assault resulting in relatively minor injury but amounting to actual bodily harm	3 months Custody* + Compensation Order	Community Order to 6 months Custody** + Compensation Order

²²⁴Judiciary NI, undated. *Common Assault (Simpliciter)*. [pdf] Available at:

<https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Common%20Assault%20%28Simpliciter%29_0.pdf> [Accessed 11 February 2022].

²²⁵ Judiciary NI, undated. *Assault on police*. [pdf] Available at:

<https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Assault%20on%20Police_0.pdf> [Accessed 11 February 2022].

²²⁶ Judiciary NI, undated. *Assault occasioning actual bodily harm*. [pdf] Available at:

<<https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Assault%20Occasioning%20Actual%20Bodily%20Harm.pdf>> [Accessed 11 February 2022].

Nature of offence	Starting point	Sentencing Range
Assault resulting in relatively serious injury OR Assault involving the use of a weapon	4 months Custody* + Compensation Order	Community Order to 9 months Custody** + Compensation Order
Assault involving gratuitous violence (e.g. kicking or stamping victim when on the ground) OR Assault was motiveless	6 months Custody* + Compensation Order	Community Order to 12 months Custody + Compensation Order
Wounding / inflicting grievous bodily harm s.20²²⁷		
Non-premeditated brief assault	4 months Custody* + Compensation Order	Community Order to 8 months Custody** + Compensation Order
Premeditated assault OR Sustained assault OR Assault involving gratuitous violence (e.g. kicking or stamping victim when on the ground) OR Assault was motiveless	8 months Custody* + Compensation Order	4 - 12 months Custody + Compensation Order

* Where a court finds the offence was 'committed in the context of domestic violence' or where 'the victim was engaged in providing a service to the public' it shall use a starting point higher than that prescribed. ** Where a court finds the offence was 'committed in the context of domestic violence' or where 'the victim was engaged in providing a service to the public' it may impose a sentence outside the prescribed sentencing range.

The guidelines prescribe a range of potential aggravating factors for assault offences including:

- Use of weapon to frighten or harm victim [common assault only] / Use of a weapon [GBH s20, assault on police]
- Head-butting, biting, attempted strangulation or spitting [common assault, ABH, GBH s20, assault on police]
- Offence was premeditated [common assault, ABH, assault on police]
- Offence motivated by, or demonstrating, hostility to victim on account
- of his membership of a racial group, religious group, sexual orientation
- group, disability or presumed disability [common assault, ABH, , GBH s20, assault on police]
- Abuse of position of trust [common assault, ABH, GBH s20, assault on police]
- Offender was member of a group committing the offence [common assault, ABH, , GBH s20, assault on police]
- Victim is particularly vulnerable [common assault, ABH, GBH s20, assault on police]

²²⁷ Judiciary NI, undated. *Wounding or inflicting grievous bodily harm*. [pdf] Available at: <https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Wounding%20or%20inflicting%20Grievous%20Bodily%20Harm_0.pdf> [Accessed 11 February 2022].

- Additional degradation of the victim [common assault, ABH, GBH s20, assault on police]
- Offence committed in the presence of a child [common assault, ABH, GBH s20, assault on police]
- Offence committed in victim's home or workplace [common assault, ABH, GBH s20]
- Offender prevented victim from seeking or obtaining help [common assault, ABH, GBH s20]
- Victim forced to leave home [common assault, ABH, GBH s20]
- Offence took place in an isolated area [common assault, ABH, GBH s20]
- Assault committed in the context of 'road rage' [common assault, ABH, GBH s20].

However, only a single mitigating factor is prompted for consideration across all the assault offences for which guidelines have been produced: provocation.

9.5 Australia

In Australia, like the USA, sentencing guidelines are issued at the federal level as well as in other states and territories. No offence-specific guidance is issued for assault offences and federal legislation does not provide for mandatory or minimum penalties. Rather the maximum penalty for a Commonwealth offence is usually specified in the provision/legislation which creates the offence. The maximum penalty can assist the court in determining a suitable sentence by providing a 'yardstick' for sentencing assessments, which are otherwise discretionary. However, the maximum penalty is only one of the many factors that a court must consider when sentencing. All assault offences carry the possibility of a jail term, although the penalties and length of imprisonment varies between the different states and territories in Australia as the criminal codes of the various States have legislation defining the type and nature of assaults. No states have issued assault specific sentencing guidelines incorporating sentencing tariffs. And, whilst standard sentences (upon which to base any final sentence) are issued for some offences as a starting point in Victoria, assault offences do not have standard sentences – although maximum sentences (and in some cases, such as assaults on emergency workers, statutory minimums) are given.²²⁸

The Australian and Commonwealth laws differentiate five types of assault as follows:

- common assault
- assault occasioning bodily harm
- unlawful wounding
- grievous bodily harm
- sexual assault.²²⁹

²²⁸ Sentencing Advisory Council, 2021. *Guide to Sentencing Schemes in Victoria 2021*. [pdf] Available at: <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2021-01/Guide_to_Sentencing_Schemes_in_Victoria_2021.pdf> [Accessed 11 February 2022].

²²⁹ Sexual assaults are outside of scope of the current review and so the details of maximum sentence are not indicated.

These offences are mainly differentiated according to the intention of the offender, degree of injury and – in some cases – the identity of the victim.

The state of New South Wales, issues information on sentencing principles and practice concerning assault offences in the Sentencing Bench Book.²³⁰ Therein factors relevant to assessment of the gravity of personal violence offences include:²³¹

- extent and nature of the injuries
- degree of violence
- intention/mental element.

Aggravating factors, which frequently arise in the context of personal violence offences, are listed as:

- weapons, knives, firearms
- syringes
- glassing, broken bottles etc
- premeditated or planned offence/contract violence
- unprovoked offence
- offence committed in company
- vulnerable victim
- commission of offence in victim's home
- gratuitous cruelty
- substantial harm

A separate note is issued concerning intoxication. Highlighting that “an offender’s intoxication may constitute an aggravating factor, or it may have no impact on the sentencing exercise”. Rather the law “provides that in determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor”.²³² As such, “intoxication may be an

²³⁰ Judicial Commission of New South Wales, 2021. Sentencing Bench Book. [online] Available at: <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/assault_wounding_offences.html> [Accessed 1 March 2022].

²³¹ The Bench Book also describes the De Simoni principle - which provides that a court cannot consider as an aggravating factor a circumstance that would warrant conviction for a more serious offence – as an important consideration in assault offences both in terms of the nature of the injury inflicted and the intention with which the offence is committed.

²³² Judicial Commission of New South Wales, 2021. Sentencing Bench Book. [online] Available at: <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/assault_wounding_offences.html#p50-150> [Accessed 1 March 2022].

aggravating factor because of the recklessness with which the offender became intoxicated or if it involves the voluntary ingestion of alcohol by a person with a history of alcohol-related violence” and “the commission of an offence while intoxicated may also warrant greater emphasis being placed on general deterrence”.²³³

Just two mitigating factors, which frequently arise in the context of personal violence offences, are listed if: the injury or harm was not substantial and provocation.

²³³ Judicial Commission of New South Wales, 2021. *Sentencing Bench Book*. [online] Available at: <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/assault_wounding_offences.html#p50-150> [Accessed 1 March 2022].

10 Conclusions

Scottish common law and statute provides for the consideration of assault offences, which comprises a wider range of behaviour. Whilst the common law conceptualises assault as a single crime, it allows for gradations in severity. This also permits a significant degree of discretion in sentencing, with disposals ranging from admonition through to life imprisonment.

The sentencing of assault offences in Scotland is currently informed by considerations as set out in the general Sentencing Process Guideline (which details several features in assessing offence seriousness and aggravating/mitigating factors that are likely to be of relevance in considering assault offences) and guided by case law and appeal judgements.

The case law highlights that judges can vary significantly in their judgments on sentencing outcomes for cases of assault. This is not too surprising given that for common law assault, there is great variation from a verbal threat of harm to severe assault with permanent disfigurement and threat to life. Further, the possible penalty range for common law assault represents a continuum up to life imprisonment. In their sentencing opinions, judges commonly contextualise the crime in terms of specific case facts that tend (or not) to indicate greater or lesser culpability, seriousness, aggravation, and mitigation. Notably, it is not uncommon, it appears from the published case databases, that initial penalties for assaults are overturned on appeal, hence reflecting differences of opinion. Judges have great discretion and in terms of assault cases, they select different primary purposes of punishment to invoke and vary in their perceptions of the severity of the particular assault that is at issue.

To date, there has been “no precedent in Scotland for an assault to injury recognising any mental harm or distress.”²³⁴ Consequently, it is likely that physical assaults will remain “privileged in a hierarchy of harms in the minds of sentencing judges, and potentially, for wider society”²³⁵ unless the Sentencing Council addresses this specifically in any forthcoming assault guidelines.

In general, assaults comprise a large volume of the proceedings brought before court and although the *number* of convictions has reduced in the last decade, conviction *rates* remain high. Mirroring offence severity, custodial sentences more common for attempted murder and serious assault offences (compared to less serious assaults). And attempted murder and serious assault offences have also seen the largest increase in average custodial sentence length over the last ten years (when compared to less serious assaults).

Public perception of the sentencing of all offences (including assaults) highlights how knowledge of crime rates and sentencing is generally poor. For cases of more serious assault, the public tends to favour retributive or denunciative reasons/purposes for sentencing. Still, public surveys indicate some interest in rehabilitation in some contexts, such as when the offender is younger and has no prior convictions. When asked to assign a sentence to a hypothetical assault offender, the public has disparate ideas, with significant

²³⁴ Forbes, E. (2018). The Domestic Abuse (Scotland) Act 2018: the whole story? *Legislative Comment Edinburgh Law Review*, 22,3 pp. 406-411.

²³⁵ Forbes, E. (2018). The Domestic Abuse (Scotland) Act 2018: the whole story? *Edinburgh Law Review*, 22,3, pp.406-411.

variation in suggested penalties – both whether to give a sentence of imprisonment and the length of a prison term if suggested.

Across anglophone guideline-based jurisdictions, approaches to sentencing and punishment severity varies for assault offences. And, whilst punishment severity ranged across the jurisdictions, most allow the severity of sentences to be distinguished based on the culpability of the defendant, the degree of harm inflicted through assault, the status of the victim, weapon use and repeated assaultive behaviour against the same victim.

Consideration of offending history, most importantly prior violent behaviour, was also a key feature considered in sentencing assault offences in some jurisdictions. Yet it has been noted that guidelines for violent offences can be singled out by sentencing commissions to receive relatively severe sentences especially where they emphasise repeat offending.²³⁶

Consideration of mitigating factors for assault offences were fewer in number across anglophone guideline-based jurisdictions and comprised mostly mitigation associated with provocation and evidence of self-defence. Although also variously allowed for consideration of age, addiction, mental illness and a defendant's health and good character/exemplary conduct as well as where the assault was deemed to be an isolated incident.

Of all the anglophone guideline-based jurisdictions reviewed, the sentencing guidelines for assault in England and Wales most closely mirror the general Sentencing Process Guideline in Scotland. However, as much of the Scottish provision for considering assault offences is provided for in common law (as opposed to statute in England and Wales), any development of assault guidelines in Scotland would need to take account of the differences in legal/statutory provisions for assault offences in Scotland.²³⁷

Further research and more granular data analysis of assault offences and their gradations is encouraged to delve more specifically into the way in which assault offences are sentenced based on severity, offending history and other pertinent case characteristics (e.g. weapon use and intoxication) as well as characteristics of both the defendants and victims (e.g. age, sex, ethnicity). This would help illuminate what culpability, harm and other factors are influencing sentencing decisions/outcomes and to what extent. It can also help ascertain whether such sentencing factors are being uniformly applied and help monitor the impact of any future assault guideline to be introduced. Further qualitative work may also be of value in understanding and contextualising what factors outside those already outlined might be influencing judicial and public judgments on the appropriate penalties for assault.

²³⁷ The Scottish Sentencing Council would initial draft such guidelines for consultation before approval by the High Court.

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ISBN: 978-1-912442-46-1